



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: April 7, 2023

CBCA 6453, 6560

BES DESIGN/BUILD, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Todd A. Jones and Peyton D. Mansure of Anderson Jones, PLLC, Raleigh, NC, counsel for Appellant.

Jennifer L. Hedge, Office of General Counsel, Department of Veterans Affairs, Pittsburgh, PA; and Laetitia C. Coleman, Office of General Counsel, Department of Veterans Affairs, Lakewood, CO, counsel for Respondent.

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

DRUMMOND, Board Judge.

These consolidated appeals by appellant, BES Design/Build, LLC (BES), arise from a construction contract with respondent, the Department of Veterans Affairs (VA). In CBCA 6560, BES challenges the termination for default of its contract and the VA's denial of payment under pay application no. 32. In CBCA 6453, BES challenges the denial of its claim for compensation for a fifty-nine-day delay.

For the reasons below, we deny the appeals.

Background

I. Contract Award, Performance, and Delays

The VA awarded the subject contract to BES in September 2015. The fixed price construction contract required BES to renovate approximately 3300 square feet of interior space for a new step-down clinic located on the third floor of the VA medical facility in Fayetteville, Arkansas (the project). The clinic is listed as an historical landmark on the National Register of Historic Places. As part of the renovation work, BES was to construct six new private patient rooms and six new bathrooms. The contract also required BES to demolish and replace the existing heating, ventilation, and air conditioning (HVAC) equipment in the attic, including the relocation of 200 square feet of linear piping. The contract required the work to be completed within 270 days of the notice to proceed with an anticipated contract completion date (CCD) of June 17, 2016. The total contract price was \$1,865,864.00.

After issuing the notice to proceed, the VA informed BES of the presence of asbestos and the need to perform removal and abatement prior to proceeding with the contract work. It is undisputed that the presence of asbestos was not disclosed at the time that BES submitted its bid on the project. Twenty-five days later on November 23, 2015, the contracting officer submitted to BES a request for proposal (RFP) and a corresponding statement of work for asbestos removal and abatement. BES completed the asbestos removal and abatement on April 12, 2016, allowing BES to begin work on the original project nearly six months after the notice to proceed. The VA issued a modification extending the CCD by fifty-nine days, to and including October 6, 2016.

After completing the asbestos work, BES's performance did not proceed smoothly. On or about April 16, 2016, BES requested permission to use a window as a trash chute. At some point, BES damaged the window and replaced it without prior approval or a submittal to the VA. According to the VA, not only was the window particularly important to the project, but the replacement required specific details in order to comply with the State Historic Preservation Office. The VA also alleges that BES caused structural damage to the space. More specifically, BES caused damage to structural beams that, without repair, rendered the space uninhabitable. The VA felt generally insecure about BES's ability to complete the project. During the period of performance, BES had five project managers, eight superintendents, and three mechanical subcontractors. According to the VA, "the contracting officer estimated that had BES been allowed to continue in that fashion, the project would have taken another 31 months to complete, not including rework."

Between March 2017 and October 2018, the VA, through its contracting officer for the project, issued several letters of concern outlining various issues, including "lack of

progress,” “incomplete submittals,” “nonpayment of subcontractors,” “overstatement of work on progress payment applications,” “issues with quality and inspections,” and “inaccuracies in the daily logs.” The contracting officer deemed BES’s responses to these letters unsatisfactory but continued to work with BES to move toward completion. On October 9, 2018, BES and the VA bilaterally executed modification no. 9 (mod. 9), which extended the CCD to November 16, 2018.

II. Termination for Default

On October 17, 2018, the VA issued another letter of concern listing a number of items that the VA alleged were deficient or behind schedule. The letter also required BES to submit its plan to complete the project. BES answered, stating it would “work diligently to get the project completed as timely as possible” and providing an estimate for when upcoming tasks would be completed but providing no plan to address any of the issues that had been raised. Instead, BES identified issues with the window delivery and show mud beds that would cause further delay. On October 31, 2018, the VA responded with further questions and concerns about BES’s performance and the feasibility of its estimate for when upcoming tasks would be completed. Notably, the VA did not mention liquidated damages in its letter of concern. BES again answered, but no further correspondence occurred between the parties until January 29, 2019, when the VA issued a cure notice. According to the VA, BES had not sufficiently addressed the deficiencies raised in the letter of concern. The cure notice identified several items to be cured within fifteen days or the VA would initiate termination for default. BES asserts that the VA incorrectly stated that, “[t]o date, no formal response from . . . [BES] to this [allegation of] material breach has been received.”

Nevertheless, BES formally responded to the issues identified in the cure notice on January 31, 2019. First, on the issue of the damaged window, BES stated that the window had been damaged twice during delivery and now had to be specially ordered because it was no longer in production, resulting in delay. Second, as to the structural damage, BES asserted that the damage was caused by one of its subcontractors working outside its scope of work and that BES’s engineer had proposed a solution that would be submitted to the VA. Third, BES stated that most of the items identified in an above-ceiling inspection were either corrected or in the process of being corrected. Fourth, BES stated that it was working diligently to resolve the issue of coordination drawings by working with its subcontractors to submit drawings with no errors and omissions. Fifth, BES was aware of the issues with the cracked floor topping, and BES was in the process of proposing repairs for VA approval. Finally, in response to concerns identified in the cure notice about BES’s subcontractors and doubt that BES had retained the required specialty subcontractor support needed to complete the project, BES acknowledged its subcontractor issues but blamed the VA for failing to pay BES for its completion of work.

After BES responded to the cure notice, the parties began having weekly construction meetings while BES continued to work on the project. On March 13, 2019, the VA issued a show cause notice, informing BES that the VA was considering terminating the contract for default and inviting BES to respond with any facts demonstrating that BES's failure to perform was due to causes beyond BES's control. On March 22, 2019, BES responded to the show cause notice. In its response, BES asserted that it addressed each of the VA's outstanding issues. The VA maintains that BES failed to address the deficiencies or provide a project completion date.

On April 17, 2019, BES provided the VA with a substantial completion date of April 26, 2019. On April 18, 2019, the VA responded to BES's March 22 response to the show cause notice, rebutting BES's statements regarding its failure to perform and emphasizing BES's responsibility for the project's delay. On the same day, the VA terminated BES's contract for default. The termination letter stated that BES had failed adequately to respond to the issues raised in the cure notice and the show cause notice and had failed to complete the project by the amended CCD of November 16, 2018.

On August 3, 2020, the VA hired a replacement contractor to complete the project and established a period of 270 days to complete the project. The project was completed by the replacement contractor in July 2021.

III. BES's Fifty-Nine-Day Delay Claim

BES completed the asbestos removal and abatement on April 12, 2016. On August 2, 2016, the VA issued modification no. 6 (mod. 6) to extend the contract completion period by an additional fifty-nine days, from August 8, 2016, to October 6, 2018. The delay, pursuant to mod. 6, caused BES to incur additional costs, prompting the VA to issue RFP #5. On November 9, 2016, BES responded with a request for \$50,934.50 plus interest and fifty-nine additional days to perform under the contract. On March 10, 2017, after several months of non-payment, BES submitted a certified claim to the VA requesting the \$50,934.50 as compensable delay and an additional fifty-nine days to perform under the contract.¹

¹ For more than a year after BES submitted its claim on March 10, 2017, the parties engaged in negotiations concerning the amounts owed to BES resulting from the delays. On July 10, 2018, the VA offered, via email, to pay BES \$31,726.07 to resolve the dispute concerning mod. 6 and the fifty-nine-day delay. BES accepted the offer via email the same day. To date, the VA has not paid BES the \$31,726.07 settlement amount.

Separately, on August 25, 2016, BES submitted a certified claim for \$168,847.06 and additional time to the contracting officer for asbestos-related delays. The contracting officer issued a final decision, offering additional time and \$21,998.34 for the additional costs of asbestos abatement. BES appealed the decision to the Board, which docketed the dispute as CBCA 5640. On June 14, 2018, the parties entered into a settlement agreement, memorialized as modification no. 7 (mod. 7), for \$50,000 and twenty-one days of compensable delay. Pursuant to the settlement agreement, the Board dismissed CBCA 5640 with prejudice.²

IV. Pay Application No. 32

On April 9, 2019, BES submitted a draft of pay application no. 32 (pay app. 32), which identified the work completed by BES for an alleged sum of \$257,537.94 and requested a walk-through of the site. On April 10, 2019, the parties met for a walk-through to determine the extent of work completed and associated payments that the VA owed BES. The VA identified several items that it deemed incomplete, not performed, or overstated and therefore ineligible for full payment. The VA created an itemized worksheet which acknowledged that BES was owed \$85,947.83 of the \$257,537.94 for completed work. BES continued to perform work on the project until the VA issued its termination for default on April 18. An hour before receiving the notice of termination, BES resubmitted pay app. 32 requesting the full \$257,537.94, rather than the \$85,947.83 for work approved by the VA.

V. The Appeals

On April 25, 2019, BES appealed the contracting officer's denial of its claim for \$50,934,50 and fifty-nine days of delay. That appeal was docketed as CBCA 6453. The parties dispute whether the CBCA 5640 settlement agreement concerning asbestos-related delays encompasses BES's compensable delay claim for \$50,934,50, thereby precluding BES from pursuing this appeal. BES argues that the claim is wholly unrelated to asbestos and that the VA unequivocally agreed that mod. 6 is a compensable delay. The VA asserts that BES is precluded from raising this appeal because it involves asbestos-related delays and was therefore settled in CBCA 5640. In the alternative, the VA argues BES has not demonstrated entitlement to compensation for the fifty-nine-day delay.

² Both parties agree that BES incurred a delay and additional costs due to asbestos. The parties disagree on whether the settlement for CBCA 5640 precludes the fifty-nine-day delay claim (CBCA 6453) and whether BES can prove entitlement under the fifty-nine-day delay claim.

Subsequently, on July 17, 2021, BES appealed the default termination. That appeal was docketed as CBCA 6560. In the same notice of appeal, BES appealed the contracting officer's denial of its claim seeking payment for pay app. 32 in the amount of \$257,537.94.

BES contends that the VA improperly terminated the contract for default because the contracting officer never established a new CCD after November 16, 2018, and allowed BES to continue performance for an additional five months, thereby precluding the VA from terminating for default. BES further argues that, even if the VA had the right to terminate, the grounds for termination were improper. In the alternative, BES asserts that other justifiable excuses made termination for default improper. The VA disagrees, arguing that its termination for default was reasonable and justified due to BES's (1) failure timely and diligently to prosecute work in accordance with the contract, and (2) failure to correct defective work in response to numerous letters of concern, the cure notice, and the show cause notice. The VA additionally noted that the "issues on the project at the time of termination rendered the space uninhabitable and unusable for its intended purpose."

With respect to pay app. 32, BES asserts its submission of pay app. 32 was timely and that the VA's denial was improper. BES claims that it is "entitled to recover the full amount of the services rendered to and accepted by the Government." The VA, in opposition, argues that it properly denied BES's claim because BES failed to submit a proper invoice and billed for work that was never performed or was overstated and that payment of the invoice would have resulted in overpayment and an advance payment by the Government.

Discussion

I. Termination for Default, CBCA 6560

A. The Standards Applicable to Default Termination Challenges

1. The Government's Initial Burden

Contracting officers have broad discretion in deciding whether to terminate a contract for default. *I-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913, at 175,552 (citing *Consolidated Industries, Inc. v. United States*, 195 F.3d 1341, 1343 (Fed. Cir. 1999)). But default termination "is a drastic sanction which should be imposed (or sustained) only for good grounds and on solid evidence." *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987) (quoting *J.D. Hedin Construction Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969)).

Failure to complete work by the contractual deadline is a well-settled reason for a default termination. *I-A Construction & Fire, LLP*, 15-1 BCA at 175,552. If the work is not

completed by the contract deadline, the Government, barring any valid excuses from the contractor, has an immediate right to terminate for default. *Id.* When the contractor challenges the default termination, the Government bears the initial burden of establishing a prima facie case that the contractor failed to complete work by the deadline. *Id.*

The contracting officer can also terminate for failure to make progress if he or she reasonably believes “that there [is] ‘no reasonable likelihood that the [contractor] c[an] perform the entire contract effort within the time remaining for contract performance.’” *Lisbon Contractors*, 828 F.2d at 765 (quoting *RFI Shield-Rooms*, ASBCA 17374, et al., 77-2 BCA ¶ 12,714, at 61,735). When the Government reasonably thinks that the contractor may not be able to perform the contract on a timely basis, the contracting officer may issue a cure notice before terminating the contract. *I-A Construction & Fire, LLP*, 15-1 BCA at 175,553 (citing *Danzig v. AEC Corp.*, 224 F.3d 1333, 1337 (Fed. Cir. 2000)). “A ‘cure notice’ identifies a deficiency in the contractor’s performance that the Government considers to endanger performance of the contract, and warns the contractor that the contract may be terminated for default if the problem is not ‘cured’ or addressed, within a specified period of time.” *Decker & Co. v. West*, 76 F.3d 1573, 1576 n.2 (Fed. Cir. 1996). Once a cure notice is issued, the contractor must take steps to demonstrate that progress is being made toward a timely completion of the contract or explain that the reasons behind any prospective delay are not the responsibility of the contractor. *I-A Construction & Fire, LLP*, 15-1 BCA at 175,553 (citing *AEC Corp.*, 224 F.3d at 1337). If a contractor fails to respond adequately, the contracting officer may terminate the contract for default. *Id.* A contracting officer need only be justifiably insecure about the contract’s timely completion in his assessment of a termination for default. *Affiliated Western, Inc. v. Department of Veteran Affairs*, CBCA 4078, 17-1 BCA ¶ 36,808, at 179,401, *aff’d*, 748 F. App’x 331 (Fed. Cir. 2019).

2. Waiver of the CCD and the Right to Terminate for Default

The Government may not be justified in finding a contractor in default if it has waived its established CCD. In *DeVito v. United States*, 413 F.2d 1147 (Ct. Cl. 1969), the Court explained “waiver of the right to terminate” as follows:

Where the Government elects to permit a delinquent contractor to continue performance past a due date, it surrenders its alternative and inconsistent right under the Default clause to terminate, assuming the contractor has not abandoned performance and a reasonable time has expired for a termination notice to be given.

Id. at 1153. The Court distilled this principle into two elements necessary to find a governmental election to waive default: “(1) failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) reliance by the

contractor on the failure to terminate and continued performance by him under the contract, with the Government's knowledge and implied or express consent." *Id.* at 1154; *see Olson Plumbing & Heating Co. v. United States*, 602 F.2d 950, 956 (Ct. Cl. 1979); *Technocratica*, ASBCA 47992, et al., 06-2 BCA ¶ 33,316, at 165,187.

Since *DeVito*, tribunals, including our predecessor boards, have determined that this "waiver of the right to terminate" applies to supply contracts but is rarely applicable to construction contracts like the one at issue here, for the reasons that the ASBCA explained:

[T]he *DeVito* principle [does] not apply to construction contract cases for two reasons: First, construction contracts generally provide for payment for work completed after the [CCD]. Second, construction contracts generally contain a liquidated damages provision, and the assessment of such damages indicates time is of the essence. Thus, under these circumstances, the element of detrimental reliance is difficult to establish.

AmerescoSolutions, Inc., ASBCA 56811, 10-2 BCA ¶ 34,606, at 170,549; *see M. Zanis Contracting Corp.*, DOT BCA 2756, 96-2 BCA ¶ 28,439, at 142,084. The Government may waive its right to terminate construction contracts only in "unusual circumstances." *AmerescoSolutions*, 10-2 BCA at 170,550; *see Indemnity Insurance Co. of North America v. United States*, 14 Cl. Ct. 219, 224 (1988) (finding that the *DeVito* waiver rule has only been applied in a construction contract case "when exceptional or rare circumstances are presented"). Tribunals usually find "unusual circumstances" only where an unreasonable period of time has elapsed between the established CCD and termination for default or, alternatively, where the Government allows the contractor to continue performance without communicating concern or its intention to assess liquidated damages. *See, e.g., Technocratica*, 06-2 BCA at 165,188; *B.V. Construction, Inc.*, ASBCA 47766, et al., 04-1 BCA ¶ 32,604, at 161,350-51; *Overhead Electric Co.*, ASBCA 25656, 85-2 BCA ¶ 18,026, at 90,473; *see also Danrenke Corp.*, VABCA 3601, 93-1 BCA ¶ 25,365, at 126,337-39 (1992).

3. The Contractor's Burden After the Government Establishes Default

If the Government establishes a valid reason for default, the burden shifts to the contractor to prove that there were excusable delays or that it is making sufficient progress on the contract and will complete work on time. *I-A Construction & Fire, LLP*, 15-1 BCA at 175,553. To establish excusable delay, the contractor must show by a preponderance of the evidence that the delay resulted from unforeseeable causes outside the control and without the fault and negligence of the contractor. *Id.* Whether the delay was caused by unforeseeable causes and without the fault or negligence of the contractor will depend on the facts and circumstances surrounding the delay. *Id.* Examples of such delays include, but are

not limited to, acts of God, acts of the Government in either its sovereign or contractual capacity, floods, fires, epidemics, and unusually severe weather. *Id.* at 175,553-54.

Further, if the contractor has failed to complete work by the deadline or it anticipates failing, it is not enough for the contractor to show only that there were excusable delays. *I-A Construction, LLP*, 15-1 BCA at 175,553. In addition to proving excusable delay, the contractor must also demonstrate how the delay “affected activities on the contract’s critical path and impacted the contractor’s ability to finish the contract on time.” *Id.* at 175,554 (citing *Sauer Inc. v. Danzig*, 224 F.3d 1340, 1345 (Fed. Cir. 2000)).

B. The Government Met Its Initial Burden Proving Default

The VA contracting officer based the default termination decision at issue on BES’s failure to satisfy the cure notice and show cause notice and its failure to complete performance by the contractual deadline of November 16, 2018, as established by mod. 9. BES does not contest that it did not complete the work by that date but argues that, because the VA never established a new CCD, it waived its right to terminate for default. Appellant’s Post-Hearing Brief at 35. BES argues that “[a] waiver of a performance or completion date requires a reestablishment of the date in order to have a right to terminate.” *Id.* (quoting *Humphrey Logging Co.*, AGBCA 84-359-3 et al., 85-3 BCA ¶ 18433 at 92,570-71).

BES compares this dispute to *Technocratica* where the Navy terminated two construction contracts for default. In *Technocratica*, the Navy allowed the contractor to continue performance on the contracts for ten to thirteen months after the completion dates had passed and made no mention of liquidated damages or that the CCD was in effect. *See Technocratica*, 06-2 BCA at 165,187-88. The ASBCA found these circumstances to be sufficiently unusual to apply the *DeVito* principle to a construction contract and held that the Navy had waived its right to terminate. *Id.* at 165,188. Like in *Technocratica*, BES asserts here that “there [was] a manifestation by the government that it no longer considered the CCD enforceable.” Appellant’s Post-Hearing Brief at 37. However, unlike in *Technocratica*, the record here is replete with communications from the VA, both before and after the CCD of November 16, 2018, expressing concern about BES’s ability to complete the contract, including a cure notice and show cause notice. Additionally, in *Technocratica*, the ASBCA highlighted instances of interference where the Navy failed to provide required information and prevented access to the job site. *See, e.g., Technocratica*, 06-2 BCA at 165,184. These circumstances are not present here.

We agree with the VA that the dispute here more closely resembles *AmerescoSolutions* than *Technocratica*. In *AmerescoSolutions*, the ASBCA compared the contractor’s termination with previous decisions involving waivers of the right to terminate for default to determine if “unusual circumstances” existed:

One of the factors the [ASBCA] considered in determining whether “unusual circumstances” existed in applying *DeVito* to construction cases was the length of time between the CCD and the termination. In *Technocratica*, it was 10 to 13 months after the CCD in one contract and 11 months in the second contract. In *B.V. Construction*, it was over two years. In this case, the original CCD was 5 December 2008; [task order] 0013 was terminated for default on 27 February 2009, 84 days later. Even if we start the forbearance period from mid-September 2008 when the Corps first became aware of the airborne asbestos, the termination occurred about five months later.

AmerescoSolutions, 10-2 BCA at 170,551. The board explained that “forbearance for a time under a construction contract is not normally inconsistent with a subsequent termination for default or assessment of liquidated damages; forbearance hereunder was not an election as it was in *DeVito*.” *Id.* (quoting *Joseph Morton Co.*, ASBCA 19793, 78-1 BCA ¶ 13,173, at 64,411). Further, like BES, the contractor in *AmerescoSolutions* argued that “[t]he Corps’ failure ever to establish a reasonable completion date invalidates the default as a matter of law.” *Id.* The board disagreed, explaining that “the Court of Claims spoke to this issue: This duty—to unilaterally or bilaterally set a reasonable time for performance—‘does not arise . . . until the facts and circumstances show the due date has been waived.’” *Id.* (quoting *Olson Plumbing*, 602 F.2d at 957).

Here, the VA never waived the completion date, even though the contracting officer allowed BES to continue performance after the CCD of November 16, 2018. During the period between the CCD and the termination on April 18, 2019, the contracting officer agreed first to a new completion date of February 28, 2019, and then to a later completion date of March 29, 2019. Although the parties never memorialized either agreement as modifications, the contracting officer maintained continuous communication with BES, seeking assurances that BES would complete the work. On January 29, 2019, the contracting officer issued a cure notice to BES outlining the VA’s concerns that work was progressing far slower than promised. On March 13, 2019, the contracting officer issued a show cause notice based on BES’s failure to resolve issues with structural damage, window replacement, and floor repairs. The contracting officer deemed BES’s responses insufficient and, on April 18, 2019, finally terminated the contract.

In total, the contracting officer allowed BES to continue performance for five months beyond the established CCD of November 16, 2018. Like in *AmerescoSolutions*, we find that the contracting officer offered BES a reasonable length of time to complete the project before terminating for default. During this time, the contracting officer communicated his concerns in notices and at weekly meetings. These circumstances are not sufficiently “unusual” to apply the *DeVito* principle to this construction contract or justify a finding that the VA waived its right to terminate for default.

Accordingly, the VA need only demonstrate that BES failed to meet its deadline to complete the project or that the contracting officer felt justifiably insecure about the contract's timely completion in his decision to terminate for default. Based on volumes of contemporaneous communications expressing concern and the contracting officer's testimony, the VA has satisfied this initial burden of proving default, shifting the burden to BES to show that excusable delays affected its timely completion.

C. Appellant Has Not Overcome the Government's Showing

Because the VA has established default, the burden shifts to BES to prove that the default was the result of excusable delays. *See 1-A Construction*, 15-1 BCA at 175,553. BES asserts that its failures leading to the delay were excusable because they were either beyond BES's control or caused by the VA.

First, BES claims that its delayed installation of the window was due to the replacement window being twice damaged during shipment. According to BES, the damage occurred outside of BES's control and is, therefore, an excusable delay. However, if a contractor can prevent an event from occurring, it is not beyond its control. *See Fox Construction, Inc. v. General Services Administration*, GSBCA 11543, 93-3 BCA ¶ 26,193, at 130,403-04 (a defective specification is not the cause of delay where the delay is due to a contractor's failure to consider non-defective contract requirements). During the hearing in this matter, the contracting officer's representative (COR) for the VA testified that, during the demolition phase of the project, BES requested and the VA approved the use of the window at issue for a trash chute. According to the COR, "the window had received damage during the demolition." BES has failed adequately to rebut the assertion that BES caused the window damage itself, necessitating the shipment of a replacement window. It is immaterial that the replacement window sustained damage during shipment because the damage to the original window, which created the need for the replacement window, was within BES's control. Therefore, we are not persuaded that the delays involving the window replacement are excusable.

Second, BES asserts that the damage to the structural beams was an excusable delay because the damage was caused by its subcontractor operating beyond the subcontractor's scope of work and, therefore, outside BES's control. "[T]he normal rule under the [Federal Acquisition Regulation (FAR)] is that the contractor is responsible for the unexcused defaults of its subcontractors or suppliers." *General Injectables & Vaccines, Inc. v. Gates*, 527 F.3d 1375, 1378 (Fed. Cir. 2008) (citing John Cibinic, Jr., Ralph C. Nash, Jr., & James F. Nagle, *Administration of Government Contracts* 555 (4th ed. 2006) ("Under the clauses currently in use . . . before the contractor can be excused, it must be shown that the cause of delay was beyond the control and without the fault or negligence of the contractor and all intervening contractors including the delayed subcontractor")). Thus, BES bears the burden of proving

not only its own excusable delay but also that the structural damage resulted from unforeseeable causes outside the control and without the fault and negligence of the subcontractor. *Id.* BES merely states that, “[f]or the issue related to the damage to the structural beams, BES stated that this was caused by the subcontractor, and was outside of the subcontractor’s scope of work—an excusable delay.” Appellant’s Post-Hearing Brief at 48. BES fails to explain why the subcontractor’s own issues were cause for an excusable delay. Accordingly, we are not persuaded that the structural damage is an excusable delay sufficient to overcome the VA’s default termination.

Third, BES identifies the VA’s failure to provide timely responses to requests for information and submittals as an excusable delay. “When the contract does not specify a period in which the government must respond, the law imposes an obligation to act within a reasonable period of time.” *Essex Electro Engineers, Inc. v. Danzig*, 224 F.3d 1283, 1291 (Fed. Cir. 2000) (quoting *Specialty Assembling & Packing Co. v. United States*, 174 Ct.Cl. 153, 355 F.2d 554, 565 (1966)). “That period is determined by the reasonable expectations of the parties in the special circumstances in which they contracted.” *Id.* (quoting *Commerce International Co. v. United States*, 338 F.2d 81, 87 (Ct. Cl. 1964)). According to BES, “when the Government takes excessive amounts of time to respond to RFIs or approve submittals, BES cannot proceed until it receives a response from the Government.” Appellant’s Post-Hearing Brief at 51. BES relies on the COR’s testimony on cross-examination that there was “typically” a deadline of twenty business days for responding to submittals and “a reasonable amount of time” for responding to RFIs, although the COR testified at the hearing that she “would need to look and see what the contract says on that.” Hearing Transcript, Vol. 5 at 334-35. The COR further testified that the agency attempted to respond to RFIs within five to seven business days but that “sometimes it takes a little bit longer.” *Id.* at 328.

Nowhere does BES identify a particular deadline in the contract itself by which the Government was required to respond to submittals or to RFIs. To the extent that BES is attempting to rely upon the COR’s testimony as evidence of a contract requirement, we look to the contract itself, not testimony about what someone thinks the contract says, to determine what the contract says. To the extent that BES is relying on the COR’s testimony as evidence of what a reasonable response time to submittals and RFIs should have been during the VA’s administration of this contract, the testimony at the hearing reflects that the time frames which the COR referenced were not set in stone and could vary depending on the circumstances and the quality (including whether necessary support was provided) of the submittals and RFIs. Nevertheless, even if we were strictly to hold BES to the response times to which BES refers, BES has failed to prove excessive or unreasonable VA delay.

In its post-hearing briefing, BES lists the VA’s response times to those particular submittals and RFIs that BES asserts as evidence of the VA’s “excessive [response] delays.”

Appellant's Post-Hearing Brief at 48-49. BES's list is misleading because BES presents response times in calendar days, not the business days to which the COR referred. For example, BES complains that, after it presented submittals to the VA on October 12, 2016, and December 13, 2018, the VA did not respond to those submittals until November 9, 2016, and January 11, 2019, respectively. BES argues that the VA's response times to those two submittals of twenty-eight and twenty-nine days, respectively, are examples of the VA's "excessive delays." BES, however, counts in calendar days. Looking at the amount of time in terms of business days (accounting for federal holidays), the VA's response time was twenty business days and eighteen business days, respectively, both of which fall within the time frames that the COR testified the VA had considered reasonable.

Of the six submittals that BES cites as examples of the VA's excessive delays in responding, only three of VA's responses to those submittals actually exceeded the twenty-business-day target to which the COR testified. Although the nineteen (out of more than 150) RFIs that BES cites as having responses that exceeded the five-to-seven business-day response time that the COR testified the VA attempted to meet, the VA's response time for all of those RFIs was between ten and thirty-two business days, a number that does not seem excessive or unreasonable under the circumstances. In any event, for the submittals and RFIs that BES identifies as having received late responses, and for any other submittal and RFI responses that BES has not cited but assumes that the Board should find in the record, BES has done nothing but complain about numbers of days. BES has not established that any extra time that the VA took to review those submittals and RFIs was unreasonable, considering the possibility that they were more complicated than other submittals or that BES may have failed to submit clear or fully supporting documentation. BES has not shown that the VA's response times were unreasonable.

Further, BES has not established that any of the allegedly delayed responses actually impacted its ultimate ability to complete the project on time or that it was unable to work around the alleged VA delays. "[T]o result in an excusable delay, 'the unforeseeable cause must delay the overall contract completion; i.e., it must affect the critical path of performance.'" *K-Con Building Systems, Inc. v. United States*, 131 Fed. Cl. 275, 321 (2017) (quoting *Sauer Inc. v. Danzig*, 224 F.3d 1340, 1345 (Fed. Cir. 2000)). BES has not proven that the few instances of submittal returns that exceeded twenty business days and RFI returns that exceeded seven business days were so pervasive that they had any significant impact on BES's work, much less the ultimate completion of its work, or created excusable delay.

Finally, BES cites to allegedly delayed VA progress payments, which BES asserts resulted in its inability to pay its subcontractors, as creating excusable delay. BES's contract incorporated FAR 52.232-27, Prompt Payment for Construction Contracts, which provides that the Government should make progress payments within fourteen days after the

designated billing office receives a proper payment request, “provided . . . there is no disagreement over quantity, quality, or Contractor compliance with contract requirements.” 48 CFR 52.232-27 (2021). BES cites eleven late progress payments over the course of contract performance, alleging that those payments were made between thirty-three and 132 days after invoice submission. Appellant’s Post-Hearing Brief at 50-51. Yet, in its post-hearing brief, BES has misstated when it actually submitted its invoices. The exhibits in the record show that, for at least nine of the eleven invoices that BES cites, BES submitted the invoices to the VA weeks later than the date it identifies in its post-hearing brief.³ Recalculating the VA’s response times by using the *actual* dates of invoice submission, as reflected on the invoices in the record, the VA paid nine of the eleven cited invoices between six and thirteen days after invoice submission, a number of days that falls within the fourteen-day period anticipated by FAR 52.232-27. The only two outliers are pay application nos. 27 and 31, which BES asserts took ninety-two days and 132 days, respectively, to be paid.⁴ After both pay application nos. 27 and 31 were submitted, however, the VA complained about defects in the applications and required that BES revise and resubmit them before payment could be made. Because FAR 52.232-27 provides for a progress payment within fourteen days only if the contractor has submitted a “proper payment request” and “there is no disagreement over quantity, quality, or Contractor compliance with contract requirements,” BES has not identified any inappropriate payment delays here.

³ As an example, BES represents in its post-hearing brief that it submitted pay application no. 4 to the VA on April 30, 2016, and that the VA did not make the associated progress payment until June 2, 2016, creating a response time of thirty-three calendar days. Appellant’s Post-Hearing Brief at 50. Yet, looking at Exhibit 13D (to which BES cites in support), it is clear that, although pay application no. 4 covered work performed during the month ending April 30, 2016, the pay application was not actually submitted to the VA until May 20, 2016. Given BES’s representation that it received payment on this invoice on June 2, 2016, the period of time between the VA’s receipt of the invoice on May 20 and payment of the invoice on June 2 was only thirteen days, a period of time that falls within the fourteen-day window identified in FAR 52.232-27.

That problem exists with at least nine of the eleven allegedly late progress payments. That is, for each of those nine payments, BES in its post-hearing brief lists the last day of the work period covered by each progress payment request as the “Date Submitted,” even though the evidentiary record evidences that BES did not actually submit any of the pay applications to the VA until a later date.

⁴ We have been unable to identify from the record when those two pay applications were first submitted to the VA. For purposes of our discussion here, we assume that BES’s assumptions about the submission dates are correct.

In any event, “failure to pay progress payments when due is not a material breach per se. Materiality must be shown by the totality of the facts and circumstances.” *D.W. Sandau Dredging*, ENG BCA 5812, 96-1 BCA ¶ 28,064, at 140,161 (1995). “[T]he amount of money involved, the length of time of the non-payment, and the payment procedure agreed to by the parties are significant factors to consider” in determining whether delayed payment is material. *Jones Plumbing & Heating, Inc.*, VABCA 1845, et al., 86-1 BCA ¶ 18,659, at 93,857 (1985) (quoting *General Dynamics Corp.*, DOT CAB 1232, 83-1 BCA ¶ 16,386). Here, BES has done nothing to explain the circumstances surrounding the submission and payment of the invoices at issue. BES simply counts (or, in reality, miscounts) the number of days that it took for the VA to pay after receiving an invoice and tells us to assume unreasonableness. Further, although BES asserts that the allegedly unreasonable payment delays precluded it from timely paying its subcontractors, it has not presented adequate evidence that payment delays actually affected work on the project or impacted the ultimate completion of the project. In fact, BES admits that each alleged individual delay in payment, taken alone, may not have contributed to the overall project delay and argues instead that, the Board should assume that the delayed payments, taken collectively, impacted the overall project. The record contains insufficient evidence to support BES’s assertion. While BES makes vague and conclusory statements about the untimely payments, it cites no specific instances in the record in which the VA’s untimely payments caused the project to be delayed from its critical path. Therefore, we do not find the timing of the VA’s payments to BES as creating an excusable delay.

II. Fifty-Nine-Day Delay, CBCA 6453

A. Whether BES is Precluded from Raising the Claim

The VA first argues that BES is precluded from raising its claim for entitlement to costs related to the fifty-nine-day delay because it concerns the same asbestos abatement issues settled in CBCA 5640.

“The preclusive effect of prior litigation is examined under the doctrines of issue preclusion and claim preclusion, ‘which are collectively referred to as “res judicata.”’” *SBBI, Inc. v. International Boundary and Water Commission*, CBCA 4994, 17-1 BCA ¶ 36,722, at 178,815 (quoting *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008)). “Issue preclusion bars a party from litigation of those matters that were actually litigated in a prior proceeding,” whereas “claim preclusion bars litigation of those matters that a party [raised or] could have raised or litigated in an earlier proceeding but failed to do so.” *Optimum Services, Inc. v. Department of the Interior*, CBCA 4968, 16-1 BCA ¶ 36,357, at 177,243 (citing *Carson v. Department of Energy*, 398 F.3d 1369, 1375 n.8 (Fed. Cir. 2005)); see *Pactiv Corp. v. Dow Chemical Co.*, 449 F.3d 1227, 1230 (Fed. Cir. 2006). The prior appeal, CBCA 5640, was not resolved by judicial determination following litigation, so issue preclusion cannot apply.

See *SBBI, Inc.*, 17-1 BCA at 178,815. Accordingly, we need consider only whether BES is barred from bringing its claim for compensation for the fifty-nine-day delay based on the doctrine of claim preclusion.

Claim preclusion applies when the following three factors are met: “(1) the parties are identical or in privity; (2) the first suit proceeded to a final judgment on the merits; and (3) the second claim is based on the same set of transactional facts as the first.” *Ammex, Inc. v. United States*, 334 F.3d 1052, 1055 (Fed. Cir. 2003). The second factor is satisfied by “[a] final judgment of an administrative agency, such as a board of contract appeals, that ‘is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate.’” *Phillips/May Corp. v. United States*, 524 F.3d 1264, 1268 (Fed. Cir. 2008) (quoting *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966)). As for the third factor, courts define “same transaction” in terms of a “core of operative facts,” the “same operative facts,” the “same nucleus of operative facts,” or “based on the same, or nearly the same, factual allegations.” *SBBI, Inc.*, 17-1 BCA at 178,816 (citing *Ammex, Inc.*, 334 F.3d at 1056). In other words, “there must be a substantial degree of factual identicalness underpinning the initial and subsequently brought claims for claim preclusion to be implicated.” *Id.*

The VA asserts that BES’s claim for compensation for the fifty-nine days of delay is barred by *res judicata* because the claim was previously dismissed with prejudice after the parties executed the June 27, 2018, settlement agreement in CBCA 5640. The VA must satisfy the three elements to establish claim preclusion. See *SBBI, Inc.*, 17-1 BCA at 178,815. The first two factors are clearly met. This appeal involves the same parties as CBCA 5640, and that appeal was dismissed with prejudice by the Board pursuant to the parties’ mutual settlement agreement. Notably, “[i]t is widely agreed that an earlier dismissal based on a settlement agreement constitutes a final judgment on the merits in a *res judicata* analysis.” *Ford-Clifton v. Department of Veterans Affairs*, 661 F.3d 655, 660 (Fed. Cir. 2011). Therefore, the remaining issue is whether this claim is based on the same transactional facts as CBCA 5640.

When considering whether a claim had the same transactional facts as a previous appeal dismissed with prejudice, the Board explained:

Courts decide whether two claims involve the same transactional facts by “pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties’ expectations or business understanding or usage.” In contract disputes, there is a presumption that claims arising from the same contract are based on the same transactional facts, and thus, must be brought together. The

presumption, however, may be overcome by showing that the claims are unrelated.

SBBI, Inc., 17-1 BCA at 178,817.

BES's claim in CBCA 5640 concerned asbestos-related delays. More specifically, on June 14, 2018, BES and the VA entered into a settlement agreement for the payment of \$50,000 and twenty-one days of compensable delay meant to address certain delays to the project caused by the discovery of asbestos. The VA contends that BES's present claim concerning the fifty-nine-day delay is tied to the previously settled asbestos-related delay. BES disagrees, asserting that the fifty-nine-day delay is wholly unrelated to the asbestos delays, and, therefore, claim preclusion is inapplicable.

We do not find there to be a "substantial degree of factual identicalness" between the asbestos abatement settlement in CBCA 5640 and the presently disputed fifty-nine-day delay. *SBBI, Inc.*, 17-1 BCA at 178,816. In CBCA 5640, BES appealed the VA's final decision on its August 25, 2016, certified claim for \$168,847.06 and additional time for costs and delay resulting from asbestos abatement. The agreement settling this dispute resulted in mod. 7. Here, BES's fifty-nine-day delay claim is based on a certified claim, submitted on March 10, 2017, requesting \$50,934.50 and an additional fifty-nine days to complete the contract based on an RFP issued on November 16, 2016, where BES agreed to a fifty-nine-day extension without funds. The RFP makes no mention of asbestos abatement. Although all construction delays are in some way related, we are reluctant to deny a litigant's day in court unless there is a "clear and persuasive basis for that denial." *Sharp Kabushki Kaisha v. ThinkSharp, Inc.*, 448 F.3d 1368, 1372 (Fed. Cir. 2006) (quoting *Kearns v. General Motors Corp.*, 94 F.3d 1553, 1557 (Fed. Cir. 1996)). The Board is unable to find that the claim in this appeal and those in the predecessor appeal are related such that this appeal, CBCA 6453, is barred by res judicata.

B. Whether BES Has Proven Entitlement to the Overhead Costs

When seeking money from the Government, contractors are required to prove their damages or costs with specificity. *United Facility Services Corp. v. General Services Administration*, CBCA 5272, 22-1 BCA ¶ 37,988, at 184,465 (2020). For overhead costs, the Board has consistently held that a contractor must "submit proof (affidavits and other information to verify and corroborate the costs sought) to the contracting officer of its actual costs for each aspect of the payment sought, and of the value of the impacted work." *Industrial Maintenance Services, Inc. v. Department of Veterans Affairs*, CBCA 5618, 17-1 BCA ¶ 36,850, at 179,577 (finding that the contractor may only recover the amounts that are supported by its submissions and calculations). The Board will deny claims that are not supported by specific information. *Industrial Maintenance Services, Inc. v. Department of*

Veterans Affairs, CBCA 5618, 18-1 BCA ¶ 37,088, at 180,559 (denying contractor's claim where the contractor did not provide specific information to support dollar amount figures).

In support of entitlement, BES relies solely on its July 10, 2018, communication with CO Geary in which Mr. Geary stated that the VA "is in a position to offer \$31,726.07 for the 59 [c]alendar [e]xtension for the [d]elays." Appellant's Post-Hearing Brief at 53. BES responded to this communication with an acceptance of the VA's offer. *Id.* However, beyond this communication, the record is unclear as to what exactly the \$31,726.07 is meant to cover. The VA asserts that this delay and monetary request are related to asbestos delays, which were settled in CBCA 5640. Respondent's Post-Hearing Brief at 20. BES disagrees but does not provide an alternative justification for its monetary claim. In the absence of proving the damages or costs with specificity, we cannot award BES its requested overhead costs.

III. Pay App. 32, CBCA 6560

A. Standards Applicable to Payment for Work Completed Prior to Termination for Default

FAR 49.402-2(c) states: "[T]he Government shall pay the contractor the contract price for any completed supplies, and the amount agreed upon by the contracting officer and the contractor for manufacturing materials, acquired by the Government under the Default clause." BES correctly identifies that our predecessor board has held that, "[w]hile the default clause makes no such similar reference to payment for services rendered and accepted, we determine that this omission should not require [a contractor] to forfeit payment for services rendered and accepted by [the Government] prior to default." *All South Properties, Inc.*, HUD BCA 92-G-7604-C12, et al., 97-2 BCA ¶ 29,329, at 145,820.

The Government must accept all work before payment is required. "Under the terms of the contract, the contractor must complete all work and have it accepted by the contracting officer prior to receiving payment." *ITS Group Corp v. Department of Agriculture*, CBCA 6621, et al., 21-1 BCA ¶ 37,775, at 183,354. The contractor "bears the burden of proving that the Government has not paid an amount that is due or owing." *Id.* (citing *JBG/Federal Center, L.L.C. v. General Services Administration*, CBCA 5506, et al., 18-1 BCA ¶ 37,120, at 180,672).

The Government has a general right to withhold payment for deficient work. Nevertheless, the contracting officer can only withhold payment for the portion of work that is unsatisfactory, and there must be a reasonable relationship between the suspended payment and the unsatisfactory work. *Eastern Massachusetts Professional Standards Review Organization, Inc.*, ASBCA 33639, 91-3 BCA ¶ 24,301, at 121,431-32. The money withheld

must make up a reasonable estimate of the contractor's potential liability. *Norair Engineering Corp.*, GSBCA 3539, 75-1 BCA ¶ 11,062, at 52,629. The boards carefully scrutinize withholdings for unperformed work to ensure that the withholdings represent an amount commensurate with the reasonable value of the work. *See, e.g., E & J Trucking*, PSBCA 5092, et al., 09-1 BCA ¶ 34,073, at 168,478; *Wright's Auto Repair, Inc.*, ASBCA 29138, et al., 88-1 BCA ¶ 20,449, at 103,424-25; *Harrell-Patterson Contracting, Inc.*, ASBCA 30801, et al., 87-2 BCA ¶ 19,805, at 100,179. Therefore, under the terms of this contract, the VA must pay BES for services rendered and accepted prior to default if BES can prove an amount owed, and the VA cannot justify withholding the payment.

However, “[w]hen a surety executes a takeover agreement with the Government following a default termination, ‘the money available to the surety generally would include all funds held by the Government on the contract, including withheld percentages and progress payments, whether earned prior to or subsequent to the contractor’s default.’” *Mayberry Enterprises, LLC, v. Department of Energy*, CBCA 5961, et al., 20-1 BCA ¶ 37,616, at 182,590-91 (citing *United States Surety Co. v. United States*, 83 Fed. Cl. 306, 312 (2008); *Priority to Remaining Proceeds of Contract Between Veterans Administration & Kathy's Kranes Corp.*, B-225115, 87-1 CPD ¶ 191 (Feb. 20, 1987)); FAR 49.404(e)(1) (requiring that unpaid earnings of the defaulting contractor be paid out to the completing surety for its actual costs and expenses incurred in completing the contract).

B. Whether the VA Properly Denied Pay App. 32

The VA asserts that it properly denied pay app. 32 because BES failed to submit a proper invoice. During its walk-through, the VA concluded that it owed BES \$85,947.83 for completed work, rather than the \$257,573.37 requested by BES in the April 8, 2019, draft of pay app. 32. According to the VA, BES was instructed to correct and resubmit its draft pay application to reflect the VA's findings. Instead, BES submitted the original invoice for \$257,573.37. The CO denied pay app. 32, in part, because it “contained elements of work that were not completed” and “were deficient.” Transcript, Vol. 5 at 63-64. The VA had no opportunity to inspect the work completed between its April 10, 2019, walk-through and the April 18, 2019, resubmission of pay app. 32. Because the VA was unable to accept all work for which BES requested payment (i.e., the full \$257,573.37), we find that the VA properly denied pay app. 32. The remaining question is whether BES is entitled to any amount under pay app. 32, namely the accepted \$85,947,83 worth of completed work.

C. Whether BES is Entitled to an Amount Owed Under Pay App. 32

BES asserts that it is entitled to \$85,947,83 because the Government accepted that amount of completed work. The Government counters that surety case law requires the amount be paid to the surety, not BES, and that the surety was paid as part of the takeover

agreement. Both case law and regulations support the Government's position. *See Mayberry Enterprises, LLC*, 20-1 BCA at 182,590-91; FAR 49.404(e)(1). Therefore, BES is not entitled to an amount under pay app. 32.

Decision

For the foregoing reason, these appeals are **DENIED**.

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge

We concur:

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge