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ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of - )  
 )  
KiewitPhelps ) ASBCA No. 62119  
 )  
Under Contract No. W9128F-12-C-0023 )

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OPINION BY ADMINISTRATIVE JUDGE EYESTER

The U.S. Army Corps of Engineers (Corps) awarded appellant KiewitPhelps (KP) a construction contract to build a five-level, 916,000 square foot replacement command facility for the U.S. Strategic Command (USSTRATCOM). The now-constructed replacement facility, referred to as STRATCOM, is located at Offutt Air Force Base (AFB), Nebraska.

Numerous issues arose during construction of the facility, which have resulted in several claims filed with the Board.<sup>1</sup> In this claim, KP argues that the cumulative

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<sup>1</sup> KP has filed the following five claims relating to the construction of the STRATCOM facility: (1) the condenser water pipe claim (ASBCA No. 60850)

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impact of design deficiencies along with numerous actions (and inactions) by the Corps caused disruptions and inefficiencies impacting KP and its subcontractors, resulting in a 525-day compensable delay over a three-year period. Although the Corps acknowledges that KP is entitled to “something,” it nonetheless disputes all of KP’s arguments and contends, for the first time in its post-hearing briefing, that KP’s claim lacked a sum certain and was vague and included unsupported theories of recovery (including some never presented to the contracting officer). The Corps also argues the claim conflated factual bases and legal theories and is mostly barred by accord and satisfaction and/or releases.

Based on the following, we conclude that KP is entitled to certain costs associated with the 525 days of delay and disruption. This decision addresses entitlement only.<sup>2</sup>

FINDINGS OF FACT

Background

1. USSTRATCOM is one of nine unified commands in the Department of Defense (DoD). Since its purpose is to deter strategic attacks, the command requires a global operations center that can continue operations without outside support during a war. At the time of award of the contract at issue here, the operations center was outdated and lacked necessary design features such as sensitive compartmentalized information facility (SCIF)<sup>3</sup> spaces and updated electrical services and cooling systems. Accordingly, USSTRATCOM required a new operations center to replace this outdated one built in 1957. (App. supp. R4, tab 17.04 at 15)

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which the parties settled; (2) the drywall claim (ASBCA No. 61197), in which the Board found entitlement for KP; (3) the mold claim (ASBCA No. 61184), in which the Board also found entitlement for KP; (4) this delay and disruption claim for the period November 30, 2014 through April 19, 2018 (ASBCA No. 62119); and (5) the commissioning claim for delays and disruptions for the period January 1, 2018 through February 19, 2019 (ASBCA No. 62980). The record here consists of documents from ASBCA No. 61184 (the mold claim), as supplemented to address additional issues in this appeal (*see* Bd. Order dtd. August 14, 2020). We cite to the PDF page numbers of the documents. We also cite to the PDF page numbers for the briefs.

<sup>2</sup> *See* Bd. Orders dtd. April 9, 2020, June 2, 2020. According to KP, the appeal was bifurcated at the Corps’ request and over KP’s objections (app. br. at 8 n.2).

<sup>3</sup> SCIFs are vaulted areas with substantial walls and soundproofing to prevent the leakage of classified information (tr. 6/13).

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2. The three basic steps for building the replacement facility were to: (1) develop the requirements, (2) design the facility, (3) and construct the facility. Around 2007, USSTRATCOM completed the first step with the assistance of a contractor (not KP) and developed its requirements for a replacement facility, referred to as the project, to be located at Offutt AFB (app. supp. R4, tab 17.04 at 34-36). As noted, the new facility would serve as the command and control facility for USSTRATCOM (Joint Stipulation of Uncontested Facts (JSF) ¶ 18).

3. Although USSTRATCOM would utilize the replacement facility (i.e., was the end user) and served as the project management office (PMO) for the project, there were many others involved (app. supp. R4, tab 17.04 at 14-17). The U.S. Air Force (Air Force) funded the project with its appropriations as the facility is located on an AFB (*id.* at 16-17). Specifically, the Air Force provided the funding via the Air Force Civil Engineer Center (AFCEC), which served as the executive agent and provided the project requirements regarding funding, scope, quality, schedule and criteria (*id.* at 16). The Air Force 55 Civil Engineering Squadron (55 CES) at Offutt AFB was also involved with the design and construction of the facility (*id.* at 17).

4. The Corps supported AFCEC by serving as the project manager (tr. 9/22; app. supp. R4, tab 17.04 at 15-16). The Corps, primarily the Omaha District, was responsible for the project design, as well as the award and management of the design and construction contracts (*see* app. supp. R4, tab 17.04 at 15-16).<sup>4</sup> The Corps was therefore responsible for contract modifications (tr. 6/70-72). However, the Air Force, via AFCEC, reviewed and approved the user-requested modifications while the Corps reviewed modifications related to design deficiencies (i.e., the changes that make the building useable) (tr. 6/71, 82).

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<sup>4</sup> We note that KP objected to numerous documents in the Corps' Rule 4 file which the Board then constructively removed pursuant to Board Rule 4(d) (*see* tr. 1/7-9). Some documents were admitted during and after the hearing (*see* Bd. Order dtd. March 20, 2023). Due to the large volume of documents in the Rule 4 file, the Board ordered the parties to submit a final supplemental Rule 4 index (*id.*). The Corps filed its final version of the index, stating that it "understands that the parties are in agreement regarding the contents of the index" and KP filed a list of exhibits and documents admitted during the hearing stating the Corps "concur" (Corps March 31, 2023 Ltr. to Board; KP March 31, 2023 Ltr. to Board). KP had earlier filed its final index (*see* KP March 31, 2023 Ltr. to Board). Neither party objected to these final versions of the Rule 4 files. Accordingly, the Board relied on those indexes and corresponding documents for this decision.

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5. Because various offices and agencies were involved and STRATCOM was labeled as a “megaproject,” specific groups or boards were created to facilitate information (app. supp. R4, tab 17.04 at 17-18; tr. 9/12-13). The Senior Advisory Group (SAG), comprised of senior leadership from each of the key entities involved, met at least monthly to discuss and resolve project issues (e.g., scope, schedule, cost, funding, contractual issues) and provide recommendations to the senior executive review group (SERG) (app. supp. R4, tab 17.04 at 17; tab 22.0041 at 3).

6. The SERG, comprised of higher-level leaders, met at least quarterly to resolve problems forwarded by the SAG and prevent adverse impact to the project on larger, overarching issues (app. supp. R4, tab 17.04 at 17; app. supp. R4, tab 22.0041 at 3). Discussions at the SERG included the schedule, modifications, and contingency funding/burn rate to ensure money was available for the project (tr. 9/27-29).

The Initial Design Stage

7. Once USSTRATCOM (along with 55 CES and a contractor) developed the requirements, as noted the next step was to design the facility and surrounding areas. On October 16, 2009, the Corps awarded a fixed-priced contract to HDR Architecture, Inc., located in Omaha, NE, to serve as the designer of record (DOR) (JSF ¶ 2; R4, tab 16.02 at 1, 126). Pursuant to its contract, the DOR was to survey and perform geotechnical review; conduct design charrettes;<sup>5</sup> provide the comprehensive interior design, early preliminary design, interim and final documents; complete a value engineering study; and furnish ready to advertise documents and any modified work (R4, tab 16.02 at 1, 46-68).

8. In addition, the DOR’s contract explicitly stated the yet-to-be awarded construction contract for USSTRATCOM would be incrementally funded. Consequently, the resulting construction contract would include a base and four option years and the contract periods of performance could only be awarded if the Corps received the funding for that year from the Air Force. (R4, tab 16.02 at 78-79)

9. Accordingly, the DOR’s contract included Federal Acquisition Regulation (FAR) 52.236-22 (APR 1984), DESIGN WITHIN FUNDING LIMITATIONS, and FAR 52.236-23 (APR 1984), RESPONSIBILITY OF THE ARCHITECT-ENGINEER CONTRACTOR (R4, tab 16.02 at 126). FAR 52.236-22(a) required the DOR provide a design that allowed the Corps to award the construction contract at or below a set

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<sup>5</sup> During a design charrette, the designers, users, and decision-makers collaborate to develop the project design (app. supp. R4, tab 17.04 at 11).

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price and if proposals exceeded that estimated price, the DOR was to issue a new design to permit contract award within the funding limitation (*see also id.* at 3). In addition, FAR 52.236-22(b) required the DOR notify the contracting officer if the project would exceed the funding limitations and it could not design a facility within those limitations. The DOR's contract made clear that the basic construction cost for this project was limited to 85 percent of the \$560 million purchasing authority (R4, tab 16.02 at 73-74). Once construction began, FAR 52.236-23(a) required the DOR to correct or revise any errors or deficiencies in its designs or drawings, as it was responsible for the "professional quality" and "technical accuracy" of those documents (*see also id.* at 30, 36, 100).

10. Unfortunately, the \$560 million budget for the basic construction contract was a moving target; budget estimates and funding for the project were a pervasive issue. For example, the government utilized the requirements to create an initial estimate for the project. In 2008, the estimated project cost was \$453 million and by November 2009, it rose to approximately \$560 million (app. supp. R4, tab 17.04 at 20-21, 36-37).

11. In February 2010, DoD requested \$564 million for the construction project (app. supp. R4, tab 17.04 at 21).<sup>6</sup> By March 2011, at the 95 percent design completion, the DOR and the Corps estimated the project would cost \$551 million, which was under the programmed amount, although the DOR did not include backup documents for many items such that the Corps could not validate the unit costs (*id.* at 22, 40).

12. As the DoD Office of Inspector General (OIG)<sup>7</sup> later concluded, the budget

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<sup>6</sup> DoD submits requirements and justifications to Congress to support military construction appropriated funding requests. The submission to Congress includes the project's cost estimate, and description and requirements, among other things. The funding request meanders through a review process, ending, in this case, with congressional approval and appropriated funds. If the project's cost increases by more than 25 percent of the appropriated amount, the Office of the Secretary of Defense must notify Congress of the reasons and the funds proposed to finance the increase. (App. supp. R4, tab 17.04 at 10) This is referred to as above threshold reprogramming (ATR), which occurred twice here and is discussed later in the decision as it relates to the STRATCOM facility (*id.* at 50-51).

<sup>7</sup> Pursuant to a 2017 law, the DoD OIG was required to report on five elements relating to the construction of STRATCOM. The five elements included: (1) reasons

estimate utilized for the funding request was inaccurate (i.e., too low) (app. supp. R4, tab 17.04 at 38). In fact, after the project ended, the Corps itself identified the following issues with the cost estimates: (1) USSTRATCOM failed to identify all of its requirements or develop completely the facilities design criteria before starting the design process; (2) the DOR and its subcontractor had inadequate staffing for the size of this design package, used incorrect unit prices and did not understand the government's cost-estimating software; (3) the Corps had inadequate staffing to develop an accurate initial estimate or review the completed estimate; and (4) these numerous underestimations "magnified the error in the overall cost estimate" due to the facility's size (*id.* at 40-41).

13. The DOR completed the design around March 2011 (app. supp. R4, tab 17.04 at 22). Since the design was now completed and a budget requested, the next step was to issue a solicitation and then contract for the construction of the replacement facility.

#### The Construction Solicitation

14. On August 2, 2011, the Corps issued Solicitation No. W9128F-11-R-0023 seeking proposals for the STRATCOM construction project (JSF ¶ 3; app. supp. R4, tab 6.02 at 1). The solicitation explicitly stated: "THIS PROJECT IS 100 PERCENT DESIGNED CONSTRUCTION [REQUEST FOR PROPOSAL (RFP)]" (app. supp. R4, tab 6.02 at 1). The Corps was to evaluate offers on a best-value basis using technical and price factors (R4, tab 2.04 at 54). The Corps notified offerors that the estimated construction cost was over \$500 million (*id.* at 36).

15. At that time, the working estimate was actually \$547 million (for what is referred to as the basic contract) and \$560 million (with options) (app. supp. R4, tab 17.04 at 23). Congress ultimately approved the requested programmed amount of \$564 million to be funded in four increments (*id.* at 23, 38). Of this amount, \$524 million was authorized for the construction contract (other amounts were needed for items such as demolition) (*see* tr. 6/86). There was risk of losing funding if the Corps did not award the construction contract by the end of the fiscal year (tr. 9/154; *see also*

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for the 16-month delay and 10 percent cost increase; (2) actions taken to prevent further delays and cost increases; (3) ongoing investigations into causes for delay or cost increases and results; (4) final judicial or administration actions; and (5) OIG recommended changes (app. supp. R4, tab 17.04 at 9). While we found the DoD OIG report helpful, we do not necessarily agree with every conclusion. In this regard, we note that the OIG did not interview KP or its subcontractors when preparing its report (*see id.* at 81).

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tr. 6/94-95).

16. In November 2011, the Corps received four offers in response to the solicitation that greatly exceeded the programmed amount and surpassed the government estimate by approximately \$200 million (app. supp. R4, tab 17.04 at 23; JSF ¶ 4). This means the lowest-priced proposal received was \$660 million for the basic contract and \$728 million with options (app. supp. R4, tab 17.04 at 23). In fact, all the offerors' pricing was similar for the basic contract. In response to the DoD OIG report, the Corps acknowledged that this supports the conclusion the government's "estimate contained serious flaws, errors, and omissions in cost development." (*Id.* at 43)

17. KP, a joint venture between Kiewit Building Group Inc. and Hensel Phelps Construction Co., was one of the four offerors (R4, tab 2.20 at 5). KP's initial proposal was \$696,511,964 for the basic contract and \$766,529,964 with options (app. supp. R4, tab 33.0025 at 2).

18. The government was faced with a dilemma. One, it could re-design the facility and delay award (and a delay meant the Air Force could lose its funding, at least for that fiscal year). Two, it could issue the award within the \$564 million budget by reducing the scope of work before award, expediting the award to maintain the schedule, and then reducing the scope of work further after award. Three, it could seek additional funds from Congress. The Corps recommended the second option and USSTRATCOM agreed. (App. supp. R4, tab 17.04 at 23)

19. On December 16, 2011, the Corps issued KP an evaluation notice seeking a cost breakdown for the basic line items (R4, tab 30.9 at 1). The contracting officer then notified KP that its proposed pricing was significantly higher than the government estimate and "not awardable without significant scope changes" as an increase in project funding was not an option. Specifically, the contracting officer stated the government was "determined to reach [its] goal of an awardable contract within the funds available, representing the overall best value" and requested a meeting to discuss potential cost reduction areas and costs relating to: electrical and communication work; getting the project out of the ground; door openings and glazings; integrated automation costs; heating, ventilation, and air conditioning (HVAC); general requirements; and field office overhead. (R4, tab 27.03.03 at 1)<sup>8</sup>

20. KP met with the Corps on January 12, 2012, where the government estimate was discussed, and KP proposed several value management options to reduce

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<sup>8</sup> We utilized KP's amended version of the government's Rule 4 file, tab 27.

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the scope of the project by about \$290 million (R4, tab 30.14 at 1, 3, 54). KP recommended, for example, reducing the total square footage, eliminating Level 4 (L4) in the north office block, reducing floor-to-floor heights, and relaxing or eliminating progressive collapse resistance for certain areas (*id.* at 53). As the Corps notes, KP's value management suggestions impacted many of the trades/subcontractors (*see id.* at 54).

21. After that meeting, the Corps notified the DOR that “[a]t some point we will require re-design for an amendment to issue to all offerors” and then award the contract based on the amended solicitation plus the contractor’s narrative proposal of all changes to the design. This meant that the Corps would award the construction contract and then make post-award changes to the drawings based on the contractor’s proposal and solicitation amendments and, if the drawings deviated from the agreed upon proposal, the Corps “would work with the contractor to resolve.” (App. supp. R4, tab 22.0010 at 3)

22. On February 15, 2012, the contracting officer notified KP that, as discussed in the prior meeting, the Corps compiled a list of cost reduction measures that would be reflected in amendment 13 to the solicitation (R4, tab 30.15 at 1). Amendment 13, issued in March 2012, was several hundred pages and made numerous changes to the design (R4, tab 21.13). For example, it eliminated the entire fourth floor of the north part of the building (referred to as the North Bar) and lowered the roof and penthouse one level (*id.* at 77-78).

23. The amendment also deleted the sections related to building information modeling (BIM) (R4, tab 21.13 at 25). This specification section would have required KP provide a BIM conflict resolution package which modeled the entire project in order to coordinate all of the trade work and locate and resolve conflicts (R4, tab 2.04 at 247). As the Corps noted, BIM conflicts address issues that generally arise during construction as the different trades fight for plenum space, shaft space, and routings; the BIM highlights the conflicts sooner to help determine where the overcrowding may occur, or lack of shaft space, plenum space exists (app. supp. R4, tab 22.0252 at 1). There was a requirement for BIM in the DOR’s contract (R4, tab 16.02 at 91).

24. KP submitted a revised proposal on April 30, 2012, priced at \$546,679,410 (R4, tab 30.16). KP subsequently submitted several other revised and reduced proposals (R4, tabs 30.18 and 30.19).

25. The Corps continued to amend the solicitation to cut costs. Amendment 16, issued in April 2012, deleted the mechanically stabilized earth retention system and reduced the visitor control center in size, among other things (R4, tab 21.16 at 3-4).

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Amendment 21, issued in May 2012, removed three areas of vertical structural bays,<sup>9</sup> reconfigured workstations and spaces, and moved the visitor control center to an option (R4, tab 21.21 at 4, 6).

26. The government continued to look for ways to cut costs. In July 2012, USSTRATCOM removed from the basic contract the 48 volt (V) direct current (DC) power (app. supp. R4, tab 22.0017 at 1). Also in July 2012, the Corps issued amendment 27 which added the parking lot and a smaller visitor control center to the basic contract, and reduced the scope of the entire facility by deleting structural bays, one cooling tower and two generator sets (app. supp. R4, tab 22.0018 at 2; R4, tab 21.27 at 1-3). The government believed that these scope reductions would result in a facility that was 84 percent of the initial size (about 915,000 square feet) and an award \$3.6 million under the authorized \$564 million (app. supp. R4, tab 22.0018 at 2; tab 22.0019 at 2).

27. In July 2012, the Corps also modified the DOR's design contract to require the DOR amend the drawings to address changes and accommodate revised J Code<sup>10</sup> personnel numbers as "the new office layouts" were being developed due to the building's reconfiguration and loss of square footage (R4, tab 16.02 at 3). In addition, the Corps modified the DOR's design contract to explain it was the DOR's "responsibility to incorporate the cost reductions identified in Amendments 13 through 27 into the contract documents," as required by FAR 52.236-22 and FAR 52.236-23 (*id.* at 4).

28. The Corps next issued the final solicitation amendment, amendment 29, on August 2, 2012. In the amendment, the Corps requested revised proposals which were to include the Standard Form (SF) 1442 and pricing/CLIN schedule "ONLY." (R4, tab 21.29 at 2)

29. KP submitted its final proposal on August 3, 2012, proposing \$524,445,324 for the basic contract only (the options were not awarded and not priced) (R4,

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<sup>9</sup> Bays are the areas between the columns of a building and for this structure consisted of two floors below grade and three floors above grade (*see* app. supp. R4, tab 22.0030 at 1 and R4, tab 21.21 at 4).

<sup>10</sup> J-Codes refer to the office spaces for the USSTRANSCOM personnel (*see* R4, tab 16.02 at 3). When the square footage in a building is slashed, the result is that a fewer number of individuals can work in the building. This meant the J-Code/personnel office layouts had to be changed. (*See* R4, tab 21.27 at 2 ("Reconfigured workstation layouts within the remaining spaces will be provided in the contract drawings."))

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tab 30.19 at 2). By August 4, 2012, it was clear the reductions and amendments did not result in sufficient cost savings as the current working estimate still exceeded the purchasing authority. Three of the four offerors were in the same range as KP, and one was above \$530 million (app. supp. R4, tab 22.0019 at 1-2).

30. Specifically, the working estimate had increased and was \$21.7 million over the purchasing authority for the basic contract (which included demolition costs and contingency funds). Thus, the government needed to slash at least another \$20 million from the budget, knowing this would require severe scope reductions, or award at the current authorized amount of \$564 million with the hope of getting the remaining money later. (App. supp. R4, tab 22.0019 at 1-2) At this point, the Corps had already issued a total of 29 amendments to the solicitation. It issued 18 of those amendments after receipt of proposals. Many of these amendments led to significant cost reductions and required three additional proposals from offerors in less than a year. (App. supp. R4, tab 17.04 at 43) The offerors, including subcontractors, were frustrated with the length of the procurement (app. supp. R4, tab 22.0030 at 1).

31. As discussed above, the major amendments were 13, 21 and 27 (app. supp. R4, tab 17.04 at 43; app. supp. tab 22.0192 at 6). In total, those amendments reduced the facility by 169,200 square feet, removed the 4th floor from the North Bar, lowered the atrium roof one level, removed IT communications systems, removed two cooling towers, removed four vertical bays, changed the scope of the parking and visitor center, and removed two diesel generators, among many, many other things (*see* R4, tabs 21.13 at 78-81; 21.21 at 4, 6; 21.27 at 2-3; app. supp. R4, tab 17.04 at 44). By removing bays via amendments 21 and 27, the Corps removed all flooring, structures, walls, doors, partitions, ceilings, lighting, chilled beams, and roofing in those bays, and then shifted other bays inward to form a continuous structure (R4, tabs 21.21 at 4; 21.27 at 2).

32. Because there was risk to the project funds if the Corps did not award the contract (and all were aware of this), there were no additional solicitation amendments and the DOR ultimately could not complete all of the contract drawings incorporating the solicitation amendments prior to the award of the construction contract (*see* app. supp. R4, tab 22.0041 at 1; app. supp. R4, tab 17.04 at 47; *see* tr. 8/153-54, 185; 9/154). The major solicitation amendments were therefore in narrative form, and did not include drawings of the changes but stated the revised drawings would be forthcoming (tr. 9/16, 154). This meant all offerors, including KP, submitted a proposal based on their interpretation of these descriptive changes (*see* tr. 9/156). The Corps would then provide the construction contractor the revised contract drawings after the notice to proceed (*see* tab 21.21 at 3).

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33. As the Corps Chief of Military Programs Branch for Omaha noted in October 2012, “[w]hen you cut as much scope post receipt of proposals and then try to reconcile the drawings to match what the government believes [was] awarded after the fact it is going to be a little messy, and never perfect” especially when “[t]he last two amendments were pretty much run and gun, and not pretty” (app. supp. R4, tab 22.0041 at 1-2). And as set forth in a SAG briefing, originally the facility was to be over a million square feet and accommodate 3,921 personnel, with 526,000 square feet of SCIF space; the final facility was 916,000 square feet, accommodated 3,754 personnel, and had 689,000 square feet of SCIF space (app. supp. R4, tab 22.0192 at 6). Those are some major changes.

34. Further, there was only about 1.1 percent or \$200,000 in construction contingency funds available for cost overruns; the Corps planned to save money, and reduce risk, by using value engineering changes (app. supp. R4, tab 17.04 at 47; app. supp. R4, tab 22.0192 at 12).<sup>11</sup>

35. The Corps therefore proceeded to “adopt a high-risk approach” in order to award the project (app. supp. R4, tab 17.04 at 25). Some at the Corps had never seen a project awarded in this fashion (with conformance documents prepared after award) so it was difficult to compare to other construction projects with regards to expected cost growth (*see* app. supp. R4, tab 22.0196 at 3). As the Corps’ Chief of Engineering Division in Omaha admitted, both the way the contract was awarded and the size and complexity of the project resulted in numerous design errors (tr. 7/18-19). We discuss the design errors, in length, throughout this decision.

36. We note there was testimony from the Corps’ Chief of Military Programs that removing a bay or fourth floor resulted in small changes to the mechanical, structural and walls and that not much of the building was affected (tr. 6/126, 239-40). This testimony is contrary to the weight of the other evidence before us and we find, as did many others, that awarding this contract without first completing a re-design was “high risk” and that the DOR would essentially be completing a major re-design of the facility after award (app. supp. R4, tab 22.0158 at 1; tab 22.0043 at 1; tab 17.04 at 25, 47).

37. The Corps conducted a best-value tradeoff analysis, considering relevant

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<sup>11</sup> The standard military construction contingency is 5 percent (2 percent contingency and 3 percent reserve) (app. supp. R4, tab 22.0192 at 12). A 5-6 percent contingency is needed because projects of this size average a 7-11 percent cost overrun (*see* app. supp. R4, tab 17.04 at 47 n.28; app. supp. R4, tab 22.0249 at 9).

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construction experience, past performance, subcontractor experience, construction management plan, personnel qualifications, and construction experience, among other things (R4, tab 2.04 at 54, 57). With respect to subcontractor experience, the offeror could submit up to three candidates for each of the primary subcontractors (*id.* at 63). The solicitation stated that the primary was the HVAC subcontractor for mechanical work and the building electrical subcontractor for the electrical work (*id.* at 64).

38. KP identified three mechanical and three electrical subcontractors (R4, tab 2.20 at 177, 203) KP could substitute subcontractors after award with the contracting officer's consent (R4, tab 2.04 at 63). Likewise, KP identified individuals to serve as key personnel and after award, was permitted to replace them with the approval of the contracting officer (*id.* at 69). KP did ultimately utilize different subcontractors and personnel. KP's subcontractors relevant to this appeal are set forth in appendix 1 and discussed throughout this decision.

Construction Contract Award to KP

39. It is against this backdrop--inadequate budget estimates resulting in insufficient funding; a low contingency fund; a flurry of solicitation amendments severely impacting the project's scope and design; and incomplete design drawings and specifications--that the Corps knowingly awarded a high-risk, incrementally funded, large-scale, fixed-priced construction contract. Specifically, on August 16, 2012, the Corps awarded fixed-priced contract No. W9128F-12-C-0023 to KP in the amount of \$524,445,324 to construct a five-level, approximately one-million-square-foot STRATCOM replacement facility at Offutt AFB (JSF ¶ 1; R4, tab 2.01 at 1-2, 1404). As with the solicitation, the contract stated the project was "100 PERCENT DESIGNED CONSTRUCTION RFP" (R4, tab 2.01 at 1; *see also* R4, tab 2.04 at 36 ("This project is a 100 percent designed construction RFP.")).

40. The contract incorporated by reference KP's offer and the solicitation (R4, tab 2.02 at 2). As noted above, the last offer submitted in response to solicitation amendment 29 was the SF 1442 and updated pricing/CLIN schedule "ONLY" (R4, tab 21.29 at 2). According to the contract, the Corps was to provide KP drawings that incorporated all changes (descriptive, sketches and notes), i.e., the conformed drawings, within 45 days of the notice to proceed (R4, tab 2.04 at 880).

41. Although KP was aware the contract drawings were incomplete at the time of award, it was nonetheless the Corps' responsibility to provide not only conformed contract drawings, but conformed drawings that were complete and accurate. As per the solicitation, the project was design-bid-build. (JSF ¶ 2) Hence, the Corps contracted with a DOR to design the project and then contracted with KP to build it

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(JSF ¶ 2). KP was not the architectural and engineering (A/E) designer; KP was the construction company.

42. Further, there was also testimony from the Corps that one task of its construction division was to review the drawings and specifications post-award to look for conflicts (tr. 10/178, 182). The Corps' construction and engineering groups also reviewed the documents to see what issues could arise, especially as it related to base standards (tr. 10/179-80).

43. Accordingly, regardless of any discussions with KP prior to award, including about ways to cut costs, the Corps was required to provide and KP expected to receive, a fully designed project. As we next discuss, KP did not receive a fully designed project at the time of award, at the time of the notice to proceed, and not during the periods in question for this appeal. Therefore, while it was not a surprise to KP that there would be new and revised drawings and specifications, it was a surprise that those designs contained numerous and seemingly never-ending errors.

44. In fact, KP's expert Mr. Alex Staley from Analytical Management Solutions (AMS)<sup>12</sup> stated he "did not identify any period in which the design was fully developed or issued by [the Corps] that would allow KP to have essentially a completed design and continue to perform the work on it with all of the information" because it was an evolving design "throughout the entire duration of the project" (tr. 13/120). Based on our review of the record, and as set forth below, we find the same.

45. The award was for the basic contract, in this case line items 01-10 (R4, tab 2.02 at 2; *see also* R4, tab 2.01 at 1404). Basic line items 02-10 required KP furnish and install the drilled piers and security fencing. Basic line item 01 required KP "[f]urnish and install entire work complete, excluding Basic Items and Option Items listed below" and this included the visitor control center and parking lots. (R4, tab 2.02 at 3) Because the Corps only evaluated each offerors' price for the basic requirement pursuant to FAR 52.217-3, EVALUATION EXCLUSIVE OF OPTIONS (APR 1984), the options were not evaluated for award purposes and not (immediately) awarded to KP (*id.* at 9).

46. The options line items included the following: auditorium furniture package; workstations and commercial item description package; Uninterruptible

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<sup>12</sup> Mr. Staley was qualified as an expert in scheduling and delay and impact analysis (tr. 13/95).

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Power Supply (UPS) systems;<sup>13</sup> demountable walls on all levels; security components; certain secure parking; additional wireless communications access points; landscaping; extended warranty; additional cooling capacity to chilled water plant and cooling tower; two diesel generators; additional service elevators; reinforced concrete pads for future relocation of two missiles; additional passenger elevator in the North Bar; enclosure of walkway between visitor center and building; sound transmission class (STC) 45 doors in SCIF areas and interior open storage areas; certain wall types with STC 50 in lieu of basic contract wall type for SCIF and open storage areas; acoustically enhanced gypsum board; wall type AB in lieu of basic contract wall type for open storage walls; all signage not permanently mounted; glass curtain walls surrounding north and south atrium elevators; white concrete at cooling towers; terrazzo and acoustical material in lobby; and all work between certain areas on all levels of building (R4, tab 2.02 at 4-6).

47. As the contract was incrementally funded, the award for the basic line items stated the FY 2012 funded amount was limited to \$102,754,426 (R4, tab 2.01 at 1556). The contract further indicated the government would allot the funds as follows: FY 2013-\$123,024,862; FY 2014-\$128,372,753; and FY 2015-\$170,293,283 (*id.* at 1557).

48. The contract included the following relevant FAR clauses: 52.236-21, SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (FEB 1997); 52.242-14, SUSPENSION OF WORK (APR 1984); 52.243-4, CHANGES (JUN 2007); and 52.246-12, INSPECTION OF CONSTRUCTION (AUG 1996) (R4, tab 2.01 at 1518-21, 1536-37). According to FAR 52.236-21(a), KP was to submit discrepancies in the figures, drawings or specifications to the contracting officer who was to “promptly” address the matter in writing (*id.* at 1518).

49. According to FAR 52.243-4(a), the contracting officer may make changes in the specifications (including drawings and designs) or method or manner of performance of work, or direct acceleration of the work (R4, tab 2.01 at 1520). Further, this Changes clause states:

(d) If any change under this clause causes an increase or decrease in the Contractor’s cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the

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<sup>13</sup> The UPS system included UPS modules, 48V DC rectifiers, flywheels, output distribution switchgear, DC disconnects, and battery systems (app. supp. R4, tab 21.0003 at 2).

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Contracting Officer shall make an equitable adjustment and modify the contract in writing. . . . In the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications.

(*Id.* at 1520-1521)

50. In addition, according to FAR 52.246-12, government inspectors were not authorized to change specifications, the government was not to “unnecessarily delay work” when performing inspections and tests, and the contractor was required to replace or correct nonconforming work (R4, tab 2.01 at 1536-1537). In addition, this Inspection clause states that the government may decide to examine completed work prior to acceptance by removing or tearing it out. If the inspected work is defective or nonconforming due to the contractor’s/subcontractor’s fault, the contractor shall defray the expenses of the examination and reconstruction. However, if the work meets the contract requirements, the contracting officer shall make an equitable adjustment for the additional services involved, including, if completion of the work was thereby delayed, an extension of time. (*Id.* at 1537)

51. The contract also included FAR 52.211-13, TIME EXTENSIONS (SEPT 2000), which states that extensions “will depend upon the extent, if any, by which the changes cause delay.” The clause explains that change orders granting the time extension “may provide that the contract completion date will be extended only for those specific elements related to the changed work and that the remaining contract completion dates for all other portions of the work will not be altered.” Further, the clause states that the change order may provide an equitable readjustment of liquidated damages with the new schedule. (R4, tab 2.01 at 1564)

52. KP was to complete the work no later than 1460 calendar days after receipt of the notice to proceed (R4, tab 2.01 at 1564). The contract included phasing and early beneficial occupancy requirements. Specifically, there were four phases and each phase listed early beneficial occupancy areas for that phase. (R4, tab 2.04 at 233-34) Areas were to be completed before occupancy, meaning all walls, ceilings, floors, and doors completed and painted and all HVAC and power fully installed and functional (i.e., all cooling towers, mechanical room equipment and electrical room equipment completed) (*id.* at 232). For Phase IV, the government would have early beneficial occupancy to LL1, which would then be under government security control, which required a government escort to access the areas (*id.* at 234). There was also a liquidated damages schedule (R4, tab 2.01 at 1564).

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The Project – an Overview

53. The project and site encompass over 55 acres and include (from right to left, see picture): the loading dock, cooling towers, walkway, mission support building, visitor center, anti-ram walls, seeded grass fields, parking lots, and roads that run along the perimeter (R4, tab 9.15; JSF ¶¶ 19, 22; tr. 1/68).



The primary feature of this project is the mission support building--a 916,00 square foot, five-story structural steel superstructure supported on concrete foundations (JSF ¶ 20). The building has three levels above ground (L1, L2, and L3) and two levels (LL1, LL2) and the specialized high-altitude electromagnetic pulse (HEMP) structure below ground (tr. 1/68; JSF ¶¶ 21-23). The building's upper levels are mostly office space and the below ground area contains a data center (tr. 1/172).

54. The interior of the building includes a full-height atrium on L1, which divides the building into a northern segment (the North Bar; closest to the cooling towers) and a southern segment (the South Bar). There are bridges which span the atrium at the upper levels for access between the north and south parts of the building. (JSF ¶ 21) LL2 is multi-tiered, slab-on-grade and the lowest level of the building. Each of the elevated floors consists of concrete slabs over metal decking. (JSF ¶ 23)

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55. KP performed work from its office trailer, referred to as the green zone, which was next to the project as well the Corps' and Air Force's project management trailers (tr. 1/65-66; 6/304-05). There could be close to 50-60 trailers in the area during construction (tr. 6/305).

KP's Plan of Action – The Train

56. The contract required KP prepare a project schedule for approval that showed the sequence KP proposed to perform the work and dates for starting and completing all activities (R4, tab 2.04 at 283). KP was to perform structural work first. Essentially, the basic stages of structural work for the building included: (1) excavating; (2) completing the foundation; (3) erecting the structural steel; (4) installing the rebar; and (5) installing the concrete decks. (JSF ¶ 24; tr. 1/70-71, 212; 2/89)

57. After completion of the structural work, KP planned to work on the interior build-out (tr. 1/69-70; 2/89). Specifically, after completing the concrete decks, KP planned to construct "full height" fire-rated walls (JSF ¶ 24). The vast majority of the interior walls consisted of these full height walls (*id.* ¶ 25). Full height walls are also referred to as priority walls and they go from the floor (top of the concrete deck) to the ceiling (bottom of upper level floor deck) (tr. 1/126, 128; 2/115; 13/154).<sup>14</sup> They are called priority walls because they are installed first (*see* tr. 2/115). SCIF walls are full height walls (tr. 1/124-26). Different mechanical and electrical systems that "poke" through a wall are called wall penetrations (tr. 1/128).

58. Once the full height walls were installed, KP planned to start the overhead utilities which either penetrate or are adjacent to the full height walls (tr. 13/154). Next, KP planned to complete the remaining walls and close in the ceilings (either hard ceilings or grids); once the ceilings were inspected and approved, KP did not intend to "go back" into the ceilings to perform any work (tr. 13/154-55). KP was also to install a raised access floor throughout the facility which has some utilities underneath (tr. 13/155). From there, KP was to install the partition walls, and then the finishings such as painting, flooring, and doors (tr. 13/155-56). The ceilings had to be completed before painting, flooring and other finishing could be completed (tr. 13/147). Either KP and its subcontractors, also referred to as the trades, or both, performed this work.

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<sup>14</sup> There are distinct types of walls with various levels of priority, such as: two-hour firewalls, one-hour firewalls, one-hour smoke walls and nonrated walls (tr. 5/26).

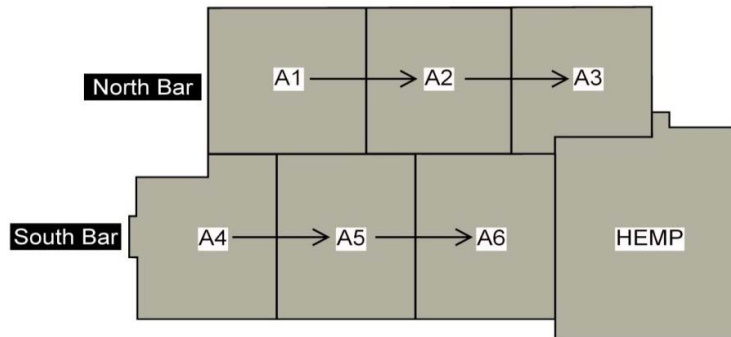
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59. KP stated it would use intervals for an organized sequence of work for each trade requiring them to complete an activity from start to clean-up for this interior build-out (R4, tab 22.01 at 261). Hearing testimony provided further details on this plan.

60. Specifically, KP's interior build-out plan was to work from west to east, starting in the North Bar, from Area 1 (A1) to A3. Next, KP would work from west to east in the South Bar (A4 to A6). (Tr. 1/69-70; 2/89) Specifically, KP would work from LL1 to L3 in the North Bar before then proceeding to work LL1 to L3 in the South Bar (tr. 1/69-70). Any impacts to work in the North Bar would therefore impact work in the South Bar.

61. In sum, KP planned to work upward within each area (A1-A6) during the interior build-out, moving up level-by-level (LL1 to L3) before moving to the next area (tr. 1/69-70; 4/124; 2/90). These areas (A1, A2, etc.) divided the bars into roughly 20,000 square foot work areas (tr. 1/69; 2/91). The following is a simplistic drawing of the plan:



(R4, tab 27.02.01 at 130). The contract drawings were also structured this way (tr. 3/27-28, 45).

62. Within each of these areas the 20-25 trade activities would work, starting in A1, LL1, performing the following: fireproofing, framing, dry wall, overhead/above ceiling work (hydronic piping, plumbing, ductwork, electrical, fire protection), access flooring, wall framing, painting, carpeting, finishing, and commissioning (tr. 1/71-72; 2/92; 4/124-29). KP anticipated the trades would work in an assembly line fashion, or like a train (tr. 1/72, 154; 2/91-92; 4/149, 225; 7/149). This plan was to be used to schedule deliveries and mobilize crews (tr. 1/72-73). For example, material was to be delivered incrementally, for each of these 20,000 square feet areas; if all materials were delivered for the entire floor it would get in another subcontractor's way (tr. 4/130).

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63. As KP explained, for them (and probably most contractors), construction projects are linear; in other words, “something has to be done and finished before something else can occur” (tr. 4/116-117). And similar to a train that “has to move along the tracks together,” the car in the middle cannot go faster than the car in front (tr. 7/149).

64. KP depicted this plan in its block schedules where each block and row represented approximately one 20,000 square foot work area and each colored block represented a subcontractor’s crew (*see* R4, tab 22.01 at 262; tr. 7/138-39, 149-50; *see e.g.*, app. supp. R4, tab 30.0091). As required by the contract, KP depicted the sequence, or train, of work in its baseline and other schedules which the Corps accepted (tr. 1/77-78; 7/122; R4, tab 2.04 at 283; *see also* R4, tab 32.2.1 at 20 (Figure 4); tab 25.01.02).

65. KP communicated this plan to the subcontractors in the 2012 timeframe (tr. 2/93). KP’s subcontractors planned their work in accordance with this plan (tr. 2/93; 5/25 (Cleveland Construction, Inc. (Cleveland)); 5/145-46 (Cobb Mechanical (Cobb)); 7/250-52 (Bergelectric-Helix Joint Venture (BHJV))). For example, the electrical contractor BHJV explained that each of the areas in the North and South Bar contained an electric room approximately center of the area so to start from the west side and work toward the electric room “work[ed] very well for a smooth flow and efficient installations” (tr. 7/251-52). And BHJV (as did others) had a manpower plan based on this flow (tr. 7/252-53).

66. Likewise, the drywall and framing subcontractor Cleveland anticipated performing 100 percent of its work in each of the 20,000 square foot spaces (tr. 5/25). For example, if Cleveland were to frame in A1 for 10 days, it anticipated performing 100 percent of the framing in that area during that time (tr. 5/25). Cleveland, however, needed a complete design to perform the wall layout since, as noted, there were different types of walls in the facility (tr. 5/26). The mechanical, electrical and plumbing (MEP) subcontractors followed the framing and relied on the layout, including for the penetration markers (tr. 5/30).

67. Thus, the train served several purposes. It allowed KP and several subcontractors to work on the project at the same time but in different locations, preventing trade stacking, and to achieve efficiency (R4, tab 22.01 at 261; *see* 4/125-26, 3/245-46; 5/31-32). In other words, the plan ensured there were not too many workers from the many trades in the same space because each trade needed to work, lay down material and not impede each other (tr. 2/94, 4/125; R4, tab 22.01 at 261). This approach therefore also prevents trade damage caused by overcrowding of labor,

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equipment, and materials (tr. 4/38, 152; 3/245). As KP explained, this approach allows construction activities to run concurrently within these areas, results in an efficient and safe construction flow of work, reduces schedule risk, provides a week-by-week schedule for subcontractors to manage, and allows subcontractors to participate in planning and coordination (R4, tab 22.01 at 261).

*The Train Sputters Out of the Station*

*The Project is Re-Designed*

68. Almost two weeks after contract award to KP, the Corps modified the DOR's contract and required drawing revisions within 45 days from the notice to proceed for the construction phase (R4, tab 16.02 at 3). The Corps issued KP the notice to proceed on September 10, 2012, about two weeks later (app. supp. R4, tab 17.04 at 26). But 45 days was insufficient time to essentially re-design the project. As the Corps Chief of Military Programs Branch for Omaha later noted in a 2014 email, when preparing for a SERG meeting:

We cut almost 200k square feet (4 structural bays, two in each bar) with nothing more than an 8.5 x 11 sketch and narrative. We cut the site-work the same way. We gave [the DOR] less than 3 months to re-design the facility post award to reflect the changes. The floor plans had to be completely revised because functional units (J codes) [and] impacted bays (all five stories) had to move to other locations. . . . The MEP impacts of the cuts were substantial. Only the core areas of the building remain unchanged (stairs, bathrooms, elevators, telephone closets). There are numerous design issues due to the haste creating 'conformed drawings.' It was much more complicated than just stitching the design back together.

(App. supp. R4, tab 22.0242 at 1) Due to this re-design, KP and its subcontractors were essentially rebidding the job (app. supp. R4, tab 22.0056 at 2). Less than two months after contract award, a senior Corps leader acknowledged that the government was "in a high risk situation" and "[u]nder any other circumstance with a project at this stage and without contingency, we'd be asking to reprogram immediately" (app. supp. R4, tab 22.0043 at 1).

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69. The DOR completed the drawings by November 24, 2012 (app. supp. R4, tab 22.1128 at 2). These drawings are referred to as the conformed drawings and they were to show what was changed by the amendments to the solicitation (tr. 9/153, 155).

*KP Reviews the Conformed Drawings<sup>15</sup>--An Overview of the Problems*

70. The Corps issued a modification requiring KP perform a BIM review of the conformed drawings (app. supp. R4, tab 17.04 at 49; tr. 9/155). As noted earlier, the requirement for BIM modeling had been removed from the solicitation originally, as it was in the DOR's contract. Now it was back in the construction contract.

71. KP reviewed the conformed drawings through July 2013 (app. supp. R4, tab 22.1128 at 2). KP's role in this review was not to design the project, but to work with the DOR in design coordination such as clash detection (e.g., making sure there was enough space for duct work) (tr. 1/87-88). KP informed the Corps it believed there were design quality issues, conflicts in the coordination issues, and that drawing areas did not align with KP's interpretation of the contract (app. supp. R4, tab 22.1128 at 2; *see also* tr. 9/157). KP expressed concerns with the walls and doors (tr. 9/34). Further, there was "scope creep," where USSTRATCOM, the user, required a complete revision of the floor plans during the DOR's conformed drawing process which required a complete functional re-design (app. supp. R4, tab 22.1128 at 2).

72. In 2013, KP informed the Corps about design issues. At that point, the plan was for KP to begin interior build-out about 18 months later (tr. 4/139). In other words, the Corps had sufficient time to fix the design errors but, as we will see, the Corps failed to do so.

73. The Corps' senior project manager, who was also one of the contracting officer's representatives (CORs), agreed in his testimony before the Board that the conformed drawings contained design errors, conflicts and omissions (tr. 9/84; 10/188). The Corps concurred that MEP coordination was an issue as the DOR's BIM modeling did not fully consider everything (tr. 10/188). In fact, as noted, KP submitted its offer on the descriptive changes and what it understood the changes to mean, but the DOR could have had a completely different opinion (tr. 9/156). During the hearing, Corps personnel also explained that KP's responsibility during this review

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<sup>15</sup> At this point, the decision cannot follow a strict chronological order because many of the issues and modifications extended for months or even several years (e.g., final modifications might have taken 2 years to issue) and were occurring at the same time.

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process was to ensure the drawings were what KP expected to receive and if not, the government could owe KP money (tr. 9/156).

74. By May 2014, the Corps acknowledged the conforming and subsequent correcting design process was taking more effort than estimated, there was design risk based on the major pre-award scope reductions, and re-design was required (e.g., deleting 4th floor of the North Bar and two structural bays from the North and South Bar impacted many infrastructures such as power, communications, HVAC, and redundant systems) (app. supp. R4, tab 22.0249 at 8; tab 22.0251 at 1). By this time, there were already over 1,500 requests for information (RFIs) which the Corps attributed to correcting design errors (app. supp. R4, tab 22.0249 at 8). The Corps itself had to add at least 18 additional engineers to address the infrastructure incongruences, especially MEP (app. supp. R4, tab 22.0249 at 8). By May 2014, the Corps was increasing its resident office staff from 27 full-time to more than 35 to handle the design issues (app. supp. R4, tab 32.0042 at 1, 8).

75. The issues relating to the design errors were further compounded by the need to re-design the floor plans to accommodate the J-Codes. Because the government had decreased square footage from the original design during the solicitation process, STRATCOM now had to squeeze workers into a smaller space resulting in the need for this re-design. While the government took two years to prepare the advertised design, it only gave the DOR 45 days post award to “re-stitch the facility back together in order to not delay the contractor, and incur costs . . . .” Consequently, the rush to complete the conformed drawings in 45 days was “optimistic” and resulted in more design errors and omissions post award than would have been anticipated. Around this time, the Corps also realized that the DOR’s quality control resulted in numerous additional design errors and omissions and change orders. (App. supp. R4, tab 22.0251 at 1)

76. Also, by 2014, some at the Corps believed 90 percent of the added costs were due to design errors (app. supp. R4, tab 22.0282 at 1, 3). The problem is, even though the Corps was aware there were numerous design issues, it never addressed the problem head-on but rather iteratively fixed problems as they arose. As the Chief of Operations for Construction for the Air Force testified, the DOR was designing the project at least “for the better part of the first half of construction” (tr. 6/15).

77. Hence, the root of KP’s claim is not just defective design (specifications and drawings) *but also* the continued re-design of the project during the course of the construction, e.g., spending a year re-designing the overhead (which lowers the ceilings) and then finding deficiencies the whole time (tr. 1/83-84). Again, the Corps, not KP, was responsible for the design.

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78. This “design-as-you-go” plan impacted KP and its subcontractors. For example, the subcontractors developed shop drawings from the design documents for items such as fire alarm and smoke control, only to find out much later that the drawings had to be redone as there were major modifications warranting a full re-design (tr. 1/93). We discuss additional implications of the design-as-you-go approach later.

79. The Corps tracked design deficiencies in 191c forms (tr. 9/135-36). By January of 2017, the Corps individual in charge of tracking modifications calculated that about 73 percent of executed modifications were due to design errors/omissions by count and 42 percent by dollar value (app. supp. R4, tab 22.0863 at 1). In May of 2017, some at the Corps (the resident office staff) believed that the DOR had “checked out” and was not providing the appropriate level of support on this mega-project and with this “level of design errors” (app. supp. R4, tab 22.0956 at 2).

80. According to testimony by the Corps, these 191c forms were field-level documents of what the team thought “might be a liability” so these were not a conclusion of design liability (tr. 9/136; 9/185). Interestingly, modifications issued (we discuss many modifications later) with an attached 191c form explained the design issue and were signed by the administrative contracting officer and a civil engineer for the STRATCOM resident office (*see e.g.*, R4, tab 31.341 at 37). The Corps did consider at one point establishing an A/E liability board to address the design issues (tr. 9/136). There is also testimony from the Corps that the Air Force, STRATCOM and even the Corps believed there was design liability (tr. 9/137). However, at some point the Corps was directed to stop preparing the 191c forms unless it involved delay or rework as, ultimately, the Corps decided to not proceed with A/E liability (app. supp. R4, tab 22.0956 at 1-2). Regardless, we find that the 191c forms attached to modifications explained the design issue. In other words, while the Corps is trying to pretend now the design errors did not result in these numerous modifications we discuss later, we find the modifications speak for themselves.

81. By May 2014, at a SAG briefing, the following was noted: “Cumulative Impact of Mods: High volume of modifications creates potential for future claim. Contractor has already put government on notice of potential cumulative impact of mods” (app. supp. R4, tab 32.0042 at 7). At that time, the SAG noted a possible worst-case scenario was the potential for a domino effect where early problems cascaded through and impacted the schedule, creating larger problems later. Further, there could be massive schedule impacts relating to material delivery, equipment reliability, labor availability and productivity, as well as unusually large amounts of rework due to failed quality assurance (QA)/quality control (QC) tests, among other

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things. (*Id.* at 17) Given the circumstances in which the Corps was designing (and re-designing constantly) a large and complex facility while constructing it at the same time this “worst-case scenario” strikes us as an all-too-predictable outcome.

*The DOR’s Responsibilities After Contract Award*

82. The DOR’s work here was obviously not done once the construction contract began, and this is especially the case here, where the Corps provided the DOR such a short turn-around time to essentially re-design the project. There were design deficiencies that needed correction throughout the course of the contract. Again, the Corps (via the DOR) and not KP was responsible for the design.

83. For example, in July 2014, the Corps modified the DOR’s contract to require, among other things, additional design effort for revised wall types for the video conference room and walls around the SCIF entries (R4, tab 16.02 at 33-35).

84. The DOR was also responsible for the design of items moved from the basic contract to the options in an effort by the Corps to save money. Initially, the solicitation required offerors include pricing for furnishing and installing a UPS system (UPS modules, rectifiers, flywheels, etc.) (R4, tab 29.1 at 16, 19, 21, 73). At the time of award, however, the Corps informed offerors it would only include the price for the basic requirements in its evaluation and therefore would not evaluate options, such as the option for the UPS system (R4, tab 2.04 at 23, 30). The facility would not be useable without the UPS system (app. supp. R4, tab 21.0003 at 5). In this regard, the UPS system, with an installed 48V DC system (48V/UPS), supplies power to certain mission critical telecommunications equipment (JSF ¶ 34).

85. The DOR was also responsible for reviewing all government A/E submittals within seven days during construction, including shop drawings prepared by KP (R4, tab 16.02 at 25-26). If the DOR noticed any deficiencies or errors in the plans and specifications, it was to notify the Corps. The DOR was also to respond to RFIs when the Corps could not. (*Id.* at 26) As the Corps project manager explained, this was an extension of the design to make sure the Corps could resolve any issues as it moved forward with the project (tr. 9/145).

86. There is testimony from the Corps that there were times it had difficulty resolving issues with the DOR and getting it to respond in a timely matter because the DOR would argue it was KP’s issue to resolve (tr. 9/136; 10/190-91). This certainly did not aid in responding to RFIs or to advancing the construction of the project.

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*The Inaccurate Train Schedule (Multi-part, Blue Clock and Red Star Modifications)*

87. Before we begin discussing specific modifications, we must provide some background on the modification process and schedule.

*Modifications, An Overview*

88. As background, the typical modification procedure began with KP or the Corps identifying an issue and then either KP submitting an RFI to the Corps or the Corps submitting an RFI to the DOR (*see* tr. 9/34-35; 2/261). Generally, it seemed KP would issue the RFI to the Corps and the Corps would issue it to the DOR (*see* tr. 9/34). The Corps would receive an architectural supplemental instruction (ASI) and then issue an RFP to KP seeking pricing and requesting a response on how to implement the change or resolve the issue (tr. 9/35; 2/261-63). At the same time, the government would prepare an independent government estimate (IGE) (tr. 9/35).

89. The RFP for each modification originated from an internal Corps document--the basic change document--which generally included a section stating the proposed change to the specification and the drawings (tr. 9/179). It also included a statement explaining the necessity for the change (tr. 9/180). As noted above, the necessity for the change could (and generally was) a design issue. KP would not see this necessity for the change when the Corps issued the RFP. KP's response to the RFP included its proposed pricing after discussions with its subcontractors, as applicable. (Tr. 9/181) Once the Corps issued the modification, KP would issue a change order to one or more of its subcontractors (tr. 3/20).

90. KP kept a log of the RFIs, ASIs, and RFPs in a coordination of team action item list (tr. 2/261-63; app. supp. R4, tab 31.0071). With respect to the RFIs, KP kept track of whether it had received an answer and how long it took to receive the response (app. supp. R4, tab 31.0070).

91. Due to the numerous changes occurring during the project, the Corps issued many multi-part modifications, i.e., a modification issued in several parts to address one issue. The contract addressed two-part modifications, explaining the Corps could make payments for within scope changes only to the extent funds were authorized (*see* R4, tab 2.04 at 242).

92. The Chief of Contract Administration for the STRATCOM resident office had a team of seven to nine individuals working on these multi-part modifications (tr. 11/19). Likewise, KP had a change management group to deal with the

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modifications which operated in a separate trailer and did nothing but work on changes (tr. 4/10; *see also* tr. 11/20; 3/107; 12/73). There were generally at least 50 open changes every month during the December 2014 through September 2017 timeframe, despite the fact the Corps closed over 550 in that same time period (tr. 3/110-11). While KP and the Corps could add staff to address all these changes, it was difficult for some of KP's subcontractors to add additional support due to all of the unexpected changes (tr. 3/114).

93. The Corps stated the multi-part modifications were supposed to minimize delays. Rather than wait to issue an RFP, receive a proposal and then negotiate the modification, with the multi-part modification the Corps would identify an issue of immediate importance, put together a government estimate, obtain the funding, and give KP the notice to proceed via the first modification (tr. 13/19-20). With respect to funding of the multi-part modifications, the Corps would allocate half of the IGE to the first modification as the not-to-exceed price (tr. 9/158-60; 13/20). For purposes of calculating the value of the modification to ensure sufficient contingency funds were available, the Corps would first consider the full value of the modification, i.e., the IGE (tr. 9/158; 6/19). If the Corps had received a proposal from KP, the Corps would use KP's estimate. And if KP's estimate was higher than the IGE, there would be negotiations and then a final modification. (Tr. 6/19) The Air Force was monitoring the modification financing and contingency funds available, as well (tr. 6/17-18).

94. Many in the Corps explained the use of multi-part modifications had nothing to do with funding issues (*see* tr. 13/20-21; 8/89-90; 9/53). In other words, the Corps was not using them to slowly dole out money based on what funding was available. But the Corps did agree it was correcting design errors with these multi-part modifications (tr. 13/59). As the Chief of Contract Administration for the STRATCOM resident office explained, the multi-part modifications were also used to separate work in the North and South Bar and allowed the DOR to work through the design as the project proceeded (tr. 11/35, 44).

95. KP agreed that the multi-part modifications allowed it to proceed as sometimes there would be only a limited amount of information available on an issue and it was enough to move forward on part of the matter "but not the whole thing" (tr. 2/200). Sometimes, however, the first part of a multi-part modification was insufficient direction to proceed, especially when more changes were coming via, say, the second through seventh modification (*see* tr. 3/51). For example, KP explained that it needed answers to an issue months before getting into a space to work, but instead the Corps would provide the needed information only two weeks in advance, after the first part of a multi-part modification was issued (*see* tr. 4/164-66).

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96. The volume of modifications using this piecemeal process resulted in trade damage (where one trade damages another trade's work), rework, material handling issues, and manpower problems (tr. 4/166; 7/360-61). For example, with respect to manpower, as the various parts of the multi-part modification trickled in, a subcontractor may have had to redirect employees to a different area or lay off people because there was no work at that time (tr. 12/71). Employees may have been hesitant to return to the project due to the design issues since there were too many ebbs and flows with the various modifications (tr. 12/72). It also impacted productivity or flow of work. In this regard, generally a subcontractor mobilizes its crews, the crews have a learning curve, the subcontractor then orders materials and starts work; once in the flow, the crews would "naturally start to get into productivity mode" (tr. 5/159). Further, as BHJV explained, when the plan (the train) went awry due to the many modifications, it was difficult to recruit local manpower because BHJV could not provide a specific start time due to the constant changes (tr. 7/260). BHJV, like others, had to recruit outside the state (tr. 7/261).

97. In addition, many of these multi-part modifications were all ongoing at the same time, which caused problems. As the Corps project manager explained, there were issues with clouding, which depicts changes on the drawings. Sometimes there was no clouding at all (tr. 9/139). Other times, the clouding was incorrect due to the multiple modifications issued. Specifically, if the Corps issued a modification with clouding, sometimes another modification would be issued next which would make the prior drawing obsolete and create the need for another change/modification. (Tr. 9/138-39)

98. These problems were further compounded by the fact KP and the Corps could not agree on pricing and time. As a result, the Corps started issuing unilateral "blue clock" modifications when the parties could not agree on time and compensability of time (delay and impact), such as related field office overhead, but did agree on direct labor costs and material (R4, tab 31.1020 at 4, 45, 45 n.1; tr. 1/86-87; 4/28-29; 9/111; 11/25). The modifications included a blue clock icon on the modification tracking sheet (R4, tab 31.1020 at 45 n.1). The first blue clock modification was executed on November 5, 2015 (*id.* at 45).

99. Finally, the Corps also issued unilateral red star modifications (R4, tab 31.1020 at 45). Red star modifications included a red star icon on the modification tracking sheet to show direct costs, costs and/or time were in dispute; with these, direct costs were always in dispute (R4, tab 31.1020 at 45 n.2; tr. 11/120).

100. We find that the Corps was trying to move the project forward, despite the multitude of design issues. Unfortunately, this piecemeal process of multi-part (and

blue clock and red star) modifications exacerbated the issues for KP and its subcontractors. In other words, these modifications deferred the resolution of time, delay and cumulative impact issues, as well as the design issues. We also find that the Corps was aware KP believed it should be compensated for time, delay and impact, which is why the Corps agreed to the multi-part, blue clock and red star modifications.

### *The Project Schedule*

101. Based on just those facts, it should come as no surprise that there were also issues and disputes with the schedule. As noted, KP was to have an approved project schedule, which would be used to measure work progress and aid in evaluating time extensions (R4, tab 2.04 at 284). KP was to use the critical path method (CPM) to generate the project schedule (*id.* at 285). In addition, each week KP was to submit for approval a daily work schedule covering a two-week period (*id.* at 246). KP was also to provide monthly schedule status reports (*id.* at 284).

102. The approved schedules were used to measure the work progress and evaluate time extensions (R4, tab 2.04 at 284). KP was to include government activities that could impact the schedule such as approvals, inspections, government furnished equipment, and the notice to proceed for each phase (*id.* at 286). Further, KP was to add any activity or sequence of activities to the schedule resulting from a modification (*id.* at 287). If the contracting officer believed KP fell behind on the approved schedules, KP was to take steps necessary to improve progress without cost to the government, including adding shifts and using overtime (*id.* at 284; *see also* FAR 52.236-15(b)).

103. KP was to assign an activity code to any activity or sequence of activities added to the schedule due to a contract modification when approved by the contracting officer. Activities or sequences of activities could only be added to the schedule due to an alleged constructive change if the contracting officer approved the addition. The contract specifically states the government does not accept liability or responsibility for activities added to the schedule due to an alleged constructive change. Rather, the purpose of adding the activities to the schedule was to maintain “a realistic and meaningful schedule.” (R4, tab 2.04 at 287) These additional activities or sequence of activities (whether via a modification or other unplanned events) are referred to as fragnets (fragmented network of activity); a time impact analysis (TIA) inserts these fragnets into the schedule to determine whether there is an impact to the critical path (*see* tr. 7/124-25; 12/80).

104. During the hearing, a project scheduler for KP (at the beginning of the project and who later became a project superintendent) provided the following

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summary of building the project schedule. The project schedule includes everything from start to finish, and for a project like this, there were thousands of activities (tr. 7/120). Activities are linked to one another, so the schedule shows predecessor and successor activities; some activities are critical and some are not (tr. 7/120). The string of non-critical activities is defined in the project schedule as float. If a non-critical activity has a float of 100 days, that means the activity could happen 100 days later without impacting the project's end date. (Tr. 7/121) In comparison, the critical path (comprised of critical activities) is the longest pathway through the project which establishes the project's overall duration, from start to finish (tr. 7/121-22). Those activities have zero float because if they are impacted, the end date of the project is impacted (tr. 7/122). Negative float occurs when the finish date of the last activity on the schedule is later than the contract completion date (R4, tab 2.04 at 288). According to this scheduler, a project schedule has one critical path (tr. 7/122).

105. In preparing the schedules here, KP would compile the status and progress of activities the prior month and the impacts of any unplanned events. KP recorded and reflected the impact of each unplanned event on critical and non-critical work activities. KP would also submit fragnets for proposed incorporation into the project schedule. KP and the Corps met to review the draft schedules and agree on progress (for payment) and any impacts. (Tr. 7/119, 123-25)

106. As explained above, the contract itself recognized that for the schedule to be realistic, KP would have needed to add activities or sequences of activities resulting from alleged constructive changes, acknowledging this did not mean the government accepted liability for the change. However, as the contract states and testimony confirms, KP could not insert these fragnets into the schedule without the contracting officer's permission (tr. 1/82; 7/128-29). Unfortunately, the contracting officer did not generally permit the insertion of the fragnets. For example, KP's monthly schedule submission dated November 23, 2015 was for the October 2015 schedule, which did not include numerous fragnets (some not completed and some submitted) (app. supp. R4, tab 30.0079 at 1, 7-8). The schedule submission included a narrative about impacts to the critical path completion date (*id.* at 5). Likewise, the February 2016 schedule narrative included approximately 16 modifications and hundreds of unincorporated fragnets (app. supp. R4, tab 30.0095 at 1-8).

107. The Corps Chief of Contract Administration testified that although numerous modifications impacted the schedule, the impacts (fragnets) could not be inserted into the schedule because there were issues with KP's overall schedule (i.e., a lack of detail) (tr. 11/160; *see also* tr. 9/66). According to the Corps, KP's schedule compressed activities (shortened time for activities). In other words, rather than pushing activities which had been delayed further out in the schedule, KP compressed

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them, which made it difficult to complete those activities at a later time in the scheduled timeframe. (Tr. 9/66) Further, the schedule initially lacked detail on activities (e.g., commissioning, green zone, finishing Phase 4 and Phase 5) and the Corps assigned KP homework in 2016 of adding detail to the schedules (tr. 11/160-64; 9/66). The homework assignment was completed in 11 weeks (tr. 11/165) so it is unclear how the initial schedule could have impacted insertion of fragnets and TIAs related to modifications throughout the rest of the contract period.

108. Regardless of these issues with KP's schedule, the Corps also acknowledges it typically would not allow KP to insert the fragnets into the project schedule relating to a multi-part modification until the final modification was approved (all costs and time had been negotiated) but explains that it would sometimes have questions or issues with some of the time impacts put forth by KP (tr. 11/30-31, 233). Specifically, in deciding whether to give KP time for a modification, the Corps used the "leave them where you found them" approach (tr. 11/70). In other words, when issuing the first part of a multi-modification, the Corps would not allow associated delay to be inserted in the schedule as the Corps left KP where it found them (tr. 11/76). The Corps would allow KP to insert the associated delay when the final modification or final negotiation on time was reached (tr. 11/75-76).

109. The problem is that the final part of a modification could take years to issue for many reasons: complexity, scope clarifications, changes during the negotiation process, delays in getting proposals from KP, and proposal revisions. According to the Chief of Contract Administration for the STRATCOM resident office: "The most accurate result is to put the impact into the schedule immediately when it happens. So, the longer that the schedule is out before the delay is put in or the impact is put in, the less accurate it becomes." (Tr. 11/74) We agree and find that the contemporaneous incorporation of fragnets (delays) as the impact occurred is needed for an accurate project schedule and was permitted by the contract.

110. For example, the time impact associated with a specific modification would not be inputted into the schedule until KP was "well past when the work was actually occurring" (tr. 4/25 (discussing wall modifications); *see also* tr. 7/137-38 (discussing framing)). While this works for billing purposes (i.e., you can now bill for an approved modification reflected in the schedule) it is not useful for planning purposes (i.e., forecasting or projections) (tr. 7/138).

111. The Chief of Contract Administration for the STRATCOM resident office agreed that multi-part modifications "carry additional risk because work is progressing before negotiations are complete" (tr. 11/46). In other words, the DOR was still designing the change (*see* tr. 6/29). The multi-part modifications were an iterative

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process which led KP to believe that the project was in a state of constant re-design (tr. 1/89).

112. The Chief of Contract Administration for the STRATCOM resident office also explained that the goal was to evaluate one modification in its entirety correctly, and then review the next one for delay despite also acknowledging that when several issues are happening at the same time (i.e., the stacking of issues), the schedule is rendered less accurate; in fact, the level of accuracy decreases every time there is a different impact (tr. 11/79-81, 90). Others at the Corps also acknowledged the project schedules were inaccurate (tr. 9/96-97).

113. We agree that as time dragged on, the problems worsened with the schedule. By 2017, the Chief of Contract Administration for the STRATCOM resident office explained that the Corps could not revisit many of the blue clock or red star modifications on an individual basis because they were:

too far down the path, with too many adjustments to the phased completion dates in the project, logic ties, critical paths, to be able to negotiate TIAs on these old modifications individually. We will need to look at the schedule as a whole (as-built), and evaluate/negotiate from there in the [delay and damages 1] and [delay and damages 2] claims. We are where we are, and I think a new path now, will be beneficial going forward for everyone.

(App. supp. R4, tab 22.1000 at 1) The Chief of Contract Administration had “lost confidence” in looking at the delays for open modifications individually and was going to have to look at them “holistically, just due to the number of impacts that either weren’t in the schedule or weren’t captured correctly” (tr. 11/124). We agree and find this accurately sums up and applies to the schedule for the timeframe included in the claim.

114. Due to all of this, KP’s schedule would show negative float, i.e., that KP was delayed on the work, at least until the final modification was approved (tr. 4/251). More problematic was that the contract completion date did not change (tr. 4/251-52; 7/144-45). For example, at one point the contract maintained a completion date of December 30, 2016, yet the government was internally tracking a completion date of August 2017 (tr. 11/68-70). And the Chief of Operations for Construction for the Air Force agreed that in 2014, before the Corps provided any time extension to KP, he did not believe KP would finish by the original completion date (tr. 6/33).

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115. KP then had to accelerate, supplement for the trades, increase manpower and perform overtime to meet an unchanged completion date, despite the issuance of numerous modifications relating to design errors (*see* tr. 7/145-47).

116. As noted, KP believed that an inaccurate project schedule was not a usable tool for forecasting or planning purposes (tr. 7/131-38). For example, KP's subcontractors relied on the schedule to plan their own work including scheduling manpower, stocking and purchasing materials and equipment (tr. 7/126, 131, 135-36; 5/38).

117. Because the Corps would not allow KP to update the CPM schedules to address impacts until a final modification was approved, KP and its subcontractors had to rely on short term schedules, or block schedules, which were communicated to the government in weekly meetings and to KP's subcontractors (tr. 1/83, 220; 5/72-73; 7/138-39; *see e.g.*, app. supp. R4, tab 30.0091). Block schedules describe a typical flow through the building for the interior buildout on a week-by-week basis where the various color-coded blocks represented a crew (e.g., drywall) (tr. 7/140-41) Although KP had planned to use block schedules in conjunction with the CPM schedule, KP had to solely use the block schedules because the CPM schedule had become so unreliable (tr. 4/101-02, 195-96; 7/135-36, 221).

118. It reached a point where KP did not provide the CPM schedule to its subcontractors (tr. 5/94; 7/135). KP informed the subcontractors the schedule was no longer accurate for schedule management and was merely a billing tool (*see* app. supp. R4, tab 34.0019 at 3).

119. As KP explained, the numerous RFIs, modifications, and RFPs just broke the system (tr. 1/95-96). Even the Corps' project manager stated the Corps relied on the block schedules (as well as meetings and conversations since the schedule was not accurate) (tr. 9/97, 146-47). Unfortunately, as one of KP's subcontractors explained, the CPM schedule is the life blood of a project because it is a planning tool that is used for forward forecasting (tr. 5/93). Having an unreliable CPM schedule is a problem.

120. In addition, the contract provided that KP could request an extension of time, but any such request relied on the project schedule as support for the delay. Further, the contract explained that actual delays caused by the contractor's own actions "will not be a cause for an extension to the performance period, completion date, or any interim milestone date." (R4, tab 2.04 at 295)

The Various Releases in the Modifications

121. In addition, because there were so many disputes as to time and money during contract performance, KP requested the Corps change the release language on the various modifications. Several modifications included the following release:

In consideration of the modification(s) agreed to herein, the contractor hereby releases the government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances. It is understood and agreed that the adjustment to the contract price and time for performance set forth herein is inclusive of all costs and time incurred by the contractor as a consequence of this modification individually and collectively with other modifications including, but not limited to, those for delay, impact, inefficiency and extended field and home office overhead.

(See e.g., R4, tab 31.405 at 5) (emphasis added) For purposes of this decision, we call this the standard release.

122. On February 15, 2016, KP formally notified the Corps it wanted to change the standard release (R4, tab 31.666 at 28). At that time, at least 21 modifications were waiting KP's signature (*id.* at 29). The Corps stated it was the first time it had notice of a disagreement with the release (*id.* at 15). This does not seem quite right since, as discussed above, during a 2014 SAG briefing KP had already put the government on notice of a potential cumulative impact claim for the issued modifications (app. supp. R4, tab 32.0042 at 7). And since 2015, KP and the Corps had been unable to bilaterally negotiate time extensions and related costs (R4, tab 31.1020 at 45).

123. KP wrote the Corps again on March 10, 2016, stating it wanted "to reserve [KP's] rights as to the final release language of the paragraph in regard to the unknown costs and impacts resulting from the facts and circumstances giving rise to the modification." According to KP, "this include[d] but [was] not limited to cumulative impacts resulting from a modification individually and collectively with other modifications to where [KP's] rights [were] not released but expressly reserved." (R4, tab 31.666 at 26)

124. After a meeting on the issue, by April 6, 2016, both parties agreed on new release language (R4, tab 31.666 at 21). The parties formalized the agreement in

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Modification No. 620, effective June 16, 2016 (*id.* at 3). The modification listed the outstanding modifications awaiting the revised language; some of the modifications listed dated back to March and April 2014, while others were dated 2015 and 2016 (*id.* at 4-5). The modified release follows:

In consideration of the modification(s) agreed to herein, the Contractor hereby releases the government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances specific to this modification. It is understood and agreed that the adjustment to the contract price and/or time for performance set forth herein is inclusive of all costs and time agreed to by the contractor as a consequence of these specific facts and circumstances including, but not limited to, those for delay, impact, inefficiency and extended field and home office overhead. Costs and impacts caused by the cumulative impact of multiple changes and modifications are not released and are expressly reserved.

(*Id.* at 4) (emphasis added) For purposes of this decision, we call this the modified release.

125. The modified release was not included on several unilateral, blue clock modifications (Modification Nos. 493, 692, 660 and 665). By 2017, the Chief of Contract Administration noted the following on the modified release:

It is my hope that we can get a bilateral signature from the Contractor on these “blue clock” modifications if we amend the closing paragraph . . . to also reserve their right to claim for time AND cumulative impact. Keeping the individual modifications open will only cause additional workload, continued tracking, and continued discussion at higher level meetings of “unresolved disputes”, when the individual changes are no longer severable in the overall schedule discussion.

(App. supp. R4, tab 22.1000 at 1) The parties executed bilateral Modification No. 819 on November 27, 2017, which replaced the closing paragraph on certain previously issued unilateral blue clock (time only) modifications to include the following:

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In consideration of the Modification(s) agreed to herein and subject to the exclusions and limitations set forth below, it is understood and agreed that the adjustment to the contract price set forth in this Modification includes all direct costs related to the specific facts and circumstances described herein and the government is hereby released from any and all liability for additional direct costs related to those facts and circumstances specifically addressed by this Modification. The Contractor expressly reserves the right to request an adjustment to the time for the performance of the work covered by this Modification and an equitable adjustment to recover any associated time-related costs which are not already addressed through this Modification. The Contractor further expressly reserves the right to include this Modification in a future cumulative impact claim which may be based upon this and other Modifications.

(R4, tab 31.1020 at 1, 3-4) (emphasis added) For purposes of this decision, we call this the revised modified release. This revised modified release was included in at least 15 modifications.<sup>16</sup> As the Chief of Contract Administration noted, this modification addressed direct costs only, reserved the right for KP to claim time and cumulative impact, acknowledged the time extensions and used the “leave ‘em where you found ‘em” logic as KP’s corporate policy at the time was not to negotiate time (app. supp. R4, tab 22.1000 at 1).

126. As we discuss the various modifications in further detail, we note whether they included any of these releases, or something else.

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<sup>16</sup> The modification covered the following unilateral Modification Nos.: 218 (Tempest Vault Utilities dated 11/05/15); 256 (Revise Fire Alarm and Smoke Control dated 10/16/15); 295 (Revise Polished Plaster Louvers dated 12/18/15); 409 (Revise Exec Conf AV Rooms Equipment dated 10/03/16); 413 (Revise H3 Footing Depth dated 01/20/16); 472 (Bed Down 2 Tech Ops AV Wall dated 12/02/16); 476 (Framing for Openings Greater than 12 dated 02/24/16); 477 (Add Thermal Shims to Clip Angle Precast dated 09/23/16); 505 (Add HEMP Catwalk Penetration Details dated 04/07/16); 509 (Power for Folding Partitions dated 02/01/16); 511 (Beddown 2 J8 SCIF Area dated 06/24/16); 521 (Add Electrical Outlets to NLI 146 dated 02/16/16); 617 (Full Height Atrium Wall dated 10/21/16); 623 (Atrium Louver Gasketing dated 09/09/16); 427 (Mech Changes for Vertical Deflection dated 07/11/16) (R4, tab 31.1020 at 4).

*The Train is Delayed*

127. Now that we have outlined the general issues with the modifications and schedule, we can discuss the specific issues that arose during construction. In its claim, KP addresses design issues encountered with the structure of the building. We understand that KP presented some of these issues to demonstrate that there were in fact design errors from the start, the magnitude of the design errors (since they relate to structure), and how they impacted construction. And of course, these structural design issues demonstrate that the Corps failed to proactively fix the issues but rather iteratively addressed the design errors throughout construction of the facility. We briefly address these structural issues.

*Structural Steel*

128. As noted, KP's plan was to perform excavation first and then heavy concrete and structural steel work over the first two years (tr. 1/70-71, 212; 4/116). After that, in the next 18 months, KP's plan was to work on the interior build-out (tr. 1/70; 2/89). KP's claim encompasses the period November 30, 2014 through December 31, 2017, when KP was working on structural steel and the start of interior build-out (*see* tr. 1/71).

129. In August 2014, the parties discovered the loadings for MEP installations above the ceiling for LL2 exceeded the steel beam capacities (R4, tab 31.405 at 45). The parties resolved the issue via bilateral Modification No. 389, effective June 30, 2015, where the Corps paid KP for the change (*id.* at 3, 5). The modification included the standard release (*id.* at 5).

*Thermal Movement*

130. Also in August 2014, KP discovered the design failed to account for thermal movement which occurs when there is a temperature change that would require an expansion joint (R4, tab 31.1098 at 64, 72). This caused delays in erecting the steel structure as the constant thermal expansion and contraction complicated the connection of the steel to the precast panels that formed the "skin" of the building (*id.* at 70-71). Thermal movement caused the skin to rip away (tr. 1/96-99).

131. The skin of the building was necessary due to weather and for the construction of temperature sensitive construction activities inside the building (tr. 2/111; 4/143-46). For example, it would prove difficult to provide temporary heat inside the building in the winter months when there is no exterior skin (tr. 2/111;

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4/144). This impacted the interior build-out as it reduced the interior square footage in which KP planned to work (tr. 2/113-14).

132. As a result, KP installed temporary outer barriers to minimize impacts, but it still could not complete the interior build-out as planned. For example, KP could not complete the drywall framing and electrical rough-in, and created what KP refers to as “islands of comeback work.” KP could not complete its work in the block, or train format, it had anticipated. (Tr. 2/38; 4/145-46)

133. KP filed a request for equitable adjustment due to the thermal movement issues. KP argued the DOR should have required the use of an expansion joint, and the Corps found this argument “to have merit” (R4, tab 31.1098 at 56). In 2018, almost four years after KP issued its first of many requests for information, and after the Corps initially denied any liability for the issue, the Corps issued bilateral Modification No. 803 for installation of an expansion joint and paid KP for the change (*id.* at 4, 72). The modification included the modified release (R4, tab 31.1098 at 5).

134. We note that this modified release, although set forth in a modification issued in 2018, relates to an issue dating back to 2014 when KP discovered an issue with the design. Further, KP explains that thermal movement delayed the precast installation of the exterior skin which then “served to delay the work,” and the associated delay “ripple[d] out to the site” (tr. 1/209; 6/304).

135. Specifically, there is testimony that in August 2015 through March 2016, this impacted the sitework/earthwork contractor Anderson Excavating (Anderson) (tr. 6/291-97). Earthwork included digging the foundation and then moving the piles of dirt/materials to other locations to place and compact the fill (tr. 6/290, 296). Approximately 200,000 cubic yards were in piles as fill that needed to be moved, hauled, and placed (tr. 6/296). As there was ongoing work on the exterior skin and work in the building, as well as cranes surrounding the building and an access ramp to get material inside, one could not start major earthwork (tr. 6/289-91; 2/110). For example, as many of the utilities would be next to the building, the dirt had to be built up several feet to bury them; however, with the cranes and materials there, one could not place the dirt in and bury the utilities (tr. 6/289).

136. Other sitework included the underground utilities, storm drainage, sanitary waste, fuel, and electrical communications (tr. 6/292, 296). KP’s other subcontractors included Valley Corporation (Valley) for the site utilities, BHJV for the underground electrical, Schwob for the fuel lines, and Amino Brothers for the site security walls and site paving (tr. 6/293-94). These subcontractors also could not perform work such as installing site utilities due to the cranes and other activity on the

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site (tr. 6/294-95). At least 20,000 linear feet of utility piping, 3,000 feet of security walls, and 5,000 cubic feet of concrete had not been completed by March 2016 (tr. 6/296-97). Further in March 2016, no parking lot or road paving, or site flat concrete work had started. As the contract completion date remained October 2016, KP intended to do whatever it had to in order to meet that date. (Tr. 6/297)

137. KP's superintendent for sitework testified that the CPM schedule was unusable because the Corps would not allow KP to input changes such as added time because they were not yet approved (tr. 6/298). As KP could not rely on the schedule due to its inaccuracy, KP worked with the earthwork/sitework subcontractors to create a schedule that included acceleration (tr. 6/299).

138. As Anderson was a small business, it could not bring on additional labor or equipment to meet the accelerated schedule and KP therefore brought in equipment, operators, and laborers to supplement the work (tr. 6/299, 312). KP performed the majority of the work at that time (tr. 6/302).

139. KP supported Valley by digging and backfilling a trench and then supported the site paving subcontractor by supplementing other work and concrete placement preparation (tr. 6/300, 319). Eventually, KP had to take over the site paving work, including drying the soil (tr. 6/312, 318-19). And KP had to maintain the roads longer due to the delays with the sitework (tr. 6/319). Valley also had difficulty meeting the accelerated schedule (tr. 6/326, 328). As a result of the supplementation for sitework, KP added supervisors, equipment (loaders, dozers, excavators, skid loaders), operators and crews onsite, who were working in more places (tr. 6/301, 317-18).

140. There is also testimony from the KP superintendent for sitework that Valley's work was impacted because it was forced to perform in a fragmented manner when normally their line of work is linear (dig a trench, bury the pipe, backfill). Schwob was to bury the fuel lines and experienced similar issues as it was onsite longer and the work was more segmented than planned. (Tr. 6/320) Olsson Associates, Inc. performed the earthwork and concrete testing and also was onsite longer and had to perform more tests. Total Automation Group put gates in the security walls and barriers (site security) and was also onsite longer and incurred additional costs. (Tr. 6/321)

*Progressive Collapse*

141. Thermal movement was not the only issue resulting from the pre-award slew of design amendments and design issues. In October 2014, the Corps and KP

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learned the steel support structure design for the concrete deck was not in accordance with the United Facilities Criteria concerning progressive collapse requirements (i.e., where the spread of an initial failure, or collapse of one part of the building, would cause other parts to also fail and collapse) (R4, tab 31.509 at 36, 72; app. supp. R4, tab 17.04 at 49, n.31).

142. The resulting modification stated the issue was due to engineering changes including possible and confirmed A/E fault (R4, tab 31.509 at 72). The Corps issued bilateral Modification No. 368 paying KP money and providing additional days (*id.* at 3, 72). The modification included the standard release (R4, tab 31.510 at 5).

143. The Corps issued the modification in seven parts where both parties signed the last two parts with an effective date of November 3, 2015 (R4, tab 31.509 at 3; tab 31.510 at 3). It changed the contract completion date to November 10, 2016 and explained that the issue effected completion of the building skin and pushed the contractor into the winter season and forced KP to incur additional costs and man-hours (R4, tab 31.509 at 5, 37). Modification No. 368 served as the “reset point” (R4, tab 27.02.01 at 8).

144. Specifically, the Chief of Contract Administration testified that the final part of this modification resolved all time and delay issues through November 3, 2015 (tr. 11/203-04). It is questionable, however, that this could be a reset point through that date when the modification addressed progressive collapse which was identified a year earlier, and mold was discovered one month before this modification was finally issued by the Corps and as we discuss below, wall modifications and other issues come into play. Further, as discussed above, the modification for thermal movement, a design issue also discovered in 2014, included the modified release when signed in 2018 evidencing claims for design issues were still in play. In addition, the schedule was inaccurate and a moving target. As the Chief of Contract Administration for the STRATCOM resident office noted, construction continued to happen and things were overtaken by events (tr. 11/74-75). And of course, the design still contained numerous errors and was incomplete.

145. We also find, again, that these issues were design issues and the Corps, not KP, was responsible for the design. Despite all of these problems, by November 2014, the building had the erected structural steel and installation of the elevated concrete decks was in progress (JSF ¶ 26).

### *Vertical Deflection*

146. In addition, before the effective date of Modification No. 368, in February 2015, the Corps expressed its concern that the building design did not sufficiently account for vertical deflection in overhead mechanical piping systems, i.e., when the piping drops because the connectors are stressed (app. supp. R4, tab 22.0430 at 2, 7; tab 22.0545 at 1).

147. In May 2015, the Corps instructed the DOR to provide a corrected design for a contract modification (app. supp. R4, tab 22.0491 at 6). Over a year after discovering the vertical deflection issue, the Corps issued unilateral Modification No. 427 effective July 11, 2016 (R4, tab 31.694 at 5). Ultimately, the resolution was to change the flush and fill sequencing and completion of the LL1 and LL2 mechanical and control systems (*id.* at 46, 162-3).

148. The Corps provided no time extension but compensated KP for its direct costs (R4, tab 31.694 at 1, 3). The Corps later issued a bilateral modification for this issue on November 27, 2017, which added the revised modified release (R4, tab 31.1020 at 4).

149. The issue of vertical deflection is included in KP's claim because it delayed the filling of the pipes on the lower levels which was a long and drawn out process that had two stop work orders, and delayed the filling of the pipes to flush and fill which then delayed the commissioning process (tr. 1/209). It also impacted the MEP flow (tr. 2/118). Further, KP and its subcontractors had to resequence their framing, drywall/finish and paint in other areas (R4, tab 32.6.1 at 32). Again, we find that vertical deflection was a design issue and the Corps was responsible for the design.

### *The Train Is Derailed*

#### *Windows of Time*

150. In its claim, KP divides the time period at issue (November 30, 2014 through April 19, 2018), into six windows of time (windows 1-6). These windows represent timeframes in which KP believes delays to the critical path and disruptions occurred due to the cumulative and numerous issues and modifications to the contract (R4, tab 27.02.01 at 95) Likewise, KP's expert, AMS, relies on the windows for its analysis, explaining they represent periods of significant changes in the critical path or major impacting events (R4, tab 32.2.1 at 15; tr. 13/117).

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151. As such, we address each window depicted in the claim and KP's expert report. It is important to note that KP and its expert AMS do not necessarily quantify each window or issue identified with a number of days of delay but instead looked at the cumulative impact the issues had in each window (and prior windows) as it relates to the critical path. This is due to the fact that many factors affected the work during the various timeframes. (Tr. 13/247-48, 295). For example, KP's expert states that one could not quantify the impact of a particular RFI when there were numerous other events going. In other words, it is difficult to "distinguish between which one is actually affecting" the critical path. (Tr. 13/295-98) In addition, we note that we cannot address every modification issued during these windows but focus on those considered the major modifications.

Window 1 (November 30, 2014 to June 29, 2015)

152. For window 1, AMS explains that KP began work on the interior of the North Bar but was delayed due to the numerous design changes to the interior layout (R4, tab 32.2.1 at 21). In other words, the interior build could only partially progress as the Corps was changing the ceilings and walls which impacted the framing and created issues with engineering judgements (discussed later) (*id.*).

153. Further, as noted above, the Corps precluded KP from including any impacts into the contemporaneous schedule until approved. According to KP's expert, this meant the schedule showed work areas that were to follow the North Bar as "available" and potentially "critical" but did not acknowledge that work and labor remained in the North Bar to complete activities resulting from ongoing design changes. (R4, tab 32.2.1 at 22)

154. And, as discussed above, during this window KP was working on issues regarding thermal movement (*see* R4, tab 32.2.1 at 25-26). However, as the full impact of these issues had not yet been realized, KP's expert allocated 0 days of delay to this window (*id.* at 28). Rather, this window depicts the first stage of issues as they started to cumulate, and snowball, through the remaining periods (windows).

*Ceiling Modifications*

155. Both parties agree that the design for the building included certain areas where there was insufficient above-ceiling space to install overhead MEP work (JSF ¶ 28). While the Corps expected minimal clashes, the opposite occurred (*see* app. supp. R4, tab 22.0249 at 8). As the Corps explained, "[t]he situation has resulted in a need for an involved redesign effort where the routing of the building features will be

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changed and/or the heights of ceilings will be adjusted such that all construction features fit within the required spaces” (R4, tab 31.48 at 17).

156. The Corps issued several ceiling modifications to lower the ceiling heights in various locations of the building to resolve coordination and spatial limitation issues (JSF ¶ 29). As an example, if there needed to be five feet of space for the MEP and only four feet was in the design, the ceiling had to be lowered for all required material to fit (tr. 2/97-98).

157. In addition, soffits had to be revised/adjusted, chases added to allow conduit to be relocated, and numerous MEP systems had to be re-routed (R4, tab 32.534 at 67). Further, there were conformance issues with ceiling plans and grid sizes, and lighting and MEP elements (*id.*). KP discovered these design issues when performing the clash detection using the BIM modeling (tr. 2/98; R4, tab 31.48 at 17). As a reminder, the DOR’s contract also had a BIM modeling requirement (R4, tab 16.02 at 91).

158. The design problem was identified August 19, 2013 (R4, tab 31.48 at 18). At this point, interior build-out had not commenced (tr. 4/134-139). Yet, it took years to finally resolve (*see e.g.*, R4, tab 31.962 at 3 (Modification No. 211)). Further, this should have been another signal to the Corps to re-consider or review the design. And as one can imagine, changes to the ceiling, i.e., the ceiling modifications, affected every area of the building (tr. 1/124).

159. These MEP conflict modifications impacting the ceiling included the following, almost all of which were multi-part where the issues were discovered in 2013 based upon KP’s BIM modeling:

<b>Modification No.</b>	<b>Description</b>	<b>Final Effective Date</b>	<b>Release</b>	<b>Design Issue?</b>
127	MS LL2 Overhead Conflict Resolution	1/27/2016	Standard (with amendment)	Y
182	Ceiling Height Changes at LL1 Mission Support Building	08/06/2015	Standard	Y
211	Revise Corridor Ceiling Heights L1-L3	02/18/2016	Modified	Y
225	LL2 Ceiling Revisions from MEP Coordination	07/08/2015	Standard	Y
323	Revise Ceiling Tower/Loading Dock Ceiling	09/10/2014	Standard	Y
324	L3 Coordination Team	01/29/2015	Standard	Y

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380	HEMP Revisions from MEP Coordination	08/07/2015	Standard	Y
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(R4, tab 31.565 at 4-5, 7, 43 (Modification No. 127); tab 31.441 at 3, 9, 37 (Modification No. 182); tabs 31.572 at 5 and 31.962 at 3, 4, 59 (Modification No. 211); tab 31.409 at 3-4, 23 (Modification No. 225); tab 31.241 at 3-4 (Modification No. 323); tab 31.332 at 3, 5 (Modification No. 324); tab 31.443 at 3-4, 6, 34 (Modification No. 380)).

160. With respect to Modification No. 127, the Corps issued it in September 2013, for KP to resolve overhead conflicts in LL2 which KP identified during its [BIM modeling] coordination activities (R4, tab 31.48 at 4-5). KP was to work with the DOR and the Corps to resolve conflicts. The modification stated that liability for assuring the design was functional remained with the DOR. (*Id.* 31.48 at 5)

161. These design deficiencies caused delays to KP's schedule (R4, tab 31.48 at 17). The Corps anticipated issuing a two-part modification; the first modification covered labor costs (*id.* at 18). The Corps issued a second part to this modification on November 15, 2013, for spatial conflicts in both LL2 and LL1 mainly dealing with ceiling heights/elevations and routings of mechanical, electrical and construction features in those areas (R4, tab 31.72 at 5). The Corps issued a fourth and final overhead conflict resolution modification in December 2015 (R4, tab 31.534 at 3). In sum, it took the Corps over two years from when KP identified the issue to issue the final Modification No. 127.

162. Important to note is that a fifth part to this modification, issued at no cost and effective January 2016, amended the release to state the “[c]ost settlement of modification 127 will release all claims for all direct, indirect, and cumulative cost impacts associated with BIM and coordination for the overhead and underfloor spaces in Mission Support Lower Levels 1 & 2 and HEMP underfloor areas encountered through July 31[,] 2015” (R4, tab 31.565 at 6) (emphasis added). This language limits the release to anything associated with BIM and BIM coordination of the overhead and underfloor spaces in the lower levels prior to July 2015.

163. Modification No. 211 was originally issued in February 2016 as a unilateral modification (R4, tab 31.572 at 5). The revised bilateral Modification No. 211, effective September 18, 2017, contained the modified release (R4, tab 31.962 at 3-4). This modification changed the ceiling heights in the corridors for L1-L3 (tr. 11/180). KP issued the original RFI, which led to the development of several RFPs, in February of 2014 and the Corps issued a revised RFP one year later (tr. 2/269). The

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original RFI concerned MEP coordination and design issues (R4, tab 31.962 at 59). One problem associated with the delay in resolving a design issue relates to the MEP coordination process. KP could not coordinate or model MEP until it had a final design solution from the Corps (tr. 2/270; 3/41-42).

164. Even though KP performed BIM modeling, we find that the issues with the ceilings and MEP were design issues and KP alerted the Corps to these issues. Further, while some of the modifications include the standard release, at least one ceiling modification which covered the corridor ceilings in L1-L3, included the modified release and another something altogether different. This is further evidence that the design contained numerous errors and the Corps failed to take immediate and responsible actions to correct the design.

*48V/UPS*

165. In February 2014, the parties executed bilateral Modification No. 56 to add UPS equipment purchase and installation (R4, tab 31.108 at 10, 16). Therefore, the supply and installation of the 48V/UPS battery backup equipment was added to the scope of work (JSF ¶ 35). The bilateral modification paid KP and included the standard release (R4, tab 31.108 at 16).

166. A delay occurred in 2016, however, because there was a design deficiency: the cable tray for the 48V/UPS system was undersized and did not meet the 2008 National Electrical Code (R4, tab 31.1047 at 8). The Corps issued bilateral Modification No. 603, effective August 4, 2016, to pay KP for BIM qualified personnel to address the 48V/UPS system (R4, tab 31.718 at 3-4). The modification contained the modified release (*id.* at 4). The Corps issued unilateral Modification No. 601, effective January 30, 2018, to resolve the cable tray problem. (R4, tab 31.1047 at 7). As the Corps explained, the cable trays were part of the basic contract and therefore “[t]his work was bid from the contract documents as ‘bid-build’ to allow for future installation of the” system (*id.* at 32).

167. Testimony was that this impacted BHJV who would not have been able to install the system without the corrected design (tr. 2/122). KP’s expert, however, did not identify this design flaw as an overall delay to the critical path. Nevertheless, some of these issues may have affected intermediate milestones and impacted work. (Tr. 13/234-35, 237)

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*Wall Modifications*

168. In addition to all of the issues with the ceilings, there were numerous issues with the walls relating to changes in the types of walls or design deficiencies. As one can imagine, in a building with over 900,00 square feet, wall modifications can become an issue. These modifications included the following:

<b>Modification No.</b>	<b>Description</b>	<b>Final Effective Date</b>	<b>Release</b>	<b>Design Issue?</b>
325	Wall Type Revisions LL1/LL2	02/17/2015	Standard	Y
353	Revise Wall Types L1-L4	01/07/2016	None (Unilateral)	Y
360	Wall, Door and Electrical Revisions	01/27/2017	None (Unilateral)	Y
363	Wall Revisions & Mechanical Penetrations- LL2 & LL1	01/26/2017	None (Unilateral)	Y
375	Wall Revisions and Mechanical Penetrations- L1-L3	03/29/2018	Modified	Y
406	Fire Extinguisher and Electrical Panel Detail and Wall Changes	08/06/2018	Modified	Y
587	Mullion Cap Detail Revisions	04/04/2017	Modified	Y

(R4, tab 31.341 at 4, 5, 9, 36 (Mod. No. 325); tab 31.559 at 8, 56 (Mod. No. 353); tab 31.843 at 6, 54 (Mod. No. 360); tab 31.842 at 8, 47-48 (Mod No. 363); tab 31.1085 at 4-6, 56 (Mod. No. 375); tabs 31.356 at 99 and 31.1126 at 3, 4-5 (Mod. No. 406); tab 31.898 at 3-4, 44 (Mod. No. 587)).

169. In May 2014, the PMO notified the Corps of a sound and physical security review conducted on the wall types in the specifications (R4, tab 31.559 at 61). This resulted in a change to the wall types to meet the STC requirements for SCIF areas (R4, tabs 31.559 at 56; tab 31.842 at 47-48). Specifically, the Corps made changes to the configuration and size of individual SCIF spaces (JSF ¶ 30). The Corps issued modifications adding or revising sound-rated MEP wall penetrations for SCIF walls (*id.* ¶ 31).

170. For example, Modification No. 325 (issued a year after the PMO conducted the security review) specifically addressed STC requirements for the SCIF areas and conference rooms and removed electrical and light panels from the SCIF. The Corps issued the modification because the design did not provide proper sound

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rated walls. (R4, tab 31.341 at 36) Likewise, Modification No. 363 revised conformed drawings due to this security review of the SCIF design (R4, tab 31.842 at 47-48). Ultimately, the Corps issued at least eight modifications totaling at least \$3.8 million relating to the SCIF design deficiencies (app. supp. R4, tab 17.04 at 50).

171. Many modifications, such as Modification No. 353, related to numerous RFIs issued by KP concerning issues such as door swing direction, hardware, wall cavity depth for flush mounted panel, air duct and full height wall conflicts at the door (*see* R4, tab 31.559 at 61 (Modification No. 353 related to three RFIs)). We note the resulting modification addressed many more issues (*see id.* at 9-15). As expected, the modification impacted numerous subcontractors, including BHJV, Cleveland, American Direct, Continental Fire Sprinklers (Continental) and Haworth, Inc. (Haworth) (*see id.* at 67).

172. Modification No. 353, dated January 2016, demonstrates the many iterations of the wall designs. For example, there was the original design, and then changes in September 2014, January 2015 and more changes in January 2016 (R4, tab 31.559 at 9; tr. 5/43-45). Some of the changes were to the wall types, such as a change from a B4 wall (designed to sit on top of the raised access floor) to a C6 wall (full height wall from structure to structure with two layers of wall on each side) (tr. 5/45-46; R4, tab 31.559 at 9). Several of the wall modifications related to either or both design deficiencies and user requested changes referred to as beddowns (*see* R4, tab 31.559 at 60).

173. The design issues were being discovered as KP progressed with its work (tr. 11/174; 3/43). Sometimes the Corps issued the modification before the walls were built, but generally issued them during and after they had been placed (including painted and the overhead utilities installed) (tr. 7/175-77). Stating the obvious, this caused inefficiencies in construction.

174. Many of the modifications were multi-part. For example, the Corps issued Modification No. 360 in several parts, for the following reasons: first part due to wall partition design deficiencies; second part due to untimely pricing response by KP and user-requested additional changes to the interior configuration; third part due to incomplete drawings and incorrect dimensions in prior modifications for the walls and without correct dimensions, KP “would have been unable to correctly construct the facility;” fourth part due to user provided changes; and the fifth part due to incorrect design of electrical room doors and mechanical duct realignment (R4, tab 31.843 at 54).

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175. The Corps issued the first part of Modification No. 360 around October 2014 and the final part in January 2017 (R4, tab 31.843 at 6, 54). In sum, it took over two years to issue complete and accurate drawings for this modification.

176. Similarly, Modification No. 375 was issued in multi-parts. The first part, which did not include any release, was due to design deficiencies and included changes to resolve wall and duct conflicts in L1-L3 and revisions to drawings to reflect the wall revisions and incorporate user changes. The second part fixed incorrect dimensions and included additional dimensions. The third part revised drawings to resolve wall and duct conflicts in L1-L3 (and anticipated re-work at L1 and L2). The fourth part changed the sound rated soffits and ceilings at L1-L3 as well as door swings for various doors. The fifth part required an increase in the not-to-exceed price. (R4, tab 31.1085 at 56, 62)

177. The Corps issued the first part of Modification No. 375 in November 2014, for an initial amount of \$19,000; the fourth part on December 16, 2016, and the final part in March 2018 (R4, tab 31.293 at 1-7; tab 31.826 at 5; tab 31.1085 at 4). In sum, it took at least two years (and maybe three) to fully resolve the issue. The total for Modification No. 375 was \$497,393 in direct costs only (R4, tab 31.1085 at 5-6, 42).

178. As KP informed the Corps in October 2015, the fact this modification was issued in multiple parts caused issues:

MOD 375 - Wall Revisions & Mech [Penetrations]:

Framing is impacted on Level 1 and Level 2 due to requirements in the multipart Modification. A fourth revision was received for this MOD on May 28, 2015. One of the requirements in this revision is a performance requirement for the Metal Stud Framing Contractor to design the soffit/lid. This design component is currently being performed by the Metal Stud Framing Contractor, until the design is complete this work cannot progress and the extent of the framing cannot be determined. Additionally, with the changing of wall heights in this Modification (from half to full height walls, in instances), the need for multiple Engineering Judgements (EJ) . . . is required. Each EJ takes approximately 3 - 4 weeks to produce and approve before work can commence. The design requirement and EJ requirements are impacting the progress of Metal Stud Framing and Drywall operations on

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multiple floors of the North Bar and may require rework of areas partially constructed.

(App. supp. R4, tab 30.0072 at 10) Testimony from KP explained that wall modification No. 360 was a “breakout” of wall modification No. 353, and that wall modification No. 375 supplemented both modification Nos. 360 and 353 (tr. 3/53). One would therefore need a final modification for all three to complete the interior build out (tr. 3/53-54).

179. KP informed the Corps that revisions to the wall types not only affected wall installation but also the follow-on activities such as installation of the overhead rough-ins through to the finishes (R4, tab 31.559 at 86). In other words, the wall modifications broke up the sequence of work because everything was overlapping and instead of a planned continuous workflow, there were “island pockets of completed work or partially completed work with a bunch of design changes around them” (tr. 1/141-42). The Chief of Contract Administration for the STRATCOM resident office agreed that, as there were 13 volumes of drawings, “many times when we made changes to a wall or an area, it would impact architectural, mechanical, electrical and plumbing” (tr. 11/24).

180. We agree the wall modifications impacted the MEP. For mechanical work, the modifications impacted the penetration locations, for electrical it impacted the rough-ins (e.g., if you did not have a doorframe location for a wall you could not frame around the door) (tr. 2/123). And as Cobb’s<sup>17</sup> project executive explained, while moving one utility is the responsibility of that particular subcontractor, there is a “ripple down effect” meaning, it impacts the other contractors (electrical, fire sprinkler, communications) (tr. 5/158). There is also testimony from the Corps that the wall modifications impacted follow-on work (tr. 10/192). So, when making these changes or moving any of these systems, all parties had to get involved (tr. 5/158).

181. Testimony during the hearing provided further examples of the impact the wall modifications had on the various trades/subcontractors. For example, the wall modifications impacted KP’s framing and drywall contractor Cleveland (who also performed metal studs, acoustic ceiling tile work, head of wall<sup>18</sup> and fire stop

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<sup>17</sup> Cobb was KP’s subcontractor that performed HVAC work, some earthwork related to plumbing, utilities work, thermal and moisture protection, and the plumbing (app. supp. R4, tab 35.03 at 11-12).

<sup>18</sup> Head of wall refers to the location where a full height wall meets the concrete and metal decking above and head of wall detail is where the MEP utilities penetrate a fire-rated wall (tr. 7/155; 3/75-77).

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insulation) (tr. 5/25, 64-65; 14/21-23). Cleveland explained that obtaining design changes to the walls, sometimes several months apart, impacted its work because it was unclear what to even build, resulting in frustration amongst the team (tr. 5/58-62). Further, Cleveland could not complete their job in what is referred to as the initial pass through of the building due to the constant changes in the wall design and specifications (tr. 7/168, 175-76). This forced Cleveland to leave the islands, or pockets, of work and then return and complete the work later (referred to as “go back” work) (tr. 1/129-30; 7/168, 175-176; 5/75-76).

182. This also meant Cleveland was working in areas that were already crowded with other subcontractors’ equipment, materials and labor resulting in trade damage and requiring the subcontractors to purchase the material again (tr. 5/35; 3/245-46). According to a Cleveland project manager, it was the worst trade damage he had ever seen on any job (in his 30 years of experience) (tr. 5/104). Cleveland would also be faced with personnel issues since one never knew when an area would be ready for rework or completion work (e.g., do you utilize people working in other areas or hire a new crew) (tr. 5/34-35, 37).

183. This out-of-sequence work impacted the other trade subcontractors (tr. 5/152-55; 7/168-72, 254-56, 325-28). BHJV and Cobb had to go back and correct work (i.e., perform rework such as taking down ducts and pipes) and finish work due to the wall modifications (tr. 2/124-27; 5/156; 7/265). For BHJV, the rework entailed taking completed work out and putting it back later when framing was done (tr. 7/265). In fact, BHJV did not complete its rough-in work until 2017 (tr. 7/266).

184. For Cobb, the wall modifications changed the penetration details, whether as Underwriters Laboratory (UL) assemblies or SCIF type assemblies (tr. 5/155). And KP and the subcontractors were not getting “any relief from the schedule” because the Corps did not add days (tr. 2/127). It also impacted Cobb’s fabrication of ductwork, among other things (tr. 5/150).

185. KP’s electronic security subcontractor, Tyco Integrated Security LLC/Johnson Controls Federal Systems (TJCFS), was impacted as well because moving walls changes the space which then changes the electronic security for that area (tr. 7/294). Likewise, changing walls impacts the doors which impacts the electronic components mounted on the doors, resulting in delays (tr. 7/296-97). The security systems were niche, with a limited number of subject matter experts available to perform the work (tr. 7/291). At one point, TJCFS had to staff up and add shifts (tr. 7/293-94). Further, as there were sometimes hundreds of workers moving around the building, this caused the motion sensor alarms to go off causing testing complications (tr. 7/301).

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186. In addition, this impacted KP's subcontractor Continental, the sprinkler system installer (tr. 7/326). Most of the sprinkler system was installed above the finished ceilings or within the first couple of feet of the structure (tr. 7/321-22). Much of this work is generally prefabricated off-site based on shop drawings; however, here Continental had to adjust the prefabricated work due to the changes (tr. 7/322-26). The predecessor work for the fire sprinkler was the mechanical duct work, large plumbing lines and roof drains and therefore delays in those areas meant delays to Continental who, as a result, experienced inefficiencies (tr. 7/326-27; 331).

187. Further, Chapparral Insulation Company (Chapparral) noted that it was to have been on the job for only 16 months but was actually on the job for almost 5 years as a result of the numerous modifications causing inefficiencies because "getting momentum anywhere was difficult" (tr. 7/359-60). For example, Chapparral would have to get items tested and released but once released, a new change would occur resulting in stopped and removed work and then rework (tr. 7/360). Hundreds of modifications affected the subcontractors directly while hundreds of other modifications affected them indirectly (tr. 7/361).

188. Likewise, Chapparral would be delayed if Cobb was delayed. Cobb had to install the mechanical components and then Chapparral insulate them. (Tr. 7/362) As Chapparral explained, the inefficiencies led to worker downtime, among other things (tr. 7/364).

189. In addition, Facility Engineering Services (FES) did all of the controls, wiring, poles and programming for the building automation system and if all other work were delayed such as ductwork and piping, FES could not place its equipment because it was the lowest installing trade contractor (tr. 1/193-94). Federal Technology Solutions, Inc. had to pay to store its equipment for the fire system antenna (tr. 1/194-95).

190. This is but one example of how the multi-part modifications did not prevent delays, but caused them. As we previously discussed, there was testimony from the Corps that the date of the first modification (with the not-to-exceed) was the go-ahead date for KP to fix the problem. As can be seen here with just the wall modifications, the Corps did not actually resolve the problem until it issued the final modification.

191. According to testimony from a KP project manager when discussing Modification No. 360, for example, KP could not proceed with the initial modification because it was incomplete and it took the revised documents to get the information KP

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needed (tr. 3/50). Further, Corps personnel testified that sometimes the Corps would try and stop KP from working in an area involving wall construction because the Corps knew a change to the wall was coming. Other times, “if a different area was going to change because we didn’t know it yet, there could be work that was, had to be taken out and redone.” (Tr. 10/199) In other words, as the Corps explained, the wall modifications could change dimensions and layout (tr. 10/203).

192. The Chief of Contract Administration testified that some of these iterations of the modifications clarified the drawings and design changes (i.e., changing the clouding which indicated a change) and the overall scope did not change (tr. 11/167-69). We find the modifications speak for themselves--they were due to design issues and were not mere clarifications.

193. In the unilateral modifications, the Corps recognized that “[m]ultiple modifications required KP to hire additional manpower to complete modification proposals and negotiations” or that “additional manpower was expended on multiple wall modifications,” but the Corps and KP could not agree on a specific amount (R4, tab 31.559 at 56; tab 31.843 at 4; tab 31.842 at 5). Similar to the larger issues here, it seems that while the Corps acknowledged KP incurred these costs, the parties could not agree on the specific amount.

194. KP depicted this chaos created by the wall modifications in a color-coded wall status map it provided to the subcontractors and Corps. KP created the wall maps to specifically show the following: walls not yet inspected; approved framing; approved for top down close-in; approved head of wall; approved for full height close-in; approved for full height close-in and head of wall; not a full height wall or has been deleted; Modification No. 375 issue with MEP; head of wall side to be re-inspected; inspected approval pending. (App. supp. R4, tab 31.0211) The wall changes affected framing, which had a significant negative impact on the critical path (app. supp. R4, tab 22.1026 at 1). In fact, a government analysis showed that “the direct cause of the delays prior to mold discovery and remediation (prior to September 2015) were due to inefficiencies and slow production associated with framing and drywall installation” (app. supp. R4, tab 22.1027 at 1). The wall changes also impacted the engineering judgements, discussed next, because it led to a different interface/penetration (tr. 5/67).

195. Ultimately, the wall modifications were due to either design issues or late in the game user requested changes (discussed later); the Corps was responsible, again, for the ultimate design and implementation of the user requested changes in a timely manner. And such iterative changes over days, weeks, months and even years impacted the work, causing delays and removing efficiencies.

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*Engineering Judgements (EJs)*

196. The contract required all firestopping materials meet certain requirements such as UL Fire Resistance standards. If the materials did not meet those specific standards, then KP was to submit a manufacturer's EJ for review and approval prior to installation. (R4, tab 2.04 at 1874) An EJ is an alternate method specified by the manufacturer or a contractor to firestop and firesafe a wall so that it is considered fire-rated for fire protection (tr. 10/146). Issues can arise when there is a penetration in the wall because the penetration must be fire-rated. If the penetration meets the UL standard it is fire-rated, and if not, an approved EJ is necessary to meet this standard. (Tr. 10/147)

197. The EJ submittal was to be in matrix form and identify the wall and penetration types and indicate the firestopping material for each application (R4, tab 2.04 at 1874). KP was to develop the matrix with all of the trades so a single material/system would be used for each wall and penetration combination (*id.* at 1874-75).

198. The EJ process started with KP and its subcontractors identifying a field condition and then drafting a detail, which was submitted to KP's firestopping subcontractor Hilti. Once Hilti approved the detail, KP would submit it to the Corps for approval. (App. supp. R4, tab 35.04 at 41-42) The Corps would provide the detail to the DOR who provided it to their own firestopping subcontractor for review and approval (app. supp. R4, tab 35.04 at 41). We note that HILTI was submitting designed EJs with an engineer's signature (app. supp. R4, tab 22.0423 at 1).

199. According to KP's witnesses, in a design-bid-build project, the fireproofing details for head of the wall connections are normally set forth in the design drawings; here, the drawings failed to include such details (tr. 7/157-58; 3/79, 93-94; R4, tab 24.12.148 at 1-2). Therefore, EJs were required because the head of wall details were not all in the design documents and EJs "became the way in which the head of wall details were designed" (tr. 3/79). For example, at one point KP explained to the Corps that KP had installed two details per specifications (09 29 00 and 22 05 48.00) but the *firestopping* details for those were not addressed in the drawing detail (R4, tab 24.12.148 at 2-3).

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200. According to KP's expert, William J. McConnell of Vertex,<sup>19</sup> the incomplete design and reconfiguration of walls, including the reclassification of walls, meant the standard head-of-wall details were unavailable (R4, tab 32.6.1 at 41).

201. According to the Corps' COR, however, Cleveland had a high rate of turnover with its crews, which meant each crew framed a wall differently. The COR believed this caused the issues with the EJs. (Tr. 10/150) The COR also stated that if the sequence of work were out of order, such as Cobb having to put conduits through an area that had been framed but had no wall yet, this could require KP and its subcontractors to seek EJs (tr. 10/150-151). As we have explained, the sequence of work was out of order due to the multi-part modifications and design issues.

202. KP experienced issues in obtaining approval for the EJs. In August 2015, KP stated that Cleveland's inability to pass inspections due to insufficient UL documentation or EJs impacted completion of the work (R4, tab 38.55 at 2-3). According to KP, the issues continued for at least six months after shaft construction began as EJs had still not been submitted to the Corps (*id.* at 3). By that time, KP assisted in developing over 24 EJs for Cleveland (*id.* at 4).

203. At the same time, however, KP informed the Corps that the documentation required for these EJs (the firestopping applications) exceeded what could have been anticipated at the time of bid (R4, tab 24.12.148 at 1-2). Interesting to note is that a STRATCOM resident office civil engineer believed both the DOR and Corps were viewing the EJ requirements to be "more robust" than the contract required, including the amount of description required (which was inconsistently applied) and the basis for rejection (which was sometimes based on things other than contract non-compliance) (app. supp. R4, tab 22.0523 at 1-2; tab 22.0577 at 1). These issues were ongoing even in September 2015 (app. supp. R4, tab 22.0585).

204. In December 2015, KP assumed the responsibility of coordinating UL documentation and EJs because Cleveland argued these were not contractual requirements. At this point, a large issue was Cleveland's use of inappropriately sized z-clips (i.e., a framing component) and inconsistently installed details, all of which resulted in multiple EJs. (R4, tab 38.74 at 2)

205. After approval, each wall penetration in compliance with an EJ had to be installed and then inspected, which could take a month or more. Regardless, the train

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<sup>19</sup> Mr. McConnell was qualified as an expert in construction management, investigation, determination, analysis, and calculation of loss of productivity on large-scale construction projects (tr. 14/98-99).

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had to keep moving, albeit in a non-linear fashion. (Tr. 1/154) For example, KP could not obtain a final inspection or close in the head of the wall until the Corps approved the written EJ (tr. 3/78-81; 7/157-66). KP therefore had to leave walls incomplete which derailed Cleveland meaning Cleveland could not complete the walls in sequence (tr. 3/80; 7/157-59). The area would remain unfinished for framing and head of wall condition while waiting for an EJ (tr. 1/154). As EJs were used throughout the facility, it created numerous areas where progress stopped and work flowed to other parts of the building. There was a separate tracking system for just the EJs. (Tr. 1/155)

206. This EJ process was occurring the same time period as a myriad of other issues--almost all of them related to design deficiencies that had to be corrected and which took time to correct. For example, in 2015 KP and its subcontractors were dealing with the conclusion of incorporation of the wall modifications (tr. 3/262). And therefore, while KP appeared to be blaming Cleveland for these issues, and “spurring” them on to move quickly and more efficiently, these issues relate to design deficiencies or the Corps’/DOR’s inconsistent approval process.

207. Regardless, KP’s expert AMS did not specifically quantify the delays due to EJs. AMS noted the EJs because there were outstanding EJs in the North Bar area during the claim period window 2 that contributed to the delay (especially since they were happening around the same time as the beddowns) (tr. 13/240-41).

Window 2 (June 30, 2015 to September 29, 2015)

208. KP’s expert explains that during the period June 30-September 29, 2015, the project’s critical path went through the drywall installation of LL1 and L1 of the North Bar. The critical path was impacted by the need for KP and its subcontractors to do a “second pass” or return to perform drywall work rather than have all the work completed in “one pass.” Further, there were outstanding and ongoing wall modifications, continuation of the EJ process, and the beddown changes, discussed next. (R4, tab 32.2.1 at 29)

*Beddown Changes*

209. As the issues discussed above were continuing, additional issues arose based on user requested or driven changes referred to as beddowns or beddown changes (tr. 1/159). In November 2014, the Corps and Air Force were working with the DOR on a “C2F Beddown Gameplan.” The gameplan was a revision to several offices/workstations to accommodate personnel, as well as the visitor center. (App. supp. R4, tab 22.0379 at 1)

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210. On May 4, 2015, the Corps modified the DOR's contract for beddown revisions, mostly wall changes, to accommodate the personnel changes (R4, tab 16.02 at 39-40). The first set of changes was due about one month later for L1 and LL1; then LL2 and L2; and then finally the visitor control center. The modification noted that some of the changes could affect the classification of newly created space. (*Id.* at 40)

211. Although the Corps was aware of the need for these changes in November 2014, it did not suspend work on impacted areas until March 2016, and did not issue the modification (Modification No. 386) to KP until April 2016 (app. supp. R4, tab 22.0379 at 1; R4, tab 24.05.105; tab 31.604 at 7, 13). The Corps lifted the suspension for all mechanical work in those areas only on April 6, 2016 (R4, tab 24.05.143). The Corps lifted the suspension of work for all remaining areas later, on April 18, 2016 (R4, tab 31.604 at 3).

212. Modification No. 386 addressed this wave of wall modifications due to beddown room changes and included the modified release (R4, tab 31.604 at 7, 13, 56). In addition, it included language that time adjustments and "costs associated with any delays, impacts or schedule based supervision costs" were excluded from the modification and not released and would be negotiated in a supplemental modification (*id.* at 13). The modification impacted LL1, LL2, L1, L2, and L3. It deleted walls, added walls for new offices and rooms, deleted doors, added doors, and moved doors. (*Id.* at 8-11)

213. The Corps realized that KP would need to perform rework as work had already progressed in the building per the contract (*see* R4, tab 31.604 at 57-58). In fact, the mechanical subcontractor had already procured and installed items. The Corps, however, believed it was KP's fault for not providing a response to the RFP sooner. Specifically, the Corps provided KP the RFP on September 2, 2015, but KP did not respond with a proposal until much later, on March 4, 2016. (*Id.* at 58) We find otherwise based on the fact that the Corps knew these changes were coming at least a year earlier.

214. In sum, in late 2014, the Corps knew that the user wanted changes but failed to implement them until much later. And again, as these wall beddowns were occurring, so were the wall modifications related to design errors.

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*Window 1 and 2 Summary*

215. As stated above, KP's expert testified that during this time frame, the critical path was through the interior--the full height walls and installation of the mechanical systems (tr. 13/151-52). In other words, KP was to have finished all interior work and the drywall (tr. 13/158-59).

216. But there were delays due to the wall modifications which reconfigured SCIF spaces, required relocation of full-height walls, added or revised numerous sound-rated MEP penetrations resulting in EJs, added SCIF-rated soffits which conflicted with previously installed MEP systems, changed wall types (creating dimension errors), and changed door frames, doors, and door hardware (R4, tab 32.2.1 at 23; tr. 13/159-60). Moving a wall moves the penetration areas and the shop drawings must be changed, for example (tr. 1/129).

217. KP's expert opined that these issues affected KP and many of its subcontractors including Cleveland, Cobb, BHJV, Continental and Chapparral who experienced labor issues during this period (R4, tab 32.2.1 at 28). Further, KP's expert explained that these issues caused a 60-day delay because the drywall partitions on L1 were scheduled to begin by July 13, 2015, but did not start until September 11, 2015 (tr. 13/168-69, 203-04). These issues were occurring and continuing as the next major event--the discovery of mold--happened.

218. And as KP's expert noted, while KP and its subcontractors experienced "minor normal construction issues" such as coordination, manpower allocation and routine quality concerns, the real issue was that KP did not have a completed design (R4, tab 32.2.1 at 34). Therefore, if there were manpower issues, it related to the deficient design and numerous modifications all of which required additional manpower or changes in manpower not originally planned. We find the same.

*The Train Stops Due to Mold: Window 3 (September 30, 2015 to April 30, 2016)*

219. In addition to the continuing issues above (e.g., wall modifications), in September 2015, mold was discovered in the installed fiberglass duct liner located in the project's HVAC system. *KiewitPhelps*, ASBCA No. 61184, 23-1 BCA ¶ 38,254 at 185,756; (see also JSF ¶ 32). The Corps issued a stop work order on September 11, 2015, due to the presence of mold in the duct (JSF ¶ 33). According to a KP updated schedule narrative dated October 30, 2015, there were already delays due to multiple EJs and changes which created slow progress for crews in the North Bar causing a late start to framing activities in the South Bar (app. supp. R4, tab 30.0072 at 5).

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220. KP filed what has been called the mold claim with the Corps and subsequently with the Board, which argued that the Corps caused a delay to the critical path starting from when the mold was discovered on September 9, 2015, through duct removal, fabrication and installation, ending in April 2016 (R4, tab 4.49 at 42-47). According to KP, this impacted the phase 5 completion date by 209 days (*id.* at 10, 49).

221. In the mold claim, KP sought its direct costs and also direct costs for four subcontractors, as well as extended performance, and indirect costs for one of those subcontractors. It did not include cumulative impact costs, or KP's and three of the subcontractor's indirect costs/delay damages and KP reserved the right to seek these additional costs in a separate claim. (R4, tab 4.49 at 2, 10 n.6)

222. The Board held a hearing on the matter and ultimately concluded the design specification was defective because it failed to require anti-microbial mastic, the latent defect did not trigger KP's duty to inquire, KP's performance in compliance with the specification resulted in mold growth in the lined duct system, and there was a constructive change. *KiewitPhelps*, 23-1 BCA ¶ 38,254 at 185,768. Accordingly, the Board ruled that the Corps breached the implied warranty of specification. *Id.* The parties stipulated that the mold issue caused a 209-day critical path delay (gov't br. at 134; app. br. at 80).

223. There was approximately 10 miles of lined and unlined ductwork on the project (tr. 5/163-64). KP's expert explained that therefore, ductwork was one of the major overhead mechanical components and the discovery and investigation of mold affected the progression of the overhead MEP (R4, tab 32.2.1 at 35). As the former Corps Chief of the Contract Administration Branch explained, there were numerous modifications during this time, and there were delays due to mold, and it was all "happening at the same time" (tr. 13/26). At this point, the schedule was severely impacted and the progress of work, the train, disrupted causing a "trickle-down," and "substantial, huge impacts" on the project (*see* tr. 8/162-68).

224. As a result, the delay due to mold was a day-to-day delay that impacted the ability of KP to complete the ceilings (tr. 13/169-70; R4, tab 32.2.1 at 41). In addition, the Corps agreed that the mold delay forced KP to re-order activities such as by constructing underfloor utilities and raised access flooring before completing overhead work (e.g., ceiling and ductwork) (app. supp. R4, tab 17.04 at 56; tr. 2/158). Stored materials had to be moved because they would not be used at that time (tr. 2/165).

225. Further, KP could not complete the “second pass” (or second coat) of the drywall installation, could not perform fire protection or overhead electrical, had to work in limited areas, and could not complete other areas (R4, tab 32.2.1 at 35-36; tr. 4/170). In addition, Continental could not finish certain areas and the crews had to remove materials (tr. 7/327-28). Further, if duct work was removed, Continental then had to remove portions of its installed system (tr. 7/328).

226. As the former Corps Commander for the Omaha District explained, KP never fully recovered from the mold issue because “you don’t just recover from an eight-month delay . . . you can’t get enough people on site . . . [t]he sequencing and the schedule is so disrupted, and the contractors are so impacted, the costs go through the roof, the schedule goes out the door” (tr. 8/168). Of course, this statement (and others like it) were made when the Corps believed KP was responsible for the mold delay. In any event, KP obviously agreed and explained it never got back to its planned sequence (the train) (tr. 2/165). Accordingly, KP’s expert AMS utilized the September 30, 2015 impacted schedule as the re-baselined schedule and the 209-day delay (R4, tab 32.2.1 at 35).

227. The Corps’ expert, Dr. Anamaria Popescu<sup>20</sup> of Berkeley Research Group (BRG), takes issue with AMS’ use of a time impact analysis (i.e., the 209-day delay) for window 3 instead of maintaining the same methodology as the other windows (R4, tab 32.1.1 at 6). BRG also takes issue with the fact AMS then uses a time impact schedule from this window to start windows 4 and 5 when it should have used the contemporaneous schedule (*id.* at 7). We discuss this later in detail.

*The Train Moves Slowly Along: Window 4 (May 1, 2016 to October 31, 2016)*

*Post Mold Inspections*

228. According to the mold claim, installation of the new ductwork was delayed by the Corps’ inspection, testing, monitoring and documentation process (R4, tab 4.49 at 47). In that claim, KP sought, among other things, direct costs for the new inspection process (*id.* at 48). In this claim, as noted several times, KP seeks entitlement and costs due to delay and the cumulative impact of events occurring in or impacting certain windows of time, including the mold issue.

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<sup>20</sup> Dr. Popescu was qualified as an expert in the identification, investigation, analysis, evaluation, methodology, and determination of delay in project scheduling on large-scale construction projects (tr. 15/267).

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229. Prior to the development of the mold issue, KP explains that the process for ductwork was straightforward--overhead coordination, shop drawings, fabrication, shipment, inspection and then installation of ductwork (tr. 1/162). However, when KP and Cobb resumed ductwork fabrication and installation in 2016, a more thorough inspection protocol was implemented such that every piece of lined ductwork was inspected for mold multiple times by all parties prior to installation. *KiewitPhelps*, 23-1 BCA ¶ 38,254 at 185,764 (citation omitted).

230. From May 2017 to October 2018, a team from Weston Solutions, Inc. conducted extensive testing inside lined ducts during five separate testing events with each event spanning 3-4 days (R4, tab 18.1 at 30). The new inspection process involved placing the ductwork into a trailer and then a quarantine space (i.e., L1, auditorium space). Next, there would be an inspection and sample taken, then delivery of the ductwork to the prep area for inspection and then installation. (Tr. 1/163-64; *see also* tr. 10/154) The Corps would review every piece of duct and perform a frequency sampling for mold. Once accepted, KP could affix an acceptance sticker on the duct. (Tr. 1/164; 10/220) There were different stickers for different processes until the duct was placed into the ceiling (tr. 10/220). Once the ductwork was installed in the overhead, the Corps performed a visual inspection. For this visual inspection, KP would have to cut numerous holes in the ductwork and then patch the holes after inspection. (Tr. 1/164-65; 2/167; 10/220-21) According to testimony, KP cut more than 100 holes (tr. 5/175). Those performing the inspection prior to installation worked half days (tr. 4/183-84).

231. According to the Corps' mechanical engineer on the project, the Corps conducted numerous inspections on the ductwork due to mold (tr. 9/206). The mechanical engineer also testified that the Corps performed quality inspections and found deficiencies in the lined ducts such as gaps and abrasions (tr. 9/206; 10/257-59). Prior to mold, the Corps found no QA deficiencies in the duct work (tr. 10/279-80).

232. Testimony from Cobb was that the inspections, post-mold, took on a different level of scrutiny never seen before, impacting productivity (tr. 5/173-74). Chapparral also stated that after mold was discovered the inspection process got a lot worse. The irony is that the Corps was performing these inspections because it blamed KP and Cobb for the mold in the ductwork when it was not their fault. Therefore, as Cobb explained, it seemed the elevated scrutiny would not have been necessary if the specifications had originally provided for mastic that did not cause mold (tr. 5/212). We agree.

233. KP worked with Cobb on the inspections, which began after the 209-day stop work order (tr. 1/165; 2/166). These inspections slowed down the train because

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anytime the ductwork was the highest utility installed, none of the other work such as piping or electrical could be installed adjacent to or below it (tr. 1/166; 5/166). This is problematic because the overhead was on the critical path (tr. 1/168). Because KP could not work in the overhead areas, it worked on the under floor areas (tr. 1/168).

234. For example, the overhead installation required the use of heavy equipment, which could damage the installed raised access floors, so KP had to build temporary platforms, ramps and safety rails resulting in additional labor and materials due to the out-of-sequence and extra work (tr. 1/167-68; 4/174-81). Further, because the ductwork could not be installed, it first went to a quarantine area and then to the area of the building where it would ultimately be installed (tr. 1/163-66; 10/153-54). This meant it was lying on the ground and KP and Cobb had to move the ductwork around the building which also required additional labor and costs (tr. 4/178-81; 5/171-72).

235. According to Cobb, the post mold inspections were a huge part of its work, and Cobb lost productivity by having to “hopscotch” around the job (tr. 5/182). KP brought in additional crews for this type of work (e.g., moving temporary construction) (tr. 4/179-81). KP also had additional salaried staff to supervise (tr. 2/167).

*More Beddowns*

236. We addressed Modification No. 386 concerning beddown room changes above. KP’s expert states that additional beddown changes impacted interior work, mainly due to the piecemeal issuance of the changes (R4, tab 32.2.1 at 36-37). KP’s expert opines that the beddowns “involved sweeping design changes” regarding the office layouts and at this point, KP could not maintain or recover its original project schedule (*id.* at 37).

237. Beddown modifications also included the following:

<b>Modification No.</b>	<b>Description</b>	<b>Final Effective Date</b>	<b>Release</b>
469	Visitor Control Center Beddown Changes	11/07/2016	Modified
472	C2F Beddown Phase II, Current Ops AV Wall	12/02/2016	Revised Modified
511	Beddown 2 J8 SCIF Area	06/24/2016	Revised Modified
581	Changes to Mechanical System in Visitor Control Center	09/02/2016	Modified

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(R4, tab 31.791 at 3, 7 (Mod. No. 469); tab 31.817 at 5-6 (Mod. No. 472); tab 31.686 at 5-6 (Mod. No. 511); tab 31.738 at 3, 5 (Mod. No. 581); tab 31.1020 at 4 (adding release language to certain unilateral modifications))

238. The modifications were coming at the same time KP was performing other work. For example, Modification No. 511 started with the Corps issuing KP an RFP on October 26, 2015 (R4, tab 31.686 at 11). During this time period, KP's expert states that KP was re-installing lined ductwork and then completing the remaining mechanical and electrical rough-ins (R4, tab 32.2.1 at 41; tr. 13/187). The ductwork was controlling the process although in some instances the electrical trade could begin some work (tr. 13/187). After the ductwork and rough-ins, KP and its subcontractors were to perform ceiling close-up, partitions and finishes and overhead trim-out (R4, tab 32.2.1 at 42).

239. However, due to these modifications and all that was happening, KP experienced delay during this window period. And the delay resulted in an impact to the North Bar and South Bar as KP's schedule originally anticipated an overlapping of resources where overhead rough-in and framing and drywall work was completed in the North Bar, the trades would move to the South Bar (R4, tab 32.2.1 at 49). As the trades had to remain in the North Bar to complete work due to these delays, the South Bar work lagged (*id.* at 50-52).

240. As a result, rather than an organized and orderly train, the project "had instead developed into a 'renovation' project" with work status varying room by room due to the incomplete design and lengthy time to design resolution (R4, tab 32.2.1 at 43; tr. 13/173). KP developed "micro-schedules" which were work schedules subdivided into micro construction areas based on functional workspaces. This resulted in out-of-sequence and piecemeal installation of work and the need to prioritize outstanding design issues and remobilize labor. (R4, tab 32.2.1 at 44)

*Construction Surveillance Technicians (CSTs) and Incident Reports (IRs)*

241. As previously discussed, the mission support building included SCIF spaces. As a result, there were special security requirements for work inside the secure building areas (R4, tab 2.04 at 301). KP was to designate an individual to serve as a security officer who had to coordinate with the government's construction security manager (CSM) (*id.* at 302). For example, there were limitations on the use of cell phones and cameras, and laptops were inspected (*id.* at 311).

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242. The CSM had a staff of CSTs who were to be on site at all times and conducted the special security inspections of work and materials. The CSTs were to observe all aspects of construction in the SCIF, including installation of drywall, flooring, ceiling, lighting, doors, cabinetry, painting, carpeting and all other finishes. (R4, tab 2.04 at 312)

243. Prior to beneficial occupancy or early occupancy, the government was to conduct security inspections for compliance for SCIF areas using several methods, including a sign-off by a CST (R4, tab 2.04 at 313). The government was to inspect the following at a minimum: wall construction, electronic security systems, communication cables and terminations, sealing of penetrations, conduit installation, locking devices and door hardware, HVAC installation, sound attenuation installation and cable markings (*id.* at 314).

244. In sum, the Corps employed a security team of CSTs, who were under contract via the USSTRATCOM PMO to surveil or observe activities during construction (JSF ¶ 36). The CSTs issued IRs alleging deficiencies in the work (*id.* ¶ 37).

245. Sometime around the middle of 2014, the CSTs began issuing the incident reports on both security matters and construction issues (app. supp. R4, tab 24.0338 at 1). Some security matters were also construction issues, such as the use of a temporary conduit that would create a void after use that needed to be filled or the improper use of parts made in a certain country (*id.* at 1). The CSTs were checking to ensure there were no issues with the SCIF spaces (e.g., no gaps or holes and concerns about the STC rating) among other things (*see generally* app. supp. R4, tabs 24.0338). Some of the IRs affected areas outside the SCIF, but related to the SCIF (e.g., LL1 floor had electrical junction box secured to floor that led into the SCIF wall) (*id.* at 3).

246. The CST IRs were required by the contract. The CSTs issued over a thousand of these reports (tr. 1/183-84; app. supp. R4, tab 24.0338).

247. The problem was not with the CSTs or the actual IRs. The problem was that KP did not receive the reports until late 2015, and then received over 100 of them, some a year old (tr. 1/182-83). As a KP project superintendent explained, the CSTs were making observations but when they saw a problem, they could not prevent it (tr. 7/194-95). For example, KP would reach a point where it would put the ceiling in or close a wall or floor after receiving sign-off to do so, and then receive the IR (tr. 7/195-96). This required KP to pull apart completed work (tr. 1/183-84).

248. As we explained earlier, the contract included an inspection clause

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(FAR 52.246-12) which stated that government inspectors were not authorized to change specifications. More importantly, it states that the government was not to “unnecessarily delay the work” when performing inspections and tests. (R4, tab 2.01 at 1536-37) While KP believes some of the inspections were overkill, the real issue was the timing, which caused out-of-sequence work (inefficiencies) and trade damage (tr. 7/196-97). KP’s expert noted that this issue was difficult to quantify (R4, tab 32.2.1 at 48).

*Anchor Bolt Survey*

249. During this window, there were issues with anchors. Anchors, or anchor bolts, attach the MEP installations to the overhead space (tr. 4/168-69). On June 2, 2016, 30 linear feet of large ductwork installed by Cobb fell from its installed location. During the investigation, the Corps discovered the anchors submitted and approved for use by multiple trades in the building complied with the contract but did not comply with the International Building Code (IBC) as it was not rated for cracked concrete. IBC compliance was not in the contract or the Corps’ standard unedited guide specification. The Corps concluded this was an unsafe installation issue per the IBC and manufacturer’s product data. (R4, tab 31.1090 at 30; tr. 10/266)

250. Ultimately, the Corps issued Modification No. 660 (in multiple parts) beginning in August 2016, with the final modification effective April 10, 2018 (R4, tab 31.1090 at 4-5). The modification was “required” due to engineering changes including possible and confirmed A/E fault (*id.* at 30).

251. The modification addressed anchor corrections for IBC compliance (R4, tab 31.1090 at 4). KP was to “[p]erform existing condition analysis” and “take corrective action through repair/supplementation of the anchor/hanger systems for all trades to bring the anchors to IBC standards and cracked concrete standards” (*id.* at 5). In other words, KP and Cobb performed an anchor bolt survey to determine the amount of weight to be hung by every anchor bolt (tr. 4/168-69; 5/178-79). The DOR used this survey to run new design calculations (tr. 4/168-169). According to testimony, there were about 5,000 anchors surveyed (tr. 10/262-65).

252. Accordingly, the modification of new anchor bolts required rework--the removal and replacement of anchors for MEP installations by: Continental (including draining the sprinkler piping), Schwob, Chapparral, and Cleveland (hanger replacement including ductwork replacement, insulation and removal and reinstallation of STC-rated ceilings). Subcontractors replaced the following number of anchors: Cobb-393; Berg-95; and Continental-105. (R4, tab 31.1090 at 31)

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253. As KP's expert explains, Modification No. 660 impacted the progress on the re-installation of the ductwork in the North Bar L1 and the anchor bolt mapping itself impacted work and the critical path through the North Bar L1 and L2 (R4, tab 32.2.1 at 47). Cobb explained that crews could not progress installing the anchors or hanger until the survey was completed (tr. 5/180). The modification paid KP direct costs and included the revised modified release (R4, tab 31.1090 at 5-6).

254. At this point, AMS contends the critical path was impacted by the lined ductwork/mold issue and inspections, and then further impacted by the IRs, anchor bolt survey and ongoing wall modifications, including beddowns (R4, tab 32.2.1 at 45). AMS contends this resulted in a delay of 118 days (*id.* at 50).

*The Train is Approaching Home: Window 5 (November 1, 2016 to July 31, 2017)*

255. At the same time as KP and its subcontractors were implementing all the changes due to design issues or user requested changes, KP and the Corps were discussing early joint occupancy. In addition, this time period of window 5 was impacted by enhanced drywall finishing changes.

256. KP's expert explains that in addition to a lag in the North Bar, there was a lag in the South Bar, particularly L3, due to the increased impact of the predecessor areas and late design changes to the executive office areas on L3 (R4, tab 32.2.1 at 60). The expert compared the actual as-built schedule to the planned dates, looking at the actual progress and delays to the overall completion of the overhead MEP installations, and concluded there was a 191-day delay. In this regard, KP was still re-installing lined ductwork in the North Bar L3 and encountering the new inspection process. (*Id.* at 59-61) At that point, KP had to move resources to address the new joint occupancy requirements, discussed next.

*Joint Occupancy*

257. The contract itself addressed early beneficial occupancy. Specifically, KP was to complete and allow the government access to certain areas for early beneficial occupancy so the government could begin fit-out of specific building spaces and allow installation of communication lines. (R4, tab 2.04 at 232) The contract identified the specific areas for early beneficial occupancy for different phases of the construction (*id.* at 232-35).

258. On November 14, 2016, the Corps and KP entered into bilateral Modification No. 658 to address joint occupancy (JSF ¶ 38). By this time, as the

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project was delayed, the Air Force needed to start installing computer systems and furniture under separate contracts (R4, tab 31.798 at 5).

259. Pursuant to the modification, the Corps designated certain spaces within the building for early turnover, referred to as joint occupancy, so the government could proceed with fit-out and furniture, fixtures and equipment (FF&E) work in parallel with the construction of the remainder of the building (JSF ¶ 39). For example, the government wanted KP to turn over specific areas each week for furniture installation (tr. 4/36-37; R4, tab 23.11 at 9). According to the Corps, it held extensive discussions with KP and STRATCOM on how to structure the modifications (tr. 12/148).

260. The modification included a 332-day time extension to the completion date and earlier access for the government (R4, tab 31.798 at 1, 4, 11). The final building completion date was extended from January 9, 2017 to October 30, 2017. The final site work completion date was now December 22, 2017. (*Id.* at 7)

261. The modification included the modified release. However, it also stated that the Corps and KP “have not come to agreement regarding the causes or responsibility for the total delay in completion of the project” and therefore the modification was “time-only” and did not include any costs. (R4, tab 31.798 at 11) (emphasis added) We find this language means what it says--that the cause for the total delay for the project was an open issue between the parties. We also find this means that costs related to the delay were an open issue, as well.

262. As KP and the Corps both noted, the 332-day time extension alleviated liquidated damages (tr. 4/34; 12/149). Specifically, the government understood that it was changing the method for enforcing liquidated damages but the change was required because STRATCOM needed access so it would not incur additional costs on other contracts (R4, tab 31.798 at 51).

263. The modification added a specification paragraph titled “Concurrent Construction” stating that the government would perform construction work to install computer cabinets and wiring for the audio visual system, furniture, computer systems, and audio visual equipment at the same time as KP was performing construction of the building (R4, tab 31.798 at 5-6). As one subcontractor explained, this “was much different than the traditional kind of joint occupancy” (tr. 7/295).

264. Joint occupancy meant that KP had to relinquish physical space in the building for the FF&E which were locked down (tr. 1/173). The areas were locked down because, due to the joint occupancy, they now contained sensitive equipment

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and systems and KP and its subcontractors stated they did not expect to need government escorts to enter these areas to perform work (tr. 1/173; 7/197-205, 298).

265. However, the modification stated that after computers systems were installed, those areas would be in “lock down status.” The issue is the modification also stated that equipment and furniture would be installed *after* final inspections of the architectural features and correction of punch list items had occurred. STRATCOM was responsible for any damage caused by the installers. KP was to coordinate access to the area with either the Corps or STRATCOM. (R4, tab 31.798 at 6)

266. In October 2017, KP complained that it was delayed due to the Corps’ inability to provide access to locked down areas. As an example, there was an instance of confusion between the government and CST security as to who was to open the doors and allow access. (R4, tab 24.14.331)

267. In addition, during joint occupancy, the government had crews install cabling under the access flooring and then replace the flooring, which was to have occurred at night so that KP and its subcontractors could work during the day (tr. 7/197-98). Unfortunately, the government crews either replaced the floors incorrectly or caused damage and KP’s subcontractor had to train the government crews on how to put the floors back properly (tr. 7/198-201). Further, if the government crews left certain cable exposed, which it was not supposed to, an escort was then required (tr. 7/202). KP and its subcontractors often had to wait for escorts, which meant KP and its subcontractors would have to remobilize to other areas and work (tr. 7/204-05, 263-65; 4/38-41).

268. KP had to provide steady power and cooling starting June 1, 2017 which meant it had to commission the building differently than planned (tr. 1/173-78; 4/32). BHJV explained that it had to provide permanent power to areas where the government was moving its equipment so the government could wire its secure networks, and this forced them to shuffle manpower (tr. 7/263). And as KP’s expert explains, meeting these power and cooling requirements early had an impact on the electrical and telecommunication rooms in the North Bar (R4, tab 32.2.1 at 55). Rather than performing startup and commissioning of these systems for the entire building, KP and its subcontractors had to proceed with “isolated pockets” to support the designated early occupancy areas (R4, tab 32.2.1 at 55; tr. 4/32).

269. And TJCFS explained that it had to move security system parts to different locations around the building which then required TJCFS to reprogram the parts (tr. 7/295). Moreover, it became clear that the government was also designing

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one of the systems as the contractor was moving forward with it (tr. 7/296). In fact, there were significant gaps in the design and operations of the systems (e.g., how the government wanted different levels of the security system to work) (tr. 7/291). In addition, Continental was unable to complete overhead rough-in work due to activities occurring below in the finished areas, such as installing furniture or pulling low-voltage wiring (tr. 7/329).

270. Ultimately, the joint occupancy required KP to change its sequence of work once again. At the time of joint occupancy, KP was continuing with the interior build out and progress on the site and basically working in any available area (tr. 2/171). Further, KP was completing work on modifications and the Corps was issuing additional ones (tr. 4/39, 41).

271. In this regard, KP had to complete small areas for early turnover and in many cases the drywall was not complete (*see app. supp. R4, tab 22.0917 at 1*). Cobb especially had to change their plan regarding duct work; BHJV also had to change its plan. Both had to go back and redo work and it created inefficiencies. (Tr. 2/173-75) KP stated it impacted its ability to complete the security system testing (tr. 4/43; R4, tab 24.14.331). KP admitted it was pushing its subcontractors to do this out of the realm of what was originally planned (tr. 2/175-76). It created inefficiencies as subcontractors had to move material and equipment throughout the site further causing them to work out of sequence (tr. 4/38).

272. According to KP's expert, this meant KP had to complete some of the buildings' more complex areas early and out of sequence which added another "overlay" to the already existing design issues (R4, tab 32.2.1 at 54). The Corps agreed that this made things "challenging," that KP would have to resequence work, and there would be impacts such as inefficiencies because KP had to focus on priority areas (tr. 11/211; 9/134).

273. There is also testimony from the KP superintendent for sitework that this impacted work on the outside, as well. In this regard, KP had to relocate the green zone due to joint occupancy, which required area prep, fencing revisions, adding a parking lot earlier than planned, maintaining additional access roads, and loading/unloading areas for the contractors to bring in the furniture and other materials (tr. 6/306, 313-16, 320). KP relocated the green zone by May of 2017 because joint occupancy changed the dates for sitework completion, which meant the original green zone area had to be completed sooner than originally planned (tr. 6/312-13).

274. Although the contract had always required early beneficial occupancy, this was different. The project was delayed and KP and its subcontractors were trying

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to complete these joint occupancy areas even as the project was being re-designed or design errors were being fixed.

*Commissioning and Controls*

275. The Corps issued a series of modifications relating to the fire alarm and smoke control systems as follows:

<b>Modification No.</b>	<b>Description</b>	<b>Final Effective Date</b>	<b>Release</b>	<b>Design Issue?</b>
776	Finalize Extended Overhead/Duct Detectors for MS Stairway Fans	10/02/2018	Unilateral/Modified	Y
807	Smoke Control Operational Matrices	12/01/2017	Modified	Y
782	Damper End Switch Status to Fire Alarm	11/01/2017	Modified	Y

(R4, tab 31.1061 at 5-6, 35; tab 31.1138 at 6-8; tab 31.1021 at 3-5, 27; tab 31.1002 at 3-4, 28).

276. Modification No. 776 addressed a design issue where the ducts serving the outside air for stairwell pressurization for life safety/egress were required to have a duct smoke detector installed to ensure air forced into the stairwell did not contain smoke (R4, tab 31.1061 at 35). The Corps issued the modification unilaterally but it still included the modified release (R4, tab 31.1138 at 7-8). It provided the final direct costs and extended overhead costs, as well as a 105-day time extension, for other modifications related to duct detectors, smoke control operational matrices, and damper end switch status to fire alarm (*id.* at 10, 117). The time extension was due to the impact of Modification Nos. 776, 807, 782 (R4, tab 31.1061 at 6). The negotiations for this modification started in July 2017, the notice to proceed with work was not issued until January 2018 (R4, tab 31.1138 at 109-10).

277. Modification No. 807 addressed design errors and oversights regarding the smoke control system operation (R4, tab 31.1021 at 27). Modification No. 782 changed a specification due to engineering changes including possible and confirmed A/E fault (R4, tab 31.1002 at 28).

278. The shop drawings for these modifications had been completed years prior. Due to the changes, the drawings were reproduced and resubmitted. (Tr. 1/187, 188) Next, KP and its subcontractors had to reinstall and test the new work (tr. 1/188-89). Primarily, BHJV worked on this matter (tr. 1/188).

*Enhanced Drywall (Gypsum Board) Finishing*

279. KP also filed a claim on November 17, 2016, regarding wallboard (gypsum board) finishing requirements throughout the buildings (R4, tab 24.13.384 at 1, 15). The claim stated it did not include related delay, disruption and cumulative impacts as that would be in a separate claim (*id.* at 1). The Corps denied the claim, which KP appealed to the Board.

280. We concluded there was a latent ambiguity in the specifications relating to Level 4 finishing requirements and KP relied on the ambiguity during performance; thus, we construed the ambiguity against the Corps as the drafter of the language. *KiewitPhelps*, ASBCA No. 61197, 19-1 BCA ¶ 37,319 at 181,526. The Board issued a consent judgement which included the parties' stipulation and agreement on quantum (R4, tab 37.1).

281. KP contends that a significant amount of drywall work had been completed as well as the adjacent MEP by the time the Corps directed KP perform the enhanced drywall finishing (tr. 1/169-70; 4/169-70). As an example, KP stated it had completed its full height partitions a year in advance of the issue and KP had to go into those areas and remove the ductwork and make other access points and to then go back and finish the Level 4 drywall (tr. 4/169-70). KP's expert explains that this caused re-work in condensed overhead spaces and related impacts, inefficiencies, and supplementation to complete the work (R4, tab 32.2.1 at 57).

*There is a Fire in the Train, Among Many Other Things That Can Go Wrong*

282. KP's expert concluded there was no concurrent delay (to the critical path) during the windows identified above because KP and its subcontractors were prevented from performing as planned due to design issues, continual changes and disruptions on a daily basis all of which effected productivity (R4, tab 32.2.1 at 67). According to AMS, KP was advancing the work and, in fact, starting some work early, but could not move forward because there were design issues (tr. 13/167). AMS also opined, when questioned by the Corps, that the design issues and government interferences resulted in a completely different project and it was "unbelievable" that design changes were happening in 2017 for a project bid in 2013 (tr. 13/278).

283. Meanwhile, the Corps' expert, BRG, takes issue with the claim and AMS' report for failure to consider issues that were the responsibility of KP and its subcontractors including inadequate manpower, lack of sufficient skilled manpower, large amounts of correct work and rework unrelated to modifications, out-of-sequence

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work, later material deliveries and material shortages, site access restrictions, subcontractor problems and other issues allegedly within KP's control (R4, tab 32.1.1 at 7). BRG contends AMS' expert report regurgitated KP's claim and therefore fails for the same reason (R4, tab 32.1.7 at 4-5). We discuss these expert reports, and others, more fully later in the decision. At this point, however, we discuss some issues the Corps and BRG maintain KP and its subcontractors caused which the Corps believes resulted in concurrent delay.

284. The quality assurance/quality control (QA/QC) process for the project included quality assurance daily reports and quality control daily reports (R4, tab 2.04 at 755-57, 764; tr. 10/126). KP's QC daily reports were to have an attachment showing the equipment on site, issues, activities, and subcontractors' involvement (R4, tab 2.04 at 755-57; tr. 10/127). The Corps' QA report was to identify deficiencies, address any issues not covered in the QC report as well as inspections attended (R4, tab 2.04 at 765; tr. 10/127). We discuss several issues raised by the Corps relating to KP and its subcontractors regarding QA/QC.

285. According to the COR who also served as the head of the quality assurance branch, KP's subcontractor experienced problems with the PERS wall relating to tie backs (tr. 10/129). In addition, there were issues with the foundation walls and steel erection (tr. 10/129-30). There is also testimony that KP's subcontractor Cobb did not weld the condenser water pipes properly (tr. 10/130). The COR also stated there were some installation issues with the roofing subcontractor Douglass Colony Group, Inc. (Douglass) (tr. 10/134-35). The COR also stated that Douglass workers would go home to Colorado every few weeks and this caused manpower issues (tr. 10/136).

286. On April 20, 2017, there was a fire at the facility caused by one of Cobb's welders who ignited cardboard that had been left in the ductwork when the pressure testing was completed (app. supp. R4, tab 17.04 at 63-64; tr. 2/15-16; 9/207-08). KP informed Cobb that it would be liable for the deductible under the builder's risk policy (tr. 2/16-17). The fire caused heavy smoke damage (tr. 2/17).

287. KP testimony is that government-driven factors contributed or raised the likelihood of such an event (tr. 2/19). It occurred the same time as joint occupancy and finalizing overhead interferences (tr. 2/68). KP explains that while it received insurance for the fire, the "time" element was not part of the insurance money received (tr. 2/61).

288. According to the Corps' mechanical engineer, KP and Cobb cleaned all of this up (tr. 9/208). In the end, the Corps' mechanical engineer believed the Corps

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received a high quality, finished product from Cobb (tr. 9/208-09). But there was time and effort on the government's part too, regarding this issue (tr. 9/208). Further, the Corps mechanical engineer on the project also testified that there were quality issues with Cobb resulting in the need for extra inspections and oversight (tr. 9/204-05). For example, there were issues with the welding on initial piping, which Cobb did replace (tr. 9/205).

289. AMS testified that this fire event did not delay the critical path because it did not drive the overall completion of the job (tr. 13/280). At that time, the critical path areas were interior turnovers and controlled access space in the North Bar and completion of ceilings in the South Bar (tr. 13/281).

290. Right after the fire occurred, and also in April 2017, a material failure of a copper pipe joint caused a 9,000-gallon flood that destroyed a HEMP generator's alternator and caused delays (app. supp. R4, tab 17.04 at 64; tr. 2/19; 9/206). According to testimony from the Corps mechanical engineer, Cobb acknowledged the issue was due to improper soldering and replaced all the of the solder joints in that area (tr. 9/206).

291. In January 2018, there was another flood caused by incorrect flow balance valves on multiple hot water lines, all of which had to be replaced (app. supp. R4, tab 17.04 at 65). The flood caused about \$35,250 of damage to IT equipment (*id.* at 66).

292. Weather also impacted the project and Modification Nos. 535 and 633 together provided an extension of seven days for that reason (R4, tab 23.06 at 3; tab 23.09 at 3). On June 16, 2017, there was a tornado near the project site which damaged portions of the installed roof (R4, tab 26.04.124 at 36; tab 26.04.125 at 78). The tornado caused roof damage (i.e., gouges/tears in the roofing membrane from windblown objects, damaged metal panels, and damage to waterproofing) that needed repair (R4, tab 26.04.125 at 78). KP submitted a builder's risk claim for this damage (tr. 3/182).

293. In addition, KP and its subcontractors were arguing over performance. For example, KP was concerned with the performance of Cleveland, the drywall and framing subcontractor, yet Cleveland was concerned that it was unable to complete all of its work in certain areas due to no fault of its own (*see* R4, tab 36.243; tab 36.240). In fact, Cleveland expressed concern with the Corps' and DOR's lack of responses, or untimely responses, on certain issues (*see* R4, tab 36.243 at 3). At one point, Cleveland told KP to stop blaming Cleveland for the fact that the design documents

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were incorrect and only 80 percent completed (as this was actually the fault of the Corps and the DOR) (R4, tab 32.1.17.48 at 1).

294. As the Corps highlights, though, starting in May 2015, KP notified Cleveland that its work was impacting the CPM schedule (R4, tab 38.55 at 1; tr. 3/208). In August 2015, KP informed Cleveland that its performance, including quality deficiencies, lack of manpower and other issues started as early as October 2014 (R4, tab 38.55 at 1-2). Further, from May through July 2015, KP expressed concern with Cleveland's insufficient manpower on the project (R4, tab 36.239) and quality control issues (R4, tab 36.242). This forced KP to strategize the best way to maintain progress on the critical path (*id.* at 2).

295. However, KP did acknowledge that by July 2015, Cleveland's onsite manpower almost doubled due to an influx of carpenters in late June (R4, tab 36.242 at 2-3), but then later decreased again in July (R4, tab 38.55 at 3). By August 2015, KP alleged that Cleveland was responsible for numerous "days lost" (*id.* at 7). In December 2015, KP was finding issues with the quality of Cleveland's work; however, a KP project manager explained that it is difficult to have the same level of quality when doing rework or going back and completing work as compared to work performed on an initial pass (tr. 3/224-29). In 2015, KP and its subcontractors such as Cleveland were finishing the wall modifications (tr. 3/262). The problems extended through February 2016 where both parties continued to blame each other for schedule issues (*see* R4, tabs 38.74; 36.244; 36.245).

296. In February 2016, Cleveland argued that KP failed to provide the complete area for work. For example, another subcontractor had stored duct along a wall, a subcontractor was working in columns where framing was taken apart, there was damage to a wall and door frame, and the penetrations incorrectly laid, to name a few. (R4, tab 36.246)

297. According to testimony, Cleveland was to have finished its work in September 2016, but in May of that year was still performing significant work in a piecemeal fashion due to all of the changes, extra contractual inspections, engineering judgements, etc. (tr. 1/278). In addition, in May 2017, Cleveland told KP that there was no approved CPM schedule in place and the block schedules were a "wish list" of items KP would like to have ready. Cleveland requested a recovery schedule and stated it would not be responsible for overtime or supplementation resulting from KP's mismanagement of the schedule. (R4, tab 36.203 at 4)

298. There were many issues with Cleveland's performance (tr. 3/234-45). And the relationship between KP and Cleveland became contentious for many reasons,

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including Cleveland's distaste for KP's supplementation of its work (tr. 5/96-97). When supplementing the work for Cleveland, however, KP began to realize Cleveland's frustration with having to perform go back work (tr. 5/97). The many modifications all at the same time impacted Cleveland regarding the drywall framing who had to perform much rework due to the many changes (tr. 3/115-16).

299. KP also expressed concerns starting in December 2014, with work performed by its mechanical subcontractor, Cobb (R4, tab 10.02 at 60). For example, there were issues with Cobb's storage of onsite materials (*id.* at 59-60). In June 2015, there was an issue with trade damage (where a Cobb worker damaged a door jamb placed by a different subcontractor/trade) (R4, tab 36.241). There was also an issue with pipe welds (tr. 2/214). Meanwhile, Cleveland blamed Cobb for about 117 incorrect door frame sizes and locations (R4, tab 32.1.17.48 at 2).

300. As discussed earlier, in June 2016, multiple sections of installed ductwork fell from the overhead space in LL1, destroying metal wall studs and damaging materials on the ground (R4, tab 4.58 at 1). Many believed the drop-in anchors supporting the duct section were incorrectly installed (R4, tab 4.58 at 1; tr. 2/220). There is also testimony, from the Corps mechanical engineer, that a scissor lift hit the duct which contributed to the piece falling (tr. 9/209). Upon inspection, KP found deficiencies on a majority of installed drop-in anchors (R4, tab 4.58 at 1-2). As a result, the Corps expressed concern with KP's and Cobb's quality control (*id.* at 2). However, as noted, there was also the discovery that the anchor specification did not comply with IBC and was not rated for cracked concrete (R4, tab 31.1090 at 30).

301. There is of course testimony that the quantity of design changes in the mechanical drawings resulted in extended overhead, inefficient and additional costs for Cobb and hence why KP passed through the claim (tr. 1/150; *see also* 5/159-60). Cobb also explained that moving equipment and manpower around to finish work resulted in unproductive labor (tr. 5/162).

302. With respect to KP's mechanical systems insulation contractor, Chapparral, in May and June 2015, KP expressed concern over the lack of manpower and the resulting impact it had on the follow-on trades such as Cleveland (R4, tabs 36.287; 36.288; 36.289). At times, Chapparral blamed KP or Cobb for any delay (R4, tab 36.290 at 1).

303. KP's roofing and waterproofing subcontractor was Douglass, who also experienced some issues, as noted by KP (*see* R4, tab 36.249). From August 2015 through May 2016, KP believed Douglass' crews were not working enough on good weather days, and had insufficient manpower and supervision, and submittal issues

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(R4, tab 36.249; tab 36.251 at 2; *see also* tr. 3/164, 172). Douglass argued that over a two-year period it had to mobilize at least 40 times to finish work, but this was due to lack of continuity of work, which caused a 19-month delay (R4, tab 36.248 at 2). Douglas had anticipated continuous work in only a few mobilizations (tr. 3/166). As Douglass noted, its work should have been completed in 2014, but Douglass was hopeful to finish in 2016 (R4, tab 36.248 at 2). Douglass' crews were from Colorado and would travel for temporary duty assignment (tr. 3/162). KP did not anticipate Douglass would have a continuous crew at the site (tr. 3/163).

304. Due to delays, Douglass had issues in mobilizing its crews for acceleration purposes (R4, tab 36.248 at 1). For example, at one point Douglass explained to KP that since it had been offsite for two months due to delays, and did "not have the luxury of having a waterproofing crew waiting and available for KP to get work areas ready" Douglass could attempt to accelerate but would have to shut down other jobs as it relates to waterproofing (R4, tab 36.248 at 1; tr. 3/167-68). In other words, as Douglass' work was pushed out into a later timeframe than originally anticipated, this impacted their ability to establish their crews and sufficient manpower (tr. 3/259-60).

305. KP wanted Douglass to perform in smaller areas that were ready for their work rather than in fewer mobilizations as Douglass anticipated in their bid (tr. 3/166-67). In May to July 2016, Douglass brought in additional crews from Texas as the project needed a more robust vapor barrier for the roof because the permanent roof was incomplete; this allowed KP to proceed with the interior build-out (tr. 3/177-79).

306. KP acknowledged that Douglass could not perform rainwater proofing in one pass but had to mobilize two or three times (tr. 3/128). Douglass also had to provide enhanced waterproofing material because the roofing work went into a different season than anticipated (tr. 3/129). Likewise, Douglass experienced delays due to the schedule with the installation of metal panels (tr. 3/130). According to KP, the permanent roof was not on the critical path because Douglass placed a temporary membrane underneath that provided protection (tr. 4/245).

307. In August 2017, KP threatened to terminate TJCFS' subcontract for electronic security due to performance issues (R4, tab 36.272 at 1). As noted earlier, TJCFS was impacted by the wall modifications because moving walls changes the space which then changes the electronic security for that area (tr. 7/294).

308. Starting in January 2015, BHJV (KP's electrical subcontractor) expressed concern to KP over the schedule slippage due to change orders, weather and design

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flaws. BHJV also noted that predecessor activities such as priority wall framing were not completed in any area of the building that would allow for completion of the rough-in activities, which impacted BHJV's production levels and required a second and third pass through to complete the activities. (R4, tab 36.115 at 4) As a result, BHJV requested a recovery schedule (*id.* at 5). KP would not provide a standalone recovery schedule but explained it had been working with its multiple contractors to implement plans that maximized a productive workforce and also adjusted the CPM schedule when allowed by the Corps (*id.* at 1).

309. In 2015, Continental (KP's fire sprinkler installation subcontractor) experienced damage to the installed fire sprinkler pipes on a "nearly daily basis" (R4, tab 36.165; tr. 7/219-20). By March of 2016, Continental was preparing a spreadsheet to show costs and outlining issues relating to schedule delay, material stocking issues which created material handling issues, additional time for their project manager and foreman, out-of-sequence work creating overruns in the seismic bracing activity, and issues with the QA/QC process. Specifically, at that time Continental was delayed and could not make progress because the framer, Cleveland, had not completed its work. (R4, tab 36.164 at 1) And in 2016, Continental was still experiencing trade damage (from other subcontractors) such as bent and removed hangers, broken heads and other trades touching the pipes (R4, tab 36.161). The trade damage continued throughout 2016 (R4, tab 36.169).

310. There is testimony that Valley experienced issues with the thrust blocks on the water line and storm manholes (tr. 6/332). There were also issues with meeting the schedule (which had been accelerated) and testing (tr. 6/335-36, 338). With respect to Anderson, there was testimony that KP withheld money from them (tr. 6/339-40). However, as we discussed earlier, there is also testimony that during that time KP had to accelerate the schedules for these businesses because the Corps did not change the completion date despite obvious delays.

311. KP's painting subcontractor was Terry McGill. The duration of painting was extended for the interior build due to the scheduled slippage. In addition, Terry McGill had to perform go back work (i.e., rework or finish work) on finished areas. (Tr. 3/130-31)

312. American Direct supplied the doorframes, doors, and hardware (tr. 3/131). It had to store their material onsite and in warehouses for a longer period of time due to delays (tr. 3/131-32). Grazzini Brothers & Company (Grazzini Brothers) was the tile installer. Due to the modifications issued by the Corps, Grazzini Brothers installed the tile at a later date than anticipated. Haworth installed the raised access floors. (Tr. 3/132) The duration of the work was extended through buildout. The raised

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panels for the floor were about 2 inches thick and weighed about 25 pounds which made relocating or moving the material more complicated thus requiring Haworth to utilize a warehouse to store the materials. (Tr. 3/132-33) Haworth also had to pull the raised access floor up and replace it during joint occupancy in certain areas (tr. 3/136).

313. Corps personnel testified that KP projected 1,200 people on site at the peak, but never got to that point; rather, the number reached 900 briefly (tr. 9/68; 10/174-75). But there was a shortage of qualified tradesman throughout the project area (app. supp. R4, tab 17.04 at 66). According to the DOD OIG and testimony, the shortage was caused by a general shortage of construction workers and a non-government construction project in the area (*id.*; tr. 8/178; 9/69; 10/175). As the Corps acknowledged, this meant that KP was competing for the craft, the trades, such as drywallers, as there was a persistent labor shortage compounded by the need for background checks due to the nature of the facility (tr. 8/178-79; 9/69-70; 6/258; 10/175).

314. In addition, the re-sequencing of work impacted manpower as we have discussed briefly already. Subcontractors had to ramp up at different times than previously thought (tr. 4/156-61). This created problems for finding sufficient manpower as a subcontractor could not just find workers in a few days; it could take months and it could require a national, rather than a local search, to meet these needs (*see id.*). For example, a subcontractor may have brought 20 workers to the job but had to let them go two weeks later because there was not enough work for them at that time or something had been shut down (*see tr.* 4/155).

315. As another example, KP issued a change order to ATEC, the HEMP shield fabricator and installer (tr. 2/176). Due to schedule delays, ATEC could not install the steel panels until a later date, and their high-energy poles ended up with some corrosion due to the delay. Specifically, because the materials (poles) were delivered per the initial schedule, the delay meant they were exposed to the climate, despite protection. (Tr. 2/177) Likewise, KP issued a change order to BHJV due to the delays and required a need for additional heating and cooling (tr. 2/178). KP issued a change order to Cobb for temporary utilities and a specialty piece of equipment called a fusion machine (tr. 2/180).

316. KP was pushing its subcontractors to increase manpower and work extra shifts as it accelerated the schedule. As a result, it offered some subcontractors performance incentives during the latter part of 2017 (tr. 2/178). This included BHJV and Cobb (tr. 2/178-79).

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317. And KP had to supplement resources, which it had not anticipated (tr. 3/117-19). This included assisting with the raised access floor (supplementation of Haworth), insulation, doorframes, door hardware frame, trim, and cleaning (tr. 3/118). For example, KP had to supplement Terry McGill for painting as it lacked the capacity to meet the increasing demands imposed by the modifications and failure of the Corps to change the contract completion date (tr. 3/123). The purpose of supplementing the subcontractors was to meet the contract completion date (tr. 3/121). KP's subcontractor for cleaning services was The Office Cleaners. The project required acceleration for cleaning so KP had to subcontract with an additional company. (Tr. 3/126)

318. KP did not believe the issues experienced with the subcontractors caused a delay to the critical path (*see* tr. 1/218). For example, although Cobb had issues with pipe welding, KP did not believe this was the driving force to delay the project in that period--KP believed the design issues were (tr. 1/218). Likewise, KP explained that trade damage was caused by the need to go back and do rework (caused by the deficient design). For instance, KP's original plan required the use of a scissor lift or other large equipment prior to installation of the doors (tr. 4/152-53). In this regard, Cleveland utilized scissor lifts to reach into the ceilings (tr. 5/36). But the modifications and re-sequencing of work altered this plan regarding the scissor lifts and large equipment. And KP explained that while there were some issues with a few workers, there were ultimately about 12,000 workers that moved through the project during its duration (tr. 4/248).

319. In sum, while KP and its subcontractors were less than perfect, any problems they may have caused were relatively small in comparison to those caused by the Corps. Furthermore, KP and its subcontractors were faced with an unexpected challenge in that the Corps provided them a defective design at the beginning of the project, which was corrected iteratively throughout the project term. There should be no surprise that this caused and resulted in issues such as with manpower and trade damage. In fact, the issues identified above support the position that the defective design, compounded by the beddowns and other Corps actions, caused delays and inefficiencies and resulted in extra costs and damages (such as trade damage).

*The Train Went to Monte Carlo*

320. In addition, due to the facts that the contract was insufficiently funded at the start, there was little contingency funding, and there were numerous modifications,

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the Air Force had to utilize below threshold programming (BTR) and ATR<sup>21</sup> (*see* app. supp. R4, tab 17.04 at 50; *see also* tr. 9/102-04). In February 2014, the SERG tasked the SAG with development of courses of action to complete the project due to the limited contingency and existing and projected cost modifications (app. supp. R4, tab 22.0192 at 5). The recommendation was to start reprogramming funds by April 2014 and seek an ATR of around \$20/\$30 million (*id.* at 9-10).

321. In May 2014, the first BTR was approved for \$1.8 million (app. supp. R4, tab 17.04 at 26). A few months later, Congress approved the first ATR for \$37 million to replenish contingency funds (*id.* at 26, 50). The Corps utilized a Monte Carlo simulation to estimate the needed reprogramming amounts.<sup>22</sup> The simulation showed an 85 percent confidence level that \$37 million would be sufficient funds to complete the project. (*Id.* at 50-51)

322. At that time, the SAG's risk analysis/risk register included the following risks: design deficiencies, KP's extended overhead costs, and the cumulative impact of modifications (app. supp. R4, tab 22.0269 at 9). The SAG also considered proactive actions, such as: increasing staffing at the Corps, ensuring the design was in sync with changes, and identifying design issues as soon as possible (*id.* at 10). The SAG was aware that electrical and mechanical issues were the top drivers of increased costs and delays (*id.* at 13). In fact, the SAG was aware the following were potential cost drivers (or issues): complex UPS; generator and mission critical systems to be integrated during commissioning; exposure from multiple modifications causing revision to the coordination study; modifications impacting major electrical equipment; penetration issues at the interface at the SCIF and HEMP; routing conflicts, including inadequate ceiling space; labor availability; supply chain issues; complex building management system to be integrated during commissioning; less

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<sup>21</sup> Volume 3, Chapter 7 of the DoD Financial Management Regulation (FMR) addresses reprogramming of military construction and family housing appropriated funds to provide flexibility while ensuring DoD appropriations comply with congressional intent. U.S. Dep't of Def., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION (DOD FMR) vol. 3, ch. 07, sec. 0702 (Apr. 2021). Reprogramming of funds below the threshold of \$2 million does not need Congressional approval. *Id.* para. 070302, subpara. 070302C.

<sup>22</sup> A Monte Carlo simulation is “[a] computational algorithm using random samples to obtain a range of possible outcomes and the probability they will occur” and was used here to estimate the contract value at completion and determine the project contingency amount needed (*see* app. supp. R4, tab 32.0042 at 5, 10).

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cooperative subcontractor (mechanical); errors in duct tampers; cooling tower issues; and BIM coordination (*id.* at 14).

323. In December 2016, the government again used a Monte Carlo simulation to determine additional funds needed. The simulation showed three options, all of which considered the mold and cumulative impact requests for equitable adjustments (REAs) (app. supp. R4, tab 32.0019 at 6-8). With the recommended option two, the government would seek sufficient funding to execute mandatory modifications and fund the REAs. As the government noted, there had already been over 700 modifications, with only one having compensable time and “[a] third party is likely to consider the REA reasonable.” (*Id.* at 7, 9)

324. During the hearing, Corps personnel testified that at the time, the Corps believed it owed nothing to KP for these REAs, but this option nonetheless included funding for risk relating to the potential claims (tr. 9/113). And there is testimony that it is the Corps that makes determinations on whether an REA or claim has merit (tr. 6/73-74). But an Air Force witness explained that a liability was listed here if it had been determined reasonable (tr. 6/77). And here, the recommendation was option two (app. supp. R4, tab 32.0019 at 7, 9), which meant *the government* realized it could owe money to KP for its claims (including cumulative impact).

325. In May of 2017, the projected contingency was negative and there was a recommendation, which some in the Corps disagreed with, for “[n]o more two-part [modifications]” (tr. 11/111-12; app. sup. R4, tab 22.0960 at 2). In July of 2017, the projected contingency with modifications was \$-3.8 million (app. supp. R4, tab 31.0504 at 22).

326. There was a second ATR in August 2017, when Congress approved a total of \$14.1 million for a 9.4 percent growth from the original programmed amount of \$564 million (app. supp. R4, tab 17.04 at 30, 51). There was also a \$2 million BTR (*id.* at 30).

327. Although there was an inadequate contingency funding at the start of the contract and periodically throughout the claim period, we do not believe the Corps intentionally chose not to obtain adequate funding. Likewise, the government’s funding issues were not the reason for the multi-part modifications. Rather, we find the Corps used multi-part modifications to keep the project moving forward because the DOR (and Corps) were unable to manage all of the design issues and other changes throughout the course of the project.

Someone Disembarks -- The DOR and Corps Reach a Settlement

328. Also, in August 2017, the Corps and the DOR entered into a settlement agreement (R4, tab 16.12; app. supp. R4 tab 29.0131 at 1). The Corps concluded that settlement was in its best interest because, as of January 2017: (1) there had been 837 construction contract change requests (with more to come) and 527 designated as resulting from a “Design Error”; (2) two modifications--Modification No. 368: Progressive Collapse and Modification No. 127: MS LL1 and LL2 Overhead Conflict Resolution, were the largest two issues; (3) the Corps required the DOR remove about \$200 million in costs in the solicitation with descriptive narrative amendments in order to award the construction contract; (4) the DOR then had to have conformed construction documents incorporating these changes issued to KP 45 days after award; (5) the construction documents consisted of about 3,300 drawings, most of which needed to be changed, and thousands of specifications; (6) at the same time, the Corps required the DOR incorporate USSTRATCOM re-organization/re-structuring, which required revisions to every room in the mission support portion of the building; and (7) the same Corps resources to be utilized for the DOR REAs were dedicated to the construction project completion (R4, tab 16.12 at 6-7, 9-12).

329. In other words, the Corps understood that the way it awarded the construction contract caused or helped cause the issues (*see* app. supp. R4, tab 22.1055 at 1). The Corps also considered the “Documented, under-documented or undocumented design guidance in criteria provided by [the Corps] or User requests made during [the] design phase” and “Extensive documentation and historical records of A-E in refuting or rebuttal of Government assertions or claims of negligence with respect to A-E responsibility” (R4, tab 16.12 at 15).

330. The irony here is that the Corps essentially blamed itself and the way it awarded the construction contract for the design flaws for purposes of settlement with the DOR but seems to have ignored this same fact when reviewing the claims for the construction contract.

331. As part of the settlement, the DOR agreed to coordinate with the Corps regarding any subpoenas and provide claim analysis, for a fee, on KP’s anticipated claims (app. supp. R4, tab 29.0131 at 4). In fact, the DOR was part of the team reviewing KP’s claim and providing documents (tr. 11/133). The Corps told the DOR it would need to provide documents and start collecting documents for discovery for KP’s claim (tr. 11/133). Sometime in the summer of 2017, the Corps sent the DOR a folder so it could send back documents (tr. 11/143-44).

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332. For at least one year after the DOR settlement, Corps personnel attended SAG meetings with the Air Force and PMO during which A/E liability was discussed (tr. 6/58, 62). Even the Corps' senior project manager was not aware of the settlement; during the hearing, he stated that at the time he was furious about absolving the DOR of all liability (tr. 9/140-42). The Corps told the senior project manager not to discuss the settlement with the PMO or the Air Force (tr. 9/143).

333. In July 2018, when the Air Force (AFCEC) expressed concern with the DOR performing the parking lot re-design, and requested the Corps utilize a different design team, the Corps stated that while it understood the concerns relating to the building, the same concerns were not present with the parking, roads or sitework (app. supp. R4, tab 22.1114 at 2-3; tr. 6/58). The Air Force was still concerned about using the DOR for the parking lot because it believed there was going to be a liability action against the DOR (app. supp. R4, tab 22.1114 at 2). It also believed the DOR had performed poorly (tr. 6/58-60).

334. The Corps then explained there were no liability actions related to the DOR as "they are not that kind of firm [and the Corps has a] very strong relationships with their leadership" (app. supp. R4, tab 22.1114 at 1). In response, the Air Force stated it was unaware of an REA from the DOR, let alone a settlement, and was shocked and disappointed (*id.*; tr. 6/61). Thus, the Air Force and PMO learned of the DOR settlement in August 2018, one year after settlement (app. supp. R4, tab 22.1114 at 1; tab 22.1115 at 1).

*The Train Finally Arrives: Late, Over Budget and With a Lot of Baggage to Unpack*

335. Ultimately, the Corps issued over 1,100 formal modifications to the contract (JSF ¶ 5). According to the DoD OIG, the Corps issued some modifications to KP's contract to account for issues identified in the conformed drawing review, which were intended to pay KP for additional work performed but unaccounted for in the proposal because of the changes during the solicitation process and the incomplete drawings at the time of award (app. supp. R4, tab 17.04 at 49).

336. The Corps issued over 700 RFPs and numerous ASIs, and KP issued over 5,800 RFIs; as noted, in March 2014, the Corps itself admitted the majority were attributable to design errors, omissions or deficiencies (app. supp. R4, tab 24.0340; tab 22.0172 at 2; tab 31.0589). In fact, during the October 2012 through October 2015 time period, Corps personnel were concerned with the DOR's design documents, deficiencies encountered, quality issues with the ASIs, and untimely response times for the RFIs (*see* app. supp. R4, tab 22.0647 (*draft performance assessment*); tr. 7/45-51).

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337. This resulted in an administrative burden on KP, which had to manage the open modifications, RFIs, RFPs, change requests and everything discussed above. KP had to double its staff from 50 salaried employees managing the project to 100 during the 2016 peak period to address all the impacts because KP did not anticipate the volume of changes (tr. 1/192, 221-23; 2/141, 151). In addition, KP added a separate team to handle only price changes (tr. 2/141). All of this derailed the train. And when the train is derailed, there is also extended overhead and additional temporary construction (lifts for raised access floor; getting equipment into spaces not intended for work at that stage; insurance) (tr. 1/193-94; 2/141-43). It put pressure on KP and its subcontractors to resolve the issues and it was detrimental to the flow of work (tr. 2/132).

338. Further, several years after contract award, the former Commander of the Corps' Omaha District (and effectively the program manager for the STRATCOM project) explained that in his "professional assessment" awarding the project at 85 percent of full scope to stay within programmed funding was one factor for the cost and schedule growth of this project. He further explained that there were solicitation amendments deleting the 4th floor and five structural bays but design updates were made after award "requir[ing] the construction team to continually address the myriad of deferred design changes through hundreds of contract modifications during construction, contributing in part to cost and schedule growth throughout the life of the project." (R4, tab 27.03.03 at 6)<sup>23</sup>

339. Changes are expected, especially on a project of this size. However, as with any plan of action, certain changes and delays, such as those due to design issues, can impact the progress of a particular subcontractor working in an area (*see* tr. 7/149-53). Common sense dictates that certain delays by one subcontractor in an area could then impact the successor or subsequent subcontractor in the train line. And here, where there were many delays due to a deficient design, KP could never really implement its planned sequence of work due to the numerous changes and design issues (tr. 7/151-53 ("It got messed up from the beginning" with framing); tr. 5/33-36, 152-55; 7/254-56, 325-27).

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<sup>23</sup> It is interesting to note that the former Commander learned at least three lessons from this project: (1) understand and establish requirements prior to design start; (2) ensure cost estimates keep pace with the required/approved design changes; and (3) have the government maintain a well-documented, independent and fully updated assessment of the contractor's resources-loaded schedule (R4, tab 27.03.03 at 6-7).

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340. The original contract completion date was September 12, 2016 (R4, tab 2.01 at 1405; app. supp. R4, tab 29.0033 at 3). The construction project reached substantial completion on February 20, 2019, and was turned over to STRATCOM on October 31, 2019 (R4, tab 28.01 at 4).

341. Before that, however, KP filed several claims. As relevant here, on October 5, 2018, KP submitted a certified claim in the amount (as adjusted) of \$169,583,431, seeking a contracting officer's final decision (COFD) and alleging the Corps caused delays and disruption impacts and inefficiencies. The parties refer to this as the delay and disruption claim (JSF ¶ 7). We discuss this claim, which is the one at issue here, in further detail later.

342. Before filing the claim, KP contacted its subcontractors and told them they were preparing a delay and damages claim and sought their input as to any disruptions to the efficient and timely execution of the original planned work (tr. 1/225-27). KP asked for information about whether each subcontractor was impacted or if there was no cost. KP had received verbal communications from trade partners about claims. (Tr. 1/227)

343. After the claim was filed, the Corps' Chief of Construction noted in a January 2019 email: "You won't find a person in this building who doesn't believe there is some merit regarding the \$186 million 'delay and disruption (D&D)' claim currently in our hands." He did note that the Corps would not begin to understand the quantum part until the mold claim was done. (App. supp. R4, tab 22.1175 at 1) We note the mold claim has been "done" for a while now.

*Analyzing the Train and Ultimately, Its Disruptive and Circuitous Route*

344. Several experts have opined on the various matters here, especially as they related to schedule and disruption. We have discussed some of their views already but address the remaining here.

*Schedule/Delays*

345. KP's expert, AMS, provided an analysis on the quantification and causation of the critical path schedule and delays incurred after analyzing project documents and schedule information as well as observations (R4, tab 32.2.1 at 5, 13). KP's subcontractors relied on this analysis for their claims, as well (*see, e.g.*, tr. 5/196). As one subcontractor aptly explained, the schedules determine the delay to the project "which affects the entire construction crew" (*id.*).

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346. AMS did not use contemporaneous project schedules for projected or forecasted completion dates because the schedules were inaccurate and unreliable and did not reflect an accurate critical path that could be used as the basis for analysis (R4, tab 32.2.1 at 7; tr. 13/115, 118, 275-76, 308). In this regard, as discussed throughout the decision, the Corps would not allow KP to incorporate unsettled change events into the schedule until the Corps issued a final modification (R4, tab 32.2.1 at 7).

347. Accordingly, the AMS report used an “as-planned v. as-built” schedule analysis methodology based on the method implementation protocols in the Association for the Advancement of Cost Engineering (AACE) International’s Recommended Practice No. 29R-03-Forensic Schedule Analysis) (R4, tab 32.2.1 at 13). This method reviewed the as-planned schedule prior to the impact period and compared it to the actual as-built events as they occurred (*id.*; tr. 13/118). For the as-built schedule, AMS relied on contemporaneous progress data which included reviewing status information/task completed on the schedules, schedule narratives, daily reports, RFIs, modifications, and change information (tr. 13/118-19). AMS utilized the schedules’ start date of an activity and completion date, believing that information was reliable as it was used for billing purposes (tr. 13/145). Ironically, even Corps personnel at one point noted that it would need to look at the schedule as a whole (as-built) when evaluating the delay and damages claims (app. supp. R4, tab 22.1000 at 1).

348. In other words, this method evaluates actual events and the progress of the work and compares it to the as-planned schedule before the experienced impacts; the method then evaluates the impacts on a periodic basis, in this case the windows of time. Other than window 3 which dealt mostly with the mold issue, the other windows include hundreds of what KP and the AMS expert consider disruptive events which makes implementation of a prospective time impact analysis “virtually impossible.” (R4, tab 32.2.1 at 14)

349. AMS’s Mr. Staley explained he was somewhat involved with the project and working with KP starting January 2014, and then again in the summer or fall of 2015; therefore, he relied on some on his own observations as he walked through the construction project on a periodic basis (R4, tab 32.2.1 at 13; tr. 13/96-97, 215). During that time, Mr. Staley’s job was to evaluate schedules and determine any critical path delays (tr. 13/98).

350. AMS analyzed the critical path for the duration of KP’s contract (tr. 13/229). Some of KP’s subcontractors may not have been on the project for the entire duration (see tr. 13/230). AMS did not quantify disruption or impact (tr. 13/237).

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351. The Corps' expert, Dr. Anamaria Popescu of BRG, reviewed the AMS report and concluded: (1) AMS' as-planned v. as-built methodology was ill-suited for projects of long duration such as STRATCOM and also failed to follow basic requirements for this methodology; (2) AMS incorrectly states that KP's schedules were unreliable because KP was precluded from inserting pending changes; (3) AMS used a different time impact analysis for window 3 instead of maintaining a consistent methodology; (4) AMS used an artificially created time impact analysis from window 3 as its baseline instead of the contemporaneous schedule for windows 4 and 5; (5) AMS failed to correlate alleged delay impacts to a specific critical path activity; (6) AMS found zero non-excusable delays attributable to KP and its subcontractors; and (7) AMS made some factual errors in its report (R4, tab 32.1.7 at 3-5, 11-43).<sup>24</sup> We address each of these contentions.

352. As noted, BRG contends that an as-planned v. as-built methodology was inappropriate here because the AACE recommended practice provides this methodology is suitable for short-term projects, not suitable for projects built significantly different than planned, not suitable for complicated projects with multiple critical paths, and does not generally consider concurrency, pacing issues, or that changes to the baseline may have been the cause of delay (R4, tab 32.1.7 at 21-26). BRG also states that AMS' actual methodology is wrong because it failed to use the as-submitted November 30, 2014 schedule but used a modified version as its baseline and failed to comply with at least nine minimum recommended implementation protocols (*id.* at 26-30).

353. In response, AMS states its analysis confirmed that the as-built critical path followed the original work sequencing as planned by KP and therefore the methodology used is accurate and reliable. AMS also states it used the November 30, 2014 schedule update as its baseline but adjusted the completion date to account for settled changes related to Modification No. 368. (R4, tab 32.2.80 at 9) In other words, AMS used the corrected November 30, 2014 schedule (*see also* R4, tab 27.02.01 at 95). Further, AMS stated it did comply with the minimum recommended implementation protocols and provided clarifications (R4, tab 32.2.80 at 11-12).

354. BRG also claims that AMS was incorrect in asserting KP's schedule updates were unreliable (R4, tab 32.1.7 at 13-14). BRG states that KP's schedule, such as the February 1, 2016 schedule update, did include details on unapproved

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<sup>24</sup> BRG issued an initial report in 2021 which the contracting officer relied on for her COFD (tr. 8/35). As the contracting officer explained, she utilized excerpts from the BRG report, but did not fully understand the half-step analysis (which we discuss later) BRG used (tr. 8/36-39).

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changes (*id.* at 14-18). According to BRG, “AMS’s allegation that the contemporaneous schedule updates were not reliable since the Government did not allow KP to insert [modifications] in the schedule until they were approved is unfounded” (*id.* at 18).

355. In response, AMS states that Corps officials acknowledged that the monthly schedule updates were not accurate and an analysis using such schedules would be unreliable (R4, tab 32.2.80 at 4; tr. 16/258). AMS also states that BRG’s representation that the modifications were reflected in the schedule updates was incorrect as the schedules showed that a modification was “received” and then clearly identified the modifications and impacts not included in the schedule (R4, tab 32.2.80 at 4-7). We agree there has been testimony from the Corps that it would not allow KP to include modifications into the schedule until the modification was final, which rendered the contemporaneous schedule unreliable and useless.

356. BRG also takes issue with the use of a time impact analysis for window 3 (mold) instead of maintaining the same methodology as the other windows or using the contemporaneous schedule (R4, tab 32.1.7 at 31-33). According to BRG, this is fundamentally flawed hybrid analysis that is not accepted industry standard (*id.* at 33). AMS responds by stating it utilized this schedule as it was utilized by this Board in the hearing related to the mold impacts and the Corps stipulated to its accuracy (R4, tab 32.280 at 10). We agree there was a 209-day stop work order for mold, for which the Board found the Corps responsible and the parties stipulated to the 209-day delay. Regardless of whether it was industry practice or not, it is logical to use the actual days of delay for this window.

357. BRG also states AMS failed to correlate its alleged delay impacts to critical path delays. Instead, BRG contends AMS offers vague and overgeneralized discussions on the various claimed delays. (R4, tab 32.1.7 at 33) In response, AMS states that this criticism that AMS did not examine causation by an activity-by-activity analysis as BRG did is “convenient” (*id.* at 14). Specifically, AMS explains that when the Corps precluded KP from including modifications contemporaneously into the schedule to evaluate the effect on the critical path, the Corps “effectively precluded the type of activity-by-activity analysis that BRG now maintains is the only appropriate way to evaluate causation” (R4, tab 32.2.80 at 14). AMS notes that BRG also did not consider the “ongoing design changes that continually prevented specific work activities from completing” meaning individual schedule work activities remained in progress for extended durations such that a discrete activity-by-activity basis is unreliable (*id.* at 14-15).

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358. In addition, BRG states AMS' delay analysis, using the as-planned v. as-built methodology, did not account for non-excusable or concurrent delays (R4, tab 32.1.7 at 34). BRG states such an analysis uses a critical path as a "singular view" failing to consider near-critical paths (*id.* at 34-35). This resulted in AMS failing to consider "whether there were delays incurred on these near-critical paths that would also have concurrently delayed the Project even if the critical path delays discussed by AMS had not materialized." Further, BRG argues that AMS failed to determine whether KP was responsible for any critical delays. (R4, tab 32.1.7 at 35)

359. In response, AMS explains that it did not identify instances where KP caused critical path delays because the delays were caused by the continuous design changes (R4, tab 32.2.80 at 15). AMS also rebuts that it made inaccurate factual assertions (*id.* at 16-17).

360. BRG performed its own delay analysis, referred to as the half-step windows analysis, which segregated the claim timeframe into 19 discrete windows where most of the window durations are about 60 days (R4, tab 32.1.7 at 8, 19). BRG states this analysis is discussed in ACEI's 29R-03 Forensic Schedule Analysis as Method Implementation Protocol 3.4 (MIP 3.4) (*id.* at 19). With this analysis, BRG evaluated the delays to the work planned to be accomplished (and actually accomplished) within a window period and the non-progress delays (e.g., newly introduced modification work) (*id.* at 19-20). With this half-step analysis, you are cutting the project into pieces where the windows are boundaries set by the schedule updates on each side of that window (tr. 16/24-25).

361. Dr. Popescu stated during the hearing the same thing other witnesses have stated: the Corps "already granted all 660 days of delay" at issue here and therefore the only issue is how many of those days are excusable compensable (tr. 16/18). BRG understands the Corps granted 660 calendar days of extensions with 306 calendar days of it being compensable (R4, tab 32.1.7 at 8-9). Regardless, BRG disagrees with this as its half-step analysis shows that KP is only entitled to compensation for 71 of those days and not the remaining 235 that the Corps granted (*id.* at 9). This was an increase from BRG's initial analysis (tr. 16/23).

362. BRG's analysis identifies several different activities running through the critical path. These activities include items such as installation of elevator 12 CMU walls, framing partitions, atrium concrete, elevator equipment delivery, fireproofing, frame partitions, light delivery, ductwork sampling, installation of door frames, in-wall electrical rough-ins, ballistic wall door frames, electrical large overhead, unlined ductwork overhead, and ductwork remediation. (R4, tab 32.1.7 at 22-24) Dr. Popescu explains these are the most critically delayed activities (tr. 16/162). Further, she states

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the critical path is dynamic and changing especially when you have over 12,000 activities happening (tr. 16/30-31). Dr. Popescu explains that the near critical path could be days of float off the critical path (tr. 16/31).

363. AMS contends these critical paths are in the wrong areas of the building, i.e., in the South Bar when the critical path actually ran through the North Bar (tr. 16/271-72). AMS states that the error is because BRG relied on the contemporaneous schedules which did not reflect the modifications and additional work to complete the North Bar therefore showing the North Bar as almost complete (tr. 16/272). We agree with AMS. There is testimony, including from the Corps, the critical path ran through the North Bar and it seems the activities BRG identified, such as framing, unlined ductwork, etc., were due to design issues. In other words, even if these activities are on the critical path the cause for the delay was from the defective design.

364. Dr. Popescu also explained, as the other testimony has demonstrated, that KP's original plan--the A1, A2, A3 in the North Bar and then proceed to the South Bar--would have been a great plan but it was not possible because by 2014 KP was working everything it could, being diligent, but that expanded the problems (tr. 16/52). We find this testimony supports KP's position rather than the Corps' in that KP and its subcontractors were doing what they could to remain on target with the contract completion date.

365. Further, as noted, BRG concluded KP's schedule included the modifications (R4, tab 32.1.7 at 14-18). During her testimony, Dr. Popescu stated that in her opinion, KP was inserting the modification information into the schedule once approved and then even before that. However, she also stated that hypothetically, if the Corps had not allowed KP to insert fragments of the modifications until final, then there could be integrity issues with the schedule. (Tr. 16/198) We have found that the Corps did not allow KP to maintain an updated schedule and include fragments in a timely manner, based in part upon testimony from the Corps itself, which means there were integrity issues with the exact schedules BRG used for its analysis.

366. Further, BRG compiled an Issue Database which includes excerpts from project documents such as daily reports, meeting minutes, schedule narratives, deficiency logs, etc. (R4, tab 32.1.7 at 37). BRG used this database to show, for each of BRG's 19 windows, the issues it believed KP caused, including: construction equipment problems, fabrication issues, lack of equipment, lack of manpower/skilled labor, lack of materials, lack of notice, late delivery of equipment/material, laydown issues, management problems, subcontractor problems, trade stacking, suspension, site

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safety issues, schedule issues, quality problems, material substitution, no progress on work, rework, and schedule issues, to name a few (*id.* at 37-38).

367. For example, BRG's windows 6, 7, 10, and 14 relate to issues surrounding the discovery of mold in the ductwork and the remediation efforts (R4, tab 32.1.7 at 112). BRG recognized the stop work order but believed that 155 days were non-excusable because it was KP's responsibility due to the storage issues and lack of evidence that the Corps contributed to the delay (although BRG did defer to any ruling by this Board on the matter) (*id.* at 111). During the hearing, when asked how a ruling by the Board on the mold claim would impact this analysis, Dr. Popescu stated that these days could be essentially moved to the column of excusable compensable days (tr. 16/244). Dr. Popescu explained it did not matter that there was a 209-day stipulation because her analysis was retrospective and not prospective (tr. 16/102).

368. Further, when asked whether BRG considered cumulative impact, the answer was less clear. Dr. Popescu seemed to agree that multiple modifications could cause a cumulative impact on work, but blamed KP for performing the work late (tr. 16/246). Dr. Popescu explained that while multiple modifications could cause disruption not every one of those modifications would necessarily cause a delay (tr. 16/81).

369. For the report, Dr. Popescu considered each modification, including revisions to a modification (i.e., the multi-part modifications) as separate and distinct with individual scopes of work (tr. 16/209). Likewise, even if a subsequent modification fixed an error in a prior modification, Dr. Popescu's view was that the Corps made a change and paid KP for the change so it was just another modification (tr. 16/210-12). According to Dr. Popescu "since KP got paid to perform each part of these mods and each part of these mods was done sometimes months apart, I'm really not sure what impact, massive impact this has for them doing the work" (tr. 16/213). Hence, she used the start date set forth by KP in its schedule for a modification and then the completion date to conclude whether KP was "late" (tr. 16/247).

370. Since Dr. Popescu considered each modification in a multi-part modification separately, it does not appear she considered the impact the second, third or even fourth modification had on the first one. Rather, Dr. Popescu used the Issues Database and the fact KP was "late" to find KP was almost entirely at fault. With respect to her argument KP was paid for each part of a multi-part modification, we note that KP did not get paid for each modification; if anything, it received some direct costs for a not-to-exceed amount because the parties could not agree on costs.

371. AMS contends that BRG's issues database is not comprised of actual work items but instead comprised of subcontractor notes, issues related to non-critical project areas, or issues that represent normal construction matters (R4, tab 32.2.80 at 15). AMS further argues that the issues database is merely a tabulation of all daily report references which were categorized as non-excusable without any evaluation or understanding of the critical path (*id.* at 16). We find the issues database is not direct evidence of the delays to the critical path but is merely a compilation of every single problem a contractor could encounter on a large project. And BRG ignored the root cause of these issues: the defective design and specifications and the Corps' ill-management of the matter. If anything, the issues database supports the contention that the defective design caused a myriad of problems for KP and its subcontractors, along with the management of the contract (e.g., beddowns, joint occupancy). Accordingly, we are more persuaded by AMS's analysis and find the Corps responsible for the 525 cumulative days of delay to the critical path.

#### *Disruption*

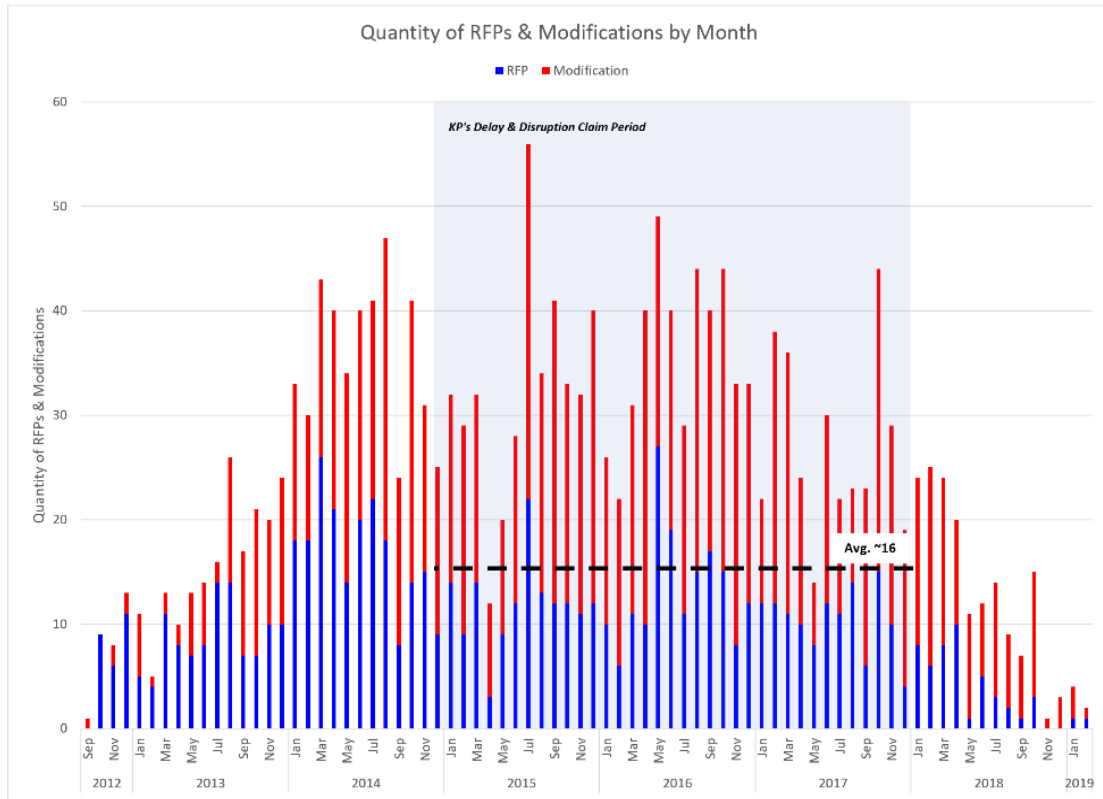
372. KP utilized Vertex to address the impacts of all the issues discussed above on KP's performance and productivity (including its subcontractors). Vertex states, relying on ACEC Recommended Practice No. 25R-03, Estimating Lost Labor Productivity in Construction Claims, that the following are common causes of lost productivity: directed or constructive acceleration; cumulative impact of multiple changes causing a ripple impact; crowding of labor/stacking of trades; defective drawings/specifications; poor morale; out-of-sequence work; and untimely approvals/responses (R4, tab 32.6.1 at 11-13). According to Vertex, many of these are also recognized by the American Society of Civil Engineers (ASCE) as part of ANSI/ASCE/CI 71-21, Identifying, Quantifying, and Proving Productivity Loss (*id.* at 13).

373. Mr. McConnell of Vertex stated that loss of labor productivity in construction projects occurs when "unforeseeable events impact a contractor's construction program" which then "detrimentally impact the cost and often the time the contractor spends on a project" (tr. 14/102). One does not need to quantify the loss of productivity to show there was one; rather, you identify first whether there were any events that caused it and then whether there were impacts (tr. 14/111-12). Quantification would occur during the next phase (i.e., a quantification hearing) (tr. 14/116).

374. Most interesting, and telling, from Vertex's report is that the Corps "issued KP an RFP or contract modification every other day on average during the claim period" (R4, tab 32.6.1 at 20). The following chart depicts this:

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(*Id.* at 21) Vertex states that the Corps issued 438 RFPs during the claim period, which equated to about 54 percent of the total RFPs issued (*id.* at 62). Vertex states that the volume, magnitude and timing of the changes influence a contractor’s productivity; for timing, changes occurring later in a project cause a greater loss of productivity (*id.* at 21-22). If a change occurs prior to performance of work, the effects of the change can be mitigated (*id.* at 22). Vertex explains the myriad of changes here led to the starting and stopping of work which forced “multiple passes” through an area, the jumping around to available work and performance of out-of-sequence work, and the creation of crowded work areas (*id.* at 23). According to Mr. McConnell, this includes user requested changes and changes due to design errors (tr. 14/184).

375. For example, the wall modifications were issued in a piecemeal fashion rather than in one re-design, and over several years, where some modifications revised earlier ones or did not coordinate with other modifications (R4, tab 32.6.1 at 36-37). Vertex states that ACE’s Recommended Practice for Estimating Lost Productivity notes that “continued changes, performing unnecessary work, rework, and consistently returning to areas to perform work that cannot be completed as part of typical operations” can lead to decreased morale and decline in productivity. Here, KP’s

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framing subcontractor had to return to areas multiple times which caused the reassignment of manpower, crew size inefficiencies, concurrent operations and the stacking of trades. Vertex states this impacted the other MEP trades, as well. (*Id.* at 37)

376. Likewise, Vertex states that the EJs, drywall finish change, and mold caused disruption. For the EJs, Vertex claims that the incomplete design and reconfiguration/reclassification of wall types meant the standard head of wall details were inapplicable and the available design details could not be utilized (R4, tab 32.6.1 at 41). The five-week process to get an approved EJ impacted the drywall subcontractor, which then impacted the MEP trades (*id.* at 42).

377. With respect to the changes to drywall finish, the Corps made five changes to the drywall finish level in two months. At this point, KP installed the MEP equipment, raised flooring and ceilings causing access issues and obstructions for those making these changes (R4, tab 36.2.1 at 45). And the mold issue, including inspections, forced the re-sequencing of work, rework and replacement work, among other things (*id.* at 46).

378. Vertex highlighted several inadequacies with the Corps' modifications, including: (1) Modification Nos. 360 and 363 resulted in clashes with a revised full-height wall and ductwork; (2) Modification Nos. 325 and 360 showed the same door with different swings; and (3) Modification No. 360 stated fire alarm circuit penetrations were limited to one point but Corps' direction in response to an RFI was the penetration should have two entrance points (R4, tab 32.6.1 at 48).

379. Vertex also provided a chart showing the number of days for resolution for some modifications, including wall modifications. For example, it took 1,157 days to resolve wall type revisions in Modification No. 360, from the time the issue was first identified in November 2013. (R4, tab 32.6.1 at 50)

380. With respect to joint occupancy, Vertex states the Mechanical Contractors Association of America identified joint occupancy as a factor that affects labor productivity (R4, tab 36.2.1 at 54-55). Here, there was already large areas that needed out-of-sequence work or rework due to the modifications. Add on joint occupancy and the result was more crowding, more movement through areas, varying stages of progress in the priority areas, less production time, more set-up/tear down, and fluctuations in crew sizes and composition. (*Id.* at 56)

381. According to Vertex, KP had to supplement its project management staff, trades/subcontractors and sitework activities (R4, tab 32.6.1 at 62-70). KP also had to

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self-perform concrete work, relocate the green zone, extend temporary heating and provide temporary stair towers, for example (*id.* at 72-78). And, of course, the stacking, re-sequencing and segmenting of work impacted the subcontractors (*id.* at 78-79). Also, had there been no delay around 2016, KP would not have struggled with the labor shortage that prevailed around that time (tr. 14/235).

382. KP's major subcontractors also engaged experts who utilized the windows of delay in which to identify various issues. Mike Zollman,<sup>25</sup> from HKA, provided an expert report and testimony concerning how the delay and disruption impacted BHJV's productivity (R4, tab 32.3.1). HKA used a measured mile approach to show the loss of productivity on installing conduits 1.5 inches and larger (HEMP and building), branch conductors (HEMP and building), and conduits 1.25 inches and smaller (HEMP) (R4, tab 32.3.1 at 13-21, 27-43, 47-63, 65-84, 90-117, 123-52). Mr. Zollman explained that he could and did reach the same conclusion, that BHJV expended more labor hours due to the unproductive approach here, without performing a measured mile analysis because you can identify a loss of productivity and then next quantify the loss (tr. 14/256-58; 15/18-19). Mr. Zollman explains that production is the volume of work done while productivity is the input to get the work done, or ratio of hours and production (tr. 14/258).

383. As discussed, BHJV had planned and estimated its work based on the train; in other words, its work was sequential in that it was to perform in-wall MEP on the full-height priority walls after framing, overhead MEP after drywall on the full-height priority walls and then in-wall MEP after framing on the partitions (R4, tab 32.3.1 at 6). As Mr. Zollman explained, BHJV is a "downstream" subcontractor, meaning it "is entirely dependent on [] predecessor work being in place" (tr. 14/254). In addition to following this logical sequence, BHJV was to stagger its work to use a dedicated crew floor-by-floor (R4, tab 32.3.1 at 7). Further, electrical work gets installed in "systems" (i.e., from the panel out to the distribution) (tr. 14/268-69).

384. Instead, HKA explains that BHJV performed work on all levels simultaneously and in an often-unpredictable pattern forcing it to increase manpower beyond that planned (R4, tab 32.3.1 at 8-9). For window 1, HKA explains that electrical work is installed as a system so working in a 20,000 square foot area would have given BHJV sufficient space, but the wall-by-wall and room-by-room approach that occurred did not (*id.* at 25). For window 2, as BHJV could not complete its work

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<sup>25</sup> Mr. Zollman was qualified as an expert in investigation, determination, analysis, and calculation of loss of productivity on large-scale construction projects (tr. 14/246).

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in “one pass” in window 1, it had to continue installations in this next window (*id.* at 44).

385. For window 3, BHJV could not advance its overhead during the mold stop work order. Instead, BHJV installed its “go-back” in-wall work and worked in available areas of overhead unaffected by the stop work order. BHJV was again impacted during the ductwork inspections process because its work followed procedure. (R4, tab 32.3.1 at 63) And, of course, it was still impacted by the delays in windows 1 and 2, as well as by the beddowns (*id.* at 64).

386. For window 4, HKA explains that BHJV could follow the finished ductwork to finish overhead installations and for a few months, performed in the “least impacted” manner to date. This period was used as the measured mile for mission support. (R4, tab 32.3.1 at 85) BHJV was later impacted in this window by ductwork inspections, mapping and testing of anchor bolts, post-installation modifications to the above-ceiling level drywall finish, the IRs, continued impacts from the wall modifications and other design modifications (*id.* at 86).

387. Finally, for windows 5 and 6, HKA explains that BHJV had to perform mini projects during the joint occupancy for commissioning (R4, tab 32.3.1 at 120). The Corps issued some of the modifications for cooling and power late, after some testing and commissioning activities occurred (*id.* at 121).

388. HKA states that with respect to manpower, there is a curve where one ramps quickly and consistently for the middle part of the job and then there is a drop-off as work is completed. But here, there were spikes or varying degrees of manpower based on the amount of work available. (Tr. 14/ 252-53)

389. Mr. Andrew T. Englehart,<sup>26</sup> of J.S. Held, provided an expert report and testimony on behalf of Cleveland concerning disruption impacts (R4, tab 32.4.1 at 1-2). J.S. Held utilized an as-planned v. as-built methodology to show how Cleveland was impacted, basically showing it took double the time in most instances to achieve the work here (*id.* at 14). Mr. Englehart states he not only reviewed documents but visited the site during construction as well (tr. 14/32).

390. Mr. Englehart stated loss of productivity occurs where the contractor has experienced materially different conditions, requiring it expend more resources such as

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<sup>26</sup> Mr. Englehart was qualified as an expert in the investigation, determination, analyses, and calculation of the loss of productivity on large-scale construction projects (tr. 14/12-13).

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trade labor hours and equipment and supervision (tr. 14/19). Mr. Englehart states you can find there has been a loss of productivity without quantifying the extent of the loss by reviewing the change orders, actual cost information, estimates, and other project available data (tr. 14/19-20). As this appeal was bifurcated, J.S. Held focused on entitlement (*see* tr. 14/89).

391. Mr. Englehart explained that at the time the Corps issued a modification, KP could not price out the loss of productivity due to the cumulative impact of the events occurring because it is a backward looking endeavor which looks at the ripple effect of the changes (tr. 14/29-31). According to Mr. Englehart, Cleveland experienced a loss of productivity because at the onset of this project, it did not reasonably expect any of these events to have occurred (tr. 14/28).

392. According to J.S. Held's report, Cleveland was impacted because it had to divide and subdivide its work into smaller areas because it could not complete its operation or activity as planned, but was forced to stop short, perform come back work or complete the activity later (R4, tab 32.4.1 at 15). For example, Mr. Englehart explained that staging of the material was important for Cleveland because of the size and weight of the studs, and size and quantity of the board/drywall (tr. 14/18).

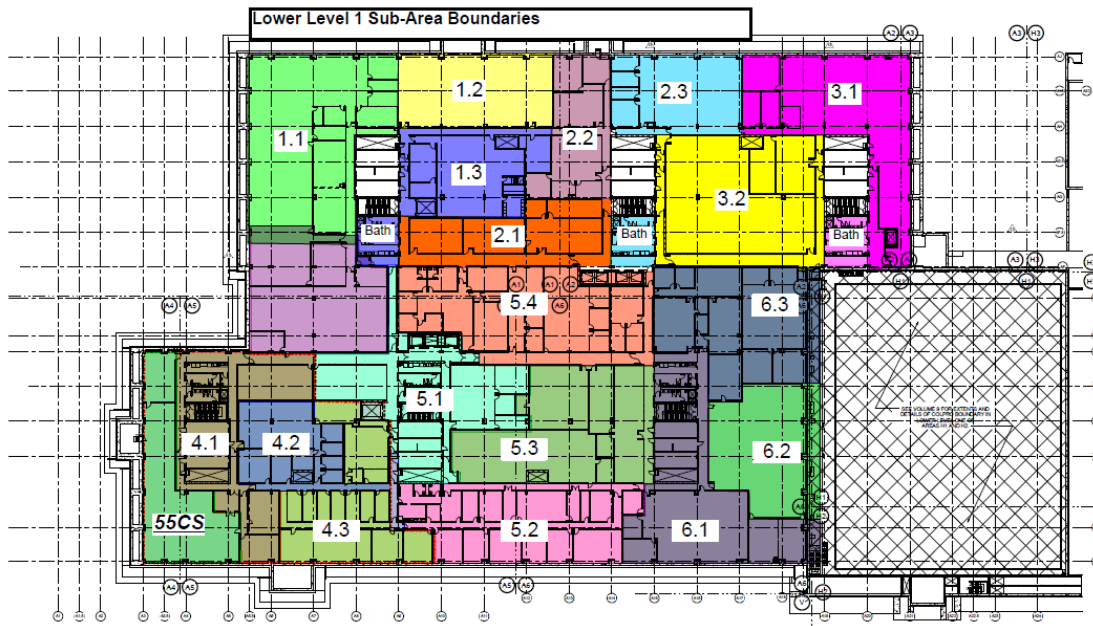
393. With respect to the deficient design, or lack of one, Mr. Englehart stated the obvious during his testimony--that a contractor such as Cleveland would have difficulty providing a cost estimate for building a wall or ceiling that had not been designed (tr. 14/22). This impacted Cleveland's trade labor, requiring additional labor which required a learning curve, and required additional supervision, project management and supervisors (tr. 14/26-27).

394. J.S. Held's report stated that the use of block schedules, rather than the CPM schedule (which could not be updated) hindered Cleveland's ability to marshal labor, material, supervision and manage resources in an efficient and effective manner (R4, tab 32.4.1 at 17). For example, rather than hanging gypsum wallboard in a two-step process, Cleveland was forced to leave the middle board out to come back and install, requiring a three-step process (*id.* at 17-18).

395. J.S. Held did not follow the windows identified above but rather outlined the specific areas in which Cleveland was impacted, all of which have been described above. The following diagram from the report provides an example of how fragmented and out of sequence the work became:

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(R4, tab 32.4.1 at 16, Figure 1) This is clearly not a train or sequence of activities but a hodgepodge of work areas which we find support Cleveland’s contentions that the design issues caused disruptions.

396. Mr. William Schwartzkopf of The Sage Group, Inc. (Sage) provided an expert report on behalf of Cobb explaining that he was involved in the project “live as it was occurring” (tr. 15/31). Sage explains that based on the November 30, 2014 schedule, Cobb was to complete its work by September 8, 2016, but did not actually complete its work until November 26, 2018 (app. supp. R4, tab 35.03 at 11). Sage states the design deficiencies and maladministration of change orders caused the delay and disruption to Cobb (*id.* at 11-12).

397. Sage explains that in addition to delay damages (e.g., site management and support costs), there were disruption damages which occur when the planned means, methods and sequence of performance are disrupted thereby impacting the productivity rates (app. supp. R4, tab 35.03 at 13). Sage explains that determining loss of productivity is simply looking at the difference between actual labor hours and budgeted labor hours and there is no need to calculate the actual quantum related to the loss to find a loss of productivity. The difficulty lies in determining the responsibility and allocation of the lost productivity. (Tr. 15/31)

398. According to Sage, disruption damages do not arise necessarily from a delay, but from a contractor performing work in a piecemeal fashion or under accelerated conditions with overtime shifts causing reduced productivity such that

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there is trade stacking, crowding, overmanning, concurrent work, increased labor, multiple moves in and out of an area, re-sequencing of work, and worker fatigue (app. supp. R4, tab 35.03 at 13-14). The disruption results in reduced productivity and associated increased costs for equipment, small tools and supplies, field supervision, and personal protective equipment (*id.* at 14).

399. Sage explains that Cobb and certain subcontractors it interfaced with were impacted; this included BHJV (the electrical subcontractor), Continental (fire sprinkler), and Cleveland (dry wall) (app. supp. R4, tab 35.03 at 15-16). For Cobb to perform based on the planned sequence, the framing of full-height walls had to occur first because Cobb needed to perform the above ceiling work using lifts or rolling scaffolds. After Cleveland installed the rest of the walls, it would be difficult to access the above ceiling areas until the access floor was installed. (App. supp. R4, tab 35.03 at 24) Sage explains that the wall modifications impacted Cobb's work (and the other subcontractors) because the modifications and design were issued over an extended period of time and some modifications impacted the SCIF areas (*id.* at 25).

400. According to Sage, the modifications changing the walls did not include the typical head of wall details thereby requiring EJs (app supp. R4, tab 35.03 at 27). Sage also concludes that the anchor bolt survey and vertical deflection impacted Cobb's productivity (*id.* at 28-32).

401. Sage states that a research study using actual project data on productivity and changed work over a 30-year period revealed that productivity declines as the ratio of changed work to base contract work increases (app. supp. R4, tab 35.03 at 17). Another study showed that the earlier the changes happen, the less of an impact on productivity (*id.* at 19-20). For example, changing a wall when you are building a foundation will have less of an impact than changing a wall once it is built (tr. 15/48). Another study showed that productivity declined as labor hours increased and when overtime was required (app. supp. R4, tab 35.03 at 21).

402. According to Sage, Cobb performed 20 percent additional work just due to the mold issue (app supp. R4, tab 35.03 at 18). Further, Cobb's overtime over the life of the project equated to an approximate 43-hour work week (*id.* at 22). Overall, Cobb's labor hours increased approximately 300,000 hours (*id.* at 23). Sage also states that the duration for Cobb to complete its activities was more than 3-6 times longer than the planned average (*id.* at 40-42).

403. Sage states that the disruptions to the project, including maladministration of the change orders, forced Cobb to maintain a workforce more than two years longer than anticipated and increase its workforce (app supp. R4, tab 35.03 at 44-46).

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404. Mr. Schwartzkopf of Sage explained in his testimony that the disruptions (e.g., unfinished work, material stored on floor because it was awaiting Corps' direction) resulted in many of the quality issues the Corps reported about Cobb (tr. 15/61-62). He did not believe the quality issues caused the disruption (tr. 15/63).

405. In response to the above expert opinions on disruption, the Corps' expert, Mr. John Jerz of BRG,<sup>27</sup> issued a rebuttal report. The rebuttal report was based solely on a review of the four expert reports prepared on behalf of KP and its subcontractors (tr. 15/241). Mr. Jerz claimed he did not have any data to prepare an independent assessment because it was not provided; however, during testimony it was clarified that since the appeal was bifurcated (at the Corps' request), the Board denied the request for these documents as they related to quantum and although Mr. Jerz reviewed the subcontractor's claims and had access to the discovery database, he did not review the thousands of documents provided in discovery (tr. 15/241-42). Further, Mr. Jerz explained he did not assess whether the government caused any disruptions or impact (e.g., deficient design) because he performed no such analysis (tr. 15/243, 247).

406. According to BRG, the four expert reports discussed above are inconsistent because they do not agree on what is required to prove and substantiate a disruption claim (R4, tab 32.1.9 at 4).

407. BRG also states that HKA's measured mile analysis is flawed because it used a baseline sample size which is insufficient in size for comparison purposes; included learning curve periods but did not make adjustments to exclude periods for typical learning curve inefficiencies; did not provide detailed explanations for the source of the productivity data used or the backup data used; and incorrectly assumes the Corps caused all of the disruptions experienced by BHJV (R4, tab 32.1.9 at 4-5, 9-19).

408. BRG states that Sage's analysis assumed the Corps caused all the delay and disruption events (ignoring contemporaneous documents reflecting delay and disruption not caused by the Corps), did not provide the source data for labor hours, and did not provide a definitive conclusion on the actual productivity loss in terms of labor hours but as a range of predicted productivity losses (R4, tab 32.1.9 at 6, 19-31). During testimony, Mr. Jerz stated that the mathematical models Sage used are generally to show the claim is not overstated and he would "think the best approach" here was a measured mile type analysis (tr. 15/143).

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<sup>27</sup> Mr. Jerz was qualified as an expert in the investigation, evaluation, analysis, and calculation of disruption on large-scale construction projects (tr. 15/116).

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409. BRG states that J.S. Held did not quantify alleged impacts, and did not perform a detailed cause-and-effect analysis, a disruption analysis (in terms of labor hours), or critical path analysis (R4, tab 32.1.9 at 7, 31-38, 51-53).

410. BRG also states that Vertex assumed the Corps caused all of the common causes of productivity losses, does not reference productivity or labor data, and does not provide a disruption analysis that demonstrates any actual impacts the primary disruptions had to KP's workforce (R4, tab 32.1.9 at 7-8, 53-66).

411. During the hearing, Mr. Jerz explained that "to demonstrate entitlement, you first have to establish that the owner . . . was responsible for the [event] that you're claiming productivity impacts" (tr. 15/118). Next, you would show a cause-and-effect relationship between the event and labor productivity to recover damages, which means you would need to show how much of the disruption is due to the owner (i.e., the number of manhours lost to disruption) (tr. 15/118-19). With respect to the expert reports discussed above, Mr. Jerz takes issue with the lack of accountability for self-inflicted issues as BRG identified over 16,000 events that were caused by KP's subcontractors (tr. 15/125).

412. Mr. Jerz also stated that while the number of modifications does not have any bearing on productivity, the "quantity of change," or the percentage of change compared to the base scope, is where productivity impacts are measured (tr. 15/122-23).

413. We find that while there were issues regarding KP's administration of the contract and its subcontractor's performance, the basis for this failure stems from the Corps' error-riddled design and administration of the contract, especially the multi-part modifications with inaccurate schedules. BRG's reports fail to address this issue. We find, based on the facts set forth above and included in the record, that the Corps' action disrupted KP's (and its subcontractors') work causing inefficiencies.<sup>28</sup>

The Claim and COFD

414. On June 30, 2017, KP submitted its claim for costs due to delays and disruptions (R4, tab 24.14.228 at 2). The Corps requested KP voluntarily withdraw the claim and resubmit as an REA so the parties could potentially resolve it using

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<sup>28</sup> Due to the volume of the record, including the transcripts, there are numerous additional facts we could have cited to explain the events relevant to the appeal. It should go without saying, however, that although we do not cite these additional facts, we have considered them in reaching our findings here.

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alternative dispute resolution (R4, tab 24.14.227). KP agreed to resubmit the claim as an REA on the following conditions: (1) the Corps agrees the claim has entitlement but was subject to further analysis regarding schedule and cost; (2) the parties would conduct working sessions to develop an agreed methodology and timeframe of schedule impact analysis for the delay and disruption claim; (3) the parties' schedule experts would be heavily involved; and (4) the parties would establish a methodology to measure quantum (*id.* at 1-2). The meetings did occur but obviously there was no resolution (R4, tab 28.01 at 5).<sup>29</sup>

415. KP resubmitted the claim in October 2018 (R4, tab 27.02.01 at 1). KP's claim, much like its complaint and brief (both discussed later), argues that the Corps provided KP a design riddled with errors and omissions which resulted in changes, delays, disruptions, and additional costs to both KP and its subcontractors (*id.* at 7). KP explains that Modification No. 368 concerning progressive collapse settled the cost and schedule impacts of formal modifications as of November 30, 2014, and Modification No. 776 settled the request for compensable time extension from April 19, 2018 through the end of the project. The claim therefore addressed the period of delays and disruptions occurring from November 30, 2014 through April 19, 2018. (*Id.* at 7).

416. Specifically, KP argues in its claim that events prior to November 30, 2014 relating to the procurement process, funding, and design issues impacted the periods in question in the claim and caused multiple changes which had a cumulative impact of unforeseeable delay and disruption of productivity (R4, tab 27.02.01 at 7-8). KP's claim outlines the significant design flaws: structural design (thermal movement, progressive collapse, vertical deflection); mechanical design (MEP coordination, ceiling modifications, BIM modeling, insufficient architectural space to fit utilities, deficient HVAC design/mold, incomplete wall design); wall design (architectural design errors, SCIF floor plan, MEP penetrations into SCIF walls, dimension issues, wall type changes, door changes, added sound/SCIF-rated soffits and hard lids, missing design on sound and fire-rated wall terminations, wall re-design for beddown changes); and 48V/UPS system (deficient system design) (*id.* at 22-53).

417. KP's claim explains that the deficient design led to corresponding delays to the site work; specifically, sitework was to have begun in spring of 2015 but did not commence until March 2016 (R4, tab 27.02.01 at 54, 58). We note that the claim states that the flawed structural design is "technically not part of this Claim" but then spends seven pages discussing the impact of these flaws on KP and its subcontractors

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<sup>29</sup> For example, the Corps disputed KP's use of the measured mile approach, among other things (R4, tab 28.01 at 5).

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(*id.* at 22-28). For example, in the claim KP specifically stated that the flawed structural design significantly delayed the commencement of site utility installation. KP argues that underground utility lines could not be installed while cranes were still onsite for purposes of installing the structural steel and concrete panels. Sitework could not proceed while material covered the area due to delays. (*Id.* at 58-59) These issues were due to structural issues such as thermal movement (*id.* at 58-59, 168, 172-76, 179, 185). KP stated that the sitework around the facility equaled 50 football fields with 230,000 cubic yards of soil that had to be handled (*id.* at 55).

418. In addition, in the claim KP argues the Corps used an inspection process to complete or validate the design, or force KP to complete the design, resulting in further delays and disruptions (R4, tab 27.02.01 at 63). Specifically, KP argues the Corps used the EJ process to complete the head of wall design, used over-inspections to mask its deficient HVAC design, conducted additional inspections due to Modification No. 660 (anchor surveying and replacement), and used an entity not mentioned in the contract as an inspector (i.e., CSTs) to provide incident reports and surveillance (*id.* at 64-78).

419. KP also claimed that the Corps' maladministered the contract, specifically the change order process (R4, tab 27.02.01 at 82). According to KP, the Corps was not proactive in addressing the deficient design issues, attempted to correct the design through multi-part modifications, and failed to promptly approve schedule changes (*id.* at 83-84). KP further claimed the Corps refused to acknowledge the cumulative impact of the multiple changes it directed, which created inaccurate and unusable schedules (*id.* at 84-86).

420. The claim sets forth several legal theories for recovery. First, KP argued it was entitled to direct and indirect costs, cumulative impact costs, and losses from decreased productivity, all pursuant to the Changes clause (R4, tab 27.02.01 at 86-88). KP claims the defective specifications drove the Corps to make numerous changes which required KP perform additional or changed work and resulted in a loss of productivity, and the cumulative impact of all these changes is treated as a separate constructive change (*id.* at 88).

421. KP also contends the Corps breached its implied warranty of specifications and owes KP all its costs (delays, disruptions, increase in labor inefficiencies) (R4, tab 27.02.01 at 89-93). KP argues the Corps is liable for specification deficiencies and breached its duty of good faith and fair dealing when it maladministered the change order process and contract, failed to timely correct the defective specifications, failed to timely negotiate claims, and used extra contractual and abusive inspection processes (*id.* at 89-94).

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422. As we have explained, KP’s claim divides the time period at issue into six windows of time (windows 1-6). KP’s claim started November 30, 2014, due to the settlement of the progressive collapse issue but noted that the modification was not settled until November 2015 (R4, tab 27.02.01 at 95). That modification changed the contract completion date to November 10, 2016 (R4, tab 31.509 at 5, 37).

423. Further, in November 2014, the steel and concrete structure had started and advanced, and then over the next three years, KP worked on the interior build-out (tr. 1/71). Starting with this date, KP separated the issues into the following windows of time which it believed matched the measurable critical path delays:

<b>Window</b>	<b>Time Period</b>	<b>Description</b>	<b>Delay Days</b>
Window 1	11/30/14 - 06/30/15	Early Wall Mods	0
Window 2	07/01/15 - 09/30/15	Wall Modifications	60
Window 3	10/01/15 - 04/30/16	Mold Remediation	209
Window 4	05/01/16 - 10/31/16	Corps Overhead Interferences	118
Window 5	11/01/16 - 07/31/17	Corps Overhead Interferences/Joint Occupancy	191
		<b>Delay Subtotal through end of Window 5</b>	<b>578</b>
		<i>Forecasted Acceleration / Mitigation</i>	-53
		<b>TOTAL COMPENSABLE DELAY CLAIMED</b>	<b>525</b>
Window 6	08/01/17 - 12/31/17	Controls Impact	105
		<b>TOTAL DELAY</b>	<b>630</b>

(R4, tab 27.02.01 at 95-96)

424. KP’s claim relied on the as-planned v. as-built methodology which evaluated the planned schedule prior to the impact period and compared it to the actual events. KP utilized project records to determine impacts. KP asserted that when there are hundreds of disruptive events, it is virtually impossible to implement a prospective time impact analysis (apart from the mold delay). (R4, tab 27.02.01 at 96) We summarize KP’s claim as it relates to each window.

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425. For window 1 (November 30, 2014 through June 30, 2015), KP argues there was delay due to numerous partial wall and interior modifications such that the subcontractors could not complete critical path framing, drywall and MEP (R4, tab 27.02.01 at 97-101). According to KP, the modifications were to fix incorrect and missing wall types, and door frame throat sizes not matching wall types; there were also extensive corrections to SCIF wall penetration requirements (*id.* at 101). KP argued that it took anywhere from 125 days to 790 days to resolve some of these wall design issues (*id.* at 102). KP explains the critical path impact was zero days because the impacts had not yet been realized and are reflected in the following windows (*id.* at 107).

426. For window 2 (July 1, 2015 through September 30, 2015), KP argues it was delayed due to completion of the wall modifications and the Corps' EJ process (R4, tab 27.02.01 at 115). Further, KP argues that Modification No. 386 regarding the beddown changes affected the interior layout including wall deletions and revisions, door additions, electrical, communications and fire alarm systems changes (*id.* at 114). KP states its critical path, represented by drywall installation in LL1 and L1 of the North Bar leading to access floor and finishes installation was delayed by 60 calendar days (*id.* at 110).

427. For window 3 (October 1, 2015 through April 30, 2016), KP argued that the mold issue, along with the concurrent implementation of interior changes based on wall modifications, the EJ process and beddown and related changes caused a critical path delay (R4, tab 27.02.01 at 115-127).

428. For window 4 (May 1, 2016 through October 31, 2016), KP argued that the Corps used EJs to complete a deficient head of wall design; imposed extra contractual inspections regarding the deficient HVAC design; required KP address numerous CST issued IRs; directed mapping and testing of about 100,000 MEP anchors; and modified, post-installation, above-ceiling level of drywall finish (R4, tab 27.02.01 at 130-48). According to KP, this window included the cumulative impacts of the mold delay while the mold claim included the known impacts to the procurement and re-fabrication of the lined ductwork as of April 20, 2016. At this time, the critical path was proceeding through the completion of overhead rough-ins on L1 and L2 of the North Bar. (*Id.* at 128)

429. For window 5 (November 1, 2016 through July 31, 2017), KP argued it was mainly a continuation of window 4 but compounded with Modification No. 658 relating to joint occupancy (R4, tab 27.02.01 at 148-62). As with window 4, the critical path was proceeding with the overhead rough-ins (*id.* at 148). Finally, for

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window 6 (August 1, 2017 through December 31, 2017), KP argued the delays were due to building commissioning and controls issues, as well as acceleration/mitigation measures (*id.* at 163-64). However, KP is seeking 525 calendar days of delay, “not including the 105 calendar days” the Corps acknowledged in Modification No. 776 (*id.* at 165).

430. The claim did not include a sum certain for each window *per se* as the windows depict periods of alleged government caused delay and disruption. KP therefore used these windows in support of the cumulative impact delay and damages claim here (*see* tr. 2/29). For example, thermal movement caused a ripple effect throughout the project and the various windows, but for purposes of the cumulative impact claim it is but one of the many issues and modifications executed to correct design deficiencies (tr. 2/29-30).

431. KP did, however, include a sum certain for 51 various items relating to these windows for both KP and its subcontractors (R4, tab 27.01.02 at 1-3). First, KP set forth specific, detailed unanticipated costs for the following: (1) disruption it incurred for concrete work and KP’s need to self-perform the work; (2) disruption requiring supplementation of interior trades and site work; and (3) additional direct impact costs due to disruptions and delays (additional supervision, change management team, green zone relocation, craft safety supplies, extension of building heat, temporary construction, additional cleaning, potholing, site access, stair towers, additional equipment, offsite warehouse storage and extended insurance costs) (R4, tab 27.02.01 at 167-92). KP included a sum certain for delay damages, which were “time-related general conditions costs” related to each window, removing amounts previously captured in the mold claim (*id.* at 193). KP also included a sum certain for the change orders issued (separated into three categories for remediation/rework from flawed design and joint occupancy; acceleration and schedule compressions due to failure to extend the schedule; and subcontractor resequencing costs due to deficient design) (*id.* at 195-97). Finally, KP included a sum certain for each of its subcontractor pass-through claims and KP legal and consulting costs (*id.* at 197-99). KP explains it believes these costs are attributable to the Corps’ deficient design and maladministration of the contract which resulted in an overall project delay (as set forth for each window), unanticipated costs, costs incurred to maintain/mitigate further schedule impacts, time-related costs for project delays, and requests for reimbursement for KP-issued change orders paid or owing to KP’s suppliers (*id.* at 166).

432. KP submitted a detailed cost break-down for each of these amounts sought and included attachments further detailing the breakdown of these claimed costs (R4, tab 27.02.01 at 166-197, 199; tabs 27.02.26-27.03.01). KP submitted numerous figures and exhibits it believed supported its claim, as well (*see e.g.*, R4,

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tabs 27.02.02-27.02.25). For example, for the change orders KP issued to its subcontractors, KP included the name of the subcontractor, the change order number, notes, amount and type of cost (remediation, resequencing, acceleration, etc.).

433. As noted, KP also submitted claims on behalf of its many subcontractors (R4, tab 27.01.02 at 1-3; tabs 27.03.76-27.03.78; tabs 27.04.01-27.04.22; tabs 27.05.01-27.05.17). Each of these subcontractor claims included a sum certain that correlated to one or more specific windows (R4, tab 27.01.02 at 2-3; tab 27.02.01 at 98). KP included the subcontractors' narratives, certifications and cost backup as exhibits to the claim (*see* R4, tabs 27.03.75-27.03.78; tabs 27.04.01-27.04.22; tabs 27.05.01-27.05.17). For example, BHJV's claim includes specific costs for loss of productivity (cumulative impact/disruption) and delay (R4, tab 27.05.03). And KP explained during the hearing that it reviewed the subcontractor's costs in the claims before submitting them to the government and evaluated them the same as its claim, e.g., using the same bottom-up methodology discussed next (*see* tr. 12/95). To be clear, KP's claim included thousands of pages supporting the sums sought.

434. During the hearing, KP's project manager, who worked on drafting significant portions of the claim, clarified that the days of delay in the claim are not in dispute because the Corps had already awarded those days. What is in dispute is the cost of the time and disruption related to those 525 days. (Tr. 1/66)

435. KP testified that if KP or its subcontractor had complete control over an issue and caused the delay, it was not included in the claim (tr. 12/25). KP performed a bottom-up type analysis, in which it identified specific issues supported by changes or issues caused by the government and then developed costs from there; such an analysis does not include items for things such as the fire or tornado for which the government was not solely responsible (tr. 12/25, 68).

436. Further, some parts of the claim relate to both the delay and disruption (tr. 1/210; 2/26-27). Specifically, KP explains it is seeking 525 days of compensable delay which includes extended overhead delay costs and disruption costs due to the cumulative impact (or aggregate effect) of the modifications, RFIs, RFPs, and all the issues discussed (tr. 1/211-12).

437. Prior to issuing a COFD, in 2017 the contracting officer had the Defense Contract Audit Agency (DCAA) review the claim (app. supp. R4, tab 22.1190; R4, tab 28.01 at 5). DCAA posed several questions and the contracting officer noted her thoughts. For example, DCAA asked whether there was any waiver of cost or a release where KP relinquished its rights to be paid. The contracting officer stated KP's "release was modified multiple times to ensure confidence that KP did not waive its right to costs and time associated with the cumulative impact of multiple

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modifications.” The contracting officer also stated that there was the potential for duplication of costs in some modifications where the parties could not agree on all costs because “time and compensable time were in many cases not settled.” (App. supp. R4, tab 22.1190)

438. On April 6, 2020, the Corps issued a COFD, which largely denied KP’s claim and concluded that KP was entitled to only 18 days of excusable delay (JSF ¶¶ 14-15). The contracting officer utilized BRG to analyze the days of delay (R4, tab 28.01 at 8). During the hearing, the contracting officer stated the government “believes that there is some level of merit and there is something that is owed, but to what extent and where and all that, that’s what we weren’t sure of” (tr. 8/82).

439. According to the COFD, Modification No. 368, the progressive collapse reset modification, included language releasing the government from “all time related issues associated with the Project . . . up to and including” the November 3, 2015 modification effective date (R4, tab 28.01 at 7). Therefore, the contracting officer did not consider days of delay through November 3, 2015 (*id.* at 7, 15, 20).

440. The contracting officer identified each delay as either excusable compensable, excusable non-compensable, or non-excusable and concluded that delays to the critical path were generally non-excusable due to the following: inefficiencies caused by poor subcontractor coordination and site access restrictions in congested areas; quality/rework issues; a lack of manpower/manpower issues; site maintenance issues; issues in the quality control reports, quality assurance reports, and subcontractor daily reports; slow progress; construction equipment issues; quality issues relating to Cleveland (the framing and drywall subcontractor); ductwork remediation; slow progress on drywall; ductwork mold and remediation (R4, tab 28.01 at 10-38).

441. The contracting officer did not consider any other release language in the modifications other than Modification No 368. For example, with respect to Modification No. 325 concerning wall revisions and which contained the standard release, the contracting officer awarded KP compensable days of delay (R4, tab 28.01 at 16, 18). Likewise, the contracting officer considered Modification No. 375 (where the first part of this multi-part modification was issued in November 2014), with the modified release to analyze whether there was compensable delay to the critical path (*id.* at 21). In addition, the COFD addressed structural design issues included in the claim such as the impact to site work, precast panels and building heat (*id.* at 39-40, 44, 50). In other words, the contracting officer considered a modification with a standard release and modifications with design issues dating to 2014 (before the effective date of Modification No. 368).

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442. The contracting officer found KP responsible for at least 119 calendar days of delay due to ductwork issues (R4, tab 28.01 at 26). As we have noted, this was in error. *See KiewitPhelps*, 23-1 BCA ¶ 38,254 at 185,768. In fact, the Board has concluded already that KP is entitled to a delay and compensation due to the mold. *Id.* The parties stipulated it resulted in 209 days of delay.

443. With respect to quantum, the contracting officer concluded the cost data provided was inadequate to calculate a fair and reasonable amount for the 18 calendar days of compensable delay (R4, tab 28.01 at 66). The contracting officer never expressed concern or asserted that KP or its subcontractors failed to state a sum certain. Specifically, the COFD summarized the costs as follows: additional direct costs due to design deficiencies and contract maladministration; time-related costs due to project delays exclusive of the mold claim costs; reimbursement for change orders paid or owing to subcontractors; delay and disruption costs; and claim preparation costs. Further, the contracting officer recognized that KP's request for time-related costs for delays "are exclusive of any costs previously filed in the mold claim." (*Id.* at 38) Finally, the COFD addressed KP's claims for disruption (*see e.g., id.* at 39).

Summary of Facts

444. In sum, the government (Air Force, STRATCOM, and Corps) could not risk losing funding for the project and the Corps issued a solicitation based on ill-prepared requirements and insufficient funding. Offerors submitted proposals based on an incorrect government budget/estimate for a solicitation labeled 100 percent designed, which, after numerous amendments to cut costs was never fully designed during the solicitation stage or construction periods in question here. Offerors, such as KP, had to have a plan of action to efficiently construct the project and especially the main building (which should be true in every case but especially necessary here). Upon award, the Corps provided the DOR insufficient time to essentially re-design an entire mega project.

445. No one should have been surprised when immediately there were issues. These initial issues related to the very structure of the building. Issues that, if not corrected, could have resulted in thermal movement or vertical deflection, for example. Regardless, the Corps pressed on with the contract, and KP continued to try and construct the building based on a design that for at least several years (and maybe for the entire project) was deficient and erroneous.

446. Throughout the duration of the project, many in the government knew that all of this (but mainly the design and constant re-design) caused problems for KP and

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the subcontractors. The Corps attempted to alleviate some issues through the use of various types of modifications, including multi-part modifications. However, this caused further issues especially as it related to the schedule and the contract completion date. Eventually, the Corps did provide for some time extensions. In addition, the government knew the REAs, and ultimately the claims, were coming because although KP constructed the facility, KP's plan of action, aka the train, was derailed

447. And while we acknowledge that KP and its subcontractors were less than perfect, those issues pale in comparison to the government's actions here. This is not a chicken and egg scenario, meaning, here we know the flawed design and everything else stemming from contract award caused problems that trickled down throughout contract performance resulting in inefficiencies for KP and its subcontractors.

DECISION

Motions

*In Limine*

The parties filed numerous motions prior to the hearing which we now address. The Corps filed an October 27, 2022 Motion in Limine to Exclude the Expert Testimony [and Reports] of Proffered Scheduling and Disruption Experts Alex Staley, William McConnell, William Schwartzkopf, Mike Zollman and Andrew Englehart. In addition, KP filed an October 26, 2022 Motion in Limine to Exclude Evidence of Quantum in this Bifurcated Proceeding. In the motion, KP sought to exclude evidence, including expert reports and testimony, which addresses quantum because it is irrelevant to this portion of the appeal addressing entitlement only; we note this related mainly to Mr. Jerz' report and testimony. The Board denied the motions during the hearing explaining the parties could raise objections to the experts and/or testimony in their briefs (tr. 15/275-78, 282; 16/14-15).

We note at the onset that the extent to which the Board relies upon expert testimony "is an evidentiary determination left to the sound discretion of the Board." *Lebolo-Watts Constructors 01 JV, LLC*, ASBCA No. 59740 *et al.*, 21-1 BCA ¶ 37,789 at 183,427. The Board's discretion includes deciding which expert statements and positions to accept or reject. *Wright Bros., the Bldg. Co., Eagle LLC*, ASBCA No. 62285, 23-1 BCA ¶ 38,255 at 185,778 (citing *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 judgement for that of the expert.")). We have already addressed some of these issues in our findings and made

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respective findings on those matters. A few others relating to delay are addressed later in our discussion on the issues.

In addition, KP filed a Motion in Limine to Exclude Evidence in Contravention of the Parties' Joint Factual Stipulation regarding the 209 days of critical path delay related to mold. As the Board has already decided that issue in a prior appeal and the parties have agreed to the 209 days of delay, the motion has been rendered moot.

*Adverse Inference*

The one remaining motion to address is KP's motion for an adverse inference against the Corps (tr. 16/15). In this motion, KP argues that prior to filing its first delay and damages claim on June 30, 2017 (as noted there are two pending), it requested confirmation that the Corps had placed a litigation hold on its agents' records, including design records, funding related documents and all emails (app. mot. at 2, 5).

After KP filed its second delay and damages claim, it issued the DOR a subpoena, who responded with 3,279 documents which did not include any internal emails and only included 12 external emails with the Corps (app. mot. for adverse inference (app. mot.) at 6-7). Ultimately, the DOR explained the following: (1) prior to December 1, 2017, it retained all emails indefinitely; (2) on December 1, 2017, it purged all emails more than four years old; (3) on December 1, 2018, it purged all emails more than six months old; and (4) in October 2019, it destroyed all documents on its project-related server (*id.* at 8; *see also* app. br. at 198).

According to KP, this destruction of documents is spoliation for which the Corps is responsible (app. mot. at 9). KP argues that spoliation can occur well before litigation is imminent, does not require intentional or bad faith intent, and the DOR was required by its settlement agreement with the Corps to provide litigation support (*id.* at 10-11). KP also argues that because the DOR was an agent of the Corps and the Corps exercised control over the DOR's maintenance of project-related documents, the Corps was responsible for this spoliation and the Board should draw an adverse inference and essentially conclude the Corps was responsible for all of the delay and damages KP seeks (*id.* at 11-15).

The Corps failed to address this issue; KP argues therefore the motion should be granted (app. reply br. at 8). To succeed on a motion for adverse inference due to spoliation, however, KP was required to prove: (1) the party having control over the evidence was obligated to preserve it when it was destroyed or altered; (2) the destruction or loss was accompanied by a "culpable state of mind;" and (3) the

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destroyed or altered evidence was “relevant” to KP’s claims (i.e., a reasonable factfinder could conclude that the lost evidence would have supported KP’s claims). *Garco Constr., Inc.*, ASBCA Nos. 57796, 57888, 13 BCA ¶ 35,456 at 173,879 (citation omitted). Since KP is seeking a dispositive outcome based on the alleged spoliation, the “culpable state of mind” element equates to a showing of bad faith. *Sungjee Constr. Co., Ltd.*, ASBCA No. 62002, 21-1 BCA ¶ 37,825 at 183,701 (citing *Micron Tech., Inc. v. Rambus, Inc.*, 645 F.3d 1311, 1327 (Fed. Cir. 2011)). Further, to impose dispositive sanctions, the Board would also have to consider the degree of fault of the party who destroyed the evidence, the degree of prejudice suffered by the opposing party, and whether there is a lesser sanction available. *Id.* (citing *Micron Tech., Inc.*, 645 F.3d at 1329).

Here, KP has not provided any evidence the Corps acted in bad faith. In fact, KP itself avers and the facts show that in the summer of 2017, the Corps directed the DOR to provide all of its project records for discovery to fight the claim, and sent the DOR a folder to facilitate transmission of documents (finding 331).

Further, the Board does not need thousands of additional documents from the DOR to find, as it has already done, that the design prior to contract award was deficient and that there was not a complete design until much later, if one at all. Rather, the Board already has numerous documents from both KP and the Corps, and 17 days of hearing testimony, to make all the findings necessary for a ruling here. The remaining conclusions KP seeks due to the spoliation are legal conclusions, addressed next. Accordingly, the motion for an adverse inference is denied.

Legal Arguments – Overview

KP argues that the Corps’ defective design, contract maladministration and inadequate funding caused KP and its subcontractors to suffer 525 days of critical path delay and disruption over a three-year period—November 2014 through December 2017 (app. br. at 7, 10). KP argues the Board should find entitlement because the Corps breached the contract by providing defective specifications (pursuant to the Spearin doctrine), breached the duty of good faith and fair dealing, and materially breached the contract in numerous respects. KP argues it is entitled to damages and an equitable adjustment pursuant to the Changes clause (*id.* at 198-255). KP further argues the design changes resulted in cumulative time and cost impacts (*see e.g., id.* at 7-8, 42, 51-52, 67, 69, 85, 88, 115-16). KP argues the same for its pass through subcontractor claims (*see generally id.* at 135).

KP argues the Corps has already issued excusable time extensions for the days in question. However, KP argues that the Corps did not issue the time extensions

immediately, but rather eventually, which forced KP and its subcontractors to implement extensive and unplanned acceleration (app. br. at 118-19). This resulted in KP bearing costs of “extended field and overhead” (*id.* at 118). Thus, KP argues that the Corps has already acknowledged the time delay and reimbursed KP for direct costs in some cases but failed to reimburse KP for the time associated with the delay (*id.* at 168-69). In addition, KP contends that the delays, which were recognized by the Corps, were cumulative and resulted in unplanned acceleration, increased manpower, increased manhours and overtime, supplementation of the subcontractor crews by KP, and loss of productivity (*id.* at 119).

The Corps acknowledges that everyone working on the project believed KP was entitled to “something” and therefore, about halfway through the project, “the government helped KP preserve the ability to bring a cumulative impact claim for the cumulative effect of various modifications” (gov’t br. at 81; *see also* findings 343, 438). Regardless, the Corps disputes all of KP’s arguments and asserts several affirmative defenses which we must first address.<sup>30</sup>

#### Delays and Disruptions

The parties call this the D&D claim, short for delay and disruption. The Corps’ affirmative defenses center around one theme--that a delay claim and disruption claim are different, based on different legal theories, and thus separate claims (gov’t br. at 91-103). The Corps’ affirmative defenses, legal arguments and expert reports hinge on the premise that these are separate claims and should have been filed as such.

Although the two claims may arise together on the same contract, there is a distinction in the law between (1) a delay claim, and (2) a disruption or cumulative impact claim. *Bell BCI Co. v. United States*, 81 Fed. Cl. 617, 636-37 (2008), *aff’d in part, vacated in part, and remanded*, 570 F.3d 1337 (Fed. Cir. 2009). Specifically, a delay claim “captures the time and cost of *not* being able to work,” while a disruption/cumulative impact claim “captures the cost of working less efficiently than planned.” *Bell BCI Co. v. United States*, 72 Fed. Cl. 164, 168 (2006) (citing *U.S. Indus., Inc. v. Blake Constr. Co.*, 671 F.2d 539, 546 (D.C. Cir. 1982) (holding that a delay claim provides redress from not being able to work while a disruption claim compensates for damages when the work is more difficult and expensive than anticipated); *Fox Constr. Inc.*, ASBCA No. 55265 *et al.*, 08-1 BCA ¶ 33,810 at 167,381 (loss of production means the contractor proceeded in a less productive manner). In some cases, there may be a cumulative delay claim, which “is a single

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<sup>30</sup> The parties make numerous arguments, or conjectures, which we have considered and find without merit and do not address here in detail.

claim of a number of days of delay, a total delay caused by government action or inaction.” *Gaffny Corp.*, ASBCA No. 37639 *et al.*, 94-1 BCA ¶ 26,522 at 132,012.

Here, we have a claim for cumulative delays (using the windows analysis) and cumulative disruptions/impacts.

*Affirmative Defense Re: Contract Disputes Act (CDA) Requirements*

The Board’s jurisdiction is governed by the CDA, which requires the contractor’s submission of a claim to the contracting officer for decision. 41 U.S.C. § 7103(a)(1). The Corps’ main arguments that KP’s omnibus claim and complaint fail to meet the CDA requirements are as follows: lack of a sum certain for specific claim allegations/different legal theories; vague and unsupported theories of recovery, including some never presented to the contracting officer; and conflated factual basis and legal theories based on one theory of total entitlement (gov’t br. at 83-111).

The Corps argues that, as a result, the contracting officer was not provided with adequate notice of the basis and amount of the claim. The Corps spends several pages explaining to the Board the policy behind the CDA, which is to try and resolve disputes efficiently and expeditiously, and then complains it could not do so as a result of this “Frankenstein Monster” claim (gov’t br. at 81-93). As the Corps discusses both the claim and complaint (as amended), and sometimes focuses solely on the complaint, we must first summarize it. Such a summary demonstrates that the complaint and claim state the same arguments.

In Count I of the complaint, KP seeks an equitable adjustment pursuant to the Changes clause, FAR 52.243-4 (compl. ¶¶ 166-76). According to KP, the Corps changed the contract when it awarded a contract that had a deficient and incomplete design, and then during performance, provided design revisions with errors and omissions (*id.* ¶¶ 170-71). Further, KP alleges the Corps then directed KP and its subcontractors to perform individual and cumulative changes due to the incomplete and erroneous designs which resulted in a delay and disruption of the schedule, sequencing and performance, causing a loss of productivity and other inefficiencies (*id.* ¶¶ 172-73). KP alleges that the defective specifications and changes resulted in over-inspections by the Corps and other extra contractual directives which also contributed to the delay and disruption (*id.* ¶ 174). As noted, KP’s claim also argued it was entitled to compensation for its direct work, indirect work, and cumulative impact pursuant to the Changes clause and the deficient design the Corps provided KP (finding 420).

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In Count II, KP alleges the Corps breached the contract by providing a materially incomplete and erroneous design at the start of construction and then also later, with its design changes and revisions (compl. ¶¶ 180-81). KP further argues the Corps breached the contract by directing KP and its subcontractors perform numerous and significant changes resulting from the defective design and then failing to reasonably administer the contract (e.g., failing to timely and fairly negotiate change orders, REAs, and schedule updates; issuing excessive design changes; imposing overzealous and improper inspections; failing to maintain control of the design and design documents; failing to compensate KP for increased costs; having KP's subcontractors incur delays, disruptions and inefficiencies) (*id.* ¶¶ 183-85). While KP's claim does not specifically characterize this as a legal ground, the entire claim encapsulates this theory and addresses each allegation (*see generally* findings 415-29).

In Count III, KP alleges the Corps breached the implied warranty of plans and specifications by providing materially incomplete and erroneous construction designs (compl. ¶ 190). Again, KP argues this forced KP and its subcontractors to incur significant delays, disruptions, inefficiencies, and damages (*id.* ¶¶ 190-92). In its claim, KP also argued the Corps breached its implied warranty of specifications and owes KP all of its costs (delays, disruptions, increase in labor inefficiencies) (finding 421).

In Count IV, KP alleges the Corps breached the duty of good faith and fair dealing. KP argues the Corps provided KP with a materially incomplete and erroneous design; failed to disclose this to KP and that the Corps intended to resolve known design deficiencies during construction; failed to disclose the contract award was inadequately funded; and required KP bear the cost of the Corps' incomplete design (e.g., failed to timely negotiate change orders, REAs, claims) (compl. ¶ 196). In addition, KP argues the Corps required KP to correct and complete the design and perform changed work without compensation; failed to proactively resolve its own design errors; failed to cooperate with KP's efforts to advance the project; failed to timely consider, negotiate and accept KP's schedule updates; overzealously inspected KP's work with IRs and CSTs and abused the inspection process; and failed to maintain control of the design documents (*id.*). KP argues it and its subcontractors incurred significant delays, disruptions, inefficiencies and other increased performance costs and damages as a result (*id.* ¶¶ 197-98). Likewise, KP had argued in its claim that the Corps breached its duty of good faith and fair dealing when it failed to timely correct the defective specifications and later attempted to correct them using EJs, maladministered the change order process and contract, failed to timely negotiate claims, and used an extra contractual and abusive inspection process (finding 421).

In sum, in its complaint, KP seeks to recover \$169,583,431 in costs and damages for 525 calendar days of delay and disruptions that allegedly negatively impacted KP and its subcontractors between November 30, 2014 and April 19, 2018 (JSF ¶¶ 6, 16; compl. ¶¶ 175, 186, 192, 198). KP incorporated by reference its entire claim including all exhibits into its complaint (compl. ¶ 20). As noted, KP argued the same in its claim (findings 415, 423).

#### *Sum Certain Requirement*

The Corps argues that KP fails to state a sum certain for each different legal theory of recovery and conflates arguments relating to delay, disruption, cumulative impact and acceleration making it impossible for the Corps to determine the sum certain for each of these legal theories (gov't br. at 91-96). As an example, the Corps argues that Count I of the complaint includes costs for both direct and indirect work and costs for impact/disruption and delay which conflates the legal issues of delay and disruption/impact (*id.* at 94). The Corps contends that each are separate claims (because they are separate theories of recovery) and therefore each needed a sum certain (*id.* at 95). Similarly, the Corps argues that each count of the complaint includes damages attributed to both delay and disruption, despite being separate legal theories (*id.*).

The Corps also contends that KP failed to set forth a sum certain for its claims based upon different factual bases because it “merges various numerous s design defect allegations (structural, mold, ceiling, wall) into a single sum certain, along with additional modifications that are not related to alleged defects but rather were issued to implement the owner’s changed requirements (beddown, joint occupancy, commissioning, and controls design changes)” or other issues such as the “alleged over-inspection and other constructive changes. . . (overhead design, EJs, post-mold inspections, anchor bolt survey, CST reports)” and “a contract interpretation disagreement (enhanced drywall finishings)” (gov't br. at 97). In sum, the Corps complains that KP categorized its costs into buckets to which it attributes multiple different causes but was required to assign a sum to each independent cause for which it claims damages (*id.* at 101).<sup>31</sup>

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<sup>31</sup> The Corps places much emphasis on *Placeway Constr. Corp. v United States*, 920 F.2d 903 (Fed. Cir. 1990), to argue that this large claim here is actually multiple claims requiring a sum certain (gov't br. at 84, 87, 97-101). The court in that appeal stated that to determine whether “two or more separate claims, or only a fragmented single claim, exists” one must look at whether the claims are “based on a common or related set of operative facts” *Placeway Constr. Corp.*

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KP contends the Corps forfeited these arguments regarding an alleged lack of a sum certain because they were not raised until years after KP submitted the claim, the parties engaged in discovery and an alternative dispute resolution and concluded a hearing on the merits (app. reply br. at 13-14). KP further argues that in its amended complaint, KP stated that pursuant to “41 U.S.C. § 7103 and [FAR] 52.233-1,” KP submitted its claim, and in its answer, the Corps “[a]dmitted that KP submitted the [claim] as alleged,” but denied only the amount of its liability (*id.* at 15 (quoting answer ¶ 20)). And of course, KP argues that it submitted a claim detailing the basis and amount, requested a certified sum certain, included a critical path analysis, and identified specific and compensable delay days which it separated into “windows” (*id.* at 17-18). KP argues it tied these windows to specific costs resulting from the alleged Corps’ acts and omissions (*id.* at 18). Further, KP avers the COFD acknowledged the sum certain and compensable days requested, addressed each window of the claim and associated cost components, and never asserted there was no sum certain (*id.* (citing R4, tab 28.01)).

In *ECC Int’l Constructors, LLC v. Sec’y of the Army*, the court held that “the requirement to state a sum certain in submitting a claim under the CDA is a mandatory, nonjurisdictional requirement subject to forfeiture.” *ECC Int’l Constructors, LLC v. Sec’y of Army*, 79 F.4th 1364, 1380 (Fed. Cir. 2023). The Corps acknowledged this decision in a footnote, arguing that a sum certain for each separate claim is nonetheless required (gov’t br. at 86 n.14). The Corps contends it has repeatedly complained of this matter, including prior to the hearing where it stated that “the Government still does not know . . . even how much of the money KP believes it is owed is attributable to lost productivity, as distinct from delay” (*id.* at 95 (quoting 10/30/22 Gov’t Resp. in Opp’n to KP Mot. *In Limine* to Exclude Evidence of Quantum at 5)). The Corps, however, fails to cite any motion filed specifically arguing this matter prior to the hearing.

We reject the Corps’ attempt to claim it raised this matter via a comment in an opposition brief relating to a motion *in limine* to exclude quantum evidence. *See ECC Int’l Constructors, LLC*, ASBCA No. 59643, 24-1 BCA ¶ 38,490 at 187,085 (the Board “reject[ed] the government’s attempt on remand to shoe-horn into the present discussion an exchange during the hearing in which the government did *not* present the sum-certain challenge that it presented only after the hearing.”). Therefore, we agree

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*v. United States*, 920 F.2d. at 907. That appeal involved the segregation of claims for certification purposes, an issue we do not have here. *Id.* at 907-08. Plus, the claims here are based on a common set of operative facts (*see* findings 415-29).

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that the Corps raised this issue late in the game and has forfeited its right to require KP comply with the Corps' own view of the sum certain requirement as the Corps waited until after a hearing on the merits to raise the issue. *Id.*; *see also JE Dunn Const. Co.*, ASBCA No. 63183, 24-1 BCA ¶ 38,478 at 187,025 (government forfeited its right to challenge contractor's satisfaction of the sum certain requirement by waiting until after the hearing on the merits to request dismissal on sum certain grounds).

The irony of course, is that the crux of the Corp's argument relating to KP's alleged lack of a sum certain is that it prevented the contracting officer from possibly settling some or all the claims. But if that were the case, then why did the Corps wait to raise this issue after a 17-day hearing and never in a formal motion to the Board?

And regardless of the Corps' arguments, KP did submit a sum certain for each allegation in its claim (findings 431-33). The Corps' arguments even admit that each component of the claim (delay v disruption) has a sum certain (*see generally* gov't br. at 96). And the COFD itself had no problem identifying the alleged costs which it organized into five subsections (finding 443). Further, KP did segregate out the claim issues it could, such as the level 4 drywall finish and mold claim (findings 220, 279).

### *Claim Specificity*

In a similar vein, the Corps argues the various issues in the claim and complaint are separate claims, or subclaims, and should not be lumped together into one giant claim. In other words, they are based on either separate legal theories (delay, cumulative impact, acceleration) or operative facts (e.g., thermal movement v. progressive collapse). This apparently meant the hundreds of pages of claim narrative contained "insufficient specificity." (Gov't br. at 103-10)

KP argues that the Board should conclude these "notice-based" challenges have been forfeited since, like the sum certain requirement, they are not based in statute (app. reply br. at 13-14). We agree. The Corps never explains why it has waited years to make these arguments in any formal way, including waiting until after it issued a lengthy COFD. However, we address a few examples, mainly because the Corps spent so much (too much) of its briefing on these arguments.

The Corps argued, for example, that KP's complaint and claim narrative are not specific because Counts II and III of the complaint are based on a defective design but KP fails to identify the specific design defect/specification (gov't br. at 105). This argument is not persuasive because KP's claim and numerous attachments detail that the contract and numerous modifications were issued due to a design defect (*see* findings 416-18, 425, 428). And the modifications speak for themselves--the Corps

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issued them due to design defects and set forth in the modification the amended specification paragraphs and drawings (*see e.g.*, findings 80, 133, 142, 147, 155, 159, 166, 168, 250, 275). Yet, according to the Corps, it is even unclear as to whether KP is arguing it relied on design or performance specifications (gov't br. at 106). The Corps makes this assertion despite the fact KP argues, *ad nauseum*, that the contract stated it was 100 percent designed (or was supposed to be).

Notably, the Corps cites to nothing in the CDA that specifically requires what it is seeking: a re-write of the claim so we can drag this out even longer or that KP loses its appeal rights. In fact, the Corps' arguments seem the opposite of the purpose of the Board, in which the CDA instructs "shall . . . to the fullest extent practicable provide informal, expeditious, and inexpensive resolution of disputes." 41 U.S.C. 7105(g)(1).

As the Corps notes, KP's claim includes numerous subcontractor claims, direct and indirect costs, all of its delay and disruption costs, and accelerations costs "to boot" (gov't br. at 81, 106-10). The Corps contends this is what hindered its ability to settle the dispute (*id.* at 107-09). But the biggest problem with the Corps' argument is that it is the one that caused KP to file this massive claim. Rather than dealing with the issues as they arose during construction, the Corps kept punting the decision, with things such as the red star and blue clock modifications, until after it received a completed project (*see e.g.*, findings 91, 93-94, 98-100).

### *Presentation of Issues in Claim*

One potentially interesting argument by the Corps, buried in a section of its brief, is that KP's count II concerning multiple breaches was never presented to the contracting officer and only the characterization of count III, which relates to a single breach, was presented (gov't br. at 105). A party may seek redress using alternative legal theories of recovery. *Lockheed Martin Aeronautics Co.*, ASBCA No. 62209, 22-1 BCA ¶ 38,178 at 185,417-18; *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003). The Board has held that "[t]he introduction of additional facts which do not alter the nature of the original claim . . . or the assertion of a new legal theory of recovery, when based upon the same operative facts as included in the original claim, do not constitute new claims." *Trepte Constr. Co.*, ASBCA No. 38555, 90-1 BCA ¶ 22,595 at 113,385-86.

As noted, in Count II, KP alleges the Corps breached the contract several ways, including by providing a materially incomplete and erroneous design at the start of construction and then also later, with its design changes and revisions (compl. ¶¶ 180-85). While KP's claim does not state specifically that this is a legal ground, the

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entire claim encapsulates this theory and addresses each allegation (*see generally* findings 415-29). We conclude the issue was presented to the contracting officer.

The Corps also argues, in a completely different section of its brief, that any argument relating to structural design was not part of the claim presented to the contracting officer (gov't br. at 126-27). The Corps complains that in the claim, KP stated the structural design issues relating to thermal movement, progressive collapse, structural steel and vertical deflection were not at issue (*id.* at 126).

The claim states that the flawed structural design is “technically not part of this Claim” but then spends six pages discussing the impact of these flaws on KP and its subcontractors (finding 417). Later in the claim, KP specifically states that the flawed structural design significantly delayed the commencement of site utility installation (*id.*). The COFD addressed these two issues in the response (e.g., structural design impacting site work and structural design impacting precast panels and building heat) (finding 441). Accordingly, we find that these issues are properly before us.

*Affirmative Defense Re: Release and Accord and Satisfaction*

The Corps' better argument is that several parts of KP's delay and disruption claims are barred by accord and satisfaction and release. The Corps explains that while its answer only raised the accord and satisfaction defense, and did not specifically discuss the related defense of release, the argument that several of the bilateral modifications foreclosed further payment was raised in the COFD, the Corps' pre-hearing brief, and at the hearing (gov't br. at 112 n.20 (citations omitted)). The Corps states that as a result, KP has suffered no prejudice and both defenses are within the “proper scope of the appeal” pursuant to Board Rule 6(d) (*id.*) (quoting *Frazier Invs., Inc. d/b/a Optimum Constr.*, ASBCA No. 63001, 23-1 BCA ¶ 38,313 at 186,044).

“Affirmative defenses’ can protect a defending party from the consequences of its actions, even if everything alleged in the claim is true” and are “available to avoid suit or ensure a fair result to the one against whom the action was brought, even if the law might otherwise dictate a different result.” *Lockheed Martin Aeronautics Co.*, ASBCA No. 62209, 21-1 BCA ¶ 37,891 at 184,024 (citations omitted). Board Rule 6(b), which sets forth requirements for the government's pleadings, requires the answer to include any affirmative defenses. As noted by the Corps itself, it did not assert the affirmative defense of release in its answer, and only asserted the following:

1. Accord and Satisfaction. There were 14 modifications to this Contract that authorized additional time and an extended contract completion date, some of

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which were bilateral modifications accepted by the Appellant. See Table 3 in the Contracting Officer's Final Decision. To the extent that additional time was negotiated and accepted by KP through a bilateral modification with the Government, no additional compensation is due.

(Answer at 62-63)

As admitted, the Corps did not explicitly raise release as an affirmative defense in its pleadings or seek to amend its answer to add it. But our analysis does not stop there. Board Rule 6(d) states, in part, that “[w]hen issues within the proper scope of the appeal, but not raised by the pleadings, are tried by express or implied consent of the parties, or by permission of the Board, they shall be treated in all respects as if they had been raised therein.” The same Board rule further explains that in those instances, motions to amend the pleadings “are not required.” Board Rule 6(d). In addition, the rule explains that if a party objects to evidence at a hearing because it is a matter not set forth in the pleadings, it may be admitted within the proper scope of the appeal provided the objecting party is granted an opportunity to meet such evidence. *Id.*

Here, during the hearing, the Corps raised the issue of the releases several times. Further, the matter was addressed in the Corps' post hearing brief and also in appellant's post hearing brief and reply brief. As the Board has stated before:

Absent “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment,” we “freely” permit amendment of pleadings.

*Kellogg Brown & Root Servs., Inc.*, ASBCA No. 62681 *et al.*, 24-1 BCA ¶ 38,476 at 187,013-14 (citations omitted). Although the Corps did not formally amend its answer to add the affirmative defense of release, we conclude the Corps has tacitly sought to amend its answer and that ultimately, there is no prejudice to appellant here.

*Accord and Satisfaction, Release, Both, or N/A*

While an accord and satisfaction and a release are separate defenses, an agreement may be both, either of which may bar future claims. *Holland v. United States*, 621 F.3d 1366, 1377 (Fed. Cir. 2010) (citations omitted). An accord and

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satisfaction occurs when “some performance other than that which was claimed to be due is accepted as full satisfaction of the claim.” *Id.* “Accord and satisfaction has been ‘aptly described’ as a four-part test of ‘proper subject matter, competent parties, meeting of the minds of the parties, and consideration.’” *Meridian Eng’g Co. v. United States*, 885 F.3d 1351, 1363 (Fed. Cir. 2018) (quoting *Brock & Blevins Co. v. United States*, 343 F.2d 951, 955 (Ct. Cl. 1965)).

A release, on the other hand, is when a party relinquishes a right or abandons a claim that could be asserted against another. *Holland*, 621 F.3d at 1377 (citation omitted). “A release is contractual in nature and must be interpreted in the same manner as any other contract term or provision.” *Korte-Fusco Joint Venture*, ASBCA No. 59767, 15-1 BCA ¶ 36,158 at 176,455 (citation omitted). If the release is “clear and unambiguous” it must be given its plain and ordinary meaning. *Bell BCI Co. v. U.S.*, 570 F.3d at 1341.

The government bears the burden of proof on its defenses of accord and satisfaction and release. *Sonabend Co.*, ASBCA No. 63359, 24-1 BCA ¶ 38,482 at 187,033. For either defense, the Corps “must show that both parties intended [the bilateral modification] to release and/or discharge the claim[s] that [are] the subject of this appeal.” *Optex Sys., Inc.*, ASBCA No. 58220, 14-1 BCA ¶ 35,801 at 175,097.

#### *Modifications with the Standard Release*

The Corps identifies numerous modifications that it believes are an accord and satisfaction because each modification settles a dispute regarding a design issue (gov’t br. at 111, 113-14). Each of these modifications also includes what we have labeled the standard release (*id.* at 113). According to the Corps, the plain language of this release foreclosed consideration of the modification’s subject matter as part of a cumulative impact claim and also foreclosed any additional costs and time (e.g., extended field and home office overhead) (*id.* at 113-14).

KP argues the Corps lacked sufficient funding to pay the true costs of the modifications (e.g., delay and cost impacts) and would only pay direct costs and provide for a few time extensions (app. br. at 245-46). KP argues any modification agreeing to only additional time does not mean the release covers requests for additional money (*id.* at 246).

KP also argues that to prevail on the defense of accord and satisfaction, the Corps must show a meeting of the minds (app. br. at 246). According to KP, the Corps was always aware (starting in 2014) that KP would file a cumulative impact claim and cites to the testimony of the contracting officer (*id.* at 246-47 (citations

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omitted)). Accordingly, KP argues that the standard, revised and modified releases do not reflect a new understanding as to KP's reservation of the cumulative impact claim, but rather clarify and confirm the parties continued understanding (app. reply br. at 65). For example, KP explains that the parties applied the modified release to unexecuted modifications dating back to 2014, which reflects the parties understanding of the impending claim issues (*id.* at 65-66).

Viewing the modifications absent the release would not evidence an accord and satisfaction regarding the design defects because the performance by KP on the modification cannot be considered full satisfaction of the claim for cumulative impact, delay, or even any of the arguments regarding design defects. *See Pyrotechnic Specialties, Inc.*, ASBCA No. 57890 *et al.*, 17-1 BCA ¶ 36,696 at 178,703 (no accord and satisfaction where no evidence that the parties reached a meeting of the minds that the change to the sealing disk specifications was intended to satisfy future improper rejection claims). In other words, the modifications, absent any release, did not evidence a settlement of the disputes KP and the Corps had regarding the never-ending design defects, the cumulative impact, or delays.

We focus therefore on the specific release in the modifications since a bilateral modification with a release “usually constitutes an accord and satisfaction unless that release is either ambiguous or limited in scope.” *Jackson Constr. Co. v. United States*, 62 Fed. Cl. 84, 92 (2004) (citing *Merritt-Chapman & Scott Corp. v. United States*, 458 F.2d 42 (1972); *Brock & Blevins Co. v. United States*, 343 F.2d 951, 954-55 (1965)). A release is contractual in nature and therefore we interpret it in the same manner as any other contract term or provision. *See Metric Constructors, Inc. v. United States*, 314 F.3d 578, 579 (Fed. Cir. 2002). Accordingly, we look at the plain language of the release and “if the ‘provisions are clear and unambiguous, they must be given their plain and ordinary meaning.’” *McAbee Constr., Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996) (quoting *Alaska Lumber & Pulp Co. v. Madigan*, 2 F.3d 389, 392 (Fed. Cir. 1993)).

We identified in the facts those modifications with the standard release and address them here. With respect to structural issues, both Modification No. 389 (structural steel) and Modification No. 368 (progressive collapse) included the standard release (findings 129, 142). In addition, with respect to overhead MEP, the following modifications included the standard release: Modifications Nos. 182, 225, 323, 324 and 380 (finding 159). The Corps further argues that Modification No. 325, regarding wall modifications (gov't br. at 131-32 (citing Table 1)) and Modification No. 56 concerning the 48V/UPS contain the standard release (*id.* at 135; *see also*

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findings 165, 168).<sup>32</sup> The Corps argues KP released its right to file cumulative impact, delay and direct cost claims relating to the “subject matter of the modification as part of a cumulative impact claim” (gov’t br. at 114).

As noted, the standard release stated that KP “releases the government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances,” that the adjustment to contract price and time “is inclusive of all costs and time incurred by the contractor as a consequence of this modification individually and collectively with other modifications” which includes but is not limited to “delay, impact, inefficiency and extended field and home office overhead” (finding 121). At least one court has held that language stating a contractor releases the government from “any and all liability” for further equitable adjustments attributable to the modification is unambiguous and would include a release of any cumulative impact claim. *Bell BCI v. U.S.*, 570 F.3d at 1341.

In this case, the standard modification also included language that KP released the government from any and all liability resulting from the modification and other modifications relating to delay, impact, inefficiency and extended field and home overhead (finding 121). This added language unambiguously releases the government from any claim relating to the substance or “subject matter” of that modification as part of cumulative impact claim.

*Modifications with the Revised or Other Release Language*

The Corps does agree, generally, that the modified release permitted a cumulative impact claim (gov’t br. at 114, 118). The Corps argues that the modified release, however, did not preserve a delay or direct impact claim (*id.* at 118-19, 121). In this regard, the Corps argues that although KP reserved a cumulative impact claim, KP did not reserve a claim for impact or inefficiency relating specifically to each modification but only for disruption/impact/reduced productivity costs due to a cumulative impact (*id.* at 118, 120). Again, KP argues that this language clarifies its intent to reserve the right to claim indirect costs for delays (resulting from extended time on the contract) and cumulative impact costs (app. reply br. at 69). In other words, KP reads it, and has put forth a claim and complaint with the same

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<sup>32</sup> The Corps also contends the KP abandoned allegations relating to the 48V/UPS issue in its brief (gov’t br. at 135). In KP’s brief, however, KP argued the 48V/UPS matter relates to the design defect allegations and the Corps’ failure to amend the schedule issue (app. br. at 206, 227). We agree with KP as Modification Nos. 601 and 603 addressed the design deficiencies for the undersized cable tray for the 48V/UPS (finding 166).

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interpretation, that cumulative impact relates to both the 525-day delay *and* the impacts/inefficiencies.

As set forth in the facts, most of the remaining modifications addressed in detail included the modified release releasing the government from any and all liability (finding 124).<sup>33</sup> The modified release also states that the adjustment to the contract price and time was “inclusive of all costs and time agreed to by the contractor as a consequence of these specific facts and circumstances” including those for delay, impact, inefficiency and extended field and home office overhead (*id.*). The language, however, expressly excepts costs and impacts “caused by the cumulative impact of multiple changes and modifications” (*id.*).

We find the language ambiguous as the release states in one sentence that the costs and time set forth in the modification (if any) include delay, inefficiency and impact costs, but then specifically preserves KP’s right to claim costs and impacts caused by the cumulative impact of multiple changes and modifications. As we discussed above, although delay claims and cumulative impact claims are different, there is such a thing as a cumulative delay claim. If a “release is ambiguous as to its scope of coverage, we construe its language to effect the parties’ intent at the time they executed the release.” *Dureiko v. United States*, 209 F.3d 1345, 1356 (Fed. Cir. 2000).

Ultimately, KP’s interpretation is supported by the facts. Starting in May 2014, KP made the Corps and others aware that there was a potential for a future cumulative impact claim (finding 81). Starting November 2015, it became clear the parties could not agree *on time and impact* for various modifications thereby requiring the use of blue clock and red star modifications (findings 98-99). In 2016, KP informed the Corps it wanted to revise the release language and the parties agreed on the modified release (findings 122-24). Specifically, KP notified the Corps it wanted to reserve its rights for “unknown costs and impacts resulting from the facts and circumstances giving rise to the modification” (finding 123). KP explained this included, but was not limited to, cumulative impacts (*id.*).

Taken as a whole, this explains to us KP’s intent to preserve “unknown” delay costs due to cumulative impact with the modified release. And as we discuss in more detail next, the Corps seemingly understood this when a year later the parties agreed to

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<sup>33</sup> With respect to Modification No. 127, regarding BIM coordination, the Corps argues that this included the standard release, which it did not (*compare gov’t br. at 58, with finding 162*). We note that the release here limited the release to only BIM or BIM related issues for certain floors through July 31, 2015 (finding 162).

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the revised modified release to reserve KP's right to "claim for time AND cumulative impact" (finding 125).

Thus, while the release language precludes a singular claim "as a consequence of [the] specific facts and circumstances" of that modification, it did allow for costs and impacts of a cumulative impact claim, which in this case included cumulative delay. This makes sense because ultimately even the Corps recognized that one could not look at the delays for the modifications individually but needed to look at them holistically due to the number of impacts not in the schedule or not captured correctly (*see* finding 113).

We therefore conclude the modified release (and the revised modified release which similarly reserves KP's rights to file a cumulative impact claim and recover any time-related costs) do not prevent KP from filing this claim for cumulative delay (aka the windows analysis) and impact costs.

KP argues that even if the Board were to conclude there was an enforceable release, or accord and satisfaction, it was vitiated through continued consideration and negotiation of the issues by the Corps (app. br. at 247-48; app. reply br. at 70-73). The Corps acknowledges it "understood that KP had not entirely released a cumulative impact claim" and "continued to negotiate with KP about that cumulative impact claim" (gov't br. at 147). However, the Corps argues that KP preserved its ability to file a cumulative impact claim when signing the partial releases for wall design, sitework, anchor bolts, and joint occupancy only (*id.*). The Corps argues at all times it construed the various releases as KP abandoning certain rights in its claim and that KP's subsequent conduct fails to show it "never construed the release as abandonment of the claim" (*id.* at 146) (citation omitted).

There are limited circumstances in which a claim may be prosecuted when the parties have executed a release, such as "where the conduct of the parties in continuing to consider a claim after the execution of the release makes plain that they never construed the release as constituting an abandonment of the claim, . . . the release will not be held to bar the prosecution of the claim." *J.G. Watts Constr. Co. v. United States*, 161 Ct. Cl. 801, 807 (1963) (citations omitted); *Bender Shipbuilding and Repair Co.*, ASBCA No. 41459, 91-3 BCA ¶ 24,230 at 121,186. The same standard applies when there has been an accord and satisfaction. *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1581 (Fed. Cir. 1993) (record showed the government continued to negotiate and audit appellant's claims years after they were submitted and therefore the claims were not barred by an accord and satisfaction).

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Whether one considers it vitiation, or not, we ultimately conclude the *numerous* actions of both parties' further evidence the intent regarding the modified releases. For example, in November 2016, the parties entered into bilateral Modification No. 658 for joint occupancy (finding 258) which specifically acknowledged the parties had not agreed yet on the causes or responsibility for the total delay (finding 261). This modification is telling, we believe, about the parties' thoughts on the potential claim issues. The modification included the modified release, provided a 332-day time extension and stated that the Corps and KP "have not come to agreement regarding the causes or responsibility for the total delay in completion of the project" and therefore the modification was "time-only" and did not include any costs (*id.*) (emphasis added). Both parties knew that costs related to delay was an issue that would be decided later (*id.*).

Likewise, in 2016, the Corps issued Modification No. 386, which addressed this wave of wall modifications due to beddown room changes and included the modified release and language that time adjustments and "costs associated with delays, impacts or schedule based supervision costs" were excluded from the modification and not released and would be negotiated in a supplemental modification (findings 211-12). In December 2016, the Corps performed a Monte Carlo analysis, which considered the mold and cumulative impact REAs and noted that as only one of 700 modifications had compensable time, a third party could consider the REA reasonable (finding 323).

In 2017, the Corps discussed the schedule and modifications in terms of evaluating/negotiating the delay and disruption claims (finding 113). In fact, in mid-2017, KP submitted its claim for delay and disruption (finding 414). The Corps requested KP voluntarily withdraw the claim and resubmit it as an REA so the parties could potentially resolve it (*id.*). KP agreed to withdraw the claim and resubmit it as an REA, noting that as a condition, the Corps must agree the claim had entitlement but was subject to further analysis regarding schedule and cost, the parties' schedule experts would be involved, and the parties would establish a methodology to measure quantum (*id.*). The meetings occurred but of course there was no settlement (*id.*). See *Meridian Eng'g Co. v. United States*, 144 Fed. Cl. 667, 673 (2019) (citing *Community Heating & Plumbing*, 987 F.2d at 1581, finding no meeting of the minds where, after the releases were issued, the government requested and considered an REA that included the claim issues which the government alleged were the subject of the release).

Also in 2017, there were still several unilateral blue clock modifications and the Corps hoped that adding the revised modified release language, which would reserve KP's rights to claim for "time AND cumulative impact" would prevent additional issues (finding 125). According to a Corps official, this revised modified release

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addressed direct costs only, reserved the right for KP to claim time and cumulative impact, and acknowledged the time extensions (*id.*). At the same time, there were modifications relating to vertical deflection, thermal movement, UPS/48 V, wall changes, beddowns and commissioning with effective dates in 2016-2018, but with issues dating earlier, containing the modified or revised modified release (findings 133-34, 147-48, 165-66, 168-69, 175, 211-12, 237, 275). For example, in 2018, the Corps issued the final modification for thermal movement, an issue identified in 2014, and which included the modified release (findings 133-34).

Regarding the claim itself, in October 2018, KP resubmitted the delay and damages claim to the contracting officer (finding 415). In 2019, the contracting officer responded to questions from DCAA in which she stated that the releases had been modified several times to “ensure confidence that KP did not waive its right to costs and time associated with the cumulative impact of multiple modifications” (finding 437). The contracting officer also stated that there was the potential for duplication of costs in some modifications where the parties could not agree on all costs because “time and compensable time were in many cases not settled” (*id.*).

Subsequently, the contracting officer issued a final decision in 2020, only noting one modification as containing a release--Modification No. 368 concerning progressive collapse (findings 439, 441). For example, with respect to Modification No. 325 concerning wall revisions and which contained the standard release, the contracting officer awarded KP compensable days of delay (finding 441). With respect to Modification No. 368, the contracting officer did not consider days of delay through November 3, 2015 (finding 439).

The contracting officer did not discuss any other releases, or accord and satisfaction; and she specifically reviewed both the delay and disruption parts of the claim (findings 441, 443 ).<sup>34</sup> The contracting officer identified each day of delay as

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<sup>34</sup> The Corps argues that it was not the contracting officer’s job to dig through the claim to find valid bases and invalid bases (e.g., what has been settled and released) (gov’t br. at 148). It is true that a COFD does not generally act as a waiver of defenses (such as release) since the claim is reviewed *de novo* by the Board. Nevertheless, in the circumstances presented here, the contracting officer’s decision to consider the claim, and the modifications notwithstanding the applicable releases, is one more piece of evidence supporting our finding that the parties did not consider the releases to preclude this claim for cumulative delay and damages. Amongst other things, the contracting officer’s discussion of the releases with DCAA in 2019 discussed above demonstrates them to be something of which they were well aware.

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either compensable or not and concluded that KP was entitled to compensation for only 18 days of delay (findings 438, 440).

The Corps contends that KP is asking the Board “to ignore the plain language of all the releases” and “to hold that by agreeing to discuss its claim with KP, the government was tricked into vitiating all of the signed releases, which both parties understood contemporaneously as collectively releasing some, but not all, issues” (gov’t br. at 147). We do not believe that KP tricked the Corps here but rather, that the Corps has always understood KP was entitled to “something” and therefore in good faith considered all of the issues before it. These facts evidence that the Corps and KP did not intend to foreclose KP’s claims for delay and cumulative impact except, potentially, for Modification No. 368.

With respect to Modification No. 368, addressed in the COFD, the Corps maintains it settled all disputes predating its execution in 2015. Specifically, the Corps argues KP and the Corps settled ALL design issues arising before November 6, 2015. (Gov’t br. at 122-24)<sup>35</sup> KP argues that modifications containing the standard release, such as Modification No. 368 (progressive collapse), do not serve as a complete release to all modifications up to its effective date (app. reply br. at 67).

The Corps’ actions, identified above and several others, demonstrate that Modification No. 368 did not waive every prior design issue. For example, the Corps issued Modification No. 375 due to design deficiencies regarding wall and duct conflicts in L1-L3 (finding 176). It was a multi-part modification and the Corps issued the first part in November 2014, and it did not include any release (findings 176-77). Thus, the Corps issued this first part of Modification No. 375 prior to the effective date of Modification No. 368, which was November 2015. (Findings 143, 176-77) According to the Corps, the release in Modification No. 368 would preclude KP from arguing about the design and other issues related to Modification No. 375. However, the Corps issued the final part of Modification No. 375 in March 2018, and it included the modified release reserving KP’s ability to file a claim (findings 168, 177). The timing here says it all. Modification No. 368 does not erase from consideration all prior design issues. Similarly, it did not waive the issues regarding thermal movement

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<sup>35</sup> For example, the Corps argues that KP, at a minimum, released all structural claims prior to this time because its claim stated that the structural design errors predated the resolution of Modification No. 368 and “thus are technically not part of this Claim” (finding 417). However, as we have already discussed, the claim specifically alleges certain structural issues such as thermal movement significantly delayed the start of site utility installation, especially as it related to concrete operations (*id.*).

and vertical deflection as those modifications contained the modified or revised modified release (findings 133, 148). What did Modification No. 368 do then? It prevented KP from seeking costs relating specifically to progressive collapse. And it changed the contract completion date and therefore was a reset for scheduling purposes.

In sum, the record shows that as work progressed and more issues arose, the Corps acknowledged the issues. Further, the Corps worked with KP to ensure it preserved a claim for cumulative delay and impact, and was attempting to work with KP toward settling any REAs/claims. Any design or other issue covered by a modified or revised modified (or unilateral) modification is at play here.<sup>36</sup>

Entitlement: Three Breaches

As noted, to recover for either a delay or disruption claim, KP must prove liability, causation, and resulting injury. *S-Tron*, ASBCA No. 45893, 96-2 BCA ¶ 28,319 at 141,398. KP argues the Corps is liable for the delays and disruptions because it breached the implied and express warranty that the specifications and drawings were not defective, breached the duty of good faith and fair dealing, and ultimately materially breached the contract. KP seeks relief under the contract for the delays (compensable delays) and damages suffered by the breaches.

*Breach of Express and Implied Obligations Regarding Design (Spearin Doctrine)*

KP argues that the Corps was responsible for the project design, provided an incomplete and defective design for KP to use, failed to correct the design in a timely manner, and therefore the Corps breached the contract and is liable for damages pursuant to the *Spearin* doctrine (app. br. at 200, 203-07). KP argues the Corps'

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<sup>36</sup> We note that KP's expert does not rely solely on the issues concerning progressive collapse or the ceiling modifications, which contain the standard release, to demonstrate delay and likewise, KP and its subcontractors' experts do not rely on those issues to demonstrate cumulative impact (*see e.g.*, findings 152-54, 167, 208, 216-17, 225, 239-40, 253, 272, 278, 281, 375-76, 380, 385, 387-88, 395, 399). That is because there were just so many other issues upon which they could rely and we do the same. In other words, the standard release was effective but we do not need to rely on the modifications containing that release for our conclusions here. However, we do note the Corps was still revising ceiling heights in 2016, based on an issue identified in 2014, with a modification that included the modified release, which supports finding a design deficiency related to the ceilings (findings 163-64).

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breach of contract entitles KP to recover all costs proximately flowing from the breach including the direct costs of performing the corrective work and additional work (*id.* at 202).

Likewise, KP argues that the Corps is also liable for all delay, inefficiencies and increased costs caused by the pervasive design defects, especially when the Corps delayed in correcting the defects (app. br. at 207-17). Specifically, KP argues that the deficient design increased performance and administrative costs; forced KP and its subcontractors to leave work behind, perform out-of-sequence and come-back work; delayed the interior work causing a ripple effect to the exterior work; was further impacted by joint occupancy, beddowns, the reintroduction of the 48V/UPS systems and cable trays, IRs, and the mold issue; impacted the critical path causing a delay; and led to the costs included in the subcontractor's pass-through claims (*id.* at 206-17). KP argues that the Corps' use of multi-part modifications, revisions to modifications and design-as-you approach evidence the design was defective and not timely corrected (*id.* at 207). KP relies on its scheduling expert to argue that the design deficiencies and Corps' handling of the matter caused 525 days of compensable critical path delay (*id.* at 215). The Board has already ruled that the Corps caused a 209-day delay due to the mold issue.

To its credit, or because no one can hide this elephant in the room (or in this case, the train car), the Corps acknowledges the design was not complete (findings 35, 68, 73-76, 79-80, 94, 155-56, 322, 328- 29, 336, 338). The Corps acknowledges as true that it engaged in a "massive descoping" of \$200 million on the project which removed an entire floor, three vertical bays, and required revision of at least 30 percent of the drawings resulting in the conclusion the re-designed building was not the same as advertised pre-award. (Gov't br. at 197 (citations omitted); *see also* findings 31, 33, 68) Somehow, the Corps believes this admission demonstrates that KP, being aware of all those changes and even proposing some of them, was at fault (gov't br. at 198-01). According to the Corps, KP should have known the implications of these changes, expected change orders, known the "rushed re-design effort would have mistakes," had the ability to deal with significant changes to the project, and realized the "train of trades" (aka the train) would not proceed in an orderly fashion after award (*id.*). The Corps also argues that KP touted it could handle disruptions and therefore should have kept the train of trades moving in an orderly fashion (*id.* at 200-01).

The parties agree that KP's contract was "design-bid-build" and therefore, the design and construction were "sequential" and performed by two separate contracts and two contractors (findings 7, 39, 69, 83-85; FAR 36.102). The DOR performed A/E services under its contract (finding 7), which, by statute, means the DOR was licensed to provide "professional services" that are "associated with research,

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planning, development, [and] design” of real property. 40 U.S.C. § 1102(2)(A), (B). And the DOR’s contract required it correct or revise any errors or deficiencies in its designs or drawings because it was responsible for the professional quality and technical accuracy (findings 9, 27).

According to the FAR, then, the Corps (and its A/E contractor) are responsible for the design, which the FAR explains as “defining the construction requirement (including the functional relationships and technical systems to be used, such as architectural, environmental, structural, electrical, mechanical, and fire protection), producing the technical specifications and drawings, and preparing the construction cost estimate.” FAR 36.102. Accordingly, any argument by the Corps that deficiencies in the design were KP’s fault must fail (findings 41-43). And have failed before as we found in our prior decision that “KP had no hand in the design of the project and did not have any input in the drafting of the project’s specifications” which meant the Corps “was solely responsible for the project’s design . . .” *KiewitPhelps*, 23-1 BCA ¶ 38,254 at 185,755. The Corps was responsible for the design.

This truism is reflected in the *Spearin* doctrine, which provides that “if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications.” *United States v. Spearin*, 248 U.S. 132, 137 (1918) (internal citations omitted). This implied warranty that the specifications are free of defects includes government-furnished specifications prepared by another contractor. *Radionics, Inc.*, ASBCA 22727, 81-1 BCA ¶ 15,011 at 74,279.

The design included numerous defects, which impacted the entire project, and the Corps is responsible for them (findings 35-36, 43-44, 68, 71, 73-76, 79-81 130, 133, 146-47, 163, 166, 168, 171, 173, 179, 192, 195, 232, 249-50, 274-75, 328, 336, 338, 444-47). The fact that KP may have offered some suggestions during the solicitation process does not mean that KP was aware there would be defects in the design at the time the Corps issued the award or when KP received the specifications and drawings (findings 41, 43). As explained, KP did not create the design or specifications, rather, the Corps and DOR created them.

Further, KP was not aware, nor could it discern, there was a defect in the specifications at the time it submitted its offer and entered into the contract or after the DOR provided the completed design; nor could KP expect that the design would be so defective it would need to be constantly revised. Similarly, in *E.L. Hamm & Assocs., Inc. v. England*, 379 F.3d 1334, 1342 (Fed. Cir. 2004), the Federal Circuit concluded it was “far from obvious” that appellant could look at the numbers or drawings and find the defect (i.e., understated acreage). This appeal involves more than defective

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specifications regarding understated acreage as was the case in *E.L. Hamm*. This appeal involves the defective specifications of an almost one million square foot building with SCIF spaces and a HEMP shield.

In sum, KP relied on the defective design, it was not obvious the design contained numerous defects, and KP was misled into thinking the design was 100 percent complete and accurate. KP was misled by the fact the Corps promised a 100 percent designed project at all times and then misled each time the Corps provided specifications and revised specifications that were erroneous.

The Corps relies on *PCL Construction Services* as support arguing that like the appellant in *PCL*, KP signed a contract that virtually assured it that the design was imperfect (gov't br. at 197). In that appeal, the government issued an invitation for bids and resulting contract explaining there were issues encountered in review of the project area and stating the awardee would perform the final investigation to determine the exact elevations of the initial top of rock and final elevation of competent rock. *PCL Constr. Servs., Inc. v. United States*, 47 Fed. Cl. 745, 756, 787 (2000).

Further, according to the court, the contract stated the drawings would need to be supplemented during construction (and therefore the project was not constructible upon award), there were imperfections in the design that would arise and cause problems requiring the contractor to assist in resolution, and there were mechanisms for compensating the contractor for costs incurred due to contract changes. *PCL*, 47 Fed. Cl. at 787, 790-91. With respect to the drawings and specifications, the contract stated “[e]xtreme accuracy is not guaranteed, nor is perfection in these documents implied[,]” “[t]he drawings illustrate the general arrangements and locations of work; its materials, equipment, and structures[,]” and the “specifications indicate the basic quality, purpose, standard, products, and controls required” for the work. *Id.* at 789. The contract also stated the “[c]ontractor shall expect that there may be some omissions, discrepancies, and conflicts within the design documents and with the actual field and construction conditions encountered” and “therefore requires significant supervision and engineering efforts by the constructors. . . to help resolve such issues when they arise.” *Id.* In addition, the contract was not 100 percent designed as there were several instances where the contractors performed some design work. *Id.* at 796-97.

First, of course, as a Court of Federal Claims case, *PCL* is only persuasive authority and is not binding on us. Moreover, this case is much different than *PCL*. Essentially, and to its credit based on the foregoing facts, the Corps has agreed to all of KP's allegations regarding the fact the design was imperfect and incomplete and resulted in “ongoing design modifications during construction” (*see* gov't br. at 6). It

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seems however, the Corps is arguing that this knowledge makes KP complicit in the “run and gun” award here. But that is not the case here where the contract did not inform or warn KP that the design was defective and potentially would never be complete. Rather, the contract here stated the project was 100 percent designed (findings 39-41). Further, the Corps intended pre-award, and did post-award, provide its DOR extra time to provide the complete drawings and specifications (findings 21, 32, 68-69).

To be fair, we do not believe even the Corps expected the design to be so problematic (which could explain why the Corps did not immediately remedy the problem or include the language identified in *PCL* in the contract). In other words, even now, it is unclear to us when the Corps provided an error free design. That is not a burden that KP or its subcontractors ever agreed to bear. *See Parsons of Cal.*, ASBCA No. 20867, 82-1 BCA ¶ 15,659 at 77,406 (although appellant knew the drawings were not in production ready status and if not clarified could burden production planning, the record did not show appellant knew or should have known of the massive number of drawings problems encountered after award). Accordingly, we conclude that the Corps breached its obligation to provide non-defective specifications and drawings.

*Breach of Good Faith and Fair Dealing*

KP argues the Corps also breached the duty of good faith and fair dealing by maladministering the contract. Specifically, KP argues the Corps failed to: (1) equitably extend contract completion dates and adjust the schedule which compelled KP to accelerate; (2) properly fund the project and pay for changes; (3) timely issue modifications for known changes; (4) consider/resolve meritorious claims; (5) conduct reasonable inspections; and (6) timely correct and complete the design within a reasonable time (and then attempted to correct them using engineering judgements) (app. br. at 217-33). KP argues this forced it and its subcontractors to bear the associated time and impact costs (*id.* at 217). In sum, KP argues the Corps’ actions hindered or interfered with its performance (*id.* at 218).

In response, the Corps argues it requested funding as needed, executed modifications in a timely manner, handled the claims through the appropriate process, and adhered to the contract with respect to inspections and the engineering judgment process (gov’t br. at 242-55). Specifically, the Corps contends the contract was incrementally-funded, that it issued multi-part modifications to keep the project moving, and fairly considered all of KP’s claims (including using a consultant for assistance) (*id.* at 244-49). Further, the Corps contends that its failure to adjust the schedule was due to a disagreement about time owed (*id.* at 251).

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“The covenant of good faith and fair dealing is an implied duty that each party to a contract owes to its contracting partner.” *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005). In essence, each party is “not to interfere with the other party’s performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.” *Id.* “Failure to fulfill this implied covenant constitutes a breach of the contract . . . .” *Metcalf Constr. Co. v. United States*, 742 F.3d 984, 990 (Fed. Cir. 2014). The duty may be breached “even if ‘the actor believes his conduct to be justified.’” *Labatte v. United States*, 899 F.3d 1373, 1379 (Fed. Cir. 2018) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (1981)). In other words, there is no requirement for KP to show the Corps acted in bad faith. See *Metcalf Constr. Co. v. United States*, 742 F.3d at 992-94. In *Relyant, LLC*, ASBCA No. 59809, 18-1 BCA ¶ 37,085, we elaborated that “the doctrine imposes duties that fall within the broad outlines set forth by the express terms of the contract, approximating the parties’ intent, as divined by the express terms of the contract, for addressing circumstances not specifically set forth by the contract.” 18-1 BCA at 180,539. We further noted that “the proper inquiry regarding the duty often boils down to questions of ‘reasonableness’ of the government’s actions.” *Id.* (citation omitted). Thus, in *Relyant*, we held that the government’s unreasonably long delays in considering proposed change orders, which adversely affected the company’s performance of the contract, constituted a breach of the duty. *Id.* at 180,539-40.

Considering all of the facts, we conclude the Corps interfered with KP’s performance when it failed to: (1) extend the contract completion date in a timely manner and realistically adjust the project schedule per the terms of the contract requiring KP to accelerate, (2) utilize a reasonable inspection process (i.e., the inspections, when taken as a whole, were not reasonable) (mold/ductwork, IRs/CSTs),<sup>37</sup> (3) timely issue modifications for known changes (e.g., multi-part

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<sup>37</sup> With respect to any arguments concerning mold, the Corps argues collateral estoppel prevents KP from raising the issue again (gov’t br. at 250). In response, KP argues collateral estoppel only applies when issues are identical and here, the issues are far broader in scope than the discrete issues raised in the mold claim (app. reply br. at 11). As we have explained, in the mold claim KP sought its direct costs, the direct costs for four subcontractors, extended performance, and indirect costs for one of those subcontractors (finding 221). Since it did not include cumulative impact costs, or KP’s and three of the subcontractor’s indirect costs/delay damages, KP reserved the right to seek these additional costs in a separate claim (*id.*). And it did so here when discussing the cumulative impact of the defective mold specification and the post-mold

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modifications); and (4) timely correct and complete the design.<sup>38</sup> With respect to the contract completion date, the Corps knew that KP would not meet the date, yet waited to extend the deadline, which forced KP to accelerate (e.g., thermal movement and other issues discovered in 2014 but a general extension to contract completion date was not until November 2015) (findings 113-15, 130, 143, 310, 316, 446). Despite internally knowing the contract completion date was not feasible, the Corps waited until it needed something from KP to finally add some time. Specifically, it was not until the Corps issued Modification No. 658 concerning joint occupancy, did the contract completion date substantially move. That modification was not issued until November 2016, and provided a 332-day extension (findings 258-62).

We have also found the Corps failed to allow KP to insert fragnets for the modifications correcting design defects, such that the project schedules were unusable (findings 106-10, 112-13, 116, 118). The Corps did so despite the fact the contract specifically allowed the insertion of fragnets (finding 103). Even the Corps itself recognized the problems with the schedule, which have been described as the life blood for the project (findings 109, 112-13, 116-17, 119). The Corps compounded issues with the schedule with its multi-part, blue clock and red star modifications which simply pushed the issues so far out that even the Corps realized it was “too far down the path, with too many adjustments to the phased completion dates in the project, logic ties, critical paths, to be able to negotiate TIAs on these old modifications individually” but needed to look at the schedule as a whole (which it did too late) (findings 91-95, 98-99, 113). The Corps ended up using KP’s block schedules (finding 119).

With respect to the inspections, we note the duty of good faith and fair dealing is not violated if the party’s actions are sanctioned by the contract. *LaBatte v. United States*, 899 F.3d at 1379-80. The Corps argues the contract’s Inspection clause sanctioned its conduct regarding this issue (*see gov’t br. at 143*). The relevant

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inspection issue; therefore, there is no estoppel. Further, even the COFD recognized that KP’s request for time-related costs for delays “were exclusive of any costs previously filed in the mold claim” (finding 443). Likewise, with respect to enhanced drywall, that claim stated it did *not* include related delay, disruption and cumulative impacts as that would be in a separate claim (this one here) (finding 279).

<sup>38</sup> We did not conclude there was a breach of the duty of good faith and fair dealing regarding the Corps’ funding of the project as we found that while there were issues with the budget for the contract, the Corps did monitor, attempt to control and ultimately sought funding through ATRs and BTRs (findings 5-6, 93-94, 320-27).

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Inspection clause allows the government to inspect work before acceptance, including removing or tearing out work (findings 48, 50). However, the relevant Inspection clause also states that the government may not “unnecessarily delay work” when performing inspections and tests (finding 50).

Here, the post-mold inspection process (which we agree is an important issue) was unreasonable and it unnecessarily delayed the work (findings 229-35). *See Konecranes Nuclear Equip. & Servs., LLC*, ASBCA No. 62797, 24-1 BCA ¶ 38586 at 187,560 (agency breached the duty of good faith and fair dealing by unreasonably inspecting cranes, pursuant to contract’s inspection provisions, which caused delays). There were five separate mold testing events each spanning 3-4 days where the ductwork was moved from a trailer to a quarantine space, and then prep area (finding 230). Every piece of ductwork was inspected, including after installation, where KP would have to cut holes in the ducts and later patch them (*id.*). The inspectors worked half days (*id.*). And ultimately, the testing was required due to a defective design specification that failed to require anti-microbial mastic (finding 222). With respect to the IRs/CSTs, although the CSTs were contractually permitted to issue the IRs here, the fact the Corps waited over a year to provide the IRs to KP for re-work was unreasonable and again, the Corps unnecessarily delayed or interfered with KP’s work (findings 241-48).<sup>39</sup>

All of these problems started with how the Corps awarded the project (findings 39, 68; *see also* findings 10-12, 15-16, 18, 21-23, 25-28, 30-36). As we have stated several times now, the Corps knew there were design issues from the start, yet decided it best to iteratively correct the designs throughout the course of the entire construction period (findings 33, 35, 39, 68, 70-74, 76, 79-81, 322, 328-30). The Corps truly implemented a “design-as-you-go” plan (finding 78). As noted, FAR 52.236-21(a), incorporated by reference into the contract, required the contracting officer to “promptly” address discrepancies in the figures, drawings or specifications (finding 48). Rather than promptly address the issues, the Corps used multi-part modifications which, in this case, only served to delay providing KP a complete design (findings 91-92, 94-97, 100). Further, there was a complete revision

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<sup>39</sup> Because the contract’s Inspection Clause specified that the inspections were not to “unnecessarily delay work” we need not actually seek recourse from the doctrine of good faith and fair dealing to find that the Corps had breached the contract: this requirement is already expressly in the contract. But the outcome is the same no matter how we characterize this breach so we will find this to be a breach of the duty of good faith and fair dealing even if, technically, it is better considered a breach of the Inspection Clause.

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of the floor plans during the DOR's conformed drawing process which required a complete functional re-design (findings 71, 75).

Additionally, the Corps' added crucial options late to the contract, such as the 48V/UPS system, which ultimately ended with a design defect to the cable tray (findings 84, 166). Further, in 2017, the Corps was still working on modifications (commissioning and controls) that fixed design defects (findings 275-77). And as the Board has already concluded, the Corps was responsible for the mold and Level 4 drywall issues (findings 222, 280).

The Corps not only failed to act quickly to address all of the design issues, but it then compounded the problems with added requirements such as beddowns, an anchor bolt survey (caused by a design defect), and a complex joint occupancy (findings 209-14, 236-40, 249-54, 259, 263-74).<sup>40</sup> See *ECC Int'l, LLC*, ASBCA No. 58993 *et al.*, 22-1 BCA ¶ 38,073 at 184,896 (where agency breached duty of good faith and fair dealing by refusing to grant time extensions, among other things, which forced appellant to accelerate to meet an unreasonable completion date).

As such, we conclude the Corps breached the duty of good faith and fair dealing with respect to these limited issues (whether alone or cumulatively) and hindered KP's ability to proceed with the work.

*Material Breach*

Finally, KP argues that each of the breaches discussed above are sufficient to find a material breach but when considered together, there is no question that the Corps materially breached the contract (app. br. at 233-35). KP argues the deficient

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<sup>40</sup> We did not find the KP met its burden of proof in demonstrating the Corps is responsible for the engineering judgment "issue." In this regard, while there were issues with the head of the wall design, since there was a process in the contract for obtaining EJ approval (findings 196-98), it is not clear that there was an issue regarding KP's need to obtain such approval. In other words, while KP argues the Corps used the EJ process to design the head of wall detail, it seems the contract anticipated this (*see id.*). Further, there was evidence that KP's subcontractor may have caused the issues due to its use of different z-clips (finding 204). At most, the Corps imposed an over-arduous document review process (finding 203). However, there also seemed to be an issue with Cleveland's ability or want to submit documentation for the approvals and therefore KP stepped in to assist, which seemed to make the review process smoother (findings 202, 204).

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design, lack of good faith and fair dealing and totality of the circumstances demonstrate a material breach depriving KP of its reasonably anticipated benefits from the contract (*id.* at 235-40). KP contends it is entitled to an equitable adjustment under the Changes clause, which includes increased costs, time and inefficiencies resulting from the changed or constructively changed work (*id.* at 241). In addition, KP argues the cumulative impact claims are compensable as a constructive change under the Changes clause and such claims do not include direct costs of the changes (*id.*).

“A breach is material if it relates to a matter of vital importance or goes to the essence of the contract.” *Kelly-Ryan, Inc.*, ASBCA No. 57168, 18-1 BCA ¶ 36,944 at 180,027. Arguably, the Corps’ actions and the three breaches, taken together, could be considered a material breach. But as KP performed here, it seeks an equitable adjustment under the Changes clause, and as there is no requirement to demonstrate a material breach for entitlement to such monetary relief, we need not reach any conclusions on this argument.

*Delay and Cumulative Impact*

KP argues these breaches caused delays and disruptions (and that the delays also caused disruptions/inefficiencies). KP first seeks an equitable adjustment pursuant to the Changes clause for these breaches.

The Board has jurisdiction to grant equitable adjustments under the contract’s Changes clause for defective specifications and for the government’s failure to cooperate by administering the contract in a manner which hindered, delayed and disrupted the appellant. *Parsons of Cal.*, 82-1 BCA ¶ 15,659 at 77,411. The relevant Changes clause states that the contracting officer may make written changes in the work regarding the specifications (including the drawings and designs) or method or manner of performance, or may direct acceleration in performance (finding 49). If the change increases the contractor’s cost of or time for performance, “whether or not changed by any such order,” the contracting officer “shall make an equitable adjustment and modify the contract in writing” (*id.*).

If the changes are due to “defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications” (finding 49). The Changes clause in the contract therefore contemplates an equitable adjustment for the cumulative impact of numerous modifications affecting KP’s performance of unchanged work. *See Bell BCI Co.*, 81 Fed. Cl. at 637-38.

### *Delay*

As noted, KP must prove the elements of liability, causation, and resultant injury for claims seeking an equitable adjustment. *Servidone Constr. Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991) (citation omitted). KP has shown the Corps is liable for the defective specifications. KP has also shown liability based on a breach of good faith and fair dealing on a limited number of issues.

Since the Corps breached the implied warranty under the Spearin doctrine, KP “is entitled to recover all of the costs proximately flowing from the breach.” *Essex Electro Eng’rs, Inc. v. Danzig*, 224 F.3d 128, 1289 (citations omitted). The court in *Essex* explained that “compensable costs include those attributable to any period of delay that results from the defective specifications” and “all delay due to defective or erroneous Government specifications are *per se* unreasonable and hence compensable.” *Id.* (citations omitted).

To prevail on a claim for compensable delay, KP must “establish the extent of the delay, [its] harm resulting from the delay, and the causal link between the government’s wrongful acts and the delay.” *Maverick Constructors, LLC*, ASBCA No. 61989, 25-1 BCA ¶ 38,783 at 188,591 (quoting *Essex Electro Eng’rs v. Danzig*, 224 F.3d at 1295); *see also Kinetic Builder’s Inc. v. Peters*, 226 F.3d at 1316. Such a “causal link” exists if appellant can demonstrate “that the government’s actions affected activities on the critical path of the contractor’s performance of the contract.” *Kinetic Builder’s Inc. v. Peters*, 226 F.3d at 1317; *see also Essex Electro*, 224 F.3d at 1295. The term “critical path” is defined as “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 (citations omitted). This is consistent with the testimony from KP regarding the critical path and float (finding 104).

Let us first see whether there was a causal link between the defective specifications and delay. When the government’s wrongful act is defective specifications, appellant “has the burden to show by a preponderance of the evidence that the defective specifications were the most probable cause of its failure to obtain satisfactory results when considered with reference to all other possible causes.” *Aleutian Constructors, J.V.*, ASBCA No. 49255, 01-1 BCA ¶ 31,392 at 155,091 (citing *Brantley Construction Co.*, ASBCA No. 27604, 84-3 BCA ¶ 17,532 at 87,317). If KP meets the burden, it then shifts to the Corps to show, for example, “that defective workmanship materially and measurably contributed to the delay, or that there were additional causes of the contractor’s difficulties which absolve the Government of

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liability.” *Id.* (citations omitted). In other words, KP cannot recover for concurrent delays because there would be no causal link between the government’s acts (e.g., defective specifications) and the delay. *See Essex Electro Eng’rs v. Danzig*, 224 F.3d at 1295.

The parties agree there are 525 days at issue here. The records show, and KP and its subcontractors have provided testimony and expert opinions evidencing the defective specifications caused a ripple effect that impacted KP’s activities on the critical path (*see e.g.*, findings 194, 222, 233, 253). *See MW Builders of Texas, Inc. v. United States*, 134 Fed. Cl. 469, 508 (2017) (delay caused solely by the government). The Board has explained that:

If an event that would constitute an excusable cause of delay in fact occurs, and if that event in fact delays the progress of the work as a whole, the contractor is entitled to an extension of time for so much of the ultimate delay in completion as was the result or consequence of that event, notwithstanding that the progress of the work may also have been slowed down or halted by a want of diligence, lack of planning, or some other inexcusable omission on the part of the contractor.

*GSC Constr., Inc.*, 21-1 BCA ¶ 37,751 at 183,243 (citations omitted).

This is a cumulative delay claim where KP argues that although the defective specifications alone impacted the schedule, here there were additional issues which added to the problems. This included the beddowns and other actions by the Corps’ (anchor bolt survey, inspections, modification process, etc.), which along with the defective design and the constant correcting of the design, caused the delays. KP’s and its expert’s windows analysis explains how the defective design and constant re-design, along with these other issues, impacted the critical path (findings 150-54, 208, 215-18, 253-56). The Corps’ expert concluded otherwise (finding 351, 360-62, 366-70). The experts’ critical path and windows analysis varied greatly.

With respect to these expert reports/analysis, we note that AACEI’s 29R-03: Forensic Schedule Analysis recommended practice, which the experts reference, states in its introduction that its purpose is to provide a unifying reference of basic principles and guidelines for CPM scheduling in forensic analysis (29R-03 at 9).<sup>41</sup> The guide

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<sup>41</sup> A sample of the first few pages of this guide, referred to as 29R-03, is available at: [https://web.aacei.org/docs/default-source/toc/toc\\_29r-03.pdf](https://web.aacei.org/docs/default-source/toc/toc_29r-03.pdf).

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further states the methods discussed have not necessarily been deemed acceptable by courts or government boards. Further, the guide states:

[It] is not intended to establish a standard of practice, nor is it intended to be a prescriptive document applied without exception. Therefore, a departure from the recommended protocols should not be automatically treated as an error or a deficiency as long as such departure is based on a conscious and sound application of schedule analysis principles.

*Id.* The guide explains that one should use it in conjunction with professional judgment, subject matter knowledge, consideration of the contract, facts, applicable law, availability and quality of contemporaneous project documents and other circumstances. *Id.* The guide specifically states that in creating a competent work product there may be instances where additional or fewer steps are required in the analysis. *Id.*

The main problem with each of these expert reports, which the experts recognize, is that *they* decide causation. In other words, AMS states the design issues caused the delays and BRG states KP and its subcontractors caused the delays (findings 359, 366). Therefore, we consider these reports to the extent they conform with our findings on the matter. And we find that the design, along with the Corps' handling of the design issues and how the Corps managed the contract (e.g., imposing late beddowns), caused the problems here from the start of the contract to the end of the claim period (findings 444-7). For that reason alone (but there are other reasons), we find that BRG's conclusions lack credibility as BRG ignores the design and other Corps-caused issues and that the issues encountered by KP and its subcontractors were directly attributable to the Corps (finding 371). Consequently, we find reasonable AMS' analysis (and AMS at least acknowledged KP and its subcontractors were less than perfect) and conclude the Corps is responsible for the delays to the critical path (findings 217, 226, 254, 256, 371).

For example, starting in 2014, KP was working on the interior build out, which included framing (findings 57-58, 62, 128). At the same time, the Corps knew there were going to be changes to the walls due to sound ratings but did not issue modifications or inform KP until later (findings 209-12, 214). These changes were in addition to design defects related to the walls, ceiling (at least one modification), and some structural issues, among other things (findings 130, 141, 146, 159, 168).

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“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. It is not the added work *per se* that compounded the problems. It was the way the Corps handled the added work. For example, the Corps did not notify KP that certain beddowns were coming and there is testimony that the wall beddowns forced KP to tear down already built walls (findings 213-14, 216-17, 238-40).

In addition, while the parties were starting to address the design defects with the walls, in September 2015, mold was discovered in the installed fiberglass duct liner resulting in a stop work order (finding 219). The mold was the result of a defective specification (finding 222). Not only was there a 209-day delay due to this issue, but as the Corps itself explained, everything was “happening at the same time” as there were numerous modifications during this time unrelated to mold, and KP could not complete the ceilings, had to re-order activities, and never fully recovered from the mold issue because “you don’t just recover from an eight-month delay. . . you can’t get enough people on site. . . [t]he sequencing and the schedule is so disrupted, and the contractors are so impacted, the costs go through the roof, the schedule goes out the door” (findings 222-23, 226).<sup>42</sup>

After this, there were mold inspections, more beddowns, late IR reports, an anchor bolt survey that KP and its subcontractor had to perform for the DOR/Corps, joint occupancy that hindered KP and its subcontractors (and which the Corps itself realized would be a problem), more issues with enhanced drywall and other design issues (findings 229-34, 237, 248-53, 274-75, 280). Again, the joint occupancy, in and of itself, is not problematic but this was different. As noted, the contract originally included phasing and early beneficial occupancy requirements (finding 52). Early beneficial occupancy meant the areas were to be completed before occupancy, meaning all walls, ceilings, floors, and doors completed and painted and all HVAC and power fully installed and functional (i.e., all cooling towers, mechanical room equipment and electrical room equipment completed) (*id.*). The problem here was how the joint occupancy, or “Concurrent Construction,” was structured; construction was happening at the same time rather than being completed (finding 263). And the Corps’ failed to efficiently assist KP and the subcontractors throughout the process (findings 263, 266-74).

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<sup>42</sup> According to the Corps, then, it is responsible at least for all delay after the discovery of mold, which (including the 209 days of delay for mold) would equal 465 days of delay.

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The Corps argues there was concurrent delay, but we agreed with the experts and testimony that either those instances did not impact the critical path or, more important, they were caused by the Corps' defective design and handling of the issues (findings 282, 371). While there is testimony about the fire and water damage, for example, we did not find these caused an impact to the critical path; rather, they were issues that occurred and were resolved by KP (findings 282, 288-291, 318-19, 371). Further, the issues database, a compilation of every single instance where a problem occurred, which was viewed through a biased and narrow lens, does not demonstrate defective workmanship materially and measurably contributed to the critical path delay (findings 362-371).

Rather, the fact that KP and its subcontractors were able to work through the Corps' deficient design and mishandling of the defective design issue (among other things), and complete the project, demonstrates the opposite--that the workmanship did not materially and measurably contribute to the delay. In fact, when there were problems with a subcontractor, the Corps, itself, noted the problems were resolved to its satisfaction (findings 288, 290). The record does not demonstrate that there were any additional issues relating to KP and its subcontractors which absolve the government of liability (*see* finding 371). Therefore, the Corps has not proven that KP's performance issues, considered individually or cumulatively, and not the defective specifications, caused the delay. As such, KP is entitled to recover all the costs proximately flowing from the defective specification, as all resulting delays are "*per se* unreasonable and hence compensable." *Essex Electro Engineers, Inc. v. Danzig*, 224 F.3d at 1289 (citation omitted); *see also Am. Ordnance LLC*, ASBCA No. 54718, 10-1 BCA ¶ 34,386 at 169,787. And as we have stated, not only did the defective specifications cause the delay, but so did the Corps' management of the contract. The government here caused the delays to the critical path.

### *Inefficiencies*

Finally, KP has argued that it is entitled to recover costs for inefficiencies and disruptions in its work sequence and other losses of efficiency resulting from a deficient design (app. br. at 207-08). This includes, among many other things, the additional labor and supervision; overtime, acceleration, and other mitigation actions; additional materials, equipment, and materials handling; additional material storage; temporary construction; repairs due to overcrowding and out-of-sequence work; change orders to the subcontractors; and additional site work and supplementations (*id.* at 211).

Both delays due to defective specifications and drawings *and* lost efficiency are compensable pursuant to the Changes clause (*see* finding 49). *Parsons of Cal.*, 82-1 BCA ¶ 15,659 at 77,418 (citations omitted). Lost efficiency may be caused by a

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disruption of a contractor's planned sequence of work; the necessity for its employees to work overtime and holiday hours; and/or the need for untrained or less efficient workers. *Id.*; *States Roofing Corp.*, ASBCA No. 54860 *et al.*, 10-1 BCA ¶ 34,356 (citation omitted) (loss of productivity "occurs when the government is responsible for changes in the contractor's method of performance that cause it to proceed in a less productive manner."). In addition, although loss of productivity and delay are different, a contractor can attempt to show improper delays caused the loss of production. *Luria Bros. & Co. v. United States*, 369 F.2d 701, 712 (Ct. Cl. 1966) (citations omitted). Likewise, as noted, defects in drawings can cause wasted efforts if not discovered prior to manufacture, delays to discover the cause and then remedy the defect, and additional work to remedy the defect. *Parsons of Cal.*, 82-1 BCA ¶ 15,659 at 77,406.

Similarly, inefficiencies may be shown by cumulative impact where the impact constitutes a "separately compensable constructive change." *Triple "A" S.*, ASBCA No. 46866, 94-3 BCA ¶ 27,194 at 135,541 (quoting *Dyson & Co.*, ASBCA No. 21673, 78-2 BCA ¶ 13,482 at 65,970). More specifically, a cumulative impact claim, sometimes referred to as a "disruption," "ripple effect," "loss of labor efficiency," or "loss of productivity" claim, is based upon the theory that individual compensable contract changes, "taken as a whole, can have such a disruptive effect on the contractor's performance that the contractor has a compensable claim for costs in addition to the amounts of its individual change orders." *Jackson Const. Co. v. United States*, 62 Fed. Cl. 84, 103-04 (2004).

To prove liability for a separately compensable constructive change under the theory of a cumulative impact, the contractor must show the contracting officer exceeded the permissible limits of discretion under the Changes clause and ordered changes that "materially alter the nature of the bargain" originally agreed upon. *Triple "A" S.*, 94-3 BCA ¶ 27,194 at 135,541 (quoting *Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 965-966 (Ct. Cl. 1965); *Aragona Construction Co. v. United States*, 165 Ct. Cl. 382, 394 (1964); *Dyson & Co.*, 78-2 BCA ¶ 13,482 at 65,970). Again, the contractor must show the "causal connection between the accumulated changes giving rise to 'contract growth' and their effect on other changed and unchanged work." *Triple "A" S.*, 94-3 BCA ¶ 27,194 at 135,541. Specifically, such claims are fact-intensive and the contractor must show that its work was "delayed or was performed in an inefficient, unproductive, or more costly manner" due to the cumulative impact of the government's actions. *Jackson Constr. Co. v. United States*, 62 Fed. Cl. 84 at 104.

Either way, KP has met its burden through documents, expert testimony and reports, and fact witness testimony. It has shown that it proposed to use the train of

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trades, the subcontractors relied on the train, and the Corps' actions impeded the train from moving in an orderly fashion: rework, inefficiencies, and impacts, all of which started with the defective design that was iteratively corrected throughout the claim period and during construction and then exacerbated by the beddowns; multi-part modifications; mold and post-mold-inspections; late IR reports; anchor bolt survey; joint occupancy; and enhanced drywall issues (findings 56-67, 116-19, 130-32, 135-40, 149, 163, 166-67, 179-95, 213, 216, 223-26, 232-35, 240, 247-48, 252-53, 266-74, 281, 329-30, 337-39, 372-404, 413, 446-47).

In other words, this was more than just a claim where the government issued numerous change orders and modifications. This appeal involved the government's actions, which caused disruptions that rippled throughout performance, from prior to the inception of the construction contract until at least the end of this claim period. *See States Roofing Corp.*, 10-1 BCA ¶ 34,356 at 169,667 (when considering entitlement, Board concluded that evidence sufficiently demonstrated appellant's productivity was impacted by the differing site conditions along with the changes, which began at the start of performance and continued throughout performance and resulted in cumulative disruption and inefficiency). Specifically, KP has shown that its work was delayed, performed in an inefficient, unproductive, and more costly manner due to these impacts, i.e., the train was derailed several times.

Further, we do not believe that the evidence presented by the Corps as to inefficiency on the part of KP and/or its subcontractors excuses the Corps from its responsibility for the disruption caused by the defective specifications and changes the Corps has overwhelmingly acknowledged (finding 319). *See States Roofing Corp.*, 10-1 BCA ¶ 34,356 at 169,667. The same is true of the many instances of rework which were required due to problems encountered (finding *id.*).<sup>43</sup> *See id.*

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<sup>43</sup> The Corps argues KP was required to quantify its injury during this entitlement phase (gov't br. at 187-88). As noted, this appeal was bifurcated and in fact, explained to the Corps in a May 18, 2021 Order that labor data and other cost records were not relevant at this date and would be addressed during the quantum phase, if any.

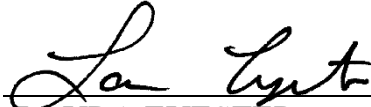
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CONCLUSION

We have concluded the Corps breached the contract and find KP and its subcontractors are entitled to compensation for 525 days of delay and impact costs.<sup>44</sup> Accordingly, the next issue to decide, and which is really the crux of this appeal, is damages.

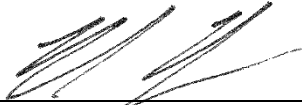
Dated: May 4, 2026



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LAURA EYESTER  
Administrative Judge  
Armed Services Board  
of Contract Appeals

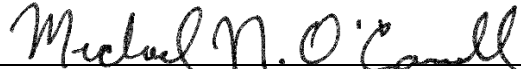
I concur



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

I concur



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MICHAEL O'CONNELL  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

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<sup>44</sup> KP presented testimony regarding all but two of its subcontractors: Commercial Flooring, Inc. and Heartland Leasing Services, Inc. Further, KP's briefs do not discuss either of these two subcontractors (*see app. reply br.*). Although these subcontractors may have had viable claims, KP did not submit any specific evidence in their behalf, nor did it present any witnesses at trial. *See Bell BCI Co. v. United States*, 81 Fed. Cl. 617 at 641.

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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. 62119, Appeal of KiewitPhelps, rendered in conformance with the Board's Charter.

Dated:

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

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**Appendix 1**

<b>Subcontractor</b>	<b>Scope of Work</b>	<b>Claim Amount (\$)</b>
American Direct Procurement, Inc.	Supplier of Door Frames, Doors and Hardware	439,689
Anderson Excavating	Excavation/Site Work	452,935
ATEC Shielding Systems	HEMP Shield Manufacturer, Fabricator and Installer	1,888,469
Bergelectric-Helix Joint Venture	Electrical	15,501,654
Cabb dba The Office Cleaners	Construction Cleaning	41,609
Chapparral Insulation Company	Insulation (of mechanical systems)	3,965,178
Cleveland Construction, Inc.	Drywall and Framing	10,968,253
Cobb Mechanical Contractors, Inc.	Mechanical (HVAC, duct work, mechanical pipes, plumbing through Vincentini Plumbing)	37,984,031
Commercial Flooring Systems, Inc.	Carpet and VCT	64,684
Continental Fire Sprinklers	Fire Suppression	2,288,217
Douglass Colony Group Inc.	Roofing and Waterproofing	1,720,554
Exclusive Gardens, Inc.	Landscaping	109,523
Facility Engineering Services	Systems Control	1,996,248
Federal Technology Solutions, Inc.	Telecom	11,827
Grazzini Brothers & Company	Tile Installer, Ceramic Tile	685,024
Haworth, Inc.	Raised Access Floor	970,523

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Heartland Leasing Services, Inc.	Telescoping Seating Systems	58,640
Olsson Associates, Inc.	Testing	418,538
Schwob Building Company, Ltd.	Fuel Oil Systems	814,976
Total Automation Group, Inc.	Active Barriers	44,128
Terry McGill, Inc.	Painting and Wall Covering	951,529
Tyco Integrated Security LLC/Johnson Controls Federal Systems	Electronic Security Systems	11,786,241
Valley Corporation	Site Utilities	2,297,687