PSBCA Nos. 6303, 6339, 6340, and 6342

June 27, 2013

Appeals of

TROMEL CONSTRUCTION CORP.

Under Contract No. 332495-07-B-0709

PSBCA Nos. 6303, 6339, 6340, and 6342

APPEARANCE FOR APPELLANT

Joseph P. Asselta, Esq.

APPEARANCE FOR RESPONDENT

Barbara H. Cioffi, Esq.

OPINION OF THE BOARD

Appellant, Tromel Construction Corp., performed a construction project to renovate and expand the St. James New York Main Post Office under a contract with Respondent, United States Postal Service. The project was completed well after the originally scheduled completion date. The parties contest Respondent's $73,500 claim assessing liquidated damages and Appellant's $114,825 construction delay damages claim for extended field overhead. The Board conducted a four-day trial in Mineola, New York. Both entitlement and quantum are at issue.

We rule in Appellant's favor on the disputed date of substantial completion. We rule in Respondent's favor in part and in Appellant's favor in part, on Respondent's liquidated damages claim, and on Appellant's compensable delay claim. We conclude that Appellant is entitled to a net recovery of $1,223.25.

FINDINGS OF FACT

1. On October 7, 2007, the parties entered into Contract No.332495-07-B-0709 for the expansion and renovation of the St. James New York Main Post Office, at a cost of $2,167,000 (Stipulations[1]13-14, 16; AF 3).

2. The contract established a 287-day scheduled project duration and Respondent issued notice to proceed on November 19, 2007 (Stipulations 17-18; AF 3-4). Accordingly, the project originally was required to be completed by September 1, 2008 (Stipulations 17-18; AF 4, AF 77).[2]

Phased Construction

3. The St. James Post Office continued to function as a post office open to the public throughout the project (Stipulation 10; AF 1 at G-102, General Notes 1, 3). The contract required Appellant to coordinate its work with postal officials to minimize disruption to operation of the post office (AF 3 at 36, clause B.801.b).

4. The contract required the project to be performed in five phases with each phase to be completed and accepted prior to the work commencing on the next phase. A preliminary phasing plan prepared by Appellant followed this convention. However, without explanation, it included two Phase 4 segments, consecutive with one another. (AF 1, Phasing Plans at G-101-102, AF 77).

5. Phase 1 involved construction of an addition on the north side of the post office. Phase 1 also required provision of temporary utilities, including electricity, needed to maintain existing building operations during construction. Phase 2 involved renovations and finish work to increase the size of the post office workroom. Phase 3 involved construction of an addition on the south side of the post office. Phase 3 also required construction of a new loading dock on the south side (hereafter "new loading dock" or "Phase 3 loading dock"). Phase 4 involved renovations on the east side of the post office, including demolition and renovation of the existing loading dock (hereafter "old loading dock" or "Phase 4 loading dock"). Phase 5 involved alterations inside and outside the post office on the west side, and renovation of the customer parking lot. (AF 1 at G-102; July 18 Tr. 31).

6. The contract included clause B.1201, which provided in part, that the "Postal Service will inspect the work as soon as practicable after completion." (AF 3 at 42). The contract does not require Appellant to request an inspection of the work when completed (*see* AF 3).

Electrical Utility Service

7. Appellant planned to complete Phase 1 by the end of April 2008 (AF 60, AF 77). However, the electrical utility authorities would not allow provision of overhead electrical service as designed by Respondent's architect. Instead, the utility authorities required at least partial underground service and installation of a utility pole (July 18 Tr. 42-44).

8. Following Respondent's issuance of a show cause letter asserting construction delays, Appellant responded with an explanation involving the electrical service redesign referenced in Finding of Fact (FOF) 7. Appellant requested a time extension of 122 days because of the change (AF 5, AF 60).

9. The electrical service situation rendered the phasing plan infeasible. To keep the project moving, Respondent directed Appellant to begin performance of Phase 2 before Phase 1 was completed. (July 18 Tr. 41-45; July 19 Tr. 20; July 21 Tr. 12-13; AF 23, AF 61 at 36-37, 40, 43, 46, 49, 55, 58, 61, 64, 71). Thereafter, the phasing plan was not followed, and the record does not contain a revised phasing plan reflecting this change or any other changes (AF 5, AF 61 at 34-36; *see also*, FOF 48-50).

10. At the start of the project, Appellant was at least four weeks behind schedule (MT[3] 13-15; AF 30 at 226, AF 33, AF 61 at 15, 35; *but cf.*, AF 61 at 16).

11. Following discussions between the parties, on August 11, 2008, Appellant submitted to Respondent its third revised proposed scope of work for the electrical utility re-design and proposed a $24,123 price increase. However, Appellant also indicated that it could not then determine the necessary time extension. (Stipulations 29-30; AF 60 at 13-14, 20-21).

12. In December 2008, Respondent proposed contract Modification 1 addressing the electrical utility re-design, which Appellant returned unsigned because it did not include time extensions (AF 60 at 26-30).

13. On August 3, 2009, Respondent re-issued proposed Modification 1, extending the project completion date by 122 days (AF 23, AF 60 at 33-34). Appellant never signed Modification 1 (Stipulation 27).

14. Ultimately, on June 10, 2010, Respondent issued a letter in the form of a contracting officer's final decision, along with Modification 1 on a unilateral basis. Modification 1 increased the contract price by $24,123 and extended the performance period by the 122 days previously requested by Appellant. This time extension, in addition to others granted by Respondent on a unilateral basis in Modifications 4, 9, and 12, resulted in 179 days of time extensions, extending the project completion date to February 27, 2009. (Stipulations 28, 41, 45; AF 23, AF 60; Consolidated Complaint and Answer ¶ 18).

15. Appellant timely appealed the final decision. That appeal was docketed as PSBCA No. 6339. (Stipulation 46).

16. Immediately prior to the start of the hearing, Appellant withdrew its appeal of PSBCA No. 6339, and eliminated its claims for both additional time extensions and compensable delay damages related to the electrical service re-design which is the subject of Modification 1. Accordingly, Appellant reduced its delay damages claim from $217,414 to $114,825. (Handwritten July 18, 2011 stipulation; July 18 Tr. 6-8).

Loading Docks

17. After completing the new loading dock on the south side of the post office in Phase 3, the contract required Appellant to demolish the old loading dock on the east side as part of Phase 4 (July 18 Tr. 40). Demolition of the old loading dock could not begin until the new loading dock was completed because at least one working loading dock was needed at all times for the functioning post office (MT 49; AF 61 at 81).

18. In August 2008, while constructing Phase 3 foundations, Appellant encountered an unexpected subsurface condition requiring the removal and replacement of unsatisfactory soil (July 18 Tr. 46-49; AF 61 at 52). In March 2009, Respondent sent Appellant proposed contract Modification 4 covering the additional work (AF 61-62, AF 25).

19. The proposed modification contained a price adjustment that is not in dispute, and a ten-day contract extension. Appellant's president agreed with the ten-day extension but did not sign the modification because he believed it limited his recovery only to direct costs and did not allow recovery of extended overhead. (July 18 Tr. 50; July 19 Tr. 22).

20. On August 5, 2009, Respondent's contracting officer issued a letter in the form of a final decision, accompanied by unilateral Modification 4, which contained a contract price adjustment and a ten-day time extension that is not disputed (Stipulation 32; July 19 Tr. 22; AF 25, AF 50). The record does not include a specific appeal of this decision.

21. During an on-site construction progress meeting conducted on December 17, 2008, the parties observed that the new loading dock was constructed with bumpers which were installed as designed, but at a height that would not protect the dock from trucks that might back into the dock. Except for the bumper design, the dock was capable of being used by Respondent at that time (July 18 Tr. 56-57, 61; July 20 Tr. 150; AF 61 at 82).

22. At the December 17 meeting, Respondent advised Appellant that Respondent's architect (who also served as its construction manager) would provide a written request to Appellant describing the extra work to be performed regarding the defectively designed bumpers, and that once it received that request, Appellant should provide a cost proposal (AF 61 at 80).

23. Sometime between the construction meetings of December 17, 2008 and January 14, 2009 (*compare* AF 61 at 80 *with* AF 61 at 83, 86), Respondent's architect provided a design solution to Appellant involving removal of the bumpers and replacement with steel bollards to protect the loading dock (AF 61 at 82; MT 50-52; July 18 Tr. 62).

24. During the January 14, 2009 construction meeting, Respondent directed Appellant to proceed with installation of the bollards and follow with submission of a cost proposal (AF 61 at 84, 86).

25. Respondent would not allow the new loading dock to be used until the bollards were installed (AF 61 at 84).

26. The bollards were installed on January 29, 2009. At that point, the new loading dock was ready for use by Respondent (July 18 Tr. 63; July 19 Tr. 29; AF 61 at 84, 88; MT 53).

27. Respondent sent Appellant proposed Modification 9, addressing the bumpers-bollards contract change, on March 30, 2009 (AF 26). However, Appellant did not sign it because Appellant claimed that its ability to move on to Phase 4 work was delayed by this situation by more than the thirty-seven days Respondent proposed (July 19 Tr. 25-26, 65, 99-100).

28. On August 5, 2009, Respondent's contracting officer issued a letter in the form of a final decision, accompanied by unilateral Modification 9, which provided a contract price increase and allowed a thirty-seven-day extension of the project completion date (Stipulation 34; AF 26; July 19 Tr. 25, 28, 65, 69). Appellant did not specifically appeal this decision (July 19 Tr. 30).

29. Appellant began demolition of the old loading dock on February 11, 2009 (July 18 Tr. 64-65). On February 17, 2009, Appellant discovered that existing columns at the dock lacked footings shown in the design, and Appellant asked Respondent's architect for direction (AF 62 at 19; July 20 Tr. 91-92; *but cf.*, MT 54-55). The architect told Appellant's project manager to await further instructions (MT 56).

30. The next day, February 18, 2009, Respondent's architect and an engineer examined the work site. The architect told Appellant how to proceed, but costs or time extensions were not addressed for what was acknowledged by the parties as a differing site condition. (AF 61 at 91, AF 62 at 19, AF 46A; MT 59-60; July 18 Tr. 70; July 19 Tr. 92).

31. On February 20, Appellant continued its demolition of the old loading dock under the February 18 advisement (*see* FOF 30), and that day encountered another unexpected subsurface condition – buried concrete foundations that required additional demolition. Appellant's project manager again informed Respondent's architect the same day. (MT 42-43, 61-63; July 18 Tr. 69-71).

32. At the next construction site meeting, on February 25, 2009, Respondent asked Appellant to provide a maximum cost to correct the subsurface conditions so that it could issue a not-to-exceed modification with costs to be negotiated later. However, Appellant's project manager told Respondent's officials that Appellant needed to receive prior approval of the cost of the extra work before proceeding. (MT 64; AF 61 at 90-91; *see also*, AF 47).

33. On February 26, Respondent's architect sent a letter to Appellant regarding the subsurface situation. The letter acknowledged that Appellant had told postal officials that it wanted to receive approval for the extra work before proceeding, and reiterated that Respondent intended to issue a not-to-exceed modification with the amount to be negotiated later. However, the architect's letter also contested that the cost of all the added work would be borne by Respondent, and asserted that some of the work would have to be done at Appellant's expense. (MT 44, 47, 65; AF 47, AF 79).

34. Nineteen days later on March 17, 2009, Appellant submitted to Respondent a $12,483.12 cost proposal for the additional work (AF 31 at 233; *see also*, July 18 Tr. 77, 82; July 20 Tr. 97). On March 20, Respondent's architect recommended to Respondent that it formally direct Appellant's performance (July 20 Tr. 158). As of March 26, the extent of the required work remained uncertain and at that time Respondent informed Appellant that it intended to issue a not-to-exceed modification, with costs and time extensions to be negotiated later (AF 61 at 93-94).

35. On March 30, Respondent's contracting officer issued a letter to Appellant directing it to proceed as described in the architect's prior instructions at a price to be determined later but not to exceed $12,483.12, which is the same amount that Appellant had identified on March 17. The contracting officer's letter also stated that a contract extension would be determined at a later time. (AF 31 at 230, 233).

36. Following remobilization, the work ordered on March 30 began on April 3 and was completed on April 9 (AF 31; July 18 Tr. 80-82; MT 68-69).

37. On August 24, 2009, Respondent's contracting officer issued a letter in the form of a final decision, accompanied by unilateral Modification 12, addressing both differing site conditions at the old loading dock. The modification confirmed the $12,483.12 contract price increase that already had been paid, and it increased the performance period by ten days (Stipulations 36-37). Appellant did not sign the modification and did not separately appeal this decision (AF 31; July 19 Tr. 39).

38. All the contract modifications included the following language:

[t]he contractor agrees that the compensation provided by this modification constitutes full and complete satisfaction for all direct costs, indirect costs, applicable interest, impact and delay costs, and additional contract completion time (beyond that specified herein) which either has been or will be incurred in performing all work described by this modification.

(AF 10-14, AF 24-26, AF 31, AF 39, AF 60).

Project Completion

39. A temporary ramp at the old Phase 4 loading dock was moved to its permanent location on April 13, and Appellant turned it over to Respondent on April 15 (July 18 Tr. 86-87; July 19 Tr. 36-37; AF 55 at 623; MT 72-73). Respondent was using both loading docks no later than April 15 (MT 75-76; July 18 Tr. 87; AF 61 at 49).

40. As of April 15, 2009, the date on which the Phase 4 loading dock was turned over to Respondent, aside from concededly minor punch list items, the following work remained to be performed: landscaping, snorkel box (a drive by postal collection box) change order construction, parking lot lighting, asphalt patching, installation of permanent railing, and a permanent ramp at the new loading dock (July 18 Tr. 87-88; *see also*, July 19 Tr. 50-53; AF 16-17, AF 29-30, AF 32, AF 61-62).

41. Appellant installed a railing on the new loading dock on April 23, 2009 (AF 55 at 639; July 18 Tr. 90), and a permanent ramp replaced a temporary one on April 29 (MT 72; AF 55 at 647). The temporary railing and ramp, and some missing bumpers on the new loading dock were minor punch list matters because Respondent's employees were using the temporary ramp on April 15 (MT 75-76; July 18 Tr. 86-87, 89-91; July 19 Tr. 36-37; MT 75-76; AF 61 at 49).

42. On July 28, 2009, Respondent notified Appellant that it was accepting the project for beneficial occupancy as of June 12, 2009 (Stipulation 25).

43. On August 10, 2009, Appellant submitted a letter to Respondent's contracting officer asserting that April 15, 2009 was the appropriate date of substantial completion of the project (Stipulation 42; AF 27).

44. On September 17, 2009, Respondent's contracting officer issued a final decision denying what he termed Appellant's request to change the substantial completion date to April 15. The contracting officer reiterated that he considered June 12, 2009 as the date of substantial completion (AF 32; Stipulation 43). Appellant appealed, and the appeal was docketed as PSBCA No. 6303 (Stipulation 44).

45. On June 10, 2010, Respondent issued unilateral Modification 13, which assessed Appellant $73,500 in liquidated damages for delay in completion of the project (Stipulations 38, 40).

46. Respondent measured its damages from February 27, 2009, the date it determined was the scheduled completion date as extended by contract modifications, to June 12, 2009, a 105-day period (AF 39).

47. The liquidated damages assessment issued as unilateral Modification 13 was attached to a contracting officer's final decision which Appellant timely appealed. The appeal was docketed as PSBCA No. 6340 (Stipulations 47-48).

48. Neither a critical path schedule nor a detailed construction schedule of any type, as-planned or as-built, was submitted into the record (*see* MT 10). The only document in the record that in any way resembles a schedule consists of a preliminary and elementary bar chart dated November 20, 2007 (the day after notice to proceed). This bar chart merely lists the five phases of work by number (without stating what is included in each phase) and their expected duration without detail or identification of any construction activities. It also includes Phase 4 twice without explanation and assigns consecutive one-month durations to that phase. (AF 77).

49. Although a construction schedule also may have been prepared by Appellant at some point (*see* July 19 Tr. 18; *see also*, AF 61 at 32, 35, 37, 55), it also is not in the record, and Appellant's construction expert did not see one or prepare one himself (MT 10, 17, 22, 24; AF 77; July 18 Tr. 37-41, 151; July 19 Tr. 17-19, 78; *see also*, AF 50 (expert report referencing only the phasing bar chart and not a detailed construction schedule), AF 61 at 75).

50. Neither party performed a critical path analysis of the work as planned, or as actually built. Appellant did not present a schedule showing the impact of the changed or delayed construction activities that it asserts delayed completion of the project. (MT 10; July 18 Tr. 151; July 19 Tr. 78).

51. Prior to this project, the post office's parking lots were illuminated by lights attached to the building (MT 77; AF 17 at 154; July 20 Tr. 75) and by streetlights (July 19 Tr. 7, 41). The project required installation of pole-mounted lights on all four sides of the post office, including the sides overlooking the parking lots (AF 1, AF 56). Installation of the light poles and lights atop them was completed on June 8, 2009. (*Compare* AF 19 at 161 (May 7, 2009 site meeting minutes reciting that exterior lighting remained to be installed) *with* AF 20 at 164 (June 25, 2009 site meeting minutes reflecting that exterior lighting had been installed), AF 21, AF 32, AF 55 at 693-701 (daily observation reports reflecting work on parking lot lights from June 2 to June 8, 2009)).

52. The parking lots were used throughout the project, including before installation of the pole-mounted lights (July 19 Tr. 100, 150).

53. Respondent added a snorkel box as a contract change. The location of the snorkel box was discussed between the parties for a year, and was not established by Respondent until May, 2009. (AF 61 at 30, 46. 94, 98; MT 78; July 18 Tr. 87, 107; July 19 Tr. 8-11, 94-97).

54. Appellant paved the parking lots in stages in May 2008 (AF 62 at 10-11, AF 55 at 157), June, 2008 (AF 61 at 37, 41), and September-October 2008 (AF 61 at 64, AF 62 at 16, AF 55 at 373). However, a few areas required additional patch paving. Appellant added aggregate to the areas in need of patch paving so as to bring such areas level with the adjacent areas such as the ramp to the dock and around the snorkel box (July 18 Tr. 92-93). Appellant performed the remaining patch paving work in late April to early May 2009, all at the same time, and to accommodate patch paving needed at the area of the snorkel box which was not installed until May (MT 78; AF 16, AF 55 at 649, AF 62 at 21, 72, 97, 100; July 18 Tr. 109; July 19 Tr. 108-10; July 20 Tr. 125).

55. At a January 14, 2009 site meeting, Respondent's project manager: emphasized that Tromel should concentrate on completing work which effects Postal Operations. He advised that Substantial Completion for beneficial occupancy can be issued while allowing weather-related work (i.e., exterior painting, landscaping, paving, sealants, etc.) to be completed later [after substantial completion]. (AF 61 at 85 (minutes prepared by Respondent's architect) (emphasis added)).

56. Trenches at some areas by the outer perimeter of the parking lot were open for short periods while electric conduit was relocated from a grassy area to the edges of the parking lot due to a design change (July 18 Tr. 101). Trenches were opened and backfilled the same day – *i.e.*, they were not left open overnight (July 18 Tr. 104, 106-07; *cf.* July 20 Tr. 73-74; AF 62 at 21).

Liquidated Damages

57. The contract included the following clauses:

Section B.301(a), *Liquidated Damages*,

If the contractor fails to complete the work . . . within the time specified in this contract, or any extension, the contractor must, in place of actual damages, pay to the Postal Service $700.00 for liquidated damages as agreed for each calendar day of delay. . . .

(AF 3 at 23; *see also*, Stipulation 39).

Section B.301(c),

The contractor will not be charged with liquidated damages when the delay in completion . . . arises out of causes beyond the control and without the fault or negligence of the contractor.

(AF 3 at 24).

Section B.306, *Exception to Completion, Schedule and Liquidated Damages*,

In cases where the Contracting Officer determines that . . . planting . . . is not feasible during the construction period, such work will be accepted [sic – excepted] from the completion schedule and the *Liquidated Damages* clause. . . .

(AF 3 at 25).

58. Respondent's project manager established the $700 per day liquidated damages rate based on his use of a standard liquidated damages calculation sheet (AF 82; July 21 Tr. 33-36, 41, 46, 52).

59. Respondent's project manager considered only one element in calculating the liquidated damages rate -- the anticipated daily cost for Respondent's contract architect, who also served as its construction manager. In calculating the liquidated

damages rate, the project manager considered the architect's hourly rate and assumed for purposes of the calculation that he would work on the project eight hours per day, five days per week during any period of potential delay. (AF 82; July 21 Tr. 36, 41, 49).

60. The pre-printed portion of the liquidated damages calculation sheet identified other potential delay costs that might be considered in calculating the daily liquidated damages rate. However, none was included in the project manager's calculation for this project because he believed that the other potential costs were not relevant to the project. (AF 82; July 21 Tr. 36-37).

61. The pre-printed portion of the liquidated damages calculation sheet also allowed for the rate to be established in declining increments (AF 82).

62. Respondent's internal purchasing guidelines provided that to prevent an unreasonable assessment of liquidated damages, a declining rate in two or more increments may be used in a phased project (*Supplying Principles and Practices*, §1-15.6, cited in Appellant's post-hearing brief at 29).

63. However, Respondent's project manager believed that he could not take the phased nature of the project or any resulting reduced role of the architect into account while calculating the liquidated damages rate, and he did not do so (July 21 Tr. 48, 49, 52).

64. Respondent's project manager believed that the liquidated damages calculation he created could be altered solely at the contracting officer's prerogative (July 21 Tr. 52-54). However, Respondent's contracting officer did not alter the calculation or consider doing so. The contracting officer relied entirely on the analysis done by the project manager. (July 20 Tr. 21).

65. Respondent's architect performed substantial project work during the major phases of construction activity. However, at the end of the project and during any delay period, his work on the project was substantially decreased. He only worked at the project site about one day per month during the time for which liquidated damages were assessed. (July 20 Tr. 54, 110-11; July 21 Tr. 50; AF 32).

Delay claim

66. The contract included Section B.302(a), *Suspensions and Delays*,

If the performance of all or any part of the work . . . is suspended, delayed, or interrupted by: 1. An order or act of the Contracting Officer in administering the contract; or 2. By a failure of the Contracting Officer to act . . . within a reasonable time . . . an adjustment will be made for any increase in the cost of performance of the Contract caused by the delay or interruption (including the costs incurred during any suspension or interruption). An adjustment will also be made in the . . . performance dates . . . affected by the suspension, delay, or interruption. However, no adjustment may be made under this clause for any delay or interruption to the extent that performance would have been delayed or interrupted by any other cause, including the fault or negligence of the supplier . . . .

(AF 3 at 24).

67. On June 15, 2010, Appellant submitted a $217,414 certified claim for 229 days of compensable delay damages (Stipulation 49; AF 40). The claim did not identify a daily rate, but at trial Appellant asserted a $768.40 per day rate (AF 80; July 19 Tr. 85). Appellant's delay claim calculated its monetary damages on a business day basis but calculated the period of delay on a calendar day basis. Its calculations did not reconcile the discrepancy. (AF 40, AF 80).

68. The delay claim submitted by Appellant to the contracting officer did not identify the events that caused the delays for which Appellant sought compensation or the specific dates of delay (AF 40).

69. On July 7, 2010, Respondent's contracting officer denied Appellant's claim for delay damages (Stipulation 52). The contracting officer's denial did not mention untimely appeals of unilaterally issued contract modifications (AF 45). Appellant timely appealed the contracting officer's final decision. The appeal was docketed as PSBCA No. 6342. (Stipulation 53; AF 46).

70. Following the withdrawal of a portion of its delay claim (referenced in FOF 16), Appellant's remaining 121-day delay claim, calculated on a calendar-day basis, consisted of ten days for unsuitable soils encountered during Phase 3 construction (the subject of unilateral Modification 4), fifty-four days for the bollards installation and bumpers removal at the new loading dock in Phase 3 (the subject of unilateral Modification 9), and fifty-seven days for differing site conditions encountered during demolition of the old loading dock in Phase 4 (the subject of unilateral Modification 12) (July 19 Tr. 65-69; AF 50).

71. Appellant's delay claim included the following thirteen elements, identified at various costs and in varying percentages: project manager, billing clerk, general superintendent, superintendent, site labor for maintenance/cleanup, trailer, vehicle costs, telephones, FedEx/postage, small tools and equipment, overhead, profit, and bond costs (AF 40, AF 80).

After consolidating the appeals, the Board conducted a hearing in Mineola, New York from July 18, 2011 through July 21, 2011. At the joint request of the parties, both entitlement and quantum are at issue.

DECISION

Liquidated Damages.

Appellant argues that if it is found to have performed late, we should not enforce its agreement with Respondent to liquidate delay damages.

Is the liquidated damages clause enforceable?

Liquidated damages clauses serve a useful purpose by fixing damages in advance in the event of an eventual breach, providing a measure of certainty for the parties, *see Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947), and saving the time and expense of litigating the issue of damages, *see DJ Mfg. Corp. v. United States*, 86 F.3d 1130, 1133 (Fed. Cir. 1996).

There is no sound reason why persons competent and free to contract may not agree upon this subject as fully as upon any other, or why their agreement, when fairly and understandingly entered into with a view to just compensation for the anticipated loss, should not be enforced.

DJ Mfg., 86 F.3d at 1133, *quoting Wise v. United States*, 249 U.S. 361, 365 (1919). Appellant bears the burden of proving the liquidated damages clause unenforceable. *See Jennie-O Foods, Inc. v. United States,* 580 F.2d 400, 414 (Ct. Cl. 1978). Its burden is "an exacting one," and it is "rare" for a federal court or board to "refuse to enforce the parties' bargain on this issue." *DJ Mfg.*, 86 F.3d at 1134. Nonetheless, liquidated damages clauses "are not enforceable in the same way as most other kinds of bargain[ed] terms, but instead are reviewed with special scrutiny." M. Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 Stan. L. Rev. 211, 225 (1995).

In performing that special scrutiny, we examine whether the liquidated damages rate is a fair and reasonable attempt to fix just compensation for reasonably anticipated losses, as judged at the time of contracting. In doing so, we consider that liquidated damages serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable, which is often the case in government contracts. *Priebe & Sons*, 332 U.S. at 411-12; *see also*, *Young Assoc., Inc. v. United States*, 471 F.2d 618, 621 (Ct. Cl. 1973) (government damages from delayed receipt of construction inherently hard to measure).

Appellant argues that the anticipated damages from a breach caused by late performance are not uncertain in amount or difficult to measure because the only element of damage actually considered by Respondent in establishing the liquidated damages rate was its architect's fees (FOF 59), and that Respondent need only count the architect's actual invoices for any delay period to yield its actual and therefore certain damages. However, this argument inappropriately focuses on uncertainty of damages examined at the time of breach rather than at the time of contracting. *See Priebe & Sons*, 332 U.S.

at 411-12; *Mitchell Eng'g & Constr. Co. Inc.*, ENGBCA No. 3785, 89-2 BCA ¶ 21,753 at 109,471-72 (inaccurate estimate of inspection costs that would be caused by delay does not vitiate enforceability of liquidated damages clause); *see also*, *Skip Kirchdorfer, Inc. v. United States*, 229 Ct. Cl. 560 (1981).

Under the facts of this appeal, Respondent would have had no way to know with anything approaching certainty at the time of contracting how much architect expense, or any other variety of potential damage, would be incurred on a daily basis at the time of breach many months or years later. *See Weis Builders, Inc.*, ASBCA No. 56306, 10-1 BCA ¶ 34,369, at 169,721-22. Whether Respondent actually incurred the amount of architect expenses set in the liquidated damages – or whether it ultimately incurred any damages at all – does not affect enforceability. *See Green Intl., Inc.*, ENGBCA Nos. 5706 *et al.*, 98-1 BCA ¶ 29,684.

Rather, our primary focus must be on whether the liquidated damages rate, regardless of how it was derived, bears a reasonable relationship to actual damages that reasonably could result from a breach. *See DJ Mfg.*, 86 F.3d at 1137, *quoting Young Assoc.*, 471 F.2d at 622 (regardless of how the liquidated damages figure was arrived at, clause enforced "if the amount stipulated is reasonable for the particular agreement at the time it is made"); *Higgs v. United States,* 546 F.2d 373, 377 (Ct. Cl. 1976).

The $700 liquidated damages rate represents a tiny percentage of the original contract price (less than 1/30 of one-percent), is assessed on a daily basis, and does not appear to be inherently unreasonable. *See DJ Mfg.*, 86 F.3d at 1137 (daily rate of 1/15 of one percent per day upheld against unreasonableness challenge); *Pacific Hardware & Steel Co. v. United States*, 49 Ct. Cl. 327 (1914) (cited in *DJ Mfg.*) (daily rate of 1/10 of one percent per day upheld against unreasonableness challenge). Appellant has not shown the rate to have been extraordinarily disproportionate to the damage which might result from a breach as considered at the time of contracting. *See DJ Mfg.*, 86 F.3d at 1133, *quoting United States v. Bethlehem Steel Co.,* 205 U.S. 105, 121 (1907) (rate "not so extraordinarily disproportionate to the damage which might result from the [breach] as to show that the parties must have intended a penalty and could not have meant liquidated damages"); *Hughes Bros., Inc. v. United States,* 134 F.Supp. 471, 473-74 (Ct. Cl. 1955) (liquidated damages rate "not so extravagant, or disproportionate to the amount of property loss, as to show that compensation was not the object aimed at or as to imply fraud, mistake, circumvention or oppression . . . [clause upheld even though] it had the result that in individual instances there were discrepancies between the stipulated damages and the damages that may actually have been anticipated"). This case is most decidedly not one in which it would have been apparent at the time of contracting that no architect costs or other damages would be incurred during a delay – the type of situation that may invalidate a liquidated damages provision in federal contracting as one extraordinarily disproportionate to damages that might result from breach.[4]

Finally, Appellant argues that the rate was improperly penal in nature because Respondent did not follow its own guidelines that permit it to establish a liquidated damages rate in decreasing increments in a phased project (FOF 61-62). Respondent was not legally obligated to utilize decreasing increments, or to utilize a more precise “case-by-case consideration” in setting the rate. *See DJ Mfg.*, 86 F.3d at 1136-37. In any event as explained above, the analysis is objective – regardless of how the rate was derived, it should be enforced if the amount agreed upon by the parties is reasonable for the agreement at the time the contract was made. *See Higgs,* 546 F.2d at 377; *Gassman Corp.*, ASBCA Nos. 44975, 44976, 00-1 BCA ¶ 30,720 at 151,743. Appellant has not shown the rate to be unreasonable, and we conclude that the liquidated damages clause is enforceable.

Substantial Completion

The contract therefore allows assessment of liquidated damages from the contractual project deadline, as extended where appropriate, until project "completion." (*see* FOF 57). However, unless abrogated by other contract terms, for purposes of assessment of liquidated damages, "completion" must be examined in terms of "substantial completion." *See*, *e.g.*, *JC Edwards Contracting and Eng'g., Inc.*, VABCA Nos. 1947, 1969, 1985 WL 15495 (April 22, 1985); *Two State Constr. Co.*, DOTCAB Nos. 1070 *et al.*, 81-1 BCA ¶ 15,149.

Respondent assessed Appellant $700 per day for 105 days of liquidated damages calculating to $73,500 from February 27, 2009, the revised deadline for project completion, until June 12, 2009, the date on which Respondent determined the project to have been substantially complete (*see* FOF 42, 44-46).

Appellant counters that the project was substantially complete on April 15, 2009, rather than on June 12 (*see* FOF 43). Appellant further argues that the deadline for scheduled project completion should be extended based on changes and

delays caused by Respondent such that the remaining period of late completion (*i.e.*, between February 27 and April 15) also should be excused.

How should substantial completion be measured?

The contract does not use or define "substantial completion" and the parties dispute the meaning of the term. The Postal Service's purchasing regulations, found at 39 C.F.R. Part 601, also do not define substantial completion. Rather, Respondent argues that internal postal construction guidelines define the term, and that Appellant conceded the application of such a definition in its response to an interrogatory.

Specifically, Respondent relies upon a provision from a postal handbook (Handbook P-2, *Design and Construction Purchasing Practices*) (*see* AF 81; July 21 Tr. 69-70) which states in material part that to be considered substantially complete, the project must be acceptable for its intended use, and all work must be completed except minor items identified on a substantial completion punch list. The provision then goes on to place limits on the punchlist: the items must be capable of correction within thirty days; the remaining work cannot affect mail operations or the proper and safe functioning of the building; and remaining work primarily must be cosmetic (AF 81)**.** Respondent argues that this definition, which its construction manager considered when deciding upon the substantial completion date, (*see* July 21 Tr. 70), applies by virtue of a reference to postal policy thrice removed from the contract.

The contract mentions but does not incorporate purchasing guidelines published by Respondent and available to the public on its website, known as the Postal Service's *Supplying Principles and Practices*. The *Supplying Principles and Practices* recite that they are guidelines, not enforceable regulations. (*See* http://about.usps.com/manuals/spp/html/intro.htm).

Further, the *Supplying Principles and Practices* guidelines do not themselves include the proffered definition of substantial completion or expressly incorporate the handbook that includes the definition. Rather, the *Supplying Principles and Practices* mention the involved postal handbook, as follows: "[f]or additional information on calculating the liquidated damages rate for construction projects see the guidelines in Handbook P-2, *Design and Construction Purchasing Practices*." (*Supplying Principles and Practices* § 8-1.18). Handbook P-2 in turn, includes the disputed definition.

Appellant maintains that because the definition of substantial completion on which Respondent relies derives from internal guidelines that were not incorporated into the contract, the guidelines cannot alter the standard otherwise applied by law. We agree. *DJ Mfg*, 86 F.3d at 1136; *see also*, *Carolina Tobacco Co. v. Bureau of Customs and Border Prot.*, 402 F.3d 1345, 1349 (Fed. Cir. 2005) ("Guidelines are just that. They provide suggested standards for government officials to use in performing their duties . . . not . . . explicit requirements"); *American Tel. and Tel. Co. v. United States,* 307 F.3d 1374, 1380 (Fed. Cir. 2002) (“cautionary and informative regulations and directives provide only internal governmental direction” and, therefore, are "not actionable").

However, Respondent maintains that Appellant conceded in an interrogatory response that the handbook's definition controls. The interrogatory on which Respondent relies (AF 76 at 3-4) asked Appellant to define substantial completion for purposes of the allegations in its complaint that it had achieved substantial completion on April 15, 2009. Appellant's response stated that it was utilizing Respondent's definition of substantial completion as set forth in Respondent's handbook. However, Appellant went on to state:

Specifically, the USPS' rules state that a Project is to be determined substantially complete when it ‘is acceptable for its intended use’ and ‘all the work is completed in accordance with the contract requirements with the exception of minor items identified on a punchlist.’

While we recognize that Appellant's interrogatory response generally refers to the handbook on which Respondent relies, the specific portion of the same interrogatory response, quoted above, did not purport to adopt the limitations in that handbook regarding the contents of the punchlist – that punchlist items must be capable of being resolved within thirty days and primarily be of a cosmetic nature. Thus, we are not persuaded that Appellant agreed to adopt, for purposes of this litigation, the more narrow definition of substantial completion urged by Respondent.[5]

Receiving no help from the contract or from any postal regulation to inform our analysis, we turn to industry practice and precedent interpreting similar liquidated damages provisions. Appellant's construction expert testified without contradiction that absent a definition specified in a contract, industry practice considers substantial completion as the point at which the owner reasonably can use the facility for its intended purpose (*see* July 19 Tr. 123).[6]

This industry practice is consistent with the standard described in federal case law interpreting similar liquidated damages clauses. *See Franklin E. Penny Co. v. United States,* 524 F.2d 668, 677 (Ct. Cl. 1975) (substantial completion occurs when project is capable of being used for its intended purpose); *Central Ohio Bldg. Co.*, PSBCA No. 2742, 92-1 BCA ¶ 24,399 at 121,825 (substantial completion does not occur until a facility is capable of being occupied or used for its intended purpose), *recon. denied*, 92-1 BCA ¶ 24,670; *Gassman Corp.*, 00-1 BCA at 151,742 (substantial completion occurs where a high percentage of the work is complete and the project is available for its intended use); *Two State Constr. Co.*, 81-1 BCA at 74,938 (in cases involving assessment of liquidated damages, substantial completion is evaluated by "whether the owner was able to use the facility in the manner intended" because "when use of a facility commences, it is not reasonable to expect those costs [for which liquidated damages compensate] the owner will continue unabated.").

Accordingly, consistent with industry practice and federal precedent interpreting similar liquidated damages clauses, we apply the following definition of substantial completion: whether the project was capable of being used for its intended purpose. With this definition in mind, we review the items of work that remained on April 15, 2009, the date by which Appellant argues it had achieved substantial completion.

When did substantial completion occur?

Respondent relies upon four construction activities that it maintains were not completed by April 15, 2009 (and assertedly not until June 12). First, Respondent argues that lighting in the parking lot was not completed. Second, it argues that asphalt paving in the parking lot was not completed in certain areas. Third, it argues that open trenches were present in the parking lot. Respondent asserts that these three parking lot issues posed safety hazards precluding a finding of substantial completion. Respondent's fourth argument asserts that renovations of the old loading dock (a Phase 4 element) were not completed and thus affected postal operations, thereby precluding substantial completion. Appellant counters that these four construction activities merely were punch list items, that Respondent was not prevented from using the parking lot and loading dock, and indeed did use them without limitation or demonstrated problem as of April 15.[7]

The parking lot light poles were installed by June 8, 2009 (FOF 51). The parties dispute whether the locations of those light poles were changed from Respondent's initial design, by whom, and when. However, we need not navigate that particular quagmire. Rather, the analysis we must perform is whether the absence of the light poles before June 8 precludes an earlier finding of substantial completion. We find it does not.

The parking lots at issue are the same parking lots that were used by the public and by postal employees before and during the post office's expansion (*see* FOF 51-52). Respondent argues, however, that the lighting situation posed a safety hazard that should preclude substantial completion, an argument we reject.[8]

As of April 15, the parking lots were illuminated by lights attached to the building as well as by streetlights (FOF 51), and were used throughout performance of this project notwithstanding the absence of the disputed light poles (FOF 52). Respondent presented no evidence that the lighting situation in the parking lot caused a safety hazard, as it argues in its briefs. The extensive construction meeting minutes and construction observation reports do not reveal any stated concern about safety hazards posed by the parking lot lighting situation.

In *Dillon Constr., Inc.*, ENGBCA No. PCC-36, 81-2 BCA ¶ 15,416, the Corps of Engineers Board of Contract Appeals addressed a nearly identical issue. It considered whether a contractor's delay in installing lighting at a hospital's public parking lot precluded a finding of substantial completion of that parking lot. The Board concluded that because there was sufficient light on the parking lot from other sources to allow its effective use, substantial completion was unaffected and liquidated damages could not be imposed. *Dillon Constr.*, 81-2 BCA at 76,386. We agree with this analysis and conclude that because there is no evidence that safety in the post office's parking lot was compromised, and because the lot actually was used without known limitation or incident, the lighting situation did not affect substantial completion.

The areas of the parking lot which Respondent asserts required additional paving so as to preclude substantial completion as of April 15 involved locations around the snorkel box, adjacent to the renovated old loading dock ramp, and at edges of the parking lot adjacent to the light poles. Appellant acknowledges that this asphalt patching remained but asserts that it

reasonably planned to and did perform all remaining paving simultaneously for efficiency and cost reasons (*see* FOF 54). Appellant argues that it was precluded from completing the paving earlier because the snorkel box location had not been established by Respondent (*see* FOF 53), and because it awaited direction regarding the location of the light poles (MT 77). We need not resolve whether Appellant was prevented from performing the remaining patch paving earlier because we conclude that the incomplete patch paving work did not prevent the parking lot from having been fit for its intended purpose.

Respondent argues that a safety hazard was presented because of the remaining paving work, particularly at the loading dock area. However, Appellant has demonstrated that it added aggregate to the areas in need of paving so as to bring them level with the ramp to the dock so they could be used (*see* FOF 54). Respondent neither has shown why this failed to negate any safety concerns nor has it shown the existence of a safety hazard so as to preclude a finding of substantial completion.

Moreover, we note that contrary to Respondent's litigation position that the remaining parking lot areas in need of paving preclude a finding of substantial completion, its project manager specifically advised Appellant to the contrary before the dispute about the substantial completion date arose. The project manager specifically advised Appellant that that weather-related work such as paving could be completed after substantial completion was achieved. (FOF 55).

As to open trenches, we have concluded that trenches were open only while electric conduit was relocated from a grassy area to edges of the parking lot due to a design change. Adequate safeguards were taken to preclude any potential safety hazard and the trenches were open only for a short time. (*See* FOF 56). The record does not indicate that the trenching work represented a significant hazard that would preclude a finding of substantial completion.

Respondent argues secondarily that the new loading dock lacked a permanent handrail and some bumpers, and that an installed access ramp was temporary. While accurately stated, these items were minor punch list matters (*see* FOF 41), and no evidence was adduced to show that they affected postal operations or posed safety hazards. While the permanent railing was not installed until April 23 and the permanent ramp was not completed until April 29, Respondent's employees were using the dock without incident via the temporary ramp as of April 15 (FOF 41). A contractor's failure to have installed a permanent element does not preclude a finding of substantial completion where the installed temporary element affords unrestricted use of the facility. *See Fidelity Constr. Co.*, DOTCAB Nos. 75-19, 75-19A, 77-2 BCA ¶ 12,831. We conclude that substantial completion was unaffected.

Respondent also has argued that a finding of substantial completion is precluded because Appellant failed to ask for an inspection incident to substantial completion.[9] However, although Respondent may have asked for Appellant to request such an inspection, the contract does not include such a requirement. Indeed, the contract seems to place the responsibility on Respondent, requiring it to inspect the work as soon as practicable after completion (FOF 6). Moreover, Respondent's eventual determination of a substantial completion date without its contractor's request belies its current position.

We conclude that substantial completion occurred by the date on which the old loading dock was made available for Respondent's use and actually was used by Respondent as Appellant asserts -- April 15, 2009 (FOF 40).[10] Accordingly, liquidated damages may not be imposed thereafter.

However, our conclusion that substantial completion occurred on April 15 is only part of the needed inquiry, as the scheduled completion date, as extended, was February 27, 2009 (FOF 14). We therefore analyze whether, as argued by Appellant, additional time extensions should be granted to excuse the imposition of liquidated damages for the forty-seven-day period between February 27 and April 15.

Is Appellant bound by Respondent's determination

of extensions to the scheduled project completion date?

For its assertion of additional time extensions, Appellant relies on construction activities that were the subject of unilateral modifications issued by Respondent in closing out the contract. These unilateral modifications included language releasing Respondent against claims for time extensions and delay costs. (FOF 38). The modifications accompanied letters from the contracting officer purporting to be final decisions under the Contract Disputes Act (*see* FOF 28, 37). Respondent argues that Appellant's failure to have appealed those decisions specifically within the Contract Disputes Act's statutory deadline precludes it from being able to seek greater time extensions than were granted therein.

Appellant points out that the case law relied upon by Respondent involves releases in mutually agreed bilateral modifications, and since there was no agreement regarding the time extensions here, it cannot be bound by them. It argues that the modifications did not serve as final decisions, and that even if the unilateral modifications could be cognizable decisions under the Contract Disputes Act, Appellant's position should be addressed by virtue of its separate claim to establish the substantial completion date and its timely appeal of the contracting officer's final decision denying that claim. Appellant also argues that its timely appeal of the contracting officer's decision assessing liquidated damages allows it to present defenses that delays were excusable without additional procedural requirements.[11]

While a disputed release in a unilateral modification cannot bind a contractor as an accord and satisfaction because of the lack of agreement between the parties, Respondent's position is that the same result adheres because unappealed final decisions should be given preclusive effect. Respondent relies upon cases in which Boards have addressed underlying disputes where appeals were initiated from unilateral contract modifications which did not include the indicia of final decisions. *See, e.g., P.X. Eng'g Co.*, ASBCA No. 38215, 89-2 BCA ¶ 21,859. Such cases focus on the harm to the contractor from the lack of indicia of final decision language, and allow disputes to be resolved on their merits. *See Transamerica Ins. Corp., Inc. v. United States*, 28 Fed. Cl. 418, 422-23 (1993). We are presented with an entirely different issue as Respondent seeks to preclude merits consideration by the Board of the underlying dispute.[12]

The mere inclusion of final decision language does not convert the contracting officer's letters into cognizable Contract Disputes Act decisions that may be given preclusive effect when unappealed. The letters accompanying the unilateral modifications do not purport to respond to any contractor claims, monetary or otherwise. Nor can the unilateral modifications be considered affirmative government claims as they do not seek monetary compensation from Appellant or assert other contractual rights against it.

We agree with and follow the logic of prior Boards which have concluded that the inclusion of final decision language in a unilateral change order does not alone determine the jurisdiction of the Board and cannot force a contractor into litigation. *See Interstate Contractors, Inc.*, VABCA No. 3404, 92-1 BCA ¶ 24,480; *see also*, *Custer Lumber Co.*, AGBCA No. 84–138–1, 84-1 BCA ¶ 17,222 at 85,750 ("mere existence of the right to file a claim by a Contractor does not vest the Government with the right to unilaterally issue an appealable final decision and force the contractor into litigation"). We conclude that Appellant's failure to have initiated additional litigation by appealing these purported final decisions does not have preclusive effect on our ability to consider them in the context of otherwise jurisdictionally valid appeals.[13]

Is Appellant entitled to additional time extensions?

The contract excuses liquidated damages where project delays arise out of causes beyond the control and without the fault or negligence of Appellant (FOF 57). Appellant bears the burden of proving excusability under this provision, and is entitled only to so much time extension as the excusable cause actually delayed project completion. *See Leonard Pevar Co.*, ASBCA No. 27247 *et al.*, 85-1 BCA ¶ 17,826, *recon. denied*, 1985 WL 16592 (April 24, 1985). Appellant argues that imposition of the remaining forty-seven days of liquidated damages is improper because it is entitled to sixteen additional excusable days for the bumpers/bollards re-design of the new loading dock, and forty-seven additional excusable days for the subsurface differing site conditions encountered at the old loading dock.

Respondent actually was using or could have been using the new loading dock by December 17, 2008, when the parties discovered the improperly designed bumpers (*see* FOF 21). Respondent would not allow the otherwise functional dock to be used until the situation was corrected (*see* FOF 25). The resulting contract change delayed Appellant from turning the dock over to Respondent, which granted a thirty-seven-day time extension and the direct costs for the changed work (which are not in dispute except as to compensability for field overhead costs for that period). Appellant seeks to be excused from an additional sixteen days of liquidated damages assessments. (FOF 28).

Even if we were to conclude that completion of the new loading dock was delayed longer[14] without the fault or negligence of Appellant, to allow additional time extensions we would have to conclude that the overall progress of the project was impacted so as to delay its substantial completion as a result. We cannot so find.

Although the phasing plan was abandoned early in the project (FOF 9) and we have not been informed of the interplay between the phases thereafter, the new loading dock originally was planned to be constructed in Phase 3. Before substantial completion could be achieved, Appellant was required to perform significant work in Phases 4 and 5, which appear (considering two Phase 4 identifications and Phase 5) to have been scheduled to take over two months to perform. As analyzed below during our discussion of Appellant's delay claim, Appellant has presented a paucity of evidence regarding the interaction of the phases as constructed, and which work was critical to project completion.[15] We conclude

that Appellant has not proven delay to the project as a whole as a result of an additional delay to completion of the new loading dock.

We next examine excusable delay for differing site conditions encountered at the old loading dock. Respondent granted a ten-day time extension for this issue while Appellant argues that it is entitled to forty-seven additional days.

Appellant began demolition of the old loading dock on February 11, 2009, encountered the first subsurface problem on February 17, and immediately sought guidance from Respondent (FOF 29). On February 18, Respondent's architect informed Appellant how to handle the condition but did not address cost or time extensions (FOF 30). Appellant resumed demolition on February 20 at which time it encountered the second subsurface problem, and again immediately sought guidance from Respondent (FOF 31). On February 25, Respondent asked Appellant to provide a maximum cost for the work so that a not-to-exceed modification could be issued. However, at the same meeting Appellant advised Respondent that it needed approval of the cost of added work before it performed that work. (FOF 32). Rather than do so, Respondent's architect contested responsibility the next day (FOF 33).

Appellant submitted a cost proposal nineteen days later on March 17 (FOF 34). However, on March 26, Respondent acknowledged that the needed work still remained uncertain, and that it needed to issue a not-to-exceed modification. The contracting officer did not issue the directive to proceed until March 30, forty-two days after Respondent was informed of the first differing site condition. Appellant was not under a duty to perform changed work until directed by an authorized official of Respondent. *See*, *e.g.*, *Gavosto Assoc., Inc.*, PSBCA No. 4131 *et al.*, 01-1 BCA ¶ 31,389. Once the contracting officer did so on March 30, Appellant performed in a timely way, beginning the work on April 3, and completing both the demolition and dock renovation by April 9 (FOF 35-36).[16] The record does not permit us to assess whether this period of work on the dock took longer than was planned due to the change. Furthermore, there is no evidence that other, parallel work was performed that may have been critical during the period of delay to the old dock.

Respondent maintains that the nineteen-day period during which Appellant obtained a price proposal from its subcontractor was excessive. However, Appellant's principal testified without contradiction that this time period was reasonable (July 18 Tr. 152-53). Moreover, even without a cost proposal, Respondent could have directed Appellant to perform at a price to be determined later any time after February 17, as it represented it would do. Instead, Respondent's architect contested responsibility (FOF 33). Accordingly, we view the potential period of excusability for this issue to run from February 17 to April 3, a period of forty-five days, of which Respondent granted ten days. To conclude that this delay was excusable though, we must analyze whether it delayed project completion. We conclude that it did.

We have found that substantial completion occurred upon Respondent's ability to use the old loading dock, which, therefore, was the last material construction activity for Appellant to perform. Whereas Appellant's evidence that other construction activities were on the critical path is deficient, we believe that excusable delays to the last cforonstruction activity must be critical – *i.e.*, a delay to the last activity delays completion of the project. See *Frontier Contracting Co., Inc.,* ASBCA No. 33658, 89-2 BCA ¶ 21,595, *recon. denied*, 89-2 BCA ¶ 21,802. Where, as here, there is no evidence of parallel delays for which Appellant is responsible during the critical delay period, we find that assessment of liquidated damages for the thirty-five additional days of delay to the old loading dock – and to substantial completion of the project – is excused as beyond the fault or negligence of Appellant. The thirty-five day excused period equates to $24,500 of forgiven liquidated damages.

Accordingly, of the forty-seven days for which Respondent initially demonstrated it was entitled to liquidated damages, Appellant has shown that thirty-five of those days were excusable, resulting in a liquidated damages recovery of twelve days. Calculated at the $700 per day rate, Respondent is entitled to collect $8,400 from Appellant.

Is Appellant entitled to compensable delay costs for field overhead?

Appellant claims damages for its field overhead costs for 121 calendar days of delays it contends are compensable resulting from the construction activities that were the subject of unilateral modifications 4, 9 and 12 (FOF 70). To demonstrate that it is entitled to compensable delay, Appellant must show that the Postal Service proximately caused delay which harmed it, and the extent of that delay. *See Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994) (*en banc*).

While only delays caused solely by Respondent's action may be compensable, *see* FOF 66; *Polote Corp.*, PSBCA Nos. 1297, 1428, 87-1 BCA ¶ 19,490, to recover Appellant must do more than show that it was delayed by such actions. It also must show that its overall completion of the project was delayed. Where a contractor is responsible for some project delays,

regardless of government caused delay, it must present delay analysis that segregates concurrent or other contractor delays and shows how particular events delayed project completion. Without such an analysis and clear apportionment of delay and expense to each party, the contractor cannot recover monetary compensation for delay damages. *See Versar, Inc.*, ASBCA No. 56857, 12-1 BCA ¶ 35,025, *recon. denied*, 12-2 BCA ¶ 35,126.

To succeed in this case, Appellant must demonstrate therefore that Respondent's delays impacted activities on the critical path of its construction schedule such that it caused Appellant to extend the completion time of the project as a whole and thereby incur extended site overhead costs. *See Kinetic Builder's Inc. v. Peters*, 226 F.3d 1307, 1317 (Fed. Cir. 2000). It does not suffice to show that Respondent delayed only a segment of the work. *See Kato Corp.*, ASBCA No. 51462, 06-2 BCA ¶ 33,293.

Appellant's 121-day compensable delay claim consists of the following: ten days for unsuitable soil at the Phase 3 expansion (the subject of Modification 4); fifty-four days for the bumpers/bollards design change at the new loading dock (the subject of Modification 9); and fifty-seven days for the subsurface differing site conditions at the old loading dock (the subject of Modification 12) (FOF 70).

We ordinarily would begin our analysis by examining Appellant's as-planned construction schedule for these construction activities. However, in the appeal before us, the record contains no detailed construction schedule, either as-planned or as-built. Indeed, aside from a flawed and rudimentary preliminary bar chart showing the construction phases (abandoned soon thereafter) without identification of activities within those phases, we are left to determine which activities were on the critical path and therefore affected project completion if delayed.

The absence of a critical path schedule renders the Board's job in analyzing Appellant's delay claim extraordinarily difficult, particularly as we found Appellant's construction expert unhelpful as explained below. We are left without clear indication of the planned sequence of scheduled construction activities, how long certain activities (such as construction of each loading dock) were scheduled to take to perform, or how the delay of a construction activity may have affected later activities or completion of the project as a whole.

We have only the rudimentary preliminary phasing graph which does not include identification of any construction activities, and no as-built chart at all. "Time bar charts are ordinarily incapable of providing the standard of proof required to establish delays and impacts on a project." *Coates Indus. Piping, Inc.*, VABCA No. 5412, 99-2 BCA ¶ 30,479 at 150,586. Nonetheless, we examine the evidence introduced by Appellant on this issue and next analyze its construction expert's report and testimony in support of its claim.

Appellant's construction expert assumed and Appellant has argued throughout this case that its entitlement to compensable delay damages is established by Respondent having granted time extensions in its unilateral modifications. While at one time this position may have been arguable under the so-called *McMullan* presumption, the concept that government-granted time extensions equate to a presumptive concession of compensability has been rejected by our appellate authority. In *England v. Sherman R. Smoot Corp.*, 388 F.3d 844, 857 (Fed. Cir. 2004), the Federal Circuit prohibited utilization of the *McMullan* presumption as "contrary to the C[ontract] D[isputes] A[ct] and [] no longer good law."[17] It explained that a construction delay is excusable only if it arises from either the government's action or external forces but not if caused, even concurrently, by the contractor's actions. Therefore, the mere grant by the government of a contract extension does not indicate that the government is at fault and does not support a presumption that the government is responsible for the delay. *Smoot*, 388 F.2d at 857.

Without application of such a presumption, Appellant affirmatively must demonstrate compensable delay. It has done so only in a limited way.

Appellant primarily relies on the testimony of its construction expert. We find the expert witness' delay analysis to be superficial and outcome-oriented. We find no value in it and accord it no weight. Among the flaws with the expert's report and testimonial delay analysis are that he did not identify or explain which events were critical to project completion. He did not examine any concurrent delays or factors affecting the timing of the construction other than the three construction activities about which Appellant presented delay claims. He did not account for Appellant having been behind schedule in the early parts of the project or consider other delaying events. The expert neither saw nor prepared an updated schedule reflecting the project as-built, reflecting the abrogation of the phasing plan, or reflecting any other delays to the project (MT 10, 12, 16, 17, 22, 24). His report identified dates for planned construction phases that differ significantly from Appellant's phasing plan without explanation (*compare* AF 50 at last unnumbered page *with* AF 77).

Moreover, Appellant's expert witness mistakenly assumed that the three involved modifications (4, 9 and 12) had been bilateral, although they actually were unilateral and disputed (MT 18-19). Further, the expert's report itself was rife with mathematical and other calculation errors so as to render it otherwise unreliable (AF 50), and his opinion changed regarding Modification 9 following his deposition (MT 20-21). In the end, Appellant's construction expert testified that he should not be relied upon for dates or numbers but only for conclusions (MT 36). We decline that invitation and conclude that the Board is unable to rely on the expert witness' opinions as an aid in resolving this aspect of the appeal.

Without presentation of Appellant's as-planned construction schedule and comparison of such a schedule to the construction as-built, we are left with limited evidence on which to base a finding of critical path delay. Ultimately, but with one exception,[18] Appellant's failure to have presented critical path or other credible evidence of delay to overall project completion is fatal to its delay claim even where it may have shown that a construction activity was delayed. *See Nova Grp., Inc.*, ASBCA No. 55408, 10-2 BCA ¶ 34,533. Therefore, except for this one element as discussed below, Appellant has not proven its claim.

The exception concerns delays associated with the differing site conditions at the old loading dock. As discussed above in our analysis of excusability for liquidated damages, we have found that as the last material construction activity prior to substantial completion, the delay attributable to Respondent for subsurface conditions encountered at the old loading dock delayed the completion of the project as a whole. Therefore, it is compensable under the *Suspensions and Delays* clause (FOF 66). *See Gavosto Assoc.*, 01-1 BCA at 155,059; *Frontier Contracting,* 89-2 BCA at 108,730.

We concluded, above, that Appellant was entitled to forty-five days of excusable delay to project completion for this task. The entirety of that delay also is compensable. Accordingly, Appellant is entitled to forty-five days of its costs of extended field overhead. As we resolve both entitlement and quantum, we next analyze the amount of field overhead expenses due Appellant.

Quantum

During the claim process and prior to the hearing, Appellant did not identify a specific daily rate for its delay claim (FOF 67). Its construction expert did not address such costs at all. During the hearing, Appellant identified compensation at a rate of $769.40 per day (FOF 67). However, substantial failures of proof adhered in its presentation of damages evidence.

Nonetheless, and despite the problems of proof discussed below, Appellant need not prove its damages with complete certainty or mathematical precision, and is entitled to recover if it furnishes a reasonable, though approximate, basis for damages computation. *See Santa Fe Engs., Inc.*, ASBCA No. 24578 *et al.*, 94-2 BCA ¶ 26, 872, *aff'd*, 53 F.3d 347 (Fed. Cir.1995), *citing Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 968-69 (Ct. Cl.1965); *see also Willems Indus., Inc. v. United States*, 295 F.2d 822, 831 (Ct. Cl. 1961) (damages must be proven with sufficient certainty so that determination of amount is more than mere speculation).

Appellant's evidence in support of its quantum claim is inadequate. Its analysis was inconsistent and the testimony regarding it was confused (FOF 67; *see also*, AF 40; AF 80; July 18 Tr. 139-44). Appellant's quantum evidence generally consisted of estimates, often without demonstrated basis. Backup documentation, though apparently available, was not presented into the record. Appellant's summary quantum calculations were misleading, interchangeably conflating business days with calendar days without explanation, and were inconsistent. (AF 40; AF 80; July 18 Tr. 130, 155, 157, 163-64, 167-69). Nonetheless, based on the testimony and the supporting documentation that was submitted, we can ascertain proven elements of damages with sufficient certainty so as to allow us to render a reasonable, though approximate, damages computation.

The General Services Board of Contract Appeals well described the differences between field overhead, and home office overhead costs, the latter of which may be recoverable under the *Eichleay* formula (*see Eichleay Corp.*, ASBCA No. 5183, 60-2 BCA ¶ 2,688):

[f]ield office overhead costs are direct costs incurred on the specific project due to the delay. 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.

Young Enter. of Georgia, Inc. v. Gen. Services Admin., GSBCA Nos. 14437 *et al.*, 00-2 BCA ¶ 31,148 at 153,861 (citations omitted).

While Appellant purports to seek only field overhead costs, its quantum evidence includes costs normally attributed to a home office unabsorbed overhead claim. This distinction and the other problems of proof apparent in Appellant's quantum calculations are analyzed below. We examine each of Appellant's identified thirteen categories of costs.

The first three elements claimed by Appellant – a percentage of the salaries of its principal (identified in the claim as its project manager) (July 18 Tr. 118), its home office billing clerk, and its home office general superintendent (July 18 Tr. 120-22) plainly are elements of home office overhead, not field overhead. *See e.g.*, *Melka Marine, Inc. v. United States*, 187 F.3d 1370, 1375 (Fed. Cir. 1999) ("home office overhead typically includes accounting and payroll services, salaries for upper-level managers, general insurance, utilities, taxes, and depreciation").

Home office overhead is recoverable exclusively through the *Eichleay* formula. *See Wickham Contracting Co., Inc. v. Fischer*, 12 F.3d 1574, 1580-81 (Fed. Cir. 1994). Recovery under the *Eichleay* formula requires multiplying Appellant's total overhead costs incurred during the contract period by the ratio of billings from the delayed contract to its total billings during the contract period; dividing the allocable contract overhead by the number of days of contract performance; and multiplying the number of days of delay by the daily contract overhead rate. *See Wickham Contracting*, 12 F.3d at 1577. Appellant has not presented the requisite elements necessary for an *Eichleay* showing and has presented no evidence at all concerning its total overhead cost during the contract period, or the ratio of billings from the delayed contract compared with its total billings during the contract period. Moreover, Appellant expressly disclaims having submitted an *Eichleay* claim or seeking any recovery for home office unabsorbed overhead. *See* Appellant's Reply Brief at 6 ("[T]he discussion in USPS's brief regarding unabsorbed home office overhead and the Eichleay formula is completely inapplicable to Tromel's claim as Tromel has not submitted an Eichleay claim."). Instead, Appellant expressly restricts its claim to field overhead expenses incurred during any period of compensable delay. Accordingly, the salaries for Appellant's principal, its home office billing clerk, and home office general superintendent would have been incurred regardless of the delay in this project, and as such are elements of home office overhead not compensable here.

However, the *Eichleay* formula applies only to home office overhead, not to field overhead. *See K.L. Conwell Corp.*, ASBCA Nos. 35489, 35490, 90-1 BCA ¶ 22,487. Therefore, the salary for Appellant's site superintendent, all of whose work was dedicated to this project during the relevant period, and who was at the construction site every day (July 18 Tr. 125), is compensable as field overhead.

Appellant represents that its site superintendent's daily salary was $270 per day.[19] However, the evidence of its superintendent's costs provided by Appellant consists of general and conclusory testimony by its principal and site superintendent (July 18 Tr. 124-25; MT 81-82). The better evidence consists of a specific payroll summary prepared by Appellant (AF 42 at 270), which it represents is based upon more detailed payroll records it maintained though did not provide (July 18 Tr. 125).

This evidence persuades us that the site superintendent received compensation of $15,719 ($13,800 salary + $1,919 employer-paid taxes and contributions) for the summarized period, January 1 through April 15, 2009, which includes the period of compensable delay. This equates to a daily cost of $149.70 ($15,719 ÷ 105 days in the summarized period). We find $149.70 to be the compensable daily rate for Appellant's site superintendent.

Appellant next seeks recovery for what its quantum calculation chart identifies as site labor for regular maintenance/cleanup. Appellant's principal testified that involved activities included maintaining fences, snow removal, trash cleanup and the like (July 18 Tr. 125). We believe that these types of activities would have been ongoing and therefore would have cost Appellant more as field overhead for the period for which it was compensably delayed. However, Appellant did not identify which of its employees performed this work, and the only evidence of the extent of such work was Appellant's principal's testimony that the work consisted of about four hours per week (July 18 Tr. 126). We find that estimate, which was not rebutted, to be reasonable.

As we have not been informed which employee performed this work, we have attributed this basic maintenance work to the lowest salaried employee identified in Appellant's submitted payroll summaries (AF 42 at 285). That rate is $20.50 per hour (calculated as $18 per hour identified salary, plus $2.50 per hour employer-paid taxes and contributions).[20] As we credit the testimony that this work took approximately four hours per week, Appellant's damages for this element amounts to $82 per week ($20.50 x 4), equating to $11.71 per day ($82 ÷ 7) of compensable delay.

The next quantum element claimed by Appellant – its daily rental cost for an on-site field office/storage trailer (AF 52; July 18 Tr. 127) – fails entirely. The trailer was removed from the project site in January 2009, before the period of compensable delay (July 18 Tr. 128; AF 52). As Appellant did not expend any additional costs to rent a trailer during the compensable period, it has not been damaged and its claim in this regard is denied.

Appellant claims costs for vehicles and related maintenance, insurance and gasoline. This claim includes the vehicle used by Appellant's principal. It allocated 20% of its overall company vehicle costs to this contract without demonstrating the basis for that allocation. No evidence was introduced regarding vehicle costs or maintenance, and only general and unhelpful evidence was introduced concerning insurance. (AF 42 at 291-95; July 18 Tr. 128-30). Evidence regarding gasoline purchases was not attributed to the contract in any way and was paid in otherwise-untraceable petty cash (AF 42 at 296; July 18 Tr. 131-32). Although its evidence was substantially deficient, we believe that Appellant bore additional costs of owning and operating vehicles used on the project for the period of delay during which they were idle. Of Appellant's claim of $97 per (business) day, we award $25 per (calendar) day on a jury verdict basis.[21]

Similar problems adhere regarding Appellant's claim for mobile telephones. Again, Appellant appears to have identified all its home office and field mobile and hard-line telephone costs (although it used no hard-line telephones at the project site), applied an unsupported proportion to this project, and estimated allocation without support to the delayed portion of the project. It also used gross costing assumptions including irrelevant hard-line telephone expenses (AF 42 at 298-99; July 18 Tr. 156-62). Once again, while its evidentiary support is poor, we believe that Appellant incurred some additional expense dedicated to this project during the delay period for mobile phones used by its field personnel that is compensable as field overhead. However, the portion of the telephone costs that were based on telephones in its home office would not be recoverable. Of Appellant's claim of $9 per (business) day, we award $3 per (calendar) day on a jury verdict basis.

Supporting evidence for Appellant's claim for FedEx costs and postage is nonexistent except for general and unsupported testimony by Appellant's principal. There is nothing in the record that would allow us to determine that any such costs could be allocated to this project during the period of delay, and such costs, in any event, would seem to be an element of home office overhead, which Appellant disclaims seeking. (July 18 Tr. 133-34). We deny this element for lack of proof.

Appellant claims the costs of ownership for tools and equipment used in the project, including consumables. Its evidence consists of a summary chart prepared by Appellant's principal identifying various tools, their estimated cost, useful life, and a calculation of the resulting monthly cost of ownership (AF 42 at 300). Appellant supplied no further explanation and no documentary support (July 18 Tr. 168-70). Although its evidence was substantially deficient, we believe that Appellant bore compensable costs of ownership of tools dedicated to the project during the period of delay. Its support is so weak, however, that of Appellant's claim of $17 per (business day), we award $5 per (calendar) day on a jury verdict basis.

Appellant seeks 10% overhead on top of its field overhead expenses. Such overhead expenses were generic and undescribed estimates based on its home office costs (July 19 Tr. 104-05). We find such additional overhead part of Appellant's excluded home office overhead costs. As such, they are denied. *See Stephenson Assoc., Inc.*, GSBCA Nos. 6573, 6815, 86-3 BCA ¶ 19,071.

Appellant also seeks 10% profit on its field overhead expenses. Respondent relies on *Stephenson Assoc., Inc.*, GSBCA Nos. 6573, 6815, 86-3 BCA ¶ 19,071, for the proposition that profit is unavailable in the recovery of compensable delay damages. However, that limitation in *Stephenson* was based upon a restriction in the suspension of work clause in that contract which proscribed recovery for profit. The contract in this case includes no such proscription (FOF 66), and profit on Appellant's compensable field costs is permissible. *See Selpa Construction & Rental Equipment Corp.*, PSBCA No. 5039, 11-1 BCA ¶ 34,635. Appellant applied the 10% profit rate utilized in pricing its change order work (July 19 Tr. 85-86). This remains an appropriate rate to use, *see Atlas Constr. Co.*, GSBCA Nos. 8143 *et al.*, 90-2 BCA ¶ 22,812, and is awarded.

Finally, Appellant claimed 2.5% of its field overhead costs to compensate it for additional bond costs. However, it adduced no evidence that its bonding costs increased in any way as a result of the compensable delay, nor that it paid any additional bond costs (July 18 Tr. 139, 167). Because Appellant has not proved that it incurred additional bond costs, we deny that element of its quantum claim.

Accordingly, we conclude that Appellant has proved a daily rate for its field overhead costs of $213.85, calculated as follows:

Project manager	$0
Billing clerk	$0

General superintendent	$0
Superintendent	$149.70
Site labor for maintenance/cleanup	$11.71
Trailer	$0
Vehicles, gas, maintenance	$25
Mobile telephones	$3
FedEx and postage	$0
Small tools and equipment	$5
Overhead	$0
Profit	$19.44 (10% 0f $194.41)
Bond	$0
Total	$213.85

We multiply this $213.85 daily field overhead rate by the forty-five (calendar) days of compensable delay we have awarded, and conclude that Appellant's claim is granted in the amount of $9,623.25.

CONCLUSION

Respondent initially demonstrated that it was entitled to recover liquidated damages between February 27 and April 15, a period of forty-seven days. Appellant then demonstrated that thirty-five of those days were excusable resulting in a liquidated damages recovery of twelve days. Calculated at the $700 per day rate, Respondent is entitled to collect $8,400 from Appellant. Appellant is entitled to $9,623.25 for its compensable delay claim. Accordingly:

PSBCA No. 6303 (Appellant's claim concerning substantial completion date) is granted.

PSBCA No. 6339 (Appellant's electrical service claim) was withdrawn and accordingly is dismissed.

PSBCA No. 6340 (Respondent's claim for liquidated damages) is granted in part and denied in part.

PSBCA No. 6342 (Appellant's compensable delay claim) is granted in part and denied in part).

Appellant may recover $1,223.25 from Respondent.

Gary E. Shapiro

Administrative Judge

Vice-Chairman

I concur:

I concur:

_____

William A. Campbell

Administrative Judge

Chairman

_____

David I. Brochstein

Administrative Judge

Board Member

[1] The parties agreed to fifty-three pre-trial stipulations, which are referenced as "Stipulations" followed by the referenced stipulation number. Exhibits included in the various volumes of the consecutively numbered appeal file are referenced as "AF" followed by the tab number of the exhibit. References to the hearing transcript appear as "Tr.," preceded by the date of the referenced transcript volume, and followed by the page number of the transcript cited.

[2] Several bilateral modifications were executed during performance of the contract which adjusted the price of the contract but did not change the performance period (Stipulations 19-24).

[3] The Board's court reporting contractor irretrievably lost portions of the hearing recordings conducted on July 19 and July 20, 2011. Therefore, the transcript does not include

(1) testimony of Appellant's project manager; (2) testimony resulting from the cross-examination of Appellant's expert, the Board's examination of Appellant's expert, and his testimony on re-direct examination; and (3) a preliminary portion of the direct testimony of Respondent's contracting officer. The parties stipulated to testimony on which they relied that was missing from the transcript. The stipulations of the missing testimony agreed by the parties are referenced as "MT" followed by the number assigned to the stipulation. While the Board accepts such stipulations regarding testimony missing from the transcript, we do not necessarily view any such stipulated testimony as conclusive, and we evaluate such stipulated testimony just as we evaluate testimony reflected in the transcript.

[4] *See*, *e.g.*, *Priebe & Sons*, 332 U.S. at 413 (liquidated damages clause concerning late inspection of eggs so that the eggs would be ready for delivery to the government unenforceable because breach of inspection requirement could not cause any additional damage to the government where a separate liquidated damages clause addressed late delivery of eggs); *Garden State Painting Co.*, ASBCA No. 22248, 78-2 BCA ¶ 13,499 (invalidating clause where liquidated damages were calculated based on estimated daily cost of inspection and superintendence, but where the project did not require any daily inspection or superintendence); *Engineered Electric*, ENGBCA No. 4944, 84-2 BCA ¶ 17,316 (invalidating clause where liquidated damages rate was established based on continuing inspection costs for delay, but where it was not intended that an inspection staff would be established).

[5] We therefore need not reach the question of whether an admission that Appellant had interpreted the contract in this way would bind us. *See, e.g., Bay Decking Co.*, ASBCA No. 33868, 89-2 BCA ¶ 21,834 at 109,847.

[6] While we discount the testimony of Appellant's construction expert as it relates to his analysis of delay issues, *see infra* at pp. 48-50, the Board found him to be a credible expert on construction matters generally, and we credit his unrebutted testimony as to industry practice as persuasive.

[7] Although the parties debate the materiality and performance of several other construction activities, primarily landscaping, such additional elements were not relied upon to establish or contest substantial completion. We view the debate about delays to construction elements that are not at issue in establishing substantial completion as irrelevant to the issues before us. In any event, the contract specifically excepted landscaping from considerations of substantial completion (*see* FOF 57), as did Respondent's project manager (FOF 55).

[8] Respondent correctly argues that completion of essential or significant safety features rendering a project unfit for its intended use can preclude a finding of substantial completion. *See Central Ohio Bldg.*, 92-1 BCA at 121,826; *Thermodyn Constr., Inc. v. General Services Admin.*, GSBCA No. 12510, 94-3 BCA ¶ 27,071; *Ab-Tech Constr., Inc.*, VABCA No. 1531, 82-2 BCA ¶ 15,897. However, as opposed to a safety hazard, mere inconvenience will not affect substantial completion where the building otherwise is fit for its intended purpose. *See P.J. Dick Inc. v. Gen. Services Admin.*, GSBCA No. 12058, 96-1 BCA ¶ 28,188.

[9] *See, e.g.*, AF 29, AF 32, AF 63 at 5.

[10] Although Appellant finished the old loading dock on April 13, it was not made available to Respondent until April 15 (FOF 39). We have no evidence on which to attribute responsibility for the period between April 13 and 15 to Respondent, and find that it is appropriate to utilize the date on which Respondent was able to use the dock – April 15 – as the substantial completion date. Appellant does not argue to the contrary.

[11] Because we find in Appellant's favor on its first argument involving its substantial completion date claim, we need not directly address its second argument.

[12] Neither party alerted us to precedent addressing this presented question.

[13] In so concluding, we have considered *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323 (Fed. Cir. 2010), where to allow a contractor to assert time extensions as defenses against the government's assessment of liquidated damages the Federal Circuit interpreted the Contract Disputes Act to require a contractor to claim separately such time extensions, and appeal a resulting adverse contracting officer decision. Here, Appellant did file its own claim with the contracting officer seeking to establish April 15 as the date of substantial completion, and it appealed the contracting officer's decision denying that claim. We find this sufficient to place Appellant's time extension contentions within our jurisdiction, and Respondent has not contended to the contrary. *See Structural Concepts, Inc. v. United States*, 103 Fed. Cl. 84, 89 (2012).

[14] The bollards were installed on January 29, 2009 at which point Respondent should have been able to use the loading dock (*see* FOF 26). While Appellant suggests that it actually turned over the dock in early February (*see* July 19 Tr. 29, 100), it has not provided a cogent explanation as to why any delay between the bollards installation date and the turnover date was beyond its control and without its fault or negligence. Of the forty-three-day period at issue from December 17 until January 29 therefore, Respondent allowed a time extension of thirty-seven days, leaving no more than six days as potentially excusable, in any event.

[15] Appellant argues that the critical path passed through the new loading dock, and directly to renovation of the old loading dock. The planned performance period for each of these construction activities is completely absent from the record, and while the new loading dock was completed on January 29, 2009, work on the old loading dock did not begin until February 11, and an additional six days elapsed before Appellant discovered subsurface differing site conditions after demolition began. The actual renovation work at the old dock appears only to have taken seven days (April 3 to April 9).

[16] The contract expressly provided that only the contracting officer could modify the contract and provide for additional compensation (AF 3 at clauses B.511, B.605 (b-c, and h), B.1005, B.1006, AF 2). *See also*, *Winter v. Cath-dr/Balti Joint Venture*, 497 F.3d 1339, 1344-45 (Fed. Cir. 2007); *Scientific Sec. Sys. of Tacoma, Inc.*, GSBCA No. 4476, 79-2 BCA ¶ 14,079.

[17] The Federal Circuit described the *McMullan* presumption as follows: "When the Board is faced with a claim by a contractor for costs incurred as a result of a delay, and the government extended the period of contract performance, the Board will invoke a presumption, subject to rebuttal, that the government was at fault for the delay . . . 'This presumption is especially strong where the time extensions are granted after the delay has occurred.'" *Smoot*, 388 F.3d at 851 (internal citations omitted).

[18]Evidence of the correlation between any delays caused by unsuitable soil at the Phase 3 expansion and the project's substantial completion many months later is completely absent. Evidence of the impact of delays to completion of the Phase 3 loading dock to substantial completion is insufficient to permit us to conclude that project completion was delayed. *See* pp. 37-38, *supra*.

[19] Appellant's calculations of its daily costs are based on work days of delay (a weekly cost ÷ 5) while its days-of-delay analysis utilizes calendar days (AF 40, AF 80). Appellant's construction expert did not address quantum at all, and Respondent did not present an expert, audit the claim, or raise this defect in Appellant's claim. Our analysis utilizes calendar days for both elements of the quantum claim.

[20] The payroll summary at issue (AF 42 at 285) does not appear to allow us to calculate directly the employer-paid taxes and contributions for the lowest salaried-employee. We have applied the percentage for such additional expenses used in the analysis for Appellant's site superintendent as a reasonable way to approximate such costs.

[21] A jury verdict approach to damages is permissible where there is clear proof that the contractor was injured and a more reliable method to calculate damages is unavailable. However, it only may be employed where the record evidence is adequate to permit a fair and reasonable approximation of damages. *See WRB Corp. v. United States*, 183 Ct. Cl. 409 (1968); *Real Properties MLP, Limited Partnership*, PSBCA No. 3453, 95-2 BCA ¶ 27,829.