UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CBCA 6149 GRANTED IN PART; CBCA 7071 AND CBCA 7597 DENIED:
March 21, 2025

CBCA 6149, 7071, 7597

ALARES CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Douglas L. Patin and Lee-Ann C. Brown of Bradley Arant Boult Cummings LLP, Washington, DC, counsel for Appellant.

Jennifer L. Hedge, Office of General Counsel, Department of Veterans Affairs, Pittsburgh, PA; and Kathleen E. Ramos, Office of General Counsel, Department of Veterans Affairs, Arlington, TX, counsel for Respondent.

Before Board Judges **LESTER**, **RUSSELL**, and **ZISCHKAU**.

LESTER, Board Judge.

These appeals are before us following a five-day hearing that was conducted in March 2023 before Judge Jerome M. Drummond. During post-hearing briefing, Judge Drummond unexpectedly passed away. After a new presiding judge was assigned to the appeals, the parties elected to rely on the transcripts of the March 2023 hearing rather than again to present its witnesses for live testimony before the new presiding judge. The parties also provided extensive and helpful closing arguments to the new presiding judge.

In CBCA 6149, appellant, Alares Construction, Inc. (Alares), seeks to recover damages of $1,691,701.85 (a figure that has been revised several times during the course of litigation) for delays and changes on a construction project at a Department of Veterans Affairs (VA) medical center but with a reduction to its claimed general conditions costs to account for its settlement and release of some of its earlier claims under this contract. With the reduction, Alares tells us, the claim is approximately $1.5 million. Closing Argument Transcript (Oct. 18, 2023) at 66. Alares asserts that the VA caused all 765 days of delay on this project, but it seeks to recover extended general conditions for only 653 of those days. Appellant's Corrected Pre-Hearing Brief (Mar. 7, 2023) at 5.

Following a thorough review of the record, we find that, although there were some defects in the specifications for the project that had to be addressed and corrected, which cost Alares time and money and for which the VA is responsible, the project design was not, as Alares alleges, "riddled with fundamental design errors." Appellant's Corrected Pre-Hearing Brief at 1. To the contrary, much of the delay on this project was the result of Alares' difficulty in managing and coordinating the work of its subcontractors. We reject Alares' contention that the VA's issuance of cure notices and a show cause notice, as well as the VA's purported refusal to acknowledge its alleged responsibility for changes in a timely manner, were motivated by fears about not having sufficient appropriations to fund the contract or as retaliation for Alares' submission of claims. We find that, in CBCA 6149, the VA is responsible for 218 days of delay to the critical path of performance on this project but that Alares bears responsibility for the remaining delays.

In CBCA 7071, Alares seeks to recover direct costs associated with alleged extra work to the patient lift supports in several rooms of the building, and, in CBCA 7597, Alares asserts entitlement to the same damages that it seeks in CBCA 6149 on the basis of the VA's alleged breach of the implied duty of good faith and fair dealing. We deny both of those appeals.

Findings of Fact

I. The Contract

On April 28, 2016, the VA awarded a firm-fixed-price construction contract (contract VA241-16-C-0037 (the contract)) to Alares[1] for the replacement/relocation of the deficient

[1] The contract was originally awarded to Alares LLC, *see* Appeal File, Exhibit 1 at 2, but, on May 25, 2016, was novated through contract modification P00001 to identify Alares Construction, Inc., as the contractor. Appeal File, Exhibit 14 at 1-31.

Intensive Care Unit (ICU) at the Providence VA Medical Center in Providence, Rhode Island, for a lump-sum price of $7,753,880.20. Appeal File, Exhibit 1 at 1-2.[2] The project required the construction of a two-story addition to an existing building. *See* Exhibit 12. Alares was to connect the addition to the existing building through an elevated hallway, which would run between the second floor of the addition and a second-floor opening in the existing building. *See id.* Contract duration was to be 425 calendar days from the date that the VA issued the Notice to Proceed (NTP). Exhibit 1 at 3.

Under the contract, Alares was required to coordinate all aspects of the construction work in a manner that would avoid delays and ill-timed work:

> GENERAL PROJECT COORDINATION
>
> A. The Contractor shall be responsible to uncover work completed in order to install ill-timed work, at no additional cost to the Owner.
>
> B. Where space is limited, coordinate installation of different components to assure maximum accessibility for maintenance, service and repair.
>
> C. Coordinate space requirements and installation of mechanical and electrical work which are indicated diagrammatically on Drawings. Follow routing shown for pipes, ducts, and conduit, as closely as practicable; place runs parallel with line of building. Utilize spaces efficiently to maximize accessibility for other installations, for maintenance, and for repairs.
>
> D. Verify that utility requirement characteristics of operating equipment are compatible with building utilities. Coordinate work of various Sections having interdependent responsibilities for installing, connecting to, and placing in service such equipment.
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> . . . . .

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[2] All exhibits referenced in this decision are found in the appeal file, unless otherwise noted.

UTILITIES, MECHANICAL AND ELECTRICAL COORDINATION

A. Coordinate all Work of this Project. Provide full and complete coordination for utilities, mechanical and electrical work in Divisions 11, 13, and 21 through 28, with Work of other Divisions.

B. Give all advance notice to public utility companies as required by law, and provide proper disposition, subject to the Owner's Project Manager and the Architect's approval of all existing pipe lines, conduits, sewers, drains, poles, wiring, and other utilities that in any way interfere with the Work, whether or not they are specifically shown on the Drawings.

C. Coordination regarding existing utilities:
   1. Notify Owner and appropriate authorities when coming across an unknown utility line(s), and await decision as to how to dispose of same.
   2. When an existing utility line must be cut and plugged or capped, moved, or relocated, or has become damaged, notify the Owner and Utility company involved, and assure the protection, support, or moving of utilities to adjust them to the new work.
   3. The Contractor shall be responsible for all damage caused to existing, active utilities located within the limits of this Contract, whether or not such utilities are shown on the Drawings, including resultant damages or injuries to persons or properties.

D. General coordination of piping, ductwork, conduits and equipment:
   1. The Contract Drawings are diagrammatic only intending to show general runs and general locations of piping, ductwork, equipment and sprinkler heads. Determine exact routing and location of individual systems prior to fabrication of components or installation. . . .
   2. Adjust locations of piping, ductwork, conduits and equipment as required to accommodate new work with interferences anticipated and as encountered during installation. . . .
   3. Provide all offsets, transitions and changes of direction for all systems, as may be required to maintain proper clearances for headroom, and as may be required for coordination with other "fixed-in-place" building components (such as structural systems). . . .

4. Provide openings in the work for penetration of mechanical and electrical work.
5. Coordinate final locations of ceiling mounted devices (including air distribution devices, thermostats, heaters, control devices, sprinkler heads and similar work) with reflected ceiling plans. Review locations with the Owner's Project Manager and the Architect and obtain approval of all devices prior to installation.

Exhibit 6 at 46-48.

The contract specifications required Alares to develop a critical path method (CPM) plan for scheduling work on the construction project and to utilize and routinely update it as the project work progressed:

> The Contractor shall develop a [CPM] plan and schedule demonstrating fulfillment of the contract requirements (Project Schedule), and shall keep the Project Schedule up-to-date in accordance with the requirements of this section and shall utilize the plan for scheduling, coordinating and monitoring work under this contract (including all activities of subcontractors, equipment vendors and suppliers). Conventional [CPM] technique shall be utilized to satisfy both time and cost applications.

Exhibit 6 at 53. The project schedule had to "reflect the Contractor's approach to scheduling the complete project and . . . describe the activities to be accomplished and their interdependencies," with "[t]he work for each major trade . . . represented by at least one summary activity, so that the work cumulatively show[ed] the entire project schedule." *Id.* at 54. The schedule had to show "the sequence of work activities/events required for complete performance of all items of work." *Id.* "Each activity/event on the schedule [was required to] contain," at a minimum, identification and a description of each activity/event, duration, budget amount, early start date, early finish date, late finish date, and total float. *Id.*

Under the contract's terms, the project schedule had to be submitted to the VA monthly to reflect any activity/event changes resulting from delays in completion of any activity/event, delays in submittals that made rescheduling of work necessary, and/or inaccuracies in how the project was actually progressing:

> With each monthly submission of the updated project schedule, the Contractor shall submit a list of any activity/event changes for any of the following reasons:

> 1. Delay in completion of any activity/event or group of activities/events, which may be involved with contract changes, strikes, unusual weather, and other delays will not relieve the Contractor from the requirements specified unless the conditions are shown on the CPM as the direct cause for delaying the project beyond the acceptable limits.
> 2. Delays in submittals, or deliveries, or work stoppage are encountered which make rescheduling of the work necessary.
> 3. The schedule does not represent the actual prosecution and progress of the project.
> 4. When there is, or has been, a substantial revision to the activity/event costs regardless of the cause for these revisions.

Exhibit 6 at 58. In addition to monthly schedule updates, Alares' project manager was required to meet weekly with the VA contracting officer's representative (COR) "(or as otherwise mutually agreed to) . . . for the purpose of jointly reviewing the actual progress of the project as compared to the as planned progress and to review planned activities for the upcoming two weeks." *Id.* at 57.

The contract also incorporated a clause titled "Subcontracts and Work Coordination (APR 1984)" from Veterans Affairs Acquisition Regulation (VAAR) 852.236-80 (48 CFR 852.236-80 (2016)), which placed full responsibility on Alares for its subcontractors and for coordinating their work:

> The contractor shall be responsible to the Government for acts and omissions of his/her own employees, and of the subcontractors and their employees. The contractor shall also be responsible for coordination of the work of the trades, subcontractors, and material suppliers.

Exhibit 1 at 17 (VAAR 852.236-80(b)).

Alares' cost proposal for the project, which was incorporated into the contract, identified an overhead rate of 10%, calculated by applying 10% to the entire project, and a profit rate of 7%. Exhibit 1 at 4. The contract incorporated the "Contract Changes—Supplement (JUL 2002)" clause from VAAR 852.236-88, which included the following provision about overhead and profit rates applicable to changes of $500,000 or less that might be made during performance:

> Allowances not to exceed 10 percent each for overhead and profit for the party performing the work will be based on the value of labor, material, and use of construction equipment required to accomplish the change. As the value of the

> change increases, a declining scale will be used in negotiating the percentage of overhead and profit. Allowable percentages on changes will not exceed the following: 10 percent overhead and 10 percent profit on the first $20,000; 7-1/2 percent overhead and 7-1/2 percent profit on the next $30,000; 5 percent overhead and 5 percent profit on balance over $50,000. Profit shall be computed by multiplying the profit percentage by the sum of the direct costs and computed overhead costs.

Id. at 20-21.

The contract incorporated by reference the clause at Federal Acquisition Regulation (FAR) 52.242-14, Suspension of Work (APR 1984) (48 CFR 52.242-14 (2016)), *see* Exhibit 1 at 28, which includes the following provision:

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

FAR 52.242-14(b).

The contract also incorporated by reference the clauses in FAR 52.243-4, "Changes (JUN 2007)"; FAR 52.233-1, "Disputes (MAY 2014)"; FAR 52.236-2, "Differing Site Conditions (APR 1984)"; and FAR 52.236-3, "Site Investigation and Conditions Affecting the Work (APR 1984)." Exhibit 1 at 26-28.

The VA issued the Notice to Proceed on June 3, 2016, with an expected completion date within 425 calendar days (or August 2, 2017). Exhibit 16.

II. Performance Under the Contract

A. Period 1 (June 3, 2016, to January 13, 2017)

1. The Original Schedule Logic for Period 1

Period 1 covers the 212-day period of time running from June 3, 2016, through January 13, 2017. Exhibits 3644 at 5, RS-0593 (Expert Report) at 7. At this time, Nick Budris was Alares' project manager. Hearing Transcript, Vol. 3, at 35.

Alares' Chief Executive Officer (CEO), Donald Maggioli, developed the original construction schedule for the project with the assistance of one of Alares' construction managers. Hearing Transcript, Vol. 1, at 43; *see* Exhibits 3644 at 4999, 5023-24. As set forth in its original baseline schedule for the project, dated June 3, 2016, Alares planned to complete pre-construction development drawings and submissions, to mobilize and prepare the site, and to complete concrete placement and structural steel erection work during this period. Exhibit 3644 at 5023. Alares identified various dates from June 3 through July 25, 2016, as its early start dates for the submission to the VA of general requirements and site development plans, structural steel shop drawings, concrete submissions, and building envelope submissions. *Id.* It planned to mobilize to the project site on August 22, 2016, *id.*, after which, following installation of erosion control measures and other site protection work, it would perform certain site and foundation development work (inclusive of excavating for new footings, relocating existing utilities; installing new drainage, and pouring concrete footings and columns) with an early start date of October 19 and an early finish date of December 14, 2016; place structural steel columns, erect structural steel, and plumb and detail structural steel, with an early start date of December 21, 2016, and an early finish date of January 24, 2017; and cast the concrete column slab on the deck from January 25 to 31, 2017. *Id.* It would begin demolition of the existing building's second floor hallway and open an entryway, perform exterior sheathing and vapor barrier work, insulate and place PVC roofing, and install interior wall framing from November 30, 2016, to January 12, 2017. Exhibit 18 at 23.

Soon thereafter, though, Alares changed the logic behind some of its activities and moved several activities earlier in time, significantly altering many "early start" dates from what it had originally planned.[3] Specifically, in updated schedules dated July 25 and

[3] Up until January 2017, Mr. Maggioli prepared Alares' monthly updates to the construction schedule, utilizing Primavera scheduling software. Hearing Transcript, Vol. 1, at 44-45. Alares then hired Project Controls, Inc. (PCI), to serve as its scheduling consultant,

September 26, 2016, Alares indicated that it would perform its site and foundation development work beginning August 25 and ending October 27, 2016 (rather than a start of October 19 and finish of December 14, 2016); place structural steel columns, erect structural steel, and plumb and detail structural steel beginning October 28 and ending November 25, 2016 (rather than December 21, 2016, and January 24, 2017); and cast the concrete column slab on the deck on November 28 and 29, 2016. Exhibit 18 at 3, 23. This logic restructuring would allow Alares to progress earlier than previously planned to other activities that could not reasonably be performed until the concrete deck was cast. Alares now planned to be in a position to install mechanical, electrical, and plumbing (MEP) rough-in work in a portion of the building beginning January 13, 2017. *See id.*

2. Actual Performance in Period 1

Alares' June 3, 2016, baseline schedule projected substantial completion of the project by August 2, 2017. Tab A to Exhibit 3644; Tab B to Exhibit RS-0593. By the time that Alares issued another schedule update (no. 4) on January 13, 2017, the projected substantial completion date had moved to September 5, 2017, *see* Exhibit 3644 at 5; Tab B to RS-0593, reflecting a critical path delay to the project during Period 1 of thirty-four days. Exhibits 3644 at 8, RS-0593 (Expert Report) at 7.[4]

The critical path of performance initially, and logically, focused on Alares' set-up of the construction site and its initial performance activities. The parties agree that, during the initial months of the project, there were no critical path delays.

By October 2016, the critical path had turned towards the need to complete foundational work, which was necessary to allow Alares to begin erecting structural steel. The parties agree, or at least the VA does not contest, that the VA is responsible for at least four critical delay days relating to completion of the foundation. Hearing Transcript, Vol. 4,

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and, beginning in January 2017, Scott Danzer, a PCI employee, took over responsibility for the monthly updates (with input from Mr. Maggioli). *Id.* at 45-46; Hearing Transcript, Vol. 2, at 32.

[4] In his report and testimony, Mr. Maggioli asserted that there were thirty-three, rather than thirty-four, days of critical delay during Period 1—four days resulting from unforeseen underground piping that affected foundation work and twenty-nine days resulting from coordination issues for which the VA is allegedly responsible. *See* Exhibit 3644 at 8; Hearing Transcript, Vol. 1, at 62. Given that the delay in the anticipated substantial completion date from August 2 to September 5, 2017, was thirty-four days, we adopt that figure.

at 14-15. Specifically, Alares commenced excavation work on August 22, 2016, *see* Exhibit RS-0593 (Expert Report) at 7; had planned on completing foundation work on October 27, 2016, Exhibit 18 at 23; but did not do so until November 1, 2016, four days later than planned. Tab B to Exhibit RS-0593; Hearing Transcript, Vol. 4, at 15. Alares asserts that this four-day delay was caused by the discovery of unforeseen underground piping that was not shown on the contract drawings. Exhibits 3343 at 76, 3644 at 5002; Hearing Transcript, Vol. 1, at 61. In response to Alares' submission of request for information (RFI) 002 about this discovery, the VA provided Alares with a new sewer route location. Exhibit 22 at 1. This discovery delayed excavation of the water main and sewer line. Exhibit 3343 at 76. Because installation of both was a precursor to excavation and the placement of three footings, the discovery delayed the footings work. *Id.* Neither the VA's expert, Robert M. D'Onofrio, nor the VA, contests the VA's responsibility for this delay or that, because Alares had to finish the foundation work before it could begin erecting steel, it caused a four-day delay to the critical path. Exhibit RS-0593 (Expert Report) at 7-8; Tab B to Exhibit RS-0593.

Under standard practice, the footings that Alares placed would need to cure for twenty-eight days before Alares could begin placing steel. Exhibit 22 at 1. Under an early schedule, Alares had planned to erect steel beginning no earlier than December 21, 2016, Exhibit 3644 at 5023, but, by the time of an updated schedule dated September 26, 2016, had moved its planned steel erection start date to October 28, 2016. Exhibits 18 at 23, 22 at 1. Although it is unclear how Alares had planned to satisfy the twenty-eight-day cure requirement under its original schedules, the delays associated with rerouting the sewer lines affected Alares' ability to move forward with the project. At that point, the VA provided Alares with a way to speed its performance. The VA indicated, in a progress meeting on November 3, 2016, that it would waive the requirement for twenty-eight days of curing and allow steel erection to begin early if the results of a test of strength were acceptable. Exhibit 22 at 2, 144. The VA received a positive test result on November 7, 2016, and Alares began steel erection on November 9, 2016. *Id.* at 2, 147-49. The VA's waiver of the twenty-eight-day cure requirement minimized and mitigated what otherwise would have been a longer critical delay before steel erection could commence.

Alares asserts that the remaining thirty days of critical delay during this period resulted, in large part, from coordination issues in resolving conflicts in the specifications relating to MEP work, including fire protection and medical gas systems, for which Alares asserts the VA is responsible. Hearing Transcript, Vol. 1, at 61. MEP coordination is a normal part of a construction project where the parties try to determine the best routes for mechanical, electrical, and plumbing in a new building under construction. Closing Argument Transcript at 98. Alares submitted RFI 005 on October 20, 2016, with preliminary questions about requirements for the coordination drawings that its subcontractor, Delta

Mechanical Contractors (Delta Mechanical or Delta), was preparing. Exhibit 83A at 243-50. The VA responded to the RFI the next day, indicating that it would have the architect/engineer (A/E) for the building revise plans as needed to reflect new toilet chase and enclosure dimensions and ceiling tile elevation revisions, the latter of which would allow for dropped ceiling tiles where needed to accommodate piping. *Id.* at 245. The VA indicated in its response, however, that "[t]hese changes will not affect structural steel fabrication," *id.*, such that these MEP coordination issues should not have affected, and did not affect, Alares' ability to move forward with steel fabrication.

Alares' subcontractor, Delta, met with the A/E and the VA on November 10, 2016, and the A/E and the VA indicated that they would consider Alares' request to drop the ceilings on an as-needed and room-by-room basis once Alares submitted final coordination drawings. Exhibit 19 at 163. Alares submitted the initial Delta-created coordination drawings to the VA on December 20, 2016, while indicating that Delta still needed the A/E's revised plans as discussed in the VA's original response to RFI 005. Exhibit 83k at 287-93. Alares submitted a revision to RFI 005 on December 22, 2016, Exhibit 19 at 131, 163, and, when the VA provided an answer about toilet chase sizes on January 26, 2017, told the VA that it would "need[] an answer on this RFI and revisions to floor plans within the next week to keep project on schedule." *Id.* at 163. On February 10, 2017, Alares submitted its second revision to RFI 005. Exhibit RS-0593 (Expert Report) at 7. After resolving what it called "[i]ssues with submission," Exhibit 19 at 152, and participating in a conference call with Delta and the VA, *id.* at 195, the A/E, on or before February 23, 2017, issued Bulletin 3 and its response to the second revision of RFI 005, resolving the MEP coordination conflicts, *id.* at 206, which was immediately forwarded to Alares and Delta. *Id.*

Although it is clear that there was a delay associated with MEP coordination, that delay did not affect the critical path during Period 1. Mr. Maggioli testified that coordination of the MEP drawings for the new building had to be complete "before [Alares] could begin mechanical rough." Hearing Transcript, Vol. 1, at 62. Yet, under both Alares' original baseline schedule and its subsequent schedule updates, MEP rough-ins were never scheduled to begin until after the end of Period 1, *see* Exhibit 18 at 23; Tab B to Exhibit RS-0593,[5] and any MEP coordination issues were not the cause of the additional thirty-day critical path delay during Period 1. Any delay caused by MEP coordination issues would not, under

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[5] Under Alares' original baseline schedule, dated June 2, 2016, MEP rough-ins were listed as having a planned early start date of March 7, 2017. Exhibit 3644 at 5024. Subsequently, by the time that it issued revised schedules on July 25, September 26, and December 8, 2016, Alares had moved the early start date to January 13, 2017. Exhibit 18 at 3, 23; Exhibit 3345 at 109.

Alares' contemporaneous scheduling plans, have impacted critical path items until, at the earliest, Period 2. Even with that, meeting minutes from Alares' weekly project meetings with the VA reflect that, despite the MEP coordination issues that it alleges, Alares had commenced some initial MEP rough-in work in December 2017, earlier than its projected early start date. Exhibit 19 at 105-06, 129. Alares acknowledged on January 26, 2017, after Period 1 had ended, that it would need the A/E's complete response to RFI 005 "within the next week" to preclude schedule impacts, indicating that these MEP coordination issues had not *yet* impacted the critical path at that time. *Id.* at 163. We find insufficient contemporaneous evidence in the record to show that MEP coordination issues impacted necessary activities on the critical path during Period 1.

Alares also asserted that, beyond the four days of delay previously discussed for which the VA assumes responsibility, additional critical delays in Period 1 were caused by the continuing effects of unforeseen underground steam lines, unforeseen underground steel piping, and defective design drawings. Yet, the parties dealt with these issues before Alares completed its foundation work on November 1, 2016. Alares issued RFI 002 on September 1, 2016, seeking instruction from the VA by September 8, 2016, regarding the discovery of the steam lines impacting the foundation work. Exhibits 2 & 8 to Exhibit RS-0593. The VA provided an initial response on September 8, 2016, and provided a new route location on September 19, 2016. *Id.*, Exhibits 3, 4; Exhibit RS-0593 (Expert Report) at 8. Alares then submitted a change order proposal (COP) on September 23, 2016. *Id.*; Exhibit 6 to Exhibit RS-0593 (Expert Report). The COR asked for clarifications and revisions of the COP twice, but the parties could not agree on the change, and the contracting officer issued unilateral modification P00002 on October 11, 2016, directing Alares to complete the work in accordance with the VA's initial response to RFI 002. Exhibit 24; *see* Exhibit RS-0593 (Expert Report) at 8-9; Exhibits 7 & 8 to Exhibit RS-0593. The VA contracting officer's resolution of how Alares should proceed predated Alares' completion of the foundation, and there is nothing in the record that shows how, once the foundation was completed, these issues affected subsequent work during this period.

Instead, the record reflects that any critical path delays (beyond the four-day period associated with laying the foundation) related to Alares' slow progress on steel erection, decking, welding, and detailing. Under Alares' as-planned schedule, steel erection was supposed to start immediately after the foundation was completed, Exhibit 18 at 23; Tab B to Exhibit RS-0593, although it is unclear from the record whether that schedule properly accounted for the contract's twenty-eight-day concrete cure requirements. Nevertheless, to expedite the project, the VA, as described above, authorized a shorter cure period (seven days if the foundation passed a test of strength, which it did) than the contract required. After the foundation was completed on November 1, 2016, Alares began steel erection on November 9, 2016, eight days later than originally planned (but earlier than would have been realistic

had the original schedule accounted for the twenty-eight-day cure requirement), but it did not finish that work until November 30, 2016, taking longer than planned under the baseline schedule. Exhibit RS-0593 (Expert Report) at 8. Steel decking, welding, and detailing commenced on November 29, 2016, and was not completed until January 4, 2017, with the welding and detailing taking longer than scheduled. *Id.* Alares has identified no viable defects in drawings or with VA coordination and assistance that would have slowed Alares' steel work once it began.

Further, under the construction schedule (as revised in the July and September 2016 schedules), concrete slab on deck pours were supposed to have occurred the day after completion of steel erection, which, as noted above, was finished on November 30, 2016. Exhibit RS-0593 (Expert Report) at 8. Applying that sequence of events, Alares should have started casting the concrete slab on December 1, 2016. By schedule update no. 3, dated December 8, 2016, in which Alares acknowledged that casting the slab remained a critical path item, Exhibit 3345 at 107, 110, that date had moved to December 19, 2016. *Id.* at 109. Yet, in its next schedule update (no. 4) on January 13, 2017, which was the first one prepared by Alares' new scheduling consultant (Project Controls, Inc. (PCI)) rather than by Mr. Maggioli himself, Alares had delayed the start of cast-in-place concrete deck work until January 30, 2017. Exhibits 31 at 1, 3346 at 126. Although Alares suggested in schedule update no. 4 that it had a new logic which made MEP coordination issues the only critical path item (and removed the concrete slab from the critical path), *see* Exhibit 3346 at 119, suggesting that its unexplained delays in casting the concrete slab had no impact on the project, that explanation and Alares' sudden revision of logic make no sense and ignore or sugarcoat the impact of delays for which Alares is responsible.[6] By January 26, 2017, Alares had again delayed the start of casting the concrete slab, telling the VA that it was not planning to do that work until early February. Exhibit 19 at 164. For reasons that Alares did not explain at the hearing, it ultimately did not start the pour stops and subsequent deck pours until February 16, 2017, and did not complete them until February 21, 2017. *Id.* at 196. Casting the concrete slab on deck was necessary before Alares could begin to construct exterior light gauge metal framing, which (in schedule update no. 3) Alares had previously

[6] In schedule update no. 4, dated January 13, 2017, Alares added weeks of MEP cost negotiations to the critical path, with staggered dates beginning December 22 (after the A/E was to issue revised MEP layouts) that extended out for several weeks to allow the general contractor to review costs, the owner to review costs, and the parties to negotiate costs. Exhibit 3346 at 123. The logic behind the inclusion of this extensive cost review and negotiation period, particularly when adding them as a critical path item leading to MEP rough-in work without regard to the need first to cast the concrete slab, is unsupported and does not provide a basis for imposing critical path delays on the VA during Period 1.

identified as critical path work, *see* Exhibit 3345 at 107, or complete MEP rough-ins. Exhibits 18 at 1, 3345 at 110; *see* Hearing Transcript, Vol. 3, at 36-37 ("Casting the concrete deck was one of the key items in order to allow the project to move forward.").

Throughout Period 1 and into Period 2, the VA was complaining that the schedule was slipping for reasons that the VA did not understand. *See, e.g.*, Exhibits 30 at 1, 31 at 1. On January 9, 2017, Mr. Boyle, the VA COR, complained that "[a]fter reviewing [the] latest schedule, dated 12/8/2016, this morning I have to reiterate my concern that the schedule is sliding on the ICU project. . . . While I realize Alares is bringing a scheduling consultant onboard per our last weekly meeting, there appears to be a significant loss of time when I look at the schedule." Exhibit 30 at 1. Based on the Board's review of the record, it appears clear that Alares was not keeping up with its planned schedule for reasons not caused by the VA.

3. Summary of Critical Delays in Period 1

Of the thirty-four days of critical path delay in Period 1, four days of that delay were caused by issues surrounding completion of the building foundation for which the VA is responsible. The remaining thirty days were caused by Alares' slow progress, first on steel erection and then on the cast-in-place concrete slab.

B. Period 2 (January 13 to July 14, 2017)[7]

1. MEP Coordination Issues

Period 2 covers the 183-day period of time running from January 13 to July 14, 2017. In its January 13, 2017, schedule update, Alares projected substantial completion on September 5, 2017, Exhibit 3346 at 118, but, in its July 25, 2017, schedule update (which had

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[7] In their reports, both Mr. Maggioli and Mr. D'Onofrio select January 13, 2017, as the start date for Period 2. Nevertheless, their end dates differ. Although Mr. D'Onofrio picked July 14, 2017, as the end date, Mr. Maggioli selected July 25, 2017, which is the date that Alares submitted schedule update no. 10 to the VA. *See* Exhibit 3352 at 182. As Mr. D'Onofrio correctly notes, however, even though schedule update no. 10 was submitted on July 25, the data within that update and upon which the update relies was run on July 14, 2017. *See id.* at 190; Exhibit RS-0592 (Expert Rebuttal Report) at 6-7. Like Mr. D'Onofrio, we end Period 2 on the date of the July 14, 2017, data run. Given that the parties agree on the number of days of delay during Period 2, the differences in the parties' selection of a Period 2 end date is ultimately of no consequence.

a run date of July 14, 2017), *see* Exhibit 3352 at 190, the substantial completion date had slipped to December 27, 2017. *Id.* at 183-84. The parties agree that the project was delayed a total of 113 days during Period 2.

As addressed above in our discussion of Period 1, Alares, as set forth in its schedule updates dated July 25 and September 26, 2016, had planned to commence MEP rough-ins by January 13, 2017. *See* Exhibit 18 at 3, 23; Tab B to Exhibit RS-0593. By the time that Alares submitted schedule update no. 3 on December 8, 2016, that start date had slipped to January 13, 2017, Exhibit 3345 at 116, and, in Alares' schedule update (no. 5) on January 13, 2017, had further slipped to March 13, 2017. Exhibit 3346 at 126-27. Although it is difficult from the record to decipher some of the logic ties applicable to Alares' work during this period, the VA's expert witness, for reasons that we do not understand, acknowledged in a rebuttal report that the critical path for activities between January 13 and February 17, 2017, was driven by "Activity D190," which involved the VA's issuance of a response to RFI 005 and the A/E's issuance of new layouts for MEP, steps needed to allow Delta to revise and prepare final coordination drawings. Exhibits 18 at 44, 48; *see* Exhibit RS-0592 (Expert Rebuttal Report) at 7. Although, in Alares' updated schedule dated January 13, 2017, Activity D190 had a projected finish date of January 27, 2017, *see* Exhibit 18 at 44, 48, the A/E did not (as previously noted) issue the new layouts until sometime on or before February 23, 2017, Exhibit 19 at 206, delaying resolution of the MEP layout. Nevertheless, as Alares acknowledged on January 26, 2017, Alares would not have needed the A/E's complete response to RFI 005 until early February 2017 to preclude schedule impacts to the critical path. Exhibit 19 at 163. Putting these pieces together, the VA's expert conceded a critical delay of twenty-two days from the delay in Activity D190, for which he determined the VA is responsible. Hearing Transcript, Vol. 4, at 16; Exhibit RS-0592 (Expert Rebuttal Report) at 7-8. For reasons that we will explain in our later discussion of delay responsibility for Period 1, the Board is unable to understand the basis of this concession or the logic for asserting that MEP coordination issues, rather than the cast-in-place concrete work, was the critical path item at this point in time.

Responsibility for MEP coordination change delays shifted after the A/E issued new layouts on or about February 23, 2017. Delta took several weeks to prepare new coordination drawings based on the A/E's new layouts, before submitting them to Alares on March 17, 2017. Exhibit 83N at 318-20. For reasons that Alares does not explain in the record, Alares waited forty-six days after receipt before, on May 2, 2017, it forwarded Delta's coordination drawings to the VA. Exhibits 83N at 316, 83O at 321; Closing Argument Transcript at 102. The VA approved the coordination drawings sixteen days later. Exhibit 83O at 321; Closing Argument Transcript at 102. Although Alares complains about the VA's delays in approving Delta's coordination drawings and attributes delays between February 23 and May 18, 2023, to the VA based on MEP coordination issues, *see* Exhibit

3644 at 5005, there was nothing for the VA to approve between February 23 and May 2 because Alares had not provided the coordination drawings to the VA.

Alares also claims that continuing MEP design errors for the locations of tie-ins and routes for water, electrical, fire sprinkler, and medical gases caused continued delays during Period 2, until at least June 2, 2017, if not later. *See* Exhibit 3644 at 5005-06. There were changes made in tie-ins during this period that were eventually resolved through modification P00008. *See* Exhibit 48. Nevertheless, contrary to the suggestion in Mr. Maggioli's report, these changes did not affect the critical path of contract performance. Exhibit RS-0593 (Expert Report) at 12-13.

2. Cast-in-Place Concrete Slab

Other activities in which Alares planned to engage during Period 2 (as reflected in schedule update no. 4) included casting the concrete slab that it had originally planned to complete during Period 1, completing superstructure erection, completing enclosure work, meeting a weathertight milestone, and installing the Air Handling Unit (AHU). Exhibits 3346 at 123, 125-26; RS-0593 (Expert Report) at 11, 14. With regard to the concrete slab, the VA COR complained early in Period 2 about the continuing slide in the schedule for that work and the accompanying delays in other activities (like installation of exterior light gauge metal framing) that depended on completion of the concrete slab casting work. By email dated February 8, 2017, the COR informed Alares that, "[a]fter further reviewing your latest schedule this morning, dated 1/13/2017, the previous schedule dated 12/8/2016, and the look ahead provided with the meeting minutes received yesterday, I have to again reiterate my concern that the schedule is sliding on the ICU project." Exhibit 31 at 1. Focusing on the cast-in-place concrete work, he noted that, under the latest schedule, it "was to be placed on 1/30-31/2017," but that, under the weekly "look ahead," it was "currently scheduled for . . . 2/15-16/2017, and there is little to no progress being made by Alares on any one item in particular." *Id.* "This," the COR asserted, "represents a 9 week slide in the placement of the deck from the 12/8 schedule and a 3+ week slide from the latest schedule." *Id.* He also made the following more general observation:

> There appears to be an ongoing loss of time and a general lack of progress when I review project status and schedules. Although the schedule appears to be well thought out and I only have a few minor comments on the schedule narrative . . . , my primary concern is that I don't see a comprehensive course of action or plan in the narrative that will stop the loss of time and bring the project back in line with contractual end date.

Id. He noted that, although Alares identified in its schedule updates ways that Alares believed the VA had slowed performance and actions that the VA could take to speed Alares' performance, "nothing is mentioned" in those updates "about the avenues available to Alares to correct the situation." *Id.* at 2. The COR informed Alares that the VA did not intend to "modify[] the contract to extend the end date" and that Alares should "investigate adjustments to means and methods to keep the project moving forward and correct the delay in project completion." *Id.* at 1.

As noted in our discussion of Period 1, for reasons that Alares did not explain at the hearing, Alares ultimately did not start the pour stops and subsequent cast-in-place concrete deck pours until February 16, 2017, and did not complete them until February 21, 2017. Exhibit 19 at 196, 198, 207, 209. Although Alares could have immediately commenced exterior light gauge metal framing at that point, it delayed commencement of that activity until mid-March 2017, *see* Exhibit 3349 at 158, for reasons that, again, are not explained in the record.

3. Weathertight Milestone and AHU Delays

Aside from the cast-in-place concrete slab work, Alares was, under the schedule that it had in place at the start of Period 2, supposed to satisfy the contract's weathertight milestone by March 10, 2017. Exhibit 3346 at 118. "Achieving weathertightness is generally an important milestone in the construction of a building as it allows the construction of aspects of the interior that might be damaged by exposure to the weather, such as finishes, electrical equipment and so on." https://www.designingbuildings.co.uk/wiki/Weathertight (last visited March 21, 2025). By the time that Alares submitted schedule update no. 6 on March 10, 2017, the deadline for achieving weathertightness had slipped from March 22 to May 1, 2017. Exhibit 3348 at 141. Weathertightness controlled the critical path at that point in time, and Alares' inability to achieve it had caused sixty-two days of delay to the critical path. Exhibit RS-0593 (Expert Report) at 11.

The initial delays in achieving weathertightness were the result of Alares' lack of progress on the superstructure erection. Exhibit RS-0593 (Expert Report) at 11. That is, Alares could not make the building weathertight until the superstructure was erected. The weathertight milestone deadline continued slipping to May 22, 2017 (in schedule update no. 7, dated April 14, 2017), *see* Exhibit 3349 at 152; then to June 2, 2017 (in schedule update no. 8, dated May 12, 2017), *see* Exhibit 3350 at 161; and then to August 15, 2017 (in schedule update no. 9, dated June 9, 2017). *See* Exhibit 3351 at 171. There was no explanation for much of this continual slippage.

Once the superstructure erection was sufficiently in place, Alares' ability to meet the weathertight milestone was affected by delays in roofing activities for the building envelope, specifically "Roof Railing Assemblies & Closure Plates" and "Roof Blocking - Perimeter & AHU Deck." Exhibit RS-0592 (Expert Rebuttal Report) at 8. These delays were the result of Alares' lack of progress on the building envelope and a new logic tie that required "Spray Fireproofing (Roof Deck & Interior Steel)" to commence immediately after the critical building envelope work was completed. *Id.* at 8 & n.14. There were also delays, as noted above, in Alares' commencement of exterior light gauge metal framing, which, even though Alares could have begun that work immediately after completing the cast-in-place concrete slab on February 21, 2017, did not begin until late March and was not completed in the scheduled time. *See* Exhibits 3350 at 168, RS-0592 (Expert Rebuttal Report) at 8.

Alares also delayed the start of procurement for the fabrication and delivery of the AHU and curb. The design of the AHU penthouse building, which was to sit atop the building, originally contained two AHUs and related equipment. The curb is "a structural support for the [AHU]." Hearing Transcript, Vol. 3, at 101. In its early schedules, Alares had planned on commencing procurement of the AHU and curb in January 2017. Exhibit RS-0592 (Expert Rebuttal Report) at 9. It appears that Alares actually began that work in January 2017 but that its subcontractor made a mistake by planning on a smaller footprint for the AHU than the design documents required and failed to coordinate the decreased AHU footprint with the roofing subcontractor, Exhibit RS-0053 at 7, which essentially required Alares to start over with planning for the AHU work once the error was discovered. Accordingly, in its Period 2 schedules, Alares changed its original January start dates to reflect that work had actually commenced in March 2017, with revised completion dates. Exhibit RS-0592 (Expert Rebuttal Report) at 9. Nevertheless, Alares also made logic changes to its schedule to tie fabrication and delivery of the AHU to the completion of roofing, which reduced the amount of delay originally tied to the AHU and curb schedule. *Id.*

Once it recommenced AHU procurement with the appropriate sizing, Alares discovered a defect in the A/E's original design for the AHU. On March 9, 2017, Alares submitted RFI 26, notifying the VA that the manufacturer of the steam generator that was part of the AHU system, DriSteem, had informed it that the design required two steam generators, rather than the single steam generator that the A/E had identified. Exhibit 3670 at 5241. Alares asked the VA to have the A/E review the matter and issue appropriate drawings, sketches, narratives, and a revised equipment schedule, as needed. *Id.* at 5241, 5243. The A/E did so on March 15 with drawings that the VA forwarded to Alares on March 16, 2017. *Id.* at 5242. Alares' subcontractors provided Alares with cost quotations for the added work on March 30 and April 10, 2017, *see* Exhibit 33 at 18, 21, and Alares submitted a change order cost proposal to the VA on April 11, 2017, which the VA rejected three days

later as too high. Exhibit 50 at 3-4. Alares eventually, on May 12, 2017, submitted a revised cost proposal through COP 0012-R2. Exhibit 33 at 15.

Eleven days later, on May 23, 2017, the parties entered into bilateral modification P00005 to add to the contract the work identified in COP 0012R2—specifically, addition of a second steam generator to the AHU "in accordance with RFI #26 and #31 in the amount of $42,398.86," plus associated necessary plumbing. Exhibit 33 at 1. In the modification, the parties agreed that the "contract completion date remains 08/02/2017" and that the modification was "the adjustment for the contractor's proposal and for the contractor's rights to submit claims for unresolved issues which are not covered by this change." *Id.* at 2. The modification further provided that "[e]xcept as provided herein, all terms and conditions of the document referenced in Item 10A of this document, (VA241-16-C-0037) with any/all modifications as heretofore changed by this modification, remain unchanged and in full force and effect." *Id.* Incorporated into the modification were RFIs 26 and 31 themselves, which indicated that the increase of $42,398.86 was "only [for] the direct costs of the change" and that Alares "reserves its rights to additional costs for impact of this change, alone or in combination with other changes, on unchanged work; for additional time, due to impacts, if any, on the schedule; and for time-related extended time of performance costs, all of which will be evaluated separately." *Id.* at 15.

When the parties executed modification P00005, Alares anticipated a lead time for the second generator of four to six weeks, which would result in delivery by early July 2017. Exhibit RS-0593 (Expert Report) at 13. In the schedule update near in time to the modification, Alares projected that the AHU work would be complete by July 19, *see* Exhibit 3350 at 168, but, by June 9, 2017, that date had slipped, without explanation, to August 4, 2017. Exhibit 3351 at 177. Further, by the time of the June 9, 2017, schedule update, the AHU become the focus of the critical path. *Id.* at 172. Similarly, the curb associated with the AHU, though set in the May 12 schedule update to finish on the same day as the update (May 12), Exhibit 3350 at 168, was delayed to a finish date of August 4 in the June 9 update. Exhibit 3351 at 177. Nevertheless, delivery of the second generator was delayed until August 7, 2017. Exhibit RS-0593 (Expert Report) at 13-14. It is not clear from the record when Alares (or its subcontractor) actually submitted the order to DriSteem for the second generator.

Despite the length of time that it took to resolve the AHU second steam generator issue, the controlling critical path delay in Period 2, at least up until June 9, 2017, was the lack of progress in enclosing the building, coupled with the lack of progress on interior MEP rough-in work that, despite the lack of a weathertight seal of the building, Alares had already begun. Exhibit RS-0593 (Expert Report) at 13. Without enclosure, Alares could not create a weathertight building. Nevertheless, in schedule update no. 9 (dated June 9, 2017), Alares

shifted the critical path to the rooftop mechanical AHU and curb work (specifically, the "Fab[ricate] & Deliver – AHU" and "Fab[ricate] & Deliver Curb" line items). *Id.*; Exhibit 3351 at 172. Despite the shift in the critical path, Alares did not explain why, in its June 9 schedule update, it added more than two weeks of time than had previously been identified in its prior May 12 schedule update for completing the AHU and added almost *twelve* weeks of time for completing the curb.

4. Alares' Staffing and Submittal Issues

At various times during Period 2, the VA expressed concern about the continued slide of the schedule, as well as about schedule updates that, in the VA's mind, compressed activities to maintain a particular completion date projection but did not appear logical, as seen in this email from the VA's COR to Alares' project management team from May 26, 2017:

> After reviewing the latest schedule update (no. 8), updates 6 and 7, the narrative and the three week look ahead provided with the meeting minutes received yesterday, I have to reiterate the VA's concern that the schedule is sliding on the ICU project. While the latest updated schedule maintained the previous finish date, it did not bring the end date back in line with, or move it closer to, the contractual end date. It appears as though several individual items were compressed to keep the end date shown in previous schedule updates. Per my previous e-mails, there appears to be an ongoing loss of time and lack of progress related to bringing the end date back in line with the contractual end date. My primary concern is that I don't see a comprehensive course of action or plan in the narrative that will stop the loss of time and bring the project back in line with contractual end date, such as the [overtime] and [w]eekend work that was discussed in our progress meeting. . . . Please investigate adjustments to means and methods to keep the project moving forward and correct the delay in project completion.

Exhibit 35 at 1; *see* Hearing Transcript, Vol. 3, at 41-43.

The VA's concerns were reinforced by an email that Alares received from its fireproofing subcontractor in late April 2017, complaining about Alares' failure to move the project along appropriately and performing work out of logical sequence:

> I was just informed by my field ops that the second floor at the ICU project has been completely studded. This is not how we figured this project. We have been waiting for the roof to on [sic] for months now and then you decide to

> stud the entire floor? Why? This will definitely impede my production. The studs will have to come down because I will need access with a rolling scaffold to perform my work. It clearly states in the qualifications . . . that the floors will have clear access for the efficient use of a rolling scaffold. Studding the entire floor is not clear access. . . . Please advise what will be done about this so we can perform our work in an efficient manner.

Exhibit RS-0069 at 59719.

By March 6, 2017, Alares was on its second project manager (Josh Abrams, replacing Nick Budris). Hearing Transcript, Vol. 3, at 38-39; *see* Exhibits 19 at 221, RT07. By April 10, the VA had still not received 50% of the submittals that were required to construct the project. Hearing Transcript, Vol. 3, at 40. Alares could not perform work on each aspect of the project until it had provided the VA with a submittal showing how it would accomplish the work and the VA had approved it, which means that there were many areas of work that Alares could not yet commence. *Id.*

5. Safety Violation Shutdown

On June 16, 2017, the entire construction site was shut down under the authority of FAR 52.242-14 when one of Alares' subcontractors, People Ready, created an on-site safety incident. Exhibit 37 at 1; *see* Exhibit 096.1 (photograph of safety violation); Hearing Transcript, Vol. 2, at 168-69. Alares was informed that the suspension would remain in effect "until an adequate site safety monitoring plan is put into place, or until further direction is given to you." Exhibit 37 at 2. Ultimately, the shutdown lasted two weeks, with the shutdown notice being lifted on June 30, 2017. Exhibit 107. Alares was not allowed to, and did not, perform any work at the project site during the period of suspension. *See id.*; *see also* Exhibit 17 at 569-82. Alares' current safety manager, who was not employed by Alares when this incident occurred, *see* Hearing Transcript, Vol. 2, at 176-78, acknowledged at the hearing that the safety incident underlying the shutdown was a "serious concern," *id.* at 172, but he believes that the two-week shutdown was unnecessary and that what he calls the VA's zero-tolerance policy for safety infractions after this suspension was too much. *Id.* at 163-64. Alares' safety manager has misstated the requirements that the VA imposed for restarting on-site operations, which did not impose a zero-tolerance policy, *see* Exhibit 102; Hearing Transcript, Vol. 2, at 179-80; *id.*, Vol. 3, at 85-86, and we find the VA's response to the safety infraction, including what became a two-week suspension, reasonable. *See* Hearing Transcript, Vol. 3, at 82-83 (discussing safety issues). The shutdown occurred during the procurement of the roof top mechanical AHU and curb, which was not affected by the shutdown. Appellant's Post-Hearing Reply Brief (Sept. 14, 2023) at 10; *see* Exhibit 3352 at 184.

Although the shutdown was lifted on June 30, Alares did not restart operations on the job site until July 5, 2017. *See* Exhibit 17 at 583-87. For the first few days after it resumed performance (that is, from July 5 through 9, 2017), Alares utilized lower-than-average manpower at the site (a total of only 104 man-hours during those five days), *see* Exhibits 17 at 587-94, RS-0592 (Expert Rebuttal Report) at 10, before resuming staffing levels closer to normal but still less than desirable from July 10 to 17, 2017 (with 59.5, 86.1, 76, 76, and 64 man-hours, respectively). Exhibit 17 at 595-604. Progress was slow between July 5 and 14, 2017.

We find no evidence of any improper motives or nefarious conduct by the VA in the issuance or duration of the safety shutdown. Although the VA raises the safety shutdown in its briefing, *see* Respondent's Post-Hearing Brief (June 16, 2023) at 33, the VA's expert witness did not identify this issue in his expert report as creating any delay to the critical path.

6. Summary of Critical Path Delays in Period 2

At the start of Period 2 through February 21, 2017, the critical path of performance was delayed by Alares' unexplained delay in the casting of the concrete slab, after which Alares' delays in enclosing the building, which precluded Alares from reaching the weathertight milestone, controlled the critical path, up until June 6, 2017. At that point in time, delays in being able to complete the AHUs caused by redesign and rework necessitated by the required addition of a second steam generator (an issue covered in modification P00005) controlled the remainder of Period 2, although Alares' progress was unnecessarily slow.

Of the 113 days of delay during Period 2, Alares is responsible for delays to the critical path relating to the cast-in-place concrete slab and building enclosure, which cover the period from January 13 through June 6, 2017. With regard to the remaining thirty-eight days of delay in Period 2 (from June 7 to July 14, 2017), the VA provided the original drawings that omitted the need for the second AHU steam generator and is responsible for extra work and delays associated with the necessary redesign. The VA argues that, by executing bilateral modification P00005, Alares assumed responsibility for that extra work and those delays. We will address that argument later in this decision.

C. Period 3 (July 14, 2017, to May 18, 2018)[8]

1. Weathertight Milestone and AHU Delays

Period 3 covers the 309-day period of time running from July 14, 2017, to May 18, 2018. Exhibit RS-0593 (Expert Report) at 15. At the start of Period 3, Alares' anticipated substantial completion date was December 27, 2017, Exhibits 3352 at 183, RS-0593 (Expert Report) at 10, although the VA was pushing for completion by no later than December 1. Exhibit 41 at 1. By the end of Period 3, Alares was projecting a substantial completion date of September 4, 2018, which represented a critical path delay during Period 3 of 251 days. Exhibit RS-0593 (Expert Report) at 15. Delays during this period were caused by continued building enclosure delays, Alares' failure timely to advance the interior rough and finish work, and, eventually, issues involving receipt of permanent power. *Id.*

Early in Period 3, Alares changed the performance schedule to compress exterior enclosure work to allow it to achieve weathertightness for the building. Exhibit RS-0593 (Expert Report) at 15. By the time of its September 2017 schedule update, Alares had extended the deadline for making the building weathertight until September 29, 2017, but the VA complained that it seemed unlikely that Alares could meet that date. Exhibits 18 at 83, 45 at 1. Alares blamed delays in its ability to achieve weathertightness on the VA's own alleged delays in resolving an AHU curb issue and a separate infill issue. Exhibit 45 at 3. Yet, those delays were not the VA's responsibility. The AHU curbing was installed between August 21 and 23, 2017, and the AHU sections were installed on August 24 and 25, 2017. Exhibit RS-108 at 21512. In mid-September, one of the VA's CORs, Scott DaRosa, was on the roof of the ICU building and discovered two problems: (1) that the eastern edge of the AHU was overhanging the curb, creating a gap between the AHU frame and the curb, and (2) that the western curb was damaged during installation, apparently by winches when one of the AHU sections was being installed that caught the leading edge of the curb and bent it inward. Hearing Transcript, Vol. 3, at 100-01. This caused springs along the sides of the curb to protrude outward and caused a structural issue in the supports for the AHUs, affecting their ability to support the weight of the AHUs. *Id.* at 101-06. The VA reported these issues to Alares by email dated September 18, 2017, with suggested corrective measures. Exhibit RS-108 at 21512-14. Alares took time to resolve these issues, Exhibit 45 at 3, which were not caused by the VA.

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[8] We adopt the start and end dates for Period 3 that the VA's expert, Mr. D'Onofrio selected, as they have a more logical basis than the start and end dates that Mr. Maggioli, in his delay report, selected.

By October 5, 2017, Alares had still not reached the weathertight milestone, evidenced by a photograph of the exterior of the project from that date showing numerous items necessary for a weathertight structure—in addition to the AHU curb issue and the infill issue—that were still far from complete. Exhibit 45 at 4; *see* Exhibit 17 at 746; Hearing Transcript, Vol. 3, at 52. The building had to be weathertight before Alares could complete interior work. Hearing Transcript, Vol. 3, at 50. These delays in enclosing the building were caused by Alares' subcontractor workmanship and Alares' delays in addressing its subcontractor issues. *See* Exhibit 45 at 3-4; Hearing Transcript, Vol. 3, at 51-52. Issues surrounding the AHUs and making the building weathertight at this time were not caused by the VA.

By its October 27, 2017, schedule update (no. 14), weathertightness had dropped off of Alares' written schedule and out of its schedule narrative, and Alares indicated that it was planning to begin interior drywall work on October 30, 2017. Exhibit 3356 at 216, 218; *see* Tab J to Exhibit RS-0593. That, though, does not mean that Alares had achieved the weathertight milestone. It appears that Alares changed its schedule logic to remove weathertightness completely from the schedule, which is evident from the listing of other activities that were precursors to weathertightness which still needed to be completed, including an AHU and curb corrective plan and roof flashing. Exhibit 3356 at 218. Although no longer referencing "weathertightness," Alares indicated that roofing and exterior framing/sheathing, necessary for building enclosure and weathertightness, were "nearly complete," *id.* at 215, and set to be finished by December 6, 2017. *Id.* at 218. By the time of its December 22, 2017, schedule update, the roofing and exterior framing/sheathing building enclosure were still identified as "nearly," though not quite, "complete," Exhibit 3359 at 239, but now with a January 17, 2018, finish date. *Id.* at 241-42. By the time of its January 24, 2018, schedule update, Alares had dropped any references to the status of the roofing and the exterior framing/sheathing but indicated that it was still working on the AHU and curb corrective plan and roof flashing needed to allow for enclosure, *see* Exhibit 3360 at 248, which, in a later schedule update, Alares reported completing sometime between June 20 and 22, 2018. Exhibit 3365 at 284. Alares' schedule updates provided no reason for the constant and ultimately lengthy delays in completing this work.

2. <u>Staffing, Scheduling, and Subcontractor Issues, and Two Cure Notices</u>

Early in this period, the VA again recognized and expressed concern about what it viewed as Alares' lack of appropriate attention to this project, with inadequate staffing being assigned to it, as reflected in this email from the VA COR to numerous Alares representatives on July 25, 2017:

> After numerous understaffed days on the project both last week and this week, the VA wants to alert you again of our concern regarding the project schedule. Given the current staffing levels being provided[,] we are concerned that the project will not be completed in accordance with the latest schedule. (run date 6/13/2017). The VA has previously expressed concerns related to project progress. . . . Alares should be implementing measures to complete the project in a timely manner. However given the current staffing levels, the VA is concerned [that the] completion date will continue to slide. Please provide an updated schedule prior to the weekly progress meeting so we may review and discuss it with you during the meeting.

Exhibit 39 at 1; *see* Exhibit 17 at 619-30 (daily logs showing, from July 24 through 30, 2017, Alares and its subcontractors worked a total of ninety-six man-hours on the project (spending thirty-four man-hours on July 24, followed by eighteen, eighteen, eighteen, eight, zero, and zero man-hours over the next six days); Hearing Transcript, Vol. 3, at 45 (Alares and subcontractor staffing levels were low at this time). The VA COR expanded on these concerns in another email just two days later, complaining that, in a new schedule update that Alares had just submitted (no. 10), Alares had ignored work areas that were causing schedule slippages but that, seemingly because they were controlled by and the responsibility of Alares or its subcontractors, Alares excluded from its narratives, including the effect of continual personnel turnover, a lack of coordination among the various trades and subcontractors, and inadequate staffing:

> Prior to the meeting, seeing [as] how this is Alares' narrative on the impacts to the schedule, I am requesting that the narrative be revised to include impacts to the schedule related to the following:
>
> - Alares' Personnel turnover
> - Lack of coordination
> - Delayed responses to VA requests (such as 21 days to provide information related to the steam generator COP which was insufficiently documented)
> - Inadequate staffing
> - Lack of subcontractor control
> - Time lost due to 2 week shut down related to continued safety violations
> - Etc.

Exhibit 40 at 1. The VA COR raised a concern that "[i]t appears as though the narrative is carefully written to place the onus for delays squarely on the VA, and does not address a single item that has impacted the schedule due to Alares." *Id.*

On August 2, 2017, after meeting with Alares on August 1, 2017, the VA contracting officer issued a cure notice declaring that Alares was in default on the contract for failing to meet the contractual completion deadline of August 2, 2017. Exhibit 41 at 1. While reserving "all contractual rights and remedies under the subject contract," the contracting officer indicated that "if Alares . . . will pursue all aspects of work required under an extended schedule to ensure the successful completion of the contract and submit to the Providence VAMC a recovery plan and schedule indicating major milestones and associated dates of delivery or completion with 10 calendar days" of the cure notice, the VA would "modify the contract and extend the completion date to December 1, 2017." *Id.* We find no evidence of any improper motives or nefarious conduct by the VA in the issuance of this cure notice.

Alares responded on August 11, 2017, with an updated schedule identifying an anticipated substantial completion date of December 1, 2017. Exhibit 42 at 1. It proposed deadlines for the completion of remaining tasks on the project, including completion of AHU installation by August 28; making the building weathertight by August 29; breaking through to the second floor by August 31; and having the exterior wall complete by October 27, the envelope complete by October 31, the interior work complete by November 22, and the final site work complete by November 27. *Id.* Nevertheless, Alares highlighted its concerns about a lack of permanent power for the building with its proposed solution involving a contract modification allowing for the use of temporary power:

> Please note that, due to the differing/unforeseen site condition involving the location of the required electrical panel and the necessity of a contract modification to correct this problem, permanent power cannot be completed by the December 1, 2017 deadline. The permanent power connection issue is still outstanding. Alares Construction requested the VA determine an alternate permanent power tie-in due to differing site conditions as early as February 2017. This is an issue over which Alares has no control. The change modification still requires negotiation and, because of the long-lead-time equipment that must be ordered to correct the problem, the modification must be finalized by August 22, 2017 in order to have permanent power by January 3, 2018.
>
> Since the earliest permanent power can be completed is January 3rd, temporary power will be required to condition the interior spaces for the installation of the finishes to achieve the December 1st completion date. Temporary power must be installed by September 29, 2017 and will require a change modification.

Exhibit 42 at 1. Alares also represented that, as part of what it called a "Recovery Plan," it "has additional manpower commitments from the subcontractors" with a "recovery plan consist[ing] of working double shifts, night work, and weekend work." *Id.* at 2. It reported that, once the VA approved its new schedule, "each subcontractor will develop a micro schedule to achieve each of the task deadlines and develop manpower projections as well as dates for double shifts or weekend work," and "delivery of materials will be expedited to ensure the labor efforts are not impeded." *Id.* Alares also "reserve[d] all rights for an equitable adjustment and modification to the contract . . . for the above-mentioned conditions." *Id.*

Despite saying that it would adopt a recovery plan, Alares continued to have difficulty with staffing and with its subcontractors, even though it began significantly to increase daily staffing and the number of man-hours on the project. *See* Exhibit 17 at 657-714. It began complaining to its subcontractors about their insufficient staffing of the project and blaming them for delays, *see, e.g.*, Exhibits RT-20 at 29-31, RT-33 at 1, RS-0258 at 33888, RS-0279 at 32823, RS-0322 at 34058, RS-0370 at 150241, RS-0439 at 152835-36, even though at least some subcontractors were complaining that Alares was not willing to *pay* for increased manpower. *See, e.g.*, Exhibit RS-0259 at 32295. For example, by letter dated September 8, 2017, Alares complained to one of its subcontractors, Delta, about its "failure to perform in accordance with the contract requirements, which had "caused significant, unreasonable and costly delays on the Project." Exhibit RS-0099 at 1761. It claimed that "Delta has failed to provide an Air Handler Building and Chiller in accordance with the contract documents" and "has also failed to install certain materials in accordance with the contract documents such as hanging pipe and ductwork from the structural steel instead of the metal deck." *Id.* It further pursued its complaints against Delta by letter dated February 28, 2018, warning Delta that Alares would be filing a claim against Delta's performance bond because of "Delta's failure to perform which caused significant, unreasonable and costly delays on the Project and caused significant harm to Alares Construction's reputation." Exhibit RS-0352 at 44415. Alares listed the following "major failures" by Delta and represented that Delta was responsible for 254 days of delay to the project:

1. Delta did not provide Air handler unit (AHU) building drawings in a timely manner causing the overall project schedule to delay.
2. Delta did not properly coordinate the AHU building curb with the steel contractor causing significant repair costs.
3. Delta failed to deliver the AHU as originally scheduled.
4. Delta failed to provide the specified AHU building and equipment.
5. Delta failed to properly install the AHU building on the roof causing major rework and delays.
6. Delta did not provide the proper hangers for ductwork or piping.

> 7. Delta failed to coordinate ductwork and piping in patient room causing major rework.
> 8. Delta did not provide the proper supports for roof exhaust fans.
>
> Alares Construction relied on Delta's mechanical expertise as Rhode Island's premier mechanical contractor to provide a quality mechanical installation on time and on budget. Instead Alares Construction suffered numerous delays and sub-par quality installation of materials and equipment by Delta. Alares Construction's reputation was permanent[ly] impaired as a result of Delta's poor workmanship and schedule delays.
>
> These and other failures have resulted in other subcontractors working out of sequences, losses of productivity, losses of efficiency, and significant project delays. Alares will be seeking reimbursement from Delta Mechanical for damages that of Alares Construction and other subcontractors have incurred.
>
> Alares Construction will be seeking damages of $867,884 for the project delays. Delta caused the project to be delayed 254 days.

Id. In the appeals now before the Board, Alares has represented that, after sending this letter to Delta, it eventually changed its mind about Delta's fault and concluded that none of Delta's delays impacted the critical path. Hearing Transcript, Vol. 2, at 8.

Alares was also submitting schedule updates to the VA during Period 2 that failed accurately to update or include all activities that Alares had to complete. By email dated October 4, 2017, the VA COR complained that "[i]tems that appeared to be overlooked during the [most recent schedule] update, and items that are likely going to miss the scheduled early completion date, include," among other things, "Milestone: New Addition—Weather Tight (9/29/2017)," mechanical insulation, setting exhaust fans, interior framing for stairs, and electrical rough-ins. Exhibit 45 at 1; *see* Exhibit RS-0439 at 152835-36 (Alares' complaints about a glass subcontractor's defective work with soffit panels).

On May 7, 2018, the VA issued another cure notice, this time because Alares had failed "to install smoke tight partitions in accordance with Fire Stopping Specification Section 07 84 00 paragraph 1.1B and Regulatory Requirements Specification Section 01 41 00 paragraphs 1.3-A.1 and 1.3-A.12, a condition that is endangering the performance of the contract." Exhibit 54 at 1. Alares responded on May 14, 2018, acknowledging that it was "aware of the smoke barrier requirements and [that] the drawings provide details of the smoke barrier wall" but asserting that it felt that it still needed additional guidance. Exhibit

55 at 1. Through a series of communications between the parties between May 16 and June 2, 2018, Alares eventually agreed to a remediation plan through which it performed the identified work. Exhibits 56 at 1-2, 57 at 1-3, 58 at 1. We find no evidence of any improper motives or nefarious conduct by the VA in the issuance of this cure notice.

Throughout Period 3, Alares was still trying to find subcontractors for work on the project at prices that Alares found acceptable. *See, e.g.*, Exhibit RT-22 at 258. In September 2017, Alares named its third project manager (George Archambeault, replacing Josh Abrams). Exhibit 19 at 473, 483.

3. Permanent and Temporary Power Issues

Contract drawing E2.0 provided detailed conduit routes from the electrical point of connection in Building 1 to the new ICU addition. Exhibits 12 at 96, RS-0527 at 2. As early as February 2017, Alares had raised concerns about the installation of electrical conduits for the new building that would tie-in to the existing Building 1 electrical system, as the routes identified on the drawings were, according to Alares, not feasible. Exhibits 19 at 218, 3673 at 5268-71, RS-0593 (Expert Report) at 11. The electric panel through which the ICU would receive permanent electrical power was not in the location as shown on the drawing. Exhibit RS-0527 at 2. Further, according to Alares, the ceiling through which the electrical conduits were supposed to be routed was blocked with existing AHU ductwork and piping, leaving insufficient room for additional conduits. *Id.* During March 2017, the VA worked with Alares to identify a solution, looking for alternate routes, Exhibits 19 at 241, 3663 at 5169, 3665 at 5202, but, in response to a change order request from Alares on March 31, 2017, the COR responded that "the utilities should be installed as shown on the plans" and that Alares should "[p]roceed with the installation of the interior utilities as needed to maintain project progress/schedule." Exhibit 25 to Exhibit RS-0593. The COR cited section 1.4 (Utilities, Mechanical and Electrical Coordination) of contract specification 01 31 00 to indicate that the contract drawings were only diagrammatic and that the contractor was obligated to configure exact runs as conditions permitted:

> The Contract Drawings are diagrammatic only intending to show general runs and general locations of piping, ductwork, equipment and sprinkler heads. [Contractor should] [d]etermine exact routing and location of individual systems prior to fabrication of components or installation.
>
> . . . . .

> Adjust locations of piping, ductwork, conduits and equipment as required to accommodate new work with interferences anticipated and as encountered during installation.

Id. (quoting Exhibit 6 at 47).

On April 6, 2017, Alares submitted RFI 35, seeking direction from the VA for alternate routing for the electrical tie-ins, given "that the engineer's original planned route did not take in account the obstructions and existing conditions." Exhibit 3666 at 5210. The VA COR immediately responded that, because "[t]he routes shown on the plans are diagrammatic" and "[t]he specifications clearly indicate that the investigation and inspection to determine final routes . . . is the responsibility of the Contractor," the VA would "no longer work to identify an alternate route as this may be cause for a delay and is the responsibility of the Contractor." *Id.* at 5211. In a revision to RFI 35 submitted on May 5, 2017, Alares proposed new routes for electrical services and other MEP tie-ins while noting that such engineering work was not within the scope of its contract. Exhibit 3668 at 5228. Further, the original contract drawings only called for one automatic transfer switch (ATS), which did not comply with the requirements of the National Electrical Code (NEC). The NEC requires separation of power into three branches, each of which must be supported by stand-alone power feeders and dedicated transfer switches: (1) life-safety (such as egress lighting and alarms); (2) critical (patient area lighting and outlets); and (3) equipment (such as AHUs and elevators). Exhibit 4305 at 10559.

Although the VA COR issued a partial response to the RFI 35 revision on June 2, 2017, Exhibit 3668, that response did not provide a complete remedy to the tie-in issues. The A/E attempted to remedy remaining defects on July 12, 2017, by issuing Bulletin #8, which identified the need for three ATSs (instead of one) and new panels and transformers that were not in the original design and that showed alternate MEP routes and tie-in locations in a somewhat different manner from the COR's June 2 response. Exhibits 63, RS-0593 (Expert Report) at 13. Bulletin #8 also called for a larger electrical closet to house the increased number of ATSs and also moved the electrical closet eight feet—from the existing building to the ICU—to avoid disrupting the pharmacy below. Exhibit 63.[9] On August 1, 2017, Alares submitted COP 15 providing a preliminary cost estimate for the changes, which Alares updated on August 15 and 31, 2017. Exhibits 3391, 3392, 3393.

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[9] As we will discuss later in this decision, the bulletin incorrectly only provided for one control wire from the generator control panel to each ATS when, to comply with the NEC, it needed more. Exhibit 63 at 9 (note 6).

As discussed above, the VA issued a cure notice on August 2, 2017, attempting to get the project on track. Exhibit 41 at 1. When Alares responded to that cure notice on August 11, 2017, it recognized that it would not be able to complete permanent power connections by the then-proposed substantial completion date of December 1, 2017. In the "Recovery Plan" that it provided to the VA, Alares proposed that "[s]ince the earliest permanent power can be completed is January 3rd, temporary power will be required to condition the interior spaces for the installation of the finishes to achieve the [then-proposed] December 1st completion date. Temporary power must be installed by September 29, 2017 and will require a change modification." Exhibit 42 at 1. In its August 4, 2017, schedule update, Alares added temporary power activities, proposing to have temporary power in place by September 29, 2017, Exhibit 18 at 78, although it did not meet that deadline. On October 9, 2017, Alares submitted a change order proposal to "[p]rovide temporary power for the ICU addition for use until the permanent power tie in is completed," which would "operate the AHU and chiller," with a proposed price of $5914.79. Exhibit 116A at 1133. This temporary power tie-in would have "allow[ed] the HVAC system to be operated" and "to control the climate in the space." Hearing Transcript, Vol. 3, at 96. The contracting officer agreed to the request, and Alares reported that it was having one of its subcontractors proceed with installation while the change order was being processed. Exhibit 19 at 507. Yet, on the day that Alares' subcontractor, Collard Enterprises Inc. (Collard), was to run the temporary power cable to the existing panel, Alares told Collard to stop and to abort the work. Exhibit RS-0246 at 150998. Alares informed the VA on October 30, 2017, that, in the course of a month, it had lost two months of time on the schedule because of its "review, analysis and cost feasibility on supplying a temporary power source to start the building HVAC equipment" and that "[t]he review yielded a cost which was not acceptable to the project team, therefore, the plan for startup now requires the building permanent power." Exhibit 3356 at 216. Yet, if price was the concern, Alares never attempted to submit an upward price revision to its COP proposing temporary power or ask the VA whether it would fund a larger dollar figure to install temporary power. Alares reported during a November 16, 2017, meeting that it had decided not to perform the temporary power tie-in and effectively withdrew its change order request. Exhibit 19 at 556-57.

Alares argues that, although it initially proposed the use of temporary power and provided a price quote for it, it later determined that temporary power would not have mitigated delay because the temporary power used to commission the equipment did not have sufficient capacity. Appellant's Closing Argument Presentation PowerPoint (Oct. 18, 2023) at 54, 56-57; Closing Argument Transcript at 36-37. We find a lack of support in the record for this assertion. When telling the VA that it was abandoning the concept of using temporary power, which would have allowed Alares to pursue interior work, Alares did not mention any capacity issue with temporary power. Further, on January 22, 2018, only two months after withdrawing its request for funding to install temporary power, Alares' project

manager, when complaining to its subcontractor, Delta, about delays to the ceiling mechanical and AHU that Alares was then saying were Delta's fault, represented that "[t]emp power can be provided at any time to facilitate start-up," Exhibit RS-0323 at 35944, an assertion that is inconsistent with Alares' position before the Board. Neither the VA's internal electrical engineer nor the A/E saw any issues with using temporary power for start-up and operation of the AHUs. Hearing Transcript, Vol. 3, at 95. Although it is unclear from the record exactly why Alares ultimately decided to abandon the use of temporary power to mitigate the delay in being able to tie in permanent power, it was *not* because temporary power would have been insufficient to provide Alares with the ability to perform interior rough and finish work or other activities.

Eventually, the permanent power issue was resolved through modification P00007, which the VA issued on December 6, 2017, increasing Alares' contract price by $208,982.90 in exchange for the tie-in work and ATS and transformer installations identified in Alares' change order request. Exhibit RS-0268 at 42721-73. The parties executed the bilateral modification on December 13, 2017. Exhibit 46 at 1. The agreement expressly reserved Alares' right "to submit claims for additional time and costs associated with any time extension required to perform the work under this modification." *Id.* at 2.

Despite the delays in resolving the electrical tie-in issues for obtaining permanent power in the new building, Alares' monthly schedule updates never identified permanent power as a critical path item until October 30, 2017, when, in schedule update no. 14, Alares indicated that the "critical path for this update has changed . . . [to] run[] thr[ough] the on-going change management associated with the establishment of permanent power." Exhibit 3356 at 214; *see* Exhibit 19 at 506, 515, 525-26, 536, 546, 556 (comments about critical nature of permanent power at October and November 2017 meetings). This change was based upon a change in logic to Alares' planned schedule to make permanent power a predecessor to HVAC startup and commissioning, which was a change from the logic in Alares' earlier schedules. Exhibit RS-0593 (Expert Report) at 17.

After the parties executed modification P00007, Alares' next several schedule updates continued to maintain a logic showing the critical path continuing to run through permanent power. Exhibit RS-0593 (Expert Report) at 18. The prior delays in obtaining permanent power had delayed Alares' submittal for approval of electrical equipment required under modifications P00006 and P00007. *Id.* The VA received Alares' submittal for electrical equipment on January 25, 2018, and approved it on January 30, 2018. *Id.* Yet, even though the VA approved that submittal on January 30, Alares inexplicably did not place its order for the electrical equipment until April 2, 2018, sixty-two days after the VA's approval. Exhibits 45 at 207, RS-0593 (Expert Report) at 18.

The VA's expert, Mr. D'Onofrio, determined that, although some delay in obtaining permanent power constituted a critical delay for which there was no corresponding concurrent delay, there were critical delays in the interior rough and finish work, along with HVAC work, that were the cause of critical delays during Period 3 or were at least concurrent with delays for which the VA was responsible:

> While waiting on permanent power, Alares would have been independently responsible for critical path delays due to its delayed enclosure and the lack of progress on the interior build out of the building unrelated to the permanent power issue. Upon recognizing the added scope associated with the permanent power issue, much of the delay in the ability to proceed with the added work was attributable to Alares' deficient [change order proposal] that underwent 4 revisions, the late execution of Modification P00006, extended/late submittals and the delay in ordering the required equipment. Independent of Alares' declining the VA's offer to mitigate the permanent power, it still would have been delayed by its own late progress on HVAC work. Alares would not have completed its other predecessor work to HVAC startup, testing, and commissioning for the enclosure, roof, and exterior sheeting on June 13, 2018, and would not have required temporary or permanent power through planned tie in of permanent power on July 17, 2018. Even if it did not exercise the temporary power mitigation that the VA offered to pay for, the delay that would have been solely due to permanent power would have been the period between June 13, 2018 and July 17, 2018, meaning Alares would be owed compensable time for only that portion of delay—34 days.

Exhibit RS-0593 (Expert Report) at 18-19. We agree with Mr. D'Onofrio's factual analysis.

4. Interior Rough and Finish Work

In response to the VA's August 2 cure notice, Alares significantly revised the project schedule and indicated that it would complete interior work no later than November 22, 2017. *See* Exhibit 34 to Exhibit RS-0593 at 1-7. Yet, despite the schedule revisions and promises of a heightened aggressive approach to staffing and to weekend and overtime work, Alares failed to make any significant progress on the interior rough and finish work. By the time that it submitted schedule update no. 13 on September 22, 2017, Alares was projecting that it would not complete interior finishes until January 22, 2018. Exhibit 18 at 85; *see* Exhibit RS-0592 (Expert Rebuttal Report) at 11-12 (finding that Alares' September 22 update showed no significant progress towards interior rough and finish work). When Alares submitted its next schedule update (no. 14) on October 30, 2017, that completion date had slipped to April 11, 2018. Exhibit 18 at 85. In fact, in its October 30 report, Alares indicated

that it had not even begun interior drywall work and had instead been focused on completing remaining sitework and other activities. Exhibit 3356 at 216. The VA noted during each of its August, September, October, and November 2017 meetings with Alares that "[t]he breakthrough and work inside the hospital is a critical path issue, and needs to be done as soon as possible to meet the December 1st deadline" (even though, by November, it was clear that Alares would not meet that December 1 deadline). Exhibit 19 at 413, 475, 485, 495, 514, 524, 535, 545, 555. Although Alares completed the breakthrough work, it continued to work slowly on interior work. By May 18, 2018 (the end of Period 3), Alares was not projecting to finish interior work until August 7, 2018, a significant delay from its earlier schedules. Exhibit RS-0593 (Expert Report) at 18. Nevertheless, at this point in time, the delays in performing interior finish work were not causing any delay to the critical path. *Id.*

5. Summary of Critical Path Delays in Period 3

The initial critical path delays during this period were caused by Alares' delays in enclosing the building and failing to advance interior rough and finish work. Alares' schedules do not show the necessity of obtaining permanent power to have become the critical path issue until October 30, 2017. By that time, Alares had proposed a mitigation plan involving the installation of temporary power that, for reasons that the Board has not been able to identify, Alares suddenly abandoned. The VA's expert has opined that the VA is responsible for thirty-four days of critical path delay because of permanent power. Exhibit RS-0593 (Expert Report) at 17. Although he finds that there were an additional seventy-eight days of critical delay associated with permanent power between the November 17, 2017, and May 18, 2018, schedule updates, *id.* at 17-18, he opines that Alares' concurrent delays in the building enclosure and interior build-out, unrelated to the permanent power issue, render those seventy-eight days of delay non-compensable:

> While waiting on permanent power, Alares would have been independently responsible for critical path delays due to its delayed enclosure and the lack of progress on the interior build out of the building unrelated to the permanent power issue. Upon recognizing the added scope associated with the permanent power issue, much of the delay in the ability to proceed with the added work was attributable to Alares' deficient COP that underwent 4 revisions, the late execution of Modification P00006, extended/late submittals and the delay in ordering the required equipment. Independent of Alares' declining the VA's offer to mitigate the permanent power, it still would have been delayed by its own late progress on HVAC work. Alares would not have completed its other predecessor work to HVAC startup, testing, and commissioning for the enclosure, roof, and exterior sheeting on June 13, 2018, and would not have

> required temporary or permanent power through planned tie in of permanent power on July 17, 2018. Even if it did not exercise the temporary power mitigation that the VA offered to pay for, the delay that would have been solely due to permanent power would have been the period between June 13, 2018 and July 17, 2018, meaning Alares would be owed compensable time for only that portion of delay—34 days.

Id. at 18-19.[10] Alares has not presented a viable critical path analysis to rebut the VA expert's findings.

D. Period 4 (May 18, 2018, to April 12, 2019)[11]

1. The Critical Path in Period 4

Period 4 covers the 330-day period running from May 18, 2018, to April 12, 2019. RS-0593 (Expert Report) at 24. In its May 18, 2018, schedule update, Alares projected substantial completion on September 4, 2018, Exhibit 3364 at 272-73, but, in its April 12, 2019, schedule update, the substantial completion date had slipped to June 6, 2019. Exhibit 3370 at 323. This change represents a critical path delay in Period 4 of 275 days. Exhibit RS-0593 (Expert Report) at 19.

Alares' contemporaneous construction schedule updates identify the critical path delays during this period as being caused by (1) the completion of ceilings, doors, and hardware necessary to proceed with HVAC startup, test/balance, and commissioning; (2) establishing permanent power to proceed with HVAC startup, test/balance, and commissioning; (3) alleged delay resulting from added ATS and Building Management System (BMS) interface work; and (4) alleged delay from an added security camera scope. Exhibit RS-0593 (Expert Report) at 20. In his report, however, Mr. Maggioli attributes all critical path delays in this period to a design change for the generator switch gear control panel, Exhibit 3644 at 5011, and a deficient control sequence design for the HVAC system. *Id.* at 5013. The VA's expert attributes these delays to four activities, some of which he finds compensable: (1) additional activities needed to satisfy revised medical gas requirements

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[10] It is not completely clear to the Board why Mr. D'Onofrio selected June 13, 2018, rather than a slightly later date within Period 3, as the start date for the VA's sole responsibility for critical path delay during this period, but we will accept his concession that sole responsibility transferred to the VA by June 13, 2018.

[11] We rely in this discussion on the start and end dates for Period 4 that the VA's expert selected.

(compensable); (2) Alares' slow progress in installing cable for permanent power (non-compensable); (3) Alares' unexplained increased planned duration for HVAC startup, testing/balancing, and commissioning (non-compensable); (4) change associated with the ATS and BMS interface (compensable); and (5) Alares' unexplained delays in getting around to performing certain activities in a manner consistent with its planned schedule (non-compensable). Exhibit RS-0593 (Expert Report) at 24. The VA's expert believes that Alares is entitled to a total of 131 compensable days of critical path delay in Period 4 but that Alares is responsible for the remaining 144 days of critical path delay during this period.

At the beginning of this period, Alares submitted a schedule update (no. 22) showing that the critical path was shifting from permanent power to the work leading to HVAC startup, test/balance, and commissioning. Exhibits 3364 at 273, RS-0593 (Expert Report) at 20. By its next schedule update (no. 23), the change was complete: the path now ran through the change management associated with medical gas requirements on medical boom assemblies that the VA had revised, which caused a delay in the critical path, Exhibits 3365 at 280, RS-0593 (Expert Report) at 20, because that work had to be completed before Alares could perform ceiling tiling, flooring, and door and hardware installation, which, in turn, delayed commissioning. Exhibit RS-0593 (Expert Report) at 20; Tab O to Exhibit RS-0593. Installation of the medical gas was scheduled to last forty-five work days. Exhibits 3365 at 280, RS-0593 (Expert Report) at 20. This added scope originally resulted in a sixty-four-day slippage in the schedule, although two days of that delay were subsequently recaptured. Exhibit RS-0593 (Expert Report) at 20. The VA, which required the extra work necessitated by its revisions, bears responsibility for this delay. *Id.*

The critical path then shifted back to permanent power (followed by HVAC startup, test/balance, and commissioning) because of an expansion of the amount of time that Alares now anticipated it would take to obtain permanent power. Exhibit RS-0593 (Expert Report) at 20. Alares was slow in installing cabling for the permanent power, which contributed to delaying the anticipated connection to permanent power. *Id.* at 21. Alares did not obtain permanent power until September 25, 2018. Exhibit 3369-D at 321. The schedule continued to slip, as seen in Alares' September 21 schedule update (no. 26), in which Alares added an additional twenty-one days to the planned duration of the project to allow for HVAC startup, test/balance, and commissioning without providing any justifiable explanation of the reason for the addition of time. Exhibits 3368 at 301-02, RS-0593 (Expert Report) at 22.

Subsequently, at a September 25, 2018, meeting, the VA indicated that additional wires, not shown on the drawings, would be required from each ATS to the building's switchgear. Exhibits 3686 at 5359, 3688 at 5364. At this point, the critical path shifted to this new ATS work. Exhibit RS-0593 (Expert Report) at 22-23. Alares submitted RFI 159 on September 26, 2018, formally requesting direction for the control wiring, including a

detailed diagram for connecting it. Exhibit 3687 at 5361. The VA responded on September 28, 2018, directing Alares to install thirty-three #14 American wire gauge (AWG) control wires from each ATS to the control panels. *Id.* at 5362; Exhibit 3688 at 5365. Although the VA initially viewed this direction as something within the scope of the existing drawings based on a note on a drawing directing Alares to provide necessary wiring, Exhibit 3687 at 5362, it eventually acknowledged that the direction was a change and, on November 5, 2018, requested a change order proposal. Exhibit 3689 at 5369. On November 30, 2018, Alares provided the VA a COP for the work, *id.* at 5371-74, addressing the VA's requirement that Alares run the thirty-three #14 AWG wires through one-inch electrical metallic tubing (EMT) that already existed in the building. Because the one-inch EMT conduit was too small to accommodate thirty-three regular AWG wires, Alares' subcontractor, Collard, would have to order special pre-manufactured thin wiring that would allow all of the wires to run through the one-inch conduit, with a delivery lead time of three to four weeks. Exhibit RS-0527 at 4. The VA provided authorization to proceed with the ATS wiring on December 6, 2018. Exhibit 3689 at 5369. The ATS wiring and testing was completed on January 22, 2019. Exhibit RS-0527 at 4. The additional RFI 159 interface work created a sixty-nine-day delay for which the VA is responsible.

Alares submitted a schedule update (no. 29) on December 14, 2018, reflecting an anticipated substantial completion date of February 14, 2019. Exhibit 3369-D at 318. At that point, Alares indicated that the critical path was running through resolution of the interface requirements between ATS and BMS. *Id.* at 319. Alares did not submit schedule updates in January, February, or March 2019. Its next schedule update was not submitted until April 12, 2019. Exhibit RS-0593 (Expert Report) at 23. By that point, Alares had shifted the substantial completion date to June 6, 2019, Exhibit 3370 at 323, but provided no explanation for this delay. *See id.* There are no daily logs or time records that explain the work that Alares performed between December 14, 2018, and April 12, 2019. By the time that the April 12 schedule update was submitted, the critical path, according to Alares, had shifted to management of security cameras. Exhibit RS-0593 (Expert Report) at 23. Yet, we do not see that work identified on its schedules.

2. <u>Alares' Performance Problems During Period 4</u>

On July 16, 2018, the VA issued a show cause notice to Alares, stating that, "[s]ince you have failed to perform [the contract] within the time required by its terms and cure the conditions endangering performance as described to you in the Government's letter of 02 [August] 2017; the Government is considering terminating the contract under the provisions for default of this contract." Exhibit 4139 at 9075. We find no evidence of any improper motives or nefarious conduct by the VA in the issuance of this show cause notice.

Alares responded to the show cause notice on July 26, 2018, asserting that "[s]everal significant causes beyond Alares Constructions control and without fault or negligence on Alares Construction's part delayed the project and prevented project completion by the original contract completion date of August 2, 2017 and the extended completion date of December 1, 2017 deadline" and explaining the reasons that it believed continued performance of the contract was in the Government's best interests:

> We believe that it is in the best interest of the Government for Alares Construction to continue working to complete the project. The project is currently 92% complete (as shown on the May 2018 invoice and VA's agreement of the % complete) and activities are on-going to substantially complete the finishes in 6-8 weeks. The remaining work after the finishes will only involve the completion of the permanent power installation and follow-on related tasks, which were delayed due to VA design omissions. We anticipate completing the permanent power installation and related tasks by November 15, 2018. In addition, there is low risk to the Government because of Alares Construction's detailed knowledge of the project and momentum as we near completion, and any break to that work would only serve to create additional delays. Simply put, a work stoppage would be less efficient and more expensive to the government.

Exhibit 129 at 1334. Alares identified the following actions that it had taken "to ensure the project remains on track":

> 1. Supplemented labor to the drywall contractor
> 2. Removed and replaced the panel subcontractor for non-performance
> 3. Continued pressure on subcontractors to complete their work
> 4. Provided timely response to Government requests
> 5. Improved communication with subcontractors
> 6. Hiring of additional personnel as space and activities permit

Id. at 1335. Nevertheless, Alares acknowledged the problems that it had been having with obtaining sufficient manpower to perform:

> One issue that was beyond Alares Construction's control is the availability of capable and available trades. It is universally accepted that the construction industry is experiencing a considerable labor shortage. We have continually requested additional manpower from the subcontractors to accelerate the schedule.

Id. At that point, it anticipated substantial completion of the project by November 6, 2018. *Id.* at 1342.

As Alares reported to the VA, it was having trouble getting its subcontractors to provide sufficient manpower for the project and was having to correct work that its subcontractors had performed incorrectly. For example, on June 5, 2018, Alares notified its glass subcontractor, which had been on the project since May 2017, that it was being terminated for default because "[i]t has come to a point where your actions have been detrimental to the project causing significant financial harm to Alares Construction and unacceptable project schedule delays." Exhibit RS-0443 at 151157. Alares reported that the subcontractor had "demonstrated a lack of experience with the installation of [the] Insulated Panel System" and had "installed [it] improperly per the manufacturer's instructions," "proceed[ing] with the installation of the exterior panels without the proper insulation installation." *Id.* It complained that the subcontractor had "demonstrated the inability to properly measure for installation [of] the individual panels as the initial panel order was manufactured improperly and had to be discarded," with "[t]he panel reorder caus[ing] more schedule delays." *Id.* It further complained that the subcontractor's improper removal of soffit panels had "resulted in a two to three month delay to finish the panel system as new panels will need to be manufactured, shipped and installed," *id.* at 151157-58, and that it had "failed to achieve the schedule as provided [by Alares] at the beginning of the project," as explained below:

> [The subcontractor] started the exterior panel project in September 2017 which was scheduled to take one month. [It] still has not finished the exterior panels. You are nine (9) months behind schedule. The exterior panels system requires rework and the soffit panels were not installed correctly.

Id. at 151158.

Similarly, on September 4, 2018, Alares terminated its framing and drywall subcontractor, which had worked the project since November 2016, because the subcontractor had "failed to properly provide sufficient manpower to complete the project." Exhibit RS-0480 at 151050. Alares said that it had "sent dozens of emails . . . requesting additional manpower because the project schedule was delayed" but that the subcontractor "did not send the manpower." *Id.* Alares also complained about the subcontractor's "fail[ure] to install framing and drywall in accordance with the contract documents[,] causing Alares . . . to retain additional resources to correct [the subcontractor's] mistakes," at "significant costs to Alares." *Id.* In terminating the subcontract, Alares represented that the subcontractor's "actions have been detrimental to the project causing significant financial harm to Alares Construction and unacceptable project schedule delays." *Id.*

At the same time, Alares' subcontractors were complaining about Alares' lack of job management for this project. One subcontractor contacted the other subcontractors through a group email on July 23, 2018, to express frustrations with Alares' project management failures:

> To my fellow owners and/or subcontractors,
>
> I can't speak for each of your companies, however our experience at the above named project is something I've never experienced in my 27 years of owning my company; whether it's payments, lack of schedule, lack of job meetings, change orders, or being treated fairly[.] We have dealt with approximately 6 [project managers] on this job, and I ran out of fingers counting supers.
>
> I'd like to suggest meeting at my office to discuss a possible team effort in dealing with Alares. Please feel free to bring your counsel or check with them as I believe there is power and strength in numbers in getting us compensated for the delays that their combined lack of management on this project created.

Exhibit RT-0042 at 1.

The VA contracting officer ultimately did not terminate the contract for default and allowed contract performance to continue. Nevertheless, Alares did not meet the November 2018 substantial completion deadline that it set for itself in its show cause response.

3. Summary of Critical Path Delays in Period 4

The VA is responsible for a total of sixty-two days of critical path delay early in this period[12] that resulted from the VA's revision of medical gas requirements in the contract. The VA is also responsible for sixty-nine days of critical path delay that resulted from the change management of the ATS and BMS interface and associated added work, which was a contract change.[13]

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[12] The VA's expert showed that, originally, there were sixty-four days of critical delay from the revision to the medical gas requirements but that Alares was able to recapture two of those days and decrease the duration of the delay. *See* Exhibit RS-0593 (Expert Report) at 20-21, 24.

[13] The direct costs associated with the VA's changes to the medical gas requirements and the ATS/BMS interface are not before us in these appeals. They appear to have been resolved through Alares' October 29, 2019, "Final Release of Claims," Exhibit

The VA's expert identifies eleven days of critical path delay between the July 20 and August 17, 2018, schedule updates, which were the result of Alares falling behind in its cabling installation. Exhibit RS-0593 (Expert Report) at 21. Although the VA's expert finds this delay to be Alares' responsibility, *id.*, Alares met its burden of showing that the VA's vendor was the cause of this delay. The email exchanges between the VA's COR and Alares' project manager, George Archambeault, sufficiently support Alares' position because the COR acknowledged that the VA's other contractor had to resubmit a junction box, causing a delay, and Mr. Archambeault explained to the COR how the junction box rather than the conduits caused the delay because the junction box "isn't in place and [he has] no cut sheets on it after multiple requests." Exhibit 4150 at 9184; *see* Hearing Transcript, Vol. 5, at 5-8.

Remaining days of delay in Period 4 are Alares' responsibility. Delays in HVAC startup, testing and balancing, and commissioning resulted from Alares' slow discussions with its vendor and the historical timing for inspections and follow up on the project. And, during the last 112 days in Period 4, Alares was inexplicably deferring performance of a part of the contract (the security camera scope). Even if the security camera scope was not the cause of delay here and, as Alares argues, the delay was instead because of a delay in the performance of one of its subcontractors, Stryker, Alares cannot impose liability on the VA for deficiencies of Alares' subcontractor.

E. Period 5 (April 12 to September 6, 2019)

Period 5 covers the 148-day period of time running from April 12 to September 6, 2019, the latter date being when the VA accepted the project "as is." Exhibit RS-0593 (Expert Report) at 24-25. In its April 12, 2019, schedule update at the start of this period, Alares projected substantial completion by June 6, 2019. Exhibit 3370 at 323. The VA's expert opines that there were ninety-two days of delay to the critical path during this period, none of which he believes are compensable, running from the projected June 6 substantial completion date through the VA's "as is" acceptance of the work on September 6, 2019, *see* Exhibit RS-0593 (Expert Report) at 24-25, while Alares asserts that every day between April 12 and September 6—147 days in total—constitutes a critical path delay for which the VA is responsible.[14] Strangely, in addressing delay days, neither party addresses the fact that

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RS-0533 at 3116, which is discussed below.

[14] Mr. Maggioli used a different period of time—February 14 to September 6, 2019—than Mr. D'Onofrio as Period 5. For that period, Mr. Maggioli found that every single day during that period—205 days—were compensable delay days. Exhibit 3644 at 5013-15, 5018. Although we are using April 12, 2019, as the start date for Period 5, it is

most of the alleged delays to the critical path occurred long after the substantial completion date of the project.

Specifically, on May 15, 2019, Alares provided the VA COR with what it called the "updated punch list from the final walkthrough." Exhibit 3920-29-00 at 7546. Although Alares still had to complete commissioning, install some seismic bracing, and adjust some doors, Alares told the VA that it had achieved substantial completion of the project:

> Based on the work completed to date we are substantially complete in accordance with the contract documents and the VA can take possession of the space.

Id. Alares repeated its representation that the project was substantially complete, "except for a few punchlist and warranty items," and was ready for beneficial occupancy at a weekly meeting on May 16, 2019. Exhibit 82 at 242. Alares continues to believe that the project was substantially complete on May 15, 2019, *see* Hearing Transcript, Vol. 1, at 154-55; *id.*, Vol. 2, at 34, and the VA essentially agrees. Exhibits 4310 at 11063, 4311 at 11125.[15] We agree that substantial completion occurred on May 15, 2019.

Two weeks later, by email dated June 5, 2019, Mr. Maggioli reiterated that the project was substantially complete when he informed the VA contracting officer that "[s]ince the project is substantially complete the weekly meetings are no longer needed," that "going forward the Thursday morning meetings are canceled," and that Alares would "provide the VA updates of the punchlist items, warranty issues and the change order work as they get completed." Exhibit 144 at 1522. Although the VA contracting officer suggested that continued weekly meetings would be beneficial "until all remaining items are complete," *id.* at 1521, Mr. Maggioli responded that Alares would "require a change modification to attend

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clear from his delay report that Mr. Maggioli believes that every single day from April 12 through September 6, 2019, constitutes a compensable delay day.

[15] The VA presented Mr. Boyle to testify for the VA in response to a deposition notice under Rule 30(b)(6) of the Federal Rules of Civil Procedures in which the VA was asked to identify the date that it believes the project was substantially complete. *See* Exhibit 4310. Mr. Boyle responded that substantial completion would have been the date of "transmittal of the final consolidated punch list," which he identified as "early June 2019." *Id.* at 11063; *see* Exhibit 4311 at 11125. Because the punch list that we located in the record that resulted from the parties' final walkthrough was provided on May 15, 2019, *see* Exhibit 3920-29-00 at 7546, we interpret Mr. Boyle's testimony as acknowledging May 15 as the date of substantial completion.

these meetings" and that Alares could "keep everyone updated on the progress via email which is more than adequate considering where we are in the project." *Id.* The weekly meetings stopped.

After Alares submitted its April 12, 2019, schedule update (no. 30), it never again submitted a schedule update. Exhibit RS-0593 (Expert Report) at 25; Hearing Transcript, Vol. 2, at 32-33. Beginning May 24, 2019, it also stopped creating daily activity reports of on-site work. Exhibits 3635 at 4143, RS-0593 (Expert Report) at 25. It did not create minutes for any meetings and, in fact, had no meetings with the VA after May 16, 2019. Exhibit 82 at 239-41.[16] Alares has provided virtually no contemporaneous evidence of what work, if any, it performed after May 24, 2019. Although it maintained sign-in sheets for the project site through June 14, 2019, the only notations on them indicate work that is more indicative of punch list work than continuing construction work. *See, e.g.*, Exhibit 3643 at 4996 (note to Alares from a subcontractor on June 14, 2019, sign-in sheet: "There were 2 Broken Light Jars and one light fixture that is corroded and needs replaced! I drained all the water out of the others. Water getting inside which caused glass to break.").

After declaring substantial completion, Alares still had to complete the commissioning process for the building. As defined in the contract specifications, commissioning under this contract was "a systematic process of verifying that the building systems perform interactively according to the construction documents and the VA's operational needs." Exhibit 6 at 233. "The commissioning process [was to] encompass and coordinate the system documentation, equipment startup, control system calibration, testing and balancing, performance testing and training." *Id.* The specifications anticipated that there would be "[c]ommissioning during the construction and post-occupancy phases." *Id.*

On July 8, 2019, EBI Consulting (EBI) issued the "Final Commissioning Report" for the building. Exhibit 4234. As part of its report, EBI identified several "Major Issues Outstanding," including low flow frequency in the chiller, negative pressure volume issues in the anteroom, balance issues involving an exhaust tie-in in the soiled utility room, and the humidifiers' return air humidity levels. *Id.* at 9468.

On July 26, 2019, Alares submitted RFI 179 to the VA, seeking direction for the control sequences (for controlling the heating and cooling of the space, as well as two

[16] Although the VA's expert represented in his report that the last meeting minutes were issued on May 23, 2019, Exhibit RS-0593 (Expert Report) at 25, we have been unable to find minutes from that May 23 meeting in the record.

isolation rooms that have negative pressure for infectious control). Hearing Transcript, Vol. 1, at 147. In that RFI, Alares complained as follows:

> Delta and the VA's proprietary vendor JCI has retested all the sequences to try to resolve the two issues noted by the [commissioning] agent. Also VA noted an alarm issue with the isolation rooms. According to Delta, the sequences have been programmed according to the contract documents.
>
> As you know, we have conducted retesting on several occasions over the last month to try to resolve the chilled water flow and humidifier issues identified by the [commissioning] agent. In testing the sequences and programming for the chilled water flow and humidifier, we identified more issues that are design related. We brought back the balancer on one of the site visits to verify whether there were balancing issues and found that there were not any that would interfere with the operation of the facility.
>
> At this point we have exhausted our options to resolve the identified issues and will need the engineer of record to resolve the noted issues. We believe the chilled water flow issue was resolved by changing the control sequences. However, we need engineer of record approval of the changes. Also the humidifier issue remains unresolved and we believe it is due to design issues.

Exhibit 3692 at 5382. Alares listed several issues that it wanted the VA to address, all of which it claimed were design defects. *Id.* at 5382-86. Alares requested a response by August 5, 2019. *Id.* at 5382.

The VA did not respond to the RFI. Instead, in an email dated September 6, 2019, the VA contracting officer notified Alares that the VA would not respond to RFI 179 and that, instead, the VA was immediately "taking over full occupancy of the space and acceptance of any/all remaining outstanding items" on the project. Exhibits 145 at 1526, 3691 at 5379. She asked that Alares "forward a release of claims and notate any items Alares is not providing full release for." Exhibit 3691 at 5379. A few days later, by email dated September 12, 2019, the VA contracting officer made clear that the VA had accepted the building "as is" and that Alares' work was done:

> The VA has taken full ownership of this space as indicated to you on 9/6. If you or any subs need to access this space, it needs to be fully coordinated and approved by the VA at least one week in advance. You informed the VA on 9/10 at 2:05pm your sub would be onsite, without fully disclosing the reason/need for their visit, to which Scott [DeRosa] responded on 9/11 at

> 11:47am informing you it would be a conflict. This email was delivered and read by you yet the sub still came on site on 9/12. Any unauthorized visits made to this site will be considered as trespassing.

Exhibit 145 at 1523. Between July 26, when Alares submitted RFI 179, and September 6, 2019, Alares was on the project site a total of no more than four days. Hearing Transcript, Vol. 4, at 24. One of the VA's employees testified that the VA had to hire other contractors to complete the project work, including electrical work, medical gas tie-ins to the Stryker boom, work on exhaust fans, and velocity nozzle installation. Exhibit 4309 at 11048 (Deposition Testimony of Michael LeBeau (June 7, 2022)); *see* Exhibits 4243, 4244, 4246, 4247 (evidencing the VA's hiring of other contractors to perform additional work after September 6); Closing Argument Transcript at 93-94.

On October 29, 2019, Alares signed and provided the VA with the following "Final Release of Claims" on this contract, excepting REAs 1 through 29, to obtain final payment:

> KNOW ALL MEN BY THESE PRESENTS: In consideration of the premise and sum of $8,243,391.89 (Eight Million two hundred forty three thousand three hundred ninety one and eighty nine cents) lawful money of the United States of America (hereinafter called the "Government") of which of $8,207,391.89 (Eight Million two hundred seven thousand three hundred ninety one and eighty nine cents) of the total amount has been paid, and a balance due of $36,000 (thirty six thousand) which is to be paid by the Government under the above noted contract, the undersigned contractor does remise, release and forever discharge the Government, its officers, agents and employees of and from all liabilities, obligations and claims whatsoever in law and equity under, arising out of or by virtue of said contract, except specified claims [REAs 1 through 29] in stated amounts, or in estimated amounts when the amounts are not susceptible of exact [sic] by the contractor [as identified in the release itself].

Exhibit RS-0533 at 3116. The excepted REAs included REA 17 (Repair Patient Lift System), REA 20 (Extended General Conditions), REA 25 (Attorney Fees), and REA 26 (Delta Mechanical Issues). *Id.*

In these appeals, Alares asserts that every day between April 12 and September 6, 2019, including days after substantial completion of the building, constitutes a compensable delay to the critical path of contract performance, alleging that these delays were caused by defects in the "control sequences design." Hearing Transcript, Vol. 1, at 147; *see* Appellant's Closing Argument Presentation PowerPoint at 71. Mr. Maggioli testified at the hearing that

"[w]e could not complete commissioning, which was a critical task, until the control sequences were redesigned, and we couldn't turn the space over to the Government until all those control sequences were properly working." Hearing Transcript, Vol. 1, at 147. Alares also argues that the VA's lack of a response to Alares's RFI 179 led to Alares being unable to complete the HVAC commissioning and thus project completion. Appellant's Closing Argument Presentation PowerPoint at 74; Exhibit 3692.

III. Alares' Claims and Proceedings Before the Board

A. CBCA 6149

On March 1, 2018, long before completing work on this project, Alares submitted a request for an equitable adjustment (REA) to the VA contracting officer, seeking (1) payment of $1,039,693 for extended general conditions allegedly resulting from government-caused schedule delays and differing site conditions, and (2) a time extension for completion of the project from August 2, 2017, to August 3, 2018. Exhibit 50 at 1. Alares alleged that the major issues causing scheduling delays at that time included differing site conditions relating to permanent power (259 days), differing underground site conditions (forty-nine days), and the need for an additional steam generator (thirty-eight days). *Id.* at 3-4. Alares asserted that "[t]here were other delays due to differing site conditions but these tasks were not on the project schedule critical path." *Id.* at 1. In the REA, Alares included the claim certification language required by the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109. Exhibit 50 at 4.

On April 2, 2018, Alares converted its REA into a certified claim. Exhibit 4274.[17] On June 5, 2018, after the deadline for the contracting officer to issue a decision on the claim had passed, Alares filed a notice of appeal with the Board of the contracting officer's "deemed denial" of the claim, which the Clerk of the Board docketed as CBCA 6149.

The parties, on September 6, 2018, requested that the Chair of the Board assign a mediator to assist them in settlement efforts, a request that the Chair granted. At a certain point in time, the parties ended the mediation but continued to engage in settlement efforts for several months. This appeal essentially remained stayed while the parties engaged in mediation efforts.

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[17] Alares filed an updated certification for the April 2, 2018, claim with the Board on March 31, 2021.

On May 29, 2019, while the parties were still engaged in mediation, Alares submitted REA 20 to the VA contracting officer, essentially updating its April 2, 2018, claim. *See* Exhibit RS-0527 at 1-7. It requested an equitable adjustment of $1,903,257.01 "for extended general conditions due to government schedule delays and differing site conditions . . . caused by the government." *Id.* at 1, 7. It asserted that the VA was responsible for 682 calendar days of delay at that point in time, which it claimed were caused by "[d]iffering site conditions relating to permanent power due to design errors," "[d]iffering [u]nderground [s]ite conditions while doing site work," "[a]dditional steam generator due to design errors," and "ATS rewiring due to design errors." *Id.* at 1.

On February 10, 2020, again while the parties were continuing their settlement efforts, Alares submitted another revised version of its April 2, 2018, certified delay claim to the VA contracting officer, increasing the amount of its claim for "extended general conditions due to government schedule delays and differing site conditions" to $1,941,801 and alleging 764 days of critical path delay. RS-0535 at 1, 28. Alares alleged that the critical path delays for which the VA was responsible were caused by the need to redesign the AHU equipment to accommodate a second steam engine, design errors relating to the new electric service, design errors relating to back-up emergency power, and a delay, and failure to coordinate requirements for installing the Stryker Boom equipment in the building. *Id.* at 2-7. It also alleged that the VA was responsible for numerous other delays that were not on the critical path, *id.* at 7-26, including various weather delays between November 2016 and May 2017 that it asserted "equate[d] to a critical path delay of 25 working days." *Id.* at 9.

On August 10, 2020, Alares submitted yet another revised version of its delay claim to the VA contracting officer, asserting that it was modifying its claim "due to recent REA #20 review comments by the VA," reducing its monetary demand to $1,535,552, and reducing its total claimed compensable time to 653 days. RS-0537 at 1, 30. It explained the basis of its updated claim as follows:

> The government reached beneficial occupancy of the Project on May 10, 2019 when the VA took possession of the ICU space. However, the contracting officer notified Alares Construction on September 6, 2019 stating the VA will be taking over full occupancy of the space and acceptance of any/all remaining outstanding items. The September 6, 2019 date was 764 days beyond the Contract completion date of August 2, 2017. Alares Construction is seeking total compensable time of 653 days.

Id. at 1.[18]

Proceedings in CBCA 6149 and other Alares appeals that the Board had previously consolidated with CBCA 6149, all of which arose out of the same contract, remained stayed until April 13, 2021, when the Board granted the parties' joint request to lift the stay of proceedings. On June 28, 2021, the VA filed a motion to dismiss the appeal for lack of jurisdiction, alleging that Alares' name in these appeals differs from the name on the contract at issue and that, therefore, Alares lacked privity of contract to pursue the appeal. The Board denied the VA's motion by decision dated August 11, 2021. *Alares Construction, Inc. v. Department of Veterans Affairs*, CBCA 6149, et al., 21-1 BCA ¶ 37,906, at 184,099-100.

Subsequently, the parties engaged in discovery. The VA engaged Mr. D'Onofrio to serve as its expert witness to analyze the delays on this project using a CPM analysis, and he prepared a report of his findings, which the VA shared with Alares. Alares' president, Mr. Maggioli, prepared a delay analysis for his company, and Alares shared his report with the VA.

Alares also requested dismissal with prejudice of six appeals—CBCA 7069, 7070, 7072, 7074, 7075, and 7086—that the Board had previously consolidated with CBCA 6149, representing that the parties had settled the claims at issue in those appeals. Modification P00015, executed November 16, 2021, resolved Alares' direct labor cost claims for smoke seal installation, scraping fireproofing, control joint installation, raising patient boom supports, reimbursement for egress maintenance, and metal roof repairs. Exhibit 3301 at 12. In those six claims, taken together, Alares had sought damages totaling $167,756, but it agreed to resolve those claims in exchange for payment by the VA of $88,000 and provided the following release:

> RELEASE. In exchange for the relief enumerated [in this contract modification], Alares agrees that such relief constitutes full and complete settlement and satisfaction of the Claims including but not limited to all costs,

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[18] On May 28, 2021, Alares filed in CBCA 6149 and the appeals with which CBCA 6149 was then consolidated what it titled "Amended Notice of Appeal," which purported to amend the notice of appeal in CBCA 6149. Alares asserted in its amended notice that the VA contracting officer never issued a final decision on its August 10, 2020, claim; that it therefore was "deemed denied"; and that Alares was adding that deemed denial to CBCA 6149. The Clerk of the Board did not docket the "Amended Notice of Appeal" as a new appeal but allowed it to remain filed as part of CBCA 6149.

> direct and indirect, interest, and attorney fees including those recoverable under the Equal Access to Justice Act (EAJA).

Exhibit 3301 at 13.

On November 22, 2022, as part of its responses to written discovery requests that the VA had served, Alares again changed the amount of damages that it was claiming. Although Alares indicated in its written discovery responses that it had recalculated its damages to remove attorney fees related to claim preparation and prosecution, *see* Exhibit 3891 at 7078, its claimed damages actually *increased* from $1,535,552 to $1,691,701.85. Exhibit 3901 at 1. No explanation for the basis of the increase was provided.

B. CBCA 7071

On February 10, 2020, Alares submitted REA 17 (revision 1) to the VA contracting officer, seeking payment of $7344.70 for being required to remove and then reinstall patient lift (LIKO) system supports that it had installed above the ceiling in Rooms 208, 209, 211, and 213 to allow duct and pipe work to be completed. Exhibit 66T at 756-59. It asserted that this work was caused by conflicts in the detailed layouts for the LIKO system that the VA had provided. *Id.* at 756. The VA contracting officer denied the REA, which it considered to be a claim, by decision dated January 4, 2021, finding that the only reason that Alares had to remove the supports was because one of its subcontractors had installed them before a different subcontractor had installed piping that needed to be installed before the supports were put into place. Exhibit 66V at 799-800. The contracting officer represented that "[t]he lack of coordination by the Contractor is the only reason this additional work was required." *Id.* at 800. The decision provided Alares notice of its appeal rights. *Id.* at 802.

Alares filed a notice of appeal with the Board on March 17, 2021, which the Clerk of the Board docketed as CBCA 7071. By order dated April 2, 2021, the Board consolidated CBCA 7071 (and other Alares appeals that were then pending) with CBCA 6149.

C. CBCA 7597

On July 27, 2022, Alares filed with the Board in CBCA 6149 what it called a "second addendum to its claim for general conditions at the [CBCA]." Exhibit 4273. In that "addendum," it attempted to add a claim for the VA's alleged breach of good faith and fair dealing to its existing appeals, asserting that VA officials took actions to deny change order requests and REAs because of funding limitations that would have caused the VA, if it approved the requests, to exceed the available appropriation for Alares' contract. *See id.* The VA argued to the Board that the second addendum was in reality a new claim over which

the Board lacked jurisdiction because it had never been submitted to the VA contracting officer for a decision. By decision dated November 9, 2022, the Board denied Alares' request to add its "second addendum" and its supporting documents to the record, finding that the Board lacked jurisdiction to consider the addendum. *Alares Construction, Inc. v. Department of Veterans Affairs*, CBCA 6149, et al., 22-1 BCA ¶ 38,225, at 185,649.

While awaiting the Board's decision on whether the Board possessed jurisdiction to consider its "second addendum," Alares converted its "second addendum" into a new CDA claim through which it sought payment of $1,679,495.60 and, on September 22, 2022, submitted it to the VA contracting officer, along with a claim certification from Mr. Maggioli. Exhibit 4278. By decision dated November 28, 2022, the VA contracting officer denied that claim. Exhibit 4279. On November 30, 2022, the Clerk of the Board docketed Alares' appeal of that decision as CBCA 7597.

The VA filed a motion seeking to dismiss CBCA 7597 for lack of jurisdiction, alleging that the new claim failed clearly to identify the sum certain to which Alares believed itself entitled and, in the alternative, seeking summary judgment, alleging that the "Final Release of Claims" that Alares executed on October 29, 2019, discharged the VA from all liabilities under the contract except for those expressly listed therein. The Board denied the VA's motion by decision dated March 3, 2023. *Alares Construction, Inc. v. Department of Veterans Affairs*, CBCA 7597, 23-1 BCA ¶ 38,296, at 185,927-28. By order dated March 6, 2023, the Board consolidated CBCA 7597 with CBCA 6149 and 7071 and indicated that it would be included as a part of the hearing that was scheduled to begin on March 8, 2023.

D. The Consolidated Hearing and Post-Hearing Proceedings

Beginning Wednesday, March 8, 2023, the parties presented five days of witness testimony before Judge Drummond at a consolidated hearing covering CBCA 6149, 7071, and 7597 that concluded on Tuesday, March 14, 2023. The hearing was conducted virtually using the ZoomGov platform. During the hearing, Judge Drummond denied Alares' request to qualify Mr. Maggioli as an expert in scheduling and delay analysis, determining that Alares had not established his qualifications. Hearing Transcript, Vol. 1, at 39-42. Nevertheless, Judge Drummond allowed Mr. Maggioli to testify about his views on the project's critical path of performance as a lay witness, *id.* at 42, and the VA did not request that his report be removed from the appeal file. Judge Drummond indicated that he would give Mr. Maggioli's report "the appropriate weight" but would not "refer[] to it as an expert report." *Id.* at 42. At the VA's request, Judge Drummond qualified Mr. D'Onofrio, without objection from Alares, as an expert in CPM scheduling, schedule delay analysis, time impact analysis, disruption and inefficiency analysis, and construction. Hearing Transcript, Vol. 4, at 10-11.

In an order issued following the conclusion of the hearing, Judge Drummond directed the parties to file post-hearing briefs no later than May 18, 2023. *See* Post-Hearing Order (Mar. 14, 2023) at 1. By May 16, 2023, when the parties requested an enlargement of time for filing those briefs, Judge Drummond had unexpectedly become unable to continue work on these appeals. On May 19, 2023, the Clerk of the Board assigned Judge Harold D. Lester, Jr., to take Judge Drummond's place as the presiding judge in these appeals. Judge Drummond passed away in June 2023.

After being assigned to these appeals, the new presiding judge immediately requested a status conference with the parties to discuss the situation and to "obtain the parties' views regarding the extent to which any modifications to the existing schedule of post-hearing activities may be necessary" because of the reassignment of the appeals to a judge other than the one who had heard the witnesses testify at the hearing, "including a discussion of whether either party will want to present any live witness testimony for a second time." Order (May 19, 2023) at 2. During the conference, both parties indicated that they did not wish to ask for a new hearing or to recall witnesses to testify except to the extent that the new presiding judge would find it helpful. Conference Memorandum (May 25, 2023) at 2. The new presiding judge indicated that, after the parties had completed post-hearing briefing, he would schedule a closing oral argument to help ensure that he fully understood the issues and evidence in the appeals. *Id.* at 3.

The parties submitted their post-hearing briefs on June 16, 2023, and reply briefs on September 14, 2023. They provided their positions to the Board through detailed presentations at the closing oral argument on October 18, 2023.

Discussion

I. Evidentiary Issues

A. Requirements When an Appeal is Reassigned After the Hearing

Neither the Board's Rules nor due process mandate that the judge who presided over the taking of testimony at a hearing be one of the judges who ultimately decides the case. *See, e.g.*, *Tri-Cor, Inc. v. United States*, 458 F.2d 112, 116-17 (Ct. Cl. 1972); *Blake Construction Co.*, GSBCA 2196, 70-1 BCA ¶ 8166, at 37,941-42. Rule 63 of the Federal Rules of Civil Procedure (FRCP), to which the Board looks for guidance, *see* Board Rule 1(c), provides that, "[i]f a judge conducting a hearing or trial is unable to proceed, any other judge may proceed upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties." Judge Drummond's successor in these appeals studied the appeal record thoroughly, went through the voluminous number of

exhibits contained in the appeal file, digested and analyzed the competing reports from the VA's expert witness and Alares' president, and repeatedly reviewed the hearing transcripts of the witnesses' live testimony. In addition, at the successor judge's request, the parties presented detailed closing arguments on October 18, 2023, after post-hearing briefing was complete, to walk the successor judge through the factual evidence supporting their positions in the appeals as well as their legal theories for or against recovery, an effort that the successor presiding judge found to be very helpful. To the extent that FRCP 63 requires the successor presiding judge formally to certify his familiarity with the record and that these appeals may proceed without prejudice to the contractors, he does so here.

Even with that certification, FRCP 63 requires that, "[i]n a hearing or a nonjury trial, the successor judge must, at a party's request, recall any witness whose testimony is material and disputed and who is available to testify again without due burden." "Courts . . . have read into Rule 63 the negative inference that if the presiding judge in a civil case has yet to issue his findings of fact and conclusions of law, a successor judge must retry the case" *unless* "all parties . . . consent to allow the successor judge to make findings of fact and conclusions of law based on the trial transcript." *Emerson Electric Co. v. General Electric Co.*, 846 F.2d 1324, 1325-26 (11th Cir. 1988); *see Townsend v. Gray Line Bus Co.*, 767 F.2d 11, 17-18 (1st Cir. 1985) ("An exception to the rule mandating a retrial is normally made only if all parties agree to allow the successor judge . . . to make findings of fact and conclusions of law based on a prior, or stipulated, record."). Here, we expressly offered the parties the opportunity to re-present witness testimony before the successor judge, but the parties declined that opportunity in favor of extensive post-hearing briefing and the ability to walk the successor judge through their positions in detail at a closing argument.

FRCP 63 also permits the successor judge, sua sponte, to "recall any other witness" from whom the judge might like to hear. We elected not to require the parties to go to the expense of presenting witness testimony a second time.

B. Alares' Request to Disregard Certain Appeal File Documents

In its post-hearing reply brief, the VA has cited to several appeal file documents that were not discussed during the hearing (Exhibits 17, RS-0103, RS-0222, and RS-0589), including the deposition transcript of Alares' finance manager (Exhibit RS-0058), who provided testimony about the preparation of financial documents upon which Alares' cost claims are based. Alares asks that we disregard those exhibits, stating that it is unfair for the VA to use them to attempt "to impeach Mr. Maggioli when those documents were never raised to Mr. Maggioli during cross-examination" at the hearing and "he was never given an opportunity to explain/address them." Appellant's Post-Hearing Reply Brief at 36.

Under Board Rule 9(a) (48 CFR 6101.9(a) (2024)), "'[t]he record on which the Board will decide a case includes,' among other things, 'Rule 4 appeal file exhibits other than those to which an objection is sustained,' other documents or parts thereof admitted as evidence at a hearing, and transcripts of testimony before the Board." *SRM Group, Inc. v. Department of Homeland Security*, CBCA 5194-R, et al., 21-1 BCA ¶ 37,869, at 183,886 (quoting Rule 9(a)), *aff'd*, No. 2021-2104, 2022 WL 1089228 (Fed. Cir. Apr. 12, 2022). "Accordingly, in reaching a decision in an appeal following a hearing, the Board is not limited to the testimony presented and exhibits introduced at the hearing but may also 'rely upon any evidence contained within the appeal file.'" *Id.* (quoting *Springcar Co. v. General Services Administration*, CBCA 1310-R, et al., 10-2 BCA ¶ 34,534, at 170,333). Under Board Rule 4(g), "[t]he Board considers appeal file exhibits part of the record for decision under Rule 9(a) unless a party objects to an exhibit within the time set by the Board and the Board sustains the objection."[19]

Alares has no basis for waiting until its post-hearing reply brief was due to request exclusion of this evidence. Here, the VA added Exhibit 17 to the appeal file on July 9, 2018, almost five years before the hearing in these appeals, and added the other exhibits on February 3, 2023, more than a month before the hearing. By order dated January 17, 2023, Judge Drummond adopted the VA's unopposed proposed revised schedule (filed on December 29, 2022) that identified a deadline of February 10, 2023, for submitting objections to appeal file documents and a deadline of February 17, 2023, for objecting to exhibits. Alares filed a list of appeal file exhibits to which it objected by the February 10 deadline, but none of the exhibits that Alares now asks the Board to disregard was listed there. Neither party filed objections to exhibits.

Even if we might be willing for good cause to consider a late-filed objection in some instances, Alares has identified no good cause here. Further, Judge Drummond, at the conclusion of the hearing on March 14, 2023, closed the evidentiary record in these appeals, "except for submission to the clerk's office and the briefs that will be coming in." Hearing

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[19] Although Board judges, under their authority to "alter these procedures . . . to promote the just, informal, expeditious, and inexpensive resolution of a case," Board Rule 1(a), have the authority to limit the documents that they will consider in deciding an appeal to those that the parties discuss with a witness or reference at a hearing, *see Lebolo-Watts Constructors 01 JV, LLC*, ASBCA 59740, et al., 21-1 BCA ¶ 37,789, at 183,426 (2020) (discussing another board's analogous authority), *aff'd*, No. 21-1749, 2022 WL 499850 (Fed. Cir. Feb. 18, 2022), Judge Drummond did not announce any such limitation in this case, meaning that Alares has no right to insist upon such a limitation here. In this instance, we will apply the standard rule set forth in Rules 4(g) and 9(a).

Transcript, Vol. 5, at 91; *see* Order (Mar. 14, 2023) at 1 ("The record will close at the end of March 14, 2023, except for evidence that was already admitted and the filing of post-hearing and reply briefs."). Alares' objections, first raised four months after the record closed, are clearly too late. Its objections are considered waived.

C. Alares' Failure to Qualify its Scheduling Witness as an Expert

During discovery, Alares identified its CEO, Mr. Maggioli, as its expert witness in scheduling and delay analysis, and Mr. Maggioli prepared a "Schedule Delay Analysis Report" in which he constructed what he identified as "an 'as-built' critical path" schedule for the project (Exhibit 3644 at 3) purporting to assess critical delays on the project, to identify causes of and assess responsibility for those delays, and to establish a basis for a damages award of $7,753,880 resulting from those delays. *Id.* at 2-22. At the hearing, Alares presented Mr. Maggioli and, over the VA's objection, asked that, pursuant to Rule 702 of the Federal Rules of Evidence (FRE), he be qualified as an expert in construction scheduling and delay analysis. As part of its objection, the VA noted that, although Alares did not mention it in its request to qualify him as an expert, Mr. Maggioli purported to provide extensive damages analyses in his report as part of his critical path delay opinions. Hearing Transcript, Vol. 1, at 40. After providing Alares an opportunity to establish Mr. Maggioli's background and areas of expertise, Judge Drummond declined to qualify Mr. Maggioli as an expert witness. *Id.* at 39-42. Nevertheless, Judge Drummond, without objection by the VA, allowed Mr. Maggioli to present his analysis as lay opinion testimony under FRE 701. *Id.*

The panel agrees with Judge Drummond's determination that Alares did not establish Mr. Maggioli's qualifications to testify as an expert under FRE 702. Only "[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" as an expert at a hearing. FRE 702. The proponent of expert testimony bears the burden of establishing by a preponderance of the evidence that the proposed witness qualifies as a expert. *Sykes v. Napolitano*, No. 07-42, 2009 WL 10696622, at *1 (D.D.C. Aug. 21, 2009); *Chung v. World Corp.*, No. CV-04-0001, 2005 WL 8155795, at *2 (D.N. Mar. Is. Oct. 24, 2005). "Whether a witness is qualified as an expert can only be determined by comparing the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness's testimony." *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 212 (7th Cir. 1990).

At the hearing, Alares' basis for presenting Mr. Maggioli as an expert in scheduling and delay analysis was his status as a professional engineer, Hearing Transcript, Vol. 1, at 25, and "his 35 years of preparing schedules for projects, updating schedules for projects, and . . . advising the VA on scheduling." *Id.* at 39. Although Judge Drummond recognized that

Mr. Maggioli might have extensive experience in forward-looking construction project scheduling, *id.* at 39-40, the report that Mr. Maggioli prepared did not involve forward-looking scheduling but instead purported to reconstruct prior project timelines, assess past time impacts, assign responsibility for delays on the completed project through what Mr. Maggioli described as a critical path analysis, and quantify more than $1.5 million in alleged damages. *See* Exhibit 3644 at 2-22. Mr. Maggioli had never previously prepared a schedule delay analysis report, Hearing Transcript, Vol. 1, at 42, and Alares presented no evidence that Mr. Maggioli had ever previously conducted a critical path delay analysis or damages quantification. In such circumstances, Judge Drummond properly found that Alares did not meet its burden of establishing Mr. Maggioli's qualifications to testify as an expert under FRE 702 on scheduling, delay, and damages analysis. *See The Sherman R. Smoot Co.*, ASBCA 52261, 03-1 BCA ¶ 32,197, at 159,151 (excluding testimony of proposed expert in construction CPM schedule analysis for lack of qualifications).

Ultimately, however, Alares suffered no prejudice from that ruling. Despite the lack of evidence supporting Mr. Maggioli's expertise in delay and damages analysis, Judge Drummond, without objection by the VA (Hearing Transcript, Vol. 1, at 41-42), allowed Mr. Maggioli to present his analysis as lay opinion testimony, eliminating any possible prejudice to Alares from his exclusion as a FRE 702 expert witness, and the entirety of his report was included in the Rule 4 appeal file. FRE 701 provides that, "[i]f a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." To the extent that Mr. Maggioli's testimony went beyond that which a lay opinion witness might ordinarily be allowed to provide,[20] the VA represented at the hearing that it had "no objection to him testifying as a fact witness based on his personal experience on this project," Hearing Transcript, Vol. 1, at 41, and it did not otherwise object at any time during the hearing to any of the testimony that he provided about his schedule delay analysis report. In such circumstances, the VA waived any objection to the Board's acceptance of his testimony. *Fruin-Colnon Corp. v. United States*, 912 F.2d 1426, 1429 (Fed. Cir. 1990); *see Constant v.*

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[20] The type of critical path schedule analysis that Mr. Maggioli purported to provide, inclusive of a quantification of damages based on that analysis, typically would be viewed as "based upon 'scientific, technical or other specialized knowledge' and therefore [would] fall outside the ambit of Federal Rule of Evidence (FRE) 701." *Regency Construction, Inc. v. Department of Agriculture*, CBCA 3246, et al., 17-1 BCA ¶ 36,884, at 179,774 (2016).

Advanced Micro-Devices, Inc., 848 F.2d 1560, 1566 (Fed. Cir. 1988) ("Failure to object in a timely fashion constitutes a waiver.").

D. Alares' Request for an Adverse Inference

Although the VA indicated on its witness list that Karla Rotondo, the contracting officer for this project, would testify at the hearing, and although Ms. Rotondo attended the hearing, the VA ultimately did not have her testify.[21] Focusing on its implied duty of good faith and fair dealing breach claim, Alares asks that we draw an adverse inference against the VA and find that, had Ms. Rotondo testified, her testimony on issues such as the VA's funding limitations, the VA's motives in issuing show cause and cure notices, the VA's recognition of delay caused by defective designs, and the VA's ultimate breach of the duty of good faith and fair dealing would not have been helpful to the VA. Appellant's Post-Hearing Brief (June 16, 2023) at 37. The VA responds that, in light of the documentary evidence in the record and the fact that Peter Boyle, the COR, testified, Ms. Rotondo's testimony was unnecessary and would have been duplicative of Mr. Boyle's, making an adverse inference unwarranted. Respondent's Post-Hearing Reply Brief (Sept. 14, 2023) at 12-13.

"When it would be natural under the circumstances for a party to call a particular witness . . . and the party fails to do so, tradition has allowed the adversary to use this failure as the basis for invoking an adverse inference." 2 Kenneth S. Broun, *McCormick on Evidence* § 264, at 220 (6th ed. 2006); *see Graves v. United States*, 150 U.S. 118, 121 (1893) ("[I]f a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable."). Yet, "a party's failure to call a witness does not necessarily imply that the witness's testimony would have been unfavorable to that party." *United States v. Busic*, 587 F.2d 577, 586 (3d Cir. 1978), *rev'd on other grounds*, 446 U.S. 398 (1980). "Every experienced trial lawyer knows that the decision to call a witness often turns on factors which have little to do with the actual content of his [or her] testimony." *Id.* The adverse inference is potentially available only if the missing witness "could have given material non-cumulative evidence." *LaMarca v. United States*, 31 F. Supp. 2d 110, 128 (E.D.N.Y. 1998). "If the testimony of the witness would be merely cumulative, the inference is unavailable." 2 Kenneth S. Broun, *supra*, § 264, at 222. Further, even when all of the elements supporting an adverse inference are met, the tribunal may

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[21] Alares also listed Ms. Rotondo on its own witness list but then elected not to call her to testify. *See* Appellant's Witness List (Feb. 13, 2023) at 2; Closing Argument Transcript at 69-70.

"exercise [its] discretion and decide not to grant a request for an adverse inference." *BancorpSouth Bank v. Herter*, 643 F. Supp. 2d 1041, 1061 (W.D. Tenn. 2009) (quoting *Kounelis v. Sherrer*, 529 F. Supp. 2d 503, 521 (D.N.J. 2008)).

We deny Alares' request for an adverse inference for several reasons:

First, "the availability of modern discovery and other disclosure procedures serves to diminish both [the] justification [of an adverse inference] and the need for the inference." 2 Kenneth S. Broun, *supra*, § 264, at 223. Other tribunals have held that "the fact that [the party seeking an adverse inference] had [the missing witness's] testimony available in deposition form" weighs heavily against allowing an adverse inference against an employer who did not call the witness to testify. *Labit v. Santa Fe Marine, Inc.*, 526 F.2d 961, 962-63 (5th Cir. 1976). During the discovery period, Alares deposed Ms. Rotondo. Closing Argument Transcript at 68-69; Respondent's Response to Board's Order (Jan. 20, 2025) at 1. Although Alares included deposition transcripts from two VA witnesses in its appeal file supplements, *see* Exhibits 4309, 4310, 4311, it did not submit Ms. Rotondo's. We can only presume from Alares' decision not to introduce the deposition transcript that it does not contain the types of admissions that Alares would have us now infer. *See Bent Glass Design, Inc. v. Brandt Manufacturing Systems, Inc.*, Civ. No. 89-4748, 1991 WL 60595, at *4 (E.D. Pa. Apr. 10, 1991) ("[P]laintiff had the opportunity to introduce all or part of the [missing witness's] deposition and having declined to do so, dispelled any possible inference that [the witness's] testimony would have been adverse to defendant's interest.").

Second, the VA presented the live testimony of the COR and project manager, Mr. Boyle, *see* Hearing Transcript, Vol. 3, at 9-10, and there is nothing in the record to suggest that Ms. Rotondo's testimony would be anything but duplicative of, yet potentially less fulsome than, Mr. Boyle's. Mr. Boyle testified that he and Scott DaRosa, another COR on the project, took the lead in much if not most of the cost estimating for change orders, *id.* at 11, and he would likely have had more routine contact with Alares and contemporaneous insight into on-site work, *see id.* at 33-34, and the VA's internal evaluations than the contracting officer, who would have been located somewhere other than the job site. Alares offers nothing to suggest that Ms. Rotondo disagreed with Mr. Boyle, and neither Mr. Boyle's testimony nor the documentary record in this case suggests it. To the contrary, counsel for Alares represented during closing arguments that, during her deposition, Ms. Rotondo repeatedly indicated that she did not remember the specifics of this project. Closing Argument Transcript at 69-70. Because "the documentary evidence amply explains the parties' intents and there is no reason to believe that [the missing witness's] testimony would be materially any different than [Mr. Boyle's,] [t]he government's failure to call a witness that the appellant believes would be helpful to appellant's case, without more, does not justify an adverse inference." *Aegis Defense Services, LLC*, ASBCA 59082, et al., 17-1

BCA ¶ 36,915, at 179,859 n.10; *see Del E. Webb Corp.*, ASBCA 22386, 79-2 BCA ¶ 14,140, at 69,597 ("The contracting officer's final decision is part of the record of this appeal. It speaks for itself. No good purpose would have been served by calling the contracting officer to testify as to what [is] already in the record."), *aff'd*, 652 F.2d 69 (Ct. Cl. 1981).

Third, Alares listed Ms. Rotondo on its own witness list. Ms. Rotondo was available at the hearing, and Alares could have called her to testify. It chose not to do so. We see no basis for an adverse inference when Alares decided not to call a witness from its own list.

Fourth, because "[f]ailure to anticipate that the inference may be invoked entails substantial possibilities of surprise, . . . courts often require early notice from a party expecting to make a missing witness argument or intending to request [an adverse inference] instruction." 2 Kenneth S. Broun, *supra*, § 264, at 223 (citing cases). Nothing in the record suggests that, prior to filing its post-hearing brief, Alares ever informed the VA that it viewed the VA's failure to call Ms. Rotondo to testify as something warranting an adverse inference against the VA. The hearing transcripts do not contain any indication that Alares warned the VA that, unless it called Ms. Rotondo as a witness, Alares would seek an adverse inference. Alares's failure to provide the VA with that type of notice, while the VA could still have addressed Alares' concerns by putting Ms. Rotondo on the witness stand, further supports the Board's decision not to apply an adverse inference.

Finally, after replacing Judge Drummond, the newly assigned presiding judge provided the parties the opportunity to reopen the prior hearing and present live testimony. By that point in time, Alares was well aware that the VA had not presented Ms. Rotondo's testimony at the hearing, and Alares could have elected to call her as a witness in response to the invitation to reopen the hearing. It did not do so, waiving its right to seek an adverse inference.

II. Alares' Delay Claim (CBCA 6149)

A. Standards for Evaluating Delay Claims

1. The Use of Critical Path Analysis

"[E]vents on a construction site do not always go according to plan. Actually, they very rarely do." Stacy Moon, Neil L. Wilcove, & Stephanie A. Stewart, "Assessing Delay Damages: How Critical Is the Critical Path?," 56 No. 6 DRI for the Defense 41 (2014) (available on Westlaw). That is certainly true on the project at issue here, which was supposed to be completed in 425 calendar days but eventually extended out almost two years beyond the originally anticipated substantial completion deadline. Alares claims that every

delay on this construction project that affected the critical path of contract performance was the VA's fault and that Alares is not responsible for any critical path delays. Hearing Transcript, Vol. 2, at 50.

"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." *Yates-Desbuild Joint Venture v. Department of State*, CBCA 3350, et al., 17-1 BCA ¶ 36,870, at 179,684 (citing *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." *Id.* A two-week delay in the planned on-site receipt of floorboards for a room would be unlikely to cause a delay to the completion of a construction project if the room's subfloor (on which the floorboards are to be laid) was not scheduled to be ready for floorboard installation until four weeks later. In such a circumstance, the schedule would have built in "float" for the floorboard delivery—that is, "the time between when an activity is first scheduled to occur and the last date the activity can [actually] be completed" without causing any delay to contract completion. *MW Builders, Inc. v. United States*, 134 Fed. Cl. 469, 505 (2017). By building "float" into a construction schedule, a contractor can anticipate delays and minimize the effect of possible delays to certain activities. *See id.* At a certain point, though, if there is no "float" left that would allow for a continued delay to the start or completion of a scheduled activity, there may necessarily be a delay to the ultimate completion of the project.

It may seem relatively simple, when looking at a single construction project activity, to determine when an extension in the time needed to finish one activity will cause a delay in another activity that cannot begin until the first activity is finished. In a complex construction project, however, there are likely thousands of activities that have to be scheduled, many of which will occur simultaneously and have different degrees of overlap and interplay. With so many activities in play, it becomes more difficult to determine which activities will, or will not, be affected by a delay on another part of the project, and the complexity of identifying the cause and effect of numerous delays and changes to numerous activities that are occurring in the same time frames can quickly become overwhelming. Tribunals follow certain rules to allow them to track and review disputes, when they arise, over the cause and effect of construction project delays:

> 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 [CPM] 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. C1. 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.

Yates-Desbuild, 17-1 BCA at 179,684-85.

"[T]o 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.'" *Yates-Desbuild*, 17-1 BCA at 179,685 (quoting *George Sollitt Construction Co. v. United States*, 64 Fed. C1. 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 179,403 (quoting *Mega Construction*, 29 Fed. C1. 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. C1. at 240. "As a result, 'the determination of the critical path is crucial to the calculation of delay damages.'" *Yates-Desbuild*, 17-1 BCA at 179,685 (quoting *Wilner v. United States*, 24 F.3d 1397, 1399 n.5 (Fed. Cir. 1994) (en banc).

To assist the tribunal in understanding delays on the project, the contractor generally must identify the critical path of contract performance, from start to finish, which is typically done through use of what is known as a CPM schedule analysis:

> 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." *1-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." *1-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 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.

Yates-Desbuild, 17-1 BCA at 179,685; *see* Stacy Moon, Neil L. Wilcove, & Stephanie A. Stewart, *supra*, 56 No. 6 DRI for the Defense 41 ("The critical path methodology is so entrenched in the construction industry as to be a de facto analytical requirement, and failing to submit a CPM analysis with a delay claim may create grounds for a trier of fact to disregard expert testimony.") (available on Westlaw); Jon M. Wickwire, Tony Warner, & Mark R. Berry, "Construction Scheduling," in 1 Robert F. Cushman & James J. Myers, *Construction Law Handbook* § 17.17, at 630 (1999) ("[T]he use of CPM techniques to plan and schedule the work has become the accepted standard in the construction industry."). When a contract requires the use of CPM scheduling during contract performance, as does Alares' contract, Exhibit 6 at 53, the contractor must use CPM schedule analysis to support a claim seeking monetary compensation for delay. *George Sollitt Construction*, 69 Fed. Cl. at 240.

It is important in any viable CPM analysis that the information being used to identify delay impacts is current, up to date, and accurate at the time of the delay being considered:

> 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 Cl. Ct. 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 [(1989)]. "[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).

Yates-Desbuild, 17-1 BCA at 179,685. Nevertheless, to the extent that the contemporaneous schedules are based on faulty or defective logic or fail to include all necessary activities that are needed to complete the project, the CPM analysis has to attempt, as best possible, to account for those errors:

> [T]he 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 74-32, 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, et al., 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).

Id. at 179,685-66.

2. Accounting for Concurrent Delays to the Critical Path

"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." *Yates-Desbuild*, 17-1 BCA at 179,686. "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." *Yates-Desbuild*, 17-1 BCA at 179,686 (citing *Blackhawk Heating & Plumbing Co.*, GSBCA 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.

B. The VA's Request for Denial of the Entirety of Alares' Claim

In its post-hearing briefing, the VA asserts that, without having an expert witness to present a CPM analysis of the delays on this project, and having presented "no coherent testimony showing critical path delay," Alares "failed to meet its burden for a claim of delay." Respondent's Post-Hearing Brief at 5; *see* Respondent's Post-Hearing Reply Brief at 28; Closing Argument Transcript at 127 (asserting that, because of its failure of proof, Alares is "[due] nothing"). The VA seems to suggest that, without an expert witness, Alares could not present a viable CPM analysis and, therefore, failed to prove any recoverable damages.

Alares' failure to present an expert witness in CPM schedule analysis makes Alares' ability to prove its case much more difficult. As noted above, "[i]t is the contractor's burden to establish the critical path of the project in order to justify an equitable adjustment based on an extension of the completion date of the project." *George Sollitt Construction*, 64 Fed. Cl. at 240. Because its contract required CPM scheduling, Alares must use CPM schedule analysis to support its delay claim. *Id.* There may be cases in which a non-expert has presented CPM analysis at a hearing, but, typically, such analyses are prepared and presented by expert witnesses in CPM scheduling analysis. Without CPM analysis, Alares is unlikely

to be able to prove what delays were critical to the project and that its delays were not concurrent to VA-caused critical delays that impacted Alares. *See* Jennifer W. Fletcher & Laura J. Stipanowich, *Successful Forensic Schedule Analysis*, 1:1 J. Am. College of Constr. Laws. 7 (Winter 2007) (available on Westlaw) ("In most construction cases, lawyers and experts find it impossible to prove the case using exclusively the client's contemporaneous schedule documentation.").

We need not explore the extent to which Judge Drummond's decision during the hearing to allow Mr. Maggioli to present his report and to testify about his non-expert critical path analysis would, in other circumstances, be supportable because, at the hearing, the VA did not object to admission of either the report or Mr. Maggioli's testimony. That does not mean that the Alares report is particularly helpful to the Board. There are serious issues with the opinion testimony that Mr. Maggioli provided. The report that he prepared essentially was a comparison of the original as-planned schedule for the project against the as-built schedule. Hearing Transcript, Vol. 1, at 60. That is typically just a starting point in a fulsome CPM schedule analysis. Further, Mr. Maggioli's report too often left out and did not account for activities that were required to complete this project and relied on schedules to support delay findings that were critically out of date for the periods of time for which he was citing them. *See, e.g.*, Exhibit RS-0592 (Expert Rebuttal Report) at 11-12, 15. Those are all defects that limit, if not eliminate, the helpfulness of the report to the Board. *See Blinderman Construction*, 39 Fed. Cl. at 585.

Another problem is the schedules and schedule updates that Alares prepared throughout the project, which are supposed to provide the basis for the CPM analysis. "Courts and boards have declined to rely upon CPM analysis where the logic was not credible or was 'suspect.'" J. Richard Margulies, *supra*, at 664 (citing, among others, *J.W. Bateson Co.*, ASBCA 27491, 84-3 BCA ¶ 17,566, and *Joseph E. Bennett Co.*, GSBCA 2362, 72-1 BCA ¶ 9364). After studying the record evidence in this case, it is clear that the contemporaneous schedule updates that Alares was issuing throughout most of contract performance often contained logic errors and were missing necessary activities. The logic in Alares' schedule updates simply did not always work. For example, in its January 13, 2017, schedule update, Alares indicated that it planned to perform interior finish work from April 7 to July 18, even though it would not finish enclosing the building, with appropriate temperature controls, until July 10, leaving inadequate time to perform all interior work by July 18. Exhibit RT-50 at 1. Further, as discussed in our findings of fact, throughout performance, the VA was discovering that Alares had failed to add new activities into schedule updates and had deleted previously listed activities even though it had not yet completed them. Alares' delay report does not account for or attempt to correct these deficiencies. If anything, Mr. Maggioli's report seems simply to ignore schedules that do not support Alares' current positions on the source of delays. There is even some evidence in

the record suggesting that, from early on in this project, Alares was already preparing its documents, potentially including schedule updates, in a manner that would increase the likelihood of its ability to prevail on claims against the VA. *See, e.g.*, Exhibit RT-09 (project manager's statement in an email dated August 2, 2017, that "choice of words in our current RFIs/Meeting Minutes, the inclusion and exclusion of questions, issues are critical to documenting Alares's case"); Exhibit 40 at 1 (VA COR's complaint that, in a schedule update, "[i]t appears as though the narrative is carefully written to place the onus for delays squarely on the VA, and does not address a single item that has impacted the schedule due to Alares"); Exhibit 3346 at 119, 126 (in schedule update no. 4, removing, without explanation, "cast concrete slab on deck" from critical path and significantly delaying it, where, in prior schedule update (Exhibit 3345 at 107, 110), it was identified as the next necessary critical path item); Hearing Transcript, Vol. 3, at 46 (Narrative "didn't highlight any of the issues that have occurred on . . . the construction project that were related to the contractor and not the VA.").

Nevertheless, regardless of problems that Alares' sometimes questionable logic or lack of an expert witness in CPM analysis might create in its ability to prove its claims, the VA has at least partially remedied those deficiencies by having its *own* expert witness supply a CPM analysis in which he opines that Alares is entitled to at least some compensable delay time. That CPM analysis is a part of the record. In reaching a decision following a hearing, we do not look just to whether the appellant met its burden of proof in its case-in-chief. Instead, we look to the entirety of the record presented at the hearing in deciding an appeal. We will resolve an issue in favor of the party with the burden of proof "if [the fact or matter at issue] has been proved by the preponderance" of the evidence, "without reference to who must prove the elements." *Stafne v. Unicare Homes, Inc.*, No. CIV-97-470 JRT/FLN, 1999 WL 1212656, at *2 n.6 (D. Minn. Aug. 12, 1999) (quoting Committee Comments to the Model Civil Jury Instructions for the United States Court of Appeals for the Eighth Circuit § 3.04 (1998)), *aff'd*, 266 F.3d 771 (8th Cir. 2001). Ultimately, "it does not matter which party proves something, e.g., whether defendant proved a part of plaintiff's case. It only matters, at that stage in the proceedings, whether it has been proved by anyone." *Id.*; *see Kozlowski v. Fry*, 238 F. Supp. 2d 996, 1006 (N.D. Ill. 2002) ("[T]he typical application of the disparate impact or disparate treatment tests are not necessary, because Defendants have arguably proved Female Plaintiffs' prima facie case for them."); *Clark v. Peco, Inc.*, No. 97-737-HU, 1999 WL 398012, at *4 (D. Or. Apr. 16, 1999) (sustaining jury verdict in plaintiff's favor without resolving sufficiency of plaintiff's evidence on one element because, "[i]n an attempt to sustain its theory that plaintiff was not disabled and could perform her job without accommodation, defendant's witnesses essentially proved plaintiff's case on the issue of whether she needed accommodation to perform the essential functions of her job."). Had the VA, after Alares had finished presenting its case-in-chief, believed that Alares had failed to prove any damages, it could have elected not to have presented a responsive CPM

analysis. Having entered that analysis and its expert's opinions into the record, they are available to the Board for consideration, and we have considered and relied on those opinions in deciding these appeals.

C. Responsibility for Critical Path Delays on the Project

1. Delays During Period 1 (June 3, 2016, to January 13, 2017)

Based upon the Board's factual findings reflected above, we find the VA responsible for four days of compensable critical path delay during Period 1. The VA, through its expert witness, acknowledges responsibility for those four days of delay, which related to a differing site condition (unanticipated underground piping) that delayed completion of the foundation of the new building.

Alares argues that the VA is responsible for the additional thirty days of critical delay during Period 1. It was not. Alares very clearly caused delays in steel erection and concrete deck casting during Period 1. Although Alares asserts that those delays were not on the critical path, we disagree. Alares attempts to focus on the VA's delays in coordinating MEP work as delaying the critical path during Period 1, but, because those issues did not need to be resolved until Alares was ready to begin MEP rough-ins, and because MEP rough-ins were not scheduled to begin until Period 2, any MEP coordination delays in Period 1 did not affect the critical path. Although Alares, in a schedule update submitted at the end of Period 1 (on January 13, 2017), added several weeks of MEP cost review and negotiation as a critical path item that would precede the actual performance of the MEP work, *see* Exhibit 3346 at 119, the logic underlying that addition is unsound. Alares should have known that, if changes were necessary to MEP, the VA was entitled to require Alares to perform the work before or while the parties negotiated price. *See* Exhibit 1 at 20 (containing "Contract Changes—Supplement (JUL 2002), Veterans Affairs Acquisition Regulation (VAAR) 852.236-88 (48 CFR 852.236-88 (2016)). It does not get to defer the work until the parties have agreed on the cost, and Alares' critical path analysis identifying weeks of cost review and negotiation as a critical path item that would delay its ability to perform the MEP work (that it never planned to perform during Period 1) is unsupported.

In his rebuttal report, Mr. Maggioli asserts that the VA expert's finding that steel erection was completed late is incorrect, stating that, in fact, steel erection was completed *early* and therefore could not have impacted the critical path.[22] Exhibit 3693 at 5390. As

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[22] In his original report, where he finds that MEP coordination issues were the delaying critical path item during this portion of Period 1, Mr. Maggioli does not mention

support, he asserts that Alares' original "baseline schedule shows steel decking, welding, and detailing with an early finish date of January 24, 2017," and that Alares' completion of that work on January 12, 2017, was earlier than planned. *Id.* The problem with Mr. Maggioli's analysis on this issue is an example of a problem that runs through his entire report: Mr. Maggioli is relying on an outdated schedule, one that Alares had discarded before it commenced any actual construction work (*long* before the delay at issue here). Specifically, the January 24, 2017, finish date was set forth in Alares' original baseline schedule issued right after contract award. Within a month of issuing that original baseline schedule, and before it had commenced any construction work, Alares issued an *updated* baseline schedule that moved the start and finish dates for steel erection earlier in time. Exhibits 18 at 23, 22 at 1. In its updated schedule, Alares changed the logic of its schedule, moving the early start and finish dates for placing structural steel columns, erecting structural steel, and plumbing and detailing structural steel to October 21 and November 21, 2016, respectively (rather than the original dates of December 21, 2016, and January 24, 2017). *Compare* Exhibit 18 at 3 *with* Exhibit 3644 at 5023. That plan for structural steel erection remained essentially the same (even with some relatively minor changes in the start and finish dates various continuing schedule updates, *see* Exhibit 18 at 23) throughout the relevant part of Period 1. Applying those schedule updates, steel erection finished later than planned.

"One of the reasons cited most frequently to reject expert testimony [and, in this case, a non-expert's effort at CPM analysis] is reliance upon an outdated project schedule." Jennifer W. Fletcher & Laura J. Stipanowich, *supra*, 1:1 J. Am. College of Constr. Laws. 7. "The critical path is dynamic and may change during the course of the project depending on when the project status is evaluated and completion is forecasted." American Society of Civil Engineers (ASCE) 67, Guideline 4.1, *Schedule Delay Analysis* (67-17), Guideline 4.1, at 7 (2017) (Exhibit 48 to Exhibit RS-0592). "Delays should generally be evaluated by comparing the schedules before, during, and after the delay." *Id.*, Guideline 4.4, at 7; *see Blinderman Construction*, 39 Fed. Cl. at 585 ("[T]he only way to accurately assess the effect of the delays alleged . . . on the . . . project's progress is to contrast updated CPM schedules prepared *immediately* before and *immediately* after each purported delay."), *aff'd*, 178 F.3d 1307 (Fed. Cir. 1998) (table). The appropriate methodology for a CPM analysis "is to use the updated CPM schedules" applicable to the time period during which the delay occurred, "not the baseline schedule prepared before construction began." *George Sollitt Construction*, 64 Fed. Cl. at 252; *see* ASCE 67, Guideline 4.1 ("Because the critical path is dynamic, delays should be evaluated based on the critical path during each delay."). Mr. Maggioli's delay analysis, based on a long outdated baseline schedule, is valueless to the Board in evaluating the delays at issue in Period 1.

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steel erection delays. *See* Exhibit 3644 at 5005-06.

The VA is responsible for a total of four days of critical path delay in Period 1.

2. Delays During Period 2 (January 13 to July 14, 2017)

The VA's expert witness acknowledged in his rebuttal report and in his testimony at the hearing that the VA was responsible for twenty-two days of critical path delay near the beginning of Period 2, finding that MEP coordination issues were the critical item at that time. Initially, in his original report, he had found that the activity which controlled the critical path at the outset of Period 2 was the need to make the building weathertight. *See* Exhibit RS-0593 (Expert Report) at 11. After issuing that report, the VA's expert obtained a document that he had not previously seen, which was Alares' schedule update no. 5. Exhibit RS-0592 (Expert Rebuttal Report) at 7. In his rebuttal report, the VA's expert acknowledged that, based on that new document, he had revised his opinion to find the VA's delay in resolving MEP coordination issues caused twenty-two days of delay to the critical path.

The Board has struggled to understand the VA expert's change of opinion. There is no doubt that the VA needed to respond to the MEP problems addressed in RFI 5, which Alares submitted during Period 1, and that the A/E's delay in issuing new MEP layouts is a delay for which the VA is responsible. We cannot see, however, how this delay affected the critical path at this point in time. First, although MEP layouts needed to be finalized before Alares could get too far into MEP rough-in work, Hearing Transcript, Vol. 3, at 64-65, there is only so much rough-in work that Alares could perform before the cast-in-place concrete deck, which was the precursor to the installation of exterior light gauge metal framing for the building, was completed. Without the exterior light gauge metal framing for the building, there was not a complete structure for the building in which Alares could "rough in" MEP. For reasons that Alares has never explained, although it could have started casting the concrete slab as early as December 1, 2016, it did not do so until February 16, 2017, and it did not complete that work until February 21, 2017. Exhibit 19 at 196. Alares has not explained what MEP rough-in work it would have been able to perform, beyond the work that it performed, before casting the concrete slab. Second, under the schedules and updates that Alares submitted prior to mid-June 2017, Alares did not plan to complete MEP rough-in work until the building was weathertight. *See* Tabs C, D, & E to Exhibit RS-0593. Although Alares changed the logic in its schedules in schedule update no. 9 (dated June 9, 2017) to eliminate the tie between weathertightness and MEP work, *see* Tab F to Exhibit RS-0593, that new logic does not change the fact that, under the logic of the applicable schedules prior to mid-June 2017, Alares would not perform MEP rough-ins until the building was weathertight. In the Board's view, it was the need to cast the concrete slab, followed by the exterior light gauge framing and the weathertight milestone, that were the driving critical path items during the first few months of Period 2. We find no logic that supports finding

MEP coordination on the critical path in Period 2, regardless of the VA expert's concession to the contrary.[23]

Instead, we find that the controlling critical path delay in Period 2 up until February 21, 2017, was the cast-in-place concrete slab. As previously mentioned, Alares has never explained why it did not cast the concrete slab until February 2017, but, whatever the reason, the VA is not responsible for that delay. Subsequently, the critical path changed, at least up until the June 9, 2017, status update, to focus on Alares' lack of progress in enclosing the building, coupled with, to a lesser extent, the lack of progress on interior MEP rough-in work that, despite the lack of a weathertight seal of the building, Alares apparently had already begun. *See* Exhibit RS-0593 (Expert Report) at 13. Again, the delays in enclosing the building resulted from Alares' problems with its subcontractors, not from anything that the VA did. We need not resolve whether these delays resulted from Alares' obvious problems in getting its subcontractors to perform during this period. For purposes of assigning responsibility to Alares, it matters only that the critical delays are not the VA's fault and are not shown to be excusable.

By June 9, 2017, the critical path focused exclusively on meeting the weathertight milestone (of which enclosing the building was a necessary prerequisite). Alares has asserted that it was precluded from making the building weathertight on schedule during Period 2 because of a defect in the drawings for the AHUs for the roof of the building: specifically, that the drawings identified a single steam generator for the AHUs when, in reality, two steam generators were needed. It is somewhat unclear from the record whether installation of the steam generators was truly necessary before making the building weathertight. Looking at the schedule updates that Alares submitted throughout the project, it is clear that, at one point, Alares had planned to make the building "weathertight" *before* it had completed the AHUs and accompanying roof work installation. *See, e.g.*, Exhibit 3346 at 118, 127 (looking at schedule update no. 4, where Alares identified March 10, 2017, as its weathertight milestone finish date but identified an April 7 to June 9, 2017, date span for installing the roof mechanical room and AHUs). Alares' post-performance assertions at the hearing tying the second steam generator issue to the weathertight milestone seem inconsistent with that earlier schedule.

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[23] Even if MEP coordination had been a critical path item early in Period 2, Alares created significant delay by holding onto its subcontractor's coordination drawings for several weeks after receiving them on March 17, 2017, before sending them onward to the VA. Hearing Transcript, Vol. 3, at 65-67; Closing Argument Transcript at 102; Exhibits 83N at 316-20, 83O at 321. Alares contributed to its own delay by holding the MEP coordination drawings longer than necessary.

Nevertheless, even if the Board might question whether delays associated with the AHUs truly affected the weathertight milestone, the VA's expert ties these delays to the critical path and Alares' ability to meet the weathertight milestone. *See* Exhibit RS-0593 (Expert Report) at 13-14. Early delays in the AHS procurement (before it became a critical path item) were caused by Alares' subcontractor, which planned for and apparently may have begun fabricating an incorrectly sized system. After getting back on the right track, Alares then discovered the A/E's error in failing to identify the need for a second steam generator. The VA cannot escape responsibility for that design error or the delay impacts that necessarily resulted from correcting that error. The VA's expert assigns responsibility to Alares, though, based upon a bilateral modification, P00005, that the parties executed, which provided for no time extension and, according to the expert, fully resolved any delays associated with the change to add the second generator. Hearing Transcript, Vol. 4, at 16. He asserts that, "[a]fter executing the change order, Alares had trouble procuring the generator" and "also increased the amount of work in the unit performed after obtaining the generator," *id.* at 17, but that, because Alares had already assumed responsibility for all work and time associated with the second generator through modification P00005, these delays were no longer the VA's responsibility.

We cannot agree with the VA expert's position. His opinion, which he presented in both his written report and in hearing testimony, that Alares assumed responsibility for delays associated with the second steam generator by executing modification P00005 addresses an issue of contract interpretation, which is a matter of law for which expert testimony is irrelevant. *See Sparton Corp. v. United States*, 77 Fed. Cl. 1, 8 (2007) ("In the absence of specialized trade usage, expert testimony regarding proper contract interpretation is inadmissible, as is expert testimony regarding the legal significance of the contract language."). We agree that modification P00005 addressed all direct costs associated with the change, compensating Alares for "all labor, materials, equipment, supervision, transportation and disposal necessary for . . . . Change Order proposal #12R2, dated 5/12/2017 for the second steam generator in accordance with RFI #26 and #31 in the amount of $42,398.86." Exhibit 33 at 1. But Alares is not seeking to recover its direct costs here. It is seeking delay damages. In that regard, Alares in the modification released certain rights "[i]n consideration of the modification agreed to herein as the adjustment *for the contractor's proposal* and for the contractor's rights to submit claims for unresolved issues which are not covered by this change." *Id.* at 2 (emphasis added). Because the payment under modification P00005 was expressly defined as "the adjustment for the contractor's [change] proposal," *id.*, we look to that change proposal, which Alares submitted to the VA contracting officer on May 12, 2017, *id.* at 15, to identify its scope. *See John W. Floore*, ASBCA 5761, 59-2 BCA ¶ 2356, at 10,792-95 (looking to contractor's change proposals to interpret scope of modifications).

In its change proposal, in which Alares proposed a contract price increase of $42,298.86, Alares expressly indicated that the proposal did *not* encompass time extensions that might be necessary because of the change:

> This proposal includes only the direct costs of the change. Alares Construction, Inc. reserves its rights to additional costs for impact of this change, alone or in combination with other changes, on unchanged work; for additional time, due to impacts, if any, on the schedule; and for time-related extended time of performance costs, all of which will be evaluated separately.

Exhibit 33 at 15. It is clear from this language that the resulting modification, in which the VA accepted Alares' $42,298.86 proposed cost, was limited to the direct costs of the change and that Alares did *not* assume responsibility and reserved its right to seek compensation for time delays caused by the change. *See John W. Floore*, 59-2 BCA at 10,798 ("[T]he dollar amounts of appellant's proposals were accepted and incorporated into the contract, when the proposals were clear that they were computed on the basis" identified in the change proposal).

Alares argues that we should follow Mr. Maggioli's report and award 113 days of delay to Alares during this period. Alas, Mr. Maggioli's analysis ignores at least two contemporaneous schedule updates from this period. Exhibit RS-0592 (Expert Rebuttal Report) at 8. It is critical to any viable CPM analysis that it rely on updated schedules that immediately precede and follow delays, *Blinderman Construction*, 39 Fed. Cl. at 585, and Alares' failure to rely on the latest applicable updated schedules in its CPM analysis renders its analysis of delays in this period of little value. *See Fortec Constructors v. United States*, 8 Cl. Ct. 490, 507 (1985) ("[T]he CPM must reflect actual performance to be a reliable basis for evaluating requests for time extensions.").

For its part, the VA repeatedly references the two-week shutdown that occurred during this period for safety violations, seemingly suggesting that we include that shutdown in our critical path delay analysis. Respondent's Pre-Hearing Brief (Feb. 24, 2023) at 15-16, 34; Respondent's Post-Hearing Brief at 33; Closing Argument Transcript at 77, 103-04. As discussed in our findings of fact, this two-week shutdown was Alares' responsibility and was justified. Nevertheless, although we agree that it seems unlikely that a two-week complete work stoppage of that nature would not have impacted performance in some significant way, the VA's expert did not assign any critical delay to the project for that stoppage. As noted above, "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." *Yates-Desbuild*, 17-1 BCA at 179,684. Because of the importance of a viable CPM analysis to assist in identifying the impact of a particular delay, *see id.* at 179,687

(finding "a CPM analysis is necessary to determine whether and the extent to which a contractor is entitled to delay damages for Government-caused delays"), we have no basis for tying the shutdown to any specific delay or quantifying its impact without such a showing in Mr. D'Onofrio's report. We add no days of critical path delay for the safety shutdown.

We find that, although the VA is not responsible for critical path delays early in Period 2, it is responsible for thirty-eight days of critical delay later in Period 2 resulting from the need for the second steam generator.

3. Delays During Period 3 (July 14, 2017, to May 18, 2018)

The VA's expert opines that Alares is entitled to thirty-four days of compensable critical path delay during Period 3 as a result of delays associated with obtaining permanent power. We agree. Although the expert finds that there were an additional seventy-eight critical path delay days associated with permanent power during this period, he finds that those delays were concurrent with delays for which Alares is responsible.

The Suspension of Work clause in Alares' contract provides that "no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor . . . ." 48 CFR 52.242-14(b); *see* Exhibit 1 at 28 (incorporating clause into contract by reference). Such clauses "preclude recovery if the contractor would have been equally delayed by other concurrent causes regardless of the Government's action or inaction." *Merritt-Chapman & Scott Corp. v. United States*, 528 F.2d 1392, 1397 (Ct. Cl. 1976). It "does not weigh whether the Government's action is of less importance than the concurrent cause or whether the concurrent factor is a superseding action." *Id.* Instead, it permits the contractor to recover for a Government-caused critical path delay "only if the Government's delay is the sole proximate cause of the contractor's additional loss and only if the contractor would not have been delayed for *any other reason* during that period"—that is, if there were no concurrent delays for which the contractor was responsible during the period of Government-caused delay. *Id.* (emphasis added); *see HPS Mechanical, Inc. v. JMR Construction Co.*, No. 11-CV-02600-JCS, 2014 WL 3845176, at *28 (N.D. Cal. Aug. 1, 2014) ("[T]here may be multiple events causing critical path delays" at the same time.); Jon M. Wickwire, Tony Warner, & Mark R. Berry, *supra*, § 17.19, at 635 ("True concurrent critical path delays by an owner and contractor entitle both to additional time, but no compensation for delay.").

In *Triax-Pacific v. Stone*, 958 F.2d 351 (Fed. Cir. 1992), the Court of Appeals for the Federal Circuit, applying the Court of Claims' prior precedent in *Merritt-Chapman & Scott*, defined "concurrent delay" by looking to whether, had the Government not created a critical

path delay during a particular contract performance period, "'any other cause' *would* have delayed [the contractor's] performance." *Id.* at 354 (quoting FAR 52.212-12 (1990) (emphasis added)). The manner in which the Court analyzed concurrent delay in that case is instructive here:

> Triax argues that the Board erred in finding that the government was not the sole proximate cause of Triax's delay in the performance of the contract. We do not agree. Although one cause of the resultant delay may have been the failure of the government to issue the notice to proceed within the contract deadline, another concurrent cause was Triax's late performance on the earlier contract. Pursuant to the contract, during the Phase II construction, the housing units could not be occupied. On the day the Phase II notice to proceed should have been issued, some families remained in each of the Phase II buildings. Due to Triax's late performance on the earlier contract, these families could not have been moved into the Phase I housing units. As a result, Triax could not begin performance on these occupied Phase II buildings until Triax completed the Phase I housing units. Therefore, the Board did not err in finding that Triax's late performance on the earlier contract was a concurrent cause of the delay. Accordingly, under the Suspension clause, Triax is prevented from recovering any additional costs it incurred as a result of this delay.

Id. at 354; *see* 6 Philip L. Bruner & Patrick J. O'Connor, *Bruner & O'Connor on Construction Law* § 15:68 (2024) ("[T]he party seeking damages for delay must prove that delay to the critical path would not have occurred 'but for' an event within the 'control' of the other party.").

Alares challenges the VA expert's opinion that there were seventy-eight days of concurrent delay. It appears to argue that, before the VA's permanent power delay was on the critical path, any separate contractor delay during that period could be concurrent only if it affected the same activity as the VA's and its delays were unrelated to the permanent power problem. Closing Argument Transcript at 19; *see id.* at 20 (arguing that the question to answer in determining whether a delay is concurrent is whether "that delay [is] affecting what's on the critical path at that point in time"). If that is what Alares is arguing, its position would be inconsistent with the concept of "concurrent delay," which "requires that there be two separate causes of the delay that are effective and independent, whether they are delays to a single activity or a delay to separate activities." John Livengood & Daniel S. Brennan, "Approaches to Concurrent Delay," 39 Constr. Law. 27, 27 (Winter 2019) (available on Westlaw). "At its most basic, concurrent delay has five main characteristics":

> (1) *two or more delays that are unrelated and independent*; (2) *each of which would have delayed the project even if the other delay did not exist*; (3) the delays are the contractual responsibility of different parties, but one may be a force majeure event; (4) the delay must be involuntary; and (5) the delayed work must be substantial and not easily curable.

Id. (emphasis added). "If the causes of delay are the same, then the examination of the [tribunal] is focused on the responsibility for that causative event." *Id.*

It is true, as Alares notes, that a "concurrent delay" by a contractor cannot be just some minor performance issue or inconvenience that would not, on its own, have affected the overall project performance time. "[A]ny contractor-caused delays must affect the critical path of contract performance to be considered 'concurrent,'" and "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." *Yates-Desbuild*, 17-1 BCA at 179,686; *see Santa Fe, Inc.*, VABCA 1943, et al., 84-2 BCA ¶ 17,341, at 86,410 ("In terms of the concurrent delay rule . . . the concurrent delay must pertain to activities whose completion was critical to the completion of the project itself." (quoting *Blackhawk Heating & Plumbing*, 76-1 BCA at 55,579)); Philip L. Bruner & Patrick J. O'Conner, *supra*, § 15:69 ("Delay of a noncritical activity, which by definition cannot delay the critical path of the project, cannot be a 'concurrent' cause of project delay.").

Were the building enclosure and interior build-out delays for which Alares is responsible critical path delays that were concurrent with seventy-eight days of permanent power delay in this period? Based upon the VA expert's CPM analysis, which we accept, they were. Absent the permanent power delay, they would independently have delayed the substantial completion date. To the extent that the report of Alares' president indicates other causes or effects of delays or a lack of concurrency, we do not give it any credence. In preparing his report, Mr. Maggioli ignored the critical path identified in schedule updates dated August 4, September 1, and September 22, 2017. *See* Exhibit RS-0592 (Expert Rebuttal Report) at 11-12. Alares' failure to utilize the schedule updates, without explaining its rational for not doing so, renders its analysis of delays in this period of little to no value. *See Blinderman Construction*, 39 Fed. Cl. at 585.

Even if Alares had been able to show a lack of concurrency between its delays and the permanent power issue,[24] it would still have to address its failure to attempt to mitigate the

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[24] Alares asserts that the agency "has the burden of proof that the concurrent delays it raises affect the critical path." Appellant's Closing Argument Presentation

permanent power delay. The parties had agreed to have Alares install and utilize temporary power while awaiting connection to permanent power, the VA had agreed to pay for it, Alares had proposed a price, and its subcontractor came to install temporary power. Alares then suddenly, without an explanation that we find credible, cancelled it and waited for an extended period to obtain permanent power. When it knew that there would be a significant delay in obtaining permanent power, Alares could not "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." *Yates-Desbuild*, 17-1 BCA at 179,687 (citing 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), *aff'd* 17 F.3d 1442 (Fed. Cir. 1994) (table). "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.'" *Yates-Desbuild*, 17-1 BCA at 179,687 (quoting *Midwest Industrial Painting of Florida, Inc. v. United States*, 4 Cl. Ct. 124, 133 (1983)). Alares' failure to follow through on an appropriate mitigation activity would independently limit its ability to recover for the permanent power delay.

We find Alares entitled to thirty-four days of compensable delay during Period 3.

4. Delays During Period 4 (May 18, 2018, to April 12, 2019)

The VA's expert opined that the VA was responsible for 131 days of critical path delay during Period 4, which resulted from revisions to the medical gas requirements for the project and changes to the ATS and BMS interface. Exhibit RS-0593 (Expert Report) at 24. We accept those findings.

PowerPoint (Oct. 18, 2023) at 11; *see* Closing Argument Transcript at 11 ("This case comes down to, has the VA met its burden of proving concurrent critical path delay. That's not our burden, that's their burden."). Alares has reversed the burden. It is the *contractor* that, as part of its proof of entitlement to delay damages, "must . . . establish that it was not concurrently responsible for delays." *Yates-Desbuild*, 17-1 BCA at 179,686; *see Sauer Inc. v. Danzig*, 224 F.3d 1340, 1348 (Fed. Cir. 2000) ("It was [the contractor's] burden to establish that the . . . delay was caused by the government and was not concurrent with delay caused by [the contractor]."); *Essex Electro Engineers, Inc. v. Danzig*, 224 F.3d 1283, 1292 (Fed. Cir. 2000) ("[A] contractor cannot recover 'where the delays are 'concurrent or intertwined' and the contractor has not met its burden of separating its delays from those chargeable to the Government.'" (quoting *Blinderman Construction Co. v. United States*, 695 F.2d 552, 559 (Fed. Cir. 1982)).

He opined that there was another eleven-day critical delay associated with cabling installation for permanent power for which he believed Alares responsible, Exhibit RS-0593 (Expert Report) at 21, but, in our findings of fact, we determined that Alares had shown that a VA contractor caused that delay. The VA is responsible for delays caused by its vendors. *Toombs & Co.*, ASBCA 34590, et al., 91-1 BCA ¶ 23,403, at 117,420-22. Accordingly, Alares is entitled to credit for those eleven days of critical path delay.

In summary, we find the VA responsible for a total of 142 days of critical path delay in Period 4. Responsibility for the remaining delays in this period, which include a general lack of dedication of resources to the project by Alares and problems with Alares' subcontractors during the last four months of this period, falls on Alares.

5. <u>Delays During Period 5 (April 12 to September 6, 2019)</u>

At the beginning of this period, Alares, through its updated schedules, projected a substantial completion date of June 6, 2019. Although Alares seeks delay damages for the alleged delay between April 12 and June 6, 2019, any delays that pushed substantial completion to an anticipated June 6 deadline are already accounted for in prior periods. We focus here on delays that allegedly occurred during Period 5 that are not already accounted for in earlier periods.

That being said, the parties' presentations regarding Period 5 have left the Board confused. Throughout this litigation, both parties have consistently treated all Period 5 days as part of the contract performance period. Yet, the record is clear that, by mid-May 2019, Alares had essentially demobilized the construction site. Between mid-May and September 6, 2019, Alares had workers on site no more than a total of four days. *See, e.g.*, Exhibit A5013 at 3 (only common labor charges to project after May 15, 2019 substantial completion date occurred on May 22, 23, 24, and 29); Hearing Transcript, Vol. 4, at 24. It is clear that Alares was working very little on this contract between April 12 and mid-May 2019 and virtually not at all between mid-May and September 6, 2019, when the VA accepted the building "as is" without requiring Alares to fix existing defects. Alares asserts, however, that every day between April 12 and September 6, 2019—or, as we recalculate Alares' argument to remove delay days that were already addressed in earlier periods, between June 6 and September 6, 2019—was a critical path delay for which the VA is responsible and for which Alares is entitled to delay damages. The VA's expert seemingly agrees that it is proper to conduct a CPM analysis for delays during the June 6 to September 6 period.

Both parties also agree, though, that the project was substantially completed on May 15, 2019. Hearing Transcript, Vol. 2, at 33-34.[25] "Substantial completion" is "where the contractor has provided the owner with the 'beneficial use' of the construction project," even if the contractor may have "failed to complete the work in its entirety leaving omissions and deficiencies outstanding for correction." J. Richard Margulies, "Owner Remedies for Contractor Default," in *Construction Contracting* 837, 861 (1991); *see Kinetic Builder's*, 226 F.3d at 1315 ("A project should be considered substantially completed when it is capable of being used for its intended purpose."). The types of "omissions and deficiencies" that may remain after substantial completion are typically identified as punch list work and other activities that, although still needing to be resolved as the contractor wraps up the project, do not preclude beneficial occupancy of the building by the agency. *See, e.g.*, *George Rosen & Son, Inc.*, VACAB 429, 65-2 BCA ¶ 4936, at 23,321; *B.J. Lucarelli & Co.*, ASBCA 8768, 65-1 BCA ¶ 4655, at 22,252. Whatever work remains to be done is, absent contrary language in the contract, "not subject to any contract time limitation on its performance." *George Rosen*, 65-2 BCA at 23,321. Once the contractor has met the substantial completion date, there is no secondary deadline in the contract identifying a mandatory end time for punch list and other wrap-up work. *See id.*

Generally, the date of substantial completion is a bellwether on a construction project. Substantial completion will generally limit the Government's ability to terminate a contract for default because, having obtained beneficial occupancy of the building, any remaining work is viewed as of relatively minor consequence, and the contractor's failure to perform it is typically viewed as entitling the Government to a deductive change rather than as a material breach of the contractor's obligations to the Government. *See, e.g.*, *Wolfe Construction Co.*, ENG BCA 3610, et al., 84-3 BCA ¶ 17,701, at 88,329; *Corway, Inc.*, ASBCA 20683, 77-1 BCA ¶ 12,357, at 59,804; J. Richard Margulies, *supra*, at 863. Similarly, "[l]iquidated damages may not be assessed by the Government for a period after the contract is 'substantially complete.'" *American Construction Co.*, ENG BCA 5728, 91-2

[25] As noted in our findings of fact, the VA's FRCP 30(b)(6) witness testified that the date of substantial completion was "early June 2019," a date based on his understanding that the final punch list was submitted at that time. Exhibit 4310 at 11063. Because the punch list was submitted on May 15, 2019, we interpreted the witness' acknowledgment of substantial completion to refer to the May 15 date. Nevertheless, even if the VA truly meant that substantial completion occurred in early June 2019, it would not affect the result here because, at the start of Period 5, the anticipated substantial completion date was June 6, 2019, with all critical path delays pushing the substantial completion to that date accounted for in earlier periods. To prevail on a critical path delay claim in Period 5, Alares would have to prove critical delays pushing the substantial completion date beyond June 6, 2019.

BCA ¶ 24,009, at 120,171 (quoting *Dillon Construction, Inc.*, ENG BCA PCC-36, 81-2 BCA ¶ 15,416, at 76,386-87); *see Labco Construction, Inc.*, AGBCA 95-104-10, 95-2 BCA ¶ 27,677, at 137,995; *R.J. Crowley, Inc.*, GSBCA 11080(9521)-REIN, 92-1 BCA ¶ 24,499, at 122,275 (1991).

The same rationale that limits the Government's ability to default terminate or to assess liquidated damages after the date of substantial completion applies to the contractor's ability to seek compensation for delays after substantial completion. It is true that, even after reaching substantial completion, Alares still had work to perform, including punch list work and commissioning of the building's systems. But the intermittent activity required by that work involved fixing, confirming the viability of, and wrapping up the main work that had already been performed. We see nothing in the contract that required Alares to complete that work by a specific deadline. *See George Rosen*, 65-2 BCA at 23,321 (punch list work is "not subject to any contract time limitation on its performance"). To the contrary, although the contract required it to reach substantial completion by a certain date (a date that Alares was unable to meet), it did not identify a second date *after* substantial completion when Alares would have to have completed all punch list and commissioning work. Although a good contractor will likely want to finish punch list work as quickly as possible so that it can leave the project behind and devote more attention to other continuing projects, it no longer has the pressure of having to meet a required substantial completion deadline or of getting the building in shape to allow for beneficial occupancy. With the agency already having beneficial occupancy of the space, the punch list and commissioning work that remained after substantial completion did not require Alares' daily presence on-site (as is obvious from the fact that Alares was barely on-site after May 15), and it does not lend itself to claims that the VA caused delays to which Alares was pressured to respond. It certainly did not affect the contractor's ability substantially to complete the project, and post-substantial completion "delays" do not change or affect the actual substantial completion date. *See Olson Construction Co.*, VABCA 361, et al., 1962 WL 185 (Dec. 31, 1962) ("The conclusion is inescapable that the time required for Appellant to effect substantial completion could have been extended only by causes of delay occurring prior to the date substantial completion was achieved.").

Given the parties' agreement that Alares achieved substantial completion on May 15, 2019, a stipulation that the Board accepts,[26] why are the parties applying critical path delay

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[26] Even if the parties did not effectively stipulate to the May 15, 2019, substantial completion date, we would find that it was appropriate in light of the contract language. "A finding of substantial completion is only proper where a promisee has obtained, for all intents and purposes, all the benefits it reasonably anticipated receiving under the contract." *Kinetic*

analysis methodologies to the time period after that date? What "path" of contract performance was there after May 15 that could have been "delayed," particularly since Alares never created or submitted schedule updates to the VA during any portion of Period 5? To the extent that the parties in their briefing and at the hearing purported to analyze the "critical path" of performance *after* substantial completion, we find that analysis of no value to the Board here.

Although the parties do not cite them, we have located two cases in which tribunals have, in the past, awarded delay damages (one applying a daily extended general conditions rate to the days of "delay" and another awarding extended home office overhead expenses) for delays that occurred *after* substantial completion. In *Stephenson Associates, Inc.*, GSBCA 6573, et al., 86-3 BCA ¶ 19,071, one of our predecessor boards, the General Services Board of Contract Appeals (GSBCA), determined that the contractor had been required to work for almost two-and-a-half years after substantial completion on punch list and other work beyond what it should have had to perform and granted it extended home office overhead expenses for that period. *Id.* at 96,346-53.[27] In *Neal & Co. v. United States*,

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Builder's, 226 F.3d at 1315. "In determining whether the project is capable of being used for its intended purpose, it is necessary to consider the specific provisions laid out in the contract. Thus, it is first necessary to identify the contract provisions defining the parties' expectations as to the owner's reasonable use of its facility." *Id.* (internal citation omitted). Here, the only work that Alares had not completed (other than punch list work) before May 15, 2019, was commissioning of the building. In this contract, section 01 91 00 of the contract specifications provided the "General Commissioning Requirements" that Alares had to follow. Exhibit 6 at 233. The specifications anticipated that there would be "[c]ommissioning during the construction and post-occupancy phases." *Id.* Given that the VA took beneficial occupancy, without complaint, before the final commissioning report was issued in July 2019, it appears clear that the contract did not require final commissioning before substantial completion. *See Dynamics Corp. of America v. United States*, 389 F.2d 424, 430 (Ct. Cl. 1968) ("[T]he practical interpretation of a contract, as shown by the conduct of the parties [during performance], is of great weight in interpreting the contract.").

[27] In *Stephenson Associates*, the GSBCA awarded extended home office overhead expenses apparently without requiring the contractor to establish that it was on "standby" during the period of delay. *See* 86-3 BCA at 96,349-50. We need not consider here whether, applying more recent appellate court precedent, that decision would withstand scrutiny today. *Compare P.J. Dick Inc. v. Principi*, 324 F.3d 1364, 1370 (Fed. Cir. 2003) (To recover extended home office overhead expenses consistent with *Eichleay Corp.*, ASBCA 5183, 60-2 BCA ¶ 2688, the contractor must "prove that it was required to remain on standby during that delay.") *with Stephenson Associates*, 86-3 BCA at 96,350 ("[W]e are not going to require

36 Fed. Cl. 600 (1996), *aff'd on other grounds*, 121 F.3d 683 (Fed. Cir. 1997), the court awarded the contractor damages for thirty-six calendar days of post-substantial-completion delay after the agency imposed "seemingly endless punch list items" on the contractor, some of which were unfounded, that created both unnecessary work and obstacles to needed work that required the contractor to work in an extremely inefficient manner. *Id.* at 646. In both cases, the tribunal found that the Government had committed new breaches of contract after the substantial performance date that caused the contractor to incur breach-related costs. *Neal & Co.*, 36 Fed. Cl. at 646; *Stephenson Associates*, 86-3 BCA at 96,349. At least one tribunal has referred to one of those decisions as being "unique" in its "egregious facts" and declined to extend its reach to allow for post-substantial completion delay damages when nothing more than ordinary punch list work issues were at issue. *P.J. Dick Inc. v. General Services Administration*, GSBCA 12058, 96-1 BCA ¶ 28,188, at 140,700 (discussing *Stephenson Associates*).

The circumstances here are nothing like those in *Stephenson Associates* or *Neal & Co*., and we see no basis upon which to award Alares delay time for the post-substantial completion period in this case. Alares has no time cards or daily reports that post-date substantial completion, it had workers on-site no more than a few days in the almost four-month period between substantial completion and the VA's final acceptance of the building, and the site was essentially demobilized during the entire period. Right after substantial completion, Alares refused to continue attending weekly on-site meetings, saying that they were unnecessary. The only activity that occurred, other than perhaps some minor punch list work, was the commissioning of the building, an activity that a commissioning consultant, EBI, conducted. Instead of trying to correct the deficiencies in systems that EBI identified in its July 2019 report, Alares submitted an RFI to the VA, asserting that all identified issues were design defects that the VA needed to tell Alares how to correct. Although the VA did not respond to the RFI within the time frame that Alares requested, there is no evidence that Alares performed any work in anticipation of the VA's response or devoted any resources to attempting to fix the identified deficiencies. When the VA then accepted the building on September 6, 2019, it took the building "as is" and did not require any further corrective work by Alares. In the absence of any significant work by Alares during this punch list phase, we cannot see any basis for awarding Alares extended general conditions damages for days of "delay" during which Alares performed virtually no work.

To the extent that Alares might have attempted to claim that it was on "standby" during the period of time that it was waiting on the VA to respond to RFI 179, which Alares submitted on July 26, 2019, its certified claim makes no request for *Eichleay* damages, and

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strict proof of all elements.").

it has expressly disclaimed that it is seeking extended home office overhead in these appeals. Appellant's Post-Hearing Reply Brief at 35.

Alares is not entitled to any compensation for alleged delays in Period 5.

D. Alares' Argument that It Was Entitled to Pace Activities

In its briefing, Alares argued that, because the VA was delaying critical path work on the project, it was entitled to pace its work while those critical path delays were occurring. Appellant's Corrected Pre-Hearing Brief at 39-40; Appellant's Post-Hearing Brief at 31. It is true that, "where the government causes delays to the critical path, it is permissible for the contractor to relax its performance of *non-critical* work to the extent that it does not impact project completion." Jon W. Wickwire, Stephen B. Hurlbut, & Lance J. Lerman, *Use of Critical Path Method Techniques in Contract Claims: Issues & Developments*, *1974 to 1988*, 18 Pub. Cont. L. J. 338, 381 (1989) (emphasis added); *see Utley-James, Inc.*, GSBCA 5370, 85-1 BCA ¶ 17,816, at 89,109 (1984), *aff'd*, 14 Cl. Ct. 804 (1988). To the extent that Alares is arguing that it also could delay or "pace" critical path activities when a concurrent *critical path* activity would have equally caused delay, it cites no support for such a proposition. In any event, the record does not indicate that, for delays for which it was responsible, Alares was simply pacing its work to account for VA-caused delays.

E. Quantum

1. Alares' Claimed Quantum

Alares' quantum entitlement in these appeals is the total number of delay days awarded in each period multiplied by a daily rate for extended general conditions costs for that period. *See MW Builders, Inc. v. United States*, 134 Fed. Cl. 469, 527-30 (2017); *Amec Foster Wheeler Environment & Infrastructure, Inc. v. Department of the Interior*, CBCA 5168, 19-1 BCA ¶ 37,474, at 182,039, *aff'd*, 835 F. App'x (Fed. Cir. 2021) (table). General conditions costs "refer to 'field' or 'job site' overhead costs of a construction project," inclusive of "expenses for project managers, supervisors, and clerical assistants; temporary offices and utilities and supplies for those offices; and other miscellaneous expenses necessary for on-site management," *AMEC Construction Management, Inc. v. General Services Administration*, GSBCA 16233, 06-1 BCA ¶ 33,141, at 164,247 (2005), plus markups for home office overhead and profit. *MW Builders*, 134 Fed. Cl. at 530-31; *see HGR Construction, Inc. v. Hanover Insurance Co.*, No. 6:18-cv-1406-Orl-40LRH, 2021 WL 868609, at *8 (M.D. Fla. Feb. 1, 2021) (describing extended general conditions expenses as "expenses to operate a construction site, such as trailers, supervision, security, and the like"); *One Place Condominium, LLC v. Travelers Property Casualty Co. of America*, No. 11-C-

2520, 2015 WL 2226202, at *11 (N.D. Ill. Apr. 22, 2015) (describing "Extended General Conditions" expenses as including "administrative costs, trailers, supplies and other costs that are not captured as direct charges"). They are the types of costs that, when a project is extended beyond its original completion date, the contractor will have to continue to incur to maintain the active job site. *See HGR Construction*, 2021 WL 868609, at *8. Such costs are recoverable "when compensable delay causes [the contractor] to remain on a project longer than planned." *Amec Foster Wheeler*, 19-1 BCA at 182,039.

"It has long been held that the contractor bears the burden of proving the amount of its damages 'with sufficient certainty so that the determination of the amount of damages will be more than mere speculation,'" *Mega Construction*, 29 Fed. Cl. at 444 (quoting *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 767 (Fed. Cir.1987)), including its general conditions costs. "The preferred method for proving a contractor's claim is through the introduction of actual cost data such as time sheets or payroll records, if available." *Adapt Consulting, LLC v. General Services Administration*, CBCA 7393, et al., 24-1 BCA ¶ 38,625, at 187,760 (quoting *HOF Construction, Inc. v. General Services Administration*, GSBCA 13317, et al., 96-2 BCA ¶ 28,406, at 141,849). "As such, the contractor 'must provide the [tribunal] with specific documentation of the expenses caused by the government's change.'" *Id.* (quoting *Doninger Metal Products Corp. v. United States*, 50 Fed. Cl. 110, 125 (2001)); *see Dawco Construction, Inc. v. United States*, 930 F.2d 872, 882 (Fed. Cir. 1991) ("[T]he 'actual cost method' is preferred because it provides the [tribunal], or contracting officer, with documented underlying expenses, ensuring that the final amount of the equitable adjustment will be just that—equitable—and not a windfall for either the government or the contractor."), *overruled in part on other grounds*, *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995). "The most convincing evidence to prove costs incurred would come from contemporaneous reports routinely prepared as the effort was expended." *HOF Construction*, 96-2 BCA at 141,849.

At the hearing, Alares provided the Board with what it said was a breakdown of its general conditions costs into five separate periods (correlated to the delays identified in the delay analyses of Periods 1 through 5), which Alares said it took "from actual costs . . . derived from timesheets and expenses during that period" as "cost-coded into [Alares'] accounting system." Hearing Transcript, Vol. 1, at 157-58. The general conditions costs, we were told, include daily labor rates for the project and assistant project managers, common labor, superintendent, and administrators. *Id.* at 159. Additional general conditions costs were also included in the daily rate. These costs were "[t]he costs of providing [a] job trailer, toilets, third-party scheduling, and other job site general conditions costs [that] are . . . claimed based upon an average daily rate and [are] repeated for all five periods." Appellant's Post-Hearing Brief at 60. In calculating these daily rates, Alares also added a general and administrative (G&A) cost markup and a 10% profit on its claims. Hearing Transcript,

Vol. 1, at 177-83, 186. For each of the five periods of critical delay that were analyzed, Alares calculated the following daily rates:

Period	Proposed Daily Rate
Period 1 (delaying completion to 9/5/17)	$3451.57
Period 2 (delaying completion to 12/27/17)	$2782.75
Period 3 (delaying completion to 12/14/18)	$2831.19
Period 4 (delaying completion to 2/14/19)	$1296.11
Period 5 (delaying completion to 9/6/19)	$1111.48

Exhibits A5008, A5009, A5010, A5011, A5012, A5013.[28]

2. The VA's Objections to Alares' Quantum Calculations

a. Alares' Repeated Changes to Cost Calculations

The VA has raised several objections to the calculation of the costs that form the basis of the daily rates. The VA first complains that Alares' calculations are simply not reliable, as they have changed repeatedly during the course of discovery and, in fact, changed on the very last day of the hearing, when Mr. Maggioli presented new numbers to replace those about which he had testified on the first day of the hearing, allegedly to remove potential double-counting that the VA had elicited during cross-examination on that first hearing day. Respondent's Post-Hearing Brief at 59-63; *see* Hearing Transcript, Vol. 5, at 15-38. Although the constantly changing numbers in Alares' various claim support submissions throughout this litigation has understandably caused the VA concerns about the veracity of Alares' numbers, the VA is relying at this point only on suspicions, without any actual evidence. The VA represents that it intentionally "did not obtain a [Defense Contract Audit Agency] audit but is confident that a detailed audit would find additional problems" in Alares' cost support. Respondent's Post-Hearing Brief at 55. That kind of speculation, when the agency could have but elected not to pursue an audit of the contractor's claim, is not sufficient to provide a basis for reducing Alares' cost recovery.

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[28] We recognize that the periods for which Alares identifies daily rates are tied to the periods of time that Mr. Maggioli selected for his delay analysis, rather than the periods that Mr. D'Onofrio and the Board have analyzed. Below, we will address how we have handled that discrepancy.

In his expert rebuttal report, dated May 2, 2022, Mr. D'Onofrio identified an obvious conflict between the direct labor costs that Alares was then alleging and the direct labor costs that Alares' job cost reports showed it had actually paid its employees, with Alares claiming more than it had actually paid. *See* Exhibit RS-0592 (Expert Rebuttal Report) at 16-17. Because the VA did not raise this issue in its post-hearing brief, we presume that Alares' subsequent corrections to its monetary request has resolved that concern.

b. Time Charges by Alares' President

The VA next complains that Alares is charging the time of its CEO, Mr. Maggioli, as a general conditions cost even though it has included some of his time in Alares' G&A overhead pool. Respondent's Post-Hearing Brief at 40-43; Closing Argument Transcript at 133-34. Although a contractor can elect to charge the time that its owner dedicates to work on a particular job as a direct cost to that contract, it cannot do so if it has *also* included the owner's time in its G&A pool, even if it attempts to segregate and remove what it is now charging as a direct cost from G&A. *Active Construction, Inc. v. Department of Transportation*, CBCA 6597, 22-1 BCA ¶ 38,070, at 184,853-56; *see* FAR 31.105(d)(3). Once it made the decision to elect to include its owner's time in G&A overhead, Alares could not then charge his time to this project as a direct cost. *Active Construction*, 22-1 BCA at 184,853-56. Alares acknowledges that it has included many hours of Mr. Maggioli's time in its G&A pool, which is included in its general conditions daily rate through a markup to its jobsite overhead costs. Closing Argument Transcript at 58-61.

Beyond the problem associated with Alares splitting Mr. Maggioli's time and charging some of it directly to this project and some of it to G&A, there are virtually no contemporaneous time records in the record to support Mr. Maggioli's direct time charges for jobsite work. In 721 pages of daily manpower logs, in which Alares contemporaneously identified employees that worked at the construction site each day throughout the project, Mr. Maggioli is identified only in one log, from May 21, 2019, which indicates that he worked eight hours at the site that day. Exhibit RS-0589 at 716. There is no other contemporaneous evidence of Mr. Maggioli's direct work on the construction project. Yet, in the lists of employee hours worked on this project that support Alares' general conditions daily rate calculations, Mr. Maggioli lists 1964 hours of direct cost time when he allegedly served as "Project Manager" on this contract,[29] *see* Exhibits A5009 at 4, A5010 at 5-6, A5011 at 10-12, A5012 at 4, A5013 at 4-5, even though the actual project managers

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[29] In earlier iterations of Alares' claim, Mr. Maggioli was described as "Principal" rather than "Project Manager." *See* Exhibits RS-0535 at 30-32, RS-0537 at 31, 34-37.

identified during performance were Nick Budris, Josh Abrams, and George Archambeault. Although he lists extensive hours that he allegedly devoted to this project on a day-by-day basis, which he says he took from his time cards, those cards are not a part of this record, and the VA asserts that it never saw them. Given the non-contemporaneous nature of the recently created documentation upon which Alares relies and the fact that Alares also includes Mr. Maggioli in its G&A, we will exclude his time from Alares' general conditions costs.

Because it appears that Mr. Maggioli, even for time charged directly to this contract, was working in his home office rather than on the job site, and because Alares charged some of his time to G&A, all of his time should have been charged to G&A. Had Alares done so, the costs contained within Alares' G&A pool would have been much higher, meaning that Alares' G&A markup in its general conditions daily rate calculation would have been higher. There is no way for the Board to know, however, exactly how much the assignment of all of Mr. Maggioli's time to G&A would increase the G&A pool. In such circumstances, the Board can calculate Alares' ultimate award, including any changes in the award needed to account for the fact that the G&A pool figure requested is too low, in the form of a "jury verdict" award. *See, e.g.*, *Bluebonnet Savings Bank, F.S.B. v. United States*, 266 F.3d 1348, 1357-58 (Fed. Cir. 2001); *Fanning, Phillips, & Molnar*, VABCA 3856R, 96-2 BCA ¶ 28,427, at 141,998. "The ascertainment of damages, or of an equitable adjustment, is not an exact science, and where responsibility for damage is clear, it is not essential that the amount thereof be ascertainable with absolute exactness or mathematical precision: 'It is enough if the evidence adduced is sufficient to enable a court or jury to make a fair and reasonable approximation.'" *Electronic & Missile Facilities, Inc. v. United States*, 416 F.2d 1345, 1358 (Ct. Cl. 1969) (quoting *Specialty Assembling & Packing Co. v. United States*, 355 F.2d 554, 572 (Ct. Cl. 1966)); *see Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 968 (Ct. Cl. 1965) ("It is sufficient if [the appellant] furnishes the court with a reasonable basis for computation, even though the result is only approximate."). In calculating the daily rate that Alares can recover in CBCA 6149, we will take into account the fact that Alares' G&A markup request is too low and, through a jury verdict, provide a reasonable increased allocation to the daily rate to remedy the understated G&A amount. *See Fischbach & Moore International Corp.*, ASBCA 18146, 77-1 BCA ¶ 12,300, at 59,240-41 (1976) (approving recovery of a G&A amount higher than what the contractor originally recorded in its accounting systems to address costs that the contractor should have included in its G&A pool but had incorrectly assigned to other pools for which the board had already denied recovery).

c. Common Laborer Time as a General Conditions Cost

The VA also alleges that Alares, in calculating its general conditions daily rate, is including the costs of common laborers who were working on-site at specific times to

perform activity-specific work required by the contract or by changes to the contract. Exhibit RS-0592 (Expert Rebuttal Report) at 17-18; Respondent's Post-Hearing Brief at 42-48; Closing Argument Transcript at 135. The VA identifies as an example the daily logs showing the work of one particular employee, Mr. Silva, whose work to remove a window, install framing, and make the window weathertight is a part of Alares' general conditions daily rate calculation. Respondent's Post-Hearing Brief at 44 (citing Exhibit 17 at 739). The work that Alares included in its common laborer general conditions calculation covered contract activities such as stairway fireproofing, painting and sealing columns, installing roof curbing and sleepers, installing and fixing panels, working to insulate soffits, and carpentry. *See id.* at 46-48 (identifying descriptions of common laborer work that was billed).

The types of construction project work that Alares' common laborers performed on specific discrete activity-based construction tasks constitute direct labor costs that are charged to the specific contract activity being performed. *Overstreet Electric Co. v. United States*, 47 Fed. Cl. 728, 740 (2000); *see Anthony Grace & Sons, Inc.*, ASBCA 6921, 72-1 BCA ¶ 9299, at 43,104 (finding common labor charges for carpentry and material handling work necessitated by a changed condition to constitute a "direct labor cost"), *modified on other grounds*, 72-2 BCA ¶ 9541. "[D]irect labor cost refers to the cost of individuals who work specifically on manufacturing a product or performing a service," particularly for "workers who transform the materials into a finished product at some stage of the production process." Darrell J. Oyer, *Accounting for Government Contract Cost Accounting Standards* § 27.05[3][b], at 27-17 (Matthew Bender 2016). "[D]irect labor is sometimes called *touch labor* because the workers typically touch the product while it is being made." *Id.*; *see Midwest Maintenance & Construction Co.*, GSBCA 6225(4743)-REIN, et al. 85-1 BCA ¶ 17,716, at 88,434 (1984) ("In accounting parlance, 'direct labor' is usually defined as 'all labor that is physically traceable to the finished goods in an economically feasible manner. Examples are the labor of machine operators and assemblers.'" (quoting Charles T. Horngren, *Cost Accounting* 27 (1982)). Under the FAR, "[d]irect costs of the contract shall be charged directly to the contract" and not treated as indirect costs. FAR 31.202(a).

Direct labor costs are not "general conditions" costs. Extended general conditions expenses refer to recurring time-related field *overhead* costs, such as "expenses for project managers, supervisors, and clerical assistants" that are not assigned to a specific project construction work activity and instead benefit the project as a whole. *AMEC Construction*, 06-1 BCA at 164,247; *see Overstreet Electric*, 47 Fed. Cl. at 740 ("[M]ost indirect labor costs are generally reflected in job overhead (or possibly home office overhead)."). Indirect overhead costs are not intended to cover work directed towards a specific construction activity. *See Midwest Maintenance*, 85-1 BCA at 88,434 ("'Indirect labor' is therefore activity which cannot be traced to specific products via physical observation."); Exhibit

RS-0592 (Expert Rebuttal Report) at 17 ("[C]ommon laborer day time, which has direct labor plus burdens, [is] a direct cost of the work and not a time related cost, [and], as such, [is] inappropriate to claim as a time related cost."). As Mr. Maggioli agreed at the hearing, general conditions costs "aren't specific to an activity but just specific to [the] project," such as the monthly cost for a dumpster rental. Hearing Transcript, Vol. 2, at 107; *see id.* at 106 (agreeing that general conditions costs are those that "you pay on a monthly basis"). The cost of construction work that laborers perform on the product to be delivered to the Government is a direct labor cost that is "allocated to that item and not reflected in job overhead." *Overstreet Electric*, 47 Fed. Cl. at 740.[30]

We agree with the VA that common labor time should be removed from Alares' general conditions calculation. It is clear that Alares has taken costs that should be considered direct costs and treated them as indirect extended general conditions expenses in a manner that significantly increases its general conditions daily rate.[31] Direct costs necessary to perform the work required by the contract are covered by the original contract price, and, if there are changes during performance that cause extra work, the contractor recovers those costs through an equitable adjustment that directly funds the labor hours incurred by trades that were necessary to perform the change. *See Stapleton Construction Co. v. United States*, 92 Ct. Cl. 551, 564-66 (1940). Change work or originally required contract work that tradespeople and common laborers perform is not treated as an indirect cost. Alares cannot inflate its extended general conditions costs by adding common laborer direct costs to its jobsite overhead daily rate calculations.

d. Alares' Profit and G&A Overhead Markups

Although the VA complains that Alares' contract suggests that a 7% profit markup is appropriate, rather than the 10% markup that Alares applies here, the Board has previously held that "[a] ten percent profit factor usually has been accepted by the boards and courts as the standard in the construction industry," *Yates-Desbuild*, 17-1 BCA at 179,712 (quoting John Cibinic, Jr. & Herman M. Braude, "Cost Recover & Major Pricing Elements," in *Construction Contracting* 685, 764 (1991)), and we will allow Alares to apply that profit rate

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[30] Mr. Maggioli, in testifying about the REAs, agreed that the labor hours being claimed there were direct costs. Hearing Transcript, Vol. 2, at 27. Many of the same labor hours are being claimed as general conditions expenses in CBCA 6149.

[31] Mr. Maggioli agreed at the hearing that activities such as window installation would not be a general condition but instead that costs for that work would be a direct cost, Hearing Transcript, Vol. 2, at 109, yet Alares' general conditions claim in CBCA 6149 includes window installation labor costs in its general conditions daily rate calculation.

here. We also accept Alares' overhead markup rate, despite the VA's objection. We view the VA's complaints about other costs that make up Alares' general conditions, *see* Respondent's Post-Hearing Brief at 49-55, as not sufficiently supported.

e. The VA's Remaining Cost Challenges

The VA raises additional cost challenges, including complaints about whether the VA's charges for small tools, shipping, copying, and supplies are adequately supported, whether various costs are double- or even triple-counted in Alares' general conditions daily rate calculation, and whether such costs are even appropriately included in general conditions. Respondent's Post-Hearing Brief at 49-57. We deny these challenges. Alares has adequately supported its costs and shown them to be a part of job site overhead.

To the extent that the VA has raised other cost challenges not previously discussed, they are denied.

3. The Effect of the Settlement of Six General Conditions REAs

The parties have agreed that, if there is general conditions entitlement for any of the five periods claimed, the VA is entitled to a credit to account for the parties' settlement of six previously submitted REAs involving general conditions management costs. Hearing Transcript, Vol. 2, at 9; Closing Argument Transcript at 86-87. In those six REAs (which were the basis of the appeals in CBCA 7069, 7070, 7072, 7074, 7075, and 7086), Alares sought payment of a collective total of $167,756, but it agreed to settle the REAs in exchange for a lump sum payment of $88,000. Hearing Transcript, Vol. 2, at 14; Exhibit 3301 at 12. It did so, though, without breaking out the costs applicable to each REA or to specific periods of time covered in the REAs. The parties' settlement agreement, which was incorporated into the contract through modification P00015, included a release through which Alares agreed that the settlement payment constituted full and complete satisfaction of the REAs. Exhibit 3301 at 13. Alares asserts that the fairest way to credit the labor costs associated with the six REAs is to take $88,000 and divide it by $167,000, which provides a recovery rate of 53%. Hearing Transcript, Vol. 2, at 15-16, 21-22. Alares proposes to apply a 53% factor to the direct labor costs for the REAs and to credit back the resulting dollar amount to the VA. *Id.*; *see* Exhibit A5005; Closing Argument Transcript at 86-87.

We do not see how Alares' suggestion, which essentially seeks to credit the VA for the amount of the settlement but to keep 47% of the costs that it had essentially waived through the settlement in its current general conditions claim, is a "fair" way to address the effect of the parties' modification P00015 settlement. Although the scope of any settlement is defined by language in the parties' agreement, interpreted in accordance with basic rules

of contract interpretation, *see Alliant Techsystems Inc. v. United States*, 74 Fed. Cl. 566, 575-78 (2007), Alares agreed that the VA's $88,000 payment "constitute[d] full and complete settlement and satisfaction of the Claims" at issue in the six REAs, "including but not limited to *all* costs" that Alares had claimed in those REAs. Exhibit 3301 at 13 (emphasis added). In the six REAs at issue, Alares identified all of the labor hours for which it was seeking compensation, providing the name of the employee who worked and whose time was being charged to the REA and listing the specific days worked and the number of hours charged for each day. Alares' settlement of its claims for those *specific* labor hours precludes Alares from reviving those labor hour costs in its CBCA 6149 general conditions cost calculations. Having demanded payment of particular costs in its REAs and then settling them with a release that provided "full and complete settlement and satisfaction" of those claimed costs, Alares has waived its claim for them. Alares' offer to give the VA a credit for only 53% of the specific costs that it settled does not comport with its full settlement and release of those costs.

Nevertheless, having studied each of the six REAs encompassed within the settlement agreement, we see that the need to remove from CBCA 6149 the labor hours costs claimed in CBCA 7069, 7070, 7072, 7074, 7075, and 7086 and settled in modification P00015 has been mostly rendered moot by the Board's decision above to eliminate Alares' inclusion of common labor from the extended general conditions calculation. Looking at the REAs underlying CBCA 7069, 7070, 7075, and 7086, each of the REAs sought payment of common labor time that duplicates the common labor time in Alares' current claim. *Compare* Exhibit 064Z1 at 214-15 (claiming common labor hours worked from June 18 to July 6, 2018, by Messrs. Franchini, Arias, and Viera) *with* Exhibit A5011 at 4-6 (seeking payment for the same common labor hours of the same employees (CBCA 7069)); Exhibit 065Z6 at 460 (claiming common labor hours worked on April 13, 20, and 27, 2018, by Mr. Franchini) *with* Exhibit A5011 at 4 (seeking payment for the same common labor hours of the same employee (CBCA 7070)); Exhibit 069Z7 at 1734-35 (claiming common labor hours worked by Mr. Comito on June 11, 12, and 13, 2018) *with* Exhibit A5011 at 8 (claiming the same common labor hours of the same employee (CBCA 7074)); Exhibit 070T at 1894-96 (claiming 369 hours of common labor for maintenance of fire egress, plus $3670 for materials, from August 15, 2016, through April 13, 2018) *with* Exhibits A5009 at 1, A5010 at 1, A5011 at 1 (claiming common labor for same periods (CBCA 7075)); Exhibit 075G at 2548-54 (claiming forty-eight hours of common labor worked on August 6, 7, 8, 9, 27, and 30, 2018) *with* Exhibit A5011 at 1 (claiming common labor hours for same periods (CBCA 7086)). Because we have already decided to remove all common laborer time from the extended general conditions calculation in CBCA 6149, we need not account for the portion of the modification P00015 settlement encompassing those common labor costs.

Similarly, because we have stripped out of Alares' general conditions calculation any time for Mr. Maggioli, Alares' recovery here will not include the thirty hours of labor time that were a part of the REAs settled in CBCA 7069, 7072, and 7074. *See* Exhibits 064Z1 at 187, 069Z7 at 1734-35, 067Z at 1033. We will, as discussed above, add an amount to Alares' award to account for the fact that Mr. Maggioli's time should have been included in G&A.

In addition, although the REAs underlying CBCA 7072 and 7074 included time for Alares' project manager, assistant project manager, and/or a supervisor, the time that was claimed there is *not* being claimed in CBCA 6149, *see* Exhibits 067Z at 1033 (CBCA 7072), 069Z7 at 1734 (CBCA 7074), A5008 at 1, making it unnecessary to account for it in any monetary award in CBCA 6149.

There is only one REA—the one at issue in CBCA 7069—in which Alares requested payment of particular labor costs that duplicate costs in Alares' CBCA 6149 general conditions claim. In that REA, Alares sought a total of $7667.52 in labor time for a project manager, George Archambeault, and an assistant project manager, Bruce Callard, that it has included as part of its general conditions calculation in CBCA 6149 and that we have not previously removed from that calculation. *Compare* Exhibit 064Z1 at 187, 213 *with* Exhibit A5011 at 12-19. Alares cannot simply forfeit its claim to 53% of those previously claimed costs but revive the remainder in its CBCA 6149 calculation. Alares specifically demanded payment of the $7667.52 labor hour time in CBCA 7069, and it settled its claim for that money. The only way to address that money is to strike it from Alares' damages calculation in CBCA 6149. Because the settled labor time is included in the Period 3 general conditions calculation, we will recalculate Period 3 after removing the $7667.52 in labor time.

4. <u>Calculation of Alares' Quantum Entitlement</u>

Looking at Exhibits A5009, A5010, and A5011, we found it fairly simple to remove Mr. Maggioli's time and common laborer time from Alares' cost calculation sheets for extended general conditions expenses in Periods 1 and 2 and identify a fairly accurate estimate of the VA's liability for those expenses, while adding through a jury verdict an amount of Mr. Maggioli's missing G&A time. For Period 3, Alares' cost calculation spans a longer period of time than the dates that we defined as Period 3 in our evaluation of critical delay, but, using a jury verdict calculation, we have made a best effort to account for general conditions labor hours for the project managers, assistant project manager, superintendent, and administration, less the amounts claimed for Mr. Maggioli's time, common laborer time, and the $7667.52 settlement credit discussed above, to create a fair approximation of the VA's liability. For Period 4, we have not identified an easy way to recalculate Alares' calculations excluding Mr. Maggioli's and common laborer time, particularly since the

period of time that we selected as Period 4 spans parts of three different Alares cost calculation sheets (with a portion of Period 4 covered by a portion of Exhibit A5011, a portion of it covered by Exhibit A5012, and a portion of it covered by a portion of Exhibit A5013). To reach a fair approximation of the VA's liability, we have applied a jury verdict reduction to Alares' claimed daily rate that, in the Board's best estimation, appropriately allocates and assigns time within each of Alares' three cost calculation sheets covering Period 4.

We award Alares the following quantum:

Period	Days of Delay	Proposed Rate	Awarded Rate	Total Award
Period 1	4 Days	$3451.57	$2500.00	$ 10,000.00
Period 2	38 Days	$2782.75	$2000.00	$ 76,000.00
Period 3	34 Days	$2831.19	$1700.00	$ 57,800.00
Period 4	142 Days	$1296.11	$1000.00	$142,000.00
Period 5	No Days	$1111.47	N/A	Zero

Adding the figures from Periods 1 through 5 together, Alares' total quantum award is $285,800.

III. Alares' Good Faith and Fair Dealing Breach Claim (CBCA 7597)

On September 29, 2022, while CBCA 6149 was pending before the Board, Alares submitted a new certified claim to the VA contracting officer seeking the same monetary relief as in its claim in CBCA 6149 but alleging a new theory in support: the VA's alleged breach of its duty of good faith and fair dealing. After the contracting officer denied that claim by decision dated November 28, 2022, Alares filed a notice of appeal with the Board, which the Board docketed as CBCA 7597. By order dated March 6, 2023, the Board consolidated that appeal with CBCA 6149.

In the claim underlying CBCA 7597, Alares alleged that the VA breached its duty of good faith and fair dealing by "fail[ing] to reasonably review and approve Alares change order and REA delay requests because of funding limitations." Notice of Appeal in CBCA 7597 (Nov. 29, 2022), Exhibit 1 at 1. Specifically, it alleged as follows:

> Six years after the Project had initially been funded, Alares was awarded the construction contract in April of 2016 and the notice to proceed was issued on June 3, 2016. A year later, in the summer of 2017, the contingency for the Project was nearly exhausted due to unforeseen conditions, and pervasive design errors, which required work outside the scope of Alares' contract and extended the project schedule. To keep the increasing costs from exceeding the approaching Minor Construction Project Threshold, the VA unreasonably forced Alares into absorbing additional costs by wrongly withholding equitable adjustments; seeking credits for out-of-scope work; threatening to terminate for default; and refusing to extend the contract performance period to avoid paying the extended general conditions to which Alares was clearly entitled.

Id., Exhibit 1's Second Addendum to Claim at 1. It alleged that "the VA forced Alares to absorb the additional costs and created an adversarial environment by unreasonably (1) giving Alares poor performance reviews; (2) directing Alares to perform out of scope work at its own cost; (3) refusing to cooperate with Alares, (4) failing to resolve design deficiencies and unforeseen conditions; (5) denying requests for equitable adjustment, (4) [sic] delaying in issuing contract modifications, and (6) refusing to grant time extensions." *Id.* at 2. It claimed that "[t]he VA unreasonably made Alares absorb its budgetary shortfalls by first forcing Alares to fund the work and second by forcing Alares into litigation to recover its claims from the judgment fund." *Id.* It concluded that "[t]he VA's campaign to impose the additional costs of construction onto Alares ultimately had a material impact to the construction progress and schedule and breached the VA's implied duty of good faith and fair dealing." *Id.*

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement." *Metcalf Construction Co. v. United States*, 742 F.3d 984, 990 (Fed. Cir. 2014) (quoting Restatement (Second) of Contracts § 205 (1981)). "Failure to fulfill that duty constitutes a breach of contract." *Id.* Although we typically define the scope of that duty on any particular contract by looking to the contract's terms, which define each party's contract obligations, "[i]dentifying some acts as breaches of the duty, like '[s]ubterfuges and evasions,' may require little reference to the particular contract." *Id.* at 991 (quoting *Malone v. United States*, 849 F.2d 1441, 1445-46 (Fed. Cir. 1988)) (internal citation omitted). Here, Alares alleges that the VA engaged in a type of subterfuge, which, whether intentional or not, interfered with and delayed its performance. That type of conduct, if true, would constitute a breach of the duty of good faith and fair dealing. *See Peter Kiewit Sons' Co. v. United States*, 151 F. Supp. 726, 731 (Ct. Cl. 1957).

Even without deferring to the long-standing doctrine that government officials are presumed to act in good faith, *see Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 795 (Fed. Cir.

1993), Alares has failed to prove that the VA acted in a manner inconsistent with its obligation to act in good faith and with fair dealing. At the hearing, Alares presented evidence about the manner in which this contract was funded as a minor program project, which had a $10 million cap, Hearing Transcript, Vol. 2, at 188; Exhibit 3923 at 7878, meaning that the total project cost could not exceed $10 million, Hearing Transcript, Vol. 2, at 189, and how the VA requested cost limit increases (CLIs) during the project to add funding to allow for contingencies. *Id.* at 190-91, 194; Exhibit 4048 at 8350. Yet, the cost of changes resulting from differing site conditions and other unanticipated changes like contract claims are not included in that $10 million threshold, Hearing Transcript, Vol. 2, at 200-01, and Alares presented no viable evidence that the VA ever refused a change order because it lacked funding. *See, e.g.*, *id.* at 203, 205. We need not detail all of the evidence that the parties presented regarding funding and appropriations, other than to note that Alares' arguments are based on little more than conjecture and speculation. We find that the VA acted in good faith in dealing with Alares' change requests and was appropriately protecting the Government's interests in ensuring proper performance of this contract, in accordance with its contract rights, in issuing cure notices and the show cause notice. We reject Alares' good faith and fair dealing breach argument.

IV. Alares' Patient Lift Claim (CBCA 7071)

Separately from its delay claims, Alares seeks payment for an alleged contract change that required it to remove and reinstall three structural supports for patient lifts that it had previously installed in Rooms 208, 209, 211, and 213 in the newly built space. *See* Exhibit 066T.

Alares' contract required it to furnish and install ceiling mounted patient lift systems, which would be used to move non-ambulatory veterans around a room as medically necessary. Exhibit 6 at 853. The body weight of patients being lifted and moved is supported through structural supports. Closing Argument Transcript at 90. Alares was to install the lift systems "as per manufacturer's instruction and under the supervision of [a] manufacturer's qualified representative and as shown on drawings" accompanying the contract specifications. Exhibit 6 at 857.

Alares provided the VA with a submittal with its patient lift calculations on March 13, 2017, which the contracting officer approved on April 5, 2017. Exhibit 66C at 556-69. Nevertheless, the VA modified the layout in a revision that it provided Alares on June 1, 2017. Exhibit 66E at 572-82. On July 18, 2017, Alares submitted a request for information, RFI 054, to the VA, asking various questions about the design and installation of the patient lifts, Exhibit 66I at 605, and the VA responded with additional drawings prepared by the designer, Liko, on August 1, 2017. *Id.* Alares raised additional questions (at the request of

a subcontractor, ATR Sales, Inc. (ATR)) through RFI 077 on September 22, 2017, questioning whether duct and piping in the ceiling area precluded installation in the manner specified in the Liko drawings and recommended, based on ATR's consultation with Liko, installing the support structure parallel with the lift track and to use radius pieces to facilitate the alignment of the turns in the track. Exhibit 66L at 641. On September 27, 2017, the VA agreed to ATR's suggestion "provided that the final fit and finish of the work (patient lift pendents/lift track alignment/required pendent spacing/support system installation per approved structural calculations) is not affected" and that "[a]ll work required to adjust the supports to make the installation acceptable shall be at no cost to the Government." *Id.* at 642.

Both at the hearing and in its briefing, Alares talked extensively about these exchanges, which caused changes to the lift support work and how those changes affected Alares. *See, e.g.*, Hearing Transcript, Vol. 1, at 198-208; Appellant's Corrected Pre-Hearing Brief ¶¶ 91-101 at 28-31. Yet, that discussion is mostly irrelevant to the patient lift issue before us because the parties resolved all direct cost claims associated with those issues through bilateral modification P00006, executed October 26, 2017, Exhibit 43 at 1-2, 43-60, which contained language "releas[ing] the Government from any and all liability under this contract for further adjustment [of direct costs] attributable to such facts and circumstances" giving rise to the changes. *Id.* at 2.

Despite Alares' recitations at the hearing and in its briefing, the written claim at issue before us now is unrelated to the changes covered in modification P00006. It deals with a different aspect of the patient lift work that arose later in time. Specifically, after getting the new drawings in response to RFIs 056 and 077, Alares did not provide the VA with a new submittal. Instead, on October 5, 2017, its subcontractor, ATR, installed the patient lift supports, configuring the above-ceiling supports using the original March 13, 2017, submittal as its guide. *See* Exhibit 66V at 2-3; Appellant's Corrected Pre-Hearing Brief ¶ 102 at 31. When ATR installed these supports, the MEP rough-in work was not complete. Hearing Transcript, Vol. 1, at 201-02. As another of Alares' subcontractors, Delta Mechanical, was continuing its MEP installation work, it removed some of the patient lift supports that ATR had previously installed so that it could install required diffusers. Hearing Transcript, Vol. 1, at 209; *id.*, Vol. 3, at 141-42. After one of the VA's employees discovered the removed sections on the floor of the project site, the VA notified Alares that it had to fix the problem and properly reinstall the supports. Closing Argument Transcript at 89-90.

On February 10, 2020, Alares submitted a claim to the VA contracting officer on February 10, 2020, seeking payment of $7344.70 (now reduced to of $6538.24,[32] *see* Appellant's Post-Hearing Brief at 65 (citing Exhibit 4270 at 10273)) for the cost of reinstalling structural supports. The fact that Alares' current patient lift claim focuses on the costs associated with ATR's work in reinstalling the patient lift supports after Delta Mechanical removed them, rather than on the earlier changes upon which Alares has tried to focus the Board, is made clear in the invoice that forms the basis of this claim, which Alares' subcontractor, ATR, provided to Alares:

> ATR proposes to furnish labor and materials to modify the existing previously installed strut structural support, of which was altered [sic] to allow for installation of items by another contractor in the above four (4) rooms.

Exhibit 66T at 761. The claim identifies no costs resulting from changes to the patient lift design between April and September 2017. *See id.*[33]

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[32] The work for which Alares sought payment of $7344.70 in its original REA dated February 10, 2020, was for work that it and ATR performed, *see* Exhibit 066T at 000758, but it subsequently removed Alares' claimed direct labor costs of $871.20 from its claim while adding a bond fee markup. Alares' current claimed amount of $6538.24 consists of $5885 that Alares paid ATR, a 10% fee on that payment amount ($588.50), and a 1% bond fee markup ($64.74). Exhibit 4270 at 10273.

[33] At the hearing, Mr. Maggioli was asked whether the work required by the VA's response to RFI 054 was a part of this claim, and he answered that it was. Hearing Transcript, Vol. 1, at 207. A review of the February 10, 2020, claim and its supporting documentation shows that work required by the VA's response to RFI 054 absolutely was *not* the basis of the submitted February 2020 claim. *See* Exhibit 66T.

In its pre-hearing brief, Alares represented that the VA, after making changes to drawings for the patient lifts that were covered by modification P00006 (through which Alares released all direct cost claims), issued another set of drawings for the lifts on January 8, 2018. Appellant's Corrected Pre-Hearing Brief at 30 (citing Exhibit 4303). Although Alares seems to suggest in that pre-hearing brief that the changes in those drawings support the basis for its current claim, the February 2020 claim does not mention and appears unrelated to the January 8 drawings. Further, notations on the January 8 drawings indicate that any changes in the drawings relate to "[r]evised pendant sizes per field," Exhibit 4303 at 10544-56, which Alares did not establish at the hearing or in any briefing has anything to do with the need to reinstall the supports for patient lifts. If the January 8, 2018, drawings have any relationship to Alares' patient lift supports claim, Alares has not met its burden of

Alares cannot place responsibility for ATR's need to reinstall the supports on the VA. Section 1.3(A) of the contract specifications, titled "General Project Coordination," provides that "[t]he Contractor shall be responsible to uncover work completed in order to install ill-timed work, at no additional cost to the Owner." Exhibit 6 at 46. Section 1.4 of the specifications, titled "Utilities, Mechanical and Electrical Coordination," required the contractor to "[c]oordinate all Work of this Project" and provide for the "[g]eneral coordination of piping, ductwork, conduits and equipment," including the following:

> Coordinate final locations of ceiling mounted devices (including air distribution devices, thermostats, heaters, control devices, sprinkler heads and similar work) with reflected ceiling plans. Review locations with the Owner's Project Manager and the Architect and obtain approval of all devices prior to installation.

Id. at 47-48. It is beyond question that, even without contract provisions identifying such a requirement, "[a] prime contractor is obligated to review the contract specifications and drawings and to coordinate the activity of its subcontractors based upon all of the contract requirements." *Fred A. Arnold, Inc.*, ASBCA 28545, 89-1 BCA ¶ 21,190, at 106,951 (1988).

ATR's need to reinstall the lift supports arose because the supports, as constructed, made the work of another Alares subcontractor, Delta Mechanical, impossible to perform. To complete its MEP work, Delta Mechanical removed the supports, leaving them for ATR to reinstall. Although Alares blames the VA for this problem, no issue would ever had arisen had Alares coordinated the work of its subcontractors to ensure that ATR did not install the lift supports until Delta Mechanical had completed whatever work needed to be completed in that space before the supports were installed. Alares' failure to coordinate that work and to ensure that ATR did not install the patient lift supports before Delta Mechanical installed MEP provides no basis for a cost claim against the VA. *See National Housing Group, Inc. v. Department of Housing and Urban Development*, CBCA 340, et al., 09-1 BCA ¶ 34,043, at 168,378 ("Relief under a theory of constructive change is inapplicable for the purpose of shifting a contractor's risk to the Government where there was no direction to [the contractor] to perform its contracts in a manner different from that specified.").

Alares alleges that the work was a constructive change because, had the VA not delayed in procuring patient lift equipment and provided Alares with design information that it needed to install the patient lift rails and coordinate the installation of the rails with the MEP work, Alares would never have needed to perform the removal and reinstallation work.

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establishing what that connection is.

See Appellant's Post-Hearing Brief at 64. That allegation is inconsistent with the record evidence.

To the extent that Alares is complaining that changes resulting from RFIs 054 and 077 caused it to incur extra costs, that allegation is outside the scope of and not the basis of its February 2020 claim, and, in any event, Alares waived such complaints by executing bilateral modification P00006. *See Progressive Brothers Construction Co. v. United States*, 16 Cl. Ct. 549, 551 (1989) ("Absent certain specific circumstances [like fraud, duress, or mutual mistake], a claim can not be prosecuted following the execution of a general release."). Further, those changes were not the reason that ATR installed the supports before Delta Mechanical had performed its MEP work, which needed to be complete before ATR performed its installation work. To the extent that Alares is arguing, as Mr. Maggioli testified at the hearing, that its claimed costs in this claim are for professional engineer calculations that the VA wanted Alares to provide to assist in identifying new locations for the supports, *see* Hearing Transcript, Vol. 1, at 209, that argument is, again, inconsistent with the claim itself, *see* Exhibit 66T,[34] and is unsupported by the facts. To the extent that Alares alleges that poor design information from the VA caused this extra work, Alares has failed to prove such facts. It is clear from the record that this reinstallation work was caused by Alares' failure properly to coordinate the work of its subcontractors. The VA is not responsible for Alares' failure to coordinate.

Decision

For the foregoing reasons, we find that, in CBCA 6149, the VA is responsible for 218 days of critical path delay on the project—four days in Period 1, thirty-eight days in Period 2, thirty-four days in Period 3, and 141 days in Period 4—for which there were no concurrent delays and for which Alares is entitled to monetary compensation. Alares' appeal in CBCA 6149 is **GRANTED IN PART**. Alares is entitled to recover $285,800, plus interest under the CDA, 41 U.S.C. § 7109, running from March 1, 2018, the date that the VA contracting officer received Alares' certified claim.

CBCA 7071 and CBCA 7597 are **DENIED**.

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[34] In fact, the ATR invoice that forms the basis of Alares' patient lift system claim expressly indicates that it "[e]xcludes: . . . PE stamped engineering drawings or calculations." Exhibit 66T at 761.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

We concur:

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge