

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Idela Construction Company ) ASBCA No. 45070  
 )  
Under Contract No. DACA63-88-C-0105 )

APPEARANCE FOR THE APPELLANT: Theodore M. Bailey, Esq.  
San Antonio, TX

APPEARANCES FOR THE GOVERNMENT: Frank Carr, Esq.  
Engineer Chief Trial Attorney  
David A. Tomlinson, Esq.  
Engineer Trial Attorney  
U.S. Army Engineer District  
Fort Worth, TX

OPINION BY ADMINISTRATIVE JUDGE KIENLEN

INTRODUCTION

The Government claims that the appellant, without excuse or interference by the Government, was 109 days late in completing a sewer line; and, that it is entitled to liquidated damages, at the rate of \$160 per day, in the amount of \$17,440. The appellant contends that the Government caused or contributed to the delay, and, in any event, the liquidated damages are an illegal penalty. The appellant seeks the return of the \$17,440 in liquidated damages. In addition, the appellant claims home office and job site overhead compensation in the amount of \$82,635. This appeal does not involve any claim for direct costs arising out of these circumstances. Only entitlement was tried.

FINDINGS OF FACT

*I. Overview of the Contract and Personnel*

On 21 July 1988, the U. S. Army Corps of Engineers awarded a \$349,999.91 contract to Idela Construction Company for the installation of a sewer line at Lackland Air Force Base, San Antonio, Texas (R4, tab 3). The sewer line was 8,880 feet long, from a point on the drawing designated as station 92+33 in the north to station 3+53 in the south. A station number is a unit of measure, indicating the distance in feet from a fixed point on the drawing. Thus, station 92+33 signifies 9,233 linear feet from a fixed point, while station 3+53 signifies 353 linear feet from the same fixed point. (R4, tab 54; ex. G-4)

The contract required a pump station and a metering station, at the south end of the sewer line (R4, tab 9A; ex. G-4). The pump station is a wet well; it is made of concrete with a submersible electric pump at the bottom (R4, tabs 2B, 9A, 9B; Derrick, tr. 3/219). The metering station is a dry vault; it is a concrete structure with controls and valves for regulating and recording the outflow of sewage (Derrick, tr. 3/218-19). The contract required work to begin within 10 days, and to be completed within 150 days, of receipt of the notice to proceed; but, prohibited work from beginning before the Quality Control (QC) and Safety plans were approved (R4, tab 5, Special Clause Nos.1, 3(c)).

Idela's general manager was Mr. Richard Reising. He was also Idela's general manager on a sewer line project for the Air Force, also on Lackland Air Force Base. (Reising, tr. 3/7-8) The adjacent Air Force project was larger, started before, and finished after, this contract (Allison, tr. 2/200-01, 212, Reising, tr. 3/8).

Idela's construction manager was Mr. Robert Allison. He was also the owner and manager of Bradco, Idela's principal subcontractor. (Reising, tr. 3/38-39, Allison, tr. 2/79, 85-86) Beginning in November 1988, he came to the job site five or six times a day to oversee the work. He had little contact with the Government inspectors. (Allison, tr. 2/205-07) In March 1989 Mr. Allison worked part-time in Houston on another job. He left Idela's payroll a month later. (Allison, tr. 2/248) At that time Mr. Allison took his company, including most of its equipment and some of its employees, to Houston with him. Mr. Allison left some equipment and some people on the project. Idela had to bring in its own equipment. (Allison, tr. 2/247-52)

When it bid the project, the appellant planned to use a backhoe to excavate the sewer line, put sand on the bottom, lay the pipe, put another layer of sand over the top, and bring up the filler in lifts of six to 12 inches until level (Allison, tr. 2/95-96). The unrebutted testimony of Mr. Allison was that only one loader and one backhoe were needed (Allison, tr. 2/97). Idela and Bradco had three of each, and three crews, on the Air Force project. Idela planned to move one of each over to this Corps of Engineers project, because work on the Air Force project was slower than planned. Additional labor was readily available in the San Antonio area. (Allison, tr. 2/97-99, 211) A sewer line crew usually included a foreman, a superintendent, an operator for the backhoe and one for the loader, a couple of pipelayers, and two to four laborers (Allison, tr. 2/98, 211).

Idela planned to begin construction with the road boring and then the excavation and installation of the sewer pipe. Idela planned to construct the wet well and dry vault simultaneously with the excavation and installation of the sewer pipe. After the sewer pipe was completed, Idela planned to spend about a week hooking up the wet well and dry vault to the sewer pipe, thus completing the installation of the sewer line. Idela then planned for the final turf work to be done a month or so after the sewer line itself was completed. (Allison, tr. 2/99, 216; R4, tabs 78, 79) The work was performed more or less according to this

schedule, except for several delays and for doing turf work before hooking up the wet well and dry vault, and before installing the last segment of the sewer line.

The Government's project engineer was Captain Derrick. His duties consisted of answering correspondence, processing submittals, reviewing daily logs, and meeting with the contractor (Derrick, tr. 3/183). His contact on the job was Idela's quality control inspector. He testified that he visited the job site, for at least five minutes, two or three times a week. The Government's Daily Log (GDL), which provides for listing visitors to the job site, shows Captain Derrick there, but only on seven occasions: 3 November 1988, 3, 15, and 27 February, 17 March, 21 April, and 1 May 1989 (R4, tabs 86-94; ex. A-7). Captain Derrick had no recollection of seeing Mr. Allison at the job site (Derrick, tr. 3/184-85).

Mr. Moomey was usually the Government's quality assurance representative (QAR). He inspected work in progress. (Moomey, tr. 1/35-36) Mr. Moomey testified that he was at the site four to six hours a day when he was working (Moomey, tr. 3/103). His primary contact was also Idela's quality control inspector. The GDLs reflect that Mr. Moomey did not work at the job site on 11-30 November, 27 December 1988, 9 January, 23-31 January, 1-26 February, 1 March, 4 March, 2 May, 2 June, 12-16 June, 28 June, 5 July, and 11-12 July 1989 (R4, tabs 86-94; ex. A-7). Mr. Moomey recalled seeing Mr. Allison at the job site only on a "monthly basis to go over the pay requests" (Moomey, tr. 3/103-04).

The Government argues that because Captain Derrick and Mr. Moomey had no recollection of seeing Mr. Allison regularly at the job site, Mr. Allison really was not there as often as he said he was and thus his testimony about events that occurred at the job site was not credible. We are persuaded otherwise. Based on Mr. Allison's demeanor during his testimony, as observed by the author as trial judge, and the record which shows that Captain Derrick was seldom at the job site and that Mr. Moomey, except for December, was often absent from the job site during the time when Mr. Allison was the construction manager, we find that Mr. Allison routinely and daily oversaw progress of the work until March 1989, and we find that Mr. Allison was a credible witness.

Among the standard clauses included in the contract were the following: SCHEDULES FOR CONSTRUCTION CONTRACTS (APR 1984), located at FAR 52.236-15; MATERIAL AND WORKMANSHIP (APR 1984), located at FAR 52.236-5; PROTECTION OF EXISTING VEGETATION, STRUCTURES, EQUIPMENT, UTILITIES, AND IMPROVEMENTS (APR 1984) located at FAR 52.236-9; CHANGES (AUG 1987) located at FAR 52.243-4; SUSPENSION OF WORK (APR 1984) located at FAR 52.212-12; DISPUTES (APR 1984) located at FAR 52.233-1; DIFFERING SITE CONDITIONS (APR 1984) located at FAR 52.236-2; DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) located at FAR 52.249-10 (R4, tab 3).

The contract did not have a special clause governing the time frame for approving all submittals. However, Special Clause No. 8 did address review and approval times for shop drawings. That clause reads in relevant part:

8. SHOP DRAWINGS (CESWF-CD)

(a) Shop drawings shall be submitted in accordance with the procedures listed below . . . .

(b) The following classifications of shop drawings are designated Category 1 and will be given priority in review . .

..

(1) Extensions of design such as (a) structural steel members and connections not shown on the drawings, (b) steel joists other than standard J-, H-, LJ-, and LH-series, and (c) any items for which the drawings or specifications require submittal of design calculations.

(2) Deviations and/or departures from the contract drawings when deemed necessary by the Contractor.

(R4, tab 5) Elsewhere the contract provided:

20. Schedule for Submittals: (CESWF-CO)

A schedule shall be submitted to the Contracting Officer within 21 calendar days after the date of receipt of the notice to proceed . . . . [T]he schedule shall reflect the following information for each item:

....

(e) Designation of shop drawing category (Category I or II).

(f) The date that approval is needed by the Contractor. (A minimum of 60 days or more should be allowed for Government Review of Category 1 shop drawings.)]

(R4, tab 5) The contract also provided for a pre-construction conference:

3. *PRECONSTRUCTION CONFERENCES:*

Approximately one week after award of the construction contract and prior to the start of any construction work an authorized representative of the Contracting Officer will schedule and conduct a preconstruction conference. . . .

. . . .

(b) The following is a list of items for discussion during this conference. This is not considered to be a complete listing.

(1) Authority of the Area/Resident Engineer and organization of the Area/Resident office.

(2) Contractor's Safety Program.

(3) Contractor's Quality Control Plan.

(4) Contractor's Environmental Protection Plan.

NOTE: The Contractor will submit the plans for items (2), (3), and (4) prior to the preconstruction conference.

. . . .

(c) If the Contractor has submitted his Accident Prevention (Safety) Plan, Quality Control Plan, and Environmental Protection Plan for review prior to this meeting, these may be approved in toto or approved with comments at the conference. Construction work will not proceed until after this meeting has been held, these three plans noted above as items (2), (3), and (4) have been approved and the Notice to Proceed has been received and acknowledged by the Contractor.

(R4, tab 5)

## *II. Activities Prior to Approval of Quality Control and Safety Plans*

Nearly 30 days after award, the Government held a pre-construction conference on 19 August 1988. The minutes of the conference were signed by Mr. Allison for Idela and by Captain Derrick for the Government. As of the date of the conference the Government had not issued the notice to proceed. The date of 28 September 1988 was subsequently

inserted in the minutes of the conference as the date the notice to proceed was issued. The conference was called to orient the contractor to local procedures and to discuss items of major importance relating to the contract. Among the items covered included a discussion of liquidated damages, which were set at \$160 per day for failure to complete the contract work within the contract time and at \$53 per day for delayed establishment of the turf. The conference memo also notes that a progress schedule was due five days after starting the work. The contract did not require a critical path analysis for the progress schedule; however, the schedule was to show a breakdown of the principal features of the work by bar graphs. In particular, ENG Form 2454, Construction Progress Chart, was discussed because the contractor was not familiar with that form. (R4, tab 4B)

Four days later, on 23 August 1988, the Government held a Mutual Understanding Conference to discuss Quality Control, Environmental, and Safety issues. Those present for the contractor included Mr. Allison and Mr. Hazelwood, Idela's first quality control supervisor. Those from the Government included Captain Derrick. Mr. Moomey was not listed as among those present. (AR4, tab 7)

The following week, on 29 August 1988, the appellant submitted nine material submittals, including a material submittal for the PVC pipe (AR4, tab 8, Transmittal No. 1). These material submittals were recorded in the Government's Submittal Register and assigned an approval suspense date of 24 October 1988, with a notation that the material was needed by 1 February 1989. Also on 29 August 1988 the appellant submitted a material submittal for the sewer pump (R4, tab 11, Transmittal No. 2).<sup>\*</sup> This material submittal was recorded in the Government's Submittal Register and assigned an approval suspense date of 22 December 1988, with a notation that the material was needed by 1 February 1989 (AR4, tab 8). The record contains no information explaining how the approval and material needed dates, including those in 1989, were established. The first Government action on these material submittals was 24 October 1988.

Contemporaneously with the initial material submittals, the appellant submitted its QC and Safety plans on or before 29 August 1988 (R4, tabs 32, 33). The contract did not provide a time limit for the review of these plans or for any of the material submittals. Mr. Moomey testified that it would take no more than four hours to review the QC plan (Moomey, tr. 1/39-41) and no more than eight hours to review the Safety plan (Moomey, tr. 1/71). We find that one week was a reasonable time for the Government to complete the review and processing of both of these plans.

---

\* Although this and other submittals are identified in the Rule 4 index as "shop drawing transmittals," that identification is erroneous. The transmittals sheet indicates that "brochures," not drawings, are being submitted. Further, the transmittals are designated in the register as "material," not "drawing," submittals.

On 29 August 1988 the appellant also submitted a material submittal for concrete. The Government assigned an approval suspense date of 30 September 1988, with the notation that the material was needed by 1 November 1988 (Transmittal No. 3). On 30 August 1988 the appellant submitted a material submittal for concrete pipe for the wet well. The Government assigned an approval suspense date of 30 September 1988, with a notation that the material was needed by 1 November 1988 (Transmittal No. 4). (AR4, tab 8)

On 22 September 1988 the appellant submitted nine more material submittals, including submittals for submersible motors, impeller, pump control, paint, flange adapters, and electrical controls. This transmittal was stamped "received" on 23 September 1988. (R4, tab 13, Transmittal No. 5) The Government recorded it in the register with a submittal date of 15 October 1988 and assigned a suspense approval date of 30 November 1988, with a notation that the material was needed by 15 December 1988 (AR4, tab 8). Initial Government action was taken on this submittal on 10 November 1988 (R4, tab 13; AR4, tab 8).

By letter of 23 September 1988 concerning the QC plan, the Government wrote to Idela as follows:

Reference your letter 22 August 1988, subject as above.

Submit sample of daily report to be used on this contract. Add statement to delegate quality control with the authority to stop any phase of work with deficiencies in workmanship, material, and/or safety compliance.

Referring to paragraph 6.0.C of your Quality Control Plan, all test results from your approved testing lab must be sent directly to the Contracting officer as per Special Clauses [clause numbers omitted].

If you have any questions concerning this matter, you should contact Cpt. Derrick, Lackland Project Office. (512) 675-7712

(R4, tab 34) Appellant thought, reasonably so, that the plan was approved subject to compliance with the Government's instructions and did not understand that it was required to resubmit the plan (Allison, tr. 2/88-89, Reising, tr. 3/12-13). Mr. Moomey acknowledged on cross examination that the letter of 23 September 1988 could have been interpreted as not requiring resubmission (Moomey, tr. 1/49). While the plan was not formally approved at that time, it was later given formal approval after the appellant

implemented those instructions. (*Infra*) The Government had no other written or verbal contact with the appellant concerning the QC plan until 21 October 1988. (*Infra*)

Meanwhile, the Government had issued the notice to proceed on 12 September 1988. It was mis-routed and not received by the appellant until 28 September 1988. (R4, tabs 4A, 4B) After receipt of the notice to proceed, work was to begin in ten days and be completed in 150 days, *i.e.*, 25 February 1989. The next day, 29 September 1988, both the appellant and the Government began recording activity on their daily logs, *i.e.* the GDL and the Contractor Daily Log (CDL) (R4, tab 84, GDL/CDL). Idela's log is the daily report required by its QC plan and was submitted to the Government at the time.

On 4 October 1988 there was a meeting between the Government and Idela concerning the excavation requirements for the metering vault and the pump station. On 12 October 1988 the Government sent a letter to Idela concerning those requirements. The letter read as follows:

Reference meeting on 4 October 1988 between CPT Bob Derrick and Messrs. Mike Moomey, Bob Allison and Joe Hazelwood, and the memorandum of record of this meeting.

You are directed to comply with the note on section 3/S-1/S-1. As the note states, both the pipe and metering vault and the pump station must be excavated to the shown lines and backfilled with nonexpansive fill.

If you have any questions, please contact CPT Bob Derrick, (512) 675-7712, Lackland Project Office.

The letter was signed by Mr. Keith Allen, the contracting officer's authorized representative (R4, tab 18). Further discussions ensued (R4, tabs 19, 20, 21).

From 29 September through 19 October 1988, the contractor's inspector had written "NONE" throughout the CDLs. On 20 October 1988 the CDL contains the following notation in the space for verbal instructions:

Update safety sign – Moomey – Bought supplies – 20 Oct 88  
Schedule Prep. Insp. – Moomey – Cannot do until method of  
const. is decided per appt w/Moomey @ 1:00 20 Oct 88

(R4, tabs 84, 85 at reports #1 through #22)

By letter of 5 October 1988 the contractor submitted its "Bore Program," consisting of a one page description of the bore process (R4, tab 58). The Government took 22 days

to approve that one page boring plan. The approval was in a letter dated 28 October 1988 (R4, tab 59).

On 14 October 1988 Idela advised the Government that a new quality control inspector was being appointed. The new inspector was John Sawyer. (AR4, tab 11) Mr. Sawyer began his duties on Tuesday, 18 October 1988. Two days later, on Thursday, 20 October 1988, Mr. Sawyer brought supplies and gave Mr. Moomey notice to schedule the preparatory inspection. Under the contract the Government was entitled to 72 hours notice of the inspection (R4, tab 5, SC 18(c)(1)). We find that Mr. Sawyer sought to schedule the preparatory inspection on Monday, 24 October 1988, so that work could begin at the site.

On 21 October 1988, the GDL reflects that Mr. Moomey informed the contractor's inspector that the Safety plan and the QC plan "must be resubmitted as they were both were [sic] turned down." Further, Mr. Moomey said that both "must be approved prior to starting work." This latter requirement was a specific provision in the contract (R4, tab 85, GDL 23). This information about the QC and Safety plans precluded the appellant from scheduling its preparatory inspection on 24 October 1988 and beginning work at the site. This was the first time that the contractor had been told to resubmit its QC plan; and, it was the first time it had heard anything about the Safety plan (Allison, tr. 2/88-89, 208, Reising, tr. 3/14, 44).

Captain Derrick thought a letter concerning the appellant's original Safety plan had also been sent to the appellant (Derrick, tr. 3/191). No file copy of such a letter was found; and, Mr. Moomey, who reviewed the QC and Safety plans, was unaware of any letter (Moomey, tr. 1/36, 72-73). We conclude that no letter was sent and that the appellant was not aware until 21 October 1988 that its Safety plan was being rejected.

Afterwards, the appellant found out from Government personnel what problems the Government had with the Safety plan (Reising, tr. 3/14). The appellant was given a copy of a previously approved plan and, using it as a guide, revised its Safety plan (Reising, tr. 3/14-25). On 27 October 1988, in a manner consistent with the verbal instructions it received, the appellant resubmitted its Safety plan. As to the QC plan, the appellant changed it to reflect the directions in the 23 September 1988 letter. This plan was also resubmitted on 27 October 1988. Because appellant could easily and promptly have resubmitted the QC plan with the delegation language, if it understood it was required to do so, we find that the misunderstanding about the resubmission of the QC plan was not the cause of contract delay. We find rather that the Government's failure to respond to the safety plan until 21 October 1988 was the cause of the delay with respect to the two plans insofar as the delay impacted the start of construction. (R4, tabs 38, 39)

Mr. Moomey testified that it would only take a few minutes to review the changes in the resubmitted QC plan (Moomey, tr. 1/54-55). As to the resubmitted Safety plan, he

admitted on cross examination that a technical review of the three page plan would take “quit a bit” less than eight hours (R4, tab 39; Moomey, tr. 1/70-76). Administrative processing needed only 24 hours (Derrick, tr. 3/202). We find that four days was a reasonable time to review the resubmitted plans. The appellant expected approval “most any day,” and anticipated starting work soon. (Reising, tr. 3/16-17, Allison, tr. 2/208)

The following day, 28 October 1988, the Government issued its formal letter setting forth deficiencies in the Safety plan. Those were the deficiencies which had been orally communicated to the appellant on and after 21 October 1988 and corrected in appellant’s re-submittal of 27 October 1988. (R4, tab 40)

Also by separate letter of 28 October 1988 the Government advised Idela that “Your boring plan submitted on 5 October 1988 is approved as submitted. If you have any questions concerning this matter, you should contact CPT. Bob Derrick, Lackland Project Office (512) 675-7712.” The letter was signed by Thomas L. Armstrong, the contracting officer’s authorized representative. (R4, tab 59)

From 21 October 1988 the CDLs did not reflect any activity until 27 October 1988, when the CDL contained the following notation in the space for verbal instructions:

Per telecon w/Moomey (C.O.E.) Pit for well area to be  
barricaded per 06.A.06 of Safety & Health Manual

(R4, tab 85) On or about Friday, 28 October 1988 the appellant ordered some PVC pipe for the job (Reising, tr. 3/52-54, 96-97, Allison, tr. 2/91-93; ex. A-3).

Again, no activity was recorded in the GDLs until 31 October 1988 (R4, tab 85). On that date, 31 October 1988, the parties met for a “preparatory inspection” on the specifications for excavation, grading, and the force main (sewer line), in anticipation of beginning work on 3 November 1988 (R4 tabs 7A, 7B, 45, §§ 02201, 02210, 02724). The inspection also covered safety issues. Mr. Moomey attended that meeting. (R4, tab 85, GDL 33; Moomey, tr. 1/80-81) The appellant raised safety and construction concerns about keeping the pipe bells (joints) exposed, as required by the contract, until the pipeline was finished and ready for the hydrostatic tests. The appellant noted that the open holes along the 8,880 feet of sewer pipe would be an attractive nuisance for children on the base, would present an unsightly appearance, and would be impossible to keep dry during the coming rainy season. The Government agreed that the appellant should cover the bells with dirt as the pipeline was laid and covered. At this point in time, appellant now planned to start work on 3 November 1988. (R4, tab 46, tab 85, GDL 33).

On 2 November 1988 the CDL reflected that 445 pieces of 12-inch PVC pipe, “4 GAL. LUB.” And “5 TBS LOB” were delivered to the job site. On 3 November 1988 the CDL reflected that a front end loader and an operator were on the site and that the PVC pipe

were re-stacked because they had been stacked too high and the QAR noted it as a safety concern. (R4, tab 86)

By letter of 4 November 1988 the appellant said that the Government's delay in approving submittals had delayed the start of work and sought the cooperation of the Government in expediting such reviews. The letter read as follows:

SUBMITTALS #1 & 2 DATED 29, AUGUST 1988 HAVE TAKEN UNTIL 24, OCTOBER 1988 TO BE REVIEWED. IN LIGHT THAT THESE ITEMS ARE NOTED VARIANCES AND MUST BE APPROVED RPRIOR [SIC] TO WORK COMMENCING, THIS LASP [SIC] IN TIMELY REVIEW HAS PREVENTED US FROM COMMENCING WORK ON THIS PHASE OF THE PROJECT. THE REMAINING FACETS OF WORK ARE BORING, WHICH HAS BEEN UNDER REVIEW UNTIL 4, NOVEMBER 1988 FOR POSSIBLE DELETION AND THE CONSTRUCTION METHOD OF THE WET WELL PROPOSED BY IDELA IS STILL UNDER REVIEW. YOUR COOPERATION IN EXPEDITING REVIEWS ON THIS SHORT JOB IS REQUESTED SO THAT WE MAY COMPLETE THIS JOB IN A TIMELY MANNER.

THANK YOU FOR YOUR HELP IN THIS MATTER.

The letter was signed by Mr. Reising, Idela's general manager (R4, tabs 22, 61). Those submittals included material submittals for the PVC pipe.

The Government expressly approved the QC and Safety plans on 7 November 1988. The QC plan approval was expressed as an acceptance, and read as follows:

This is to acknowledge receipt of your Quality Control Program per requirements of Special Clause No. 18 for subject contract.

Your program as submitted is acceptable. If any changes are made in personnel during the period of construction, please advise me immediately of the name of the replacement together with his qualifications.

(R4, tab 42) The Safety plan approval was subject to two qualifications, and read as follows:

Reference your letter dated 27 October 1988, subject as above.

Your safety program is approved as submitted with the following comments:

Under paragraph 4.0G, if at any time throughout the life of this contract, your work force exceeds 10 employees, you must revise your safety program.

Under paragraph 4.0J, it must be understood each new employee coming to work on this contract will be given a safety indoctrination prior to his/her starting to work which will cover all aspects outlined in EM 395-1-1, paragraph 01.B.01 and 01.B.02.

If you have any questions concerning this matter, you should contact CPT Bob Derrick, Lackland Project Office, (512) 675-7712.

(R4, tab 43)

Mr. Reising testified that the only reason the appellant could not begin work prior to 7 November 1988 was the lack of approval of the QC and Safety plans (Reising, tr. 3/50). The PVC sewer pipe was readily available in the local San Antonio area (Allison, tr. 2/91-93, Reising, tr. 3/96-97; ex. A-3).

Mr. Moomey testified that he did not know of any reason why the appellant could not have gotten pipe-layers, laborers, and equipment operators during September, October, and November 1988. He also testified that he was not aware of any reason why the boring subcontractor could not have started earlier than 9 November 1988. (Moomey, tr. 1/83-84)

From 3 November through 7 November 1988 no activity was recorded on the CDLs. On 8 November 1988 the CDL recorded that five contractor personnel were on site and that a preparatory inspection for the boring work had been conducted. On the following day, 9 November 1988, excavation for the boring began. There were eight contractor personnel, a trackhoe, a boring machine, and a front end loader, on site. Also, 70 feet of 20-inch O.D. steel pipe was delivered to the site. (R4, tab 86)

Government counsel argues that the PVC pipe submittal was a shop drawing submittal, for which the Government was permitted, under Special Clause No. 8, to take over 60 days to review. The record does not support that argument. The submittal for the PVC pipe was submitted to the Government on the same date the appellant submitted its QC and Safety plans - 29 August 1988. The Government designated the PVC pipe submittal as a material submittal, rather than a shop drawing submittal, in the Government's Shop

Drawings and Materials Submittal Register. The register also reflects that the Government established the approval date as 24 October 1988 and the material needed date as 1 February 1989. The transmittal for the PVC pipe was returned to the contractor on 24 October 1988 along with the other initial 29 August 1988 submittals.

The PVC pipe submittal was resubmitted on 28 October 1988. The Government established the approval date as 7 November 1988 and the material needed date as 10 November 1989. This transmittal was returned to the appellant on 7 November 1988. The transmittal for the PVC pipe was resubmitted again on 9 November 1988. The Government established the approval date as 9 November 1989 and the material needed dated as 15 November 1989. The register does not reflect that the transmittal was ever returned to the appellant, although it showed that the submittal was approved. (AR4, tab 8) The record contains no information explaining how the approval and material needed dates, including those in 1989 (such as 10 November 1989), were established.

The record does not contain copies of the documents which were part of Transmittal No. 1. The parties have not pointed to any specific testimony concerning the PVC pipe submittal that was part of Transmittal No. 1. There is a letter in the file from the authorized representative of the contracting officer which references Transmittal or Submittal Nos. 1 and 2. The subject of the letter is "Timely Reviews," it is addressed to the appellant, and it states in relevant part:

Reference your letter dated 4 November 1988, subject as above.

It is not unusual for submittals which are variations to the contract to take 60 days for review. Submittal No. 1 took 56 days and Submittal No. 2 took 17 days with respect to the possible road boring deletion.

Request you proceed with your contract schedule until a modification is formally issued. . . .

(AR4, tab 23) The record contains Submittal No. 2. However, that submittal concerns sewer pumps, not road boring deletion as stated in the Government's letter. (R4, tab 11)

### *III. Discovery of the Telephone Cable*

On 8 November 1988 the appellant held its preparatory inspection for road borings (R4, tab 86, GDL 41; Moomey, tr. 1/68-69). The next day appellant submitted its construction progress chart (R4, tab 78) and began boring operations (Allison, tr. 2/216; R4, tab 86, GDL/CDL 42). The bore allowed the sewer line to pass beneath the road without destroying the pavement. Road boring was done first so there would be no delay in

laying the pipe. (Allison, tr. 2/99, 218) The finished bore pit was 50 feet long, 10 to 12 feet wide, and four or five feet deep (Allison, tr. 2/219-20).

On 11 November 1988, at 3:30 p.m., the road boring subcontractor hit a Southwestern (S.W.) Bell underground communications cable at station 28+34. The drawings showed the cable located between stations 29+00 and 30+00 (R4, tab 65). At 4:00 p.m. S.W. Bell arrived on the job site. At 4:30 p.m. Captain Perez and Lieutenant Colonel Topper arrived on the job site and reported that houses at the Medina Base Annex were without phone service. They left to find Captain Derrick, but did not return. Idela assisted S.W. Bell by uncovering the severed cable. S.W. Bell brought in a contractor to finish the hole and to repair the cable. The appellant left the job site at 7:30 p.m. (R4, tab 86, CDL 44). The appellant's CDL recorded the events of 11 November in the following words:

At station 28.00+34. Our boring machine encountered an unmarked conduit owned by the Gov't containing a 400 PR tele. Cable owned by S.W. Bell (time 3:30 p.m.). Comm. Lines had been marked by PFF. Rayle & none were shown in this area. At 4:00 p.m. S.W. Bell arrived on jobsite. Prints showed . . . cable at site not underground. SWB brought in crew & tech & supervisor & opened manhole shown on plans. Manhole is full of water & SWB began to pump it out. At 4:30. CPT. Perez & LTC. Topper arrived on jobsite and confirmed houses at Medina Base annex were w/o phone service. [At 4:30 P.M. LTC Topper told sub (Arnold Const.) To stop work. After assessing situation, LTC Topper told Idela to begin work again (4:45 p.m.)] CPT. Perez stated his instructions to C.O.E. (Mike Moomey) was to coordinate all locates personally and had given M. Moomey plans as to location of fiber optic telephone the prior week. Supt (D. McGraw) told Perez the water line had still not been located & Perez stated he would have crew out to locate same 14 Nov 88 a.m. 5:00 p.m. CPT Perez & LTC. Tooper left to look for CPT. Derrick. Did not see or hear from Perez or Topper again. Bore complete at 5:10 & fencing & flashes installed. McGraw began digging hole in Medina Base Rd at S.W.B. request to speed up repairs. Bell brought in private contractor to finish hole and make repairs. All flashers & signs at this point around hole belong to Bell & its subs. Idela left jobsite secured with Bell still present at 7:30 p.m.

(R4, tab 86, CDL 44)

On 12 November 1988 the appellant continued with boring and excavation work. The appellant backfilled the entire site, except for the S.W. Bell area, and left the job site. (R4, tab 86, CDL 45) Although Mr. Moomey had the quality assurance responsibility, he was not at the job site on 11 or 12 November (R4, tab 86). The appellant's CDL reported the events of 12 November 1988 as follows:

SWB Supervisor confirmed conduit was owned by Govt & Bell had been paid in '85 by Govt to move line from aerial into Govt owned conduit. Govt contact at that time was Paul Vilte, now retired. S.W.B. states conduit was Govt property and base comm should have picked up . . . the line. Inspection of the M.H. [manhole] after pumping it dry did reveal that a cable left the M.H. at south side. Idela backfilled all areas except for S.W.B. area & left jobsite secure.

(R4, tab 86, CDL 45)

On 15 November 1988 Mr. Reising wrote a letter to the Government advising it of the differing site condition encountered when the boring subcontractor severed the unmarked communication cable near Medina Base Road. The letter recounted that the appellant assisted S.W. Bell in its efforts to restore telephone service to the base, by using the front end loader to uncover the severed line under Medina Base Road. However, the letter did not claim that such effort caused any delay in completing the bore or sewer line. (AR4, tab 21) The appellant was delayed momentarily when it struck the cable, but the boring work was only stopped for about 15 minutes (4:30 p.m. to 4:45 p.m.) on 11 November 1988. While the appellant was still involved with the cable issue on 12 November 1988, there is no evidence that boring work or work on the sewer line itself was actually delayed on the 12th. We conclude that there was no delay in contract completion as a result of this incident.

#### *IV. Repair of the Telephone Cable Site*

The appellant began installing the sewer pipe on 16 November 1988 (R4, tab 86, GDL/CDL 49) at the north end, near station 92+33 (Moomey, tr. 2/21). Mr. Moomey was not at the job site and did not return until December (R4, tab 86). The Government asked the appellant for a cost proposal for the repair of the Medina Base Road where the cable was encountered (R4, tab 86; ex. G-1). The appellant proposed \$2,484.34 for the repairs.

Over the next day or two the appellant backfilled the excavation and repaired the asphalt in the area at the Medina Base Road where the communication cable was struck (R4, tab 86, CDL 50, GDL 51). Negotiations on the price were concluded on 22 November 1988, and although there was some initial discussion of a time extension because of the two days it took to encase the cable and repair the road, it was agreed that no additional time was

required. Modification No. P00001 for this telephone cable repair work was executed on 21 December 1988 for the additional amount of \$2,176. It expressly excludes any additional contract time for performing this work. It reads in relevant part as follows:

II. The contractor shall furnish all plant, labor and material, and perform all work necessary to accomplish the following described work:

A. Statement of Change:

1. Replace conduit around existing communication cable with 6" flexible conduit. Compact 12" of sand around conduit and backfill with suitable material.

2. Repair asphalt street back to original condition.

....

III. Contract Price:

It is understood and agreed that as a result of this modification, the contract price for Bid Item (1) "Wastewater Treatment Facility" is increased in the net amount of \$2,176.00.

IV. Contract Time:

It is understood and agreed that the contract time remains unchanged.

V. It is understood and agreed that this modification constitutes compensation in full on behalf of the contractor for all costs and markups directly or indirectly attributable to the work ordered herein, for all delays related thereto, and for performance of the work within the time stated.

(Ex. G-1) This was a bilateral modification.

*V. Mislocated Sprinkler Lines*

The drawings showed the sprinkler lines crossing a wide swath of the sewer line excavation between station 23+00 and 33+00 (Moomey, tr. 2/21; R4, tab 65; ex. G-4). Note 1 on drawing sequence 2 required the appellant to locate all utilities before any

machine excavation was performed (R4, tabs 64, 69). Idela could not locate the sprinkler lines based on where they were shown on the drawings, so Idela asked the Government to mark the sprinkler lines in the field. The Government's San Antonio Real Property Management Agency (SARPMA) came to the job site on 9 November 1988 to locate the sprinkler system. (Allison, tr. 2/110; R4, tab 66) While SARPMA located some of the sprinkler heads, the lines were not where SARPMA said they were either (Allison, tr. 2/110). While excavating for the sewer line and in order to avoid cutting into the sprinkler lines, the appellant had the laborers dig ahead of the rest of the excavation crew in search of the sprinkler lines (R4, tabs 66, 68, 69; Allison, tr. 2/104-09).

The appellant had several discussions with SARPMA during attempts to locate the sprinkler lines because the sprinkler lines were not correctly identified on the maps. Mr. Allison testified for the appellant that he lost between four and seven days trying to locate the sprinkler lines during November and December 1988. (Allison, tr. 2/186-88) Because it was not having any success in locating the sprinkler lines where the Government said they were located, Mr. Reising sent a request for information (RFI) to the Government on 27 December 1988 seeking assistance in locating those sprinkler lines (Allison, tr. 2/103-04, 110). This activity was not recorded on the appellant's CDLs. However, the fact of the mis-located sprinkler lines was recorded in the 27 December 1988 RFI. (R4, tab 66) Mr. Allison testified that, "The Air Force had no earthly idea where their sprinkler systems were. They knew where you could cut it on and where their [sprinkler] heads were, but how the lines were laid, they had no earthly idea . . . ." (Allison, tr. 2/110-11; R4, tab 66)

On 4 January 1989, Captain Derrick responded to the 27 December 1988 RFI by stating that "The underground sprinkler is operative and was located for you on 9-Nov-1988. The contractor shall protect from damage all existing utilities. See contract clause 53(b)." (R4, tab 66) Neither the GDLs nor the CDLs recorded the activity of SARPMA locating the sprinkler lines on 9 November 1988 (R4, tab 86). In making that statement Captain Derrick simply ignored the fact that SARPMA's November location of the sprinkler lines was inaccurate. On 25 January 1989, the appellant's trenching operations had reached station 43+00 (R4, tab 88, CDL 119), much closer to the general location of the sprinkler lines. The next day, 26 January 1989, the appellant wrote another letter, drafted by Mr. Allison, requesting the location of the underground sprinkler heads and lines between stations 42+00 and 24+00. That letter read in relevant part:

PLEASE REFER TO RFI NO. 6 DATED 27, DECEMBER  
1988. ONCE AGAIN WE ARE REQUESTING THE  
LOCATION OF THE UNDERGROUND SPRINKLER HEADS  
AND LINES PRIOR TO US TRENCHING THROUGH THE  
AREA FROM STATION NO. 42+00 TO 24+00. LOCATES  
PROVIDED BY THE GOVERNMENT WERE ONLY FOR  
SPRINKLER HEADS. WITHOUT ADDITIONAL  
INFORMATION TO THE LOCATION OF THE ADDITIONAL

LINES WE CANNOT AND WILL NOT ASSUME RESPONSIBILITY FOR A SYSTEM THAT PLUMBING SHOP PERSONNEL HAVE OFF HANDEDLY REFERRED TO AS INOPERATIVE AND HAVE ALSO TOLD US THAT THEY DO NOT KNOW WHERE THEY ARE LOCATED.

....

WE APPRECIATE YOUR COOPERATION IN EXPEDITING THIS MATTER FOR US AS THE FIELD ENGINEERS DO NOT SEEM TO BE ABLE TO PROVIDE US WITH THIS INFORMATION. THIS INFORMATION IS NEEDED BY 6, FEBRUARY 1989 SO AS NOT TO IMPEDE OUR PROGRESS ON THIS CONTRACT.

(R4, tab 68) The Government came out again on 7 February 1989 and marked locations for the sprinkler lines (R4, tab 69). This activity is not recorded in either the GDLs or the CDLs. Both daily logs recorded that no work was done that day, with the GDL noting that it was too cold to work. (R4, tab 89) The Government never was able to locate the sprinkler lines. Afterwards, the appellant “just cut right through” the area where the sprinkler lines were marked (station 23+00 to 33+00). The lines which the appellant found, it did not cut; but there were others that it did cut. The appellant did not spend time looking for them like they had before. Mr. Allison testified:

Q Well, when you were in that area of excavation, did you have anybody trying to search for them [the sprinkler lines] by hand?

A You wouldn't have like you would have before you got there. I mean, this was already – we had already spent the time looking for them and everything else. Once we get there with a hoe, then we are going to open up our ditch.

(Allison, tr. 2/112-13; R4, tab 68) Mr. Allison could not remember how many lines were cut nor whether Idela made any repairs for cut sprinkler lines or broken sprinkler heads (Allison, tr. 2/115). On 16 February 1989 the Government acknowledged receipt of appellant's 26 January 1989 letter (R4, tab 69).

The Government argues that the activity for locating the sprinkler lines was “inconsiderable.” (Gov't resp. to app. proposed findings at ¶ 96). At one point Mr. Moomey testified that he did not recall seeing appellant's men looking for the sprinkler lines (Moomey, tr. 3/153). Yet, he also testified that he recalled that there was a problem about the location of the sprinkler lines and he testified that “I cannot recall the sprinkler lines

ever being located” (Moomey, tr. 1/96). Mr. Moomey did not record these events in the GDLs. In any event, Idela’s contemporary letters and the responses by the Government are uncontroverted evidence that the lines were mislocated, and that Idela had been trying to locate them in advance. (Allison, tr. 2/108-11) Mr. Moomey’s lack of recollection is credibly attributable to the fact that he was not on site during much of the time in question, including 16-30 November, 27 December 1988, 9 January, 23-31 January and all of February except 27 and 28 February 1989 (R4, tabs 86-89; ex. A-7). Mr. Allison’s testimony is credible and uncontroverted.

In explaining how much time the appellant lost trying to locate the sprinkler lines that were not where they were supposed to be, Mr. Allison testified that it is impossible to be precise, but trying to locate the sprinkler lines “would slow anybody down” (Allison, tr. 2/108). Mr. Allison testified that during November and December the delay was between four to seven days, and that during February the appellant was delayed between a day and one-half to two days trying to locate the sprinkler lines (Allison, tr. 2/186-88).

Government counsel notes that delays associated with looking for the sprinkler lines were not recorded in the CDLs. From that observation, counsel argues that there were no delays. In fact, even the activity of looking for the lines is not recorded in the daily logs. Likewise, the marking by SARPMA of suspected locations for the sprinkler lines was not recorded in the daily logs. Since looking for the sprinkler lines was not a major activity recorded in the daily logs, it would not be expected that delays resulting from those efforts would be recorded. Moreover, only the CDL has a specific space for recording delays, and then only for delays due to weather or material. It is simply not significant that such delays were not recorded in the daily logs.

We find that the Government’s failure to properly mark the sprinkler lines during November and December caused appellant five days of additional work. However, we also find that, in this case, the effort of locating the sprinkler lines was sufficiently in advance of the excavation of the sewer line that it did not actually delay the work on the sewer line itself; and, thus did not delay overall contract completion.

#### *VI. Mislocated Ten-inch Water Line*

Appellant’s 26 January 1989 letter also informed the Government that Idela had been digging for three days in an attempt to locate a ten-inch water line, which the drawing showed was lying in the path of the sewer trench excavation (R4, tab 68). Mr. Allison testified that he would have had a backhoe, a loader, an operator, a couple of laborers, and a foreman out there for three days digging for the water line (Allison, tr. 2/119-20). This effort was not specifically reflected in the daily logs. However, the time spent was documented in appellant’s letter of 22 March 1989, prepared by Mr. Allison. (R4, tabs 73, 88) Thus, in January the appellant had expended effort over three days unsuccessfully trying to locate the ten-inch water line.

On 7 February 1989, when the Government again marked the location of the sprinkler system, it also marked the ten-inch water line at station 20+00 (R4, tabs 69, 70, 71). On 14 February 1989, the substitute Government inspector (Mr. Rosales) told the appellant that it should excavate five feet on each side of the ten-inch water line marking and eight feet deep to look for the line (R4, tab 89, GDL 139). The appellant took its crew and went forward to station 20+00. It spent the day digging as directed, but the water line was not there. Mr. Allison testified that he lost one day, maybe two, trying a second time to find the water line. (Allison, tr. 2/121-23) This effort was not specifically reflected in the daily logs. The time spent was documented in appellant's letter to the Government complaining about digging down eight feet and still not being able to find the water line where SARPMA had said it was. (R4, tabs 70, 87) Mr. Moomey was not on site during any of this period; he was absent all during February except for the 27<sup>th</sup> and 28<sup>th</sup> (R4, tab 89; ex. A-7).

While continuing with the excavation near station 29+15 on 21 February 1989, the appellant was told by SARPMA that the ten-inch water line might be in that area. The appellant did strike a water line, but instead of the ten-inch water line the appellant struck a three-inch feeder line for the sprinkler system. (R4, tab 89, CDL 146) Mr. Allison described the procedure of digging and probing for the water line in the general area where the line was suspected of being. He testified that as they were digging with the track hoe they would take off a layer of dirt and then probe for the water line before taking off another layer of dirt. (Allison, tr. 2/123-24) This procedure continued until 27 February 1989, when a water line was hit by appellant's track hoe at station 21+50. This was still 150 feet away from station 20+00 where SARPMA had located the ten-inch water line. (CDL 152, ex. A-7; Allison, tr. 2/124) At that time the sewer pipe was installed to station 22+00, *i.e.*, within 50 feet of where the water line was found (ex. A-7, GDL/CDL 152).

### *VII. Decision to Encase the Water Line*

On 28 February 1989 the contractor ceased work on the sewer line at 10:30 a.m. while Air Force personnel repaired the nick in the water line (R4, tab 89, GDL/CDL 153). If this line was the ten-inch water line, the sewer line would have to be encased in concrete to protect the water line from the sewer line. As of 28 February 1989 Idela was held up waiting for the decision on encasing the sewer line. (Allison, tr. 2/131-32) From 1 through 4 March 1989, while waiting for the Government to decide, the contractor worked at the wet well and began filling the line with water to test the line at the air pressure valve located at station 26+70. The contractor did not work on Sunday, 5 March 1989. On 6 March 1989 the Government informed the appellant that the line was abandoned and not to encase the sewer line. The contractor continued to work at the wet well and to fill the line with water for the hydrostatic tests. (R4, tab 90, GDL 159)

On 7 March 1989 the contractor resumed excavating the trench and laying sewer pipe to station 20+00 and tried to find the water line marked by SARPMA at station 20+00. The appellant still could not find the water line at station 20+00 (R4, tab 90, GDL 160). At the end of the day SARPMA concluded that the line at 21+50 must be the water line after all. (R4, tab 90, CDL 160)

On 8 March 1989 the appellant was orally informed by the Government's field engineer that the water line nicked at station 21+50 was the same one they had expected to find at station 20+00, and that concrete encasement of the sewer line would be necessary at the point that the sewer line intersected the water main. As a result of the Government's indecision on whether to encase the sewer line, and because the sewer line laid on 7 March had to be removed (discussed *infra*), the appellant was delayed in its work on the sewer line from 28 February through 8 March, or nine days. (R4, tab 90)

On 10 March 1989 Mr. Moomey attended the 8:00 a.m. preparatory inspection for the concrete and the metering vault. He left the site and did not return until 3:40 p.m. On his return he noticed that the concrete encasement of the sewer line at the ten-inch water line intersection was in progress. Mr. Moomey said there was only a 22½-inch clearance between the two lines and the contract required 24 inches. The appellant measured from inside the sewer pipe and measured a clearance of 23¾ inches. Idela tried to push the sewer line down a little to get the clearance wanted by Mr. Moomey, but was unsuccessful. (R4, tab 90, CDL 163)

The following Monday, 13 March 1989, the appellant removed 120 feet of sewer pipe between station 21+50 and 20+00, and dug the excavation a little deeper to obtain the full 24-inch clearance. The appellant finally poured the concrete encasement at 3:45 p.m. (R4, tab 90, CDL 166) This rework would not have been necessary but for the Government's erroneous direction that the water line was abandoned. That decision on 6 March 1989 led to the appellant laying 120 feet of the sewer pipe to station 20+00 the next day. That pipe had to be removed in order to get the clearance to encase the sewer line after the Government changed its mind about encasing the water line on 8 March 1989.

#### *VIII. Modification Concerning Excavation for the Ten-inch Water Line*

On 22 March 1989, after completing all work related to or affected by the ten-inch water line, the appellant's general manager, Mr. Reising, submitted a cost proposal for \$3,943.33 and a three-day time extension for delays associated with the ten-inch water line, sometimes referred to as a transite water line (R4, tab 73). The appellant's 22 March 1989 cost proposal read in part as follows:

PLEASE ACCEPT THE FOLLOWING AS OUR CLAIM FOR  
10" TRANSITE WATER LINE MISTAKENLY MARKED IN

THE FIELD BY SARPMA SHOPS AND ITS RESULTING  
TIME AND MONEY DELAY.

(R4, tab 73) The claim included 20 hours of labor for each of six workers over a three-day period. Mr. Allison testified that this covered Idela's direct costs incurred in searching for the water line in January 1989 (Allison, tr. 2/119-21). There is no evidence that Mr. Allison's view was communicated to the Government. Both parties subsequently agreed to a three-day time extension and a contract price increase of \$3,943.33, as originally proposed by the appellant, in Modification No. P00008, which included the following language:

II. A. Statement of Change:

Compensate contractor for additional excavation at station 21+50 in efforts of locating existing 10" water line mislocated by SARMPA [sic] personnel.

....

V. It is understood and agreed that this modification constitutes compensation in full . . . for all costs and markups directly or indirectly attributable to the work ordered herein, for all delays related thereto, and for performance of the work within the time stated.

(Ex. G-3)

*IX. Extra Testing of Sewer Line*

The specifications provided for pressure and leakage tests of the sewer line (§ 02724, Force Main, Sewer), as follows:

6.1 Pressure Test: After the pipe has been installed, joints completed, thrust blocks have been in place for at least five days, and the trench has been partially backfilled, leaving the joints exposed for examination, the pipe shall be filled with clean water in a manner to expel all air. Water shall be furnished by the Contractor. The pipeline shall be subjected to a test pressure of 100 psi . . . for a period of at least one hour.

....

6.2.1 The leakage test may be conducted subsequent to or concurrently with the pressure test.

6.2.2 . . . The water shall be pumped into the line by the test pump as required to maintain the specified test pressure as described for pressure test for a two-hour period.

(R4, tab 45)

Although the Government, during the preparatory inspection, had agreed to allow the appellant to cover the pipe bells for those tests, on 1 December 1988, when Mr. Moomey returned to work, he told the appellant, per Captain Derrick's request, to leave the bells (sewer pipe joints) exposed until after the pressure tests were completed (R4, tab 87, GDL/CDL 64). By this time the appellant had reached station 82+00, installing over 1,000 feet of sewer line, and had been covering the bells along the way without objection. By letter of 2 December 1988, the appellant responded to these instructions by recalling that at the preparatory inspection on 31 October 1988 everyone had agreed to cover the pipe joints because:

**SAFETY:**

1. IF THESE AREAS ARE LEFT EXPOSED THERE WILL BE APPROXIMATELY 8,400 LINEAR FEET OF OPEN DITCH WITH A DEPTH OF SLIGHTLY OVER FOUR FEET TO TWO FEET AT TWENTY FOOT INTERVALS REPETITIVELY.
2. THESE AREAS, WHICH CROSS OVER OUR DITCH LINE, PARTICULARLY THE PARADE FIELD AND GRASSY RESIDENTIAL AREAS WILL HAVE TO BE CLOSED TO ALL PERSONNEL FOR THE DURATION OF THE PROJECT.
3. THESE OPEN DITCHES WILL POSE A SERIOUS THREAT TO UNATTENDED CHILDREN THAT RESIDE IN THESE AREAS.

**INSTALLATION:**

1. WE WILL NOT BE ABLE TO KEEP WATER OUT OF THE ENVELOPE.
2. WE WILL NOT BE ABLE TO REACH DIRT AND SAND COMPACTION ON THE PIPE.
3. IF WE HAVE A HEAVY RAIN, WE WILL LOOSE [sic] COMPACTION.

GENERAL PRACTICE:

1. IT IS STANDARD PROCEDURE WITH ALL MAJOR METROPOLITAN AREAS TO COMPLETELY BACKFILL THE DITCH DURING CONSTRUCTION AND PRIOR TO TESTING TO INSURE THE SAFETY OF THE POPULACE AND TO MAINTAIN THE ENGINEERING INTEGRITY OF THE PIPELINE.

MANUFACTURER'S RECOMMENDATION:

1. THE DITCH BE COMPLETELY BACKFILLED BEFORE TESTING.
2. THE DITCH RECEIVE A MINIMUM OF THREE FEET COVERAGE BEFORE WATER TESTING.
3. PLEASE SEE ATTACHED.

WE, THE CONTRACTOR, WILL GUARANTEE TO LOCATE AND REPAIR ALL LEAKS. WE REALIZE THE CONTRACT DOES NOT CALL FOR IT TO BE DONE ANY OTHER WAY. HOWEVER, IN ACCORDANCE WITH SECTION 2724 PARA. 6.2.2, WE ARE REQUESTING A MODIFICATION TO FOLLOW THE MANUFACTURER'S INSTALLATION AND TESTING RECOMMENDATIONS.

(R4, tab 46) Attached to the appellant's 2 December 1988 letter was literature from the manufacturer of the leak detector that Idela intended to use. That literature stated in part:

The XLT-20 may be used for detecting leaks in all types of pipe, including steel, cast iron, PVC, cement and asbestos. It may be used in all types of earth, such as sand, clay, gravel, and even water filled cavities. . . . [It] detects leaks at valves, couplings, meter boxes and tanks, through cement slab, pool decking, walls, radiant heating systems and encased pipe.

(R4, tab 46) Mr. Reising, who had extensive underground utility experience, testified on cross examination that he had never tested lines in sections before (Reising, tr. 3/89). Mr. Scott, the owner of Idela, who had extensive experience with sewer pipe, including one in excess of 100,000 feet on South Padre Island and adjoining areas, testified that he had

never seen the bells or joints of the pipe exposed during testing (Scott, tr. 2/255-57). Mr. Moomey testified that he had seen bells exposed before, but he had limited experience.

In discussing ways to keep rain water out of exposed bells, Mr. Moomey could only suggest that the appellant could have poured a concrete berm around each of the 480 bells (Moomey, tr. 2/29, 2/60-62). Mr. Allison testified without contradiction, and we so find, that covered bells do not create any problem or difficulty in locating leaks in a pressurized sewer line (Allison, tr. 2/161). Mr. Allison explained that there was no practical way to leave some 480 holes open at the connection of each pipe until the entire sewer line was laid, and that such practice was not normal in the construction industry:

Q I think you heard some discussion [by Moomey] earlier today about what you could have done in – if you left the bells uncovered until the end of – until you were finished with all the force main. There was some testimony about putting up berms of some kind, either of dirt or concrete.

Do you have any opinion as to how practical that is?

A In my honest opinion, I have never done it in my life. It would be the silliest thing to ever do. I have never done it on a job, and I have never been required to do it on a job.

Q Well, why do you say it would be silly?

A You have – I don't know – [480] or 500 holes open all the way across the base, the parade field and everything else, and plywood sitting over them. That is ridiculous. That is 500 places for kids to fall in. The safety would be ridiculous.

Any time any water would get in there, you are going to lose your compaction on your backfill. If you had it compacted and it is 95 percent, once the moisture enters that, you lose your compaction.

Q Well, there is some testimony that you would put the berms up so that water wouldn't get into the holes. Would that work?

A All the time I have ever been in the sewer business, I have never done that and never will do that.

Q But do you think it would keep all the moisture out that would prevent loss of compaction by putting up berms?

A No, sir.

Q Why is that?

A Well, water is still going to get in your ditch no matter what. No matter what you do, as long as you build a berm up there, you can concrete berm it, but water is still – it is excavated soil.

Water is still going to get through there, unless you go in there and compact it up 95 percent density all the way around there, and then you would have to put – you will read a million times in there where they will tell you [that] you would have to go in there and put up fences and stuff.

You would have to put a fence around each berm, put enough plywood over it and everything. It would be almost – it wouldn't be impossible, but it would be close to impossible. You would have the base raising hell with you.

Q There was some testimony yesterday –

JUDGE KIENLEN: Excuse me. I mean, what is impossible about it? Are you saying that it would just be very costly and time-consuming or what?

THE WITNESS: No. If we did that, let's say, across the parade fields, the Air Force would be out there and would be all over you about closing your holes up. You will read a lot of times – and it is – you can't leave that many holes open on a job anywhere without having some kind of safety problems, and then you would lose your – by the time you started backfilling your holes, if it rains at all, you would have to go back and redig up all your ditch again and compact it back in again because all your dirt, then, would lose its compaction.

You are compacted between your bells 25 percent. Once moisture gets to it, you lose your compaction, so there is no way to keep moisture out of the dirt between your joints.

You would be there from now on digging it up and then replacing it, digging it up and replacing it every time it rained.

(Allison, tr. 2/155-57)

During an office meeting at 11:00 a.m. on 7 December 1988, in which Mr. Allison met with Captain Derrick and Mr. Moomey, the Government again gave verbal permission to backfill the ditch and cover the bells to finish grade before testing, but added the direction that each of the four sections containing an air relief valve be tested in turn. No modification to the contract was ever issued. (R4, tab 47)

It took one to three days to prepare for a pressure test because you had to haul water to fill the line, fill the line with water, and pressurize the line (Allison, tr. 2/162-64, 239-40, Reising, tr. 3/90). Mr. Moomey agreed that in testing the line every time a new section was added, all the prior sections would be retested as well. Each test would require a greater quantity of water to be pumped into the sewer line. (Moomey, tr. /173-74)

#### *First Hydrostatic Test*

On Friday, 16 December 1988 the appellant began filling the sewer pipeline with water in preparation for the hydrostatic tests between station 67+30 and 92+33 (R4, tab 87; CDL 79). No work was done on the weekend. On Monday, 19 December 1988, the line was filled with water, and the hydrostatic pressure test for one hour and the leakage test for two hours were performed. The line passed both tests. No deficiencies were noted. (R4, tab 87, GDL 82; AR4, tab 30) The next day, work on the force main resumed with excavation, pipe laying, and backfilling from station 66+20 to 67+30 (R4, tab 87, CDL 83). Filling the line with water and conducting the test took two days.

By letter dated 22 December 1988, Thomas Armstrong, the contracting officer's authorized representative, wrote to the appellant the following:

Reference is made to the meeting on December 7, 1988, between Captain Bob Derrick, Mr. Mike Moomey, and Mr. Bob Allison and your letter of December 2, 1988, concerning the referenced contract.

Due to the nature of this contract, we will authorize you to cover the bells up to the second air relief valve, station 67 + 30. It is agreed that 30% of \$424 per 20-foot section will be held until the section passes both hydrostatic tests. After you have satisfactorily demonstrated your ability to pass the tests, I will issue authorization for you to continue to cover the bells to the next air relief valve. The same demonstration will be

required at each subsequent valve prior to proceeding with the final tests conducted from station 3+53 to 93+48. If, in my determination, you cannot lay the pipe without leaks and/or cannot find the leaks with the Fisher II-Scope, I will rescind this authorization. Please note that this variation in test procedure is acceptable if it does not result in additional cost to the Government or delays in contract performance.

(R4, tab 47) In reply, by letter of 27 December 1988, the appellant said it would bear the costs of the extra testing, but explained that the extra time for the additional testing could not be absorbed:

PLEASE REFER TO YOUR LETTER RECEIVED BY THIS OFFICE THIS DATE. THERE WILL BE NO ADDITIONAL COST TO THE GOVERNMENT, ALTHOUGH WE MUST REQUEST AN ADDITIONAL FIFTEEN DAYS. WE NEED THE ADDITIONAL TIME DUE TO THE FACT THAT WE WILL HAVE TO HAUL WATER TO THE LINE AND PUMP UP PRESSURE ON THE LINE FOUR DIFFERENT TIMES RATHER THAN ONCE.

(R4, tab 48)

#### *Second Hydrostatic Test*

On 10 January the appellant gave the Government notice that the second set of hydrostatic tests would be held on 12 January 1989 for the section of the line between station 51+50 and 67+33 (R4, tab 87, tab 88, GDL/CDL 104). The next day the appellant began filling the sewer line with water (R4, tab 88, CDL 105). After a day of filling up the line the appellant began the test at 8:05 a.m. and noted that there was no loss of pressure at 9:05 a.m. and no loss of pressure at 10:05 a.m. The job was shut down at 10:30 a.m. due to rain. The appellant was credited with a rain day for 12 January 1989, so there was only one day of delay. (R4, tab 88, CDL 106)

After completion of the second test of the sewer line, by letter dated 13 January 1989, Mr. Armstrong, the contracting officer's authorized representative, responded to Idela's 27 December letter, "Your request for 15 additional days is denied." (R4, tab 49). By letter dated 18 January 1989 Idela replied, "WE AGREED TO COVER THE BELLS ON THE PIPE FOR BOTH OUR CONVENIENCE AND THE CONVENIENCE OF THE GOVERNMENT . . . WE ARE NOT ASKING FOR ANY ADDITIONAL COMPENSATION FOR DELAY; ONLY AN EXTENSION OF TIME." (R4, tab 50).

After a long delay of 12 days, on 24 January 1989 Mr. Armstrong finally authorized the appellant to continue covering the bells up to station 26+50 (AR4, tab 41). A handwritten note on the Government's file copy of that letter states:

Bob – I realize it took about 12 days to process. However, we may need to relook at this as I see where he could claim time from 12 Jan-26 Jan getting letter authorizing him to continue with testing. Not sure how we should do it. Maybe give him OK subject to continued passing of tests.

Nevertheless, the appellant had continued to excavate, lay pipe, and backfill without objection from Mr. Moomey (R4, tab 88).

#### *Third Hydrostatic Test*

On 6 March 1989 the appellant filled the sewer line with water for the hydrostatic tests (R4, tab 90, CDL 159), having begun filling the line between 1 and 4 March 1989 (R4, tab 90, CDLs 154, 156). There was no work on Sunday, 5 March 1989. Filling the line with water for conducting the hydrostatic tests took five days. However, this Government-caused delay was concurrent with the Government-caused delay in deciding to encase the water line.

#### *Fourth Hydrostatic Test*

Except for 3 April 1989, when the appellant laid 65 feet of pipe to station 24+85, the appellant worked primarily on the wet well, dry vault, and top soil during April and May. On 30 May 1989 the appellant resumed excavation and trenching for the pipeline and laid pipe on 31 May 1989. (R4, tabs 91, 92) On 1 through 3 June 1989 the appellant completed the excavation, trenching, laying, and backfilling of the pipeline. On 4 June 1989 the appellant began filling the sewer line with water for the hydrostatic tests. On 9 and 13 June 1989 leaks were discovered. By 27 June 1989 the leaks were repaired and the sewer line passed the hydrostatic tests on 29 June 1989. (R4, tab 93)

#### *X. Topsoil*

The contract required Idela to replace topsoil over the excavation of the sewer line (R4, tab 7B, § 02210, ¶ 2.5). Mr. Moomey acknowledged that the contract required the top four inches of soil to be treated differently than the rest of the soil (Moomey, tr. 1/194-95). To comply with this provision of the contract, Idela stockpiled good topsoil along the sewer trench for reuse (Reising, tr. 3/29-30, 68-69, Scott, tr. 2/262, Allison, tr. 2/183-85). The Air Force removed this saved topsoil in order to have a neater appearance on the grounds. The appellant advised the Government by letter dated 6 April 1989, as follows:

ON 29, MARCH 1989 AIR FORCE PERSONNEL HAULED OFF APPROXIMATELY 7 LOADS OF TOPSOIL THAT BELONGED TO IDELA CONSTRUCTION AND WAS TO BE USED FOR THE ABOVE REFERENCED PROJECT. AT THIS TIME, WE ARE READY TO BEGIN TO USE THE MISSING TOPSOIL. PLEASE DIRECT THE PROPER PERSONNEL TO RETURN OUR TOPSOIL AS SOON AS POSSIBLE OR THIS WILL DELAY PROGRESS ON THE ABOVE NOTED CONTRACT.

(R4, tab 62, tab 90, GDL/CDL 182)

The topsoil which was hauled away by the Air Force was not returned until 17 April 1989 (R4, tabs 62, 63; tab 91, GDL 202). Although the lack of topsoil may have delayed work on finishing the topsoil, other work was being performed; and, we have not found any evidence that the top soil incident caused overall delay in completing the contract.

## *XI. Sewage Backups*

### *First Sewage Backup*

While working in the wet well on 6 March 1989, the appellant was forced to stop work because of a sewage backup in the wet well. The sewage backup was caused by the Air Force sewage plant turning off its pumps for servicing the sewer line without any notice to the appellant. Mr. Moomey was present when the sewage backed up in the wet well on 6 March 1989. Mr. Allison testified that the Air Force “just cut the sewer pumps off. And then it just backed up in the line.” (Allison, tr. 2/165). If Idela had been notified that the Air Force was going to shut off its pumps, Idela could easily have taken steps to prevent the sewage from entering its work area (Allison, tr. 2/176-77, Reising, tr. 3/32).

The sewer line is a gravity flow system and the sewage flows into the wet well and the pumps. When the Air Force cut off their sewer pumps, it caused all the lines to surcharge. The sewage then builds up along the sewage line – depending on how long the sewage line is cut off. (Allison, tr. 2/164-65; R4, tab 90, CDL 159) To clean up the wet well job site, Idela had to pump out the raw sewage and clean up the contaminated sand and dirt (Moomey, tr. 1/176). While cleaning up the sewage backup, the appellant was also filling the sewer line with water for the third hydrostatic test. While this first sewage backup caused the appellant extra work, the delay on the sewer line was at the same time as the delay caused by the third hydrostatic test and thus was a concurrent cause of additional delay on the sewer line itself.

### *Second Sewage Backup*

The appellant advised the Government of a second sewage backup by letter dated 18 April 1989. Idela wrote to Mr. Armstrong, the contracting officer's authorized representative, as follows:

AT 11:30 THIS DATE OUR CREW BROKE FOR LUNCH. AT NOON LACKLAND AIR FORCE BASE SEWAGE PLANT SHUT OFF THEIR PUMPS SO THAT THEY COULD PUMP THEIR RETAINING (HOLDING) TANK DRY. THIS TURNING OFF OF THE PUMP CAUSED THE LINE AT MANHOLE 6A TO BACK UP INTO OUR WORK AREA AND FLOODED IT WITH RAW SEWAGE IN AN AREA ABOUT SIX FEET DEEP THAT WAS TWELVE BY TWENTY FEET. WE INFORMED OUR INSPECTOR, MIKE MOOMEY, AT ABOUT 1:30 THIS AFTERNOON. HE INFORMED US THAT THE MATTER WAS OUT OF HIS AREA OF CONTROL BUT THAT HE WOULD TRY TO MAKE SURE THAT THIS DID NOT HAPPEN AGAIN.

(AR4, tab 55) Mr. Moomey acknowledged that he did not investigate the cause of this sewage backup (Moomey, tr. 1/177). At the time of the trial Mr. Moomey testified that he had no actual recollection of the sewage backups (tr. 1/178-80).

The record establishes the fact and impact of this second sewage backup. CDL No. 202 dated 18 April 1989 noted, "12:00 sewage plant shut down and flooded areas – see letter for more info." Under remarks it stated, "Sewage plant shut down at 12:00 causing sewage to backup & flood excavations at well w/ raw sewage. Area about 6' deep & 20' x 12' wide." (R4, tab 91)

The appellant spent the next three days pumping out the sewage from the wet well, hampered greatly by heavy rains which exacerbated the damage done by the sewage backup (R4, tab 91, GDL/CDL 203, 204, CDL 205; Allison, tr. 2/182-83). The appellant did no clean up over the weekend. The appellant continued clean up of the wet well area on the following Monday and Tuesday. (R4, tab 91, CDL 208/209) However, there is no evidence that pumping out sewage or contaminated rain water continued to be a problem on Monday and Tuesday. We find that the appellant was delayed three days as a result of this second sewage backup.

### *Third Sewage Backup*

On 19 June 1989 the wet well was completed at a depth of 26 feet. At 11:30 a.m. a third sewage backup occurred. The appellant had to pump out the wet well and

re-sandblast prior to painting. (R4, tab 93, GDL/CDL 264). Because of the depth of the wet well, the appellant had to obtain a pump truck to reach and remove the sewage. A pump truck was not required on the previous sewage backups. It took the appellant four days to obtain the use of the pump truck. (R4, tab 93, GDL 267; Scott, tr. 2/260-61) We find that the third sewage backup was cleaned up by 23 June 1989, and that the appellant was delayed four days as a result of this third sewage backup (R4, tab 75, tab 93, GDL/CDL 264, CDL 267, 268).

## *XII. Substantial Completion*

The project was substantially complete on 6 July 1989, the date on which the appellant passed the operational tests for the sewer line. The original contract completion date of 25 February 1989 was extended for three days by bilateral Modification No. P00008; and, for an additional 18 days by bilateral Modification Nos. P00002 and P00003, neither of which is at issue in this appeal. The contracting officer determined that contract completion was delayed by 109 days after the adjusted contract completion date. Liquidated damages were assessed at the contract rate of \$160 per day (R4, tab 5, Special Clause No. 1). The Government withheld \$17,440 for 109 days of delay (R4, tab 82).

By letter of 20 February 1992 the appellant filed its claim for overhead and the return of liquidated damages. The claim was received by the Government on 25 February 1992. The claim was denied by the contracting officer on 17 August 1992. This final decision was received by the appellant on 25 August 1992. (R4, tabs 2A, 2B) The appellant's appeal was received by the Board on 11 September 1992.

## DECISION

The Government claims liquidated damages of \$17,440 for 109 days of delay. The appellant seeks remission of the liquidated damages and contends that the liquidated damages are an unenforceable penalty; further, the appellant claims \$82,635 in home office and field office overhead.

### *GOVERNMENT'S CLAIM FOR LIQUIDATED DAMAGES*

We treat first the Government's claim for liquidated damages. In order to assess liquidated damages the Government must prove by a preponderance of the evidence that the contractor is in default, that it did not prevent performance or contribute to the delay, and that the appellant was the sole cause of the days of delay. *Gaffny Corporation*, ASBCA Nos. 37639 *et al.*, 94-1 BCA ¶ 26,522 at 132,010 and cases cited. *George Bernadot Company*, ASBCA No. 42943, 94-3 BCA ¶ 27,242 at 135,743. The Government has established that substantial completion did not occur until 109 days after the adjusted contract completion date.

In order to defeat the Government's claim for liquidated damages, the appellant must come forward with evidence to show that the Government prevented performance or contributed to the delay or that the delay was excusable. *Gaffny Corporation*, 94-1 BCA ¶ 26,522. Because liquidated damages is a Government claim, the Government continues to have the overall burden of proof, and if the responsibility for days of delay is unclear, or if both parties contribute to the delay, for the Government "[t]o recover liquidated damages the Government must prove a clear apportionment of the delay attributable to each party." *International Fidelity Insurance Company*, ASBCA No. 44256, 98-1 BCA ¶ 29,564 at 146,551; *Tempo, Inc.*, ASBCA Nos. 37589 *et al.*, 95-2 BCA ¶ 27,618 at 137,667; *Gaffny Corporation*, 94-1 BCA at 132,011, citing *William F. Klingensmith, Inc. v. United States*, 731 F.2d 805, 809 (Fed. Cir. 1984).

The appellant has come forth with evidence showing that the Government caused or contributed to the following events of delay: 1) Approval of the QC and Safety Plans; 2) Discovery of the Telephone Cable; 3) Mislocated Sprinkler Lines; 4) Mislocated Ten-Inch Water Line; 5) Decision to Encase the Water Line; 6) Extra Testing of the Sewer Line; 7) Topsoil; and 8) Sewage Backups. We consider each of these to examine whether or not the Government has carried its burden of proof to establish that it is entitled to collect liquidated damages.

#### *Approval of the Quality Control and Safety Plans*

The contract did not specify a time period for the Government's review and approval of the QC and Safety plans, or for any of the material submittals. In similar circumstances we have held that the Government is entitled only to a reasonable time to complete the review of plans and submittals. *Astro Pak Corporation*, ASBCA No. 49790, 97-1 BCA ¶ 28,657 at 143,148-49 (days exceeding two weeks to review cleaning procedure was Government delay), citing *Mech-Con Corporation v. West*, 61 F.3d 883, 886 (Fed. Cir. 1995) and *Blinderman Construction Co., Inc. v. United States*, 695 F.2d 552, 559 (Fed. Cir. 1982); *Gaffny Corporation*, ASBCA Nos. 37639 *et al.*, 94-1 BCA ¶ 26,522 at 132,004 (delays caused by a failure to approve submittals within 14 days were the responsibility of the Government); *Azerind, Inc.*, ASBCA Nos. 34294 *et al.*, 87-3 BCA ¶ 20,122 (more than two weeks for review of submittal was unreasonable); *Ernest A. Cost*, ASBCA No. 28811, 86-1 BCA ¶ 18,559 (10 days is normal maximum).

The Government has an obligation to act promptly to review and approve plans and submittals. This is especially so where they must be approved before the appellant is permitted to start work. *Commerce International Company, Inc. v. United States*, 338 F.2d 81, 85 (Ct. Cl. 1964); *Kehm Corporation v. United States*, 119 Ct. Cl. 454 (1950); *George A. Fuller Co. v. United States*, 108 Ct. Cl. 70 (1947). *See also Donohoe Construction Company*, ASBCA Nos. 47310 *et al.*, 98-2 BCA ¶ 30,076 at 148,832. "The government has an 'ever-present obligation to carry out its contractual duties within a

reasonable time.” *Essex Electro Engineers, Inc. v. Danzig*, 224 F.3d 1283, 1291 (Fed. Cir. 2000).

In this case we found that one week was a reasonable time to review the original submittals of the QC and Safety plans. We found that it took the appellant one week to revise and resubmit the plans, and that four days was a reasonable time to review and approve the resubmitted plans. Thus, both plans should have been reviewed, resubmitted, and approved in less than three weeks. Since the plans were originally submitted by 29 August 1988, they should have been approved no later than 19 September 1988. If the Government had acted with reasonable diligence in its review of the QC and Safety plans, they would have been approved nine days before the appellant received the notice to proceed on 28 September 1988.

However, the Government did not approve the QC and Safety plans until 7 November 1988. Because of this delay, the appellant was delayed 40 days from 28 September 1988 until 7 November 1988. The Government was at least a contributing cause of this 40-day period of delay. Because the Government caused or contributed to this 40 day period of delay, the Government cannot collect liquidated damages for that delay. *Gaffny Corporation*, 94-1 BCA at 132,010.

#### *Discovery of Telephone Cable*

This cable was not shown on the drawings. There was no evidence that the appellant was in anyway negligent in its excavation at the time it hit the unmarked cable. The failure of the drawings to show the underground cable rests solely on the Government which provided the drawings. However, we found that appellant was not delayed in its boring work or its work on the sewer line because of the cable.

#### *Mislocated Sprinkler Lines*

We found that the five days of extra work expended looking for the sprinkler lines did not cause delay in overall contract completion.

#### *Mislocated Ten-Inch Water Line - Accord and Satisfaction*

The appellant claims that there was delay as a result of the Government’s mis-location of the ten inch main water line. The Government contends that this claim was resolved by bilateral Modification No. P00008 “for additional excavation at station 21+50 in efforts of locating existing 10” water line mislocated by SARPMA personnel.” The modification included “all costs and markups directly or indirectly attributable to the work . . . for all delays . . . and for performance of the work within the time stated.”

The appellant argues that this modification only included three days in January. The appellant relies on the testimony at trial to that effect by Mr. Reising for the appellant. There is no evidence that such an intention was made known to the Government. A party may not rely on an unexpressed intention to create an interpretation that is contrary to the plain meaning of the words of a bilateral modification. *Firestone Tire & Rubber Company v. United States*, 444 F.2d 547, 551 (Ct. Cl. 1971). On its face the modification includes all time and costs for extra excavation work associated with the water line. Thus, the modification is an accord and satisfaction with respect to all costs, direct and indirect, associated with the delay due to the additional excavation caused by SARPMA mis-marking the ten-inch water line in the field. The appellant is not entitled to any additional time for this delay. *See, Tempo, Inc.*, ASBCA Nos. 37589 *et al.*, 95-2 BCA ¶ 27,618 at 137,649. *See also, C.B.C. Enterprises, Inc. v. United States*, 978 F.2d 669, 675 (Fed. Cir. 1992) (Eichleay not applicable to bilateral contract extensions).

#### *Mis-Directions on Encasing the Ten-Inch Water Line*

Because of the confusion over the location of the water line, due to the defective Government drawings, the Government gave conflicting and indecisive instructions concerning the water line. This period of Government indecisiveness lasted over a period of nine days, from 28 February through 8 March, when the Government made up its mind to encase the sewer line where it crossed the ten-inch water line. The conflicting instructions by the Government caused the appellant to re-excavate and to re-lay 120 feet of pipe that had been laid when the Government erroneously advised the contractor that the ten-inch water line was an abandoned water line. All of these days of delay were caused by the Government's failure to decide, or its furnishing of erroneous information, and are thus the Government's sole responsibility. The Government has an obligation to assist the contractor and to provide accurate information. *Atlantic Dry Dock Corporation*, ASBCA Nos. 42609 *et al.*, 98-2 BCA ¶ 30,025 at 148,551; *Kahaluu Construction Co., Inc.*, ASBCA No. 31187, 89-1 BCA ¶ 21,308, *aff'd on recon.*, 89-1 BCA ¶ 21,525. Where the drawings are defective, the Government is responsible for any resulting delay until the effects of the defective drawings are corrected. *See Essex Electro Engineers, Inc. v. Danzig*, 224 F.3d at 1289. Because the Government caused or contributed to those nine days of delay, the Government cannot collect liquidated damages for that delay. *Gaffny Corporation*, 94-1 BCA at 132,010.

#### *Extra Testing of Sewer Line*

The Government required that the sewer line be tested at the completion of each of the four sections. The appellant argues that the first three tests were unnecessary, because the fourth test of the sewer line tested the whole line as required by the contract. The appellant claims that the first three tests caused 15 days of unnecessary delay. However, we found that the delay caused by the third test was concurrent with the water line encasement delay, and the first two tests only took three extra days.

The Government argues that the extra tests were in exchange for permitting the bells to be covered, and thus the appellant was not entitled to a time extension. That is not what we have found. The Government failed to establish that the appellant agreed to do four hydrostatic tests, instead of the one required by the contract, without additional time to perform the extra tests. The Government waived the contract requirement to leave the bells uncovered. It did so for good reason; we found that it would have been impractical, and a safety hazard, to leave the 480 bells uncovered until the final test. The appellant, however, did not agree to do the four tests without a time extension. Because the contract required only a single one time test, the Government's decision to impose the three extra tests was a constructive change. The time required to do the first three (extra) tests caused three days delay in completion of the sewer line. That delay was solely caused by the Government and the Government cannot collect liquidated damages for those days of delay. *Gaffny Corporation*, 94-1 BCA at 132,010.

#### *Sewage Backup Delay*

The appellant claims that it was delayed by sewage backups caused by the Air Force. There were three such episodes and we found that the Government did nothing to coordinate the closing down of the waste plant. The Government has an obligation to do what is reasonably necessary to assist the contractor in performing the contract. *Kehm Corporation v. United States*, 119 Ct. Cl. 454 (1950); *George A. Fuller Company v. United States*, 108 Ct. Cl. 70 (1947). In this case the Government repeatedly failed to make any effort to do so, even though asked for assistance by the contractor.

The first sewage backup on 6 March 1989 delayed work, but the delay resulting from the sewage backup was concurrent with the third hydrostatic test delay, which was also caused by the Government. Thus, the first sewage backup did not cause additional delay to completion of the sewer line. The second sewage backup was aggravated by heavy rains. The second sewage backup delayed all other work on the contract for three days between 19 and 21 April 1989. The third sewage backup was not aggravated by heavy rains, but did require the appellant to obtain a special pump truck to remove the sewage backup, delaying other work on the contract for four days between 19 and 22 June 1989. The appellant was delayed seven days by these two sewage backups. Because the Government failed to assist the appellant in preventing these unannounced sewage backups, the Government is responsible for the resulting delay. *Shirts 'N' Stuff*, ASBCA No. 32206, 89-2 BCA ¶ 21,784 at 109,612-13. Because the Government caused or contributed to those seven days of sewage backup delay, the Government cannot collect liquidated damages for those days of delay. *Gaffny Corporation*, 94-1 BCA at 132,010.

### *Topsoil Delay*

The appellant has argued that work on the contract was extended by the Government's removal of top soil and the Government's failure to return it for 11 days. Although we found that the Government did remove the topsoil and delayed its return for 11 days, we found that the delay with respect to the topsoil did not delay the overall completion of the sewer line.

### *Conclusion - Liquidated Damages*

The Government caused or contributed to the following days of delay: Approval of the QC and Safety plans: 40 days from 28 September to 7 November 1988; Mis-Directions on Encasing the Ten-Inch Water Line: 9 days from 28 February through 8 March 1989; Extra Testing of the Sewer Line: 3 days (2 days on 16 and 19 December 1988, 1 day on 11 January 1989); and Sewage Backup: 7 days (3 days on 19-21 April 1989 and 4 days on 19-22 June 1989). This is a total of 59 days of delay caused, or contributed to, by the Government, for which the Government is not entitled to collect liquidated damages. The Government's claim for 109 days of liquidated damages is reduced by 59 days, leaving 50 days for which liquidated damages may be assessed.

The appellant has argued that the liquidated damages were a penalty. However, the appellant has not provided sufficient evidence to overcome the presumption that liquidated damages in a contract are reasonable. *Wise v. United States*, 249 U.S. 361 (1919); *Priebe & Sons, Inc. v. United States*, 332 U.S. 407 (1947); *Gaffny Corporation*, 94-1 BCA at 132,010. We hold that the liquidated damages in this contract were not a penalty and that the Government is entitled to assess those damages for 50 days.

### *APPELLANT'S CLAIM FOR OVERHEAD COMPENSATION*

To recover on its claim for overhead, the appellant must prove by a preponderance of the evidence that the Government was the sole cause of the days of delay. *Gaffny Corporation*, 94-1 BCA ¶ 26,522 at 132,013, citing *Commerce International Company, Inc. v. United States*, 338 F.2d 81 (Ct. Cl. 1964); *William F. Klingensmith, Inc. v. United States*, 731 F.2d 805, 809 (Fed. Cir. 1984). We begin, therefore, with an examination of those periods of delay which we have found were caused, or contributed to, by the Government; and, determine to what extent the Government was the sole cause of those periods of delay.

The first period is the 40 days of delay in approving the QC Control and Safety plans. The Government argues that the appellant was not able to start work immediately after receipt of the notice to proceed because the appellant could not begin until the sewer pipe intended for use on the project had been approved; and, that approval did not come until 9 November 1988. The Government further argued that the delay in obtaining Government

approval was due to the fact that the appellant had requested a variance on the PVC pipe. The Government contends that the 70 days spent by the Government in reviewing the PVC pipe submittal was reasonable, because the PVC pipe submittal was a category 1 deviation under Special Clause No. 8, permitting a minimum of 60 days for review. (Gov't br. at 23, 25, 61)

The Government's contention that the PVC pipe submittal was a category 1 shop drawing, for which the Government is entitled to take a minimum of 60 days to review, is an assertion without any foundation. Moreover, the Government's contention ignores the injunction in Special Clause No. 8(b) that a category 1 shop drawing must be given "priority in review." The Government pointed to no testimony or other evidence of record which indicated in any way that the PVC pipe submittal was a shop drawing.

There is no evidence to support the Government's contention that the PVC pipe submittal was a category 1 deviation. We found to the contrary. The category 1 designation is applied only to shop drawings. The evidence establishes that the PVC pipe submittal was not a shop drawing, but rather a material submittal. The Government's assertion that 70 days was a reasonable time for review of the PVC pipe submittal is without any factual foundation or legal basis. The Government has an obligation to act promptly to review and approve plans and submittals. Promptness is especially required where the submittals must be approved before the appellant can begin work. *Gaffny Corporation*, 94-1 BCA at 132,004-05.

While one can speculate that the appellant might not have been able to begin the PVC pipe installation, even if the QC and Safety plans had been timely approved, there is no evidence to support such speculation. Moreover, as the appellant points out, the Government's position is contrary to the evidence which showed that the pipe was not delayed by the PVC pipe submittal. The PVC pipe was in fact ordered and delivered to the site before approval of the PVC pipe submittal. The evidence we have on this issue is the uncontroverted testimony of Mr. Reising that the pipe was readily available and that the only reason that the appellant could not begin work in late September 1988 was that the QC and Safety plans had not been approved.

The appellant promptly submitted its plans and material submittals. It was the Government that delayed issuing the notice to proceed, it was the Government that took an unreasonably long time to review the plans and submittals. The Government's argument, that the Government's delay in reviewing submittals is the fault of the appellant, is specious. The appellant's testimony that only the approval of the QC and Safety plans prevented it from beginning construction on 28 September 1988 was uncontroverted.

We would hold that the Government was the sole cause of the 40 days of delay from receipt of the notice to proceed until approval of the QC and Safety plans except that we are not convinced that the appellant would have begun work prior to Monday, 24 October 1988,

the day appellant planned for its preparatory inspection. While the appellant could have started work on 28 September 1988 but for the Government's failure to act promptly on the QC and Safety plans, we hold that appellant, in situations like this one where work has yet to begin, must do more than show it could have started work; it must come forward with some evidence to show that it would have started work. *Cf. Wickham Contracting Co. v. Fischer*, 12 F.3d 1574, 1582 (Fed. Cir. 1994) (contractor's burden to show not only that it could have but also would have finished the contract work by a certain date). The appellant is entitled to 14 days of delay damages from 24 October to 7 November 1988, including overhead compensation.

The next period of delay concerns the nine days of delay caused by the Government's indecision on the encasement of the water line. There was no evidence of any concurrent delay caused by the appellant. The appellant is entitled to nine days of delay damages, including overhead compensation.

The next period of delay concerns the three days of delay caused by the Government's constructive change adding three hydrostatic tests. There was no evidence of any concurrent delay caused by the appellant. However, the appellant waived monetary compensation for the additional testing. Thus, the appellant is not entitled to, and has not asked for, delay damages for these days of delay.

The last period of delay concerns the seven days of delay caused by the sewage backups. The three days of delay on 19-21 April 1989 were solely caused by Government. The four days of delay on 19-22 June 1989 were concurrent with the delay locating and fixing the leaks in the sewer line, which lasted from 9 June through 27 June 1989. That delay was caused by the appellant. Since the four days of sewage backup delay were concurrent with appellant caused delay, the appellant is not entitled to delay damages for that period. *Gaffny Corporation*, 94-1 BCA at 132,013. The appellant is entitled to only three days of sewage backup delay, including unabsorbed overhead compensation.

Unabsorbed overhead compensation is determined according to the Eichleay formula. *Wickham Contracting Co., Inc. v. Fischer*, 12 F.3d 1574, 1582 (Fed. Cir. 1994). *See Eichleay Corp.*, ASBCA No. 5183, 60-2 BCA ¶ 2688, *aff'd on recon.*, 61-1-2 BCA ¶ 2894. In order to be entitled to unabsorbed overhead under the Eichleay formula, the appellant must, in addition to establishing that the Government was the sole cause of the delay, establish that the periods of delay were of uncertain duration. *Mech-Con Corporation v. West*, 61 F.3d 883, 886 (Fed. Cir. 1995). It is clear that each period of delay in this case was of uncertain duration. The periods of delay were never announced in advance; nor was the duration certain until the delay had ended, usually when the Government completed its review process, or decided whether water lines were abandoned. We found that the period of contract performance was extended by each period of delay. Under these circumstances the appellant is entitled to unabsorbed overhead. *Altmayer v. Johnson*, 79 F.3d 1129, 1133-34 (Fed. Cir. 1996).

Moreover, the Government has not offered any evidence that the appellant could have obtained any other replacement work during the delay period. We hold that it was impractical for the appellant to take on any other work during these periods of delay. The appellant is entitled to recover its unabsorbed overhead. *See Satellite Electric Company v. Dalton*, 105 F.3d 1418, 1421 (Fed. Cir. 1997); *West v. All State Boiler, Inc.*, 146 F.3d 1368, 1376 (Fed. Cir. 1998); *Melka Marine, Inc. v. United States*, 187 F.3d 1370, 1374, 1376-77 (Fed. Cir. 1999).

*Conclusion - Overhead Compensation*

The Government was the sole cause of the following days of delay: Approval of QC and Safety plans: 14 days from 24 October to 7 November 1988; Mis-Directions on Encasing the Ten-inch Water Line: 9 days from 28 February through 8 March 1989; and Sewage Backup: 3 days from 19-21 April 1989. This is a total of 26 days of delay.

CONCLUSION

The appeal is sustained to the extent of remitting 59 days of liquidated damages and awarding 26 days of delay damages, including *Eichleay* unabsorbed overhead, as set forth above; the appeal is otherwise denied. The parties are to negotiate quantum.

Dated: 31 May 2001

---

RONALD A. KIENLEN  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

---

MARK N. STEPLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

---

EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 45070, Appeal of Idela Construction Company, rendered in conformance with the Board's Charter.

Dated:

---

EDWARD S. ADAMKEWICZ  
Recorder, Armed Services  
Board of Contract Appeals