

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Kilgallon Construction Company, Inc.) ASBCA No. 51601
)
Under Contract No. N62474-95-C-2869)

APPEARANCE FOR THE APPELLANT: William J. Braun, Esq.
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OPINION BY ADMINISTRATIVE JUDGE PEACOCK

In this timely appeal, the appellant claims that it encountered a differing site condition during the demolition phase of the referenced contract to construct family housing at Travis Air Force Base, California. Only entitlement is before us for decision. We deny the appeal.

FINDINGS OF FACT

1. The referenced contract was awarded to Kilgallon Construction Company, Inc. (Kilgallon or appellant) by the Naval Facilities Engineering Command, San Bruno, California (NAVFAC or Government) on 10 October 1995 for the demolition and removal of existing "Wherry family housing" at Travis Air Force Base (Travis), California and construction of 92 new duplex or fourplex townhouse units. The demolition work included removal of the existing concrete housing slabs. No boring logs, geological data or results of any subsurface investigation describing the nature or classifications of the soils were included in the contract. The contract incorporated by reference FAR 52.236-2 DIFFERING SITE CONDITIONS (APR 1984) and FAR 52.243-4 CHANGES (AUG 1987). (R4, tabs 1, 3)

2. Specification section 02210, "SITE GRADING," contained the following pertinent provisions:

1.4 JOB CONDITIONS

A. Classification of Excavation

1. No classification has been made to differentiate the various surface and subsurface conditions the Contractor may encounter during his performance under this contract.

2. It is the Contractor's responsibility to verify the site surface and subsurface conditions.

....

1.5 CRITERIA FOR BIDDING

Base bids on the following criteria:

a. 1000 cubic yards of waste to be removed and disposed of.

b. 1000 cubic yards of fill material required for the project site.

PART 2 - PRODUCTS

2.1 SUITABLE MATERIALS

....

B. Unsuitable materials shall include those materials that are determined to be inadequate for providing a stable slope, fill, subgrade or foundation for structures.

C. Materials which contain excess moisture content will be classified as unsuitable unless they can be dried by manipulation, aeration or blending with other materials and conform to the requirements for suitable materials.

D. Expansive clay soils shall be classified as unsuitable unless treated or mixed in an approved manner.

E. If there are inadequate supplies of suitable excavated materials on site to allow the grading of the site as indicated on the Drawings, the Contractor shall obtain suitable materials

from another source off Government controlled property at no additional cost to the Owner. . . .

. . . .

PART 3 - EXECUTION

3.1 EXCAVATION

. . . .

B. Suitable excavated material shall be transported to and placed in fill areas within the limits of the work. Unsuitable material encountered within the limits of the work shall be excavated below the grade shown and replaced with suitable material as directed by the Owner's Representative.

(R4, tabs 1, 3)

3. Kilgallon had performed one relevant prior project at Travis involving work on the "squad ops" building approximately one to two miles from the Wherry housing job. Construction of the "squad ops" project was ongoing at the time of bid opening preceding award of the instant contract. Only minor excavation for footings, foundations and utilities was involved in the "squad ops" contract. The minor excavation was performed in mid-April 1995, after the rainy season. (Tr. 255-58, 639, 641-43) Borings were included in the solicitation for the "squad ops" project. Those borings indicated the extensive presence of clay soils that did not differ materially from those encountered at the Wherry site. (R4, tab 9; ex. G-9; tr. 642-43, 753-65)

4. The claim in this appeal concerns the demolition work and the condition of the soils under the concrete housing slabs that were to be removed. At all times prior to bidding and after award, Kilgallon intended to subcontract the demolition work (tr. 267, 271-72). There is no evidence concerning Kilgallon's bid relative to demolition work or what equipment the appellant (or a subcontractor) planned to use in that phase of the job. There is no evidence detailing what types/classifications of soils Kilgallon anticipated that it would encounter.

5. On or about 30 October 1995, appellant entered into a subcontract with Tri-State Restorations, Inc. (Tri-State). The subcontract required Tri-State to perform the demolition work, asbestos abatement and lead paint removal and disposal. (SR4, tab 2; tr. 23) Prior to bid opening, Tri-State submitted a quote to Kilgallon for the "abatement" work only (tr. 134-37, 164-65). Although Tri-State had no experience in demolition involving soils, after

award Kilgallon persuaded Tri-State to perform the demolition work as well (tr. 31, 141, 363).

6. Lacking relevant demolition experience, Tri-State entered into a second tier subcontract with Cin-Mar Industries, Inc. (Cin-Mar) on 20 November 1995 for performance of that portion of the contract (SR4, tab 3). The claim in this appeal seeks recovery of costs associated with problems Cin-Mar encountered in removing the concrete slabs. No Cin-Mar representative testified at the hearing. There is no evidence that Kilgallon, Tri-State, or Cin-Mar made inquiries concerning or performed any analysis of subsurface soil conditions that would be encountered at the site prior to commencement of the demolition work in issue. Cin-Mar is headquartered in southern California. There is no evidence that Cin-Mar had performed prior work involving soils in the Travis area (in northern California) or was knowledgeable concerning such soils.

7. In the Travis area, the dry season extends from approximately 15 April though 15 October with rains commonly occurring during the remainder of the year (tr. 142-43, 357, 618, 634-35, 730-31; R4, tab 6). Precipitation during the El Nino winter of 1995-1996 was two to three times the mean with floods occurring in the area. The mean monthly precipitation amounts in the Travis area for the months of December, January, February, March and April versus the actual amounts occurring during those months in 1995-1996 in inches were: 3.1 mean v. 9.14 in December 1995; 3.8 mean v. 7.02 in January 1996; 2.9 mean v. 8.52 in February 1996; 2.4 mean v. 2.26 in March 1996 and 1.1 v. 2.26 in April 1996. (R4, tabs 6, 7; tr. 458, 618-19, 633, 730-32) Without these heavy rains, appellant concedes that it would not have experienced problems working in the soils (tr. 150; SR4, tab 10)

8. Cin-Mar intended to begin the demolition work in December 1995. However, completion of the abatement work did not occur until the end of January 1996. Delays relating to the abatement work were resolved by the parties pursuant to bilateral modification (Modification No. P00003), executed by the appellant on 31 January 1996. The modification, *inter alia*, extended the contract performance period by 31 days, contained a full release and constituted an accord and satisfaction with respect to the events relating to the delays. Cin-Mar commenced demolition of the concrete housing slabs on 6 February 1996 using a track loader. (Tr. 43, 48-52, 82, 196, 202-04, 407; SR4, tabs 4, 57; R4, tab 3)

9. Tri-State's vice president, Mr. Timothy Vitta, was "effectively the project manager" for the subcontracted work (tr. 21, 47). Mr. Vitta was at the project site approximately four times during February through March 1996 (tr. 113, 146). He has no expertise in soils (tr. 141). Mr. David Myrice, Kilgallon's superintendent was at the site full time. This project was his first project with Kilgallon and his initial project at Travis. After completion of this contract, Mr. Myrice formed his own company and performed as a subcontractor on 15-20 projects at Travis, some involving excavation. Prior to his

employment with Kilgallon, Mr. Myrice had 16 years experience with the design of military family housing projects while serving as an officer of the joint venture Actus-Sundt. Mr. Myrice has a Bachelor of Science in Industrial Technology from Fresno State University. (Tr. 167-72) There is no evidence that Mr. Myrice had any experience with soils work in the Travis area prior to this project.

10. On 12 February 1996, Cin Mar demobilized from the site because of “extremely wet conditions” and did not return until 6 March 1996 (tr. 62-64, 151, 203, 243; SR4, tab 8). The wet conditions limited Cin-Mar’s access to the work, made it more difficult to break and remove concrete and more difficult to shake mud off the broken concrete (tr. 243).

11. By letter dated 21 February 1996, Mr. Myrice issued a “directive” to Tri-State to return to the job site no later than 26 February 1996. Mr. Myrice noted, “it is obvious that Cin-Mars [sic] proposed equipment and method of removal will not satisfy the needs of this project.” (SR4, tab 9)

12. In a letter dated 23 February 1996, Cin-Mar requested that Tri-State increase the subcontract price for Cin-Mar to remobilize and work in the “saturated ground.” Cin-Mar argued “delays, created by others, on the early portion of the project pushed Cin-Mar’s originally scheduled start time into the heavy rain season.” Cin-Mar attributed the difficulties to “inclement weather” and “different site conditions.” (SR4, tab 10)

13. Further exchanges of correspondence during the period February to 3 July 1996, among Kilgallon, Tri-State and Cin-Mar, indicated that Kilgallon did not contemporaneously consider the delay of the demolition work to be excusable. Kilgallon threatened termination of the Tri-State subcontract and demanded prompt performance. (SR4, tabs 11 through 15, 18 through 24; exs. G-7, -8)

14. On 6 March 1996, Cin-Mar returned to the site and initially attempted to perform the work using the track loader. On 12 March 1996 Cin-Mar mobilized a rented excavator at Kilgallon’s insistence to perform the slab removal work (tr. 74-76, 83-84, 149-50, 309, 311, 407; R4, tab 5 at 3; SR4, tab 57). The slab demolition work was substantially completed using the excavator by mid-April 1996. At some point Cin-Mar ran out of money and withdrew from the project with Tri-State performing the remaining work using the excavator. (Tr. 178, 464-67, 471-72)

15. By letter dated 9 April 1996, Tri-State notified Kilgallon of its intent to file a differing site conditions claim alleging that the “saturated soil conditions” at the site differed “materially from the soil type indicated by the Contract Documents.” Tri-State noted that, “Apparently, the recent rains combined with native soils with inadequate drainage and/or high clay content has rendered the material unworkable.” Tri-State did not disclose what contract indications it was referencing. In the alternative, Tri-State contended that

“this condition may constitute a constructive change” because Tri-State was delayed by predecessor activities and “required to perform the work during periods of adverse weather.” (SR4, tab 24) Appellant has not developed the latter, alternative argument in this appeal.

16. By letter dated 23 April 1996, Kilgallon advised the Government of Tri-State’s “preliminary intent” to file the claim (SR4, tab 26).

17. On 24 July 1997, Kilgallon submitted a certified claim in the amount of \$291,450 to the Government on behalf of Tri-State and requested that the contracting officer issue a final decision on the matter. The claim asserted that appellant expected to encounter “clean, non-cohesive soil,” and, contrary to these expectations, actually encountered saturated, cohesive soils. According to appellant, the conditions encountered constituted a Type II differing site condition that forced changes in construction, equipment and disposal techniques. The claim did not seek delay damages. The claim was substantially prepared by Tri-State and submitted to the Government through Kilgallon. (R4, tab 5)

18. No technical analyses or tests of the soils encountered during the slab demolition work were adduced by appellant. Nor did it attempt to classify the soils under the Uniform Soils Classification System. Kilgallon employed a certified soils engineer, Mr. Pat Walls of Walls Testing, on other projects at Travis during the relevant period. Mr. Walls visited the Wherry site shortly after Cin-Mar experienced difficulties in early February, 1996. Walls Testing performed soil testing for Kilgallon in connection with the excavation/fill/compaction work associated with the redesign, *infra* (tr. 239; SR4, tab 34). However, Mr. Walls was not called as a witness and appellant did not offer any tests of the soils performed by Mr. Walls or his company. (Tr. 207-13, 239, 459) At trial, Mr. Myrice described the subsurface soils encountered as mud, “gunk,” “a mucky mess,” saturated, and “black, weird dumping and stuff” (tr. 203, 205, 208, 225-26, 228). Mr. Gerald Kilgallon, appellant’s president, visited the site occasionally and described the soils as “like a swamp,” “gooey,” and “like a big ball of chewing gum” (tr. 288-90, 370). In Mr. Myrice’s opinion, the extensive rains in December though February did not cause Cin-Mar’s problems. He considered that the rains worsened or exacerbated the soil conditions which differed from normal soil conditions in the area. (Tr. 62-63, 85, 151-52, 209, 217, 244) Neither witness was shown to have significant soils expertise.

19. Mr. Gene Cortright testified for the Government concerning the usual soil conditions commonly encountered at Travis. Mr. Cortright is the city engineer for the city of Fairfield, California. Travis lies within the Fairfield city limits. Mr. Cortright stated that very expansive plastic, cohesive clay soils predominate in the area. The soils expand with increased moisture content and, once saturated, they remain wet and unstable for extended periods. Working in the local saturated clay soils is difficult and contractors often must use special measures to cope with the adverse conditions including using larger equipment, stabilizing the soils with lime treatment, and over excavating to provide for a more stable

foundation base. The nature of the native soils was readily determinable from city and county records. Mr. Cortright noted that the winter of 1995-1996 was extremely wet causing extensive flooding in the area. (Tr. 600-01, 615-23, 633, 636; ex G-1)

20. Mr. Rick Valerga, who holds a B.S. in Systems Engineering from the U.S. Naval Academy and an M.S. in Electrical Engineering from Stanford University, was a Government contract administrator on this and other projects at Travis. He is familiar with the Travis soils and stated that the typical soils were predominately clays that were unstable when wet and these were the soils encountered by the appellant. (Tr. 637-43, 646, 655, 678-79)

21. A Government project engineer, Lynn Gillespie, who earned a Master of Science in Geotechnical Engineering from the University of California at Berkeley, prepared a geotechnical analysis of soils at the site (tr. 652; SR4, tab 43 at 5). That analysis concluded that the soils at the site were “not uncommon” for the area, consisting of clays having “high shrink-swell potential.” According to the analysis, contractors should have planned on encountering these “highly expansive soils.” (R4, tab 8)

22. The contracting officer, Mr. Patrick Collins, is a graduate civil engineer, with a masters in engineering and, *inter alia*, five years experience in the Soils Mechanics and Painting Branch of the Design Division of NAVFAC’s Southern Division. He also concluded that the clays encountered were normal for the area and had high shrink swell potential. He noted that one of the characteristics of the soil was a very slow permeability, *i.e.*, water flows very slowly out of the clays and once they are saturated they require a long time to dry out. According to Mr. Collins, the soils were highly saturated at the time the slab demolition work commenced causing the contractor’s difficulties. (Tr. 715-16, 719, 733-34, 737-39, 748, 751-52, 754-55, 763-65, 789, 791)

23. On 14 June 1996, the Government issued Modification No. P00007 (Mod. 7) to the contract. Mod. 7 was issued pursuant to the contract’s CHANGES clause and, *inter alia*, modified the design of the sub grade beneath the new replacement units to be constructed by Kilgallon following the demolition of the old units. Its stated purpose was to “Replace the Native soils with imported nonexpansive engineering fill.” The change had no effect on the demolition work. It affected only the subsequent site grading and construction of the replacement units. Mod. 7 enhanced and strengthened the design of the subgrade as a precaution and to insure the long-term reliability/stability of the foundation but the units could have been constructed as originally designed. The modification arose out of concerns expressed by the contractor relative to the adequacy of the original subgrade design taking into consideration the expansive soils known to be present. At the time the redesign was under discussion, appellant’s grading subcontractor was experiencing difficulty achieving compaction requirements resulting from the extremely wet rainy season. Additions to other housing units constructed about two years before at an adjacent site had experienced foundation “heaving” problems. Contemporaneously, the subgrade

issue was discussed as a possible design problem, *i.e.*, whether the original design adequately accounted for the expansive clays “native” to the site. Bilateral Modification No. P00012 (Mod. 12) provided for an equitable adjustment compensating appellant (and its impacted subcontractors) for the cost of the Mod. 7 work. (R4, tab 3; tr. 223, 297, 400-01, 440-41, 657-66, 798; ex. A-1) There is no evidence in the documentation accompanying the modifications of any admission by the Government that the changed design was in response to the presence of soil conditions that differed from the typical soil conditions extant at Travis.

24. On 24 May 1996, prior to issuance of Mod. 7, a geotechnical report summarizing the results of a detailed investigation of the soils at the site was prepared for the Government by William C. Boli, a registered geotechnical engineer employed by Raney Geotechnical (Raney). The purposes of the Raney investigation were to provide information regarding the soil conditions and recommendations for the redesign. Nothing in the Raney report indicates that the soil conditions encountered were unusual or differed from soils native to the area. The Raney report conclusions corroborate the above testimony of the Government witnesses and the Gillespie geotechnical analysis concerning soil conditions at the site. (SR4, tab 43)

25. Following receipt of the appellant’s certified claim (finding 17), NAVFAC’s Engineering Field Activity West (EFAW) convened a “Disputes Resolution Board” (DRB) proceeding on 20 November 1997. There were no contractual provisions relating to the DRB. At that time, the DRB consisted of three members and its proceedings were conducted by EFAW on an ad hoc basis under unpublished internal guidelines set forth in DRB “Manual W4365-1” (Manual). The Manual, *inter alia*, gave the DRB authority to make a “decision” on entitlement. Before agreeing to participate in the voluntary DRB proceeding, Kilgallon was informed by one of the DRB members that if a decision finding entitlement was issued by the DRB, that decision would be binding on the Government. After compiling an unknown documentary record and hearing brief and informal presentations by representatives from Kilgallon and NAVFAC, the DRB requested additional information from the contractor. Kilgallon furnished the information and the DRB reconvened to attempt to reach a decision. Two of the three DRB members were of the opinion that Kilgallon had established the presence of a Type II differing site condition. The third member, the legal representative, disagreed with any determination of entitlement, refused to sign any DRB decision, and declined to vouch for the legal sufficiency of any such decision. The Manual does not address situations involving disagreements among DRB members. As a result of the lack of consensus, the EFAW commander requested the EFAW’s chief procurement official, the director of contracts, Mr. Collins, to investigate the impasse and to independently assess the validity of the claim. Mr. Collins determined that no “decision” had been issued by the Board and that the claim lacked merit. (Tr. 499, 570-71, 589, 717-22, 726-41, 794, 801-03, 812-15; SR4, tabs 44-52)

26. The contracting officer, Mr. Collins, issued a final decision denying the appellant's claim on 20 March 1998. The decision was received by Kilgallon on 25 March 1998. (SR4, tab 53) Appellant timely appealed by letter date 19 June 1998.

27. After filing the appeal, Kilgallon received a "mysterious package" from an unknown sender that contained internal Government documents and memoranda relating to the DRB proceeding and describing the impasse among the DRB members (tr. 330; SR4 tabs 44-52). Another "magic envelope" from an unknown source was received by Tri-State containing identical documents (tr. 811). The documents included a "MEMORANDUM" dated 5 December 1997 that was signed by the two DRB members that had determined that the claim had validity. The latter "Memorandum" contained a checked box reading "ENTITLEMENT FOUND-RETURN TO ACO FOR NEGOTIATION." (SR4, tab 48) All memoranda and documents were received into evidence without objection by the Government on the basis of privilege or Federal Rule of Evidence 408 (tr. 5).

DECISION

Kilgallon alleges that it encountered a Type II differing site condition in performing the slab demolition work. To establish entitlement on that basis, appellant must prove, *inter alia*, that the soils encountered were "of an unusual nature" differing materially from conditions "ordinarily encountered and generally recognized as inhering in" the work. In asserting a Type II condition, appellant is "confronted with a relatively heavy burden of proof." *Charles T. Parker Constr Co. v. United States*, 193 Ct. Cl. 320, 333, 433 F.2d 771, 778 (1970). Kilgallon has failed to sustain that burden. The cohesive, expansive clays encountered by appellant were not "unusual." Nor did these native Travis soils exhibit unexpected properties or behavior when saturated by the severe rains during the winter rainy season when appellant elected to demolish the slabs.

An "unusual" condition is one that might not reasonably be anticipated given the nature and location of the work. *Kinetic Builders, Inc.*, ASBCA No. 32627, 88-2 BCA ¶ 20,657 at 104,400. The appellant has offered no persuasive evidence to prove that the soils encountered at Travis were unusual. It relies solely on anecdotal, imprecise, lay descriptions of witnesses concerning the conditions encountered (finding 18). The witnesses had no significant soils expertise and only one was present at the site for more than brief periods. For the most part, these witnesses merely provided a highly generalized recounting of problems symptomatic of working in wet soils. Appellant adduced no test results or technical analyses of the soils actually encountered. Although the appellant's soils engineer performed tests of the soil (finding 18), inexplicably, no results of his investigations were offered and the soils engineer did not testify. We infer that objective soils test results did not provide persuasive, qualitative evidence of any unusual properties or behavioral characteristics of the clays.

Appellant argues that it encountered “super-plasticized” soils. It also alleges that it expected to encounter “non-cohesive” soils. Yet it has failed to offer any probative proof of its contentions or the reasonableness of any expectations it may have had. Neither Tri-State nor Kilgallon intended to perform the slab demolition work itself at the time bids were submitted. Prior to this contract, Tri-State had never performed demolition work involving soils. Despite the site verification duties imposed by the specifications (finding 2), the record is bereft of evidence of even minimal inquiries or investigations relative to determining the types and properties of subsurface soils native to the area or other geological and climatological conditions that could reasonably be expected to impact the project.

Moreover, there were extensive, contemporaneous, internal disagreements among Kilgallon, Tri-State and Cin-Mar relative to the existence of a differing site condition. No representative of Cin-Mar, Tri-State’s subcontractor that actually performed the demolition work, testified. Cin-Mar originally protested that the demolition work was delayed and attributed its difficulties to appellant’s directive to perform during the rainy season (finding 12). Contemporaneously, Kilgallon did not consider Tri-State’s delayed performance of the demolition work to be excusable and threatened termination of the subcontract (findings 11, 13).

In addition, the Government has offered the best evidence of the “usual” soil conditions that should reasonably have been anticipated by Kilgallon. We consider that the Government has established the expansive clay soils encountered were native and usual in the Travis area and that these soils reacted as would be expected when saturated by abnormal rainfall. The conclusions to that effect of the Raney report (finding 24) and the Gillespie analysis (finding 21) were persuasively supported in particular by the testimony of Messrs. Cortright (finding 19) and Collins (finding 22). There were also no alleged, much less proven, differences between the soils indicated in the borings for the nearby “squad ops” project that were in appellant’s possession prior to bidding (finding 3) and soils encountered at the Wherry site.

Appellant regards the labeling of the cohesive, expansive clay soils as “unsuitable” as proof that they constituted a differing site condition. The fact that the wet clays were defined as “unsuitable” (unless treated/aerated/dried) in the specifications does not mean that the soils were unusual. Significant cut and fill work was contemplated by the specifications, to remove the wet, expansive clays and other “unsuitable” materials from the designed subgrade. The fact that wet native clays might require treatment or replacement with imported fills should not have surprised Kilgallon. Moreover, appellant was subsequently compensated pursuant to the redesign modifications (finding 23), among other things, for changed cut and fill requirements associated with the redesign.

To the extent that appellant now argues that the site contained fill materials and not native soils (app. br at 11), the presence of material quantities of non native soils is wholly

speculative and is refuted, in particular, by both the Raney report and Gillespie analysis. There is no evidence of where, when and how much such material was encountered, much less any test results or classification of the alleged fills. The record is clear that appellant's difficulties were caused by working in saturated, expansive clays at the height of a severe El Nino rainy season. There is no proof that any fills exacerbated conditions inherent in working in the native Travis soils at the time appellant ordered Tri-State to perform the slab demolition phase.

Kilgallon primarily relies on the fact that the subgrade was redesigned as a substitute for detailed proof of the necessary elements of its case. It argues that Mods. 7 and 12 constitute Government admissions that the soils encountered constituted a differing site condition. This contention is without merit. We have detailed the reasons why the redesign cannot be construed as any acknowledgment by the Government of differing soil conditions (finding 23). The concerns addressed by the redesign involved the long term stability/reliability of the units if constructed per the original design given the "native" expansive clays known to be present. The Government simply opted to enhance the subgrade, although the new housing could have been constructed as originally designed.

From December 1995 through February 1996, the site was inundated with two to three times the mean precipitation amounts historically recorded for that period (finding 7). Without the rain, Kilgallon concedes that it would not have experienced difficulties with the native soils in removing the slabs. Nevertheless, appellant directed that the demolition work proceed in the saturated expansive clay soils. Appellant recognizes that acts of God, including bad weather such as the heavy rainfall during the winter of 1995-1996, standing alone, do not entitle it to monetary relief under the Differing Site Conditions clause. *Turnkey Enterprises, Inc. v. United States*, 597 F.2d 750 (Ct. Cl. 1979); *Arundel Corp. v. United States*, 103 Ct. Cl. 688, 711-12, *cert. denied*, 326 U.S. 752 (1945); *Security Nat'l Bank v. United States*, 397 F.2d 984 (Ct. Cl. 1968); *Reinhold Constr. Co., Inc.*, ASBCA No. 23770, 79-2 BCA ¶ 14,123; *George A. Fuller Co.*, ASBCA No. 8524, 1962 BCA ¶ 3619 at 18,210 (muddy site after rain). It must also prove that interaction of the rain with the pre-existing and unknown site condition produced unforeseeable consequences, *i.e.*, in this case, that unknown soils exhibited behavior or properties when saturated that were not reasonably anticipated. *John A. Johnson Contracting Corp. v. United States*, 132 Ct. Cl. 645, 132 F. Supp. 698 (1955) (capillary action from thaw in combination with improperly-constructed road created quagmire); *D.H. Dave and Gerben Contracting Co.*, ASBCA No. 6257, 1962 BCA ¶ 3493 (unknown, inadequately-designed drainage system); *Paccon, Inc.*, ASBCA No. 7643, 1962 BCA ¶ 3546 (expected clay soils behaved erratically with an unexpected tendency to slide). Appellant has not established that the native Travis soils were unusual or that they behaved in an unexpected, unforeseeable manner when subjected to the severe winter rains. We have found, to the contrary, that the saturated, expansive clays responded to the lengthy rains as should have been anticipated. *Cf. Perini Corp. v. United States*, 381 F.2d 403, 410 (Ct. Cl. 1967); *Southwest Engineering Co., Inc.*, ASBCA No. 13223, 69-1 BCA ¶ 7424 (common knowledge that lean, clay soils could become

spongy, unstabilized, uncompactable quagmire when saturated following heavy rains); *Apache Constr. Co., Inc.*, ASBCA No. 36895, 90-2 BCA ¶ 22,718; *W. S. Meadows Engineering, Inc.*, ASBCA Nos. 32536, *et al.*, 88-2 BCA ¶ 20,616; *J. R. Pope, Inc.*, DOT CAB No. 78-55, 80-2 BCA ¶ 14,562 (and cases cited) (no monetary compensation for the normal, natural consequences of rain and other weather phenomena such as mud slides and wet roads).

Finally, appellant contends that the DRB rendered a “decision” finding entitlement by the majority vote of two of its three members and that the Government should be estopped from disputing that finding. In particular, it alleges that the DRB “decision” was a “final judgment” that should be accorded either *res judicata* or collateral estoppel effect. This case does not warrant an elaborate discussion of the doctrines of collateral estoppel or *res judicata*. Suffice it to say that any decision by the DRB would not constitute a “final judgment” for purposes of either doctrine. Moreover, regardless of the questionable authority of DRB members to make binding determinations absent approval of the contracting officer, no “decision” was issued by the DRB. The entire process was simply a failed, albeit structured, settlement negotiation.

The appeal is denied.

Dated: 26 September 2001

ROBERT T. PEACOCK
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
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. 51601, Appeal of Kilgallon Construction Company, Inc., rendered in conformance with the Board's Charter.

Dated:

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