UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CROSS MOTIONS FOR PARTIAL SUMMARY RELIEF GRANTED IN PART:
July 29, 2010

CBCA 420, 450, 451, 1307, 1855

DICK/MORGANTI, A JOINT VENTURE,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Kerry L. Kester and Joel D. Heusinger of Woods & Aitken, LLP, Lincoln, NE; Barbara G. Werther of Howrey LLP, Washington, DC; John W. Ralls of Howrey LLP, San Francisco, CA; and Richard T. Bowles and Kenneth G. Jones of Bowles & Verna LLP, Walnut Creek, CA, counsel for Appellant.

Thomas Y. Hawkins, Jay N. Bernstein, Lesley M. Busch, and Heather R. Cameron, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **BORWICK**, and **GOODMAN**.

BORWICK, Board Judge.

In these construction contract cases, the General Services Administration (GSA or respondent) moves for partial summary relief on the construction and application of the Mark-Up Rate clause and the Daily Delay Rate clause and moves to dismiss portions of Dick/Morganti, A Joint Venture's (DM's or appellant's) quantum claim as barred by those

clauses.[1] Appellant cross-moves for summary relief on one issue, whether the Mark-Up Rate clause entitles appellant to apply an 18% mark-up on disputed change orders. We grant appellant's motion for summary relief on that issue. We conclude that appellant may charge an 18% mark-up on disputed change orders. We also grant respondent's motion for summary relief in part. We conclude that, contrary to appellant's position, the Mark-Up Rate clause is to include appellant's field support costs. Appellant may not claim separately for those costs.

We also agree with respondent that the Daily Delay Rate clause applies to all proven days of compensable delay, not just the first fifty days of government-caused delay, as urged by appellant. We conclude that the Daily Delay Rate clause applies to all costs, direct and indirect, associated with proven government-caused delay. The clause limits appellant's recovery for all such costs to the clause's recovery rate of $8000 per day for proven compensable delay.

Background

This appeal is from a contracting officer's decision denying claims under the construction phase of a contract for the design and construction of the San Francisco Office Building and Federal Courthouse. The firm fixed-price construction contract was entered into by respondent and appellant on or about February 14, 2003, at a price of $133,774,965. Complaint ¶¶ 12-15; Answer ¶¶ 12-15. On March 18, 2003, respondent issued a notice to proceed with a substantial completion date of November 13, 2005, or 970 calendar days from the effective date of the notice to proceed. Complaint ¶ 17; Answer ¶ 17. The project was finished at the end of February 2007. Appellant claims in bidding on the construction phase of the project that appellant and its subcontractors relied upon the accuracy, completeness, and constructability of the documents. Complaint ¶ 21. Appellant alleges that the construction documents were full of deficiencies, errors, conflicts, and omissions. *Id.* ¶ 22.

Appellant alleges that as a result of the drawing deficiencies, appellant and its subcontractors had to perform significant extra work, that the work of appellant and its subcontractors was delayed, and that the delays were compensable because they were caused by the actions or inactions of respondent and its agents. Complaint ¶ 24. Appellant alleges that respondent repeatedly required appellant to perform extra work without compensation. *Id.* ¶ 25. In this phase of the appeals, claimant seeks a total of $55,000,000 plus extensions

[1] Respondent also moves for summary relief on certain of appellant's subcontractor pass-through claims. Those issues will be addressed in a separate opinion.

of time for alleged breach of contract (first claim), breach of the implied warranty of plans and specifications (second claim), and cardinal change (third claim).

The first claim of the complaint contains allegations commonly found in construction contract disputes. Appellant alleges that respondent furnished construction documents that were substantially defective and inadequate to permit performance of the work without an unreasonable number of corrections, clarifications, and re-design, resulting in an excessive number of requests for information (RFIs). Complaint ¶ 34a. Appellant alleges that the defective design documents caused appellant and its subcontractors damages due to delays, acceleration, inefficient and out of sequence performance, and stacking of trades. *Id.* ¶ 34b. Appellant alleges that respondent failed to respond in a timely manner to appellant's RFIs for correction and clarification of the defective plans and inconsistent specifications. *Id.* ¶ 34c. Appellant alleges that respondent issued changes in the plans and specifications that far exceeded in number and consequences the scope of the design changes that would reasonably have been anticipated. *Id.* ¶ 34d. Appellant alleges that respondent ordered changes in the plans and specifications in an untimely manner and without sufficient notice to appellant to allow it to reschedule and resequence operations in an orderly and efficient fashion. *Id.* ¶ 34e. Appellant alleges that respondent imposed overly strict requirements and inspections beyond those called for in the contract, *id.* ¶ 34f; failed to exercise its responsibilities as owner of the project to minimize adverse impact on the work, particularly as respects inspection of the work, *id.* ¶ 34g; refused appellant's requests for time extensions to which it had become entitled, *id.* ¶ 34h; and refused appellant's requests for equitable adjustments due to it under the contract that would be sufficient to compensate it for the numerous delays, disruptions, inefficiencies, and acceleration of the work, *id.* ¶ 34i. Appellant alleges that respondent failed to pay it for the additional amounts due it for the added work performed as a result of the changes, *id.* ¶ 34j; failed to pay the entire contract price based on the assertion of improper back-charges and liquidated damages, *id.* ¶ 34k; and failed to pay mark-ups on change orders as called for by the contract, notwithstanding having agreed to pay and notwithstanding having actually paid those mark-ups during the performance of the project, *id.* ¶ 34l.

Undisputed Contract Provisions

The solicitation and resulting contract contained certain clauses pertinent to the mark-up and daily delay rate to be applied in administering contract costs, particularly those regarding changes, delays, and disputes about changes and delays:

552.243-71 Equitable Adjustments (APR 1984).

(a) The provisions of the "Changes" clause prescribed by FAR [Federal Acquisiiton Regulation] 52.243–4 are supplemented as follows:

(1) Upon written request, the Contractor shall submit a proposal, in accordance with the requirements and limitations set forth in the "Equitable Adjustments" clause, for work involving contemplated changes covered by the request. The proposal shall be submitted within the time limit indicated in the request or any extension of such time limit as may be subsequently granted. The Contractor's written statement of the monetary extent of a claim for equitable adjustment shall be submitted in the following form:

. . . .

(ii) For proposals in excess of $5,000, the claim for equitable adjustment shall be submitted in the form of a lump sum proposal supported with an itemized breakdown of all increases and decreases in the contract in at least the following detail:

Direct Costs

Material quantities by trades and unit costs (Manufacturing burden associated with material fabrication performed will be considered to be part of the material costs of the fabricated item delivered to the job site) Labor breakdown by trades and unit costs (Identified with specific item of material to be placed or operation to be performed) Construction equipment exclusively necessary for the change Costs of preparation and/or revision to shop drawings resulting from the change Workers' Compensation and Public Liability Insurance Employment taxes under FICA and FUTA Bond Costs—when size of change warrants revision

Mark-up rate on Direct Costs

The Mark-up rate on direct costs submitted on the Total Evaluated Price [Form] by the Contractor shall be used as the rate on all equitable adjustments during both the Design Assist Phase and the Construction Phase.

Daily Delay Rate

The Daily Delay Rate shall be an allowable cost added to the Equitable Adjustments with the following exceptions:

[Listed exceptions not applicable here]

. . . .

Equitable adjustments for deleted work shall include credits for direct costs plus the mark-up rate. On proposals covering both increases and decreases in the amount of the contract, the application of the mark-up rate [is] on the net change in direct costs for the Contractor or subcontractor performing the work.

Respondent's Motion for Summary Relief, Exhibit 8, Attachment V.

Section H of the contract contained the following pertinent provision:

4. Contract Modification Mark-Up Rate.

A. The contractor shall provide a bid on the "Total Evaluation Price Form" in Section B for his mark-up rate that will be in the form of a single mark-up to be applied to the total direct cost of any modification, and will be inclusive of all prime and first tier subcontractor overheads, general and administrative cost, bonds, insurance, site overhead, miscellaneous costs such as small tools and the like, and all other indirect and direct costs associated with any contract modification. This rate offered by the contractor shall be accepted by the government and used in contract modifications in lieu of negotiating overhead, commission, and profit and will be applied to the overall total direct costs on each modification for the prime contractor and first tier subcontractor. (No other mark-ups, fees or other indirect costs will be allowed the prime contractor or first tier subcontractor on either their own work or on work being performed by lower tier subcontractors.)

. . . .

B. Clause GSAR [General Services Administration Acquisition Regulation] 552.243-71, Equitable Adjustments (APR 1984) is hereby modified to provide that the Mark-Up rate offered by the Contractor on the Total Evaluated Price

Form in Section B shall be used in determining all equitable adjustments, additive or deductive, which may be negotiated or [_____] [sic] under the contract. *The mark-up rate shall also be used, when applicable, in determining any entitlement claimed by the Contractor under the Disputes clause.*

C. Equitable adjustments will be determined as follows:

. . . .

4. The Mark-Up Rate identified on the Total Evaluation Price Form shall be applied to the negotiated direct costs to establish a price for the contract modification on the following conditions:

a. Less than 25% of the work for which the equitable adjustment is being negotiated has been completed; and

b. The Contractor agrees that the equitable adjustment represents a complete settlement, and releases the Government from all claims for time or money arising in whole or in part out of the circumstances giving rise to the equitable adjustment.

5. If either condition 4.a. or 4.b. is not satisfied, a rate equal to the bid Mark-Up rate, less 5 percentage points, shall be applied to the negotiated direct costs to establish a price for the contract modification.

5. **Compensable Delay Costs**

The contractor shall provide an offer on the "Total Evaluation Price Form" in Section B for his daily delay rate to be used as the sole daily delay cost to include all contractor and subcontractor (at any tier) field overhead, home office overhead, general overhead, general and administrative costs, commissions, profits, bonds, insurance fees and any other direct and indirect costs which are the result of delays caused solely by the government. The rate will be multiplied by the number of days delay shown on the Evaluation Form (based on historical data) and added to the contractor's offer for evaluation

> purposes only. The rate offered shall be accepted by the government and used to negotiate government-caused delays provided that the contractor can demonstrate that the delay was caused solely by the government and resulted in a delay to the critical path of the contract was evidenced by the current and up-to-date CPM [critical path method] schedule that has been approved by the Contracting Officer. Recovery of such sum shall be the Contractor's sole remedy for compensable delays. For all delays, the daily delay cost covers all costs and mark-ups related to delay. Therefore, the contract modification mark-up covered under paragraph 4) above does not apply to delay modifications or to any portion of a modification that addresses delay.
>
> . . . .
>
> 6. [misnumbered "4" in document] Evaluation Estimates on the Price Evaluation Form
>
> The estimated modification [for] direct costs and compensable delay times set forth on the Total Evaluated Price Form are based upon the Government's estimate of reasonably possible occurrences. In no way do they establish entitlement, and under no circumstances will the Government be liable to the contractor should actual modification quantities or compensable delays vary by any degree from the evaluation estimates.

Respondent's Motion for Summary Relief, Exhibit 7; Appellant's Opposition, Exhibit 8.

Section L, ¶ IIB.3, provided in pertinent part:

> Evaluated Future Modifications Mark-Up Rate. State a percentage mark-up rate to be applied to work performed under the Contract. Apply the rate to the estimated modification direct costs provided on the Total Evaluated Price Form.
>
> . . . .
>
> This rate must include all prime and first tier subcontractor overheads, general and administrative costs, bonds, insurance, commission, profit, and all other direct and indirect costs which may be associated with work performed under

> this contract. Upon award of the Contract, the mark-up rate offered by the awardee shall be used in determining all equitable adjustments, additive or deductive, which may be negotiated under the Contract.

Appellant's Opposition, Exhibit 9.

Appellant's Statement of Undisputed Facts Regarding Appellant's Bid for Mark-Up Rate and Daily Delay Rate

In accordance with the instructions in the solicitation, appellant included a mark-up on its bid form. The rate was 18%. Appellant's Statement of Undisputed Facts ¶ 2; Declaration of Ronald G. Brookfield (June 22, 2010) ¶ 15. Appellant bid a daily delay rate of $8000. Declaration of John T. Sebastian (June (undated by day) 2010) ¶ 15.

Appellant's Statement of Undisputed Facts Regarding Appellant's Reliance on Respondent's Statement

Appellant states that it built the project according to the construction documents of February 14, 2003, that respondent provided to it and that those construction documents were represented to be 100% complete. Sebastian Declaration ¶ 6. Appellant proposed to build the project in accordance with those documents for a bid price of $133,774,965. *Id.* ¶ 7. In bidding the $8000 daily delay rate, appellant states that it relied on respondent's representations in the solicitation that there would be no more than fifty days of delays caused by respondent. *Id.* ¶¶ 12, 14. In bidding the $8000 daily delay rate, appellant states that it did not anticipate that there would be delays of 473 days, which appellant attributes mostly to respondent. *Id.* ¶ 13. Had appellant known that there would be government-caused delays beyond fifty days, appellant's declarant says that appellant would have bid a considerably higher number. *Id.* ¶ 76.

In addition, appellant states that the construction documents were flawed. During the course of the project construction, appellant states that GSA revised 91% of the original drawings and issued fifty-three new drawings as a result of instructional bulletins, in addition to other directed and constructive changes. Sebastian Declaration ¶ 17.

Respondent's Statement of Undisputed Facts Regarding Appellant's Application of Mark-Up Rate

Section I of DM's claim seeks an 18% mark-up on the claimed additional field labor, field supervision, materials, equipment, and consulting costs allegedly incurred by DM due

to the alleged imposition by GSA of concrete finish standards that were higher than specified.

Section II of DM's claim seeks an 18% mark-up on claimed extra costs allegedly incurred by DM to perform "various work activities" to identify, process, and administer RFIs which allegedly were the result of GSA's "defective and deficient design on the Project."

Section III of DM's claim seeks payment for open and disputed change order requests (CORs) submitted by DM to GSA on the project. In addition to the alleged direct cost of performing each COR, DM claims entitlement to "direct field support costs" allegedly associated with and allocated to the disputed CORs, in the amount of $6,039,843, plus an 18% mark-up on said "direct field support costs" in the amount of $1,087,172 (rounded figure).

Section IV of DM's claim seeks payment for "direct field support costs" associated with two specific open and disputed CORs: Disputed Issue No. 364, "Rebar Congestion," and Disputed Issue No. 590, "Concrete Finish." In addition to the alleged direct cost of performing each of these CORs, DM claims entitlement to "direct field support costs" plus an 18% mark-up on these "direct field support costs."

The "direct field support costs" claimed by DM in sections III and IV of its claim are an allocated portion of the $16,613,939 overrun allegedly experienced by DM to its budgeted costs. This portion is composed of typical site overhead items, such as project supervisory personnel, office personnel, and office expenses. Respondent maintains that recovery of these costs is limited to the contract mark-up rate.

Section V of DM's claim seeks payment for acceleration and overtime costs paid by DM to various subcontractors, plus an18% mark-up of those costs, plus claimed overtime expended by DM in operating the elevator, plus an 18% mark-up of those costs.

Section VIII of DM's claim seeks a mark-up of 7.27% on each of the amounts claimed by DM's subcontractors, and passed through by DM as part of this appeal. The 7.27% rate is compounded on the subcontractors' 10% mark-up to arrive at a total mark-up on the subcontractor claims of 18%.

Respondent states that because neither of the conditions set forth in Section H, paragraph 4, of the contract for application of the 18% rate have been satisfied, the proper

mark-up on the amounts claimed by DM in Sections I, II, III, IV, V, and VIII of its claim submittal is 13%. Respondent's Statement of Undisputed Facts ¶¶ 13-20.

Appellant states that in nearly all circumstances when respondent negotiated changes with appellant during the project, it consistently allowed an 18% mark-up, even when more than 25% of the work had been completed and even when the work was entirely complete. Declaration of Vincent C. Petito (June 22, 2010) ¶ 9. According to appellant, GSA in its pre-negotiation position (PNP) nearly always used an 18% mark-up rate in its independent estimates of appellant's change order requests. *Id*. GSA's unilateral change orders overwhelmingly used the 18% mark-up rate. *Id*. Through early settlement negotiations GSA allowed an 18% mark-up on change order requests. Brookfield Declaration ¶ 24. In over 100 negotiated change order requests, GSA allowed an 18% mark-up rate on submitted costs included in GSA unilateral modifications. Petito Declaration ¶ 12. It was not until the end of 2009 that GSA took the position that it would only allow the 13% mark-up rate. *Id*.

As for direct field support costs, appellant states that such costs are booked in its accounting system as direct costs, not overhead costs. Brookfield Declaration ¶¶ 40, 48, 50. Appellant states that it backed out field support costs from base bid work, and then allocated the remaining field support costs to disputed change order requests. *Id.*

Respondent's Undisputed Facts Regarding Appellant's Application of Daily Delay Rate

Section VI of DM's claim seeks compensation for "non-direct overhead costs" at the rate of $2689.49 per day, which DM multiplies by 356 days of compensable delay to arrive at an amount due of $957,457, plus 18% markup (total amount claimed of $1,129,799).

DM, on behalf of its subcontractor Webcor Concrete, seeks to recover $1,672,447 plus 10% mark-up for 268 days of alleged government-caused delay for a total of $1,839,691.

DM, on behalf of its subcontractor Bay Area Reinforcing (BAR), seeks to recover time related delay costs of $430,372 plus 10% markup for 134 days of alleged compensable delays, i.e. 106 days of government-caused delay and 28 days of adverse weather delays. The total claimed is $517,409.

DM, on behalf of its subcontractor Boyett Door and Hardware, seeks to recover $670,459, inclusive of mark-up, for 260 days of alleged government-caused delay.

DM, on behalf of its subcontractor Marelich Mechanical Company (MMC), seeks to recover $948,562, inclusive of mark-up, for an alleged 473 days of government-caused delay. The claim on behalf of MMC also includes the labor escalation costs and extended general conditions costs allegedly incurred by its subcontractor, Syserco, as a result of project delays.

DM, on behalf of its curtainwall, glazing, metal panel, skylight, and sunscreen subcontractor, Permasteelisa Cladding Technologies, Inc., claims $1,606,119, inclusive of mark-up, for an alleged 232 days of government-caused delay.

DM, on behalf of an interior finish subcontractor, ISEC, Inc. claims $174,831 plus 10% mark-up for an alleged 420 days of government-caused delay. The total plus mark-up is $192,314.

DM, on behalf of its subcontractor for metal fabrications, metal stairs, catwalks, and sunscreen supports, T&M Manufacturing, claims $1,251,010, inclusive of 10% mark-up, for an alleged 406 days of government-caused delay.

DM, on behalf of Performance Contracting, Inc., its subcontractor for metal stud framing, drywall, cement panels, and acoustical work, claims $1,734,866, plus 10% mark-up, for 484 days of alleged government-caused delay. Included are claimed expenses for additional jobsite management, administrative expenses, unabsorbed home office overhead expenses, storage and personnel standby costs, labor escalation costs, and material escalation costs. The total plus mark-up is $1,908,352.

DM, on behalf of its electrical subcontractor, Rosendin Electric, Inc., seeks recovery of $2,203,972, plus mark-up, for sixteen months of alleged government-caused delay. Included in this claim are costs for additional general foreman field supervision, additional material handler, extended home office overhead, escalated labor, and extended jobsite overhead. The total plus mark-up is $2,424,369. Respondent's Statement of Undisputed Facts ¶¶ 27-36.

Respondent maintains that the extended performance time-related damages alleged by appellant and its subcontractors to have resulted from delays for which respondent is responsible total $12,488,084. *Id.* ¶ 37. Appellant does not disagree with the figure, but disputes the characterization of its claim as being solely time-related; appellant maintains that the claim also includes direct costs which it maintains are excluded from the daily delay rate. Appellant's Statement of Genuine Issues ¶¶ 26-27.

Discussion

The parties have cross-moved for summary relief. Summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justiciable inferences must be drawn in favor of the non-movant. *Government Marketing Group v. Department of Justice*, CBCA 964, 08-2 BCA ¶ 33,955, at 167,990-91 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986)).

When, as here, both parties have moved for summary relief, each party's motion must be evaluated on its own merits and all reasonable inferences must be resolved against the party whose motion is under consideration. *First Commerce Corp. v. United States*, 335 F.3d 1373, 1379 (Fed. Cir. 2003); *DeMarini Sports, Inc. v. Worth, Inc*., 239 F.3d 1314, 1322 (Fed. Cir. 2001); *Metlakatla Indian Community v. Department of Health and Human Services*, CBCA 181-ISDA, et al., 09-2 BCA ¶ 34,307, at 169,466; *Government Marketing Group*, 08-2 BCA at 167,991 (citing *California v. United States*, 271 F.3d 1377, 1380 (Fed. Cir. 2001)). The mere fact that both parties have moved for summary relief does not impel a grant of one of the motions. *California*, 271 F.3d 1377, 1380; *see also Electronic Data Systems, LLC v. General Services Administration*, CBCA 1552, 10-1 BCA ¶ 34,316, at 169,505 (2009).

Pure contract interpretation, however, is a question of law that may be resolved on summary relief. *Electronic Data Systems*, 10-1 BCA at 169,505 (citing *P.J. Maffei Building Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984)). Based upon a review of the parties' statement of undisputed facts, and the terms and conditions of the contract, the Board concludes that there are no material disputed facts and that this case is appropriate for summary resolution, since the issues presented involve a matter of pure contract interpretation.

We now turn to the construction of the Mark-Up and Daily Delay Rate clauses at issue in this case. As the Board recently noted:

> Contract interpretation begins with the language of the written agreement. *Foley Co. v. United States*, 11 F.3d 1032, 1034 (Fed. Cir. 1993). When interpreting the contract, the Board is bound to consider the document as a whole and interpret it in such a way as to give reasonable meaning to all of its parts. *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1434-35 (Fed. Cir. 1996). An interpretation will generally be rejected if it leaves portions of the contract language meaningless, useless, ineffective, or

> superfluous. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991); *Connor Brothers Construction Co.*, VABCA 2519, et al., 95-1 BCA ¶ 27,409 (1994).

F.A. Wilhelm Construction Co. v. Department of Veterans Affairs, CBCA 719, 09-2 BCA ¶ 34,228, at 169,181.

Construction of the Mark-Up Clause

Appellant argues that the plain terms of the Mark-Up clause--subclause H4B-- permit it to claim the 18% mark-up rate it entered onto the Total Evaluated Price Form in calculating disputed equitable adjustments and that the 5% reduction imposed by subclause H4C only applies to negotiated equitable adjustments before the onset of a dispute. Appellant's Motion for Summary Relief at 1; Appellant's Opposition to Respondent's Motion for Summary Relief at 7-8. Respondent argues that subclauses H4B and H4C must be read together so as to harmonize and give meaning to all of the clause's parts. Respondent's Opposition Memorandum at 3. Respondent claims that appellant's reading of subclause H4C is "narrow and constricted." *Id*. at 5.

Appellant prevails on this issue. Contrary to respondent's position, subclauses H4B and H4C are not harmonized and are not related to each other. Indeed, H4B clearly states that "the mark-up rate [identified on the Total Evaluation Price Form, i.e., the 18%] shall also be used, when applicable, in determining any entitlement claimed by the Contractor under the Disputes clause." In other words, under subclause H4B, appellant was allowed to use the 18% mark-up rate in submitting claims to the contracting officer under the Disputes clause and establishing its damages in this appeal. The 5% mark-up reduction of subclause H4C, at paragraph 5 applies to "the negotiated direct costs to establish a price for the contract modification" in circumstances where the conditions of clause H4C, at paragraph 4, were not met. Subclause H4B does not explicitly cross-reference the 5% reduction of subclause H4C, paragraph 5, to mark-ups for claims that are in dispute either before the contracting officer or before this Board.

Construction of the Daily Delay Rate Clause

Appellant argues that the daily delay rate of $8000 per day it submitted as required by the Daily Delay Rate clause of H5 only applies to the first fifty days of government-caused delay because of representations by the Government that there would be no more than fifty days of government-caused delay on the project. Appellant's Opposition Memorandum at 20-22. Appellant has submitted declarations of its officials that they relied upon those representations in submitting the $8000 figure and if they had known that the

project would be delayed by 473 days, appellant would have bid a higher daily delay rate. *Id*. at 22. Appellant placed particular focus on the phrase "based on historical data" in clause H5 and the phrase "reasonably possible occurrence" phrase in clause H6. *Id.*

In short, appellant would have us read the Daily Delay Rate clause in H5 and H6 as establishing an express condition that there would be no more than fifty days of government-caused delay on the project, which, if unfulfilled by the Government, would relieve appellant of the duty of compliance with the $8000 Daily Delay Rate clause. *See, e.g., Charron v. United States*, 200 F.3d 785, 790-91 (Fed. Cir. 1999); *Restatement of Contracts* § 225 (1981); *13 Samuel Williston & Richard A. Lord*, A Treatise on the Law of Contracts § 38:6 (4th ed. 2000 & Supp. 2010). However, clause H5 stated that the fifty-day delay estimate was for "evaluation purposes only." That provision does not represent a promise that there would be only fifty days of government-caused delay. *Electronic Data Systems,* 10-1 BCA at 169,507-08 (contract statement that bidders should base pricing on 420,000 units of smart card enrollment "for estimating purposes only" not a commitment to order 420,000 units).

The purported reliance of appellant's officials on the Government's fifty-day estimation of government-caused delay as a limitation of clause H5 to only the first fifty days of any government-caused delay is unavailing. Other provisions of the clause make it clear that the daily delay rate applied to all government-caused delay. Clause H5 states clearly that the daily delay rate was to "be used as the sole daily delay cost" and "used to negotiate government-caused delays," not just the first fifty days of government-caused delays. Furthermore, the clause states in pertinent part: "Recovery of such sum shall be the Contractor's sole remedy for compensable delays. For all delays, the daily delay cost covers all costs and mark-ups related to delay." There is no limitation in this language to only the first fifty days of government-caused delay. Consequently, the daily delay rate applies to all of appellant's claims of government-caused delay, not just the first fifty days.[2]

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[2] Appellant has not shown that its reliance on the fifty-day provision was reasonable or that the Government acted with deliberate misconduct so as to estop the Government from enforcing the delay rate. *Premo v. United States*, 599 F.3d 540, 547 (6th Cir. 2010); *Melrose Associates, L.P. v. United States*, 45 Fed. Cl. 56, 58 (1999). Nor, as appellant argues, is this clause an unallowable exculpatory clause, which exempts an agency from liability imposed by a required remedy granting clause, as in the case of *Clark Concrete Contractors, Inc. v. General Services Administration*, GSBCA 14340, 99-1 BCA ¶ 30,280, at 149,756-57. Rather, it is a limitation of liability clause in which the parties mutually agreed that the amount of liability for proven compensable delays would be $8000 per day. Such a supplementation of a remedy-granting clause is permissible. *Reliance Insurance Co. v.*

Application of the Mark-Up Clause

Respondent maintains that appellant's claim of direct field support costs of $6,039,843 for 468 open and disputed CORs plus an 18% markup on those costs, and its claim for direct field support costs of $4,298,466 plus and 18% mark-up for disputed CORs 364 (rebar congestion) and 590 (concrete finish) must be dismissed because the direct field support costs are to be included in the mark-up rate applied to the claimed direct costs of those CORs, which are $12,452,263 for the 468 open CORs and $7,554,171 for CORs 364 and 590. Respondent's Motion for Summary Relief at 10. The total of field support costs claimed is $10,338,309. Appellant argues that because its accounting system treated direct field support costs as direct costs, those costs should not be included in the mark-up rate, but should be marked up as a direct cost. Appellant's Opposition at 18-19.

We agree with respondent that direct field support costs of the type claimed by appellant here are included in the mark-up rate of subclause H4A. That rate includes a mark-up which by its terms is "inclusive of all prime and first tier subcontractor overheads, general and administrative cost, bonds, insurance, *site overhead*, miscellaneous costs such as small tools and the like, and all other indirect and direct costs associated with any contract modification." (Emphasis supplied.)

Appellant relies on the case of *AMEC Construction Management, Inc. v. General Services Administration*, GSBCA 16233, 06-1 BCA ¶ 33,141 (2005), *reconsideration denied*, 06-1 BCA ¶ 33,177, as support for its position. As respondent notes, that case actually supports respondent's position. Here, as in the *AMEC* case, in its accounting system the contractor treated field support costs as direct costs, not as overhead costs. The Government argued that those costs should be treated as overhead costs included in the mark-up rate. The board disagreed, holding that because appellant had treated those costs as direct costs, and because there was no express contract term mandating treatment of those costs as overhead, those general conditions costs could have been appropriately treated as direct costs under the contract. *AMEC*, 06-1 BCA at 164,247. This case is similar to *Jack Picoult*, GSBCA 3516, 72-2 BCA ¶ 9621, in which the board held that a contractor's field overhead costs were included in the mark-up rate when the contractor's mark-up rate included the costs of field supervisors and assistants. As in *Picoult*, the Mark-Up clause in the contract expressly included site overhead as costs within the clause. Appellant may not treat its field support costs as direct costs subject to the mark-up rate. Its field support costs are to be included in the mark-up rate.

United States, 931 F.2d 863, 865 (Fed. Cir. 1991).

Application of the Daily Delay Rate Clause

Respondent urges that appellant is limited to the $8000 daily delay rate for all costs of claimed government-caused delay. Thus respondent states that if all delays are compensable, appellant can recover no more than $2,784,000 for the delay representing what respondent characterizes as appellant's claim of 406 days of compensable delay. Respondent's Motion for Summary Relief at 14. Appellant responds that the Daily Delay Rate clause:

> is entirely concerned with costs in the nature of overhead and profit. It does not state that damages for disruption acceleration, lost productivity, loss of efficiency or cumulative impact are included in the daily rate. It further does not state that labor and material escalation, increased storage costs, increased stocking costs, standby costs, overtime premium and extended rental caused by Government-issued changes are subsumed within the daily delay rate. In fact these costs are not delay costs because they are not time-related. They are direct costs associated with and caused by GSA's changes to [appellant's] work.

Appellant's Opposition at 26.

Appellant is incorrect as to the narrow reading of clause H5. The clause states that the rate covers not only overhead costs, but also "any other direct and indirect costs which are the result of delays caused solely by the government." Additionally, the clause states that "recovery of such sum shall be the Contractor's sole remedy for compensable delays. For all delays, the daily delay cost covers all costs and mark-ups related to delay." The clause, therefore, is comprehensive as to what time-related delay costs are included within its purview.

Decision

Appellant's and Respondent's cross motions for partial summary relief are granted in part.

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ANTHONY S. BORWICK
Board Judge

We concur:

_____ _____
STEPHEN M. DANIELS ALLAN H. GOODMAN
Board Judge Board Judge