



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: March 22, 2007

CBCA 50

TIDEWATER CONTRACTORS, INC.,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Joseph A. Yazbeck, Jr., of Yazbeck, Cloran & Hanson, LLC, Portland, OR, counsel for Appellant.

David Sett, Division Counsel, Federal Highway Administration, Lakewood, CO, counsel for Respondent.

Before Board Judges **STERN**, **FENNESSY**, and **SOMERS**.

SOMERS, Board Judge.

This appeal arose from a contract between appellant, Tidewater Contractors, Inc. (Tidewater), and the Department of Transportation, Federal Highway Administration (FHA), for road work in the Mad River area of Northern California. Appellant alleges that it is entitled to an eighty-nine day extension of the contract completion date because the Government failed to issue a notice to proceed in a timely fashion. We find that the appellant has established entitlement to a thirty-one day extension of the contract completion date. The remainder of the extension sought in the appeal is denied.

Background

On November 23, 2003, the FHA awarded a contract to Tidewater to perform road work in the Mad River area of Northern California. Tidewater executed the contract and timely submitted the required performance and payment bonds. Joint Pretrial Statement, Stipulated Fact No. 3.

Under the contract, work could begin after the contractor received the notice to proceed:

52.211-10 Commencement, Prosecution and Completion of Work (Apr 1984) – Alternate I (Apr 1984).

The Contractor shall be required to (a) commence work under this contract within 10 calendar days after the date the Contractor received the notice to proceed The completion date is based on the assumption that the successful offeror will receive the notice to proceed by the 70th day following the bid opening. The completion date will be extended by the number of calendar days after the above date that the Contractor receives the notice to proceed, except to the extent that the delay in issuance of the notice to proceed results from the failure of the contractor to execute the contract and give the required performance and payment bonds within the time specified in the offer.

48 CFR 52.211-10 (2005) (FAR 52.211-10); Appeal File, Exhibit 1; Joint Pretrial Statement, Stipulated Fact No. 6. Thus, the contract required the Government to issue a notice to proceed by January 9, 2004, i.e., the seventieth day following the bid opening on October 30, 2003. Section 108 of the contract stated that “a preconstruction conference will be held after the contract is awarded and before beginning work. . . . [T]he notice to proceed must be issued before the commencement of any work.”

The contract incorporated FP-96, Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects, supplemented by the Special Contract Requirements (SCRs). Appeal File, Exhibit 1; Joint Pretrial Statement, Stipulated Fact No. 8. The contract addressed preconstruction conferences as follows:

PRECONSTRUCTION CONFERENCE (FEB 1995)

If the Contracting Officer decides to conduct a preconstruction conference, the successful offeror will be notified and will be required to attend. The Contracting Officer's notification will include specific details regarding the date, time, and location of the conference, any need for attendance by subcontractors, and information regarding the items to be discussed.

FAR 52.236-26; Appeal File, Exhibit 1; Joint Pretrial Statement, Stipulated Fact No. 7.

On December 4, 2003, Ed Hansen, the FHA Project Engineer and Contracting Officer's Technical Representative, met with representatives from Tidewater at the project site. One month later, on January 5, 2004, Gene Dodd, FHA Construction Operations Engineer, called Scott Fitzhugh of Tidewater to schedule a preconstruction conference. Transcript at 137. He faxed Fitzhugh a list of items to be submitted or discussed during the preconstruction meeting. The list required Tidewater to submit, among other things, a proposed schedule, a written quality control plan, an equal employment opportunity (EEO) policy, a document detailing the names and signatures of company officials and representatives authorized to sign project documents, and a proposed schedule for accomplishing temporary and permanent erosion control work. Foley Construction, a subcontractor, initially prepared the written quality control plan required under the contract. Transcript at 112.

Also on January 5, the contracting officer sent a letter to Tidewater, which stated:

In accordance with your Contract . . . you are hereby directed to begin off-site construction operations on January 7, 2004. Off-site construction operations are operations not performed within the construction limits of the subject project. A Notice to Proceed for on-site operations will be issued after a scheduled preconstruction conference has been conducted, and after all required submittals have been received and approved.

Appeal File, Vol. 7, Exhibit 2. The letter stated that the project should be completed by August 10, 2005. *Id.* The contracting officer did not designate this letter as a "notice to proceed"; however, below the contracting officer's signature, the letter included the following:

I acknowledge the above Notice to Proceed date

Date: _____
By: _____
Title: _____

Id. Fitzhugh, the project manager, acknowledged receipt of the letter on January 6, 2004.
Id.

After coordinating the date for the preconstruction conference with representatives from the Government, representatives from the contractor, and various county and national forest officials, FHA scheduled the preconstruction conference for February 5, 2004. Appellant's Exhibit 8. Under the terms of the contract, no work could begin before the preconstruction conference. Transcript at 200.

At the February 5, 2004, preconstruction conference, Tidewater submitted a copy of Tidewater's EEO policy, safety plans, and a traffic control plan. Appeal File, Exhibit 10. Fred Foley, Tidewater's quality control subcontractor, presented a draft quality control plan to the Government. Appellant's Exhibit 9; Respondent's Exhibit 2; Transcript at 52-53. Tidewater brought a draft preliminary construction schedule to the meeting for discussion. Transcript at 54; Appellant's Exhibit 9. Tidewater's preliminary construction schedule anticipated that the Government would issue the notice to proceed on February 9, 2004. *Id.* The parties did not discuss the Government's letter issued on January 5, 2004.

Based upon the discussions at the pretrial conference, Tidewater became aware that the notice to proceed would not be issued on February 9. Transcript at 53-54. At the hearing in this case, Fitzhugh testified that he believed that the notice would not be issued on the date originally projected because, among other things, Hansen advised them that the office would be closed for two weeks, from the last week of February until the first week in March, while Hansen attended a training course in Denver, Colorado. *Id.* Fitzhugh concluded that Hansen would inform them when the Government planned to issue the notice to proceed, at which time Tidewater would update and submit a final preconstruction schedule prior to the issuance of the notice. *Id.*

By letter dated February 20, 2004, Hansen confirmed that his office would be closed from Monday, February 23, through Friday, March 5, 2004. Appellant Exhibit 26. The letter stated that Hansen would be in Denver, Colorado, and would be unavailable at the project site. *Id.* However, Hansen provided contact information should the contractor have any submittals to be reviewed. *Id.* Finally, Hansen stated:

There are still numerous submittals required prior to beginning **any** work on the project. Upon receipt of the required

submittals, they will be reviewed and responded to in a timely manner. After all submittals required have been approved, you will be issued an on-site “Notice to Proceed.” Until that time no work will be permitted on the project.

Appellant’s Exhibit 26.

On March 1, 2004, Hansen called Fitzhugh and told him that “after preliminary review of his Quality Control Plan it would be best if he did not plan any work next week because of deficiencies in his plan. I told him that I would try to get a response out this week so that he can begin working on corrections or additions to the QC [quality control] plan as well as to other submittals.” Appellant’s Exhibit 5.

Hansen sent Tidewater a letter on March 4, 2004, identifying several deficiencies in the quality control plan. Respondent’s Exhibit 6; Transcript at 102, 209. For example, Hansen felt that Tidewater’s quality control plan did not adequately document the qualifications of inspection personnel. Respondent’s Exhibit 6. He explained that the quality control plan should not include references to safety, traffic control, supervision, erosion control, or the persons responsible for implementing those plans. *Id.* Hansen stated that the plan failed to adequately address subcontractors. *Id.* Hansen concluded:

You have much to do to correct deficiencies in your Quality Control Plan. When you resubmit the plan, submit several copies so that they can be distributed to all personnel approved to participate in the implementation of the plan. . . . No work will begin until this plan is approved since quality control begins with construction sign installation and ends with removal of these devices after completion of all work.

Respondent’s Exhibit 6 at 2.

On March 16, 2004, Hansen returned the first draft of the quality control plan with his edits. Hansen remarked that “with corrections, this is acceptable for preparatory, startup and production phases of QC plan. This was draft QC plan given to me at the precon by Fred.” Respondent’s Exhibit 7; Transcript at 213-14.

On March 19, 2004, Tidewater revised its quality control plan and told Hansen that Tidewater wished to set up a pre-survey meeting as soon as possible. Hansen returned the revised quality plan with a memorandum on March 22, 2004, stating that the quality control plan needed additional revisions. Hansen noted that only two of the proposed quality

control personnel met the required experience and training requirements and that the plan failed to address device maintenance and maintenance of the roadway for traffic. In addition, Hansen proposed some stylistic changes. Respondent's Exhibit 9; Transcript at 216.

On the next day, March 23, 2004, Tidewater submitted a response to Hansen's comments and a revised quality control plan. Respondent's Exhibit 10; Transcript at 216-17. In response to Hansen's comments, Tidewater explained that it planned to revise the plan at different stages as the project progressed. Respondent's Exhibit 10. Tidewater disagreed with Hansen's statement that the superintendent could not be part of the quality control system, and indicated that Tidewater intended to assign other persons in addition to the superintendent to perform quality control. *Id.* Tidewater also clarified sections that Hansen found problematic, stating, in the final paragraph:

Hopefully this will clear up most of the issues that are holding up acceptance of the plan so that we can get started. I think that once we are on the project and in contact we will be able to make necessary changes and needed addendums that will be required to successfully complete the project. . . .

Id.

On that same day, in a written response, Hansen expressed his disagreement with some of Tidewater's explanations of its plan. Respondent's Exhibit 11. However, Hansen did not reject the revised plan. He stated:

We should meet as soon as possible so that we can formalize the QC plan, review what is missing or needs clarification in your erosion control plan, and meet with the surveyors prior to their work beginning.

Id.

On April 5, 2004, Hansen, Fitzhugh, and Jason Labonte, another Tidewater representative, met to discuss final corrections to the quality control plan. Fitzhugh told Hansen that he expected that there would be at least two weeks of surveying before the contractor would disturb the ground. Respondent's Exhibit 14. Fitzhugh returned to the FHA office trailer with additional revisions to the QC plan later that day. *Id.* The Government issued a Notice to Proceed on April 5, 2004. Appeal File, Vol. 2, Exhibit 2.

On April 6, Hansen compiled the various revisions to the quality control plan and approved the document. Respondent's Exhibits 12, 14. After meeting with the surveyors on April 7, Tidewater began work on the project. Appellant's Exhibit 5.

By letter dated August 31, 2004, the Government notified Tidewater that Tidewater had failed to fulfill various contract requirements. Appeal File, Vol. 7, Exhibit 7. For example, citing subsection 152.03(c), the Government stated that Tidewater had failed to complete all slope, clearing, and grubbing staking by close of business on July 4, 2004, as required by the contract. *Id.* In addition, the Government stated that Tidewater had failed to stabilize a portion of the roadwork. *Id.*

On August 8, 2005, Tidewater alleged that the Government did not issue its notice to proceed until eighty-eight days after the seventieth calendar day following bid opening, contrary to contract requirements. Appeal File, Vol. 3. Tidewater requested that the Government extend the contract for eighty-nine days, until November 6, 2005. *Id.* The contractor asked the Government to issue a final decision on its request. *Id.*

The contracting officer issued her final decision by letter dated August 12, 2005. Appeal File, Vol. 4. The contracting officer asserted that the Government issued an off-site notice to proceed on January 5, 2004, which included a statement that the project completion date was August 10, 2005. *Id.* The contracting officer noted that Tidewater had not objected to the notice to proceed at the time. *Id.* The contracting officer denied the contractor's request to extend the contract completion date based upon an untimely issuance of the notice to proceed. *Id.*

This appeal followed.

Additional Relevant Contract Clauses

In addition to the various contract clauses cited above, the contract incorporated, by reference, FAR 52.242.14 (April 1984), which states:

As prescribed in 42.1305(a), insert the following clause in solicitations and contracts when a fixed price construction or architect-engineer contract is contemplated:

SUSPENSION OF WORK (APR 1984)

(a) The Contracting Officer may order the Contractor, in writing, to suspend, delay, or interrupt all or any part of the

work of this contract for a period of time that the Contracting Officer determines appropriate for the convenience of the Government.

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted (1) by an act of the Contracting Officer in the administration of this contract, or (2) by the Contracting Officer's failure to act within the time specified in the contract (or within a reasonable time if not specified), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an equitable adjustment is provided for or excluded under any other term or condition of this contract.

FAR 52.242-14.

The contract incorporated FP-96, which supplements FAR clause 52.202-1 with subsection 101.04, entitled Definitions. FP-96 defines the following:

Contract Time – the specified time allowed for completion of all contract work.

Notice to Proceed – Written notice to the Contractor to begin the contract work.

Work – The furnishing of all labor, material, equipment, and other incidentals necessary to successfully complete the project according to the contract.

Pursuant to FP-96, section 108.01 stated that a preconstruction conference will be held after the contract is awarded and before the notice to proceed would be issued. In accordance with section 153.02, the contractor could not begin work until the quality control plan covering the work was accepted. Chapter 7 of the Department of Transportation's

Federal Lands Highway Construction Manual (Manual) provides guidelines for the preparation of quality control plans. These guidelines address the content of a contractor's quality control plan. In the section entitled "Acceptance of the QCP [Quality Control Plan]," the Manual states:

The plan is accepted based on whether it addresses the requirement of the contract, not whether the agency official accepting it believes it is comprehensive enough to ensure quality. . . . QC plans are typically conditionally approved, based on the contractor's ability to demonstrate that required contract compliance can be, and is achieved. It is not possible for the agency approving official to determine prior to construction whether the QC plan will, or is likely to yield acceptable quality work. . . . Generally, it is better to accept a marginal plan and assertively monitor the quality of the resulting construction, than to delay the start of work while arguing over the details of the plan.

Appellant's Exhibit 22; Manual ¶ 7-23

Summary of Arguments

One of the issues presented by the parties is whether the contract, the Federal Acquisition Regulation, or any other applicable regulations authorized the Government to issue an off-site notice to proceed, followed by a separate notice to proceed with work on site. The Government asserts that FAR 1.102-4(e) permits it to create the two-step notice to proceed process.

Appellant contends that the contract specifically required that, before the Government could issue the notice to proceed, the Government must approve various submittals, which did not occur. In addition, the contract did not authorize the issuance of an "off-site" notice to proceed. Because final approval of the submittals did not occur until April 5, 2004, appellant asserts that it is entitled to an extension of the completion date from the seventieth day following the bid opening until the date that the Government issued the second notice to proceed. Accordingly, appellant seeks an extension of time of eighty-nine days.

In response, the Government asserts that, even if the Board finds that the Government had no basis for issuing an "off-site" notice to proceed, the appellant's submission of inadequate submittals delayed the process. Accordingly, the Government contends that

because the appellant caused the delay, it is not entitled to an extension. Appellant disagrees, contending that the Government's improper failure to approve its submissions caused the delay.

Discussion

I. The Issuance of the Notice to Proceed

The first issue to be addressed is whether the contract permits the Government to issue an "off-site" notice to proceed before the preconstruction conference and prior to approving the required submittals. In order to resolve this issue, this Board must identify and apply "principles of general contract law." *Franconia Associates v. United States*, 536 U.S. 129, 141 (2002) (quoting *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947)). The starting point for interpreting a contract invariably is the "plain language" of the agreement. *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996). As the United States Court of Appeals for the Federal Circuit has stated:

We give the words of the agreement their ordinary meaning unless the parties mutually intended and agreed to an alternative meaning. In addition, we must interpret the contract in a manner that gives meaning to all of its provisions and makes sense.

Jowett, Inc. v. United States, 234 F.3d 1369, 1372 (Fed. Cir. 2002).

When the terms of a contract are clear and unambiguous, there is no need to resort to extraneous circumstances for its interpretation. See *Sea-Land Service, Inc. v. United States*, 553 F.2d 651, 658 (Ct. Cl. 1977), *cert. denied*, 483 U.S. 1012 (1978). The plain reading of a contract term is "the meaning derived from the contract by a reasonably intelligent person acquainted with the contemporary circumstances." *Firestone Tire & Rubber Co. v. United States*, 444 F.2d 547 (Ct. Cl. 1971). A written agreement is ambiguous only when a plain reading of the contract could result in more than one reasonable interpretation. *Metric Constructors, Inc. v. National Aeronautics & Space Administration*, 169 F.3d 747, 751 (Fed. Cir. 1999). It is not enough that the parties differ in their interpretation of the contract clause. See *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1578 (Fed. Cir. 1993). Nor may outside evidence be brought in to create an ambiguity where the language is clear. *Interwest Construction v. Brown*, 29 F.3d 611, 615 (Fed. Cir. 1994).

The contract required the Government to issue its notice to proceed by the seventieth day following bid opening, i.e., by January 8, 2004. Section 108 of the contract stated that “a preconstruction conference will be held after the contract is awarded and before beginning work. . . . [T]he notice to proceed must be issued before the commencement of any work.” Section 108.01 of FP-96 stated that a preconstruction conference would be held after the contract was awarded and before the notice to proceed was issued.

The Government asserts that the January 5, 2004, notice to proceed met the contract requirements under FAR 1.102-4(e). This provision, which is included in the section entitled “Role of the acquisition team,” states:

The FAR outlines procurement policies and procedures that are used by members of the Acquisition Team. If a policy or procedure, or a particular strategy or practice, is in the best interest of the Government and is not specifically addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, Government members of the Team should not assume it is prohibited. Rather, absence of direction should be interpreted as permitting the Team to innovate and use sound business judgment that is otherwise consistent with law and within the limits of their authority. Contracting officers should take the lead in encouraging business process innovations and ensuring that business decisions are sound.

FAR 1.102-4(e). However, pursuant to the terms of the clause, FAR clause 1.102-4 applies only when the “procedure . . . is in the best interest of the Government *and* is not specifically addressed in the FAR.” In this case, however, the FAR specifically addresses the issuance of a notice to proceed. *See, e.g.*, FAR 11.404(b) (referencing FAR 52.211-10). Therefore, FAR clause 1.102-4 does not apply in this situation.

Ignoring the contractual requirement that a notice to proceed could only be issued after the contract was awarded and after the preconstruction conference, the Government asserts that Tidewater is not entitled to additional time because it could have started work after receiving the “off-site” notice to proceed. Respondent’s Motion for Summary Judgment, Attachment 1, Declaration of Gene Dodd (Mar. 27, 2006). For example, according to Mr. Dodd, Tidewater could have begun crushing aggregate base, stocking standard lengths of piper, or pre-manufacturing bridge deck units, among other things. Transcript at 156-57.

The Government's argument is inconsistent with its own correspondence. The Government's letter of February 20, 2004, expressly stated that no work would be permitted on the contract prior to approval of all submittals. Appellant's Exhibit 26. In a second letter dated March 22, 2004, the Government stated that "any notice to proceed that may be issued upon approval of the QC Plan and receipt of a revised preliminary construction schedule will not allow for ground disturbing activities." Appellant's Exhibit 18. Thus, on at least two occasions subsequent to the issuance of the alleged "off-site notice to proceed," the Government expressly advised Tidewater that it could not start work at that time.

In any event, the evidence supports Tidewater's contention that it could not have begun work after receiving the "off-site" notice to proceed. Tidewater's witnesses testified that surveying is required as one of the first steps for projects of this type, and that surveying occurred on site. Transcript at 18, 56-57, 159, 238-41. In addition, the contract required field verification of all installed materials. Transcript at 80-81. Thus, Tidewater could not pre-order crushed aggregate because Tidewater would be purchasing the aggregate from another party and the aggregate required on-site verification and testing. *Id.* at 80-81, 119-21, 130-31.

The contract specifications called for the Government to give Tidewater the notice to proceed within a specified period of time. It is clear from the facts that the Government did not comply with the provision. While it is true that the Government purported to give Tidewater a notice to proceed by issuing what it deemed to be an "off-site" notice to proceed on January 5, 2004, the Government issued this letter before the preconstruction conference and prior to the Government approving any of the prerequisite submittals. Accordingly, we find that the letter issued on January 5, 2004, did not fulfill the requirements for a notice to proceed as required by the terms of the contract.

II. Government Delay

Next, we turn to the issue of whether the Government unreasonably delayed appellant's progress by failing to issue the notice to proceed until April 5, 2004. Tidewater asserts that the Government delayed its performance for eighty-nine days by rejecting Tidewater's quality control plan for non-material deficiencies and by failing to respond to Tidewater's submissions in a timely manner. The Government disagrees and argues that Tidewater's submissions did not meet contract requirements.

As noted previously, the contract contained the Suspension of Work clause, FAR 52.242.14. *See* Appeal File, Vol. 1 at F-5. The Suspension of Work clause contemplates equitable adjustments for unreasonable delays in the performance of the contract. *Triax-Pacific v. Stone*, 958 F.2d 351, 354 (Fed. Cir. 1992). In order to recover under the

Suspension of Work clause, a contractor must show that (1) contract performance was delayed; (2) the Government directly caused the delay; (3) the delay was for an unreasonable period of time; and (4) the delay injured the contractor in the form of additional expense or loss. *John A. Johnson & Sons, Inc. v. United States*, 180 Ct. Cl. 969, 986 (1976). The burden of proof is upon the contractor to establish that the Government did in fact cause delay, and further that any delay adversely affected the project, entitling the contractor to an equitable adjustment. *See William F. Klingensmith, Inc. v. United States*, 731 F.2d 805 (Fed. Cir. 1984); *Blinderman Construction Co. v. United States*, 695 F.2d 552 (Fed. Cir. 1982). However, a contractor is only entitled to recover under the Suspension of Work clause when the Government's actions are the *sole* proximate cause for the contractor's additional loss, and the contractor would not have been delayed for any other reason during that period. *Triax-Pacific*, 958 F.2d at 354. The general rule is that,

“[w]here both parties contribute to the delay neither can recover damage[s], unless there is a clear apportionment of the delay and expense attributable to each party.” *Blinderman Construction Co. v. United States*, 695 F.2d 552, 559 (Fed. Cir. 1982), quoting *Coath & Goss v. United States*, 101 Ct. Cl. 702, 714-15 (1944). Courts will deny recovery when the delays are *concurrent* and the contractor has not established its delay apart from that attributable to the government.

P.R. Burke Corp. v. United States, 277 F.3d 1346, 1359 (Fed. Cir. 2002) (quoting *William F. Klingensmith, Inc. v. United States*, 731 F.2d 805, 809 (Fed. Cir. 1984)). In this case, therefore, Tidewater may only recover if it can (1) establish that the Government alone delayed the work by failing to issue a timely and necessary change order and (2) prove which portion of the total period of delay was thus chargeable solely to the Government. *See id.*

In reviewing Tidewater's claim for delay, it is helpful to evaluate the time period at issue by looking first at the time period from January 5 until February 5, 2004. The contract required the Government to issue its notice to proceed by January 5, 2004. However, the Government did not conduct the preconstruction conference until February 5, 2004. Under the contract, the Government could not issue its notice to proceed until after the preconstruction conference.

The Government has argued that Tidewater failed to respond when the contracting officer contacted it initially to schedule the preconstruction conference. However, the uncontradicted evidence is that the contracting officer did not schedule the preconstruction conference until February 5, 2004, and that the contracting officer chose that date after coordinating with county and national forest officials, as well as with Tidewater. In addition,

the contract puts the burden of scheduling the preconstruction conference upon the contracting officer. See FAR 52.236-26 (“If the Contracting Officer decides to conduct a preconstruction conference, the successful offeror will be notified and will be required to attend.”). Furthermore, the contractor could not proceed to work on the contract until after the preconstruction conference. See, e.g., *Robert L. Rich*, DOT BCA 1982, 82-2 BCA ¶ 15,900 (granting recovery for a one-day delay when bad weather prevented the contracting officer from attending the pre-work meeting and the solicitation required that the meeting be held as soon as possible after award). Therefore, we find that the Government caused the delay from January 5 to February 5, 2004, a period of thirty days.

Next, we examine the evidence concerning the time period from February 5 until April 6, 2004, to determine whether the Government used a reasonable period of time to review the first quality control submission. What is a reasonable period of time for the Government to do a particular act under the contract is entirely dependent upon the circumstances of the particular case. *Speciality Assembling & Packing Co. v. United States*, 355 F.2d 554, 565 (Ct. Cl. 1966). The length of time taken to grant approval does not establish *ipso facto* an unreasonable delay on the part of the defendant. *R.J. Crowley, Inc.*, (ASBCA 35679), 88-3 BCA ¶ 21,151 (citing *Jefferson Construction Co. v. United States*, 368 F.2d 247, 256 (Ct. Cl. 1966)). It is the contractor’s burden to show “where the work was delayed because of lack of approval.” *Id.*

On February 5, 2004, the Government received a draft of Tidewater’s quality control plan from Foley Constructors, Inc., a subcontractor to Tidewater. Tidewater officially submitted its quality control plan to the Government on February 27, 2004. The Government advised Tidewater on March 1, 2004, that it would need to correct various deficiencies in the plan. After receiving several revisions, the Government finally approved the plan on April 6, 2004.

It is undisputed that Tidewater was contractually required to prepare a quality control plan, submit it to the Government, and obtain the Government’s approval. Under the contract, moreover, the Government had a right to review the plan and ensure that it conformed to the contract requirements. *P.R. Burke, Corp.* 277 F.3d at 1360 (citing *Cascade Pacific International v. United States*, 773 F.2d 287, 291 (Fed. Cir. 1985) (illustrating that the Government has a right to insist upon compliance with the contract’s requirements)). Tidewater has not proven that the Government acted unreasonably by rejecting the various versions of the plan.

We find that, as a matter of law, the time period from the initial submission of the quality control plan by Tidewater, i.e., February 27, 2004, until the date the plan received Government approval, April 6, 2004, cannot be attributable solely to the Government

because it was caused by Tidewater's failure to comply with the contract. The Government, for its part, was merely exercising its right under the contract to receive, review, and approve a plan that conformed to the contract. *J.S. Malone & Associates, Inc. v. United States*, 879 F.2d 841, 845 (Fed. Cir. 1989) (stating "it is settled that the government is entitled to obtain precisely what it contracts for as long as it does not mislead the contractor,") and citing *American Electric Contracting Corp. v. United States*, 579 F.2d 602, 608 (Ct. Cl. 1978). The contractor has not met its burden of proof to establish that the Government's actions caused unreasonable delay to the work.

In sum, we find that appellant has met its burden of proof to the extent that it has established that, of the eighty-nine days sought, the Government's actions caused an unreasonable delay of thirty-one days. Appellant has failed to establish entitlement to the remaining extension of time sought in this appeal.

Decision

The appeal is **GRANTED IN PART**.

JERI KAYLENE SOMERS
Board Judge

We concur:

JAMES L. STERN
Board Judge

EILEEN P. FENNESSY
Board Judge