Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

GSBCA 14437 GRANTED IN PART;
GSBCA 14603 GRANTED: October 19, 2000

GSBCA 14437, 14603

YOUNG ENTERPRISES OF GEORGIA, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Thomas E. Abernathy IV of Smith, Currie & Hancock L.L.P., Atlanta, GA, counsel for Appellant.

Sharon J. Chen, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **WILLIAMS**, and **DeGRAFF**.

WILLIAMS, Board Judge.

Appellant, Young Enterprises of Georgia, Inc. (Young), seeks home office and field office overhead costs for delays on a renovation project on which unforeseen asbestos and numerous tenant-requested changes were encountered. The General Services Administration (GSA) granted Young 118 calendar days of extended overhead costs. At issue in GSBCA 14437 is whether Young and one of its subcontractors are entitled to additional extended overhead costs. GSA contends that Young failed to prove any increased costs of performance were caused by any act or omission of GSA; that additional costs incurred in performing the work were fully embraced within the change orders; and that recovery is barred under the doctrine of accord and satisfaction. Only entitlement is to be decided at this time. Also in GSBCA 14437, appellant seeks interest under the Prompt Payment Act because respondent delayed in paying an invoice.

At issue in GSBCA 14603 is $11,100 in liquidated damages, which GSA assessed for thirty-seven calendar days of delay from the extended contract completion date until GSA determined that the project was substantially complete.

We conclude that appellant has not proved entitlement to any additional days of extended overhead costs, but that appellant is entitled to some of the interest it seeks. Therefore, we grant GSBCA 14437 in part. We also conclude that respondent has not proved entitlement to liquidated damages, and therefore grant GSBCA 14603.

Findings of Fact

On March 29, 1993, GSA issued an invitation for bids for renovations to the United States Bankruptcy Court, a historic building in Columbia, South Carolina. Stipulation I.1, Appellant's Posthearing Brief, Attachment A; Transcript at 6.

The Contract

On May 12, 1993, GSA awarded contract number GS-04P-93-EXC-0021 to Young for the renovations, including some asbestos abatement and sprinkler work. Stipulation I.2.

Contract specification 02085-Asbestos Abatement Procedures states, in part:

> A. General
>
> This section includes all work necessary to reduce airborne concentrations of asbestos to the specified level and maintain the specified asbestos control limits during the life of the contract. It also includes containment, removal, and disposal of asbestos-containing material.
>
> 1. The following asbestos-containing materials are to be removed. Refer to drawings in the appendix of this specification. The contractor will be responsible for the removal of all Thermal System Insulation, pipe run insulation, pipe joints and elbow mud, from all hot water supply, chilled water supply and return lines as described for the areas listed below. Removal of miscellaneous vinyl asbestos floor tile is also included in the scope of removal.

There follows a list of the locations in the third floor and basement, along with the type and quantity of asbestos containing materials to be removed. Appeal File, Exhibit 1 at 02085-1 to -3.

The contract drawings contain a note stating:

> **NOTE**: **IF AT ANY TIME DURING THE DEMOLITION OR CONSTRUCTION OF THIS FACILITY, PREVIOUSLY UNFORESEEN ASBESTOS CONDITIONS ARE ENCOUNTERED, CONSTRUCTION SHALL STOP IMMEDIATELY, & THE CONTRACTING OFFICER SHALL BE NOTIFIED.**

Appellant's Exhibit 33.

The contract includes the Liquidated Damages Clause, Construction, FAR 52.212-5, which states that "[i]f the Contractor fails to complete the work within the time specified in the contract, or any extension, the Contractor shall pay to the Government as liquidated damages, the sum of $300.00 for each day of delay." Appeal File, Exhibit 1 at 0800-11. The contract also includes the Prompt Payment Clause, GSAR 552.232-71. Id. at 0800-14 to 0800-15.

Young's Subcontracts

Young entered into a subcontract with Environmental Management Services, Inc. (EMS) to perform the removal and disposal of asbestos and re-insulation of abated piping for $29,669.15. Respondent's Exhibit 41. Young also subcontracted out the following work: installation of metal studs, mechanical rough-in, plumbing rough-in, electrical rough-in, fire protection rough-in, and part of the following items: drywall and plaster repair, acoustical ceiling grid, architectural woodwork, toilet partitions, painting and wall covering, doors, door hardware, carpet, toilet, bath and basin accessories, and cleanup. Transcript at 186-88. Fidelity Construction (Fidelity) was the subcontractor for the metal studs, sheet rock and drywall, painting, plaster, ceiling grid, and ceiling tile. Id. at 68. Collins and Wright also performed installation of metal studs on this job. Id. at 198. Triad Mechanical Contractors (Triad) did the mechanical work and Derrick Plumbing did the plumbing. Id. at 417, 459.

The Personnel

Young assigned one full-time employee to this job, a superintendent, and otherwise used temporary labor. Transcript at 188. Appellant's president, Don Wilbanks, was the only employee of appellant called as a witness at the hearing.[1] Mr. Wilbanks visited the project periodically less than once a month and less than ten times over the course of the project, but he was in daily contact with Young's superintendent. Transcript at 190, 242-43.

The contracting officer's technical representative (COTR), John Bradley, a licensed architect and formerly a licensed general contractor, was the GSA contracting officer's "eyes and ears" on the project, and had the authority to approve or reject construction schedules. Transcript at 269-70, 414-15; Respondent's Supplemental Appeal File, Exhibit G2. The COTR visited the site on average twice a month, and worked on this project for its entire duration. Transcript at 415-16, 426.

Gilbert and Associates (Gilbert), the architects, prepared the drawings and specifications for the project. Transcript at 90; Appellant's Exhibit 33.

The Original Schedule

On June 10, 1993, GSA issued a notice to proceed stating that all work was to be completed within 200 calendar days after receipt of the notice. Stipulation I.3. Young

[1]No employees of appellant's subcontractors testified at the hearing.

received the notice to proceed on June 14, 1993, establishing the completion date as December 31, 1993. Id. I.4, I.5.

Young's president submitted a bar-chart type construction schedule for the project, and that schedule was approved. Appellant's Exhibit 20; Transcript at 33-34, 242. The contract did not require a critical path method (CPM) schedule; a bar chart was acceptable to GSA. Appellant's Exhibit 20; Transcript at 498-99. No CPM schedule was ever done for this job. Transcript at 25, 242, 498.

The approved construction schedule showed the renovation being performed in four areas: the third floor, the basement, the fire pump room, and the exterior and miscellaneous work areas. Work was to be done in all areas from mid-June to late December, except that efforts in the fire pump room were not to begin until mid-July. Appellant's Exhibit 20. Appellant determined that the third floor work was the most critical because a new judge had been assigned to third floor space. Transcript at 31. Young was to totally rehabilitate the third floor, including gutting rooms and taking out most interior walls. The second most critical area was the basement renovation work because this space, as well as the third floor, utilized all of the subcontract trades. Id. The approved bar chart schedule indicated that asbestos abatement and removal in all areas would be completed before the end of July 1993 (third floor, July 7; fire pump room, July 19; and basement, July 27). Appellant's Exhibit 20.

After asbestos work had been completed, the metal studs and walls were to go up. Young planned to start the work of the mechanical, plumbing, electrical, and fire protection trades thereafter; each of these trades needed to have the metal stud walls up before it could begin. Transcript at 38; Appellant's Exhibit 20. After the rough-in items were two-thirds finished, Young planned to start the drywall installation and plaster wall repair. Transcript at 39; Appellant's Exhibit 20. The next item was the acoustical ceiling grid. Transcript at 40. Following all of the finish trades, the most critical item was the architectural woodwork, which involved ornate wainscoting, chair rail, and other wood trim. Id. at 41-43. After the finish trades completed the final painting and wall covering, Young would complete the doors, hardware, glass and glazing, toilet and bathroom accessories, and then the heating, ventilating and air conditioning (HVAC) and electrical trim, ceiling tile, and carpet. Id. at 43-44.

Additional Unforeseen Asbestos

Because the specifications showed only a small amount of asbestos on the third floor in one room, Young allocated only a couple of days in early July to do that work. Transcript at 36, 56; Appellant's Exhibit 20. Young contemplated "glove and bag" type asbestos removal, which did not necessitate setting up containment areas or chipping up the floor tile and bagging it. Transcript at 35. Because the specifications and plans indicated more asbestos in the basement, Young intended to begin its demolition there and then move up to the third floor area for abatement. Id. at 56.

However, as soon as Young started the demolition in the basement, it encountered unforeseen asbestos. Transcript at 56; see Respondent's Exhibit 4, Appellant's Daily

Progress Report 12; Appellant's Exhibit 36.[2] As a result, GSA directed appellant to test for additional asbestos on the third floor; it did so on July 7, and the test was positive. Transcript at 58; see Appellant's Exhibit 24.

In July 1993 Young discovered asbestos above the ceiling on both the second and third floors, and asbestos insulation on ducts and pipes in the third and fourth floor mechanical rooms and fifth floor attic access. Appellant's Exhibit 36. This asbestos was not shown on the specifications or drawings. Transcript at 455. Young was unable to work in those areas until the asbestos was abated completely, and all work in those areas was stopped until it was abated. Appellant's Exhibit 36; Transcript at 69, 71.[3]

However, Young was never formally directed to stop work on this project. Young's president testified: "Stop work was not an option given to us when we met with both the GSA and the courts. . . . [W]e were directed to go ahead and do work where we could until these issues were resolved and that is what we did." Transcript at 554.

In July 1993 additional asbestos, not shown on the specifications or drawings, was found on the pipes below the third floor restrooms and in a pipe chase. Appellant's Exhibit 36.

By letter dated July 16, 1993, Young notified GSA that the project was about to "come to a complete halt due to many factors that should have been addressed prior to our start of work"; the letter identified numerous areas with unforeseen asbestos and a forthcoming change in the basement layout. Appellant's Exhibit 25.

On July 8, 1993, GSA requested that Young provide a proposal for this changed work, and by letter dated July 20, 1993, Young proposed to perform the additional abatement work on the third and fourth floors for $26,107.95, which included 10% profit. Appellant's Exhibit 2. Although Young sought a time extension and delay costs, Young's president and the contracting officer agreed that all extended overhead costs would be held until the end of the job and settled later. Transcript at 58, 67, 317, 508; Respondent's Exhibit 1 at 3; Appellant's Exhibit 38 at 2. Young's proposal stated: "We reserve the right to claim for delays due to this change and will submit after this work is complete." Appellant's Exhibit 2. On July 21, 1993, GSA issued modification PC-02, which authorized Young to proceed with the work set forth in this proposal at a cost not-to-exceed $26,108. Appellant's Exhibit 3. By modification PC-03, modification PC-02 was revised and the price was decreased by $949 to $25,159. Appellant's Exhibit 3. This modification stated:

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[2]Appellant's Exhibit 36 is a summary of delays prepared by the COTR in a memorandum dated June 10, 1994, tracing the project from June 1993 until that date. Transcript at 513; Appellant's Exhibit 36. The COTR prepared this document over the course of a few days based on his recollection and his review of the change orders, the pay requests, correspondence, and similar documents. Transcript at 513.

[3]According to the COTR's summary of delays in July 1993, "mechanical demolition and most other work [was] stopped until these [asbestos] conditions [could] be remedied." Appellant's Exhibit 36.

> The equitable adjustment in this modification also includes all direct, indirect, and cumulative impact and delay costs, if any, incurred in performing the changed (and unchanged) contract work affected by this modification.

Id. PC-03 was signed by Young on August 8, 1993, and by the Government on August 23, 1993. Id. In August 1993 the first asbestos abatement change order work was performed. Appellant's Exhibit 36.

In September 1993 asbestos was discovered in the attic above the courtroom on the third floor, where the sprinkler pipes were to be run. Appellant's Exhibit 36. In November 1993 asbestos was discovered in the mechanical room in the basement, and in December 1993 some was found at the fresh air duct to the fourth floor mechanical room and at the exterior duct at the basement level. Id.

In January 1994 asbestos abatement of the attic space above the third floor courtroom as well as the basement mechanical room and fifth floor mechanical closet was performed. Appellant's Exhibit 36. In March 1994 the asbestos abatement of the pipe chase was performed. Id. That same month, Young was presented with the asbestos survey that had been done in December 1992; the survey showed the presence of asbestos in a number of basement areas, the chiller room, fan room, fourth floor side attic, room 503, and pipe chase on the fifth floor. Transcript at 542-43; see id. at 1133-14; Appellant's Exhibits 45, 45A. None of these areas was designated in the contract specifications or drawings as having asbestos. Id. at 113-15, 536-43; Appeal File, Exhibit 1. The Prerenovation Report, which was used to prepare the specifications did not include samplings of areas which were later determined to have asbestos. Appellant's Exhibit 49; Deposition of Gerald Hust (March 16, 1999) at 39-40, 67-70; Deposition of Merrill Delange (March 16, 1999) at 26, 69, 77-79; Affidavit of Don Wilbanks (April 22, 1999) ¶ 3.

Young's daily field progress reports indicate that asbestos abatement was performed at times between July 1993 and March 1994, but do not indicate that any asbestos abatement was performed after March 1994. Respondent's Exhibit 4; see also Appellant's Exhibits 21, 36.

The following is a summary of the contract modifications issued for asbestos abatement work:

Identification No.	**Date Signed by GSA**	**Renovation Work Involved**	**Amount**
PC-02/PC-03	07/21 & 08/23/93	Asbestos abatement on pipe insulation in basement elevator machine room, duct insulation on third and fourth floors and plumbing pipe insulation	$26,108 (PC-02) $25,159 (PC-03)

PC-04	12/07/93	Asbestos abatement in rooms 232, 503, removal of pipe insulation	$11,355
PC-05	01/04/94	Asbestos abatement in attic above room 332	NTE [not to exceed] $50,403
PC-06	01/21/94	Asbestos abatement of insulation	$35,321
PC-08	05/16/94	Asbestos abatement of pipe chase through all five floors	$30,061

Appellant's Exhibits 2-6, 8, 34.

In its change order proposals, Young included overhead and profit for its own work or a commission on its subcontractor's work. Appellant's Exhibits 3-5, 7-9; see Transcript at 196-99. Modifications PC-04 and PC-06 contained the identical language as PC-03 to the effect that all delay costs were included. Appellant's Exhibits 4, 6. In modification PC-08, a unilateral change order, the Government omitted the requested overhead. Appellant's Exhibit 8.

As a result of the additional asbestos which was discovered during the renovation, but not noted in the contract, Young's subcontract with Environmental Management Services, Inc. was increased by $143,520.90 -- from $29,669.15 to $173,190.05. Respondent's Exhibits 41-46.

The Reconfiguration of the Basement

At the pre-construction meeting in mid-June, the court requested a major change in the configuration of the basement, which included the deletion of a fitness center and the construction of offices and a computer operation room. Transcript at 457; Appellant's Exhibit 36.

In July 1993, GSA decided not to use the original architect, Gilbert, for this work because the agency considered Gilbert's price too high and the anticipated time for completion too long. Transcript at 89-90, 458, 505-06; Appellant's Exhibit 36. Instead, the COTR, John Bradley, drew up the plans for the new basement configuration. Appellant's Exhibit 36; Transcript at 458. GSA contracted with Young for the mechanical redesign work, and Triad, Young's mechanical subcontractor, did that work. Transcript at 459. The revised basement floor plan was approved by the courts on August 4, 1993, and the drawings were submitted to Young in change estimate three (CE-3) on September 8, 1993. Appellant's Daily Progress Report 36, Respondent's Exhibit 4; Respondent's Exhibit 18; Transcript at 482-83; Appellant's Exhibit 36.

Under the reconfiguration, approximately two-thirds of the basement work was new work. Transcript at 456. The COTR admitted that the plans he drafted for the basement

were "an elaborate sketch." Id. at 459. He stated: "I showed the electrical receptacles and phone outlets and that kind of stuff on the plan but as far as any wiring diagrams and circuits . . . that was basically left to the electrical engineer to work out." Id. at 458-59. The redesign was done by Triad on a trial-and-error basis to make the duct work fit. Id. at 85.

In September 1993 the HVAC subcontractor's submittals had been rejected by Gilbert because parts of air handling units did not comply with the specification; the subcontractor and the architect went back and forth at least three times before the submittals were approved. Transcript at 464; Appellant's Exhibit 36. In October 1993 the HVAC subcontractor was still redesigning duct work in the basement. Appellant's Exhibit 36. In November 1993, while engineering the basement air conditioning change, the HVAC subcontractor learned that the specified variable air volume (VAV) boxes were not the correct ones for the proposed new system. Id. GSA approved changing the VAV boxes and requested the HVAC subcontractor to submit a cost proposal. Id. The electrical contractor was not involved in HVAC redesign, and there were subsequent electrical problems when the new VAVs were installed. Transcript at 88.

In December 1993 the ceiling layout in the basement needed to be reworked due to the larger VAV boxes. Appellant's Exhibit 36. Triad was required to redesign the ducts into a different configuration but still deliver the same volume of air to the rooms. Transcript at 504-05.

Although Young's president testified that the problem with the design in the basement extended the job until October 1994, an extension of this duration is not corroborated by other evidence of record. Compare Transcript at 86-89 with Appellant's Exhibits 18, 36; Transcript at 500; Respondent's Exhibits 4, 13. The COTR's summary of delays indicates that the ceiling plans in the basement were revised in July 1993 and reworked in December 1993. Appellant's Exhibit 36. The design work for the HVAC was incorporated into change estimate twenty (CE-20), and both Young and Fidelity requested a thirty-day delay for CE-20 work. Transcript at 500; Appellant's Exhibits 10, 18. Young's daily progress reports indicate that changes to the basement floor plan or HVAC design were delaying the job on some days between July and December 1993 -- July 1, 9, 14-16, 20, 27, and 29; September 9 and 30; October 8, 13, 26, and 29; November 4 and 15; and December 13 and 22. Appellant's Daily Progress Reports 13, 18, 21-23, 25, 30, 32, 60, 74, 82, 84, 93, 96, 100, 106, 124, 131; Respondent's Exhibit 4.[4] However, other work was performed on those dates with between

[4]On June 24, Triad's demolition in the basement was noted as a delay. On July 1, 8, and 9, the new basement floor plan was noted as a delay or as a problem that needed resolution. On July 14, 15, 16, 27, and 29, delays were noted for the basement floor plans or mechanical plan changes. On September 3, mechanical engineering for the basement was noted as a delay. On September 9, 27, and 30, delays were noted because of HVAC duct work changes. On October 8, 12, 13, 19, 26, and 29, delays were noted for HVAC submittals and duct work design and third floor courtroom changes. On October 28, there was an entry in Young's daily progress reports regarding relocating duct work to columns. As of November 1 and 4, the HVAC design in the basement was still causing delays. On November 12, a delay was noted regarding the progress of change order proposals Young had submitted and

four and thirteen employees working on site. Id. In 1994, no delays were noted in Young's daily job progress reports referencing the basement floor plan or HVAC changes.[5] Id.; see Respondent's Exhibit 13. In its daily reports Fidelity indicated delays relating to mechanical work in the basement on August 21, 25, 31, and December 14, 15, and 22, 1993.[6] Fidelity's Daily Reports 57, 61, 64, 112, 113, 118.

Changes Due to Discrepancies Between the Drawings and Field Conditions

In June 1993 discrepancies between the contract drawings and the field conditions began to surface. Appellant's Exhibit 36. In particular, the drawings did not show existing radiators, piping, and boxing, and they contained erroneous ceiling heights. Id.; Transcript at 453-54. Specifically, the drawings called for the ceiling height to be seven feet, six inches, and the courts wanted an eight-foot ceiling in the basement area (the clerk's office), but with the duct work Young could achieve seven-foot, four-inch ceilings at best. Transcript at 502-03; Respondent's Exhibit 18. Young was asked by the courts to obtain higher ceilings, and it did so, at least in the center areas. Transcript at 454.

In August 1993 conflicts arose with regard to electrical locations in the basement; because the radiators and boxing were not shown on the plans, changes in electrical locations had to be made. Appellant's Exhibit 36.

In September 1993 the COTR noted that the file and bookcase details on the contract documents "[did] not work." Appellant's Exhibit 36. This same month the court requested

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resubmitted to the COTR. On November 15, there were delays due to HVAC. As of December 13 and 14, HVAC approvals were still causing delays. The radiator boxes and HVAC in the basement were noted as delays on December 22. Appellant's Daily Progress Reports 8, 13, 17, 18, 21-22, 23, 30, 32, 57, 71, 74, 82-84, 88, 93, 95-97, 100, 106, 124, 125, 131, Respondent's Exhibit 4.

[5] Duct work in the basement was also proceeding in January and February 1994; although the daily reports for April and May also indicated some duct work occurring in the basement, there was no indication that this was a problem or causing a delay at that time. Appellant's Daily Progress Reports 145-49, 162-65, 199-239, Respondent's Exhibit 4.

[6] On August 21, 1993, Fidelity's daily progress report stated: "Changing everything around in basement"; on August 22, "nobody knows anything about what is changing or when"; on August 25, "Basement to a halt, no changes approved, painting fifth floor interior in areas which have mechanical and sprinklers and doing finish work which should be done last, not first." Fidelity's Daily Reports 57-58 61. On December 14, Fidelity's report stated: "Electrical mechanical changes and work not done by them that hold us up and other trades taking apart what we have already done and [Young] keeps wanting us to redo." Fidelity's Daily Report 112. On March 2, 1994, the entry in Fidelity's daily progress report stated: "Talked to mechanical man working in Basement. Still installing duct work in basement and they said ceilings would be a problem and in their way." Fidelity's Daily Report 167, Respondent's Exhibit 13. Fidelity's April 5, 1994, entry noted "Everything at standstill." Fidelity's Daily Report 191, Respondent's Exhibit 13.

deletion of a jury box and additional spectator seating in the new third floor courtroom. Id. These revisions were submitted to the contractor for pricing in September. Id. In October 1993 GSA requested a cost proposal from Young to eliminate the radiators in the basement and increase the heating capacity of the new air handler unit. Id. In November 1993 GSA approved a change order to eliminate these radiators and make the heating changes. Id. In December 1993 the existing sewer and water lines in the basement needed to be relocated due to a conflict with the air conditioning duct work. Id.

Gilbert's drawings originally showed a chiller on the roof area off the fourth floor outside the courtroom windows. Transcript at 468; Appellant's Exhibit 36. Due to the tenant's concern with noise, in December 1993 GSA requested that the chillers be relocated on the ground level. Id.

In the original drawings a vertical, exposed sprinkler pipe was to go in the corner of an ornamental staircase, but in January 1994 GSA and the courts expressed their dissatisfaction with the amount of exposed sprinkler pipe that was installed in the ornamental stairwell. Appellant's Exhibit 36. In March 1994 GSA and the courts reviewed their options for relocating or concealing the exposed sprinkler pipe. Id. Because it was not possible to relocate this pipe, Young boxed around it. Transcript at 470-71. In addition, some exposed sprinkler pipe on the fourth floor stairwell was relocated. Id. at 471-72.

Delays Caused by the Mechanical Subcontractor, Triad

Young's mechanical subcontractor did not man the job properly or in timely fashion, and did not show up for work several times. Transcript at 216-27, 445, 451. This caused some delays in the design work in the basement, and also delays in coordination of that work, which resulted in additional change orders. Transcript at 445. According to Young's daily report of June 24, 1993, Triad delayed demolition in the basement. Appellant's Daily Progress Report 8, Respondent's Exhibit 4.

By letter dated April 19, 1994, Young's project manager complained to Triad that it had not submitted change order pricing breakdowns, stating:

> I have made every effort to stress to you the importance of getting all the change order pricing breakdowns to the owners so that we may all get paid for them.
>
> You don't seem to be concerned with the fact that some of this work is several weeks old and we are now nearing the final completion of this project with the paperwork still outstanding solely due to your being non-responsive.

Respondent's Exhibit 6 at 1.

The COTR prepared an undated, handwritten memorandum entitled "Time Extensions and Liquidated Damages" relating to his findings of fact for modification PC-18. Transcript at 447-48; see id. at 511-12; Respondent's Exhibit 104. In this memorandum, the COTR characterized Triad as "the subcontractor which caused the most delays" and stated that its work "affected and delayed many other trades." Respondent's Exhibit 104.

The Out-of-Sequence Work

Young did not prepare revised bar chart or work item list schedules when delays were encountered. Transcript at 186. Young met with its subcontractors and advised them on a daily or weekly basis where they were to work when they were out of sequence. Id.

The electrical subcontractor did its rough-in work before the plumbing subcontractor and mechanical subcontractor did theirs. Transcript at 448, 553. The COTR testified: "The problem with that is that he ran his conduit where it was easiest to run it and then it was in the way . . . of the mechanical subcontractor when he came to install the duct work which meant in most cases the electrician had to come back and move the conduit and reroute it and in at least one case we [had to] . . . modify some duct work." Id.

In order to keep working, Young installed the metal studs and drywall on one side of the wall and even painted, but left the other side of the wall open, so the electrical conduit could be installed. Transcript at 79.

Young painted some areas before the work by other trades was done there. Transcript at 450. In its August 25, 1993, daily progress report, Fidelity noted: "Painting on interior will be ruined at end of job . . . . Basement to a halt, no changes approved, painting 5th floor interior in areas which have mechanical & sprinklers & doing finish work which should be done . . . last not first." Appellant's Daily Progress Report 61, Respondent's Exhibit 13. Young had to repaint approximately 30% of the basement. Transcript at 89.

The Problems with the Change Order Process

There were nineteen modifications covering twenty-two change order requests on this job. Appellant's Exhibits 1-19, 34.

Delays in executing change orders emanated from both Young and GSA. Young's president testified that Young could not price the change order work because GSA had not provided enough information, and it was receiving vague requests from the COTR – "since [the architect] was out of the loop . . . and [Young] got no input from engineers." Transcript at 97. According to the COTR, however, Young's proposals for contract modifications were often inadequate because Young provided only lump sums without cost breakdowns, and the COTR needed to request additional information to evaluate the proposals. Id. at 463-64. For example, Young's submittals for certain of the air handling units were rejected several times for lack of detail, and Young was slow in its resubmissions. Id. at 464-65. As of February 1994, the COTR was still negotiating with Young and requesting cost breakdowns on non-asbestos change order proposals. Appellant's Exhibit 36. As of March 1994, the COTR had received revised proposals on other miscellaneous change order items, but was still having problems with some items or required further breakdowns. Id.

Young's daily progress reports indicate delays due to change orders on July 15-16, and 23; September 9 and 10; November 1, 8, 12, 23, and 30; and December 13 and 14, 1993; and January 7; February 2 and 22; March 16; and April 8, 1994. Appellant's Daily Progress Reports 22, 23, 28, 60, 61, 97, 102, 105, 112, 115, 124, 125, 137, 156, 171, 187, 203, Respondent's Exhibit 4; Transcript at 97-98. However, other work was being performed on

all of these dates, with between two and sixteen employees working on site. Id. Fidelity's daily progress reports indicate delays due to change orders on August 22-24, 25, and 31, and December 14 and 15, 1993. Fidelity's Daily Reports 58-61, 64, 112-13, Respondent's Exhibit 13.

The COTR's summary of delays reflects that as of May 1994:

> Miscellaneous change order items have been popping up over the last few months, the prices for which have been negotiated with the contractor. Final packaging of items was determined at the end of last month and sent to contractor. Contractor has performed most of contract work not affected by pending change orders. Contractor submits all change order packages to date including time extensions. Most costs are OK -- only a few are still questionable.

Appellant's Exhibit 36. As of June 1994, the COTR wrote: "All change orders to date are being sent in to Atlanta and being processed. Work at jobsite is proceeding around critical pending change order items." Id.

Problems Involving Fidelity

The record indicates that delays were caused by both Fidelity and Young. Young's president acknowledged that at times during the project Fidelity did not man the job when asked by Young to do so. Transcript at 216; Respondent's Exhibits 29, 34. He testified:

> Q . . . [S]o are you saying [Fidelity] put adequate manpower on the job?
>
> A For the full time of the job?
>
> Q Yes.
>
> A Not in every case, no. Let me rephrase that. They put adequate manpower on the job but there were just times when they didn't have, feel like they had enough work to stay on the job.

Transcript at 222-23.

In his deposition, Young's president testified as follows:

> Q [D]o you have an opinion as to whether or not the project would have been finished early if Fidelity would have put more manpower on the job or would have been more responsive to [Young's] request for them to come in and do work?
>
> A Yes.
>
> . . . .

> Q How much sooner would the project have been completed?
>
> A The project, the punch list could have been finished in August of '94. It didn't happen until October of '94.

Transcript at 227.

The COTR received complaints from Fidelity's superintendent that Young would request him to work, but when he got to the job he discovered that there was only a half day's work to do. Transcript at 449. According to Fidelity's daily reports, Fidelity began experiencing difficulties in its work in mid-August 1993. Fidelity's Daily Report 53, Respondent's Exhibit 13. Specifically, the August 18 report noted: "Bouncing around on framing and nothing decided on. Can't tie walls into outside walls because they may be changed to sheetrock." Id. Fidelity's daily report for August 31, 1993, stated "[D]elays: everything!! But still being requested to stay on job and try to keep busy or look that way." Fidelity's Daily Report 64, Respondent's Exhibit 13. By letter dated September 27, 1993, Fidelity notified Young that "as of the close of business tomorrow we will be at a standstill on [this] project due to the changes in walls and ceiling work." Respondent's Exhibit 19.

There are no daily reports for Fidelity in the record for the periods October 29-December 13, 1993, and July 30-August 29, 1994. See Fidelity's Daily Report 109 (Oct. 28, 1993) to next report in sequence, 112 (Dec. 14, 1993), and 271 to unnumbered next report in sequence (Aug. 30, 1994), Respondent's Exhibit 13.

By letter dated November 8, 1993, Fidelity advised Young:

> We are now in a delay period as stated in our letter dated September 27, 1993 on the above referenced contract.
>
> We will be leaving the job site tomorrow. When it is determined that we will be able to return to work with our full crew and complete the job as bid, we will do so.
>
> . . . .
>
> We have been on the job for a month doing small items that have come up, but we cannot continue to do so. This is not the way we bid the job and we are [losing] money as I am sure you can understand. This is why we will be demobilizing.

Respondent's Exhibit 21.

By letter dated December 13, 1993, Fidelity advised Young that its "work has been effectively shut down and the efficient prosecution of our subcontract work has been materially disrupted since September 25, 1993." Respondent's Exhibit 22.

Fidelity's December 14, 1993, daily report noted: "Items were being done and ripped out and done again and moving too slow to even warrant any manpower on job." Fidelity's

Daily Report 112, Respondent's Exhibit 13. By letter dated December 27, 1993, Fidelity requested $51.14 per day beginning January 1, 1994, throughout the duration of time it would take to complete the project. Respondent's Exhibit 26. By letter dated January 4, 1994, Young responded to Fidelity: "On 1/1/94 you were not being delayed." Id.

Young's daily progress reports indicate that Fidelity "pulled off the job for unknown reasons" on December 13, 1993, and that there were no Fidelity workers on the job on January 18, February 7 and 8, and March 4, 1994. Appellant's Daily Progress Reports 124, 125, 159, 160, 179, Respondent's Exhibit 4. Fidelity's daily progress reports indicate that one employee, the superintendent, was on the job on January 18 and February 7-8, but that nothing was ready on February 7 and 8, 1994. Fidelity's Daily Reports 135, 148-49.

Subsequent correspondence between Young and Fidelity reflects delays on both of their parts. By letter dated February 10, 1994, Fidelity advised Young that it had visited the jobsite on January 26, 1994, and that Fidelity was experiencing delays based upon unavailability of rooms, interference by another contractor doing drywall work, and uncompleted duct work in the third floor courtroom. Respondent's Exhibit 26. Fidelity stated: "We cannot afford to keep our superintendent on the job doing the work of laborers in order to keep our job open. There's too much unfinished work to be done by others delaying our progress in order to keep a full crew on the job." Id.

On March 23, 1994, the following entry appeared in the Fidelity's daily progress reports: "Talked to [the COTR] about all the delays and nothing done in proper order. Us doing finish work and painting before mechanicals even done, the amount of time wasted and waiting for items to be approved or done. [The COTR] said it is hindsight and job should have been shut down in August 1993 but they wanted to keep going for [the court] to keep showing something going on." Fidelity's Daily Report 182, Respondent's Exhibit 13.

Between March 25 and April 6, 1994, no work was done by Fidelity except a little taping. Fidelity's Daily Reports 184-92, Respondent's Exhibit 13. According to the April 5 report, Fidelity's work was at a standstill. Id. By letter dated May 6, 1994, Fidelity requested its delay costs in the amount of $22,523.64. Respondent's Exhibit 25.

In a letter dated June 20, 1994, Young's president advised Fidelity: "I have visited this jobsite on June 7, 1994. You had no people on the job. . . . Your statement that you now have a crew of men at this site with nothing to do is totally false." Respondent's Exhibit 29.

By letter dated August 18, 1994, Young advised Fidelity that work would be ready to be done by August 22, 1994, and that Young was expecting Fidelity to put people on the job and complete all the remaining work in one week. Respondent's Exhibit 32.

By letter dated September 16, 1994, Young advised Fidelity that "you have not moved the project as you stated you would, and as Young has emphasized in the past, you have underestimated the amount of work needed to complete. We once again ask that you man this project with sufficient forces to complete." Respondent's Exhibit 34.

There were also delays related to Fidelity's pricing. When Fidelity priced its change order work, GSA determined that the pricing was too high and asked Young to pursue

another method. Transcript at 194. Thereafter, Young did some of the work itself or brought in another subcontractor to perform the new work. Id. With respect to modification PC-14, Collins and Wright did the drywall and metal stud work. Id. at 195.

Fidelity completed its work on this job on October 3, 1994. Fidelity's Daily Report 296, Respondent's Exhibit 13.

The April 1994 Schedule

In April 1994 Young met with the COTR at the site to discuss all change order items and time extensions. Young drew up a construction schedule for completion of the job showing an end-of-May completion date and gave this revised schedule to all subcontractors. Appellant's Exhibit 36. In May 1994 base contract work unaffected by any of the change orders had been completed. Id.; Transcript at 498. However, there was work remaining at that time which had not been completed because it was affected by the modifications. Id. On May 16, 1994, GSA issued PC-08, which extended the contract completion date to March 13, 1994. Appellant's Exhibit 8.

Subsequently, GSA and Young had a meeting, and GSA requested Young to draw up a revised construction progress schedule with a proposed completion date. Respondent's Exhibit 104. Young proposed a completion date of August 10, 1994, and the Government agreed with this completion date. Appellant's Exhibit 10.

The Status of the Job between August 10 and October 31, 1994

Between the established contract completion date of August 10, 1994, and the date of substantial completion, September 16, 1994, Young was still performing original base contract work which had been affected by change order work as well as change order work. Transcript at 478-79,[7] 497-98; Appellant's Exhibit 36.

The Government requested some additional work after the date of the scheduled contract completion, August 10, 1994. Transcript at 421-22. For example, when the courts moved their equipment into the basement some areas were dark, so surface light fixtures had to be added. Id. at 422.

On August 17, 1994, the COTR notified Young that the contract completion date established by contract modifications had passed and that Young was now in a period for which liquidated damages were due. Appeal File, Exhibit 9; Transcript at 477. As of that date, the mechanical work was not ready for final inspection, the electrical work was not complete, and only the third floor judge's chambers and courtroom were complete. Transcript at 477-78. The COTR prepared a memorandum supporting liquidated damages which stated:

> The present contract completion date is 8/10/94 and the substantial completion date is 9/16/94 which means the contractor is subject to liquidated damages.

[7]The parties agree that the project was substantially complete on September 16, 1994.

> The contractor has shown by his time extension cost breakdown that he should receive a time extension, for this modification, from 8/10/94 to 10/31/94 or 82 days. In my opinion, 82 day[s] is totally unjustified. We have been very lenient with this contractor as far as time extensions. We had a meeting, months before our last official time extension (8/10/94), and requested that the [contractor] draw up a revised construction progress schedule, with a proposed completion date, based on all the pending modifications. We used his proposed completion date of 8/10/94 to grant him a time extension then. Those pending modifications included most of the items in CE 22. In my opinion, the contractor is trying to cover his own delays due to the inefficiency of his superintendent and subcontractors. The only reason that CE 22 has not been resolved a long time ago, is that the contractor continuously submitted proposals which included items not pertaining to this contract or included costs which I challenged. The contractor also wanted to include all time extension costs in this last modification, but could not determine these costs due to a lawsuit brought against him by one of his subcontractors. This project really fell apart, especially toward the end. The contractor's project manager, who began the project left about midway [through] the project, and the new project manager left before substantial completion. The contractor's superintendent also left before substantial completion. These actions did not help the contractor complete the project in a timely manner. The subcontractor who caused the most delays was the mechanical subcontractor. He was very non-responsive to man the job especially toward the end of the project, and his work affected and delayed many other trades. In conclusion, I believe the contractor should still be subject to liquidated damages.

Respondent's Exhibit 104.

The Deficiencies and Omissions (D&O) List

On December 16, 1993, the COTR prepared a seventy-item list of deficiencies and omissions, also known as a punchlist. Appellant's Exhibit 30; Transcript at 422.

The finish hardware items on the D&O list arose because the courts changed specified trim on the hardware that Gilbert had originally chosen. Transcript at 425. These items were completed on June 3, 1994. Id. Some of the other finish work on the D&O list had been completed by Fidelity, but there were problems with pricing and Fidelity had not yet been paid. Id.; Respondent's Exhibits 102, 103.

Another item on the D&O list, the ladies' toilets, was not completed until 1995. The Government did not cause that delay. Transcript at 433. Young delayed in installing the toilet partitions; late in the job it discovered these partitions did not fit and needed to order extra parts to make them work. Transcript at 432-33; see also id. at 156. According to the COTR, the CE-22 items changed "all of them, constantly." Transcript at 436.

The Lost Daily Reports

On October 31, 1994, Young's superintendent closed down the job, removed the job reports from the site, and returned them to Young. Transcript at 200. Later, Young moved its office to Texas and lost all of the reports dated after September 9, 1994, except for one, the report for October 4, 1994. Id.[8] These field reports would have gone through October 31. Id. at 200-01.

Contract Time Extension Requests and Modifications

On February 7, 1994, the COTR issued change estimate ten (CE-10), requesting a proposal for asbestos abatement of the pipe chase through all five floors of the building, and on February 10, 1994, Young submitted a proposal for the asbestos abatement and requested a thirty-day time extension and extended overhead. Young had previously submitted a proposal for asbestos abatement on piping in room 407 on January 27, 1994, and had requested a forty-five-day time extension and extended overhead. No overhead was sought for any subcontractor at this time.[9] The direct costs of both of these proposals were included in modification PC-08, which also granted a seventy-five day time extension and extended the contract completion date until March 13, 1994. Appellant's Exhibit 8.

Modification PC-10

In change estimate eighteen (CE-18), GSA requested a proposal to remove existing radiators in the basement and to provide framing, drywall, and finishing to conceal the radiator piping in the basement. Appellant's Exhibit 10. Change estimate twenty (CE-20), dated April 25, 1994, dealt with radiator boxes and mechanical design work for all changes in the basement. Id. Modification PC-10, which was executed on August 1, 1994, encompassed the work in CE-18 and CE-20, and extended the completion date until August 10, 1994, but did not include any costs associated with delays for these work items. Id. Under modification PC-10, Young was compensated an 8% commission on its subcontractor's work on CE-18 and a 5% commission on its subcontractor's work for CE-20. Id.

Modification PC-11

In change estimate fifteen (CE-15) the Government requested changes which included demolishing two walls and ceilings on the third floor and framing and finishing five walls, providing raised floors in the basement conference room and computer training room, installing drywall window pockets, painting and finishing ceiling areas at the basement window pockets, and adding vinyl wall covering in lobbies. Appellant's Exhibit 11. Young's direct costs and markup for this work were $12,494 without delay costs. Id. These additions

[8]Young's field reports 288, 290-295, and 297-298 are also not in the record. Respondent's Exhibit 4. There are no field reports in the record for Fidelity between July 30 and August 29, 1994. Respondent's Exhibit 13.

[9]By letter dated May 9, 1994, Young submitted a revised proposal for change order work performed under contract modification PC-08. This proposal reflected a seventy-five-day subcontractor delay billing on behalf of Fidelity totaling $65,517. Respondent's Exhibit 26.

were reflected in modification PC-11, which added $12,494 to the contract, but did not include any costs for delays associated with these items. Id. Young received both 10% profit and 10% overhead on its work and an 8% commission on its subcontractor's work on CE-15. Id.

Modification PC-12

In change estimate sixteen (CE-16) dated June 8, 1994, GSA requested a proposal for ten mechanical changes due to deletions, changes by the courts, changes in basement and mechanical space, and conflicts above the ceiling. Appellant's Exhibit 12. Modification PC-12, dated August 1, 1994, added $8723 for this work. It did not include any costs associated with delays for this work, but did include a 6% commission on the subcontractor's work. Id.

Modification PC-13

In change estimate fourteen (CE-14), dated June 1, 1994, the Government requested a proposal for installing a chiller at ground level in lieu of on the roof area. Appellant's Exhibit 13. Modification PC-13, dated August 1, 1994, added $7336 for this work, did not include any delay costs for this work, but did include 10% overhead and 10% profit on Young's work, and an 8% commission on the subcontractor's work. Id.

Modification PC-14

In change estimate seventeen (CE-17), dated April 25, 1994, the Government asked Young to provide additional drywall, drops, and soffits in the basement; to laminate designated existing walls; and to provide a credit for not plaster-patching laminated walls. Appellant's Exhibit 14. In PC-14, dated August 1, 1994, GSA added $9434 for Young's direct costs and markup for this work, including an 8% commission on the subcontractor's work. Id. The modification included no costs associated with delays. Id.

Modification PC-15

In change estimate nineteen (CE-19) the Government requested additional electrical work in the basement, including relocating fixtures and receptacles and conduits, modifying the electronic court recording system, changing the floor boxes, and similar work. Appellant's Exhibit 15. As a result of these changes, the Government in modification PC-15, dated August 16, 1994, agreed to pay Young $8188, which included a 6% commission on subcontractor work, but no costs for delays associated with this work.

Modification PC-16

On July 27, 1994, GSA requested seventeen miscellaneous changes in change estimate twenty-one A (CE-21A). Appellant's Exhibit 16. These changes included changing glass, paint and wood trim; installing a shower door and metal access doors; routing sprinkler pipe; reinsulating abated piping; and providing HVAC control training. Id. Young's proposal for this work did not seek any delays or costs associated with delays. Id. In modification PC-16 the Government paid Young $26,356, which included 10% overhead and

10% profit for Young on its own work, and an 8% commission on the subcontractor's work. Id.

For the work in CE-14 through CE-20, Young requested a total of 100 days of extended overhead for Young and 100 days for Fidelity. Appellant's Exhibits 10-15.

Modifications PC-17 and PC-18

By letter dated January 29, 1997, Young submitted a breakdown for revised change estimate twenty-two (CE-22) which included: (1) the remaining additional direct cost items for various items of work, (2) a request for 304 days (January 1-October 31, 1994) of extended field office and home office overhead costs for Young, and (3) a request for $43,233.27 of field office overhead and $24,947.64 of extended home office overhead for its subcontractor Fidelity. Supplemental Appeal File, Exhibit G18; Stipulation II.4.

The direct costs in CE-22 included changes in panels in wood doors, changes in hardware finishes, wall covering, extra toilet partitions, electrical work, and additional finishes and painting, totaling $21,156.62, including an 8% commission on the subcontractor's work. Appellant's Exhibit 17. Young sought field office overhead in the amount of $67,196.16 and home office overhead in the amount of $59,635.68 for a total of $126,831.84. Id. The $67,196.16 represented 304 days at a rate of $221.04 per day. Id. Fidelity's home office overhead in the amount of $24,947.64 was based on 276 days (January 1-October 3, 1994) of delay at a rate of $90.39 per day.

By letter dated November 26, 1997, the contracting officer responded to Young's January 29, 1997 revised CE-22, enclosing contract modifications PC-17 and PC-18. Appeal File, Exhibits 14, 21; Stipulation II.5. Contract modification PC-17 accepted Young's January 29, 1997, breakdown of direct costs associated with the items in CE-22, and this resolved the direct cost portion of CE-22. Appeal File, Exhibits 14, 17; Stipulation II.6.

Contract modification PC-18 granted extended overhead at a daily rate of $254 per day for 118 of the 259 calendar days between December 31, 1993, and September 16, 1994. Appeal File, Exhibit 21; Complaint ¶ 20; Answer ¶ 2; Stipulation II.7. In allowing 118 days of compensable delay for PC-18, the contract specialist awarded half of the seventy-five days of delay incorporated in PC-08 plus eighty days. Transcript at 394.[10]

Modification PC-18, with an effective date of November 20, 1997, added $29,972 to the contract price and provided as follows:

> This action confirms the Government's unilateral determination on payment of all fair and reasonable extended overhead costs for the period of 12/31/93 up to and including substantial completion issued on 9/16/94, all in the amount

[10]In an earlier effort to compromise this claim, the COTR, as reflected in an e-mail message dated June 20, 1997, had recommended paying Fidelity and Young extended overhead for 259 days. Appellant's Exhibit 37. However, this was strictly by way of compromise. The COTR did not make an analysis using the Eichleay formula.

> of $29,972. Your contract is increased accordingly. . . . Extended overhead costs for 118 calendar days at a rate of $254.00/day.

Appellant's Exhibit 18.

The Delay in Payment of Modification PC-17

Modification PC-17, representing the direct costs in CE-22, was negotiated and agreed to on February 8, 1997. Appellant's Exhibit 17; Transcript at 338. However, the costs contained in this modification were not paid until June 1998, some fifteen months later. Transcript at 339-41.

On September 8, 1997, the contract specialist drafted a letter authorizing payment of $21,156.62 as the direct costs for CE-22 and $29,972 of extended overhead for 118 calendar days at the rate of $254 a day. Appellant's Exhibit 42. On September 25, 1997, the COTR requested funding from GSA's funding authorization official for CE-22 direct costs in the amount of $21,156.62 and for extended overhead payments for 118 days at $254 a day in the amount of $29,972. Transcript at 364; Appellant's Exhibit 43. In response, a GSA funding official advised the contract specialist via an e-mail message on September 29 that funds were available. Transcript at 365-66; Appellant's Exhibit 41. The contract specialist testified that he did not follow up on this because he was "waiting on the funding," and did not recognize the e-mail message as a funding authorization. Transcript at 370. Rather, he stated that he needed a procurement request, PR Form 49, signed in triplicate in order to obtain funding. Id. at 366-70.[11] However, the person at GSA responsible for funds control testified that the e-mail message requesting funding on September 25, 1997, was a procurement request for funding in the amounts of $21,156.62 and $29,972. Id. at 530. She further testified that on September 26 she sent the e-mail messages to the GSA person who tracks the funds, who in turn responded via e-mail to the contract specialist on September 29 that the requested funds were available and approved for use; upon receipt of this e-mail message from the funding personnel, the contract specialist could have issued a modification utilizing those funds the very next business day. Transcript at 531; Appellant's Exhibit 41. We find the testimony of GSA's person in charge of funds control to be more credible than that of the

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[11]The contract specialist had testified in his deposition:

> [Q.] Do you have any knowledge as to why [the contracting officer] did not go ahead and send these [modifications] out[?]
>
> [A.] Well I wish I could blame this on someone else but evidently I found this stuff in, just before Thanksgiving, in November and realized that it hadn't gone out, so this is probably a faux pas on my part. It is interesting to note that at the time I didn't have funding to go with it back in early September but it is possible that a copy of this was forwarded to [agency payment personnel].

Transcript at 369.

contract specialist, who claimed funding was not authorized. Compare Transcript at 361-70 with id. at 529-35.[12]

The modifications were not issued until November 26, 1997. Appeal File, Exhibits 13, 14. On December 12, 1997, Young submitted an invoice in the amount of $64,960. Respondent's Exhibit G-19. The COTR corrected the invoice in his construction progress report dated January 6, 1998, concluding that the contractor was entitled to payment in the amount of $44,944. Transcript at 407-08. The difference in the amounts is due to the facts that (1) the contractor made a calculation error on its construction progress report by adding the bond premium twice and (2) the project manager retained $11,100 for liquidated damages. Affidavit of Don Wilbanks (June 18, 1998) ¶ 6. This corrected invoice was then forwarded to the contract specialist. The contract specialist then prepared a corrected construction contract payment voucher bearing the date January 8, 1998, showing the correct amount due, $44,944. Transcript at 409.

However, the contract specialist did not pay this amount in January because he claims the invoice submitted by the contractor was defective even though it had been corrected by the COTR. He testified: "I didn't have an original invoice after I sent the other invoice back. What is required by finance is contractor's letterhead, original signature, correct invoice. Once I sent back the defective invoice I didn't have an original signature. All I had was the photocopy and I never received a corrected invoice. Therefore I felt like I couldn't pay it." Transcript at 410-11. The contract specialist did not prepare the construction payment voucher until May 21, 1998 -- after appellant had filed a motion for summary relief in these appeals to recover this payment. When the contract specialist paid this "uncorrected" invoice several months later, he still had not received a corrected invoice from the contractor. Id. at 411-12. Young received this payment on June 1, 1998. Id. at 410.

Young's president never received any indication that his invoice was invalid or incorrect. Transcript at 554-55. He never had received any letter from GSA asking that he reevaluate or revise or resubmit an invoice. Id. at 555.

Progress Payments Young Received

Young received fifteen payments during the period from June 1993 to October 1994:

	Date Issued	Amount Paid
1.	6/23/93	$8,916
2.	8/6/93	$160,255
3.	9/2/93	$231,091

[12]The contract specialist also gave other unsubstantiated reasons that the Government did not pay this invoice sooner. He claimed he did not have sufficient information to make payment, that he was busy with another contract, and that counsel advised him not to pay the invoice until it was corrected. Transcript at 343-44.

4.	9/29/93	$79,282
5.	11/3/93	$89,021
6.	12/2/93	$124,006
7.	1/12/94	$122,700
8.	2/1/94	$156,571
9.	3/9/94	$88,989
10.	4/1/94	$64,476
11.	5/4/94	$56,116
12.	6/11/94	$50,232
13.	7/12/94	$76,027
14.	8/4/94	$82,700
15.	10/20/94	$40,198
16.	5/18/98	$44,944

Respondent's Exhibits 1, 2; Transcript at 174-75; Supplemental Appeal File, Exhibit G-19.

On May 21, 1998, the contracting officer wrote a final decision enclosing modification PC-19, which assessed $11,100 of liquidated damages for the thirty-seven-day period between August 10 and September 16, 1994. Appeal File, Exhibit 31; Stipulation II.8.

Discussion

Is Young Entitled to Extended Overhead for Any Days of Delay Beyond the 118 Days Already Allowed?

The parties have stipulated that the principal issue to be determined by the Board in GSBCA 14437 is "whether additional calendar days of extended overhead costs, in excess of the 118 calendar days in PC-18, are due and . . . whether the Eichleay formula is the proper method for determining the home office portion of the extended overhead costs."[13]

Field office overhead costs are direct costs incurred on the specific project due to the delay. Blinderman Construction Co. v. United States, 39 Fed. Cl. 529, 588 n. 56 (1997), aff'd, 178 F.3d 1307 (Fed. Cir. 1998). Home office overhead costs are those costs that are expended for the benefit of the whole business and cannot be attributed to any particular contract -- typically account and payroll services, salaries for managers, general insurance, utilities, and the like. Melka Marine, Inc. v. United States, 187 F.3d 1370, 1375 (Fed. Cir. 1999), cert. denied, 120 S.Ct. 1555 (2000); Altmayer v. Johnson, 79 F.3d 1129, 1132 (Fed. Cir. 1996). The Eichleay formula calculates home office overhead costs to be reimbursed if work on a contract was suspended, and if that suspension decreased "the stream of direct costs against which to assess a percentage rate for reimbursement." C.B.C. Enterprises, Inc. v. United States, 978 F.2d 669, 671 (Fed. Cir. 1992); see Eichleay Corp., ASBCA 5183, 60-2 BCA ¶ 2688.

[13]The stipulation further states: "The amounts of extended overhead (both field office and home office) which are due Young and its subcontractor, Fidelity, will be determined on remand to the parties for negotiation and audit, if necessary. If the parties are unable to reach agreement on quantum, then a subsequent appeal will determine the amounts due."

Counsel for appellant stated in his opening statement that the 118 calendar days of delay in the "aggregate" amount of $254 per day cover both Fidelity and Young. Transcript at 17-18. Therefore, we assume that both Young and Fidelity received extended overhead for 118 calendar days of delay in some compromised amount. We recognize that we are not called upon to review the validity of the Government's compromise of the 118 calendar days at the rate of $254 per day. However, in deciding whether either Young or Fidelity is entitled to additional days of home office and field office overhead, we must analyze separately whether each has satisfied all of the requirements for entitlement to such damages. E.g., E. R. Mitchell Construction Co. v. Danzig, 175 F.3d 1369, 1374 (Fed. Cir. 1999). In order to recover extended overhead, appellant has the burden of proving that the delay was proximately caused solely by Government action and was not concurrent with contractor-caused delay. William F. Klingensmith, Inc. v. United States, 731 F.2d 805, 809 (Fed. Cir. 1984); M. Raina Associates, Inc., ASBCA 50486, 99-1 BCA ¶ 30,180 at 149,319. Based upon the record before us, we conclude that neither Young nor Fidelity is entitled to any additional days of delay. Appellant has not proven entitlement to additional home office overhead under the Eichleay formula. Nor has appellant marshaled the requisite specific proof of the proximate causation of its additional field office overhead costs. Blinderman, 39 Fed. Cl. at 588 n. 56.

It is clear that the Eichleay formula is the exclusive method for calculating extended home office overhead when a contractor otherwise meets the Eichleay prerequisites. Melka Marine, 187 F.3d at 1374-75; Wickham Contracting Co. v. Fischer, 12 F.3d 1574, 1580-81 (Fed. Cir. 1994). In order to recover unabsorbed overhead under the Eichleay formula, appellant must prove three elements: "(1) the Government imposed a delay; (2) the Government required the contractor to 'stand by' during the delay; and (3) while 'standing by' the contractor was unable to take on additional work." Sauer Inc. v. Danzig, 224 F.3d 1340 (Fed. Cir. 2000); Satellite Electric Co. v. Dalton, 105 F.3d 1418, 1421 (Fed. Cir. 1997); Interstate General Government Contractors v. West, 12 F.3d 1053 (Fed. Cir. 1993).

The Court of Appeals for the Federal Circuit has specified:

> [W]hen a contractor can show that the Government required a contractor to remain on "standby" and the Government-imposed delay was "uncertain," the contractor has established a prima facie case of entitlement to Eichleay formula damages. The burden then shifts to the government to present rebuttal evidence or argument showing that the contractor did not suffer or should not have suffered any loss because it was able to either reduce its overhead or take on other work during the delay.

Satellite Electric Co., 105 F.3d at 1421 (citing Mech-Con v. West, 61 F.3d 883, 886 (Fed. Cir. 1995)).

Did Young Establish Government-Caused Delay?

Appellant submits that there are three periods of time in which Young was delayed by the Government. These are:

January 1-March 16, 1994, for a total of 75 days;

> March 16-August 10, 1994, for a total of 147 days; and
> August 10-October 31, 1994, for a total of 82 days.

Appellant's Posthearing Brief at 30.

At the outset we note that we are hampered in this case by the lack of any persuasive delay analysis or schedule analysis offered by appellant. Appellant's comparison of its approved schedule with the as-built schedule compiled by its president, coupled with this witness' testimony, establishes that there were delays, but this exhibit and testimony do not constitute a preponderance of the evidence as to the cause of these delays. Appellant's Exhibit 21. Further, appellant did not call any of its own superintendents or subcontractor employees who were on the job with some frequency; appellant's sole employee witness, its president, visited the site only ten times on a job which spanned some 504 days.

The First Alleged Period of Delay: Seventy-Five Days from December 31, 1993, to March 16, 1994

Appellant claims entitlement to extended overhead for seventy-five days of delay between December 31, 1993, and March 16, 1994, "for unanticipated asbestos which had to be abated in various phases of the project."[14] Appellant's Posthearing Brief at 48-49.

During this time frame, there was no actual suspension of work; nor were appellant's employees idle.[15] However, this is not an insurmountable obstacle to appellant's Eichleay claim. The Court of Appeals for the Federal Circuit recognized in Altmayer v. Johnson that contractors may use the Eichleay formula when Government-caused disruption or delay has made the length of a performance period uncertain. The Court stated:

> The proper standby test focuses on the delay . . . of contract performance for an uncertain duration during which a contractor is required to remain ready to perform. Interstate, 12 F.3d at 1058. Indeed, the linchpin to entitlement under Eichleay is the uncertainty of contract duration occasioned by Government delay or disruption. See, Wickham, 12 F.3d at 1577 and . . . C.B.C., 978 F.2d at 672 (contractors can use Eichleay when disruption or delay have "cast a cloud of uncertainty over the length of the performance period of the contract").

79 F.3d at 1133.

In the instant case, appellant's discovery of substantial quantities of unanticipated asbestos which had to be abated and which prevented other work from proceeding is precisely the type of uncertain delay and disruption contemplated by Altmayer. Indeed, the drawings mandated that construction was to "stop immediately" if any unforeseen asbestos were encountered, and it is clear that some work did stop. The COTR's summary of delays

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[14]The record indicates that the unanticipated asbestos was first discovered in July 1993.

[15]There were days when Fidelity's employees did not work. See Respondent's Exhibit 13.

for July 1993 stated: "Mechanical demolition and most other work is stopped until [the asbestos] conditions can be remedied." There is also evidence that Fidelity's work was "effectively shut down" or severely disrupted at times between September 27, 1993, and January 1994.

Further, the specifications and plans were so deficient with regard to asbestos that it was impossible to predict the quantity of the unforeseen asbestos -- a circumstance which rendered the duration of the delay and disruption most uncertain.[16] Finally, the nature of the asbestos abatement work -- dealing as it did with contaminated materials -- necessarily prevented other work from proceeding or so disrupted planned performance that it generated uncertain delays until it could be completed. However, it is clear that this work was completed in mid-March 1994. The record supports the conclusion that all seventy-five claimed days were attributable to the unforseen asbestos and were exclusively a Government-caused delay, satisfying the uncertainty and standby requirements necessary to establish a prima facie case of entitlement to Eichleay damages as well as entitlement to any field office overhead costs proximately caused by the unforeseen asbestos.[17]

The Second Alleged Period of Delay: One Hundred Forty-Seven Days from March 16 to August 10, 1994

For the alleged second period of delay, appellant seeks extended overhead for 147 days from March 16, 1994, to August 10, 1994, due "to the many changes necessary to either correct defects in the plans and specifications or to make changes because GSA's client, the court, did not like the original plans and specifications." Appellant's Posthearing Brief at 49. The record does not support a conclusion that there were 147 days of Government-caused delay attributable to such changes during the March-August 1994 time frame.

First, some of the changes appellant contends occurred in this second period of delay actually occurred earlier in the job. Discrepancies between the drawings and the field conditions regarding radiators and piping, and the ceiling height, occurred in the June-July 1993 time frame, according to the COTR's June 10, 1994, memorandum and Young's daily progress reports.

Second, the delays which the record does support in this time frame were not solely caused by GSA. As the Court of Appeals for the Federal Circuit recently recognized in Sauer v. Danzig:

> In order to demonstrate a compensable delay, a contractor must separate government-caused delays from its own delays. See, e.g., T. Brown Constructors, Inc. v. Pena, 132 F.3d 724, 734-35 (Fed. Cir. 1998); Commerce

[16]The quantity of asbestos actually found in this building was so much greater than that identified in the specifications that EMS' abatement costs increased from $29,669.15 to $173,190.05.

[17]Because the parties have stipulated that only entitlement is before us, we make no finding as to proof of quantum.

> Int'l Co. v. United States, 338 F.2d 81, 89-90 (Ct. Cl. 1964) (applying "the rule that there can be no recovery where the [government's] delay is concurrent or intertwined with other delays").

224 F.3d at 1348. There were delays due to work which was performed out-of-sequence due to Young's coordination decisions; Fidelity had done finish work and painting before the mechanical work was completed, and painting had to be redone. There were also delays due to Fidelity's failure to man the job.

The delays associated with the change order process are attributable not only to GSA, but also to Young and its subcontractors. Therefore, those delays are not compensable. Sauer. At times, GSA submitted vague change order proposals, but at other times Young and its subcontractors failed to provide sufficient breakdowns. The record also indicates that Fidelity's pricing was too high and that this resulted in other subcontractors being asked to do the work for certain change orders, also causing delay.

The delays relating to the mechanical subcontractor, Triad, must be shared by the Government, Young, and Triad. The COTR's redesign of the basement was so sketchy that Triad had to redesign and retrofit the HVAC equipment in the field, causing delays. However, according to Young's own correspondence and daily reports, Triad also was the cause of delay in that its employees failed to show up for work, delayed demolition in the basement, and failed to provide change order pricing breakdowns to the point where Young called Triad "nonresponsive."

Third, the type of delays which Young claims occurred during this period, stemming from the deficiencies in the drawings and the changes by the courts, did not cause a suspension of work or standby or the same degree of uncertainty and disruption as did the unforeseen asbestos. Nor do we have sufficient evidence of record to allocate these delays to specific time periods. Young has not established a prima facie case of entitlement to Eichleay damages or entitlement to field office overhead for itself or Fidelity due to these delays.

The Third Alleged Period of Delay: Eighty-two Days from August 10 to October 31, 1994[18]

Young contends that it experienced eighty-two days of delay because "the impact of the asbestos delays and changes to correct defective plans and specifications and make owner changes discussed in the first two delay periods forced the completion of follow-on base contract and punch list work through the end of October, 1994." Appellant's Posthearing Brief at 49. Appellant does not specify on which dates the impact of asbestos work caused

[18]Young contends that there was delay on eighty-two days between August 10 and October 31, 1994, because of the changes contained in contract modifications PC-09, PC-10, PC-11, PC-12, PC-16, and PC-17. Appellant's Reply Brief at 17. However, Young's proposal for the work in modification PC-16 did not seek any delays or delay costs.

delays during this period.[19] In our view, the record supports delays due to impact and disruption on other work from the unforeseen asbestos -- but none beyond those already allowed. In reimbursing appellant for 118 days of extended overhead, the Government has conceded forty-three days of such damages in addition to seventy-five days of damages to which Young is entitled for the first delay period. These forty-three days would cover the impact caused by the unforeseen asbestos removal. The record does not support a finding of impact due to defective plans and specifications or owner changes. In short, while the record may support forty-three days of extended overhead damages conceded by GSA due to the impact of the unforeseen asbestos, it can support no more.

With respect to the third period of delay, the record does not support a finding of exclusively Government-caused delay. Rather, there is evidence that Young and its subcontractors caused delay during this period. Two of Young's project managers left the job before substantial completion, thereby contributing to the delays at the end of the project. Young's correspondence to Fidelity indicates that it was not satisfied with Fidelity's efforts to man the job in June, late August, and September. Specifically, as of late August 1994, Young was expecting Fidelity to "put people on the job and complete all the remaining work in one week." Respondent's Exhibit 32. In a letter a month later, Young criticized Fidelity for not moving the project and asking that it man the project with sufficient forces to complete the job. Respondent's Exhibit 34.

Young itself proposed a completion date of August 10, 1994. Young's president testified that the punch list work could have been finished in August 1994, but was not completed until October 1994 because Fidelity did not put more manpower on the job. Young also caused delay because toilet partitions did not fit and required extra parts.

Further, with respect to the third period of alleged delay, the Board has recognized that recovery of unabsorbed home office overhead is inappropriate for delays after the date of substantial completion when the amount of work to be done is minimal and the contractor had not established that the delays beyond substantial completion hindered its ability to increase its bonding and secure additional work. P. J. Dick, Inc. v. General Services Administration, GSBCA 12058, 96-1 BCA ¶ 28,188, at 116,158; EMS, Inc., GSBCA 9588, et al., 90-2 BCA ¶ 22,876.

In sum, appellant has failed to prove that additional delays beyond the forty-three days GSA conceded in the third period of alleged delay were exclusively Government-caused. Thus, appellant has failed to prove a prima facie case of entitlement to additional Eichleay damages or field office overhead during this period.

Was It Impractical for Young to Obtain Replacement Work?

Even assuming arguendo that appellant had established a prima facie case of Eichleay entitlement for more than forty-three days during the second and third periods of delay,

[19]Contemporaneous evidence, i.e., Young's daily progress reports, is missing for the time period September 9 through October 9, 1994 -- solely due to Young's admittedly losing them. Nor are there daily reports in the record for Fidelity from July 30 to August 29, 1994.

appellant has not met its burden of persuading us that its obtaining replacement work was impractical. As the Court of Appeals recognized in Melka Marine:

> The burden on the government, however, is one of production only--Melka still bears the ultimate burden of persuasion that it was impractical for it to obtain sufficient replacement work. See Satellite Elec. Co. v. Dalton, 105 F.3d 1418, 1421 (Fed. Cir. 1997) ("Despite the shift in the burden of production, the contractor must nevertheless 'establish . . . (3) that it was unable to take on other work.' Altmayer v. Johnson, 709 F.3d 1129, 1133 (Fed. Cir. 1996).").

187 F.3d at 1376.

Here, the Government has met its burden of production by demonstrating that Young's stream of income was not disrupted, that Young received continuous progress payments, and that Young performed additional change-order work for which it was compensated during these periods. There is no basis in the record to find that Young's overhead was unabsorbed or that there was a disruption in Young's stream of income because performance of the contract was suspended or significantly interrupted during these time frames, beyond the forty-three days noted. Interstate General, 12 F.3d at 1057. There was no testimony by appellant's president regarding jobs on which Young could not bid because of the delays. Cf. P. J. Dick, Inc. Eichleay damages compensate a contractor for its overhead which is unabsorbed because performance of the contract was suspended or significantly interrupted and additional contracts were unavailable during the delay when payment for the suspended contract activity would have supported such overhead. Interstate General, 12 F.3d at 1057. This critical element of Eichleay entitlement is missing here.

There is evidence, in the form of Fidelity's letters to Young, that Fidelity was prevented from bidding on other jobs and that its stream of income was disrupted, but there is also evidence that Fidelity had a limited bonding capability from the outset of the project. However, we need not decide whether this evidence, unsupported as it is by the testimony of any Fidelity employee, carried appellant's burden of persuasion as to Fidelity, since the first two prerequisites for Eichleay damages have not been met.

As such, neither Young nor Fidelity is entitled to additional Eichleay damages.

Is Recovery Barred by an Accord and Satisfaction?

Respondent contends that the parties negotiated and executed four bilateral contract modifications for changed work which did not contain a reservation of rights and thus barred recovery of Eichleay damages. Respondent's Posthearing Brief at 20-21. In particular, the Government points to contract modifications PC-03, PC-04, PC-09, and PC-16, which all include the following language:

> The equitable adjustment in this modification also includes all direct, indirect and cumulative impact and delay costs, if any, incurred in performing the changed (and unchanged) contract work affected by this modification.

It is well established that discharge of a claim by accord and satisfaction occurs when some performance different from that which was claimed is due is rendered and such substituted performance is accepted by the claimant as full satisfaction of the claim. The essential elements of an effective accord and satisfaction are proper subject matter, competent parties, meeting of the minds, and consideration. Here, the record clearly reveals an understanding between the parties to defer the Eichleay claim. Thus, the parties recognized that these remained in dispute and there was no meeting of the minds in the four modifications that the Eichleay claims were fully resolved and thus barred by accord and satisfaction. Peter Bauwens Bauunternehmung GmbH & Co., ASBCA 44679, 98-1 BCA ¶ 29,551, at 146,496-97; see generally Zueblin v. United States, 44 Fed. Cl. 228, 232 (1999) (there can be no accord without a meeting of the minds).

As the Court of Appeals for the Federal Circuit recognized in Community Heating & Plumbing Co. v. Kelso, 987 F.2d 1575 (Fed.Cir. 1993):

> [C]ourts may refuse to bar a claim based upon the defense of accord and satisfaction where the parties continue to consider the claim after execution of a release. Winn-Senter Constr. Co. v. United States, 75 F.Supp. 255, 110 Ct. Cl. 34 (1948). "Such conduct manifests an intent that the parties never construed the release as an abandonment of plaintiff's earlier claim." A & K Plumbing & Mechanical, Inc. v. United States, 1 Cl. Ct. 716, 723 (1983).

Id. at 1581; see also Brock and Blevins Co. v. United States, 343 F.2d 951, 955 (Ct. Cl. 1965); Blake Construction Co., GSBCA 4742, 80-2 BCA ¶ 14,756 (subsequent behavior of parties together with absence of reference to contract price in change order negates implication that a mutual agreement and satisfaction of appellant's claim for impact costs was reached); Gardner Zemke Co., IBCA 2626, 90-3 BCA ¶ 23,064. Here, the evidence in the record indicates that GSA continued to negotiate Young's claims years after they were submitted. Accordingly, Young's claims were not barred by an accord and satisfaction.

Liquidated Damages

The Government assessed $11,100 in liquidated damages for thirty-seven calendar days from the extended contract completion date of August 10 until September 16, 1994. The Government bears the burden of proving its entitlement to liquidated damages, which are at issue in GSBCA 14603. Specifically, the Government must prove that the contractor failed to meet the contract completion date; then the burden of proof shifts to the contractor to show why its failure to meet that date was excusable. E.g., Kemron Environmental Services Corp., ASBCA 51536, 00-1 BCA ¶ 30,664 (1999). In this case it is clear that Young failed to meet the extended contract completion date, August 10. Accordingly, we find that the Government has established a prima facie case that liquidated damages are warranted beginning August 11. The burden then shifts to Young to establish a valid defense. Id. at 151,398-99.

Acknowledging that it failed to meet the August 10 deadline, Young contends that the Government contributed to the delay and that Young's delays were excusable. As discussed above, the record indicates that both parties were responsible for delays which extended completion. The Government was responsible for delays associated with unforeseen asbestos

and its impact, as well as with deficient specifications and drawings and changes by the court. Indeed, the parties stipulated that the 118 days of extended overhead costs granted by GSA included days between December 31, 1993, and September 16, 1994 -- which could acknowledge days of Government delay during the alleged liquidated damages period.

Young was responsible for delays associated with Young's out-of-sequence work, Fidelity's failure to man the job and price work properly, the departure of two of Young's project managers before substantial completion, and ordering the wrong size toilet partitions. Both the Government and Young are responsible for delays associated with the change order process and Triad Mechanical. Further, the COTR testified that the work encompassed in change order CE-22 "changed constantly."[20]

As the Board recognized in Spectrum Leasing Corp. v. General Services Administration, GSBCA 7347, et al., 90-3 BCA ¶ 22,984:

> It is well established in the law of Government contracts that where both parties contribute to the delay, neither can recover damages, unless there is in the proof a clear apportionment of the delay and the expense attributable to each party. William F. Klingensmith, Inc. v. United States, 731 F.2d 805 (Fed. Cir. 1984); Blinderman Construction Co. v. United States, 695 F.2d 552 (Fed. Cir. 1982). We have consistently applied this principle where liquidated damages are assessed for delay but both parties have contributed to the delay. We will require the party claiming the damages to prove the degree in which liability should be apportioned. Warwick Construction, Inc., GSBCA Nos. 5070, 5387, 5388, 5457, 5543, 82-2 BCA ¶ 16,091; Scientific Security Systems of Tacoma, Inc., GSBCA No. 4476, 79-2 BCA ¶ 14,079; Minmar Builders, Inc., GSBCA No. 3430, 72-2 BCA ¶ 9559.

90-3 BCA at 124,197. In this case, respondent has failed to provide us with any basis for the apportionment of responsibility between itself and appellant for delays which extended completion. The evidence as to what transpired during this time period does not support assessment of liquidated damages.[21]

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[20]We recognize that Mr. Wilbanks testified that if Fidelity had put more manpower on the job, the project would have been completed in August 1994. Transcript at 227. Given the totality of the evidence, we do not base an award of liquidated damages on this opinion testimony.

[21]Moreover, any award of liquidated damages would have been decreased due to the additional work the Government requested after August 10 which Young performed.

Is Young Entitled to Prompt Payment Act Interest?[22]

In GSBCA 14437, appellant seeks interest on $21,157 for the delayed payment of contract modification PC-17, as well as interest on $29,972 for the delayed payment of contract modification PC-18. Appellant's Posthearing Brief at 64. Appellant contends that in September 1997 the contract specialist did not recognize that e-mail messages he received were an approval of funding for these two modifications. Appellant contends further that if funding had been approved the contract specialist should have issued the modifications and Young would have submitted a formal invoice at that time. Instead, because the contract specialist did not realize he had funding, he did not issue the contract modifications until November 26, 1997.

Given this delay in the issuance of the modifications, Young was not able to submit its invoice for modifications PC-17 and PC-18 until December 12, 1997. However, that invoice did not include GSA's assessment of liquidated damages and contained an error which was readily recognized and corrected by the COTR. On January 6, 1998, the COTR prepared a corrected construction progress report stating that Young was entitled to payment in the amount of $44,944 and forwarded it to the contract specialist, who received the corrected invoice on January 8 but claims to have not paid it for various reasons -- none of which rings true. First, the contract specialist failed to issue modifications because he claimed he thought he did not have funding -- testimony which squarely contradicts that of GSA's funding personnel. Then, after Young made an error on its invoice, which was corrected within days by the COTR and forwarded to this same contract specialist, the latter said he could not pay it because the invoice was not the "original" signed by the contractor, he lacked sufficient information, was busy with another contract, and was advised by counsel not to pay the invoice until it was corrected. However, some six months later this contract specialist saw fit to pay the exact same defective invoice, and Young received payment on June 1, 1998.

The Prompt Payment Act states that the Government must make invoice payments by the thirtieth day after the designated billing office receives a proper invoice from the contractor. Further, the Government must pay an interest penalty when payment is not made by this date. 31 U.S.C. §§ 3901-3906 (1994).

Although the contract specialist through his own error prevented appellant from submitting a proper invoice by delaying issuance of the modification, statute does not permit the award of interest based upon conduct which precedes the submission of a proper invoice. As our appellate authority recognized in FDL Technologies, Inc. v. United States, 967 F.2d 1578, 1581 (Fed. Cir. 1992): "It is well established that interest cannot be recovered unless the award of interest was affirmative and separately contemplated by Congress . . . and that in the absence of a specific provision by contract or statute or express consent . . . by

[22]Appellant filed a motion for partial summary relief for Prompt Payment Act interest, and respondent filed a motion to dismiss appellant's motion. The Board deferred these motions pending further development of the record. Based upon the record as a whole, respondent's motion to dismiss is denied.

Congress, interest does not run on a claim against the United States." (Citations omitted.) The court continued: "Thus in interpreting the Prompt Payment Act, this court may not enlarge the waiver of sovereign immunity beyond what the language of the Act requires." Although we find the contract specialist's delay in issuing the modifications for some two months to be inexcusable, we cannot conclude that his dilatoriness warrants the payment of interest. See Lance Colburn, AGBCA 94-117-1, 95-2 BCA ¶ 27,726 ("Appellant is claiming interest for the period before the invoice was submitted for payment. Therefore, the [Prompt Payment Act] is not applicable.").

However, turning to appellant's additional claim for interest from the time the corrected invoice was received on January 8 until payment was made on June 1, we conclude that interest is warranted under the Prompt Payment Act. The Government states that interest cannot be paid because the contractor never submitted a proper invoice -- because the contractor submitted an erroneous invoice and the Government, not the contractor, corrected it. Respondent's Reply Brief at 10. This argument overlooks the reality that GSA never notified appellant that it had submitted a defective invoice so as to afford appellant the opportunity to correct it and that a Government official, the COTR, accepted responsibility for correcting the invoice and authorized payment of this invoice as corrected by him. The invoice could have been paid as of that time, and indeed was paid months later with no further correction.

This is not a case where appellant failed to meet the regulatory requirements for a proper invoice, i.e., an invoice containing or accompanied by the substantiating documentation the head of the appropriate agency may require by regulation and contract. 31 U.S.C. § 3901(a)(3); Consolidated Construction, Inc., GSBCA 8871, 88-2 BCA ¶ 20,811, at 127,084, reconsideration denied (Nov. 30, 1988). Rather, this was a corrected invoice which had already been improperly delayed by the contract specialist's failure to acknowledge that funding was available. Moreover, the Prompt Payment Act expressly requires the agency "to return any . . . payment request which is defective to the contractor within 7 days after receipt, with a statement identifying the defect." 31 U.S.C. § 3903(b)(2). Here, the contracting officer never advised appellant of the defect in its invoice or afforded it an opportunity to correct the defect. As such, the agency may not refuse to pay the invoice in timely fashion and avoid paying interest.

Where, as here, the deficiency in the invoice is known to the Government, and corrected by the Government without notifying the contractor, the Government should not be permitted to thwart the intention of the statute by failing to advise the contractor of the deficiency and delaying payment. We grant appellant's claim for Prompt Payment Act interest as follows. Interest shall run beginning thirty days after the contract specialist's receipt of the corrected invoice until that invoice was paid – i.e., from February 8 until June 1, 1998.

Decision

GSBCA 14437 is **GRANTED IN PART**. Neither appellant nor its subcontractor is entitled to any additional days of home office or field office overhead costs. Appellant is awarded Prompt Payment Act interest from February 8 to June 1, 1998. GSBCA 14603 is **GRANTED**. The Government may not recover liquidated damages.

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MARY ELLEN COSTER WILLIAMS
Board Judge

We concur:

_____
STEPHEN M. DANIELS
Board Judge

_____
MARTHA H. DeGRAFF
Board Judge