

06-2 BCA P 33,293, ASBCA No. 51462, 2006 WL 1461129 (A.S.B.C.A.)

1. ASBCA

APPEAL OF -- KATO CORPORATION

Under Contract No. N62471-91-C-1312

May 18, 2006

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OPINION BY ADMINISTRATIVE JUDGE HARTMAN

Appellant contends that the government delayed its contract work by 67 days and is not entitled to 22 days of liquidated damages. Appellant seeks extended overhead costs for 67 days, electrical and insurance costs for 67 days and for 233 days of additional time to perform granted by bilateral contract modifications, and \$1,299.00 for the difference between the amount it sought to perform “changed” coiling grill work and the amount granted for the performance of that work in unilateral contract Modification No. A00020. Entitlement, including the number of days of compensable or excusable delay, if any, is before us.

FINDINGS OF FACT

I. Parties' Contract

On 29 September 1994, the Department of the Navy, Naval Facilities Engineering Command awarded appellant Kato Corporation a “three-phase” contract, No. N62471-91-C-1312, in the amount of \$9,103,501.00 to “modernize,” *i.e.*, renovate, Bachelor Enlisted Quarters (BEQ) in Building Nos. 229, 230, and 321 at the Naval Computer and Telecommunication Area Master Station, Eastern Pacific, Wahiawa, Oahu, Hawaii. The first contract phase, which was referred to as “Phase A,” began 15 calendar days after date of contract award and was the renovation of

Building Nos. 229 and 230 within 360 calendar days, *i.e.*, by 10 October 1995. The second phase, Phase B, was for Navy relocation of personnel, furniture and equipment from Building No. 321 to Building Nos. 229 and 230, and was to be completed 45 days after completion of Phase A. The third and final phase, Phase C, was Kato's renovation of Building No. 321 and was to be accomplished within 359 calendar days after the completion of Phase B. The parties' contract expressly provided that "[e]ach phase of the work shall be within the number of calendar days stated" and, "[s]hould the Contractor complete each phase ahead of the completion days, the next phase may be started ahead of the scheduled start day with the approval of the Contracting Officer" (CO). Contract § 01010, paragraph 1.5 stated, "[i]f the Contractor fails to complete the work within the time specified in the contract, or any extension, the Contractor shall pay to the Government as liquidated damages" the sum of \$2,150.00 per day for Phase A and \$1,800.00 per day for Phase C. (R4, tab 1)

Contract § 01011, paragraph 1.4 specified that within 15 days after notice of contract award Kato was to "submit for approval" a "construction schedule," a "critical path method" (CPM), or a network analysis system affording equal information to a CPM "subject to" or "in accordance with" the contract's "Schedules for Construction Contract" clause. The SCHEDULES FOR CONSTRUCTION CONTRACTS clause set forth in the contract, Federal Acquisition Regulation (FAR) 52.236-15 (APR 1984), required submission of (1) a "practicable schedule showing the order in which the Contractor proposes to perform the work, and the dates on which the Contractor contemplates starting and completing the several salient features of the work (including acquiring materials, plant, and equipment)" and (2) a schedule in a form suitable "to indicate appropriately the percentage of work scheduled for completion by any given date during the period." Paragraph 1.4 of contract § 01011 also specified the contractor was to "update" its "construction schedule . . . at monthly intervals or as directed." (R4, tab 1)

The parties' contract contained various standard clauses, including FAR 52.233-1 DISPUTES (MAR 1994), 52.236-2 DIFFERING SITE CONDITIONS (APR 1984), 52.236-14 AVAILABILITY AND USE OF UTILITY SERVICE (APR 1984), and 52.243-4 CHANGES (AUG 1987) (R4, tab 1). Standard clause FAC 5252.201-9300 set forth in the contract provided:

In no event shall any understanding or agreement between the Contractor and any Government employee other than the [CO] on any contract, modification, change order, letter or verbal direction to the Contractor be effective or binding upon the Government. All such actions must be formalized by a proper contractual document executed by an appointed [CO]. . . . Payments will not be made without being authorized by an appointed [CO] with the legal authority to bind the Government.(R4, tab 1 at 93)

With respect to claims for equitable adjustments, paragraph 1.15 of contract § 01010 expressly provided that "[w]henver the Contractor submits a claim for equitable adjustment under any clause of this contract which provides for equitable adjustment of the contract, such claim shall include all types of adjustments in the total amounts to which the clause entitles the Contractor, including, but not limited to, adjustments arising out of delays or disruptions or both caused by such change." It additionally expressly provided that, "[e]xcept as the parties may otherwise expressly agree, the Contractor shall be deemed to have waived: (1) any adjustments to which the Contractor otherwise might be entitled under the clause where such claim fails to request such adjustments; and (2) any increase in the amount of equitable adjustments additional to those

requested in the Contractor's claim.” (R4, tab 1)

With respect to utilities, part 1.5.1 of contract § 01011 provided reasonable amounts of utilities will be available to the contractor “at the prevailing rates at time of use” pursuant to the contract clause entitled “Availability and Use of Utilities Services.” It also provided that the contractor shall “establish an account” with PWC Comptroller prior to requesting service. (R4, tab 1)

The contract specification contained the following 11 “divisions”: site work; concrete; masonry; metals; wood and plastics; thermal and moisture protection; doors and windows; finishes; specialties; mechanical; and electrical. Each specification division contained various sections. For example, among the 16 sections set forth in “Division 2,” site work, were: demolition and removal; removal of asbestos materials; pavement markings; excavation, backfilling and compacting for utilities; storm drainage system; exterior sanitary sewer system; and turf. (R4, tab 1)

The fire alarm system for the renovated buildings was specified in § 16723 of specification “Division 16,” electrical. Part 1 of § 16723 required Kato to install a fire alarm system “in accordance with” National Fire Protection Association (NFPA) Nos. 72 and 1221, and stated that the Pacific Division (PACDIV), Naval Facilities Engineer had delegated authority to approve fire alarm submittals and drawings to PACDIV's “U.S. Registered Fire Protection Engineer,” who was to have two copies of all approved submittals and drawings no later than 15 working days prior to final inspection. With respect to acceptance of the system, part 3.3.2 of that section provided: the fire alarm system “shall have been in service for at least 30 days prior to the final inspection;” the contractor shall notify the CO in writing when the system is ready for final acceptance tests “at least 15 days prior to the date of the final acceptance test;” the system shall be tested for approval in the presence of representatives of the manufacturer, the CO, and the PACDIV Fire Protection Engineer; and “deficiencies found shall be corrected and the system retested at no cost to the Government.” (R4, tab 1)

II. Project Schedule

While the contract to renovate the BEQs was awarded on 29 September 1994, work at the site did not begin until nearly four and a half months later, *i.e.*, 8 February 1995, when Kato disconnected the main electrical feeder lines to Building Nos. 229 and 230 (R4, tab 4; tr. 76; ex. A-109). On 13 February 1995, Kato started preparations for the removal of asbestos at the two buildings. The following day, on 14 February 1995, four and a half months after award of the contract, Kato transmitted to the Navy and to its subcontractors a “preliminary schedule” prepared by its project superintendent. The project superintendent was confident of the “starts and stops” listed on the schedule, but labeled the schedule “preliminary” because he wanted the subcontractors to “eye” the schedule. Kato's preliminary schedule was in a “bar chart” format containing the following 20 “bars” or work items: asbestos removal; underground tank removal; demolition; concrete foundations; masonry walls; metal wall construction; new roof construction; site water; site sewer; site electrical and telephone; mechanical systems; electrical; earthwork; paving; site concrete; turf; miscellaneous metal install; rough carpentry; drywall; and finish carpentry. (Ex. A-109, -116; tr. 78-79, 81-82, 136)

While the superintendent testified that the “titles” for the schedule bars or work items were taken

from the contract's specification, the 20 titles do not correspond to the 11 specification divisions or to the numerous sections within the specification divisions. For example, there is no bar corresponding to specification Division 9, "Finishes," or to 10 of the 11 sections within that Division. (*Compare* ex. A-116 with R4, tab 1; tr. 256)

Kato's preliminary schedule depicted the commencement of work, *i.e.*, beginning of demolition and asbestos removal, on 15 February 1995 and the completion of all Phase A contract work within five and a half months, *i.e.*, on 30 July 1995, almost two and one half months before the 10 October 1995 completion date for Phase A. The bar schedule showed specified "electrical" work being performed in February, April, May, June and July 1995, with such work being completed 30 July 1995. (Ex. A-116; R4, tabs 1, 3; tr. 75, 95-96)

On 17 March 1995, Kato transmitted to the Navy as Submittal No. 34 another bar chart schedule that was not labeled "preliminary." This schedule was identical to Kato's earlier schedule labeled "preliminary," except for the fact the project superintendent had asked an individual he deemed to have "better handwriting" to transcribe the schedule. (*Compare* R4, tab 5 with ex. A-116; tr. 83-85, 253)

Approximately two weeks after Kato submitted the schedule, on 31 March 1995, the Navy's Resident Officer in Charge of Construction (ROICC) returned Submittal No. 34 to Kato with a handwritten statement the submittal was "Acknowledged" and the following note:

The contract completion date for Phase A is Oct 10, 1995. Also, the schedule is missing such major items as Painting, Carpentry/Flooring/Tile work and the EIFS installation. The Phase B . . . government move-in period does not start until the completion and acceptance of the Phase A work. Before completing Phase A, Kato did not submit any other schedule to the Navy, even though the ROICC had indicated that Kato's schedule was missing "major items" and Navy officials asked Kato for a revised or updated schedule, which reflected problems encountered. (R4, tabs 5, 20; tr. 141-44, 253-55, 281-83)

III. Contract Modifications

During performance of its work on Phase A, Kato encountered various problems: existing building roofs were not sloped as depicted in the contract drawings, but flat; the underground storage tank that was to be removed had leaked diesel fuel contaminating the surrounding soil; the location of a communication line and its related "handhole" interfered with a sewer manhole, an existing duct bank, and the mechanical yard fence; there was more asbestos at the site than had been anticipated; additional electrical work was necessary to supply electrical power to the buildings; and excessive soil moisture content was encountered when performing foundation work. Each of these problems, however, was resolved through the negotiation and execution of a "bilateral" contract modification increasing the contract's price and/or number of days to perform contract work. In Modification No. A00005, the parties increased the contract price by \$97,768.00 and number of days to perform by 56 calendar days due to the need to achieve a "sloped" building roof. In Modification No. A00006, the parties increased the contract price by \$169,836.00 and the number of days to perform by 94 calendar days due to the need to cleanup soil contaminated by diesel fuel. In Modification No. A00007, the parties increased the contract price by \$19,719.00 and the number of days to perform by 2 calendar days due to the need to

install a new communication duct line and increase the depth of the related “handhole.” In Modification No. A00008, the parties increased the contract price by \$62,868.00 and the number of days to perform by 17 calendar days due to the need to remove additional asbestos. In Modification No. A00010, the parties increased the contract price by \$21,636.00 due to the need to remove additional asbestos and install a “backflow preventer” valve on the fire sprinkler system. In Modification No. A00011, the parties increased the contract price by \$73,204.00 and the number of days to perform by 38 calendar days due to the need to splice two “feeders” in Electrical Manhole No. 17A. In Modification No. A00015, the parties increased the contract price by \$38,676.00 and number of days to perform by 6 calendar days due to the need to provide a “12 [inch] base course under the shear wall footings for Buildings 229 and 230 and under (9) column footings.” Through their bilateral modifications, the parties added a total of 213 calendar days to the performance period for Phase A contract work and increased their contract's total price to \$9,608,209.00. (R4, tab 1; tr. 101, 103, 105, 121, 132, 193, 247-52, 505, 526; ex. A-10, - 56, -116)

The bilateral modifications executed by the parties stated that the parties “mutually agree to the following contract prices” and, in some cases, time extension, “as complete equitable adjustment” for the work specified in the modification. Each bilateral modification also stated:

Acceptance of this modification by the contractor constitutes an accord and satisfaction and represents payment in full for both time and money and for any and all costs, impact effect, and for delays and disruptions arising out of, or incidental to, the work as herein revised.(R4, tab 1)

During the performance of Phase A contract work, the parties encountered three additional problems which were not the subject of a “bilateral,” but a “unilateral” contract modification: (1) an existing four-inch waterline was located differently than depicted and obstructed Kato's construction of the Mechanical Yard near Building No. 229; (2) due to the discovery of an unforeseen concrete-encased fiber optic duct line and the resulting relocation of specified new installations such as telephone and electrical duct lines, there was insufficient room in the new Mechanical Yard to install a new, 24-inch storm drain; and (3) because an existing sewer line had not been installed as depicted on the contract drawings, a plumbing drain line to be installed in the Mechanical Yard would obstruct installation of Sewer Manhole A-1. The Navy resolved the three problems by changing the contract to specify as follows: (1) cut and cap the existing waterline at Building No. 229, and install a new waterline to “re-establish the loop system” and “distribute water at Bldg. 63;” (2) delete installation of the new storm drain and related manholes; and (3) delete installation of the new sewer manhole and provide instead a full size, eight-inch “clean-out” for maintenance purposes. While the parties agreed upon the direct costs associated with performance of this work, they did not agree on the amount of time to be added to the contract's performance period due to those changes. Kato asserted it was entitled to 20 extra days for the waterline change, 37 extra days for the storm drain change, and 10 extra days for the manhole change or a total of 67 additional days to perform Phase A contract work. The Navy believed that Kato was entitled to 20 additional days for the waterline change, but the other two changes in mechanical yard work were performed “concurrent” with Kato's performance of other contract work and did not have an impact upon Kato's “critical path.” The Navy, thus, issued a unilateral modification, No. A00020, addressing these changes which increased the contract price by \$23,515.00 and number of days to perform Phase A work by “20” calendar days. In Modification No. A00020, the Navy also increased the contract price by an additional

\$3,145.00 for changes made in coiling grille work, which are discussed below in footnote one. (Ex. A-111; R4, tab 1; tr. 506-07, 509-10, 533-35, 538-41)

Accordingly, bilateral and unilateral contract modifications extended Kato's date for completing Phase A contract work by 233 calendar days, *i.e.*, from 10 October 1995 to 29 May 1996 (R4, tab 1; tr. 266). As discussed below, Kato completed all Phase A "Mechanical Yard" contract work prior to its revised 29 May 1996 completion date for Phase A work (tr. 300, 346, 453-54).

IV. 1996 Mechanical Yard Work

During January of 1996, pursuant to bilateral contract Modification Nos. A00010 and A00011, Kato performed asbestos abatement, and splicing and other electrical and telephone line work at Handhole No. 10 located in the Mechanical Yard (ex. A-109; tr. 130, 132, 193; *see* ex. A-107). On 3 January 1996, the Navy advised Kato by letter it intended to modify the contract under the Changes clause to:

Delete the installation of the 24" RCP storm drain and three (3) drainage manholes as shown in Sheet C-1, Site, Grading and Utility Plan of the contract drawings. Install new reinforced concrete pad above the existing RCP storm drain pipe as shown on Sketch Nos. 1312-X21-SKETCH A and 1312-X21-SKETCH B, provided as enclosures (1) and (2) [to the Navy's letter].(Ex. A-81 at 100162) About two weeks later, on 18 January 1996, the Navy notified Kato by facsimile transmission that:

[T]he new reinforced concrete pad to be constructed over the existing 24" RCP storm drain line . . . is not required.(Ex. A-81 at 100168)

On 25 January 1996, Kato discovered that the existing sewer line for installation of Sewer Manhole A-1 was not located where the site plan showed it, but closer to Building No. 229. Due to the sewer line's actual location, an existing waterline presented itself as an obstacle to Kato's installation of Sewer Manhole A-1. (Ex. A-109) On 26 January 1996, Kato continued excavation work for Sewer Manhole A-1 and discovered that the manhole could not fit in the required location (ex. A-109). Kato, therefore, proceeded with its installation of the other two manholes, A-2 and A-3, until the Navy determined what it wished to do about Sewer Manhole A-1 (ex. A-107 (29 Jan. and 5 Feb. 1996), A-109 (Nos. 254-57)).

On 8 February 1996, Kato stopped work on footings and equipment pads in the Mechanical Yard because its superintendent believed the existing water line constituted a safety hazard, *i.e.*, risk of potential personal injury should the line break from pressure (ex. A-109 (13 Feb. 1996), A-81 at 100185-88, 100193, A-107 (2 Feb. 1996)). However, Kato continued to perform other Phase A contract work at locations inside and outside of the two buildings being renovated, including installation and compaction of part of the base course at the Mechanical Yard (ex. A-107 (12 and 20 Feb. 1996); A-109 (9 through 20 Feb. 1996)).

On the day Kato discontinued working on the footings and equipment pads in the Mechanical Yard, 8 February 1996, the Navy sent Kato a letter stating:

Delete the contract requirement to provide a sewer manhole at Station 0 + 00 [Sewer Manhole

A-1]. [C]onnect the new sewer line SL-A at Station 0 + 00 to the existing 8 inch VCP sewer line as shown in Sketch No. N62471-91-C1312-X24, provided as enclosure (1) [to the Navy's letter].(Ex. A-81 at 100187)

The next week, on 14 and 15 February 1996, Reliable Fire Protection, one of Kato's subcontractors, commenced installing "backflow preventers" on the fire sprinkler system (ex. A-109; *see* ex. A-107 (20 Feb. 1996)). Pursuant to Modification No. A00010 dated 8 January 1996, Kato was to "[p]rovide double check valve, backflow preventer[s] to the fire sprinkler systems for Buildings 229, 230, & 321, as shown in the attached sketch" (R4, tab 1). Kato's daily report for 14 February 1996 noted the "[s]ize of [the] backflow preventers [will] require [the] fire riser room and slab to be enlarged" (ex. A-109; *see* R4, tab 30; ex. A-107 (4 Mar. 1996)). Reliable completed installation of the backflow preventers the following week (ex. A-107 (20 Feb. 1996), A-109 (22 Feb. 1996)).

On 20 February 1996, less than two weeks after Kato discontinued working on the footings and pads in the Mechanical Yard, the Navy sent Kato a letter stating:

Cut and cap existing 4" waterline and provide concrete reaction blocks as shown in Sketch No. N62471-91-C-1312-X25 provided as enclosure (1) [to the letter].(Ex. A-81 at 100199) By facsimile transmission dated 23 February 1996, however, the Navy notified Kato that: base personnel "will be cutting and capping the 4" waterline that runs through the new Mechanical Yard location by [Building No.] 229" on Saturday, 24 February 1996; the "waterline which had impacted your construction will be dead and . . . can be covered with concrete," and Kato therefore can "start construction on the Mechanical Yard on Monday, 26 February 1996" (ex. A-81 at 100200, A-109 (26 Feb. 1996)). Kato resumed its work on Mechanical Yard footings and pads on 27 February 1996 and completed that work on or about 11 March 1996 (ex. A-109).

Kato began work on the Mechanical Yard wall on 13 March 1996 and completed that work on or about 15 March 1996 (ex. A-107 (18 Mar. 1996), A-109). On 19 March 1996, Kato assembled a crane to lift equipment onto the concrete pads in the Mechanical Yard and placed on the pads a chiller, two heat pumps, water storage tanks, and water pumps (ex. A-109). On 21 March 1996, Kato notified the Navy that "the new water line . . . installed" needs "to have the valve cover raised" to prevent damage or being buried as Kato finishes the grading improvements around the buildings (ex. A-68).

The same week, Kato decided to proceed with installation of the cleanout desired by the Navy in lieu of Sewer Manhole No. A-1, which Kato determined would have to be "angled away from the building to avoid the newly installed Building [No.] 229 sewer lines." Phoenix Pacific, a Kato subcontractor, also completed testing of the fire alarm equipment for Building No. 229, installed the antenna to transmit the fire alarm signal to Pearl Harbor, and continued working upon installation of the fire alarm equipment for Building No. 230. (Ex. A-107 (25 Mar. 1996), A-109)

During the first half of April 1996, two sections of underground telephone conduit at Handhole No. 10 were reworked prior to an inspection by GTE Hawaiian Telephone. Other work being performed at the time included: Phoenix Pacific's continued installation of the fire alarm system in Building No. 230; Kato's new electrical subcontractor's installation of control wiring in the Mechanical Yard; two subcontractors' installation of carpeting and tile inside the buildings; and

other subcontractors' installation of equipment piping and insulation within the Mechanical Yard. (Ex. A-107 (1, 8 and 15 Apr. 1996), A-109 (Nos. 300-10))

On 15 April 1996, Kato's superintendent requested a final inspection of Building Nos. 229 and 230 commencing at 9 a.m. on 29 April 1996 (R4, tab 34). As of 15 April, items of work remaining incomplete included carpet and tile installation, landscaping, mechanical yard electrical and piping work, installation of fire alarm equipment, and installation of the sewer line cleanout (R4, tab 33; ex. A-109).

During the latter half of April, Kato and its subcontractors performed additional telephone work necessary for a GTE inspection (ex. A-69). They also continued to: perform work on the fire alarm system; rewire the control relays; insulate mechanical yard piping; install tile and carpeting; perform work upon the chiller; and add control wiring for the mechanical yard (ex. A-107 (22 and 25 Apr. 1996)). Kato began work necessary to delete Sewer Manhole No. 1 on or about 15 April and completed that work on or about 26 April 1996. (Ex. A-109 (Nos. 310-13, 318), A-107 (22 Apr. 1996) (“Kato had [its subcontractor] Mid Pacific . . . install the sewer piping with cleanout which eliminates sewer manhole A-1 last Friday”; “[t]he piping was installed per the sketch received from the ROICC which was faxed to Kato dated 2-6-96”)) About the same time, a Kato subcontractor hooked up the water supply for building No. 230 and another subcontractor performed disinfection tests for the water systems for “both” Building Nos. 229 and 230 (ex. A-109 (No. 312)). On 22 April 1996, the Navy advised Kato that, “[a]t this time, a final inspection cannot be scheduled” because “all systems i.e. fire protection, HVAC, heat pump and transformer/switchgear” have not been “completed, tested and certified in accordance with requirements of the contract.” (R4, tab 36) The same week, a Kato subcontractor failed a disinfection test performed on the fire sprinkler system. The subcontractor subsequently flushed the system and took new samples for retesting. (R4, tab 38; ex. A-107 (29 Apr. 1996), A-109 (Nos. 316, 318))

During the first week of May, Kato performed hydroseeding, planted trees and shrubs, applied sealants at windows, checked electrical circuits, painted, continued to work on the fire alarm system, insulated pipes, performed “punchlist” type work, and started the chiller and then shut it down due to a gas leak and missing valves. Testing and balancing of the air system could not be performed until the Trane representative (Elite Mechanical) installed the missing chiller valves. (Ex. A-107 (6 May 1996), A-109 (Nos. 322-25)). On 1 May 1996, Kato and the Navy's Construction Management Engineer (CME) conducted an inspection of the interiors, individual rooms, hallways and common areas of Building No. 229 (tr. 225-26; ex. A-16, -107 (6 May 1996), A-109 (No. 322)). On 7 May 1996, the CME gave Kato a “Pre-Final Inspection Punchlist” for Building No. 229 consisting of 5 typewritten pages identifying more than 95 items in need of correction (R4, tab 40).

The next day, on 8 May 1996, Kato installed 5.95 tons of base course material at the Mechanical Yard (ex. A-109 (No. 327)). Kato completed its “physical” work in the Mechanical Yard one day later on 9 May when a subcontractor applied plaster veneer to the Mechanical Yard fence (ex. A-109 (No. 328)).

The same day, 9 May 1996, Kato began testing and balancing various systems housed in the Mechanical Yard (*id.*). On 13-15 May 1996, Elite Mechanical installed the valves and controls

necessary for testing of the chiller and, after completing some control wiring on 16 May 1996, the chiller and heat pumps were started by Kato's subcontractor, Alliance Mechanical. On 17 May 1996, readings were taken for the chiller and the heat pumps. While there was hot water throughout the buildings, "Certified Testing said there was a temperature problem" at four air handling units (AHUs) and Alliance Mechanical determined that "the 3-way valve control wiring [wa]s wired wrong." Kato's electrical subcontractor corrected the AHU control wiring on 20 May 1996. (Ex. A-107 (13 and 20 May 1996), A-109 (Nos. 329-35)). Another subcontractor corrected a noise problem with an AHU on 22 May 1996 (ex. A-109 (No. 337)).

Kato requested on 15 May 1996 that an inspection of the fire extinguishing sprinkler system, fire alarm system, and interior alarm system be scheduled (R4, tab 41). The Navy scheduled this inspection/test for 9 a.m. on 22 May 1996 (R4, tab 42). When the fire protection test was conducted, the sleeping room alarms failed to sound in each specific room. Kato's subcontractor, Phoenix Pacific, thus, immediately realized it had to reprogram the system computer to satisfy the specification requirement that alarms sound in each room. (R4, tab 44; *see* ex. A-109 (No. 338))

The same day as the inspection/test, 22 May 1996, Alliance Mechanical began a seven-day operational test for the chiller (ex. A-109 (No. 337)). From 23 to 24 May 1996, Certified Testing completed testing and balancing, a noise and vibration test, and temperature testing (ex. A-109 (Nos. 338-39)). On 28 May 1996, Kato applied grout to the Mechanical Yard equipment stands (ex. A-109 (No. 340)).

On 29 May 1996, the Navy advised Kato that, as a result of PACDIV's 22 May 1996 fire protection system inspection, PACDIV determined that the Navy should not accept the fire protection systems due to various problems with the sprinkler system and fire alarm system (R4, tab 46). On the same day, the Navy's CME determined Kato had corrected 68 of the items on the "Pre-Final Punchlist" for Building No. 229. While the Navy's CME was willing to conduct an inspection of Building No. 230 on that date, he stated in a letter the next day that he and the superintendent agreed that Building No. 230 was not ready for a final inspection. (R4, tab 47)

Kato does not dispute that: as of 29 May 1996, it was still attempting to get mechanical systems, such as the fire alarm and air conditioning, "fully functional;" this necessitated its workers moving between the interior and exterior of the buildings to ascertain whether a system was running properly; and such actions by its workers could result in damage to the buildings causing creation of a punch list item because the actions presented the opportunity for tool belts to hit interior walls and muddy earth to be dragged into the buildings (app. br. at 50-51, ¶ 143; tr. 207, 236-37, *see* tr. 267; ex. A-109 (Nos. 341-42, 344)).

On 30 May 1996, Phoenix Pacific completed reprogramming of the fire alarm system computer (ex. A-109 (Nos. 341-42)). Between 3 and 7 June 1996, Reliable corrected problems identified by PACDIV, except one which the Navy had advised could be corrected as a punch list item (ex. A-107 (3 and 10 June 1996), A-109 (Nos. 344-48); R4, tab 50). From 10 to 17 June, four of Kato's subcontractors performed punch list work. On 14 June 1996, Phoenix Pacific retested the fire alarm system for the ROICC and the system passed. (Ex. A-107 (17 June 1996), A-109 (No. 353)).

PACDIV's fire protection engineer then scheduled his re-inspection of the system for five days

later, on 19 June 1996. After re-inspection of the system on 19 June, the engineer determined the system was acceptable. (Ex. A-109 (Nos. 355-56)) On 20 June 1996, the Navy performed a final inspection of the buildings noting remaining punch list items. Pursuant to its inspection, the Navy took beneficial occupancy of the buildings and Kato transferred the keys to the buildings to the Navy's CME. (Ex. A-87, -109 (No. 357)) The buildings were thus substantially complete on 20 June 1996.

On 9 August 1996, the Navy sent Kato a bill for electricity used during Phase A of the contract in the amount of \$7,359.10 based upon readings of a temporary power meter, an office trailer meter, and a switchgear meter (ex. A-83). Kato paid the bill by check dated 12 August 1996 (R4, tab 71 at encl. 2).

V. Claims

In a unilateral contract Modification No. A00022 dated 11 December 1996, the Navy's CO assessed Kato 22 calendar days of liquidated damages at a rate of \$2,150.00 per day or a total of \$47,300.00 for the period from Kato's Phase A completion date of 29 May 1996 to the Navy's beneficial occupancy date of 20 June 1996 (R4, tab 1). By letter dated 30 June 1997, Kato submitted a certified claim to the CO for \$137,330.47. Kato sought: extended field overhead costs for 67 days of delay (\$63,382.00); rescission of the \$47,300.00 assessed by the Navy as liquidated damages; \$4,599.00 in utilities cost and \$6,990.00 in builder's risk insurance cost for the 67 days of delay and the 233 days added to Phase A by the parties' bilateral and unilateral contract modifications; the difference in amount (\$1,299.00) between the sum Kato sought to perform "changed" coiling grill work and the sum granted to perform that work in unilateral contract Modification No. A00020;^[FN1] and \$13,760.47 for costs incurred by Kato regarding its claim dated 6 December 1996, which Kato had withdrawn (R4, tabs 65, 69, 70, 71).

By final decision, the Navy's CO denied Kato's entire claim. The CO said: Kato's assessment of 67 days of delay based upon a deficient schedule was "unreliable;" there was no documentation the alleged delay was caused by the Navy; Kato's installation of the fire alarm system occurred concurrently with the alleged delay; and the assessment of liquidated damages was therefore correct. The CO explained that Kato's claims for utility and insurance cost were without merit because the 67 day delay claimed was not compensable and, with respect to the other additional days claimed, the costs were barred by bilateral contract modifications the parties negotiated and executed granting monies for the additional days. The CO stated Kato was not entitled to costs for time spent by three officials to attend meetings because those costs constituted salaries included in Kato's overhead rate. Finally, the CO said Kato was barred from an award of costs to prepare its withdrawn claim pursuant to FAR 31.205-47(f)(1). (R4, tab 74)

VI. Alleged Settlement and Trial

Kato timely appealed the CO's decision to this Board. After conduct of discovery by the parties, the Board scheduled a four day trial. On the morning trial was to commence, the presiding judge learned from his staff assistant that the parties had advised by telephone that the appeal was being resolved amicably and trial was unnecessary. The Board, therefore, cancelled the conduct of trial, pending further communication from the parties.

Counsel for the parties completed their settlement discussions on Friday afternoon before commencement of trial on Tuesday morning. The following Monday, counsel for the Navy sent Kato's counsel a letter which "confirms the terms of the settlement" stating the "Navy has agreed to pay Kato a total amount in the sum of \$85,000 in full settlement of the claim on appeal in ASBCA No. 51462" and the sum "will be paid within thirty (30) days of the earlier of either; (i) Kato's return to the [CO] . . . of an executed bilateral contract modification, invoice and final release under its contract; or, (ii) entry by the Board and transmittal to the Department of the Treasury for payment of a Judgment." Navy counsel added the "settlement amount includes attorney's fees, and all interest if paid within thirty (30) days," and "the mod/release means of perfecting our settlement agreement is likely to be quicker than the Judgment Fund route." (Ex. A-129A) About two weeks later, the CO sent Kato a contract modification, No. A00039, to effectuate the terms of the settlement agreed to by the parties. The modification included a release of "any and all past, present or future claims, or potential claims, arising out of or relating to the Contract." Kato returned the contract modification to the CO unsigned. It stated that it took exception to the language of the release, its claim "only dealt with Phase A of the contract," and it was considering asserting a claim under the latter phase of the contract. The CO responded by letter stating "the settlement was for the entire contract, a condition agreed to by [Kato's then attorney]." The CO added that if, within 30 days of receipt of his letter, Kato advised it had decided not to submit other claims, the Navy would honor the "agreement set forth in the [the contract] modification," otherwise it would ask the Board "to reschedule the hearing for a later date." Subsequently, the Navy requested trial again be scheduled in this appeal. (*See ex. A-129B, -129C*; app. br. at 70, ¶ 203; gov't reply at 11 n.1; tr. 6-9)

At the start of trial, Kato's then counsel moved orally for summary judgment, *i.e.*, to enforce the settlement agreement that he contended had been agreed on by the parties previously with respect to this appeal. The presiding administrative judge explained that dispositive motions in Board appeals are not ruled on by one judge, but a panel of judges, only one of whom was present, and thus counsel would have to present such a motion as part of post-trial briefing. (Tr. 6-30) In its counsel's opening statement at trial, Kato withdrew its claim for costs associated with its withdrawn claim (tr. 49; *accord* tr. 382).

With respect to its schedule, Kato's project superintendent testified at trial that: a bar chart is not capable of showing a "critical path" but one can identify a "critical path" in Kato's schedule; one cannot determine what if any "float" exists in a given element on Kato's schedule; the items the Navy stated were missing from Kato's schedule were within the realm of item 19 (drywall), or somewhere between items 18 (rough carpentry) and 20 (finish carpentry); the Mechanical Yard work was not shown on Kato's schedule as a specific line item but included within the Building No. 229 work; Mechanical Yard work can be found by looking at various items on the schedule, such as item 4 (concrete foundations), 5 (masonry walls), 10 (site electrical and telephone) and 11 (mechanical systems); Kato's electrical subcontractor went out of business shortly before 15 March 1996; Mechanical Yard work became "critical" after mid-March 1996; it was reasonable on 19 June 1995 for Kato to expect remaining Mechanical Yard work to be completed within six weeks, *i.e.*, by 31 July 1995; and, when Kato was not able to work as it had planned, it always had other contract work it could perform so it "didn't shut down the job or anything like that" (tr. 143, 146, 263-64, 274, 276, 278-80, 292-94, 326-28, 335, 343-45). Kato's general manager in Hawaii testified that every item on Kato's schedule was a "critical" item and there really wasn't

any “float” in the schedule (tr. 449-50, 495).

During trial, Kato did not present testimony regarding negotiation of its bilateral contract modifications or the Navy’s calculation of a daily rate for liquidated damages. Kato also did not present testimony regarding the \$1,299.00 in costs it sought to perform coiling grille work which were deemed unreasonable by the Navy or testimony about the actual costs it incurred performing the “changed” coiling grill work. Rather, Kato simply presented general testimony regarding reimbursement for officials (its general manager, project superintendent, and quality control manager) to attend various meetings regarding such work. (*E.g.*, tr. 381)

DECISION

Kato asserts initially that this Board has jurisdiction “to enforce” a “settlement agreement” and should “enforce the terms of the parties’ Settlement Agreement” in this appeal. According to Kato, the Navy entered into an “oral” agreement to pay \$85,000.00 in full settlement of Kato’s claim on appeal, Navy counsel confirmed this agreement in writing by letter, the CO is bound from denying that agreement because he was “copied” on that letter and “never disavowed” the settlement, the parties had not agreed to release of “all” claims under the contract as part of the “settlement” even though Navy counsel’s letter discussing settlement stated Kato was to execute a “final release under its contract,” the CO could not unilaterally impose a new term (*i.e.*, execution of a release of all claims under the contract) in the contract modification sent Kato because the “parties had already agreed to [their] terms of settlement,” and even if Kato was required to sign a release of claims as part of the negotiated settlement it was free to “except from such a final release the un-addressed . . . Phase C claims” because “the government may not insist upon an unconditional release as a prerequisite to final payment.” (App. br. at 71-80)

While Kato asserts that we possess jurisdiction to entertain a claim founded on a settlement agreement, we need not resolve that issue because (1) we possess authority to determine whether a matter pending before us has been resolved amicably by the parties and (2) conclude here that the parties did not enter into an agreement settling the appeal. A tribunal has authority to determine whether an underlying claim before it is moot and the pending action has “lost its character as a present, live controversy.” See *Exigent Technology, Inc. v. Atrana Solutions, Inc.*, 442 F.3d 1301, 1311-12 (Fed. Cir. 2006) (if settlement agreement enforceable, it rendered moot entry of a final judgment); *Kaw Nation v. Norton*, 405 F.3d 1317, 1323 (Fed. Cir. 2005); *Gould v. Control Laser Corp.*, 866 F.2d 1391, 1392 (Fed. Cir. 1989) (“[s]ettlement moots an action, . . . although jurisdiction remains with [tribunal] to enter a consent judgment”); *Swanson Group, Inc.*, ASBCA No. 53496, 04-1 BCA ¶ 32,417, *aff’d on recon.*, 04-1 BCA ¶ 32,535; *Texas Instruments, Inc.*, ASBCA No. 32925, 89-2 BCA ¶ 21,787; *Primeco, Inc.*, ASBCA No. 28217, 83-2 BCA ¶ 16,628; *Macco-Raymond-Kaiser-Puget Sound*, ASBCA No. 8319, 1962 ASBCA LEXIS 987. We therefore have held we possess authority “to determine whether appeals pending before us have been settled.” *Leadermar, Inc.*, ASBCA Nos. 40575, 42408, 92-2 BCA ¶ 24,919 at 124,247; *accord Voices R Us*, ASBCA Nos. 49818, *et al.*, 97-2 BCA ¶ 29,135 at 144,960, *recon. denied*, 98-2 BCA ¶ 29,827. In order to ascertain if the claims before us are moot, as Kato suggests, we thus proceed to determine whether the claims were the subject of a “settlement agreement” between the parties.

Kato contends there was an “oral agreement” to settle the claims underlying this appeal and to

increase the amount of money it received for performing work under the contract. However, because the “oral agreement” changed, *i.e.*, increased, the price the Navy was to pay under the contract, it altered the existing contract and constituted a modification of that contract. *Mil-Spec Contractors, Inc. v. United States*, 835 F.2d 865, 867 (Fed. Cir. 1987); *SCM Corp. v. United States*, 595 F.2d 595, 597 (Ct. Cl. 1979); accord *Texas Instruments, Inc. v. United States*, 922 F.2d 810, 814 (Fed. Cir. 1990). Until there was a contract modification to which both Kato and the CO had agreed in writing, there could be no “binding” modification of the parties' contract. *Mil-Spec Contractors*, 835 F.2d at 867; *Kasel Mfg. Co.*, ASBCA No. 26975, 89-1 BCA ¶ 21,464 at 108,165-66; accord *SCM Corp.*, 595 F.2d at 598. The CO recognized this fact by preparing a form 30 contract modification document embodying what he believed to be the oral settlement previously negotiated and by submitting that written modification to Kato for execution. See *Mil-Spec Contractors*, 835 F.2d at 868.

Had the CO believed that the “oral agreement” entered into was itself a valid agreement binding both parties, there would have been no need for him to prepare the form contract modification he submitted to Kato. All he would have had to do was to write a simple letter to Kato summarizing and confirming the oral agreement. The Navy CO, therefore, clearly did not believe that there was any binding oral settlement of this appeal. See *Mil-Spec Contractors*, 835 F.2d at 868.

The CO's preparation of the written contract modification, which included a “final release” of claims under the contract, did not *nunc pro tunc* turn a “prior oral agreement” into a “valid contract” that bound the Navy. *Id.* at 867. The regulations applicable to the parties' contract require a modification of a contract to be in writing and executed by both parties. FAR 2.101, 43.101, 43.103, 43.301; *Mil-Spec Contractors*, 835 F.2d at 867-68. Where the regulations require that a contract modification be written, as here, an “oral” modification not reduced to writing and signed by both parties simply is not effective. *Mil-Spec Contractors*, 835 F.2d at 868-69; *SCM Corp.*, 595 F.2d at 598; *Kasel Mfg. Co.*, ASBCA No. 26975, 89-1 BCA ¶ 21,464 at 108,165-66. As the Court of Claims explained:

Oral understandings which contemplate the finalization of the legal obligations in a written form are not contracts in themselves. When legal obligations between the parties *will be deferred* until the time when a written document is executed, there will not be a contract until that time. . . . Under the regulations, Government funds were not obligated until the execution of standard form 30. The parties were well aware of the fact that only the written contract modification could finalize their agreement. *SCM Corp.*, 595 F.2d at 598 (emphasis in original, citations omitted).

Here, Kato never executed a written modification settling the claims underlying this appeal and increasing the contract's price for performance of work. Accordingly, there was no agreement settling the claims underlying this appeal, and no valid accord and satisfaction. *Mil-Spec Contractors*, 835 F.2d at 869; *SCM Corp.*, 595 F.2d at 598; *Kasel Mfg. Co.*, ASBCA No. 26975, 89-1 BCA ¶ 21,464 at 108,165-66. The pending appeal is therefore not moot and we must address the merits of the claims Kato has asserted in the appeal.

I. Unabsorbed Overhead

Kato contends in this appeal that it is entitled to recover unabsorbed overhead for 67 days due to

delays in its performance of Mechanical Yard work. Kato asserts that: it performed the physical work of installing the Mechanical Yard in 77 days (29-31 January 1996, 26-29 February 1996, and 1 March through 9 May 1996); it performed its testing and balancing of Mechanical Yard equipment for 17 days; it thus spent a total of 94 days in the Mechanical Yard; it was “paid for” seven of those days (29-31 January 1996 and 26-29 February 1996) under prior bilateral contract modifications; it received payment for 20 additional days under unilateral contract Modification No. A00020; and it therefore is entitled to receive overhead compensation for 67 days (94 - (7 + 20) = 67). (App. br. at 2, 68 (¶ 195), 84-85; tr. 365-69) According to Kato, it is entitled to unabsorbed overhead compensation for the 67 days due to “myriad interferences with and hindrances slowing its progress in the Mechanical Yard.” While Kato refers to “myriad interferences” with its work, it specifically identifies only three - an obstruction for a new storm drain, an obstruction for new Sewer Manhole A-1, and the existing water line not being in the location depicted on the plans. (App. br. at 82-84)

If the government delays work on a contract for an indefinite period of time, a contractor may be entitled to recover its costs for additional performance time caused by that delay. *See, e.g., Essex Electro Engineers, Inc. v. Danzig*, 224 F.3d 1283, 1295 (Fed. Cir. 2000). One category of recoverable delay costs is unabsorbed home office overhead. The purpose of awarding home office overhead is to compensate a contractor for its indirect costs (such as accounting-payroll, general insurance, and senior management salaries), which are not attributable to any one contract and are incurred even if there is inactivity on a construction project, when those costs are not “absorbed” by a contractor's income stream for direct costs incurred due to interruption or suspension of that income stream by a delay in, or suspension of, contract performance. *West v. All State Boiler, Inc.*, 146 F.3d 1368, 1372 (Fed. Cir. 1998); *Mech-Con Corp. v. West*, 61 F.3d 883, 886 (Fed. Cir. 1995); *Interstate Gen. Gov't Contractors, Inc. v. West*, 12 F.3d 1053, 1057-58 (Fed. Cir. 1993). A contractor incurs unabsorbed home office overhead cost when: it experiences a substantial government-caused delay of indefinite duration suspending much, if not all, of its contract work and disrupting its contract income stream; it must remain ready to resume contract work immediately; and it is unable to secure comparable “replacement” work during the impacted period. *P.J. Dick, Inc. v. Principi*, 324 F.3d 1364, 1371-72 (Fed. Cir. 2003).

In *Eichleay Corp.*, ASBCA No. 5183, 60-2 BCA ¶ 2688 at 13,574, *aff'd on recon.* 61-1 BCA ¶ 2894, we adopted a formula for estimating home office overhead which may be unabsorbed. It is now well established that, when the government suspends or delays work upon a contract for an indefinite period, that formula will be utilized to calculate the amount the contractor can recover. *E.g., P.J. Dick*, 324 F.3d at 1370; *Melka Marine, Inc. v. United States*, 187 F.3d 1370, 1375 (Fed. Cir. 1999).

To make a *prima facie* case of entitlement to recovery under the *Eichleay* formula, a contractor must make three showings. *E.g., Melka Marine*, 187 F.3d at 1376; *Precision Dynamics, Inc.*, ASBCA No. 50519, 05-2 BCA ¶ 33,071 at 163,918-19. It must first show there was a government-caused delay to its planned contract performance “not concurrent with a delay caused by the contractor or [for] some other reason.” *P.J. Dick, Inc.*, 324 F.3d at 1370; *Sauer, Inc. v. Danzig*, 224 F.3d 1340, 1347-48 (Fed. Cir. 2000). Next, it must show that its original contract performance time was thus extended or, alternately, that it completed its performance on time or early but incurred additional, unabsorbed overhead cost because it planned to finish even

earlier. *P.J. Dick, Inc.*, 324 F.3d at 1370; *Interstate Gen.*, 12 F.3d at 1058-59. Finally, it must show it was required to remain on “standby” during the delay. *P.J. Dick, Inc.*, 324 F.3d at 1370. As discussed below, Kato has failed to make all three showings here.

Kato has not demonstrated here there was a Navy-caused delay not concurrent with a delay caused by the contractor or for some other reason. While Kato points to three specific changes in its contract work the Navy made regarding the storm drain, Sewer Manhole A-1, and existing waterline, and complains generally about the overall number of changes that the Navy made in its work, almost all of which were the subject of bilateral contract modifications, it does not provide an analysis of how those items individually, or in concert, acted to delay its overall completion of the contract work. When a contract contains a “Changes” clause, as here, a contractor is not justified in believing that it will be able to proceed from start to finish of its contract work without interruption. *Law v. United States*, 195 Ct. Cl. 370, 384 (1971); *Magoba Constr. Co. v. United States*, 99 Ct. Cl. 662, 690 (1943). The mere fact that three changes occurred in Mechanical Yard work or that there were a number of other changes in Kato's work is meaningless. See *Law*, 195 Ct. Cl. at 382, 384. We explained in *Essential Constr. Co.*, ASBCA No. 18706, 89-2 BCA ¶ 21,632 at 108,834, that:

It is immaterial that some particular event came along which disrupted certain work or delayed its start or completion. It may well have been that that item was not one which would delay the project completion or have any effect on it. We cannot presume that, merely because some extra work was ordered and compensation paid by the contracting officer, there would have been a delay to the completion of the project entitling appellant to an extension in performance time. It is appellant's burden to convince us of the impact on the overall completion of the project.

To establish a claim of government-caused delay, a contractor must demonstrate there was a delay “proximately caused” by the government which “harmed” it and the “extent” of that delay. *Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994) (*en banc*). Such a demonstration requires a contractor to prove the delay alleged occurred on the contract work's “critical path,” *i.e.*, affected overall completion. *Kinetic Builder's, Inc. v. Peters*, 226 F.3d 1307, 1317 (Fed. Cir. 2000); *Kelso v. Kirk Bros. Mech. Contrs., Inc.*, 16 F.3d 1173, 1177 (Fed. Cir. 1994); *Law*, 195 Ct. Cl. at 385 (issue is whether there was delay to ultimate completion of project); *Gassman Corp.*, ASBCA Nos. 44975, 44976, 00-1 BCA ¶ 30,720 at 151,738. In *Precision Dynamics, Inc.*, ASBCA No. 50519, 05-2 BCA ¶ 33,071 at 163,920, we explained:

It is not sufficient . . . for a contractor to show that the Government delayed completion of a segment of the work. Rather, in order for the contractor to recover, it must establish that completion of the entire project was delayed by reason of the delay to the segment. *Contel Advanced Systems, Inc.*, ASBCA No. 49075, 04-2 BCA ¶ 32,664 at 161,680; *Donohoe Constr. Co.*, ASBCA Nos. 47310, 47312, 99-1 BCA ¶ 30,387 at 150,190; *Rivera Constr. Co.*, ASBCA Nos. 29391, 30207, 88-2 BCA ¶ 20,750 at 104,856. Here, Kato has not shown that the Navy's changes in work regarding the storm water drain, Sewer Manhole A-1 or existing waterline occurred at a time those items were on the critical path for completion of its work and delayed its overall contract completion. As found above, the Navy notified Kato of the changes to all three work items on or before 23 February 1996, two of the three changes in work involved principally the “deletion” of contract work, and Kato's project superintendent testified that, in his opinion, Mechanical Yard work did not become “critical” until after mid-March 1996, *i.e.*, subsequent to

Kato's notification of the changes in work. While Kato presented testimony from its general manager that “all” items on its schedule were on the “critical path,” such testimony cannot be credited. As demonstrated by the testimony of Kato's superintendent and its daily reports, when Kato encountered a problem performing an item of contract work on its schedule, it frequently was able to perform other contract work pending resolution of that problem without delaying overall contract completion. For example, when it discovered there was an obstruction for Sewer Manhole A-1, Kato notified the Navy of the problem and proceeded to perform work on Sewer Manhole A-2 and A-3 pending its receipt of a response. Where testimony, such as the Hawaii general manager's, is contradicted at least in part and is inherently unbelievable, it need not be accepted by this or other tribunals. *E.g.*, *Sternberger v. United States*, 401 F.2d 1012, 1016 (Ct. Cl. 1968).

Moreover, even if we were to accept the general manager's testimony that the three changes cited specifically occurred with respect to work on the critical path for contract completion, Kato has not shown that any delay arising from the changes was not concurrent with delay for which Kato was responsible. As found above, Kato's electrical subcontractor went out of business shortly before 15 March 1996, about the same time Kato was lifting the equipment onto the concrete pads in the Mechanical Yard and Kato, therefore, was required to locate another electrical subcontractor to install the “control wiring” for that equipment, work which its daily reports indicate required several weeks to accomplish in April 1996. It thus appears there was a delay of several weeks in the performance of this contract electrical work while Mechanical Yard work was being performed due to loss of a subcontractor for which Kato would “bear” responsibility. *See, e.g.*, *Sach Sinha & Assocs.*, ASBCA No. 46916, 96-2 BCA ¶ 28,346 at 141,563. Further, as found above, throughout the period of April through May 1996, numerous Kato subcontractors (such as tile, carpeting, and fire alarm) were performing work inside the two buildings while work was occurring in the Mechanical Yard. There is no logical nexus between the performance of such work and the changes made by the Navy to the storm water drain, sewer manhole, and water line, and Kato proffers no explanation or evidence regarding why such contract work was occurring during a period it contends it would not have been performing contract work, except for delays arising from the three Mechanical Yard changes. It thus appears there was a delay of several weeks in the performance of that contract work while the Mechanical Yard work was being performed for which Kato would appear to bear responsibility (*see id.*). Accordingly, in any event, Kato has failed to make the initial showing necessary for it to establish a *prima facie* case of entitlement to recovery of unabsorbed overhead under the *Eichleay* formula.

Kato also has not demonstrated that its original contract performance time was extended by a specified number of days due to government-caused delay or, alternately, that it completed its performance on time or early but incurred additional, unabsorbed overhead cost because it planned to finish even earlier. As found above, the parties extended the period for performing Phase A contract work until 29 May 1996. It is undisputed that Kato completed all Mechanical Yard contract work before that date. While the Navy did not accept “beneficial occupancy” of the two buildings renovated under Phase A until 20 June 1996 due to problems with the buildings' fire alarm system and the contractual requirement the system be approved by PACDIV, in this appeal, Kato has not shown any nexus between testing of the fire alarm system and the changes made by the Navy to the storm water drain, sewer manhole, and water line. It,

therefore, has not established its contract performance period was “extended” by any specific number of days due to the alleged Navy-caused delays and does not so argue (*see* app. br. at 81-82). Rather, Kato contends it incurred additional, unabsorbed overhead cost because it planned to finish earlier than the contractually specified date for completion of Phase A work. According to Kato, it was going to complete Phase A contract work 71 days before the specified completion date. (App. br. at 8-9, 15) When a contractor seeks to recover unabsorbed overhead based upon alleged delay to an “early completion,” it must show additionally: (a) it intended to finish early; (b) it was capable of finishing early; and (c) it would have finished early but for the government's actions. ***P.J. Dick, Inc.*, 324 F.3d at 1373; *Interstate Gen.*, 12 F.3d at 1059.** Kato has not made those additional showings here.

Kato has not submitted a bid, estimate, or any other documentation generated prior to contract award showing that it intended to complete Phase A work within a period less than the 360 days contractually specified. The only documentary evidence cited by Kato as proof of a “planned early finish” is a bar chart schedule labeled “preliminary” that it submitted to the Navy four months after the period for contract work commenced and a copy of that schedule it re-submitted five months after the period of contract work commenced which was not labeled “preliminary.” It is not disputed that neither of the schedules was marked “approved” by the Navy and the latter was returned to Kato with a notation that “contract completion date for Phase A is Oct 10, 1995,” the contractually specified date. Kato's contract expressly provided that “[e]ach phase of the work shall be within the number of calendar days stated” and a subsequent phase may be started ahead of schedule only “with the approval of the [CO].” In view of the express contractual provision limiting Kato's ability to start a subsequent phase early and ultimately demobilize early, Kato's assertion that it intended to finish Phase A work early and incurred unabsorbed overhead by not doing so is difficult to comprehend. Under the terms of its contract, Kato could not begin Phase B and/or C of the contract early, absent CO approval which it never obtained. How Kato therefore intended to complete its “overall” contract work early and thereby benefit from an early completion of Phase A work has not been explained and is not clear from the record. As discussed above, the purpose of awarding unabsorbed overhead under the *Eichleay* formula is to compensate a contractor for indirect costs not absorbed due to a disruption of the contractor's income stream during an indefinite period the contractor must remain ready to resume contract work immediately. Here, Kato knew, no matter when it completed its Phase A work, it would have to resume contract work on a later specified date to perform a subsequent phase of its contract. Kato's assertion that it intended to complete the work under its Navy contract early by performing “Phase A” work before a specified date, accordingly, on its face, appears to be a non-sequitur. We conclude, based upon the record before us, Kato has not shown it intended to finish early. *See Wickham Contracting Co., Inc. v. Fischer*, 12 F.3d 1574, 1581-82 (Fed. Cir. 1994); *Interstate Gen.*, 12 F.3d at 1059; *C.B.C. Enterprises, Inc. v. United States*, 978 F.2d 669, 675 (Fed. Cir. 1992) (“*raison d'etre* of *Eichleay* requires at least some element of uncertainty”); *CATH-dr/Balti Joint Venture*, ASBCA Nos. 53581, 54239, 05-2 BCA ¶ 33,046 at 163,815-16, *recon. denied in relev. part*, 06-1 BCA ¶ 33,161.

While Kato presented general testimony that it was capable of finishing contract work early, the record indicates otherwise. As discussed above, the contract expressly required Kato to begin its work on subsequent contract phases on specified dates unless Kato obtained CO approval to begin work early and Kato never obtained such approval. It, therefore, is not apparent how Kato

would have finished overall contract work early simply by completing “Phase A” prior to the contractually specified date. Moreover, as found above, Kato had subcontractors performing various work subsequent to its alleged early completion date for Phase A, and the work being performed by those subcontractors was not related to the changes the Navy made regarding the storm drain, sewer manhole, and existing water line. About one to two weeks before its alleged early completion date, Kato's electrical subcontractor went out of business and Kato had to locate another to do the control wiring for the Mechanical Yard. Kato's new electrical subcontractor did not complete Mechanical Yard control wiring until about five weeks after the alleged early completion date for Phase A. Moreover, during the nine weeks following the date of alleged early completion, subcontractors performed contract work inside and outside of the buildings unrelated to changes made by the Navy regarding the storm sewer, sewer manhole, and existing water line, such as carpeting, tiling, landscaping, and installing of the fire alarm system. The record therefore indicates Kato did not have a viable work schedule to complete Phase A of the job approximately seven weeks ahead of schedule or the technical ability to do so. We conclude, based on the record before us, Kato also has not shown that it was capable of finishing its contract work early, absent the alleged delays.

While Kato further suggests it would have finished nearly 10 weeks early but for the government's actions (app. br. at 82), it has presented only self-serving speculation that it would have done so and the record again indicates otherwise. Besides the reasons set forth immediately above, which additionally support a conclusion that Kato would not have finished early, a comparison of the number of days that Kato spent working in the Mechanical Yard with the total number of days of contract work Kato's superintendent believed necessary to complete that work reveals a discrepancy of at least 52 days or 7 and a half weeks, almost the entire period (10 weeks) that Kato asserts it would have finished Phase A work early. The project superintendent who prepared Kato's schedule showing a 71 day or 10 week early finish testified that, on 19 June 1995, he believed remaining Mechanical Yard work could be completed within six weeks or 42 days (tr. 292-93). Kato, however, acknowledges that the remaining Mechanical Yard work actually required 94 days to perform (app. br. at 68, 84-85), a difference of 52 days or 7 and a half weeks. A review of Kato's daily reports suggests Kato spent even more than 94 days in the Mechanical Yard performing work, possibly as many as 112 days or a difference of 10 weeks. *Compare* app. br. at 85 *with* app. br. at 25-28 (¶¶ 68-80) and app. ex. 109 (Nos. 234-37, 244-46, 248, 250-60). As found above, at least seven and a half weeks of those days were after Kato was aware of the changes the Navy intended to make regarding the storm water drain, Sewer Manhole A-1, and existing water line. Because two of those three changes involved principally deletion of work, and the third concerned capping of an existing water line, it is not apparent that work associated with the three changes, in and of itself, added to the time Kato was required to spend performing work in the Mechanical Yard. The record here thus indicates Kato would not have finished nearly 10 weeks early but for the government's actions. Accordingly, Kato has not made any of the three extra showings necessary for recovery of unabsorbed overhead based on alleged delay to an “early completion.”

Finally, Kato has not demonstrated it was required to remain on “standby” during the alleged delay. In order to demonstrate it was on “standby,” Kato must show effective suspension of much, if not all, of the work on the contract. As the U.S. Court of Appeals explained, “every case

where this court has held a contractor to be placed on standby has involved a complete suspension or delay of all the work or at most continued performance of only insubstantial work on the contract.” *E.g.*, ***P.J. Dick, Inc.*, 324 F.3d at 1371-72**. As found above, from January through May 1996, the period that Kato alleges the delays occurred, Kato continuously performed significant contract work, both inside and outside of the buildings being renovated. As Kato's project superintendent testified, when Kato was not able to work as it had planned, it always had other contract work it could perform so it “didn't shut down the job or anything like that.” Kato therefore was not on standby at any time during the period of the alleged delays. *Id.*

In sum, Kato has not made any of the showings necessary to establish a *prima facie* case of entitlement to recovery under the *Eichleay* formula. It has not established: there was a government-caused delay to its planned contract performance “not concurrent with a delay caused by the contractor or for some other reason;” its contract performance time was thus extended or, alternately, it completed performance on time or early but incurred additional, unabsorbed overhead cost because had it planned to finish even earlier; or it was required to remain on “standby” during the alleged delay. Accordingly, Kato is not entitled to an award of unabsorbed overhead under the *Eichleay* formula.

II. Liquidated Damages

Kato asserts that the Navy's assessment of 22 days of liquidated damages is invalid because: (A) the Navy delayed Kato by 67 days with respect to performance of contract work in the Mechanical Yard; (B) Phase A of the contract was substantially complete on 7 June 1996 and liquidated damages should not have been assessed after that date; and (C) the Navy did not correctly calculate a liquidated damages daily rate under its internal guidelines. According to Kato, the Navy's liquidated damages assessment of \$47,300.00 must either be reversed or reduced. (App. br. at 87-89).

A. Excusable Delay

Kato asserts that the Navy cannot assess 22 days of liquidated damages for the period 30 May through 20 June 1996 because it incurred government-caused delay of 67 days with respect to its contract work in the Mechanical Yard (app. br. at 87-88). We held above, however, that Kato failed to demonstrate there was Navy-caused delay with respect to its Mechanical Yard contract work. Kato, therefore, cannot obtain remission of the liquidated damages assessed based on the asserted delay. *E.g.*, ***Sauer*, 224 F.3d at 1347**.

B. Substantial Completion

Kato further asserts that building Nos. 229 and 230 were “fit for their intended purposes, no later than June 7, 1996,” and that “liquidated damages cannot properly be assessed against a contractor after the contract is substantially complete.” According to Kato, only “minor work, primarily on the exterior of the buildings, was being performed” by it during the period of 7 through 20 June 1996. (App. br. at 88-89)

As found above, however, PACDIV's Fire Protection Engineer did not retest the buildings' fire alarm system until 19 June 1996. While Kato characterizes retesting of the buildings' fire alarm system as "minor work," the contract here expressly required performance of a "final acceptance test" for the fire alarm system in the presence of the PACDIV Fire Protection Engineer, 15 days notice to the CO of the final acceptance testing date, and the correction of any deficiencies found during the test. "Accordingly, in addition to bargaining for operational installation of the fire alarm system," the Navy "bargained for testing of that system to demonstrate that the system was operational." Thus, "fire alarm testing was an important requirement . . . before the building could be used for its intended purpose." ***Kinetic Builder's, Inc. v. Peters*, 226 F.3d 1307, 1316 (Fed. Cir. 2000).**

A project should be considered substantially completed when it is capable of being used for its intended purpose. ***Id.* at 1315.** "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." ***Id.* at 1315-16, citing *Franklin E. Penny Co. v. United States*, 524 F.2d 668, 677 (Ct. Cl. 1975)** (the substantial completion doctrine "should not be carried to the point where the non-defaulting party is compelled to accept a measure of performance fundamentally less than had been bargained for"). Accordingly, we found above that building Nos. 229 and 230 were not "substantially complete" until the parties completed their retest of the fire alarm and that system was accepted, *i.e.*, on 20 June 1996. *See, e.g.*, ***Kinetic Builder's, Inc.*, 226 F.3d at 1315-16.** Kato, therefore, cannot obtain a partial remission of liquidated damages assessed based upon the assertion of a "substantial completion" date of 7 June 1996. *See id.*

C. Calculation of Daily Rate

Finally, Kato asserts the assessment of liquidated damages against it is improper because the Navy CO "has not correctly established the daily liquidated damages rate in accordance with the Navy Manual P-68." According to Kato, the Navy "overstated its daily liquidated damages rate for Phase A by \$81.84 per day," *i.e.*, approximately four percent, and a "liquidated damages provision may be stricken" if "an agency applies internal agency guidelines regarding liquidated damages incorrectly or improperly." (App. br. at 88; *see id.* at 65-66)

Damages are often uncertain in nature or amount or not measurable where there has been a delay in completing a contract for the government. *E.g.*, ***DJ Mfg. Corp. v. United States*, 86 F.3d 1130, 1133 (Fed. Cir. 1996).** When damages are uncertain or not easily measured, a liquidated damages clause will be enforced as long as "the amount stipulated . . . [in the clause] is not so extravagant, or disproportionate to the amount of property loss, as to show that compensation was not the object aimed at or as to imply fraud, mistake, . . . or oppression." *Id.*, quoting ***Wise v. United States*, 249 U.S. 361, 365 (1919).**

One challenging a liquidated damages clause, such as Kato, "bears the burden of proving that clause unenforceable." This burden "is an exacting one" because, where damages are uncertain or difficult to measure, it necessarily follows it is difficult to find that a particular liquidated damages amount or rate is an unreasonable projection of what those damages might be. ***D.J. Mfg. Corp.*, 86 F.3d at 1134-35; *Gassman Corp.*, ASBCA Nos. 44975, 44976, 00-1 BCA ¶ 30,720 at 151,743.** We must enforce a liquidated damages clause, regardless of how the damage

figure set forth in that clause was established, “if the amount stipulated [in that clause] is reasonable for the particular agreement at the time it is made.” *D.J. Mfg. Corp.*, 86 F.3d at 1137; *Young Assocs., Inc. v. United States*, 471 F.2d 618, 622 (Ct. Cl. 1973).

There is nothing inherently unreasonable about a per day reduction of about 2/100 of one percent of the contract price (\$9,103,501.00), *i.e.*, a daily liquidated damages rate of \$2,150.00, on a multiple-phase construction contract for military housing in the islands of Hawaii. See *D.J. Mfg. Corp.*, 86 F.3d at 1138 (reduction of 1/15 of one percent of contract price for military supply contract not unreasonable); *Pacific Hardware & Steel Co. v. United States*, 49 Ct. Cl. 327, 334 (1914) (reduction of 1/10 of one percent of contract price for military supply contract not inherently unreasonable); *Gassman Corp.*, ASBCA Nos. 44975, 44976, 00-1 BCA ¶ 30,720 at 151,743-44 (reduction of about 1/5 of one percent of contract price in multiphase construction project not inherently unreasonable). According to Kato's brief, such an amount is about four percent greater than the daily housing allowance granted to military personnel multiplied by the total number of military personnel displaced from housing as a result of a delay in completion of the contract (app. br. at 65-66, 88). While Kato appears to suggest it was unreasonable for the daily rate to exceed that sum by 4 percent and is somehow not in accord with the agency's internal guideline, *i.e.*, P-68, the provision expressly states that amounts derived from the liquidated damages formula “may be increased or decreased up to 50 percent by a [CO's] written determination that the Government's anticipated loss from delayed completion is less or greater than these amounts” (ex. A-127). The amount selected as the daily rate of liquidated damages, therefore, did not, on its face, contravene P-68. We have held that utilization of P-68 to establish a daily rate is reasonable “since its very purpose is to establish a reasonable estimate of the potential loss the Government is expected to incur as a result of delay.” *E.g.*, *JEM Dev. Corp.*, ASBCA No. 45912, 94-1 BCA ¶ 26,407 at 131,367; *Brooks Lumber Co.*, ASBCA No. 40743, 91-2 BCA ¶ 23,984 at 120,034.

Kato failed to introduce any evidence here that the amount of liquidated damages selected was an unreasonable forecast of the potential damages the Navy would incur. Accordingly, Kato has not carried its burden of proof and it cannot obtain remission of liquidated damages assessed based on assertion that the liquidated damages clause is unenforceable. *See D.J. Mfg. Corp.*, 86 F.3d at 1134-35, 1137.

In sum, Kato has not presented a basis for remission of any liquidated damages assessed. We, thus, uphold the CO's assessment of \$47,300.00 in liquidated damages.

III. Electric and Insurance

Kato asserts that it is entitled to an equitable adjustment of \$4,599.00 for electrical costs and \$6,990.00 for insurance costs for 67 days of Navy-caused delay regarding work in the Mechanical Yard which were not the subject of any bilateral contract modification and for 233 days of delay for which additional performance time was granted by bilateral and unilateral contract modifications. According to Kato, it did not know what electricity was costing it per day and never included electricity or builders' risk insurance cost in bilateral contract modifications it executed regarding the 233 days of delay. (App. br. at 66-67, 69, 89-90)

We held above that Kato failed to establish it experienced 67 days of Navy-caused delay to overall contract completion with respect to its contract work in the Mechanical Yard during 1996. Kato, therefore, is not entitled to recover an equitable adjustment comprised of “prorated” electrical and builders' risk insurance cost for an additional 67 performance days based upon asserted delay to 1996 Mechanical Yard work. *See, e.g., Servidone Constr. Corp. v. United States*, **931 F.2d 860, 861 (Fed. Cir. 1991)** (contractor must show liability, causation, and resultant injury to receive an equitable adjustment).

While Kato contends it did not know the “amount” of electrical cost it would incur during its negotiation of bilateral and unilateral contract modifications concerning the 233 days of delay, it does not assert that its incurrence of either electrical or builders' risk insurance cost was “unforeseeable.” We found above the parties' contract stated “[w]henver the Contractor submits a claim for equitable adjustment under any clause of this contract which provides for equitable adjustment of the contract, such claim shall include all types of adjustments in the total amounts to which the clause entitles the Contractor” and, “except as the parties may otherwise expressly agree, the Contractor shall be deemed to have waived: (1) any adjustments to which the Contractor otherwise might be entitled under the clause where such claim fails to request such adjustments; and (2) any increase in the amount of equitable adjustments additional to those requested in the Contractor's claim.” We also found above that, with respect to the 213 additional performance days granted for delay, Kato executed bilateral contract modifications stating the parties mutually agree to the following contract prices “as complete equitable adjustment” for the work specified in the modification and “[a]cceptance of this modification by the contractor constitutes an accord and satisfaction and represents payment in full for both time and money and for any and all costs, impact effect, and for delays and disruptions arising out of, or incidental to, the work as herein revised.” Kato did not “except” from those releases the claims it now asserts which are related to the subjects of the bilateral modifications. Moreover, Kato has not cited anything in the record showing that “the broad and unambiguous language of the contractual release provisions” does not mean what it says or that this appeal “involves ‘any of the special and limited circumstances under which a claim can be considered despite the execution of a release.’” *See J.C. Equip. Corp. v. England*, **360 F.3d 1311, 1315-16 (Fed. Cir. 2004)**, quoting *Mingus Constructors, Inc.*, **812 F.2d 1387, 1395 (Fed. Cir. 1987)**. Accordingly, based upon the record before us, pursuant to express terms of its contract, *i.e.*, clauses and modification releases, Kato is barred from receiving an equitable adjustment for 233 days of prorated electrical and insurance costs by release, and by accord and satisfaction. *See, e.g., J.C. Equip. Corp.*, **360 F.3d at 1316**; *Molony & Rubien Constr. Co.*, **ASBCA No. 20652, 76-2 BCA ¶ 11,977** (clause requiring contractor include all foreseeable costs in equitable adjustment claim barred claim for additional costs after agreement to adjustment), *aff'd*, **618 F.2d 119, 219 Ct. Cl. 616, 617 (1979)**; *McLain Plumbing & Elec. Serv., Inc. v. United States*, **30 Fed. Cl. 70, 80-81 (1993)**.

IV. Coiling Grill Work

Finally, Kato asserts it is entitled to an equitable adjustment of \$1,299.00 for the difference between the amount it sought to perform “changed” coiling grill work and the amount granted for the performance of that work in unilateral contract Modification No. A00020. According to

Kato, with respect to the contract's "coiling grilles," the Navy seeks "to shift" to Kato "administrative burden" and costs "not part of Kato's contractual responsibility." (App. br. at 37-43; 89) Since only entitlement is before us, we consider whether Kato has shown entitlement to any amount in excess of that which it has already received.

We found above that the Navy awarded Kato \$3,145.00 in unilateral contract Modification No. A00020 for performing changed work with respect to the coiling grilles. In this appeal, Kato has made no showing of the costs it bid for performance of coiling grille work or the costs it actually incurred to perform that work, as changed. Rather, it simply has presented very general testimony from its project superintendent and Hawaii general manager regarding what it deems "excessive contract administration" by supervisory or senior personnel it employed (its project superintendent, quality control manager, and Hawaii general manager) and pointed to the number of instances (53) that "coiling grille" issues were referenced by it in correspondence, quality control meeting minutes and other documents. (See app. br. at 2, 37-43) Kato, therefore, appears to be contending its senior personnel were required to devote more time to assisting the Navy with resolution of the coiling grille issues than was mandated under the parties' contract. However, a review of the record here reveals no "out of the ordinary" or "extraordinary" effort by Kato's senior personnel regarding coiling grille issues. As found above, Kato's senior personnel simply attended several meetings and otherwise engaged in communications one might expect to occur where a problem has been discovered with contract specifications and/or drawings. Thus, Kato failed to demonstrate here that (a) senior/supervisory personnel were required to do anything beyond the requirements of its contract and (b) it incurred costs to perform changed "coiling grille" work greater in amount than the sum it received as an equitable adjustment for performance of that work under unilateral Modification No. A00020.

A contractor has the burden of proving affirmative claims against the government by a preponderance of the evidence. Kato has failed to carry its burden of proof with respect to various elements of its affirmative claim concerning changed coiling grille work. Accordingly, Kato is not entitled to an award of the \$1,299.00 it seeks above and beyond the equitable adjustment granted it by the Navy for changed coiling grille work. See, e.g., *J.C. Equip. Corp.*, **360 F.3d at 1317-18**; *Servidone Constr. Corp.*, **931 F.2d at 861** (must show liability, causation, and resultant injury to receive equitable adjustment).

CONCLUSION

The appeal is denied.

TERRENCE S. HARTMAN
Administrative Judge
Armed Services Board of Contract Appeals
I concur
MARK N. STEMLER
Administrative Judge
Acting Chairman

Armed Services Board of Contract Appeals

I concur

EUNICE W. THOMAS

Administrative Judge

Vice Chairman

Armed Services Board of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 51462, Appeal of Kato Corporation, rendered in conformance with the Board's Charter.

CATHERINE A. STANTON

Recorder,

Armed Services Board of Contract Appeals

FN1. The roll-up window (or coiling grille) specified in the contract was the wrong size and its installation (along with that of air conditioning duct) conflicted with installation of a plumbing drain. The Navy ultimately resolved these issues by replacing the roll-up window with a sliding glass window, rerouting the air conditioning duct through office 123 and having the duct penetrate the wall to access lobby 118, and installing a new air supply diffuser at the latter location. (*E.g.*, ex. A-111)

Kato personnel dealt with “coiling grill” issues beginning 26 September 1995, when Kato's superintendent sent the Navy Request For Information (RFI) No. 83 stating that the coiling grille which was to be placed between the lobby and reception area of Building No. 230 could not be installed due to a conflict with an air conditioning vent (ex. A-80 at 100425; tr. 215-16). On 17 October, the Navy and its architect visited the project site regarding RFI No. 83. Two weeks later, on 31 October, the Navy and its architect met with Kato to discuss various RFIs. (Ex. A-109) On 1 November, the Navy provided reasons why it believed that it was Kato's “responsibility to resolve” the coiling grille “problem” (ex. A-80 at 100426). By letter dated 2 November, Kato asked the Navy to advise regarding the course of action it preferred regarding the coiling grille (*id.* at 100430). During early November, the Navy supplied Kato with names of three “manufacturers of tubular motor driven coiling grilles” that would fit within the space called for and advised Kato the Navy's architect had mentioned it was “will[ing] to pay for the cost to extend the grille” (*id.* at 100432). By letter dated 13 November, Kato notified the Navy its responses to RFI No. 83 did not address “dimensional problems” (*id.* at 100434). On 3 January 1996, Kato personnel discussed RFI No. 83 with the ROICC and Navy architect on site (ex. A-109). Five days later, ROICC and base personnel met in building 230 to discuss RFI No. 83 (*id.*). On 16 January, the Navy's architect asked Kato to provide it with a cost proposal to “move air-conditioning duct . . . per sketch” and “[c]hange roll-up grille . . . to [a] sliding window” (ex. A-57). Kato did not respond (tr. 222, 474-76). On 23 February, Kato sent the Navy RFI No. 101 advising that a light over the countertop in the reception area was in conflict with mechanical duct and a ceiling height of 8 foot could not be achieved with duct in place (ex. A-109, -124). The Navy's

architect asked Kato on 26 February how much the ceiling height needed to be lowered to fit the recessed ceiling light (ex. A-124). Kato responded that an additional 5-inch depth was necessary to locate the light fixture above the proposed acoustical ceiling grid located beneath the insulated duct (*id.*). On 1 March, the Navy's architect was at the site and proposed a "re-route of [the] duct[ing] from Rm 119 (Reception) thru 123 (Office)" (ex. A-109). Kato advised the Navy the same date its subcontractor had advised "[t]here is no available space to run the duct into the lobby" because lobby ceiling is at 8 foot 3-inches and the office ceiling is at 8 foot 0 inches, and the wall is not deep enough to handle 90 degree duct bends without restricting air flow (ex. A-80 at 100435). On 4 March, the Navy's architect visited Building No. 230 and took measurements to design a route for the duct from room 119 into the lobby (ex. A-107, -109). On 7 March, the Navy sent Kato by facsimile two documents responding to RFI No. 101. The first stated an alternate site had been selected for the light. The second advised: the ceiling height could be lowered to 7 foot 7 inches to accommodate the light; "drop-in" acoustical ceiling tile could be used in lieu of gypsum board, and enclosure 1 prepared by the Navy's architect set forth direction for providing "a soffit for the rerouted AC duct installation in Office Room #123" (ex. A-124). While Kato requested a formal contract modification setting forth the changes, it performed work associated with the coiling grille during 15 March and 2 and 8 April 1996 without such a modification (tr. 223-34; ex. A-107 (11 Mar. 1996), A-109 (Nos. 288, 300, 304)).