



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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CBCA 3350, 3672 GRANTED IN PART;  
CBCA 4658, 4659 DENIED: September 19, 2017

CBCA 3350, 3672, 4658, 4659

YATES-DESBUILD JOINT VENTURE,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Douglas L. Patin and Thomas Lynch of Bradley Arant Boult Cummings LLP, Washington, DC, counsel for Appellant.

Thomas D. Dinackus, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Rosslyn, VA, counsel for Respondent.

Before Board Judges **SOMERS**, **HYATT**, and **LESTER**.

**LESTER**, Board Judge.

When W.G. Yates & Sons Construction Company (Yates) teamed with Desbuild Incorporated (Desbuild) in April 2005 for the express purpose of pursuing a contract for the construction of a nine-building Department of State (DOS) consulate compound in Mumbai, India, it seemed like an excellent match between two entities with different types of construction expertise. Yates was, and still is, a construction contractor (headquartered in Mississippi) with extensive experience in large and complex construction projects in the United States. Desbuild, a construction contractor headquartered in Maryland that is headed

by a native of India, had extensive experience with projects in India and elsewhere overseas, including but not limited to DOS projects in India. In forming Yates-Desbuild Joint Venture (YDJV),<sup>1</sup> these two companies, which had never previously worked together, hoped that the combination of Yates' experience with large complex construction projects and Desbuild's ability to navigate the Indian skilled construction labor market and knowledge of qualified local specialized subcontractors would prove successful. Several months later, in September 2005, DOS awarded YDJV the contract for the New Consulate Compound (NCC) project in Mumbai.

Unfortunately, the NCC project, which was supposed to take twenty-eight months to complete, ultimately stretched out to almost six years – three-and-a-half years more than anticipated. YDJV believes that the extensive delays that it experienced on the project resulted primarily from property tax disputes between the United States Government (USG) and the Government of India (GoI), and YDJV blames DOS for not disclosing prior to award DOS's knowledge that the GoI, to gain leverage in a lawsuit filed by the City of New York demanding that the GoI pay real property taxes in New York, might block construction permits for the NCC project unless and until the USG paid its own outstanding NCC and other property tax bills – tax bills that dated back to the 1970s. Ultimately, YDJV submitted a certified claim to DOS seeking payment of \$23,802,082.48 as compensation for delays, while the DOS contracting officer assessed liquidated damages of \$11,301,352 against YDJV for 1192 days of delay beyond the contracted substantial completion date.

Based upon our review of the documentary evidence in these appeals, as well as testimony presented at a thirteen-day hearing, we find DOS responsible for its failure to notify YDJV, prior to award, of its well-grounded concerns that the GoI was very likely to delay the issuance of construction permits to force a coordinated resolution of the City of New York's lawsuit and the tax dispute over the NCC property. We also find that there are other excusable delays – including a change in GoI policy during the construction project that forced YDJV temporarily to remove workers from India and to await issuance of new entry visas for those workers – that are not YDJV's fault and for which DOS cannot assess liquidated damages.

Ultimately, though, despite the problems that the tax dispute and visa issues created, responsibility for the bulk of the delays on this project rests with YDJV. It was simply unable to merge the different types of expertise of its founding partners, Yates and Desbuild,

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<sup>1</sup> For purposes of our decision, "YDJV" refers to the joint venture team of Yates and Desbuild. When referring to either of the individual companies themselves, we refer to "Yates" or "Desbuild."

in a manner that allowed it to find and motivate local workers and subcontractors capable of performing, and willing to perform in a timely manner, the level and quality of work that the construction standards applicable to a DOS project require. While Desbuild had completed several construction projects for DOS in India and elsewhere, none were of the magnitude of the NCC project. Desbuild had never had to obtain construction permits from the GoI for any of its past projects, and Desbuild did not recognize the challenges that it would face in obtaining the level of skilled labor that it would need for a project of this size or the scope of the permitting efforts that, even without the complications of the tax dispute, it would need to undertake. Yates, in contrast, did not have any experience in performing either DOS contracts or international construction work, and it did not recognize the extent of the challenge that it would face in attempting to transfer its experiences in the United States to a foreign country that typically applied different construction methods from those under which Yates normally worked. Although YDJV suggests that the sheer size of its losses on this project evidences DOS's responsibility for significant portions of the delays at issue here, the size of YDJV's loss is irrelevant to the question of who caused, or is responsible for, the delays. We find that YDJV's inexperience in crucial aspects of a project of this size in India accounts for the majority of the delay here.

Below, evaluating and applying the critical path method (CPM) analyses that the parties presented at the hearing of these appeals, we assign responsibility for, quantify, and allocate costs for this project's delays after making factual findings about the scheduling and sequence of contract work on this project.<sup>2</sup>

### Findings of Fact

#### I. Planning and Solicitation for the Mumbai New Consulate Compound Project

##### A. The New Consulate Compound

On April 26, 2005, DOS issued solicitation no. SALMEC-04-R0013 (solicitation R0013) for the design and construction of the NCC in Mumbai. Joint Stipulations of Fact (JSF) ¶ 1. The NCC was to serve as a new and additional facility in Mumbai to process an increasing number of applications from Indian citizens for United States visas. Transcript (Tr.) Vol. 5 at 223-25. It was to be located in a planned commercial area of Mumbai known as the Bandra Kurla Complex (BKC) and situated on land that the USG had leased two years earlier (on September 30, 2003) for a ninety-nine-year term from the Mumbai Metropolitan

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<sup>2</sup> We include in an appendix a list of the acronyms that we use in this decision and their definitions, as well as a list of the individuals and corporate entities that we mention.

Regional Development Authority (MMRDA), the special planning authority with responsibility for the BKC. JSF ¶¶ 18- 19; Appeal File, Exhibit 13328.<sup>3</sup>

The compound was to consist of a perimeter wall and nine major buildings: a new office building (NOB), a general services office (GSO), a 1350-square-meter warehouse, Marine security guard quarters (MSGQ), the Consul General residence (CG residence) (with a 630-square-meter swimming pool and separate pool house), a 488-square-meter utility building, and three separate Compound Access Control structures (a main compound access control building (MCAC) through which employees would enter the compound, a consular compound access control building (CCAC) through which visitors would enter the compound, and a service compound access control building (SCAC)). JSF ¶ 20. Of those nine buildings, the NOB was not only the largest, but also the most complex and significant since, unlike any of the other buildings, it was to house a controlled access area (CAA) in which classified information was to be processed and stored. JSF ¶ 20; Tr. Vol. 10 at 76-79.

The lease for the land into which DOS had entered with MMRDA in September 2003 stated that the USG “shall before commencing construction submit to the Chief, Town & Country Planning Division of [MMRDA] for his approval” the plans for the project and that “[n]o work shall be commenced . . . until the said plans, elevations, sections, specifications and details shall have been so approved.” Exhibit 13327 at 11446; *see* JSF ¶ 19.

#### B. Pre-Solicitation Planning

In advance of the solicitation, DOS’s Office of Overseas Building Operations (OBO) requested preparation of an initial planning survey (IPS). The IPS was an internal DOS document and was not shared with offerors. JSF ¶ 2. This document, dated November 1, 2003, and prepared by DOS’s contractor, Kling Architects, *id.* ¶ 2, detailed, among other things, the local procedures that the awarded contractor would be required to follow to obtain necessary construction permits, as well as the role that MMRDA and another local authority,

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<sup>3</sup> All exhibits referenced in this decision are found in the appeal file, unless otherwise noted. The Department has numbered the pages of the appeal file using a Bates label which begins “DOS-MUM,” followed by an eight-digit number. For brevity’s sake, we identify the page only by the one-to-six digit page number. For example, “Exhibit 1 at 1” refers to the Bates page DOS-MUM 00000001, and “Exhibit 6 at 230” refers to Bates page DOS-MUM 00000230. Our citation to specific exhibits or testimony should not be interpreted as meaning that there is no other evidence in the record supporting a specific factual finding or that we have relied exclusively upon the cited evidence in making a finding.

the Municipal Corporation of Greater Mumbai (MCGM), would play in that process. Exhibit 1494 at 13073.

MMRDA and MCGM are two somewhat separate, though connected, authorities within the local Mumbai government that are both involved in the issuance of building permits. MMRDA is a local body within the State Government of Maharashtra that is responsible for planning and coordinating development activities in the Mumbai Metropolitan Region and is headed by a Metropolitan Commissioner, who, for the time periods in this appeal up until August 2007, was Dr. T. Chandrashekar and, after August 2007, was Mr. Ratnaker Gaikwad. Exhibit 22317. MCGM (or, as it is also known, the Bombay Municipal Corporation)<sup>4</sup> is a separate local body within the State Government of Maharashtra that possesses authority (including taxing authority) over Greater Mumbai, a geographical area that encompasses, but is broader than, the Mumbai Metropolitan Region. MCGM is headed by a Municipal Commissioner, who, for the time periods relevant to this appeal up until May 2007, was Mr. Johny Joseph<sup>5</sup> and, from May 2007 onward, was Mr. Jairaj Phatak. Exhibit 22277 at 55. Although MMRDA and MCGM were technically two separate autonomous bodies, the commissioners for both entities were nominated by and reported to the Chief Minister for the State Government of Maharashtra, and both entities depend upon the Government of Maharashtra for a certain amount of their budgets. *Id.* at 45. Accordingly, the Chief Minister for the state had influence over both MMRDA and MCGM. *Id.* at 44-45. Although the Chief Minister (a political position) oversaw the State Government of Maharashtra, he was assisted by the Chief Secretary (a senior civil service position). Separate and apart from these local and state bodies, the Ministry of External Affairs (MEA), or “Foreign Ministry,” was a ministry within the national GoI responsible for the conduct of India’s foreign relations.

The process that the OBO identified in the IPS for obtaining a building permit was as follows: First, building plans were to be submitted by the project architect to MMRDA. Exhibit 1494 at 13031. After approving the plans, MMRDA would issue a plinth

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<sup>4</sup> Because the city of Mumbai was previously known as Bombay, MCGM is also known as the Bombay Municipal Corporation. For purposes of this decision, we refer to the authority as MCGM.

<sup>5</sup> In 2007, Mr. Joseph left his position as MCGM Commissioner and was appointed Chief Secretary for the State Government of Maharashtra. As we will discuss later in this decision, Mr. Joseph remained involved in the NCC tax and permitting issues, albeit upon behalf of the state government rather than the local Mumbai government, after he became Chief Secretary.

commencement certificate (PCC) indicating MMRDA's approval of construction up to, but not beyond, the plinth level – that is, construction up to the level of a slab-on-grade platform. *Id.* The plans would then be forwarded to MCGM's Deputy Chief Engineer, who would issue a conditional approval (called an intimation of disapproval (IOD)) subject to conditions that the contractor would have to satisfy before a certificate authorizing further work (beyond the plinth level) would be issued. *Id.* at 13031, 13230. Once those IOD conditions had been satisfied and the contractor had finished the plinth, MMRDA and MCGM would conduct a joint plinth inspection and identify any IOD conditions (including payment of property taxes) that still needed to be satisfied. *Id.* at 13230. Upon compliance with the IOD requirements, a further work commencement certificate (FWCC) would be granted by both MMRDA and MCGM, which would permit the contractor to build a structure upon the plinth. *Id.* The contractor would then construct the building and, following a detailed inspection and the contractor's compliance with any IOD conditions, MCGM would issue an occupancy certificate. After water connections had been made, MCGM would issue a building completion certificate. *See* Exhibit 1494 at 13230.

Also as part of the planning process, OBO in January 2005 prepared a project analysis package (PAP). JSF ¶ 3; Exhibit 20535. OBO's planning manager, Steven Rosenfeld, was the primary author of this document, with assistance from Kling Architects. JSF ¶ 3; Exhibit 22027 at 34087. The PAP described the project's scope, schedule, and budget. *See* Exhibit 20535. Much of the text or information contained in the PAP was to be included in the request for proposal (RFP). *Id.* at 22874. Some items were designated to be "copied as is into the RFP" (denoted with an asterisk as "RFP\*"), while other information was flagged to be "otherwise incorporated or considered to correctly construct the RFP" (denoted without an asterisk as "RFP"). *Id.*

As part of the process of drafting the PAP, its authors approached MMRDA and MCGM to obtain information about the permitting process as it would apply to the NCC. During discussions, MMRDA and MCGM indicated that they wanted to assist in expediting the NCC construction process. Exhibit 22027 at 34097. In that regard, they indicated that they would issue separate permits for early foundations and subgrade work, as well as authorizing "conditional approvals" of foundation work on "a piecemeal basis" to allow work to start earlier than it normally would if the regular permitting process were to apply. *Id.* at 34097-98. In the construction industry, a foundation is something different from, and a precursor to the laying of, the plinth. Tr. Vol. 6 at 288. Foundation work involves putting vertical shafts into the ground and pouring concrete on top of them – basically, the installation of piles and grade beams. *Id.* Before the plinth (or slab on grade) is poured, other activities such as plumbing, water, mechanical, and electrical lines underlying it may first have to be laid – activities that are not necessary merely for laying foundations. *Id.* Accordingly, in representing that they intended to issue permits for early foundations and

subgrade work, MMRDA and MCGM were referring to a permit different from, and preliminary to, the PCC that MMRDA typically issued as part of the normal permitting process.

Section J.3 of the PAP, concerning local permitting requirements, accepted the MMRDA and MCGM representations and was labeled “RFP,” signifying that the language contained therein was being suggested for inclusion in the RFP. Exhibit 20535 at 22899. The proposed RFP language that it provided was as follows:

OBO’s Planning Manager has coordinated with Post, [OBO’s Project Execution Office (Construction and Commissioning Division)], and the Host government to identify the specific documentation and processes required to obtain permits. . . . The host government will accept a permit application for site work and foundations, and a final submission defining site plan, building massing, interior fire exiting, toilets, and elevators.

A local registered Architect or Licensed Surveyor must submit the plans for approval to the MMRDA. Phased submissions will be entertained for site development and foundations, but substantial interim drawing[s] must specify the general extent of the project. Drawings showing fire stairs and exiting, structural design, and life-safety issues are required. MMRDA approved plans are forwarded to [MCGM], which is the final authority. Conditional approvals will be issued to expedite foundation construction.

*Id.* Like the IPS, the PAP was an internal DOS document and was not shared with offerors. JSF ¶ 3.

## II. Property Tax Disputes with the Government of India

### A. The New York City Tax Dispute

During the Department’s planning for the NCC project, the USG and the GoI were involved in two separate diplomatic disputes concerning reciprocal property tax obligations.

On April 2, 2003, the City of New York filed suit in the Manhattan State Supreme Court seeking to recover approximately \$4.9 million in unpaid real property taxes, plus \$11.5 million in accrued interest, allegedly owed by the Permanent Mission of India to the United Nations. Exhibit 20182. That suit was removed to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 1441(d) (2012). The complaint alleged that the Indian Mission, which occupied diplomatic office and residential space in

a GoI-owned building in Manhattan, had failed to pay property taxes to the City from March 1991 to January 2003. *Id.* The GoI contended that it was exempt from such taxes pursuant to the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, and the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77 (collectively, the Vienna Convention).<sup>6</sup> The GoI wanted DOS's assistance in resolving the New York City tax dispute.

#### B. The Mumbai Property Tax Dispute

At the same time, there was an unresolved issue concerning whether the USG owed property taxes on the NCC project site at BKC, as well as other USG properties in Mumbai. Consistent with the GoI's argument in its dispute with the City of New York, DOS took the position that, under the Vienna Convention, the USG was exempt from property taxes on its consulates. In an internal DOS e-mail message dated October 7, 2004, bearing the subject line "Mumbai Property Tax Issues," James Leaf, the Department's management officer for the U.S. Consulate General in Mumbai, summarized the issue as follows:

The [USG] owns two properties freehold in Mumbai[,] Lincoln House . . . , which contains the Consulate and Consul General's Residence . . . [and] Washington House, the Consulate apartment building. . . .

The site of the [NCC] project is located in the [BKC] . . . and was leased from April 1, 2004. We prepaid the 99-year lease and have an option for renewal. In addition, in April 1995, the [USG] purchased the American Center building . . . , which houses Public Affairs, [Foreign Commercial Service], and has two apartments, but leases the ground underneath from the municipal government, [MCGM]. . . .

[MCGM] has been sending property tax bills for both Washington House and Lincoln House requesting payment for taxes in arrears since the beginning of the 1970 fiscal year (starting April 1, 1970) though the Consulate's records date back to only 1994. In addition, the government has been requesting the payment of property taxes for the American Center back to the beginning of

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<sup>6</sup> This dispute would later be the subject of a case before the United States Supreme Court titled *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193 (2007), which, after DOS intervened in the matter on remand, was subsequently resolved in the GoI's favor in *City of New York v. Permanent Mission of India to the United States*, 618 F.3d 172 (2d Cir. 2010), *cert. denied*, 564 U.S. 1046 (2011).

the 1996 fiscal year (starting April 1, 1996). Some, but not all of the components of the property tax have been waived by [MCGM]. . . .

*The Consulate is also in receipt of a full tax bill for the [NCC site]. A letter was sent from the Consulate to [MCGM] on September 14 requesting an exemption from all taxes but a reply has not yet been received.*

Exhibit 20558 at 298640 (emphasis added).

Responding from a location within the United States, the Tax and Customs Director for the Office of Foreign Missions (OFM) within DOS discussed the interrelatedness of the New York City tax dispute and the Mumbai property tax issues, the potential it had to affect the NOB project, and the Department's overall effort to address future similar disputes:

Thanks for the briefing, Jim. . . . It's very complicated on this end too, especially since in [New York (NY)] where the City has a restrictive view of the Vienna Convention rights and doesn't recognize full property tax benefits for [United Nations] Missions (State Dept disagrees with their position but we can't get them to change it). I'm sure you know that India (along with Mongolia) has sued NY on the issue and we're waiting for the Fed[eral] C[ourt] decision on the Foreign Sovereign Immunities [Act] issues involved.

I think it will be very important to try to address the [NCC] construction project tax issue as distinct from the property tax quagmire. . . .

. . . .

Frankly, Jim, there's more at stake here than the \$6 million foreign tax exposure on the Mumbai NOB project. *This is the first effort under [DOS's] new push for getting our tax relief rights under international law.* We're including Kathmandu, Mumbai, and Suva on the first trip because the 3 situations are very different, are worth alot [sic] of money, and offer varying degrees of the likelihood of success. One objective has been to force OBO [and other DOS sections] to work cooperatively to get it done. . . . The second objective is to get a couple successes on this trip so we can come back and show that it's possible and worth the effort. What we learn on this trip will help us put together a template for the [Department] to follow on future capital construction projects – the \$100 million in foreign tax exposure is just the start, and goes up as the building program intensifies in [2007] and beyond.

Exhibit 20558 at 298639 (emphasis added).

In fact, back in 2003, the United States Embassy in New Delhi, India, had already indicated its employees' understanding of the reciprocal nature of its request for tax exemptions and the GoI's expectation of the same exceptions for its properties in the United States. The Embassy had sent a diplomatic note to the GoI's MEA on September 29, 2003, requesting expeditious approval for DOS to proceed with the lease for the BKC land and "ministry confirmation that the acquisition of the land and the land itself will be exempt from the payment of all taxes, stamp duties, and other charges as provided for in Article 23 of the Vienna Convention." Exhibit 14169 at 161951. It expressly recognized the reciprocal nature of tax exemptions that the GoI would expect for property that the GoI would acquire in the United States:

The Embassy has been advised that the Government of India is planning to acquire property in the United States for use as a Cultural Center, and will be seeking similar assurance that the acquisition of the land and the land itself will be exempt from payment of all taxes, stamp duties, and other charges under the same provisions of Article 23 of the Vienna Convention on Diplomatic Relations.

The Embassy anticipates that such reciprocal exemptions will be granted as provided under the Vienna Convention on Diplomatic Relations. However, the responsibility for processing requests for tax exemptions from Foreign Missions in the United States is vested with the Property Section of the Office of Foreign Missions (OFM) of the U.S. Department of State.

*Id.* at 161951-52.

Discussions between the USG and the GoI concerning the property tax issue continued through the end of 2004. Mr. Leaf met with the then-MCGM Commissioner, Johnny Joseph, on or about October 19, 2004, to discuss an exemption from property tax bills for the entire NOB project. Exhibit 20219. Mr. Leaf then met with a deputy secretary for the State Government of Maharashtra on December 22, 2004, regarding tax treatment of the United States Consulate and the NCC project and, as he indicated in an e-mail message to the DOS OFM's Tax and Customs Director and other DOS personnel the next day, "repeated [the Department's] request for an exemption from *all* applicable taxes from the State Government, *including all taxes currently levied by [MCGM].*" Exhibit 20188 (emphasis added). Yet, in a letter from S.G. Shinde, MCGM Assessor and Collector, dated January 28, 2005, titled "Exemption from Property Taxes," Mr. Leaf was informed that, although foreign

consulates are typically granted exemptions from some aspects of property taxes, certain portions “are indispensable.” Exhibit 20219.

Negotiations continued into 2005. An internal DOS email message to Mr. Leaf dated February 1, 2005, addressed the fact that, before construction of any structures above the plinth level could occur, MCGM would have to issue a tax “no objection certificate” (NOC), which, according to a MCGM representative, would occur only if DOS first agreed to pay the outstanding property taxes for the land on which the NCC was to be constructed:

Following is submitted with regards to Property tax exemption issue related to BKC land in Mumbai.

....

During multiple meetings with Mr. S.L. Lakeshri (Superintendent, [H/East] ward of [MCGM], Assessor & Collector office) to gauge implication of non payment of Property taxes at the time of excavation of [BKC] land. It was learned that MMRDA is the Principle [sic] body to approve the proposed plan, hence plan should be approved by MMRDA and a copy of proposed plan should be submitted to [MCGM] for their information, however a “no objection certificate (NOC)” certification has to be obtained from [MCGM] stating that the property tax issue is under review and unsolved. This will allow the post to complete the project, *if [MCGM] does not give the NOC then post can do construction only till basement level. Only the [MCGM] Commissioner has powers to give a NOC and . . . also has powers to reconsider the [amount of the tax].*

....

*Mr. Lakeshri stated that he will assist the Consulate in getting an approval as [a] residential/Commercial bldg. only if Consulate assures to pay the property taxes and the pending bills will be settled in reasonable time frame.*

Exhibit 13363 at 23198 (emphasis added). Subsequently, during a March 2005 meeting, the MCGM representative, Mr. Lakeshri, informed another DOS representative that “under no circumstances [would it] be possible for [the] USG to get total exemption on property taxes.” *Id.* at 23196.

Maintaining the position that the Vienna Convention exempted the USG from payment of any taxes, DOS officials internally discussed the extent to which non-payment

of the taxes could negatively affect the NCC project. Exhibit 13363 at 23194-95. In a March 23, 2005, e-mail message to a DOS negotiator located at the U.S. Consulate General in Mumbai, the deputy management officer for the United States Embassy in New Delhi, Gail Cleveland, questioned whether non-payment of taxes by the USG would cause MCGM to deny issuance of necessary building permits for the Mumbai NCC project:

It's clear the municipality will keep trying – as you said they'd rather reduce the [tax] rate and receive something. If we simply don't pay . . . until this can be worked via the MEA here, isn't it likely that we'll be denied the building permits we need?

*Id.* at 23195. In response, the DOS negotiator indicated that he had met with an MMRDA official to “gauge the consequences” of DOS refusing to pay any taxes and “go[ing] ahead with the project.” *Id.* The negotiator explained that, under the local procedures, MMRDA had limited authority to approve construction above the plinth level; that further construction required the approval of the MCGM Commissioner; and that, in the event of “any dispute OR disagreement on tax policy of [MCGM] OR of the host government, we need to [seek a] NO OBJECTION CERTIFICATE (NOC) from the [MCGM] Commissioner to go ahead with the project, as only the Commissioner is empowered to do so.” *Id.* Ms. Cleveland forwarded the negotiator's response to (among others) Mr. Rosenfeld, stating that “[t]he tax issue described in the string of e-mails below has potential to delay the Mumbai N[C]C. We continue to work the issue.” *Id.* at 23194.

On the evening of March 23, 2005, Mr. Rosenfeld apprised others at DOS of the situation developing in Mumbai:

This just in. It appears the City of Mumbai has been trying to collect taxes from the consulate since 1970 and, of course, the consulate has never paid. *The post received a tax bill on the first six months of ownership on the site for \$333,333±, which they have also ignored.* Our position is that the city's position is in violation of the Vienna Convention, but they have not stopped sending bills.

The permitting authorities – MMRDA and the [MCGM] – have been big supporters of this project and are, I believe, independent of the city on this development. *Post has just shared this problem with us and while it is a risk, I think it will be resolved or moot prior to any need to secure a building permit.* This issue never came up in any of our conversation[s] with the MMRDA or the [MCGM]. They may have been being polite, but it was never raised.

Exhibit 13363 at 23193-94 (emphasis added).

Ms. Cleveland responded by e-mail message the next morning, stating that DOS “has never paid the tax bills on the current consulate,” but that, “[o]n the new consulate” that was to be constructed, DOS “did not just ignore the bill, but went to speak with the relevant authorities who have lowered the bill, but refuse to acknowledge our exemption under the Vienna Convention.” Exhibit 13363 at 23193. She indicated that MCGM “apparently will lower it even further – they just want to get something out of us, which it would be a mistake to pay” because of the precedent that it would set. *Id.* Mr. Rosenfeld responded that DOS’s “only interest is that we get the building permit without a delay, . . . but you are right in not paying.” *Id.*

On April 25, 2005, the day before the solicitation for the NCC was issued, the Consulate General’s office in Mumbai sent a letter (signed by Mr. Leaf) to the Secretary and Chief Protocol Officer for the State Government of Maharashtra in Mumbai, asking the Government of Maharashtra to “exempt all USG properties from all taxes under provision of Vienna Convention (Article 32).” Exhibit 14169 at 161941-42. Mr. Leaf sent another letter, requesting a response to the first, on June 8, 2005. Exhibits 14169 at 161944, 22165 at 253412. No response was received.<sup>7</sup>

Then, on July 5, 2005, the Officer-in-Charge of the United States Embassy in New Delhi met with, among others, the MEA Chief of Protocol to discuss various outstanding tax issues associated with several properties and projects, including DOS’s request for tax relief for the NCC. Exhibit 20535. The MEA protocol chief represented that, because of the taxation problems at the GoI’s United Nations mission in New York, MEA “could not give a favorable answer” to DOS’s request for tax relief for the NCC. *Id.* at 336601. Although the Officer-in-Charge argued that it was inappropriate to link the NCC taxes to the New York City tax dispute and that DOS, as part of the Federal Government, could not control the actions of a city or state government, MEA indicated that it would not offer relief or assistance on the NCC tax issues until and unless DOS acted to resolve the New York tax dispute. *Id.* at 336602.

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<sup>7</sup> In fact, more than a year later, still with no response to those letters, the U.S. Consulate General’s office in Mumbai sent another letter on September 12, 2006, seeking a response. Exhibit 14169 at 161946.

### III. Solicitation and Pre-Contract Matters

As discussed above, DOS issued solicitation R0013 for the design and construction of the NCC on April 26, 2005. JSF ¶ 1. Before the solicitation was issued, Mr. Rosenfeld did not amend the PAP to reflect any concerns about the potential effect of tax disputes on the GoI's issuance of permits, and OBO did not include any information in the solicitation about those concerns.

YDJV, having formed as a joint venture entity in April 2005 for the express purpose of pursuing DOS overseas projects and, in particular, the Mumbai NCC project, JSF ¶ 4, submitted a proposal in response to the solicitation. In its proposal, YDJV acknowledged that, if awarded the contract, it would be solely responsible for providing complete design and construction services for the Mumbai NCC, including management, professional design services, and construction necessary to meet the contract requirements within established schedules. Exhibit 1531 at 173806. YDJV also represented that its team would prepare a project execution schedule, a design submittal schedule, and a master summary schedule for the project, each of which YDJV would maintain and update every month. *Id.* at 173812. It also represented that it would compile and maintain an as-built project schedule to reflect actual work performance, as well as numerous other schedules, all of which would be prepared and maintained using P3 software from Primavera Corporation. *Id.*

From May 25 to 27, 2005, DOS held a pre-proposal conference for prospective offerors in Mumbai. Exhibit 20319. Two representatives from Yates (Frank Mitchell and Larry Harrington) and two representatives of Desbuild (Ananth Badrinath and Yogesh Hate), attended that conference upon behalf of YDJV. As part of that conference, the YDJV representatives met with MMRDA representatives, who discussed zoning, licensing, and clearance requirements that might affect the winning bidder. Exhibit 1500. The MMRDA representatives also explained the permitting process, including a requirement that a local architect be involved in submitting the permit applications, but indicated that permits would not be a problem on the project. Tr. Vol. 4 at 15; Exhibit 1500. The record does not indicate whether, or to what extent, MMRDA said anything about whether it would grant conditional approvals for foundation work prior to issuance of official foundation permits. YDJV also met with MCGM representatives, who similarly discussed rules and regulations pertaining to construction projects, water, and sewage. Exhibit 1500 at 176426. Neither OBO, MMRDA, nor MCGM mentioned any tax or anticipated permit problems during the pre-proposal conference. Tr. Vol. 4 at 14-16.

#### IV. The Contract

On September 27, 2005, DOS awarded to YDJV contract no. SALMEC-05-C0039 for the design and construction of the Mumbai NCC at a firm-fixed price of \$86,881,576. JSF ¶ 15. The contract required completion of the project within twenty-eight months of the issuance of the first of five limited notices to proceed (NTPs), the first one relating to design work. Exhibit 1 at 1, 21, 31; JSF ¶ 15.

The contract price included all work necessary for the project, including “permits,” as follows:

The Contract Price includes all labor, materials, equipment and services necessary to accomplish the design and construction required by the Contract Documents, including applicable customs duties, transportation to the site, storage, premiums for insurance and bonds required by the Solicitation Documents and/or the Contract Documents, permits, licenses and inspection fees, and all other items called for by the contract or otherwise necessary for performance of the contract.

Exhibit 1 at 14 (clause B.1.1). The contract indicated that “[n]o additional sums will be payable on account of any escalation in the cost of materials, equipment or labor, or because of the contractor’s failure to properly estimate or accurately predict the cost or difficulty of achieving the results required by the contract.” *Id.* at 16 (clause B.3). Changes in the contract price or time to perform were to “be made only due to changes made by the Government in the work to be performed, or by delays caused by the Government.” *Id.* The contract language expressly advised the contractor “that the [USG] has no agreements with the Host Nation Government excluding any tax, including but not limited to Value Added Tax,” *id.* at 14 (clause B.1.3), but did not disclose that there was an outstanding, and unresolved, dispute about whether the USG owed property taxes relating to the project site. JSF ¶ 16.

A clause titled “Permits and Licenses” (the P&L clause) in section C.1.6.1 of the contract’s Statement of Work specified that it was YDJV’s responsibility to obtain all necessary permits and licenses related to the project, but also incorporated information from the PAP about MMRDA’s willingness to issue “conditional approvals” for foundation work, prior to issuance of official foundation permits, to assist in expediting foundation construction:

The Contractor is responsible for obtaining all permits (such as building, utility, construction, occupancy), developing studies (such as Environmental

Impact Statement and Traffic Impact Study) and licenses required to execute the work. The Contractor shall provide all drawings and other design documents needed to obtain those permits and licenses for which they are responsible, as well as official translations as required to execute those permit actions. The host government will accept a permit application for site work and foundations, and a final submission defining site plan, building massing, interior fire exiting, toilets, and elevators. A local registered Architect or Licensed Surveyor must submit the plans for approval to the [MMRDA]. Phased submissions will be entertained for site development and foundations, but substantial interim drawings must specify the general extent of the project. Drawings showing fire stairs and exiting, structural design and life-safety issues are required. MMRDA approved plans are forwarded to the [MCGM], which is the final authority. *Conditional approvals will be issued to expedite foundation construction.*

Exhibit 2 at 100 (emphasis added). That clause also required the contractor to “submit a list of drawings to the [contracting officer’s representative] for approval prior to releasing drawings to local permitting and/or licensing agencies for any permits,” with an added requirement (for security purposes) that all drawings be “labeled by generic terminology (e.g. office, restroom, mechanical space).” *Id.*

Relatedly, the contract incorporated by reference the clause at Federal Acquisition Regulation (FAR) 52.236-7, “Permits and Responsibilities (Nov 1991)” (the P&R clause). Exhibit 1 at 85. That clause, in relevant part, further prescribed the contractor’s obligations for obtaining required permits:

The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work. The Contractor shall also be responsible for all damages to persons or property that occur as a result of the Contractor’s fault or negligence. . . .

48 CFR 52.236-7 (2005).

The contract, through clause H.25, also provided that the Government could, in its sole discretion, choose to undertake to provide additional services upon behalf of the contractor – beyond those that the Government was contractually obligated to provide, including but not necessarily limited to assistance in obtaining tax exemption licenses and

permits – but that any such extra-contractual effort or assistance would not shift the contractor’s obligations to the Government:

## **H.25 OTHER SERVICES NOT TO RELIEVE CONTRACTOR**

In the interest of expediting the project, the Government may, in its sole discretion, undertake to provide additional services for or on behalf of the Contractor which are not required of the Government under this contract, such as assisting the Contractor in obtaining customs clearances other than those for which the Government is responsible, tax exemptions, licenses, permits and approvals from local governmental authorities. However, the Government shall be under no obligation to do so, and neither the provision nor the failure to provide such services nor the manner in which such services are provided shall relieve the Contractor of or excuse the Contractor from any of its responsibilities under the contract.

Exhibit 1 at 61.

In addition, the contract included a clause that placed upon the contractor the burden of complying with all laws, codes, and ordinances of the host country:

## **H.19 LAWS AND REGULATIONS**

*H.19.1 The Contractor shall, without additional expense to the Government, be responsible for complying with all laws, codes, ordinances, and regulations applicable to the performance of the work, including those of the host country, and with the lawful orders of any governmental authority having jurisdiction. Host country authorities may not enter the construction site without the permission of the Contracting Officer. Unless otherwise directed by the Contracting Officer, the Contractor shall comply with the more stringent of the requirements of such laws, regulations and orders and of the contract. In the event of conflict among the contract and such laws, regulations and orders, the Contractor shall promptly advise the Contracting Officer of the conflict and of the Contractor’s proposed course of action for resolution by the Contracting Officer.*

Exhibit 1 at 59 (emphasis added).

Clause E.2 of the contract defined when “substantial completion” of the project would be considered to have been reached:

“Substantial Completion” means the stage in the progress of the work as determined and certified by the Contracting Officer or Contracting Officer’s Representative in writing to the Contractor, on which the work or a portion of thereof designed by the Government is sufficiently complete and satisfactory, in accordance with the requirements of the Contract Documents, that it may be occupied or utilized for the purpose for which it is intended, and only minor items such as touch-up, adjustments, and minor replacements or installations remain to be completed or corrected which (1) do not interfere with the intended occupancy or utilization of the work, and (2) can be completed or corrected within the time period required for final completion.

Exhibit 1 at 21. It further defined the “Date of Substantial Completion” as the “date determined by the Contracting Officer or Contracting Officer’s Representative of which substantial completion of the work has been achieved,” with the added caveat that the contractor, to achieve substantial completion, would have to “complet[e] certain general construction work as identified in Section J, Attachment J.1.12, CONTRACTOR ACCREDITATION WORKSHEET, at a minimum of thirty days prior to substantial completion.” *Id.* (clause E.2.2.). That accreditation worksheet required approval of the completed exterior physical security, interior physical security, telecommunications operations facilities, shielded enclosures and parent rooms, roof-mounted communications support equipment, emanations security, telecommunications cabling systems, non-secure telephone systems, and electrical systems. Exhibit 17.

The contract also incorporated the “Liquidated Damages” clause at FAR 52.211-12 and granted DOS the right to impose liquidated damages of \$9481 per day for contractor-caused delays in completion of the project. Exhibit 1 at 31 (clause F.3). It further provided that “[l]iquidated damages will be assessed from the completion date indicated in the contract . . . to the date that substantial completion is actually achieved by the Contractor, as determined by the Contracting Officer.” *Id.* at 35 (clause F.12). It further provided that, given that the contract “consists of multiple phases, projects, or buildings, the liquidated damages rate will be prorated on the ratio of the estimated price of each phase, project or building to the Contract Price unless otherwise provided in the Contract Documents.” *Id.* Nevertheless, the contract also provided that YDJV would “be allowed time, not money, for *excusable* delays as defined in FAR 52.249-10, Default,” including but not limited to acts of God, acts of the host country government in its sovereign capacity, fires, floods, and unusually severe weather. *Id.* at 32 (clause F.9) (emphasis added).

The contract incorporated by reference the “Changes (Aug 1987)” clause at FAR 52.243-4, the “Changes and Changed Conditions (Apr 1984)” clause at FAR 52.243-5, and the “Suspension of Work (Apr 1984)” clause at FAR 52.242-14. *See* Exhibit 1 at 91, 93. It

also contained a special “Equitable Adjustments” clause (clause H.31.1) indicating that “[a]ny circumstances for which the contract provides an equitable adjustment, that causes a change within the meaning of paragraph (a) of the ‘Changes’ clause shall be treated as a change under that clause.” *Id.* at 63.

## V. Performance

### Period 1 (Contract Award through September 30, 2007): 362 Days of Delay

#### A. Initial Preparations

Having awarded the contract to YDJV on September 27, 2005, DOS issued the first limited NTP on November 17, 2005, and the contract completion date was set for March 16, 2008. JSF ¶ 15; Exhibit 13378 at 173915.<sup>8</sup>

Under its original schedule, YDJV planned to submit 35% design drawings to DOS (as required by its contract) no later than February 13, 2006, and to submit 100% design drawings no later than June 26, 2006. Exhibit 31000-A at 349. YDJV viewed the submission of the 35% drawings as a “precursor” to approaching the local GoI authorities for any construction permits. Exhibit 13387.<sup>9</sup> Further, under the original plan, YDJV anticipated beginning to lay foundations on June 27, 2006, immediately after completing the 100% drawing design work. Exhibit 31000-A at 354. YDJV did not build into its baseline schedule time for applying for or obtaining construction permits. Tr. Vol. 7 at 54.

YDJV did not submit the 35% drawings until March 10, 2006, Exhibit 10145, a delay of twenty-five days under its “as planned” schedule, and it did not submit (and was not ready to submit) any permit applications by that date. DOS promptly reviewed those applications.

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<sup>8</sup> DOS subsequently issued four more limited NTPs before issuing the final and full NTP on June 12, 2006. Exhibit 13453; *see* Exhibits 13438, 13452.

<sup>9</sup> Although the contract did not expressly require that permit applications be delayed until submission of 35% drawings, Tr. Vol. 10 at 62-64, the GoI permit process required submission of certain drawings as part of the permit application, essentially making drawing and design review a precursor to permit application.

## B. The PCC Authorizing Plinth Construction

While preparing its 35% drawings, YDJV began contemplating applying for construction permits. In a meeting on March 20, 2006, YDJV asked its foundations subcontractor, Shapoorji Pallonji & Co., Ltd. (Shapoorji), immediately to begin the permit application process. Exhibit 13425. In a confirmation letter the next day, YDJV recognized that permit application was “a time consuming and lengthy process which can adversely impact the completion of the Project.” *Id.* at 352405. Accompanying YDJV’s letter was another letter that YDJV had obtained from the U.S. Consulate General for use in the permit application process, asking relevant authorities to process any permit applications that Shapoorji submitted as expeditiously as possible. *Id.* at 352405-06.

Shapoorji hired a permit firm, Vartak & Sons Pvt. Ltd. (Vartak), to submit the YDJV permit applications. Vartak submitted an application to MMRDA on May 11, 2006 (apparently, as a resubmission following earlier letters in April 2006), for a permit to erect some temporary structures on the NCC site and to perform other site work, including construction of a perimeter wall. Exhibits 13455, 13460. MMRDA, after Vartak paid mandatory development fees that it had initially failed to include with its request, issued that permit on June 26, 2006. Exhibits 13450, 13460. YDJV had already begun the temporary structure erection and perimeter wall pile driving before it applied for the permit, Exhibits 900, 901, and all temporary structures were erected before the permit was actually issued. Exhibit 902. Vartak did not seek permission to construct foundations in its April submissions or May 11 application.

Vartak did not submit any further applications until August 1, 2006, at which point it submitted two separate letters titled “The proposed new U.S. Consulate Complex,” one addressed to MMRDA and one addressed to MCGM, attaching what it described as “detailed building plans” of the “various permanent structures/buildings proposed” for the NCC and requesting that MMRDA and MCGM “issue us at your earliest, your formal sanction/approval to the proposed works as shown on the plans.” Exhibits 20664, 20665. The letters did not expressly mention either foundations or plinths for the buildings, making it unclear whether Vartak intended through these letters to obtain a PCC, which was required under MMRDA and MCGM regulations before a FWCC could be issued, or full FWCCs for the entire project.<sup>10</sup> Regardless of any ambiguity in the letters, they plainly did not request

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<sup>10</sup> Although the parties have presented evidence about whether both MMRDA and MCGM needed to issue PCCs to allow for plinth construction, YDJV completed its plinth work before MCGM ever issued a PCC, and MCGM never took any action against YDJV for having performed plinth work without an MCGM PCC. To the extent that YDJV was

a permit limited to foundations or something less than plinth construction, the phased issuance of permits (except to the extent that Vartak was possibly seeking a PCC prior to seeking a FWCC), or conditional approvals of foundation construction.

Despite the absence of a foundation permit or a PCC, YDJV began the process of pile drilling (using augers, or hydraulically-operated piling drill machines) for the NOB foundation on or about August 9, 2006, Exhibit 912, a delay from YDJV's planned commencement of pile installation at the NOB of June 27, 2006.<sup>11</sup> At this point, creating the footprint of the NOB was the critical item, on the critical path of performance, that needed to proceed if YDJV was to complete the project in the time frame that it had anticipated. Tr. Vol. 1 at 29, 85.

On September 22, 2006, MMRDA, unaware that YDJV was already beginning pile work, responded to Vartak's permit application, returning the submittal because, among other noted deficiencies, Vartak had failed to attach the actual permit application (known as Appendix X) to its submission. Exhibit 311. MMRDA also indicated that the application was unaccompanied by any of the NOCs or certificates that are required for a PCC (including those from the Mumbai electric, police, fire, airport, river protection, environmental, and urban planning departments) and did not contain plans of all of the structures or of walkways, canopies, projections, and porches. *Id.* Vartak took no action in response before resigning from the project on November 9, 2006. Exhibit 312; *see* Exhibit 317 (YDJV acknowledging that it had requested Vartak's resignation because of "the inordinate length of time that had transpired to submit the required permit documentation, and the incompleteness of the permit application").

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seeking a PCC from MCGM, it is irrelevant to the circumstances of YDJV's work on this project.

<sup>11</sup> YDJV has argued in its briefs that there was only negligible delay to its planned late start date of June 27, 2006, for commencing pile installation because it began pile installation at the warehouse (despite the absence of a foundations permit or a PCC) on July 1, 2006. The original plan, though, was to begin pile installation at the NOB, not the warehouse, on June 27. The NOB was on the critical path at this point in time, and the warehouse was not. For reasons that we will explain below, we reject YDJV's argument that work on a non-critical item, outside the context of its planned schedule, somehow negates the delay to the critical NOB item. Further, even YDJV's own scheduling expert has attributed the delay in beginning NOB piling (from June 27 to August 9, 2006) as a critical path delay. Tr. Vol. 7 at 50.

At about the same time, YDJV informed Shapoorji, its foundations subcontractor, that Shapoorji would not receive any further subcontracts from YDJV for additional construction work on the NCC project. Exhibit 13508. Shapoorji had assisted YDJV in preparing its proposal for the project and had anticipated that it would serve as YDJV's primary subcontractor throughout contract performance. Nevertheless, YDJV informed Shapoorji by letter dated September 22, 2006, that it found Shapoorji's price for the remaining construction work too high and was going with a lower-priced subcontractor, Larsen & Toubro, Ltd. (L&T). YDJV also complained that it was dissatisfied with Shapoorji's poor management and staffing of the project for the work currently being done and that, although it had been asking Shapoorji to hire an experienced project manager for the past five months, Shapoorji had taken no action to do so. *Id.* at 352395. Nevertheless, YDJV directed Shapoorji to continue its work to complete the perimeter wall and piling for the NOB, the GSO, and the warehouse, as well as to obtain any remaining permits. *Id.* YDJV indicated that, at that point in time, it expected the perimeter wall to be completed by October 5, 2006, and piling work completed by October 15, 2006, *id.*, deadlines that were not met.

As of September 29, 2006, YDJV was reporting a 76-day delay in the project schedule and that it anticipated continuing slow progress until its new subcontractor, L&T, mobilized on November 6, 2006. Exhibit 919, 923.

On or about November 16, 2006, Shapoorji hired a new firm, Design Cell, to replace Vartak as its permit expeditor, essentially restarting the entire permit application process following Shapoorji's finding (after visits to MMRDA and MCGM) that Vartak had performed very minimal work. Exhibits 311, 313, 13570; Tr. Vol. 12 at 62.

On or about November 19, 2006, YDJV decided to impose a two-week "stand-down" on work at the site to allow L&T "to gather workforce and machinery." Exhibit 927.

Subsequently, MMRDA became aware that YDJV was performing NOB pile and foundations work without a permit. In a meeting on November 28, 2006, during YDJV's "stand-down" period, the MMRDA Commissioner, Dr. T. Chandrashekhar, told representatives of YDJV (Tom Milos, who was then serving as YDJV's project manager), Design Cell (Paritosh Parelkar), and OBO (Robert Browning, the OBO project director) that the NOB work which YDJV was doing was illegal and verbally told YDJV to shut down its construction operation until it had obtained a PCC. Exhibit 13582.<sup>12</sup> Mr. Milos quickly informed the owners of YDJV, Ananth Badrinath and William Yates (both of whom were

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<sup>12</sup> Dr. Chandrashekhar also informed the then-Consul General that there would be "some serious problems" if YDJV did not stop work until it had a PCC. Tr. Vol. 9 at 29.

located in the United States), of the meeting and indicated that, even though MMRDA had not issued a formal stop work order, he interpreted the absence of such a written order as a means of “giving [YDJV] an out” because, if a formal stop work order were issued, “it would be accompanied by fines” that likely would exceed \$1.5 million and would have to be paid by cashier’s check before any work on the project could resume. *Id.* Mr. Milos recommended to Messrs. Yates and Badrinath that, even though the action could result in claims from subcontractors, YDJV immediately stop all project work (other than some compound perimeter wall backfilling unrelated to the NOB construction) until the PCC could be obtained, a process that Design Cell had indicated should take approximately five weeks. *Id.* YDJV management, including Jeff Cross (the YDJV employee in the United States who had “overall responsibility for the project,” Tr. Vol. 6 at 184-85), rejected Mr. Milos’ recommendation, even after being told that Design Cell intended to walk away from the project if YDJV violated the MMRDA Commissioner’s instruction and after a plea from another YDJV on-site manager, Tom McKenney, regarding the ramifications to the USG (including fines upon the USG in excess of \$1 million) and to YDJV if YDJV did not stop operations until obtaining the PCC. Exhibits 13586, 13587.

After learning that YDJV intended to continue performing piling and foundation work despite the MMRDA Commissioner’s admonition, the DOS contracting officer, David Vivian, issued a letter on November 29, 2006, directing YDJV to “bring [its] performance in line with the contract and the regulations of the host Government” and, “[t]o that end, . . . to stop all construction activities on the New Consulate Compound that violates [sic] the contract and the local authority’s regulations.” Exhibit 315. In response to that letter, YDJV stopped NOB piling and foundation work, and Mr. Badrinath indicated to the OBO contracting officer and the OBO project manager that, “upon realizing the adverse impacts of continued work in the field,” it had ceased piling and grade beam work pending receipt of appropriate permits. Exhibits 316, 317; Tr. Vol. 4 at 30.<sup>13</sup>

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<sup>13</sup> Despite Mr. Badrinath’s representations, Jeff Cross of YDJV subsequently wrote a letter to the DOS contracting officer on December 18, 2006, stating that, although YDJV had stopped work in response to what he called the “stop work order,” YDJV retained its right to seek compensation for the suspension of work. Exhibit 13607. Mr. Cross identified YDJV’s understanding that MMRDA was supposed to issue phased permits or, at least, conditional approvals to expedite foundation construction, and he represented that, by submitting drawings through Vartak in June 2006 for a site work permit, YDJV had provided MMRDA with the information that it needed to issue such permits and approvals. *Id.* Yet, Vartak had not requested phased permits (except to the extent a PCC constitutes part of a “phased permit” process), foundations permits, or conditional approvals in its submissions. Further, YDJV was aware that issuance of foundations permits or conditional approvals for

Design Cell submitted Appendix X to MMRDA on or about December 15, 2006, Exhibit 318, and submitted signed drawings on January 5, 2007. Exhibit 13615. On January 19, 2007, MMRDA returned the submittal to Design Cell, noting several deficiencies, the most important being a floor-to-floor height issue that, if not modified, would cause the project to exceed a square-meter limit imposed by the Mumbai Development Control Regulations. Exhibit 324. Those regulations required that, if a building was to have a floor-to-floor height of more than 4.2 meters, there had to be an environmental impact study analyzing it (a requirement that did not exist for buildings with lesser floor-to-floor heights). The OBO Standard Embassy Design, which was available to offerors during the bidding process, required a certain amount of space between floors in DOS buildings to accommodate various security and other equipment located in mechanical spaces between the floors, Exhibit 28 at 1012, and the planned height of the NOB was sufficient to require such a study. Although YDJV was contractually responsible for any necessary environmental impact studies, Exhibit 2 at 100 (clause C.1.6.1), it had not arranged for such a study to support the floor-to-floor height requirements of the NOB.

On February 15, 2007, YDJV representatives met with OBO's David Louh, a senior OBO employee who traveled from Washington to Mumbai, to discuss progress on the project and the permit process. At that meeting, Mr. Louh directed YDJV to proceed with any work that was legal prior to receipt of a PCC, including under-slab utilities, rebar, and formwork preparation and fabrication. Exhibit 13819 at 209896; Tr. Vol. 1 at 68. Also at the February 15 meeting, Mr. Louh suggested that YDJV ask MMRDA for a "foundations only" permit, Exhibit 13819 at 209895, something that YDJV had not previously done. Later that day, YDJV met with Pravin Malkani, a director of Design Cell, and asked him formally to seek a foundations permit from MMRDA. Exhibit 20413. In response, Mr. Malkani submitted a letter to MMRDA, dated February 15, 2007, asking whether MMRDA might issue a "Plinth Certificate" i.e. A plinth commencement certificate" for the NCC to allow YDJV "to undertake and complete all sub ground works such as foundation and allied services" before MMRDA had approved the submitted building plans. Exhibit 20402. Although this letter did not specifically ask for a "foundations only" permit, we interpret it as seeking conditional approval to allow foundation work.

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foundations was contingent upon submission of a proper request. *See* Deposition Designation of Frank Mitchell, Vol. II, at 209 (acknowledging requirement to seek a construction permit, but that "[f]oundations could be started," following MMRDA approval, "with the correct information"). On December 19, 2006, the DOS contracting officer responded to Mr. Cross's letter, stating that he "did not issue a Stop Work Order" and indicating that he was simply trying to preclude the Government from being "fined for the contractor's violation of host nation laws and regulations." Exhibit 321.

On February 16, 2007, YDJV, in response to Mr. Louh's February 15 suggestion, began installing underground utilities and performing backfill and rebar bending, despite the fact that MMRDA had not issued a PCC. Design Cell submitted new drawings to MMRDA on February 23, 2007, that resolved the height and environmental clearance issues. Exhibits 329, 13676.

On March 1, 2007, YDJV wrote a letter to Mr. Malkani asking him to submit a formal written request to MMRDA seeking a foundations permit. Exhibit 20413. Mr. Malkani responded by letter the next day, stating that, in Design Cell's opinion, MMRDA regulations did not provide for a "foundations only" permit and that, "if this needs to be followed up with MMRDA[,] your clients can call on them and ask them directly in this regard." Exhibit 20414. Mr. Malkani also testified that he contacted some MMRDA employees who told him that there was no provision in law allowing for foundation work prior to approval of building plans. Deposition Designation of Pravin Malkani, Vol. I, at 133-34.

Nevertheless, only four days later, on March 6, 2007, MMRDA verbally approved Design Cell's request to start foundations, Tr. Vol. 10 at 143-48, and YDJV began working on structural concrete that day. There was some subsequent confusion regarding the scope of the written permit that was subsequently issued – MMRDA first issued an "excavation only" permit on March 8, Exhibits 13726, 13730, rather than a full foundation construction permit or a PCC, after YDJV had paid the development fee necessary for such a permit, Exhibit 942 – but that confusion did not cause further delay because YDJV, despite the absence of a full PCC, directed its subcontractors to perform all piling and other work up to the ground floor slab of the NOB. Exhibit 13726; Tr. Vol. 1 at 68, 126. YDJV placed its first slab for the NOB on or about March 24, 2007. Tr. Vol. 1 at 69.

On March 31, 2007, as a result of a newspaper article discussing the United States' repeated efforts to obtain tax exemptions under the Vienna Convention, YDJV first became aware that there were unpaid taxes and a tax dispute involving the NCC property. Exhibit 13763; Tr. Vol. 4 at 32-33. YDJV immediately recognized that the dispute would likely affect its permit process. Exhibit 13762.

MMRDA provided its formal written approval, through issuance of a PCC, on April 12, 2007. Exhibit 20427. At the hearing of these appeals, YDJV presented evidence about subsequent efforts of its permit expeditor, Design Cell, to obtain a corresponding PCC from MCGM, but the MCGM PCC was never issued. Tr. Vol. 1 at 113-21. To the extent that Design Cell devoted time and energy to that effort, neither that failed effort nor the absence of a MCGM PCC delayed the project because YDJV went ahead and performed all of the plinth work at the NOB, and later at the other compound buildings, despite the absence of a PCC from MCGM. *Id.* at 125, 126.

In the PCC that it issued on April 12, 2007, MMRDA stated that, before it would issue a FWCC authorizing vertical construction of any of the NCC buildings, there first would have to be a joint inspection of the plinth for each building by both MMRDA and MCGM. Exhibit 20427. YDJV's ability to schedule a plinth inspection was delayed because of the slow performance of the new lower-priced subcontractor that YDJV had hired, L&T. Tr. Vol. 1 at 126. The plinth for the NOB was not completed until June 29, 2007, Exhibit 13087 at 9796-97, and YDJV's architect did not request the NOB plinth inspection until July 18, 2007. Exhibit 14030. MMRDA and MCGM conducted the joint inspection of the NOB plinth, as well as of the warehouse plinth, twelve days later (on July 30, 2007). Exhibits 6520, 14040, 21175 at 25693; Tr. Vol. 4 at 150. The NOB and warehouse plinths were the only two plinths that were ready for inspection at that time. The tax issue did not affect the NOB or warehouse plinth inspections. Tr. Vol. 1 at 125, Vol. 8 at 6.

### C. The FWCC Authorizing Vertical Construction Above the Plinth

MMRDA's issuance of the PCC permitted YDJV to perform, legally, construction work for all nine buildings in the NCC up to and including the plinth level. Exhibit 331; Tr. Vol. 1 at 81-82; Tr. Vol. 10 at 154. Before YDJV would be able to build structures on and above the plinth, it would need to obtain FWCCs from both MMRDA and MCGM. Several actions would have to occur before either MMRDA or MCGM would issue a FWCC.

To obtain the MMRDA FWCC for any particular building, YDJV would first have to obtain a joint plinth inspection, and approval, of the plinth for the building at issue by both MMRDA and MCGM. Exhibit 13839. In addition, YDJV would have to provide MMRDA with certain documents, including, but not limited to, an NOC from the Mumbai Police Commissioner. Exhibit 331 at 7048; Tr. Vol. 1 at 136.

The MCGM would issue its own FWCC only after MMRDA had first issued *its* FWCC. In addition, the applicant would have to satisfy several additional prerequisites, including, among others, (1) submission of a NOC from the Civil Aviation department approving the proposed height of the building, and (2) submission of a tax NOC from the tax assessor's office, an office that is a part of MCGM and reports to the head of MCGM. Exhibits 8649 at 104364, 20439 at 22060, 22023 at 278.

On February 27, 2007, before the PCC was issued, YDJV provided OBO with copies of the first of its mechanical drawings, which depicted a cooling system different from the one that was required by the contract specifications. Exhibit 20406. The drawings also identified specific rooms by function rather than in a generic manner, which, if submitted to a foreign authority, would have violated OBO security requirements. *Id.* at 911547; Tr. Vol. 1 at 268. In response to YDJV's subsequent inquiry about the drawings, YDJV's

subcontractor, Design Cell, indicated that the drawings were preliminary and that it would update the drawings to be submitted to support of its FWCC permit application. Exhibits 20407, 20412. Design Cell also indicated that it would ensure that the drawings submitted were more detailed than it had originally anticipated providing, as requested by OBO. Exhibit 20407.

On August 2, 2007, Design Cell submitted a request to MMRDA for issuance of a FWCC for the NOB, but indicated in its request that there was a “slight change in dimensions” of entrance lobbies on the NOB’s first floor and that Design Cell would soon be submitting revised drawings for that building to reflect that change. Exhibits 20448 at 267776, 21175 at 25693. It requested a FWCC from MCGM by letter dated August 7, 2007. Exhibits 20448 at 267779, 21175 at 25693.

For whatever reason, YDJV did not apply for a FWCC for the warehouse when it applied for the NOB FWCC, even though the joint plinth inspection by MMRDA and MCGM on July 30, 2007, covered the plinths for both the NOB and the warehouse. Exhibits 14083, 21175 at 25693. Although OBO advised YDJV by letter dated August 17, 2007, that it seemed important to obtain the FWCC for the warehouse, Exhibit 14083, YDJV took no action at that time to do so.

YDJV’s permit expeditor, Design Cell, did not request the police NOC until July 5, 2007,<sup>14</sup> had to resubmit it at least once, and did not obtain it until August 22, 2007. Exhibits 340, 14056, 14068; Tr. Vol. 1 at 114-15. OBO acted reasonably in assisting YDJV in obtaining the police NOC. *See, e.g.*, Tr. Vol. 1 at 150. The tax issue did not affect issuance of the police NOC. Tr. Vol. 8 at 6-7.

MMRDA subsequently issued its FWCC for the NOB on September 6, 2007, Exhibit 14126, and the MMRDA FWCC was forwarded to MCGM. On September 28, 2007, despite the absence of a tax NOC, MCGM issued its FWCC for the NOB after YDJV satisfied the

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<sup>14</sup> On June 21, 2007, YDJV drafted, for OBO’s signature, a cover letter to the police commissioner seeking the police NOC. Exhibit 335; Tr. Vol. 1 at 146. After some deficiencies were corrected, Mr. Browning, OBO’s project director, signed and returned that cover letter to YDJV on June 29, 2007, Exhibit 22205, and Design Cell submitted it to the police commissioner on July 5, 2007. *See* Tr. Vol. 2 at 79.

various steps necessary for obtaining one. Exhibit 343.<sup>15</sup> YDJV's subcontractor started the first vertical concrete pour for the NOB on October 3, 2007.

There were significant discussions involving MCGM, DOS, and/or the tax assessor's office during this period about whether the Government must pay property taxes on the NCC land. On June 14, 2007, the OBO project manager, Mr. Browning, and YDJV's Gene Rivenbark attended a meeting at the tax assessor's office at which Mr. Browning was handed a letter (addressed to Design Cell) indicating that the tax NOC would not be issued until "payment of following outstanding dues" – that is, the previously assessed property taxes. Exhibit 13968; Tr. Vol. 10 at 160; *see* Exhibit 13972. At OBO's request, the then-Consul General (CG), Michael Owen, met with the newly appointed MCGM Commissioner, Mr. Phatak, who assured him that the NCC project was a priority for the GoI, that MCGM wanted to do all that it could to support the project, and that the property taxes would not be an issue in granting permits. Tr. Vol. 9 at 85-87; Tr. Vol. 10 at 161. On June 25, 2007, CG Owen reported to DOS headquarters that the MCGM Commissioner had assured him that tax issues would not affect issuance of NCC building permits. Exhibit 13993 at 158206. The MCGM Commissioner reaffirmed that commitment at various times, including during a meeting on September 17, 2007. Exhibits 14142 at 272765, 14156 at 251401.<sup>16</sup>

To the extent that lower-level MCGM personnel raised the tax issue during discussions with YDJV, its subcontractors, and/or DOS representatives (including at meetings on August 17 and September 12, 2007), it had no ultimate impact upon MCGM's issuance of the FWCC,<sup>17</sup> with one limited exception. Exhibit 22277 at 92. After MMRDA

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<sup>15</sup> Although MCGM's FWCC for the NOB contained language appearing to limit the scope of the NOB authorization, the FWCC actually authorized the entirety of the planned NOB construction.

<sup>16</sup> The only evidence suggesting otherwise is a July 2, 2007, cable from the American Embassy in New Delhi to DOS officials in Washington, D.C., indicating, among a discussion of numerous other matters, that "[b]uilding permits [for the NCC] are also being withheld, delaying construction." Exhibit 10034 at 221550. But there is nothing in the record to support that statement, made by an individual located away from Mumbai who apparently was not involved in the NCC project. We do not give credence to a document containing hearsay that is contradicted by the other evidence in the record.

<sup>17</sup> YDJV and its scheduling expert relied upon deposition testimony of a DOS witness to establish that, during this time period, the MCGM Commissioner was stating that no building permits would issue until taxes were paid. The witness testimony at trial, as well as the documentary evidence, establish that the deposition testimony was in error.

issued its FWCC on September 6, 2007 (an action that had to await issuance of the police NOC and that was not delayed by the tax dispute), MCGM did not swiftly issue its own FWCC in response, even though it had previously indicated that it would expedite issuance and should have taken only a couple of days for MCGM to issue its FWCC in response to MMRDA's action. Throughout this period, despite the MCGM Commissioner's representations to DOS, there were continued rumblings within MCGM about the tax issue and about whether the FWCC should be issued without the USG's agreement to pay the taxes, even after the September 17, 2007, meeting with the MCGM Commissioner. An MCGM employee, Mr. Ghade, told a YDJV representative on September 21, 2007, that he would not issue the FWCC until the tax issue was resolved, despite what the MCGM Commissioner had said on September 17. Exhibit 14158 at 156901. It was not uncommon for lower-level MCGM employees, unaware of promises or commitments made by the MCGM Commissioner, to make statements in conflict with the Commissioner's until they received more specific communication and direction from the Commissioner. Exhibit 22277 at 127. OBO and CG Owen subsequently intervened with the MCGM Commissioner to ensure that the MCGM FWCC was, in fact, issued, but there was a tax-related delay between September 8, 2007, the date by which MCGM should have issued its FWCC, and September 28, 2007, when MCGM finally issued its FWCC.

#### D. Summary of Delay Impact

Based upon YDJV's original plan as set forth in its baseline schedule, YDJV had planned to submit 35% design drawings to DOS, something that it viewed as a precursor to its ability to apply for construction permits, no later than February 13, 2006, but it did not do so until March 10, 2006. Despite having submitted those drawings, it did not at that time apply for either a foundations permit or a PCC, waiting until August 1, 2006, to submit a somewhat confusing permit request containing serious deficiencies that YDJV, through its subcontractor, made no attempt to begin to correct until December 15, 2006.

YDJV had planned to start pilings at the NOB on June 27, 2006, but did not do so until August 9, 2006, and did so without a permit. Having never requested a foundations permit or conditional approvals, it had to cease work at a certain point after MMRDA discovered that it was working without a permit. It made an inquiry about conditional approval for foundation work on February 15, 2007; MMRDA verbally approved foundation work on March 6, 2007; and MMRDA issued a permit on March 8, 2007, that YDJV interpreted as allowing it to commence full plinth work. Subsequently, YDJV's ability to schedule a plinth inspection was delayed because of its subcontractor's slow performance. The plinth for the NOB was not completed until June 29, 2007, YDJV's architect did not request the NOB plinth inspection until July 18, 2007, and the joint NOB plinth inspection

was not conducted until July 30, 2007. Only at that point could YDJV request a FWCC for the NOB.

YDJV had planned to begin its first vertical concrete pour for the NOB on November 6, 2006, but did not do so until October 3, 2007, after it had obtained the required NOB FWCCs from both MMRDA and MCGM. MMRDA issued its NOB FWCC on September 6, 2007, after being presented with the necessary police NOC that was issued on August 22, 2007. Although MCGM should have issued its own NOB FWCC within a couple of days after the MMRDA FWCC was issued (given the promises of the MCGM Commissioner that it would be expedited), MCGM did not issue its FWCC until September 28, 2007, because of internal MCGM administrative delays resulting from the USG's tax dispute with the GoI.

There ultimately was a critical path delay totaling 362 days from the start of contract performance to September 30, 2007. Twenty of those 362 days (from September 8 to 28, 2007) were the result of the tax dispute between the USG and the GoI. Two of those 362 days were caused by flooding in the Mumbai area in August 2006. Tr. Vol. 7 at 50-58, 59, 62-63.

Period 2 (September 30, 2007, to April 1, 2008): 12 Days of Delay

A. Critical Delays by YDJV's Subcontractor

During this period of time, the critical work that was necessary for the performance path to continue was the installation of vertical structural concrete at the NOB. YDJV's subcontractor, L&T, was tasked with performing that work, but failed to maintain the schedule that YDJV had planned. There were forty-nine days of delay to the concrete activities at the NOB, but, by starting NOB finish work earlier than originally scheduled, YDJV recovered thirty-seven days of that delay. Ultimately, then, there were twelve days of delay to the critical path of the project. These delays to the schedule that YDJV had originally planned were unrelated to any tax issues, and responsibility for these days of delay falls upon YDJV.

YDJV has asserted that, because of the prior delays in the NOB FWCC issuance (for which it blames DOS), it "made no sense to maintain or ramp up a substantial [vertical construction] workforce" before there was vertical construction work to be performed, so L&T released much of its workforce for this project while awaiting the FWCC. Appellant's Post-Hearing Brief at 59. Nevertheless, L&T understood that, once it was ready to perform the vertical work, it would need to use workers that had the proper security badges, and its decision to release its workers required it completely to remobilize a workforce once the

FWCC was issued (including work required for the badging process). YDJV complained at the time that L&T was showing no “sense of urgency” in scheduling, staffing, or performing work. Exhibit 14177. No evidence was presented at the hearing in this matter showing that YDJV or L&T had developed a reasonable advance work plan addressing labor and hiring needs, and there is no evidence of a serious and coordinated effort to develop one during contract performance. L&T did not begin the effort to remobilize, or to hire and obtain badges for workers, until after the FWCC was issued. L&T’s failures in the remobilization effort caused further delays.

L&T’s manpower levels, once the NOB FWCC was issued, were inadequate for the work required. YDJV asserts that prior delays that it attributes to the Government pushed L&T’s NOB vertical construction work into a period in which it was more difficult to find and hire qualified labor than it would have been had there been no prior delays. It asserts that the labor marketplace had changed since it submitted its bid because of, among other things, a significant increase in the number of construction projects that were ongoing in Mumbai at that time. Yet, as previously discussed, all but 22 days of delay in the earlier period were caused by work deficiencies by YDJV or its subcontractors, rather than by DOS. Further, the record does not establish that, in establishing its original labor estimates or hiring plans, YDJV developed any kind of realistic analysis of the Mumbai labor market, and it presented no viable evidence, beyond speculation, that the labor market was significantly different during this period of time than it would have been when YDJV had originally planned on constructing the NOB. Although YDJV was relying on the expertise of one of its joint venture partners, Desbuild, to assist it in hiring the labor necessary to support the project, Desbuild did not have prior experience in projects the size of the NCC, and it did not conduct any studies or analysis about the level of skilled labor that it realistically should have expected to find in the Mumbai labor market. We find that YDJV did not establish that changes in the labor market affected or delayed its performance. Instead, any difficulties that YDJV and/or its subcontractors had in hiring skilled labor during this period were the result of YDJV’s faulty expectations about the state of the Mumbai skilled labor market.<sup>18</sup>

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<sup>18</sup> This finding is consistent with more generalized testimony that YDJV presented about difficulties it had with subcontractors in Mumbai. Yates’ then-Senior Vice President for Special Projects, Henry Dearman, testified that YDJV’s subcontractors would repeatedly make promises to do something (such as a promise to meet a particular deadline or completion date) that YDJV knew or would later find out the subcontractors could not keep, but the subcontractors refused to admit that they would not be able to keep it – specifically, the subcontractors did not want to be seen as unable to accomplish their assigned tasks, no matter how difficult. Tr. Vol. 1 at 25-26. Mr. Dearman contrasted that situation with the subcontractors with which he has dealt in the United States, which generally push back

B. Other Delays Involving Tax Issues

On October 1, 2007, the Consulate General's office for DOS in Mumbai wrote to the Chief Protocol Officer for the Government of Maharashtra, once again seeking his assistance in obtaining tax exemptions for the BKC property and referencing the applicability of the Vienna Convention to exempt the United States from such taxes. Exhibit 14169. It referenced the fact that the local municipal authorities were requiring DOS to provide tax clearance documents from the tax assessment department to obtain necessary building permits, but that the tax assessment office "will not provide clearance documents until this tax matter is resolved." *Id.* It recognized the "potential operational delays" that would result if the issue was not resolved swiftly. *Id.*

While L&T was working on vertical construction at the NOB, it was also laying plinths for other NCC buildings, pursuant to the PCC that the MMRDA had issued for the entire NCC project. On December 27, 2007, YDJV requested plinth inspections from the MMRDA for two of the NCC buildings: the GSO and the CG residence. Exhibit 21175 at 25697; Tr. Vol. 4 at 151-52. Although YDJV initially anticipated fairly swift inspections and approvals from MMRDA, a MMRDA representative verbally informed YDJV on or just before January 4, 2008, that MMRDA would not be able to conduct the plinth inspections because of "tax assessment issues" between the United States and the GoI. Exhibit 20280; *see* Tr. Vol. 1 at 211. YDJV quickly reported that news to OBO, which began a series of inquiries that resulted in the involvement of CG Owen.

On February 8, 2008, the United States District Court for the Southern District of New York issued a decision in *City of New York v. Permanent Mission of India to the United Nations*, 533 F. Supp. 2d 457 (S.D.N.Y. 2008), *vacated*, 618 F.3d 172 (2d Cir. 2010), finding that the Vienna Convention only exempted from taxation the "residence of the head of the mission" and that the City of New York could properly tax those portions of the GoI's buildings in New York in which GoI employees other than the GoI's United Nations mission head were residing. Four days later, on February 12, 2008, the MCGM Commissioner informed CG Owen that there would be no more building permits issued for the NCC "until the NY case was settled." Exhibit 20103 at 158373. This was a change in the MCGM Commissioner's previously stated position, a change resulting from "instructions" that he had received from MEA. Exhibit 22277 at 131-34. At that point in time, although there were PCCs permitting the laying of the plinth for the various compound buildings, the only building permit (or FWCC) that had been issued to allow for vertical construction was for the NOB.

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during the planning process if a proposed deadline is unrealistic or risky. *Id.*

Subsequently, during a meeting with CG Owen on February 14, 2008, the MCGM Commissioner and Deputy Commissioner agreed to allow immediate issuance of a FWCC for two more NCC buildings – the GSO and the warehouse – but they indicated that they would issue stop work orders for those buildings if the United States had not resolved the tax issue within sixty days. Exhibit 20103. The MCGM Commissioner indicated during that meeting that, pursuant to instructions that he had received from a higher authority in the GoI, MCGM could not issue any other FWCCs until the United States had paid the outstanding taxes. *Id.* at 158373. Within DOS, there was a belief that “this newly ‘hardened’ position by authorities in Mumbai [insisting that DOS pay taxes before FWCCs were issued] has been precipitated by the New York court case.” Exhibit 20284.

Plinth inspections for the GSO (which was now viewed as tied to the warehouse, which had previously been subject to a joint plinth inspection) and the CG residence were performed on February 18, 2008. Exhibits 14334, 20287, 21175 at 25698.<sup>19</sup> Nevertheless, the MCGM engineers mentioned during the plinth inspections that the FWCCs for the GSO, the warehouse, and the CG residence that MCGM expected to issue would be limited, permitting construction only to the first floor of each building. Exhibits 14334, 20287, 20288. CG Owen immediately requested clarification and elimination of any such limitation from the MCGM Commissioner. Exhibit 20287. The FWCC issuance process was not helped by the fact that YDJV’s amended drawings submitted in support of the FWCC application contained various errors, including an incorrect location for fuel tanks. Exhibit 22317 at tab 38. The FWCC for the GSO, the warehouse, and the CG residence had still not been issued by the end of Period 2 (for reasons that will be discussed in the next section). Notwithstanding that delay, none of these buildings was on the critical path of performance at this point of the overall NCC project.

By at least mid-March 2008, DOS was making concerted efforts to work out a bilateral agreement between the United States and the GoI to resolve both the New York tax dispute and the NCC tax dispute. Exhibit 20290.

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<sup>19</sup> YDJV requested a plinth inspection of another outbuilding, the CCAC, but the local authorities declined because the edge forms for the CCAC plinth were still in place, meaning that the plinth was not finished. Exhibit 14334.

Period 3 (April 1, 2008, to November 1, 2009): 391 Days of Delay

A. Critical Delays by YDJV's Subcontractor

During this period (from April 1, 2008, to November 1, 2009), NOB mechanical, electrical, and plumbing (MEP) became the critical activity on the NCC project. Tr. Vol. 2 at 12. There were 391 days of delay in this 579-day period. Essentially, YDJV lost four days of every six-day work week. In fact, during the seven-month period from April to November 2008, NOB MEP activities lost almost five months of time, and the contractor fell another eight months behind over the course of the next eleven months.

As of April 1, 2008, air handling unit and ductwork installation at the first, second, and third levels of the NOB was expected to drive the critical path of the project through July 18, 2008 (with an expected duration of three-and-a-half months). That work actually took *seventeen* months. As of August 30, 2008, YDJV anticipated that its MEP subcontractor, Shine Electric Works Pvt. Ltd. (Shine), would complete the already-delayed ductwork within two weeks – by September 13, 2008. It was not completed by that date. At a meeting on November 11, 2008, YDJV began its efforts to demand that Shine increase its MEP manpower levels. Shine complied by December 2008, meeting the increased manpower levels that YDJV had requested, and it continued to increase manpower levels over the next several months. Despite that fact, Shine did not complete the MEP work at the NOB until August 27, 2009.

The cause of this delay was the poor performance of Shine, coupled with YDJV's overestimation of the available skilled labor market to perform in accordance with DOS construction requirements. Shine failed to perform work for extended periods of time and did not respond adequately (beyond making unsupported excuses for its failure to perform) to YDJV's repeated pleas for performance of the work. Further, the work that Shine performed was not always performed correctly and had to be redone – in fact, from February 2009 through June 2009, Shine was devoting its time to fixing NOB second floor rough-in work that it had previously done incorrectly. Tr. Vol. 2 at 12; Tr. Vol. 4 at 128-32; Exhibits 12872, 12873, 12869, 14641. YDJV eventually (in May 2009) supplemented Shine's workforce by bringing in workers from elsewhere (through another subcontractor, Microtech M&E Pvt. Ltd. (Microtech)), Tr. Vol. 1 at 210, but it potentially could have reduced delays by doing so at an earlier date.

Although YDJV attempted at the hearing of this matter to establish that demand for skilled labor and for construction materials suddenly increased during this period because of a massive number of new construction projects in the Mumbai area, and that this change in the available labor market and the availability of building materials caused its delays, the

evidence does not support YDJV's allegation. It seems clear, based upon the preponderance of the evidence, that Shine did not have the experience to handle a job of the magnitude of this project, that it had not adequately planned its work at the outset of the job, and that Shine, for unexplained reasons of its own making, elected not to staff the project sufficiently with workers of adequate skill.<sup>20</sup> To the extent that Shine reported to YDJV during the project that the skilled labor market had changed so that it suddenly could not find a sufficient number of skilled workers, that report was an unsupported excuse to gain more time, rather than a true indicator of the labor market. Tellingly, when YDJV eventually brought in Microtech to supplement Shine's work in May 2009, the skilled labor issues largely abated. Exhibits 12866, 12867 at 340947; Tr. Vol. 2 at 63-67.

After completing above-ceiling ductwork on August 27, 2009, YDJV planned to test the ductwork before installing above-ceiling fire sprinkler lines and above-ceiling electrical conduit, work that could not be performed until after the ductwork installation was complete. By November 1, 2009, the third-level NOB duct testing had still not been completed. Again, although the reasons for this delay are somewhat unclear, there is no doubt that the fault for this delay lies with YDJV's subcontractor, Shine, which simply did not get the work done.

## B. Concurrent Delays to the Outbuildings

### 1. Delays to the Warehouse and Non-MCAC Buildings

As indicated in the preceding section, the MCGM Commissioner and Deputy Commissioner had informed CG Owen on February 12 and 14, 2008, that no FWCCs for any additional buildings in the NCC – except for the GSO/warehouse buildings and the CG residence – would be issued until the NCC tax issues were resolved.

On April 16, 2008, CG Owen learned from a conversation with a high-level MEA representative that MEA had met with the Maharashtra Chief Minister about the tax and construction permit issues the prior day and that the Chief Minister wanted to be helpful to ensure that construction of the NCC could continue. Exhibit 22317 at tab 39. He notified CG Owen that the Maharashtra Chief Secretary had been instructed to investigate the matter immediately and that CG Owen should meet with the Chief Secretary expeditiously. *Id.*

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<sup>20</sup> Documentation in the record indicates that YDJV, during this delay period, was blaming Shine for taking skilled workers hired for this project and transferring them to another embassy project in Hyderabad, India. It is unnecessary for us to define the specific reasons for Shine's inability to complete its work in a timely manner, other than to find that they are not the fault of DOS.

On April 19, 2008, CG Owen, along with two OBO representatives and two YDJV employees, met with the Maharashtra Chief Secretary, Johnny Joseph (who, until May 2007, had been the MCGM Commissioner), as well as with representatives of MEA, MCGM, and MMRDA.<sup>21</sup> At the meeting, CG Owen urged the Chief Secretary to delink the NCC construction permits from the property tax issues because of the importance of the NCC project to both DOS and the City of Mumbai. At the conclusion of that meeting, the Chief Secretary directed MCGM and MMRDA to change course and told them not to impede construction of the NCC in any way, to conduct all necessary inspections and issue all necessary certificates as expeditiously as possible, and to delink for the time being the property tax issue from the construction work. He ordered that resolution of the property tax issue should be pursued on a separate track from the construction authorizations for the time being, although he indicated that, before MCGM would issue a final occupancy certificate for the NCC, DOS would first have to resolve all property tax issues involving the NCC. Exhibits 1001, 20295, 20298.<sup>22</sup>

On April 21, 2008, YDJV submitted revised final drawings to MMRDA for the GSO/warehouse and the CG residence, as required to obtain FWCCs for those structures. Exhibit 20296. Those revised drawings were to be forwarded to the MMRDA Commissioner for expedited action on or about April 23, 2008. Exhibit 20297. Nevertheless, lower-level employees within MMRDA and MCGM, unaware of the new direction that had been announced at the April 19 meeting, did not expedite matters in the manner that should have occurred. Exhibits 22277 at 151, 22317 at tab 43.

On April 23, 2008, pursuant to an agreement made at the April 19 meeting, MMRDA and MCGM conducted a joint plinth inspection of the utility building, the CCAC, and the MSGQ, at which time they discovered that the plinths for two of the buildings (CCAC and the utility building) did not match the plans that YDJV had submitted for those buildings on April 21, meaning that YDJV would have to submit revised drawings (delaying YDJV's ability to obtain FWCCs). Exhibits 1001, 20297.

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<sup>21</sup> This meeting followed a preliminary meeting on April 17, 2008, between CG Owen and the Chief Secretary, after which CG Owen provided a list of the necessary permits that YDJV needed to proceed with construction. Exhibits 22277 at 146-48, 22317 at tab 41.

<sup>22</sup> Based upon the Chief Secretary's directive, MCGM issued a formal written order on May 2, 2008, directing that the property tax issues "should not be presently linked with the issuance of the [FWCC] for the buildings in the layout on the [NCC] plot" and that "MMRDA will issue the full [FWCC] for all th[e] structures in the layout," but that the issue "shall be resolved before grant of occupation for the buildings." Exhibit 14393.

MCGM issued the FWCCs for the GSO, the warehouse, and the CG residence on May 6, 2008, 78 days after the plinth inspections for those buildings. Exhibits 14411, 14417. The FWCCs for the MSGQ, the CCAC, the utility building, and the SCAC were issued on June 19, 2008. At this point in time, the only NCC building for which YDJV did not have a FWCC was the MCAC, but YDJV had not yet finished the plinth for that building and, therefore, was not yet ready for a joint MMRDA/MCGM plinth inspection, a prerequisite to issuance of a FWCC.

These delays affected YDJV's ability to use its warehouse as an on-site laydown and storage facility to support the NOB construction, as it had originally planned to do. Tr. Vol. 4 at 33; Tr. Vol. 6 at 216.<sup>23</sup> Because the warehouse was not available to it, YDJV rented an off-site storage facility that, depending on traffic, took anywhere from forty minutes to two hours to reach. Tr. Vol. 4 at 34, 57, 143, 145-46. YDJV could not have set up a sufficiently secure temporary warehouse or storage facility on-site because it would have required a permit, which the record makes clear MMRDA and MCGM were declining to issue. *Id.* at 57.<sup>24</sup> As a result, YDJV had to make regular trips to the off-site storage location to obtain materials such as electrical conduit, wire, duct hangers, and other items necessary to support NOB MEP work. *Id.* at 146; Tr. Vol. 7 at 139-40. Once the FWCC for the warehouse was issued on May 6, 2008, YDJV began vertical construction. By September 29, 2008, the warehouse was sufficiently complete to allow it to serve as a secure on-site storage facility. Exhibit 13087.

Nevertheless, the delays that the absence of an on-site storage building created were negligible. The main NOB MEP critical path activity from April to September 2008 was HVAC duct installation, and duct material was not stored at the off-site storage facility.

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<sup>23</sup> We note that, despite testimony from YDJV about its original plans to finish the warehouse early so that it could be used for secure on-site storage, YDJV's actions during the project did not always match that intent. As previously discussed, MMRDA and MCGM conducted a joint inspection of the warehouse plinth on July 30, 2007, which was the last step necessary for YDJV to request a FWCC for the warehouse. Yet, despite a complaint from the OBO project manager in August 2007 questioning why YDJV had sought a FWCC only for the NOB and not for the warehouse, YDJV delayed requesting a warehouse FWCC until November 21, 2007.

<sup>24</sup> There was a small secure storage area on-site, but it was exclusively for the use of materials that were to go into the CAA. Tr. Vol. 4 at 144. YDJV could not place non-CAA materials in the small secure storage area. *Id.*

## 2. Delays to the MCAC

As indicated above, when FWCCs were issued for the outbuildings in May and June 2008, YDJV had not yet finished the plinth for the MCAC. Accordingly, it was not ready at that time for a joint plinth inspection, which was a prerequisite to the issuance by MMRDA and MCGM of a FWCC.

On June 27, 2008, after FWCCs had been issued for all of the NCC outbuildings other than the MCAC, MEA instructed the local authorities in Mumbai that “no further construction clearances or occupancy certificate or utility connections be issued to the United States Consulate in Mumbai without the concurrence of MEA.” Exhibits 1034, 20302. Plainly, this direction was tied to the outstanding tax issues between the GoI and the United States. On July 18, 2008, and again on October 13 and 21, 2008, MEA notified the Embassy in New Delhi of its strong desire to enter into a bilateral agreement on reciprocal exemption from property taxes at the earliest opportunity. Exhibit 22317 at 26245-47.

Despite the restriction on the issuance of new FWCCs, there was no direction to rescind or limit *previously* issued FWCCs, and the local authorities did not do so. The only direction given, and implemented, was that the local authorities not issue any new FWCCs. Construction work on all NCC buildings other than the MCAC continued unabated, and plinth work at the MCAC, which was covered by the previously issued PCC, continued as well.

When MEA made its announcement restricting further FWCCs on June 27, 2008, the MCAC was not ready for a FWCC. It was not until December 16, 2008, that the MCAC plinth was complete, Exhibit 6491, and YDJV was not ready for the MCAC plinth inspection until December 17, 2008. Exhibit 20116 at 212379. At that point, MMRDA and MCGM declined to conduct the required joint plinth inspection.

Although the NOB MEP work was the critical path activity at this point in time and remained so through and beyond November 1, 2009, work at the MCAC was very close to the critical path and was, at times, concurrent with it during that period. Exhibit 22317 at 107749. High-level officials within DOS, cognizant of the impact of the GoI’s refusal to grant the FWCC for the MCAC, Exhibits 20604, 20605, 20606, were taking affirmative and active steps to try to resolve the outstanding tax issues and to have the GoI lift its FWCC issuance restriction. For example, on January 20, 2009, Paul Folmsbee, who had replaced

Michael Owen as CG,<sup>25</sup> met with various GoI officials, including the MCGM Commissioner, to encourage issuance of the MCAC FWCC, but the MCGM Commissioner represented that holding up the FWCCs was the only leverage that he had to get payment of the United States' outstanding taxes. Exhibits 14557, 21972. On February 11, 2009, David Mulford, the United States Ambassador to India, met with the GoI's Foreign Secretary, Shivshankar Menon, to encourage issuance of the remaining FWCC as well as occupancy certificates, but it was clear from that meeting that the GoI was linking the City of New York tax case with the tax issues involving the Mumbai NCC and would not assist unless there was some corresponding assistance in the City of New York matter. Exhibit 20118 at 107740.

Despite repeated efforts by DOS, the head of MMRDA informed Mr. Browning and CG Folmsbee at a meeting on June 18, 2009, that he had just received a letter from MEA reaffirming that MMRDA must not issue any permits or offer any cooperation in the construction of the Mumbai NCC until tax issues were resolved. Exhibit 22317 at 20402.

On June 23, 2009, at the direction of the Secretary of State, DOS issued Public Notice 6690, Designation and Determination Under the Foreign Missions Act, formally exempting from local, state, and federal taxation any real property in the United States that a foreign government owned and was using to house staff of permanent missions to the United Nations:

I hereby designate exemption from real property taxes on property owned by foreign governments and used to house staff of permanent missions to the United Nations or the Organization of American States or of consular posts as a benefit for purposes of the Foreign Missions Act. I further determine that such exemption shall be provided to such foreign missions on such terms and conditions as may be approved by the Office of Foreign Missions and that any state or local laws to the contrary are hereby preempted. Prior inconsistent guidance is hereby rescinded.

74 Fed. Reg. 31,788 (July 2, 2009); *see* Exhibit 14736.

By July 7, 2009, the MEA Chief of Protocol called the Charge d' Affaires at the United States Embassy in New Delhi to represent that he was in the process of ordering issuance of all permits and licensing for the NCC project. Exhibit 22317 at 199829.

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<sup>25</sup> CG Owen had departed his post in Mumbai for another position within the Foreign Service on July 8, 2008, and was replaced by Mr. Folmsbee. Exhibit 22277 at 155.

On July 20, 2009, MMRDA and MCGM conducted the joint plinth inspection for the MCAC, and the final FWCC for the MCAC was issued on August 12, 2009. Exhibits 14531, 14736. YDJV commenced vertical work on the MCAC on August 27, 2009.

Period 4 (November 1, 2009, to August 1, 2010): 205 Days of Delay

A. Visa Issues

From November 1, 2009, through August 1, 2010, the critical item that was affecting, and stalling, other work on the project continued to be NOB MEP work and, specifically, telecommunications work in the NOB.

On October 26, 2009, just before this period began, YDJV became aware of an impending change in the GoI's visa policy for foreign skilled workers, which the GoI had publicly announced on August 30, 2009. Exhibits 21184, 21223. Under the GoI's prior visa policy, highly-skilled foreign workers entering India to perform work for a particular corporate entity would receive a business visa, or a "B" visa, permitting them to work within India for that corporation for a specified period of time. Apparently, a controversy, wholly unrelated to the NCC project or to any of the parties here, arose in connection with the issuance of "B" visas to thousands of unskilled and/or semi-skilled foreign workers from another country who, according to the GoI, should not have been eligible for such visas and were taking jobs from India's available labor force. Tr. Vol. 3 at 41-42; Tr. Vol. 4 at 35. In its August 30 announcement, the GoI stated that all skilled foreign workers would now have to apply for an employment (or "E") visa, rather than a "B" visa, and that the application would have to be made while the skilled worker was in his or her home country. The notice further stated that any such workers who currently held a "B" visa would, regardless of the expiration date on the visa, have to depart India no later than September 30, 2009 (a deadline that was subsequently extended to October 31, 2009), and return to their home countries to apply for an "E" visa.

YDJV learned of the new policy when some of its American employees were registering for their business visas with the Mumbai Foreigners Regional Registration Office on October 26, 2009. That office informed those employees that, pursuant to a direction from MEA, all foreign workers would have to depart India by October 31 and apply for new "E" visas from their home countries. Exhibit 21223; Tr. Vol. 4 at 109-10. YDJV began to make plans to return approximately thirty-nine American YDJV employees and several employee dependents to the United States, but asked DOS to attempt to intervene with the GoI to stop the threatened visa action. Exhibit 22122\_A. DOS in good faith made such efforts, to no avail. See Exhibit 22122.

Applying its new policy, the GoI officially revoked almost all “B” visas, including those of YDJV’s foreign workers, effective October 31, 2009. Exhibit 21182. Accordingly, all but two of YDJV’s American staff – approximately thirty-seven American employees – left Mumbai and returned to the United States, Exhibit 1088 at 204989, and YDJV shut down the CAA construction. Further, on November 23, 2009, the GoI announced a new quota system under which the GoI would allow an employer to hire skilled foreign workers only if the employer’s total foreign workforce did not exceed one percent of its total workforce. Once this quota was reached, the employer supposedly would be unable to sponsor visas for additional foreign workers. Exhibit 21244. In addition, the GoI imposed new restrictions on the issuance of “E” visas that were not always consistently applied by different GoI offices reviewing “E” visa applications. Exhibit 13087 at 9858.

By November 30, 2009, YDJV had received only five of the “E” visas that it needed. Exhibit 1088. By December 11, 2009, twenty-seven “E” visas had been issued, although, as of December 20, 2009, only twenty cleared Americans had returned to the site. *Id.* Ultimately, of the thirty-seven workers who had to return home, twenty-three returned to the Mumbai work site by December 28, 2009, and fourteen either resigned or were dismissed. Exhibit 12721 at 404.

The departures essentially required YDJV to shut down its CAA conduit work during this period. Tr. Vol. 3 at 25. That was because any employees entering the CAA area had to have a security clearance, *id.* at 15, making it necessary for YDJV (and its telecommunications subcontractor, American Systems) to use cleared American workers (CAWs) for all CAA work. *Id.* at 32. The departures also affected non-CAA work on the project because of the loss of key oversight, although YDJV was able to continue some work with its on-site Indian workforce and the few Americans who were allowed to remain. *Id.* at 25; Tr. Vol. 4 at 114; Exhibits 21223, 22122. Nevertheless, YDJV was able to restore its project workforce to pre-departure levels by January 6, 2010. Tr. Vol. 3 at 26; Exhibit 21590.

American Systems had its own difficulties obtaining visas for its American employees. American Systems had different responsibilities over CAA and non-CAA work. For non-CAA work, American Systems was supposed to supervise system infrastructure installation and cable pulls that local Indian employees of another subcontractor, Shine, were performing; then to use its own American employees to terminate those cable pulls (that is, to take the end of the wires in each junction box or panel, add the terminal unit onto the wires, and connect the unit to the system); and to test the system. Tr. Vol. 3 at 47. For CAA work, YDJV’s electrician employees would install the infrastructure, after which American Systems would enter the space to pull the wires, terminate the pulls, and test the system. *Id.* at 48. Under the original plan, American Systems was to have a supervisor on-site for the

non-CAA oversight work for approximately eight weeks before six American System technical employees (over a ten-week period) would perform the remaining non-CAA work and then perform the CAA installation, termination, and testing work. *Id.* at 48.

American Systems had planned to begin its telecom work on November 5, 2009, and was in the process of preparing to bring American workers into India to perform that work when the GoI changed its visa policy. Exhibit 13087 at 9863. American Systems was not eligible to sponsor foreign employees for entry into India under an “E” visa because American Systems was not registered as an Indian company, meaning that it would have to obtain “B” visas (which did not require sponsorship by an Indian company). Although it had one employee – a joint citizen of the United States and India – with a pre-existing “B” visa not subject to the GoI’s recall, who was to oversee Shine’s non-CAA work beginning November 5, Exhibit 15014, American Systems would need visas for its six additional CAWs. Between November 30 and December 29, 2009, it submitted a total of only four “B” visa applications, Exhibit 12721 at 464, two of which were quickly approved and two of which, for reasons not specified in the record, were quickly rejected. No additional visa requests were submitted to the GoI until March 12, 2010, and, except for a three-week period in December 2009 when one of the two approved CAWs went to Mumbai until running out of work and returning to the United States, the two approved CAWs did not go to Mumbai until March 15, 2010, at which time the telecommunications wire pull work effectively commenced. Exhibits 12721 at 464, 13056 at 237. American Systems never fully staffed its anticipated crew of six telecom CAWs. Tr. Vol. 3 at 94.

Although American Systems was having problems with visas, YDJV’s technical security services (TSS) subcontractor, AES International Corporation (AES), was not. The AES TSS workers arrived on site in mid-December 2009, a delay from their intended arrival date of November 5, 2009. Exhibits 14848, 14898, 14918, 14921. Eventually, YDJV attempted to mitigate the difficulties that American Systems was having with visas by seeking the assistance of AES, which told YDJV that it had three telecom technicians with security clearances coming off another project for whom YDJV, if it hired them as YDJV employees, could apply for “E” visas as CAWs using their diplomatic passports. Tr. Vol. 3 at 85, 89.

#### B. Materials Issues

In addition to its visa problems during this period (November 1, 2009, to July 31, 2010), YDJV was also having problems shipping and maintaining adequate materials. As an example, certain TSS materials were to be on-site by November 5, 2009, for AES to use in its TSS work, but the materials, including tens of thousands of feet of cable, did not arrive until February 28, 2010. Exhibits 12721 at 410, 13087 at 9861. In December 2009, certain

secure telecom materials for the CAA were incorrectly labeled, requiring the secure procurement process to begin all over again. Exhibit 12721 at 409. In April and May 2010, there were repeated shortages of random materials that then had to be shipped from the United States. Exhibit 12721 at 413.

On January 11, 2010, Mr. Badrinath, Desbuild's president, visited the Mumbai site and recognized that YDJV needed (at that point in time) at least eight more months to finish the project. In his view, the "major set back [was] materials, at every front we have something or the other missing." Exhibit 14985. All materials for the project, with the exception of some concrete products, were shipped by YDJV from the United States to the project site in Mumbai. Tr. Vol. 4 at 54. When material was needed, YDJV's subcontractor would have to contact YDJV's home office in Atlanta, which would then have to procure the materials and air ship them to Mumbai. *Id.* at 56. Material sent by ocean freight would take two months to arrive, so YDJV typically shipped by air freight, which generally would take about ten days to arrive after an order was placed (with a few days added to that to deal with the assessment and payment of customs duties). *Id.* at 55. Mr. Badrinath discovered that "[a]t this stage we are air shipping skimmers for pool, ceramic tiles, stone anchor, caulking, carpet, grout, fans. These are only few items I have listed. Work on these fronts are at standstill." Exhibit 14985. Mr. Badrinath stated, "I can tell you without materials we are in trouble." *Id.*

Material shortages, which continued through this period, were generally the result of waste, shipping errors, mistakes made by subcontractors that required work to be stripped out and performed a second time, and a lack of a sufficient control system cataloging materials on hand so that they could be easily located. Tr. Vol. 4 at 56-57, 152.

#### C. Shine's Performance Delays

During this period, Shine was simply not keeping pace with the requirements for completing its non-CAA telecom infrastructure installation work. Three weeks after one of American Systems' CAWs arrived to perform non-CAA work on December 8, 2009, that CAW went back to the United States, mainly because Shine's slow performance had left him with nothing to do. Although materials issues may have affected Shine, its employees were not performing at the pace necessary to support the project. Exhibit 12721 at 409.

#### D. Summary of Delay

During this period, YDJV was delayed by 205 days. YDJV lost fifty-nine days from November 1, 2009, to January 6, 2010, because of visa issues surrounding the GoI's direction that CAWs leave the country and reapply for "E" visas. YDJV lost another 146 days

between January 6 and July 31, 2010, arising in part because of continuing visa difficulties, but mainly because of YDJV subcontractor performance issues and materials shortages.

Period 5: August 1, 2010, to February 1, 2011: 162 Days of Delay

On August 1, 2010, the NOB telecom wiring was completed. At this point, YDJV was projecting completion of the entire NCC by November 11, 2010 (103 calendar days later). The critical work driving YDJV's ability to complete the project by that deadline was telecom/electrical wire pulls and panel terminations in the NOB, followed by telecom room punchlist work.<sup>26</sup> To meet the projected November 11 completion deadline, YDJV needed to complete telecom/electrical wire pulls and panel terminations no later than August 16, 2010, and to complete telecom/electrical panel trimout by August 21, 2010. YDJV did not complete this work as anticipated. Instead, the telecom panel terminations were not completed until December 23, 2010, and the telecom panel trimout was not completed until January 28, 2011, resulting in a delay to the critical path of 162 days. The fault for this delay falls upon YDJV and its subcontractors, which were slowed by, among other things, disputes about who was responsible for damaged materials and who was responsible for what work. We cannot attribute any delay during this period to DOS.

YDJV believes that various issues in subcontractors' ability to obtain visas created delay during this period. We find no support for YDJV's position. To the extent that there were problems in getting subcontractor employees to travel to Mumbai, those problems were primarily the result of disputes between the employee and its employer or disputes between YDJV and its subcontractor. Further, in the matter of a visa for YDJV's commissioning authority, Brian Kolak of Nelson Engineering, who YDJV expected to conduct visual inspections of equipment between March 23 and April 23, 2010, any delays in the visa process did not affect the critical path of contract performance.

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<sup>26</sup> YDJV's contemporaneous critical path plan shows the installation of NOB exterior canopies, which would be followed by NOB exterior punchlist work, as somehow (inexplicably) driving subsequent NOB *interior* punchlist work. In meetings at the time, YDJV recognized that it needed to change its schedule logic because the critical path in its contemporaneous schedule was incorrect. Canopy installation was not on the critical path.

Period 6 (February 1, 2011, to October 6, 2011): 167 Days of Delay

A. Delays in Accreditation

Accreditation is a process specific to OBO that required OBO's inspection and acceptance of the secured access areas within the NCC. Tr. Vol. 2 at 129-30. Under the contract, YDJV could not be considered as having achieved "substantial completion" until, at least thirty days prior to substantial completion, it had completed certain general construction work identified in a "Contractor Accreditation Worksheet" that was included as an attachment to the contract. The worksheet covered specific items relating to, among other things, exterior and interior physical security, telecommunication operations facilities, roof-mounted communications support equipment, emanations security, electrical systems, and telephone lines. Exhibits 1 at 21 (clause E.2.2), 17.

Although not specifically laid out in the contract, the OBO accreditation process typically begins with a pre-accreditation period where teams of subject area experts come to the site to evaluate the work done in their areas of expertise. Tr. Vol. 2 at 130. Subsequently, the actual accreditation team comes to the site to validate the work that has been performed, particularly in the CAA. *Id.* at 131.

The start date for accreditation had continually been deferred – a scheduled date of September 13, 2010, was changed to December 1, 2010, to January 17, 2011, and then to February 18, 2011 – because the project work was not sufficiently complete to permit the accreditation inspection. On January 24, 2011, OBO's Mr. Browning sent an e-mail message to Shane Deville of YDJV, requesting that YDJV complete and return an accompanying accreditation checklist by January 27, 2011. Exhibit 15730. YDJV and OBO were planning for pre-accreditation activities to begin on March 1, 2011, and for accreditation to begin on March 15, 2011. Tr. Vol. 2 at 170-73. Yet again, though, YDJV was not ready for accreditation, and the accreditation date was pushed to April 18, then May 9, and then June 8, 2011. Ultimately, the accreditation inspection did not begin until July 7, 2011.

YDJV blames the OBO project director, Mr. Browning, for postponing accreditation unnecessarily and asserts that his actions ultimately delayed the project during this period. Although it is true that Mr. Browning issued letters directing that accreditation be postponed, he did so only when it was clear that YDJV was not ready for accreditation. His actions did not delay the project, but merely recognized the obvious. It would have been irresponsible for Mr. Browning to require DOS personnel to travel to Mumbai for accreditation only to have them sit for weeks or even months as YDJV tried to ready itself for the inspection.

YDJV further complains that its subcontractor employees, who were necessary for the work that would lead to accreditation, were delayed by problems in obtaining visas. The record does not support YDJV's assertion.

Nevertheless, during this period, members of OBO's inspection team ultimately experienced delays in obtaining their own visas to allow them to travel to India for the inspections. *See* Exhibit 16378; Tr. Vol. 2 at 171-72. Without Mr. Merton Bunker and other members of the inspection team, the accreditation process could not begin. Tr. Vol. 2 at 180-81. Although YDJV is responsible for being unable to complete work because of problems in the performance of its subcontractors and for forcing delays in accreditation, DOS is responsible for forty-two days of concurrent delay resulting from DOS's problems obtaining visas for its inspection team.

The first accreditation inspection, which began on July 7, concluded on July 22, 2011. The inspection team's report noted several deficiencies, including a lack of occupancy sensors in every workstation in the secured CAA area of the NOB. On September 12, 2011, YDJV reported that it had completed 94% of the punchlist work, and it anticipated full completion by September 24, 2011. On October 2, 2011, the DOS accreditation inspection team commenced its second accreditation inspection, which finished on October 6, 2011.

To achieve substantial completion under the contract, YDJV, pursuant to clause E.2.1 of the contract, had to obtain a certification from the contracting officer or his representative that the project "is sufficiently complete and satisfactory . . . that it may be occupied or utilized for the purpose for which it is intended." Exhibit 1 at 21. In addition, under the P&L clause, it was YDJV's obligation to obtain an occupancy certificate at the end of construction. Exhibit 2 at 100. After Design Cell submitted the necessary NOCs to MMRDA in August and September 2011, MMRDA notified YDJV on October 4, 2011, that, once appropriate fees were paid, it would issue the occupancy certificate. Exhibit 16161. On October 5, 2011, YDJV paid the fees, and MMRDA issued the certificate. On October 6, 2011, the contracting officer declared that the project was substantially complete.

Ultimately, there were 167 days of delay during this period before substantial completion was achieved.

#### B. L&T's Termination and Court Order

On April 6, 2011, YDJV terminated L&T as its subcontractor. Tr. Vol. 3 at 148; Exhibit 1161. Following termination, L&T instituted an action in the High Court of Judicature at Bombay, and, in connection with that action, the court issued an order to YDJV on April 21, 2011, directing YDJV to perform "no further work . . . at site" pending an

inspection by a court-appointed commissioner. Exhibit 13212; *see* Tr. Vol. 3 at 148-49. Despite its broad language, YDJV understood that the stop work order covered only work that was encompassed within L&T's contract – essentially, outdoor sitework in the south parking lot and landscaping work. Exhibits 1161, 1451 at 83093; Tr. Vol. 3 at 148-49. Although YDJV asserts that, because L&T had previously performed drywall work in the NOB and the outbuildings, “the [entire] job site was effectively shut down as a result of that order,” Tr. Vol. 3 at 149, we can find no support for that assertion in contemporaneous documentation associated with the project.

The court order halted progress on the sitework and other areas in which L&T had worked until May 26, 2011, when the order was lifted, and the replacement subcontractor remobilized and completed the remaining sitework by June 15, 2011. Although YDJV believes that the court order excusably delayed it by forty-seven days, we cannot find that any delays arising from the L&T stop work order affected the critical path.

#### VI. YDJV's and DOS's Claims, and Proceedings Before the Board

On August 30, 2012, YDJV submitted a certified claim, titled “REA 0034,” to the DOS contracting officer, alleging that DOS's improper withholding of pre-award information linking tax disputes with the GoI to the issuance of permits, DOS's issuance of a “stop work” order prior to the GoI's issuance of a PCC, the GoI's change in visa policy, a sudden boom in construction projects in Mumbai, and other changes caused YDJV to incur substantial costs that DOS should bear and/or created excusable delays that entitled YDJV to a non-compensable time extension. In its claim, YDJV requested a compensable time extension of 868 calendar days, an additional excusable non-compensable time extension of 316 calendar days, and an equitable adjustment in the amount of \$23,802,082.48. On February 21, 2013, the DOS contracting officer issued a decision denying that claim and asserting a government claim for liquidated damages for 1192 days of delay. YDJV filed its first notice of appeal with the Board on April 19, 2013, appealing the contracting officer's February 21 decision. The Board docketed that appeal as CBCA 3350.

The parties soon thereafter engaged in an extensive and document-intensive discovery process. The appeal file in this matter consists of more than 17,000 documents, and each party took numerous depositions.

On December 18, 2013, while discovery was continuing in CBCA 3350, the DOS contracting officer issued another decision, this time asserting (in a single document) several government direct cost claims against YDJV totaling \$892,810.42. YDJV appealed that decision to the Board on January 8, 2014, in an appeal docketed as CBCA 3672. At the parties' joint request, that appeal was consolidated with CBCA 3350.

In December 2014, YDJV submitted two additional claims to the DOS contracting officer for decision. On or about December 14, 2014, it submitted a claim seeking payment of \$53,136 for costs incurred to install occupancy sensors and associated infrastructure in the CAA of the NOB, which YDJV claimed was a change that DOS had directed YDJV to perform. On or about December 19, 2014, YDJV submitted another claim, seeking reimbursement in the amount of \$123,612 for utility bills that it paid between August 30, 2011 (the date upon which, according to YDJV, the DOS contracting officer should have found YDJV had reached substantial completion) and October 6, 2011 (the date upon which the contracting officer actually found substantial completion). The DOS contracting officer denied the claims in separate decisions dated February 18 and 20, 2015, and YDJV appealed those decisions on April 1, 2015, which the Board docketed as CBCA 4658 and 4659. Upon the parties' joint motion, the Board consolidated the two new appeals with CBCA 3350 and 3672.

The Board conducted a three-and-a-half week hearing in the consolidated appeals beginning June 15, 2015. At the hearing, the parties presented a total of sixteen fact witnesses, submitted the deposition designations of several other witnesses, and presented oral testimony of five expert witnesses. The expert witnesses included each party's scheduling expert, each of whom prepared a delay analysis in which he opined as to the causes of delay on the project, responsibility for each delay, and the impact of each delay.

YDJV's scheduling expert, who presented extensive testimony at the hearing about his detailed schedule analysis of the project, was Charles Y. Choyce, Jr., who is currently the managing director of the Berkeley Research Group, LLC. Mr. Choyce graduated from law school in 1979 and subsequently went into private legal practice, during which time he focused on construction and labor law. In 2000, Mr. Choyce left legal practice to join a forensic schedule delay analysis firm, where he engaged in extensive training in hands-on scheduling practices and prepared numerous baseline schedules, schedule updates, and recovery schedules for major projects. He holds four professional certificates and is a certified forensic consultant of the Association for the Advancement of Cost Engineering (AACE). YDJV retained him in late 2008 to assist it in evaluating the project delays, and he worked with YDJV extensively through the date of the hearing. The Board accepted Mr. Choyce as an expert in construction scheduling and inefficiency claims.

DOS presented its own scheduling expert, Mark Boe, a founding shareholder (since 1996) in Capital Project Management, Inc. Mr. Boe holds a Bachelor of Science degree from the United States Coast Guard Academy in Civil Engineering and a Master of Science degree in Civil Engineering/Construction Management. He has over thirty-five years of experience in planning, scheduling, design, engineering, construction, project controls, and claims analysis, and he has worked for the past twenty-five years as a delay and disruption

consultant and expert on a variety of project types. He holds several professional memberships and is registered as a planning and scheduling professional with AACE. The Board accepted Mr. Boe as an expert in critical path method scheduling and delay analysis and labor of productivity claims.

Following the hearing of these appeals, the parties engaged in extensive briefing. The appeals are now before the Board for decision.

### Discussion

#### YDJV's Delay Claim

YDJV seeks more than \$23 million in damages for the delays to this project, while DOS seeks more than \$11 million in liquidated damages. Below, we first address the standards that we will apply in evaluating both parties' delay claims. We then discuss the main causes of delay that the parties have raised and our allocation of responsibility for each of those causes. We subsequently address how each of the causes of delay impacted the critical path of performance in each period of performance and, for each period, define the number of days of compensable, excusable, and unexcused delay. Finally, we address the damages calculation for these delays.

#### Standards for Evaluating Delay Claims

##### I. The Use of Critical Path Analysis

In this appeal, YDJV claims that DOS is responsible for numerous delays that it incurred while constructing the NCC in Mumbai, delays that it asserts caused it to complete work on the project late and for which it should be compensated. DOS asserts that virtually all delays on this project were YDJV's responsibility and that it, in turn, is entitled to recover liquidated damages for YDJV's delay in completing the project.

To the extent that the Government causes delays to a contractor's work under a contract that increase the contractor's performance costs, the contractor may seek compensation for its damages. *Mega Construction Co. v. United States*, 29 Fed. Cl. 396, 423 (1993). Yet, the mere fact that there is some delay to some aspect of planned contract work is not enough to establish that the contractor's ultimate contract performance costs or time increased.

In evaluating the effect of Government-caused delays on the contractor's ultimate performance time and cost, tribunals generally look to the critical path of contract performance, a method of delay analysis that the Court of Claims explained as follows:

Essentially, the critical path method is an efficient way of organizing and scheduling a complex project which consists of numerous interrelated separate small projects. Each subproject is identified and classified as to the duration and precedence of the work. (E.g., one could not carpet an area until the flooring is down and the flooring cannot be completed until the underlying electrical and telephone conduits are installed.) The data is then analyzed, usually by computer, to determine the most efficient schedule for the entire project. Many subprojects may be performed at any time within a given period without any effect on the completion of the entire project. However, some items of work are given no leeway and must be performed on schedule; otherwise, the entire project will be delayed.

*Haney v. United States*, 676 F.2d 584, 595 (Ct. Cl. 1982). "Where the time frame for performance of an activity, set by the earliest possible start time and the latest possible finish time, establishes a time interval equal to the expected activity duration, the activity is termed 'critical,'" and "[n]o discretion or flexibility exists in the scheduling of that activity." J. Richard Margulies, "Delays, Suspension of Work, and Acceleration," in *Construction Contracting* 617, 662 (1991). Items of work for which there is no timing leeway "are on the 'critical path,'" and "[a] delay, or acceleration, of work along the critical path will affect the entire project." *Haney*, 676 F.2d at 595.

Specifically, then, "to prevail on its claims for the additional costs incurred because of the late completion of a fixed-price government construction contract, 'the contractor must show that the government's actions affected activities on the critical path.'" *George Sollitt Construction Co. v. United States*, 64 Fed. Cl. 229, 240 (2005) (quoting *Kinetic Builder's Inc. v. Peters*, 226 F.3d 1307, 1317 (Fed. Cir. 2000)). Typically, "[i]f work on the critical path [i]s delayed, then the eventual completion date of the project [i]s delayed." *Affiliated Western, Inc. v. Department of Veterans Affairs*, CBCA 4078, 17-1 BCA ¶ 36,808, at 179,401 (quoting *Mega Construction*, 29 Fed. Cl. at 425). Conversely, "[a] government delay which affects only those activities *not* on the critical path does not delay the completion of the project." *George Sollitt Construction*, 64 Fed. Cl. at 240 (emphasis added). As a result, "the determination of the critical path is crucial to the calculation of delay damages." *Wilner v. United States*, 24 F.3d 1397, 1399 n.5 (Fed. Cir. 1994) (en banc) (quoting *G.M. Shupe, Inc. v. United States*, 5 Cl. Ct. 662, 728 (1984)).

To satisfy its burden, the contractor must establish what the critical path of the project actually was and then “demonstrate how excusable delays, by affecting activities on the contract’s ‘critical path,’ actually impacted the contractor’s ability to finish the contract on time.” *I-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913, at 175,557, *appeal dismissed*, No. 15-1623 (Fed. Cir. Jan. 28, 2016); *see Mega Construction*, 29 Fed. Cl. at 425-26. This is done through “an analysis to show ‘the interdependence of any one or more of the work items with any other work items’ as the project progressed.” *I-A Construction*, 15-1 BCA at 175,557 (quoting *Mega Construction*, 29 Fed. Cl. at 428); *see PCL Construction Services, Inc. v. United States*, 47 Fed. Cl. 745, 801-02 (2000) (“Part of understanding that an activity belongs on the critical path of a project is also an understanding of how that activity affects the other activities.”), *aff’d*, 96 F. App’x 672 (Fed. Cir. 2004). “One established way to document delay is through the use of [contemporaneous] Critical Path Method (CPM) schedules and an analysis of the effects, if any, of government-caused events.” *PCL Construction Services*, 47 Fed. Cl. at 801. In fact, in situations, as here, where the contractor utilized Primavera scheduling software to create schedules throughout the life of the project, it would be folly to utilize some other method of critical path analysis.

Because the critical path of construction can change as a project progresses, “activities that were not on the original critical path subsequently may be added,” *Sterling Millwrights, Inc. v. United States*, 26 Ct. Cl. 49, 75 (1992), and, to preclude post hoc rationalization and speculation, it is important that the contemporaneous schedules that the contractor uses to show critical path delay are updated throughout contract performance to reflect changes as they happened. *PCL Construction Services*, 47 Fed. Cl. at 801; *Norair Engineering Corp.*, ENG BCA 3804, et al., 90-1 BCA ¶ 22,327, at 112,205. “[A]ccurate, informed assessments of the effect of delays upon critical path activities are possible only if up-to-date CPM schedules are faithfully maintained throughout the course of construction.” *Blinderman Construction Co. v. United States*, 39 Fed. Cl. 529, 585 (1997), *aff’d*, 178 F.3d 1307 (Fed. Cir. 1998) (table).

Nevertheless, the existence of contemporaneous schedules does not permit a tribunal to ignore, or fail to consider, logic errors in those schedules. A CPM schedule, even if maintained contemporaneously with events occurring during contract performance, is only as good as the logic and information upon which it is based. CPM “is not a ‘magic wand,’ and not every schedule presented will or should be automatically accepted merely because CPM technique is employed.” Margulies, *supra*, at 664. “To be a reliable basis for determining delay damages, a CPM schedule must reflect actual performance” and must “comport with the events actually occurring on the job.” *J.R. Roberts Corp.*, DOT BCA 2499, 98-1 BCA ¶ 29,680, at 147,009 (quoting *Ballenger Corp.*, DOT CAB 72-32, et al., 84-1 BCA ¶ 16,973, at 84,524 (1983)). Tribunals may need to “inquire into the accuracy and

reliability of the data and logic underlying the CPM evaluation” in appropriate circumstances and reject CPM analyses if “the logic was not credible or was ‘suspect.’” Margulies, *supra*, at 664; see *Dawson Construction Co.*, VABCA 3306, 93-3 BCA ¶ 26,177, at 130,314 (discounting CPM schedule because, in part, its “logic was not fully revised and updated to reflect actual construction or what was, in fact, critical”), *aff’d*, 34 F.3d 1080 (Fed. Cir. 1994).

## II. The Effect of Concurrent Contractor Delays

Even if the contractor shows delay by the Government that affects the critical path, the contractor must also establish that it was not concurrently responsible for delays. “Courts will deny recovery where the delays [of the Government and the contractor] are concurrent and the contractor has not established its delay apart from that attributable to the government.” *William F. Klingensmith, Inc. v. United States*, 731 F.2d 805, 809 (Fed. Cir. 1984); see *Coath & Goss, Inc. v. United States*, 101 Ct. Cl. 702, 714-15 (1944) (“Where both parties contribute to a delay neither can recover damage, unless there is in the proof a clear apportionment of the delay and the expense attributable to each party.”). Nevertheless, any contractor-caused delays must affect the critical path of contract performance to be considered “concurrent” – contractor delays that, absent the Government-caused delay, would have had no negative impact upon the ultimate contract completion date do not affect the Government’s monetary liability. *Blackhawk Heating & Plumbing Co.*, GSBICA 2432, 76-1 BCA ¶ 11,649, at 55,579 (1975). For the same reasons discussed above, “[b]ecause concurrent delays which do not affect the critical path of contract work do not delay project completion, an accurate critical path analysis is essential to the determination of whether concurrent delays have caused delay damages related to the delayed completion of a complex construction project.” *George Sollitt Construction*, 64 Fed. Cl. at 241.

## III. Excusable Delays and Liquidated Damages

In these appeals, not only has YDJV raised affirmative delay claims against the Government, but also the Government has demanded liquidated damages arising out of what DOS considers to be YDJV-caused delays in project completion.

In response to a challenge to a liquidated damages claim, the Government has “the initial burden of going forward to show that the contract was not completed by the agreed contract completion date and that liquidated damages were due and owing,” meaning that “the period for which the assessment was made” was properly calculated. *Central Ohio Building, Inc.*, PSBCA 2742, 92-1 BCA ¶ 24,399, at 121,824. Once the Government satisfies that initial burden, the contractor bears the burden of establishing that any delays on the project were excusable and that, as a result, “it should be relieved of all or part of the

assessment.” *Id.*; see *Sauer Inc. v. Danzig*, 224 F.3d 1340, 1347 (Fed. Cir. 2000) (“As a general rule, a party asserting that liquidated damages were improperly assessed bears the burden of showing the extent of the excusable delay to which it is entitled.”). Obviously, if the contractor shows that a critical path delay was caused by the Government, the Government cannot charge the contractor with financial responsibility for that delay. However, in establishing excusable delay, the contractor may also point to causes outside the Government’s control – causes of delay that would not entitle the contractor to financial reimbursement or damages from the Government – but for which the contractor should not be held financially responsible in the form of liquidated damages.

YDJV’s contract expressly provided that YDJV would “be allowed time, not money, for *excusable* delays as defined in FAR 52.249-10, Default,” Exhibit 1 at 32 (clause F.9) (emphasis added), which are defined in FAR 52.249-10(b)(1) as “unforeseeable causes beyond the control and without the fault or negligence of the Contractor.” 48 CFR 52.249-10(b)(1). The non-exhaustive list of excusable delays identified in FAR 52.249-10(b)(1), as supplemented by clause F.9, includes acts of God, acts of a host country government in its sovereign capacity, fires, floods, epidemics, strikes, and unusually severe weather. *Id.* “Obviously, a contractor has no control over whether it rains, whether there is a flash flood, or whether there are forest fires, and the Government cannot penalize a contractor . . . when a delay is caused by such uncontrollable circumstances.” *Asheville Jet Charter & Management, Inc. v. Department of the Interior*, CBCA 4079, 16-1 BCA ¶ 36,373, at 177,301.

Nevertheless, the mere fact that a delay is caused by a type of activity listed in the contract as generally excusable does not give the contractor carte blanche to rely upon such excuses. “The purpose of the proviso,” which is “to protect the contractor against the unexpected, and its grammatical sense both militate against holding that the listed events are always to be regarded as unforeseeable, no matter what the attendant circumstances are.” *United States v. Brooks-Callaway Co.*, 318 U.S. 120, 122-23 (1943). As the Supreme Court has explained, “[a] quarantine, or freight embargo, may have been in effect for many years as a permanent policy of the controlling government” and, if so, may not meet the definition of a cause “unforeseeable” at the time of contract award, even if quarantines and freight embargoes are listed in the contract as examples of possible excusable causes of delay. *Id.* at 123.

Further, even if an unforeseeable cause of delay occurs, the contractor cannot sit back and fail to take reasonable steps in response to it – once such an unforeseeable event occurs, the contractor affected by it has an obligation to attempt to mitigate the resulting damage to the extent that it can. *Restatement (Second) of Contracts* § 350 (1981); see *Signal Contracting, Inc.*, ASBCA 44963, 93-2 BCA ¶ 25,877, at 128,736 (contractor facing contract

delay “has a duty to mitigate [its] damages” to the extent that it reasonably can). If the contractor fails to do so, it “may not recover those damages which could have been avoided by reasonable precautionary action on its part.” *Midwest Industrial Painting of Florida, Inc. v. United States*, 4 Cl. Ct. 124, 133 (1983).

To the extent that the contractor can show that excusable delay affected the critical path of performance, the Government can recover liquidated damages only to the extent that there were additional delays for which the contractor was responsible (beyond those that were excusable) and that “there is in the proof a clear apportionment of the delay and the expense attributable to each party.” *Sauer*, 224 F.3d at 1347; *see Robinson v. United States*, 261 U.S. 486, 488 (1923) (“Since the contractor agreed to pay at a specified rate for each day’s delay not caused by the government, it was clearly the intention that it should pay for some days’ delay at that rate, even if it were relieved from paying for other days, because of the government’s action.”). For the same reasons that a CPM analysis is necessary to determine whether and the extent to which a contractor is entitled to delay damages for Government-caused delays, such an analysis is equally necessary to permit a tribunal to assess when, and the extent to which, the Government is entitled to recover liquidated damages for a contractor’s delays in performance. *Fireman’s Fund Insurance Co. v. United States*, Nos. 93-441C, et al., 2001 WL 36415627, at \*47-\*48 (Fed. Cl. Aug. 1, 2001).

### Specific Alleged Causes of Delay on this Project

#### I. YDJV’s Superior Knowledge Claim

##### A. General Standards

YDJV asserts that DOS is liable for breach of contract based upon the agency’s failure to disclose its superior knowledge of the pre-existing tax disputes between the USG and the GoI, which ultimately delayed the permitting process and further construction on the project. DOS counters that the fixed-price, design-build nature of its contract placed substantial risks on YDJV as the contractor. Under such a contract, DOS contends, the contractor’s “commitment to a fixed-price strongly suggest[s] that it . . . assumed all the uncovered risks inherent in its promised performance” and that, “by accepting responsibility for design, the contractor . . . assumes the risks of any defects or deficiency in the design” and “must determine the cause of,” and resolve, any problems as they arise. Respondent’s Post-Hearing Brief at 2-3.

“The essence of a firm fixed-price contract is that the contractor, not the government, assumes the risk of unexpected costs.” *Lakeshore Engineering Services, Inc. v. United States*, 748 F.3d 1341, 1347 (Fed. Cir. 2014). Nevertheless, “under certain circumstances

the government owes a duty to disclose critical information to a contractor that is necessary to prevent the contractor from unknowingly pursuing ‘a ruinous course of action.’” *CAE USA, Inc. v. Department of Homeland Security*, CBCA 4776, 16-1 BCA ¶ 36,377, at 177,350 (quoting *McDonnell Douglas Corp. v. United States*, 182 F.3d 1319, 1329 (Fed. Cir. 1999) (quoting *Helene Curtis Industries, Inc. v. United States*, 312 F.2d 774, 778 (Ct. Cl. 1963))). If the Government violates its duty of disclosure, it alters the contractor’s assumption of the risk of unexpected costs to the extent that the lack of information ultimately increases the contractor’s costs:

Where the Government has made no misrepresentations, has no duty to disclose information, and does not improperly interfere with performance, the fixed-price contractor of course bears the burden of unanticipated increases in cost; the Government can rightly rely on him to fulfill the agreement he chose to make. In the same way, an end-product specification normally leaves it to the contractor to perform as best he can, but that does not excuse the defendant from liability if it breaches an independent duty to reveal data or if the end-product specification embodies a material misrepresentation misleading the contractor.

*Helene Curtis Industries*, 312 F.2d at 777-78 (citations omitted).

Nevertheless, “[t]he superior knowledge doctrine only applies ‘in limited circumstances.’” *CAE USA, Inc.*, 16-1 BCA at 177,351 (quoting *GAF Corp. v. United States*, 932 F.2d 947, 949 (Fed. Cir. 1991)). Generally, the superior knowledge doctrine affords relief to a contractor only to the extent that the Government fails “to disclose to [the] contractor otherwise unavailable information regarding some novel matter affecting the contract that is vital to its performance.” *Scott Timber Co. v. United States*, 692 F.3d 1365, 1373 (Fed. Cir. 2012) (quoting *Giesler v. United States*, 232 F.3d 864, 876 (Fed. Cir. 2000)). The Court of Appeals for the Federal Circuit has applied the following four factors in evaluating whether the superior knowledge doctrine applies in a given situation:

The doctrine of superior knowledge is generally applied to situations where (1) a contractor undertakes to perform without vital knowledge of a fact that affects performance costs or duration, (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specification supplied misled the contractor or did not put it on notice to inquire, and (4) the government failed to provide the relevant information.

*Scott Timber*, 692 F.3d at 1373 (quoting *Hercules, Inc. v. United States*, 24 F.3d 188, 196 (Fed. Cir. 1994), *aff'd*, 516 U.S. 417 (1996)).

It is clear that the doctrine does not require the Government to volunteer each and every piece of information known to it. *CAE USA, Inc.*, 16-1 BCA at 177,351. In fact, doing so unnecessarily could deter or confuse bidders and reduce competition. See *American Ship Building Co. v. United States*, 654 F.2d 75, 81 (Ct. Cl. 1981) (“In borderline situations, talk that would discourage bidders from bidding must be eschewed; the need for the warning must therefore be manifest.”). The superior knowledge doctrine only requires disclosure of “the ‘vital’ and ‘essential’ information” that a contractor needs, as it develops its proposal or bid, to understand the performance or cost risks that it would be undertaking if awarded the contract in question. *CAE USA, Inc.*, 16-1 BCA at 177,352; see *ECOS Management Criteria, Inc.*, VABCA 2058, 86-2 BCA ¶ 18,885, at 95,260 (a necessary element of superior knowledge claim is that “the ‘special’ knowledge withheld was ‘vital to the successful completion of the contract’” (quoting *Piasecki Aircraft Corp. v. United States*, 667 F.2d 50, 59 (Ct. Cl. 1981) (quoting *H.N. Bailey & Associates v. United States*, 449 F.2d 376, 382-83 (Ct. Cl. 1971))).

The existence of a duty of disclosure “depends upon a variety of factors, including the ease of discovering the information from other sources.” *Meredith Construction Co.*, DOT CAB 1549, 85-1 BCA ¶ 17,896, at 89,618. “[T]he Government is under no duty to volunteer information in its files if the contractor can reasonably be expected to seek and obtain the facts elsewhere . . . .” *H.N. Bailey*, 449 F.2d at 383. If a situation is not one in which “a Government agency withheld or concealed vital information *which it alone had*, and which it knew that bidders did not have,” the superior knowledge doctrine does not apply. *T.F. Scholes, Inc. v. United States*, 357 F.2d 963, 970 (Ct. Cl. 1966) (emphasis added); see *Scott Timber*, 692 F.3d at 1373 (“the doctrine only applies if ‘the government was aware the contractor had no knowledge of and had no reason to obtain such information’ and ‘any contract specification supplied misled the contractor or did not put it on notice to inquire’”).

A contractor asserting that the Government withheld vital information bears the burden of establishing by “specific evidence” each element of its superior knowledge claim. *GAF Corp.*, 932 F.2d at 979. This includes the burden of establishing that the undisclosed information ultimately contributed to delays in, or increased costs of, its performance. *Bay Shipbuilding Co. v. Department of Homeland Security*, CBCA 54, et al., 07-2 BCA ¶ 33,678, at 166,742.

## B. The NCC Tax Dispute

YDJV complains that DOS breached the contract by failing, prior to award, to disclose that there were unpaid taxes on the NCC property, the nonpayment of which ultimately delayed the GoI's issuance of some building permits. "When analyzing a claim that the Government breached its duty to disclose superior knowledge, the Board 'must focus its inquiry on the government's knowledge at the time of contracting and its relationship to the contractor's lack of knowledge.'" *Bay Shipbuilding*, 07-2 BCA at 166,743 (quoting *L.W. Matteson, Inc. v. United States*, 61 Fed. Cl. 296, 316 (2004)).

By the time that DOS awarded this contract to YDJV, the GoI had made clear to DOS that it was planning to tie the issuance of NCC building permits to the United States' resolution of outstanding tax issues. Some of the DOS officials at the United States Embassy in New Delhi were concerned that the GoI was going to hold NCC building permits hostage to get the tax issues resolved, and there was discussion within DOS about how to resolve the issue, with the constant understanding that the United States, in reliance on the Vienna Convention, would not pay the taxes. At the same time, the City of New York was pursuing a lawsuit against the GoI, seeking payment of real estate taxes on a GoI compound housing the GoI's United Nations workers, and the GoI made clear that it wanted DOS's assistance in resolving that dispute. On several occasions between 2003 and the date of contract award in 2005, the GoI had identified to DOS representatives the reciprocal nature of DOS's request for tax exemptions on United States properties in India and the GoI's expectation of the same exemptions for its properties in the United States. Although some individuals within DOS believed that the GoI would not actually withhold permits or that the issue would be resolved diplomatically before it could affect the NCC construction,<sup>27</sup> those beliefs, with the benefit of hindsight, were incorrect.

Had the situation been what it had been for many years preceding 2003, we would be more forgiving of DOS's non-disclosure about tax disputes. Since the 1970s, the local GoI authorities had been sending tax bills to the United States for the NCC and other properties, and DOS had routinely responded by referencing the Vienna Convention's protection against such taxes. Historically, the GoI authorities had never taken any action following DOS's responses, making non-payment seem a non-issue. *See, e.g.*, Tr. Vol. 9 at 16-18, 22-23. To satisfy its duty of disclosure, the Government need only provide "vital" information affecting

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<sup>27</sup> In 2004, DOS launched what it called the Diplomatic Tax Relief Initiative, which was to assist in negotiations with foreign governments to obtain savings from foreign taxes. Exhibits 1474, 1475. The creation of such a program did not eliminate the risk that the NCC permits would be delayed for tax non-payment and did not justify non-disclosure of the risk.

performance costs or duration, *Scott Timber*, 692 F.3d at 1373, and it seems unlikely that, had the two governments' historical dealings remained static, DOS would not have had any reason to suspect that non-payment was an issue that could affect permit issuance. DOS has no obligation to disclose information about its diplomatic relations with a foreign government where there is no viable reason to suspect that the information will affect project costs or duration.

Here, though, DOS had specific information, and specific concerns, about the likelihood that the GoI was going to try to use payment of the outstanding tax bills (or DOS's assistance in resolving the City of New York's lawsuit against the GoI for unpaid taxes) as leverage for the issuance of building permits for the specific NCC project at issue here. It was folly for DOS to withhold knowledge of that type of specific targeted collection effort from offerors when, at the same time, it was placing on bidders the obligation to obtain those building permits and burdening them with the risk that there would be delays in permit issuance. In such circumstances, DOS had an affirmative obligation to warn YDJV of the strong possibility that permits would be held hostage over the tax disputes. Its failure to disclose that information, while simultaneously writing the contract in a manner that placed upon YDJV the risks associated with the permits, breached its duty of disclosure.

DOS raises several arguments in response to YDJV's superior knowledge claim:

*First*, DOS argues that "consular facilities are exempt from property taxes" and that, pursuant to the Vienna Convention, there should not have been any question about the NCC's exemption status. Respondent's Post-Hearing Brief at 36. Whether there *should* have been a question about the NCC status is irrelevant here. The only issue is whether DOS knew that the GoI was likely to stall issuance of NCC building permits as a means of getting action on the GoI's tax disputes. DOS knew, or should have known, that. DOS could not assign to YDJV the risk that the GoI would refuse to issue or delay issuing NCC building permits when, at the same time, it knew, but failed to disclose, that the GoI was likely to do so.

*Second*, DOS argues that its employees did not actually believe that the GoI would follow through and interfere in the NCC permit process, meaning that DOS did not possess information or have knowledge about possible NCC permit problems. We reject DOS's argument. Although some DOS employees may have believed that these issues would be resolved through diplomacy before permits became an issue, that view was not universally accepted within DOS. DOS made a judgment call in discounting specific information in its possession that the GoI might interfere in the permit issuance process. When it failed to disclose that information to offerors, DOS decided to take a risk that its judgment call was correct. If it had been, and the GoI had continually issued permits without regard to the tax disputes, DOS's gamble would have paid off. DOS could not, however, make such a

judgment call while, at the same time, shifting to YDJV the risk that the judgment call was wrong. When the agency failed to disclose the risk, the agency assumed financial responsibility for that risk.

*Third*, DOS argues that the information at issue here was not solely in DOS's possession. News about the City of New York lawsuit, it asserts, was reported in various newspapers, as well as in public filings in the United States district court in which the case was pending. We agree that "the Government is under no duty to volunteer information in its files if the contractor can reasonably be expected to seek and obtain the facts elsewhere." *H.N. Bailey*, 449 F.2d at 383; see *Max Jordan Bauunternehmung v. United States*, 10 Cl. Ct. 672, 679 (1986) (Government "is under no obligation to volunteer information that is reasonably accessible from another source"), *aff'd*, 820 F.2d 1208 (Fed. Cir. 1987). Here, though, the information that DOS was required to share was not the mere existence of the New York lawsuit, but the fact that the GoI was specifically and expressly tying the NCC permits to that lawsuit and/or the unpaid NCC property taxes. It was the specific information about the *connection* between the permits and the tax disputes that DOS uniquely held and that it had an obligation to share.

*Fourth*, to the extent that DOS is arguing that information about diplomatic relations with a foreign nation is sensitive and should not be lightly shared with the public, we understand DOS's concerns. Premature public disclosure of behind-the-scenes diplomatic efforts can create tensions with the foreign governments with which DOS must engage. At times, general warnings to contractors about potential risks may be sufficient to satisfy the duty of disclosure while still allowing the Government to maintain the confidential or even classified nature of specific information. See *J.A. Jones Construction Co. v. United States*, 390 F.2d 886, 893 n.14 (1968) ("While some aspects of the Air Force's plans undoubtedly were classified, the evidence falls short of proving that a general warning to plaintiff would have rent the security blanket."); *Northrop Grumman Corp. v. United States*, 63 Fed. Cl. 12, 18-19 (2004) (rejecting the Government's contention that a "classified information" exception applies to the superior knowledge doctrine). Here, DOS did not provide even a general warning about possible permit issuance problems. In any event, diplomacy concerns cannot justify risk-shifting to the contractor without knowledge-sharing.

*Fifth*, DOS argues that information about tax disputes and permits is not the type of information that the superior knowledge doctrine covers. It asserts that the doctrine is limited to technical information about "a process, or method, or characteristic of a metal or compound," Respondent's Post-Hearing Brief at 47 (quoting *Wright Industries, Inc.*, ASBCA 18282, 78-2 BCA ¶ 13,396, at 65,493), or "particular components or materials, manufacturing methods, prior research and/or production history and problems." *Id.* (quoting *Ideker, Inc.*, ENG BCA 4389, et al., 87-3 BCA ¶ 20,145, at 101,975-76). We disagree. The

duty to disclose applies to “vital knowledge of a fact that affects performance costs or duration.” *Henry H. Norman v. General Services Administration*, GSBCA 15070, et al., 02-2 BCA ¶ 32,042, at 158,351. If DOS knew that the GoI was definitely (or even likely) going to refuse to issue building permits, that would be a “fact” that would clearly affect both YDJV’s costs and project duration. That there was a question in DOS’s mind as to whether the GoI would actually refuse to issue the permits, despite the information that DOS was receiving to the contrary, does not lessen the risk that the contract awardee would undertake and the cost and duration impacts that would result if the permits were not issued. DOS should have warned its contractor of this risk.

As we will discuss below, for at least a period of time, DOS was correct in believing that the GoI would not stop the NCC project and would actually issue building permits. For quite some time, the GoI issued permits, even while it was threatening not to do so. The evidence makes clear that the local GoI authorities wanted the NCC project to succeed, and they were attempting to help move the project along for long periods of time. And DOS was working hard, with some success, to get the local GoI authorities to do that, to YDJV’s benefit. As we will discuss below, YDJV is not entitled to time extensions or delay damages for periods of time when the GoI, though complaining about unpaid taxes, did not actually delay the project. Nevertheless, at a certain point, the GoI took action on its pre-award threats to interfere in the permit process, and that action affected the project duration. DOS must assume responsibility for that delay.

### C. Measuring Damages for a Superior Knowledge Violation

If the Government breaches its duty to disclose superior knowledge, the Government must “bear the loss, if any, resulting from the breach of that duty.” *J.A. Jones Construction*, 390 F.2d at 893. It is the contractor’s burden to show that “the nondisclosure . . . caused its additional . . . expenditures.” *Id.*

A failure to disclose superior knowledge is typically viewed as a constructive change under the Changes clause of the contract. *See, e.g., Chemical Technology, Inc. v. United States*, 645 F.2d 934, 946 (Ct. Cl. 1981); *Miller Elevator Co. v. United States*, 30 Fed. Cl. 662, 678 (1994), *appeal dismissed*, 36 F.3d 1111 (Fed. Cir. 1994); *Johnson & Sons Erectors*, ASBCA 24564, 81-1 BCA ¶ 15,082, at 74,599; *Norair Engineering Corp.*, GSBCA 2394, 72-1 BCA ¶ 9305, at 43,142; Ralph C. Nash, Jr., *Government Contract Changes* 10-9 to -11 (2d ed. 1989). Pursuant to the Changes clause, “[w]hat would otherwise be breaches [of contract] are converted into claims for equitable adjustment, compensable under the contract.” *Johnson & Sons Erectors Co. v. United States*, 231 Ct. Cl. 753, 757 (1982). The Court of Claims, however, sometimes treated a pre-award failure to disclose vital information as a breach of contract, rather than a constructive change. *See, e.g., American Ship Building*

*Co. v. United States*, 207 Ct. Cl. 1002, 1004 (1975); *Hardeman-Monier-Hutcherson v. United States*, 458 F.2d 1364, 1372 (Ct. Cl. 1972); *Helene Curtis Industries*, 312 F.2d at 777.

The Court of Claims long ago indicated that the question of whether pre-award failures to disclose constitute changes or breaches can vary by situation: “It is not impossible they will [fall within the Changes clause], not impossible that in some circumstances they will be breach claims.” *Johnson & Sons Erectors*, 231 Ct. Cl. at 759. Nevertheless, where a contractor’s claim is redressable under a contract clause, the boards of contract appeals have generally permitted recovery under the clause rather than as a breach, *see Cleereman Forest Products*, AGBCA 2000-101-1, 02-1 BCA ¶ 31,664, at 156,462 (2001) (Westbrook, J., concurring), and clause H.31.1 of YDJV’s contract expressly directs us to utilize the Changes clause if we can. Exhibit 1 at 91. Whether a breach or a change, though, the recoverable damage is essentially the same in the circumstances here: the contractor is “entitled to recover that part of its loss on the . . . contract attributable to” the Government’s failure to disclose the vital information. *Helene Curtis Industries*, 312 F.2d at 779; *see Baltimore Contractors, Inc. v. United States*, 12 Cl. Ct. 328, 344 (1987) (whether a superior knowledge claim is considered a breach or a change, “[t]he court considers the remedies for these breach of contract claims to be coextensive with the remedies for . . . changed condition and constructive change claims because only damages actually sustained are recoverable in this situation”).

In its post-hearing brief, YDJV argues that a different rule of damages should apply. Specifically, it argues that, had it known that the GoI might delay NCC permits, it would never have competed for this contract. As a result, it believes that it is entitled to be placed in the position that it would have occupied if it had never entered the contract in the first place, although, rather than asking for reimbursement of all costs that it expended in performance, it limits its monetary request to mirror the delay damages and direct cost claims that it has submitted (an amount that it asserts is far less than what it lost on this project). As support for its argument, it cites a Court of Claims decision, *Atlantic Dredging Co. v. United States*, 53 Ct. Cl. 490 (1918), and a Supreme Court decision affirming it, *United States v. Atlantic Dredging Co.*, 253 U.S. 1 (1920). YDJV is essentially seeking damages under a restitution theory, but limiting its claimed recovery to what it would receive under an expansive view of the reliance damages theory. *See Glendale Federal Bank, FSB v. United States*, 239 F.3d 1374, 1380, 1382 (Fed. Cir. 2001) (“The idea behind restitution is to restore – that is, to restore the non-breaching party to the position he would have been in had there never been a contract to breach,” while the “underlying principle in reliance damages is that

a party who relies on another party's promise made binding through contract is entitled to damages for any losses actually sustained as a result of the breach of that promise.”<sup>28</sup>

We reject YDJV's damages argument, for the following reasons:

*First*, restitution is “‘a fall-back position’ for the injured party who is unable to prove expectancy damages,” *Hansen Bancorp, Inc. v. United States*, 367 F.3d 1297, 1309 (Fed. Cir. 2004) (quoting *Glendale*, 239 F.3d at 1380), a situation that does not exist here. Further, it “is ‘available only if the breach gives rise to a claim for damages for total breach and not merely to a claim for damages for partial breach.’” *Id.* (quoting *Restatement (Second) of Contracts* § 373). The superior knowledge withholding affected only one aspect of the construction period and did not constitute a total breach. A restitution theory is inappropriate here.

*Second*, the *Atlantic Dredging* decisions that YDJV cites do not say what YDJV wants them to say. In *Atlantic Dredging*, the contractor was to perform certain dredging work based upon maps and specifications that incorrectly described the character of the material to be dredged. After finding that the Government's contractual misrepresentations constituted a breach of contract, the Court of Claims awarded the contractor all of its performance costs, less amounts already paid, as damages, *Atlantic Dredging*, 53 Ct. Cl. at 500, 504, and the Supreme Court affirmed that award, finding that it was “simply compensatory of the cost of the work, of which the government got the benefit.” *Atlantic Dredging*, 253 U.S. at 12. YDJV argues that, under the rationale of *Atlantic Dredging*, it is entitled to recover all of the more than \$26 million in costs that has claimed “since [that amount] is much less than its actual \$59M loss caused by the government's breach.” Appellant's Post-Hearing Brief at 10. Yet, in *Atlantic Dredging*, the reason that the contractor recovered all of its performance costs is because they were all caused by the Government's breach. The Court of Claims, in its decision, cites with approval another decision in which the Supreme Court had held that the contractor's recovery for a government misrepresentation in the contract was limited to “the damages incurred *because of* the different character of material found behind the dam than that described in the specifications.” *Hollerbach v. United States*, 233 U.S. 165, 172 (1914) (emphasis added). The decisions in *Atlantic Dredging* do not support YDJV's entitlement to recovery of any and all costs that it spent and thinks it ought to be paid. YDJV still must prove that it

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<sup>28</sup> Although YDJV compares its theory to a request for reliance damages, it more closely appears to resemble a request for partial restitution, as it seeks to recover its requested damages amount without regard to whether it can prove that the claimed costs were specifically tied to and caused by the tax dispute/permit issuance problem.

incurred extra costs *because of* the Government's failure to disclose vital information and the specific cost impact resulting from that nondisclosure. The *Atlantic Dredging* decisions did not eliminate that obligation.<sup>29</sup>

*Third*, as for the factual underpinning of its argument, we find that YDJV failed to prove that it would not have accepted this contract had DOS disclosed the possibility of permit issuance delays resulting from tax disputes. We understand that, by necessity, the testimony that YDJV provided on this point had to be, and was, post hoc rationalization. YDJV did not know about the tie between the tax disputes and the permit process when it was preparing its offer, so it could provide no contemporaneous evidence that it evaluated such a possibility. Nevertheless, the post hoc rationalizations that YDJV provided focused exclusively on whether YDJV would have accepted a contract placing upon YDJV the entire risk of permit delays resulting from tax disputes. Yet, the contract that we ultimately have here is one that places the financial burden associated with any permit delays resulting from tax disputes upon DOS, not YDJV. YDJV's witnesses did not sufficiently attempt to explain why they would have rejected a contract placing that burden on DOS, and we reject YDJV's factual premise that such a contract would have been unacceptable to YDJV back in 2005.

## II. The Government's Alleged Warranty of the Permit Process

### A. Responsibility for Obtaining Permits

FAR 52.236-7, titled "Permits and Responsibilities" (P&R), was incorporated into this contract and very broadly places upon the contractor the obligation and responsibility for obtaining all necessary permits and licenses: "The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits." 48 CFR 52.236-7. Taken on its own, the clause clearly and unambiguously assigns to the contractor responsibility for and risk associated with obtaining permits from host or local

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<sup>29</sup> There is support for the concept that, if a contractor agrees to accept a contract because of either a fraudulent or material misrepresentation by the Government upon which the contractor is justified in relying, the contract is voidable by the contractor. *Restatement (Second) of Contracts* § 164(1). We need not address the circumstances in which such a contract may be voidable because that concept only applies to executory contracts for which some performance remains to be completed. Here, YDJV has completed its contract work. "The power of a party to avoid a contract for non-fraudulent misrepresentation . . . is . . . lost if the contract has been so far performed or the circumstances have otherwise so changed that avoidance would be inequitable and if damages will be adequate compensation." *Restatement (Second) of Contracts* § 381(2).

governments. *Blaze Construction, Inc.*, IBCA 3651-96, 98-2 BCA ¶ 30,035, at 148,618. It is consistent with the general rule that, absent fault or negligence by the Government or some other contractual provision creating a right to the contrary, the Government is not liable or responsible for damages resulting from the acts of third parties. *Oman-Fischbach International (JV) v. Pirie*, 276 F.3d 1380, 1385 (Fed. Cir. 2002).

Nevertheless, the P&R “clause can be constrained by other contractual provisions that specifically limit the scope of the contractor’s obligations for permitting requirements.” *Bell/Heery v. United States*, 739 F.3d 1324, 1331 (Fed. Cir. 2014). Further, to the extent that “the Government makes positive statements in the specifications or drawings for the guidance of bidders, . . . a contractor has a right to rely on them regardless of contractual provisions requiring the contractor to make investigations.” *Arcole Midwest Corp. v. United States*, 113 F. Supp. 278, 280 (Ct. Cl. 1953). If those positive statements are incorrect, and the contractor is misled by them, the contractor may be entitled to recover for any damage that it incurs from having been misled. *Railroad Waterproofing Corp. v. United States*, 137 F. Supp. 713, 715 (Ct. Cl. 1956).

Here, the contract contains an additional clause, the “Permits and Licenses” (P&L) clause (clause C.1.6), that modifies, or places some limits upon, the P&R clause. In the P&L clause, DOS purported to explain, albeit in a very general and broad manner, how the GoI would go about dealing with permit applications. It states that the GoI would “accept a permit application for site work and foundations, and a final submission defining site plan, building massing, interior fire exiting, toilets, and elevators,” while also identifying some detailed submission requirements that YDJV would have to satisfy to obtain permits. Exhibit 2 at 100. It provided that “[p]hasd submissions will be entertained for site development and foundations, but substantial interim drawings must specify the general extent of the project.” *Id.* At the end of the clause, DOS represented that “[c]onditional approvals will be issued [by the local GoI authority] to expedite foundation construction.” *Id.*

The permitting process that the GoI actually followed was a bit different from what DOS described in the contract. Generally, MMRDA would issue a site work permit, prior to issuance of the PCC that would precede issuance of a FWCC, that did not deal with foundation work. In fact, in this case, YDJV’s subcontractor submitted a permit application on May 11, 2006, for general site work (including the erection of temporary structures and construction of a perimeter wall) without mentioning foundations and without providing the supporting interim drawings that the P&R clause described as being required, Exhibit 13460, and then later submitted a somewhat confusing application on August 1, 2006, that mentioned neither foundations nor plinths. The normal permitting process that MMRDA and MCGM had described as being required involved obtaining a PCC for construction of up to the plinth level, an inspection of the completed plinth by both MMRDA and MCGM, and

then issuance of a FWCC by both MMRDA and MCGM allowing for vertical construction. The normal permitting procedure at MMRDA and MCGM did not involve issuance of foundations permits or conditional approvals of foundations. As we previously found, a foundation is something different from a plinth, and, reading the contract provision about the permitting process, YDJV reasonably would have anticipated separate foundation and plinth permits. Nevertheless, YDJV never requested a foundation permit. Although it eventually asked MMRDA for conditional approval allowing for foundation work, it did not do so until February 15, 2007, at which point it received verbal approval for foundation work nineteen days later and written approval two days after that. With regard to PCCs, the contractor could apply for a separate PCC for each of the nine buildings on the NCC, but elected to submit a single PCC application for all of the NCC buildings. It submitted separate FWCC applications for each of the nine NCC buildings.

YDJV complains that, based upon the language of the P&L clause, it reasonably believed that the GoI was going to “fast track” its permit requests to speed the laying of foundations and construction of the entirety of the NCC project. The term “fast tracking” is one that YDJV created for use in this litigation – it does not appear in the contract or, as far as we could tell, in any of the contemporaneous documents created during the contract bidding or performance process. It is a concept that finds some limited support in the contract language, but not to the extent that YDJV attempts to stretch it.

In evaluating YDJV’s argument, we consider the extent to which the P&L clause created some type of warranty upon which YDJV was entitled to rely when preparing its offer and whether such a warranty affected YDJV’s risk assumptions under FAR 52.236-7 (beyond and without regard to the superior knowledge issues that we have already discussed). “[A] warranty is an assurance by one party to an agreement of the existence of a fact upon which the other party may rely; it is intended precisely to relieve the promisee of any duty to ascertain the facts for himself.” *Oman-Fischbach*, 276 F.3d at 1383 (quoting *Dale Construction Co. v. United States*, 168 Ct. Cl. 692, 699 (1964)). “To establish that the representation constitutes a warranty, [a contractor] must show that ‘(1) the Government assured the [appellant] of the existence of a fact, (2) the Government intended that appellant be relieved of the duty to ascertain the existence of the fact for itself, and (3) the Government’s assurance of that fact proved untrue.’” *Regency Construction, Inc. v. Department of Agriculture*, CBCA 3246, et al., 16-1 BCA ¶ 36,468, at 177,707 (quoting *Oman-Fischbach*, 276 F.3d at 1384 (quoting *Kolar, Inc. v. United States*, 650 F.2d 256, 258 (Ct. Cl. 1981))), *appeal pending*, No. 16-2600 (Fed. Cir. docketed Sept. 1, 2016).

Although the Government is typically not liable for the sovereign acts of a foreign government, an agency can bind itself through contractual provisions that create warranties to pay damages to the contractor if the foreign government engages in conduct contrary to

the agency's warranty. See *Swinerton & Belvoir*, ASBCA 24022, 81-1 BCA ¶ 15,156, at 74,987-88 (discussing how agency, through warranty, can assume liability for another agency's sovereign acts). Nevertheless, "not all statements in a contract are warranted." *Swinerton & Belvoir*, 81-1 BCA at 74,988. Unless YDJV can establish that DOS made warranties about the GoI's permit process that turned out not to be true (to YDJV's financial detriment), "the Government is not liable for damages resulting from the actions of third parties." *Oman-Fischbach*, 276 F.3d at 1385 (quoting *Dale Construction*, 168 Ct. Cl. at 698).

The linchpin of a warranty is the extent to which the contract language reads as a promise or a guarantee to the contractor, as compared with a mere factual representation. A warranty is "[a]n express or implied *promise* that something in furtherance of the contract is *guaranteed* by one of the contracting parties." *Black's Law Dictionary* 1821 (10th ed. 2014) (emphasis added). It differs from a representation, which is "[a] presentation of fact . . . made to induce someone to act" or "the manifestation to another that a fact . . . exists." *Id.* at 1493. While "a warranty is conclusively presumed to be material, . . . the burden is on the party claiming breach to show that a representation is material." *Id.* at 1821. Further, "a warranty must be strictly complied with, while substantial truth is the only requirement for a representation." *Id.* "[A] warranty is an essential part of a contract, while a representation is usu[ally] only a collateral inducement." *Id.*

#### B. Representations That Did Not Create Actionable Warranties

Although there were some errors in DOS's description of the MMRDA/MCGM permitting process, most of them did not rise to the level of actionable warranties, for the following reasons:

*First*, although DOS erred in suggesting that there would be a single site work and foundations permit, given that the site work permit was requested separately from other permits, YDJV cannot complain about that misstatement in the contract. Vartak's initial application for a permit in May 2006 was limited to temporary structures and site work, without reference to foundations. Further, even if Vartak had sought a foundations permit, the contract representation about such permits indicated that, although "[p]hased submissions will be entertained for site development and foundations, . . . substantial interim drawings must specify the general extent of the project." Exhibit 2 at 100. For YDJV to rely upon the Government's alleged warranty about foundations permits, YDJV would have to have submitted those substantial interim drawings with its foundations permit application, which it did not do. As a result, any error in describing the coupling of the site work and foundations permits was harmless.

*Second*, most of the language that DOS included in the P&L clause purporting to describe the permit application process was stated in a very general way. Any contractor reading it would have to find it too vague to use as a sole source for explaining how to submit permits. The P&L clause lacked any detail as to where or how to submit permit applications, the specific information that MMRDA would need in an application, or the amount of time that MMRDA would need for review. As a result, despite the language in the P&L clause, the contractor would have to conduct further investigation to identify specific requirements for the permit process, and YDJV (through the permit expeditors that it hired) did just that. In addition, MMRDA and MCGM representatives were a part of the pre-proposal conference that YDJV attended from May 25 to 27, 2005, and they discussed the permitting process or permitting requirements at that time, explaining the PCC and FWCC process. *See* Tr. Vol. 8 at 230. YDJV cannot viably argue that it relied on the vague descriptions in the P&L clause as fully defining exactly what the process would be. *See T. Brown Constructors, Inc. v. Pena*, 132 F.3d 724, 729 (Fed. Cir. 1997) (“for a contractor to prevail on a claim of misrepresentation, the contractor must show that the Government made an erroneous representation of a material fact that the contractor honestly and reasonably relied on to the contractor’s detriment”). We must view the availability of MMRDA and MCGM at the pre-proposal conference and the explanations that they made there of the permitting process as placing YDJV on notice of information beyond that contained in the P&L clause. The bulk of the statements about foundations permits in the P&L clause are simply too vague and general to constitute a “warranty” about the permitting application process.

*Third*, to the extent that YDJV is complaining that MMRDA did not provide for “phased submissions . . . for site development and foundations,” as indicated in the P&L clause, we find that MMRDA actually accepted a series of phased site work and foundations submissions and issued a series of permits in response, including a backfill permit in February 2006, an excavation permit in April 2006, the perimeter wall and temporary structures permit in June 2006, and the PCC for all of the NCC buildings in April 2007. Accordingly, YDJV cannot show that the representation was incorrect. In any event, to the extent that any of YDJV’s permit applications could be viewed as an attempt at phased submissions, those applications were never accompanied by the “substantial interim drawings . . . specify[ing] the general extent of the project” that the P&L clause indicated were required. As previously stated, YDJV cannot claim that it was damaged by misinformation in the clause when it did not comply with the purported requirements in the first place.

Had YDJV actually complied with the requirements identified in the P&L clause when seeking permits, we might concentrate more fully on the extent to which specific representations in the clause could be viewed as a warranty. Because YDJV did not do so, we need not engage in a more detailed review.

### C. Representations Creating A Warranty

There were two representations in the P&L clause that rose to the level of a warranty. First, DOS affirmatively represented that MMRDA and MCGM would issue permits for foundations. Although DOS has argued that “foundations,” in the context of the P&L clause, intended to refer to the plinth permits, or PCCs, that MMRDA would normally issue through its regular permit process, plinths, as we previously found, are different from foundations. Second, the P&L clause indicated that “[c]onditional approvals [by the local GoI authorities] will be issued to expedite foundation construction.” Exhibit 2 at 100.

These affirmative statements about how the GoI would modify its standard permit procedures to accommodate the NCC project were direct representations upon which YDJV was entitled to rely when it was preparing its offer. These statements were taken from the PAP that DOS’s employee, Mr. Rosenfeld, wrote following his meetings with MMRDA during the solicitation development process. They were included in the solicitation to encourage contractors to submit offers and were intended to indicate the willingness of MMRDA and MCGM to help in expediting the construction process through the foundation level. The fact that DOS included the statements in the P&L clause in good faith, believing that they were true, makes no difference. *Womack v. United States*, 389 F.2d 793, 800 (Ct. Cl. 1968). DOS could have added a caveat to its assertions, stating that the local authorities had *suggested* that they would issue foundation permits and conditional approvals for foundations but that DOS could not force them to do so (leaving the risk of the local authorities’ noncompliance upon YDJV). DOS did not add such a caveat. DOS created a warranty, which “amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue.” *Dale Construction*, 168 Ct. Cl. at 699.

This warranty, though, does not justify YDJV’s purported belief that the GoI authorities were going to “fast track” the entire NCC project. The “conditional approvals” language is limited to *foundation* construction. The P&L clause says nothing about the GoI authorities agreeing to expedite or provide conditional approvals of *all* construction permits for the NCC project, including those involving vertical construction above the plinth level. YDJV’s reliance upon this clause to argue that the GoI was required to expedite every permit that YDJV requested and grant conditional permit approvals throughout the NCC project is unfounded. Further, nothing in YDJV’s proposal evidences that YDJV anticipated a “fast track” approach at that time, suggesting that “fast tracking” is a post hoc rationalization to justify a monetary recovery rather than an actual understanding upon which YDJV relied during contract performance.

Further, we cannot find that YDJV suffered any damage from any misrepresentation arising out of the warranty.<sup>30</sup> YDJV never applied for a “foundations only” permit, separate and apart from its larger PCC applications that necessarily encompassed foundations, and it delayed asking MMRDA for a conditional approval for foundation work until February 15, 2007. Once it asked for conditional approval, MMRDA, despite some initial confusion about the request, granted it nineteen days later, a time lag between request and response that we do not find unreasonable in the circumstances here. YDJV understood that the issuance of a foundations permit or conditional approval was not automatic or self-effecting. YDJV still had to ask for it. *See* Deposition Designation of Frank Mitchell, Vol. II at 209 (acknowledging requirement to seek a construction permit, but that “[f]oundations could be started,” following MMRDA approval, “with the correct information”). Although YDJV has argued that Vartak, one of its first permit expeditors, tried inartfully to seek a foundations permit as early as August 2006 through a larger permit request that it submitted and that its attempt was rejected, Vartak’s application made no request for a foundations permit or conditional approval for foundation work. In fact, at the time, Vartak was telling YDJV that it did not even *need* a permit to begin constructing foundations, and YDJV began that work without any permit for the work. YDJV cannot complain that DOS’s P&L clause was misleading and caused it to suffer damage before YDJV itself ever complied with the requirements that the P&L clause said were necessary for obtaining a foundations permit and when it proceeded to perform the work without the permit. *See T. Brown Constructors*, 132 F.3d at 729 (to recover damages for contractual misrepresentation, contractor must honestly and reasonably rely on misrepresentation to its detriment).

Similarly, reading the P&L clause as a whole, which we must, *Jane Mobley Associates, Inc. v. General Services Administration*, CBCA 2878, 16-1 BCA ¶ 36,285, at 176,954, it is clear that any conditional approvals allowing for foundation work would come *after* submission of, and were to be in response to, a proper permit application. YDJV’s efforts to submit such a permit application were severely delayed. It is impossible to read the P&L clause as guaranteeing, or warranting, conditional foundation construction approvals before the contractor ever met its obligation to submit a proper construction permit application. Further, once Design Cell submitted a conditional approval request on February 15, 2007, MMRDA approved it. Again, the warranty was not self-executing. For the Board to find that YDJV was damaged by a breach of the warranty, YDJV first would have to have

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<sup>30</sup> In its post-hearing brief, DOS argues that, in fact, the GoI authorities issued “conditional approvals” in the written PCC and the NOB FWCC documents, given that both of them had “conditions” written into them. Respondent’s Post-Hearing Brief at 19. The “conditional approvals” language in the P&L clause relates to foundation construction, not plinth or vertical construction work.

taken steps to engage in the warranted process. In the circumstances here, we cannot find that YDJV is entitled to any damages arising out of any error in this warranty or that any error caused delay.<sup>31</sup>

### III. Responsibility For the Police “No Objection Certificate”

One of the prerequisites for obtaining a FWCC was the issuance by the police commissioner in Mumbai of a “no objection certificate.” MMRDA would not issue its FWCC without the police NOC. YDJV’s permit expediter was late in applying for the police NOC and received it only a short time before the FWCC was actually issued. Although the P&R and P&L clauses expressly place responsibility upon YDJV for obtaining permits, YDJV argues that any delays in its application for or receipt of the police NOC are DOS’s fault and responsibility. We reject YDJV’s argument.

The language of the P&R and P&L clauses makes very clear that responsibility for all aspects of the process of obtaining permits falls on the contractor. Those clauses are “risk-shifting device[s] [whose] primary purpose is to place upon the contractor, and not the Government, the burden of ascertaining the scope and extent of local requirements which impinge upon [the contract] work.” *Gardner Construction Co.*, DOT CAB 73-3, 74-1 BCA ¶ 10,406, at 49,146 (1973); see *McKenzie Engineering Co.*, ASBCA 53374, 05-2 BCA ¶ 33,090, at 164,040 (P&R clause is stated in “broad terms” to place the permitting burden on the contractor and to require the contractor “to assure compliance with relevant laws and regulations”).

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<sup>31</sup> YDJV also argues that the P&L clause evidences a mutual mistake of fact that justifies reformation of the contract. We reject the argument because the description of how the GoI would process permit applications is not the type of “fact” covered by the doctrine. “A party’s prediction or judgment as to events to occur in the future, even if erroneous, is not a ‘mistake’ as that word is defined [under the doctrine of mutual mistake of fact].” *Dairyland Power Cooperative v. United States*, 16 F.3d 1197, 1203 (Fed. Cir. 1994) (quoting *Restatement (Second) of Contracts* § 151 cmt. a). Further, YDJV has not established that “the mistake had a material effect on the bargain,” as required to find a mutual mistake. *Atlas Corp. v. United States*, 895 F.2d 745, 750 (Fed. Cir. 1990).

In addition, YDJV argues that the P&L clause constitutes a defective specification or constructive change, asserting that the “government may be liable if it misinforms the contractor about the laws applicable to the contract.” Appellant’s Post-Hearing Brief at 31 (quoting John Cibinic, Ralph Nash & James Nagle, *Administration of Government Contracts* 257 (4th ed. 2006)). This argument fails for the same reasons as YDJV’s warranty arguments.

YDJV cites testimony from its witness, Pravin Malkani of Design Cell (YDJV's second permit expediter), suggesting that the police NOC is always obtained by the owner of the property – here, DOS – rather than the contractor, establishing a trade custom that should override the contract language. As an initial matter, we find any evidence of a trade custom too insignificant to warrant reliance. There is no evidence, beyond Mr. Malkani's testimony, to support the existence of a trade custom. Nothing in the Mumbai permitting regulations, *see* Exhibit 1467, states that only the owner itself, as opposed to another person upon behalf of the owner, may submit the request for a police NOC. In fact, YDJV's argument is rather odd given that virtually *all* of the permits – the PCC, the FWCC, and other NOCs that had to be obtained from other offices – were submitted in the name of the owner. Under the rationale underlying YDJV's theory, it should have been DOS's responsibility to obtain *all* NOCs and permits. It appears that YDJV has singled out the police NOC as being DOS's responsibility only because its failure timely to apply for this particular certificate negatively affects its delay argument.

Beyond that, it appears to be the custom in the Mumbai area for entities to hire and utilize permit expediters to assist in navigating the somewhat complicated permitting process. That is precisely what happened here: YDJV's subcontractor, Design Cell, prepared a letter for a DOS representative's signature asking for the police NOC, and DOS promptly signed and returned it to Design Cell for submission after noting some deficiencies in the exhibits that were to accompany it. There is no indication that the police commissioner objected to that procedure. In fact, the police commissioner actually signed the NOC that Design Cell submitted. Design Cell, upon behalf of YDJV and DOS, followed the same practice in applying for the PCC and the FWCCs. We reject YDJV's argument that there was some trade custom limited to police NOCs that required some different process.

Further, even if there were a trade custom applicable to police NOCs, we could not find that it overrides the express language of the P&R and P&L clauses. YDJV cites *Marine Construction & Dredging, Inc.*, ASBCA 38412, et al., 95-1 BCA ¶ 27,286 (1994), to argue that trade custom does just that. In *Marine Construction*, the Armed Services Board of Contract Appeals (ASBCA) held that the P&R clause did not shift responsibility for obtaining a wetlands permit where “it is a customary practice in the dredging industry for the project owner, including the Government, to obtain the wetlands permits.” *Id.* at 135,955. In that case, though, the Government, at the outset of contract performance, had already obtained a wetlands permit that allowed the contractor to perform dredging in a certain waterway, but not in the area that dredging was needed under the contract. The agency attempted, but was unable, to obtain a new permit for the work in the excluded area, but led the contractor to believe that all wetlands permits were in order. To conduct the necessary dredging, a new wetlands permit was needed, the issuance of which would require significant studies and testing, and, pursuant to the applicable regulations, only the agency could submit

it. Although the ASBCA identified trade practice in its discussion, the board's focus was the agency's failure to disclose known problems in obtaining the permit while leading the contractor to believe that the permit was already in place.

We do not read the ASBCA's decision in *Marine Construction* as conflicting with the general rules of contract interpretation, which allow a tribunal to accept evidence that a "term in the contract . . . has an accepted industry meaning different from its ordinary meaning" if a party shows that, applying the trade practice or custom to the actual language of the contract, it reasonably relied upon its interpretation when entering into the contract. *Jowett, Inc. v. United States*, 234 F.3d 1365, 1369 (Fed. Cir. 2000). Nevertheless, any interpretation that *ignores* actual contract language, including the language of the P&R and P&L clauses, would conflict with the Federal Circuit's guidance in *Bell/Heery*, 739 F.3d at 1334, which directed that the "plain language of the [P&R] clause . . . unequivocally assigns *all* of the risk for complying with the permitting requirements" upon the contractor "without additional expense to the Government." Further, it appears that the ASBCA's central holding in *Marine Construction* was that the agency's failure to disclose superior knowledge affected its ability to hold the contractor to the risk-shifting in the P&R clause, rendering its comment about trade custom superfluous.<sup>32</sup>

In addition, even if the P&R and P&L clauses could be read as somehow leaving some permitting obligations with DOS, other language in this contract makes clear that DOS had truly transferred *all* responsibility for permits to YDJV. Under clause H.25 of the contract, titled "Other Services Not To Relieve Contractor," DOS agreed that, "[i]n the interest of expediting the project, the Government may, in its sole discretion, undertake to provide additional services for or on behalf of the Contractor which are not required of the Government under this contract, such as assisting the Contractor in obtaining . . . permits." Exhibit 1 at 61. That clause makes clear that "the Government shall be under no obligation to [provide that assistance], and neither the provision nor the failure to provide such services

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<sup>32</sup> YDJV also cites to the decision of one of our predecessor boards, *Christopher Construction Co.*, IBCA 109, 59-1 BCA ¶ 2129, as placing various permit responsibilities on the Government despite the P&R clause. There, plumbing specifications conflicted with the local county's plumbing code, meaning that the contractor could not obtain a permit without a change in the specifications, and the Government had not paid an availability charge for which, outside the context of the contract, it was responsible. It was the defect in specifications that caused the Government's liability. Nothing in that decision supports an argument that, in contracts containing the risk-shifting P&R clause but no other clauses limiting or affecting that shift in risk, the Government remains ultimately responsible for applying for permits.

nor the manner in which such services are provided shall relieve the Contractor of or excuse the Contractor from any of its responsibilities under the contract.” *Id.* To the extent that DOS had an implied duty of good faith to assist in the permitting process, it met any such obligations, responding swiftly to Design Cell’s request for review and signature and contacting the police commissioner’s office to seek expedited consideration.

Finally, we find that, during contract performance, YDJV waived any argument imposing a duty upon DOS to obtain the police NOC. YDJV never suggested during performance that it was DOS’s obligation to obtain that NOC. To the contrary, YDJV, through its permit expeditor, affirmatively assumed and handled that responsibility, albeit with some delay. If, during contract performance, YDJV was being delayed by DOS’s failure to apply for a police NOC that it thought was DOS’s responsibility, YDJV had to say something while DOS could still correct or minimize its error. YDJV, if aware of a breach, could not surprise DOS with news of that breach only after contract completion. YDJV’s silence during performance was a waiver. *See, e.g., E. Walters & Co. v. United States*, 576 F.2d 362, 367-68 (Ct. Cl. 1978); *Ling-Temco-Vought, Inc. v. United States*, 475 F.2d 630, 636-39 (Ct. Cl. 1973).

#### IV. Labor Shortages

YDJV alleges that, beginning around September 2007, it was unable to hire sufficient local labor to staff this project because of an extraordinary and unprecedented “boom” in construction projects in the Mumbai area, which was siphoning off all available labor. YDJV argues that the delays caused by the labor shortage are not only excusable (entitling it to a time extension), but also compensable.

YDJV’s contract provided that YDJV would “be allowed time, not money, for excusable delays as defined in FAR 52.249-10, Default.” Exhibit 1 at 32 (clause F.9). “To establish entitlement to an extension based on excusable delay, [a contractor] must show that the delay resulted from ‘unforeseeable causes beyond the control and without the fault or negligence of the [c]ontractor,’” as well as that the delay affected overall contract completion. *Sauer*, 224 F.3d at 1345 (quoting 48 CFR 52.249-10(b)(1)). The contract listed various examples of excusable delays, including but not limited to acts of God, acts of the host country government in its sovereign capacity, fires, floods, and labor strikes. Exhibit 1 at 32. That list is not exhaustive, however. As expressly stated in clause F.9.2 of the contract, the important requirement for finding any delay to be excusable, regardless of whether it is listed in the contract as an example of a possible excusable delay, is whether the delay was beyond the control and without the fault of the contractor:

In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor, and the failure to perform furthermore (1) must be one that the Contractor could not have reasonably anticipated and taken adequate measures to protect against, (2) cannot be overcome by reasonable efforts to reschedule the work, and (3) directly and materially affects the date of final completion of the project.

*Id.*

“A contractor is responsible for providing the labor needed in order to perform the contract, and its failure to do so is not an occurrence beyond its reasonable control and without its fault or negligence except in the most unusual circumstances, such as where the Government contributes to the unavailability of the labor or where abnormal circumstances exist which could not have been anticipated.” *Business Management Research Associates, Inc. v. General Services Administration*, CBCA 464, 07-1 BCA ¶ 33,486, at 165,991. Although it is perhaps somewhat unsettled as to what types of “abnormal circumstances” might justify an excusable delay arising from labor problems, those circumstances do *not* include “a general labor shortage, the unavailability of skilled operatives or technical specialists, [or] the loss of employees on whose assistance a contractor may have counted.” *Hydro Fitting Manufacturing Corp.*, ASBCA 11768, et al., 70-1 BCA ¶ 8211, at 38,183. That is, a contractor’s “general difficulties in obtaining the required labor” do not create a basis for excusable delay, *Business Management*, 07-1 BCA at 165,991 (quoting *Robert McMullan & Son, Inc.*, ASBCA 11998, 68-1 BCA ¶ 7068, at 32,678), and “[p]erformance of a contract is not excused by unusual or unexpected expense.” *Industrial Engineering Co. v. United States*, 92 Ct. Cl. 54, 60 (1940).

YDJV claims that the “abnormal circumstances” that it faced in performing this contract were that construction in the Mumbai area suddenly, and unforeseeably, increased in such a monumental way that it stretched the available local construction labor market beyond its capacity. Because of that, it and its subcontractors were unable to hire the large number of workers that they needed for this job. We find YDJV’s evidence insufficient to establish that a change in the labor market affected its work.

Although, in its pre-project survey, YDJV determined that the availability of skilled workers in Mumbai was positive, it submitted no evidence of the reasonableness of that original assumption or that it, or its subcontractors, had adequately analyzed how they could find all of the workers, both skilled and unskilled, that it needed for a project of this size. There was no detailed pre-performance work plan showing how many workers YDJV would actually need at any given time and how it would find them. It intended to rely on subcontractors to find workers, but it repeatedly complained about its subcontractors’ efforts

during performance and about its own inability to motivate them to perform to YDJV's standards. In addition, YDJV complained during the hearing that the security requirements of this project may have scared off Indian workers and made it more difficult to staff this project, given that workers arriving at the job site each day would have to wait in line to go through an access control facility, which included an x-ray machine and an iris (eye) scanner, before they could enter the compound. Tr. Vol. 4 at 126. But that fact was known to YDJV before the contract was awarded, and any disincentive that it caused in labor hiring is not something that YDJV can claim was unforeseeable or unknown to it at the time of contract award.

Further, despite YDJV's attempt to prove a sudden extraordinary construction boom in late 2007, the evidence of record only reflects that there was a modest increase in construction *spending* in Mumbai during this period, but that the rate of increase had been fairly steady for several years. We cannot find based upon the existing record that YDJV's labor hiring problems – and the poor performance of its subcontractors, which YDJV repeatedly criticized during the period of its alleged labor shortages – were the result of anything other than YDJV's original misunderstanding of what the Mumbai labor market would support. “That Appellant's labor time and costs turned out to be greater than had been anticipated is not . . . sufficient of itself to establish that the conditions encountered were either unknown or unusual within the meaning of the changed conditions clause of the contract.” *Vulcan Asphalt Co.*, VABCA 428, 1961 WL 189, at \*1 (Nov. 30, 1961). YDJV is not excused for and cannot evade responsibility for delays caused by YDJV's problems in hiring labor.

Because YDJV's labor shortage experience does not amount to an excusable delay, YDJV cannot prevail on its further argument that, because prior government delays pushed contract performance into a period of labor shortages, the labor shortage delays are compensable. Further, for reasons that we will discuss later, the Government is not responsible for the fact that YDJV's work was pushed into the period of the alleged labor shortages, further defeating YDJV's compensability argument.

## V. Visa Delays

As discussed in our findings of fact, in the fall of 2009, the GoI imposed a new visa policy for foreign workers, apparently because it wanted to encourage companies to hire local Indian labor. The GoI required most foreign workers then in India to depart no later than October 31, 2009, and, once back in their home countries, to apply from there for new visas through an application process that was generally more stringent than the GoI had previously imposed. Because of security requirements on the NCC project, there were certain jobs that American workers had to perform.

One of the examples of excusable delay in clause F.9, which incorporates and supplements FAR 52.249-10(b)(1), is “acts of the government of the host country in its sovereign capacity.” Exhibit 1 at 32. The power to control the visa process is clearly a sovereign prerogative, *see Chae Chan Ping v. United States*, 130 U.S. 581, 603-04 (1889), and the GoI’s action in changing its visa rules and in forcing American workers to depart India plainly constitutes an “act[] of the host country government in its sovereign capacity.” Critical path delays resulting from the GoI’s action requiring YDJV’s American workers to depart India, return to the United States, and apply for new visas are generally excusable.

Nevertheless, to the extent that an unexpected action, like the GoI visa order, negatively affects work on a contract, the contractor that is injured by it is required to take steps to mitigate the resulting damage, *Signal Contracting*, 93-2 BCA at 128,736, and it will not be able to recover damages that it could have avoided had it taken reasonable precautionary action. *Midwest Industrial Painting*, 4 Cl. Ct. at 133. YDJV’s subcontractor, American Systems, did not always take reasonable actions in response to the GoI visa change. It never submitted visa applications for the full number of workers that it had intended to have on-site, and, after some of the initial visa applications for American Systems workers were denied, it waited almost three months before submitting new applications. Even then, it never submitted applications sufficient to provide for the six CAWs that it originally intended. Although YDJV explains that American Systems was having trouble finding qualified workers who were willing to go to India, it does not show that the GoI’s change in visa policy created that situation. American Systems did not take reasonable steps to mitigate delay after the GoI’s visa policy change, and YDJV is responsible for the actions, or lack thereof, of its subcontractor. *Living Tree Care Inc. v. Department of the Interior*, CBCA 2008, et al., 11-2 BCA ¶ 34,850, at 171,442.

#### VI. Delays Associated with the L&T “Stop Work” Court Order

On April 6, 2011, as YDJV was trying to finish the project so that accreditation could occur, YDJV terminated L&T’s subcontract, an act that caused L&T to file a wrongful termination action in the High Court of Judicature in Mumbai. That court issued a stop work order against YDJV on April 21, 2011, enjoining any work encompassed within L&T’s scope of work. The stop work order was lifted on May 26, 2011, and YDJV’s replacement contractor was able to complete the L&T work by June 15, 2011.

YDJV claims that the court order caused forty-seven days of excusable delay because, it asserts, delays caused by acts of a host country government in its sovereign capacity are excusable under the clause F.9, which incorporates and supplements FAR 52.249-10(b)(1), 48 CFR 52.249-10(b)(1). It is difficult to see how a court order would qualify as an act of a host government in its sovereign capacity. A sovereign act involves “[w]hatever acts the

government may do, be they legislative or executive, so long as they be public and general.” *Horowitz v. United States*, 267 U.S. 458, 461 (1925) (quoting *Jones v. United States*, 1 Ct. Cl. 383, 384 (1865)). A court acts in a judicial capacity, not a legislative or executive capacity, taking a court order out of the sovereign acts doctrine. See *Superior Timber Co.*, IBCA 3459, 97-1 BCA ¶ 28,736, at 143,431 (1996) (“the sovereign acts doctrine refers to acts of the Government in its ‘legislative or executive’ capacity, . . . rather than to judicial decisions”). Further, the court order at issue here was not “public and general,” but was specifically directed to YDJV and required YDJV, and only YDJV, to stop work. See *Orlando Helicopter Airways, Inc. v. Widnall*, 51 F.3d 258, 262 (Fed. Cir. 1995) (“A sovereign act is public and general in nature, not private and contractual.”). YDJV’s cited basis for excusable delay does not apply here.

Yet, the listing in clause F.9 of “acts of the government of the host country in its sovereign capacity” is only one of several examples of what can constitute an excusable delay. That list is not intended to be exhaustive. *Asheville Jet Charter*, 16-1 BCA at 177,304 n.9. The purpose of the excusable delays clause is to protect a contractor if an event is truly unexpected, unforeseeable, and caused by circumstances beyond the contractor’s reasonable control and without his fault or negligence. *Brooks-Callaway Co.*, 318 U.S. at 123-24; *Asheville Jet Charter*, 16-1 BCA at 177,301. Even those actions actually listed in FAR 52.249-10(b)(1) will not be considered excusable if, in a given situation, they were not outside the contractor’s reasonable control or were the fault of the contractor. *Asheville Jet Charter*, 16-1 BCA at 177,301; see *Tri-State Construction Co.*, IBCA 63, 57-1 BCA ¶ 1184, at 3287 (“the m[e]re fact that strikes are among the enumerated causes of [excusable] delay does not make every strike and its consequences unforeseeable”).

It is the contractor’s burden to establish that a particular delay is excusable. *MLJ Brookside, LLC v. General Services Administration*, CBCA 3041, 15-1 BCA ¶ 35,935, at 175,623. Generally, “it is the duty of a contractor to ensure its ability to perform the contract it is awarded,” including the hiring of sufficient labor and subcontractors, and tribunals “have been hesitant to excuse a contractor when it failed to provide that labor.” *Asheville Jet Charter*, 16-1 BCA at 177,301. Typically, “tribunals ‘will not allow excusable delay from a labor problem other than a strike except in the most unusual circumstance as where the Government also contributed to the delay . . . or where abnormal circumstances exist which could not have been anticipated.’” *Id.* (quoting *NTC Group, Inc.*, ASBCA 53720, et al., 04-2 BCA ¶ 32,706, at 161,810).

YDJV did not satisfy its difficult burden here. It presented no evidence as to whether, in the Indian court system, the type of “no further work” order that it received was unusual or unforeseeable following termination of a local subcontractor. It presented no evidence about any negotiations in which it engaged with L&T before termination or whether such

negotiations might have resolved any need for L&T to seek the temporary stop work order that it obtained. We cannot find that the court order created unforeseeable excusable delay entirely outside YDJV's control. Further, we cannot find that the delays alleged affected the critical path of contract performance.

## VII. Alleged Breaches of Duties of Good Faith

YDJV argues that there were several actions that DOS undertook, usually through Mr. Browning (the on-site OBO project manager), that violated DOS's implied duty of good faith and fair dealing. Specifically, YDJV maintains that Mr. Browning's actions improperly precluded YDJV from obtaining an earlier substantial completion finding. We recognize that every contract "imposes an implied obligation 'that neither party will do anything that will hinder or delay the other party in performance of the contract.'" *Essex Electro Engineers, Inc. v. Danzig*, 224 F.3d 1283, 1291 (Fed. Cir. 2000) (quoting *Luria Brothers & Co. v. United States*, 369 F.2d 701, 708 (Ct. Cl. 1966)). The Government's insistence that a contractor comply with contract requirements "does not constitute hindrance of performance." *Sach Sinha & Associates, Inc.*, ASBCA 46916, 96-2 BCA ¶ 28,346, at 141,563. We address YDJV's complaints below.

YDJV asserts that DOS unfairly imposed new fire inspection standards as part of the accreditation process (in response to criticism by the Office of the Inspector General about old standards) and that the new standards somehow affected accreditation. However, YDJV has not shown that it relied on the old standards, which were not a part of the contract, when preparing its proposal or that any such reliance was reasonable. Further, it has not shown how the new standards actually impacted the accreditation results. It has shown no cause of delay from DOS's use of the new standards or any breach of a good faith duty.

YDJV further complains that Mr. Browning failed to cooperate in the accreditation process and that this failure contributed to delays in contract completion. As evidence, it cites to a document showing that one of OBO's inspectors was relieved to see "a management change" – that is, the replacement of Mr. Browning as on-site project manager by another OBO employee – between the first accreditation inspection in July 2011 and the second one in early October 2011 – which, according to the OBO employee, made the second inspection run more smoothly and with less opposition. YDJV asserts that Mr. Browning was focusing on minor issues that should not have stymied an earlier finding of substantial completion and that, in fact, another OBO employee was pushing to have the accreditation team find substantial completion effective August 30, 2011, over Mr. Browning's objections. The desire by the other OBO employee essentially to waive some defects and omissions in the job completion, so that OBO could be done with YDJV and take over fixing any deficiencies itself, does not mean that Mr. Browning's insistence on full contract compliance

and completion was a breach of the duty to act in good faith or a failure to cooperate. To the extent that there were instances in which Mr. Browning was unwilling to waive contract requirements or was viewed by YDJV as too strict or unbending, we do not find that they rise to the level of a breach of a duty to cooperate. Mr. Browning was simply attempting, in good faith, to perform his responsibilities. That another employee might have been more forgiving or willing to bend does not mean that Mr. Browning acted improperly.

To the extent that YDJV is complaining that there should have been an earlier substantial completion date – August 30, 2011, instead of October 6, 2011 – we disagree. Unlike many contracts, the NCC contract expressly defines the meaning of “substantial completion.” One of those requirements is that, “as determined and certified by the Contracting Officer or Contracting Officer’s Representative in writing to the Contractor, . . . the work . . . is sufficiently complete and satisfactory, in accordance with the requirements of the Contract Documents, that it may be occupied or utilized for the purpose for which it is intended, and only minor items such as touch-up, adjustments, and minor replacements or installations remain to be completed or corrected.” Exhibit 1 at 21. Before occupancy could be achieved, MMRDA had to issue an occupancy certificate, *see* Tr. Vol. 2 at 282, and that was not issued until October 5, 2011, the day before the contracting officer declared the project substantially complete. Although YDJV complains that there were various actions necessary preceding issuance of an occupancy certificate – obtaining various certificates and paying various fees – that it blames DOS for not completing in a timely fashion, the P&R and P&L clauses placed most of those responsibilities on YDJV, and YDJV did not perform those responsibilities in time to obtain substantial completion by August 30, 2011. Based upon the timing of when YDJV completed those requirements, along with the deficiencies that were identified during the first accreditation inspection, we find that DOS was justified in not finding substantial completion before October 6, 2011.

YDJV generally complains that Mr. Browning was overly difficult throughout the contract administration process and that his behavior affected the entire project. He was too persnickety, YDJV says, and made everything more difficult than it needed to be. Again, as stated above, we do not find his conduct on this project to constitute anything other than a good faith attempt to exercise his oversight responsibilities properly. He routinely responded to any request for assistance by YDJV promptly and actively, and he made suggestions and identified concerns when he foresaw problems on the horizon. That he might not have waived defects and discrepancies and might have required YDJV and its subcontractors to follow the rules is not a cause for a breach claim. In any event, YDJV has not tied any instances in which Mr. Browning was allegedly too strict or unhelpful to any specific delays in its CPM analysis, meaning that any such instances were not shown to affect the critical path of contract performance.

### VIII. The Parties' Challenges to Expert Witnesses

Each of the parties presented the testimony of a scheduling and delay expert – Mr. Choyce for YDJV, and Mr. Boe for DOS – who had developed, through significant time and effort, a schedule and delay analysis of the NCC construction project. The reports and analysis of each expert were extensive, and the Board found the work that each expert performed helpful in organizing and categorizing the delays that occurred during performance.

YDJV objects to Mr. Boe's analysis in its entirety, arguing that his modified method finds no support in industry standards or literature. Mr. Boe has used what he calls a "modified contemporaneous period methodology" to assess the causes of and duration of delays on the project. He defines that method as "an analytical scheduling technique used to determine the schedule impact of delay-causing events on contract completion," through which "delay to the project is measured by examining as-built progress along the critical path from the previous update (or slice in time) and changes to the critical path forecasted as of the status date." Exhibit 12721 at 320. He has asserted that he "modif[ied] the method somewhat, by placing somewhat more emphasis on measuring the as-built delays." *Id.* He did so, he asserts, because YDJV went through several series of schedules during the course of the project, some of which were unreliable. *Id.* at 321. His modification to provide greater reliance on as-built documentation, he asserts, was an attempt to focus on data with greater reliability.

We reject YDJV's challenge to Mr. Boe's analysis. Both Mr. Choyce, YDJV's own expert, and Mr. Boe developed their schedule analyses by reference to the guidance of AACE International Recommended Practice No. 29R-03 (Apr. 25, 2011) (the RP) applicable to forensic schedule analysis. Tr. Vol. 12 at 26-28. "The purpose of the AACE International Recommended Practice 29R-03 *Forensic Schedule Analysis* is to provide a unifying reference of basic technical principles and guidelines for the application of [CPM] scheduling in forensic schedule analysis." Exhibit 20635 at 23883 (RP No. 29R-03, ¶ 1.1, at 9). Yet, the AACE recognizes in the RP itself that "[f]orensic scheduling analysis, like many other technical fields, is both a science and an art," relying "upon professional judgment and expert opinion and usually requir[ing] many subjective decisions." *Id.* "One of the most important of these decisions is what technical approach should be used to measure or quantify delay and identify the effected activities in order to focus on causation," and another "is how the analyst should apply the chosen method." *Id.* In accordance with that guidance, the RP makes clear that it is not intended to be, and should not be interpreted as, a standard of practice that must be blindly applied without accounting for defects in underlying data or analyzing the appropriateness of following particular strictures:

This RP is not intended to establish a standard of practice, nor is it intended to be a prescriptive document applied without exception. Therefore, a departure from the recommended protocols should not be automatically treated as an error or a deficiency as long as such departure is based on a conscious and sound application of schedule analysis principles. As with any other recommended practice, the RP should be used in conjunction with professional judgment and knowledge of the subject matter. While the recommended protocols contained herein are intended to aid the practitioner in creating a competent work product it may, in some cases, require additional or fewer steps.

*Id.*; see Tr. Vol. 12 at 29 (Boe: describing the RP as a “reliable guide” that is “not prescriptive”). Even YDJV’s expert, Mr. Choyce, agrees that the RP “is not intended to . . . be a prescriptive document that’s rigidly followed as to every rule.” Tr. Vol. 7 at 259.

“Pursuant to Federal Rule of Evidence 702, so long as ‘scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue,’ a ‘witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.’” *Yates-Desbuild Joint Venture v. Department of State*, CBCA 3350, et al., 15-1 BCA ¶ 35,996, at 175,847. If an expert’s opinion is to be admitted into evidence and used as a guide by the deciding tribunal, the expert’s opinion must be credible; to be credible, it must be reliable; and to be reliable, it must meet the standards of Federal Rule of Evidence 702. *Id.* at 175,847-48. Although YDJV asserts that Mr. Boe’s opinions are not credible or reliable because they depend upon an unrecognized methodology, we find his analysis to be fully compliant with the guidance of the RP. Although CPM analysis is widely recognized as a useful and effective tool in evaluating construction schedule delays, it cannot always be applied in a simple cookie-cutter fashion, especially in projects of great complexity and scope, and it is not a “magic wand.” Margulies, *supra*, at 664. A proper CPM analysis requires the application of an expert’s well-considered judgment in evaluating the logic underlying the various pieces of information that support the analysis. CPM analyses that are unsupported by that type of judgment and critical consideration may be suspect or not credible. *Id.* We find Mr. Boe’s thorough and thoughtful analysis both credible and helpful.

By contrast, despite the obvious time and effort that he devoted to his analysis, we find Mr. Choyce’s opinions less helpful, in part because it appears to discount or minimize the considerable evidence in the record, generated by YDJV itself during contract performance, that repeatedly indicates YDJV’s frustrations with and difficulties handling and motivating its subcontractors in India.

One particular cause of delay obtained short shrift in Mr. Choyce's analysis – a cause that, the Board believes, cannot be ignored. A proper schedule analysis must account for all activities that were necessary to complete the project. *Fru-Con Construction Corp.*, ASBCA 53544, et al., 05-1 BCA ¶ 32,936, at 163,162. On the NCC project, one of the necessary activities was for YDJV to obtain the police NOC, which YDJV had to obtain before MMRDA, under its regulations, would issue its FWCC. In his analysis of delays during the period leading to the FWCC issuances, YDJV's expert notes the application for the police NOC as a "dot" on his critical path analysis graphic, recognizing that YDJV applied for it on June 29, 2007, but without tying it to any of the activities necessary for the FWCC issuance. Exhibit 30007 at 19. His chart further notes, again through a "dot" that is untethered from the other activities on the schedule, that the police NOC was received on August 21, 2007, but his CPM graphic blames the entirety of any delay in obtaining the FWCC during this period – or, at least, from June 15, 2007, onward – upon the "ongoing tax issue preventing NOB FWCC." *Id.* Yet, without the police NOC, MMRDA could not issue its FWCC. Even if we agreed with YDJV's expert that tax issues delayed MMRDA's issuance of the NOB FWCC (which we do not) and that DOS bore financial responsibility for that delay, we would still have to account, under a proper CPM analysis, for YDJV's concurrent failure to have obtained the police NOC at an earlier date than it did. That is, had DOS resolved the tax issue that YDJV's expert asserts precluded YDJV from obtaining the FWCC earlier than it did, YDJV would still not have been able to obtain the MMRDA FWCC before (at the earliest) August 21, 2007, because it did not have the police NOC.

Normally, as previously discussed, if there are concurrent delays precluding an activity, and each party is responsible for one or more of those delays, neither party may recover damages for that delay unless those delays can be apportioned. *William F. Klingensmith, Inc.*, 731 F.2d at 809. Had YDJV's expert acknowledged that the police NOC was necessary to issuance of the MMRDA FWCC, and that it was YDJV's responsibility to obtain the police NOC (which it was under this contract), he could not have found that YDJV was entitled to 154 days of compensable delay from March 16 through September 30, 2007, as he did. *See* Exhibit 30007 at 17. In fact, he could not have found *any* non-concurrent compensable delay time for the FWCC delay until some time *after* the police NOC was issued on August 21. The willingness of YDJV's expert to ignore the interplay of a necessary requirement for FWCC issuance with other activities, and to plot it simply as a "dot" on a graphic rather than as a necessary contract activity tied into the CPM analysis, caused us to approach the other parts of his analysis more critically.

### Assignment of Responsibility for Delays

Based upon our findings of fact and our discussion above of several of the main allegations of delay on the NCC project, we now assign responsibility for delays throughout this project in each of the periods of performance previously discussed:

#### Period 1 (Contract Award to September 30, 2007): 362 Days of Delay

##### A. Period 1A (from Contract Award to March 24, 2007)

As discussed in our findings of fact, the delays to the critical path began soon after contract performance commenced. YDJV was twenty-five days late in submitting its 35% design drawings; its permit expediter did not request a permit for temporary structures and site work until May 11, 2006, and did not obtain it until June 27, 2006; and YDJV did not begin NOB pilings until August 9, 2006 (rather than the planned start date of June 27, 2006), and, even then, began that work without having applied for a PCC or a foundations permit. YDJV does not contest responsibility for delay during these early stages of the project.

After August 9, 2006, though, YDJV attributes at least some of the subsequent delays during this period, which ends with MMRDA's issuance on March 24, 2007, of the PCC for all nine buildings in the NCC complex, as the fault of the Government. Particularly, YDJV argues that any delay resulting from what it calls the contracting officer's "stop work" letter of November 29, 2006, is the Government's responsibility. We reject YDJV's position and place responsibility for delay during this subperiod upon YDJV.

It is clear that YDJV's problems during this subperiod arose because it hired, through its subcontractor, a permit handler that did not perform its job properly. That handler, Vartak, submitted an application for a site work and temporary structures permit in early June 2006, which MMRDA quickly granted, but it inexplicably delayed applying for any further permits until August 1, 2006, in a submission that was minimalist at best. The application was unclear as to what type of permit was being sought, although we previously found that it most likely was intended to constitute a PCC application, and Vartak did not attach to it the documentation necessary for a PCC. In fact, Vartak failed even to attach Appendix X to its submission letter, which is the actual formal permit application. Vartak eventually resigned on November 9, 2006, at YDJV's request, after having failed to respond to MMRDA's request for the missing documentation. YDJV is responsible for its subcontractor's failures.

Despite the absence of any permit other than one for site work and temporary structures, YDJV began to perform foundations construction work, and it was able to move

the project ahead doing so. Nevertheless, in late November 2006, MMRDA discovered that YDJV was performing such work without a permit and strongly suggested that YDJV voluntarily stop and obtain a valid PCC encompassing such work, indicating that, if MMRDA had to take formal action to end the unauthorized work, MMRDA would have to impose significant fines. When YDJV ignored that warning, DOS wrote a letter directing YDJV to comply with the GoI laws and regulations. Although YDJV has argued that this letter improperly directed YDJV to stop work and that YDJV is entitled to delay or suspension of work damages for that direction, that letter only directs YDJV to comply with its contract requirements. Clause C.1.6.1 of the contract made YDJV responsible for obtaining all necessary permits, Exhibit 2 at 100, and clause H.19 of the contract expressly made YDJV responsible, “without additional expense to the Government,” for “complying with all laws, codes, ordinances, and regulations applicable to the performance of the work, including those of the host country.” Exhibit 1 at 59; *see id.* at 85 (incorporating similar requirements of the P&R clause at FAR 52.236-7). The contracting officer’s letter of November 29, 2006, expressly directs YDJV to stop any construction activities that violate those contract requirements, without specifying what activities YDJV had to stop (even though, as we recognize, the contracting officer was strongly suggesting that the NOB plinth activities should await issuance of a PCC). We do not view a letter insisting that YDJV comply with its contract obligations as some type of contract change or cause of delay. YDJV cannot impose financial liability upon DOS for being required to comply with its contract obligations.

YDJV also argues that it is entitled to delay damages for the period of time that it was forced to stop work while awaiting a PCC because the GoI’s failure to issue a “foundations only” permit or conditional approvals of permits allowing for foundation work was a breach of DOS’s warranty, as set forth in the P&L clause. Although, as we found above, the P&L clause warranted that the local GoI authorities would issue foundations permits and conditional approvals allowing for foundation construction, YDJV never submitted a foundation construction permit request, and it did not request conditional approval allowing for foundation work until February 15, 2007. MMRDA granted that approval nineteen days later, a time lag that we do not view as unreasonable in the circumstances here. As we found above, the warranty was not self-executing, but required action by YDJV before the GoI was required to provide conditional approvals. Having failed to undertake that action in a timely manner, it cannot pass liability for the absence of conditional approvals or a lack of a “foundations only” permit onto DOS for this period of delay. YDJV’s problems during this subperiod were of its own making.<sup>33</sup>

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<sup>33</sup> YDJV was able to mitigate some of the delay that would have resulted from its failure timely to obtain a PCC by performing work without the PCC, technically in violation

In addition, despite YDJV's attempts to establish otherwise, it is clear that the delays in obtaining the PCC during this subperiod had nothing to do with the property tax issues discussed in section II of our findings of fact. Exhibit 22023 at 33729; Exhibit 22277 at 92. YDJV presented no evidence that MCGM had discussed the tax issue with MMRDA at this point, and there is no evidence that MMRDA was somehow intentionally delaying the permit review process. Accordingly, although, as we have found, DOS is responsible for any delays caused by its withholding of superior knowledge about the likelihood that the GoI would attempt to tie ongoing tax disputes to the issuance of permits, that issue did not cause delays during this subperiod.

B. Period 1B (from March 25 to September 30, 2007)

During this subperiod, which commences with MMRDA's issuance of the PCC and YDJV's first slab pour at the NOB, YDJV began working to construct the plinths for various buildings – particularly the NOB, which was on the critical path, and the warehouse – and to obtain a FWCC for the critical path NOB. Before Design Cell could submit the NOB FWCC application, YDJV had to complete the NOB plinth and obtain a joint inspection (and approval) of the plinth from MMRDA and MCGM. Construction of the plinth was delayed by the slow performance of YDJV's subcontractor, L&T. Design Cell submitted the joint plinth inspection request on July 4, 2007, but, because of an error in the submission, had to resubmit the request on July 20, 2007. MMRDA and MCGM inspected both the NOB and the warehouse plinths on July 30, 2007, a period of time within the fourteen-day period provided by local GoI regulations. Design Cell then submitted the NOB FWCC application on August 2, 2007. To the extent that there were delays in Design Cell's ability to submit the NOB FWCC application, they were not caused by DOS, which was working to assist YDJV in ensuring that the drawings to be submitted with the application were correct and appropriate. After the August 2 submission, Design Cell had to submit revised drawings, as well as pay a development fee (which occurred on August 22, 2007) and submit missing NOCs (the last of which (the police NOC) was submitted to MMRDA on August 24, 2007), and the MMRDA issued its FWCC on September 6, 2007.

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of local Mumbai government requirements, and that illegal work benefited the construction schedule. Tr. Vol. 1 at 81-82. Nevertheless, to the extent that OBO sometimes turned a blind eye to what YDJV was doing (that is, performing plinth work without a PCC) or even, at times, may have encouraged it (through the actions of an OBO employee pushing YDJV to perform), that did not somehow waive OBO's right to insist that YDJV comply with local permitting laws. YDJV's contract required it to comply with such laws.

YDJV argues that the tax disputes between the GoI and the USG caused the local GoI authorities to delay action on the FWCC application. It is true, as we have previously discussed, that there were indications from lower-level employees within MCGM during this subperiod that tax issues would preclude issuance of the MCGM FWCC for the NOB, but those representations were overridden by the MCGM Commissioner, who made clear that MCGM was not, at that time, going to stall the NCC project based upon the outstanding tax disputes. Nevertheless, there was potentially one slight delay in the NOB FWCC issuance caused by the tax dispute: after MMRDA issued its FWCC on September 6, MCGM employees initially declined to issue the MCGM FWCC (a necessary prerequisite to performing NOB structural work) because there was no tax NOC. Apparently, the lower-level employees were unaware of the MCGM Commissioner's direction to the contrary. That FWCC was finally issued, after the MCGM Commissioner intervened, on September 28, 2007. DOS's expert witness attributes thirteen days of compensatory delay to the MCGM lower-level employees' initial refusal to issue the MCGM FWCC, but DOS argues that the time between the issuance of the MMRDA and MCGM FWCCs – a period of only twenty-two days (from September 6 to 28) – is reasonable and should not be viewed as a delay at all. In other circumstances, we might find a twenty-two-day period for an agency's review and action upon an application to be reasonable. Here, though, MCGM employees admitted that they delayed issuing the FWCC because of the tax dispute and the absence of a tax NOC, and the MCGM FWCC was to be issued expeditiously – presumably, within a couple of days after MMRDA issued its FWCC. We have attributed any delays arising from the tax disputes to DOS, in light of its failure to disclose its superior knowledge about the tax/permit linkage prior to contract award. In the circumstances here, assuming that the MCGM employees should have issued the MCGM FWCC within two rather than twenty-two days, we grant YDJV twenty days of compensable delay arising from MCGM employees' failure to abide by their Commissioner's direction, a delay associated with the tax disputes that DOS failed to disclose prior to award.

YDJV argues that DOS caused additional delay throughout the period leading to issuance of the first FWCC – the MMRDA FWCC – because DOS did not apply for and obtain a police NOC in a timely manner. As we discussed above, it was YDJV's obligation to apply for and obtain the police NOC, and YDJV could not obtain the MMRDA FWCC without it. Design Cell delayed submitting the documentation necessary for obtaining the police NOC until July 5, 2007, and did not receive it until August 22, 2007. Any delays in applying for that NOC and in obtaining it fall upon YDJV. Even if DOS had been responsible for other delays leading to the issuance of the September 6 MMRDA FWCC, YDJV would have been concurrently responsible for the delays in obtaining the police NOC. To the extent that YDJV is arguing that tax disputes delayed the police NOC, there is no viable evidence to support YDJV's argument. To the extent that YDJV is arguing that OBO breached its duty of good faith and fair dealing in failing sufficiently to assist it in obtaining

the police NOC, we disagree, as OBO did everything that was asked of it and acted affirmatively to assist in having the police commissioner expedite issuance of the certificate. YDJV cannot blame DOS for the late police NOC.

We find that, of the 362 days of delay during the period from contract award to September 30, 2007, responsibility for 340 of those days falls upon YDJV. We find twenty days of compensable delay based upon MCGM employees delaying issuance of the MCGM FWCC prior to September 28, 2007, and two days of excusable delay during the period for flooding.

Period 2 (September 30, 2007, to April 1, 2008): 12 Days of Delay

As previously found, the critical path at this time revolved around the installation of vertical structural concrete at the NOB. YDJV's subcontractor, L&T, was tasked with performing that work, but failed to maintain the schedule that YDJV had planned. There were forty-nine days of delay to the concrete activities at the NOB, but, by starting NOB finish work earlier than originally scheduled, YDJV recovered thirty-seven days of that delay. Ultimately, then, there were twelve days of delay to the critical path of the project. YDJV bears responsibility for those delays. Although YDJV attributes this delay to manpower issues that were affected by a construction boom in Mumbai, we have rejected that argument. To the extent that the delay in issuance of the NOB FWCC "prevented a timely ramp-up of the concrete workforce," as YDJV alleges, Appellant's Post-Hearing Brief at 59, very little of the Period 1 delay (only twenty of the 362 delay days) is attributable to DOS.

At the same time that L&T was having performance problems, however, the linkage between GoI/USG tax disputes and the GoI's issuance of permits was becoming a bigger political issue. On October 1, 2007, CG Owen had written to the state government asking for assistance because the local GoI authorities were threatening to defer issuance of further permits. YDJV requested plinth inspections for three buildings – the warehouse (for a second time), the GSO, and the CG residence – on December 27, 2007, but the inspections did not happen before, on February 12, 2008, the MCGM Commissioner announced that there would be no more permits issued until tax issues were resolved. CG Owen was able to negotiate a resolution on February 14 through which the requested plinth inspections would happen (as they did on February 18), with FWCCs to follow, but with direction that, if the tax disputes were not resolved swiftly, the FWCCs would be rescinded. By the end of this period (April 1, 2008), the FWCCs had not yet been issued.

Although the delayed plinth inspections and FWCCs clearly caused delays to these three outbuildings during this period, none of them were on the critical path during this period. "If the concurrent delays affected only work that was not in the critical path, . . . they

are not delays within the meaning of the rule since timely completion of the contract was not thereby prevented.” *Santa Fe, Inc.*, VABCA 1943, et al., 84-2 BCA ¶ 17,341, at 86,410 (quoting *Fischbach & Moore International Corp.*, ASBCA 18146, 77-1 BCA ¶ 12,300, at 59,224).

Nevertheless, in March 2009, the contracting officer issued contract modification no. M026, granting YDJV a seventy-day time extension for excusable delay to these outbuildings resulting from these tax issues, *see* Exhibit 264, and “[w]e may not assume that the post hoc extension was some sort of gratuity.” *Norair Engineering Corp. v. United States*, 666 F.2d 546, 548 (Ct. Cl. 1981). We apply twelve days of the grant of excusable delay from contract modification no. M026 to this period (and will apply the remaining fifty-eight days in the next period). This excusable delay is concurrent with the twelve days of delay for which YDJV is responsible. Because a period of contractor-caused delay is simultaneous with a period of excusable delay, “there are said to be concurrent delays, and the result is an excusable but not compensable delay.” *Morganti National, Inc. v. United States*, 49 Fed. Cl. 110, 132 (2001) (quoting *Utley-James, Inc.*, GSBCA 5370, 85-1 BCA ¶ 17,816, at 89,109, *aff’d*, 14 Cl. Ct. 604 (1988)), *aff’d*, 36 F. App’x 452 (Fed. Cir. 2002). Accordingly, the twelve days of delay during this period, even though concurrently caused by L&T’s slow performance, are excusable.

#### Period 3 (April 1, 2008, to November 1, 2009): 391 Days of Delay

During this 579-day period, YDJV experienced 391 days of delay, losing four days of every six-day work week. During the seven-month period from April to November 2008, NOB MEP activities lost almost five months of time, and YDJV fell another eight months behind over the course of the next eleven months. As previously discussed, the cause of most of this delay, particularly for work at the NOB, was the poor performance of YDJV’s subcontractor. Although YDJV has argued that the delay was caused by an unexpected construction boom in Mumbai, which created a severe local labor shortage, we have, as previously discussed, rejected that argument.

Nevertheless, the tax dispute with the GoI caused significant concurrent delays during this period relating to the outbuildings. As previously discussed, the contracting officer granted YDJV seventy days of excusable delay to the outbuildings through contract modification no. M026, fifty-eight days of which we apply in this period. It was not until May 6, 2008, that YDJV was able to obtain the FWCCs for the GSO, the warehouse, and the CG residence, a period of seventy-eight days after the plinth inspections for those buildings. That delay resulted in large part because lower-level employees within MMRDA and MCGM were not made aware of the change in direction that had been ordered. Although construction began on these buildings, the warehouse was not sufficiently complete, such that

YDJV could use it for on-site storage of supplies and materials, until September 29, 2008. Because the on-site warehouse was unavailable, YDJV had to use off-site storage far from the NCC site, adding significant travel time each work day to allow for delivery (and return travel for storage) of supplies and materials. That delay ran from early April to late September 2008 and sufficiently impacted activities on the critical path to constitute compensable delay. We find that YDJV is entitled to a total of 100 days of delay associated with the warehouse (inclusive of the fifty-eight days of excusable delay that the contracting officer previously granted). These days would be compensable but for the fact that they are wholly concurrent with YDJV's own delays to the critical path NOB work during the same period.

Further, as discussed in our findings of fact, there was a new direction from MEA on June 27, 2008, to the local Mumbai authorities not to issue any further permits without MEA's concurrence, pending resolution of the outstanding tax disputes. At that point, the only building that still needed a FWCC was the MCAC. Nevertheless, the MCAC plinth was not ready for inspection until December 17, 2008. At that point, MMRDA and MCGM declined to conduct a joint plinth inspection, meaning that YDJV could not obtain a FWCC for the MCAC. Only after the tax dispute was resolved, with the Secretary of State issuing a public notice on June 23, 2009, designating the GoI's New York property as tax exempt pursuant to the Vienna Convention, did MMRDA and MCGM agree to conduct the plinth inspection. That inspection occurred on July 7, 2009, and the FWCC for the MCAC was issued on August 12, 2009. The MCAC was either on or extremely close to the critical path from late December 2008 until the MCAC FWCC was issued in August 2009. Through contract modification no. M034, dated March 11, 2009, the contracting officer, David Vivian, granted YDJV compensable time of twenty days for the MCAC delay. Exhibit 273; Tr. Vol. 11 at 121-22. Like DOS's expert, Mr. Boe, we accept the contracting officer's finding of twenty days of compensable delay, but add an additional 217 days (representing the remaining period from December 17, 2008, to August 12, 2009) of delay resulting from that refusal to inspect, which was the result of the tax/permit linkage that DOS had failed to disclose to YDJV prior to award. This 217-day delay, for which we hold DOS responsible under the superior knowledge doctrine, would be compensable but for the fact that YDJV was concurrently responsible for delay on the critical path work at the NOB.

In addition, in contract modification no. M022, the contracting officer granted three days of excusable delay beginning November 27, 2008, arising out of terrorist attacks in Mumbai, which we credit to this period. *See Exhibit 259.*

In summary, we find that YDJV is entitled to twenty days of compensable delay in this period, 337 days of concurrent delay (100 days for warehouse delays and 237 days for the MCAC delays, inclusive of the excusable delay days that the contracting officer granted

through modification no. M026), and three days of excusable delay resulting from the terrorist attacks. YDJV is responsible for thirty-one days of non-concurrent unexcused delay.

Period 4 (November 1, 2009, to August 1, 2010): 205 Days of Delay

On October 31, 2009, the GoI changed its visa policy and forced virtually all of YDJV's CAWs out of the country, requiring them to apply for new visas (under a new visa category) while stationed in their home countries. As discussed above, the GoI's direction is an act of the host country government in its sovereign capacity, and any resulting delay is excusable under clause F.9 and FAR 52.249-10(b)(1). This direction seriously disrupted YDJV's work, including the critical path NOB MEP work, and, for the period from October 31, 2009, to January 6, 2010, we find YDJV entitled to fifty-nine days of excusable delay.

YDJV argues that this delay should be compensable, rather than merely excusable, because DOS's earlier delays pushed YDJV's work into this time period (when it otherwise would have been finished with the contract). Although it is possible that the Government can become financially responsible for pushing a contractor into a period of excusable delay (typically seen where a Government-caused delay pushes work into a period of extended adverse weather), *see* John Cibinic, Jr., James F. Nagle & Ralph C. Nash, Jr., *Administration of Government Contracts* 498-99 (5th ed. 2016), we reject YDJV's argument here. Although DOS may have been concurrently responsible for some of the delays preceding the GoI's order regarding visas, YDJV is equally responsible for concurrent delays and is primarily responsible for other delays that pushed its work into this period.<sup>34</sup>

For the period from January 6 to August 1, 2010, the primary causes of YDJV's delays were subcontractor performance issues and materials shortages. Although YDJV complains that one of YDJV's subcontractors, American Systems, was having extreme difficulty obtaining visas for its workers, the record makes clear that American Systems was not actually applying for worker visas in a reasonable manner (waiting more than two months after visa applications were denied before submitting new applications) and that its failure to staff a crew of six CAWs, as originally planned, was because it had trouble recruiting individuals who were willing to work in India at whatever salary American Systems was offering. The failure to take reasonable action to obtain visas for necessary workers in response to the GoI's direction on visas constitutes a failure to mitigate, which limits YDJV's

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<sup>34</sup> That being said, we also reject DOS's request, in footnote 141 of its post-hearing brief, that we charge YDJV with financial responsibility for these excusable delays because YDJV pushed work into Period 4. DOS shares enough responsibility for concurrent delays to undermine the factual basis for its request.

ability to claim excusable delay. *Midwest Industrial Painting*, 4 Cl. Ct. at 133. We find that continuing visa problems, outside the control of YDJV and its subcontractors, impacted the critical path by sixty days between January 6 and August 1, entitling YDJV to an additional sixty days of excusable delay, which, combined with the 59 days of excusable delay that we found above from November 1, 2009, to January 6, 2010, entitles YDJV to a total of 119 days of excusable delay during Period 4. YDJV must bear responsibility for the remaining eighty-six days of unexcused delay during Period 4.<sup>35</sup>

Period 5 (August 1, 2010, to January 31, 2011): 162 Days of Delay

During this period, the critical work necessary to drive contract performance was telecom work at the NOB. The fault for the delays to the critical path during this period falls upon YDJV and its subcontractors, which were slowed by, among other things, disputes about who was responsible for damaged materials and who was responsible for what work. YDJV cannot attribute the delay during this period to DOS, and the 162 days of delay here are unexcused.

Period 6 (February 1, 2011, to October 6, 2011): 167 Days of Delay

This period involves delays in the commencement of the accreditation process and the designation by the contracting officer of substantial completion of the project. As discussed in our findings of fact, accreditation was delayed by the poor performance of YDJV's subcontractors and by YDJV's inability to motivate them to complete the job. In fact, during this period, YDJV terminated one of its subcontractors, L&T, which promptly filed a lawsuit in the Mumbai court and obtained a "stop work" order against YDJV for any work covered by L&T's subcontract. As discussed above, YDJV has not established the factual underpinnings to render any delay caused by the stop work order excusable. Nevertheless, DOS is responsible for forty-two days of concurrent delay during this period resulting from problems obtaining visas for its inspection team.

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<sup>35</sup> Having found that DOS is not responsible for the GoI's change in visa policy, we reject YDJV's labor inefficiency claim arising out of that policy change.

We summarize the totality of our findings regarding responsibility for delays on the NCC project in the chart below:

Period	Delay (Calendar Days)			
	Total	Compensable (DOS Responsible)	Excusable Or Concurrent	Unexcused (YDJV Responsible)
1	362	20	2	340
2	12	0	12	0
3	391	20	340	31
4	205	0	119	86
5	162	0	0	162
6	167	0	42	125
<b>TOTALS</b>	1299	40	515	744

### Damages for Delay

As indicated above, we find that YDJV is entitled to forty days of compensable delay, plus an additional 515 days of excusable (but not compensable) delay, but is responsible for 744 days of unexcused delay. We now must assess and allocate damages for these delay days.

DOS's damages are easy to compute. The contract here contains a liquidated damages provision allowing DOS to assess damages of \$9481 for each day of contractor-responsible delay, which is the amount that the contracting officer used in imposing such damages in his decision of February 21, 2013. Other than through its argument that DOS's withholding of superior knowledge should bar *any* award to DOS, an argument that we rejected above, YDJV has not challenged the enforceability of the liquidated damages provision. Accordingly, we can award liquidated damages by multiplying \$9481 by the number of delay days for which DOS is entitled to compensation. *See Wadena Sheet Metal & Heating*, GSBICA 2313, 67-1 BCA ¶ 6266, at 29,006 ("where a contract contains a provision for liquidated damages for delay, such as the one involved here, it is not necessary for the Government to prove or even allege any damage or loss under such a provision"). Because liquidated damages are not available for periods of concurrent or excusable delay, *Ace Constructors, Inc. v. United States*, 70 Fed. Cl. 253, 293-94 (2006), *aff'd*, 499 F.3d 1357

(Fed. Cir. 2007), we would normally apply the \$9481 figure to the 744 days of YDJV's unexcused delay to identify DOS's liquidated damages award.

We have to offset that amount by the forty days of compensable delay to which YDJV is entitled. Defining the amount of that offset is more cumbersome. It is clear that YDJV is entitled to compensation for non-concurrent delays for which DOS is responsible that were sequential to, but separate and apart in terms of timing (and capable of being apportioned) from, YDJV-caused delays. See *R.P. Wallace, Inc. v. United States*, 63 Fed. Cl. 402, 409-10 (2004) (sequential delay occurs "where one party and then the other cause different delays *seriatim* or intermittently," but not at the same time). Generally, it is the contractor's burden "to provide a basis for making a reasonably correct approximation of the damages which arose" from delays for which the Government is financially responsible. *Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 969 (Ct. Cl. 1965). Unlike the liquidated damages provision upon which the Government can rely, there is no provision in the contract here that defines exactly what "daily rate" the Board should apply as a means of awarding YDJV damages for its days of compensable delay or precisely how YDJV's damages should be measured.

In their post-hearing briefs and through testimony at the hearing (particularly that of the parties' damages experts, Theodore E. Needham III (presented by YDJV) and Robert Peterson (presented by DOS)), YDJV has identified and DOS has responded to numerous claimed costs, broken into categories, that YDJV allegedly incurred because of project delays, including, among others, Yates' supervisory labor costs, Desbuild's supervisory labor costs, Yates' executive supervision costs, subcontractor costs, increased workers' compensation insurance costs, other insurance costs, Yates' extended general conditions costs, Desbuild's general conditions costs, and extended outside professional services costs. YDJV has divided each of these costs into daily rates (some of which vary depending upon the project time period at issue). DOS has stipulated to the amount of some of the costs, but has objected to and is litigating either the manner of calculation or the cost support in other categories.

It is less than clear to the Board from the parties' submissions exactly how much YDJV is seeking, in total, for each period of delay. There are multiple daily rates that the Board apparently is expected to locate, evaluate, and piece together into a comprehensive damages award, and the amount of each rate may change depending upon the time period for which the costs are being claimed. In its briefing, YDJV has identified and discussed lots of pieces to its multitude of daily rates, but it never completely puts them together, leaving the Board to guess at whether the Board has identified all of the delay costs that YDJV seeks in a particular period.

In these circumstances, we believe that, rather than attempting to construct a total daily rate for each of the periods in which YDJV was granted some compensable delay, the most appropriate means of addressing YDJV's compensation is to deduct the forty days of YDJV's compensable delay from the 744 days of liquidated damages to which DOS is entitled. From the record, it appears that YDJV's daily rates, when totaled, at least somewhat approximate the \$9481 figure in the liquidated damages claim. Even though the forty days of compensable delay are sequential to, rather than concurrent with, unexcused delay days, we believe it most appropriate in the circumstances here to reduce DOS's compensable liquidated damages award by those forty days, for a total of 704 days.

We award DOS liquidated damages covering 704 days, totaling \$6,674,624, plus interest consistent with the requirements of FAR 52.232-17, which is incorporated into this contract. *See* Exhibit 1 at 11; *see also Advanced Injection Molding, Inc. v. General Services Administration*, GSBGA 16504-R, 05-2 BCA ¶ 33,097, at 164,064 (discussing manner in which interest is applied on government claims). In a post-hearing joint stipulation, the parties agreed that DOS retained \$4,720,366.10 from YDJV's final contract balance payment to account for DOS's liquidated damages assessment. That amount, which DOS may retain, should be deducted from what YDJV must affirmatively pay and from the calculation of interest.

### The Parties' Direct Cost Claims

#### I. YDJV Claims

##### A. Consultant and Legal Costs Claim (CBCA 3350)

##### 1. Entitlement

In and among the costs listed in its original delay claim (CBCA 3350) that were to be included in daily rates for any days of delay for which YDJV wanted to be compensated, YDJV listed several costs that, rather than constituting a part of its daily rates, appear to have been set forth as direct cost claims. One of those was YDJV's claim for costs that it incurred in attempting to negotiate through mediation a settlement of this matter during contract performance, as well as the costs that it incurred in preparing its original REA, which was later converted into a claim. We say that YDJV "appears" to address this issue as a direct cost claim because YDJV's briefing on this issue is sparse, and the claim was barely mentioned during the hearing. Its consultant and legal costs claim is simply in a chart along with, and not differentiated from, the costs that it includes in the daily rates for its delay claim, and, in its pre- and post-hearing briefing, it does not differentiate whether this claim is for inclusion in a daily rate or is a direct cost claim. We had to look to YDJV's certified

cost claim, which it submitted on August 30, 2012, to see that YDJV did not break its consultant and legal costs down into a daily rate, but set it forth as a single direct cost. Exhibit 22081 at 39305. We treat it as such here.

“[C]onsultant costs” and legal fees “incurred by a contractor in connection with negotiations relating to the additional compensation to which the contractor was entitled by reason of government-caused delay of the job [are] allowable as contract administration costs, even [if] the negotiations eventually failed.” *Tip Top Construction, Inc. v. Donahoe*, 695 F.3d 1276, 1281 (Fed. Cir. 2012) (citing *Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541, 1550 (Fed. Cir. 1995), *overruled in part on other grounds by Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1579 & n.10 (Fed. Cir. 1995) (en banc)). Such costs remain recoverable so long as the contractor is incurring them “for the genuine purpose of materially furthering the negotiation process.” *Bill Strong Enterprises*, 49 F.3d at 1550; *see Foxy Construction, LLC v. Department of Agriculture*, CBCA 5632, 17-1 BCA ¶ 36,687, at 178,628 (“the contractor is entitled to pursue negotiation before submitting a formal claim and to treat the costs that it incurs in that negotiation process as contract administration costs”). This typically includes REA preparation costs if the REA is not submitted as a “claim” upon which the contractor is seeking a decision. *See Moshe Safdie & Associates, Inc. v. General Services Administration*, CBCA 1849, et al., 14-1 BCA ¶ 35,564, at 174,304. Once the contractor’s primary purpose becomes an effort “to promote the prosecution of a CDA claim against the Government,” any subsequently incurred costs are considered claim prosecution costs, which are not recoverable. *Bill Strong Enterprises*, 49 F.3d at 1550 (citing FAR 31.205-33). Classifying a cost as either a contract administration cost or a cost incidental to claim prosecution requires the Board to “examine the objective reason why the contractor incurred the cost.” *Id.*

The consultant and legal costs that YDJV seeks, totaling \$385,463, were incurred between February 2007 and April 2012. *See* Exhibit 40009. In its pre-hearing brief, YDJV states that these costs were incurred “in preparing a request for equitable adjustment.” Appellant’s Pre-Hearing Brief at 87. Yet, reviewing the invoices that YDJV submitted in support of the claim, it is clear that some of the costs – particularly the legal fees – were incurred for other reasons, including dealing with general contract administration matters rather than in preparing to negotiate with the Government. For its part, DOS does not dispute that costs incurred in furtherance of a mediation in which the parties participated from March through December 2010 are recoverable as contract administration costs, but asserts that costs incurred after December 2010 could not have been for the purpose of negotiation because there were no further efforts after that point by YDJV to resolve the parties’ disputes amicably. DOS argues that, although YDJV prepared and submitted what it titled an REA

in April 2012, after contract performance was complete,<sup>36</sup> YDJV converted that REA into a certified claim on August 30, 2012, before the contracting officer could respond to the REA and without ever contacting DOS to attempt to discuss or negotiate the REA. According to DOS, YDJV's efforts after December 2010 were not legitimate efforts to negotiate and do not satisfy the definition of recoverable contract administration costs.

YDJV argues in response to DOS's challenge that, because DOS stipulated to the fact that \$385,463 in consulting and legal costs were incurred, "it is improper to challenge those costs" now "as it undermines the stipulation process." Appellant's Post-Hearing Reply Brief at 74. We reject YDJV's argument. DOS only stipulated to the *amount* of the claimed costs and the fact that YDJV incurred them, eliminating YDJV's obligation to provide cost support for the claim at the hearing. DOS did *not* stipulate that the costs were something other than claim prosecution costs or that YDJV was legally entitled to recover them. The burden of proving the recoverability of its claimed contract administration costs remains on the contractor. See *Southwest Marine, Inc.*, DOT BCA 1665, 96-1 BCA ¶ 28,168, at 140,595 ("Appellant shoulders the burden of proving its entitlement to REA preparation expenses.").

Although the evidence in the record on this claim is very thin, DOS has stipulated in its post-hearing brief that at least \$319,979.93, the amount incurred prior to December 2010, is recoverable. Respondent's Post-Hearing Brief at 227 & n.219. It argues against recovery of any post-2010 costs by stating that, in preparing its REA, YDJV must have been intending to prosecute a claim because the parties' prior mediation efforts had ended without success. With some hesitancy, we reject DOS's argument. YDJV submitted its April 2012 REA without a claim certification and without requesting a contracting officer's decision, indicating that it was not intending to submit a claim at that time. We recognize that, in the 206-page REA itself, YDJV never expressly requested or even suggested negotiation between the parties, but merely stated that the majority of the project delays were DOS's responsibility, that YDJV was entitled to 868 days of compensable delay and 112 days of excusable delay, and that YDJV would "address its damages in a separate document." Exhibit 463 at 8113. That "separate document" was ultimately submitted on August 30, 2012, with a request for a contracting officer's decision and a certification converting the REA into a claim. Exhibit 22081. Although there is some question about YDJV's intentions when submitting the REA in April 2012, and despite the paucity of evidence that YDJV submitted on this point (including the complete absence of any testimony at the hearing about

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<sup>36</sup> There is no reason that a contractor cannot submit an REA, for purposes of negotiation and as an administrative matter that benefits the contract purpose, after contract performance is complete. *Ahtna Environmental, Inc. v. Department of Transportation*, CBCA 5456, 17-1 BCA ¶ 36,600, at 178,308 n.3 (2016).

YDJV's motivations in preparing and submitting an REA rather than a claim), we find it more likely than not that the REA was prepared with the intention of reopening negotiations, making its consultant costs incurred up until April 2012 potentially recoverable.

Having reviewed the invoices that YDJV included in the record to support this claim, we find that some of the legal fee invoices evidence general work on contract performance issues, rather than on development of negotiation positions with DOS, and that a \$265 consultant invoice from September 2011 deals with an arbitration with a YDJV subcontractor, L&T. Such costs are, at best, considered to be the costs of performing a fixed-price contract, which are not recoverable as the direct costs resulting from a change under the rationale of *Bill Strong*. See *Viacom, Inc. v. United States*, 70 Fed. Cl. 649, 660 (2006) (absent a contract change or breach, “[f]irm-fixed-price contracts do not ordinarily involve any direct cost-reimbursement”); *Marcel Watch Corp.*, GSBCA 3558-R, 72-2 BCA ¶ 9747, at 45,548 (the Board has no authority “to direct an adjustment in a fixed price contract to cover . . . increased cost[s]” absent a Government-caused change or suspension of work). We reduce YDJV's claim by \$4750 to account for costs not shown by the invoices to be associated with YDJV's efforts to negotiate with DOS a resolution of the parties' disputes. YDJV's direct cost award for its consultant and legal costs is \$380,713.

## 2. Overhead Markup

YDJV seeks to apply two markups to the costs that it incurred in preparing its REA and negotiating with the Government. First, it seeks to apply a corporate overhead markup of 6%.<sup>37</sup> Second, it seeks to apply a profit markup of 13.5% on its costs and overhead. DOS has not directly addressed whether such markups should apply to an REA preparation and negotiation claim, but it argues generally that, if they are added, rates of 3.76% and 10% are more appropriate.

With regard to the corporate overhead markup, the Board has previously applied an overhead markup to this type of contract administration cost, see *Moshe Safdie & Associates*,

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<sup>37</sup> To the extent that there are other overhead costs identified in its claim that it might have attempted to add as a markup to its consultant and legal costs award, YDJV has waived them. YDJV's briefing on this claim is minimal, and we have had difficulty understanding exactly what it seeks in addition to its direct costs. We extracted YDJV's request to add the corporate overhead markup from its original August 30, 2012, claim. If YDJV attempted to seek any other overhead markups in its briefing to the Board, we were unable to identify them. Even in YDJV's August 2012 claim submission, we could not see any explicit or implicit request to add any other overhead markups to the consultant and legal costs claim.

14-1 BCA at 174,303-04, and we see no reason not to apply overhead to these contract administration costs. *See Optimum Services, Inc.*, ASBCA 59952, 16-1 BCA ¶ 36,490, at 177,826 (applying overhead markup to REA preparation costs); *C.H. Hyperbarics, Inc.*, ASBCA 49375, et al., 04-1 BCA ¶ 32,568, at 161,161 (same). Without disparaging the valid concerns that DOS has raised about YDJV's 6% figure (including the absence of any actual cost data showing that YDJV incurs corporate overhead costs at that level), we accept YDJV's use of a 6% overhead rate. YDJV based its final proposal on a 6.8% overhead markup, and the parties routinely used a 6% overhead markup in negotiated change orders.

### 3. Profit Markup

With regard to the profit markup, profit is traditionally added to an equitable adjustment as "a reasonable and customary allowance." *United States v. Callahan Walker Construction Co.*, 317 U.S. 56, 61 (1942); *see Structural Services*, HUD BCA 81-582-C18, 82-2 BCA ¶ 15,890, at 78,804 ("An equitable adjustment . . . for excusable delay by definition includes the contractor's profit and overhead expense incurred as a result of the increased work."). Tribunals, including this one, have added profit to awards of costs incurred in preparing and negotiating REAs. *See, e.g., Optimum Services*, 16-1 BCA at 177,826; *Moshe Safdie & Associates*, 14-1 BCA at 174,303, 174,308; *C.H. Hyperbarics*, 04-1 BCA at 161,161; *Unarco Material Handling*, PSBCA 4100, 00-1 BCA ¶ 30,682, at 151,526 (1999).

In defining the amount of the profit markup, the Board "is not delegated uncontrolled discretion," but must attempt to "apply guidelines prescribed by authority" in applicable regulations "to determine reasonableness of profit." *Newport News Shipbuilding & Dry Dock Co. v. United States*, 374 F.2d 516, 530 (Ct. Cl. 1967). The regulation applicable here provides that, "[i]f a change or modification calls for essentially the same type and mix of work as the basic contract and is of relatively small dollar value compared to the total contract value, the contracting officer may," but is not required to, "use the basic contract's profit or fee rate as the prenegotiation objective for that change or modification." 48 CFR 15.404-4(c)(6). Nevertheless, it also directs agencies to use a "structured approach" when analyzing and negotiating the profit to be applied to an equitable adjustment, *id.* 15.404-4(c)(2), and DOS's policy, as set forth by regulation, is to use the structured approach for profit/fee analysis that was contained in the Department of Health and Human Services (HHS) FAR Supplement at the time this contract was awarded. *Id.* 615.404-4(b)(2). Under HHS Form 674, "Structured Approach Profit/Fee Objective,"<sup>38</sup> the agency considers various

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<sup>38</sup> HHS deleted any reference to Form HHS 674 from its FAR Supplement in 2015, *see* 80 Fed. Reg. 72150, 72187 (Nov. 18, 2015); 80 Fed. Reg. 11266, 11272 (Mar. 2, 2015),

cost factors and objectives, weight ranges, and assigned weights in creating its ultimate weighted profit/fee objective. 49 Fed. Reg. 13960, 14047 (Apr. 9, 1984).

In this instance, although YDJV applied a profit rate of approximately 13.8% in developing its original contract proposal, every modification to which the parties agreed during contract performance provided for a profit rate of only 10%. “If the contract neither establishes nor precludes a rate for profit, the parties’ rate for change orders may be relevant, as contemporaneous conduct establishing a reasonable rate.” John Cibinic, Jr. & Herman M. Braude, “Cost Recovery & Major Pricing Elements,” in *Construction Contracting* 685, 764 (1991). Further, “[a] ten percent profit factor usually has been accepted by the boards and courts as the standard in the construction industry.” *Id.* (citing cases); see 2 Ralph C. Nash, Jr. & Steven W. Feldman, *Government Contract Changes* § 16:21, at 31-32 (3d ed. 2007) (10% is the typical profit rate that tribunals apply in resolving disputes). In deciding to request a 13.5% markup here, YDJV did not apply or address the HHS weighted approach, and it did not explain why it agreed to 10% markups throughout contract performance. In addition, if the work being compensated through a change is less demanding or involves a lesser risk than the original contract work, the awarded rate of profit should reflect that risk reduction. *Varo, Inc.*, ASBCA 15000, 72-2 BCA ¶ 9717, at 45,360.

In considering and applying the regulatory guidance, the Board retains some, albeit not uncontrolled, discretion in deciding upon the appropriate profit rate to apply. *White Buffalo Construction, Inc. v. United States*, 546 F. App’x 952, 955 (Fed. Cir. 2013). Here, where the parties routinely and consistently used a 10% profit markup in contract modifications, where the contract administration costs for negotiation and REA preparation that are being compensated are different and of a less technical and “risky” nature than the design and construction work that YDJV was performing under its contract, and where YDJV has not applied the weighted average approach upon which DOS would have been required to rely had the parties been negotiating a change, we elect to apply a 10% profit markup.

Adding overhead and profit to YDJV’s direct costs, we award YDJV \$443,911.36 for its consultant and legal costs claim, with interest running from August 30, 2012, the date upon which YDJV submitted the certification for the claim.

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but the form was available at the time of YDJV’s contract award and performance.

B. Warehouse Rental Costs (CBCA 3350)

In its delay claim as part of CBCA 3350, YDJV seeks \$88,213 as reimbursement for costs that it incurred to rent an off-site storage facility. It asserts that it originally intended to store materials in the warehouse that it was to construct on the NCC site, but, because of delays caused by tax disputes between the USG and the GoI, the on-site warehouse construction was significantly delayed, meaning that YDJV had to find an alternative means of temporary storage of materials. We have previously found DOS responsible for failing to disclose the possibility of permit delays resulting from the USG's tax dispute with the GoI, and we further found that failure to have caused significant delays in the construction of the on-site warehouse. Accordingly, we find DOS responsible for YDJV's need to rent an off-site warehouse facility.

DOS has stipulated to the amount of YDJV's costs. For the same reasons discussed with regard to the consultant and legal costs claim above, we apply markups for overhead and profit at rates of 6% and 10%, respectively. Accordingly, inclusive of overhead and profit markups, YDJV is entitled to recover its off-site storage facility rental costs in the amount of \$102,856.36, with CDA interest running from August 30, 2012.

C. Other Possible Direct Cost Claims in CBCA 3350

In the delay claim underlying CBCA 3350 and in YDJV's briefing and expert reports, YDJV has identified several other costs that could be considered to be direct cost claims, and DOS stipulated to the amount of (but not liability for) several of them. These costs include additional equipment rentals allegedly caused by the delay; escalations in the prices of filters provided by Johnson Controls, of various roofing materials, and of other materials provided by Shaw Industries, Inc., and ETS-Lindgren; and increased charges from various outside professional services. *See* Damages Stipulation (July 7, 2015). Yet, there is scant if any discussion of these costs in YDJV's briefing or at the hearing of this matter. The mere fact that DOS stipulated to the *amount* of these costs does not constitute proof of entitlement. To the extent that YDJV was pursuing any of these costs as direct costs resulting from delays caused by DOS, we find that YDJV has failed to prove causation.

D. Occupancy Sensor Change Order Claim (CBCA 4658)

YDJV appeals the contracting officer's decision, dated February 18, 2015, denying YDJV's claim for increased costs, totaling \$53,136, arising out of the installation of occupancy sensors in the classified access area of the NOB.

As previously discussed, the NOB contains a secured area, the CAA, where classified information was to be processed and stored. JSF ¶ 20; Tr. Vol. 10 at 76-79. The contract required that “[e]very workspace and office in the Controlled Access Areas (CAA) shall be protected by volumetric detection alarms . . . .” Exhibit 53 at 3366. The volumetric detection alarms, which YDJV calls “occupancy sensors,” were a security requirement that enabled DOS personnel to monitor each workstation in the CAA space at times when the space was unoccupied.

YDJV designed the CAA space as part of its design responsibilities under the contract. As part of that design, it placed computer workstations that were authorized for processing classified information in offices that it created inside the CAA space, each of which had its own door and special lock, and it placed occupancy sensors in each of those offices that were capable of monitoring the workstations in those offices. It also elected to place classified information workstations in two alcoves off a corridor that connected those offices within the CAA. Those alcoves were not separated from the rest of the CAA by doors, and YDJV did not place occupancy sensors in areas that would focus on the classified information computer workstations in those two alcoves. During the accreditation process, DOS recognized the problem with the location of the occupancy sensors and, more specifically, that there were no volumetric (or occupancy) sensors that completely monitored the workstations in the alcoves. At DOS’s request, YDJV added sensors to the two alcoves. The contractor then submitted a claim for the costs associated with having to add them.

YDJV argues that it is entitled to an equitable adjustment for adding the occupancy sensors in the alcoves because it reasonably interpreted the contract language as requiring only that, as Britton Miles, who was a project manager on the NCC project for YDJV for a portion of the contract performance period, explained, “the perimeter doors and the corridor spaces leading up to these workstations provided [the] protection” that the contract clause required. Tr. Vol. 3 at 7. YDJV viewed DOS’s direction to add occupancy sensors in the workstation spaces themselves as a request for further protection of those workstations, beyond what the contract clause required.

YDJV is essentially arguing that the occupancy sensor contract clause is ambiguous. “When a contract is susceptible to more than one reasonable interpretation, it contains an ambiguity.” *Metric Constructors, Inc. v. National Aeronautics and Space Administration*, 169 F.3d 747, 751 (Fed. Cir. 1999). In such circumstances, where “some substantive provision of a government-drawn agreement is fairly susceptible of a certain construction and the contractor actually and reasonably so construes it, in the course of bidding or performance, that is the interpretation which will be adopted – unless the parties’ intention is otherwise affirmatively revealed.” *WPC Enterprises, Inc. v. United States*, 323 F.2d 874, 876 (Ct. Cl. 1963). Nevertheless, “[t]o show an ambiguity it is not enough that the parties

differ in their respective interpretations of a contract term.” *Metric Constructors*, 169 F.3d at 751. “Rather, both interpretations must fall within a ‘zone of reasonableness.’” *Id.* (quoting *WPC Enterprises*, 323 F.2d at 876).

We cannot agree with YDJV that the clause here is ambiguous. The contract clause clearly states that “[e]very workspace . . . in the [CAA] shall be protected by volumetric detection alarms.” Exhibit 53 at 3366. There are three basic types of sensors – perimeter, volumetric, and proximity – and volumetric sensors are “designed to detect the presence or actions of an intruder almost anywhere” within a specific area. U.S. Geographical Survey Manual: Physical Security Handbook 440-2-H, ch. 5, ¶ 6.D(2) (Aug. 2005), *available at* <https://www2.usgs.gov/usgs-manual/handbook/hb/440-2-h/440-2-h-ch5.html>. As Richard Plunkard, DOS’s technical security specialist for the project, testified, volumetric sensors “see change in heat sources” through a “passive infrared” system and need “line-of-sight coverage for a given area.” Tr. Vol. 10 at 270-71. Although YDJV protected every self-enclosed office inside the CAA with a volumetric (or occupancy) sensor, it did not protect every workspace with one. It instead relied on detection devices in other parts of the CAA that would have identified if and when someone entered CAA space, but those sensors did not necessarily continue to monitor activity inside a specific alcove workspace. That did not satisfy the contract requirement for each workspace to be protected by a volumetric detection alarm. YDJV is not entitled to an equitable adjustment. CBCA 4658 is denied.

E. Utility Bill Claim (CBCA 4659)

Clause H.39.4.4 of the contract provides that the contractor “shall arrange to receive, and make payment of, bills by utilities for the Contractor’s consumption and use for their products and services, until the date of substantial completion of the project.” Exhibit 1 at 55. On or about December 18, 2014, YDJV submitted a certified claim seeking \$123,612 in costs incurred to pay a utility bill for municipal electrical service for the NCC project from September 1 through 30, 2011. The basis for YDJV’s request for reimbursement of these costs is its belief that the contracting officer should have found that it reached “substantial completion” on the NCC project in late August 2011, rather than October 6, 2011.

As we previously explained, to achieve substantial completion under the contract, YDJV, pursuant to clause E.2.1 of the contract, had to obtain a certification from the contracting officer or his representative that the project “is sufficiently complete and satisfactory . . . that it may be occupied or utilized for the purpose for which it is intended.” Exhibit 1 at 21. In addition, under the P&L clause, it was YDJV’s obligation to obtain an occupancy certificate at the end of construction. Exhibit 2 at 100. After Design Cell submitted the necessary NOCs to MMRDA in August and September 2011, MMRDA notified YDJV on October 4, 2011, that, once appropriate fees were paid, it would issue the

occupancy certificate. Exhibit 16161. On October 5, 2011, YDJV paid the fees, and MMRDA issued the certificate. On October 6, 2011, the contracting officer declared that the project was substantially complete. For these reasons and those discussed earlier in this decision, YDJV has no basis for seeking an earlier substantial completion date or for recovering utility costs incurred during the month of September 2011. CBCA 4659 is denied.

## II. The Government's Counterclaims (CBCA 3672)

### A. Water Treatment Deletion Claim (\$337,921)

DOS seeks a price reduction of \$337,921 for its deletion of one of two water treatment systems that the contract originally required YDJV to construct. YDJV disputes the amount of the requested price reduction. We grant DOS's claim in the requested amount.

Pursuant to clause 2.2.2.7 of the NCC contract, YDJV was required to design and construct on the NCC two separate water treatment systems, one dealing with municipal water and a separate system dealing with on-site well water:

Use of municipal water is limited to drinking and to fire protection. In addition to municipal water, this project requires an on-site water well for backup domestic water supply and irrigation. *The Contractor shall design and construct two separate water treatment systems, one each for municipal water and on-site well water.* Depending on the water treatment requirements, three or four single or double split water storage tanks may be required for the following:

1. Fully treated domestic water (stored in double or split tank)
2. Irrigation . . .
3. Pre-treated municipal water
4. Pre-treated well water

Exhibit 2 at 107 (emphasis added).

The 2005 OBO International Codes Supplement (ICS), which was incorporated into the contract along with the 2003 International Plumbing Code that it was intended to supplement, added the requirement that the separate water treatment systems have parallel modules and component isolation valves to allow for continual operation of the separate systems during maintenance:

**611.1 Design.** . . . The potable water system design must be approved by the [contracting officer's representative] . . . Potable water will be treated and maintained downstream of general water storage. All potable water treatment system components shall be designed with parallel modules and component isolation valves that allow continual operation during maintenance.

**613.1 General.** . . . General water storage tanks shall be designed with a split tank design that will allow for maintenance of the tank while keeping water distribution systems on-line.

Exhibit 21 at 562.

By June 2006, YDJV had informed OBO that, “[f]rom reading the test results of the waste extracted from the well, it is evident that the well water can not be used as domestic waste without extravagant expense” and that the “water tested from the municipality will also require treatment.” Exhibit 13085 at 8334. It suggested that, rather than well water, tanker-truck supplied water might be a more viable drinking water source. OBO responded by indicating that “[a]n on-site water well and a water treatment system specifically for the on-site well were part” of the contract and that “[t]he design and installation of such a system should have been contemplated in your proposal.” *Id.* at 8339. It further indicated that the contract “requires treatment of municipal water” and separately “requires an on-site well for backup domestic water supply and irrigation, and a water treatment system specifically for the well water.” *Id.* at 8340. Nevertheless, the parties soon agreed that the well water option identified in the contract was not viable as a backup source of drinking water for the NCC, and OBO agreed that it would replace well water with water brought to the NCC site by tanker-truck. Accordingly, OBO deleted all of the components needed for the well water treatment system from the contract.

Subsequently, the parties began to discuss the credit that OBO was due for the deletion of the well water treatment system. Initially, after suggesting a \$381,000 dollar figure that it swiftly withdrew, YDJV stated that no credit was due. OBO insisted to the contrary – that “[a] credit is due for the deletion of the well water treatment system as well as other work associated with ground water extraction system that will not be constructed/installed.” Exhibit 13085 at 8394. The parties have never been able to agree on the credit, and, on December 18, 2013, the DOS contracting officer issued a decision taking a \$340,986 credit for the deletion of the well water treatment system work. During proceedings before the Board, DOS reduced the claimed credit to \$337,921.

To the extent that DOS’s deletion of the well water treatment system work from the contract reduced the costs that YDJV would have had to expend on this project, DOS is

plainly entitled to a price reduction for the deletion. When the Government deletes work from contract requirements, the Government is entitled to a downward adjustment in the contract price reflecting the amount that the contractor saved as a result of that deletion. *Celesco Industries, Inc.*, ASBCA 22251, 79-1 BCA ¶ 13,604, at 66,683. “The agency bears the burden of proof to substantiate the [amount of the] deductive change for deleted work.” *Rodriguez Construction LLC v. General Services Administration*, CBCA 4452, 16-1 BCA ¶ 36,351, at 177,229.

The water treatment systems that YDJV designed and had planned to construct did not completely comport with the contract requirements. As originally written, the contract required two completely separate water treatment systems: one for municipal water and another for well water. Well water was supposed to serve as a backup if the municipal water system stopped working. Because the well water treatment system needed to be fully functional if the municipal water system went down, the well water treatment system needed to be completely separate. Further, as set forth in paragraph 611.1 of the OBO ICS, each separate system had to have “parallel modules and component isolation valves [to] allow continual operation during maintenance.” That is, if DOS cleaned the piping and changed the filters on the municipal water system, the “parallel module” would allow DOS to continue providing municipal water to the NCC during that cleaning process. *See* Tr. Vol. 10 at 251 (“for maintenance purposes you can switch [the municipal water treatment system] over to another sited duplex[], or a parallel system, so that you can clean one half of that water treatment facility while still maintaining the flow of the [municipal] water to the site”).

YDJV’s original design viewed the “parallel modules” as tying the municipal and well water systems together and did not anticipate truly separate systems. That is, there was one parallel module that was used for both systems. Under YDJV’s plan, if DOS used the well water system while cleaning the municipal water system, the well water would still run through the “parallel module” for the municipal water treatment system, which was not the intent of the contract terms. The systems were supposed to be independent. Because of how it had planned to build its systems, YDJV viewed DOS’s deletion of the well water system as having little if any impact on its overall costs because YDJV still had to construct most of the system that it had originally planned to accommodate the municipal water treatment system.

In considering an appropriate price reduction here, we have to consider the work that YDJV’s contract originally *required* it to perform, as opposed to the unapproved reduced level of work that YDJV had hoped to perform. In a similar situation in *S.N. Neilson Co. v. United States*, 141 Ct. Cl. 793 (1958), the contractor, misled by a bid submitted to it by a subcontractor, had underpriced electrical work in its original offer. When, after award, the contracting officer eliminated certain underground duct work from the contract, the

contractor became aware that it had unintentionally underpriced that work in its offer and suggested a price reduction in the underpriced amount that it had included in that offer. Nevertheless, the actual costs that the contractor would have incurred to perform that work, had it not been deleted, would have been significantly greater than the contractor's suggested price reduction. The Court of Claims held for the Government, stating that the contractor "is not entitled to use its mistaken estimated figures, which have no relation to actual costs, in determining the equitable adjustment." *Id.* at 797. Instead, the Court upheld an award based upon an estimate prepared by an outside consultant of the actual costs that the contractor most likely would have incurred. *Id.* at 806-07; see *Plaza Maya Limited Partnership*, GSBICA 9086, 91-1 BCA ¶ 23,425, at 117,500 (1990) ("the costs that would have been incurred in performing the deleted work, and not the amount included in the contractor's proposal or bid, are the controlling consideration").

At the hearing of this matter, DOS presented the testimony of a construction cost estimating expert, Christopher Payne, Executive Vice President of McDonough, Bolyard & Peck, regarding his development of an estimate of the costs that YDJV would have incurred had it been required to construct a well water treatment system that was entirely separate from the municipal water treatment system. He developed his estimate using standard construction industry cost estimating techniques, as well as through a review of YDJV's bid and supporting materials. YDJV has not successfully challenged the validity of his estimate. Accordingly, we find that DOS is entitled to recover \$337,921 on this claim, plus interest consistent with FAR 52.232-17. To the extent that YDJV based its offer on some other figure, or upon a misunderstanding of the well water system requirements, it does not affect DOS's right to a price reduction based upon a more accurate cost estimate.<sup>39</sup>

#### B. Windows Claim (\$464,000)

DOS seeks compensation for damage to 346 forced entry ballistic resistance (FE/BR) windows and forth-one FE/BR doors that YDJV, pursuant to the terms of its contract, was required, but failed, to protect prior to installation. YDJV does not dispute that DOS is entitled to some relief for the damage to the windows and doors, but it believes that recovery

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<sup>39</sup> This decision only addresses the price reduction for the deletion of the well water treatment system. It does not account for any increased costs resulting from the addition to the contract of systems or structures to allow for tanker-truck supplied water. We understand from representations made at the hearing that costs for that addition to the contract were compensated through a separate contract modification. To the extent that they were not, this decision is not intended to resolve or preclude further negotiations between the parties regarding those costs.

should be limited to \$40,800 (approximately \$105 per window or door). DOS originally sought \$438,810, which equates to approximately \$1130 per window or door, but appears to have increased its request in its post-hearing brief to \$464,000.

The NCC contract required YDJV to install FE/BR windows and doors at the perimeters of the various NCC buildings. Exhibit 2 at 120. DOS, rather than YDJV, was to procure the FE/BR windows and doors and then make them available to YDJV as “Government Furnished Contractor Installed Equipment.” Exhibit 2 at 109, 111, 112, 114, 115. Once procured, the FE/BR windows and doors would remain stored at the manufacturer’s warehouse until YDJV was ready for them, at which point YDJV would “be responsible for shipping” them “from the manufacturer’s warehouse to the NCC project site.” *Id.* at 120. The cost of the FE/BR windows is significant.<sup>40</sup>

The contract incorporated the P&R clause at FAR 52.236-7, which provided that the contractor shall “be responsible for all damages to persons or property that occur as a result of the Contractor’s fault or negligence” and “shall also be responsible for all materials delivered and work performed until completion and acceptance of the entire work.” Exhibit 1 at 85 (clause I.66). Similarly, clause H.35.2 provided that YDJV “shall be responsible for all materials delivered and work performed until final completion of and acceptance of the entire work.” *Id.* at 65 ; *see* Exhibit 89 at 4567 (OBO Project-Specific Division 1 Specifications § 01101, ¶ 3.2.I: “The Contractor shall be responsible for all materials delivered . . . until completion of the works and final acceptance by the USG as defined herein.”); *id.* at 4573 (¶ 3.7: “The Contractor shall coordinate and supervise the protection, cleaning, and maintenance work at the Project Site during receipt, handling, storage, installation, curing, and similar stages of construction execution to effect minimum exposure to hazards by personnel and minimum deterioration to the work.”); Exhibit 93 at 4634 (§ 01401, ¶ 3.2: “monitor protective measures in relation to construction activities”).

After the windows were delivered to the NCC job site, construction workers on the site etched graffiti – sometimes a random series of scratches, other times methodically laid-out rows of scratches, random words or letters, rows of dots, designs that somewhat resemble tic-tac-toe games, and/or other scribbles – into the mylar coatings on the interior side of the glass of more than 400 FE/BR windows, as well as on the glass of forty-one doors. Exhibit 16003. The etchings in approximately sixty-two of the windows were so severe that YDJV agreed, without objection, to replace the windows at its own expense. Exhibit 461. Nevertheless, there remain 346 windows and forty-one doors with varying

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<sup>40</sup> DOS estimates that replacement of the windows would cost approximately \$1.25 million. Exhibit 13084 at 8458. It has not sought replacement costs.

degrees of etched graffiti, some more significant than others (with some involving very noticeable etching in the primary vision area of the window). The parties jointly inspected the materials, and they mutually signed off on drawings that memorialize the scratches in each window and door. *See* Exhibit 16003. Although OBO originally insisted that YDJV replace more of the windows and doors than it did, OBO eventually relented and allowed the remaining damaged windows to be installed, subject to OBO's right to a price reduction for the damage.

There is no question that YDJV is liable for the damage to the Government-supplied windows and doors. The contract expressly required YDJV to take responsibility for and to protect those windows and doors after they were delivered to the job site. Leaving them sufficiently unprotected in a manner that allowed its subcontractors' construction workers to carve graffiti into the majority of blast-resistant windows on the compound in no way meets YDJV's contractual obligations. Yet, for the most part, the windows and doors, though aesthetically defective, remain functional, and the etchings did not affect the ballistic-resistant or blast characteristics of the windows and doors. Tr. Vol. 10 at 258.

YDJV has questioned whether there was sufficient damage to all of the 387 windows and doors included in DOS's damages calculation to warrant including them in the damages assessment. In determining which windows were sufficiently damaged to warrant a price adjustment, DOS tried to find a standard to apply that would provide solid guidance and support for such a determination. It settled on the "Q3" standard in the American Society for Testings and Materials (ASTM) Standard Specification for Flat Glass, Designation C1036-06, Tr. Vol. 10 at 259, which "covers quality requirements for flat, transparent, clear, and tinted glass" by defining when a blemish in glass (measured by depth and other factors) renders the glass unacceptable. Exhibit 445 at 7850. YDJV does not believe that the standard applies here because, by its own terms, the Q3 standard "does not apply to glass thicker than 12 mm (½ in.)" and indicates that "[a]llowable blemishes for glass thicker than 12 mm (½ in.) shall be determined by agreement by the buyer and seller," Exhibit 445 at 7852, but it identifies no alternative standard applicable to determining when etched graffiti should be viewed as causing compensable damage. Although DOS's expert has argued that the ASTM standard applies because each piece of glass in the windows falls below that thickness before being pressed together with other pieces of glass, we find it unnecessary to decide whether the standard applies here. Either with or without the standard's guidance, the result is the same. DOS delivered blemish-free windows and doors to YDJV, and they were damaged by the mostly intentional conduct of the construction workers that YDJV allowed on the site. The parties have documented the specific damage to each window and door in a joint review of each one. *See* Exhibit 16003. Having studied that jointly prepared document and considered the testimony of witnesses, we find damage to each of the 387 windows and doors included in DOS's calculations.

We must, then, identify an appropriate means by which to measure compensation for that damage. “The primary objective of damages for breach of contract is to place the non-breaching party ‘in as good a position pecuniarily as he would have been by performance of the contract,’” assuming that the breaching party had fully and properly performed its obligations. *White v. Delta Construction International, Inc.*, 285 F.3d 1040, 1043 (Fed. Cir. 2002) (quoting *Miller v. Robertson*, 266 U.S. 243, 257 (1924)). Generally, “[i]f work that is partially completed is damaged prior to acceptance by the Government, it is the contractor’s obligation to restore it without additional compensation,” *Fox Construction, Inc. v. General Services Administration*, GSBCA 11543, 93-3 BCA ¶ 26,193, at 130,402, and a proper measure of damages for breach of that obligation can be the cost of restoring the damaged structures to the condition that the parties contemplated when they entered into the contract. *Missouri Baptist Hospital v. United States*, 555 F.2d 290, 294 (Ct. Cl. 1977). Yet, sometimes the cost of repair “will be clearly disproportionate to the probable loss in value to the injured party.” *Restatement (Second) of Contracts* § 348 cmt. c.

In such circumstances, if “the work is otherwise adequate for its intended purpose,” *Granite Construction Co. v. United States*, 962 F.2d 998, 1006-07 (Fed. Cir. 1992), the damaged party may not recover the full cost of repair because such an award would constitute economic waste:

Damages based on the cost to remedy the defects would then give the injured party a recovery greatly in excess of the loss in value to him and result in a substantial windfall. Such an award will not be made. It is sometimes said that the award would involve “economic waste,” but this is a misleading expression since an injured party will not, even if awarded an excessive amount of damages, usually pay to have the defects remedied if to do so will cost him more than the resulting increase in value to him.

*Restatement (Second) of Contracts* § 348 cmt. c; see *Granite Construction*, 962 F.2d at 1007 (under the doctrine of “economic waste,” the Government may have to limit its remedy, in appropriate circumstances, to a downward adjustment in the contract price); *Short v. Greenfield Meadows Associates*, No. 07-CA-14, 2008 WL 2589659, at \*3 (Ohio Ct. App. June 24, 2008) (“Economic waste exists when the cost to remedy the defect is grossly disproportionate to the good to be attained.”). Determining whether requiring strict compliance would result in economic waste is dependent upon weighing “the purpose to be served, the desire to be gratified, the excuse for deviation from the letter, [and] the cruelty of enforced adherence.” *Triple M Contractors, Inc.*, ASBCA 42945, 94-3 BCA ¶ 27,003, at 134,531-32 (quoting *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 891 (N.Y. 1921)); see *Fire Security Systems, Inc. v. General Services Administration*, GSBCA 12120, et al., 97-2

BCA ¶ 28,994, at 144,405 (contractor's deviation from specifications reduced the reliability of installed system to detect and respond to fires).

DOS has agreed not to require YDJV to replace all damaged windows and doors and allowed installation of all but sixty-two of the damaged windows and doors (which YDJV voluntarily agreed to replace). However, the parties cannot agree upon the dollar amount that DOS should receive as a result of the damage or the manner in which those damages should be measured. As previously mentioned, DOS originally requested that we order YDJV to pay \$439,810, a cost that it estimated (using a complicated set of calculations) it would take to reglaze all of the damaged windows and doors, but, in its post-hearing brief, DOS increased its request to \$464,000. DOS acknowledges, however, that it does not intend either to replace or to reglaze the windows or doors, at least at this point in time. Its original estimates depended upon the concept that the life of the windows would likely be reduced by five years or so because of the etchings, but even it now questions that original assumption, and the evidence in the record does not establish that the etchings have any effect whatsoever on longevity. For its part, YDJV has offered to pay \$40,800, which was an amount that a YDJV representative had originally negotiated with the on-site DOS project manager as compensation for the thirty-eight most severely damaged windows that were not being replaced.

We reject out of hand YDJV's request that we enforce the "agreement" that it reached with the on-site DOS project manager, which YDJV argues would "give effect to the party-to-party commercial dealings between DOS and YDJV." Appellant's Post-Hearing Brief at 118. YDJV acknowledges that the DOS representative only agreed to *recommend* acceptance of YDJV's offer to his superiors and that the DOS representative did not purport to create and lacked authority to consummate any agreement. The DOS contracting officer rejected that recommendation as too low. We cannot enforce an agreement that YDJV acknowledges never occurred, nor can we enforce an agreement that, even if it was made, was made with a government employee without actual authority to make it. *See Pearson E. Dubar v. Department of Agriculture*, CBCA 1895, 10-2 BCA ¶ 34,497, at 170,147 ("The actions of a government employee without actual authority cannot bind the Government."). Further, with exceptions not relevant here, Federal Rule of Evidence 408 prohibits the use of evidence about conduct or statements made during compromise negotiations about a claim. *Walsh/Davis Joint Venture v. General Services Administration*, CBCA 1460, 12-1 BCA ¶ 34,968, at 171,904.

We must also reject DOS's cost-of-repair request. DOS does not intend to repair the etchings in the existing windows and doors, in part because of the disruption to its staff that would result in doing so and in part because the damage is something with which DOS has decided to live. As a result, an award in the amount of the cost of repair – in excess of

\$430,000 – would seem to constitute economic waste in the circumstances here, particularly because the “defects [are] essentially cosmetic rather than structural” and the constructed material is “functional as built.” *Asp v. O’Brien*, 277 N.W.2d 382, 384 (Minn. 1979). DOS is using the windows and doors, and there is no viable evidence of a reduction in the useful life of the windows and doors as a result of the graffiti. The cost-of-repair award that DOS seeks would “substantially overcompensate [the] owner” because the owner, DOS, would not use the money for repairs, “granting [the] owner a windfall.” Hal J. Perloff, “The Economic-Waste Doctrine in Government Contract Litigation,” 43 DePaul L. Rev. 185, 186 (Fall 1993). We cannot grant cost-of-repair damages here.

Typically, “[i]f an award based on the cost to remedy the defects would clearly be excessive and the injured party does not prove the actual loss in value to him, damages will be based instead on the difference between the market price that the property would have had without the defects and the market price of the property with the defects.” *Restatement (Second) of Contracts* § 348 cmt. c; see *Asp*, 277 N.W.2d at 384 (“If reconstruction is not possible without unreasonable economic waste, the proper measure of damages is the difference in value between what was contracted for and what was actually built.”). Market value is generally determined from “what a willing buyer would pay in cash to a willing seller.” *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 474 (1973). The rationale for awarding diminished value damages is that the injured party “could always sell the property on the market even if it had no special value to him.” *Restatement (Second) of Contracts* § 348 cmt. c.

The remedies identified in the *Restatement* for the situation here seem plainly inadequate. It seems impossible to apply a market value approach to a secure DOS consulate compound, the true value of which would seemingly not be properly represented in a “market value” sale of the property in its current form. See *United States v. 50 Acres of Land*, 469 U.S. 24, 30 (1984) (market value is generally too difficult to prove for “properties that are seldom, if ever, sold in the open market,” meaning that the tribunal “cannot predict whether the prices previously paid, assuming there have been prior sales, would be repeated in a sale” (quoting *United States v. 564.54 Acres of Land*, 441 U.S. 506, 513 (1979))). At the same time, it would be unfair simply to forgive YDJV’s failure to protect the windows and doors from the mostly intentional actions of its subcontractors’ workers – a violation of its express contract obligations – and force DOS to live with damaged windows and doors with no recompense.

Fortunately, there is case precedent to support a tribunal’s ability to fashion and apply other standards “when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public.” *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950) (discussing concept of “market value” in takings

cases under the Fifth Amendment). We undertake that effort here, but we first have to reject the alternative theories of assessing damage, based upon a variety of rationales, that DOS presented through its expert witness, Mr. Payne. Mr. Payne has calculated an alternative damages award of \$198,583 based upon cost estimating principles assuming that the scratches in the windows will cause a two-year reduction in the windows' useful life, but the record evidence does not support the assumption. He suggests different figures based upon different documents found in YDJV's files in which different YDJV employees suggested different ways to resolve this conflict – an award of fifty percent of the cost of each window, a suggestion that someone at YDJV thought that \$1200 per window would be reasonable, and a \$365,000 figure based upon an unsigned and unsent letter found in YDJV's files – but we cannot bind YDJV to its negotiation strategies and thought processes during its attempts to settle this dispute any more than we can bind DOS to the unapproved “agreement” that YDJV asked us to enforce.

In the end, we are left with the firm belief that the etchings in the windows and doors that are now installed at the Mumbai NCC clearly have a negative aesthetic impact upon the consulate that will continue to plague DOS until the useful life of those windows and doors comes to an end. The record shows that the intended traffic through the NCC was expected to be, and is, of an extremely high volume, and the fact that the large majority of the windows in the complex are scratched with graffiti has to affect visitors and DOS employees at the site alike. Where, as here, the NCC was to be a conduit to, and a first impression of, the United States for many of the NCC's visitors, the fact that so many windows in a brand new complex have noticeable graffiti certainly has to have a negative impact upon their impressions of the United States. We recognize that there are decisions in which boards have declined to award other than nominal damages in economic waste situations in which a decline in market value could not be measured. *See, e.g., Valley Asphalt Corp.*, ASBCA 17595, 74-2 BCA ¶ 10,680, at 50,770-71 (awarding nominal damages of \$1000 where value of runway with uneven elevations was not measurably less than value of runway as promised). Yet, it appears clear that, when there are adverse aesthetic impacts from the breach that strongly affect a property's aesthetic value, those aesthetic impacts may be considered in evaluating economic waste. *See Toombs & Co.*, ASBCA 34590, et al., 91-1 BCA ¶ 23,403, at 117,433 (1990) (citing fact that “deformed boots had no adverse aesthetic impact” as factor in considering damages in economic waste situation); *Bromley Contracting Co.*, GSBCA 6965, 85-3 BCA ¶ 18,428, at 98,545 (declining to apply economic waste doctrine when there was a strong aesthetic reason for requiring strict compliance with contract requirements). Further, the willfulness or intentional nature of the contractor's action causing the defective work has been considered as a factor in evaluating the application of the economic waste doctrine. *See H.L.C. & Associates Construction Co. v. United States*, 367 F.2d 586, 600 (Ct. Cl. 1966) (“courts have refused to apply the test of substantial performance where the contractor's deviation from the specifications was

intentional”). Here, although there is no evidence that YDJV itself acted willfully or intentionally to damage the FE/BR windows and doors, it clearly failed to take the necessary steps, as required by its contract, to preclude willful and intentional conduct by the construction workers that it allowed on the site.

“[A]llowing a contractor to avoid covering repair costs under the guise of the economic-waste doctrine – even when the repairs are arguably wasteful – is a harmful precedent, because it encourages abusive bidding and inefficient contracting costs in addition to leaving the government under-compensated.” Perloff, *supra*, at 231. An award of only nominal damages in the circumstances here would serve as an incentive to contractors to ignore contract provisions requiring them to protect their construction sites and the materials on those sites. Although the damage here is somewhat esoteric, it is real, and DOS is entitled to compensation for it. Alas, there is scant evidence in the record to define how to value the intangibles at issue here. DOS presented little if any evidence about the effect of the damaged windows on employee morale, on the effect upon visitors, or on any effect upon efficiency in the workplace. Although Mr. Payne suggested that valuation under a “reduced aesthetic standard” theory would be expected to reduce the value of the windows and doors by fifteen to twenty percent, supporting a credit of between \$190,000 and \$315,000, there is nothing in the record to support that analysis or to indicate why the figures he chose have any more of a reasonable basis than any other numbers.

With no information in the record that truly informs how to measure the intangible reductions in value here, we are left with YDJV’s admissions – in its pre-hearing and post-hearing briefs – that it should pay \$40,800 for the damage to the windows. Yet, that figure would amount to no more than a credit of approximately \$105 per window or door. In light of the contractual breach of duty that created the situation that allowed for the intentionally destructive behavior that occurred, such a figure appears a paltry award for the damage at which DOS employees have to look every day. In the end, we elect here to fashion an award in the manner of a “jury verdict,” given that there is clear evidence that the Government was injured and there is no more reliable method for computing damages. *See WRB Corp. v. United States*, 183 Ct. Cl. 409, 425 (1968) (discussing “jury verdict” approach). Although such an approach is disfavored, the type of breach and damage at issue here leaves us with no other reasonable alternative. After considering the evidence in the record, including our review of the extent of damage to the various windows, the original cost of the windows, and the savings from which YDJV has benefitted in not having either to repair or to replace these 387 windows and doors, we award DOS \$100,000 (or approximately \$250 per window or door) upon this claim, plus interest consistent with FAR 52.232-17.

C. Fuel Claim (\$54,839)

The contract required YDJV to provide a generator that DOS could use to supply the compound with electrical power for an extended period of time if the local electrical grid was not operating. As part of that requirement, YDJV was to provide underground fuel tanks with the generators and, at the time of substantial completion, was to deliver the tanks filled with fuel. At the hearing, DOS presented evidence that the fuel tanks were not full when YDJV achieved substantial completion on October 6, 2011, and that, when DOS requested that YDJV fill the tanks, YDJV declined to do so, requiring DOS to fill the tanks itself at a cost of \$54,839.

In its post-hearing brief, YDJV represented that it no longer disputes this claim or the claimed quantum. Accordingly, we grant the Government's claim in the amount of \$54,839, plus interest consistent with FAR 52.232-17.

D. Furniture Storage Cost Claim (\$56,630)

Under clause 3.5.1.2 of the contract, DOS was to procure furniture that YDJV would then install in the CG residence. In turn, YDJV was to "take full responsibility for the furniture from receipt and shipment to project site" and "ensure that the furniture installations [were] wholly integrated with the construction and commissioning schedule and accreditation process." Exhibit 2 at 119. The contracting officer, in his decision asserting this claim, stated that "YDJV's continued performance beyond the contract required completion date resulted in the Government incurring costs for storage and detention (demurrage) charges" from January 1, 2009, through July 26, 2010, the date on which YDJV was ready to accept the furniture and install it in the CG residence. Exhibit 16237 at 50453.

The basis underlying this affirmative government claim is somewhat different from that underlying the three previously described government claims (through which the Government sought a monetary credit for deleting a portion of the contract requirement for water treatment installations, compensation for scratched and damaged windows, and compensation for underfilled fuel tanks). The costs in those three claims were incurred (or, with regard to the water treatment plant deletion, were avoided) for reasons other than project delays. The basis underlying DOS's furniture claim is different. As the DOS contracting officer acknowledges in his decision, the furniture storage costs were incurred *because of* YDJV's delays in completing contract performance. Absent those delays, YDJV would have been able to install the furniture at the CG residence when the contract schedule originally contemplated it, and no storage costs would have been incurred.

DOS's request for these furniture storage costs, incurred as a result of YDJV's delays, is barred by the contract provision allowing DOS to assess liquidated damages. "[A] liquidated damages clause is designed to *substitute* a sum agreed upon by the parties for any actual damages suffered as a result of a breach." 24 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 65:1, at 229 (4th ed. 2002) (emphasis added). The substitution of liquidated for actual delay damages is binding on both parties and becomes the means by which the Government recovers monetary damages for delay:

When they liquidated in advance the amount of the damages they fixed the amount which the one could be required to pay or the other be entitled to recover in case of breach, and the clause as much limits the defendants' right to recover as it affects the plaintiff's obligation to pay. Both are bound by the liquidated damages clause.

*Sorenson v. United States*, 51 Ct. Cl. 69, 83-84 (1916); see *MFG Properties v. General Services Administration*, GSBCA 13236, 96-1 BCA ¶ 27,929, at 139,473 (1995) ("The Government gives up the right to obtain actual damages for any harm covered by a liquidated damages provision."); *Desert Sun Engineering Corp.*, IBCA 725-8-68, 69-1 BCA ¶ 7431, at 34,512 (1968) (the Government cannot "collect both actual and liquidated damages" for the same delays); William Schwartzkopf, John J. McNamara & Julian F. Hoffar, *Calculating Construction Damages* §12.4, at 147 (1992) ("The assessment of both liquidated and actual damages is not normally permitted.").

"[A]n enforceable liquidated damages provision . . . is both a sword and a shield." J. Richard Margulies, "Owner Remedies for Contractor Default," in *Construction Contracting* 837, 892 (1991). If the contractor delays contract completion, the Government gets to "avoid [having] to prove with certainty . . . the actual damages incurred as a result of a breach" and is entitled automatically to recover the pre-set stipulated amount, even if its actual damages would otherwise have been uncertain or unmeasurable. *Safeco Credit v. United States*, 44 Fed. Cl. 406, 414 (1999); see *DJ Manufacturing Corp. v. United States*, 86 F.3d 1130, 1133 (Fed. Cir. 1996) ("By fixing in advance the amount to be paid in the event of a breach, liquidated damages clauses save the time and expense of litigating the issue of damages."). Conversely, though, in situations in which the Government can prove that its actual delay damages exceed the stipulated liquidated damages amount, "the same policy that justifies use of the stipulation offensively precludes arbitrary dismissal of the provision." Margulies, *supra*, at 892; see *Trans World Airlines v. Travelers Indemnity Co.*, 262 F.2d 321, 325 (8th Cir. 1959) ("No other or greater damages can be awarded, even though the actual loss may be greater or less." (quoting 15 Am. Jur. *Damages* § 264, at 697)). If the injury is

covered by the liquidated damages provision, that provision becomes the exclusive means by which that injury is compensated.<sup>41</sup>

It is true that a contract can contain language “stipulating for liquidated damages in limited situations only,” leaving the party seeking damages free to claim actual damages for any harm not encompassed within the liquidated damages clause. *United States v. American Surety Co.*, 322 U.S. 96, 101-02 (1944); *see Wells Construction*, IBCA 737-10-68, 69-2 BCA ¶ 7866, at 36,564. In the circumstances here, though, we see nothing in the standard FAR liquidated damages provision that somehow excludes the furniture storage costs incurred as a result of the delays from the general liquidated damages pool. DOS’s claim for an affirmative recovery of its furniture storage costs resulting from YDJV’s contract performance delays, separate and apart from the liquidated damages award that we discussed above, is precluded by the liquidated damages provision.

### Decision

For the foregoing reasons, **CBCA 3350** is **GRANTED IN PART**. DOS is entitled to recover liquidated damages in the amount of \$6,674,624. The parties have stipulated that DOS withheld \$4,720,366.10 as a retainage from the contract balance to address the liquidated damages assessment. DOS is entitled to keep the amount withheld, and YDJV must affirmatively pay the remaining balance of \$1,954,257.90, plus interest on the affirmative payment (but not on the amounts that DOS previously withheld)<sup>42</sup> consistent with

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<sup>41</sup> To the extent that the Government could recover actual, but proven, damages in addition to liquidated damages arising from the same delay, it would raise questions about the extent to which the liquidated damages provision is actually an unenforceable penalty rather than a stipulated substitute for actual damages. *See Graybar Electric Co.*, IBCA 773-4-69, 70-1 BCA ¶ 8121, at 37,732-33 (discussing when a liquidated damages provision becomes an unenforceable penalty). An enforceable liquidated damages amount must, when the parties stipulate to it, “bear[] some reasonable relationship to the probable actual damages.” *Martin Marietta Corp.*, NASA BCA 1079-18, 81-2 BCA ¶ 15,431, at 76,476.

<sup>42</sup> The current version of FAR 52.232-17, promulgated effective October 2010, expressly provides that the Government cannot recover interest under that clause on amounts otherwise payable to the contractor that the Government withheld and applied to a contract debt. 48 CFR 52.217(f)(3) (2016). Although the earlier June 1996 version of FAR 52.232-17 applicable to this contract, *see* Exhibit 1 at 11, does not contain that express language, the version of FAR 32.614-1 in effect at the time of YDJV’s contract award made clear that interest under FAR 52.232-17 would not be charged against amounts otherwise

FAR 52.232-17. On its direct cost claims for consultant and legal costs and for warehouse rental costs, YDJV is entitled to recover a total of \$546,767.72, with CDA interest running from August 30, 2012.

**CBCA 3672 is GRANTED IN PART.** The Board grants the Government’s water treatment system deletion claim (\$337,921) and its undelivered fuel claim (\$54,839), and the Board grants in part the Government’s claim for damaged FE/BR windows and doors (\$100,000), for a total award of \$492,760, plus interest consistent with FAR 52.232-17. The Board denies the Government’s claim for furniture storage costs.

**CBCA 4658 and 4659,** through which YDJV seeks costs associated with the Government’s direction to correct missing occupancy sensors and for utility bill reimbursement, are **DENIED.**

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HAROLD D. LESTER, JR.  
Board Judge

We concur:

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JERI KAYLENE SOMERS  
Board Judge

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CATHERINE B. HYATT  
Board Judge

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payable to the contractor that the Government had “withheld as a credit against the contract debt.” 48 CFR 32.614-1(c)(2) (2005).

APPENDIXAcronyms/Abbreviations Used in the Decision

AACE	Association for the Advancement of Cost Engineering
AES	AES International Corporation (YDJV subcontractor)
ASBCA	Armed Services Board of Contract Appeals
ASTM	American Society for Testings and Materials
“B” Visa	Business Visa
BKC	Bandra Kurla Complex (area of Mumbai)
CAA	Controlled Access Area
CAW	Cleared American Workers
CCAC	Consular Compound Access Control
CG	Consul General
CPM	Critical Path Method
DOS	Department of State
“E” Visa	Employment Visa
FAR	Federal Acquisition Regulation
FE/BR	Forced Entry / Ballistic Resistance
FWCC	Further Work Commencement Certificate
GoI	Government of India
GSO	General Services Office
HHS	Department of Health and Human Services
ICS	International Codes Supplement
IOD	Intimation of disapproval
IPC	International Plumbing Code
IPS	Initial Planning Survey
JSF	Joint Stipulations of Fact
L&T	Larsen & Toubro, Ltd. (YDJV subcontractor)
MCAC	Main Compound Access Control
MCGM	Municipal Corporation of Greater Mumbai
MEA	Ministry of External Affairs
MEP	Mechanical, Electrical, and Plumbing
MMRDA	Mumbai Metropolitan Regional Development Authority
MSGQ	Marine Security Guard Quarters
NCC	New Consulate Compound (Mumbai)
NOB	New Office Building
NOC	No Objection Certificate
NTP	Notice to Proceed
OBO	DOS Overseas Building Operations

OFM	Office of Foreign Missions
P&L	Permits and Licenses
P&R	Permits and Responsibilities
PAP	Project Analysis Package
PCC	Plinth Commencement Certificate
REA	Request for Equitable Adjustment
RFP	Request for Proposals
RP	AACE International Recommended Practice 29R-03
SCAC	Service Compound Access Control
SED	Standard Embassy Design
Tr.	Hearing Transcript
TSS	Technical Security Services
USG	United States Government
YDJV	Yates-Desbuild Joint Venture

Individuals/Other Corporate Entities Identified in the Decision

American Systems	YDJV Telecommunications Subcontractor
Ananth Badrinath	Desbuild's Owner
Mark Boe	DOS's Scheduling Expert
Robert Browning	OBO Project Director
Merton Bunker	Member of OBO Inspection Team
Dr. T. Chandrashekhar	MMRDA Metropolitan Commissioner until August 2007
Charles Y. Choyce, Jr.	YDJV's Scheduling Expert
Gail Cleveland	Deputy Management Officer, U.S. Embassy, New Delhi
Jeff Cross	YDJV Employee
Henry Dearman	Yates Senior Vice President for Special Projects
Desbuild	Desbuild Incorporated
Design Cell	Shapoorji's Second Permit Expediter
Shane Deville	YDJV Employee
Paul Folmsbee	Consul General at Mumbai after July 8, 2008
Ratnaker Gaikwad	MMRDA Metropolitan Commissioner after August 2007
Mr. Ghade	MCGM Employee
Larry Harrington	Yates Employee
Yogesh Hate	Desbuild Employee
Johny Joseph	MCGM Municipal Commissioner until May 2007, then Chief Secretary for the State Government of Maharashtra
Kling Architects	DOS Contractor
Brian Kolak	Nelson Engineering Employee

S. L. Lakeshri	Superintendent, H/East Ward, MCGM Assessor & Collector Office
James Leaf	DOS Management Officer, U.S. Consulate General, Mumbai
Sunil Lal	GoI Chief of Protocol
David Louh	OBO Employee
Pravin Malkani	Director, Design Cell
Tom McKenney	YDJV On-Site Manager
Shivshankar Menon	Foreign Secretary, GoI
Microtech	Microtech M&E Pvt. Ltd. (YDJV subcontractor)
Britton Miles	YDJV Project Manager
Tom Milos	YDJV Project Manager
Frank Mitchell	Yates Employee
David Mulford	United States Ambassador to India
Theodore E. Needham III	YDJV's Damages Expert
Michael Owen	Consul General at Mumbai until July 8, 2008
Paritosh Parelkar	Design Cell Representative
Christopher Payne	DOS Cost Estimating Expert Witness
Robert Peterson	DOS's Damages Expert
Jairaj Phatak	MCGM Municipal Commissioner beginning May 2007
Richard Plunkard	DOS Technical Security Specialist
Gene Rivenbark	YDJV Employee
Steven Rosenfeld	OBO Planning Manager
Shapoorji	Shapoorji Pallonji & Co., Ltd. (YDJV subcontractor)
S.G. Shinde	MCGM Assessor and Collector
Shine	Shine Electric Works Pvt. Ltd. (YDJV MEP subcontractor)
David Vivian	DOS Contracting Officer
Vartak	Vartak & Sons Pvt. Ltd. (first permit firm hired by Shapoorji)
Yates	W.G. Yates & Sons Construction Company
William Yates	Yates Owner