



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

**THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND
IS BEING PUBLICLY RELEASED IN ITS ENTIRETY ON MARCH 26, 2025**

GRANTED: March 14, 2025

CBCA 7832(5692)-REM

EAGLE PEAK ROCK & PAVING, INC.,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Bennett J. Lee and Stephen L. Pessagno of Varela, Lee, Metz & Guarino, LLP, San Francisco, CA; and David B. Wonderlick of Varela, Lee, Metz & Guarino, LLP, Tysons Corner, VA, counsel for Appellant.

Rayann L. Speakman, Office of the Chief Counsel, Federal Highway Administration, Department of Transportation, Vancouver, WA; and Milton Hsieh, Office of the Chief Counsel, Federal Highway Administration, Department of Transportation, Ashburn, VA, counsel for Respondent.

Before Board Judges **RUSSELL**, **KULLBERG**, and **SULLIVAN**.

RUSSELL, Board Judge.

This appeal is before the Board on remand from the United States Court of Appeals for the Federal Circuit. *See Department of Transportation v. Eagle Peak Rock & Paving, Inc.*, 69 F.4th 1367 (Fed. Cir. 2023). The Department of Transportation, Federal Highway Administration (FHWA or agency), awarded appellant, Eagle Peak Rock & Paving, Inc.

(Eagle Peak), a contract to perform construction work in Yellowstone National Park. FHWA terminated the contract for failure to prosecute the work with sufficient diligence to ensure that the contract would be completed within the time period required by the contract.

The Board previously determined that the termination for default was improper and converted it to one for convenience. The Federal Circuit vacated our decision, concluding that we relied “heavily, though not exclusively, on [the Board’s] view of deficiencies in the contracting officer’s reasoning” for default “rather than on de novo findings about what the record developed in the Board proceeding showed about whether the standard for termination for default was met.” *Eagle Peak*, 69 F.4th at 1371. The Federal Circuit remanded the case “for the Board to adjudicate the case de novo on the record before it.” *Id.* Based on the record, which included a two-week hearing, the Board determines that the termination for default was improper and converts it to one for convenience.

Findings of Fact

I. The Contract

A. Project Scope and Completion Dates

On May 2, 2016, FHWA awarded Eagle Peak a contract to make improvements along 4.7 miles of Grand Loop Road in Yellowstone National Park, Wyoming, as well as nearby parking areas, trails, and overlooks. Respondent’s Final Complete Rule 4 File, Exhibit 231-10 (stipulations), ¶¶ 1, 2.¹ The project consisted of four primary worksites: (1) Grand Loop Road (also sometimes referred to as the “Mainline”); (2) Inspiration Point; (3) Brink of the Upper Falls; and (4) Uncle Tom’s Point. Exhibit 1 (contract) at 000002, 000009, 000020-48; Exhibit 3 at 001307, 001313. Inspiration Point, Brink of the Upper Falls, and Uncle Tom’s Point are commonly referred to as the “Canyon Rim” sites or areas. Exhibit 3 at 001313. The project was scheduled for three construction seasons with an overall completion date of October 5, 2018, and an interim completion date for the Inspiration Point work of November 15, 2017. Exhibit 1 at 000082, 000218. The winter shutdowns were scheduled from November 11, 2016, to April 16, 2017, and from November 15, 2017, to April 15, 2018. *Id.* at 000217.

The original contract had an estimated value of \$28,049,200.62. Exhibit 231-10, ¶ 3. The original base contract was referred to as “Schedule B” and included work on Grand

¹ All exhibits are found in FHWA’s Final Complete Rule 4 appeal file, unless otherwise noted. FHWA used “tab” numbers to designate exhibits. The exhibit numbers used herein correspond with the “tab” numbers used in the appeal file.

Loop Road at Inspiration Point and on the Brink of the Upper Falls. *Id.* With respect to the Brink of the Upper Falls, the Schedule B work included rehabilitation and reconstruction of trails and overlooks at this location. *Id.*

The solicitation also required Eagle Peak to submit bids for certain options, namely options W, X, Y, and Z, which involved additional parking lot, trail, and overlook work at the Brink of the Upper Falls and Uncle Tom's Point sites. Exhibit 231-10, ¶ 4. FHWA exercised these options via a unilateral modification dated July 14, 2016. *Id.* The option work totaled \$6,536,810.50 and increased the estimated contract value to \$34,586,011.12. *Id.* Option W included work to reconstruct the entry drive and parking lot at the Brink of the Upper Falls site. Options X, Y, and Z included work at the Uncle Tom's Point site. *Id.* The contract's completion date remained October 5, 2018, regardless of which options were awarded. Exhibit 1 at 000082. The contract contained a Default clause that required an improper termination for default to be converted to one for convenience. Exhibit 1 at 000172 (citing 48 CFR 52.249-10 (1984) (Federal Acquisition Regulation (FAR) 52.249-10)).

B. Specific Scheduling Constraints

In addition to the winter shutdown periods described above, the contract included the scheduling constraints below.

1. Clause Precluding Simultaneous Closure at Two Sites

The contract included a clause precluding the simultaneous closure of the Brink of the Upper Falls and Uncle Tom's Point sites:

Brink of the Upper Falls site (Base and Option W) and Uncle Tom's Point site (Options X, Y, and/or Z) cannot be closed simultaneously. Substantially complete Brink of the Upper Falls site work or Uncle Tom's Point site work to the point of being acceptable for public use, and approved by the [contracting officer (CO)], prior to initiating construction activities at the remaining site.

Exhibit 1 at 000218 ([Special Contract Requirement (SCR)] 108.01(j)). "Substantial completion" was defined in the contract to require safe use by the public:

The point at which the project is complete such that it can be safely and effectively used by the public without further delays, disruption, or other impediments. For conventional bridge and highway work, the point at which bridge deck, parapet, pavement structure, shoulder, drainage, sidewalk, major

demolition, roadway obliteration, permanent signing and markings, traffic barrier, safety appurtenance, utility, and lighting work is complete.

Exhibit 2 at 000570 (FP-14, Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects).

2. Waiting Period for Stone Masonry Work

As part of the contract, Eagle Peak was required to apply stone masonry to retaining walls—a wire-faced Mechanically Stabilized Earth (MSE) retaining wall located at the Grand Loop Road portion of the project and a Geosynthetic-faced MSE retaining wall located at the Brink of the Upper Falls portion of the project. The contract required Eagle Peak to wait a minimum of 180 days after construction of the walls to apply the stone masonry. Exhibit 1 at 000305-306; Exhibit 3 at 001594-96.

3. Bird Migration/Nesting Provision

The contract included the following requirement as to the performance of clearing and grubbing work at the Canyon Rim sites:

Do not cut trees; perform vegetation clearing, grubbing, or other site preparation activities between May 1 and July 31 within the Canyon Rim construction area from Chittenden Bridge to Inspiration Point unless approved by the CO.

Exhibit 231-10, ¶ 14; Exhibit 1 at 000265 (SCR 201.03).

FHWA waived this provision in the 2016 season. Exhibit 153-15. The constraint was never enforced. The constraint was also waived in the subsequent 2017 and 2018 construction seasons of the completion contractor. Eagle Peak (EP) Exhibit 167-07; Transcript, Vol. 3 at 785.

4. Seeding and Mulching

The contract also stated that “seed will not be sown, by the Park Service before September 15th or after June 15th[.]” Exhibit 1 at 000375 (SCR 625.03A), and required the contractor to “[p]lace mulch over finished slopes to a loose depth of 1/2 inch[.]” *id.* (SCR 625.08), and to “[p]lace mulch over areas seeded by the Park Service within two days after the seed has been sown; and over other areas designated in the plans.” *Id.* The contract also required placement of “mulch on slopes where topsoil has been applied, before winter shutdown.” *Id.*

5. Tree Planting

The contract provided that “[p]lants shall only be planted in the months of April, May, September and October of any given year.” Exhibit 1 at 000377 (SCR 626.03).

C. Schedule Requirements

Pursuant to the contract, Eagle Peak was required to submit an initial construction schedule (SCR 155.03), a baseline schedule (SCR 155.04), and an updated construction schedule (SCR 155.05). Exhibit 1 at 000247. The approved initial construction schedule would serve as the baseline for the first construction schedule update. *Id.*

The contract directed that the construction schedule be generated using the critical path method (CPM) and include fifteen different elements (e.g., activity descriptions, original and remaining durations for construction and non-construction activities, start and finish dates, float, sequence and interdependence of activities, and a critical path). Exhibit 1 at 000248-49 (SCR 155.06). The critical path was defined as “the longest sequence of activities in the schedule that determines the duration of the project[.]” *Id.* at 000249. “Float” was described as a “shared commodity,” not for the exclusive use of either the contractor or the Government. *Id.* Eagle Peak was also required to provide a written narrative that stated the “basis and assumptions underlying the schedule” for nine elements, including: (1) “work to be done within each activity including the type and quantity of equipment, labor and materials to be used [on the project];” and (2) “planned production rates by pay item quantities[.]” (e.g., cubic yards or cubic meters of roadway excavation per day). *Id.* at 000249-250. Eagle Peak was also required, in the narratives, to identify the vendor, supplier, or subcontractor slated to perform an activity and supply the assumptions made in scheduling the work. *Id.*

The contract incorporated FAR clause 52.236-15, “Schedules for Construction Contracts,” which required that Eagle Peak provide the contracting officer (CO) with “a practicable schedule” showing how it “propose[d] to perform the work, and the dates on which [it] contemplate[d] starting and completing the several salient features of the work (including acquiring materials, plant, and equipment).” Exhibit 1 at 000149 (quoting FAR 52.236-15(a)). Failure to comply with the requirements of FAR 52.236-15 could serve as “grounds for a determination by the [CO] that the Contractor is not prosecuting [project] work with sufficient diligence to ensure completion within the time specified in the contract.” FAR 52.236-15(c).

II. The Parties' Schedules

A. Eagle Peak's Baseline Schedules

1. Initial Schedules and First Cure Notice

Shortly after contract award, on or around July 22, 2016, Eagle Peak submitted a "preliminary schedule." Exhibit 228-103 at 040942. FHWA questioned the omission of any activities for the Brink of the Upper Falls and Uncle Tom's Point sites. *Id.* On July 23, 2016, Eagle Peak inquired as to whether it could submit separate schedules for these sites to which FHWA's project engineer, on the same day, responded, "No. They need to be tied so that a critical path can be shown as an overall project." *Id.* Between August 1, 2016, and August 30, 2016, Eagle Peak submitted three baseline schedules, each of which reflected a contract completion date of October 5, 2018. Exhibit 231-10, ¶ 20; Exhibit 51R at 046539; Exhibit 53 at 003861; Exhibit 59 at 003960. FHWA rejected these schedules based on, among other reasons, missing work items, duplicate activity names, production rate issues, missing constraints, and durations that did not match production rates. Exhibit 231-10, ¶ 20; Exhibit 156-02; Exhibit 157-04.

On October 3, 2016, the CO issued a cure letter to Eagle Peak, stating that the lack of a schedule complying with contract requirements was endangering timely performance:

I have reviewed the project records related to the performance to date, specifically in relation to the schedule for the work. I am very concerned that Eagle Peak is over four months past the notice to proceed date and it has yet to submit a schedule for the project that is in compliance with the contract requirements.

I have great concern that Eagle Peak is not prosecuting the work with sufficient diligence to ensure completion [within] the time specified in the contract. I believe Eagle Peak's failure to submit a schedule is directly affecting its progress of work on the contract.

You are hereby notified that the Government considers your lack of submission of a schedule, which is in compliance with the contract requirements, a condition that is endangering performance of the contract. Therefore, unless this condition is cured within 10 days after receipt of this notice, the Government may terminate for default under the terms of and conditions of FAR Clause 52.249-10 Default (Fixed-Price Construction) (April 1984) of this contract. . . .

Within ten days after receipt, Eagle Peak must provide a schedule in conformance with FAR Clause 52.236-15 Schedules for Construction Contracts and Section 155 of the contract.

Exhibit 158-07.

2. October 13, 2016, Schedule and Agency Response

On October 13, 2016, Eagle Peak submitted another version of its baseline schedule, including a narrative, referred to as revision 5. Exhibits 64-69. The schedule identified the 180-day settlement periods for the Mainline and the Brink of the Upper Falls. Exhibit 66 at 004164; Exhibit 68 at 004205. The narrative described work to be done within each project activity, including the type and quantity of equipment, labor, and materials to be used, as well as planned production rates by pay item quantities (e.g., cubic yards of roadway excavation per day). Exhibit 64.

By letter dated November 4, 2016, the CO rejected the schedule, stating “[y]ou did not cure the condition that I determined to be endangering the performance of the contract.” Exhibit 159-07 at 010501. In the attached analysis, FHWA noted that Eagle Peak’s schedule met twelve of the fifteen required elements and provided some, but not all, of the required information for three others. *Id.* at 010502-506. For the narrative, FHWA noted that Eagle Peak’s narrative contained the nine required elements but that “some item production rates [we]re missing” and “some important schedule constraints” were missing, specifically noting the bird migration constraints for blasting work. *Id.* at 010506-507.

Eagle Peak provided the testimony of Mr. Jason R. Nolting, its scheduling expert, regarding the merit of FHWA’s objections to the October 13, 2016, schedule and whether it should have been accepted.² Mr. Nolting examined Eagle Peak’s schedules in a pragmatic, mathematical way, essentially relying on information from the schedules readily available to FHWA prior to the termination decision. Mr. Nolting noted that Eagle Peak’s October 13, 2016, baseline schedule contained 671 activities, 1108 logic ties, and four constraints for a total of 1783 schedule entries. EP Exhibit 113-2 at EP0024653. Mr. Nolting categorized FHWA’s fifty-three concerns as: (1) logic omissions, (2) production rate discrepancies, or (3) missing activities/submittals. *Id.* He testified that none of these fifty-three items were fatal flaws in the schedule. Transcript, Vol. 8 at 2615. Rather, Mr. Nolting found that this baseline schedule with a total of 1783 schedule entries was more than 97% acceptable based

² Both parties provided schedule expert testimony. E. Dean Hodge, P.E. was the second of Eagle Peak’s experts and Stephen A. Weathers, P.E. served as FHWA’s expert.

on the issues documented by FHWA in its November 4, 2016, notice. EP Exhibit 113-2 at EP0024653.

According to Mr. Nolting, logic omissions stemmed from FHWA's concerns that "Eagle Peak had not inserted relationships or logic between certain activities that should have been included." EP Exhibit 113-2 at EP0024654. In total, there were ten such logic issues. For example, "Eagle Peak had not inserted a predecessor/successor relationship between several parking area/turnout area subgrade activities with the cold recycled asphalt base and/or paving activities. . . ." *Id.* However, Mr. Nolting noted that "FHWA did not consider, or at least communicate in the November 4, 2016 notice, whether the recommended changes would have had any impact on the Project critical path or Contract fixed completion dates." *Id.* Mr. Nolting reviewed the logic omissions (e.g., missing tie between certain predecessor construction work in a parking area and the subsequent asphalt work in that same area) and determined that, given the projected dates for completion of the planned work to which the logic omissions were tied, the addition of the missing logic "would not have affected the overall critical path of the Project." *Id.* at EP0024654-58.

Mr. Nolting also considered FHWA's concern that Eagle Peak's baseline schedule identified "activities having durations that did not mathematically agree with estimated [p]roject quantities and the production rates that Eagle Peak had provided the FHWA in schedule narratives supporting baseline schedule submissions." EP Exhibit 113-2 at EP0024659. He noted that FHWA "identified . . . 20 of the 671 (3%) activities in the Eagle Peak . . . baseline schedule durations [that] were not matching exactly to production rates[.]" while pointing out that the contract, in fact, does not "require the contractor to match durations with quantities and production rates." *Id.* at EP0024660. Examining the twenty activities, Mr. Nolting noted that (1) the average float on these activities was 71.9 days and "most were significantly off the [p]roject critical path" and (2) seven (or 35%) of the activities were recommendations to reduce the time being forecasted, which Mr. Nolting opined "would improperly permit the FHWA to capture float in these activities in contravention [of FHWA rules, which identify] float [as] a 'shared commodity[.]'" *Id.* at EP0024661. Mr. Nolting opined that FHWA failed to analyze whether these flaws affected the critical path or the contract completion date. *Id.* at EP0024661-62.

As for the missing items of work, Mr. Nolting opined that three of the twenty-three items identified as missing were related to non-construction submittals for hauling, accident prevention, and water quality monitoring. EP Exhibit 113-2 at EP0024663. "While these items may have been required under the Contract[.]" he did not believe that the items "represent work likely to have any impact on the overall Project critical path or contract fixed completion date." *Id.* As for the remaining twenty construction items, he calculated the value of these alleged missing items as approximately \$591,272 of the \$34,586,011 contract

value. *Id.* Thus, based on dollar value, Eagle Peak's schedule was more than 98% compliant. *Id.*

Mr. Nolting additionally noted, about this schedule:

It is clear that Eagle Peak was forecasting its work in alignment with the FHWA contractual intent to maintain public access to at least one side of the canyon throughout the Project. It is also clear that due to the lengthy 180 day settlement requirement for the MSE wall at [the Brink of the Upper Falls site], Eagle Peak was assuming it would be permitted to complete final [Brink of the Upper Falls] scopes of work (i.e., MSE wall facing) in 2018 along with work at the [Uncle Tom's Point] side. This assumption was again based on the Eagle Peak interpretation of the Contract that it could work on both sides of the canyon as long as the first side (in this instance [Brink of the Upper Falls]) was substantially complete and that Eagle Peak maintained access for unimpeded public use at [this site] while completing the final aesthetic work in 2018.

EP Exhibit 113-2 at EP0025675.

Importantly, according to Mr. Nolting, Eagle Peak's schedule demonstrated that the company had "an appreciation for the scope of the project," "a significant appreciation for the various elements within the contract," and an appreciation for the project calendar. Transcript, Vol. 8 at 2571. Mr. Nolting concluded that Eagle Peak's baseline schedule (revision 5), as submitted, could have been accepted or could have been accepted with notes. *Id.* at 2572, 2614.

3. November 23, 2016, Schedule

By letter dated November 23, 2016, Eagle Peak, submitted yet another baseline schedule (Revision 7). Exhibit 159-20. In its letter, Eagle Peak stated, "[s]ince this schedule is open to personal interpretation, we are more than happy to work with your representative should they find any needed corrections. As we are in winter shutdown, we feel there is sufficient time to accommodate any changes to this schedule." *Id.* at 0100559. FHWA never responded to this schedule submission. Transcript, Vol. 7 at 2286; Exhibit 161-21 at 011226.³

³ In exhibit 161-21, Eagle Peak identified the Revision 7 schedule as being submitted on November 20, 2026. We believe this date to be written in error. The Revision 7 schedule was actually submitted on November 23, 2016. Exhibit 159-20; EP Exhibit 113-2 at EP0024646.

4. January 23, 2017, Schedule

On January 23, 2017, Eagle Peak submitted another baseline schedule. Exhibit 161-21. In its accompanying letter, Eagle Peak noted that FHWA never responded to the company's schedule submitted on November 23, 2016, adding that the schedule addressed all concerns raised by FHWA in the agency's letter dated November 4, 2016. *Id.* at 011226. Eagle Peak also asserted that the "FHWA's demands regarding the schedule have exceeded –and in some cases, expressly contradicted–the requirements of the Contract." *Id.* Eagle Peak referenced SCR 155.06, governing construction schedule requirements, which, according to Eagle Peak, only required that the schedule show the original and remaining durations for construction activities, break construction activities into subtasks such that no activity duration exceeds twenty working days, and break longer activities into two or more activities distinguished by location or some other description. *Id.* at 011226-27. Eagle Peak contended that its submitted schedules complied with this requirement but that FHWA was imposing an additional demand that the durations of all of these activities correspond precisely with the estimated production levels for the activities provided in the schedule narrative:

Nothing in the Contract requires this. In cases in which Eagle Peak may have indicated longer duration than the estimated productivity levels might suggest, the insistence [by FHWA] upon shortening this duration contravenes the contract requirement that "[f]loat is a shared commodity and is not for the exclusive use of the Contractor or the Government. Either party has the full use of float until it is depleted." Relatedly, the non-critical nature of many of these activities, and the substantial amounts of float associated with them – as many as 208 days – renders any minor deviations from productivity estimates the FHWA has cited completely irrelevant.

Id. at 011227.

Eagle Peak also took issue with FHWA's concerns about how logic ties were presented in the schedule. Eagle Peak noted that SCR 155.06 only required that Eagle Peak "[s]how the sequence and interdependence of [project] activities" and that FHWA admitted that Eagle Peak had done so. Exhibit 161-21 at 011227. The company added that FHWA went on to cite minor logic errors as grounds for asserting that the schedule did not comply with the contract and that the company had endeavored to correct the identified items. *Id.* Eagle Peak argued that FHWA's "demand for flawless logic ties" went beyond what would be expected in the industry and that minor errors are inevitable but in no way would hinder Eagle Peak's prosecution of the work. *Id.* As further discussed below, Eagle Peak, in its January 23, 2017, submission, detailed the resources that it planned to use "to complete the [p]roject in accordance with" the contract schedules and requirements. *Id.* Eagle Peak also

described what it characterized as “extensive errors and omissions in the Contract Documents that [had] hindered [its] efforts to [that] date.” *Id.* at 011228. One such error related to an elevation error in the Inspiration Point design. *Id.*

Via email, on January 24, 2017, FHWA’s CO responded to Eagle Peak’s January 23, 2017, submission, stating:

I am not sure where the confusion is coming from with regards to what I am looking for. The cure notice asked you to provide me with a schedule in conformance with FAR Clause 52.236-15 and Section 155 of the contract. Eagle Peak, while it provided two schedules, did not provide one that was in conformance with the FAR Clause and contract requirements. This is the last time that I indicated I was looking for the baseline schedule – everything since then has been an attempt to learn how Eagle Peak intends to complete the work.

During our conversation on January 17, 2017[,] I indicated that I was concerned that Eagle Peak was not going to complete the contract within the fixed completion date. Eagle Peak insisted it could complete the contract within the fixed completion date and asked for an opportunity to submit another schedule that showed this. I was hesitant to accept yet another schedule as Eagle Peak had not been able to submit an acceptable schedule for the duration of the first season including in response to the cure notice. However, I stated that I would accept a schedule that would show me how Eagle Peak would complete the project. I specifically asked that if completion by the fixed completion date was not realistic to provide me with a realistic schedule.

What I got was a baseline schedule that had errors – that did not give me any indication of how Eagle Peak intended to complete the project. When I asked again last night, I was clear that I need to know how you intend to complete the work in the two remaining seasons.

If you want me to consider Eagle Peak’s plans to complete this project, then I need an updated schedule.

Exhibit 161-23 at 011265.

5. Eagle Peak's "Recovery" Schedule Submission

a. The Schedule

On or around January 25, 2017, Eagle Peak's president submitted a "recovery schedule," attempting to respond to the CO's concerns expressed in her email of January 24, 2017. Exhibit 161-31. In the letter accompanying the schedule, he stated:

I would like to further clarify Eagle Peak's efforts to produce this schedule and respond to the cure notice(s) issued by the Government. Regardless of whether you characterize the November 4, 2016 letter as a second cure notice, the fact remains that both this letter and the initial cure notice dated October 3, 2016 were directed solely at the baseline schedule, and the need for Eagle Peak to develop a schedule "in conformance with the contract requirements."

Id. at 011336. Additionally, in his letter, Eagle Peak's president explained:

SCR 155.04 states "When the initial construction schedule is accepted by the CO, set this as the baseline schedule for the construction schedule updates." Though we acknowledge your requests prior to yesterday for an updated schedule indicating our plan to complete performance within the contract time, we reasonably believed that any such updated schedule that was not predicated on an approved baseline would not comply with the contract and thus would not be acceptable. It was not until yesterday that you informed us that you were prepared to dispense with the necessity of an approved baseline schedule before addressing any updates thereto. Again, we were merely attempting to develop the schedule "in conformance with the contract requirements."

Id.

Eagle Peak also disputed FHWA's contention that the baseline schedules that had previously been submitted did not comply with the contract, asserting that, at the very least, the errors had been corrected in the revised schedule submitted on November 23, 2016. Exhibit 161-31 at 011337. Eagle Peak reiterated that although FHWA had asserted that the November 23, 2016, schedule continued to have significant flaws, the company had not received any formal notification to this effect. *Id.* Eagle Peak also offered additional details regarding purported delays to the critical path discussed in its January 23, 2017, letter. *Id.* at 011337-39.

The recovery schedule included a narrative report detailing specific project activities and the work to be done, including the estimated number of days, to complete each activity.

Exhibit 161-31. The report included detailed information on the equipment, materials, and labor to be used for each activity. *Id.* The report also identified specific subcontractors who would perform on the project and the availability of those subcontractors. *Id.* at 011356-57. The report described proposed site mobilization efforts noting, for example, the type of equipment that would be used to move equipment, where equipment would be stored, and the locations of a concrete plant, an office, a testing lab (which would be moved during winter shutdowns), trailers (which would also be moved during the winter shutdown), and storage for materials. *Id.* at 011357. The report also noted that no work would be performed during the winter shutdown periods from November 11, 2016, to April 16, 2017, and from November 15, 2017, to April 15, 2018. *Id.* at 011358. The report identified a completion date of October 5, 2018. *Id.*

There is no record evidencing that the CO or the project engineer reviewed the narrative report that accompanied the recovery schedule prior to terminating Eagle Peak's contract. When asked if he had performed any analysis of the resources listed in the narrative, FHWA's project engineer stated that the CO had not asked him to do that analysis. Transcript, Vol. 3 at 820. Similarly, the CO testified that she did not recall whether anyone on her team had analyzed Eagle Peak's production rates and resources and had provided their findings to her. Transcript, Vol. 6 at 1764-65.

b. Dispute Regarding Concurrent Work

FWHA's project engineer did make adjustments to the recovery schedule in accordance with FHWA's interpretation of the contract clause precluding the simultaneous closure of the Brink of the Upper Falls and Uncle Tom's Point sites. Exhibit 1 at 218 (SCR 108.01(j)). FHWA interpreted this clause to mean that the work at the Brink of the Upper Falls and Uncle Tom's Point sites must have a finish/start relationship and, based significantly on this view, adjusted Eagle Peak's recovery schedule dated January 24, 2017, such that the completion date for the project would be December 11, 2018, as opposed to October 5, 2018, which was the completion date required by the contract. Exhibit 228-559 at 044628; Exhibit 1 at 000082. During the hearing, the CO testified that the clause required Eagle Peak to finish work at one site before starting work at the next site:

... you do one site, you finish it, it's substantially complete, its acceptable for the public to come and use that site. It's approved by the CO. Then you go and do the other one. I mean the whole point of this was we wanted the public to have full, safe access to one of the parking lots at all times.

Transcript, Vol. 6 at 1808. The CO testified that concurrent work was not allowed at the two sites, *see* Transcript, Vol. 5 at 1503, 1535, but, the CO also testified to her understanding that the clause meant that the parking lots for the two sites could not be closed at the same time.

Transcript, Vol. 6 at 1808. Although each of Eagle Peak's schedules submitted prior to the recovery schedule showed overlapping work at the sites, FHWA first articulated this interpretation of SCR 108.01(j) to Eagle Peak in the termination notice. Transcript, Vol. 3 at 817.

Prior to contract award, FHWA's design consultant prepared preliminary project schedules for Inspiration Point, Brink of the Upper Falls, and Uncle Tom's Point, that depicted stone masonry work along the Brink of the Upper Falls entry drive being performed from June 5, 2017, through June 23, 2017, and activities for Uncle Tom's Point within the same time period. EP Exhibit 99-3-113 at EP0023046; Transcript, Vol. 3 at 749-50. Eagle Peak's president testified that the "concurrent" work in Eagle Peak's January 25, 2017, recovery schedule was similar to that provided in the schedule developed by FHWA's design consultant. Transcript, Vol. 7 at 2307; EP Exhibit 99-3-113 at EP0023046; EP Exhibit 113-2 at EP0024675-77; EP Exhibit EP0024681-82. As Mr. Nolting explained about the design consultant's schedules:

[T]he . . . schedules very clearly showed that certain finishes (including stone masonry facing at the MSE wall likely as a result of the 180 day settlement period) at the [Brink of the Upper Falls] site were planned to be completed in 2017 at the same time as the forecasted work at the [Uncle Tom's Point] side of the canyon. So here, the firm responsible for the drafting of the Contract documents was interpreting the Contract in the way that Eagle Peak did and specifically so long as [the Brink of the Upper Falls site] was substantially complete in 2016, the contractor would be permitted to come back and complete work at [this site] in 2017. C2G believes that this supports the Eagle Peak position that work could be substantially complete at [the Brink of the Upper Falls site] and allow work to be started on the [Uncle Tom's Point] side of the canyon prior to the installation of MSE wall facing at [the Brink of the Upper Falls site] (among other minor finishes activities).

EP Exhibit 113-2 at EP0024677.

Eagle Peak's January 25, 2017, schedule submission showed that Eagle Peak would wait the required 180 days for the retaining walls at the Mainline and Brink of the Upper Falls. Exhibit 161-31 at 011361, 011365. Additionally, the schedule did not show any work taking place concurrently at the parking lots for Brink of the Upper Falls and Uncle Tom's Point. Transcript, Vol. 5 at 1395.

c. Schedule Analysis

Mr. Nolting found that, in the recovery schedule, Eagle Peak corrected forty-seven of the fifty-three “negligible impacts” highlighted by FHWA in its November 4, 2016, letter. EP Exhibit 113-2 at EP0024668. He explained that the remaining six activities—three related to production rates, two related to missing activities, and one deemed a logic omission—“would have little to no effect on the schedule and . . . did not impact the critical path of the Project or the fixed completion dates.” *Id.* at EP0024669-70. As for FHWA’s assertions that certain activities were missing from the schedule, Mr. Nolting estimated their value as \$27,000 of the \$34,586,011 contract value. *Id.* at EP0024669.

Mr. Weathers, FHWA’s expert, provided the following testimony on FHWA’s January 25, 2017, schedule, specifically regarding the Mainline.

Q: On . . . the 1/25/17 schedule by Eagle Peak, the work at the MSE wall on the Mainline was not on the critical path of the project. Do you agree with me.

A: I do agree with you.

.....

Q: Your graphic shows Eagle Peak completing the MSE wall by June 20th of 2017, correct?

A: Based on Eagle Peak’s January 25th schedule.

Q: . . . with the settling period on top of that, the stone-facing would be completed by 5/21/2018, correct?

A: Yes.

Q: Five months before the October 2018 date.

A: Yes.

Q: And that’s part of what informs your opinion [based on what is] depicted on Eagle Peak’s January 25, 2017 schedule [that the] MSE wall and the Mainline [were] not on the project’s critical path.

.....

A: Per that schedule it was not.

Transcript, Vol. 7 at 2037-39. Mr. Hodge, Eagle Peak's second expert, testified "that the Mainline could be completed by October 5, 2018" and that there was actually "float on the Mainline." Transcript, Vol. 9 at 2751.

B. FHWA's Schedule Rebuilds

In late November 2016, presumably based on Eagle Peak's November 23, 2016, baseline schedule submission, FHWA's project engineer created "schedule rebuilds" for the purpose of determining whether Eagle Peak could complete the remaining work on the Yellowstone Project in the subsequent two construction seasons. The project engineer provided the CO with rebuilds for the Inspiration Point, the Brink of the Upper Falls/Uncle Tom's Point sites, and the Mainline. Exhibit 159-30; Exhibit 159-31; Exhibit 160-01. Mr. Nolting, Eagle Peak's schedule expert, expressed surprise that FHWA's schedule analysis was separated into three separate files. Transcript, Vol. 8 at 2534. He stated that, given the three separate schedule components, one would really not be able to see how they "all fit together" for purposes of determining an overall completion date. *Id.* at 2538. He opined that "[t]here is not an overall project impact or milestone that can be concluded." *Id.* at 2539.

The project engineer concluded that meeting the November 15, 2017, completion date for Inspiration Point was "doable," although he noted that "it may/will require weekend work if there is any slippage or snow pack." Exhibit 159-30 at 010871. He noted that there were five pending contract modifications for Inspiration Point, two of which might affect the critical path. *Id.* at 010870-71. These two pending contract modifications were:

- More rockeries need to be added. This is a result of faulty topography used in design. (May impact critical path)
-
- Stone masonry, edging qty error. This will increase the qty. (May impact critical path)

Exhibit 159-30 at 010870. Eagle Peak identified the same two issues in its letter to the CO transmitting its January 23, 2017, schedule. Exhibit 161-21 at 011228-33.

For the Brink of the Upper Falls and Uncle Tom's Point sites, the project engineer predicted completion of work ranging from 44 days to 168 days after the date set out in the contract. Exhibit 159-31 at 010874-875. He noted that Eagle Peak could "ramp up the

manpower and increase production rates” to reduce this overage. *Id.* at 010875. For these sites, he identified one pending contract modification related to “Additional Historical Wall Repair” that might affect the critical path. Exhibit 159-31 at 010875.

As for the Mainline work, the project engineer noted that “[a]lthough the schedule has gotten very tight, nothing has a negative total slack. And I didn’t have to change any activities to night work of [sic] 7 day work weeks.” Exhibit 160-01 at 010892. He further explained that “[m]ultiple activities will need to be concurrent and to maintain the production rates shown, night work will be best for some of these items.” *Id.* For the Mainline, he noted three pending contract modifications, all of which might affect the critical path (a change to the roadway obliteration quantity, a sub-excavation addition, and a slope failure). *Id.* at 010892.

Although the migratory bird restriction was waived in 2016, the project engineer did not adjust the rebuild schedule to show potential waiver of this provision in subsequent seasons. Transcript, Vol. 3 at 814. The project engineer’s biggest adjustment, as relates to the rebuild schedule, was based upon FHWA’s interpretation of SCR 108.01(j) (discussed above) that all work at the Brink of the Upper Falls was required to be completed before work beginning at Uncle Tom’s Point. *Id.* at 805-807. Based upon this adjustment, the schedule showed that contract completion would be pushed out sixty-seven days. Exhibit 162-02 at 011387.

III. Critical Path Issue (Weather)

In inspector notes and other documents, FHWA noted the following ten days of weather events during the first construction period in 2016:

- September 22: .68 inches of rain. Exhibit 230-06 at 25.
- October 1: heavy rain was reported at the end of the work shift. Exhibit 16 at 002628.
- October 2: rain started at 10:00 am and was heavy at times. Exhibit 20 at 002860.
- October 3: steady rain during the mid-afternoon. Exhibit 20 at 002861.
- October 4: snow fell. Exhibit 30 at 003629.
- October 5: snow falling “off and on” all day. Exhibit 14 at 002459.
- October 6: significant snow on and off all day with some sections of the project seeing three inches of snow. *Id.* at 002460-63.
- October 14: intermittent rain in the morning with steady rain and wind in the mid-afternoon. Exhibit 20 at 002870.
- October 17: Intermittent snow, heavy at times. Exhibit 16 at 002637.
- October 18: wet and snowy conditions. Exhibit 149-15 at 009542.

In November 2016, an FHWA assistant project engineer, using Weather Underground data, completed a statistical analysis of rainfall quantities for a 10-year period encompassing October 2016. EP Exhibit 98-3-60 at EP0021926; EP Exhibit 98-3-61 at EP0022024. She noted that anything over three standard deviations was significant and that October 2016, which was at a standard deviation of 5.7 from the norm, was the only month that was statistically significant. EP Exhibit 98-3-61 at EP0022024. In December 2016, a second FHWA engineer, using National Weather Station data, determined a standard deviation from the norm of 6.91. *Id.* (noting total rainfall of 6.58 inches in October 2016 with the ten-year average being 1.67 inches).

Mr. Nolting testified that he used the National Oceanic and Atmospheric Administration (NOAA) database to determine the average and days of precipitation for the period 2006 to 2015. Transcript, Vol. 8 at 2496. He concluded that the weather in September and October 2016 “drastically” exceeded the prior 10-year average giving him “confidence that there had likely been an event that would [have entitled] Eagle Peak to an excusable extension of the contract.” *Id.* at 2496-98; *see also* EP Exhibit 113-2 at EP0024707. In Mr. Nolting’s opinion, the weather would have entitled Eagle Peak to an adjustment of the fixed completion date from the original October 5, 2018, date to some date in the future, estimated to be somewhere between October 15, 2018, and October 20, 2018. Transcript, Vol. 8 at 2499.⁴

IV. Eagle Peak’s Progress During the First Season

A. The Work Locations

1. Inspiration Point

Eagle Peak’s president testified about the status of construction at the conclusion of the 2016 season. For Inspiration Point, he noted that Eagle Peak “didn’t have a design,” so he was uncertain of the status of this part of the project. Transcript, Vol. 7 at 2269. As indicated above, two possible modifications were pending for this site at the time of termination that possibly affected the critical path—one indicating more rockeries were needed as “a result of faulty topography used in design” and the second indicating additional quantities were needed regarding stone masonry for the project. Exhibit 159-30 at 010870.

⁴ Mr. Nolting also opined that the CO’s demand for a schedule showing completion within the original contract time, while fully aware of a two-week weather impact, was a classic form of constructive acceleration. Transcript, Vol. 8 at 2691. “She had [the] benefit of an excusable delay and yet was demanding on-time completion.” *Id.*

Regardless of these issues, FHWA's Inspiration Point rebuild showed that, after accounting for Eagle Peak's progress in 2016, the work at this site would be completed by the interim milestone of November 15, 2017, with one day of float. *Id.* at 010871; Exhibit 1 at 000082, 000218.

2. Mainline

a. Mainline MSE Wall

Eagle Peak had not completed the MSE wall at the conclusion of the season, as worked remained on Grizzly Cut and "a little bit of work left on the Apollinaris box culvert." Transcript, Vol. 7 at 2269. The parties dispute how much progress Eagle Peak made on the wall during the first season. FHWA asserts that Eagle Peak had completed approximately 4418.8 square feet; Eagle Peak states that it had completed 5106.4 square feet. Transcript, Vol. 9 at 2808-11. Nevertheless, as reflected in Eagle Peak's recovery schedule, this wall could have been completed in 2017, thereby allowing the wall to settle over the 2017/2018 shutdown, and the masonry stone facing could have been installed in 2018 with ample float (five months) in the schedule for timely completion by the fixed completion date. Transcript, Vol. 7 at 2037-38.

b. Apollinaris Spring

The project included installation of a concrete box culvert near the Apollinaris Spring. Exhibit 3 at 001365 (the "Apollinaris box culvert"); EP Exhibit 66. In a note dated September 29, 2016, an FHWA inspector stated that, during excavation, Eagle Peak encountered "many very large boulders, some of them three [or] four feet across." Exhibit 16 at 002625. Eagle Peak informed FHWA of this issue in a letter dated September 30, 2016, stating that the company's "excavation . . . revealed a sub grade that contains large rock boulders that [Eagle Peak felt was] unsuitable for the placement of the box culvert" and, in the same letter, recommended a solution to address the issue. Exhibit 157-26 at 010413. Eagle Peak flagged this issue again in its January 23, 2017, letter. Exhibit 161-34 at 011379. In his notes on Eagle Peak's letter of January 23, 2017, FHWA's project engineer inaccurately stated that Eagle Peak had not provided prior notice of the boulders encountered during excavation and that he did not recall any large rocks encountered during excavation. *Id.*

The boring log data provided by FHWA did not indicate the presence of these boulders; instead, the data describes soil consisting of "[s]ilty SAND with gravel . . . , medium dense, gray-brown, wet, coarse grained sand." Exhibit 4 at 001918; EP Exhibit 66. Eagle Peak estimated a three-day impact associated with this issue due to the large boulders, as well as cemented cobbles, impeding excavation efforts. Exhibit 161-31 at 011339.

Notwithstanding the impact, Eagle Peak was able to complete a substantial amount of work on the culvert. Eagle Peak “had a little bit of work left on the Apollinaris box culvert[,]” but otherwise, the company was in “pretty good shape there to continue.” Transcript, Vol. 7 at 2269. In its recovery schedule, Eagle Peak anticipated completing this work by August 1, 2017, with 156 days of slack in advance of the completion date. Exhibit 161-31 at 011365.

3. Brink of the Upper Falls and Uncle Tom’s Point Sites

Relating generally to the Brink of the Upper Falls and Uncle Tom Point sites, Eagle Peak believed that the design and other issues could be fixed during the first winter shutdown and that by adding additional resources (including new crews, additional supervisors, and more equipment), Eagle Peak could complete the project on time and within specifications. Transcript, Vol. 7 at 2285-86. As discussed below, certain of these issues reflect that questions were pending in front of, or remained unresolved by, FHWA prior to termination. One matter described below appears to reflect FHWA’s failure to respond to Eagle Peak’s request for information in a timely manner.

a. Micropile Work

Eagle Peak planned to complete the micropile work at the Brink of the Upper Falls during the first season. To do this work, Eagle Peak intended using a ninety-ton crane to lift its drill rig for work near the Historic Wall and to start work on the overlook at the edge of the site. Transcript, Vol. 5 at 1378-79, Vol. 7 at 2114-15. The day before the preconstruction conference (i.e., on or around May 23, 2016), Eagle Peak, along with its subcontractor and FHWA, walked the area. *Id.*, Transcript, Vol. 2 at 405-06. Given the observed damage to the wall, Eagle Peak questioned whether the wall could sustain the weight of the crane and asked FHWA to look into stability of the wall to make sure that use of the crane would be safe. Transcript, Vol. 7 at 2114-15. On June 26, 2016, Eagle Peak followed up with information on the two rigs that it was considering for the project. EP Exhibit 156-18. On June 30, 2016, by email, FHWA’s project engineer forwarded this information to the National Park Service (NPS) stating that “[a]s for [Brink of the Upper Falls, Eagle Peak] want[s] to use the T.43. Not sure about where it will be parked. I think I could request some additional information on staging, but this is a low priority at the moment.” EP Exhibit 156-23 at EP0043778.

Although the project engineer’s email to the NPS indicated that he would follow up with Eagle Peak for clarifying information, he never did. Transcript, Vol. 2 at 407. The project engineer stated that he did not follow up because there was plenty of other work that Eagle Peak could do and he was not clear on how Eagle Peak was going to use the crane and where it would be placed. *Id.* at 407-8.

In its January 23, 2017, letter to the CO regarding this issue, Eagle Peak stated:

We walked [the Brink of the Upper Falls] with [FHWA's] Project Engineer the day before the preconstruction conference. Our subcontractor was with us and questioned the ability of the undermined retaining wall to support a 90 ton crane, which would be required for the first order of work. The [P]roject Engineer said he would get back to us. To this date we have not received a response.

Exhibit 161-34 at 011379. The project engineer's own notes on this specific passage of Eagle Peak's letter stated that "[w]e may have a redesign coming. Waiting on the [NPS] on what they want to do with the historic wall. We have not started any work at this site, so [not] sure what delays would have occurred." *Id.*

b. Micropile Quantities as Relates to the Brink of the Upper Falls;
Sunset Trail

In a December 7, 2016, email, FHWA's project engineer recognized that an issue was pending or needed to be resolved about the micropile quantities required for the work at the sunset trail. Under the topic, "Clarification on Micropile Design," and with a noted deadline of December 30, 2016, the project engineer stated:

Currently the contract calls for embedment into bedrock. We only allocate/estimate about 28' [linear feet] per pile in quantity. No bedrock shown in Geotech report. Do we have guidance for this yet? . . . I'd like to get a [contract modification] for this out soon, if needed.

EP Exhibit 162-6 at EP0045948.

Eagle Peak raised the issue with the micropile quantities in its January 23, 2017, letter to the CO. Exhibit 161-34 at 011381. On this issue, the project engineer responded, "Yes this is an issue that I'm very aware of. I have resolved with geotech and would like to issue a [contract modification] before winter shutdown is over. No work has occurred here, so no delays." *Id.*

c. Brink of the Upper Falls MSE Wall Work

On July 15, 2016, one day or so after the options award, Eagle Peak transmitted a request for information to FHWA seeking curve information for the Brink of the Upper Falls wall. EP Exhibit 157-30; Exhibit 8 at 002197. On July 27, 2016, Eagle Peak provided its submittal for the Brink of the Upper Falls MSE wall explaining how the wall would be

constructed. Exhibit 111-03. Almost two months later, on September 21, 2016, FHWA approved the submittal. *Id.* at 005277.

B. Percentage of Work Completed

In a January 31, 2017, memorandum to file, the CO initially found that, excluding mobilization, Eagle Peak earned nine percent of the total contract value while using thirty percent of the contract time. Exhibit 94 at 004536. In a subsequent report dated February 2, 2017, prepared for the surety, FHWA adjusted its assessment of the work completed based on contract value to a little more than seventeen percent (including materials on hand and mobilization efforts). EP Exhibit 113-2 at EP002471; EP Exhibit 113-3-2. Mr. Weathers, FHWA's expert, concluded that Eagle Peak had completed seventeen percent of the work under the contract in the first season using a similar analysis to the one used by the FHWA (i.e., looking at contract earnings and total value as factors in determining work completed). Exhibit 186-001R at 046398 ("Eagle Peak completed \$5,997,596.32 of contract work (excluding contract retentions) which would equate to 17% of Eagle Peak's base contract value.").

Mr. Nolting explained that simply breaking the project duration into thirds for a three-year project and concluding that Eagle Peak should have completed thirty plus or minus percent of work in the first of three seasons of the contract was "overly simplified." Transcript, Vol. 8 at 2596-97. He stated that the Government's assessment (and, it seems that of the Government's expert) did not consider when significant scopes of work were planned to occur. EP Exhibit 113-2 at EP0024712. Notably, the Government did not award the options under the contract until more than two months after the signing of the contract. *Id.* Mr. Nolting explained that this "fact alone would have likely necessitated some adjustment to the progress the Government reasonably expected Eagle Peak to have made related to the options." *Id.* Mr. Nolting also noted that design and weather impacts were not considered in the Government's assessment of completed work, opining that these impacts represented a "lost opportunity for Eagle Peak to perform work within the originally contemplated durations." *Id.* at EP0024715.

Adjusting for these impacts, Mr. Nolting concluded that "Eagle Peak was approximately 26.5% complete with the work it planned to start in 2016 when considering impacts caused by weather at the mainline and design issues at Inspiration Point. Alternatively, Eagle Peak was approximately 3.5% short of accomplishing the Government's target of 30% for the first season." EP Exhibit 113-2 at EP0024716.

Mr. Nolting explained that, on large construction projects like the one at issue in this appeal, much of the contract value is on the "back end"—i.e., "the big materials, the cold recycled asphalt base, the paving." Transcript, Vol. 8 at 2596. For the Yellowstone project,

those larger items were not scheduled until year three of the contract. *Id.* The canyon work alone, which was never planned for the first year, was valued at \$6.4 or \$6.5 million, or approximately 23% of the contract value. *Id.* at 2602.

V. Increased Manpower Projections

In the letter submitting its November 23, 2026, schedule, Eagle Peak described its plans for increased manpower in the next construction season:

Starting next year, we will be mobilizing additional crew members to work on our project. We have completed a project in California that will make available additional employees to work on this project. We also will gain additional personnel from our Utah project that is nearing completion.

Our plan is to run two crews on the Grand Loop of the project, one day shift and one night shift. Each of the crews will have a Superintendent to oversee operations and monitor production. We will utilize the night shift and employ a road closure at night to install culverts, installing culverts at night with the road closure will allow the crews uninterrupted work conditions.

Day shift will be directed to the remainder of the work, clearing and grubbing, excavations, grading, road construction, etc.

For the Canyon work, we will also utilize two crews, both crews will work during daylight hours. Having two crews will facilitate a high production rate.

All the additional personnel are qualified and experienced workers. We anticipate completing a majority of the project next year with the final year for paving, completing masonry work, completing the canyon projects and cleanup work.

We have contracted a highly qualified Mason. We are subcontracting the masonry work to his company and he will complete the masonry work on schedule. We have submitted his qualifications and since he is so highly skilled, we foresee no obstacle pertaining to his acceptance.

We have our capable Timber crew accepted and ready to work.

...

[Eagle Peak would prefer to] complete all required paper work through this winter shut down so that we may be set to go right into the working phase of the project at the beginning of next season. We are well aware of the contract, its time requirements, design and specifications and believe there will be no delay in starting back next season. We have established our vendors and suppliers to provide the hardware required for the project. We believe we are quite capable to complete this project on time and within specification.

Exhibit 159-20 at 010560-61.

As previously noted, FHWA never responded to Eagle Peak regarding the company's schedule submission of November 23, 2016. Exhibit 161-21 at 011226; Transcript, Vol. 7 at 2286.

In its January 23, 2017, letter providing another schedule, Eagle Peak reiterated that it had the resources to complete the project, stating that the company had passed on bidding on additional work for the 2017 season, even projects in close proximity to its base in California, in anticipation of bringing all personnel and equipment to the Yellowstone project. Exhibit 161-21 at 011227-28. Eagle Peak stated that this direction of personnel would "triple the resources over last year [2016] and at least triple the production." *Id.* at 11228. The company added that any projection of the completion date, without accounting for the additional resources, was inherently flawed, and, with these resources, the company could readily accommodate the work remaining within the remaining contract period. *Id.*

VI. Termination for Default

In a January 31, 2017, internal memorandum to the "Contract File," the CO explained her reasoning for the default termination. EP Exhibit 97-4-7. Based on the "schedule rebuilds," the CO concluded that Eagle Peak would not be able to complete Grand Loop Road, the Brink of the Upper Falls, and Uncle Tom's Point by the fixed completion date and would be sixty-seven days late in completing the project. *Id.* at EP0020482. She concluded that the only possible excusable delay would be due to weather but that, given the agency's assessment that Eagle Peak would be late by sixty-seven days, Eagle Peak still would not timely complete the project even with an approximate two week impact extension due to weather. *Id.* As for the percent of work completed, she concluded that "[e]xcluding mobilization, [Eagle Peak] earned 9% of the total contract value while using 30% of the contract time." *Id.* at EP0020484. She noted that "[i]f another contractor was to take over the project and finish it, it would not be able to meet the current fixed completion date . . . [but she was] more confident that another contractor would be able to complete the work under the contract sooner than if Eagle Peak continues to work." *Id.* at EP0020483.

By letter dated February 1, 2017, FHWA terminated Eagle Peak for default pursuant to FAR 52.249-10. Exhibit 162-02. In the letter, FHWA stated:

This action is based on Eagle Peak's failure to prosecute work with the diligence that will insure its completion within the time specified within this contract. I have reviewed Eagle Peak's January 25, 2017 letter identifying delays and have determined that there are no excusable delays that would extend the fixed completion date of [the] contract.

I have also reviewed Eagle Peak's updated schedule from January 25, 2017. The schedule update contained several errors that required correction (concurrent work on the Brink of Upper Falls and Uncle Tom's Point sites and MSE wall facing at the Brink of Upper Falls MSE wall shown before completion of the MSE settlement period). After making these correction the schedule update shows Eagle Peak completing 67 days past the fixed completion date. In addition[,] the Government has created a baseline and updated schedule and independently determined that Eagle Peak cannot meet the fixed completion date.

Id. at 011387-88.

Discussion

I. Standard of Review

A contractor's action challenging a contracting officer's decision under the Contract Disputes Act "shall proceed *de novo* in accordance with the rules of the appropriate court [or board]." 41 U.S.C. § 7104(b)(4) (2018). "Thus, once an action is brought following a contracting officer's decision, the parties start in court or before the board with a clean slate." *Wilner v. United States*, 24 F.3d 1397, 1402 (Fed. Cir. 1994) (citation omitted).

Contracting officers have broad discretion in deciding whether to terminate a contract for default. *Consolidated Industries, Inc. v. United States*, 195 F.3d 1341, 1343 (Fed. Cir. 1999). However, "a 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) (internal citations omitted). When a contractor appeals that termination decision, "the government . . . bear[s] the burden of proof with respect to the issue of whether termination for default was justified." *Eagle Peak*, 69 F.4th at 1375 (citing *Lisbon*, 828 F.2d at 765). "In failure-to-make-progress cases [like the appeal here], the government must establish that 'the contracting officer's decision to terminate . . . was reasonable given the events that occurred before the termination decision

was made.”” *Id.* (quoting *Empire Energy Management Systems, Inc. v. Roche*, 362 F.3d 1343, 1357-58 (Fed. Cir. 2004)). The Federal Circuit listed the factors that may be examined in judging the reasonableness of the termination decision:

On the often-central issue of whether it was reasonable to view timely completion as not reasonably likely, *see Empire Energy*, 362 F.3d at 1357-58; *Lisbon*, 828 F.2d at 765, the tribunal must focus on “tangible, direct evidence reflecting the impairment of timely completion,” *McDonnell Douglas [Corp. v. United States]*, 323 F.3d 1006, 1016 (Fed. Cir. 2003)]. In particular, the Board must “decide the actual performance that the contract requires and the amount of time remaining for performance” and “may also consider” factors such as “the contracting officer’s testimony and contemporaneous documents[,] . . . a comparison of the percentage of work completed and the amount of time remaining under the contract, the contractor’s failure to meet progress milestones, problems with subcontractors and suppliers, the contractor’s financial situation, . . . a contractor’s performance history, and other pertinent circumstances.” *Id.* at 1016-17 (citations omitted).

Eagle Peak, 69 F.4th at 1376. The Government does not satisfy its burden “by merely showing that the contractor was behind schedule.” *Lisbon*, 828 U.S. at 765. Instead, based upon the entirety of the record, the Board must determine whether the Government “proved its side of the issue by at least the weight of the evidence. If the evidence on the issue is evenly balanced, the party with the burden [here, the Government] loses.” *Id.* “The Board will sustain a default termination only if the Government shows that the circumstances at the time of the termination justified the decision, even if based on grounds unknown to the contracting officer.” *Adapt Consulting, LLC v. General Services Administration*, CBCA 7213, et al., 24-1 BCA ¶ 38,625, at 187,758. In failure-to-make progress cases, the burden of showing that non-performance was excusable shifts to the contractor only after the Government proves that its termination decision was reasonable in light of the circumstances existing prior to termination. *Eagle Peak*, 69 F.4th at 1375.

II. The Record Shows Timely Completion of the Contract Feasible

We examined Eagle Peak’s schedules, its progress through the first shutdown date, and its planned manpower increases for the following year. Based upon that evidence, we are satisfied that Eagle Peak could have met the contract completion date.

A. The Schedules

The company’s schedules, particularly revision 5 (dated October 13, 2016) and the recovery schedules (dated January 25, 2017), along with the accompanying narratives

describing in detail the resources that Eagle Peak planned to dedicate to the project, were evidence that Eagle Peak was ready, willing, and capable of performing the project work in the two remaining seasons of the contract. The function of the work schedule is “to show that the contractor was ready, willing and able to make progress.” *Discount Co. v. United States*, 554 F.2d 435, 441 (Ct. Cl. 1977). The “underlying intent and value” of the CPM schedule allows for the evaluation of contract progress:

[T]he [CPM schedule] is an efficient way of organizing and scheduling a complex project which consists of numerous interrelated separate small projects. Each subproject is identified and classified as to the duration and precedence of the work. . . . The data is then analyzed, usually by computer, to determine the most efficient schedule for the entire project. Many subprojects may be performed at any time within a given period without any effect on the completion of the entire project. However, some items of work are given no leeway and must be performed on schedule; otherwise, the entire project will be delayed. These latter items of work are on the “critical path.” A delay, or acceleration, of work along the critical path will affect the entire project.

SAE/Americon-Mid Atlantic, Inc., GSBCA 12294, et al., 98-2 BCA ¶ 30,084, at 148,915 (quoting *Haney v. United States*, 676 F.2d 584, 595 (Ct. Cl. 1982)). The CPM schedule has also been described as follows:

A contractor’s initial network analysis is not cast in bronze; it is constantly changing; that is the advantage of the critical path method of scheduling construction. The impact of each change, or delay, on the previously charted sequences must be fitted into the network. The effect may be far-reaching. Activities which were not critical prior to the new event may be rendered critical; and conversely, formerly critical activities may develop float. Whether the change or delay affects the critical path must be determined on the basis of conditions existing immediately prior to its occurrence; not on how it might have changed what someone planned (or should have planned) months or years previously.

Norair Engineering Corp., ENGBCA 3804, et al., 90-1 BCA ¶ 22,327, at 112,205 (1989).

Eagle Peak’s schedules, although not perfect, provided the necessary details to show (arguably beyond contract requirements) that it understood the required work and had a plan to finish the project in the two remaining construction seasons. Further, in its narratives accompanying the submitted schedules, Eagle Peak provided specific details on the resources and plans it would use to complete the project by the contract deadline. Finally, FHWA did

not take issue with Eagle Peak's ability to finish the work at Inspiration Point by the mandatory interim completion date of November 15, 2017.

We examined the revision 5 schedule submitted on October 13, 2017, and the recovery schedule submitted on January 26, 2017. We accept Mr. Nolting's testimony that the revision 5 schedule was a proper schedule, with minimal errors, which FWHHA should have accepted as the baseline schedule. Similarly, we find that Eagle Peak's recovery schedule was a proper schedule update that should have been accepted by FWHHA. With regard to the 180-day settlement period for the MSE walls, both revision 5 and the recovery schedules showed that Eagle Peak planned to comply with this requirement. Here, consistent with *Lisbon*, we find that Eagle Peak's "failure to give all the requested details on [its] revised schedule[s] was not in itself evidence of failure to make progress on the [Yellowstone project] which would justify" a default termination. *Lisbon*, 828 F.2d at 767.

Eagle Peak's schedule submissions and the facts of this appeal stand in stark contrast to situations described in the cases upon which FHWA relies. In *Discount Co. v. United States*, the Court of Claims found that, "weeks after [an] order to resume work had [been] issued and a day after [a] 10-day cure notice had expired . . . [the contractor] had neither begun more-than-piddling construction activities at the [project site], nor assured the Government that it could meet the completion deadline." 554 F.2d at 439. The court added that the record showed that the default termination was not based on the contractor's failure to comply with the CO's demand to provide a work schedule per se but "rather on the over-all evidence of [the contractor's] failure to prosecute diligently its work under the contract." *Id.* at 441. The Court noted that "[the contractor's] failure to furnish such a schedule . . . bolster[ed] the Government's position that it was justifiably insecure about the contract's timely completion." *Id.*

FHWA also relies upon the Board's decision in *Affiliated Western, Inc. v. Department of Veterans Affairs*, CBCA 4078, 17-1 BCA ¶ 36,808. In that case, the Board confirmed the termination decision upon finding that the contractor: (1) failed to produce the updated and detailed schedules required by contract specifications; (2) provided no information on how it planned to obtain subcontractor services necessary for completion of certain project phases, with only about two months remaining on a one-year contract; and (3) failed to demonstrate that it was capable of paying and keeping its subcontractors. *Id.* at 179,402. In *1-A Construction & Fire*, the Board found that the contractor had "plainly acknowledged its inability to complete the contract by its deadline" through both its schedules (one described as providing "very little detail" and a second described as providing "slightly more detail") and its extension requests. *1-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913, at 175,554-55. In contrast, we find that Eagle Peak's schedules comported with the contract schedule requirements and showed how Eagle Peak would meet the required completion date.

In its post-hearing reply brief, FHWA asserts that Eagle Peak's failure to comply with the schedule requirements for the contract, as required by FAR 52.236-15, provides a separate basis upon which to uphold the termination. FAR 52.236-15(c) (failure to comply with the schedule requirements of the contracting officer are "grounds for a determination by the Contracting Officer that the Contractor is not prosecuting the work with sufficient diligence to ensure completion within the time specified in the contract."). Based on the facts and analysis as discussed, we find that Eagle Peak's schedules comported with the contract's schedule requirements. Eagle Peak's schedules showed how Eagle Peak proposed to perform the work under the contract, and the dates for starting and completing the "salient features of the work (including acquiring materials, plant, and equipment)[,]" as required by the contract. Exhibit 1 at 000149. Thus, termination was not warranted on this basis.

B. The Percentage of Work Completed by Eagle Peak

The evidence shows that Eagle Peak made sufficient progress on the project such that the likelihood of timely completion of the project with two full construction seasons remaining was not impaired. We are persuaded by Mr. Nolting's quantitative assessment that Eagle Peak had performed just over a quarter of the work of the contract during the first construction season and, notably, that a significant portion of the contract value was on the "back end," reflecting activities not planned during the first year. Based on this persuasive assessment, we cannot conclude that Eagle Peak's progress during the first season was so deficient as to impair timely completion of the project. *See Fraya, S.E.*, ASBCA 52222, 02-2 BCA ¶ 31,975, at 157,949 (termination for failure to make progress upheld upon finding, in part, that contractor had completed none of the work within the initial 40% of the contract period.).

C. Eagle Peak Planned Manpower Increases

We also find persuasive, and give significant weight to, the evidence showing Eagle Peak's plans to increase its manpower for the 2017 construction season. Contrary to the CO's determination that Eagle Peak failed to provide sufficient detail, we find that Eagle Peak described concrete plans to increase staffing to accelerate its production during that season. *See, e.g., SAE/Americon-Mid Atlantic, Inc.*, 98-2 BCA at 149,917-19 (finding that the contractor would be able to timely complete the contract with the addition of resources).

D. Agency's Schedules

We also find that the agency's analysis based on the "schedule rebuilds" was flawed because those schedules did not consider the project as a whole to determine an overall completion date. Under the "schedule rebuilds," the work was divided into the Grand Loop Road, Inspiration Point, the Brink of the Upper Falls/Uncle Tom's Point. FHWA, in doing

three schedules instead of one, did not follow its own guidance or the parties' contract when creating these construction schedules. The agency did, however, satisfy itself that Eagle Peak would be able to meet the interim completion date for Inspiration Point.

Additionally, the record also reflects that, prior to terminating Eagle Peak's contract for default, the agency internally identified, but failed to resolve, a significant number of pending issues that could have impacted the critical path and completion dates, which, in turn, could have extended the period of performance. For example, in creating the "schedule rebuilds," the project engineer identified several potential modifications to the contract, some of which were described as items that might affect the critical path. Moreover, as the agency acknowledged, Eagle Peak identified several outstanding design items prior to termination. The design error with regard to the elevation of Inspiration Point, in particular, could have delayed the project.

III. Proper Interpretation of SCR 108.01(j) Supports a Finding of Timely Completion

A significant driver of the agency's determination that Eagle Peak would complete the schedule sixty-seven days late was the agency's requirement that all work be completed at one site before Eagle Peak began working at another site. We find this requirement to be an incorrect interpretation of the contract requirement for "substantial completion." Pursuant to the terms of the contract, Eagle Peak could not schedule the work so that both sites would be closed at the same time. Instead, Eagle Peak had to make sure one site was available for public use before starting construction at the second site:

Brink of the Upper Falls site (Base and Option W) and Uncle Tom's Point site (Options X, Y, and/or Z) cannot be closed simultaneously. Substantially complete Brink of the Upper Falls site work or Uncle Tom's Point site work to the point of being acceptable for public use, and approved by the CO, prior to initiating construction activities at the remaining site.

Exhibit 1 at 000218. Keeping in mind that contract interpretation begins with the plain language of the agreement, *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1435 (Fed.Cir.1996), we reject the agency's proffered interpretation that the requirement is that all work be complete at one site before beginning work at a second site. The agency's interpretation reads out the word "substantial," thereby violating a cardinal rule of contract interpretation that all words must be given meaning. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991) (providing meaning to all parts of the contract is preferred over one that leaves a portion of the contract useless, inexplicable, or void.). FHWA relies upon the contract definition of "substantial completion" found in the agency's FP-14, Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects: "The point at which the project is complete such that it can be safely and effectively used by the

public without further delays, disruption, or other impediments.” Exhibit 2 at 000570. Contrary to FHWA’s view, this definition does not require that the work be complete at one site before work can begin at another, only that the site be available for safe use by the public.

Instead, we find that the constraint is properly interpreted to preclude the simultaneous closure of the parking lots at the two sites but to permit limited overlapping work. If the parking lot is open, the public can still use the site, but Eagle Peak is permitted to begin some limited work upon substantially completing the other site. Further, this interpretation is consistent with how FHWA’s design consultant saw work at the two sites proceeding. Eagle Peak’s recovery schedule showed that it did not intend to work on the parking lots simultaneously. With the correct understanding of this schedule constraint, Eagle Peak’s schedules showed on-time completion.

IV. Converting Termination for Default to One for Convenience

We find, based on the evidence, that the CO’s stated reasons for the termination for default were “predicated on contract-related issues.” *Eagle Peak*, 69 F.4th at 1377. However, considering the evidence in its totality, we also find that the CO’s decision to terminate was not reasonable in light of the events occurring before termination. *See Darwin Construction Co. v. United States*, 811 F.2d 593, 596 (Fed. Cir. 1987) (“[T]he default article of the contract does not require the Government to terminate on a finding of default, but merely gives the procuring agency the discretion to do so, and that discretion must be reasonably exercised.”); *ACM Construction and Marine Group, Inc. v. Department of Transportation*, CBCA 2245, et al., 14-1 BCA ¶ 35,537, at 174,150 (“[W]hen all of the relevant facts and circumstances are considered, the overall decision to terminate the contract for default must have been a reasonable exercise of discretion.”). Specifically, we find it was not reasonable for FHWA to determine that there was no reasonable likelihood of timely completion of the project at issue in this appeal. *See Eagle Peak*, 69 F.4th at 1375 (“[T]he substantive contract standard, in its endangerment-of-timely-completion component, doubly considers what is ‘reasonable’—whether it was ‘reasonable’ to find that there was no ‘reasonable likelihood’ of timely completion.”).

First, Eagle Peak’s schedules showed that it understood the required work and had a plan to finish the project in the two remaining construction seasons. Second, in its narratives accompanying the submitted schedules, Eagle Peak provided specific details on the resources and plans it would use to complete the project by the contract deadline. Third, the evidence shows that Eagle Peak made progress on the project at the Mainline such that the likelihood of timely completion of the project with two full construction seasons remaining was not impaired. *See McDonnell Douglas Corp.*, 323 F.3d at 1016 (“Although the contracting officer’s testimony and contemporaneous documents are relevant to [a default]

determination, . . . the trial court may also consider other factors usually relied upon by courts and contract boards, such as a comparison of the percentage of work completed and the amount of time remaining under the contract[.]”). FHWA also did not take issue with Eagle Peak’s ability to finish Inspiration Point by the mandatory interim completion date of November 15, 2017. Finally, we are persuaded by Mr. Nolting’s quantitative assessment of the work that Eagle Peak had performed in the first season. By contrast, we find the agency’s proffered evidence based on the schedule rebuilds and its interpretation of SCR 108.01(j), as it relates to the work at the Brink of the Upper Falls and Uncle Tom’s Point sites, unpersuasive. Further, the agency’s failure to resolve a significant number of pending issues (with potential critical path and completion date impacts) prior to termination undermines the credibility and integrity of the agency’s arguments on termination.

For reasons set forth above, the termination for default is converted to a termination for the convenience of the Government. *John Reiner & Co. v. United States*, 325 F.2d 438, 442-45 (Ct. Cl. 1963).

Decision

The appeal is **GRANTED**.

Beverly M. Russell

BEVERLY M. RUSSELL
Board Judge

We concur:

H. Chuck Kullberg

H. CHUCK KULLBERG
Board Judge

Marian E. Sullivan

MARIAN E. SULLIVAN
Board Judge