UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

BAE SYSTEMS NORFOLK SHIP REPAIR, INC.,

Plaintiff,

v. **Civil No. 2:22cv230**

UNITED STATES OF AMERICA, through the DEPARTMENT OF THE NAVY, and its activity, the Mid-Atlantic Regional Maintenance Center,

Defendant.

OPINION AND ORDER

This matter is before the Court following a five-day bench trial concerning a maritime contract dispute between BAE Systems Norfolk Ship Repair, Inc. ("BAE NSR") and the United States of America, through the Department of the Navy, and its activity, the Mid-Atlantic Regional Maintenance Center (collectively the "Navy"). Although a trial was necessary in this case, many of the facts are not in dispute, and the primary legal issue is whether the Navy is liable to BAE NSR for damages flowing from the Navy's directive to protect the USS TORTUGA (LSD-46) (the "Tortuga") from hurricane damage in 2019. With the benefit of the trial transcript, the parties have submitted proposed findings of fact and conclusions of law. Therefore, the matter is ripe for review.

I. FINDINGS OF FACT

A. Background Findings of Fact

For ease of understanding the parties' stipulated facts, the Court makes the following background findings of fact by preponderant evidence.

1. Plaintiff BAE NSR is a Virginia corporation with its principal place of business in Norfolk, Virginia. BAE NSR provides emergency and planned ship repair services for commercial and military customers, including the United States Navy.

2. The United States Navy, through the Mid-Atlantic Regional Maintenance Center ("MARMC") awarded BAE NSR Contract No. N00023-18-C-4403 on November 14, 2017, for the performance of maintenance, modernization, and repairs on the Tortuga (the "Contract").

3. The Contract is a firm, fixed-price contract with an original total dollar value of $183,794,039.

4. The Contract anticipates that the scope of work may be adjusted during the Tortuga's availability.[1] In the event that new or "growth" work arises, the Navy can issue a request for contract change ("RCC") to request pricing information from BAE NSR for the additional work.

5. When BAE NSR receives an RCC, it is supposed to respond with a change order price analysis ("COPA") (including supporting

[1] The "availability" refers to the scheduled period of time for maintenance, modernization, and repairs to the Tortuga.

documentation) within 21 days. A COPA should include BAE NSR's labor hours, subcontractor quotes, material quotes, and mark-up, as applicable. Labor hours in the prime and subcontractor quotes are supposed to be "broken down by trade and labor mix." Navy Ex. 1 § 1.11. Sometimes COPA's include actual costs and sometimes they include estimated costs.

6. If the parties cannot reach an agreement regarding an RCC, then BAE NSR can file a request for equitable adjustment ("REA") seeking an adjustment to the Contract price.

7. If the parties cannot reach an agreement regarding the REA, then BAE NSR can convert its REA into a "claim" against the Navy. A written claim is evaluated by a warranted Contracting Officer who issues a final written decision on behalf of the Navy.[2]

B. Stipulated Facts[3]

The Court adopts, and incorporates herein by reference, fifty-two of the fifty-three stipulations of fact set forth in the

[2] A Contracting Officer with a "warrant" has authority to bind the federal government to contract changes up to a certain dollar amount.

[3] The footnotes in this section offer clarifications based on findings the Court makes as factfinder unless otherwise stated.

final pretrial order.[4] ECF No. 135, at 1-10. Reproduced immediately below is an abbreviated version of such stipulations.[5]

1. The Contract includes a clause that requires BAE NSR to have an approved Heavy Weather Plan ("HWP Clause").

2. BAE NSR has a Navy-approved heavy weather plan ("HWP").[6]

3. The HWP Clause states that "the Government shall reimburse the Contractor for all reasonable, allowable, and allocable costs resulting from the Contractor's implementation of the HWP based on such Government direction." HQ C-2-0029 Heavy Weather Plan (NAVSEA) (Jun 1999).

4. BAE NSR incurs three categories of costs when the Navy directs it to implement a HWP: (1) demobilization costs incurred to: (i) protect the ship from damage from floating equipment; (ii) protect government equipment and material; (iii) remove equipment that provides temporary services; (iv) remove contractor equipment (including all staging items); (v) secure temporary closures; and (vi) remove all floating equipment from alongside the ship ahead of the weather event (here, a hurricane)

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[4] Based on the evidence introduced at trial, the Court does not adopt stipulation #23 as set forth in the Final Pretrial Order because it inaccurately reflects the equitable adjustment amount sought by BAE NSR's subcontractors. See ECF No. 135, at 5.

[5] The Court has made limited revisions to the parties' stipulations for clarity and to accurately cite admitted exhibits.

[6] A HWP is a written document that "assigns responsibilities and prescribes actions to be taken on the approach of and during heavy weather conditions." HQ C-2-0029 Heavy Weather Plan (NAVSEA) (Jun 1999).

("demobilization"); (2) remobilization costs incurred to return the equipment to the ship and place the ship in a position to resume production work called for by the relevant contract ("remobilization"); and (3) schedule delay and schedule disruption for the impact the weather event caused to the production work schedule ("schedule delay" or "delay/disruption").

5. Hurricane Dorian struck the Tidewater area in September 2019.

6. When Hurricane Dorian hit Norfolk, the following Naval vessels were in BAE NSR's shipyard: the Tortuga, USS GETTYSBURG, USS COLE, USS OSCAR AUSTIN, USS SAN ANTONIO, and USS BULKELEY.

7. The Navy activated Tropical Cyclone Condition of Readiness IV at 12:01 p.m. on Monday, September 2, 2019, which directed BAE NSR and its subcontractors to implement the HWP.

8. BAE NSR immediately began removing temporary services, equipment, staging, and other items required to make the vessels as safe as possible from any heavy weather caused by the impending Hurricane Dorian.

9. On September 2, 2019, MARMC's Chief of Contracting advised that "[a]ll costs associated with implementation of the Heavy Weather Plan must be separately tracked and accounted for to ensure accurate accumulation of storm costs." Navy Ex. 6.

10. BAE NSR issued a memorandum to its subcontractors on September 3, 2019, which stated: "**All Subcontractors working BAE**

Systems Norfolk Ship Repair (NSR) ships are to create a separate charge code to track all labor, material, subcontractor, [de-]mobilization charges incurred in preparing ships for Storm Preps." Navy Ex. 71 (emphasis in original).

11. The September 3, 2019, memorandum advised subcontractors that: "**No charges will be approved for reimbursement without proper documentation of what was accomplished on each ship to comply with requirements for Hurricane Condition III**[.]" Navy Ex. 71 (emphasis in original).

12. The HWP was lifted at 6:00 p.m., on Friday, September 6, 2019, authorizing a return to work. BAE began remobilization on September 7, 2019.

13. On September 6, 2019, MARMC's Chief of Contracting stated that "[a]ll costs associated with implementation of the Heavy Weather Plan must be separately tracked and accounted for to ensure accurate accumulation of storm costs." Navy Ex. 7. BAE NSR contacted its subcontractors and stated the same on September 6, 2019. Navy Ex. 42.

14. Also on September 6, 2019, BAE NSR advised its subcontractors that: "**All Subcontractors working BAE Systems Norfolk Ship Repair (NSR) ships are to create a separate charge code to track labor, material, subcontractor, [and] re-mobilization charges incurred [in] preparing to return to production mode.**" Navy Ex. 40 (emphasis in original). BAE NSR

emphasized that "**[n]o charges <u>will be approve[d]</u> for reimbursement <u>without proper documentation</u> of what was accomplished on each ship to comply with requirements for Hurricane Condition III and re-mobilization to normal conditions.**" Navy Ex. 40 (emphasis in original).

15. For the Tortuga, the Navy requested that BAE NSR respond to RCC 1061G and RCC 1062G[7] with supporting documentation, which it identified as "subcontractor quotes to include labor hours, labor rate, material (part number, description, unit cost, quantity, total cost, and vendor quotes for each line item), and tiered subcontractor quotes (if applicable)[.] Material quote shall include the part number, description, unit cost, quantities, total cost, and vendor quotes for each line item." Navy Ex. 64.

16. For the Tortuga, the Navy ultimately paid BAE NSR and its subcontractors for demobilization ($513,680) and remobilization ($456,147) - $969,827 in total.

17. In its COPA responding to RCC 1062G, BAE NSR submitted estimates for the costs for a 21-day extension to recover the schedule after Hurricane Dorian demobilization and remobilization. The total estimated cost for the 21-day extension, including subcontractors, was $2,111,069. The subcontractors' submissions

[7] RCC 1061G concerned demobilization costs. RCC 1062G concerned remobilization costs; BAE NSR included schedule delay costs in RCC 1062G as well.

totaled $1,207,289. BAE NSR's portion of the 21-day extension cost was $903,780 or $43,037/day.

18. The costs to support each day of extension depends upon the number of personnel dedicated to the PMO (project management office) efforts by BAE NSR and for each of its subcontractors.

19. On April 27, 2020, the parties entered into Modification A00090 ("Mod 90"), which bilaterally modified the Contract, adding time (489 days) and money ($20,661,646).

20. On October 22, 2020, BAE NSR submitted an REA to the Navy to request payment of the costs, including those of its subcontractors, attributable to remobilize and recover the HWP schedule delay for the Tortuga.

21. The parties were unable to resolve RCC 1062G. On July 6, 2021, BAE NSR requested a Contracting Officer's Final Decision ("COFD") regarding its entitlement to the costs and extension detailed in its REA.[8]

22. On August 5, 2021, the Deputy Chief of Contracting for MARMC requested the assistance of the Defense Contract Audit Agency ("DCAA") "to determine if [BAE NSR's] claimed amounts comply with the terms of [the] Defense Federal Acquisition Regulation

[8] To request a COFD, BAE NSR converts its REA into a claim.

Supplement ("DFARS") 252.243-7001 (Pricing of Contract Modifications)."[9] Navy Ex. 18.

23. DCAA is an independent agency that operates under the auspices of the Under Secretary of Defense (Comptroller)/Chief Financial Officer. DCAA provides audit services to federal officials who administer government contracts.

24. DCAA conducts audits to help determine whether contract costs are reasonable, allowable, and allocable.

25. DCAA "determined that BAE NSR did not comply with the terms of Contract No. N00024-18-C-4403, USS Tortuga, under DFARS 252.243-7001, Pricing of Contract Modifications." Navy Ex. 18.

26. "[DCAA] questioned the certified claimed amount of $2,331,028 for the 21-day extension PMO & Services costs in its entirety per the requirements of FAR 31.201-2(d), Determining Allowability, FAR 31.201-3(a), Determining Reasonableness, and FAR 31.201-4 Determining Allocability . . . ." Navy Ex. 18.

27. DCAA found that "BAE NSR did not provide sufficient documentation to demonstrate that a 21-day delay was incurred in the contract period of performance due to the implementation of the Weather Plan HS C-2-0029 (NAVSEA) (June 1999) on September 2, 2019." Navy Ex. 18.

[9] Because the Contract concerns a Navy ship, the Contract includes both Federal Acquisition Regulation ("FAR") clauses as well as DFARS clauses.

28. DCAA concluded that "BAE NSR did not provide sufficient documentation to demonstrate that the claimed costs were incurred as a result of the Hurricane Dorian weather event and are allocable to Contract No. N00024-18-C-4403, USS Tortuga." Navy Ex 18.

29. On April 29, 2022, the Contracting Officer rendered a final decision. BAE Ex. 177.

30. The COFD references several Federal Acquisition Regulations ("FAR") and the DFARS, recognizing that their cost principles apply in the pricing of contract modifications and, from those cost principles, that contractors are responsible for accounting for costs appropriately and maintaining records to demonstrate that costs have been incurred that are allocable to the contract and comply with the cost principles.

31. The Contracting Officer determined that BAE NSR's assertions offered in support of a 21-day extension for PMO and Temporary Services were "not substantiated." BAE Ex. 177.

32. The COFD also states that 234 days after Hurricane Dorian, the Navy issued Mod 90, extending the Tortuga's end date from November 15, 2019, to March 18, 2021; an extension of 489 days.

33. The COFD acknowledges that Mod 90 contained an exception to the bilateral release for continued negotiations of RCC 1062G for costs claimed for the delay due to Hurricane Dorian.

34. Yet the COFD found that, regardless of the exception to the bilateral release that the parties had agreed to, any schedule impact BAE NSR may have incurred from the HWP due to Hurricane Dorian was covered by the 489-day extension provided by Mod 90. Notwithstanding the exception in Mod 90 for continued negotiations for the costs and extension due to Hurricane Dorian, the Contracting Officer determined that the delay was concurrent with the Mod 90 extension.

35. The Contracting Officer concluded that BAE NSR was not entitled to $2,331,030 for a 21-day extension. BAE Ex. 177.

36. The Contracting Officer agreed to pay BAE NSR's remobilization costs of $456,157, which at the time were unresolved. BAE Ex. 177.

37. BAE NSR filed its Verified Complaint in this Court on June 1, 2022, seeking "$2,331,028 for PMO and Temporary Services daily costs for the 21-days of delay resulting from implementation of the HWP on USS Tortuga." ECF No. 1 ¶ 60.

38. BAE NSR and its subcontractors each claim a 21-day extension for the delay/disruption.

39. BAE NSR seeks $903,274 for its PMO and time-related services ("TRS") costs associated with the alleged 21-day schedule delay.[10]

[10] BAE NSR now seeks a total of $1,954,382. BAE NSR seeks $1,051,108 on behalf of its subcontractors for PMO and TRS costs associated with the alleged 21-day schedule delay.

C. Facts Determined by the Court as Factfinder

Based on the trial evidence, the Court makes the following additional factual findings by preponderant evidence:

1. The Tortuga is a dock landing ship that was commissioned in 1990. The Contract calls for extensive repair and modernization work on the Tortuga, including upgrades to the ship's generators, engines, piping systems, living quarters, and heaters among other work items. Though the Tortuga project was originally scheduled for completion by November 15, 2019, as of the date of trial, the work on the Tortuga continued at BAE NSR.

Heavy Weather Plan

2. "[T]o ensure that Naval vessels and material are protected during gales, storms, hurricanes and destructive weather," the Navy requires its contractors to have "a written Heavy Weather Plan (HWP), which assigns responsibilities and prescribes actions to be taken on the approach of and during heavy weather conditions." HQ C-2-0029 Heavy Weather Plan (NAVSEA) (Jun 1999). In exchange for the unilateral right to invoke the Heavy Weather Plan clause, the Navy "shall reimburse the Contractor for all reasonable, allowable and allocable costs resulting from the Contractor's implementation of the HWP." Id.

3. BAE NSR had eight Naval vessels in its shipyard during Hurricane Dorian. Based on BAE NSR's manpower and materials limitations, BAE NSR created a priority list to organize

remobilization efforts. BAE NSR prioritized the Tortuga last for staging and containment, and second to last for the return of temporary services. BAE NSR emailed the priority list to the Navy on September 5, 2019, stating that "[o]ur priorities for remobilization are as follows unless otherwise directed." BAE Ex. 126, at 1. The Navy responded five minutes later neither approving nor rejecting BAE NSR's priority list. Id.

4. When the Navy initiated the HWP around noon on September 2, 2019, all production work stopped to allow for demobilization. BAE NSR was authorized to begin remobilizing around 6:00 p.m. on September 6, 2019. In other words, because the Navy directed BAE NSR to implement the HWP, no production work took place on the Tortuga for at least four and a half days.[11]

5. During remobilization, subcontractors were able to resume production work on the Tortuga at various points. Some were able to resume production work within a couple of days, but others were not able to resume production work until a couple of weeks after Hurricane Dorian passed. This variation was a function of both what the subcontractors required to complete their work (i.e., restoration of certain temporary services by BAE NSR), and BAE NSR's shipyard-wide remobilization priorities. As previously referenced, during demobilization, BAE NSR removed its temporary

[11] The Navy and BAE NSR appear to agree, however, that production work was stopped for (at least) five days. See ECF No. 137 ¶ 21; ECF No. 159 ¶ 64.

services (including electricity and low-pressure air) from the ship.[12] These services were not fully restored on the ship until 21 days after BAE NSR received the HWP order. In other words, some production work did not resume on the Tortuga until 21 days after the Navy initiated the HWP.

The Contract

6. The Contract incorporates the standard "Changes" clause for fixed-price contracts, FAR 52.243-1. This clause authorizes the government to make changes "within the general scope of th[e] contract," and provides that:

> If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under th[e] contract . . . the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both.

FAR 52.243-1(a), (b).

7. The Contract also incorporates the Change Order Accounting Clause, FAR 52.243-6, which authorizes a Contracting Officer to "require change order accounting whenever the estimated cost of a change or series of changes exceeds $100,000." FAR 52.243-6. This clause further provides that the contractor "shall maintain separate accounts, by job order or other suitable accounting procedure, of all incurred segregable, direct costs . . . of work . . . allocable to the change." Id.

[12] To be clear, because the low-pressure air restoration involved hoses being placed throughout various parts of the vessel, this meant that BAE NSR could not restore low-pressure air (for example) by merely flipping a switch.

8. These accounting principles are reiterated in the "Documentation of Requests for Equitable Adjustment" clause, NAVSEA § 5252.233-9103, which lists several categories of information that a contractor should provide for REA's of $100,000 or more. Among the categories listed, contractors are instructed to provide a description of how work has been disrupted and a statement "including the material costs, labor hours and pertinent indirect costs . . . and the amounts claimed to have been incurred and/or projected to be incurred" because of the act or omission by the Navy triggering the REA. NAVSEA § 5252.233-9103(b)(9) (emphasis added). The same clause recognizes that each REA "may not include" every data category but admonishes that the information provided must be sufficiently detailed to allow a Contracting Officer to cross-reference the claimed increased costs or delays with the information provided. NAVSEA § 5252.233-9103(d).

9. The "Documentation of Requests for Equitable Adjustment" clause applies both to changes made pursuant to a written "change order" and to "any act or omission to act on the part of the Government in respect of which a request is made for equitable adjustment." NAVSEA § 5252.233-9103(b). This includes the Navy's direction to implement the HWP in advance of Hurricane Dorian.

10. With respect to scheduling, the Contract requires BAE NSR to provide the Navy with "an integrated milestone plan for the

availability" to include "a schedule of key events necessary to meet the contract delivery dates." Navy Ex. 1 § 1.3. BAE NSR provided this plan at the start of the Tortuga's availability.[13] BAE NSR tracked its production progress during the Tortuga availability by preparing weekly status reports containing a list of work items and their percentage of completion.

11. Finally, the Contract includes the standard "Disputes" clause, FAR 52.233-1, which obliges the Navy to pay interest on any amount found owed and unpaid starting from the date that the Contracting Officer received the certified claim. FAR 52.233-1(h). In this case, BAE NSR submitted its certified claim on July 6, 2021.

Pricing HWP-related Schedule Delay

12. When a HWP is implemented, BAE NSR and the Navy ordinarily negotiate an extension of time and money to compensate BAE NSR and its subcontractors for schedule delay and disruption caused by the Navy's order to implement the HWP.[14] Compensation for additional PMO and TRS is necessary when time is added to the Contract because

[13] It appears from the Contract that BAE NSR was required to also prepare an Integrated Production Schedule (in essence, scheduling all of the work items for the Tortuga availability). Navy Ex. 1 § 1.4.2. This schedule was supposed to be updated and formally presented to the Navy for review at various milestones. The Navy does not appear to argue BAE NSR failed to comply with this requirement.

[14] Puzzlingly, no evidence was introduced to explain how BAE NSR calculates schedule "disruption." Though various witnesses explained that there is a period after delay where production work is completed inefficiently, BAE NSR has not provided this Court with any basis to evaluate schedule "disruption" as part of its claim.

the Contract includes compensation for only the PMO and TRS necessary to complete the Contract within the original availability.

13. BAE NSR has an accounting system approved by DCAA. It tracks PMO and TRS costs by each ship's project identification number and captures project work items, employee identity numbers, and hours worked. BAE NSR treats PMO as a direct labor charge in its time keeping and accounting systems. Its PMO costs are largely tied to support functions including program management, project management, the finance department, quality assurance, and security. BAE NSR's TRS costs are "costs that run with time," including electricity, hazardous waste disposal and storage, and renting office space for government personnel.

14. BAE NSR generally prices HWP-related schedule delay claims by estimating the number of production days lost due to implementing the HWP and multiplying that number by the estimated, future average daily cost for PMO and TRS. Although this is BAE NSR's general practice, no evidence was presented at trial to indicate how BAE NSR estimated the number of production days lost due to implementing the HWP in advance of Hurricane Dorian. A group of BAE employees (some known, some unknown) met and agreed that it would take BAE NSR's shipyard 21 days to recover from the HWP. To be clear, this decision was not specific to the Tortuga.

BAE NSR then directed each of its subcontractors to respond to RCC 1062G with pricing for a 21-day schedule extension.

BAE NSR's COPA

15. In its COPA responding to RCC 1062G, BAE NSR used actual prior PMO and TRS costs to create a daily cost estimate for future PMO and TRS costs. BAE NSR requested a 21-day Contract extension and $903,780 ($43,037/day x 21 days) for its PMO/TRS costs. It also sought $1,207,289 to compensate its subcontractors.

16. Ordinarily, BAE NSR and the Navy negotiate HWP-related compensation and schedule extensions based on the cost and time estimates included in the COPA. The parties did so in this case, swapping proposals for extension lengths and corresponding daily rates for more than a month. However, negotiations stalled in early December of 2019.

BAE NSR's REA

17. BAE NSR submitted its REA on October 22, 2020, seeking a 21-day Contract extension and a total of $2,331,028 for its PMO/TRS costs and that of its subcontractors. BAE NSR did not provide additional supporting documentation or revised quotes from its subcontractors. However, for its own PMO/TRS costs, BAE NSR supplemented the documentation it submitted with its COPA by providing actual PMO/TRS data for the Tortuga for January through March of 2020. For this time-period, BAE NSR had a daily PMO/TRS rate of $40,396.

18. After BAE NSR submitted its REA, negotiations continued between BAE NSR and the Navy to try to resolve the REA. On May 6, 2021, BAE NSR provided actual (average) PMO and TRS costs for two additional time periods as points of reference: immediately before Hurricane Dorian (June 1, 2019, through August 30, 2019) and immediately after (September 15, 2019, through November 22, 2019). These time periods had daily PMO/TRS rates of $36,798 and $39,049 respectively. See BAE Ex. 166.

19. By this point in the negotiations, BAE NSR and the Navy developed diverging views on what data was sufficient to justify the requested 21-days of PMO/TRS costs for BAE NSR and its subcontractors. BAE NSR believed that the averages from various time periods provided a reasonable estimate of what 21 days of future PMO/TRS costs would be. From the Court's understanding, the Navy, by contrast, wanted to see PMO/TRS data during demobilization and remobilization that delineated between time spent by each PMO employee on schedule delay/disruption work, versus base contract work. See ECF No. 158, at 80-84; see also Tr. 488:22-492:18. This type of data has never been collected by BAE NSR to track schedule delay before. None of BAE NSR's subcontractors tracked schedule delay in this manner either.[15]

[15] The Navy introduced no evidence to suggest any contractor or subcontractor has ever tracked schedule delay in this manner. Based on the record before the Court, it appears that the Navy's proposed method of data collection is purely hypothetical.

BAE NSR's Claim[16]

20. BAE NSR converted its REA into a claim on July 6, 2021, again seeking a 21-day Contract extension and $2,331,028. BAE NSR did not include any additional information (supporting or otherwise) with its claim. However, after DCAA completed its initial audit of BAE NSR's claim, DCAA requested, and BAE NSR provided, actual cost data to support its claimed PMO and TRS costs. Specifically, BAE NSR provided PMO and TRS records for the Tortuga for September 28, 2019, through October 18, 2019, a three-week period after remobilization concluded. BAE NSR's PMO/TRS costs for this period were $903,274, or, $43,013 a day.

21. Once BAE NSR converted its REA into a claim, there was no further negotiation of BAE NSR's requested 21-day extension for HWP-related delay.

BAE NSR's Damages

22. BAE NSR now seeks $903,274 and a 21-day contract extension. This breaks down to $43,013 a day and includes BAE NSR's PMO, overhead, consumables, rentals, temporary labor, general administrative costs ("G&A"), profit, and facility costs.

23. BAE NSR determined the daily rate of $43,013 using actual PMO and TRS costs for the 3-week period between September 28, 2019,

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[16] This section provides some background factual findings that lay a foundation for further discussion of BAE NSR's direct claim and the pass-through claims of each of its subcontractors. Additional claim-specific facts are set forth below within the Court's analysis of the direct and pass-through claims.

and October 18, 2019. In other words, BAE NSR's claim is based on the data it provided DCAA during the audit of its claim. PMO and TRS costs tend to be higher than normal immediately after a heavy weather event, so BAE NSR chose this 3-week period as a reasonable approximation of ordinary PMO/TRS costs.

BAE NSR's Pass-Through Claims

24. BAE NSR originally sought $1,207,289 to compensate 17 subcontractors for 21 days of Hurricane Dorian-related schedule delay. However, discovery revealed that four subcontractors had no pass-through claims, and those subcontractors' claims were dismissed. See ECF Nos. 77, 81. Then, on the first day of trial, BAE NSR informed the Court that it was sponsoring only seven of its remaining subcontractors' claims. With the agreement of the parties, the unsponsored claims were dismissed. See ECF No. 151. BAE NSR now seeks to recover $874,152 to compensate the following subcontractors: (1) Accurate Marine & Environmental ("AME"); (2) Allied Research Technologies ("ART"); (3) American Scaffolding ("AS"); (4) Consolidated Marine Systems ("CMS"); (5) Marine Hydraulics International ("MHI"); (6) Marine Specialty Painting ("MSP"); and (7) Tecnico.

25. AME is a time-related service provider that specializes in cleaning tanks on vessels. Unlike subcontractors performing production work (who can leave the vessel once their work is complete), AME's services are required for the full duration of

the Contract. Accordingly, when a contract is extended, AME prepares a quote for labor and materials based on the number of days it is told to price by BAE NSR or the Navy. In this case, AME was directed by BAE NSR to price its RCC for a 21-day extension. AME seeks $62,143 for a 21-day contract extension.

26. ART is a time-related service provider that provides unskilled labor to shipyards. For the Tortuga, ART was directed by BAE NSR to prepare a quote for a 21-day extension. ART retained actual time sheets for each employee from September 2, 2019, through the end of October 2019, but none of these records (or comparable records) were included with ART's portion of the COPA. ART initially sought $76,044 for a 21-day contract extension but is now seeking $24,000 for the same extension.[17]

27. AS is a time-related service provider that provides and maintains scaffolding and scaffolding-related containment. AS does not track its own schedule delay because it bills the prime contractor for the number of days that the prime requires it to work. In this case, AS was told by BAE NSR to price a 21-day contract extension. AS was working on other ships in BAE NSR's shipyard when Hurricane Dorian struck, and it reinstalled

[17] Inexplicably, the amount sought by ART changed during and after trial. As of BAE NSR's opening statement, ART was seeking $76,044. During trial, however, the President of ART testified that he thought ART was seeking "a little over 24,000," but then endorsed receiving $26,000 from BAE NSR for that same period. Tr. 580:19-23; see Tr. 580:24-581:1-21. In BAE NSR's post-trial brief, it states that ART is seeking $24,000. ECF No. 159, at 41.

scaffolding on the ships based on the priorities set by BAE NSR. AS seeks $13,104 for a 21-day contract extension.

28. CMS specializes in piping, structural repairs, and fabrications. On the Tortuga, CMS was upgrading the piping systems for the Tortuga's diesel generators, which is considered production work on the "critical path." [18] CMS required temporary services (power and low-pressure air) to operate its machinery. According to Jonathan Nichols, the General Manager of CMS, the temporary services CMS required to work were not restored on the Tortuga until September 23, 2019. CMS seeks $32,675 for a 21-day schedule extension.

29. MHI is a ship repair contractor and subcontractor involved in most aspects of ship repair. On the Tortuga, MHI was primarily overhauling some of the Tortuga's engines. MHI is seeking a 21-day schedule extension and $462,803, which includes $250,002 for three of MHI's second-tier subcontractors: Fairbanks Morse, C.E. Thurston, and Philadelphia Gear.[19]

30. MSP blasts, removes, and reapplies paint on ships. Its work on the Tortuga included blasting and coating the underwater

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[18] The significance of the "critical path" is discussed in greater detail below in Part II.B.3.

[19] Fairbanks Morse and Philadelphia Gear are technical representatives, and C.E. Thurston was installing insulation in the engine room. A Fairbanks Morse representative must be present for MHI to complete any engine work. BAE NSR did not introduce sufficient evidence at trial for the Court to determine what Philadelphia Gear's role was on the Tortuga.

hull and tanks, and some structural work as well. MSP initially conducted its own schedule analysis and estimated that between demobilization, remobilization, and "rework," MSP experienced a 26-day impact from Hurricane Dorian.[20] However, MSP priced a 21-day extension instead after it was told to do so by BAE NSR. MSP seeks $154,036 for a 21-day extension.

31. Tecnico's work on the Tortuga included replacing the ship's space heaters and seawater strainers, and various projects in the crew's galley and sleeping quarters. Though Tecnico initially believed it may have had a 26 or 28-day delay, it agreed with BAE NSR to price a 21-day extension. Tecnico seeks $125,391 for a 21-day extension.

II. LEGAL STANDARDS & PRELIMINARY CONCLUSIONS OF LAW

A. Jurisdiction

This Court has jurisdiction over BAE NSR's claims[21] under the Contract Disputes Act ("CDA") of 1978.[22] 41 U.S.C. §§ 7101-09. As

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[20] "Rework" refers to work that MSP had to redo after Hurricane Dorian. For example, MSP had to rewash several surfaces after remobilizing before it could continue to paint. MSP was paid for rework but did not receive payment for PMO for those ten days of work.

[21] Though the Court delineates between BAE NSR's direct claim and pass-through claims for ease of reference, all of BAE NSR's claims were included in the "claim" that the Contracting Officer considered. See 41 U.S.C. § 7103(a)(1) ("Each claim by a contractor against the Federal Government relating to a contract shall be submitted to the contracting officer for a decision.").

[22] The parties do not dispute that a COFD was issued by a Contracting Officer. Nor do the parties dispute that BAE NSR has properly "exhausted" its administrative remedies by presenting its claim to a Contracting Officer. See 41 U.S.C. § 7103(a)(1).

the Contract at issue is a maritime contract, BAE NSR's appeal of the COFD is governed by the Suits in Admiralty Act, 46 U.S.C. § 30901, et seq.[23]

BAE NSR's subcontractors lack privity of contract with the Navy, and thus cannot file claims against the Navy independently. However, this Court has jurisdiction to consider such claims because a prime contractor can bring "pass-through" claims on behalf of its subcontractors for incurred (or owed) costs if the prime contractor is liable for such costs.[24] See MW Builders, Inc. v. United States, 134 Fed. Cl. 469, 511 (2017) (citing Severin v. United States, 99 Ct. Cl. 435, 442 (1943)). Such claims must ultimately demonstrate that the government breached a contractual obligation to the prime contractor. See E.R. Mitchell Const. Co. v. Danzig, 175 F.3d 1369, 1370 (Fed. Cir. 1999).

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[23] A contract to repair a vessel, such as the Contract in this case, is a maritime contract. North Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co., 249 U.S. 119, 127-28 (1918). The Suits in Admiralty Act authorizes a government contractor to file suit in a federal district court. See 41 U.S.C. § 7102(d); 46 U.S.C. § 30906; see also East Coast Repair & Fabrication, LLC v. United States ex rel. Dep't of Navy, 16 F.4th 87, 90 n* (4th Cir. 2021) ("A contractor usually must choose between an agency board and the U.S. Court of Federal Claims. But in maritime cases . . . a contractor may choose a federal district court.").

[24] Here, the Navy does not appear to dispute that BAE NSR is liable for the costs incurred by its subcontractors. See E.R. Mitchell Const. Co. v. Danzig, 175 F.3d 1369, 1370 (Fed. Cir. 1999) (explaining that it is "the burden of the government to prove that the prime contractor is not responsible for the costs incurred by the subcontractor that are at issue in the pass-through suit").

B. Legal Framework

BAE NSR seeks an equitable adjustment to its fixed-price Contract as compensation for HWP-related delay. "An equitable adjustment makes a contractor whole after the Government modifies a contract." VHC, Inc. v. Peters, 179 F.3d 1363, 1366 (Fed. Cir. 1999). To secure an equitable adjustment to a fixed-price contract, a claimant must establish "liability, causation, and injury" by preponderant evidence. Delhur Indus., Inc. v. United States, 95 Fed. Cl. 446, 454 (2010). Stated differently, a claimant must demonstrate that the government is liable for an act which caused an injury to the claimant.

Under the HWP clause of this Contract, the Navy is liable for "reimbursement for costs resulting from" activation of the HWP. Navy Ex. 1, at 44. In other words, once the Navy directed BAE NSR to implement the HWP in advance of Hurricane Dorian, the Navy became liable (at least in theory) for "all reasonable, allowable and allocable costs resulting from [BAE NSR's] implementation of the HWP based on [the] Government['s] direction." Id. (emphasis added). The Navy has already agreed that this clause includes compensation for schedule delay. ECF No. 8 ¶ 44. The Navy has also agreed that, because the Navy directed BAE NSR to implement the HWP, no production work took place on the Tortuga for five days. ECF No. 137 ¶ 21.

In short, neither party disputes the fact that the Navy conceivably owes BAE NSR compensation for schedule delay resulting from the Navy's instruction to implement the HWP. What the parties heavily dispute, however, is the proper measure of BAE NSR's damages. Indeed, not all costs are compensable. In order to recover HWP-related damages, BAE NSR must: (1) establish by preponderant evidence that its costs are reasonable, allowable, and allocable; (2) introduce sufficient proof for the Court to determine the quantum of its damages with a reasonable degree of precision; and (3) demonstrate that it experienced compensable delay. Each requirement is addressed in turn.

1. Reasonable, Allocable, and Allowable

Reasonable, allocable, and allowable are terms of art defined by subpart 31.2 of the FAR.[25] "A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business." FAR 31.201-3(a) (emphasis added). Notably, "[n]o presumption of reasonableness . . . [is] attached to the incurrence of costs by a contractor." Id. Instead, whether a cost is reasonable depends on a "variety of considerations and circumstances," including:

[25] Although FAR subpart 31.2 is not directly incorporated by reference into the Contract, DFARS 252.243-7001, which is incorporated in the Contract, provides that, "[w]hen costs are a factor in any price adjustment under this contract, the contract cost principles and procedures in FAR Part 31 and DFARS Part 2231, in effect on the date of this contract, apply." DFARS 252.243-7001; see also Navy Ex. 1, at 68 (incorporating DFARS 252.243-7001 by reference).

> (1) Whether it is the type of cost generally recognized as ordinary and necessary for . . . the contractor's business or the contract performance; (2) Generally accepted sound business practices, arm's length bargaining . . . ; (3) The contractor's responsibilities to the Government, other customers . . . and the public at large; and (4) Any significant deviations from the contractor's established practices.

FAR 31.201-3(b)(1)-(4).

A cost is allocable to a government contract if it is "assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship." FAR 31.201-4. In other words, a cost is "allocable" if there is "a sufficient nexus between the cost and a government contract." Boeing N. Am., Inc. v. Roche, 298 F.3d 1274, 1281 (Fed. Cir. 2002). A cost must satisfy one of three criteria to be allocable: (1) it is incurred specifically for a contract; (2) it "[b]enefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received;" or (3) it "[i]s necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown." FAR 31.201-4.

Finally, a cost is allowable if it is: (1) reasonable; (2) allocable; (3) complies with the Cost Accounting Standards (if applicable) or generally accepted accounting principles and practices; (4) complies with the terms of the contract; and (5) complies with any limitation in FAR subpart 31.2.

FAR 31.201-2(a). Stated simply, a cost is "allowable" if it "can be recovered from the government in whole or in part," Boeing, 298 F.3d at 1280; this concept addresses whether a particular cost "should be recoverable as a matter of public policy." Id. at 1281 (cleaned up). Importantly, FAR 31.201-2 further provides that:

> A contractor is responsible for accounting for costs appropriately and for maintaining records, including supporting documentation, adequate to demonstrate that costs claimed have been incurred, are allocable to the contract, and comply with applicable cost principles in this subpart and agency supplements. The contracting officer may disallow all or part of a claimed cost that is inadequately supported.

FAR 31.201-2(d).

2. Methods of Proof

Once a claimant has demonstrated that the government is liable for costs of added or changed contract work, the claimant must establish the amount of its damages with a reasonable degree of precision. Determining the amount for an equitable adjustment "is not an exact science, and where responsibility for damage is clear, it is not essential that the amount thereof be ascertainable with absolute exactness or mathematical precision." CEMS, Inc. v. United States, 59 Fed. Cl. 168, 227 (2003) (quoting Elec. & Missile Facilities, Inc. v. United States, 416 F.2d 1345, 1358 (Ct. Cl. 1969)). A claimant has met its burden if it "furnishes the court with a reasonable basis for computation, even though the result is only approximate." Wunderlich Contracting Co. v. United States, 351 F.2d 956, 968 (Ct. Cl 1965).

While there are several accepted methods of proving damages, including (as relevant here) the "actual costs" method and the "jury verdict method," a contractor must prove its damages using the best evidence available under the circumstances. See Delco Electronics Corp. v. United States, 17 Cl. Ct. 302, 321 (1989).

i. Actual Costs Method

The preferred method for a contractor to prove its damages is the submission of actual cost data. Propellex Corp. v. Brownlee, 342 F.3d 1335, 1339 (Fed. Cir. 2003); see also Azure v. United States, 129 F.3d 136, at *6 (Fed. Cir. 1997) (table) ("[T]he 'actual cost' method . . . requires the contractor to submit detailed documentation regarding the 'extra' costs it incurred due to the modification in performance."). But when actual cost data is unavailable, either due to the nature of the work or otherwise, estimates of the costs may be used as "actual costs" if such estimates are derived from actual costs and "supported with detailed substantiating data."[26] Delco, 17 Cl. Ct. at 321 (emphasis added); see also Miller Elevator Co., Inc. v. United States, 30 Fed. Cl. 662, 706 (1994) (finding that the actual cost method applies when "the evidence demonstrates sufficient documentation to support an estimation based on actual costs"); John C. Cibinic,

[26] All of BAE NSR's subcontractors failed to support their estimates with detailed substantiating data. Accordingly, they cannot rely on the "actual costs method" to support their claims.

Jr., et al., Administration of Government Contracts 626 (5th ed. 2016) (hereinafter "Admin. of Gov't Contracts").

Here, BAE NSR's claimed damages are not "actual costs" per se, rather, because BAE NSR calculates its "delay damages" as an extension to the contract, BAE NSR's PMO/TRS claim is an estimate of the future cost of 21-days of PMO/TRS for the Tortuga.[27] This estimate is based on actual PMO/TRS costs for a certain period of time on the Tortuga and is supported by detailed payroll records. However, BAE NSR has not carried its burden to prove that this Court should treat BAE NSR's selected estimate as an "actual cost."

BAE NSR has a compelling argument that estimates based on actual costs (with detailed substantiating data) may be sufficient to establish the daily PMO/TRS rate for HWP-related extensions. However, BAE NSR introduced five different calculations of the daily PMO/TRS rate for the Tortuga. Depending on the date range, BAE NSR's daily PMO/TRS cost was $43,037 (BAE Ex. 143), $40,396 (BAE Ex. 137), $36,798 (BAE Ex. 166), $39,049 (BAE Ex. 166), or the $43,013 that BAE NSR now requests. See ECF No. 159

[27] The Navy takes issue with BAE NSR's characterization of its requested HWP-compensation as an "extension." See ECF No. 158, at 81. However, the consistent practice of BAE NSR and its subcontractors when working on Navy contracts is to price HWP-related delay as an "extension" to the Contract, given that an extension is generally required to place BAE NSR and its subcontractors in the position they were in (schedule wise) before the Navy invoked the HWP clause. See, e.g., Tr.289:6-16. Such extensions are routinely given (based on the parties' course of dealing resolving HWP claims), and the Court will not fault BAE NSR and its subcontractors for pricing (and referring to) their claims accordingly.

¶ 235; BAE Ex. 176. Most of these estimates are supported by substantiating data (at least, to some extent), but the Court cannot credit any one estimate as the "actual" daily cost of PMO/TRS on the Tortuga. See, e.g., Paccon, Inc., ASBCA 7890, 1965 ASBCA LEXIS 319, at *9, 65-2 BCA ¶ 4996 (1965) (accepting a contractor's estimates as actual costs when, among other positive attributes, such estimates were "uncontroverted by any other estimates"). In requesting that the Court treat its preferred estimate as an "actual cost" BAE NSR has failed to address the discrepancy in its estimates or address the degree of substantiation required to support treatment as an "actual cost." Given the inconsistency in the record and the lack of effective argument from BAE NSR, the Court finds that the actual cost method would not yield a reliable result.

ii. Jury Verdict Method

In instances where actual damages cannot be documented, federal courts have, on appropriate facts, awarded damages under the "jury verdict" method of calculating damages. The jury verdict method is "designed to produce an approximation of damages based on the entire record." Raytheon Co. v. White, 305 F.3d 1354, 1367 (Fed. Cir. 2002). This method is used when "damages cannot be ascertained by any reasonable computation from actual figures," CEMS, 59 Fed. Cl. at 227 (citation omitted), but it is a "heavily disfavored" method of calculating damages. Phillips & Jordan,

Inc. v. United States, 158 Fed. Cl. 313, 333 (2022). Indeed, as this Court has acknowledged, "the primary peril" of the jury verdict method is the adoption and extrapolation of unrealistic assumptions that "greatly multiply[] an award beyond reason, and reward[] preparers of imprecise claims based on undocumented costs with unjustifiable windfalls." East Coast, 199 F. Supp. 3d at 1032 (quoting Dawco Const., Inc. v. United States, 930 F.2d 872, 882 (Fed. Cir. 1991), overruled on other grounds by Reflectone, Inc. v. Dalton, 60 F.3d 1572 (Fed. Cir. 1995)). Accordingly, before relying on the jury verdict method, the Court must determine "(1) that clear proof of injury exists; (2) that there is no more reliable method for calculating damages; and (3) that the evidence is sufficient to make a fair and reasonable approximation of the damages." Raytheon, 305 F.3d at 1367.

Here, as previously referenced, BAE NSR's claimed damages (and certainly, the damages of its subcontractors) are not based on "actual costs" associated with the implementation of the HWP. Rather, BAE NSR and its subcontractors each estimated the cost of an additional 21-days of work on the Tortuga. The Navy asserts that, because BAE NSR and its subcontractors failed to document labor hours for "delay," this Court should refuse to apply the

jury verdict method and hold that BAE NSR's estimates (and those of its subcontractors) constitute a wholesale failure of proof.[28]

The Court finds, however, that the use of the "jury verdict" method on a claim-by-claim basis is appropriate because it will, as to several of the claims, provide a sufficiently reliable damages calculation. As discussed below, the record demonstrates that: (1) BAE NSR is not able to demonstrate "actual costs" of the delay; (2) there is no more reliable method of calculating

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[28] Throughout trial, the Navy asserted that BAE NSR should have tracked the "cost" of HWP-related delay by having every PMO employee (or perhaps, as the Court suggested at trial, their supervisor) make a daily determination of what percentage of their day was spent addressing "delay," and what percentage was spent addressing "base contract work." See ECF No. 158, at 84; see also Tr. 488:22-492:18. Such decision-making would hypothetically be "captured" by using two different Tortuga charge codes on a given day.

The Court has several concerns with the Navy's suggestion that failure to track delay in this manner bars recovery of delay damages. First and foremost, the trial evidence makes it abundantly clear that BAE NSR has never tracked HWP-related delay in this manner. As BAE NSR emphasized during trial, it has consistently tracked its daily PMO/TRS costs for the Tortuga, but it has never isolated "base contract work" and "delay" on an hourly (or daily) basis. The Navy's repeated invocation of various admonishments to "separately track" HWP-related costs during demobilization and remobilization did not put BAE NSR on notice that it had to adopt a never-before used method of delay time-tracking to secure compensation. Second, given the nature of PMO/TRS costs, it is not clear at all that adopting the Navy's newly suggested method of "actual cost" tracking would fully compensate BAE NSR for any HWP-related schedule delay. As a simple example, it appears to the Court that if the critical path of the Tortuga project was delayed 10 days due to the invocation of the HWP, PMO/TRS would be required for 10 additional days regardless of any day-to-day PMO time-apportionment during demobilization and remobilization. Finally, the Court is skeptical of the practicality of employing any such approach given the substantial discretion and guess-work necessary to effectuate the Navy's "cost-tracking" approach. See Tr. 488:22-492:18. It is not at all clear to the Court that this method would be any more accurate than the method BAE NSR actually employed.

damages;[29] and (3) the Court has before it credible trial testimony (particularly from BAE NSR personnel), coupled with hundreds of pages of exhibits documenting BAE NSR's detailed support of and preparation of its estimates. These findings allow the Court to make a "fair and reasonable approximation" of BAE NSR's damages. Raytheon, 305 F.3d at 1367.

The Navy's argument is well-taken, however, that the "estimates" from many of BAE NSR's subcontractors are so thinly supported that this Court could not make a "fair and reasonable approximation" of their damages. See Raytheon, 305 F.3d at 1367. Where the evidence of damages is not sufficient to support a reliable calculation, the Court will not award damages even if BAE NSR has effectively demonstrated that compensation may be owed. However, after sitting through a five-day bench trial, judging the

[29] The Navy generally asserts that "there was a more reliable method of calculating damages, namely, through the use of BAE NSR's DCAA-approved accounting system." ECF No. 158 ¶ 109. Because BAE NSR has a "DCAA-approved accounting system," the Navy argues that the Court cannot utilize the jury verdict method. However, it is undisputed by the parties that the Navy's newly suggested data is not available today. Though it may be possible for BAE NSR to track costs in the manner proposed by the Navy in the future, it appears to the Court that creating such records years after Hurricane Dorian would be impossible. Furthermore, as the Court already referenced, BAE NSR's failure to track PMO costs related to "delay" appears consistent with both parties' expectations at the time regarding HWP-related delay negotiations and compensation. And the data-tracking method that the Navy now proposes is certainly not required by the parties' Contract. While the Court must not award BAE NSR a "windfall" by resorting to the jury verdict method, the Court must also ensure that the Government does not receive a windfall by requesting detailed time records that do not exist well-after Hurricane Dorian passed. See WRB Corp. v. United States, 183 Ct. Cl. 409, 425 (1968) (noting the court's displeasure with the use of the jury verdict method but observing that there did not appear to be an alternative that "would produce any better foundation for an award").

credibility of witnesses through first-hand observation, asking numerous questions of witnesses and counsel, and giving careful thought to how it can best calculate damages, this Court can make a sufficiently reliable damages calculation with respect to certain claims.

3. Compensable Delay

The Contract includes a variety of clauses that allocate the risk of schedule delay and govern the parties' rights and obligations based on the cause of the delay. Under such clauses, delay may be excusable but not compensable, excusable and compensable, or inexcusable. See LCC-MZT Team IV v. United States, 155 Fed. Cl. 387, 457 (2021) (citations omitted); see also England v. Sherman R. Smoot Corp., 388 F.3d 844, 857 (Fed. Cir. 2004) ("A delay in a construction contract is excusable if it arises from either the government's action or external forces."). Generally, "[f]ederal regulations provide for extensions of time for excusable delays (e.g., unusually severe weather), but do not provide for equitable adjustments for such delays." Edge Constr. Co. v. United States, 95 Fed. Cl. 407, 420 (2010) (citing FAR § 52.249-10).[30] However, this general rule of liability is subject to modification. See Admin. of Gov't Contracts, at 487 ("The government is responsible for both time and cost effects of delays

[30] The general rule (and clauses such as FAR 52.249-10) applies to delays "not covered by other contract provisions." Admin. of Gov't Contracts, at 489.

that it causes, that are under its control, or for which it has agreed to compensate the contractor.") (emphasis added).

Under the HWP clause found in the Contract, the Navy warranted that it would compensate BAE NSR for reasonable, allowable, and allocable costs incurred implementing the HWP at the Navy's direction. See Navy Ex. 1, at 44. The Navy has agreed that this includes compensation for schedule delay.[31] See ECF No. 8 ¶ 44. Accordingly, if BAE NSR satisfies all other requisite criteria for an equitable adjustment, BAE NSR is eligible to recover both time and money related to HWP delay.[32]

When a contractor seeks an equitable adjustment for government-caused delay, "the contractor has the burden of proving

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[31] In its post-trial brief, the Navy appears to argue for the first time that BAE NSR may not recover "delay damages." See ECF No. 102, at 87. To the extent the Navy has already conceded this point, their late-raised argument is rejected. See ECF No. 8 ¶ 44 ("The United States admits that the HWP clause in the Contract requires the Navy to pay BAE NSR for all reasonable, allowable, and allocable costs incurred to implement the HWP . . . which includes schedule delay.").

[32] At times, BAE NSR invokes both the HWP clause and the Changes clause as the legal basis for its relief. Though the relationships between these clauses and BAE NSR's claim are not addressed by either party, it otherwise appears to the Court that BAE NSR could conceivably recover time and money damages under either clause. See Admin of Gov't Contracts, at 489 (explaining that equitable adjustments under the Changes clause "provide for time adjustments as well as money"). However, BAE NSR has not argued (let alone established) that it satisfies the requisite criteria to proceed under the Changes clause. See East Coast, 199 F. Supp. 3d, at 1027-29 (discussing the burden of proof to recover under the "Changes" clause, including establishing either that a "formal change[] in performance [was] expressly ordered in writing by the Government's Contracting Officer" or that a "constructive change" was made). Though it is possible that the Navy's invocation of the HWP clause qualifies as a formal or constructive change, based on the lack of argument to that effect by BAE NSR, as well as the apparent lack of any change in recovery under either clause, the Court evaluates BAE NSR's claim under the HWP clause.

the extent of the delay, that the delay was proximately caused by the government action, and that the delay harmed the contractor."[33] Wilner v. United States, 24 F.3d 1397, 1401 (Fed. Cir. 1994) (en banc). The contractor must also prove that "the excusable event proximately caused a delay to the overall completion of the project, i.e., that the delay affected activities on the critical path." R.P. Wallace, Inc. v. United States, 63 Fed. Cl. 402, 409 (2004).

Determination of the critical path is essential to calculate delay-related damage because "only construction work on the critical path ha[s] an impact upon the time in which the project [is] completed." Wilner v. United States, 24 F.3d at 1399 n.5 (citations omitted). "Critical path" can refer to either "a method of schedule analysis or to a group of activities on a project that must be completed on a certain timeline to keep the project on schedule." Ultimate Concrete, LLC v. United States, 141 Fed. Cl. 463, 480 (2019). Thus, a contractor seeking to recover delay-related damages may introduce a "critical path analysis" to

[33] Puzzlingly, in its post-trial briefing, BAE NSR newly argues that none of the caselaw governing "government-caused delay" applies because "[t]his is not a 'government-caused delay' case." ECF No. 159 ¶ 227. BAE NSR does not develop this argument further, so the Court handily rejects BAE NSR's claim that such caselaw is inapplicable. The Court observes, however, that BAE NSR's factual assertion – that this case does not involve "government-caused delay" – appears mistaken. Based on the text of the HWP clause, the Navy appears to be liable for payment of costs only when the Navy invokes the clause. Stated differently, although the Navy's decision to invoke the HWP was occasioned by Hurricane Dorian, the Navy caused delay by directing BAE NSR to implement the HWP (requiring both demobilization and remobilization, as previously discussed).

demonstrate how items on the "critical path" were delayed by the excusable event. See, e.g., PCL Const. Servs., Inc. v. United States, 47 Fed. Cl. 745, 801 (2000). Whatever the manner of proof, "[i]t is the contractor's burden to establish the critical path of the project in order to justify an equitable adjustment." George Sollitt Const. Co. v. United States, 64 Fed. Cl. 229, 240 (2005).

* * *

The parties have not cited any caselaw and the Court is unaware of any existing caselaw interpreting the scope of compensation available under the HWP clause. While the Court is confident that BAE NSR must show critical path delay to show that it requires 21 additional days of PMO/TRS, the parties have not discussed the connection between critical path delay and compensation for BAE NSR's various subcontractors. Perhaps the argument could be made that subcontractors who were not completing critical path work are not entitled to compensation under the HWP clause.

However, when the Navy invoked the HWP clause, it ordered all subcontractors (whether they were completing critical path work or not) to stop what they were doing and prepare the Tortuga to safely endure Hurricane Dorian. For most subcontractors, this order generated "bolt-turning" costs (which have been paid), and PMO costs. In other words, if a subcontractor contracted to perform for 100 days, but was ordered by the Navy to demobilize for 5 of

those days, that subcontractor will still require a total of 100 "work" days to complete their contract but will now require 105 days of PMO - assuming PMO costs continue during demobilization.

The evidence in the record is clear that the Navy and BAE NSR have never delineated between those subcontractors who were completing critical path work and those who were not in resolving HWP-related compensation claims. Given the lack of argument from the parties and the parties' consistent course of dealing, the Court finds that BAE NSR's subcontractors need not independently show that they were undertaking critical path work (that was delayed) to be entitled to some compensation for HWP delay.[34]

C. The Contractual Dispute - Mod 90

Before turning to the merits of BAE NSR's claim, the Court must address the Navy's contention that BAE NSR waived any entitlement to HWP-related PMO/TRS in Mod 90. As referenced above, Mod 90 was executed several months after Hurricane Dorian and added time (489 days) and money ($20,661,646) to the Contract. Mod 90 provides that:

> "BAE NSR waives entitlement to any additional PMO and/or Temporary Services costs it may have incurred . . . before th[is] agreement. This waiver does not include any PMO and/or [TRS] otherwise agreed to and documented in the EXECUTIVE SUMMARY and its attachments."

[34] This finding, of course, does not relieve BAE NSR of the burden of demonstrating that the subcontractors otherwise satisfy the requisite criteria for an equitable adjustment.

Navy Ex. 5, at 4. The "Executive Summary" states that "[b]oth parties agree that equitable adjustment for Hurricane Dorian . . . is not included in this [Modification] . . . and will be negotiated separately." BAE NSR Ex. 145, at 5 (emphasis added).

Irrespective of this language, during the Navy's opening statement, the Navy newly identified a "legal issue" with the Executive Summary - neither party could find a signed version of the document. Tr. 34:8, 15-23. The Navy advised the Court to "make what it will of that" and suggested that the Court would have to decide whether the Executive Summary has any legal effect. Tr. 34:24-35:12. To be clear, however, the Navy confirmed that it: (1) did not object to the introduction of the Executive Summary into evidence; and (2) never raised this legal issue in a pre-trial motion or as an objection during the final pretrial conference.[35] Tr. 34:24-35:18. Despite these concessions, the Navy newly argues in its post-trial briefing that this Court should find that BAE NSR waived any entitlement to PMO/TRS related to Hurricane Dorian because the Executive Summary was not signed. ECF No. 158, at 96-97.

The Navy has plainly waived this argument. In the Rule 16(b) Order entered in this case, a final pretrial conference was

[35] To further emphasize the last-minute nature of the Navy's new argument, the Navy made no reference to this argument in the proposed findings of fact and conclusions of law it filed a week before trial. See ECF No. 137 (filed March 26, 2024).

scheduled[36] and both parties were advised that they must identify "the triable issues as contended by each party" in a final pretrial order and that failure to do so "may result in the imposition of sanctions pursuant to Rule 16(f)." ECF No. 3-4. The Court held a final pretrial conference on March 18, 2024, and the Court entered a final pretrial order identifying the issues to be tried the same day.[37] See ECF No. 135, at 54-55. Notably absent from the Navy's list of triable issues in the final pretrial order is any challenge to the enforceability of the Executive Summary or Mod 90, and the Navy has not sought leave to amend the final pretrial order. The "[f]ailure to identify a legal issue worthy of trial in the pretrial conference or pretrial order waives the party's right to have that issue tried." McLean Contracting Co. v. Waterman Steamship Corp., 277 F.3d 477, 480 (4th Cir. 2002) (citing to Fed. R. Civ. P. 16, advisory notes, which states that: "[C]ounsel bear a substantial responsibility for assisting the court in identifying the factual issues worthy of trial. If

[36] Several delays in the case caused the final pretrial conference to be rescheduled twice.

[37] Rule 16 of the Federal Rules of Civil Procedure provides that a pretrial order "controls the course of the action unless the court modifies it." Fed. R. Civ. P. 16(d). Final pretrial orders are held to an even higher standard, "[t]he court may modify the order issued after a final pretrial conference only to prevent manifest injustice." Fed. R. Civ. P. 16(e).

counsel fails to identify an issue to the court, the right to have the issue tried is waived.").[38]

Despite these settled rules, the Navy has provided no explanation for why it waited until its opening statement to raise what would otherwise appear to be (at least, according to the Navy) a dispositive legal issue.[39] See ECF No. 158, at 97. Mod 90 was executed almost four years before this trial began. Even if the Court assumes that the Navy did not recognize the signature issue until discovery, discovery concluded almost eight months before trial. Furthermore, the final pretrial order and pleadings made it clear to the Navy that BAE NSR intended to rely on the Hurricane Dorian carve-out in the Executive Summary to show that it did not waive entitlement to relevant PMO/TRS in Mod 90. See ECF No. 135, at 35-36; ECF No. 1 ¶¶ 54-55; see also McLean, 277 F.3d at 480. Because the Navy failed to identify the legal validity of the Executive Summary as a disputed issue for trial in the final pretrial order, the Court finds that the Navy has waived its argument concerning the legal validity of the Executive Summary.

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[38] Rule 16 is designed to apprise the Court of the issues to be tried in a lawsuit and to give the parties a fair opportunity to adequately prepare (in advance of trial) to subject the other side's arguments to the crucible of adversarial testing. As it stands, the Navy has most fully presented its (new) argument for the first time in its post-trial Proposed Findings of Fact and Conclusions of Law, to which BAE NSR had no opportunity to respond. See ECF No. 158.

[39] Though the Court does not address the merits of the Navy's contention that a missing signature renders the Executive Summary superfluous, the Court observes that the Executive Summary may otherwise have been identified with sufficient specificity to be "incorporated by reference" into Mod 90.

III. DISCUSSION

With the above background factual and legal findings, the Court now turns to BAE NSR's direct claim, and BAE NSR's pass-through claims asserted on behalf of AME, ART, AS, CMS, MHI, MSP, and Tecnico. With such analysis, the Court makes additional factual and legal findings, as necessary, to determine the extent to which BAE NSR has demonstrated that it is entitled to an equitable adjustment.

A. BAE NSR

One of the primary disputes in this action was whether BAE NSR carried its burden to show that the Navy's order to implement the HWP caused critical path delay. Associated with such matter is the dispute as to whether Mod 90 compensated BAE NSR for any possible critical path delay caused by the HWP. To the extent that the evidence demonstrates that the HWP caused critical path delay, and that Mod 90 did not compensate BAE NSR for that delay, the parties further dispute whether BAE NSR's evidence is sufficient to establish its costs.

As discussed in greater detail below, the Court finds that, on this record, BAE NSR is entitled to compensation for schedule delay caused by the Navy's invocation of the HWP clause. As to the quantum of damages, BAE NSR seeks $903,274 based on 21 delay days. As set forth below, after applying the jury verdict method, the Court awards BAE NSR **$429,539** in damages for **11** days of delay.

1. Critical Path Delay

a. BAE NSR has proven that the HWP caused 11 days of critical path delay.

Before discussing the parties' arguments with respect to critical path delay, the Court must first address the state of the evidence that BAE NSR presented in support of its delay claim. As referenced previously, BAE NSR was contractually obligated to produce an Integrated Production Schedule, that is, a sideways bar chart prepared using "critical path method" tools and practices to show the duration and relationships between different work items. See Navy Ex. 1 ¶ 1.4.1 (citing NAVSEA Standard Item 009-60). BAE NSR was also obligated to update such Schedule at weekly intervals, which it did through its weekly "Availability Status Reports." Though the trial record includes several Availability Status Reports for the weeks following remobilization, neither party introduced BAE NSR's Integrated Production Schedule for the Tortuga or any other formalized "critical path" analysis.[40] Indeed, even after a five-day bench trial and extensive post-trial briefing, the Court has only a partial understanding of what work items were on the critical path, and how the Navy's invocation of

[40] Certainly, the Availability Status Reports contain a great deal of information regarding work items on the Tortuga and their week-to-week progress. It also provides some information regarding work items on the critical path. However, there is no information in the record showing all of the work items on the critical path and their relationships with each other. While such proof may not be necessary to prove "critical path delay" by preponderant evidence, the Court is mindful of the limited nature of BAE NSR's critical path evidence.

the HWP affected those items on the critical path. These limitations necessarily make BAE NSR's proof of critical path delay more difficult, but not impossible.[41]

It is undisputed by the parties that all production work on the Tortuga was paused for five days. The record evidence also unequivocally supports a finding that the Tortuga project was already several months (if not longer) behind schedule at the time the HWP clause was invoked. See, e.g., BAE Exs. 199-202 (tracking planned progress on the Tortuga, actual progress, and the Contract end date). In other words, there was no "float" left in the schedule prior to Hurricane Dorian's arrival.[42] See Tr. 790:2-5, 795:18-24. It necessarily follows that for every day that all production work was stopped, the critical path of the Tortuga was equally delayed. In other words, there is a clear critical path delay of at least five days.

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[41] The Navy at times conflates BAE NSR's contractual obligations and BAE NSR's litigation evidence of critical path delay. Despite repeated invocation of various contractual requirements in its post-trial brief (i.e., preparation of a critical path bar chart) the Navy does not go so far as to argue that BAE NSR failed to comply with its contractual requirements. See, e.g., ECF No. 158 ¶ 90. More importantly, the Navy does not connect these requirements to BAE NSR's proof (or failure of proof) in this case. The Navy cites no case (nor is this Court aware of any case) that stands for the proposition that a bar chart is required to prove critical path delay. Perhaps the Navy references these requirements as additional evidence that BAE NSR could have provided in this case, but so long as the Court finds that BAE NSR has established critical path delay by preponderant evidence, it is unclear what role (if any) other (existing or imaginary) evidence not before this Court should have.

[42] "Float" is additional time included in a firm fixed-price contract to account for unexpected delay. Tr. 789:14-25. Essentially, float allows a contractor to lose some production time without requiring a contract extension. Id.

There is not such indisputable proof of critical path delay for remobilization. Unlike demobilization, where all production work (critical and non-critical alike) was unquestionably stopped, during remobilization, subcontractors were able to resume production work at various points over a multi-week period. This variation was based in part on BAE NSR's prioritization of certain ships based on its own and its subcontractors' materials/manpower limitations and (possibly) the priorities of the Navy.[43]

To support its claim that the Navy's invocation of the HWP clause caused 21 days of critical path delay, BAE NSR relies on several "Availability Status Reports" from the weeks following remobilization and the records and testimony of its subcontractor(s) that undertook critical path work. The Availability Status Reports provide a high-level overview of BAE NSR's availability progress, tracking planned versus actual progress for the whole project, original/revised milestone and key event dates, and week-to-week progress on hundreds of work items on the Tortuga. See BAE Exs. 199-202. Additionally, these reports discuss "critical path work," and each report before the Court

[43] The Court heard some testimony from Drew Williams, the Director of Programs for subcontractor MHI, indicating that the Navy created a prioritization list for the ships. Tr. 386:13-24. But no such list was introduced into evidence, so it is not clear the extent to which BAE NSR's own priority list was reflective of the Navy's priorities. At a minimum, it appears that the Navy generally plays some role in prioritizing ships for technical representative availability, whose presence was required for all engine work. See Tr. 381:4-18.

states that "[r]epairs and [u]pgrades to the four generators remain the critical path work as they directly control the proposed end date for the availability." BAE Ex. 199, at 4 (emphasis added); see also BAE Exs. 200-02.

This is consistent with the Court's prior factual finding that CMS was completing critical path work. As referenced, CMS's work involved upgrading the piping systems for the Tortuga's diesel generators, which was part of the diesel generator upgrade referenced in the Availability Status Reports. See Tr. 948:3-20, 963:8-10. According to CMS's General Manager, Jonathan Nichols, the temporary services that CMS required to complete its work on the diesel generator piping systems were not reestablished until September 23, 2019. Tr. 965:6-967:6. CMS was thus unable to resume production work until 21 days after the Navy issued the demobilization order.[44]

This evidence, however, is BAE NSR's only support for 21 days of critical path delay.[45] Notwithstanding the Court's finding that

[44] Unlike some of the other subcontractors, the Tortuga was CMS's only ship in BAE NSR's shipyard; neither party has argued that CMS's delay resuming production work was tied in part to work on another ship.

[45] BAE NSR also contends that the engine upgrade work (handled by MHI) was critical path work. See ECF No. 159 ¶¶ 38, 70. There is some support for this contention in the record, see BAE Exs. 126 & 199, but it is not clear to the Court what significance (if any) MHI's work has for the Tortuga's critical path immediately prior to and after the HWP was implemented. Ultimately, there is nothing in the record to support a finding that a day-for-day delay to MHI's engine work resulted in a day-for-day delay to the Tortuga project. Instead, based on the record before the Court, the diesel generator work was the "critical path work" that "directly control[led] the proposed end date for the availability." Id. It is

CMS was undertaking critical path work, the Court is highly skeptical that one subcontractor's delay supports a 21-day extension to the entire Tortuga project. Indeed, CMS's delay resuming work on the Tortuga was based on BAE NSR's own delay reinstalling the temporary services that CMS required. As the Court referenced, BAE NSR prioritized the Tortuga second to last among the eight ships in its shipyard for restoration of temporary services. See BAE Ex. 126, at 1-2. BAE NSR shared this priority list with the Navy, but there is no evidence that the Navy approved or disapproved.[46] Id. at 1. As it stands, it otherwise appears to the Court that BAE NSR's claim is based both on delay caused by the Navy and delay caused by BAE NSR's own prioritization of services for remobilization. The Court recognizes that such prioritization was necessary for remobilization but given the scarcity of other proof supporting a finding of 21 days of critical path delay, the Court cannot find that the Navy caused 21 days of critical path delay for the Tortuga.[47]

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possible that MHI's engine work was (in fact) critical path work, but the relative paucity of information in the record concerning the Tortuga's critical path precludes the Court from making that finding by preponderant evidence.

[46] Though the record is insufficiently developed for the Court to find that the Navy approved of BAE NSR's prioritization, the record indicates that the Navy knew BAE NSR's priorities at a high level - as reflected in BAE NSR's priorities email, BAE Ex. 126, but also through daily meetings throughout remobilization. Tr.138:7-139:4.

[47] This conclusion, in some sense, is almost inevitable. As the Court previously emphasized, BAE NSR determined after Hurricane Dorian that the entire shipyard experienced a 21-day delay due to the HWP and proceeded to

Though the Court is not convinced that the Navy's invocation of the HWP delayed the Tortuga's critical path by 21 days, BAE NSR has proven by preponderant evidence that remobilization on the Tortuga took longer than demobilization. During trial, the Court heard ample testimony that limited resources and the nature of the work made remobilization on the Tortuga a substantial undertaking. See, e.g., Tr. 119:5-12, 128:12-25; 297:1-16, 306:11-19, 347:16-348:5, 374:5-24. Indeed, based on the evidence before the Court, the absolute earliest that remobilization was complete for any subcontractor was four days after the remobilization order was issued, or nine days after the demobilization order was issued. See Tr. 390:19-24. And when asked if the schedule was "recovered" after nine days, Drew Williams of MHI testified "absolutely not." Tr. 391:3-6 (emphasis added). Furthermore, MHI was an outlier - every other subcontractor completing production work took weeks to resume production. See Tr. 304:19-305:1 (explaining that it took MSP 16 days to demobilize and remobilize); Tr. 965:6-967:6 (explaining that the temporary services that CMS required for welding were not restored until 21 days after the demobilization order was issued); BAE Ex. 143, at 92-95 (reflecting that Tecnico's

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negotiations with the Navy accordingly. However, BAE NSR was not able to present any evidence explaining how that decision was made. This left BAE NSR in the unenviable position of having to convince the Court that the Tortuga specifically experienced 21 days of delay, when Tortuga-specific information may have had little or no role in the original shipyard-wide decision-making process.

remobilization charges ended 14 days after the demobilization order was issued); see also Tr. 350:21-351:23 (explaining that it took Tecnico longer than 21 days to fully recover from the HWP). While some of this delay may have been based on BAE NSR's priorities list, the Navy was well-aware of BAE NSR's remobilization priorities and had to know that remobilization of temporary services, for example, would take longer to restore on the Tortuga (prioritized second to last) than the USS COLE (prioritized second). See BAE Ex. 126.

Although the Court finds that some portion of Tortuga's remobilization delay is not clearly attributable to the Navy, based on the record before the Court, the Court finds by preponderant evidence that the Navy's invocation of the HWP clause caused critical path delay of **11 days** (five days for demobilization and six days for the longer process of remobilization). BAE NSR has proven by preponderant evidence that remobilization on the Tortuga took longer than demobilization, and the Court is convinced that critical path activity did not resume until at least 11 days after the demobilization order was issued. However, BAE NSR has not introduced credible evidence for the Court to find by preponderant evidence how much longer remobilization took or what effect the Tortuga's prolonged remobilization efforts may have had on the Tortuga's critical path. In recognition of the fact that remobilization took longer than demobilization, the Court finds

that a period of six days, or one day longer than demobilization, is appropriate. It is certainly possible (maybe even probable) that the Tortuga experienced greater critical path delay than that. Perhaps no critical path work took place for at least 21 days. But as the Court has already emphasized, BAE NSR left many questions regarding critical path delay and the reason for it unanswered and ultimately provided little justification for the 21 days it requested.

b. The Navy's arguments in opposition are unpersuasive.

The Navy appears to have two relevant arguments in opposition to the Court's finding of critical path delay - neither are persuasive. First, the Navy argues that BAE NSR was required to submit a "Critical Path Analysis" to Contracting Officer Vincent Young to recover damages for HWP-related delay. ECF No. 158, at 102. However, as the Court already referenced, the Navy appears to conflate base contractual requirements – i.e., the preparation of an Integrated Production Schedule - with the proof required for HWP-related delay. See ECF No. 158 ¶ 90. BAE NSR has never provided a critical path analysis for a HWP-related delay claim before.[48] Tr. 125:13-20. And as BAE NSR made clear through its cross examination of Contracting Officer Young, MARMC had all of

[48] This is supported by the testimony of Thomas Vomund, a MARMC technical advisor who prepared a technical advisory report ("TAR") evaluating BAE NSR's Tortuga claim. According to Vomund, he has never received a critical path analysis from a contractor requesting compensation for a HWP claim. Tr. 61:8-13.

BAE NSR's weekly schedule reports, as well as its Integrated Production Schedule. Tr. 619:14-620:13, 625:10-25, 626:2-24. Because MARMC had access to these documents, Contracting Officer Young could have accessed them at any point, but he never requested any of those documents, nor did he specifically request "critical path analysis" from BAE NSR to evaluate its claim. See Tr. 625: 10-25, 768:22-25. Accordingly, the Court is not convinced that BAE NSR's failure to provide such analysis to Contracting Officer Young somehow precludes any recovery here.

Second, the Navy argues that Mod 90 properly accounted for any critical path delay caused by the Navy's invocation of the HWP in advance of Hurricane Dorian. ECF No. 158, at 94-98. This argument is two-pronged: first, the Navy argues that because the Executive Summary to Mod 90 has no legal effect, BAE NSR waived its entitlement to HWP-related delay when it signed Mod 90; second, it argues that, as Contracting Officer Young reasoned, Mod 90 essentially gave BAE NSR a 489-day extension for an alleged 21-day delay. As to the first prong, this Court has already found that the Navy waived its argument that the Executive Summary did not properly preserve BAE NSR's right to seek compensation for HWP-related delay.

As for the second prong, in the Contracting Officer's Final Decision ("COFD"), Contracting Officer Young notes that "Modification A00090 [(Mod 90)] contained an exception to the

bilateral release for continued negotiations of RCC 1062G for costs claimed from Hurricane Dorian." BAE Ex. 177, at 4. Despite this express exception to the bilateral release, Contracting Officer Young determined that any possible schedule delay caused by Hurricane Dorian was addressed by Mod 90's 489-day extension to the Tortuga availability. Id. During trial, it became clear to the Court that the Contracting Officer had no compelling explanation for how he concluded that, despite a clear written exception, Mod 90 somehow compensated BAE NSR for HWP-related schedule delay. See Tr. 681:1-683:4.[49] Indeed, the Contracting Officer confirmed that: (1) he had no role in negotiating Mod 90; (2) Mod 90's extension of time and money was to compensate BAE NSR for new work; and (3) even though the parties agreed that schedule delay related to Hurricane Dorian was not included in Mod 90, he believed he could still consider Mod 90 as compensation for HWP-related delay. Tr. 681:1-24, 684:7-686:7. Accordingly, the Court finds the Navy's argument unpersuasive.

c. Conclusion

For the foregoing reasons, the Court finds that BAE NSR has proven by preponderant evidence that the Navy's direction to implement the HWP caused **11 days** of critical path delay.

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[49] Contracting Officer Young testified that he would have wanted to see a critical path analysis from BAE NSR proving that the Mod 90 extension did not adequately compensate BAE NSR for HWP-related delay on the Tortuga. Tr. 718:19-25. However, as already referenced, Officer Young never asked to see any such analysis from BAE NSR.

2. Damages

Although BAE NSR has clearly demonstrated that it is entitled to an equitable adjustment based on the Navy's invocation of the HWP clause, the proper quantum of compensation is not as clear. BAE NSR claims that it is entitled to a daily rate[50] of $43,013, based on the actual incurred PMO/TRS costs for the Tortuga from September 28, 2019, to October 14, 2019.

BAE NSR supported its requested PMO/TRS rate with detailed substantiating data, including actual time sheets and multiple similar estimates based on actual records. See BAE Exs. 137, 143, 147, 166, 169-176. The Court also heard comprehensive and persuasive testimony from BAE Finance Director Chris Desaulniers describing how BAE NSR captures PMO/TRS costs for the Tortuga and how it prepared various estimates. See, e.g., Tr. 435:13-437:16, 443:2-18, 446:9-468:4. In short, it is clear to the Court that BAE NSR's estimates contain substantial indicia of reliability such that this Court can confidently rely on the estimates and approximate a "fair and reasonable" measure of BAE NSR's damages

[50] The Navy contends that, had BAE NSR tracked "delay costs" using the method it now advocates for (which this Court has already addressed and rejected), BAE NSR would not have to resort to reliance on a "daily" PMO/TRS rate. ECF No. 158, at 80-84. However, to the extent that BAE NSR has shown that the Navy's direction to implement the HWP caused 11 days of critical path delay, it is not clear to the Court how anything less than 11 additional days of PMO/TRS costs would fully compensate BAE NSR for those additional 11 days of labor.

using the daily rates BAE NSR has provided. Raytheon Co., 305 F.3d 1367.

Though the Court finds that BAE NSR has introduced credible evidence to support its estimated daily PMO/TRS rate, the Court is skeptical that the $43,013 daily PMO/TRS rate is the appropriate measure of compensation. Desaulniers testified that he chose the period from September 28, 2019 - October 18, 2019, to support the damages rate of $43,013 because he "deemed [the 28th] as kind of [the] first clean week post-remobilization." Tr. 1100:20-25. However, based on the other daily rates BAE NSR provided, it appears to the Court that the three-week period Desaulniers selected still reflects higher than normal daily PMO/TRS costs. This is particularly evidenced by the June 1, 2019 - August 30, 2019, daily cost ($36,798) and the September 14, 2019 - November 22, 2019, daily cost ($39,049). BAE Ex. 166. The Court's skepticism that the $43,013 figure is the appropriate measure of compensation is only increased by the January 2020 through March 2020 daily cost ($40,396). BAE Ex. 137, at 4.

After considering the variation in BAE NSR's daily cost estimates, as well as the uncontroverted testimony that PMO/TRS costs are higher immediately after an event such as a HWP, the Court uses the jury verdict method to find that BAE NSR is entitled to damages of **$429,539**, reflecting a daily PMO/TRS rate of $39,049. The Court finds by preponderant evidence that such award reflects

the reasonable, allowable, and allocable cost of BAE NSR's schedule delay associated with the Navy's invocation of the HWP clause.[51]

The Navy relies primarily on the testimony of DCAA auditor Diane Schweizer and its expert witness Martin Gordon to discredit BAE NSR's proof of damages. The Court found significant analytical gaps in the testimony of each witness. Schweizer was one of the DCAA auditors who prepared the DCAA report on BAE NSR's HWP claim. Over the course of her testimony, it became clear that she: (1) was not evaluating whether BAE NSR's daily costs were accurate, only whether there was sufficient support for 21 days of delay;[52] (2) had no prior experience evaluating a HWP claim; and (3) focused on BAE NSR's accounting records as proof of delay, despite knowing that BAE NSR did not have a "delay" cost code. Tr. 983:10-16,

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[51] As a reminder, a cost is reasonable if, "in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business." FAR 31.201-3(a). This is based on a "variety of considerations," but it is compelling to the Court that BAE NSR's detailed records support a reasonably consistent daily PMO/TRS rate for the Tortuga across multiple date ranges. The Court finds that BAE NSR has carried its burden to demonstrate that a daily PMO/TRS rate of $39,049 is reasonable. A cost is allocable if it is "necessary to the overall operation of the business" or is "incurred specifically for the contract." FAR 31.201-4(a), (c). The data BAE NSR relied on when preparing its estimates was tied directly to the Tortuga project. See Tr. 455:4-459:16. And a cost is allowable (in relevant part) when it is reasonable, allocable, consistent with generally accepted accounting principles, and the terms of the contract. FAR 31.201-2(a). BAE NSR plainly satisfies these criteria. See Tr. 434:14-435:1, 438:24-329:6, 441:20-442:1, 446:9-452:8, 472:10-20; BAE Exs. 167-176

[52] It was not clear from Schweizer's testimony what evidence would have been sufficient for DCAA to determine that BAE NSR substantiated 21 days of delay. See Tr. 1077:2-1079:24. Moreover, and somewhat surprisingly, DCAA did not seek to determine whether any lesser amount of delay was properly supported. Tr. 1053:9-104:16.

1043:2-1046:25 1077:2-1079:24. It generally appears to the Court that once DCAA determined that BAE NSR did not have a delay charge code, its analysis was complete. Ultimately, cross examination of Schweizer sufficiently discredited the thoroughness of her analysis and accompanying report, leading this Court to afford both little weight.[53]

As for Gordon, a former Government auditor who was introduced by the Navy as an expert in the field of "regulatory government contract" auditing, the Court also found significant analytical gaps in his testimony. Tr. 850:2-11. Gordon was introduced to "opine as to whether BAE met its contractual obligations" under the FAR. Tr. 850:8-9. He then testified about various FAR provisions, many of which had already been discussed by the parties (both during trial and in pre-trial briefing). Ultimately, the persuasive power of Gordon's testimony was substantially limited both by his assessment of BAE NSR's claim at the highest level of generality,[54] and his failure to analyze how the parties themselves interpreted and understood their various contractual obligations

[53] Though the Court declines to give the DCAA report (or the testimony of Schweizer) much weight, the Court was interested to discover that even Contracting Officer Young gave the DCAA report no weight in his final decision. See Navy Ex. 17.

[54] As the Court discusses in greater detail below, the Court generally agrees with Gordon's testimony that the full daily amount initially sought by BAE NSR ($111,001) was not substantiated. However, that has limited persuasive power in the Court's assessment of each claim on a subcontractor-by-subcontractor basis.

in the context of negotiating HWP-related costs.[55] For example, he testified that the Navy is precluded by the FAR from paying any contract extension based on estimated costs. See Tr. 881:2-7, 888:2-892:20. However, this testimony has limited persuasive impact when the record plainly shows that the parties regularly negotiated (and settled) HWP-related contract extensions based on estimates.

For the foregoing reasons, the Court finds the Navy's arguments unpersuasive and finds that BAE NSR has carried its burden to demonstrate that it is entitled to an equitable adjustment of **$429,539** for **11 days** of critical path delay caused by the Navy's direction to implement the HWP.

B. Accurate Marine & Environmental (AME)

AME seeks $62,143 for a 21-day schedule extension. AME is a time-related service provider that specializes in cleaning tanks on vessels. As a time-related service provider, AME is "the first one on the boat in the beginning [of the availability] and [] the

[55] As one example, Gordon testified that he expected remobilization costs to have some connection to the delay compensation sought by BAE NSR's subcontractors. Tr. 880:9-881:7. However, as was made clear over the course of trial, subcontractors could have varying amounts of remobilization costs and those costs would not necessarily have a connection to the amounts sought for HWP-related delay because they are different costs. For remobilization, most subcontractors were paid for "bolt-turning" work, that is, the work required to actually put their job sites back together to resume production work. Delay, on the other hand, sought PMO for the additional time required to complete the base contract due to all the days "lost" demobilizing and remobilizing. In other words, even if a subcontractor had little or no remobilization costs, if they were told to stop working for five days by the Navy and still incurred PMO costs for those five days, the subcontractor would be owed five days of PMO.

last one off at the end." Tr. 522:6-7. In other words, AME's services are necessary on the Tortuga until the Contract is complete. See Tr. 522:16-21, 523:10-19.

AME's theory of recovery appears to be that because their presence is required every day, it is entitled to an extension for however long the Tortuga availability is extended.[56] In other words, because the Court has already determined that the HWP delayed the critical path of the Tortuga by 11 days, AME requires 11 days of additional compensation. Although AME has a compelling argument regarding compensable harm, the record is inadequately developed for the Court to apply the jury verdict method.

AME's extension documentation provides some details regarding labor categories and "straight" and "premium" labor hours associated with each category. BAE Ex. 178. However, there is no evidence in the record regarding the rates charged by each worker or how such rates were calculated. AME's CEO, John Domanski, testified that the entire amount sought ($62,143) is reasonable and that the amount sought is directly tied to AME's work on the

[56] The Navy appears to take issue with this reasoning, explaining that AME was required to request only the "five days of actual delay it experienced" to demobilize and remobilize after the HWP. ECF No. 158 ¶ 241. However, to the extent that AME's work is required for the full duration of the Tortuga availability, it appears to the Court that if BAE NSR proved 21 days of critical path delay and AME requested only five days of compensation, AME would theoretically be undercompensated by 16 days. See Tr. 534:10-24, 539:23-540:10. As AME CEO John Domanski explained, if BAE NSR receives an extension and AME does not receive compensation for the same extension, AME would effectively be working for free during the extension period. Tr. 531: 22-532:9.

Tortuga. Tr. 535:24-536:5. But the lack of supporting evidence in the record leaves the Court unable to evaluate such statements. In short, though AME may have a strong argument that they are theoretically entitled to delay-based compensation under the HWP clause, AME's evidence is not sufficient to allow the Court "to make a fair and reasonable approximation of the damages." Raytheon Co., 305 F.3d 1367.

C. Allied Research Technologies (ART), American Scaffolding (AS), and Consolidated Marine Systems (CMS)

ART (unskilled labor), AS (scaffolding), and CMS (piping and structural repairs) seek $24,000, $13,104, and $32,675 respectively for 21 days of HWP-related delay. Even assuming the Navy's liability, however, none of these subcontractors have introduced sufficient, reliable evidence for this Court to make a damages determination.

As mentioned previously, ART's requested damages amount surprisingly changed during trial from $76,044 to $26,000, and then from $26,000 to $24,000 in post-trial briefing. ART's President, William Hatfield, testified that the number sought in its COPA, $76,044, was "not accurate" because it was a quote.[57] Tr. 578:21-579:22. Hatfield then testified that he was seeking "a little over $24,000" instead, which counsel corrected to "$26,000

[57] To be clear, however, before trial BAE NSR consistently sought $76,044 on behalf of ART.

in compensation." Tr. 580:22-581:9. Without explanation, BAE NSR newly asserts in its post-trial brief that ART is instead seeking only $24,000 in compensation. ECF No. 159, at 103. Irrespective of the variation in ART's damages request, there is no evidence in the record explaining what is included in the new $24,000 figure. Accordingly, any damages figure the Court could award ART would be little more than a poorly educated guess.

AS, for its part, has requested a consistent amount in damages, but it suffers from a similar lack of detail. The only documentation introduced to support AS's claim is a one-page document showing AS's request for $13,104 and a 21-day extension.[58] BAE Ex. 143, at 37. The Court heard some testimony from Warne Zeig, the East Coast Regional Manager of AS, explaining the basic calculation of the estimate. Tr. 557:1-25. However, it is not clear to the Court how many people AS priced in its estimate (one, twelve, or somewhere in between), nor is it clear from the record how much various claimed materials cost. See Tr. 557:20-25. Indeed, Zeig testified that in the months leading up to Hurricane Dorian, AS had between six and twelve people working on the Tortuga depending on the nature of their work. Tr. 549:10-14. Essentially, AS has asked the Court to take its request for $13,104

[58] Unlike some of the other subcontractors, AS's one-page document shows only the total amount requested. BAE Ex. 143, at 37. There is no breakdown of the various jobs/hours included in this quote or any other explanation of what the quote includes.

at face value, without any supporting documentation or labor/materials breakdown. Although the Court is sympathetic to AS's position that it must be present for any and all scaffolding work on the Tortuga, the Court is not convinced on this record that any recovery is appropriately supported.

CMS's claim suffers from similar evidentiary shortcomings. During trial, Jonathan Nichols, the General Manager of CMS, credibly testified that CMS was unable to resume work on the Tortuga's diesel generator upgrades until 21-days after the demobilization order was issued. Tr. 966:21-967:6. While CMS may have a strong argument that it experienced some otherwise compensable delay, CMS has not introduced sufficient evidence to support its estimate. Nichols testified that CMS prepared its estimate by "multiplying the number of PMO employees by number of days and hours" for the 21-day period. Tr. 952:5-11. However, there is no explanation of how many PMO employees are included in CMS's quote or how CMS prepared its quote (i.e., determining how many PMO employees and hours to price for the Tortuga; whether the estimates were based on prior actual costs, etc.). As with ART and AS, the only document introduced to support CMS's request of $37,229 was its one-page COPA submission where it requests $37,229. See BAE Ex. 143, at 61. Though CMS offered compelling testimony regarding its delay, the record is insufficient for this Court to

reasonably determine what quantum of damages may be appropriate for such delay.

For the foregoing reasons, the record is insufficiently developed for this Court to utilize the jury verdict method as to these three subcontractors. In other words, the Court finds that BAE NSR has not carried its burden to introduce sufficient evidence to allow the Court to make a "fair and reasonable approximation" of damages for ART, AS, or CMS. Raytheon Co., 305 F.3d at 1367.

D. Marine Hydraulics International (MHI)

MHI seeks $462,803 for a 21-day extension. Of that amount, $212,801 is for MHI's own PMO costs, and $250,002 is to secure 21 additional days of services from MHI's second-tier subcontractors - C.E. Thurston, Fairbanks Morse, and Philadelphia Gear. For the reasons stated below, the Court finds that BAE NSR has not carried its burden to introduce sufficient evidence for the Court to determine what quantum of damages (if any) is appropriate.

MHI has slightly more support for its delay damages estimate than ART, AS, and CMS, but only by one page. In addition to the total amount requested, MHI prepared a one-page document listing various jobs and hours (including regular time and overtime) included in the estimate. See BAE Ex. 143, at 71-72. Though this is marginally better support than some of the other subcontractors provided, it bears reiterating that, in the Court's view, BAE NSR still introduced very little evidence to support MHI's claim.

Drew Williams, the Director of Programs for MHI, provided credible testimony explaining demobilization, remobilization, and some of the logistical challenges with resuming production work. However, he provided very little explanation of how MHI prepared its cost estimate for the proposed 21-day extension. During trial, Williams made various references to tracking actual costs as a matter of course, but never explained whether MHI's estimate is based on actual costs, or if not, how MHI predicted its labor hours. Williams also referenced several different numbers of employees completing PMO work (ostensibly for the Tortuga), without explaining how many PMO employees MHI actually included in its PMO estimate. See Tr. 374:25-12; 378:12-18. Furthermore, Williams stated that some (unspecified portion of) tech rep time from demobilization or remobilization is included in the estimate, but it is not clear to the Court that this is properly compensable as schedule delay.[59] Tr. 376:19-377:12.

A close review of MHI's quote only increases the Court's skepticism of its reliability. MHI includes, for example, 840 hours of project management. BAE Ex. 143, at 72. This "job" of project oversight generally falls within the Court's understanding

[59] The Court is mindful that BAE NSR and its subcontractors have been paid for demobilization and remobilization costs. Though MHI decided to include some unspecified amount of demobilization or remobilization tech rep time in its schedule delay submission, MHI has not identified what portion of the tech rep cost estimate is for the 21-day extension, and what is for remobilization or demobilization.

of PMO. However, MHI also quotes over 300 hours for "electricians" and 100 hours for "engineering" without explanation. Id. No evidence was introduced at trial to explain how these roles qualify as "PMO" or why both roles are needed. Nor did MHI explain why 337 hours of overtime across various identified jobs is necessary for 21 additional days of work. See id. Stated simply, MHI has not shown that its "estimate" qualifies as a "fair and reasonable" approximation of costs. Raytheon Co., 305 F.3d at 1367.

As for C.E. Thurston, Fairbanks Morse, and Philadelphia Gear, BAE NSR has not carried its burden to demonstrate that compensation is appropriate for any of these second-tier subcontractors. Despite seeking a combined $250,002 in compensation, each second-tier subcontractors' claim relies only on a scant one or two-page quote for 21 additional days of services. See BAE Ex. 143, at 75-78. The Court heard no testimony[60] from these subcontractors, nor did BAE NSR introduce any evidence to support a finding that the second-tier subcontracts' quotes were reasonable, allowable, or allocable.[61] Indeed, no evidence was

[60] The Court heard some testimony from MHI's Drew Williams describing the work that two of the three second-tier subcontractors performed on the Tortuga. However, such testimony did not address how the second-tier subcontractors prepared their estimates or otherwise offer any explanation as to why the Court should credit the estimates and award MHI the requested amounts.

[61] While there may be some additional evidence in the record to support the second-tier subcontractors' claims, the Court relies on the evidence BAE NSR and the Navy discussed at trial as well as evidence identified in both parties' post-trial briefs. It is particularly important for BAE NSR to bear the burden of identifying sufficient facts for the Court to find in

introduced to establish what Philadelphia Gear even does, let alone that its two page "quote" is an appropriate measure of compensation.[62] See BAE Ex. 143, at 76-77. While the Court is aware that MHI requires the services of Fairbanks Morse for its engine work, Tr. 382:11-23, there is insufficient evidence in the record for the Court to make a "fair and reasonable" approximation of damages for any of MHI's second-tier subcontractors. See Raytheon Co., 305 F.3d at 1367.

E. Marine Specialty Painting (MSP)

MSP seeks $154,036 for 21-days of additional PMO and temporary services.[63] See Tr. 306:20-22. Unlike most of the other subcontractors, MSP's estimate includes a detailed chart listing the various labor, materials, and fuel costs included in its cost estimate, as well as associated hours and rates. See BAE Ex. 143, at 80. At trial, MSP's estimate was bolstered by credible testimony from Lucas Peachock, the Vice President of MSP, who was

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its favor by preponderant evidence when, as here, the parties introduced five binders of documents into evidence at the start of trial and discussed only a small portion of their contents. As the Seventh Circuit elegantly put it, "[j]udges are not like pigs, hunting for truffles buried [in the record]." United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991).

[62] Certainly, the Court is aware that Philadelphia Gear is a technical representative, and one could presume that, given the nature of MHI's work, Philadelphia Gear was a technical representative for some component of the Tortuga's engines.

[63] MSP calls PMO "direct support." For consistency, the Court refers to MSP's "direct support" as PMO. Tr. 291:5-15. MSP references "temporary services" without clearly defining what that includes, but they appear to include, at a minimum, fuel and rental costs.

able to explain the role of each labor category listed, the source of its labor rates,[64] and the role of each listed piece of equipment. See Tr. 308:11-312:17.

Notably, Peachock testified that PMO was provided during demobilization and remobilization. Tr. 305:6-13. More specifically, Peachock testified that "[n]obody left" who was providing PMO services. Tr. 305:6-9. The Court can infer from Peachock's testimony that PMO was not included in the RCCs seeking compensation for demobilization or remobilization.[65] Accordingly, MSP's position appears to be that MSP incurred 26[66] days of PMO costs that it would not have incurred but for the Navy's invocation of the HWP clause. See Tr. 312:2-17; see also Tr. 306:7-19.

Although MSP's estimate is better supported than others, Peachock's testimony (and BAE NSR's briefing) left multiple

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[64] According to Peachock, the rates listed are "established," which the Court took to mean that they are included in MSP's agreement with BAE NSR - this is based on Peachock's subsequent testimony that he "won the job" (ostensibly, working with BAE NSR on the Tortuga) with those rates. Tr. 308:11-14.

[65] This conclusion is supported by the data MSP submitted in support of its remobilization RCC 1062G documentation, BAE Ex. at 81-86 (showing no PMO charges), and Peachock's testimony that "even on the rework [RCC] . . . there was no PMO money." Tr. 290:19-21; see also Tr. 290:21-291:4 ("I don't put PMO on base work RCCs because my [PMO] is for the periodicity of the job. The period of performance." (Peachock))

[66] Though MSP is now seeking 21 days of PMO costs, MSP initially reported that it would require 26 days to recover the pre-HWP schedule reflecting 4 days of demobilization, 12 days of remobilization, and 10 days of rework. BAE Ex. 124, at 3. "Rework" refers to work that MSP had to redo after Hurricane Dorian to reach the same point where they were before the Hurricane. For example, MSP had to rewash several surfaces after remobilizing before it could continue to paint. See Tr. 300:24-201:17, 305:2-5, 332:21-24.

discrepancies in its estimated costs unexplained. For example, during trial, Peachock testified that generally when a project is delayed, MSP tries to recoup the cost of rented equipment because MSP rents equipment monthly. Tr. 312:2-12. However, in a "Condition Found Report" filed after remobilization concluded, MSP said that it "established a separate charge code" to track all demobilization and remobilization costs, including "rental charges." BAE Ex. 124, at 2. Accordingly, it is not clear to the Court why MSP would be entitled to an additional 21 days of equipment rental costs if it included those costs in its demobilization and remobilization claims. MSP also requests 21-days of fuel costs, but no evidence was introduced at trial to suggest that MSP used 21-days of fuel during demobilization and remobilization. See BAE Ex. 143, at 80.

Discrepancies aside, the Court finds that the record, as developed through Peachock's testimony and supporting exhibits, is sufficiently detailed for the Court to use the jury verdict method to determine the appropriate measure of damages. However, for some of the reasons explained above, MSP's trial evidence fell far short of establishing that it is owed the entirety of its $154,036 estimate. Most notably, BAE NSR has not carried its burden to demonstrate that any compensation is owed to MSP for equipment or fuel costs.

Based on the record before the Court, the Court finds that MSP is entitled to **4 days** of PMO because credible evidence supports a finding by preponderant evidence that MSP is owed PMO costs for 4 days of demobilization. MSP reported 26 days of delay in its Condition Found Report, but 10 of those "delay days" are for "rework" after the Hurricane. Although the Court understands MSP's position that it was not compensated for PMO for this "rework," a separate RCC was issued to address rework, and BAE NSR has not carried its burden to demonstrate that any PMO related to such rework is properly considered as part of MSP's HWP-delay claim.[67] Nor has MSP provided sufficient information for this Court to award PMO for any portion of MSP's remobilization efforts. Stated simply, it is abundantly clear that MSP stopped production work and rapidly demobilized at the direction of the Navy. But MSP has provided no explanation why it allegedly took 12 days to remobilize. While MSP may theoretically have a plausible (or even compelling) explanation for the length of time it took to remobilize, no explanation was provided during trial.

[67] The RCC addressing MSP's rework was not introduced into evidence, so the Court has no way of knowing what limitations (if any) MSP or the Navy included in their settlement. Furthermore, it appears to the Court that MSP essentially seeks additional PMO caused by two different occurrences. The first is the delay caused by the Navy's order to implement the HWP. The second is the delay caused by Hurricane Dorian itself - the rework occasioned by the onslaught of salt water during Hurricane Dorian. While it is possible that BAE NSR and the Navy generally consider "rework" within the scope of work compensable under the HWP clause, BAE NSR has not carried its burden to demonstrate that "rework" PMO is properly compensable under the HWP clause.

Accordingly, the Court cannot attribute MSP's remobilization time to the Navy's invocation of the HWP.

Taking these findings together, the Court finds that MSP is entitled to **$11,269**, which is MSP's daily estimated PMO cost multiplied by four.[68] Though MSP may have suffered more damages than this award reflects, Court finds that such award is an appropriate figure based on the trial evidence and avoids the danger of "greatly multiplying an award beyond reason" or giving MSP an "unjustifiable windfall[]." East Coast, 199 F. Supp. 3d at 1032 (citations omitted). But after hearing Peachock's testimony and weighing the evidence, the Court finds that, utilizing the jury verdict method, such award is a fair and reasonable measure of MSP's damages. See Raytheon, 305 F.3d at 1367.

F. Tecnico

Finally, the Court considers Tecnico's claim that it is entitled to $125,391 for 21-days of HWP-related delay. In support of its claim, Tecnico provided a detailed explanation of how it prepared its estimate. According to Thomas DeWitt, a Project Manager for Tecnico, Tecnico pulled PMO[69] costs for the Tortuga from March 25, 2018, to September 8, 2019, and found that the

[68] The Court finds that MSP's PMO costs are reasonable, allowable, and allocable. See Tr. 308:11-14, 310:15-21, 316:15-18.

[69] Tecnico's refers to its "PMO" as Production Support Costs ("PSC"). Tr. 339:20-25, Tr. 340:1-4. For ease of reference, the Court refers to Tecnico's PSC costs as PMO.

Tortuga required (on average) 115 hours of PMO a day. Tr. 352: 14-23. Notably, this estimate is lower than Tecnico's actual PMO costs for September 2019. Tr. 353:8-354:19. Suffice to say, compared to evidence from BAE NSR's other subcontractors, Tecnico provided generally compelling evidence to support its cost estimate.

However, BAE NSR has not carried its burden to demonstrate that Tecnico was harmed by the Navy's invocation of the HWP. See Eden Isle Marina, Inc. v. United States, 113 Fed. Cl. 372, 494 (2013) ("[N]o matter how unreasonable the Government's delay, there can be no recovery without proof that delay caused material damage") (quoting Commerce Int'l Co. v. United States, 338 F.2d 81, 89 (Ct. Cl. 1964)). Through DeWitt, the Court heard detailed testimony explaining how Tecnico calculated its estimate, but DeWitt never articulated why Tecnico is entitled to additional PMO. For example, the Court heard no testimony that Tecnico's PMO personnel did not leave the worksite during demobilization, nor did the Court hear testimony that, for example, all of Tecnico's ordinary PMO employees for the Tortuga are salaried.[70] Stated simply, Tecnico has not provided the "clear proof of injury"

[70] If the Tecnico PMO employees who ordinarily work on the Tortuga are salaried and were not re-tasked to other Tecnico jobs, then there could be a clear financial injury caused by the Navy ordering Tecnico to stop production work for five days.

required for this Court to apply the jury verdict method. Raytheon, 305 F.3d at 1367.

It is possible that all of Tecnico's PMO employees are salaried. It is also possible that none of Tecnico's Tortuga PMO employees left during demobilization.[71] But any finding by the Court to either effect would be pure speculation. Because Tecnico has given the Court "no sound reason for believing it has been undercompensated," there is no basis for this Court to award damages under the HWP clause. WRB Corp. v. United States, 183 Ct. Cl. 409, 425 (1968). Accordingly, the Court finds that no recovery is appropriate.

G. G&A Expenses; Profit

Because BAE NSR has been awarded delay-related damages, the Court must address BAE NSR's recovery of "General and Administrative" ("G&A") expenses and "profit" on work performed by its subcontractors. It does not appear that the Navy disputes BAE NSR's contention that it is entitled to a 9.62% G&A markup on subcontractors' costs and a further 10% markup after the G&A is added to the subcontractor costs. Accordingly, as the total pass-through award in this case is $11,269, BAE NSR is awarded $1,084 in G&A markup ($11,269 × 9.62%). Additionally, BAE NSR is awarded $1,235 to reflect BAE NSR's entitlement to a 10% profit on its

[71] Tecnico has provided no information about its remobilization efforts or why any length of time it took to remobilize could be properly attributed to the Navy. See Tr. 350:21-351:1, 351:14-20.

subcontractors' damages after G&A markup (($11,269 + $1,084) × 10.00%).

H. Interest

BAE NSR seeks interest from the date the certified claim was submitted to the Contracting Officer. The Navy does not appear to challenge the appropriateness of such an award. Nor does the Navy challenge BAE NSR's assertion that the proper interest rate is set by the Secretary of the Treasury. See ECF No. 159 ¶ 324; FAR 52.233-1(h).[72] Accordingly, the Court awards interest at such rate(s) beginning on the date that BAE NSR's certified claim was submitted, July 6, 2021. The parties are instructed to confer to jointly determine the mechanics of the interest calculation.

I. Damages Summary

Based on the calculations above (exclusive of interest), the total damages awarded to BAE NSR is $443,127, consisting of: (i) $429,539 to BAE NSR for its direct claims; (ii) $11,269 to BAE NSR for its subcontractors' pass-through claims; and (iii) $2,319 to BAE NSR for its G&A expenses and profit on the subcontractors' pass-through claims.

[72] FAR 52.233-1(h) provides that "interest shall be paid at the rate, fixed by the Secretary of the Treasury . . . which is applicable to the period during which the Contracting Officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim."

IV. CONCLUSION

As set forth in detail above, following a five-day bench trial the Court makes a **PARTIAL DAMAGE AWARD** in BAE NSR's favor of **$443,127**, exclusive of the interest awarded above.

The Clerk is **REQUESTED** to send a copy of this Opinion and Order to all counsel of record.

IT IS SO ORDERED.

/s/ MSD
Mark S. Davis
CHIEF UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
August 16, 2024