

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
COMMONWEALTH ELECTRIC COMPANY,)	CASE NO. BK87-02457
)	
DEBTOR)	A88-0286
)	
COMMONWEALTH ELECTRIC COMPANY,)	
a Corporation operating as)	
Debtor-in-Possession,)	
)	CH. 11
Plaintiff)	
vs.)	
)	
ISYS SECURITY SYSTEMS, INC.,)	
a Corporation,)	
)	
Defendant)	

MEMORANDUM

Trial in this matter was held starting October 15, 1991, and was completed November 6, 1991. Following trial, the Court requested post-trial written arguments and final briefs, the last of which was received on February 4, 1992. This memorandum contains the findings of fact and conclusions of law required by Fed. R. Civ. P. 52 and Fed. Bankr. R. 7052.

This complaint which was brought as a request for turnover of property of the estate is not a core proceeding under 28 U.S.C. § 157(b)(2). It concerns a pre-petition contract dispute and is, therefore, a related matter under 28 U.S.C. § 157(c). The parties have agreed that the Court may enter final orders and judgment with consent as is permitted under 28 U.S.C. § 157(c)(2).

I. Background

In this complaint, the plaintiff asserted two claims against ISYS Security Systems, Inc. (ISYS). The first involved amounts due Commonwealth Electric Company (CECO) for work completed on a project but for which CECO had not received payment. This Court decided the first claim in an opinion reported at Matter of Commonwealth Elec. Co., 118 Bankr. 720 (Bankr. D. Neb. 1990).

The second issue involves a claim by CECO against ISYS for additional costs incurred by CECO while performing a subcontract

for ISYS, which costs resulted from delays, disruptions and inefficiencies caused by ISYS.

II. The Issues

The main issues before this Court are: (1) whether or not CECO incurred additional costs in performing the contract as a result of either delays caused or directed by the contractor or changes in the terms or manner of performance of the contract caused by the contractor; (2) if ISYS caused increased costs, what amount of an equitable adjustment of the contract payment is reasonable and proven?

III. The Decision

a) CECO has a right to make a direct claim against ISYS for an equitable adjustment in the dollar amount of the contract for changes, delays or disruptions during the performance of the contract caused by actions of the Government agency, the United States Air Force.

b) ISYS is contractually responsible to CECO for the changes, delays and disruptions and the increased costs resulting therefrom.

c) CECO has proven increased costs in the amount of \$122,779.00 caused by the changes, delays and disruptions.

IV. Uncontroverted Facts

1. ISYS's predecessor in interest, CMC, contracted with the United States Government for the installation of a security system at the Consolidated Space Operations Center (CSOC) at Falcon Air Force Station, Colorado. Through this opinion, the defendant ISYS shall be referred to as the Contractor, except when referring to direct quotes in the Contract which name CMC as the Contractor. ISYS has assumed all obligations of the CMC contract with CECO.

2. ISYS then subcontracted with CECO to perform part of the work required by ISYS's contract with the Government. This contract was executed on June 18, 1986. However, the parties operated without a written contract and CECO performed significant work on the project from October of 1985 to and following the contract execution date.

3. On December 3, 1986, CECO presented to ISYS a claim for additional costs for work performed under the contract (December claim, Exhibit 6). This claim was a final version of a claim originally presented in April, 1986, (Exhibit 43). The additional costs set forth in the claim were caused by the actions of the Department of the Air Force (the Government) in

making changes to CECO's work and delaying CECO in the performance of its work.

4. CECO asserts it has been damaged by the Government's action in the amount of \$402,822.00 and ISYS certified this amount pursuant to the Contract Disputes Act.

5. ISYS asserts that it has been damaged in the amount of \$355,516.00 by actions of the Government. The amounts of ISYS and CECO were combined and submitted as a claim to the Government, and ISYS certified this amount pursuant to the Contract Disputes Act.

6. To date, ISYS has not received payment from the Government on the combined claim submitted to the Government, and no payment has been made to CECO on the claim.

7. Any prejudgment interest shall be due on the judgment at a rate of 8% per year from the petition date, August 10, 1987, to the date of judgment.

8. The law of the State of Colorado governs the subcontract between CECO and ISYS.

V. Controverted Facts

In the pretrial statement, the parties have listed fifteen specific issues of controverted fact which the Court summarizes as follows:

1. Is ISYS responsible to CECO for delays, disruptions or inefficiencies, and the resulting costs incurred, for actions taken by the Government?

2. Did ISYS have an obligation to coordinate the work, provide CECO with access to the work, and to timely deliver materials to CECO?

3. Is CECO entitled to recover an equitable adjustment under the terms of the subcontract for the delays, disruptions and inefficiencies suffered by CECO on the project?

4. Are CECO's claims for such costs precluded, in whole or in part, by execution of the contract after the costs were incurred, by express language of the contract or by change orders entered into by the parties and incorporated into their contract?

5. Has CECO complied with all expressed and implied conditions precedent to seek adjustment to the contract price for the costs as alleged in CECO's claim?

6. What is the amount of unavoidable costs actually incurred by CECO and were the costs actually incurred by CECO necessary, fair and reasonable?

VI. The Allegations in the Claim

Exhibit 6, the December claim submitted by CECO and ISYS, requests an equitable adjustment for work delays or Government caused extra work in seven specific periods. The detail of the claim period by period is quoted below:

Period One - From October 1st through October 10, 1985. We had mobilized for an October 1st start of the perimeter main trench and manhole installation. This mobilization included having equipment onsite, work layed (sic) out, perimeter conduit purchased, delivered and positioned at perimeter, manholes purchased and awaiting release, and staff personnel and workers instructed and ready to begin installation. It is our understanding that CMC was not released to begin work by the Air Force until the 10th of October, causing us to incur lost contract period time, which entitles us to a funded contract extension of 10 days.

Period Two - Because of CMC's mobilization period delays, and because of the late introduction of Space Comm's perimeter conduit requirements and because of the late decision of the Air Force to have us do the trenching for this project, our perimeter work was further delayed until October 21, 1985.

The major part of the delay to October 21, 1985 was the contract change to add trenching and Space Comm's conduit and boxes, and for extra time required for redesign of the perimeter handholes. This delay entitles us to an additional 11 day funded time extension to our contract. Had we not been delayed in the fall of 1985, we would have completed the installation of all pads, power substations, power primary cable, and 40% of the power secondaries by February 1, 1986, allowing us to begin installation of equipment location stakes, and sensor conduits by the first of February. As it turned out we were not able to reschedule the perimeter equipment stake out work until February 24, 1986, causing delay of all perimeter work remaining.

Period Three - As this work was just beginning, the Period 3 delay was encountered. Although our work was scheduled through the proper channels, we were directed by the Air Force to stop our activity due to work conflicts with unscheduled Phase II and III contractors activities (sic) in the perimeter area (See Serial Letter No. 82, dated 3/18/86). This timely delay caused us much more impact than the Period One and Two delays. (See examples below).

- 1) Work was performed that we were directed to remove, total time of 67 hours of electrician labor was lost.
- 2) Momentum by our staff and crew was lost, "it became necessary" to lay off experienced help, to do inefficient, and nonproductive (sic) tasks such as tool cleaning and material sorting, and to inefficiently jump our remaining people around to do short duration unscheduled (sic) work to keep our key craftsmen on the payroll. This caused our efficiency to drop significantly during this period.
- 3) Equipment sat idle.
- 4) Unabsorbed overhead was encountered.
- 5) A further impact of doing these short duration indoor jobs will come later. We will have virtually no "bad weather" set aside work to do, causing us more severe impacts from bad weather than we would have otherwise experienced without the Period 3 delay to our perimeter work.

Accordingly, we are entitled to a funded contract extension for the period from 2/24/86 through 4/6/86, a period of delay in the principle portion of our work of 42 days.

Camera Pole and base delay

Period Four - The Government did not deliver camera poles and bases as originally promised in May of 1986. Instead, they awarded you a change order to purchase these materials. If the change order had been issued to you and returned to you on for procurement by January 1, 1986, you still could have had the bases and poles on site by 5/1/86. Instead, the Government directed you to proceed with procurement on 4/28/86, much too late

to meet the schedule, and causing negative impacts to Commonwealth Electric's installation costs.

As a result of the camera pole and base procurement slips, we did not receive the first camera bases until August 1, 1986, a 3 month delay. Also, we did not receive the first camera poles until September 15, 1986, a 4 month delay. Although these delays did not add to our project end date, they did add to our costs in the following ways;

- Additional cost of idle equipment involving pickup trucks, flat beds, auger trucks, and 15 ton crane while waiting for bases and poles to arrive.

- Extra labor caused by coiling of cables in manholes because cable pulling had to start before bases were installed. This requires additional work to reidentify coiled cable locations, remobilization of craft to these locations, and work to uncoil and pull cables to bases, after the bases are in place. This is an inefficient work sequence we were forced to adapt because of the pole base delivery delays.

- Extra work required to install camera conduits for bases out of sequence. Because of the pole base delivery delays, we had to install the camera conduits without being able to connect to in-place bases. This cost us extra time and labor and equipment hours to relocate and reexcavate conduit ends and in many cases make repairs to conduits because we had to install them out of normal sequence. Also, larger excavation areas were required that would normally be needed if bases were installed prior to conduit being put in place.

We request recovery of these direct costs associated with camera pole and base delivery slips, but do not seek additional extension (sic) of schedule period for this extra work.

Period 5 - Involves remobilization costs to return to the south gate area to complete the Sentrax work running through that zone. The Air Force directed us to skip this zone until they could procure installation of a concrete slab through the gate area. Extra work will include remobilizing our equipment to the South end of the site from the North end, a process which will cost

us approximately one day for the crew and equipment. We request a one day extension to our contract period and reimbursment (sic) for direct costs plus overhead and profit.

Period 6 - The Northeast perimeter Sentrax cable installation was delayed and rework of trench was required because of delays caused by Air Force procurement of a contractor to a lower water line in Zone 2 of Sentrax system.

Sentrax cable function would have been compromised by existing position of 2" water line running through Zone 2, East of Entry Control. The Air Force correction process took nearly 10 weeks to complete. Extra work involved includes remobilizing of our craft and equipment from the Southwest corner of the site to the Northeast corner of site. Approximately one full work day was lost. Also, the trench we installed for Zone 2 in September of 1986 had been damaged by the Air Force repair contractor and also by erosion during the 10 week delay. Commonwealth had to redo the trench including retrenching and resanding operations to repair it to original condition. We request reimbursement of these direct costs, plus overhead and profit for this extra work, and a one day extention (sic) of contract time period.

Period 7 - Involves extra work Commonwealth encountered to clean out or make repairs to Government G.F.E. duct bank conduit and manholes.

Many Government provided conduits have been packed with mud, concrete or other foreign objects and several G.F.E. manholes have been partially filled with water and mud. We request reimbursement for equipment rental and labor expended to make these G.F.E. cable conveyances suitable for cable pulling.

VII. The Contract Language

The contract between ISYS and CECO was admitted into evidence at plaintiff's Exhibit 5. The contract was executed in June of 1986 but, by the terms of the first paragraph on page 1, was effective as of the first day of October, 1985. Exhibit C to the contract, Exhibit 5, is entitled "Statement of Work." That document at paragraph 4.2.1 identifies the start date for CECO, as a subcontractor, as October 10, 1985.

In the Statement of Work at Exhibit C, paragraph 2.3, the contractual language provides that the subcontractor is directly responsible to and shall take directions from only ISYS (CMC). The language is:

The subcontractor shall not accept direction from any agency, Government, or otherwise, other than CMC. Direction shall be accepted only from authorized CMC personnel. No action or implementation of tasks that are outside of the scope of this SOW will be implemented by the subcontractor without appropriate subcontract change action. Letters of intent will be accepted by the subcontractor prior to formal subcontract change action if schedules impacts and/or emergency actions are involved.

In Exhibit A to the contract, "General Terms and Conditions" at Section G-3, the parties define the rights of both the contractor and the subcontractor with regard to changes and payment adjustments for such changes. This section was discussed by the parties at trial as the "Changes" section of the contract. It will be quoted in full because many of the findings to be found later in the opinion relate directly to the language in the "Changes" clause.

G-3 Changes

(a) The CONTRACTOR may, at any time, without notice to the sureties, by written order designated or indicated to be a change order, make any change in the work within the general scope of the subcontract, including but not limited to changes:

(i) in the specifications (including drawings and designs);

(ii) in the method or manner of performance of the work;

(iii) in the CONTRACTOR-furnished facilities, equipment, materials, services or sites; or

(iv) directing acceleration in the performance of the work.

(b) Any other written order or an oral order (which terms as used in this paragraph (b) shall include direction, instruction, interpretation or determination) from the CONTRACTOR which causes

any such change, shall be treated as a change order under this clause; provided that, the CONTRACTOR gives the SUBCONTRACTOR written notice stating the date, circumstances, and source of the order and that the SUBCONTRACTOR regards the order as a change order.

(c) Except as herein provided, no order, statement or conduct of the CONTRACTOR shall be treated as a change under this clause or entitle the SUBCONTRACTOR to an equitable adjustment hereunder.

(d) If any change under this clause causes an increase or decrease in the SUBCONTRACTOR'S cost of, or the time required for, the performance of any part of the work under this subcontract, whether or not changed by any order, an equitable adjustment shall be made and the subcontract modified in writing accordingly; provided, however, that except for claims based on defective specifications, no claims for any change under (b) above shall be allowed for any costs incurred more than twenty (20) days before the SUBCONTRACTOR gives written notice as therein required; and provided further, that in the case of defective specifications for which the GOVERNMENT is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the SUBCONTRACTOR in attempting to comply with such defective specifications.

(e) If the SUBCONTRACTOR intends to assert a claim for an equitable adjustment under this clause, he must, within thirty (30) days after receipt of a written change order under (a) above or the furnishing of a written notice under (b) above, submit to the CONTRACTOR a written statement setting forth the general nature and monetary extent of such claim, unless the period is extended by the GOVERNMENT and CONTRACTOR. The Statement of Claim hereunder may be included in the notice under (b) above.

(f) (Not applicable in this dispute.)

The contract at Section G-11 provides that the subcontractor is responsible for ascertaining the nature and location of the work and the conditions which affect the work or the cost thereof. However, Section G-4 permits the subcontractor to obtain an equitable adjustment of the price if the subcontractor

timely notifies the contractor in writing of sub-surface or latent physical conditions differing materially from those indicated in the contract or if the subcontractor finds unknown physical conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inherent in the work of the character provided for in the contract. The contractor is to investigate the conditions and make an appropriate equitable adjustment.

The contract contains a "suspension of work" clause at Section G-15. That clause permits the contractor to order the subcontractor to suspend, delay or interrupt the work for such period of time as may be determined to be appropriate for the convenience of the Government or the contractor. The Section, at (b), permits a contract adjustment for any increase in the cost of performance of the subcontract (excluding profit) necessarily caused by a suspension of work for an unreasonable period of time. The adjustment is limited and prohibited if the suspension or delay would have been incurred and caused by anything for which the subcontractor would have had a right to an equitable adjustment.

Finally, this section prohibits an adjustment for "any costs incurred more than 20 days before the SUBCONTRACTOR shall have notified the CONTRACTOR in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order), . . ."

In summary, the contract and its related exhibits provide an outline of the work to be performed, the price to be paid and a method or procedure for adjusting the price depending upon change orders or directions by the contractor to the subcontractor and/or suspensions, delays or interruptions of the work caused by the contractor.

VIII. Discussion

a) Disruption, Delays and Method of Estimating Cost of Inefficiencies

As can be inferred from the earlier discussion of the date of execution of the contract and the contractual terms for starting work, the parties operated from early October, 1985, through early June of 1986 without a written contract. CECO brought men, equipment and materials to the contract site, at the request of the contractor, on October 1, 1985. CECO was not given permission to begin work until October 21, 1985. One of the claims of CECO is that it should be permitted an adjustment which reflects the additional costs it incurred from October 1 to October 21, 1985. Findings concerning CECO's right to an adjustment for such delay are discussed in the summary section of the memorandum section VIII(e).

The evidence is undisputed that CECO experienced delays and disruptions to its work on this project. The Court finds as a fact that shortly after each delay and disruption, and within the time required by the terms of the contract, CECO orally and in writing notified ISYS officials of the type of delay or disruption and notified ISYS officials that a claim would be made for damages accruing as a result.

On April 15, 1986, CECO submitted to ISYS the first detailed document that listed each type of additional cost incurred, the cause of such cost and the equitable adjustment requested. During the trial, that document was called "April claim" and was admitted into evidence at trial Exhibit 43. That claim was in the amount of \$305,510.00.

On December 3, 1986, CECO submitted a revised claim for additional costs. That claim has been identified as the "December claim" and admitted into evidence at trial Exhibit 6. The amount was \$402,822.00. It included all of the items previously included in the April claim.

Trial Exhibit 6, the December claim, contains fourteen pages of detail with regard to the specific delays or work interruptions suffered by CECO and the basis for the damages or costs for which reimbursement is claimed by CECO. Exhibit 6, in addition, contains thirty-one exhibits which include correspondence between the debtor and CECO and CECO and the Government. Also included are exhibits dealing with daily overhead costs and various itemizations of costs incurred or projected by CECO.

At the trial, testimony was received from CECO's superintendent on the job and from CECO's on-site manager. They testified in detail about the contract arrangements with ISYS, the site preparation, the mobilization of employees and equipment, the start up and shutdown of various projects as a result of Air Force requirements.

They admitted that many of the costs allegedly incurred are estimates. The need for using estimates was explained on the basis that when one is attempting to determine the loss of efficiency of a work team, there is no physical way to measure such loss of efficiency. For example, when a crew is put on site and begins operation, there is an initial training period with regard to site requirements and job requirements. Once the crew is operating on a regular basis, the efficiency and productivity level of the crew increases to a satisfactory level and work is performed, subject only to weather and other interruptions, at a high level of efficiency. If the work is then shut down and the crew is dispersed or the crew is required to spend a significant amount of time on other assignments, when the crew gets back to the originally assigned project, there is once again a learning

curve and inefficiencies, sometimes due to replacement workers or relearning the job.

Some workers would be laid off when work was suspended. Either those workers or replacement workers would be hired when the work restarted. When the team "remobilized" and returned to the original job again, there would be numerous hours spent getting set up, relearning the requirements of the project, and perhaps training new members of the team who were not involved originally. The resulting work will not be at the highest level that had been incurred prior to the original shutdown.

Therefore, the "efficiency" of the team can be considered to have declined. A less efficient team will produce less work than a highly efficient team. If less work is performed in a certain period of time, theoretically the overall job will cost the subcontractor more to perform than was originally anticipated.

Since there is no physical measure of an efficiency level, certain industry standards are published which may be relied upon by companies in the industry to aid in determining or estimating the cost of delay or interruptions.

A CECO vice president in charge of the project, James Van De Grift, testified in support of CECO's claim. He testified that a manual published by the National Electrical Contractors Association (NECA) was used in the industry to calculate inefficiency. He further testified that the use of such manual was a reasonable and appropriate way to determine inefficiency hours and it was the publication that was normally used in the industry for calculating labor on change orders. He testified that the NECA studies are often used to price disruptions, delays and inefficiency costs and are commonly accepted by the owners. Because it, in his opinion, is impossible to separately, distinctly and discretely price and track the kinds of interruptions, disruptions and remobilizations that were contained in the December claim, it is appropriate to depend upon the NECA manual and the calculations contained therein to determine such costs.

The testimony of Mr. Van De Grift was supported by the testimony of the expert witness called by CECO. David Olson has many years experience in the construction business. The company that Mr. Olson has been associated with as president and chief executive officer is a general building and general engineering contractor. It has engaged in Government work projects for the United States Army Corps of Engineers, the United States Navy, and the Veterans Administration. It is usually a prime contractor. However, it has acted as a subcontractor twelve to fifteen times.

He testified that he is familiar with change order procedures both in private and Government contracts. He has had subcontractors on all jobs.

CECO has been a subcontractor for Olson many times. He testified after a review of the project that in his opinion CECO was delayed from the very start of the job. Based upon his experience and knowledge of the industry, it is his opinion that when work is disrupted, started and stopped and employees are hired and fired, or directed to show up at particular times and then sent home because of inability of the contractor to properly schedule work, the worker loses confidence in the scheduling process and efficiency and productivity are lost. He further testified that although a contractor's cost records are important to determining the actual cost of a job, such records do not reflect the impact of changes, delays and disruptions and such impact cannot be measured or tracked by the standard cost system used in the industry. Therefore, inefficiency claims, industry wide, are calculated by using industry guidelines as to efficiency loss. It is his testimony that the NECA study has been used and accepted on Government projects.

Douglas Hathaway testified on behalf of ISYS. He was in charge of the project and reviewed the claims made in April and December. He agrees with the factual allegations in the claim and stated that both he and the ISYS project site manager, Jack Baker, agreed with the factual allegations. Neither of them audited the numbers or verified the cost figures.

Several other witnesses testified on behalf of ISYS. Not one questioned the accuracy of the factual allegations in the claim, Exhibit 6, although they did not agree with the cost portion of the claim.

The Court finds as a fact that delays and interruptions were incurred by CECO in its attempt to perform the contract. The Court further finds as a fact that the use of NECA studies for estimating the cost of inefficiencies and disruptions is a reasonable method for calculating such costs.

b) CECO Records to Support Claim

In support of the allegations in Exhibit 6, the December claim, CECO witnesses Mr. Trutna and Mr. Van De Grift testified to the costs incurred and the CECO records which support the claim for costs incurred.

Mr. Trutna, an on-site CECO manager, testified in detail concerning his review of the cost records on the project. He also testified with regard to correspondence between the debtor and ISYS with regard to each of the delays and each of the elements of the claim for an equitable adjustment. He testified

that in June of 1987 when CECO left the project, the contract was substantially complete.

Mr. Trutna made clear that each of the employees kept time sheets by activities per job. At the time the ISYS job was begun, CECO was also working at the same location on a subcontract with Bechtel. Each of the craft people, that is the electricians, employed by CECO charged their work to either the Bechtel job or the ISYS job and various activities within those jobs. Mr. Trutna admitted that there was an overlap in the early days of the ISYS job with the Bechtel project. He was unable to determine which employee was working when or where and which employees would have been involved in idle time as a result of delays on the ISYS project. He didn't have the records but believed that CECO had the records.

However, he did testify that the written progress report for each job was accurate and contained the number of man hours involved on the job. Therefore, one could determine from looking at the CECO job progress reports, the actual number of hours expended.

It is his position that CECO had a right to an adjustment for "extended overhead or funded overhead." This item is a cost reimbursement for keeping field overhead staff on site beyond the ordinary contract date. The contract was for eighteen months and CECO had planned to have supervisory staff on the site for eighteen months. However, as a result of the delays, the supervisory staff was on the site from October of 1985 through June of 1987.

James Van De Grift was an employee of Commonwealth in overall charge of the project as superior officer to the on-site managers. He reviewed monthly work-in-progress reports, estimated the contract expenses and profit and kept track on a "due date" basis both the contract costs and revenues. He used the work-in-progress reports, similar to Exhibit 25, on a regular basis in the ordinary course of his business and relied upon the accuracy of the report with regard to the costs incurred. He was in charge of administering the CSOC contract for CECO.

He identified numerous documents including correspondence between the debtor and ISYS and identified Exhibit 33 which is a summary of the daily overhead charges for field office and home office overhead. These numbers as shown in Exhibit 33 were used in the calculation of the claim with regard to overhead items.

He identified Exhibit 51 as a letter from ISYS to CECO in which ISYS acknowledges that it accepts the claim of CECO and incorporates it in a claim to be submitted to the Air Force. In that letter and the attached claim, CMC incorporated CECO's April claim, Exhibit 43.

He testified that he had reviewed Exhibit 6, the December claim, and analyzed it when it was originally prepared. He believed at that time and believes now that the amounts in the claim are reasonable and necessarily flow from the delays. He agrees that many of the amounts shown are estimates.

Mr. Van De Grift, on cross examination, acknowledged that the actual labor costs incurred, not including inefficiency calculations, as a result of the delays and disruptions, could be calculated at the time of trial. The company kept records of the time spent by each employee on each aspect of the job. Even the supervisors kept time cards and so the on-site overhead expenses of the foremen and supervisors could be determined.

Although the actual hours worked, which were required by the disruption and delays, were not available at the time the claim was made in December of 1986, the job was shut down in June of 1987 and the actual costs incurred to perform the job were available as of that date. In addition, by a review of the proper records, Mr. Van De Grift testified one could determine how the actual man hours tied into the delays caused by the Air Force or ISYS. He acknowledged that the final work-in-progress report as of June, 1987, would give actual costs, but would not break out costs by cost item shown in the claim, Exhibit 6, such as remobilization or inefficiencies. Finally, Mr. Van De Grift stated that to get a fairly good idea of the efficiency/inefficiency cost, one could review the actual costs at the end of the project and compare those on an itemized basis with the initial job cost projection. He admitted that the December claim was prepared using estimates, not actual costs incurred, and that it had not been updated when CECO left the site in June, 1987.

Mr. Van De Grift testified concerning Exhibit 29 and specifically attachment No. 2, page 09569, which included a price breakdown of the original contract. That breakdown showed estimated number of hours, the cost of materials, labor and overhead. In each of the calculations, there was a profit percentage added in. The total contractual price of the project was \$3,100,000. The overhead included field office and job site overhead as well as home office overhead.

Home office overhead used by CECO was a figure which represented the overall overhead percentage on jobs resulting from calculations performed by Commonwealth Companies, Inc. Home office overhead was not a specific CECO overhead cost, but was a cost included in all contracts entered into by CECO. The home office overhead calculation of Commonwealth Companies, Inc., was used because it was the administrative office for all of the subordinate companies. CECO did not have its own home office and relied upon and used the services of the home office of

Commonwealth Companies to provide payroll, contracting, and administrative services.

This testimony was supported by Exhibit 33 which is a letter from CECO to CMC identifying site overhead and home office overhead calculations. That exhibit was sent to CMC on October 16, 1985, in support of the overhead calculation contained in Exhibit 29 at attachment 2, page 09569.

Leonard Franzen, the former accountant for Commonwealth Companies, Inc., testified with regard to the procedure used by the companies to prepare the work-in-progress sheets and other accounting and financial records. He testified in detail about the services provided by Commonwealth Companies, Inc., to CECO with regard to the charge for home office overhead. He testified to the reliability of the reports and the use of the reports in business by his superiors.

He also testified that he did an analysis of the claim in order to verify that the claim tracked with the accounting records of the company. He is satisfied after such analysis that, although a few minor adjustments were required, the claim damage amounts are based upon, in general, the company records. He prepared Exhibit 26 which is a summary of damages, by category, from the claim as compared to the corporate records.

Based upon the testimony and documents referred to above, the Court finds as a fact that the CECO records, including work in progress reports, accurately show costs incurred on the project. Whether the records that were submitted in evidence are sufficient to support all allegations of the claims will be discussed in Section VIII(e) below.

The Court further finds that the inclusion of "home office overhead" in the claim is appropriate. Such overhead was included in the original contract and the "home office" although admittedly a separate company, did perform all administration tasks for CECO.

c) Records Retention Requirements of the Contract

One contract clause requires certain records to be retained for a period of three years after completion of the contract on non-fixed price contracts. ISYS claims that because the debtor failed to keep all of the records of the job in a fashion which made those records available for a complete review, CECO has breached the contract and should not be permitted to collect any damages. The Court finds that the records retention clause was for the benefit of the Government, not ISYS, and that it applies to non-fixed price contracts. This was a fixed price contract. If the clause is applicable in this case, it is applicable only with regard to the right of the Government to audit the books.

The Government has not requested permission to audit the books since June of 1987 and ISYS cannot rely upon this contract clause to deny the CECO claim.

The Court finds that sufficient records were kept by the debtor to permit ISYS to determine the validity of the claim. Although ISYS had the testimony of an accountant who performed a test on the expense claims, by reviewing, or attempting to review, backup and support documents for each of the expense claims, the Court does not find his testimony of inadequacy of records to be convincing. He created his own test and when certain of the documents were not available at the time that he wanted them and in the place that he thought they should be, he decided that CECO had failed the test. However, it was shown by CECO in response to the testimony of the accountant, that all of the records that he wanted, but could not find, were available and were found in the short period of time after he was unable to find them.

The Court finds as fact that CECO provided ISYS with sufficient documentation and company records for ISYS to evaluate the claim.

d) Change Orders

During the project, there were three change orders executed by the parties. Each of them dealt with specific and discrete functions. They did not deal with inefficiencies or costs resulting from delays and disruptions incurred by CECO. By agreement of the parties as represented by correspondence related to the change orders, neither the change orders nor the execution of the contract of June, 1986, included the items incorporated in the claim submitted in April, 1986, Exhibit 43, or in December, 1986, Exhibit 6.

e) Damages Incurred

Exhibit 6 is the December, 1986, claim. It is broken down into great detail. However, a summary sheet of CECO's costs included in the claim is shown at page 10 of Exhibit 6. The justification for the cost figures shown on the summary sheet is included both in the analysis portion of the Exhibit 6, pages 1 through 9, and in the exhibits attached at Exhibits 1 through 31. The Court has made factual findings that the alleged delays and disruptions did occur and were caused by an entity other than CECO, and a finding that, in general, the factual allegations in the claim are true. The cost summary should be analyzed to determine whether the evidence of damages supports the cost summary. The summary identifies each portion of the damage claim by period numbers. This analysis will follow that categorization, from Exhibit 6, pages 10-13.

1. Extended Overhead Duration
Period No. 1 - 10 days \$2,526.00 per day = \$25,260.00

This claim is for \$25,260.00 for extended overhead duration from October 1, the day CECO says it was to start work through October 10, the day it was authorized to work. The contract, which was executed in June of 1986 and related back to the effective date of October 1, 1985, shows the actual starting date as October 10, 1985. Therefore, although CECO was requested to be on the job on October 1, 1985, it contractually agreed that it had no right to start until October 10, 1985. It should not be allowed any extended overhead for the ten days prior to the contractual starting date. Therefore, no damages will be allowed and the claim will be reduced by \$25,260.00.

2. Extended Overhead Duration
Period No. 2 - 11 days \$2,526.00 per day = \$27,786.00

This extended overhead duration is supported by the evidence that although CECO was authorized to begin on October 10, it could not actually begin to do work until October 21. It had, and was required by contract, to have workers, including supervisory staff, on site from October 11 and should be authorized an allowance of \$27,786.00.

3. Extended Overhead Duration
Period No. 3 - 42 days \$2,815.84 per day = \$118,265.00

This total is an estimate of the cost of field and home office overhead for 42 days during a delay in performing regular work from February 24, 1986, through April 6, 1986. The evidence is insufficient to support this overhead figure. This calculation assumes that the delay in working on the perimeter from February 24, 1986, through April 6, 1986, actually delayed the contract completion by 42 days and that during such time of delay, no significant work was performed for which the overhead could be absorbed. Because CECO did have or should have had all of the time records for the on-site supervisory staff as well as the on-site craft workers, CECO should have been able to determine what actual work was accomplished by all parties during the delay period. With such information, the Court would be able to determine whether craft workers actually were employed at a level which would be sufficient to absorb the overhead or whether the delay actually resulted in an addition of 42 days of overhead at the end of the project. Without such information, the Court is unable to make a determination of the legitimacy of the overhead calculation and whether or not 42 days of unabsorbed overhead was encountered as a result of the 42-day delay in the perimeter work. Therefore, no allowance shall be made for such claim and the claim will be reduced by \$118,265.00.

4. Period 3 - Extra work due to installing &

then removing equipment stakes on February 24 & 25, 1986. 67 Hours x J.W. hours, plus supervision, Home office overhead profit = \$ 2,603.00

Steve Trutna testified that sixty-seven actual hours were incurred as a result of being required to remove and redo certain work. The \$2,603.00 is allowed.

5. Periods 1, 2 & 3 - Escalation of craft wage rate
10,800 hours deferred to after 6/1/86 = \$ 3,290.00
x .25 = \$2,700 + 10.77% O.H. + 10% Profit

The estimate of 10,800 deferred hours for craft workers is reasonable, based on the testimony of Steve Trutna. Those hours were incurred at a higher rate than originally projected and this is a legitimate cost figure. Therefore, \$3,290.00 shall be allowed.

6. Period 3 - Cost of show-up pay for craft, caused by using up snow day work. Based on number of bad weather days predicted by COE for this area for Oct., Nov. & Dec. 1986, Jan. 1987.
7 Days x 20 craft = 140 days, 2 hours per day
x 140 = 280 hrs = \$11,398.00

The debtor has or should have the actual time cards for the snow days and this estimate, although a legitimate method for estimating snow day costs as of December of 1986, is not a legitimate method for determining such costs at time of trial. The actual snow day records would show the costs and such records are not in evidence. Therefore, there is no allowance for snow day show-up costs. The claim will be reduced by \$11,398.00.

7. The claim estimates an additional 3,685 hours to complete the project over and above the number of hours that would have been required had there been no delays or work disruptions. Those hours are based upon an inefficiency calculation for jump-around work in January and February, 1986; a learning curve for new hires caused by disruption of work between February 1, 1986, and April 7, 1986; extra hours required because of cold weather work in late November and December of 1986 and early January, 1987; and remobilization of perimeter work. The total cost of this item is \$125,120.00.

The backup support for this part of the claim is shown at Exhibit 16 to Exhibit 6. That exhibit does not break down the costs by the type of delay. For example, there is no breakdown of "extra hours required because of cold weather work." There is also no breakdown of hours required as a result of "remobilization of perimeter work." Instead, there is a total dollar value based upon the estimated number of hours impacted by

the delays and using the NECA "Guide to Electrical Contractors, Claim Management Volume II." This calculation of the total number of hours is shown on page 11 of Exhibit 6.

Once again, in December of 1986, this calculation may have been reasonable. It made certain assumptions and projections. It used the NECA guideline for inefficiency calculations. However, the actual company records should show what hours were incurred in December of 1986 and January of 1987 as a result of cold weather work. The actual company records should also show the hours incurred for remobilization of perimeter work. With those hourly records and a specific breakdown of the estimate of "inefficiency hours," the Court could determine the extra hours caused by the delay and disruption. Without such actual records, the Court, as the trier of fact, is required to speculate with regard to actual hours incurred and estimated hours resulting from inefficiencies using the NECA guide. There is no basis for such speculation and the Court shall not engage in the speculation. Therefore, the claim shall be reduced by \$125,120.00.

8. Period 4 - This claim is with regard to camera, pole and base delay. It is based on actual expenses plus overhead and profit and is supported by the record with regard to the fact that camera bases and poles were delivered late, requiring the debtor to engage in other work and expend additional hours of machine operator time. \$51,474.00 is allowed.

9. Period 4 - Camera base and pole delay. This claim is also directly related to the delay in delivering the camera bases and the poles. CECO was required to install cable and then, instead of immediately hooking it up to the bases and the poles, was required to coil the cable and wait; uncoil the cable and do the installation. It also required extra work around each of seventy-six bases including excavating, repairing and connecting conduits out of sequence. The calculation is supported by the evidence and shall be allowed in the amount of \$21,736.00.

10. Period 5 and 6 - Extended overhead duration, 2 days at \$2,815.84 per pay = \$5,632.00

This claim results from being required to remobilize in the South gate area after beginning the project and then being forced to leave until another subcontractor completed certain work. The same problem occurred in the northeast perimeter. Two days of overhead are requested and supported by the testimony evidence of Steve Trutna. Therefore, \$5,632.00 is allowed.

11. Period 5 - Direct costs for extra work at South gate area for remobilization = \$1,602.00.

This is justified by the evidence that workers actually did perform the labor after being remobilized. Therefore, \$1,602.00 will be allowed.

12. Period 6 - Direct costs for extra work at Zone 2, Northeast perimeter area = \$2,320.00.

This is also justified by the evidence in that specific labor was required, both out of sequence and in addition to what should have been incurred initially.

13. Period 7 - for cleaning and unplugging of G.F.E. conduits and manholes. Also lost time due to defective conduit design at CSC = \$6,336.00

The actual work was required and, although the contract requires CECO to be familiar with the work, both below and above ground, it does permit an adjustment for unexpected problems under ground. Therefore, the amount of \$6,336.00 is allowed.

Based upon the above, the Court finds as a summary the total of all costs actually incurred are as follows:

1.	Zero
2.	\$ 27,786.00
3.	Zero
4.	\$ 2,603.00
5.	\$ 3,290.00
6.	Zero
7.	Zero
8.	\$ 51,474.00
9.	\$ 21,736.00
10.	\$ 5,632.00
11.	\$ 1,602.00
12.	\$ 2,320.00
13.	<u>\$ 6,336.00</u>
TOTAL AMOUNT OF INCREASED COSTS PROVED	\$122,779.00

f) The Cause of the Delays and Disruptions

The parties have agreed and the evidence supports the agreement that the ultimate cause of all of the delays and disruption was action or orders by the Air Force. The Air Force interfered, on a regular basis, with the scheduling of work by CECO. The Air Force required CECO to remove certain work that had been performed and thereby caused the work to be done twice. The Air Force ordered the work stopped for forty-two days between February and April, 1986, because of schedule conflicts with other subcontractors. The Air Force failed to provide poles and bases or to award ISYS the contract to provide such equipment in time for installation to occur pursuant to the CECO schedule.

The Air Force delayed the start of the project by failing to have certain trenching and site preparation work completed by October 1, 1985. All of the claims listed in Exhibit 43 and Exhibit 6, the April and December claims submitted by CECO, were ultimately caused by the Air Force.

However, CECO was not in privity of contract with the Air Force. CECO had a contract with CMC/ISYS. That contract prohibited CECO from taking orders from anyone other than CMC/ISYS. See Exhibit C attached to Exhibit 5, the contract, at paragraph 2.3.

Both on direct and cross examination, Mr. Olson, the expert witness for CECO, testified that ISYS, as contractor, had a duty to the subcontractor, CECO, to coordinate the work and to make certain that CECO was permitted to begin and complete its work without interruptions by the Air Force or any other entity. If ISYS failed to properly coordinate the work, any additional costs incurred should be allocated to ISYS.

For example, he testified that ISYS could have dealt with trenching problems caused by another contractor simply by better communication with the Air Force and the other contractor, so that schedules prepared and submitted by CECO would not have to be interrupted. In addition, concerning the delivery of poles, which all parties agree originally were to be supplied by the Air Force and which were not supplied on a timely basis, ISYS should have dealt much more strongly with the Government and insisted upon timely delivery so that schedules could be met. It is his opinion that ISYS had a duty to assure CECO that equipment which was to be supplied by the Government was timely delivered. This is simply a matter of coordination.

His testimony is based upon the expected standard of performance regarding completion of a task in the construction industry. His undisputed testimony is that the task of a contractor includes coordination of subcontractors and failure to coordinate schedules with the owner/Government and other contractors and subcontractors was a failure to perform the duty of ISYS under the contract.

ISYS was generally responsible for coordination of the subcontractor (CECO) work schedules with other schedules proposed by the Air Force or other subcontractors. Although there is nothing specific in the contract which requires such coordination, there is nothing in the contract which would permit CECO to deal directly with the Air Force with regard to scheduling. The evidence is that CECO was required by ISYS to present "look ahead" schedules of work for at least six weeks into the future. There were meetings on a regular basis between ISYS and representatives of the Air Force with regard to coordination of activities on the site. Although representatives

of CECO attended most, if not all of such meetings, CECO, pursuant to the contract, has no contractual rights with regard to dealing with the Air Force or other subcontractors concerning scheduling.

A specific example of ISYS's responsibility for coordination which, by its failure, caused damages, is that section of the damage claim concerning the work performed by CECO to clean out Government-furnished duct banks and pole wires through such duct bank. In the Statement of Work, Exhibit C to the contract, Exhibit 5, at paragraph 3.2.5, it is clear that included in the Government-furnished equipment and conditions is the function "pole wires in existing duct banks shall be provided by base support." "Base Support" means Air Force.

That work was not performed by base support. When it was assigned to CECO, it became apparent that the duct banks were clogged and cleaning them required labor to be incurred. In addition, after they were cleaned, CECO was required to pull the wires. The work was done out of sequence and caused damages as referred to above.

As another example of the obligation of ISYS to coordinate the work with the owner and other subcontractors, refer to the Statement of Work, Exhibit C of the contract, Exhibit 5, at paragraph 4.2.2. That paragraph requires CECO to provide weekly schedules to ISYS site management detailing staffing and work projects. The schedules must include a six-week look ahead and be at a particular level of detail. That paragraph specifically refers to the subcontractor cost schedule at Attachment C to the Statement of Work and the proposed subcontractor funding schedule at Attachment D.

It is apparent from a review of the Statement of Work and the particular paragraphs referred to above, that the subcontractor had certain obligations to inform ISYS in great detail of its proposed work schedule, staffing requirements and funding requirements. It did so. ISYS, on the other hand, had an unstated but obvious duty to perform the coordination necessary to permit CECO to complete its work on a timely basis pursuant to its proposed schedule.

Therefore, although the Air Force is the direct cause of the delays and disruptions of CECO's work, contractually ISYS is the responsible party. It had the duty to approve the CECO work schedules and coordinate those work schedules with the owner, the Air Force. By its failure to so coordinate, the delays and disruptions occurred and the damages referred to above and detailed in Exhibits 43 and 6 were incurred by CECO.

The Court concludes that ISYS had a duty to coordinate the work with the owner and other subcontractors to the extent

necessary to enable CECO to complete its requirements under the contract on a timely basis. The failure to so coordinate is a direct cause of the damages incurred and CECO has a claim against ISYS for such damages.

g) Equitable Adjustment

This lawsuit was filed by CECO to obtain a judgment for damages incurred by CECO as a result of changes in the work within the general scope of the contract caused by ISYS for which, pursuant to the contract, CECO had a right to an equitable adjustment of the contractual terms and the payments due under the contract. The term "equitable adjustment" is not defined in the contract. It is a term resulting from the historical reality of Government contracts. It is based upon the concept that the Government should have the right to order changes to the contract work on payment of additional compensation to the contractor. See Ralph C. Nash, Jr., Government Contract Changes 2-2 (2d ed. 1989). The contract between ISYS and CECO is with regard to work on a Government project and is a subcontract to a contract between ISYS and an agency of the United States Government, the Department of the Air Force.

This lawsuit was brought pursuant to the "changes" clause of the contract, Exhibit A, general terms and conditions, to Exhibit 5, the contract, at paragraph G-3. To determine whether the "changes" clause is applicable, it is necessary also to consider the facts of the case in light of the "suspension of work" clause, paragraph G-15 of Exhibit A to Exhibit 5, and the "disputes" clause, paragraph G-6 to Exhibit A of Exhibit 5. The "changes" clause has been referred to and quoted in total earlier in this opinion. It provides generally that the contractor has the right to order changes, in the specifications, the method or manner of performance of work, in the contractor-furnished facilities, equipment, materials or services, or in directing acceleration in the performance of work. Such changes are to be incorporated in written change orders, but the subcontractor is permitted to proceed based upon oral direction of the contractor.

In response to such an order or change, the subcontractor, if such change causes an increase in the contractor's cost or the time required for performance of the work, is entitled to an "equitable adjustment."

There are certain notice requirements which must be complied with. This Court has found that CECO, when receiving the orders or directions from ISYS changing the work or the time for performance, did provide sufficient notice to ISYS that increased costs or time would be incurred and, therefore, CECO has complied with the requirements of the "changes" clause.

ISYS suggests that some of the changes actually should be dealt with under the "suspension of work" clause, paragraph G-15. That clause permits the contractor to suspend, delay or interrupt all or any part of the work for such period of time as it may determine to be appropriate. In addition, that clause provides at sub-paragraph (b)

if the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed or interrupted by an act of the contractor in the administration of this subcontract, an adjustment shall be made for any increase in the cost of performance of this subcontract (excluding profit) necessarily caused by such unreasonable suspension, delay or interruption and the subcontract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent (1) that performance would have been so suspended, delayed or interrupted by any other cause, including the fault or negligence of the subcontractor or (2) for which an equitable adjustment is provided for or excluded under any other provision of this contract. (emphasis added)

The clause further provides that no claim will be allowed under the clause without specific writings from the subcontractor to the contractor making such claim on a timely basis.

That portion of the claim which might be covered by the "suspension of work" clause is the delay in February of 1986 through a date in April of 1986 when CECO was prohibited from proceeding according to its work schedule because of work by other subcontractors. Immediately upon being ordered to stop work on that part of the project, CECO did provide both oral and written notice to ISYS that costs would be incurred. Therefore, the Court finds that the notice provision of the suspension of work clause was complied with by CECO.

The Court finds that the "suspension of work" clause is not applicable under the circumstances of this case. Although there was a delay of approximately forty-two days which might be considered a suspension of work under the clause, the clause does not give CECO rights for "an adjustment" under that clause unless the suspension or delay is for an unreasonable period of time. No evidence was presented on the issue of the reasonableness or unreasonableness of the period of time. Therefore, the Court finds that any adjustment should be deemed an equitable adjustment under the "changes" clause, rather than "an adjustment" under the suspension of work clause. The significance of such a decision appears to this Court to be that

profit is included in the equitable adjustment, whereas profit is not included in the adjustment which could be allowed under the "suspension of work" clause.

Finally, the "disputes" clause, paragraph G-6, must be considered. That clause purports to subject the subcontract to the Contract Disputes Act of 1978 (P.L. 95-563), (the Act). The "disputes" clause at sub-paragraph (e) provides that a subcontractor must certify any claim over \$100,000.00 and submit it to the contractor and the contractor must decide the claim within sixty days or notify the subcontractor of the date when the decision will be made.

Paragraph (f) provides "the CONTRACTOR'S decision shall be final unless the SUBCONTRACTOR appeals or files a suit as provided in the Act."

By a prior opinion in this same adversary proceeding reported at Matter of Commonwealth Elec. Co., 118 Bankr. 720, 729 - 30 (Bankr. D. Neb. 1990), this Court found that the "disputes" clause, which purported to make this subcontract subject to the Act, was ineffective to bind the subcontractor because the subcontractor had no rights under the Act. In that opinion, this Court found that CECO "may bring a direct action against ISYS for its claim." The decision was appealed, but eventually settled with the appeal dismissed.

Notwithstanding the specific language in the "disputes" clause at sub-paragraph f, that the contractor's decision shall be final unless the subcontractor appeals or files suit as provided in the Act, this Court finds that the Act does not apply and, therefore, CECO could not appeal the contractor's decision or bring a suit as provided for in the Act. CECO has the right to bring a complaint against ISYS requesting an equitable adjustment for the increased costs incurred as a result of the changes caused by ISYS. This is not a new holding, but is a reaffirmation of the decision in the previously reported opinion from this case. That opinion was a final order which was not reversed upon appeal.

CECO timely submitted notice of the potential costs or increased time for completion each and every time there was a delay or a disruption. CECO submitted two detailed claims to ISYS. Either no decision was rendered on the claim by ISYS or the claim was denied by virtue of the inaction by ISYS and refusal to pay. CECO, having no remedy under the Act, has a right to bring the matter before a court of competent jurisdiction for determination of its rights under the contract. It has done so in this case and the Court finds that an equitable adjustment should be awarded in the amounts referred to above.

Conclusions of Law

The proper measure of an equitable adjustment is the reasonable cost of the change. Bruce Const. Corp. v. United States, 324 F.2d 516, 518 (Ct. Cl. 1963).

CECO has a right under the equitable adjustment theory to overhead and profit as well as direct costs incurred by CECO as a result of the change in the method and manner of performance. Ralph C. Nash, Jr., Government Contract Changes 16-17 (2d ed. 1989).

Colorado law applies to the interpretation of this contract and the facts surrounding such interpretation. Under Colorado law, the general measure of damages for breach of contract cases is that amount which places a non-defaulting party in the same position he would have been in had the breach not occurred. Great Western Sugar Co. v. Pennant Prod., Inc., 748 P.2d 1359 (Colo. App. 1987). Uncertainty in determining the precise amount of damage does not prevent a damage award. Overland Dev. Co. v. Marston Slopes Dev. Co., 773 P.2d 1112 (Colo. App. 1989). As this Court found in the first trial, it finds once again as a matter of Colorado law that it is the obligation of a party seeking damages to provide a reasonable basis for computation of such damages.

Under Colorado law, which the parties stipulate is applicable in this case, ISYS is required to provide a "reasonable basis for computation of its damages and the best evidence obtainable under the circumstances of the case which will enable the trier of fact to arrive at a fairly approximate estimation of the loss." Tull v. Gundersons, Inc., 709 P.2d 940, 945 (Colo. 1985). Damages which are uncertain, conjectural or speculative cannot be made the basis of a recovery. Id.; Peterson v. Colorado Potato Flake & Mfg. Co., 164 Colo. 304, 435 P.2d 237 (1967); Donahue v. Pikes Peak Auto Co., 150 Colo. 281, 372 P.2d 443 (1962). The general rule is that the evidence must be sufficient to establish the damages with at least a reasonable degree of certainty. Morrison v. Bradley, 655 P.2d 385 (Colo. 1982).

Commonwealth, supra, at 725.

CECO has provided a reasonable basis for determining damages for some of the portions of the claim. CECO has provided written documentation of actual costs incurred, plus testimony of witnesses who were involved in the project at the time the costs were incurred. Both fact witnesses and an expert witness testified to the use of NECA published guidelines with regard to estimates of inefficiency caused by delays and disruptions. Use

of such guidelines constitutes a reasonable basis for determining some damages.

However, CECO has failed to present the best evidence of actual damages incurred on some of the items of the claim. For example, since the project is complete, and since CECO prepared and kept in the ordinary course of its business all time records, it should have in its records and should be able to present to the Court the actual costs incurred for certain labor expenditures in contrast to the estimates that were included in the claim. As a further example of the failure of CECO to provide adequate evidence, the factual findings above show that the plaintiff had or should have had available to it the records of actual snow days and the actual "showup" costs incurred as a result of such snow days. No such evidence was presented and, therefore, the estimate of labor costs incurred by virtue of the snow days "show up" labor rates would require the Court to speculate based upon estimates that cannot be substantiated.

In conclusion, CECO has presented sufficient evidence that changes were ordered which resulted in disruptions and delays in performance of the work and which resulted in additional costs or time for performance being incurred. CECO has presented a reasonable basis for determination of such costs. ISYS is responsible under the contract for the delays and disruptions and changes. CECO has the right to proceed against ISYS for an equitable adjustment of the contract amount.

Judgment shall be entered in favor of CECO and against ISYS in the amount of \$122,779.00 plus interest at 8% per annum from August 7, 1987, the judgment date. The federal judgment rate shall apply thereafter. Separate judgment entry shall be filed.

DATED: June 30, 1992.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies to:

Edward Tricker, Attorney, 1500 American Charter Center, Lincoln, NE 68508-2010

Wm. Hadley, Attorney, 8805 Indian Hills Dr., Suite 200, Omaha, NE 68114-4070

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
COMMONWEALTH ELECTRIC COMPANY,)	CASE NO. BK87-02457
)	
DEBTOR)	A88-0286
)	
COMMONWEALTH ELECTRIC COMPANY,)	
a Corporation operating as)	
Debtor-in-Possession,)	
)	CH. 11
Plaintiff)	
vs.)	
)	
ISYS SECURITY SYSTEMS, INC.,)	
a Corporation,)	
)	
Defendant)	

JUDGMENT

Judgment is entered in favor of plaintiff and against defendant in the amount of \$122,779.00 plus interest at 8% per annum from August 8, 1987, to this date and at the federal judgment rate thereafter. Each party shall bear its own costs.

See memorandum filed this date.

DATED: June 30, 1992.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies to:

Edward Tricker, Attorney, 1500 American Charter Center, Lincoln,
NE 68508-2010

Wm. Hadley, Attorney, 8805 Indian Hills Dr., Suite 200, Omaha, NE
68114-4070