ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeal of -- | ) | |
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| Environmental Safety Consultants, Inc. | ) | ASBCA No. 47498 |
| | ) | |
| Under Contract No. N62472-90-C-5164 | ) | |

APPEARANCE FOR THE APPELLANT: Mr. Peter C. Ngowu
President

APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq.
Navy Chief Trial Attorney
Ellen M. Evans, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TODD

This appeal involves a claim for additional costs incurred to remove, transport, and dispose of industrial waste sludge from two lagoons at a Navy facility. Appellant has claimed it encountered conditions that differed from those indicated in the contract and that the Government's failure to cooperate caused its costs to increase. Appellant has also alleged that it is entitled to recovery in *quantum meruit* for the reasonable value of services provided and to damages for procurement fraud, bad faith, and a conspiracy by the Government and its agents. The Government maintains that appellant has not established entitlement under any theory. Mr. Ngowu represented the appellant *pro se*. Only entitlement is before us for decision.

FINDINGS OF FACT

The Contract

1. On 23 May 1991, Contract No. N62472-90-C-5164 was awarded to appellant Environmental Safety Consultants, Inc. (ESCI) by the U.S. Navy, acting through the U.S. Naval Facilities Engineering Command, Lester, Pennsylvania, as a small business set-aside. The contract consisted of a fixed price portion in the amount of $229,925 and an indefinite quantity portion in the amount of $69,200. The total amount of the contract was not to exceed $299,125. The contract term was a period of 150 days beginning within 10 days after notice of award. (R4, tab 1 at 1, B-3, F-1; ex. A-3) The original completion date was on or about 31 October 1991 (ex. A-19).

2. The contract provided for sludge removal, disposal and cleaning services in lagoon #1 and lagoon #2 at the Naval Air Development Center (NADC or the Center),[1] Warminster, Pennsylvania. The contractor was required to provide all labor, supervision, tools, materials, and equipment to remove, transport, and dispose of the industrial waste sludge from the lagoons. The contract required all work to be performed in accordance with all applicable federal, state, and local laws and regulations. (R4, tab 1 at C-1)

3. The fixed price work line items were:

| | |
|---|---|
| Collect, Transport and Dispose of Lagoon Sludge | |
| 0001AA | Lagoon #1 (1400 cubic yards) |
| 0001AB | Lagoon #2 (525 cubic yards) |
| 0001AC | Lagoon #2 Cleaning |
| 0001AD | Concrete Sampling and Testing of Lagoon #2 |
| 0001AE | "Clean Closed" Certification of Lagoon #2 |
| 0001AF | Spill Contingency Plan |
| 0001AG | Equipment Mobilization and De-mobilization |

(*Id.* at B-2)

4. The solicitation, dated 4 January 1991, all of which was incorporated into the contract, contained the following information about the type and quantity of solids in the sludge in the lagoons:

> b. *Type and Quantity of Waste.*
>
> (1) *Type.* The waste sludge is produced by the treatment of industrial wastewaters originating from various points on the Center. The incoming wastewaters are batch treated with ferrous sulfate and lime. The sludge resulting from this treatment is directed to the lagoons. No effort is made to oxidize the excess iron, so there are still large quantities of iron in the ferrous state. *A small portion of wastewaters in lagoon #2 originated in an electroplating shop (now closed), thus the resulting wastewater treatment sludge*

*is a Resource Conservation Recovery Act (RCRA) generic F006 hazardous waste.*

. . . .

c. *Density and Quantity of Sludge*. The lagoon is uncovered and susceptible to collection of storm water directly. It is not anticipated that storm water run-on would add to the volumes noted below.

1. *Lagoon #1*. There are approximately 1400 cubic yards of non-hazardous industrial liquid waste sludge with a density of 8 to 12% solids in the lagoon. Because the flow of sludge to the lagoon cannot be interrupted an additional 400 cubic yards of sludge could be added during the duration of the contract. This sludge will not alter the density and quality of the sludge in the lagoon. If sludge analyses are required, the Contractor will perform them. Copies of the results of any analyses must be supplied to the NADC Environmental Programs Office.

2. *Lagoon #2.* There is [sic] approximately 525 cubic yards of hazardous industrial waste sludge in the lagoon. This sludge is approximately 18 to 22% (by weight) dry solids. In addition to the sludge in the lagoon, approximately 30 cubic yards of sludge are lying on the lagoon apron. This sludge is estimated to be 60% to 80% (by weight) dry solids. A toxicity characteristic leaching procedure (TCLP) analysis was conducted on the sludge. See Attachment J-C1 Section J [Report of Analysis, dated 17 October 1988, from Princeton Testing Laboratory]. If additional analyses are required, it will be the Contractors [sic] responsibility to perform them. Copies of the results of any additional analyses must be supplied to the NADC Invironmental [sic] Programs Office.

(*Id.* at C-1 - C-2; ex. A-4 at 4-5; emphasis in original)

5. The contract specified that the individual designated by the contracting officer to administer the contract was the administrative contracting officer (ACO) or the officer-in-charge (OIC). The OIC was the officer of the Civil Engineer Corps designated to have complete charge of and exercise full supervision and general direction of the work, except in connection with the Disputes clause. (R4, tab 1 at C-3)

6. The contractor was required to obtain authorization of its method of removal from the OIC before starting work. The contract and solicitation provided for the collection of waste sludge from the lagoons as follows:

> a. *Collection of Industrial Waste Sludge from lagoon #1 and lagoon #2.*
>
> (1) *Lagoon #1 (non-hazardous industrial waste sludge).* The lagoon #1 sludge waste . . . shall be removed from the lagoon and immediately transferred to the vehicles that will transport the waste sludge from the Center. The method of removal, and equipment used, must be authorized by the OIC [officer-in-charge] or his representative prior to start of work . . . .
>
> (2) *Lagoon #2 (hazardous industrial waste sludge).* The contractor shall provide all labor equipment and material to remove the hazardous sludge . . . from Lagoon #2. The sludge will be immediately transferred to the vehicles that will transport the waste sludge from the Center. The method of removal, and equipment to be used, must be authorized by the OIC or his representative prior to start of work.

(*Id.* at C-5 - C-6; emphasis in original.)

7. The contract specified conditions for transporting sludge from the Center. The contractor was to fill out a manifest that was to be signed by a Center representative and the transporter before loading any vehicles. The contractor was also required to provide NADC with certification that the transporter was fully licensed by the applicable federal and state authorities before starting work. Transport from the Center to a licensed landfill was to be in a way that would prevent spills, leakage and the collection of rainwater. (*Id.* at C-6)

8. The contractor was required to submit a copy of its authorization to dispose of the lagoon sludge at a licensed facility to the OIC before transporting any sludge from the Center. The contract provided for disposal of the sludge as follows:

> c. *Disposal of Lagoon Sludge.* The lagoon sludge will be disposed of in accordance with the following instructions:
>
> (1) *Landfill Certification.* Prior to transporting any sludge from the Center, the Contractor will forward to the

> OIC, a copy of his authorization to dispose of the sludge at the landfill facility.
>
> (2) *Lagoon #1 Disposal (non-hazardous waste sludge).* The Contractor must dispose of the sludge at a fully licensed landfill or treatment facility. . . .
>
> (3) *Lagoon #2 Disposal (hazardous waste sludge).* The Contractor must dispose of the hazardous waste sludge only at a fully licensed hazardous waste treatment, storage and disposal (TSD) facility.

(*Id.* at C-6, -7; emphasis in original)

9. The contract provided for the contractor to prepare a written spill contingency plan for approval by the OIC before starting work. The plan was to comply with all applicable federal, state and local regulations regarding hazardous waste contingency planning. (*Id.* at C-8)

10. The contract provided that the Government would furnish water for steam cleaning lagoon #2 and "for purposes *other than sludge dilution or thinning*" (*id.* at C-4; emphasis in original).

11. Section E, "Inspection and Acceptance," included a provision "CONSEQUENCES OF CONTRACTOR'S FAILURE TO PERFORM REQUIRED SERVICES (ALT. 1) (NAVFAC) (MAR 1989)," which gave the Government rights to take deductions or otherwise withhold payment from the contractor's invoices at the prices set out in the Schedule, for "any items of nonconforming service," *i.e.*, nonperformed or unsatisfactory work, or to require the contractor to reperform or correct deficiencies in its work. In the event the Government elected to deduct for nonperformed or unsatisfactory work or afford the contractor the opportunity to reperform the unsatisfactory work, the clause specified that:

> [T]he Government will also assess, as liquidated damages, an additional 10% of an amount associated solely for observed defects . . . . The liquidated damages are to compensate the Government for administrative costs and other expenses resulting from the nonperformance or unsatisfactory performance.

(*Id.* at E-5) The clause provided, *inter alia*, that exercising the rights under the clause, regardless of whether deductions were taken, would not preclude either single

or multiple occurrences of nonperformance or unsatisfactory performance from being grounds for default termination of the contract. The contract also included a provision, "ESTIMATING THE PRICE OF NONPERFORMED OR UNSATISFACTORY WORK (NAVFAC) (MAR 1989)," which stated that deductions could be taken in accordance with the Consequences of Contractor's Failure to Perform clause and, if the price of nonperformed or unsatisfactory work could not be determined from the prices set out in the Schedule or on the basis of the actual cost to the Government, estimating methods could be used. (*Id.* at E-3 through E-5)

12. Section F in the Schedule, "Deliveries or Performance," identified the term of the contract as a period of 150 days starting within ten days of the notice to proceed. The contractor was required to submit a work schedule to NADC for approval prior to the start of each work month. (*Id.* at F-1, F-2) Within 90 days after award of the contract, the contractor was required to remove 50 percent of the lagoon #1 fixed price quantity in the schedule (*id.* at C-1).

13. Section H, "Special Contract Requirements," included the following provision:

> H.15 PERMITS.
>
> The Contractor shall, without additional expense to the Government, obtain all appointments, licenses, and permits required for prosecution of the work. The Contractor shall comply with all applicable federal, state and local laws. Evidence of such permits and licenses shall be provided to the OIC before work commences.

(R4, tab 3 at H-4) Paragraph H.17 required the contractor to maintain minimum insurance coverage and furnish to the contracting officer a certificate or written statement of its insurance before the start of work. The contractor agreed to insert the substance of the clause in all subcontracts. (*Id.* at H-5)

14. The contract required the contractor to comply with directives in federal and state regulations that were listed as (1) Code of Federal Regulations Title 40 RCRA [Resource and Conservation Recovery Act], (2) Code of Federal Regulations Title 49 DOT [Department of Transportation], and (3) PA. Code 75.263-265 PA version of Titles 40 & 49 (*id.* at Att. J-H1).

15. The contract incorporated by reference the standard clauses "DISPUTES (APR 1984)" (FAR 52.233-1), "CHANGES-FIXED PRICES (AUG 1987)" (FAR 52.243-1), "SUBCONTRACTS (FIXED-PRICE CONTRACTS) (JAN 1986)"

(FAR 52.244-1),[2] and "TERMINATION FOR THE CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (APR 1984)" (FAR 52.249-2) (R4, tab 1 at I-3). The contract did not include standard clauses, "Differing Site Conditions" or "Site Investigation and Conditions Affecting the Work" (*id.; see* FAR 52.236-2, FAR 52.236-3).

## Background

16. The industrial wastewater sludge[3] in both lagoons at NADC was generated from the same sources: an electroplating facility that closed in 1984, boilers, cooling towers, and an airplane cleaning facility. Regulations of the United States Environmental Protection Agency (EPA) implementing the Resource and Conservation Recovery Act of 1976 (RCRA), 42 U.S.C. § 6905 *et seq.*, the federal statute governing the treatment, storage, and disposal of hazardous wastes, list waste from electoplating operations as F006 hazardous waste.[4] Anything that went into lagoon #2 was still classified as F006 because not all of the F006 waste had been removed. There had been no closure of the lagoon, *i.e.*, "clean closed" certification as required by RCRA regulations. Lagoon #1 was clean closed in 1987, and NADC relied on the certification of clean closure as proof that the lagoon #1 waste sludge was non-hazardous. NADC periodically contracted for removal of the waste to maintain the required distance between the top of the lagoons and the top of the waste. (Exs. G-19 at 143, -28 at 4; tr. 4/212-20, 5/4, 7, 15, 28, 79-80, 139-41)

17. ESCI is a small disadvantaged business founded in 1991, and located in Stone Mountain, Georgia. The founder, owner, President, and only employee of ESCI at the time of contracting was Mr. Peter C. Ngowu, a native-born Nigerian who has resided in the United States since 1980. He is an American citizen. His qualifications for performance of the contract included a college degree in chemistry, a graduate degree in environmental engineering for which he wrote a thesis on sludge treatability, and a law degree earned in 1990 while working at AT & T, where he was a chemical process engineer. ESCI's first business and Mr. Ngowu's first experience with Government contracts was the subject contract. (Exs. A-1, G-19 at 4-6, 18-20, 23, 27-29; tr. 1/114-19, 151)

## Solicitation and Award

18. Mr. Ngowu[5] prepared appellant's bid on the basis of the description of the industrial wastewater in the specification in the solicitation and his experience and technical background. He understood that the sludge was liquid that could be pumped and that the stated percentage of solids that could not be pumped would be collected and disposed of as solids. He did not make a site visit or analyze samples of the sludge

before bidding. Mr. Ngowu contacted potential subcontractors, including Envirite of York, Pennsylvania and Envirosafe Services of America, Inc. of Oregon, Ohio, and the publicly-owned treatment works (POTW) in Warminster to obtain quotations for treatment and disposal that he used in preparing appellant's bid. Appellant preferred using the POTW for disposal of lagoon #1 sludge because it was close to the Center and would be less expensive. Appellant considered an alternative of disposing of it at the Envirite treatment, disposal and storage (TSD) facility. According to appellant's plan, the lagoon #2 sludge would go to the Envirosafe RCRA-permitted TSD. The Government included a percentage of solids in the lagoon waste sludge in its description, which was based on samples drawn by NADC sewage plant operators and analyzed on a dry weight basis before the solicitation was issued.[6] The Government did not perform an analysis of the lagoon #1 sludge before issuing the solicitation to determine the quantities of contaminants, if any, in it. The Government knew the contaminants that were in the lagoon #2 sludge in 1988, and included test results in the specification. Mr. Ngowu did not know from the Government's description of the waste in lagoon #1 that the sludge contained solids and contaminants in quantities that would restrict appellant's selection of methods of removal and disposal of liquid, non-hazardous waste sludge. Appellant learned after bidding that contaminants in the sludge made it inappropriate for disposal in a POTW. We have found no credible evidence that potential contractors would perform sampling or analysis in addition to that performed by appellant prior to award (*see* finding 20, *infra*). (Exs. A-8 at 5, -11, -14; G-19 at 42, 46-47, 52, 66, 143-44; tr. 1/170-73, 3/34-35, 4/14-17, 221, 5/129)

19. At the bid opening on 12 March 1991, appellant's low bid was more than the Government estimate, but approximately half the next two low bids. The Government contacted a previous NADC contractor, Waste Conversion, Inc. (WCI), to evaluate the bid prices and learned appellant's bid was too low. According to a memorandum, dated 14 March 1991, from Frank J. Kurdziel, Jr., Environmental Programs Coordinator in the Environmental Programs Office at NADC, he found the Government estimate "completely unrealistic" because the large increase in the costs of disposal had made it "completely useless" (ex. A-7). The Government advised appellant that it was the apparent low bidder, asked for bid verification, and obtained confirmation from Mr. Ngowu of appellant's bid price and that there were no bid errors or omissions. A pre-award survey conducted 26 April 1991, showed that appellant had the financial capability to perform the contract and was not in violation of any laws or regulations applicable to the handling of hazardous wastes. (Exs. A-3, -7, -8, -9, -10, -18, G-1; tr. 1/149-53, 4/209, 5/121-25)

20. At a pre-award meeting on or about 7 May 1991, Mr. Ngowu presented appellant's work plan for discussion with Government officials and introduced a representative of a prospective subcontractor, Envirosafe. The Government was

represented at the meeting by LCDR William G. Washnock, contracting officer; Mr. John W. Floyd, facility service contracts manager; Mr. Cornell Gallagher, OIC and project engineer; and Mr. Kurdziel. (Exs. A-5, -15, G-19 at 48, 50-58; tr. 1/133-34, 5/147, 149-50, 186) Appellant visited lagoon #1 and lagoon #2, took samples from both, delivered sludge samples to the POTW at Warminster, and jointly determined with POTW representatives who visited the site that the slurry from lagoon #1 would be a pumpable slurry, but could not be disposed of in the Warminster POTW because of its chemical content. Appellant sent follow-up letters to Mr. Gallagher detailing its work plan, which included using a front-end loader in lagoon #2, and specifying it would transport the pumpable lagoon #1 sludge to the Envirite TSD for disposal. On 8 May 1991, Mr. Kurdziel found appellant's proposal that flowable lagoon #1 sludge and non-flowable solid lagoon #2 sludge go to the different named TSD facilities acceptable. The outcome of the Government's technical and price evaluation was recommendation of ESCI for the award made on 23 May 1991. (R4, tab 1; exs. A-13, -14, -15 at 6-7, 16; tr. 1/170, 177, 5/67, 149-50, 187)

Contract Performance

21. On 6 June 1991, a pre-construction conference was held at the Center. There were representatives of four potential subcontractors, Envirite, Envirosafe, Aces, Inc. (Aces), and WCI at the meeting. Mr. Ngowu had not yet contracted with a subcontractor to perform any of the work and wanted the Government to choose ESCI's subcontractor. The Government informed appellant that it was appellant's responsibility to choose a subcontractor. Mr. Ngowu has claimed he was directed by Mr. Floyd to select WCI as subcontractor for the work, but Mr. Floyd contends he did not tell Mr. Ngowu which firm to choose or that he would waive contract requirements if he selected any particular subcontractor. We find that appellant decided to use WCI, a local firm which had previous experience at NADC, rather than Envirite or Envirosafe as its subcontractor because Mr. Floyd recommended the firm to Mr. Ngowu. Appellant was responsible for its selection of a subcontractor to perform the work. Appellant's subcontract with WCI, dated 12 June 1991, was for the transportation and disposal of sludge from both lagoon #1 and lagoon #2 and transport to its TSD facility. WCI agreed to provide six vacuum trucks on weekdays for removal of the lagoon #1 sludge at a price based on five percent total solids with a surcharge for every one percent increase above that percentage. Mr. Ngowu knew nothing about WCI before bidding and declined to sign a Government Statement and Acknowledgment Form regarding the WCI subcontract on behalf of the prime contractor. He did not want to assume liability for actions of WCI. (Exs. A-19 at 6, -20, G-19 at 90-103, 306, 359, -28 at 5; tr. 3/26-31, 5/12-14, 152-55, 186)

22. On or about 12 June 1991, appellant mobilized at the work site and rented pumps and related equipment that would circulate and make the material uniform for pumping out the liquid in lagoon #1. Appellant hired Mr. David Wagner to assist with

the pumps. On 14 June 1991, appellant's subcontractor WCI removed four truck loads of liquid waste sludge from lagoon #1 that were manifested and transported from the Center. There were condensed stiff and solid materials found laying at the bottom of the lagoon that appellant had not anticipated and were not recognizable until surface liquid was removed. Messrs. Ngowu and Wagner attempted to break down the solids manually to dissolve the materials into liquid sludge for collection, but they were difficult to break. Two trucks were sent back empty at the end of the day on 14 June 1991, the first day of WCI's work. Mr. Floyd certified two manifests for NADC that showed "no load." The reaction of both appellant and Government representatives was surprise and disappointment. (Exs. A-21, -22, -23, G-19 at 56, 162, 167; tr. 3/32-38, 5/155-58)

23. Mr. Floyd told Mr. Ngowu that he could not use a front-end loader to remove the solids because the lagoon had a liner that NADC wanted protected, but to continue breaking down the solids by hand. Appellant rented equipment and hired Mr. Wagner's son and a friend of the son's to spray the solids to liquefy them. The Government agreed to release sludge and water from batch tanks next to the lagoon so that the solids would dissolve and appellant could continue to use WCI for removing the sludge by pumping pursuant to its original method of performance. Appellant was not aware of the chemical characteristics of the sludge until the men noticed skin irritations, and Mr. Washnock instructed the use of protective clothing. Mr. Ngowu understood from Messrs. Floyd and Gallagher that he could send a letter to the contracting officer stating the cost to break down the solids by hand and that appellant would be paid for its additional work. WCI continued collecting and transporting sludge from lagoon #1 on 17-19 June 1991. WCI disposed of approximately 350 cubic yards or one fourth of the quantity in lagoon #1. (Exs. A-24, -41, G-5, -19 at 58, 174, 268, 270, 278; tr. 3/37-40, 5/133, 155-56)

24. By letter dated 17 June 1991, appellant notified the Government of the change in conditions in lagoon #1. Appellant alleged that the collection of the sludge there revealed that the sludge matrix was different than that specified in paragraph c.5.2. in the specification and that it was required as a result to change its work plan to collect the stiff and solid materials and reconstitute them into liquid sludge for removal from the lagoon. Appellant stated that it wanted to use a front-end loader to remove any solids, but the Government had restricted its method of collection to work without mechanical equipment to protect the liner in lagoon #1. Appellant was aware of the liner as a result of being at the site for the pre-award meeting. (Exs. A-23, -24; tr. 3/38-40)

25. On 20 June 1991, WCI called Mr. Floyd to request a letter to be held harmless in undertaking the subcontract with appellant. NADC was informed directly by WCI of the public information[7] that WCI was suspended by the Defense Logistics Agency (DLA) from Government contracting and Government-approved subcontracting on 27 September 1990. At a meeting on 21 June 1991, the Government required Mr. Ngowu to terminate

appellant's subcontract with WCI because of the suspension and later confirmed this direction in a letter that required appellant to submit a qualified replacement subcontractor. (Exs. A-17, -24, -25 at 2, -30, G-19 at 326-30; tr. 3/41-45, 5/155, 200-01)

26. Appellant made an advance payment of $3,000 for Aces to do site work on 24-26 June 1991 to determine the current composition of the lagoon #2 waste sludge. Appellant was not permitted to begin the removal and disposal of waste sludge in lagoon #2. The Government would not approve use of a subcontractor until "50 or something percent in Lagoon #1" was performed (tr. 3/47). Mr. Ngowu objected that the contract did not provide that this would be the effect of not completing lagoon #1 disposal by a certain time and did not otherwise specify a condition for beginning lagoon #2 disposal. Appellant was not able to proceed with work in lagoon #2, did not receive any benefit from the money paid to Aces, and was not on good terms with Aces for proposing a subcontract. (Exs. A-26 at 6, G-8 at 8; tr. 3/47-49) There is no evidence that Aces lacked qualifications to perform the contract work.

27. On 17 June 1991, Mr. Ngowu obtained a waste profile and samples from lagoon #1 to solicit a proposal from a new subcontractor for collecting, transporting, and disposing of the lagoon #1 sludge. The waste profile showed the waste as containing less than 1 percent dissolved solids, 10-20 percent suspended solids, and 70-80 percent settled solids and described the physical state of the sludge as "thick viscous liquid" with a composition of lime 37 percent, ferrous sulfate 62 percent, and "waste constituents 1%" (ex. A-27 at 2). The forms used for waste profiles are varied in format, but are all intended under EPA regulations to disclose the waste characteristics for a TSD facility to determine whether it can dispose of the waste pursuant to its permits. A waste profile is prepared by the generator responsible for the waste and includes notice of constituents of the waste with a certification statement by an authorized representative. Mr. Kurdziel certified the waste profile, dated 17 June 1991, including the physical and chemical composition of the waste, and that the samples were representative on behalf of NADC, the generator of the waste. There is a general absence of proof of the sampling methods used to obtain representative samples and parts of the chain of custody for analyses of samples made by both appellant and the Government during the performance of the contract. The results of testing for percentage solids and contaminants can be affected by dates and times samples were taken, the qualification of the persons who obtained the samples, and the locations of the samples. For integrity of laboratory test results, record is kept of this information in chain of custody documentation. Neither appellant nor the Government produced complete chain of custody documentation for the samples they had tested. There is no documentation of contemporaneous objection to the samples appellant took from the lagoons. Appellant did not have reason to falsify samples or deliver materials that were not representative of the lagoon sludge to independent laboratories or potential subcontractors for analysis (tr. 3/96). There is no indication that the samples were changed before analysis. We find that the absence of portions of chain

of custody documentation is not critical to our considering the relative validity of the test results on samples that were delivered for analysis during the performance of the contract. (Tr. 3/43, 53, 95-97, 163-64, 4/30-31, 5/41-45, 107-08, 111, 121-23, 137-38, 246) The absence of sufficient data to support a finding of proper chain of custody precludes any single analysis of lagoon #1 sludge being conclusive evidence of the percentage solids or constituents in the waste (tr. 3/265).

28. Clean Harbors of Baltimore, Inc. (Clean Harbors), responded to appellant's solicitation by letter, dated 2 July 1991, with a price quote per gallon for treatment and disposal based on finding that the sample received contained 20.73 percent solids. Mr. Ngowu discussed the response with Mr. Kurdziel and was told the Government would not approve appellant obtaining services from this subcontractor because the price was high. (Exs. A-27 at 3, G-19 at 182; tr. 3/51-55) There is no evidence that Clean Harbors lacked qualifications to perform the contract work.

29. On 3 July 1991, Mr. David Wagner took waste samples from the lagoons to solicit a proposal from another potential subcontractor, Chemical Waste Management of New Jersey, Inc. (CWM). CWM received and accepted the samples on 8 July 1991. Initially CWM had a handwritten waste profile for the sample from lagoon #1 showing the chemical composition of the "non-hazardous industrial liquid waste" as including eight to 12 percent "solids (calcium hydroxide and ferrous sulfate)" that was signed by Mr. Ngowu for the generator and received by CWM by FAX on 12 July 1991 (ex. G-34 at 2). The profile was prepared to conform to the description of the sludge in the specification. CWM relied on the pre-acceptance sample and the waste profile to make its analysis that the waste sludge contained 12 percent solids, was non-hazardous, could receive aqueous processing, and could be disposed of in a POTW it used with no additional treatment. CWM did not find contaminants, such as heavy metals or petroleum hydrocarbons, above the limits of its POTW permit in the waste profile or the pre-acceptance sample. CWM approved the waste and prepared a typed waste profile with the same information for review by its client ESCI. CWM sent a letter, dated 17 July 1991, directly to the Government at appellant's request stating that it would accept the waste and was qualified with appropriate permits and licenses to perform the contract work. On 19 July 1991, Mr. Kurdziel signed and certified the accuracy of the typed waste profile on behalf of NADC, the generator of the waste. He testified that he did not see Mr. Wagner take the sample, but nevertheless certified that it was representative. Mr. Ngowu testified that he was not present. (Exs. A-32, -33, -34, G-19 at 254-56, -34; tr. 3/68-72, 81, 4/115-21, 152, 161-63, 166, 189, 193, 198, 5/135-38, 251-52)

30. On 8 July 1991, Central New York Industrial Services (CNYIS), an unsuccessful bidder and prior NADC contractor, offered subcontractor services to appellant. CNYIS proposed a dewatering operation which involves a mobile filter press

unit, pumps, and hoses to slurry the sludge and pump it to a filter press for production of solid filter cake and liquid filtrate for disposal. Appellant had considered CNYIS services after bid opening and now decided, under the influence of Mr. Floyd, to propose changing the method of removal of sludge from lagoon #2 because it had changed to become more solid. Mr. Ngowu signed the CNYIS proposal letter "accepted" on 18 July 1991. (Exs. A-31, G-17, -19 at 188-91, 561, -31, -32, -33; tr. 3/59-63, 4/10, 14, 17, 20-21, 32, 44, 60, 88) On 22 July 1991, CNYIS brought its equipment and personnel to the site as authorized by NADC and was ready to begin work. The Government did not approve CNYIS to work in lagoon #1 or lagoon #2. Mr. Kurdziel told appellant that lagoon #2 work could not begin until 90 percent of lagoon #1 was completed. The Government required appellant to submit CNYIS evidence of insurance, which appellant mistakenly did not find to be a contract requirement and NADC refused to waive. As a further condition of approving a subcontract for CNYIS to begin work, the Government required appellant to submit a certificate from a disposal facility that it would accept the filter cake. CNYIS requested a letter of credit from appellant, but did not receive it. CNYIS was not permitted to start work and removed its equipment from the site on 19 August 1991. There is no evidence that CNYIS lacked qualifications to perform the contract work. CNYIS has an unpaid claim against appellant for mobilization, equipment and personnel for 22 July through 26 July 1991, equipment standby from 29 July through 19 August 1991, and demobilization in the total amount of $32,595. (Exs. A-51, G-8, -17, -19 at 186, -31; tr. 3/63-67, 4/21, 82, 86, 5/203)

31. On 18 July 1991, the Government disapproved appellant's spill contingency plan because its hazardous waste transporter's plan did not meet applicable EPA and state regulatory requirements. The Government notified appellant that it would not be permitted to enter lagoon #2 until all submittals were approved, including certification from the designated landfill that it would accept the sludge for disposal. Appellant objected that it could not obtain landfill certification until it had the solid, *i.e.*, the filter cake from the lagoon made and sent to a TSD facility. (Exs. G-7 at 1-2, -8 at 6; tr. 1/132-33, 3/66-67)

32. On 26 July 1991, the Government approved CWM as appellant's subcontractor for work in lagoon #1 and lagoon #2, but asked that work begin only in lagoon #1. The Government also approved appellant's spill contingency plan (ex. A-36 at 3; tr. 3/76).

33. CWM was to collect and transport the liquid non-hazardous lagoon #1 waste sludge to its facility in New Jersey for disposal pursuant to its state-issued permit in a POTW (tr. 3/67-68, 83, 90). On or about 14 August 1991, a problem arose after receipt of the first two shipments of slurried sludge. The waste shipments contained constituents that had not been identified in the waste profile or found in the pre-acceptance sample.

CWM found hazardous materials,[8] namely heavy metals and petroleum hydrocarbons, in shipments it received that were not disclosed by NADC. CWM also found suspended solids in significantly higher concentrations than on the waste profile or in the pre-acceptance sample. (Ex. A-39, -40 at 7; tr. 3/97, 100-01)

34. According to the analytical data provided to appellant, CWM found solids in twelve shipments of sludge received as follows:

| Shipment Date | Manifest # | % Suspended Solids |
|---|---|---|
| 8/09/91 | NJA1237651 | N/A |
| 8/09/91 | NJA1237655 | N/A |
| 8/12/91 | NJA1237654 | 24.3 |
| 8/12/91 | NJA1237653 | 23.2 |
| 8/12/91 | NJA1237656 | 6.8 |
| 8/12/91 | NJA1237657 | 5.6 |
| 8/12/91 | NJA1237658 | 7.1 |
| 8/12/91 | NJA1237661 | 34.0 |
| 8/13/91 | NJA1237662 | 33.8 |
| 8/13/91 | NJA1237660 | 30.0 |
| 8/14/91 | NJA1237664 | 35.8 |
| 8/14/91 | NJA1237663 | 37.8 |

(Ex. A-40 at 9) At the hearing the author of this data explained that other data for specific gravity of the shipments correlated with the percent solids stated, but he did not find a one-to-one comparison (tr. 4/128, 131). The inquiry made by Government counsel into the accuracy of the data was limited and did not discredit the relevant CWM data. The CWM analysis was performed upon receipt of the shipments prior to processing by CWM (*id.*). Appellant's prior counsel's questions for CWM during the course of the litigation did not cause the author of the data to have other concerns with its validity. We find the statements of percent solids from CWM credible. The amount of solids and other constituents increased from what the specification provided due to the liquefaction of the heavier solids settled at the bottom of the lagoon which changed the physical and chemical composition of the waste sludge. Mr. Kurdziel reached a different conclusion that the shipments conformed with the parameters in the specification by calculating the solids content based on the weight of the material. CWM did not perform percent solids testing on a dry weight basis, and the figures in the analytical data sent to appellant did not represent percent solids calculated on a dry weight basis. (Ex. G-7 at 3, -35; tr. 3/78-80, 4/112-13, 117, 128, 133, 193, 5/238-39)

35. CWM could not unload the heavy suspended solids in the last shipments using its standard procedures and equipment. The presence of the hazardous substances required treatment of the sludge by filtration to remove them from the effluent. CWM could not dispose of the filtered solids in the POTW it was licensed to use because the levels and types of solids exceeded the effluent limits of its state-issued POTW permit. CWM disposed of the filtered solids in a CWM-owned RCRA-permitted hazardous waste facility in Model City, New York. By 20 August 1991, CWM had collected, transported, and disposed of 304.4307 cubic yards of lagoon #1 sludge, which represents less than one fourth the contract work for lagoon #1 (ex. A-39 at 4). CWM stopped sending trucks for additional disposal because hazardous substances in the sludge required that the waste be reclassified by NADC. By letter dated 26 August 1992, CWM confirmed the discrepancies that had been discussed with Mr. Ngowu, provided the analytical data, and billed ESCI for additional unloading costs and filtration and solids disposal costs in the amount of $28,534. (Exs. A-40 at 7-10, -42 at 2; G-19 at 152, 281, -34; tr. 4/113-25, 128-29, 144-45, 159-61, 165-68, 193, 205)

36. The discovery of regulated hazardous materials in the lagoon #1 sludge had the effect of stopping appellant's performance of the contract. It was necessary that further transport and disposal of the sludge be in compliance with applicable federal and state regulations to a facility that was permitted to handle the waste. (Tr. 3/83, 100)

37. Appellant performed additional testing of lagoon #1 waste sludge required by the changed condition of the sludge. Appellant obtained test results of two samples of lagoon #1 sludge from Law & Company (Law), Consulting and Analytical Chemists in Tucker, Georgia (ex. A-40). Dr. Thomas E. Lantz, who testified for appellant at the hearing, submitted these results, dated 28 August 1991, to appellant. Dr. Lantz used an approved EPA method known as total analysis to determine the presence of hazardous materials in the waste sludge. He found total solids of 33 and 58.2 percent, respectively, which was more than that represented in the contract specification, and the quantities of various hazardous materials in the lagoon #1 sludge. Dr. Lantz verified that the analysis was properly performed and the information on the test results was accurate. He considered additional information about the sampling, which is part of the chain of custody, important but not the concern of the laboratory. His principal objection to the available paperwork supporting the credibility of the Law test results was that the Law form used did not identify who delivered the sample to his laboratory. The Law test results did not show that the lagoon #1 waste sludge was hazardous waste under RCRA. (Ex. A-40 at 2; tr. 2/116, 120-22, 136-43, 157, 165, 169)

38. The Government presented testimony of Catherine F. Sigmon, Ph.D., CHMM, qualified as an expert in hazardous waste regulation, to show that the lagoon #1 sludge was not hazardous waste under regulatory provisions which EPA has implemented under RCRA. Dr. Sigmon's opinion was based on her review of appellant's complaint and

documents in the Rule 4 file. (Ex. G-29; tr. 3/195, 197) Dr. Sigmon's opinion was that the Government's determination that lagoon #1 sludge was not hazardous waste was appropriate because no test data demonstrated that it was hazardous waste as defined by RCRA regulations (ex. G-30; tr. 3/200-01, 235). The specific basis for her opinion was the test results from Analytical Services, Inc., Atlanta, Georgia contained in the Rule 4 file (*infra*, finding 57; ex. A-62 at 4-9). They showed constituent concentrations below detection limits for RCRA toxicity characteristics (tr. 3/257, 266-67). She was unable to identify any valid RCRA test results of analysis by the Government or anyone else that could support an opinion as to whether the lagoon #1 sludge did or did not constitute hazardous waste (tr. 3/253-57, 264-65). Appellant did not characterize the lagoon #1 sludge as hazardous waste, but considers it material whether it contained hazardous substances in significant concentrations not disclosed in the contract (tr. 3/104, 5/235-36).

39. We find the waste shipments from lagoon #1 contained hazardous substances that required filtration treatment and precluded disposal in a POTW, contrary to the contract representation that it was non-hazardous, but did not constitute hazardous waste requiring disposal in a RCRA-permitted hazardous waste facility if another facility was reasonably available to accept the waste for disposal. Although use of a RCRA facility was not required, it was difficult as a practical matter to find lower-cost landfills that would accept waste containing hazardous substances. (Ex. A-63; tr. 3/173-77) The change in the composition of the waste shipments from that in appellant's pre-acceptance sample and the waste profile certified by NADC that reflected the specification resulted in increased costs of disposal of the waste sludge in lagoon #1.

40. With respect to the hazardous waste sludge in lagoon #2, the Navy had not permitted appellant to begin work on lagoon #2 in July with either CWM or CNYSI. Since the start of the contract, a change occurred in the lagoon #2 sludge, which appellant had understood from the specification to be liquid. As of 7 May 1991, the sludge was described as liquid on a form the Government certified for Envirite. On 19 July 1991, the Government certified that the sludge was liquid for CWM. The contract represented that lagoon #2 was 18 to 22 percent solids, but liquid was pumped out by NADC,[9] and the sludge had become more solid. Approximately eight inches of liquid was no longer on the top of the lagoon. Appellant sent a letter, dated 26 July 1991, to notify the Government that it needed to change its proposed method of disposal as a result of the changed condition. (Ex. A-12 at 9, -34 at 1, -36; tr. 1/121, 160, 165, 3/23, 75-76, 5/249) Appellant sent samples of the lagoon #2 sludge to Law for analysis of the amount of solids to determine whether treatment was required or it could be transported as a hazardous waste solid. Appellant was required to obtain this analysis to have a recent classification of the sludge to meet regulatory requirements. Appellant received test results, which were eventually used to manifest the lagoon #2 sludge as "Hazardous Waste, Solid, N.O.S. (F006)." (Exs. A-47, -55 at 5, -59 at 3; tr. 3/117-19, 131, 136-42)

41. On 20 August 1991, appellant wrote to NADC alleging a failure to cooperate in not permitting the use of its proposed methods for lagoon #2 and not addressing the classification of lagoon #1 sludge for its proper disposal. Appellant requested a meeting. (Ex. A-39; tr. 3/85) Appellant pleaded for cooperation in numerous letters to NADC (exs. A-54 at 1, -55 at 7, 8, 10, G-16). During the litigation Mr. Ngowu explained his difficulties as "a nightmare" (tr. 3/31) that began with the disqualification of WCI as appellant's subcontractor due to its debarment. After that Mr. Ngowu felt the Navy had used him and "hated" (*ibid.*) him. (Ex. G-19 at 160-61, 179, 346, 604-05) On the other hand, the Government spent considerable time[10] meeting with Mr. Ngowu and trying to assist appellant in its performance of the contract. Mr. Floyd found Mr. Ngowu uncooperative. The Government attributed appellant's difficulties to its frequent change of subcontractors, problems in making contractually required submittals, inexperience, incompetence, lack of attention to safety precautions, Mr. Ngowu's leaving the job site to return to Georgia, and poor judgment and unprofessional behavior of Mr. Ngowu. On occasion Mr. Ngowu became emotional, verbally abusive, and profane if he was upset. (Exs. G-7 at 2, -8 at 4, 6, 9-11, -22; tr. 4/28, 5/71, 80-81, 148-49, 160-61, 176-77) The Government had no plan to injure appellant or cause Mr. Ngowu to fail in performing the contract (tr. 5/79).

42. At the meeting on 29 August 1991, which was attended by Mr. Ngowu, Mr. David Wagner, and Mr. Les Hill, a certified public accountant representing appellant;[11] LCDR D. Scott Bianchi, Messrs. Floyd, Gallagher, Dunsmore and Kurdziel representing NADC; and a representative of SBA, the parties discussed payment of appellant's claims and appellant's plans for work in lagoon #2. There was a change in the attitude of the NADC representatives at this meeting because of LCDR Bianchi, the new OIC responsible for the contract. Appellant had changed its proposed method of removal for lagoon #2 to delete the pumping of the liquid sludge because the sludge had become more solid and needed an additional analysis of lagoon #2 sludge to reflect the current characteristics and determine its proper disposal (finding 40, *supra*). The Government verbally approved Envirite as appellant's subcontractor for disposal of both lagoon #1 and lagoon #2 sludge, and wanted appellant to resume work on 3 September 1991. The Government did not accept the validity of the Law test results of lagoon #1 sludge that appellant had provided (finding 40, *supra*). It was agreed that further testing of lagoon #1 sludge would be performed by the Government to determine the chemical composition and solids content for correct disposal. Based on the policy of a TSD facility, the Government would consider approving a hazardous waste surcharge for disposal of non-hazardous waste. (Ex. A-44, -49, -54 at 11, G-8 at 2; tr. 3/119-22)

43. The Government had previously refused to issue a modification for payment for disposal of solids that were on the lagoon #2 apron, but agreed at the meeting on

29 August 1991 that it would negotiate a new contract line item. (Ex. A-44 at 1, 3, -45; tr. 3/110-18, 135) The previously filter-pressed solid materials on the lagoon #2 apron needed to be removed first because they were spread over the entire length of the approach ramp to the lagoon and prevented access for equipment to collect sludge in the lagoon. During the period 3-10 September 1991 appellant used the services of Environmental Professionals, Inc. (Enpro) to load all the dried materials on the apron of lagoon #2 into roll-off containers. (Ex. A-44, -49, -54 at 11; tr. 3/119-22, 152, 5/174)

44. On 10 September 1991, appellant did not consider itself financially able to return to the site to continue the work until it received a change order providing additional funds in response to its claim. In its claim letter, dated 19 September 1991 (finding 65, *infra*), appellant requested a 90-day extension in the contract completion date to 30 January 1992 (ex. A-50).

45. On 30 September 1991, the Government issued a cure notice for failure to make sufficient progress to complete the contract by the completion date of 31 October 1991. The letter denied appellant's request for a time extension made 19 September 1991. The Government did not accept appellant's proposed date of 15 October 1991, to work in lagoon #2. The date had been projected based on the expected receipt from Envirite of its analysis of the lagoon #2 waste sludge and cost proposal. The Government directed submission of a revised work schedule by 2 October 1991. At this time the Government had not yet conducted its analysis of the composition of the lagoon #1 sludge. Appellant did not have data from the generator of the waste to prepare a spill contingency plan or obtain a TSD facility for disposal of waste containing hazardous materials. The Government demanded response to the cure notice that the condition be cured within seven days of receipt of the notice or it could terminate the contract for default. (Ex. A-47, -50, -52; tr. 3/117-18, 134) Appellant's response was the submission of its work plan and schedule on 9 October 1991, with representation that diligent effort was being made to complete the project (exs. A-55 at 10, G-13).

46. On 1 October 1991, appellant subcontracted with Envirite for treatment and disposal of lagoon #2 hazardous waste (ex. A-55 at 14). On 2 October 1991, appellant submitted its revised work schedule for resuming removal of lagoon #1 sludge on 15 October 1991, and beginning collection of lagoon #2 solids and liquids on 4 October 1991, with a planned contract completion date of 29 October 1991. After discussions with Mr. Floyd, Mr. Ngowu revised this plan to allow time for subcontractor submittals before beginning work on 8 October 1991. Appellant made its subcontractor submittals for Envirite on 11 October 1991. (Exs. A-55 at 6-9, G-11, -14)

47. Appellant incurred container rental charges for the solids removed from the lagoon #2 apron and could not transport them from NADC until the Government negotiated the modification for the new contract line item on 1 October 1991 (ex. A-55

at 5-14; tr. 3/130, 133-35). On 2 October 1991, appellant transported the solids that had been removed from the lagoon #2 apron to CWM. The Government relied on an analysis, dated 24 September 1991, that appellant had obtained from Law for the manifest. (Exs. A-53, -55 at 8, -78 at tab 34; tr. 3/135-36). There were no contemporaneous objections to the samples appellant took to obtain this analysis or to other routine sampling during contract performance (ex. G-19 at 199-200, 253, 387).

48. On 17 October 1991, appellant arranged with ECP, Inc. (ECP) for labor and equipment to remove the lagoon #2 hazardous waste sludge and load it onto transporters. This work was performed during the period 18 - 31 October 1991. (Exs. A-55 at 19-23, G-8 at 21)

49. On 18 October 1991, there was an incident in which Mr. Kurdziel found an incorrect volume of lagoon #2 sludge stated on the contractor's manifest for transport. Based on the 40 cubic yards capacity of the truck, the 39 cubic yards stated appeared to be more than the actual volume being transported. Mr. Ngowu was enraged at Mr. Floyd, became abusive, and claimed that Mr. Floyd threatened him with a "police escort" and told security to take away his badge (ex. A-55 at 24). The matter was settled by agreement after "a rather heated exchange," according to Mr. Kurdziel, on a quantity of 35 cubic yards (tr. 5/79). At this time there was also an altercation between Mr. Ngowu and Mr. Floyd regarding deductions from unpaid invoices that, according to Mr. Floyd, caused Mr. Ngowu to go "out of control" and threaten him with personal harm such that he called Mr. Ngowu "a bonified [sic] threat to the community" (ex. G-8 at 22). Mr. Ngowu claimed purposeful harassment and that he had been prevented from working for racial reasons (tr. 5/78-79, 81, 176-77). Mr. Floyd was concerned about the possibility that he could become the subject of a complaint of racial prejudice by Mr. Ngowu (ex. G-8 at 21).

50. On 26 October 1991, there was an incident involving a spill of hazardous sludge removed from lagoon #2 by National Environmental Service, Inc., a truck transporter retained by ECP. The Government did not have a spill contingency plan, evidence of a license to transport hazardous waste, or certification of insurance from this company. The Government told ESCI not to load the trucks, but Mr. Ngowu proceeded, and a spill of liquid occurred when the container was tilted back. Emergency equipment from NADC arrived at the spill location. Appellant was able to clean up the spill, but should have had additional manpower and equipment to correct the situation. The transporter later informed NADC that if they had been informed the sludge was not all in a compressed, solid state, it would have furnished more suitable containers. (Exs. A-57 at 6, G-8 at 19-20, -10; tr. 5/58-59, 72-73, 162-66) At that time Mr. Floyd considered Mr. Ngowu "a safety risk" to the community and pulled his badge to prevent him from returning to NADC on the following day, a Sunday. He did not trust him, but permitted

his return to work on Monday. (Tr. 5/165-66) In this instance Mr. Floyd did not act unreasonably.

51. On 31 October 1991, appellant invoiced the Government for payment of $39,105 for disposal of 237 cubic yards of lagoon #2 sludge at $165 per cubic yard (ex. A-57 at 4). The Government did not approve payment due on this invoice (finding 54, *infra*).

52. On 4 November 1991, the parties executed Modification No. P00001, to extend the contract performance period to 2 November 1991, for lagoon #2 and 14 December 1991, for lagoon #1. There is no explanation for the Government electing to not extend appellant's contract for lagoon #2 further. (R4, tab 1)

53. On 5 November 1991, the Government sent appellant the test results of an analysis performed 16 October 1991, by QC, Inc. (QC) in Southampton, Pennsylvania of lagoon #1 sludge, which it used to deny the presence of heavy metals and any need for disposal as a hazardous waste and to show solids content of 10.06 percent, which was within the parameters in the contract. Appellant promptly objected by letter, dated 8 November 1991, to the unreasonable delay in receiving these results, the omission of the EPA method used in testing, and to the results as invalid. He did not trust the honesty of the testing because the results were so inconsistent. Appellant proposed jointly collecting samples that would be sent to different labs to compare results. The Government issued a specification to obtain the QC analysis, but did not present it in evidence. The report included a broad statement that all testing was conducted in accordance with "E.P.A. methodology," but the specific EPA method[12] that was used to make the analysis was not provided. The QC test was percentage dry weight solids. There is a significant difference between testing for percentage solids, which is normally done, and percentage dry weight solids. To determine percentage solids the weight of the solids is divided by the total weight of the waste and multiplied by 100. To determine percentage dry solids, a determination is first made of the weight of dry waste after heating in a drying oven. The weight of the dry solids plus the filter less the tared[13] filter is divided by the total weight of the initial waste and multiplied by 100. Application of these formulae provided in published EPA analytical procedures will yield different results: the percentage dry solids of a waste sample will be lower than the percentage solids. (Ex. A-75; tr. 4/112-13, 221-22, 5/233, 242-43) The Government informed appellant that it was approving its tentative work plan for lagoon #1. (Exs. A-55 at 12, 13, -56, -59, -75, G-19 at 209, -28 at 4; tr. 5/40-43, 109-13, 121-23, 232-33, 242-43)

54. On the same date, 5 November 1991, the Government notified appellant that it was exercising its rights under the clause, Consequences of Contractor's Failure to Perform, as to all the line items for lagoon #2. The Government never deducted from any

contractor invoices any billings associated with nonperformed or unsatisfactory work. The notice did not specify the unsatisfactory work or afford appellant the opportunity to perform nonperformed work within a specified time. The notice instead provided that appellant stop work on lagoon #2 and took a deduction for liquidated damages. (Ex. A-56; tr. 5/180) The Government deducted $10,964 from appellant's invoice, dated 31 October 1991, pursuant to rights it asserted under the aforesaid clause and the clause, Estimating the Price of Nonperformed or Unsatisfactory Work, in a letter, dated 18 November 1991, from the contracting officer to appellant. The Government calculated deductions for lagoon #2 line items as follows:

| | | | | 20% Deduction |
|---|---|---|---|---|
| 0001AB | 525 CY | 288 CY @ $165 | $47,520 | $9,504 |
| 0001AC | Cleaning | 2 @ 1,500 | 3,000 | 600 |
| 0001AD | Concrete sampling and testing | | | |
| | | 1 @ 2,800 | 2,800 | 560 |
| 0001AE | "Clean closed" certification | | | |
| | | 1 @ 1,500 | 1,500 | 300 |
| | | TOTAL DEDUCTION | | $10,964 |

The invoice was approved for partial payment in the amount of $28,141. (Ex. A-57 at 4; tr. 5/180-82) The Government's basis for taking the deduction computed at 20 percent of each line item on nonperformed work was an assessment of "liquidated damages and reinspection costs" (ex. A-57 at 1).

55. Appellant proceeded to solicit facilities that would accept the lagoon #1 sludge for disposal. Appellant received a letter, dated 5 December 1991, from the G.R.O.W.S. landfill that the Government's analysis from QC was insufficient for a non-hazardous waste facility to determine if the lagoon #1 sludge could be accepted for disposal (ex. A-64 at 3; tr. 3/171).

56. On 13 November 1991, appellant received a proposal from Mobile Dredging & Pumping Co., Chester, Pennsylvania for removal of the remaining lagoon #1 sludge with a dewatering operation (ex. A-62). Mobile Dredging obtained a sample of the sludge and ordered an analysis to identify a landfill that would accept the non-hazardous filter cake for disposal. The laboratory report, dated 27 November 1991, of testing this sample of lagoon #1 sludge by Analytical Services, Inc. (ASI), Atlanta, Georgia showed the percentage of solids was 42.2 percent and the detection of petroleum hydrocarbons and other constituents. The levels of hazardous substances were below regulatory limits for hazardous waste. (Exs. A-62 at 4-9, G-19 at 430, 433, 445, 447; tr. 3/171-75)

57. On 29 November 1991, appellant submitted a status report for lagoon #1 activities. After disposal of 650 cubic yards by appellant's initial method of removing pumpable liquid to a TSD facility (first WCI and later CWM), 750 cubic yards of lagoon #1 sludge remained for treatment and disposal. Appellant proposed a dewatering operation with solid filter cake for disposal as non-hazardous special waste, provided a sanitary landfill found that analysis of constituents in the waste met its criteria and approved it for disposal. Appellant advised the Government of estimated times to obtain approvals for disposal from either a hazardous or non-hazardous waste facility. (Ex. A-63; tr. 3/175) Appellant did not receive a response and wrote a letter, dated 3 December 1991, to request the additional information on lagoon #1 needed to obtain a facility for disposal (ex. A-64; tr. 3/175). The Government would not accept the analysis performed for Mobile Dredging. On 9 December 1991 Mr. Kurdziel filled out waste profile forms to obtain approval for disposal of lagoon #1 sludge. He made reference in the forms only to the QC test results. Mr. Ngowu did not expect the information received could be used to obtain a disposal facility that would accept the waste. NADC did not send additional information to appellant, and without it appellant was unable to perform further work in lagoon #1. (Ex. A-78, tab 18 at 33-40; tr. 3/175-76)

58. On 30 December 1991, the Government sent appellant a show cause letter asking why it had not completed performance of the unterminated lagoon #1 portion of the contract. On 17 January 1992, appellant sent its response setting forth its reasons, alleged to be beyond its control, for not completing the remaining work in lagoon #1 in detailed justification for its actions on the contract. (Ex. A-78 at 13, tab 19)

59. On 31 March 1992, bilateral Modification No. P00003 terminated the entire contract at no cost to either party. Appellant reserved its right to submit its claim for increased costs associated with specified activities in lagoon #1 and lagoon #2, engineering, testing, and other allowable and allocable costs. (R4, tab 2)

60. On 8 November 1991, the Government had issued a request for proposals for sludge removal at NADC. An offer made by CNYIS in the amount of $178,898 was accepted for work scheduled for 25 November 1991 through 31 December 1991 by contract awarded 25 November 1991. CNYIS completed the work in lagoon #2. (Ex. A-60)

61. On 24 November 1993, the Government issued an invitation for bids for non-hazardous waste sludge removal at NADC. A bid submitted by Mobile Dredging in the estimated amount of $198,928 was accepted by contract awarded 11 March 1994. Mobile Dredging completed the work in lagoon #1. (Ex. A-66; tr. 3/176-77)

Appellant's Claim

62. By letter dated 28 June 1991, the Government acknowledged receipt of appellant's undated letter supporting a claim of alleged changed conditions in lagoon #1 in the amount of $58,157.10. The Government rejected it without supporting documentation of costs. A cost estimation form was forwarded to appellant for use in providing a breakdown of costs supporting the claim. (Exs. A-25; G-19 at 350, 598-600, ex. G-8 to ex. G-19)

63. On 26 August 1991, appellant resubmitted its claim for increased costs incurred on lagoon #1. Appellant detailed the work involved in adopting a process of breaking up the solids in lagoon #1 for disposal of liquid sludge as one part of the claim. In addition, appellant claimed additional costs for loading, unloading and treatment of the sludge in lagoon #1 that were surcharges from its subcontractor CWM for the increased percentage of solids and treatment for the presence of hazardous materials. The claim suggested an allegation that the lagoon #1 sludge was RCRA-regulated hazardous waste by its reference to "the waste stream configuration as probably hazardous (F006)" (ex. A-42 at 2). Mr. Ngowu submitted the total amount of the claim as $87,118.92 and requested payment or a decision in accordance with the applicable provision of the Federal Acquisition Regulation (FAR) (ex. A-42 at 1-7; tr. 3/104). The Government did not accept the claim for payment, but decided that additional testing of lagoon #1 sludge for solids content would be needed for negotiation of the claim and required appellant to resubmit the claim by change order using the Government's contract modification form. (Ex. A-44)

64. In mid September 1991, appellant submitted its claim a third time to meet the NADC requirements. Appellant's claim, dated 18 September 1991, for $32,814.10 for surcharges from its subcontractor CWM included NAVFAC 4330/43 Standard Form, a change order on the Government's contract modification form, and another copy of the claim letter, dated 26 August 1991, from CWM with copies of its shipment analytical results and invoices. Appellant's claim, dated 19 September 1991, for $46,162.54 for costs it incurred also included the Government forms and copies of invoices and receipts related to the costs claimed.[14] Appellant requested a final decision within 60 days of its two claim letters. (Ex. A-46, -50, -78, tabs 12, 13)

65. On 20 September 1991, appellant submitted a request for an equitable adjustment (REA) for disposal of solids on the lagoon #2 apron that was required by the specification, but not included as a line item for unit pricing (ex. A-54 at 5).[15]

66. Appellant received no response to its claims after the Government received the 16 October 1991 analysis from QC. The Government rejected appellant's position that the Government test results were invalid. (finding 53, *supra*; exs. G-7 at 6-8, -19 at 351-52)

67. On 25 June 1992, Robert Chambers, Esquire, of Smith Currie & Hancock, Atlanta, Georgia, forwarded appellant's claim, certified by Mr. Ngowu in the amount of $150,587.95, to the contracting officer with a copy to LDCR Bianchi (R4, tab 3).[16] The three resubmissions of appellant's claim, dated 28 June 1991, were in response to NADC requests (tr. 3/84).

68. On 2 February 1994, the contracting officer issued a final decision denying the claim, dated 25 June 1992, for $150,587.95 for alleged extra costs that he found was divided into the following issues: (1) extra work due to a solids content in lagoon #1 sludge greater than that represented in the contract, (2) subcontractor surcharges due to the presence of heavy metals and petroleum hydrocarbon concentrations and higher solids content in lagoon #1 sludge, (3) additional testing of lagoon #1 sludge, (4) additional testing and extra work due to a solids content in lagoon #2 sludge greater than that represented in the contract, and (5) wrongful withholding of funds, an amount that the contracting officer agreed in the final decision to pay to the contractor (R4, tabs 3, 4; ex. A-78).

69. Appellant filed this timely appeal. In its original complaint appellant set forth counts for (1) higher solids content in lagoon #1 sludge, (2) hazardous waste in lagoon #1 sludge, (3) failure to cooperate in denied access to the lagoons and delayed approvals, and (4) constructive changes. Appellant amended its complaint shortly before the hearing to add allegations of entitlement based on *quantum meruit*,[17] procurement fraud,[18] bad faith conduct, and conspiracy.[19] The Government did not file an amended answer, but objected at the hearing to new theories of recovery that were not presented to the contracting officer. The Board heard appellant's evidence and deferred decision on the scope of the issues to be decided in the appeal. (Tr. 1/15-17)

## PRELIMINARY MATTERS

The Board left the record open at the conclusion of the hearing for the receipt of additional documents which were specifically identified during the hearing. The Board deferred rulings not previously made concerning acceptance of the additional evidence received from appellant. Federal, state, and local regulations and other documents in the public domain in appellant's Supplementary Index to Trial Exhibits marked exhibits A-73 through A-75 were admitted in evidence at the hearing (tr. 4/6-7), as were Clean Water Act regulations marked exhibit A-76 over the Government's objection as to relevance (tr. 4/7-8). Appellant moved the admission of the deposition transcript of the Government's expert witness Dr. Sigmon the day after the conclusion of her testimony at the hearing to have it in the record for reference in appellant's briefing. The Government objected on the grounds of untimeliness and the fact that it was not used during her

testimony for impeachment purposes. The Board reserved its ruling after appellant's assertion of a need to refer to it in briefing. We agree with the Government that there is no need to include the deposition testimony in the record. The deposition of Dr. Sigmon marked exhibit A-77, is not admitted in evidence. (Tr. 4/9, 5/260) Appellant's claim, certified 23 June 1992, was ruled admissible at the hearing and has been marked exhibit A-78 (tr. 5/229-30, 261). Appellant submitted a response to alleged surprise testimony from Government witnesses at the hearing with supporting documentation marked exhibit A-79, pages 1 through 20, noting that it had not had an opportunity to depose Government witnesses. To the extent appellant's statement constitutes argument based on the record of the appeal, it is included in the record, but no additional documentary evidence referred to therein or attached thereto is admissible. Appellant submitted charts used during its testimony at the hearing as requested by the Board, and they are admitted in evidence as marked exhibit A-80 (tr. 5/261). At the hearing appellant requested admission of court documents from litigation filed by CNYIS against ESCI. The Government did not know if it objected and offered to review appellant's documents and make a joint submission. (Tr. 5/257-59) Appellant submitted documents it considered relevant to the CNYIS litigation marked exhibit A-81, pages 1 and 2, which were later supplemented in a letter to the Board with two additional pages. The Government received copies of appellant's submission and has offered no objection, and exhibit A-81 is, accordingly, admitted in evidence.

## DECISION

Appellant alleges that it incurred increased costs for both lagoon #1 and lagoon #2 because the waste sludge, which was represented in the contract as liquid, required the removal of solids that was not contemplated at the time of bidding and could not have been known from a reasonable pre-bid site visit or reasonably expected. Appellant claims reasonable reliance on contract provisions that lagoon #1 contained solids of between 8 and 12 percent, and lagoon #2 contained solids of between 18 and 22 percent. Appellant maintains that the waste sludge contained in both lagoons was of significantly higher density causing it to incur unanticipated, increased costs in removing and disposing of the sludge. Appellant also claims that it incurred increased costs for lagoon #1 because of the presence of undisclosed hazardous substances in the waste sludge. The Government argues that the percentage of solids was accurately represented in the contract, that appellant did not understand and reasonably interpret the information provided, that its test results show the percentage of solids was within the range stated in the contract, and that, with respect to lagoon #1, appellant's increased costs were attributable to its failure to slurry the sludge sufficiently before beginning the removal, with the result that more solid material remained after appellant pumped off liquid in its first shipments. The Government maintains that the waste sludge in lagoon #1 was not hazardous waste.

Appellant has the burden of proving an affirmative monetary claim against the Government. *John T. Jones Const. Co.,* ASBCA Nos. 48303, 48593, 98-2 BCA ¶ 29,892 at 147,974, *aff'd sub nom. John T. Jones Const. Co. v. Caldera,* 178 F.3d 1307 (Fed. Cir. 1998 (Table). In order to receive an equitable adjustment from the Government, a contractor has the burden of proving the fundamental facts of its affirmative claim by a preponderance of the evidence and must show liability, causation, and resultant injury. *Wilner v. United States,* 24 F.3d 1397, 1401 (Fed. Cir. 1994) (*en banc*); *Metric Constructors, Inc.*, ASBCA No. 48423, 96-2 BCA ¶ 28,459. An appellant is entitled to no special consideration because of its appearance *pro se. Shiffer Industrial Equipment, Inc.,* ASBCA Nos. 34027, 34028, 88-2 BCA ¶ 20,584. The Board will accord a *pro se* litigant some leeway with respect to procedural matters, but applies the same legal standards for everyone. *Atlantic Maintenance Co.,* ASBCA No. 40454, 96-2 BCA ¶ 28,472*; see Lockhart v. Sullivan,* 925 F.2d 214 (7th Cir. 1991) (a *pro se* attorney is not entitled to special treatment); *Quincy Carpenter v. United States,* 38 Fed. Cl. 576 (1997). Appellant presented its arguments in Mr. Ngowu's opening statement, direct testimony, and rebuttal testimony at the hearing (tr. 1/41-44, 114-79, 3/5-194, 5/231-54). Only the Government filed a posthearing brief.[20]

Under the Changes clause in the contract, appellant is entitled to an equitable adjustment consisting of the difference between the reasonable cost of performing the work with and without a change. *B.R. Services, Inc.*, ASBCA No. 47673 *et al*., 99-2 BCA ¶ 30,397 at 150,271-72, and cases cited therein. A change in the scope of work performed to remove heavy sludge and solids where a contract represents that the work will be the removal of pumpable liquid wastes is compensable. *Chem-Tle Environmental Services,* ASBCA No. 39620, 99-1 BCA ¶ 30,193. The change in the physical characteristics of the lagoon #1 sludge resulted in a change in contract requirements when appellant was directed to break down the solids found in lagoon #1 instead of only removing and transporting non-hazardous liquid industrial waste described in the contract (finding 23). CWM, the subcontractor facility that received the shipments of lagoon #1 waste, performed additional work and incurred increased costs for disposal of the sludge because of its density and the contaminants in it. The presence of heavy metals and petroleum hydrocarbons was not identified in the Government's certification of the waste being shipped (finding 33). The disposal of the lagoon #1 sludge in a hazardous waste facility was a change in the scope of the contract work that is compensable.

There was also a change in the scope of work performed to remove, transport, and dispose of the lagoon #2 sludge. The liquid waste described in the contract and the certification of liquid waste by the Government changed (finding 40). The presence of a substantially increased quantity of solids in lagoon #2 required appellant to change from pumping the liquid as planned to a new method of performance involving filtering the waste sludge to produce solid filter cake for hazardous waste disposal, which was more

expensive (finding 35). As a further result of the change, appellant was required to reevaluate the lagoon #2 waste to determine its characteristics for proper transport and disposal that would meet regulatory requirements (finding 40).

The Government's attempts to discredit the existence of changes to the work appellant was required to perform are without merit. The test results in the record establish that the density and the constituents of the sludge were changed from the provided in the contract (findings 27, 34, 37). The Government's challenges to appellant's sampling methods do not persuade us that the resulting samples, which were routinely taken in performance of the work and certified as representative by the Government, produced invalid test results. Although the chain of custody of the tested samples, including the sampling procedures appellant followed, was not fully established, the Board is not persuaded that there was any falsification of appellant's records to reach a preconceived result. Breaks in the chain of custody documentation impact the weight of the evidence, and we are satisfied the Government's criticisms do not render the test results unreliable. *Kimmins Contracting Corp.*, ASBCA No. 46271, 95-1 BCA ¶ 27,386 *Dunrite Tool & Die, Inc.*, ASBCA No. 37538, 83-2 BCA ¶ 16,830; *see Government Suppliers Consolidating Services, Inc., v. Bayh*, 753 F.Supp. 739, 772 (S.D.Ind. 1990), and authorities cited therein; *aff'd in part and rev'd in part*, 975 F.2d 1267 (7th Cir. 1992); *cert. denied*, 506 U.S. 1053 (1993). Furthermore, we have found that the activities during performance of the contract are consistent with the test results appellant presented (findings 22, 40).

The Government's position that there were no changes is without evidentiary support. The Government's waste profile, dated 19 July 1991, for the lagoon #1 sludge was prepared to conform to the description of lagoon #1 sludge in the specification and does not, therefore, necessarily reflect the actual conditions at the time (finding 8). The Government's test results were presented without description of appropriate analytical methods that were used, and they are not persuasive (finding 53). The change in the physical condition of the lagoon #2 sludge from "liquid" to "solid" is not disputed by testing of lagoon #2 sludge. We have found the Government's criticisms of Mr. Ngowu's personality generally not relevant to the issues to be resolved in the appeal and not included them as a basis of our decision (*see* Gov't br. at 9, 28; findings 41, 49-50).

Appellant also claims that it incurred excess costs as a result of the Government's failure to cooperate. Appellant alleges specifically that the Government did not grant appellant access to the lagoons, delayed approval of its work plans and schedules, and delayed approval of its hazardous waste spill contingency plans. The Government argues that appellant has failed to present the requisite proof of Government-caused delay and that appellant delayed the work through its own negligence. According to the Government, appellant's problems, including its inability to work at any given time, were caused by Mr. Ngowu.

For recovery on a delay claim it would be necessary for appellant to show the extent of the claimed delay, that the delay was proximately caused by Government action, and that the delay harmed the contractor. *Wilner v. United States,* 24 F.3d 1397, 1402 (Fed. Cir. 1994); *G. Bliudzius Contractors, Inc.*, ASBCA Nos. 42366 *et al.*, 94-3 BCA ¶ 26,074. Appellant has not established delay. However, we are persuaded that the Government caused it to incur other increased costs (*e.g.*, increased subcontractor costs) by its failure to cooperate. It is long established that the Government has an implied duty to cooperate with the contractor and not to hinder its performance. *Atlantic Dry Dock Corporation,* ASBCA No. 42609 *et al.,* 98-2 BCA ¶ 30,025 at 148,551. Where the failure to take some positive action is alleged as a breach of the duty of cooperation, it must be shown that the action was necessary for performance of the contract, and that the Government unreasonably failed to take the action. *Tri Industries, Inc.,* ASBCA Nos. 47880, 48140, 48491, 99-2 BCA ¶ 30,529. Failing to give the contractor, after a valid request, information necessary to continued performance or giving the contractor erroneous information, the Board has said clearly hinders the contractor's performance. *Kahaluu Construction Co., Inc.,* ASBCA No. 31187, 89-1 BCA ¶ 21,308, *aff'd on reconsid.*, 89-1 BCA ¶ 21,525.

We have no evidence from appellant that the Government's disapproval of its spill contingency plan before 26 July 1991, constituted a failure to act promptly or was otherwise improper. We have also found nothing improper in the denial of access to the lagoons for the one day when Mr. Ngowu was prevented from entering the Center (finding 50).

The contract required the contractor to obtain certain approvals from the Government (findings 6 through 9). A contracting officer must have a reasonable basis for withholding authorization or approval. *Century Concrete Services, Inc.*, ASBCA No. 48137, 97-1 BCA ¶ 28,989. Appellant's proposed method of work and its work schedule plan were required to be submitted for approval before appellant could proceed and evidence of permits and licenses of its subcontractors was required to be provided. The Government did not cooperate with appellant when it proposed selected subcontractors, Aces and Clean Harbors (findings 26, 28). The Government did not have basis in the contract or federal, state, and local environmental regulations to reject appellant's proposals, except with respect to CNYIS for which it could require evidence of current insurance (finding 30). The Government has not challenged the subcontractor qualifications or justified its disapproval, but only alleged that appellant made piecemeal submittals and revised its submittals on numerous occasions to argue that appellant's problems involving delay were caused by Mr. Ngowu (Gov't br. at 36).

The contract required appellant to find a disposal facility that would accept the lagoon #1 waste sludge. After CWM found changes in the lagoon #1 waste sludge that

precluded its continued receipt of the sludge for disposal, appellant did not receive cooperation from the Government to obtain an analysis of the sludge that it needed to subcontract for disposal. The Government unreasonably delayed providing its analysis to appellant for over two months and provided an analysis that was inadequate for the continuation of appellant's performance, causing appellant to unnecessarily expend resources in seeking disposal facilities (findings 42, 55, 57). There is no evidence that appellant's requests for Government cooperation were harassing, unreasonable, undertaken in bad faith, or with any intent to delay the contract. *See Alsace Industries, Inc.*, ASBCA No. 50720, 98-1 BCA ¶ 29,576. To this extent, we conclude that the Government failed to cooperate and hindered appellant's performance.

The contract provided for the contractor's submission of landfill certification that the hazardous waste in lagoon #2 would be accepted for disposal, but this submission was to be made prior to transport, not prior to beginning work. Appellant could not provide samples to obtain the certification without permission for on site work. The Government's erroneous application of this contract provision interfered with appellant's ability to have CWM begin work in lagoon #2 in July (findings 31, 32). The contract did not specify when the contractor could begin work in lagoon #2, but the Government required a percentage completion of lagoon #1 work and thereby impacted appellant's planned performance (findings 26, 30). In these instances the Government's misinterpretation of contract provisions caused appellant to incur additional subcontractor costs that are compensable under the Changes clause in the contract.

Appellant also alleges that the Government directed removal of sludge of a significantly greater density and of hazardous content that changed and expanded the contract scope of work. Appellant argues that the Government's failure to compensate appellant for the cost overruns resulting from this direction constituted a violation of the Government's duty to cooperate and administer the contract properly. The Government has interpreted appellant's allegation to refer to the removal of solids on the lagoon #2 apron and maintains that bilateral Modification No. P00003 to the contract bars the claim. Modification No. P00003 provided compensation for the lagoon #2 apron solids and included appellant's waiver of a claim for additional costs relating to the modification. The Board has consistently held that a contractor who executes a general release complete on its face and reflecting unqualified acceptance with the terms and conditions thereof is subsequently barred from recovering additional compensation for work within the agreed scope of the release. *Barling Company*, ASBCA No. 45812, 95-1 BCA ¶ 27,542 at 137,249. Appellant has not shown any reason why the release in Modification No. P00003 would not be enforceable, and accordingly, if appellant were construed to be making this claim, it is not entitled to additional compensation for the changed work on the lagoon #2 apron that is the subject of the modification.

We have read the allegation to be that appellant performed additional work beyond the scope of the contract as a result of a directive regarding the lagoon #1 sludge and the Government has improperly failed to compensate it for its resulting increased costs. There was no expectation from the representations in the contract that appellant would be required to remove substantial quantities of settled solids from the bottom of the lagoon without mechanical equipment. We have concluded that the Government's misrepresentation of the conditions in lagoon #1 caused appellant additional costs for removal and disposal of the sludge that are compensable. Appellant has alleged that the Government has failed to compensate it for its cost increases in violation of its duty to cooperate and administer the contract properly. Appellant performed the extra work breaking up the stiff and solid materials in lagoon #1 with the understanding it would submit a claim for payment. The Government did not approve or deny the claim for more than two and a half years, but imposed obligations on appellant to make additional burdensome submissions. We have not found that any authorized Government official promised to pay appellant's claim. Under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended, the Government was required to issue a decision within 60 days from receipt of a written request from the contractor. 41 U.S.C. § 605(c)(1); FAR 52.233-1. The Government did not meet this obligation after appellant's claim was submitted on 26 August 1991. The Government required further submissions from appellant and considered appellant's final claim for over seven months before issuance of the final decision denying the claim. Appellant had difficulty financing continuation of its performance of the contract without receipt of payment from the Government for the additional costs it had incurred (finding 44). Assuming *arguendo* that the Government's delayed consideration of appellant's claim was improper, we find insufficient evidence that the matter led to or caused specific harm to appellant. *Christian Contractors*, ENG BCA No. 5461, 89-1 BCA ¶ 21,237. The duty of the Government to cooperate with a contractor and provide fair treatment does not create a duty to respond timely to a contractor's claims and cannot be the basis of a material breach of contract. The Government is entitled to dispute a request for an equitable adjustment, and appellant has a right to appeal from a deemed denial of its claim. Appellant has no remedy separate from the CDA. *See Empire Energy Management Systems, Inc.*, ASBCA No. 46471, 99-2 BCA ¶ 30,636. In addition, we cannot find that improper factors influenced the contracting officer's actions or any bad faith or abuse of discretion.

With respect to the allegations in appellant's amended complaint, the Government has argued in its brief that the Board does not have jurisdiction over claims of fraud and conspiracy or appellant's demand for punitive damages, which were presented for the first time in appellant's amended complaint. If there were jurisdiction to decide these matters, the Government maintains that these portions of the appeal should be denied as unfounded. Where the Board has no jurisdiction, it has no power to do anything but strike the matter from its docket. *Johns-Manville Corp. v. United States*, 893 F.2d 324, 327 (Fed. Cir. 1989). The Board has no jurisdiction over a claim that has not first been

submitted to the contracting officer for final decision. Where additional allegations do not alter the nature of the original claim, however, the assertion of a new legal theory of recovery, when based upon the same operative facts as in the original claim, does not constitute a new claim. *Lockheed Martin Librascope Corporation,* ASBCA No. 50508, 99-2 BCA ¶ 30,635; *Trepte Construction Company, Inc.*, ASBCA No. 38555, 90-1 BCA ¶ 22,595.

The Board has no jurisdiction over appellant's allegations regarding *quantum meruit,* fraud, conspiracy, or punitive damages. *Cousins Contracting, Inc.,* ASBCA No. 50382, 97-1 BCA ¶ 28,906 (no jurisdiction of complaint for *quantum meruit*); *United Technologies Corp.,* ASBCA No. 46880 *et al.,* 95-2 BCA ¶ 27,698 (no jurisdiction over criminal fraud or civil fraud); *Vec-Tor, Inc.,* ASBCA No. 25807, 85-1 BCA ¶ 17,755 (no jurisdiction over claims of conspiracy). In addition, the Board cannot make any award of punitive damages. Absent express consent of Congress, no punitive damages can be recovered against the United States. There is no such express consent here. *Advance Engineering Corporation,* ASBCA No. 46889, 95-1 BCA ¶ 27,475 at 136,869.

Allegations of misconduct or bad faith, including an allegation that a contract termination was the product of a conspiracy by Government personnel, have been heard and decided by the Board. *Apex International Management Services,* ASBCA No. 38087, 94-2 BCA ¶ 26,842, *aff'd on reconsid.*, 94-2 BCA 26,852; *Uni-Systems, Inc.*, ASBCA No. 25066, 84-2 BCA ¶ 17,292. Accordingly, we have concluded that we can take jurisdiction of appellant's allegations that Navy actions were taken in bad faith, which is only a new legal theory that alleged facts underlying appellant's assertion of the Government's failure to cooperate constituted bad faith. The Board compared the duty of good faith performance to the implied duty not to hinder or interfere with the contractor's performance in *J.A. Jones Construction Co.,* ASBCA No. 43344, 96-2 BCA ¶ 28,517, as follows:

> In Government contract practice, breach of the duty of good faith performance is often manifested by the Government's violation of its implied duty not to hinder or interfere with the contractor's performance. Such interference may be treated as a breach or a constructive change, entitling the contractor either to damages or an equitable adjustment and/or excusing the contractor's delayed performance, without necessarily being branded "bad faith."

96-2 BCA at 142,420 (citations omitted) We have concluded that the Government's interference with appellant's performance is compensable and will consider whether appellant's evidence is sufficient to establish bad faith.

There is a presumption that contractual actions of the Government are taken in good faith. A very substantial evidentiary showing of bad faith, termed "well-nigh irrefragable proof," is required from the contractor in order to overcome that presumption. Well-nigh irrefragable proof has been interpreted to require a "specific intent to injure" the contractor by a showing of specific instances of prejudice, animus, or malice toward the contractor. *Kalvar Corp. v. United States*, 211 Ct. Cl. 192, 198-99, 543 F.2d 1298, 1301-02 (1976), *cert. denied*, 434 U.S. 930 (1977); *Apex International Management Services, Inc., supra.* Appellant has not shown that the acts and failures to act that we have found interfered with appellant's performance were taken with malice toward appellant (finding 41). We have concluded that they do not satisfy appellant's heavy burden of proof. *Apex International Management Services, Inc., supra.*

The Government has alleged that its assessment of liquidated damages was appropriate and the contracting officer's conclusion in the final decision that appellant was entitled to $10,869 in improperly withheld funds was in error. The Government argues that appellant failed to perform much of the work, that it did not timely perform the work it did perform, and that the Government incurred significant administrative costs due to the contractor's failure to perform. The Government submits that the contracting officer misunderstood the facts and did not read the governing contract clauses correctly. A condition precedent for deducting liquidated damages prescribed in the Consequences of Contractor's Failure to Perform clause was action to either deduct billings for nonperformed or unsatisfactory work or afford the contractor an opportunity to perform or reperform the delinquent work (finding 11). When the Government fails to satisfy the condition precedent for deducting liquidated damages, it is not entitled to take the deductions. *Phil Brodeur d/b/a Solano Industrial Equipment Maintenance Co.*, ASBCA No. 30967, 90-3 BCA ¶ 23,154 at 116,225. In November 1991 the Government was not entitled to withhold the payment. In February 1994, when the contracting officer issued his final decision on appellant's claim, the Government decided not to prosecute its claim for liquidated damages. The final decision found appellant entitled to the amount of $10,869 plus interest from the date of appellant's claim. Appellant was entitled to remission of the liquidated damages that were assessed.

## CONCLUSION

The appeal is sustained with respect to appellant's claim for its extra work due to the higher solids content in lagoon #1 sludge, subcontractor surcharges due to the presence of higher solids content and contaminants in lagoon #1 sludge, additional testing of lagoon #1 sludge, additional testing and extra work due to higher solids content in lagoon #2 sludge, and for improper interference with appellant's performance as set forth above. The appeal is otherwise denied. For those portions over which we have no jurisdiction, the appeal is dismissed. The matter is remanded to the parties for consideration of the amount to which appellant is entitled. If the parties cannot agree

on the amount within 60 days after the date of this decision, the contracting officer shall promptly issue a final decision from which appellant shall have the right to appeal to this Board.

Dated: 29 February 2000

LISA ANDERSON TODD
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

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

I concur

CARROLL C. DICUS, JR.
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

NOTES

[1] The name was later changed to Naval Air Warfare Center. The facility closed in March 1997. (Tr. 4/209)

[2] This clause requires the contractor to notify the contracting officer reasonably in advance of entering into any subcontract if the subcontract is proposed to exceed $100,000 and obtain the contracting officer's written consent before placing such subcontract. FAR 52.244-1(b)(1) and (d).

[3] Sludge is defined as "any solid, semi-solid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility exclusive of the treated effluent from a wastewater treatment plant." 40 C.F.R. § 260.10. (Tr. 1/81)

[4] 40 C.F.R. § 261.31 (1998).

[5] The Government waived its right to cross-examine Mr. Ngowu at the hearing and gave appellant additional hearing time to present its direct case, provided that appellant agree to admit the deposition of Mr. Ngowu in lieu of cross-examination. Appellant agreed to the proposal and requested a copy of the transcript, which Mr. Ngowu did not have. The Government provided complete copies of the transcript of Mr. Ngowu's deposition to the Board and appellant during the hearing. The complete transcript was admitted in evidence as exhibit G-19. (Tr. 3/122-24)

[6] In 1987 a prior contractor informed NADC that it could not complete its contract to remove and dispose of NADC lagoon sludge because it found the percentage dry solids in the last phase of the contract exceeded 70 percent instead of the 15 percent specified and bid (ex. A-2 at 1; tr. 1/163-65).

[7] The U.S. General Services Administration Office of Acquisition Policy list of parties excluded from federal procurement as of 8 March 1991 named WCI for indefinite suspension. This document provides that agencies not consent to subcontracts with listed contractors, unless the acquiring agency's head or a designee determines that there is a compelling reason for such action (ex. A-17).

[8] The environmental regulatory framework governing hazardous materials is different than RCRA regulation of hazardous waste. Hazardous materials are regulated under the Clean Water Act. If a material is a hazardous waste, it is also a hazardous material, but a hazardous material is not necessarily a hazardous waste. (Tr. 3/87-88, 103, 5/59-60) CWM did not find that the lagoon #1 waste was hazardous under RCRA (tr. 4/121).

[9] NADC did not consider that the liquid effluent was F006 hazardous waste requiring off-site disposal and decided to send it to its sanitary treatment plant (ex. G-7 at 2; tr. 3/63-65). By removing it before permitting appellant to enter lagoon #2, the quantity of cubic yards of sludge for which payment would be due under the contract, was less (tr. 3/75).

[10] As of 23 November 1991 NADC had spent 200 overtime man-hours in surveillance of the contract and 30 hours in formal meetings with Mr. Ngowu (ex. G-8 at 23).

[11] Mr. Ngowu brought Mr. Hill, an American college professor, to the meeting to ensure that his problems were not due to a failure of communication attributable to differences he had as a native African (tr. 3/111).

[12] Appropriate EPA methodology would be found in SW-846 ["Test Methods for Evaluating Solid Waste, Physical-Chemical Methods," EPA Publication SW-846; *see* 40 C.F.R. § 260.11 (a)(11)] for each parameter being tested (tr. 5/113).

[13] "Tared" means "weigh[ed] so as to determine the tare." The tare is "the weight of a container used as a deduction esp. in laboratory weighing operations." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2341 (1986).

[14] Invoices for pump rental, equipment rental, materials, hotel and related expenses, rental cars, and canceled checks payable to its employees were referenced in the claim with copies attached (ex. A-50).

[15] The negotiations of this REA were conducted on 1 October 1991. The total negotiated price for this change order of $20,058.35 was approved for payment on 24 October 1991, and is not in dispute. (Ex. A-54 at 4-5, 11-14; tr. 5/174) Modification No. P00002, dated 25 November 1991, incorporated the work into the contract, increased the firm-fixed price portion to $249,938.35, and provided the contractor's release of claims under or arising out of the modification (R4, tab 1).

[16] The submission furnished to the Board includes documents to which Government counsel objected on the grounds that some were incomplete, some were hearsay, and it created confusion because the exhibits were not separately tabbed or identified (*id.*; tr. 1/5-7). Mr. Chambers submitted the claim to the contracting officer with tabs for the exhibits referenced throughout the narrative of the claim. Appellant submitted a copy of his submission for the appeal record as ordered by the Board (ex. A-78; tr. 5/226-30). We have found that the two submissions conform and have cited the claim which is the subject of this appeal to appellant's exhibit for ease of reference rather than the Rule 4 file, tab 3.

[17] Appellant maintains that:

> [W]hen you honestly work for people based on what they ask you to do, . . . our civilized society requires you to pay for the value of the work that you did.

(Tr. 5/240) Appellant's position is that the Navy directed ESCI to perform specific work and benefited from it and was unjustly enriched when it later refused to pay the reasonable value for that work (tr. 1/43).

[18] Appellant's position is that the Navy defrauded ESCI by leading it to believe that it would be paid the reasonable value of the extra work performed and later refused to pay (tr. 1/42). *See* finding 42, note 11.

[19] Appellant maintains there was a conspiracy among Government personnel not to tell the truth, but to say that they intended in the contract to state percentage dry weight solids (tr. 5/248). By conspiring within themselves to deny payment to appellant for its extra work, the Navy used the same scheme that had been used with a previous contractor in 1987, according to appellant's allegations (ex. A-2 at 1; tr. 1/42, 119-21, 161, 172).

[20] The Government requested sequential briefing to avoid its unnecessary review and application of different environmental regulations. The Board ordered sequential briefing to provide appellant an opportunity to eliminate the confusion Mr. Ngowu asserted that Government counsel created at the hearing. Appellant could state the issues in an initial brief, and the Government would respond in lieu of simultaneous posthearing briefing. Appellant declined to file a brief. The Government's brief did not address Mr. Ngowu's testimony other than to state that it was "clear that nothing . . . establishes there was any changed condition or any other basis upon which appellant would be entitled to additional compensation under the contract or any theory of recovery" (Gov't br. at 19). The parties' issues for decision were thus not given any focus in posthearing briefs.

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. 47498, Appeal of Environmental Safety Consultants, Inc., rendered in conformance with the Board's Charter.

Dated:

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