ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Jerry Dodds d/b/a Dodds & Associates, by Walter W. Kelley, Chapter 7 Trustee	)	ASBCA No. 51682
	)	
Under Contract No. N62467-95-C-3623	)	

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OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD

Mr. Jerry M. Dodds, doing business as Dodds & Associates (Dodds), brought this appeal of the contracting officer's deemed denial of Dodds' claims in connection with a construction contract for a pre-engineered metal building roof shelter over an existing loading dock. Dodds claimed remission of liquidated damages totaling $16,606 and an equitable adjustment totaling $502,747. Dodds based the claims on an alleged differing site condition, continual control of the contractor's pace of work, breach of contract under the Prompt Payment Act, improper retention of contract funds for liquidated damages and the improper interpretation of contract documents (R4, tab 78 at 1, 3).

As to the "continual control of the contractor's pace of work" portion of the claim, Dodds alleges interference by the Government in the following: improper administration of the contract generally and, specifically, through the submittal process; delays resulting from compliance with the project manager's direction to "air dry" excavations; and constant use of the loading dock by Government personnel and equipment.

As to the "improper interpretation of contract documents" portion of the claim, Dodds alleges it incurred additional costs and was delayed by bad weather, by the disallowance of the use of sonotubes, by the Government's requirement to provide two coats of safety yellow paint to the pre-engineered structure, and in regard to the disagreement over the translucent roof panels.

A hearing was held in Valdosta, Georgia. Mr. Dodds, a former Air Force inspector and a Government contractor with prior construction experience, represented himself *pro se* and was appellant's sole witness. Post hearing briefs have been filed. We are to decide both entitlement and quantum.

As discussed below, subsequent to the filing of his notice of appeal, appellant filed a Chapter 7 bankruptcy. The Government has moved to dismiss the appeal for lack of jurisdiction. We deny the motion and revise the caption to reflect the appearance of the Chapter 7 trustee by counsel.

FINDINGS OF FACT - GENERAL

1. By date of 8 April 1996, the Department of Navy, Naval Facilities Engineering Command (NAVFAC), issued an Invitation for Bids for the construction of a 30,000-square foot pre-engineered steel loading dock shelter at the Marine Corps Logistics Base in Albany, Georgia. Drawings and specifications were given to the bidders. There were three amendments to the solicitation, one of which is pertinent to this appeal. Amendment 0002, dated 28 May 1996, was issued upon request by Dodds and changed the contract completion time from 130 days to 175 days ("160 days plus 15 days for administrative matters and mailing time") (R4, tab 2; tr. 119). By date of 22 July 1996, the Government awarded firm fixed-priced Contract No. N62467-95-C-3623 in the amount of $251,210 to Dodds (R4, tabs 2, 6; tr. 22, 48, 119-20). The award document declared a start date of 6 August 1996 and a contract completion date of 14 January 1997 (R4, tab 6).

2. The contract included FAR 52.212-3, COMMENCEMENT, PROSECUTION, AND COMPLETION OF WORK (APR 1984) - ALTERNATE I (APR 1984), which provided as follows:

> The completion date is based on the assumption that the successful offeror will receive the notice to proceed by 15 days after the award date. The completion date will be extended by the number of calendar days after the above date that the contractor receives the notice to proceed, except to the extent that the delay in issuance of the notice to proceed results from the failure of the Contractor to execute the contract and give the required performance and payment bonds within the times specified in the offer.

3. The contract contained FAC 5252.228-9305, NOTICE OF BONDING REQUIREMENTS (JUN 1994) which required the successful bidder to furnish bonds within 10 days after receipt of award (R4, tab 2, § 00720).

4. The contract incorporated by reference the following clauses: FAR 52.212-5 LIQUIDATED DAMAGES - CONSTRUCTION (APR 1984); FAR 52.212-12 SUSPENSION OF WORK (APR 1984); FAR 52.232-5 PAYMENTS UNDER FIXED - PRICE CONSTRUCTION CONTRACTS (APR 1989); FAR 52.232-27 PROMPT PAYMENT FOR CONSTRUCTION CONTRACTS (MAR 1994); FAR 52.236-2 DIFFERING SITE CONDITIONS (APR 1984); FAR 52.236-11 USE AND POSSESSION PRIOR TO COMPLETION (APR 1984); FAR 52.236-21 SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (APR 1984); FAR 52.243-4 CHANGES (AUG 1987); and FAR 52.246-12 INSPECTION OF CONSTRUCTION (JUL 1986) which at (d) puts the contractor on notice that the inspector is not authorized to change any term or condition of the specification without the contracting officer's written authorization. (R4, tab 2)

5. The contract also contained FAC 5252.201-9300 CONTRACTING OFFICER AUTHORITY (JUN 1994) which states:

> In no event shall any understanding or agreement between the contractor and any Government employee other than the Contracting Officer on any contract, modification, change order, letter of [sic] verbal direction to the Contractor be effective or binding upon the Government. All such actions must be formalized by a proper contractual document executed by an appointed Contracting Officer. The Contractor is hereby put on notice that in the event a Government employee, other than the Contracting Officer, directs a change in the work to be performed, or increases the scope of the work to be performed, it is the Contractor's responsibility to make inquiry of the Contracting Officer before making the deviation. Payments will not be made without being authorized by an appointed Contracting Officer with the legal authority to bind the Government.

It also contained FAC 5252.242-9300 GOVERNMENT REPRESENTATIVES (JUN 1994) which states in relevant part:

> . . . In no event . . . will any understanding or agreement, modification, change order, or other matter deviating from the terms of the Contract between the Contractor and any person other than the Contracting Officer be effective or binding upon the Government, unless formalized by proper contractual documents executed by the Contracting Officer prior to completion of this contract. . . .

(R4, tab 2)

6. Section 02220, GENERAL EXCAVATION, FILLING, AND BACKFILLING, required in pertinent part:

> 3.1.1 Drainage and Dewatering
>
> Provide for the collection and disposal of surface and subsurface water encountered during construction.
>
> 3.2 EXCAVATION
>
> . . . Keep excavations free from water. Excavate soil disturbed or weakened by Contractor's operations, soils softened or made unsuitable for subsequent construction due to exposure to weather. Refill with porous fill and compact to 95 percent of ASTM D 1557 maximum density. Unless specified otherwise, refill excavations cut below indicated depth with porous fill and compact to 95 percent of ASTM D 1557 maximum density.

(R4, tab 2) Section 01300 ¶ 1.3.1 required a quality control certification on all submittals while ¶ 1.3.3 allowed the Government 20 days to review, approve or disapprove, and return submittals. (*Id.*)

7. The contract required Dodds to construct a steel roof covering over an existing loading dock. Besides using the loading dock to load and unload supplies and equipment arriving via railroad and truck, the Marines used this loading dock for temporary storage. A roof was needed as a protection from the elements for both the workers and items stored. As designed, the roof consisted of panels including skylight panels to allow lighting for the loading dock shelter. The steel roof covering was supported by 18 steel columns, 8 of which were larger columns than the others (referred to as "wind posts") and were located at the 4 corners. Before erecting the steel columns, Dodds had to saw-cut the existing concrete pavement to excavate the foundations for the steel supports. The excavated footers were to be 6 feet by 6 feet by 36 inches. (R4, tabs 10, 85) After appropriate soil compaction, the concrete footings were poured with the proper rebar and anchor bolts needed to attach the steel columns. At the base of each column, Dodds had to construct concrete column collars. The dimensions differed depending on whether the column was a wind post or regular column. The wind post column collars had to be more of an oval shape than the circular shape required for the regular column collars, but still had to leave clearance room for backing trucks to the loading dock and railroad cars along side the loading dock. (R4, tabs 2, 10)

8. The cover letter which accompanied the contract award informed Dodds that payment and performance bonds and the quality control plan had to be submitted before on-site work could begin (R4, tab 5).

9. During contract performance Mr. Dodds served as the superintendent and the quality control manager for the project (tr. 32; *see* R4, tab 2, § 01400 ¶ 1.51 permitting QC manager to perform duties of superintendent).

FINDINGS OF FACT - THE SUBMITTAL PROCESS

10. A preconstruction conference was held on 8 August 1996, 17 days after contract award. The contract required the Government to hold the preconstruction conference 10 days after contract award at a time determined by the Contracting Officer "to discuss and develop mutual understanding relative to scheduling and administering work." In addition, paragraph 1.9, § 01010, PRECONSTRUCTION CONFERENCE, required such a conference prior to commencement of any site work in order to -

> discuss and develop a mutual understanding relative to administration of the value engineering and safety program, preparation and submission of the schedule of prices, shop drawings and other submittals, scheduling, programming and prosecution of work.

(R4, tab 2, § 00721, ¶ 1.10). At the preconstruction conference, one of the matters discussed was the "functions and authority" of the inspector and other personnel on the job site (R4, tab 12). Additional copies of the drawings and specifications were given to Dodds as required by the contract (R4, tab 2, § 00721, ¶ 1.4). Mr. Ringholz, the Government project manager and resident engineer, explained the submittal process. Particular emphasis was given to critical submittals whose approval was required before certain work could start. (Tr. 245) These critical submittals included Schedule of Prices (Submittal No. 2), Quality Control Plan (Submittal No. 4), Demolition Plan (Submittal No. 5), Safety Plan (Submittal No. 6) and the Pre-engineered Metal Building Plan (which also included the anchor bolt plan) (Submittal No. 8) all of which had to be approved before Dodds could start on-site construction. (R4, tab 2; tr. 58, 241-46) Concrete Mix Design (Submittal No. 7) had to be approved before Dodds could pour concrete (R4, tab 2; tr. 57, 236).

11. By date of 26 August 1996, 20 days overdue, the Government received Dodds' payment and performance bonds (R4, tab 8; tr. 124-25). Mr. Dodds testified that the surety company issuing the bonds was responsible for the late submission but presented no additional evidence (tr. 22). By date of 28 August 1996, the Government approved Dodds' payment and performance bonds and issued a Notice to Proceed (R4, tab 33). We find that

the Government was not responsible for the delay in submitting the bonds and, once it received the bonds, gave timely approval.

12. By date of 29 August 1996, the Government received Submittal Nos. 1 through 7. All seven submittals were returned to Dodds on 5 September 1996 for failure to include the quality control certifying statement. (R4, tabs 20, 28; tr. 249-50, 253-54, 259, 264-65) The Government received Dodd's resubmission of Submittal Nos. 1 through 7 on 16 October 1996 (tr. at 248, 250-51, 255, 259, 262, 265) and approved Submittal Nos. 1, 2, 3, 6 and 7 by 23 October 1996 (R4, tabs 15, 17, 19, 29, 31).

13. Submittal Nos. 4 and 5 required further corrections and resubmission, which Dodds accomplished by dates of 6 December 1996 and 8 November 1996, respectively. The Government approved Submittal No. 4 on 12 December 1996 and Submittal No. 5 on 18 November 1996, but nevertheless allowed Dodds to start on-site work on 21 October 1996 prior to obtaining these approvals (R4, tabs 20 through 22, 24 through 27; tr. at 54-56, 253-61).

14. By date of 29 September 1996, the Government received Submittal No. 8 for the pre-engineered metal building and anchor bolts, a critical path item, and timely approved it on 2 October 1996 with a note that the translucent roof panels should be 3 feet by 10 feet (R4, tab 74; tr. 269). Dodds could not pour concrete until Submittal No. 20 for reinforcement was approved. Submittal No. 20 dated 11 November 1996, was approved by the Government on 18 November 1996. (R4, tab 47; tr. 60-61, 278-79)

15. We find that the Government timely approved all submittals.

16. By letters dated 26 March 1997 and 7 May 1997, Dodds requested, *inter alia*, time extensions for various reasons including receiving a copy of the contract in the mail on 25 July 1996 which "took 3 days of my performance period before I knew of my award date." Dodds also complained of lost performance time due to the late scheduling of the preconstruction conference since "[n]o submittal work could begin until this meeting took place." (R4, tabs 70, 76) We find that Dodds has not proved that the one-week delay in scheduling the preconstruction conference delayed contract completion.

17. By date of 26 May 1998, Dodds submitted a certified claim to the contracting officer in which, *inter alia*, it alleges:

> . . . Notice to Proceed was issued on 28 August 96, but was not actual permission to commence on-site work, due to submittal approval process on steel structure. The government included the anchor bolt plan and the steel structure in a single submittal package. This effectively prohibited any on-site work until entire submittal was approved on 10 October 96. This process

> consumed over eighty (80) days, of the performance period, which coincided with the most favorable weather conditions, in this geographic area, to accomplish subsurface excavation.
>
> A prudent contracting officer, in fulfilling his/her responsibilities, to thoroughly evaluate the overall performance period, to ascertain that the performance period is not arbitrary, would have started performance period upon issuance of the actual notice to proceed. They would have seperated [sic] the submittal package, in order for on-site performance to actually commence upon issuance of the notice to proceed.

(R4, tab 78 at 3-4) A contracting officer's final decision was not issued. Dodds filed a notice of appeal on 5 August 1998 based on the contracting officer's deemed denial.

DECISION

It is evident that appellant had problems with completing the submittal forms properly and timely. *See generally* findings 11 through 14. Dodds presented no evidence to support its allegations that the Government subjectively approved or disapproved its submittals or otherwise improperly administered the contract through the submittal process. The record shows that, on the contrary, the Government required submittals to comply with contract specifications and it timely approved all submittals when properly submitted (finding 15). We find that the record contains no evidence to support appellant's allegation that the Government controlled the pace of the work or delayed contract performance through the submittal process.

We do find however, that the Government was responsible for the scheduling of the preconstruction conference 7 days late. The contract provided that site work could not begin until the preconstruction conference was held. However, Dodds is required to show that delay to the Preconstruction Conference delayed contract completion and, to the extent it seeks affirmative relief, was not concurrent with other contractor-caused delay. *Essex Electro Engineers, Inc. v. Danzig*, 224 F.3d 1283, 1295 (Fed. Cir. 2000); *Donohoe Construction Co.*, ASBCA Nos. 47310 *et al*., 99-1 BCA ¶ 30,387. Dodds has failed to make such a showing. This portion of the appeal is denied.

FINDINGS OF FACT -DIFFERING SITE CONDITION CLAIM

18. Although Dodds could have begun on-site work with the 2 October 1996 approval of Submittal No. 8, actual on-site construction work did not begin until 21 October 1996. This was because Dodds' concrete and excavation subcontractor could not start work until then due to prior commitments on other jobs. (R4, tab 70; tr. 24-25)

19. By date of 4 November 1996 Dodds began excavation of dirt for the three-feet deep concrete footings. This was two weeks before Dodds received approval of the reinforcement submittal and before it could pour concrete (finding 14). The contract required that Dodds compact the soil to a predetermined density level before concrete could be poured and placed in the footings (R4, tab 1; tr. 234).

20. By date of 13 November 1996, Dodds first reported a "ground water" problem which was filling some of its excavations completely and undermining adjacent slabs (R4, tab 79 at no. 16). On 25 November 1996, Dodds sent a letter via facsimile informing the Government that it believed that the water contained in "[t]he center excavations, on both sides fill completely full from run-off from ground water from entire apron area." Dodds stated that it had "no means to control this situation" and maintained that this was an unforeseen site condition. (R4, tab 49)

21. Mr. Ringholz conferred with Mr. Dodds by telephone about the excess water problem. This telephone conversation was confirmed by letter dated 2 December 1996. Mr. Ringholz disagreed with Dodds' assessment that the problem was due to ground water, but rather was "due to rainfall which occurred after the footers were excavated but prior to placement of the concrete" which, in his view, Dodds did not properly protect against. Mr. Ringholz reasoned that had it been ground water, Dodds would have encountered water immediately during the excavation of the footers rather than following rainfall. (R4, tab 50; tr. 284)

22. Mr. Dodds maintains that the excess water was due to ground water because "[i]f it was strictly runoff, I should have encountered this problem in all my openings, all my excavations" (tr. 24-25). Appellant called no other witnesses because although "my subcontractor and his workmen also witnessed the condition . . . I could not afford to bring [them] in here today" (tr. 27). Mr. Dodds also testified that the on-site Government inspector failed to make notations in the logs documenting the ground water and that the Government was unresponsive to a differing site condition problem (tr. 25-26).

23. For the Government, Mr. Joseph Daniel, an expert in the field of applied hydrogeology, testified at length about the drainage at the construction site, the water table and certain borings done at various locations on the base around the loading dock area. He concluded that the water Dodds encountered in its excavations was not ground water, but run-off; and that adequate precautions would have prevented the rainwater from entering the excavations (tr. 481-500). We find this evidence persuasive and uncontroverted.

24. Mr. Wendell Pierce, a construction contractor who was working on a similar project just across the ramp from Dodds during the same time period, stated that he, too, experienced the rain and run-off conditions. But he did not experience the same problem as Dodds with water in his excavations because he bermed the excavations which prevented excess water from entering his footings. (Tr. 434-36).

25. Ms. Judy Washington, the contracting officer, stated that although she did not personally make a site visit, a contracting officer relies on the technical expertise of other Government personnel, such as the project manager, inspector and engineers, to give information from which the contracting officer formulates the Government's position and makes a determination when a contractor identifies problems. This is the process she followed. (Tr. 172-73) We find that the Government acted reasonably in response to Dodds' notice of a differing site condition.

DECISION

Dodds makes two arguments in regard to the differing site condition claim. One, that he encountered ground water which was a differing site condition; and two, that the contracting officer and project manager failed to properly and timely inspect the site to make an accurate assessment of a differing site condition.

In order to recover for a Type I site condition, the contractor must prove that: (1) the contract documents positively indicated the site conditions that form the basis of the claim; (2) the contractor reasonably relied upon its interpretation of the contract documents; (3) the conditions actually encountered differed materially from those indicated in the contract; (4) the conditions encountered were unforeseeable based on all the information available at the time of bidding; and (5) the contractor was damaged as a result of the material variation between the expected and the encountered conditions. *Monterey Mechanical Co.*, ASBCA No. 51450, 01-1 BCA ¶ 31,380 at 154,949. Further, a contractor cannot create its own differing site condition. *Geo-Con, Inc.*, ENG BCA No. 5749, 94-1 BCA ¶ 26,359, *aff'd*, 40 F.3d 1249 (Fed. Cir. 1994) (table). Dodds has not established the elements necessary to recover under a differing site conditions theory. As our findings indicate, Dodds encountered rainwater, not ground water.

We find no evidence that the Government improperly responded to appellant's claim of a differing site condition. The Government simply disagreed with Dodds about the cause of the excess water in the footings. The actions of the inspector, the contracting officer and other personnel were consistent with the Government's assessment and belief that run-off drainage and the failure to berm the excavations were the cause of appellant's problems and not ground water. We have found that the Government acted reasonably in response to appellant's notice and claim of a differing site condition (finding 24). This portion of the appeal is denied.

FINDINGS OF FACT - CLAIM FOR DELAY DUE TO GOVERNMENT DIRECTION TO "AIR DRY" FOOTERS

26. By date of 4 November 1996, Dodds began excavation for the concrete footings and completed the concrete work for all 18 footers on 13 December 1996 (R4, tab 79).

Dodds experienced the water in its footers beginning 12 November 1996 through 6 December 1996, the date on which the excavations were first bermed. Mr. Dodds maintains that the Government directed him to air dry the excavations which, in turn, delayed construction (tr. 27).

27. The following is a summary of the pertinent entries from the daily reports dated 4 November 1996 to 6 December 1996:

DATE	EVENT
04 Nov 96	Excavation for footers begins.
08 Nov 96	Rain reported.
12 Nov 96	Dodds reports "Cleaning out footers and pumping water from four excavations and compaction of footer bottoms. Rained Sunday 10 Nov 96." Navy reports Dodds delayed effort to dewater until Tuesday, 11/12/96.
13 Nov 96	Dodds reports "No work performed—drying out of footer bottoms from week-end rain. We are having problems from existing ground water filling some of our excavations completely full and undermining adjacent slabs."
14 Nov 96	Dodds reports soil needed more drying time.
19 Nov 96	Dodds reports "Pumping water from footer bottoms, cleaning out footers from rain and ground water. Footers were tested and passed on Mon. 18 Nov 96. Rained Monday night and Tuesday morning. Footer bottoms are too wet to proceed with mat placement and setting anchor bolts. Will need to re-compact when bottom dries out. . . . **Phoned p.m. Dave Ringholz and was told to let footers dry-out and re-compact**. No work will take place until first on [sic] next week."
20-24 Nov 96	Dodds reports "No work performed. Drying time needed for footer bottoms. Rained again on Wed. 20 Nov. & Thur. 21 Nov. 96." Navy reports Dodds is not dewatering.
25 Nov 96	Rain reported; Navy reports Dodds made no effort to dewater.
26 Nov 96	Rain reported; Dodds reports pumping water from footer bottoms.
27 Nov 96	Dodds reports "No work—drying time of footer bottoms."
01 Dec 96	Rain reported.
02 Dec 96	Dodds reports pumping water from 2 inches of rain on Sunday; Navy reminds Dodds of contract requirement to dewater; recommends that Dodds take action to aid in the drying of the footer excavations.
03 Dec 96	Dodds reports pumping water from sump hole.
04 Dec 96	Dodds reports removal of water and wet soil and refilling with dry soil and re-compaction.
06 Dec 96	Dodds covers and berms excavations.
13 Dec 96	Concrete work complete.

(R4, tab 79, nos. 9-38 *passim*) (emphasis added)

28. Mr. Dodds questioned Mr. Ringholz about the direction to air dry the excavations:

> Q Did you ever direct the contractor to let the bottom of these excavations air dry?
>
> A No, that is a method of doing it but if you read the specs, it tells you that you can remove that material and replace it with recompacted material.
>
> Q You don't recall the phone call from myself when [the inspector] was not at work and we were having that same problem and I was trying to get my concrete placed and I could not locate [the inspector] and so I called you and you instructed me to let—I told you what the situation was and you instructed me to let them air dry and to not do anything else to them?
>
> A I don't recall that. In the context of the conversation, I don't know if you were saying—I mean if something like that would have happened, I don't remember if you were saying what should I do or do you have any suggestions of what you can do. I don't remember the conversation. I don't know but I mean were you asking me for direction on how to do it or were you just asking for suggestions? I am not sure. I don't recall that.
>
> . . . .
>
> Q Previously, are you aware that the inspector had directed the contractor to let the excavations air dry and not remove wet soil and replace it with dry and recompact?
>
> A Was that a conversation between you and the inspector?
>
> Q Yes, had the inspector had a conversation with you where he explained that he directed me again to let them air dry?
>
> A I don't recall a conversation, him telling me that he told you to do that, no, sir.

(Tr. 336-38)

DECISION

The 19 November 1996 notation is the only supporting evidence in the record, besides Mr. Dodds' testimony, that Dodds received the direction from the Government to air dry the excavations. Dodds dewatered both before and after 19 November 1996 so the meaning and extent of this purported direction is unclear and unestablished. Accordingly, we find there is insufficient evidence to support a finding that the Government required Dodds to air dry its excavations causing a delay to the project.

FINDINGS OF FACT - BAD WEATHER DELAY CLAIM

29. In letters dated 31 December 1996 and 13 January 1997, Dodds requested additional time due to delays caused by the weather (R4, tabs 55, 56). By date of 16 January 1997, the contracting officer replied that "[a] time extension is not available upon request" and noted that Dodds had not established that the rain delays were due to unusually severe weather, but requested Dodds to submit supporting evidence (R4, tab 58). A copy of the applicable regulation was attached to the letter (*id.*). Dodds did not submit additional information to the Government (tr. 306-07, 309).

30. Mr. Ringholz used the agency guidelines for an engineered construction contract and climatological data based on a five-year average to determine that a time extension was not warranted for unusually severe weather (R4, tabs 50, 57, 86 through 93; tr. 298-309).

DECISION

Dodds presented no evidence that justifies a finding of a delay due to unusually severe weather. This portion of the appeal is denied.

FINDINGS OF FACT - CLAIM FOR DISALLOWANCE OF THE USE OF SONOTUBES

31. Dodds claims it incurred additional costs for concrete because the Government improperly directed it not to use sonotubes to form the concrete column collars around the eight wind post columns, and by so doing changed the contract. A sonotube is a preformed casing made of wood which is used in the construction industry to form cylindrical columns (tr. 310).

32. Contract § 00501 ¶ 1.2 Contract Drawings, Drawing S-2 required Dodds to provide 50 inch by 30 inch oval concrete column collars for the wind posts and 30 inch circular-shaped column collars for the non-wind post columns (R4, tabs 10, 11). The contract states that the types of materials to be used for forming purposes include wood,

plywood or steel but is silent on the specific use of sonotubes. (R4, tab 2, § 03300, ¶ 2.2.6)

33. While the actual sonotube material is fairly expensive, the sonotubes are quick to use and do not require much labor. In contrast, alternative methods are labor intensive, time consuming and costly. Dodds intended to use sonotubes for both the circular and wind post columns. One of Dodds' subcontractors was able to compress the circular sonotube to achieve the oval shape by means of an on-site presser. When Mr. Dodds explained his intentions to the Government inspector, "the inspector checked with a base engineer and told contractor not to use the larger sonotubes because they would project out too far into the truck lanes between the columns." (Compl., attach. 2 at 11; tr. 467-68) There is no evidence in the record that the inspector had contracting officer authority.

34. Although Dodds agreed that the use of sonotubes would intrude at least "three inches" into the driveway space needed for trucks, Dodds does not believe this is in contradiction of contract specifications. Accordingly, Dodds believes the decision to disallow the use of sonotubes was "very arbitrary" which resulted in increased costs to the contractor. (Compl.; tr. 75, 105)

35. Neither Mr. Ringholz, nor Mr. James Valentine, the facilities engineer who represented the end-user client, were ever asked by Dodds if it could use sonotubes for the wind post columns (tr. 310, 394). But if requested, both would have denied the request because the dimensions of the wind post sonotubes would have encroached by "ten inches" on the space needed for the trucks and railroad cars to have access to the loading dock (tr. 311, 393-95). The Government provides no reference to contract specifications which restrict appellant in the amount of clearance space between the railroad or the truck lane and the wind post columns.

36. Mr. Ringholz first learned of Dodds' changes claim due to the restrictions in the use of sonotubes when Dodds filed its claim, dated 26 May 1998, with the contracting officer (R4, tab 78; tr. 312). The record does not contain correspondence regarding the sonotube issue or a contract modification formalizing the inspector's direction.

DECISION

In order to prevail on its claim for a constructive change for the disallowance of the use of sonotubes, Dodds must prove that: 1) the contractor was compelled to perform work not required under the terms of the contract; 2) the person directing the change had contractual authority unilaterally to alter the contractor's duties under the contract; 3) the contractor's performance requirements were enlarged; and 4) the added work was not volunteered, but resulted from the direction of the Government's officer. *Monterey Mechanical Co.,* ASBCA No. 51450, 01-1 BCA ¶ 31,380. The Government constructively changes the contract by rejecting the method of performance selected or used by the

contractor if the method was permitted by the contract. *J.B. Williams Co. v. United States*, 450 F.2d 1379, 1384 (Ct. Cl. 1971).

Here, the contract required forms for the oval wind posts but did not specify which type of material the contractor could use (finding 31). The contractor was free to use wood, plywood or steel. Dodds planned to use sonotubes, which are made of wood, for the oval wind post columns, something the contract did not prohibit. The Government has not shown that the contract imposed restrictions which would prohibit the use of sonotubes for the wind post columns. Accordingly, we find that the contract did permit Dodds to use the sonotubes on the wind post columns.

Dodds next must show that the direction to not use the sonotubes came from the contracting officer or one with authority to change or alter the contract. The CONTRACTING OFFICER AUTHORITY clause clearly notified appellant that only the contracting officer had authority to make changes to or modify the contract. This clause imposed a duty upon the contractor to notify the contracting officer of any directives which the contractor deemed as changes to the contract. The record contains no such notification from Dodds (finding 34). The GOVERNMENT REPRESENTATIVES clause advised appellant that, in order to be effective, a change order must be executed and formalized if the order came from any person other than the contracting officer. No modification dealing with the direction to not use sonotubes was executed. Finally, the inspection clause informed appellant that the Government inspector was not authorized to change the contract without the contracting officer's written consent. No written authorization from the contracting officer to the inspector to change the contract is in evidence (finding 35). We conclude that Dodds has not established that the direction to change the contract came from the contracting officer or one with contractual authority to change the contract. Consequently, the verbal direction from the Government inspector was not effective as against the Government. Accordingly, this portion of the appeal is denied.

FINDINGS OF FACT - CHANGES CLAIM FOR SAFETY YELLOW PAINT

37. Dodds requests an equitable adjustment for the increased costs it incurred for painting the steel structure "safety yellow" which Dodds maintains is a change to the contract specifications. Section 13121, ¶ 2.7.2 requires that the steel be painted with a prime coat and two factory finish coats in a color to match the primer selected from the manufacturer's standard colors (R4, tab 2).

38. On 28 August 1996, Dodds contracted with Vulcan Structures, Inc. (Vulcan) for Vulcan to manufacture the steel needed for the loading dock shelter (R4, tab 32). The Vulcan contract did not include a painting scheme for the steel because Vulcan was "not in the painting business." It would not matter which color was selected, Vulcan would only prime the steel and would not have painted it with the two finish coats of paint. (Tr. 46, 210-11, 221-22).

39. By date of 4 November 1996, Dodds tendered its paint submittal to the Government with sample color charts as required by contract specification § 13121 ¶ 1.5.2. Safety yellow was not included as a choice in the submitted samples. By date of 7 November 1996, Mr. Ringholz signed this submittal with the notation "Color Selection shall be 'Light Stone.'" (R4, tab 46) There is no evidence in the record that this submittal was returned to Dodds.

40. When Dodds received the steel on 25 November 1996, it was only primed in a red oxide color and did not have the two coats of factory-finish paint as required by the contract (R4, tab 44; tr. 29). At this point, Dodds discovered for the first time that the two finish coats were not applied (tr. 362).

41. By letter dated 25 November 1996, Dodds asked the Government to make a color selection (R4, tab 49). The daily report for that same date shows that Dodds "[a]lso, requested paint color" (R4, tab 79, no. 22). The Government, after consultation with its end-user client, verbally passed on to Dodds the color of "safety yellow" which direction was later confirmed by letter dated 2 December 1996 (R4, tab 50; tr. 283-85). The 2 December 1996 letter states in pertinent part:

> b) This office has previously informed you that the color selection for the structural steel is "Safety Yellow." Normally, this information is provided to the contractor in writing on the "paint" submittal. But since a paint submittal has not been processed that color selection was passed on verbally.
>
> Additionally, you now request clarification as to the extent of the painting requirements. Refer to section 13121 para 2.7.2. . . . all structural components (columns, rafters, purlins, girts, cross bracing, etc.) require primer and two coats of FS-TT-E-481 ALKYD paint. This paragraph refers to factory color finish, however, a variance could be submitted for review for field applied finish coats if you desire to do so.

(R4, tab 50) The Government primarily wanted the two coats of paint applied to protect the steel from rusting and gave the color choice as an accommodation to Dodds rather than require strict compliance with contract specifications for the factory finish. (tr. 286).

42. Dodds did not submit a variance to field-paint the steel (tr. 285). Notwithstanding, Dodds contracted with Stabul Construction (Stabul), its steel erection subcontractor, to spray paint the steel. Stabul began painting on 16 December 1996. (R4, tab 79; tr. 30) Stabul encountered problems as it began the painting, including equipment

malfunctions, which eventually required it to withdraw as Dodds' painting subcontractor (tr. 68-69, 79).

43. By date of 17 February 1997, appellant replaced Stabul with another company, Joseph Painting. Joseph Painting employed only one person. It took Joseph Painting over 60 days, from 17 February 1997 to 24 April 1997, to complete the painting process. By date of 24 April 1997, Dodds completed the contract 100 days late. (R4, tabs 73, 79, nos. 69-115)

44. Dodds maintains that before the steel arrived, the Government directed him to paint the building safety yellow and that this direction was a change to the contract specifications causing appellant to incur additional costs and extend its performance time. Mr. Ringholz could not recall exactly when the Government made the color selection but believed that it coincided with the delivery of the building (tr. 362).

DECISION

The contract required the steel be painted with a primer and two factory-finish coats in the same color as the primer. Dodds' contract with Vulcan did not require Vulcan to add the finish coats of paint, a fact which Mr. Dodds was unaware of until the steel arrived (finding 39). Vulcan would not paint the finish coats no matter the color selected (finding 37). In order to comply with contract specifications, Dodds needed to buy and apply the paint for the two finish coats since its contract with Vulcan did not include this. The contract specified that the finish coats and primer be the same color. By choosing safety yellow as the color of the finish coats, the Government changed the contract specifications since the primer color was red oxide. However, Dodds has not shown that it was the Government's selection of the color of the paint which increased both its costs and contract performance time. Rather, it was compliance with the contract specification itself for the two finish coats of paint, which had not been included in appellant's contract with Vulcan, which caused the increase in cost and performance time. We find no evidence that the Government's change to contract specifications, by selecting safety yellow as the color for the finish coats of paint instead of red oxide, caused an increase in performance time or costs to appellant. Accordingly, this portion of the appeal is denied.

FINDINGS OF FACT - CLAIM FOR DELAY DUE TO TRANSLUCENT SKYLIGHT PANELS

45. Dodds claims the Government improperly and erroneously interpreted contract drawings and specifications in regard to the translucent skylight panels which caused appellant delay.

46. Contract drawing, Sheet S-1, requires 3 feet by 10 feet skylight panels, 10 per bay, 5 on each side of the ridge, for a total of 300 square feet of skylight per bay.

47. Contract § 13121, ¶ 2.1.1 MINIMUM THICKNESS required a "26 MFG STD gage" for the roof panels. Section 13121, ¶ 2.5 LIGHT TRANSMITTING ROOF PANELS (NONINSULATING) does not specify the number or size of the skylight panels but requires "[s]ize and color as indicated" in the same configuration as the roof panel (R4, tab 2).

48. On 9 September 1996 Dodds asked for and received a variance to change the size of the roof panels from a 26-inch gauge to a 24-inch gauge (R4, tab 40; tr. 266-67). Mr. Dodds requested that variance because "the specified 26 [gauge] roof panels will present some appearance problems . . . known as oil canning, which is ripples or waves." Mr. Ringholz approved the change to the 24-inch gauge roof panels as a no cost field change and instructed Dodds to "proceed per plans and specs." (R4, tab 40)

49. When Mr. Ringholz approved Dodds submittal no. 8, dated 24 September 1996, for the pre-engineered building he noted that "translucent panels should be 3 ft x 10 ft as required." (tr. 263)

50. According to Dodds, the change in roof panel size affected the size of the translucent skylight panels. Mr. Dodds was unable to find 36-inch wide translucent skylight panels that fit into a 24-inch gauge system and told the Government on 15 October 1996 that he could only provide 24-inch wide translucent skylight panels. This change was considered acceptable by Mr. Ringholz "as long as" there was the same amount of square footage of skylights provided as required by the contract. (R4, tabs 42, 48; tr. 270-80)

51. Dodds disagreed with the Government's contract interpretation requiring 300 square feet of skylights per bay. Instead, Dodds relied on contract § 13121 which did not specify the number or size of the skylight panels but gave the "as indicated" direction. Since the Government had agreed to the gauge variance on the drawings, Dodds reasoned, this in turn effectively changed the contract requirement for providing the square footage amount. (*See generally* tr. 204, 369-74) Accordingly, Dodds installed 2 feet wide roof and skylight panels in a configuration which resulted in a total of only 200 square feet of skylights (tr. 190-91, 200-04). As explained in appellant's claim:

> . . . The government first attempted to require the contractor to provide light transmitting roof panels in a configuration and size that was not standard in the industry. The contract drawings show three (3) foot by ten (10) foot. The drawings also required a standing seam roof panel. Standing seam roof panels are not available in three (3) foot wide panels. The specification required the same configuration for the light transmitting panels and the standing seam roof panels (Section 13121; 2.5). The specification agreed with manufacturer's

> standards thus two (2) foot wide panels were bid and provided in the correct amount specified.
>
> When the contractor explained the [sic] discrepancy existed, contractor was directed to install additional light transmitting roof panels to provide the square footage shown on the drawings at contractor's expense at a cost of $5,000.00. The contractor tried to resolve the issue in good faith but was faced with improper direction and interpretation of the specifications and refusal by the government to properly acknowledge defective drawings and specifications. The government attempted to intimidate contractor and would have accepted additional panels with no renumeration [sic] to the contractor had the contractor abided by their direction. . . .

(R4, tab 78 at 13)

52. Dodds never installed enough 2 foot panels to supply the 300 square feet of skylights and is therefore not claiming additional costs. Instead, appellant alleges improper interpretation and administration of the contract in regard to the skylight panels which delayed contract performance. Dodds submitted no additional evidence besides Mr. Dodds' testimony to support these allegations.

DECISION

The contract specified 26 inch gauge roof panels with 3 foot by 10 foot skylight panels. Appellant makes no showing that the specifications for the 3 foot by 10 foot skylight panels were defective, only "non standard." The Government accommodated appellant's request to deviate from the 26-inch gauge to a 24-inch gauge panel as long as the 300 square footage requirement for the skylight panels in the contract was satisfied. The parties disagreed on the effect that the approved variance had on the requirement for the amount of square footage of the translucent panels. Appellant's position was that once the variance was approved, only 200 square feet of skylight panels was required. The Government's position was that it approved the variance subject to the requirement for 300 square feet of skylight panels.

We are not asked to decide which interpretation of the contract is correct. Instead, we are asked to decide whether the Government's actions delayed appellant's contract performance. The record shows that the Government took no action besides responding to appellant's request for a variance and stating its interpretation of the contract that appellant was required to provide 300 square feet of skylight panels. The record is devoid of any evidence of Government delay, attempted intimidation or coercion in regard to this issue. This portion of the appeal fails for lack of evidence.

FINDINGS OF FACT - USE OF LOADING DOCK BY GOVERNMENT

53. Dodds claims that Government employees used the loading dock continually during contract performance which interfered with and delayed contract performance (compl.; tr. 102). Appellant alleges:

> When on-site work commenced on 21 October 96, several loading and off-loading operations occured [sic] and continued throughout contract performance period on a daily basis. No coordination was attempted nor permission granted to use contractor's work site. This constant, unregulated access created numerous interruptions and created safety hazards by speeding and reckless driving practices. When the government was confronted with a contractor claim of delay and control of pace of work, the contracting officer ignored the fact that the loading dock was in constant use, countering that "to our knowledge, the customer did not utilize the facility until January 1997. . . ."

(Compl. attach. 2, at 2)

54. By date of 7 May 1997, 13 days after contract completion, Dodds wrote the contracting officer that the Government had used the loading dock throughout the project "without my consent" (R4, tab 76). In response, by letter dated 16 May 1997, Ms. Washington stated that the customer did not use the facility "until approximately January 1997." She explained that "[t]he customer was told and had planned for this facility to be completed by mid January 1997" and that "[i]t had become very critical that the customer regain at least partial use of that dock." (R4, tab 77)

55. Notwithstanding her admission in the 16 May 1997 letter, Ms. Washington testified, when asked whether she was aware of the Government using the facility prior to 24 April 1997, that she "did not see the site being used" (tr. 194).

56. Mr. Valentine recalled a specific instance in February 1997 in which he requested use of the loading dock to off-load a wrecked vehicle. According to Mr. Valentine, he asked and received permission from Dodds' workers for this use and performed the activity during the contractor's lunch time, not impeding appellant's work. (Tr. 400, 419-20, 422) Mr. Valentine also admitted that the Government might have used the dock to unload "one or two times" with the contractor's permission in March 1997, and he received no complaints from Dodds for this use (tr. 422-24).

57. The daily reports contain only two notations referencing the Government's use of the loading dock area. Daily report No. 53, dated 22 January 1997, notes that the "Government [is] moving equipment & rail cars into area and slowed our progress, had to delay & work around." Dodds had three workers on-site that day, each of which worked seven hours. Daily report No. 101, dated 8 April 1997, states that Dodds "[r]equested using agency to move crates, on loading dock, so we could paint purlins." (R4, tab 79)

58. Appellant provided no further evidence of interference besides Mr. Dodds testimony which did not reference dates, specific instances of interference or impact.

DECISION

Appellant has the burden to show that it is entitled to the equitable adjustment claimed by a preponderance of the evidence. *TPI International Airways, Inc.*, ASBCA No. 46462, 96-2 BCA ¶ 28,602, *aff'd*, 135 F.3d 776 (Fed. Cir. 1998) (table), *cert. denied*, 525 U.S. 874 (1998). Appellant has not met this burden. The Government admitted to limited use of the loading dock during contract performance (finding 53), but this evidence does not support a finding of Government delay or breach of the implied duty to not hinder or interfere with contract performance. *See Lewis Mgmt. & Service Co.*, ASBCA Nos. 24802 *et al.*, 85-3 BCA ¶ 18,416 at 92,471 (the proof "amounts to cursory recitations of incidents, often occurring on unknown dates under unclassified circumstances, many of which have not been proved to have been anything more than isolated instances"). We find, as we did in *Lewis Mgmt.*, that while the Government might have inconvenienced or temporarily slowed appellant here and there, such Government-caused problems were isolated occurrences causing no material breach of the contract. *Id.* Accordingly, this portion of the claim is denied.

FINDINGS OF FACT - CLAIM FOR BREACH OF CONTRACT (PROGRESS PAYMENTS)

59. Contract § 00721, ¶ 1.1 required Dodds to submit invoices for progress payments to the contracting officer who either approved or disapproved the invoice amount (R4, tab 2).

60. For payment to occur, an invoice had to be properly submitted. A properly submitted invoice contained the contractor's name and address, the contract number, the proper dollar amount for the progress payment and a Contract Performance Statement (CPS) as required by contract § 01025, ¶ 1.3 CONTRACTOR'S INVOICE AND CONTRACT PERFORMANCE STATEMENT. This statement consists of a list of items of work that the contractor has performed or is currently performing, the amount that each item is worth and the percentage complete of each item. In order to determine the amount to be paid to the contractor, Mr. Dodds was instructed to meet with the Government inspector to discuss and agree on the percentage complete on the job. Once the percentage complete figure was

agreed upon, the contractor then submitted an invoice to the contracts office to initiate the payment process. Once these documents were received by the contracting officer's office, a route sheet was attached to the invoice. It was given to the inspector and Mr. Ringholz to review and agree or disagree upon the amount of work performed and the cost of the performance. (R4, tab 2; tr. 135-36, 138-39, 294-96) The contracting officer would then forward the contractor's original invoice and an approved voucher to Defense Finance & Accounting Service (DFAS) for appropriate payment (tr. 175-77).

61. The PROMPT PAYMENT FOR CONSTRUCTION CONTRACTS clause, incorporated by reference into the contract, required that payment be made within 14 days after the contracting officer received a properly submitted invoice from Dodds provided that there was no disagreement over pertinent terms (R4, tab 2; tr. 117-18, 294). It was NAVFAC's policy to either process the invoice for payment within three days of receipt or to return the invoice to the contractor for corrective measures within seven days of receipt (tr. 137). If a disparity arose, such as a disagreement regarding the percentage complete figure or with the cost of performance amount, the contract office would first attempt to resolve the problem informally with the contractor before sending the invoice back to the contractor for resubmittal (*id*.).

62. The Government paid Dodds $6,780 for Invoice No. 1 on 2 October 1996; $9,046 for Invoice No. 2 on 14 November 1996; $175,794 for Invoice No. 3 on 23 December 1996; and $15,826 for Invoice No. 4 on 10 January 1997 for a total of $207,446 (R4, tab 68). The payment for Invoice No. 3 reflected several errors. First, the CPS submitted by Dodds did not accurately reflect the value of all the work completed to that date (R4, tab 61, tr. 142-43; 295-97). Due to that inaccuracy, the Government certified for payment $15,826 less than due (R4, tabs 61, 68). Second, although the certified voucher was for $149,756, the disbursing office erroneously paid Dodds $175,974 (more than was due) (*id*.).

63. In January 1997, Dodds submitted Invoice No. 5. This invoice was returned because the daily reports were not up to date and payrolls were incorrect. (R4, tab 63; tr. 146-47) Invoice No. 5 as revised, dated 10 February 1997, for $27,158 was submitted by Dodds and received by the Government on 18 February 1997 (R4, tab 79, no. 87; tr. 147-48). Mr. Dodds completed the invoice as follows, in pertinent part:

D. Value of completed performance	$234,604.00
E. Less total of prior payments	$207,446.00
. . . .	
G. Amount of this invoice	$ 27,158.00

(R4, tab 63)

64. The Government disagreed with the amount of "total prior payments" of $207,446 which Dodds listed on the invoice. According to the Government's records, this amount should have been $181,408, the amount shown as value of completed work on Dodd's Invoice No. 4. Ms. Washington called Dodds to resolve the disparity but was unable to speak with Mr. Dodds directly. According to Ms. Washington, the woman who returned the telephone call from appellant's place of business told Ms. Washington that "her husband was in the hospital with a heart attack and that she was not sure of the amount of previous payments and whatever [the Government's] records said is what she would go along with" (tr. 149). As a result of this conversation, the Government changed the amount of total prior payments on Invoice No. 5 to $181,408, resulting in a change in the "amount of this invoice" to $53,196 (R4, tab 63; tr. 149). Then Ms. Washington contacted DFAS and determined that DFAS incorrectly paid Dodds $175,974 on Invoice No. 3 instead of the approved amount of $149,756. Once Ms. Washington determined that Dodds had the correct number for prior payments in his invoice, the invoice was changed back to what it originally was, $207,446. (R4, tab 63; tr. 150)

65. By date of 19 February 1997, the Government certified the voucher for disbursement for $27,158 (the amount requested) and forwarded it to DFAS for payment (R4, tab 63). DFAS issued a check for $27,158 on 25 March 1997, 35 days after the invoice receipt date of 18 February 1997 and 21 days beyond the time limit required by the PROMPT PAYMENT FOR CONSTRUCTION CONTRACTS clause. By date of 2 May 1997, DFAS issued a check to Dodds in the amount of $100.99 for Prompt Payment Act interest for the 21 days late payment of Invoice No. 5. (R4, tab 63, 67; tr. 150, 153-54)

66. Dodds sent a letter dated 24 March 1997 to the contracting officer explaining the effect on contract performance of the late payment of Invoice No. 5:

> . . . On 10 Mar 97, I asked the inspector to find out the status of my invoice, since I hadn't received my money within 14 days. I still had not been notified of the status, of my invoice, by 14 Mar 97 so I called Judy Washington. She told me about overpayment problems, however she could not stop the check from being processed and mailed to me. I asked what I needed to do and was told to let her know when I received the check. Then on 21 Mar 97, [the contracting specialist] called and told me that he had stopped the check from being cut and for me to fax him my orginal [sic] invoice and he would get them to cut a new check on 25 Mar 97 and mail to me.
>
> . . . As you can see, it will be 45 to 46 days before payment will reach my hands and through no fault of mine. I'm sure no one will understand the impact this has had on me and my business so I will try to explain the damage. First, my steel erector has

> pulled off the job because of lack of payment and I'm about to lose my painter because my paint supplier has cut me off and I donot [sic] have the funds to purchase more paint. My paint supplier is losing business because of his outstanding accounts have maxed out his credit lines with the manufacturer. I'm paying for rented equipment and cannot make use of it. I cannot make my mortgage and business loan payments nor any personal bills or utilities or property taxes or federal tax deposits. All of these people will be charging me late charges and penalities [sic] and I hope to keep my insurance in effect on business and home and auto. I have no idea of how much all this will end up costing nor how much I have been damaged with my creditors, subs and suppliers.

(R4, tab 69)

67. Daily Report No. 94, dated 22 March through 26 March 1997, noted that Dodds was "waiting on check to pay subs." By letter dated 26 March 1997, Dodds again informed the Government of the delay impact of the Invoice No. 5 late payment. "Currently I am being delayed because my steel erector has pulled off the job due to lack of payment. The Government is aware of this problem caused by delaying my last invoice and I have lost another 15 days, due to this problem." (R4, tabs 70, 79)

68. The daily reports show that Stabul left the Dodds project on 12 February 1997 to take another job and did not return to work until 4 March 1997. Stabul again left on 15 March 1997, for "lack of payment," not returning to work for Dodds until 17 April 1997, working for two days, 17 and 18 April 1997. (R4, tab 79) The Government does not dispute that Stabul pulled off the job for "15 days" due to lack of payment (tr. 79). The actual number of days Stabul was absent from the job-site due to lack of payment was 33. Joseph Painting began painting on 17 February 1997 and worked until contract completion on 24 April 1997. Miller Concrete worked from 7 April to 18 April 1997 forming the concrete collars. (R4, tab 79) On these facts, since the steel erectors had only 2 days of work remaining when they left the job on 15 March, and other work continued while they were absent, appellant has not proved that late payment affected the contract completion date.

69. Dodds contends that the contracting officer falsified Invoice No. 5 and also made a "false" statement in that the "contractor does not have a woman working for him and only has an answering machine to answer calls when he is absent from his office." (R4, tab 78; compl.) The false statement allegation is undermined by testimony that Dodds ran the business out of the garage of the Dodds' personal residence and Mrs. Dodds worked for and received several payments from appellant (tr. 82, 576-77, 619). Appellant's claim references a "conspiracy" on the part of the Government in an effort to avoid liability for

the consequences of the late payment, but Mr. Dodds presented no evidence of a conspiracy. Appellant's certified claim does not include a claim for prompt payment interest but refers to its breach claim as a breach of the Prompt Payment Act. (R4, tab 78)

70. The Government denies that it breached the contract by the late payment of Invoice No. 5 stating that "[i]t was Mr. Dodds' unavailability and failure to inform the Government that he had received an overpayment from the previously submitted [invoice no. 3] that prevented him from being paid sooner." (Gov't br. at 62; tr. 149-50)

DECISION

Appellant alleges the Government breached its obligations under the Prompt Payment Act when it paid Invoice No. 5 late, but does not seek interest apparently because late payment interest was in fact paid for Invoice No. 5. Dodds further argues that the late payment of Invoice No. 5 was a breach of contract. While it is undisputed that Invoice No. 5 was paid 21 days later than the time required by the Prompt Payment Act, Dodds has not demonstrated entitlement to any breach damages in excess of interest already paid under the Prompt Payment Act as a result of that late payment. It is clear that Dodds' financial condition was exacerbated by its admitted cost overruns for concrete and painting for which the Government was not responsible. These additional costs, not the late payment of one invoice were the primary contributors to Dodds' financial problems.

Dodds has alleged that the Government made a false statement and engaged in a conspiracy to cover up its failure to make timely progress payments. To charge the Government with conspiracy or making false statements is to charge the Government with bad faith breach of contract. These allegations are serious. We note initially that there is a presumption that Government officials act in good faith. *Kalvar Corp. v. United States,* 211 Ct. Cl. 192, 198-99, 543 F.2d 1298, 1301-02 (1976), *cert. denied,* 434 U.S. 830 (1977). Appellant can overcome this presumption with "clear and convincing" evidence. *Am-Pro Protective Agency, Inc. v. United States,* No. 01-5077, 2002 U.S. App. Lexis 3047, at *12 (Fed. Cir. Feb. 26, 2002). It requires a showing of a specific intent to injure the contractor, Governmental conduct which is "designedly oppressive" or "actuated by animus." *Id.* (citations omitted). Appellant has provided no such evidence here. Accordingly, this portion of the claim is denied.

FINDINGS OF FACT - STANDING (POST CONTRACT ACTIVITY)

71. Dodds was a sole proprietorship owned by Mr. Dodds. By date of 6 October 1997, Jerry M. Dodds and Delores E. Dodds, d/b/a Dodds & Associates Construction, filed a chapter 13 bankruptcy petition. The Chapter 13 bankruptcy was dismissed on 23 June

1998 on motion of the Chapter 13 Trustee.[*] (R4, tabs 3 at ¶ 1.6(c), 98(G-2); Supp R4, tab 2)

72. By date of 26 May 1998 Dodds submitted its claims against the Government to the contracting officer. We have listed the claim elements at the beginning of this opinion and set forth the claimed damages below (*see* finding 76). As we found above (finding 17), Dodds filed a notice of appeal based on a deemed denial of its claims on 5 August 1998. (R4, tab 78) Subsequently, by date of 3 September 1998, appellant filed a Chapter 7 bankruptcy. (R4, tabs 98; supp. R4, tabs 1, 3)

73. After the hearing, the Board, *sua sponte*, raised the issue of standing in consequence of appellant's Chapter 13 and Chapter 7 bankruptcies. The record was supplemented with appellant's Chapter 7 bankruptcy petition and schedules and certified copies of the Bankruptcy Court's dockets for both appellant's Chapter 7 and Chapter 13 bankruptcies.

74. Inasmuch as appellant failed to list the claims against the Government in either bankruptcy, the Government filed a motion to dismiss for lack of jurisdiction. Appellant subsequently reopened its Chapter 7 to amend its petition and schedules to include the claim against the Government.

75. By date of 17 April 2001, Walter W. Kelley, the Chapter 7 bankruptcy trustee for appellant, filed a brief asking the Board to not dismiss the appeal for lack of jurisdiction but allow any recovery to be paid directly to Mr. Kelley as the Chapter 7 trustee for the benefit of the bankruptcy estate and Mr. Dodds' creditors. (Lovett br.) The attorney for Dodds' Chapter 7 trustee filed a brief in support of the substitution of the Chapter 7 trustee as the true party-in-interest in the appeal.

DECISION

The filing of a bankruptcy petition immediately creates an estate comprised of the debtor's legal and equitable interests in property, which includes a legal cause of action that arose prepetition. *See* 11 U.S.C. § 541(a)(1); *Polis v. Getaways, Inc. (In re Polis),* 217 F.3d 899, 902 (7th Cir. 2000) (legal claims are assets of the bankruptcy estate, especially when they are claims for money). Unless otherwise authorized, a cause of action which is the property of the bankruptcy estate can only be prosecuted by the Chapter 7 trustee on behalf of the estate. *Tyler House Apartments, Ltd. v. United States,* 38 Fed. Cl. 1 (1997); *Miller v. Shallowford Community Hospital, Inc.,* 767 F.2d 1556, 1559 (11th Cir. 1985);

[*] The Chapter 13 was administratively closed on 30 September 1998. (*See* supp. R4, tab 2)

Lawrence v. Jackson Mack Sales, Inc., 837 F. Supp. 771 (S.D. Miss.), *aff'd*, 42 F.3d 642 (5th Cir. 1992) (table) (cause of action belonging to debtor that existed at the time of filing a bankruptcy petition becomes property of the bankruptcy estate and may only be prosecuted by trustee as the real party in interest); *Mindlin v. Drexel Burnham Lambert Group*, 160 B.R. 508, 514 (S.D.N.Y. 1993) ("By operation of 11 U.S.C. § 554(c) and (d), any asset not scheduled pursuant to 11 U.S.C. § 521(1) remains property of the estate and the debtor loses all rights to enforce it under his own name"). We have long recognized that once a contractor files bankruptcy, neither the contractor-debtor nor its counsel has standing to pursue a claim before this Board which is property of the bankruptcy estate without the authorization or consent of the Bankruptcy Court or the trustee. *Manshul Construction Corp.*, ASBCA Nos. 47795, 47797, 2002 ASBCA Lexis *10; *Coy C. Goodrich*, ASBCA Nos. 6491, 6492, 60-2 BCA ¶ 2828. We find that the Chapter 7 trustee is the proper party to pursue Dodds' claim against the Government. Since Mr. Kelley has advocated the prosecution of the Dodds' claim, the captioned appeal will reflect his appearance and standing.

FINDINGS OF FACT - DAMAGES

76. Dodds alleges entitlement to additional "direct and indirect" costs as follows in pertinent part:

1. Liquidated damages withheld		$16,606
2. Cost overruns:		
concrete	11,900	
paint	12,900	
Total cost overruns		$24,800
3. Extended overhead:		
superintendent	10,875	
quality control	9,425	
operating expense/travel	1,450	
office expense	813	
interest/late charges/escrow fees	174	
Total extended overhead		$22,737
4. Unabsorbed overhead:		
loss of business income/2 years	200,000	
loss of home equity/bankruptcy	74,300	
loss of vehicles (bankruptcy)	12,000	
loss of property (bankruptcy)	8,850	
loss of bonding/working capital	60,000	
loss of credit/cash for supplies	50,000	
loss of attorney & CPA fees	6,750	
loss of hospital & doctors fees	10,160	

loss of bank & late charges	900	
loss of moving charges	2,250	
loss of credit/purchase vehicles	30,000	
Total unabsorbed overhead		455,210
5. Total claim amount		519,353

(Compl. attach. 1; R4, tab 78 at 3) Mr. Dodds submitted no additional evidence of these costs at the hearing.

77. With respect to the liquidated damages, the record shows that Dodds submitted Invoice No. 6 dated 7 May 1997 for $14,094. By letter dated 14 May 1997, the Government returned it to Dodds refusing to process it. The contract completion date was 14 January 1997. Dodds completed the contract on 24 April 1997, 100 days late. According to the contract, the Government could assess $200 per day in liquidated damages. Because Dodds had extended performance past the contract completion date of 14 January 1997, Ms. Washington meant to withhold liquidated damages in the amount of $7,200 from Invoice No. 5. Through administrative error, this did not occur. (Tr. 150-51, 156) Nevertheless, payment was not authorized for Invoice No. 6 because the unpaid balance on the contract was $16,606 and to date $20,000 in liquidated damages had accrued. (R4, tabs 2, 64; tr. 152-54) By date of 6 October 1997, Ms. Washington requested Dodds to forward a check in the amount of $3,394 for the difference (R4, tab 9; tr. 165). Included in the 6 October 1997 letter was Modification No. P00001 assessing liquidated damages on the contract. The Government received no reply from Dodds.

DECISION

As our findings indicate, Dodds is not entitled to any of the damages it claims or release of liquidated damages. To the extent there was a breach of the payment provision of the contract, the Government has already paid interest on that late payment in accordance with the Prompt Payment Act. No additional damages have been proved.

CONCLUSION

In accordance with the foregoing, the appeal is denied.

Dated: 19 April 2002

RICHARD SHACKLEFORD
Administrative Judge
Armed Services Board

of Contract Appeals

I concur

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

I concur

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 51682, Appeal of Jerry Dodds d/b/a Dodds & Associates, by Walter W. Kelley, Chapter 7 Trustee, rendered in conformance with the Board's Charter.

Dated:

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