ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Wright Brothers, the Building Company, Eagle LLC	)	ASBCA No. 62285
	)	
	)	
Under Contract No. FA4528-14-C-3001	)	

APPEARANCE FOR THE APPELLANT:	Samuel A. Diddle, Esq. Elam & Burk, P.A. Boise, ID
APPEARANCES FOR THE GOVERNMENT:	Jeffrey P. Hildebrant, Esq. Deputy Chief Trial Attorney Michael J. Farr, Esq. Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE STINSON

Appellant Wright Brothers, the Building Company, Eagle LLC (Wright Brothers or WBTBC), appeals a contracting officer's September 27, 2019, final decision denying, in part, appellant's claim seeking an equitable adjustment for alleged government delay costs in the amount of $753,816.77. We have jurisdiction pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. The government previously filed a motion to dismiss this appeal for lack of subject matter jurisdiction, alleging that appellant failed to properly certify its claim as required by the CDA. By decision dated October 8, 2020, we held that we possess jurisdiction to consider Wright Brothers' appeal of the contracting officer's final decision. *Wright Brothers, the Building Co., Eagle LLC*., ASBCA No. 62285, 20-1 BCA ¶ 37,714 at 183,086.

The parties subsequently agreed to submit this appeal pursuant to Board Rule 11, on the record without a hearing, for a decision on entitlement only. Each party submitted initial and responsive briefs. In addition, appellant submitted two declarations in support of its initial brief and two declarations of the same individuals in support of its reply brief. For the reasons set forth below, we deny the appeal.

FINDINGS OF FACT

1. On September 26, 2014, the government awarded Wright Brothers Contract No. FA4528-14-C-3001 in the amount of $3,791,573, for the repair and renovation of Building 1113WSA located at Minot Air Force Base, in Minot, North Dakota (R4,

tab 9). The notice to proceed was issued on November 14, 2014 (R4, tab 24). The original contract period was 365 days, to commence within 10 calendar days of issuance of the notice to proceed (*id.*).

2. Over the course of contract performance, the parties agreed to seven bilateral modifications extending the contract performance period (R4, tabs 11 at 1 (Modification No. P00002 - extended the delivery date to March 31, 2016, which is 138 days), 12 at 1 (Modification No. P00003 - 198 days), 14 at 1 (Modification No. P00005 - 76 days), 15 at 1 (Modification No. P00006 - 32 days), 16 at 1 (Modification No. P00007 - 28 days), 18 at 1 (Modification No. P00009 – 90 days), 20 at 1 (Modification P00011- extending the contract completion date from June 29, 2017, to September 3, 2017, which is 66 days)). The government issued Modification No. P0008 unilaterally, extending "the completion date by 31 days . . . due to government delays in reviewing the proposal for Mod 9 (Not Released)" (R4, tab 17 at 1). Bilateral Modification No. P00011 extended the contract performance to September 3, 2017 (R4, tab 20 at 1). These modifications taken together extended the contract completion date a total of 659 days.

3. As of September 3, 2017, the project was not complete and work on concrete placement remained ongoing (R4, tabs 74-75). By email dated October 30, 2017, the contracting officer notified Wright Brothers that exterior concrete did not meet the contract specifications and that liquidated damages would be assessed beginning November 6, 2017, until the completion and acceptance of the project (R4, tab 76).

4. The parties agreed to three modifications which caused a change to the price of the contract. Modification No. P00001 added and deleted work within the scope of the contract, including additional concrete costs and removing the Air Barrier System, resulting in a net decrease of $2,839.18 that lowered the total contract value to $3,788,733.82 (R4, tabs 10 at 1, 113). Modification No. P00009 added $589,713 to the contract, increasing the total contract value to $4,378,446.82 (R4, tab 18 at 1). Modification No. P00013 added $241,257.67 to the contract, increasing the total contract value to $4,619,704.49 (R4, tab 22 at 4). Together, Modification Nos. 9 and 13 added a total of $628,310.13 reimbursement for delay damages (R4, tabs 18 at 1, 22 at 4, 121 at 5, 124 at 4-5; gov't br. at 7; Respondent's Statements of Fact ¶ 6).[1] The impact of all three modifications to the contract price was a net increase of $828,131.49.

5. By email dated March 1, 2018, appellant submitted COR (Change Order Request) 020 in the amount of $976,310.19 (R4, tab 78 at 3).

[1] Appellant's briefs did not set forth a response to Respondent's Statements of Facts, nor did they dispute the government's figure of $628,310.13 as reflecting the amount of delay damages already reimbursed by the government.

6. In a letter to appellant's attorney, dated May 22, 2019, David Reichard, P.E., of Delta Consulting Group, provided what he described as a "preliminary review of the delays and disruptions, and associated damages on the referenced project," WSA Building 1113 (R4, tab 98a at 1).[2] Mr. Reichard noted that eight modifications extended the contract completion date, ultimately to September 3, 2017 (*id*.). Mr. Reichard also noted that Modification No. "P00012 suspended liquidated damages to incorporate a winter exclusion ending on May 15, 2018," and that appellant "completed its contract work by August 31, 2018" (*id*.) (footnote omitted).

7. From the above recitation, Mr. Reichard concluded that "contract completion occurred 1,021 days after the original contract completion date," and that the government "accepted responsibility for 986 days and assessed liquidated damages for 35 days. In other words, a one-year project became a near four-year project through no fault of [appellant]" (R4, tab 98a at 1-2) (footnote omitted).

8. Mr. Reichard's May 22, 2019, preliminary review also stated:

> Not only was WBTBC's work delayed, it was also disrupted. WBTBC planned to complete the work in an orderly, efficient manner. Rather, the work was done in fits and starts as evidenced by USAF continually issuing Mods to extend the contract completion date. Furthermore, WBTBC repeatedly notified USAF of delays such as gate delays, submittal review times, RFI responses, and decisions by the Owner.
>
> The delay and disruption caused WBTBC to incur significant increased costs, particularly the disruption of subcontracted work. Typically, cost overruns due to

[2] By submission dated June 16, 2021, appellant designated Mr. Reichard as an expert, referencing Mr. Reichard's May 22, 2019 letter, which it "incorporated by reference." By submission dated July 15, 2021, the government designated Ryan S. Clark, Capital Project Management, Inc., as its expert witness. In a joint request for extension of scheduling deadlines, appellant notified the Board that it intended to rely upon its June 16, 2021, designation of expert witness and filing, as satisfying the November 15, 2021, deadline to submit its expert report. By letter dated March 3, 2022, the government informed the Board that "it has elected to not submit an expert report." Accordingly, although both parties contemplated during discovery the preparation of expert reports in this appeal, ultimately, the only such submission was Mr. Reichard's three-page, May 22, 2019 letter, which he indicated was a "preliminary review" (R4, tab 98a at 1).

> disruption are determined through a measured mile analysis where productivity during an unimpacted period is compared to productivity during an impacted period. The impacts to Building 1113, however, were prevalent throughout the entire project so there was no unimpacted period. Additionally, the increased costs resulted from more than loss of productivity. The costs included repeated mobilizations and demobilizations as well as replacement of subcontractors caused by the significant extended duration of the project. For these reasons and the nature of the available project records, Delta determined a total cost analysis for key elements of the work was the most equitable approach.

(R4, tab 98a at 1-2) (footnote omitted). As support for this analysis, Mr. Reichard cited only the document referenced as "WBTBC Baseline Schedule" (R4, tab 98a at 2 n.5).

9. Wright Brothers submitted to the contracting officer a letter from its counsel dated May 30, 2019, seeking a "final equitable adjustment" for alleged government-caused delays (R4, tab 98). Counsel's letter referenced a "request for an equitable adjustment which has been referred to as [Change Order Request] COR 020" (R4 tab 98 at 2). The letter stated that appellant "is submitting its claim in an effort to bring closure to this project through mutual agreement and to avoid adversarial adjudication of a claim." The letter also referenced a "final Change Order Request . . . itemized on COR 020 dated May 28, 2019" and "a prior version of COR 020 dated September 27, 2018" (*Id.*). COR 020, dated May 28, 2019, sought reimbursement in the amount of $753,816.77 (R4, tab 98c at 2).

10. Appellant's May 30, 2019 claim letter advanced the following additional legal theories in support of its request for additional compensation - "a constructive change of the Contract; a breach of the implied covenant of good faith and fair dealing; and/or a cardinal change to the Contract and the project warranting an equitable adjustment in the Contract price" (R4, tab 98 at 4).

11. By letter dated July 12, 2019, appellant's counsel confirmed "that the submission sent to you on May 30, 2019, represented a certified claim and a request for the contracting officer's decision" (R4, tab 101 at 2).

12. By letter dated July 30, 2019, the contracting officer informed appellant:

> In accordance with FAR 33.211(c)(2) – Contracting Officer's Decision, this letter provides notice that a

> decision on the claim, referenced as COR 020 in your counsel's letter dated 30 May 2019 and initially received with defective certification on 31 May 2019, will be sent to you on 27 September 2019. This date is based on the size and complexity of the claim, and the adequacy of the contractor's supporting data.

(R4, tab 102 at 2) The contracting officer also informed appellant that the government "would like to resolve the remaining items, detailed below, through mutual agreement, driven by discussion between the Contracting Officer and the Contractor" (*id*.).

13. On September 5, 2019, the contracting officer provided appellant with a memorandum stating, the government's concurrence with amounts sought by appellant for Items 110 and 111 of its claim, and identified as remaining unresolved, items 108D, 108E and 109 (R4, tab 104 at 2).

14. Appellant prepared a spreadsheet dated September 12, 2019, reflecting cost items contained in appellant's claim that were resolved by the parties, in the amount of $241,257.67 (R4, tab 106).

15. Bilateral Modification No. P00013, effective September 19, 2019, detailed the resolved cost items from appellant's claim, as follows:

> The purpose of this modification is to:
>
> A. Incorporate Items 101-107, 108A, 108B, 108C, 108F and 110-112 from COR 020.
>
> B. Increase the contract amount by $241,257.67 (CLIN 0003) increasing the total contract value from $4,378,446.82 to $4,619,704.49.
>
> C. In consideration of the modification agreed to herein as complete equitable adjustments for the Contractor's COR 020 items, 101, 102, 103, 104, 105, 106, 107, 108A, 108B, 108C, 108F, 110, 111 and 112, the Contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to COR 020 items: 101, 102, 103, 104, 105, 106, 107, 108A, 108B, 108C, 108F, 110, 111 and 112.

(R4, tab 22 at 1-2)

16. Appellant prepared a spreadsheet dated September 24, 2019, reflecting remaining cost items contained in appellant's claim that were not resolved by the parties, in the amount of $455,693.14. The items that remained unresolved were items 108D, 108E and 109. (R4, tab 108)

17. On September 27, 2019, the contracting officer issued a final decision stating, in part:

> Wright Brothers the Building Company (WB) has submitted a claim for contract number FA4528-14C-3001, certified and received by the Government on 12 Jul 2019, in the amount of $753,816.77. Mutual agreement resulted in some items originally claimed being incorporated into the contract by a modification for $241,257.67. The remaining confirmed amount after modification is $455,693.14.
>
> . . . .
>
> The contract has had thirteen modifications with an ultimate required contract completion date of 3 Sep 2017. Eight of the thirteen modifications adjusted the contract completion date. These modifications were executed from 31 Jul 2015 to 13 Sep 2019. A total of 659 days were added to the period of performance of which 583 days were contributable to Government delay.
>
> . . . .
>
> As of 3 Sep 2017, the project was not completed, performance period lapsed, and work was still ongoing. From 3 Sep 2017 through 30 Oct 2017 the Government and WB were in continuing dialog regarding cold joints, smoothness tests, concrete cracking, and boot imprints on a significant concrete placement. On 30 Oct 2017, the Contracting Officer notified WB that the exterior concrete did not meet the contract specifications and liquidated damages would be assessed as of 6 Nov 2017 until the completion and acceptance of the project. On 2 Jan 2018, due to winter weather, contract modification P00012 was signed. P00012 incorporated a winter exclusion period effective 22 Nov 2017 through 15 May 2018 to the benefit of WB and provided the Government with temporary use

> of the concrete driveway until it was replaced. During a winter exclusion the period of performance days are not counted.

(R4, tab 109 at 2-3)

18. On November 27, 2019, appellant filed its notice of appeal of the contracting officer's final decision, stating, in part:

> The monetary amount in controversy is $455,693.14 plus interest and attorney fees and costs to which Wright Brothers may be entitled under the Equal Access to Justice Act. Wright Brothers' claim has been fully set forth in correspondence and emails dated May 30, 2019; July 12, 2019; August 20, 2019; and September 11, 2019. . . .

(R4, tab 110 at 2)

19. Appellant submitted with its initial brief a declaration of Mr. Reichard, attesting almost verbatim to the statements contained in his May 22, 2019, letter, a copy of which was attached to his declaration as Exhibit A (June 6, 2022, Reichard decl. ¶¶ 3-8). In that declaration, Mr. Reichard concluded that "WBTBC is not responsible for any of the cost overruns – As noted above, USAF accepted responsibility for 97% of the delay" (*id*. ¶ 8).

20. Appellant submitted with its initial brief a declaration of Mr. Trevor J. Wright, a Member and Principal of Wright Brothers, attesting almost verbatim to the facts set forth appellant's initial brief at pages 7-17 (app. br. at 7-17; June 6, 2022, Wright decl. ¶¶ 6A-6L).

21. Appellant submitted with its reply brief a second declaration of Mr. Reichard, stating his belief as to the appropriateness of utilizing a modified total cost claim to substantiate appellant's damages in this appeal, and why he believed utilization "of other methods for accounting for the increased costs caused by the delay in disruption was impractical and/or impossible" (July 11, 2022, Reichard decl. ¶¶ 3- 4). Regarding his justification for not performing a critical path analysis in this appeal, Mr. Reichard stated:

> In this case a CPM [critical path method] analysis was not required. A CPM analysis may be required to determine the amount of excusable and/or compensable delay. In this case, the amount of excusable and/or compensable delay

> was determined through the Government granting time extensions due to its actions.

(*Id*. ¶ 6)

22. Appellant submitted with its reply brief a second declaration of Mr. Wright, stating that Delta Consulting was provided with Wright Brothers' "accounting information and data reflecting its total job costs," that "[a]ll costs reviewed and reported were based upon costs incurred and paid. Specifically, job costs including the job costs with MODs reflected on each schedule were costs incurred and paid," and that "[t]he increased costs claim is based upon costs incurred and paid by WBTBC." (July 11, 2022, Wright decl. ¶¶ 2-4)

DECISION

I. Contentions of the Parties

In its initial brief, Wright Brothers argues "[t]he existence of delay to the overall Project and the Government's acceptance of the vast majority of the delay is not disputed" (app. br. at 5). According to appellant, "[t]he Project experienced significant and numerous delays resulting in extensions requiring at least 659 additional days necessary to complete the work required under the Contract" (*id*.). Alleged government delays identified by appellant include failure to allow contractor access to the site, failure to timely respond to appellant's requests for instruction, failure to timely approve contract submittals, failure to timely submit requests for proposals, and failure to timely respond to requests for information (app. br. at 5-6). Appellant argues that the government "acknowledged and accepted" these delays "as Government responsibility in Contract amendments," and that "[t]he aggregation of delays required performance over an almost four (4) year period compared to the originally contracted one (1) year period" (app. br. at 6).

Appellant concludes it "is not responsible for any of the cost overruns," stating, "[a]s noted above, USAF accepted responsibility for 97% of the delay" (app. br. at 24). However, appellant's initial brief contains no discussion of the manner in which the government "accepted responsibility" for 97% of the delay, other than the inferences set forth in Mr. Reichard's preliminary review regarding the original contract completion date and the date of contract completion (app. br. at 3-4).[3] Appellant's

[3] Although appellant brief references a footnote "6", presumably supporting its assertion that "WBTBC is not responsible for any of the cost overruns," and "[a]s noted above, USAF accepted responsibility for 97% of the delay," (app. br. at 24), appellant's brief contains no corresponding text for footnote "6."

reply brief again references the alleged 97% of government-accepted delay, indicating that it is based upon calculations performed by Mr. Reichard to the effect that "contract completion occurred 1,021 days after the original contract completion date," and that the government "accepted responsibility for 986 days" because it issued modifications extending the contract performance period a total of 986 days (986/1,021= .9657) (app. reply br. at 2-3 (citing R4, tab 98a)). Indeed, Wright Brothers incorrectly asserts in its reply brief it is "undisputed" that the government "caused 97% of the three-year time extension" (app. reply br. at 1). Without question, both the government's initial brief and reply brief dispute appellant's assertion.

In its initial brief, the government states "even if days of delay equated to Appellant's increased costs (which they do not), Appellant[] has not proven that government is responsible [sic] 97% of delay days related to the delay damages the government already paid, or that the government "accepted responsibility" for any percent of Appellant's "disruption" claim" (gov't br. at 7). The government argues that "the modifications which added extensions to the completion date identified 'government delays' for no more than 246 days out of 1,021 days, which is less than a quarter of the total days of delay identified by Appellant," and that "[a]s to these days, the government paid Appellant $628,310.13 for delay claims under Mods 9 and 13" (gov't br. at 31; *see* Respondent's Statements of Fact ¶ 6; finding 4).[4] With respect to the "modifications that did not refer to government delays," the government notes that "the mere grant of a contract extension does not establish that the government was responsible for the delay" (gov't br. at 31- 32 (citing *England v. Sherman R. Smoot Corp*., 388 F.3d 844, 856-857 (Fed. Cir. 2004)).

The government likewise notes that appellant "has not proven any other delays, which requires an assessment Appellant has not performed regarding the beginning and end of each delay, and the responsible party, against a critical path of work leading to contract completion" (gov't br. at 32). With regard to this last point, the government adds "[t]o the extent Appellant's claim is based on delays caused by the government, Appellant must prove the extent of delay to work that is on the critical path that affects the completion date of the contract, the government's fault for that specific delay, and the resulting injury" (gov't br. at 35; *see* gov't reply br. at 3-4 (citing *States Roofing Corp.,* ASBCA No. 54860 *et al.*, 10-1 BCA ¶ 34,356 at 169,661)).

Appellant's reply brief fails to address either of these points, i.e., that "the mere grant of a contract extension does not establish that the government was responsible

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Indeed, appellant's brief contains only footnote "1" (app. br. at 5), which neither includes nor references any other footnotes.

[4] At page 38 of its initial brief, the government states that it accepted 248 total days of delay (gov't br. at 38; *see also* gov't reply br. at 4).

for the delay" (gov't br. at 31-32) and that appellant "must prove the extent of delay to work that is on the critical path that affects the completion date of the contract" (*id.* at 35). Appellant's reply brief likewise fails to discuss the controlling decisions cited by the government. Instead, appellant simply restates its initial argument that it "was not responsible for the increased costs" because "the Government accepted responsibility for 97% of the additional time the job required [which] is ample proof alone that WBTBC is not responsible for the increased costs associated with that delay" (app. reply br. at 12).

II. Appellant has Failed to Establish Entitlement to Compensation for Government Delay and Disruption

As noted above, the parties agreed to submit this appeal pursuant to Board Rule 11. "Pursuant to Board Rule 11, the Board 'may make findings of fact on disputed facts.'" *U.S. Coatings Specialties & Supplies, LLC*, ASBCA No. 58245, 20-1 BCA ¶ 37,702 at 183,031 (quoting *Grumman Aerospace Corp.*, ASBCA No. 35185, 92-3 BCA ¶ 25,059 at 124,886 n.13). As the Court of Appeals for the Federal Circuit explained in *Kinetic Builder's Inc. v. Peters*, "[a] contractor seeking to prove the government's liability for a delay has the burden of proving the extent of the alleged delay, the causal link between the government's wrongful acts and the delay in the contractor's performance, and the alleged harm to the contractor for the delay." 226 F.3d 1307, 1316 (Fed. Cir. 2000). To establish that "causal link, the contractor must show that the government's actions affected activities on the critical path of the contractor's performance of the contract." 226 F.3d at 1317.

Accordingly, to establish that government delay here impacted appellant's ability to complete its work, Wright Brothers must demonstrate that the government's acts "have affected activities on the critical path." *Essex Electro Eng'rs, Inc. v. Danzig*, 224 F.3d 1283, 1295 (Fed. Cir. 2000) (quoting *Mega Constr. Co. v. United States*, 29 Fed. Cl. 396, 424 (1993)); *Fru-Con Constr. Corp.*, ASBCA Nos. 53544, 53794, 05-1 BCA ¶ 32,936 at 163,158-59 ("the delay must be to work on the critical path because only work on the critical path has an impact upon when the project is completed"). "The critical path is the longest path in the schedule on which any delay or disruption would cause a day-for-day delay to the project itself; those activities must be performed as they are scheduled and timely in order for the project to finish on time." *GSC Constr., Inc.*, ASBCA Nos. 59402, 59601, 21-1 BCA ¶ 37,751 at 183,241 (citing *Wilner v. United States*, 23 Cl. Ct. 241, 245 (1991)).

In *Wunderlich Contracting Co. v. United States*, the Court of Claims cautioned that "[b]road generalities and inferences to the effect that defendant must have caused some delay and damage because the contract took 318 days longer to complete than anticipated are not sufficient. . . . It is incumbent upon plaintiffs to show the nature and extent of the various delays for which damages are claimed and to connect them to

some act of commission or omission on defendant's part." 173 Ct. Cl. 180, 199-200, 351 F.2d 956, 968-69 (1965) (citations omitted). Here, appellant admits the importance of the critical path, stating that "[c]ompensable delays, including apportionable delays, must occur on the critical path of a construction project" (app. br. at 20 (quoting *Tyger Constr. Co. v. United States*, 31 Fed. Cl. 177, 257 (1994))). Yet appellant fails to offer such evidence.

Instead, appellant alleges that it is "not responsible for any of the cost overruns," basing its argument upon Mr. Reichard's assertion that the "USAF accepted responsibility for 97% of the delay" (app. br. at 24; finding 19). As noted by the government, Wright Brothers has failed to discuss the impact of its own delay in the context of a critical path analysis, or any proper analysis offered by Mr. Reichard (gov't br. at 6). Appellant's failure to do so is fatal to its claim. *Page Constr. Co*., ASBCA No. 30350, 86-2 BCA ¶ 18,755 at 94,442 (contractor failed to demonstrate "by critical path or similar analysis that any delay by the Government . . . caused a delay in completion of the contract beyond the . . . completion date agreed upon in by [sic] Modification"). "The fact that the Government added work does not, without more, establish an impact to the critical path. It remains appellant's burden to establish that additional work delayed its completion of the project." *Matcon Diamond, Inc.*, ASBCA No. 59637, 20-1 BCA ¶ 37,532 at 182,259. Wright Brothers simply failed to meet its burden here.

The same is true regarding the linchpin holding together appellant's delay analysis - as stated by Mr. Reichard and as argued by appellant in its briefs - that the government accepted responsibility for all delays because it issued modifications extending the contract completion date (findings 6-7, app. br. at 1-2, 5; app. reply br. at 3-4). According to appellant, "contract completion occurred 1,021 days after the original contract completion date. USAF accepted responsibility for 986 days and assessed liquidated damages for 35 days. In other words, a one-year project became a near four- year project through no fault of WBTBC." (App. reply br. at 2) Notwithstanding appellant's assertion to the contrary, an extension of time granted by the contracting officer does not equate to an administrative determination that the delay was not due to the fault or negligence of the appellant. As recognized by the Federal Circuit in *England v. Sherman R. Smoot Corp*., "the mere grant by the government of a contract extension does not indicate that the government is at fault; rather, one of a number of other events external to the government could be responsible. In such a situation, a presumption that the government is responsible for the delay is unwarranted, and nothing in the Federal Acquisition Regulations supports such an assumption." 388 F.3d 844, 857 (Fed. Cir. 2004).

The same is true regarding appellant's reliance upon statements contained in a contracting officer's final decision. Citing as support the final decision, appellant states that "[a] total of 659 days were added to the period of performance of which 583

days have been accepted by the Government as Government delays" (app. br. at 2 (citing R4, tab 109 at 2)). Admittedly, the contracting officer's final decision states, "[a] total of 659 days were added to the period of performance of which 583 days were contributable to Government delay" (finding 16). However, appellant's reliance upon statements contained in the final decision as support to establish its disruption claim is misplaced, because our review here is de novo, and "once an action is brought following a contracting officer's decision, the parties start . . . before the [B]oard with a clean slate." *Wilner v. United States*, 24 F.3d 1397, 1401-02 (Fed. Cir. 1994); *Mule Eng'g, Inc*., ASBCA No. 60854 *et al.*, 17-1 BCA ¶ 36,728 at 178,892 ("when an appeal is filed following a CO's final decision, the findings of fact in that decision are not binding and are not entitled to any deference"). Moreover, to the extent the government delayed the original project, Wright Brothers still cannot recover for what would be concurrent delay, such as problems experienced by appellant with regards to concrete placement (finding 3). *Sauer, Inc. v. Danzig*, 224 F.3d 1340, 1348 (Fed. Cir. 2000); *Essex Electro Eng'rs, Inc*., 224 F.3d at 1295; *Merritt–Chapman & Scott Corp. v. United States*, 208 Ct. Cl. 639, 649-50, 528 F.2d 1392, 1397-98 (1976).

Although appellant's brief sets forth a litany of alleged delays and disruption (app. br. at 2-17), appellant readily admits, that "[t]he increased compensation WBTBC requests is not, however, based upon the specific costs associated with individual changes in work," rather, "[i]t is based on the increase in costs necessarily caused by the combined effect of the numerous delays due to Government acts that changed the project from a one (1) year project to a four (4) year project through no fault of WBTBC" (app. br. at 1). Again, appellant has provided no context to support a finding that the alleged delays and disruption ran through the project's critical path, and, as such, appellant has failed to meet its burden of proof. We note that, in addition to time extensions, the government already has compensated Wright Brothers an additional $628,310.13 as reimbursement for its delay damages (finding 4). The fact that appellant already has received considerable compensation is all the more reason to require particularity and that appellant establish an impact to the project's critical path to ensure not only that appellant is entitled to the additional compensation being sought, but that it has not already received such compensation from the government for those costs. As an adjudicative body, it simply is not our role to piece together a contractor's allegations of delay and disruption to determine their impact upon the contractor's performance. *Matcon Diamond, Inc.*, 20-1 BCA ¶ 37,532 at 182,259 ("[t]he Board is not required to sort through the record and piece together the type of delay analysis necessary for appellant to prove entitlement" (citing *Essential Constr. Co. and Himount Constructors Ltd., Joint Venture*, ASBCA No. 18706, 89-2 BCA ¶ 21,632 at 108,833 (Board declining to "comb through [the] record" and "become appellant's advocate" in appeal of delay claim))).

The fallacy in appellant's approach, and its misplaced reliance upon Mr. Reichard's opinion, is evident in the statement set forth in Mr. Reichard's second

declaration to the effect that, although a critical path "analysis may be required to determine the amount of excusable and/or compensable delay," such an "analysis was not required" here because "the amount of excusable and/or compensable delay was determined through the Government granting time extensions due to its actions" (finding 20). Notwithstanding Mr. Reichard's contrary assertion, for appellant to prevail in this appeal, it is incumbent upon Wright Brothers to establish that the government's actions affected activities on the critical path, and that the delays of the parties were not otherwise concurrent or intertwined.

With regard to Mr. Reichard's proffered opinions, the extent to which this tribunal relies upon expert testimony "is an evidentiary determination left to the sound discretion of the Board." *Lebolo-Watts Constructors 01 JV, LCC*, ASBCA No. 59740 *et al*., 21-1 BCA ¶ 37,789 at 183,427. That sound discretion includes deciding which expert statements and positions to accept, and which to reject. *Southwest Marine, Inc., San Pedro Div.*, ASBCA No. 28196, 86-2 BCA ¶ 19,005 at 95,980 ("trier of fact is not bound by expert testimony and may substitute his common sense judgment for that of the expert"). Here, the analysis conducted by Mr. Reichard fails to establish by preponderant evidence appellant's entitlement to additional compensation based upon alleged government delay and disruption. *L.B. Samford, Inc.*, ASBCA No. 32645, 93-1 BCA ¶ 25,228 at 125,660 ("[g]eneralized conclusory, unsupported opinion type statements do not demand weight when such statements are little more than self- serving conclusions"). Accordingly, we find the conclusions reached by Mr. Reichard in his summary review to be of little benefit in deciding this appeal.

In its reply brief, Wright Brothers argues that "Mr. Reichard's opinions, many of which are on ultimate issues, have not been refuted by the Government through any countervailing expert analysis and no inaccuracy in calculation or accounting has been presented in response," and that "[n]o authority relied upon by the Government involved or stands for the legal proposition that a total cost damage claim supported by unrefuted expert opinion can be rejected" (app. reply br. at 4). In a letter subsequently submitted to the Board, objecting to the government's request to file a sur-reply on this issue, appellant clarified that it does not argue that, absent a "countervailing expert" analysis, "the Board must accept WBTBC's expert's proof" (Bd. corr. ltr. dtd. July 18, 2022 at 2). On this point, as clarified by appellant, we agree. The government's decision not to present countervailing expert testimony is not a fatal arrow in appellant's argumentative quiver.

III. Appellant has Failed to Establish Entitlement Pursuant to the Theory of Cardinal Change

Appellant argues that the government's actions constitute a cardinal change to the contract, and that appellant "is entitled to increased compensation due to that

change" (app. br. at 19).[5] In support of its argument, appellant cites decisions of the Court of Federal Claims for the proposition that a cardinal change occurs when work performed is drastically different or changes in work alter the nature of what is constructed (app. br. at 17-18 (citing *Huffman Bldg. P, LLC v. United States*, 152 Fed. Cl. 476, 484 (2021) (quoting *Allied Materials & Equip. Co. v. United States*, 215 Ct. Cl. 406, 409, 569 F.2d 562, 563-564) (1978)); *Aircraft Charter Sols., Inc. v. United States*, 109 Fed. Cl. 398, 410 (2013) (quoting *Air-A-Plane Corp. v. United States*, 187 Ct. Cl. 269, 275-276, 408 F.2d 1030, 1033 (1969))).[6] The government responds, stating appellant's "general allegations of delays are not changes so profound that they are not redressable under the contract, nor do they demonstrate that the government is in breach of the contract, which Appellant must show for a cardinal change" (gov't br. at 43-44).

Appellant properly notes that "[w]hether a change is cardinal is principally a question of fact" (app. br. at 18 (citing *Becho, Inc. v. United States*, 47 Fed. Cl. 595, 601 (2000) (citation omitted))). Appellant's cardinal change argument is based upon the additional time necessary to complete the project and is dependent upon a finding

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[5] The government argues that Wright Brothers "never raised its cardinal change theory of recovery until its complaint" (gov't br. at 45). Appellant disagrees, stating, "on May 30, 2019, WBTBC wrote to the Government stating 'the extension of time required for performance also supports an equitable adjustment because a cardinal change to the contract occurred'" (app. reply br. at 13). We agree with appellant that appellant asserted cardinal change as part of its May 30, 2019, claim (finding 9).

[6] We note that decisions of the Court of Federal Claims, are "neither binding upon this tribunal, nor are they even binding in other matters pending before the Court of Federal Claims." *Northrop Grumman Corp.*, ASBCA No. 62165, 21-1 BCA ¶ 37,922 at 184,180 n.8) (citing *C.R. Pittman Constr. Co., Inc.*, ASBCA No. 57387 *et al.*, 15-1 BCA ¶ 35,881 at 175,427 n.6 (Court of Federal Claims decisions are not binding precedent for the ASBCA); *Zaccari v. United States*, 142 Fed. Cl. 456, 462 n.6 (2019) ("Decisions of the United States Court of Federal Claims do not bind the court in this matter but may provide persuasive authority"). Decisions of the former United States Court of Claims, however, "are binding precedent . . . which must be followed by the Board." *E.L. Hamm & Associates, Inc.*, ASBCA No. 43972, 94-2 BCA ¶ 26,724 at 132,940 (citing *South Corp. v. United States*, 690 F.2d 1368, 1370-71 (Fed. Cir. 1982), which in the first appeal to be heard by the newly-established Federal Circuit held that "the holdings of our predecessor courts, the United States Court of Claims and the United States Court of Customs and Patent Appeals, announced by those courts before the close of business September 30, 1982, shall be binding as precedent in this court")).

that the government was responsible for the alleged delays. Indeed, the sole basis asserted by appellant in its briefs as support for its cardinal change theory is "[t]he overall change in the contract from one that may take one (1) year to a project requiring almost four (4) years far exceeds the obligation WBTBC was originally contracted to perform" (app. br. at 18). According to appellant, "the Government, through a variety of cumulative delays, changed the Project for a one (1) year Project to a four (4) year Project," and "[t]his obvious material and drastic change resulted in a Project of an entirely different nature than the original Project contracted" (app. br. at 19). As we already have found, however, appellant has failed to establish, through examination of the project's critical path, the government's culpability for the alleged delays and disruption, and, as such, appellant has failed to meet its burden of proof.

Appellant cites *F.H. McGraw & Co. v. United States*, 131 Ct. Cl. 501, 503, 130 F. Supp. 394, 395 (1955), for the proposition that "[m]uch smaller additions to the time required for performance have justified cardinal change price increases" (app. br. at 18). However, in *F.H. McGraw*, the court expressly held that changes made under a change order "were within the general scope of the contract," and though "extensive, they were not so extensive as to be a cardinal change." 131 Ct. Cl. at 506, 130 F. Supp. at 397.

Appellant also cites the Court of Federal Claims' decision in *ThermoCor, Inc. v. United States*, 35 Fed. Cl. 480, 490 (1996), for the proposition that "[a] determination of the scope and nature of alleged changes requires a fact-intensive inquiry into the events that led to the excess work and their effect on the parties," and that "[t]he court must investigate the contract as a whole to determine whether the government is responsible for the contractor's difficulties" (app. br. at 18). However, appellant's briefs - submitted in support of its request for a decision pursuant to Rule 11 - fail to present for our review the "fact-intensive inquiry" or the details necessary to allow us to "to determine whether the government is responsible for the contractor's difficulties." 35 Fed. Cl. at 490. Rather, appellant offers only the general proposition that "[t]he overall change in the contract from one that may take one (1) year to a project requiring almost four (4) years far exceeds the obligation WBTBC was originally contracted to perform" (app. br. at 18). Again, it is not the responsibility of the Board to provide, in the first instance, appellant's factual and legal analysis. *AAR Airlift Group, Inc*., ASBCA No. 59708, 19-1 BCA ¶ 37,462 at 182,007 (citing *SKE Base Servs. Gmbh*, ASBCA No. 60101, 18-1 BCA ¶ 37,159 at 180,903 ("We won't do appellant's work for it.")).

We note also that *ThermoCor* concerned a contractor seeking additional costs of processing and transporting offsite excavated contaminated soils greater than the stated basic contract quantity. The contractor claimed the amount was so great as to constitute a cardinal change to the contract. However, the court was unable to determine whether the quantity increases "reached a point beyond reasonable limits,"

stating, "[g]iven the potential extent of the overruns, the court could find a cardinal change; however, it is precluded from entering summary judgment due to the contrary assertions about the magnitude of the overruns." *Id*. at 491-92.

Appellant cites *Saddler v. United States*, 152 Ct. Cl. 557, 287 F.2d 411 (1961), for the proposition that "a significant increase in work, even though the same type of work, justifies . . . an increase in contract compensation" (app. br. at 19). In *Saddler*, the court found a cardinal change to the contract where the contractor was required to construct a much larger embankment than was specified in the contract, requiring almost twice the quantity of material than the contractor was contracted to build and necessitating bringing of equipment 100 miles back to the job site, which the court labeled a cardinal alteration outside scope of contract. 152 Ct. Cl. at 563-64, 287 F.2d at 414-15. That obviously is not the situation here, as the appellant's allegation of cardinal change is based on the additional time it took to complete the contract, rather than an order of magnitude change to the actual construction project. Indeed, the contract work appellant performed here did not result in a materially different project, and "was essentially the same work as the parties bargained for when the contract was awarded." *Air-A-Plane Corp*., 187 Ct. Cl. at 275, 408 F.2d at 1033.

IV. Appellant has Failed to Establish Entitlement Pursuant to an Alleged Constructive Change to the Contract or Suspension of Work

Appellant argues that it is entitled to additional compensation pursuant to the legal doctrine of constructive change (app. br. at 19-21). Appellant's initial Rule 11 brief discusses several cases encapsulating the concept of constructive change (*id.* at 20-21) (citing *Merritt-Chapman & Scott Corp. v. United States*, 429 F.2d 431, 443-45 (1970) (419-day delay for subsurface exploratory work constituted constructive suspension of the contract); *Sipco Servs. & Marine v. United States*, 41 Fed. Cl. 196, 225-27 (1998) (termination for default converted to convenience termination because of government over inspection); *Metric Constr. Co. v. United States*, 81 Fed. Cl. 804 (2008) (constructive change)).

Wright Brothers has the burden of establishing by a preponderance of the evidence that the government's actions amounted to a constructive change to the contract. *CDM Constructors, Inc*., ASBCA No. 60454, 18-1 BCA ¶ 37,190 at 181,011 (citing *Amos & Andrews Plumbing, Inc*., ASBCA No. 29142, 86-2 BCA ¶ 18,960 at 95,738 (citing *Teledyne McCormick-Selph v. United States*, 218 Ct. Cl. 513, 517, 588 F.2d 808, 810 (1978)). Appellant's constructive change argument is based on the same theory already espoused to the effect that "[t]he aggregate extension of all the time for performance in this matter clearly caused [appellant] to perform work in addition to and different work from the work originally required under the contract," that "[t]his work was required by the Government's cumulative delay for which it has accepted responsibility," and that "[t]he Government extending the

Project from one (1) to four (4) years is a constructive change for which [appellant] is entitled to an increase in contract price" (app. br. at 21).

Appellant's constructive change argument, like its argument regarding cardinal change, depends upon a finding that the government was responsible for all alleged delays. Again, by failing to establish, through examination of the project's critical path, the government's culpability for the alleged delays and disruption, appellant has failed to meet its burden of proof.

The same is true regarding appellant's claim based upon an alleged suspension of work pursuant to FAR 52.242-14 Suspension of Work (app. br. at 21-23). With regard to FAR 52.242-14, appellant's argument in support is nothing more than a conclusion, stating that, "[f]or the reasons explained, the Government caused and accepted responsibility for the delays," that "[t]he delays were excessive and unreasonable," and that "[t]his delay has caused [appellant] to incur additional costs for which it should be compensated" (app. br. at 23). Again, appellant's Rule 11 submissions fail to present any analysis establishing the impact of the alleged suspension of work on the critical path or Wright Brothers' ability to perform the contract (app. br. at 21-23).

Appellant cites several cases discussing suspension of work in the context of a contractor's delay claim (app. br. at 22-23) (citing *John A. Johnson & Sons v. United States*, 180 Ct. Cl. 969, 985 (1967) (contractor entitled to price adjustment under suspension of work clause where there was "no finding, and no evidence that any of the delays that occurred in this case were due to the fault or negligence of the plaintiff"); *Blinderman Constr. Co. v. United States*, 695 F.2d 552, 559 (Fed. Cir. 1982) (contractor claim pursuant to suspension of work clause remanded to ASBCA for a determination whether delays were concurrent, stating "[g]enerally, courts will deny recovery where the delays are 'concurrent or intertwined' and the contractor has not met its burden of separating its delays from those chargeable to the Government"); *Beauchamp Constr. Co. v. United States*, 14 Cl. Ct. 430, 437 (1988) ("contractor must concomitantly show that it was not delayed by any concurrent cause that would have independently generated the delay during the same time period even if it does not predominate over the government's action as the cause of the delay"); *R.P. Richards Constr. Co. v. United States*, 51 Fed. Cl. 116, 124 (2001) (contractor entitled to 10 working-day delay awaiting government direction regarding differing site condition).

However, as the cases cited by appellant attest, to prevail, Wright Brothers must establish that none of the delays experienced were concurrent or the fault of appellant, something appellant has failed to do. Indeed, appellant admits that "[t]he burden of proof is upon the contractor to establish that defendant did in fact cause delay, and further that any delay adversely affected the project, entitling the plaintiff to an

equitable adjustment," and that "[w]hether a particular delay is reasonable or not depends upon the circumstances of the particular case" (app. br. at 22 (quoting *Commercial Contractors, Inc. v. United States*, 29 Fed. Cl. 654, 662 (1993)). Appellant's general allegations and conclusions under the guise of constructive change and suspension of work, without the requisite factual analysis, are wholly insufficient to establish appellant's entitlement pursuant to either legal theory.

V. Appellant has Failed to Establish Entitlement Pursuant to Alleged Unjust Enrichment / Breach of the Covenant of Good Faith and Fair Dealing

Appellant's initial Rule 11 brief dedicates one paragraph to its argument that the government's actions resulted in unjust enrichment and breached the covenant of good faith and fair dealings (app. br. at 23). Appellant cites *Lewis-Nicholson, Inc. v. United States*, 213 Ct. Cl. 192, 204-205, 550 F.2d 26, 32 (1977), for the general proposition that parties to a contract have a duty not to do anything that would prevent, hinder, or delay another party's performance (*id*. at 32). As with its arguments regarding constructive change and suspension of work, appellant again offers only a general conclusion as support for its position, stating that "[t]he delays accepted and admitted by the Government and resulting in four (4) year performance period establishes that the Government breached the duty to not hinder and [appellant] is entitled to an increase in contract price" (*id*.). As we already have held, appellant has failed to establish that the government is responsible for the alleged four-year performance period. Appellant's summary allegation under the breach of a duty not to prevent, hinder, or delay is likewise wholly insufficient to establish appellant's entitlement pursuant these legal theories.

Wright Brothers also summarily asserts in one paragraph entitlement to compensation for additional increased costs allegedly incurred regarding "concrete replacement work" (app. br. at 25; app. reply br. at 14 (we note that both of appellant's Rule 11 briefs contain identical paragraphs on this issue)). Other than allege that "[t]he Government did not dispute that there was a change in the contract" relating to this work, appellant fails to otherwise explain the basis for this claim or even quantify the amount requested (app. br. at 25; app. reply br. at 14). Instead, appellant simply cites to various documents contained in the Rule 4 file (app. br. at 25; app. reply br. at 14 (both citing app. supp. R4, tabs 20-27)). Without more, we are unable to make any determination regarding appellant's entitlement to these unquantified costs. Appellant has failed to establish entitlement to them.

VI. Appellant's Quantum Calculations

By Order dated November 3, 2020, the Board instructed the parties to state their election whether to proceed to a hearing pursuant to Board Rule 10, or on the briefs pursuant to Board Rule 11. Our Order stated also that the Board intends to decide

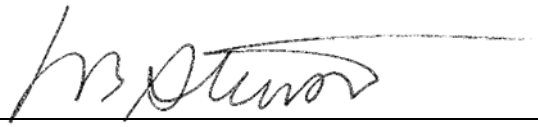
entitlement only, and if either party preferred that both entitlement and quantum be heard, the party should so advise the Board. By letter dated March 1, 2021, appellant informed the Board that the parties "agreed to present this matter under a Rule 11 submission on the record." Neither party requested that we consider quantum with entitlement. However, both parties' briefs contain extensive sections discussing quantum, including appellant's reliance upon a modified total cost method for proving damages (app. br. at 24-25; app. reply br. at 4-13; gov't br. at 13-40; gov't reply br. at 5-7).

Because we find against appellant on entitlement, we need not address at any length the issue of quantum, including appellant's reliance upon a modified total cost method. We note that, as with the issue of entitlement, appellant failed to provide any analysis establishing that the government actions affected activities on the critical path, and without such an analysis, Wright Brothers likewise cannot establish entitlement to reimbursement based upon the total cost method. *WRB Corp. et al., A Joint Venture d/b/a Robertson Constr. Co. v. United States*, 183 Ct. Cl. 409, 426 (1968) (total cost recovery requires contractor to establish, among other things, that it was not responsible for the added expenses); *Lebolo-Watts Constructors 01 JV, LLC*, 19-1 BCA ¶ 37,301 at 181,456 ("Claims based upon 'total costs' are 'looked upon with disfavor and recovery on that basis is sharply restricted since they call upon one party to indemnify the other'") (citations omitted).

CONCLUSION

We have considered appellant's remaining arguments and are not persuaded by them. The appeal is denied.

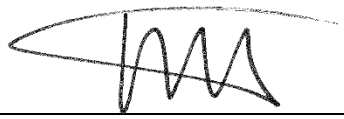
Dated: December 30, 2022



DAVID B. STINSON
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur



RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

J. REID PROUTY
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 62285, Appeal of Wright Brothers, the Building Company, Eagle LLC, rendered in conformance with the Board's Charter.

Dated: December 30, 2022

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals