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ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -)
)
O-Tech Solutions, LLC) ASBCA Nos. 61898, 62095
)
Under Contract No. FA2823-15-D-3001)

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OPINION BY ADMINISTRATIVE JUDGE ARNETT

This appeal involves a firm, fixed-price delivery order on a commercial items contract awarded by the U.S. Air Force (Air Force or government) to O-Tech Solutions, LLC (O-Tech or appellant) which required O-Tech to engineer, furnish, install and test a conduit system with fiber optic cable at Eglin Air Force Base (AFB), Florida. O-Tech appeals the government's termination for cause and the denial of O-Tech's claim for payment of the contract work performed, additional costs, rescission or revision of the Contractor Performance Assessment Report (CPAR), and a time extension.

The Board has jurisdiction over this appeal pursuant to the Contract Disputes Act (CDA) of 1978, 41 U.S.C. §§ 7101-7109. The parties elected to submit this appeal on the record pursuant to Rule 11 and requested that the Board decide entitlement only.

As to ASBCA No. 61898, we hold that O-Tech has demonstrated excusable delay and convert the termination for cause to a termination for convenience. As to ASBCA No. 62095, the appeal is sustained in part and denied in part as set forth below.

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FINDINGS OF FACT

The Contract and Delivery Order 011

1. On June 9, 2015, the Air Force awarded an indefinite-quantity commercial items contract, No. FA2823-15-D-3001, for Base Telecommunications System Installation Services at Eglin AFB, FL (hereinafter “BTIS Contract”) to O-Tech. The BTIS Contract included a base year and four option years. (R4, tab 14 at 1, 3-6, 15)

2. On February 3, 2016, the Air Force issued Request for Proposal (RFP) FO58 for a task order under the BTIS Contract. The RFP solicited pricing to “engineer, furnish, install and test (EFI&T) maintenance holes; conduit system and install a 288 strand single mode (SM) fiber optic cable (FOC)” at Eglin AFB, FL. (R4, tab 20 at 5) RFP ¶ 2.2 specifically required seventeen hand holes (HH); segments of 4” PVC conduit; approximately 14,375 feet of HDPE rollpipe; flexible geotextile innerduct; one 288 strand SM FOC from Bldg 1315 to Hut 3; and distribution panels in Bldg 1315 and Hut 3 along with “all associated splicing and terminations” (R4 tab 20 at 7).

3. The period of performance (PoP) was to be determined “based on the proposed schedule and actual contract award date” (R4, tab 20 at 15).

4. In response to the RFP, O-Tech submitted a proposal in February 2016 which noted concern that the 1-1/4” roll pipe was too small to accommodate the 288-strand fiber posing a risk of damage during installation and suggested upsizing the pipe (R4, tab 22).

5. The proposed duration reflected in O-Tech’s schedules ranged from approximately 109 to 178 calendar days¹. We find that O-Tech’s schedules did not include product data submittal activities or time for government review. (R4, tabs 23, 35)

6. The government evaluated O-Tech’s proposal as technically acceptable under the solicitation evaluation criteria (answer ¶ 77; R4, tab 36 at 1, 3).

¹ All references are to calendar days, not work days.

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7. On or about April 21, 2016², the Air Force awarded Delivery Order 0011 (DO11) to O-Tech in the amount of \$327,183.74. It consisted of one contract line item (CLIN) with a 165-day³ PoP from April 18, 2016 to September 30, 2016. (R4, tab 37)

8. Under DO11, the parties executed seven bilateral modifications which extended the end of the PoP from September 30, 2016 to September 30, 2018 (R4, tabs 86, 106, 142, 162, 207, 265, 363).

Contract Provisions

9. The BTIS Contract incorporated Federal Acquisition Regulation (FAR) clause 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (DEC 2014), which states, in part:

(a) Inspection/Acceptance. The Contractor shall only tender for acceptance those items that conform to the requirements of this contract. The Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance. The Government may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price. If repair/replacement or reperformance will not correct the defects or is not possible, the Government may seek an equitable price reduction or adequate consideration for acceptance of nonconforming supplies or services

. . .

(m) Termination for cause. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of

² While the complaint and answer indicate an award date of April 16, 2016, DO11 was executed on April 21, 2016 but states an effective date of April 18, 2016 (R4, tab 37). Two years after award, the Air Force unilaterally issued Modification No. 9 backdating the award from April 21, 2016 to April 18, 2016 (R4, tab 372). While inappropriate, Modification No. 9 did not change the end of the PoP and does not affect the outcome of this case.

³ The record does not indicate how the duration of 165 days for DO11 was calculated.

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termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

(R4, tab 14 at 7) (emphasis added)

10. BTIS Contract § 4.3, Quality Control, ¶ 4.3.1, required the O-Tech to maintain “an adequate inspection system” and perform “such inspections as will ensure that the work” conforms to contract requirements. It stated:

All work shall be conducted under the general direction of the Contracting Officer and is subject to Government inspection and test at all places and at all reasonable times before acceptance to ensure strict compliance with the terms of the contract. The Government has the right to inspect and test all services called for by the contract, to the extent practicable at all times and places during the term of the contract. **The Government shall perform inspections and tests in a manner that will not unduly delay the work.**

(R4, tab 12 at 7) (emphasis added)

11. The contractor was required to conduct weekly Integrated Product Team (IPT) meetings to discuss project progress and problems encountered and record and distribute meeting minutes (R4, tab 20 at 6).

12. The contractor was required to prepare a Quality Control Plan and assist the government representative in performing random spot checks and system acceptance tests (R4, tab 20 at 6).

13. RFP ¶ 2.2.9, Test and Acceptance/Installation Test Plan, required the contractor to provide a test plan indicating how the system would be pre-tested, in-progress tested and post-tested to demonstrate that it is fully operational. It required the contractor to test the system to demonstrate “its proper performance to the Government quality assurance representative” prior to being placed into service. (R4, at 20 at 15)

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14. RFP ¶ 2.2.1.14.3 Fiber Optic Cable Installation, states,

The Contractor shall provide and install a 288 strand single mode (SM) fiber optic cable (FOC) from Bldg 1315 to Hut 3. The total distance is approximately 18,375 feet. See Figures 7 thru 14 for route.

NOTE: Recommend the Contractor obtain and install a 10,000 meter reel length of 288 strand SM FOC to preclude any splices with this cable. No splices will be required if a 10,000 meter reel length of 288 strand SM FOC is used/installed. If a fiber optic cable splice is required, the splice location shall be coordinated with 96 CS/SCOW.

(R4, tab 20 at 13) (emphasis added)

15. RFP ¶ 2.2.1.5, Splice Connectors, states, “All fiber splicing shall be performed in accordance with RUS Bulletin 1735F-401, Standards for Splicing Copper and Fiber Cable. The fusion splice method shall be used for fiber optic cable.” (R4, tab 20 at 8)

16. The RFP listed six deliverables that were subject to Air Force approval: as-builts, work schedule, status reports, meeting minutes, test plans, and test reports (R4, tab 20 at 17).

17. We find neither the BTIS Contract nor the RFP expressly required O-Tech to provide product data submittals for government review or approval.

18. We further find that the RFP did not prohibit splicing of the fiber optic cable. If splicing of cable was necessary, O-Tech was required to coordinate the splice location with the Air Force customer. (R4, tab 20 at 8, 13)

Performance Prior to May 3, 2018

19. On May 18, 2016, the parties held a kick off meeting for DO11 (R4, tabs 53, 626).

20. On June 22, 2016, the parties bilaterally executed Modification No. 1 in the amount of \$17,109 adding CLIN 0002 for additional work to increase the bore length under the taxiway. Modification No. 01 did not extend the PoP. (R4, tab 66)

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21. On September 30, 2016, the original PoP lapsed (R4, tab 37 at 4).

22. On October 20, 2016, the parties bilaterally executed Modification No. 2 extending the PoP to February 10, 2017 at no additional cost (R4, tabs 86, 104). The extension was to address “the delay in government permitting” (R4, tab 624 at 2).

23. Citing delay with the construction waiver approval and weekend work, O-Tech requested a PoP extension. On February 9, 2017, the parties bilaterally executed Modification No. 3 extending the PoP to April 14, 2017 (R4, tab 106).

24. In March 2017, O-Tech submitted a payment request for work performed and inspected. The government notified O-Tech of an installation issue that required correction “before payment would be made.” (R4, tab 624 at 3) We find no payment was issued to O-Tech in response to this request.

25. On April 14, 2017, the PoP lapsed (R4, tab 106).

26. On May 9, 2017, the contracting officer issued a stop work order citing “contractual discrepancies ... related to Quality Assurance, Project Management and improper installation of Maintenance Holes” with no gravel base (R4, tab 136).

27. On May 25, 2017 – more than five weeks after the PoP expired – the parties bilaterally executed Modification No. 4 extending the PoP to June 30, 2017 at no additional cost to the government (R4, tab 146 at 3). According to the contracting officer, this extension was granted after the government determined that a gravel base under the maintenance holes was not required (R4, tab 624 at 3).

28. On June 6, 2017, the Air Force issued a letter of concern citing lack of an identified Project Manager, Quality Control Plan, or weekly status reports; Maintenance Holes installed without a gravel base; and “running behind schedule” (R4, tab 144). The Air Force admits that it delayed performance from May 9, 2017 to June 6, 2017 to develop and provide the letter of concern (answer ¶ 23).

29. On June 12, 2017, O-Tech provided minutes from the kick off meeting documenting that O-Tech had identified its Project Manager and the Air Force had agreed to receive verbal status reports during the weekly call (R4, tabs 149-50).

30. On June 15, 2017, the contracting officer stated in an internal email, “As part of the Stop work, there is an amount of money that, once asked to proceed with work, the company is allowed to claim. I am using that amount as the consideration to extend the PoP and have them continue work.” (R4, tab 153).

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31. On June 16, 2017, the Air Force rescinded the stop work order and requested that O-Tech resume work immediately (R4, tab 155).

32. On June 30, 2017, the parties bilaterally executed Modification No. 5 extending the PoP to August 31, 2017 at no additional cost to the government (R4, tab 162). The contracting officer's decision stated that the parties agreed to this extension "to address time lost due to the Stop Work order" and to provide time to renew the dig permits which expired while work was stopped (R4, tab 624 at 4).

33. As of August 30, 2017, O-Tech completed cable installation. During testing, O-Tech discovered that 5 strands of the 288-strand cable were broken within 800 feet of Building 1315. It notified the Air Force, provided test results, and requested a meeting to resolve the issue. (R4, tab 203)

34. On August 31, 2017, the parties bilaterally executed Modification No. 6 extending the PoP to October 13, 2017 (R4, tab 207). The extension was in response to O-Tech's request for one week for access delays, one week for weather, and two weeks for re-acquiring dig permits (R4, tabs 202 at 2, 624 at 4).

35. On September 26, 2017, the Air Force requested a plan to address the broken strands and rejected O-Tech's splicing solution on the basis that it would "negate the integrity of the cable" (R4, tab 218).

36. In a letter dated October 2, 2017, O-Tech described the manufacturer-approved method that it used to place the cable. O-Tech asserted that the proposed splice would not negate the integrity of the cable and that it would still "outperform" the specification limits. O-Tech also noted that the contract did not prohibit the use of splicing. O-Tech took responsibility for the damaged cable, committed to repairing it consistent with the contract, and requested approval to proceed. (R4, tab 222)

37. On October 13, 2017, the PoP lapsed (R4, tab 207).

38. On October 16, 2017, the Air Force stated its "original intent" for the cable to be a continuous run, rejected two splice options presented by O-Tech, and questioned whether the type of cable installed had been approved (R4, tab 232).

39. On October 17, 2017, O-Tech submitted a revised correction plan with a schedule indicating completion of DO11 by the end of November 2017 (R4, tabs 234-235). On October 27, 2017, the Air Force rejected O-Tech's revised plan, expressed concern that all installed cable was defective, and demanded progress reports and verification that the balance of installed cable was not defective (R4, tab 239).

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40. On November 27, 2017, O-Tech indicated that it had provided the requested documentation and requested a status update (R4, tab 242).

41. On December 19, 2017, the Air Force issued another letter of concern, and O-Tech requested a meeting (answer ¶ 34; R4, tabs 249-50).

42. On January 18, 2018, the parties met to discuss resolution of the broken fiber issue (answer ¶ 35). Minutes indicate that O-Tech sought approval to perform splices to replace damaged sections, and the government expressed concern about the integrity of all installed cable and required O-Tech to “back pull” cable sections and inspect it for damage in the presence of Air Force personnel. (R4, tab 257 at 2)

43. On February 13, 2018 – four months after the PoP expired – the parties bilaterally executed Modification No. 7 extending the PoP to May 4, 2018 (R4, tab 265).

44. On April 16, 2018, O-Tech submitted the manufacturer’s report which concluded that the broken fiber was not defective but had been damaged during installation. O-Tech proposed to splice the cable “mid-span.” (R4, tab 318) O-Tech also indicated that it had used incorrect couplers and would replace them with couplers recommended by the manufacturer. O-Tech submitted information regarding the recommended coupler for approval explaining that it could not provide a schedule until the government approved O-Tech’s action plan. (R4, tabs 316, 323)

45. On April 17, 2018, the Air Force contract specialist asked the customer which “fix” was discussed internally “so we can get a schedule and get this project moving forward” (R4, tab 323). Minutes from the weekly meeting indicate that the Air Force identified HH-9 as the location for a mid-span splice. As a result, O-Tech had to order and install 8000 feet of new 288 strand cable from Building 1315 to HH-9 to address the 5 damaged strands that were located within 800 feet of Building 1315.⁴ (R4, tab 324 at 7)

46. On April 25, 2018, O-Tech submitted product data for four proposed cable options and their availability ranging from in stock to a six-week lead time (R4, tab 334).

⁴ The location selected by the Air Force for the splice caused O-Tech to replace 8000 feet of cable to address a section of less than 800 feet that was damaged.

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47. On April 30, 2018, the Air Force formally accepted a mid-span splice at HH-9 and requested that O-Tech provide a proposed schedule to “fix all problems and complete the project” (R4, tab 339; answer ¶ 42). O-Tech responded:

I sent the attached requests last week and received no response . . . We are still waiting a response/approval for couplers and replacement fiber cable. Both directly impact the schedule. If the government does not respond by NLT 30 Apr by COB to the questions proposed regarding couplers and replacement fiber cable, the schedule that will be provided tomorrow will likely be inaccurate and need to be revised at a later date.

(R4, tab 340 at 1)

48. On April 30, 2018, the Air Force internally stated a preference for Dura-line couplers and questioned whether there was “any other reasoning” that the E-LOC couplers proposed by O-Tech would not be acceptable (R4, tab 345). On May 1, 2018, the government internally indicated that it was “willing to accept the Double E-Loc couplers or equivalent, not the ones proposed” (R4, tab 347). This information was not shared with O-Tech.

49. On May 1, 2018, O-Tech requested a response regarding which cable to order (R4, tab 350 at 1). O-Tech submitted a schedule “contingent upon a government approval on the coupler and fiber by 1100 tomorrow morning” (R4, tab 353 at 1). O-Tech stated, “We proposed a viable coupler option on 4/16 and fiber options with lead times on 4/25 We have yet to receive a response to either email” (*id.*).

50. On May 1, 2018, O-Tech emailed the contracting officer:

Do you have (sic) estimated date that a coupler and fiber optic cable solution will be approved? We are concerned that another meeting has been canceled and a decision has still not been made. The government firmly stated all work must be completed on FO58 this fiscal year. But this delay is negatively affecting the ability to meet that goal. I provided coupler options on 4/16 and 4/20. I also provided several fiber optic cable options, along with availability, on 4/25. As of 5/4, we cannot proceed any further until the government approves a coupler and fiber option. Fiber availability changes weekly, sometimes daily. Please be

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aware that lead times may have increased since the information was presented last month.

(R4, tab 354)

51. On May 1, 2018, the contracting officer responded:

Although I understand your need to get answered (sic) the schedule and coupler/schedule questions, there is a thought process on the government side, since there were no “couplers” required for this requirement initially. Furthermore, none where (sic) vetted through us before installation. We are looking to an acceptable way forward, and will let you know as soon as a decision is made.

(R4, tab 353)

52. Internal government communication on May 3, 2018 indicated that “the only workable solution will be to either request O-Tech replace the full length of the cable and provide a single run cable with no splices, or to terminate the contract . . . Contracting will work on a Cure Notice but in the meantime will extend the PoP to 30 September.” (R4, tab 358)

53. On May 3, 2018, the parties bilaterally executed Modification No. 8 extending the PoP to September 30, 2018, at no cost to the government (R4, tab 363). The government cancelled the May 3, 2018 weekly meeting (R4, tab 359 at 2).

Performance after May 3, 2018

54. On May 8, 2018, O-Tech inquired, “Any word on coupler and fiber approval?” (R4, tab 368 at 1). On May 9, 2018, the contract specialist responded, “This is still being discussed. I will let you know as soon as decisions are finalized” (R4, tab 369 at 1).

55. On May 23, 2018, the Air Force issued a cure notice giving O-Tech 10 days to cure the conditions endangering performance. It stated that DO11 had been “overcome with contractor-induced Quality Assurance failings, and material and installation shortcomings that prevented the contracted work from being completed in the original allotted time period....” (R4, t/ab 373 at 2) It noted problems including six PoP extensions, installation of unapproved cable, cable damage during installation, use of couplers without government awareness or acceptance, and incorrect coupler

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installation. The Air Force stated it would accept only “the on-contract single 288 Strand Single Mode Fiber Optic Cable.” (*Id.*) Finally, the letter stated, “Pending a final decision in this matter it will be necessary to determine whether your failure arose from causes beyond your control and without fault or negligence on your part.” (*Id.*)

56. On June 1, 2018, O-Tech responded that it had been waiting for over a month for approval of the coupler and cable options and attributed the numerous PoP extensions to the government. In closing, O-Tech stated that it was “ready willing and able to meet the current period of performance, provided the government can supply O-Tech a timely response to the options needing approval. Other than that, nothing within O-Tech’s control is jeopardizing the continued timely performance of this contract.” (R4, tab 376 at 5)

57. The government cancelled the June 7, 2018 weekly meeting (R4, tab 384).

58. On June 13, 2018, the contract specialist emailed O-Tech, “After deliberations, the Government wishes as well to move forward with this project and will accept the O-Tech proposed solution of replacing all current couplers with government-approved couplers and allowing the mid-span splice...” (R4, tab 388) She stated that she would “reach out” for approval of the couplers and fiber and noted, “Once this approval is given, the project can resume and will be completed by the PoP ending 30 Sep 18.” (*Id.*)

59. On June 13, 2018, the contract specialist stated to the customer, “please look back and approve or disapprove O-Tech’s proposed coupler and fiber solutions. Please let me know as quickly as possible if these options are good...” (R4, tab 389) Within less than 30 minutes, the customer approved a solution (R4, tab 390).

60. On June 13, 2018, the Air Force approved the E-LOC couplers that O-Tech proposed on April 16, 2018 and the CommScope cable from the list submitted on April 25, 2018 (R4, tabs 390-91, 334). The cable had a lead time of 5-6 weeks which O-Tech had disclosed in April (R4, tab 334 at 3). O-Tech ordered both the couplers and the cable. Given the lead time, the cable was scheduled to ship July 19, 2018 (R4, tab 396 at 4).

61. On July 3, 2018, O-Tech reported that it had installed the approved couplers (R4, tab 400). By July 26, 2018, O-Tech received the new cable (R4, tab 415 at 6). On July 27, 2018, the Air Force requested correction of coupler installation errors and warned that no further PoP extension would be granted (R4, tab 418 at 1).

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62. On August 3, 2018, the Air Force accepted installation of the duct entrances into the manholes and indicated O-Tech was “cleared to backfill” the locations (R4, tab 433 at 2). On August 8, 2018, O-Tech began installing the new 288 strand fiber, and its schedule indicated project completion within the PoP (R4, tab 437 at 2-3).

63. On August 15, 2018, the Air Force identified issues with sections of roll pipe that were improperly installed and additional unapproved couplers (R4, tab 440 at 1).

64. On August 16, 2018, O-Tech submitted test reports for the installed cable from Hut 3 to HH-9 indicating it had passed testing (R4, tabs 442, 444). The government directed O-Tech to “pot hole every 50 feet for the entire new pathway between HH1 and HH17 to expose the pipe for inspection and to mandrel all new pipes not occupied by cables during inspection to ensure pipes are clear and undamaged” (R4, tabs 449 at 2, 624 at 7). O-Tech’s schedule still projected completion within the PoP but included 13 days of “Pot hole/mandrel exploration and inspections” (R4, tab 449).

65. Notes from the August 30, 2018 weekly meeting state that O-Tech continued to pot hole, mandrel, and call for inspections and that O-Tech agreed that “any issues found will be corrected and inspected” (R4, tab 457 at 10).

66. Notes from the September 6, 2018 meeting indicate that HH-2 to HH-4 and HH-14 to HH-16 had been inspected and approved by the Air Force (R4, tab 463 at 2). O-Tech provided a revised schedule which reflected eight days for pot-holing and government inspections and requested a PoP extension to November 9, 2018 (R4, tab 459).

67. As of September 13, 2018, O-Tech continued to pot-hole and address issues identified from pot-holing (R4, tab 477).

68. On September 19, 2018, the contracting officer denied O-Tech’s request to extend the PoP stating that the proposed schedule did not “meet the Government’s necessity” (R4, tab 484). He indicated that “the decision has been made” to not grant any further time extensions (*id.*). O-Tech’s request for a meeting was denied (answer ¶¶ 57-58).

69. On September 20, 2018, O-Tech stated that it had been performing “curative/ warranty work to correct and cure latent defects discovered after completion

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of the cabling install” and inquired if it would be allowed to complete after September 30, 2018 (R4, tab 488).

70. As of September 27, 2018, the government had approved ten conduit sections, three sections were near correction completion, and three sections in the flight line path required weekend coordination to install new pipe. The new cable was installed from HH-2 to HH-1365, and the existing cable was still in place from Hut 3 to HH-9. (R4, tab 503; Compl. ¶ 59) Estimates regarding the time required for O-Tech to complete the remaining work varied from 1 week, to 3 weeks, to 40 days⁵ (app. supp. R4, tabs 301, ¶ 23, 300, ¶ 103, 459).

Events after the PoP expired on September 30, 2018

71. On September 30, 2018, the PoP expired (answer ¶ 60). On October 1, 2018, the government verbally told O-Tech to immediately stop work and remove equipment from the site (R4, tab 613 at 8; app. supp. R4, tab 300 at 7).

72. On October 2, 2018, O-Tech notified the Air Force that it considered the project complete as of August 1, 2017, that all work performed after that date was warranty work to correct latent defects, and that it had removed its personnel, equipment, and excess materials as directed. O-Tech offered to extend the warranty period to August 10, 2019 and provided a list of items requiring corrective work. (R4, tab 519 at 3-4)

73. In internal correspondence on October 3, 2018, the contracting officer stated he wanted to “push the pace on the report we need to terminate O-Tech” because he was “trying to cut them off from invoicing” (R4, tab 528 at 2). He requested, “Please get the report to us at your earliest so we can push the button on our side” (*id.*).

74. On or before October 12, 2018, O-Tech submitted invoices for payment in full of both CLINs (R4, tabs 542, 566-67). The Air Force did not pay either invoice.

75. On October 23, 2018, the Air Force executed Modification No. 10 terminating DO11 for “failure to perform services on time and in accordance with the specifications” (R4, tab 514 at 1). Although executed on October 23, 2018, the modification stated an effective date of October 1, 2018 and de-obligated the full

⁵ O-Tech’s last request to extend the PoP included a 40-day extension from September 30, 2018 to November 9, 2018, to complete the remaining work which allotted 7 days for final inspections and punch list (R4, tab 459).

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amount of the awarded DO11 (*id.*). We find that the Air Force did not pay any contract funds to O-Tech for DO11.

76. With Modification 10, the Air Force issued a letter dated October 1, 2018⁶ (R4, tabs 515, 613 at 8). It notified O-Tech that DO11 was terminated for cause because O-Tech “has been unable to provide the required installation in the time requested, as well as installing unapproved hardware” (*id.*). It stated an intent to acquire similar work from “another contractor in the area” with no anticipated re-procurement costs (*id.*).

77. We find that the Air Force termination decision lacks any indicia that the contracting officer considered excusable delay or the factors under FAR 49.402-3(f).

78. On October 31, 2018, the Air Force offered O-Tech an opportunity to remove its work and warned that, if O-Tech declined to remove the installed materials, it would not be reimbursed and the government would dispose of the installed work after November 16, 2018 (R4, tab 564 at 2). O-Tech promptly responded,

Approximately 95% of this project is complete. There are hundreds of thousands of dollars of properly installed, inspected, and accepted materials currently in place on this project. This represents a huge infrastructure expense for a small business. There is over 15,000 ft. (nearly 3 miles) of fiber optic cable pathways currently installed per agreed process outlined by contracting as well as 17 handholes that were inspected and accepted when contracting rescinded the stop work action. . . . The time frame you have afforded us to de-install our work does not allow us sufficient time to even secure the necessary permissions and dig permits required to allow us to even commence the work. If history is any guide, the allotted time will expire prior to us even receiving a response to our dig permit requests (the original permits took nearly 12 months to issue).

(*Id.* at 1)

⁶ Although the letter is dated October 1, 2018, it does not appear to have been issued on that date since the contracting officer was still trying to obtain a report to support the termination on October 3, 2018 and O-Tech alleges that it received the letter on October 23, 2018.

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79. When O-Tech tried to retrieve materials on November 2, 2018, it was unable to access them (R4, tab 575 at 2). The government internally was concerned about O-Tech removing its work because the Air Force was using one of the handholes installed by O-Tech for an active 72 strand cable (R4, tab 581 at 2). O-Tech was given until November 30, 2018 to submit a written plan if it wanted to retrieve the installed cable (R4, tab 587 at 1).

80. On November 19, 2018, O-Tech stated that it could not remove the cable without a modification and requested \$226,457.25 to remove the work it had installed (R4, tabs 588-90). We find no modification was issued to O-Tech to remove the installed cable.

Contracting Officer Decisions, CPAR, and Reprocurement

81. On November 13, 2018, the Air Force issued a CPAR to O-Tech for DO11. The CPAR had a Marginal rating for Quality citing O-Tech's use of couplers without government approval and Unsatisfactory ratings for Schedule and Management citing "significant errors" and attributing eight PoP extensions to O-Tech (R4, tab 586 at 2). The CPAR stated, "This contract has resulted in a Termination for Cause after 8 Period of Performance extensions with no viable solution" and indicated O-Tech would not be recommended for similar future requirements (*Id.*).

82. O-Tech responded to the CPAR that it did not concur with the ratings citing government delay arising from numerous issues (R4, tab 586 at 3-10). The Reviewing Official concurred with the initial rating (*id.* at 11).

83. On December 4, 2018, O-Tech filed a notice of appeal challenging the Air Force's termination for cause. The appeal was docketed as ASBCA No. 61898.

84. In February 2019, the Air Force identified 17 hand hole containers⁷ to salvage for later use. It valued the containers at \$79,220 but estimated a cost of \$73,363⁸ to remove them and concluded that O-Tech was entitled to no reimbursement. (R4, tabs 606-09)

85. In March 2019, the Air Force issued a solicitation to install conduit and fiber optic cable on the other side of the road from where O-Tech had installed DO11 (R4, tab 612).

⁷ There is conflicting correspondence as to whether these were hand hole containers or maintenance hole containers.

⁸ The Air Force used O-Tech's quote to calculate the removal costs (R4, tab 609).

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86. On April 5, 2019, O-Tech submitted a claim requesting \$312,917.84 for work performed on the contract; \$460,627.06 for “delays, extra costs, etc;” rescission or revision of the CPAR; and a time extension of the PoP (R4, tab 613).

87. On May 2, 2019, internal Air Force correspondence indicated that two pipes installed by O-Tech were being used for active 72 strand fiber (R4, tab 615). The contracting officer notified the customer that they could use manholes 13-17 and remove materials for the “follow on reinstall” (R4, tab 616). He urged them to store salvaged materials pending a decision on the claim (*id.*).

88. On May 6, 2019, O-Tech requested permission to have an independent firm, at O-Tech’s expense, test the installed cable to determine whether a functional system was installed (R4, tab 617). The Air Force rejected the proposed testing stating that it had begun removal of the cable and manholes installed by O-Tech to “clear the way” for the new project (R4, tab 618).

89. On June 3, 2019, the contracting officer issued a final decision denying O-Tech’s April 5, 2019 claim (R4, tab 624). On June 10, 2019, O-Tech filed its notice of appeal of the government’s June 3, 2019 final decision, and it was docketed as ASBCA No. 62095. ASBCA Nos. 61898 and 62095 have been consolidated for the purposes of this decision.

DECISION

I. The Parties’ Contentions

A. O-Tech:

Under ASBCA No. 61898, O-Tech asserts that the termination decision was based upon erroneous grounds: urgency and use of unapproved materials (app. br. at 37-49). Next, O-Tech contends that the termination decision was arbitrary and pretextual (app. br. at 52). Finally, O-Tech alleges that government delay caused O-Tech to be unable to complete the requirements within the PoP (app. br. at 37-44). Specifically, O-Tech claims that it was delayed 41 days (May 4, 2018 to June 13, 2018) waiting for government approval and 37 days (June 14, 2018 to July 20, 2018) due to lead time for the cable selected by the government (app. reply br. at 9-14). O-Tech asserts that the contract was “on the verge of completion” when it was terminated and the remaining 5% of the contract work could have been completed within an additional three weeks but for these government delays (app. br. at 46-47).

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As to ASBCA No. 62095, O-Tech alleges that it is entitled to compensation for the work it performed, compensation for government delay and government-directed additional work, and a time extension under the PoP for DO11. O-Tech also requests that the Board find that the CPAR was arbitrary and lacking a proper foundation and direct the government to revise the CPAR or rescind it (app. br. at 64; compl. at 17).

B. The Air Force:

Under ASBCA No. 61898, the Air Force contends that the termination for cause was proper because O-Tech did not complete the requirements of DO11 prior to expiration of the PoP. The Air Force asserts that any delays prior to May 3, 2018, were released through execution of bilateral modifications and “performance problems” after May 3, 2018 were “caused solely by O-Tech’s fault or negligence” (gov’t br. at 17). Finally, the Air Force argues that O-Tech failed to prove that the contracting officer abused his discretion (*id.* at 18).

As to ASBCA No. 62095, the Air Force contends that, under a termination for cause pursuant to FAR 52.212-4(m), it need not pay for supplies or services that it has not accepted. It asserts that O-Tech is not due any compensation for work performed because O-Tech did not tender a completed project for acceptance and the government did not accept such. (Gov’t br. at 19) In response to the claim for compensable delay, the Air Force asserts an affirmative defense of accord and satisfaction alleging that the claim is barred by the bilateral modifications executed by the parties and that O-Tech did not request time extensions contemporaneously for the alleged delays (answer ¶¶ 127, 141, 147-56). While the Air Force denied allegations about additional work, the CPAR, and the breach of good faith and fair dealing in its answer (answer ¶¶ 137, 139, 145-46), it did not directly address these issues in its brief.

II. Standard of Review under Board Rule 11

Under Board Rule 11, the parties may waive a hearing and instead have the Board issue a decision based on the record. “Unlike a motion for summary judgment, which must be adjudicated on the basis of a set of undisputed facts, pursuant to Board Rule 11, the Board ‘may make findings of fact on disputed facts.’” *U.S. Coating Specialties & Supplies, LLC*, ASBCA No. 58245, 20-1 BCA ¶ 37,702 at 183,031 (citation omitted).

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III. ASBCA No. 61898 – Whether Termination for Cause was Justified

A. Standard of Review for Termination for Cause

A default termination is a “drastic sanction . . . which should be imposed (or sustained) only for good grounds and on solid evidence.” *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987) (quoting *J.D. Hedin Constr. Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969)). Because a termination for default is essentially a government claim, the government bears the burden of proving by a preponderance of the evidence that the termination was justified. See *CKC Sys., Inc.*, ASBCA No. 61025, 19-1 BCA ¶ 37,385 at 181,750 (citing *Thunderstruck Signs*, ASBCA No. 61027, 17-1 BCA ¶ 36,835 at 179,504). If the government meets that burden, the contractor must show that its default was “caused by an occurrence beyond its control and without its fault or negligence, or that the contracting officer[‘s] decision was arbitrary or capricious or an abuse of discretion.” *Third Coast Fresh Distrib., L.L.C.*, ASBCA No. 59696, 16-1 BCA ¶ 36,340 at 177,194. The principles underlying terminations for default under FAR Part 49 apply equally to terminations for cause under FAR 52.212-4(m). See *AEY, Inc.*, ASBCA No. 56470, *et al.*, 18-1 BCA ¶ 37,076 at 180,469; *Genome-Communications*, ASBCA Nos. 57267, 57285, 11-1 BCA ¶ 34,699 at 170,889.

Under this commercial item contract, the government had the right to terminate O-Tech’s contract for cause, in whole or in part, “in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance” (finding ¶ 9). The government’s termination decision cites O-Tech’s inability “to provide the required installation in the time requested, as well as installing unapproved hardware” (finding ¶ 76). We discuss the parties’ efforts to meet their respective burdens below.

B. The Government’s Prima Facie Showing of Default

“A contractor’s failure to make timely delivery of agreed-upon goods or to complete the contract work establishes a prima facie case of default.” *DayDanyon Corp.*, ASBCA No. 57611 *et al.*, 14-1 BCA ¶ 35,507 at 174,039; see also *Truckla Serv., Inc.*, ASBCA Nos. 57564, 57752, 17-1 BCA ¶ 36,638 at 178,445.

In deciding whether O-Tech failed to deliver by the contract due date, we must consider the due date and what was due. While the concept of severability more commonly arises in construction contracts, it has been applied to service contracts. *Bulova Tech. Ordnance Sys. LLC*, ASBCA No. 57406, 14-1 BCA ¶ 35,521 at 174,098;

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see Consumers Oil Co., ASBCA No. 24172, 86-1 BCA ¶ 18,647 at 93,709-10 (requirements under one contract to supply fuel to different military or civilian activities, paid for by those separate activities, were severable requirements). In analyzing severability in the context of contract formation, the Board has considered whether the items are capable of being performed separately, and whether the conduct of the parties suggests that the requirements are “separate in character.” *Bulova Tech. Ordnance Sys. LLC*, 14-1 BCA ¶ 35,521 at 174,099 (citing *Amplitronics, Inc.*, ASBCA No. 33732, 87-2 BCA ¶ 19,906 at 100,703). In *Bulova*, we applied factors considered by the Court of Federal Claims in *Aptus Co. v. United States*, 62 Fed. Cl. 808, 812-13 (2004). We considered whether the contract required a single delivery date, the nature of the work, the contract’s overarching purpose, the contract line-item structure, and the intent of the parties. *Bulova*, 14-1 BCA ¶ 35,521 at 174,099.

Applying those factors here leads to the conclusion that DO11 was non-severable. As an order on a commercial items service contract, DO11 had only one delivery date and was solicited as one contract line item⁹ (findings ¶¶ 7, 20). The overarching purpose of DO11 was to provide and install a conduit system with fiber optic cable from Building 1315 to Hut 3 (finding ¶ 2). While it could have been structured otherwise, DO11 was not solicited with multiple line items or separate delivery dates for portions of work (findings ¶¶ 7, 20). As a non-severable contract, the entire scope of work to include installation, testing, and acceptance was to be completed within the PoP.

O-Tech admits that approximately 95% of the project was complete at the time of termination (app. br. at 28). Five defective fiber strands had not passed government inspection and remained incomplete (*id.* at 29). We conclude that O-Tech did not complete the entire scope of work to include all corrective work, testing, and acceptance prior to the end of the PoP on May 3, 2018. Thus, the government has met its initial burden to justify the termination for cause.

C. O-Tech’s Failure to Meet the Final Delivery was Excusable

Having concluded that the government made a prima facie showing of default, the burden of proof now shifts to O-Tech to prove that its default was excusable or that the termination was arbitrary, capricious or an abuse of the contracting officer’s discretion. *Axxon Int’l, LLC*, ASBCA No. 61549, 20-1 BCA ¶ 37,564 at 182,393; *Third Coast Fresh Distrib., LLC*, 16-1 BCA ¶ 36,340 at 177,194.

⁹ Modification No. 1 added CLIN 0002 in the amount of \$17,109 (finding ¶ 20).

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O-Tech advances numerous arguments to demonstrate that its default was beyond its control. Each is addressed herein.

1. *Alleged government delays prior to May 3, 2018:*

First, O-Tech alleges several government-caused delays arising prior to May 3, 2018, associated with Modification No. 1, permits, the stop work order, hand hole installation, and the splicing issue (app. br. at 6-13, 60).

In cases involving delivery schedules, such as this appeal, we repeatedly have held that the “action of the parties in agreeing upon a new delivery schedule eliminates from consideration the causes of delay occurring prior to such agreement.” *Grow Life Gen. Trading, LLC*, ASBCA No. 60467, 19-1 BCA ¶ 37,361 at 181,676; *Thunderstruck*, 17-1 BCA ¶ 36,835 at 179,505; *Precision Dynamics, Inc.*, ASBCA No. 42955, 97-1 BCA ¶ 28,846 at 143,892; *see also Bulova*, 14-1 BCA ¶ 35,521 at 174,097 (in agreeing to a new delivery schedule, the contractor erases the ability to raise pre-existing causes of delay). “In establishing a new delivery date, the parties agree to ‘let bygones be bygones’ and ‘[a]ny delinquencies on the part of either the contractor or the Government [a]re ‘washed out.’ . . .” *Env’t Devices, Inc.*, ASBCA No. 37430 *et al.*, 93-3 BCA ¶ 26,138 at 129,934 (quoting *Winder Aircraft Corp.*, ASBCA Nos. 4364 and 4733, 58-2 BCA ¶ 2044 at 8567).

In this appeal, Modification No. 8 was issued bilaterally on May 3, 2018, and extended the PoP to September 30, 2018 (finding ¶ 53). This bilateral modification eliminated from consideration any delays occurring prior to May 3, 2018. For this reason, any causes of delay occurring prior to May 3, 2018, may not be considered as excuse for O-Tech’s default.

2. *Alleged government delays after May 3, 2018:*

Next, O-Tech alleges government delay after May 3, 2018: 41 days from May 4, 2018 to June 13, 2018 for approval of coupler and cable and 37 days from June 14, 2018 to July 20, 2018 for cable lead time (app. br. at 13-14, 60-61; app. reply br. at 10-14).

For the period May 4, 2018 to June 13, 2018, O-Tech has demonstrated excusable delay. When the parties executed the last PoP extension on May 3, 2018, O-Tech was awaiting government approval of coupler and cable type to complete corrective work. The contracting officer was on notice that O-Tech was unable to proceed because O-Tech repeatedly indicated such to the contracting officer and requested approval to proceed (findings ¶¶ 47, 49-51, 54, 56, 58). Although the

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Air Force internally discussed which coupler it might approve on May 1, 2018, the contracting officer told O-Tech that the government was still discussing the product issue (findings ¶¶ 48, 51). Aware that O-Tech had been waiting weeks for approval, the contracting officer issued a cure notice on May 23, 2018, citing contractor delay (finding ¶ 55). We hold that the Air Force contracting office effectively delayed approval of the coupler and cable until June 13, 2018. The Air Force knew that O-Tech was unable to proceed stating, “Once this approval is given, the project can resume” (finding ¶ 58). When the contract specialist, on June 13, 2018, finally asked the customer to “look back” and approve a solution, the customer promptly provided approval within 30 minutes (finding ¶ 59). This approval was given 58 days after O-Tech provided the coupler product data, 44 days after internal correspondence regarding which coupler the customer would accept, and 41 days after the execution of the last PoP extension. We conclude that 41 days of excusable delay arose from this issue.

For the period June 14, 2018 to July 21, 2018, we determine that the parties share responsibility for delays. When O-Tech presented options to the Air Force on April 25, 2018, it listed four cable types: one that had been used throughout the project but had a 5-6 week lead time and three other types with shorter lead times (finding ¶ 46). O-Tech was seeking a quicker solution than use of the same cable type as already installed. Rather than promptly approve any cable type, the government took seven weeks to approve the same product that had already been installed (finding ¶ 60). Had the government simply responded that it wanted the same cable type, O-Tech might have obtained the cable by June 13, 2018. Instead, O-Tech was not able to obtain the cable until late July 2018 (findings ¶¶ 60-61). Conversely, O-Tech might have mitigated much of the impact if O-Tech had ordered, in April 2018, the cable that it had used on the rest of the project rather than wait for the government to re-approve a cable type that was already installed. When O-Tech obtained the cable in late July 2018, it was dealing with replacing couplers and did not begin installation of the new cable until early August 2018 (findings ¶¶ 61-62). Accordingly, we conclude that the parties share responsibility for any delay arising during this period.

In the cure notice, the Air Force recognized the need to evaluate excusable delay prior to a termination decision (finding ¶ 55). Based upon the record, we hold that the Air Force failed to do so. The government’s protracted response to O-Tech’s repeated requests for product approval, the cable lead times, and the added pot-holing requirements were all issues which warranted meaningful consideration prior to a termination decision.

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If the Air Force had granted O-Tech a 41-day time extension for delay arising from government approval of the cable and coupler products, O-Tech could have completed the project within the extended PoP. O-Tech demonstrated that only a few weeks of work remained at the time of termination, and its schedule indicated that it would be complete by November 9, 2018—40 days beyond the end of the PoP. O-Tech submitted un rebutted evidence that it would have completed the project before November 9, 2018 (findings ¶¶ 66, 70).

We conclude that O-Tech would have completed performance by the extended deadline of November 9, 2018 and has demonstrated that its default was excusable. As a result, the termination for cause is converted to a termination for convenience.

3. Alleged erroneous grounds, pretext, and breach of good faith and fair dealing

O-Tech asserts that the termination decision was based upon erroneous grounds, that the termination was pretextual, and that the Air Force breached the duty of good faith and fair dealing. We note that the decision lacks any indicia that the contracting officer considered excusable delay or the factors under FAR 49.402-3(f) and find the stated basis for the decision poorly developed. Because we have converted the termination for cause to one of convenience based upon excusable delay, we need not address whether the government’s conduct was arbitrary, capricious, an abuse of discretion, or a breach of the duty of good faith and fair dealing.

IV. ASBCA No. 62095 – Whether O-Tech is entitled to relief on its Claim

Under ASBCA No. 62095, O-Tech seeks \$312,917.84 for work performed on the contract; \$460,627.06 for “delays, extra costs, etc;” rescission or revision of the CPAR; and a time extension of the PoP (FoF ¶ 86). We address each issue below.

A. O-Tech is entitled to compensation for work performed consistent with a termination for convenience under FAR 52.212-4(l).

O-Tech argues that it is entitled to payment for the work performed citing the significant portion of work completed and arguing that the Air Force either expressly or impliedly accepted work (app. reply br. at 17-20). We need not address these arguments since we concluded under ASBCA No. 61898 that the Air Force’s termination for cause was not justified and is converted to a termination for convenience under FAR 52.212-4(m). Thus, O-Tech is entitled to compensation for work performed consistent with the termination for convenience of DO11 as provided by FAR 52.212-4(l).

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B. The claim for “delay, extra costs” is granted, in part, and denied, in part.

In its brief, O-Tech argues for relief on four issues: 1) improper stop work order; 2) pothole inspections and coupler replacement; 3) additional requirement for potholing; and 4) compensable delay (app. br. at 59-63). We address each of the issues below.

1. Alleged improper stop work order

O-Tech’s claim regarding the stop work order is not well developed. After the 38-day stop work was lifted on June 16, 2017, the parties executed three bilateral modifications each of which extended the PoP (findings ¶¶ 26, 31-32, 34, 53). To the extent O-Tech seeks delay or suspension costs arising from the stop work order, these bilateral modifications eliminated from consideration any alleged government delays occurring prior to the issuance of the last one on May 3, 2018. *See Grow Life Gen. Trading, LLC*, 19-1 BCA ¶ 37,361 at 181,676. Accordingly, O-Tech’s arguments to the contrary must fail.

2. Alleged pothole inspections and coupler replacement

Although captioned differently, O-Tech’s brief requests costs associated with the splicing of the fiber optic cable (app. br. at 63). While less than 800 feet of cable was damaged and needed replacement, the Air Force required O-Tech to perform a mid-span splice resulting in replacement of 8,000 feet of cable (finding ¶ 45). O-Tech contends that this was to accommodate a “future requirement” (app. br. at 63; *see also* R4, tab 613 at 30). Given that the total amount of cable required for DO11 was only approximately 18,375 feet (finding ¶ 14), an additional 8,000 feet of cable to repair an 800-foot section of damaged cable appears excessive. We conclude that O-Tech is entitled to material costs for the additional cable required by the government beyond what was reasonably necessary to replace the less than 800 feet of cable that was damaged. Given that O-Tech had to re-pull cable to correct the damaged strands, O-Tech is not entitled to labor costs associated with the re-installation of cable.

3. Alleged additional requirement for potholing

In August 2018, the Air Force required O-Tech to dig potholes every 50 feet for approximately 15,000 feet so the government could inspect the conduit and cable that had already been installed, tested, and buried (finding ¶ 65). If the frequency and overall distance alleged are accurate, the government required O-Tech to dig as many

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as 300 pot-holes. There was no indication in the contract documents that O-Tech would be required to perform potholing. FAR 52.212-4, paragraph (b) provided that the government had the right to inspect or test any supplies or services that have been tendered for acceptance (finding ¶ 9). The contract required the government to “perform inspections and tests in a manner that will not unduly delay the work” (finding ¶ 10). The last two schedules submitted by O-Tech reflected weeks of work associated with potholing and government inspections which also impacted O-Tech’s ability to complete its work prior to expiration of the PoP (findings ¶¶ 64, 66). While the government had the right to inspect or test the work and the work remained subject to inspection at all places and “reasonable” times before acceptance (findings ¶¶ 9-10), we hold that requiring O-Tech to dig approximately 300 potholes to allow government inspection after the work was installed and buried is not reasonable, and that this was additional work not required by contract.

4. Compensable delay

O-Tech argues that it should be compensated for numerous government delays. As stated herein, the parties executed a series of bilateral modifications mutually agreeing upon new completion dates. The last bilateral modification was issued on May 3, 2018 and extended the PoP to September 30, 2018 (finding ¶ 53). In agreeing to a new delivery schedule, the parties erased the ability to raise pre-existing causes of delay. *See Bulova Tech. Ordnance Sys., LLC*, 14-1 BCA ¶ 35,521 at 174,097 (citing *Range Tech. Corp.*, ASBCA No. 51943 *et al.*, 04-1 BCA ¶ 32,456 at 160,546). For this reason, O-Tech may not recover compensation for any delays occurring prior to May 3, 2018.

O-Tech also alleges 78 days of government delay arising after May 3, 2018. To prove entitlement for compensable delay, O-Tech must show that “the government was responsible for specific delays; overall project completion was delayed as a result; and any government-caused delays were not concurrent with delays within appellant's control.” *Env’t Chemical Corp.*, ASBCA No. 59280, 22-1 BCA ¶ 38,166 at 185,365; *WECC, Inc.*, ASBCA No. 60949, 21-1 BCA ¶ 37,948 at 184,306 (quoting *Versar, Inc.*, ASBCA No. 56857 *et al.*, 12-1 BCA ¶ 35,025 at 172,128). Additionally, O-Tech “must show that the government's actions affected activities on the critical path of the contractor's performance of the contract.” *Kinetic Builder's Inc. v. Peters*, 226 F.3d 1307, 1317 (Fed. Cir. 2000).

We conclude that O-Tech has not met its burden to recover for compensable delay. While we found 41 days of excusable delay sufficient to excuse O-Tech’s default, O-Tech has not addressed concurrency or provided any analysis of the

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project's critical path. As addressed herein, we found shared responsibility for the balance of delay claimed by O-Tech for the period June 14, 2018 to July 20, 2018.

Additionally, any general conditions sought by O-Tech for the period May 3, 2018 to September 30, 2018 should have been addressed or waived in Modification No. 8 since it extended the PoP to September 30, 2018. However, Modification No. 8 was issued, by mutual agreement, at no cost to the government (finding ¶ 53). O-Tech may not now recover general conditions associated with the time extension to September 30, 2018. After the PoP ended on September 30, 2018, O-Tech vacated the site and the government terminated DO11.

C. O-Tech's CPAR is returned to the contracting officer for reconsideration.

O-Tech seeks a finding that the CPAR was arbitrary and lacking proper foundation and a directive to the government to revise or rescind it (app. br. at 64; compl. at 17).

The Board lacks jurisdiction to grant specific performance or injunctive relief. *Versar, Inc.*, ASBCA 56857, 10-1 BCA ¶ 34,437 at 169,959 (citing *Rig Masters, Inc.*, ASBCA No. 52891, 01-2 BCA ¶ 31,468). We do not possess jurisdiction to order an agency to revise or rescind a CPAR rating. *See Protec GMBH*, ASBCA No. 61161, 18-1 BCA ¶ 37,064 at 180,420; *MicroTechnologies, LLC*, ASBCA Nos. 59911, 59912, 15-1 BCA ¶ 36,125 at 176,348; *Colonna's Shipyard, Inc.*, ASBCA No. 56940, 10-2 BCA ¶ 34,494 at 170,140. However, we may remand a matter to require a contracting officer to follow applicable regulations and provide appellant with a fair and accurate performance evaluation. *Id.* We may also identify inaccuracies in the current CPAR for the government's consideration.

The CPAR issued by the government attributes eight¹⁰ PoP extensions to O-Tech citing unstated "significant errors" (finding ¶ 81). This position is inconsistent with the contracting officer's decision which acknowledges government responsibility for several PoP extensions. This position is also inconsistent with the bilateral modifications executed for each PoP extension (findings ¶¶ 22-23, 27, 32, 34, 43, 53). The "action of the parties in agreeing upon a new delivery schedule eliminates from consideration the causes of delay occurring prior to such agreement." *Grow Life Gen. Trading, LLC*, 19-1 BCA ¶ 37,361 at 181,676 (quoting *Precision Dynamics, Inc.*, 97-1 BCA ¶ 28,846 at 143,892). In the same vein that O-Tech could not use alleged delays

¹⁰ Only seven modifications extended the PoP: Modification Nos. 2-8. Modification No. 1 added work without a time extension, and Modification No. 9 backdated the award date.

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arising prior to the last bilateral modification on May 3, 2018 to excuse its default, the government may not use such delays to justify its negative evaluation. Bilateral Modification No. 08 executed on May 3, 2018, effectively erased delay arising prior to that date. Accordingly, we return this issue to the government to ensure the CPAR is fair, accurate, and consistent with this decision.

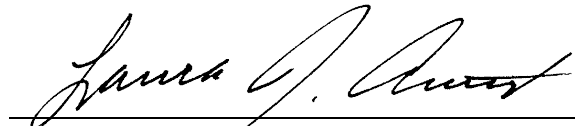
D. O-Tech is not entitled to a time extension of the PoP

O-Tech also seeks a time extension under DO11. As discussed herein, bilateral Modification No. 8 issued May 3, 2018 eliminated from consideration any delays occurring prior to May 3, 2018. While we found excusable delay after May 3, 2018 sufficient to excuse O-Tech's default, a time extension is unnecessary because DO11 was terminated effective October 1, 2018. This issue is denied.

CONCLUSION

As to ASBCA No. 61898, we grant judgment in favor of appellant and convert the termination for cause to one of convenience. As to ASBCA No. 62095, we grant judgment in favor of appellant, in part, and deny, in part. The matter is returned to the parties for resolution of quantum and consideration of the CPAR consistent with this decision.

Dated: March 28, 2023



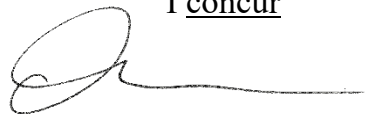
LAURA J. ARNETT
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



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

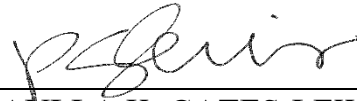
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I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 61898, 62095, Appeals of O-Tech Solutions, LLC, rendered in conformance with the Board's Charter.

Dated: March 28, 2023



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