ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Randolph and Company, Inc.	)	ASBCA Nos. 52953, 52954, 52955,
	)	52956, 52957, 52958,
	)	52959
Under Contract No. DACW60-94-C-0020	)	

APPEARANCE FOR THE APPELLANT: Paul Oliver, Esq.
Wimberly, Lawson, Steckel, Nelson & Schneider, P.C.
Atlanta, GA

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Jonathan M. Jellema, Esq.
Engineer Trial Attorney
U.S. Army Engineer District, Charleston

OPINION BY ADMINISTRATIVE JUDGE REED

This decision addresses entitlement for the remaining claims under seven appeals. The appeals originally were docketed before the Corps of Engineers Board of Contract Appeals (ENG BCA). The ENG BCA issued two previous interlocutory decisions. In the first decision, the Board denied in part and sustained in part the Government's motion for summary judgment addressed to certain claims under six of the appeals. *Randolph and Co.*, ENG BCA Nos. 6373, 6393, 6394, 6395, 6396, and 6397, 99-2 BCA ¶ 30,472.[1] In the second decision, the Board declined to reopen the record following the close of the hearing. *Randolph and Co.*, ENG BCA Nos. 6373, 6393, 6394, 6395, 6396, 6397, and 6472, 01-1 BCA ¶ 31,157.[2]

Randolph and Company, Inc. (Randolph, appellant, or contractor) claims $858,800.13, including a demand for a time extension for 81 days of delay, return of liquidated damages (LDs) in the amount of $24,219, and interest both under the Prompt Payment Act, 31 U.S.C. §§ 3901-06, as amended (PPA) and the Contract Disputes Act, 41 U.S.C. §§ 601-13, as amended (CDA). The subject matter of the claims under the appeals is generally as follows:

ASBCA No. 52953, rain-related claims, constructive changes related to weather and site conditions, defective specifications, weather delay, and return of LDs;

ASBCA No. 52954, differing site conditions and variations in estimated quantities;

ASBCA No. 52955, over-inspection, stop work order, and economic waste;

ASBCA No. 52956, deleted grassing work and a deductive modification;

ASBCA No. 52957, site access delay, substantial completion, and return of LDs;

ASBCA No. 52958, claim preparation costs and interest; and

ASBCA No. 52959; constructive changes related to hunters' vehicles and/or Government vehicles allowed on the site by the Government.

A contracting officer (CO) of the U.S. Army Engineer District, Charleston (the Government or the Corps) has denied the claims entirely except for weather delays and the deductive modification for deletion of grassing. Two modifications to the contract allowed time extensions but no money for weather delays. The dispute to be resolved here concerns the correct number of days to which Randolph is entitled and whether the time extensions are compensable as well as excusable. Concerning grassing, the Government directed deletion of certain grassing work and issued a unilateral contract modification. The correct amount to be deducted, only, is disputed. This decision addresses entitlement, including the proven number of days of weather and other delay, only.

FINDINGS OF FACT

Project Design

1. The Corps' civil design engineer (CDE) has been responsible, since 1985, for maintaining and managing the disposal area and the surrounding containment dike[3] which were to be the object of the contract. The disposal area is one of several sites managed by him, the "predominate" purpose of which is disposal of hydraulically dredged materials in support of ongoing dredging requirements. It is located aboard the Naval Weapons Station, near Charleston, SC (NWS) and sits atop a marsh. Such areas are known to subside. The CDE knew that the area had subsided in the past based on his worksheet dated 18 January 1994 (ex. A-73). The worksheet outlined information related to the site that occurred during August 1988 to January-February 1993, the date of the survey on which the dike and berm design template was based. A comparative analysis of surveys performed in September 1990 and January-February 1993 was used to compute, as shown on the worksheet, that the average height of the dike surrounding the disposal area had subsided 0.19 foot per year.[4] One portion of the dike, a linear reach of about 800-1000 feet (about 5-7% of the total 15,800 lineal feet of the dike) somewhere within the area from about

Station No. 76+00 to about Station No. 90+00 (about 1400 linear feet, the so-called "failure area") had subsided 1 foot to 1.5 feet within about two weeks after being raised 2-4 feet in February-March 1990.[5] An attempt to raise the failure area in 1988 was not fully successful because the soils would not adequately consolidate beneath the load as the dike was being raised. However, in about 1992, the area from about Station No. 72+00 to about Station No. 90+00, was successfully raised, using eight-inch lifts placed by scrapers. Information locating the failure area and concerning subsidence in March 1990 was not explicitly included in the contract. (Tr. 2/252-54, 278-314, 4/91-95; exs. A-5, -73, -79;[6] G-E, appellant's brief (app. br.) in opposition to Government's (Gov't) motion for summary judgment at 11; complaint at 26)

2. The main work under the planned contract was to raise the dike. The CDE included in the design a 60-foot wide outside stability berm adjacent to about 600 linear feet of the failure area (about Station No. 78+50 to about Station No. 84+50). (Tr. 2/278-314; ex. G-E)

3. The project designers estimated about 150 days for performance with about 30 days estimated for inefficiencies and adverse weather. Therefore, the estimated overall performance period was about 180 days. The CDE checked the feasibility of the estimated overall performance period, based on work during 26 weeks (182 calendar days), with favorable results. In making that check, he considered the actual borrow conditions and assumed a six-day work week (156 work days), an eight-hour effective work day, 30% lost time for wet conditions (about 47 work days), 10% lost time for equipment down time (about 15 work days), a reasonable and limited equipment spread, and a conservative cycle time to load, haul, and place material on the dike area during the remaining 94 "production [work] days." (Tr. 1/263-64, 2/198-213, 248-74; exs. A-74, G-94)

4. The weather delay provision of the contract, to be explained below, was derived from historical meteorological records. The data was not shown to be unreliable or its use in formulating the contract provision errant. (Tr. 2/247-50)

5. The Corps' "customer," the U.S. Navy, wanted the contract awarded during fiscal year 1994, that is, not later than 30 September 1994. The Navy agreed with the estimated performance period of 180 days; therefore, the Navy was aware that work might not be completed earlier than about April 1995. (Tr. 2/254-74)

The Solicitation and the Contract

6. Under the so-called 8(a) program, pursuant to pertinent provisions of the Small Business Act, 15 U.S.C. § 637, as amended, Randolph self-marketed to the Corps as an experienced heavy construction earthwork contractor. The firm presented itself as a veteran of work in wet, marshy soil conditions and adverse weather. However, Randolph

had no experience with constructing dikes, a fact known to the Government. (Tr. 1/19-29, 2/117-19, 140, 4/129-42, 191-96; exs. G-52, -95, -96)

7. Appellant had performed more than ten Federal construction contracts prior to award of the contract under which the appeals arose. All of those contracts had been negotiated under the 8(a) program. (Tr. 1/19-22, 2/172-73)

8. Appellant's general manager (GM), seasoned in heavy construction work and earthwork, including work in low-lying, coastal areas that are sensitive to moisture, visited the proposed work site on 18 January 1994. The GM was accompanied on his site visit by the CDE. (Tr. 1/18-22, 32-51, 2/182-87; ex. A-21)

9. During the site visit with the GM, the CDE described the envisioned work and discussed access to the site, including NWS security procedures. The CDE showed the GM a "mound" of borrow materials that was indicated on the drawings and noted for the GM that additional soil materials (estimated by the CDE to be about 10,000 cubic yards (CY)) had been deposited within the containment area, about 250-300 acres inside the dike, after the survey shown on the request for proposal (RFP) drawings had been conducted. The GM noted the spillways ("weirs"), the containment area ("the interior pool"), and their purpose at the site, that is, to contain water. The CDE described work methods employed by other firms on dikes in the vicinity of the project, particularly the need to dewater borrow areas by keeping ditches open. The CDE discussed with the GM construction practices related to clearing, excavation, windrowing, and haul road work. Following the site visit, the GM checked local sources of equipment rental and labor in the Charleston area before returning to Randolph's home office in Atlanta, GA. (Tr. 1/36-52, 2/125; ex. A-77)

10. Under a letter dated 2 February 1994, the Corps provided to Randolph an advance copy of a portion of the RFP, including a draft of the payment schedule and the technical specifications. The draft was not substantially different from the same portions of the final complete version of the RFP, which was issued to Randolph on or about 17 March 1994. The RFP provided, among other things, that Randolph's proposal could be accepted for up to 90 days after the proposal due date, 6 April 1994, that is, by 5 July 1994. (Tr. 1/29-32, 171, 2/182-87, 4/189-91; exs. A-79, G-E)

11. Randolph's GM developed and refined a proposal for the work specified by the RFP. In so doing, he considered the RFP, including the drawings, information obtained during the site visit, and production rates and work cycle times achieved by two Charleston area dike construction firms. Pertinent provisions of the RFP also allowed appellant's GM to factor in dike and borrow area settlement (subsidence) projections and to plan work methods that would minimize Randolph's risk of subsidence during the performance period. Based on that data, he was able (1) to calculate excavation and placement quantities and production rates, (2) to devise a suitable equipment spread, and (3) to develop a price for the proposal. (Tr. 1/29-54, 103-08, 123-31; ex. A-57)

12. In developing appellant's proposal, the GM considered a number of variables, most prominently the weather. Based on his experience with earthwork in low-lying coastal terrain and his interest in weather patterns, he was concerned about rain and moisture. Therefore, he included additional costs in appellant's proposal as a contingency for the fixed costs of overhead and rented equipment that could accrue during "exceptional" weather-related delays. (Tr. 1/50-54)

13. Randolph's proposal in response to the RFP was timely submitted on or about 4 April 1994. The initial proposed estimated total contract amount was $695,865[7]. The Government's initial cost estimate amounted to $425,250. The Government planned to negotiate a price under $500,000. (Tr. 1/56-58, 2/5-8, 182-87, 4/149-67; exs. A-57, G-E, -51, -52, -100)

14. The Corps attempted to evaluate Randolph's proposal; however, on 27 May 1994, the Government asked appellant to re-format its proposal in a manner more familiar to the Corps. Randolph corrected several arithmetic errors, decreased its price to $695,861, and clarified elements of its proposal in a supplementary proposal dated 7 June 1994, received by the Government on 9 June 1994. Of the proposed price, $596,144, or about 85.7% of the total, was for the major features of the work, that is, site work and dike construction, which encompass borrowing soil materials, loading and transporting those materials, and placing them on the dike. (Tr. 1/58-61, 2/182-87, 274-78, 324-27, 4/149-67; exs. A-58, -72, G-53, -54, -55, -101)

15. The parties, represented by appellant's GM and a Corps negotiator, not the CO, met to negotiate on 12 July 1994. Detailed negotiations followed for a full day, resulting in agreement on an estimated contract price for a combination of fixed-priced, lump sum and unit-priced, estimated quantity payment items totaling $544,000. Of the estimated contract price, $497,915, or about 91.5% of the total, was for site work and dike construction. All contractual tasks to perform site work, to raise the dikes and berms, and to place grass were priced as lump sum, fixed-price. Some of the contractor's price reduction was achieved by reducing durations, particularly for use or rental of equipment, to remove contingencies. No negotiation of the quantity of earthwork necessary to perform the work was required because the parties agreed on the order of magnitude of the quantity of soils materials to be excavated, loaded, hauled, and placed on the dike structure. Subsidence at the site was not discussed. The number of adverse weather days forecast and specified in the RFP, to be further described below, was not modified during negotiation. Randolph's GM, at the time, considered the negotiations to have been thorough but fair and the risk to appellant acceptable. (Tr. 1/61-79, 87-103, 2/56-76, 90-97, 131-35, 176-87, 214-47, 4/199-200; exs. A-56, -58, -64, -72, -74, G-E, -4, -10, -26, -55, -56, -57)

16. Randolph's $695,861 proposal included estimated jobsite supervision costs for 26 weeks, about the same as the performance period of 180 days specified in the RFP.

Randolph's GM believed the earthwork could be accomplished in about four months; however, he included costs for some of the major earthmoving equipment for 5.5 months, including time for weather delays and repair downtime. Much but not all of the portion of appellant's proposed price that related to possible weather delays, was removed by Randolph during negotiations for the contract. Appellant's prediction of adverse weather days, included and priced in its proposal, was unsubstantiated. To the extent that Randolph's GM had misgivings about the weather to be experienced during performance of the work, his concerns were admitted speculations based on television weather forecasts of undisclosed origin, unidentified "websites," independent reading of uncited sources, observed weather in 1991-93 at unspecified locations, and the possibility of an "El Nino" weather pattern or hurricanes. The GM had no formal training in meteorology and did not know whether 1994 was an "El Nino year." The agreed contract price was based on the predicted weather days included at contract Special Clause H.13, to be described below. Appellant's proposed price included costs for the days specified in H.13. Randolph's GM saw H.13 as a vehicle for equitable adjustments and he was familiar, when he negotiated the contract, with the concept of excusable but non-compensable time extensions for weather delay. (Tr. 1/50-51, 61-100, 2/22-28, 90-102, 167-78, 204-13, 243-50; exs. A-58, -72, G-101, -112 at 109, lines 21-25, and 110, lines 1-18)

17. Appellant planned to work five days per week, with some Saturday work for make up. The planned average workweek was to be about 5.5 days per week. (Tr. 2/173-76)

18. On 29 July 1994, the contract, in the amount of $544,000, was awarded by way of a tripartite agreement among the Corps' CO, an authorized representative of the U.S. Small Business Administration (the SBA), and appellant, subcontractor to the SBA and an 8(a) contractor. Randolph received notice of the award on 2 August 1994. Among other things, Randolph was authorized by the contract the "right of appeal from decisions of the [CO] cognizable under the 'Disputes' clause of [the] subcontract." (Tr. 1/110-14, 2/182-87; exs. G-E, -57, -58)

19. Contract Clauses pertinent to the appeals follow:

a. FAR 52.233-1 DISPUTES (DEC 1991);

b. FAR 52.236-2 DIFFERING SITE CONDITIONS (APR 1984);

c. FAR 52.236-7 PERMITS AND RESPONSIBILITIES (NOV 1991);

d. FAR 52.236-11 USE AND POSSESSION PRIOR TO COMPLETION (APR 1984);

e. FAR 52.243-4 CHANGES (AUG 1987); and

f. FAR 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984).

(Ex. G-E)

20. Concerning delivery and performance, the contract specified a performance period of 180 days. If the work was not completed during the specified performance period, the contractor would be liable for LDs amounting to $299 for each day of unexcused delay. (*Id.*)

21. The contract included relevant Special Contract Requirements as follows:

> H.3 . . . ENVIRONMENTAL PROTECTION . . .
>
> It is the responsibility of the Contractor to . . . comply with all . . . laws concerning pollution of . . . water . . . . The Contractor will provide sufficient safeguards to prevent pollution to the waterways by spillage . . . of . . . fuels, oils . . . . Additionally, all oil and oil cans, buckets, etc. shall be removed from the site . . . . No oil shall be dumped at the site. Any soil contaminated by oil shall be removed from the site at the Contractor's expense. . . . No such material shall be left within the disposal area(s) or the adjacent marsh.
>
> . . . .
>
> H.7 [FAR] 52.236-17 LAYOUT OF WORK (APR 1984)
>
> The Contractor shall lay out its work from Government-established base lines and bench marks indicated on the drawings, and shall be responsible for all measurements in connection with the layout. . . . The Contractor shall be responsible for executing the work to the lines and grades . . . indicated . . . .
>
> . . . .
>
> H.13 ER [Engineer Regulation] 415-1-15 TIME EXTENSIONS FOR UNUSUALLY SEVERE WEATHER (OCT 1989)
>
> (a) This clause specifies the procedure for determination of time extensions for unusually severe weather in accordance with the clause entitled DEFAULT (FIXED-PRICE CONSTRUCTION). In order . . . to [obtain] a time extension under this clause, the following conditions must be satisfied:

(1) The weather . . . must be . . . more severe than the adverse weather anticipated . . . during any given month.

(2) The unusually severe weather must actually cause a delay to the completion of the project [and] must be beyond the control and without the fault or negligence of the Contractor.

(b) The following schedule of monthly anticipated adverse weather delays is based on National Oceanic and Atmospheric Administration or similar data . . . and will constitute the base line for monthly weather time evaluations . . . .

. . . ANTICIPATED ADVERSE WEATHER DELAY
WORK DAYS BASED ON 5-DAY WORK WEEK

JAN	FEB	MAR	APR	MAY	JUN
8	6	8	3	6	5

JUL	AUG	SEP	OCT	NOV	DEC
5	6	4	3	4	7

(c) . . . the Contractor will record on the daily [Contractor Quality Control] CQC report, the occurrence of adverse weather and resultant impact to normally scheduled work. Actual adverse weather delay days must prevent work on critical activities for 50 [%] or more of the contractor's scheduled work day. . . . If the number of actual adverse weather delay days exceeds the number of days anticipated in paragraph (b) above, the [CO] will convert any qualifying delays to calendar days, giving full consideration for equivalent fair weather work days, and issue a modification [allowing a time extension].[8]

(*Id.*)

22. Concerning inspection and acceptance, the contract provided as follows, in pertinent part:

E.1 [FAR] 52.246-12 INSPECTION OF CONSTRUCTION (JUL 1986)

E.2 [CQC] . . .

. . . .

(b) Execution.

(1) General. The Contractor is responsible for [CQC] . . .

(2) [CQC] Plan.

. . . .

(b) Content of the CQC Plan. The CQC Plan shall provide for sufficient inspection of all items of work, including that of . . . subcontractors . . . .

. . . .

(6) Control. [CQC] is the means by which the Contractor ensures that the construction, to include subcontractors, complies with the requirements of the contract[.] The controls shall be adequate to cover all construction operations . . . .

. . . .

(11) Notification of Noncompliance. The [CO] will notify the Contractor of any detected noncompliance with the foregoing requirements. The Contractor shall, after receipt of such notice, immediately take corrective action. Such notice, when delivered to the Contractor at the site of the work, shall be deemed sufficient for the purpose of notification. If the Contractor fails or refuses to comply promptly, the [CO] may issue an order stopping all or part of the work until satisfactory corrective action has been taken. No part of the time lost due to such stop orders shall be made the subject of [a] claim for extension of time or for excess costs or damages by the Contractor.

E.3 FINAL EXAMINATION AND ACCEPTANCE - DIKING (1965 APR OCE [Office of the Chief of Engineers])

(a) Final acceptance of the whole or a part of the work . . . will not be reopened . . . and the acceptance of a completed

section shall not change the time of payment of the retained percentages of the whole . . . .

(b) Final acceptance of dikes will be made only when they are completed and conform to the shapes, grades, and slopes required, as confirmed by . . . surveys.

(*Id.*)

23. Technical Provisions of the contract germane to the disputes follow:

3. CLEARING.

All areas of construction (borrow or fill) shown on the drawings . . . shall be cleared . . . . Interior areas not used for borrow shall be cleared . . . .

4. DIKE CONSTRUCTION.

4.1 General. The dikes, berms, and ramps shall be constructed to not less than the cross sections and elevations shown on the contract drawings. In general, the dikes have been founded on a marsh type base, which has relatively low strength and high water content. Past experience has disclosed that increases to the dikes' weight (especially rapid increases) may cause settlement, bearing capacity failure, or localized slope failures. Therefore, construction of the dikes should proceed gradually to give the underlying soil time to consolidate and gain strength under the load. The materials from which the dikes are to be constructed also have low shear strengths and in general must be placed in several lifts, with each lift being allowed to develop strength through consolidation, before the required dike height can be obtained. Dike side slopes flatter than those indicated may be necessary for stability and some [overbuilding] may be required to offset dike and foundation settlement. NOTE: Dike settlements of up to one foot (1.0') per year in some places are not uncommon. Dike settlement averaging 0.20 [foot] per year at the [NWS] Disposal Area has been documented by the [Corps]. The Contractor shall achieve and maintain the dike sections until accepted. Any settlement of the dikes from consolidation of the dike or its foundation or for any other reasons occurring prior to acceptance shall be corrected, so as to conform to the requirements of this

contract. All corrective action shall be at the Contractor's expense.

4.2 Materials. . . .

4.2.1 The borrow materials shall be removed by stripping thin lifts of dewatered dredged material from large areas [of the interior containment or borrow area, that is, by windrowing] with low ground pressure (LGP) equipment . . . . All areas of borrow shall be graded or shaped so as to provide positive drainage toward existing or new drainage ditches while the work progresses and until all borrowing is completed . . . .

4.2.2 Definition: Dewatered Dredged Material: The borrow materials are comprised of predominately fine-grained dredged material which was hydraulically deposited in a slurry state. . . .

. . . .

4.2.4 The contractor should anticipate that borrow materials will be wet (even in hot, dry, weather). . . .

4.2.5 Although the borrow area has previously been ditched, significant ditching and drainage operations are expected in order to maintain good surface drainage as well as to promote continued dewatering of the [borrow] so that its moisture content is suitable for diking. The contractor shall clean out or deepen existing perimeter ditches and lateral ditches and dig additional ditches as necessary in order to maintain good surface drainage . . . .

. . . .

4.3 . . . In order to facilitate consolidation of materials, the dikes shall be raised in successive horizontal lifts not to exceed eight (8) inches in loose height over the full width of the fill section. The entire surface of each layer (including the original surface before any fill is placed) shall be compacted . . . to achieve at least 90 [%] laboratory maximum density. . . . Excessively wet material shall not be placed directly on the embankment.

. . . .

6. SURFACE DRAINAGE.

6.1 All areas disturbed or affected by the performance of this contract shall be sloped and shaped so as to provide for positive drainage of surface water. This shall include . . . the borrow area, berm areas, and fill areas. Ponded surface water within the work area will be prima facie evidence that the intent of this paragraph is not being met by the Contractor.

6.2 All existing interior drainage ditches within the borrow area (excluding perimeter ditch) shall be kept open (clear of obstructions) and shall drain freely throughout the duration of the dike construction. . . .

. . . .

10. SURVEYS.

. . . .

10.2 Survey Personnel. All surveys required shall be performed by an independent (third party) professional surveying or engineering firm hired as a subcontractor of the prime . . . . All surveys shall be certified/sealed by a Registered Land Surveyor . . . .

. . . .

11. [QC].

11.1 The Contractor shall establish and maintain QC for all construction operations . . . including, but not limited to, the following:

. . . .

(4) Spillway Installation:

. . . .

(7) Topographic Surveys

-all surveys submitted to meet third order standards [*i.e.*, accurate to 1/5,000; over a distance of 5,000 lineal feet, a horizontal error of one foot or less is allowable[9]]

. . . .

(9) Safety and Occupational Health:

. . . .

(*Id.*) (Emphasis in original)

24. The contract drawings indicate the following:

a. Drawing Sheet No. 1 shows the general location of an enclosed containment dike and interior borrow area adjacent to the Cooper River and navigation channel.

b. Drawing Sheet No. 2 denotes (1) the existing dike horizontal stationing, (2) vertical survey data (to the nearest 0.1 foot) for the centerline of the existing dike, (3) spillway locations, (4) the interior borrow area, and (5) a mound of material in the southwest corner of the borrow area, all based on a survey conducted during 27 January-2 February 1993, and (6) a bench mark for the vertical datum. The drawing also evidences the existing perimeter and lateral ditches. Relevant notes on the drawing reveal (1) that fill was placed on the inside slope of the dike between about Station No. 115+00 and about Station No. 140+00 after the survey was conducted and is not reflected by the cross-sections and (2) that the elevation of the borrow area and the dike may be lower than shown by the survey data on account of subsidence since the date of the survey.

c. Drawing Sheet No. 3 displays the required final elevation of the dike, the interior borrow area, an existing pipe ramp adjacent to the river, and other features of the work. A new exterior berm is shown from about Station No. 78+50 to about Station No. 84+50, indicating the need for additional structural stability in that area. Relevant notes on the drawing direct that all interior ditches are to remain open, maintained, and deepened as necessary throughout dike construction, that the perimeter ditch at Station No. 95+00 to Station No. 130+00 is to remain open to drain the interior ditches throughout dike construction, and that perimeter ditches to be filled must be filled from the high end to the low end so as not to trap water.

d. Drawing Sheet Nos. 4 and 5, among other things, indicate the specified final lines and grades of the raised dike. Cross-sections of the existing dike and the completed dike are depicted at 1000-foot intervals at Station No. 0+00 through Station No. 140+00. Each cross-section depicts the horizontal offset of the centerline from the existing dike to the

final raised dike. This information was essential to and allowed both parties, prior to the pre-award negotiations, to calculate the earthwork volumes needed to accomplish the work.

(Findings 1-2, 11, 15; tr. 1/32-44, 103-08, 2/254-74, 315-21, 4/107-12; exs. A-57, G-E, -55)

Contract Performance

A. Site Access Delay

25. Randolph provided performance and payment bonds to the Government on 2 September 1994. Receipt by the Corps of the bonds typically triggers issuance of the notice to proceed (NTP) and scheduling of a pre-construction meeting (precon). (Tr. 1/113-14, 2/182-87, 4/167-68; ex. G-59).

26. Randolph representatives were unable to attend the precon prior to 8 September 1994, on account of appellant's internal scheduling conflicts. At the precon conducted on 8 September 1994, representatives of both parties expressed concern about winter weather and its potential detrimental effect on earthwork. The Government wanted to issue the NTP without delay; however, Randolph had misgivings about its ability to resource the project given its other ongoing projects. Appellant also requested a 60-day time extension for future adverse winter weather delay, intending to stop work for a 60-day period sometime during November 1994-February 1995. When the Government declined that suggestion, Randolph asked that issuance of the NTP be delayed until 8 October 1994, or as late as the Government would allow, because Randolph was not prepared to begin physical work at the site until 12 October 1994. The Corps administrative CO (ACO) agreed to withhold issuance of the NTP for seven to ten days. The NTP was issued on 19 September 1994, and received by appellant on 22 September 1994, thereby establishing the contract completion date (CCD) as 21 March 1995. Appellant's contemporaneous schedule, dated 23 September 1994, consistent with its proposal, indicates a finish date of 24 March 1995. (Findings 16, 20; tr. 1/122-28, 2/173-87, 3/7-10, 141-47, 221-24; exs. A-8, -52, G-2, -60, -63, -77)

27. Access to the NWS, at that time, did not require advance notice from the Corps to the Navy. Contractors and their personnel were required to submit, to NWS security officials, proper identification and proof of insurance to obtain access, but could do so directly with the NWS and without coordination by the Corps. As a courtesy, by letter dated 29 September 1994, the Corps notified the NWS security office of the award of the contract, the location of the work site, and appellant's projected start date of 8 October 1994. Appellant's original project superintendent entered the work site starting on 3 October 1994. (Tr. 1/125-28, 172-73, 3/10-11, 147-50; exs. A-53, G-64, -74, -105)

B. Weather Delay

28. Appellant began to mobilize its personnel and equipment to clear the site on 10 October 1994. Prior to the start of the clearing work at the site, by letter dated 11 October 1994, appellant again requested a 60-day time extension, at no cost to the Government, for projected adverse winter weather. Clearing work began on 18 October 1994, following rain delays and re-delivery of equipment to the correct location. The Government, in a letter dated 21 October 1994, agreed to adjust the performance time for actual adverse weather based on special contract provision H.13, but denied any time extension based on projections of future adverse weather. (Finding 21; tr. 1/172-86, 2/56-76, 3/141-50; exs. A-1, G-1, -2, -105, -111)

29. The contract indicated that 38 days of adverse weather were normal and foreseeable during 23 September 1994, the day after receipt by Randolph of the NTP, through 21 March 1995, the original CCD. Rain and the impact of rain delayed work at the site on 78 workdays during 3 October 1994, the day Randolph began work at the site, through 21 March 1995. The difference of 40 excessive adverse weather work days plus unanticipated weather delay days experienced by Randolph after 21 March 1995, would extend the CCD on account of weather. (Findings 21 (¶ H.13), 26; exs. A-1, A-23, G-105, -110; app. br., app. A)

30. The contractor's excavation, hauling, and placement work methods, as those methods related to drainage, tended to exacerbate and lengthen the impact of rain. Randolph failed to provide positive drainage of the site by efficiently draining ditches, deepening existing ditches, and/or excavating additional ditches. The disposal area interior sometimes was ponded even after several days without rain. Appellant also neglected properly to compact the dike and to crown the top of the dike to allow runoff of rainwater rather than ponding. Wet material often was placed on the dike prior to being aerated by disking to dry. Street dump trucks traversing the wet material, rather than off-road trucks or scrapers, were causing ruts on the dike. The ruts filled with rainwater. Government quality assurance (QA) personnel notified Randolph QC personnel and/or its superintendent of deficiencies in this regard at least four times in October and December 1994 and January and April 1995. The two causes of delay (weather and contractor's drainage work method) were intertwined. The Government did not reduce its allowance of weather delay days on account of the contractor's work methods. (Tr. 1/172-78, 3/17-30, 99, 107-08, 118-58, 234-38, 248-68, 4/6-34, 44-46, 116-18; exs. A-1, -23, G-74, -105, -110, -111)

31. In a letter dated 17 January 1995, Randolph noted abnormal rainfall and requested a time extension of 73 days for rain and the continuing impact of rain through 31 December 1994. Appellant's requested time extension was increased to 75 days (for delays through 28 February 1995) in a letter dated 28 February 1995. As of its letter dated 17 March 1995, Randolph requested a time extension of 64 days plus unquantified monetary compensation. By contract Modification No. P00007 (Mod 7), dated 4 April 1995, the CO unilaterally allowed 62 calendar days for weather delays at the site through 28

February 1995. Mod 7 extends the CCD to 24 May 1995, but allows no increase in the contract price. (Tr. 1/178-91, 252-56; exs. A-1, -27, -66, -67, G-3, -7, -10, -E)

32. Contract Mod 9, dated 14 August 1995, unilaterally allowed 27 calendar days for weather delays at the site during 1 March-20 June 1995. Mod 9 extends the CCD to 20 June 1995, but allows no increase in the contract price. (Exs. A-1, -28, G-E) Appellant has not proved entitlement to more days than the CO allowed.

C. Dike and Berm Placement

33. Appellant's clearing progress was slowed by the use of light-duty equipment that was more suitable for clearing low brush rather than the tall dense brush that covered the site. Contractor performance was hampered by safety violations, use of equipment that was uninspected, unapproved, or in need of repair, use of non-LGP equipment on soft ground, spillage of petroleum products at the site, and employee absenteeism and turnover. Corps QA personnel notified appellant's QC personnel and/or its superintendent concerning safety violations at least five times in October and November 1994, and January, February, and April 1995, warned against using uninspected and unapproved equipment at least once in October 1994, and cautioned about oil spills at least once in January 1995. (Finding 23 (¶ 4.2.1); tr. 1/152-53, 167, 3/17-30, 113-16, 133-40, 211-16, 243-50, 267, 4/17-34; exs. A-22, G-110, -111)

34. The contractor began to lay out the work during October 1994, by completing a survey of the existing dike and borrow area. The surveyor, without the need for additional information from the Government, was able to create a profile of the existing dike and set grade and template (cross-sectional) stakes for raising the dike. The surveyor thereby could establish horizontal and vertical controls for the project based on information available from the contract drawings. (Finding 24b.-d., tr. 1/158-59, 176-78, 2/180-81, 3/224-28)

35. To minimize the risk of idle equipment rented by Randolph and for other reasons, appellant negotiated a major subcontract after award. The subcontract was let with a local dike construction firm on 1 November 1994. The subcontractor was to raise the portion of the dike and perform work associated with that portion of the dike from Station No. 90+00 to Station No. 158+00 and from Station No. 0+00 to Station No. 40+00 (Station No. 158+00 and Station No. 0+00 are the same location, that is, where the dike perimeter stationing closes). The area subcontracted consists of about 10,800 feet along the centerline of the dike or about 68% of the dike. The original lump sum subcontract price was $350,000, or about 64% of the original contract price. The subcontractor began work at the site on 29 November 1994. (Finding 18; tr. 1/114-22, 172-73, 3/255-56; exs. A-5, G-E, -74, -78, -79, -91, -100, -111)

36. Based on contract indications that quantified the rate of subsidence at the site, Randolph's GM believed that dike settlement had occurred between the Government survey

in 1993, and award of the contract.[10] In appellant's pre-award proposal, the GM included a quantity for overall average subsidence that would occur during the 180-day performance period but did not anticipate excessive settlement since Randolph planned to load the dike gradually, allowing underlying soils to consolidate. By letter dated 4 November 1994, having completed its survey of the site, the contractor alleged a difference between its surveyed elevations and the conditions indicated on the contract drawings, which were based on the 1993 survey. Raw survey data was provided with the letter, but no calculated volume of required additional fill material volume or performance costs was stated. (Findings 23 (¶ 4.1), 24b; tr. 1/103-10, 176-78; ex. A-78)

37. In letters dated 18 January and 20 March 1995, Randolph requested an equitable adjustment amounting to $149,422, plus 69 days of extra performance time for changes and/or differing site conditions. Appellant alleged that data from its survey subcontractor showed general subsidence of the dike[11] and/or differences between actual elevations and those indicated on the drawings at Station No. 115+00 to Station No. 140+00, causing the need for an additional quantity of fill of 52,888 CY to raise the dike to the specified lines and grades. Corps review of the survey data detected mathematical errors, confirmed in appellant's complaint at 11. Government reviewers were unable to verify the data. (Finding 24b.; tr. 1/186-200; exs. A-2, G-4, -9, -11, -12, -13) No evidence was presented at the hearing to explain Randolph's survey methods or to explain the survey data submitted to the Corps. The surveyor did not testify.

38. Confusion and error concerning the vertical and horizontal limits for placement of dike and berm fill were caused by appellant. The problems were the result of faulty survey work, misunderstandings among the surveyor, appellant's original superintendent, appellant's original QC manager (QCM), and appellant's equipment operators, as well as a lack of effective QC that should have detected some of the contractor's deficiencies. Survey work had to be redone. Randolph's original QCM was ineffective in controlling accomplishment of the work. Appellant's personnel at all levels were not adept at calculating horizontal distances based on angle of slope. This deficiency adversely impacted appellant's ability properly to angle dike and berm side slopes, to erect the dike to the specified height, and horizontally to place the dike in the specified location. Some dike and berm placement was horizontally misaligned by as much as 20-30 feet. Uncertainty and faulty survey staking caused Randolph and subcontractor equipment operators to follow existing dike contours rather than the offset lines and grades indicated on the contract drawings. Some material was loaded, hauled, and placed more than once and sometimes stockpiled on the dike rather than being placed in lifts, requiring subsequent reloading and transport. Performance was delayed and extended by such problems. Government QA personnel notified appellant's QC personnel and/or its superintendent concerning dike and berm alignment problems at least three times in January, February, and April 1995. (Findings 24d., 34, 37; tr. 1/138-43, 193-205, 214-15, 250-52, 3/14-50, 102-03, 133-40, 229-31, 4/17-34, 47-48; exs. A-22, G-26, -80, -111)

39. Randolph's work suffered from non-compliance with soil placement and compaction requirements. Lifts of material up to two to three feet thick were placed, rather than the maximum thickness eight-inch lifts required by the specifications. Compaction of the lifts was not shown to have been properly applied. Moisture content test data and compaction test data were lacking. Randolph's superintendent could not confirm that its testing subcontractor was aware of the specification testing requirements. The testing firm used incorrect procedures and equipment at first. The lack of compaction also made haul routes on the dike impassable during and after periods of rain. Slower and additional hauling was performed by appellant because the trucks moved slowly on soft, wet material or were light-loaded to avoid becoming stuck in uncompacted, wet soil. In at least one instance, Randolph failed to prepare the surface, as required by the contract, by clearing and compacting the base before placing soils materials into the dike template. Corps QA personnel notified appellant's QC personnel and/or its superintendent concerning compaction and/or associated testing deficiencies at least once monthly during October 1994-April 1995. Notices of improper work concerning moisture content and related drainage were provided by Government QA personnel to contractor supervisory personnel at least once each month during November 1994-January 1995, and March-April 1995. The ACO notified appellant's GM of this concern by telephone in January 1995. (Findings 23 (¶¶ 3., 4.3), 30; tr. 1/250-52, 3/4-7, 17-48, 212-14, 251-69, 4/17-43, 118-20; exs. G-110, -111)

40. When the dike was found to be out of alignment, rather than place additional horizontal lifts or "bench" the material, in some instances Randolph would simply use a crawler tractor (dozer) to push the soil mass sideways into a new alignment or would cut down one side of the dike (tr. 1/158-59).

41. Randolph's replacement superintendent, assigned to the site in late April 1995, did not notice and did not measure overall subsidence while the work was ongoing. He detected a grade differential of about a foot somewhere between Station No. 90+00 and Station No. 98+00, but could not definitively state whether it was attributable to a survey error, a grading error by equipment operators, subsidence, or some other cause. A sudden subsidence did occur at another location; however, the superintendent was unable to specify the date, location, or magnitude. During performance, when unspecified areas of the dike seemed to require longer to construct, the superintendent thought Randolph's workers might be the cause. (Tr. 1/138-48, 160-68)

D. Hunting and/or Government Vehicles at the Site

42. In its QC report dated 2 January 1995, appellant complained that the "dike area" was being damaged by hunter's vehicles and/or by Government vehicles in such manner as to prevent water from draining. Attached to the report was a listing of 16 "approximate"

dates, from 15 October 1994 to 3 January 1995, on which the damage allegedly was repaired by extra contractor work. (Exs. A-1, -24, G-111)

43. Other than the report on 2 January 1995, no other report for the listed dates noted any problem with damage by vehicles. On six of the dates, including 2 January 1995, no work was performed. Work on the other dates ranged from clearing only, on account of wet conditions, to full production work. (Tr. 3/258-62; ex. G-111)

44. A Corps QA representative followed up with Navy recreation officials but was unable to verify any hunting activities on the dates specified by the contractor. No other reports or information substantiated either the alleged damage to the work or the extra work claimed by Randolph. (Tr. 3/258-62)

E. Stop-Work Order (SWO)

45. Given the problems being experienced by appellant, Corps QA representatives became frustrated with the lack of progress and the number of deficiencies of which appellant was being notified without apparent improvement. Corps surveillance of Randolph's efforts increased for that reason. (Findings 30, 33, 38-40; tr. 1/154-57, 205-09)

46. The Corps employed at least three different QA representatives during the life of the job. The contractor's GM testified that this led to conflicting horizontal and vertical tolerances being required of appellant, especially after the contractor submitted requests for equitable adjustment, although he also admitted that appellant was uncertain of allowable tolerances and that the dike, as of April 1995, was misaligned 20-30 feet over a lineal distance of 200-300 feet. Appellant's surveyor was working to the nearest foot when "doing slope scale," which the ACO said was too large a margin of error and that the tolerance should be 0.1 foot. The contract shows the final elevation of the dike and berm to the nearest 0.1 foot, implying that tolerance for vertical layout and placement. Concerning horizontal measurements, the contract required survey work to third order standards, which should have been well-known to the registered land surveyor required by the contract. (Findings 23 (¶ 10.-11.1 (7)), 24b.-d.; tr. 1/138-51, 200-05, 3/75-81, 177) Based on appellant's limited evidence, we cannot find that any conflicting guidance concerning tolerances was provided to Randolph that could have caused extra work.

47. By March-April 1995, appellant's management was aware of production problems and related difficulties. Randolph was complaining to its equipment lessor about poor equipment availability and breakdowns. Appellant was discussing mobilizing additional equipment to the site, had hired a field engineer, had replaced its incapable QC manager, and had dispatched its general superintendent from the home office to evaluate progress and general conditions at the site. (Tr. 1/137-38, 160-62, 193-200, 2/157-61, 3/43, 158-63, 4/34-35, 95-101; exs. G-26, -92, -102, -111)

48. Based on negative reports from the field, the CO directed Randolph's GM to attend a status meeting and site visit on or about 21 April 1995. Corps inspectors had documented in their periodic written reports a broad list of deficiencies and had notified contractor QC personnel on site of those deficiencies. Contractor personnel sometimes made efforts to correct the deficiencies; however, the deficiencies were not always corrected and more deficiencies were noted by Government inspectors. The CO and appellant's GM had discussed some of the deficiencies and other issues by telephone on 6 April 1995. (Findings 30, 33, 38-39; tr. 1/193-200, 3/14-49, 4/168-75, 204-10; exs. A-4, -22, G-13)

49. Appellant's GM visited the site prior to the meeting with the CO. He noted several raised dike locations that were out of alignment and not placed in accordance with appellant's surveyor's grade stakes. Centerline locations on the raised dike differed from the staked centerline. The GM was uncertain how much misalignment was allowed. In addition, some portions of the raised dike had not been raised to the lines and grades specified in the contract. Randolph's GM was also aware that the contractor's problems were more pervasive than simple misalignment of the raised dike. (Finding 47; tr. 1/205-09, 4/47-48, 102-07; ex. G-111)

50. The meeting on 21 April 1995 between Randolph's GM and the CO focused, in large part, on problems with appellant's survey and with conduct of the excavation work by appellant in a manner that would better mitigate the effects of wet conditions at the site (tr. 4/168-75; ex. G-13).

51. Favorable weather followed the GM's site visit and meeting with the CO. Production rates improved but compliance worsened. Unsatisfactory dike alignment and incorrect grade controls continued as before. On or about 26 April 1995, the raised dike was found to be out of alignment at least ten feet from about Station No. 56+00 to about Station No. 64+00, and was pushed into alignment rather than placed in lifts as required by the contract. Double-handling of soils materials continued. Appellant attempted to employ its QC manager as a surveyor, performing rather than checking the work. Multiple grade stakes in some locations differed vertically by as much as two feet and confused the equipment operators. Inadequate compaction efforts continued. Small oil and fuel spills from contractor equipment continued. Additional safety violations were noted. (Findings 33, 38-40, 49; tr. 1/193-200, 233-35, 3/50-60; exs. A-22, G-24, -111)

52. On 28 April 1995, pursuant to the CQC provision of the contract, the COR issued a letter directing a partial SWO based on continuing and cumulative deficiencies in the work with little evidence of improvement. Appellant's superintendent was aware that at least 200-300 lineal feet of raised dike remained horizontally out of alignment by as much as 20-30 feet. Appellant's survey efforts and layout of the work were the root causes of the deficiencies related to placement of the dike and berms. Placement of material on the

berms and dike was stopped by the partial SWO letter; however, clearing, borrowing, survey, draining, ditching, and other work was allowed to continue. The partial SWO letter required that appellant establish an effective QC procedure, a survey of the entire raised dike, and a detailed plan for correction of deficiencies. The COR's primary concern was proper placement of soils materials on the raised dike in lifts, sufficiently compacted, and all within the lines and grades specified in the contract. (Finding 22 (¶¶ E.1-E.2); tr. 1/138-43, 164-67, 200-13, 3/60-65, 167-79, 218-19, 4/49-50, 102-07, 210-13; exs. A-4, -22, G-14, -20, -111)

53. Following issuance of the SWO, Randolph replaced its inexperienced second QC manager and its superintendent, mobilized more equipment, hired additional workers for the portion of the job being constructed by Randolph's forces (not subcontracted), and assigned its field engineer to deal with survey issues. Some workers were removed by appellant. The equipment spread was increased from one scraper to five and from two dozers to four. Additional dump trucks were added. Work other than dike placement continued. (Tr. 1/143-47, 160-67, 193-200, 209-19, 3/61-65, 180-85; exs. A-4, G-21, -26, -92, -111)

54. Randolph's initial written response to the partial SWO was deficient in two major respects. First, it limited the corrective effort to the dike area not subcontracted and failed to address the subcontractor's efforts and area of responsibility for the dike. The lines and grades of the subcontractor's work also suffered from inadequate survey and staking practices; however, appellant's general superintendent treated the subcontractor's work as completely independent and not the responsibility of the contractor. Second, appellant's initial response proposed to augment dike slopes that were "off of grade" by placing and compacting soils materials on the slopes. That procedure would neither comply with the contract specifications nor be good construction practice. Placement of soil materials in lifts, properly compacted, was the proper method. (Finding 23 (¶¶ 4.-4.1, 4.3); tr. 1/146-47, 220-22, 3/68-75, 192; exs. A-4, -30, G-15, -92)

55. The Corps conducted an initial meeting with appellant on 3 May 1995, to discuss issues related to resumption of work. Other coordination and preparatory meetings were conducted to clarify the mutual understandings necessary to restart the work. Work was allowed to resume incrementally from 3 May 1995, as appellant satisfied the Corps' requirements. The Government was most concerned with proper and accurate layout of the dike and berms, the basic building block for the project. Randolph QC and management personnel continued to perform survey work rather than engage a qualified professional surveyor as required by the contract; therefore, layout problems persisted. On 9 May 1995, the partial SWO was withdrawn by the Government. (Findings 23 (¶¶ 10.-10.2), 51, 53; tr. 3/75-93, 180, 194-96; exs. A-22, -32, G-20, -104, -111)

56. Appellant's new superintendent examined the placement of the raised dike, noted deficiencies, and submitted plans to correct incomplete, inadequate, and/or incorrect

work. The Government cooperated with the contractor by not requiring corrective work in every location but accepting dike and berm placement that was structurally sound even if not in strict compliance with the specified template. At about Station No. 50+00 to about Station No. 53+00, Randolph placed more fill than was necessary by making the dike wider than specified. (Tr. 3/81-99, 194-96; exs. A-22, G-110, -111)

F. Project Completion

57. The quality of the work improved and the contractor provided an acceptable final product; however, problems persisted. Appellant did not at all locations properly compact the raised dike slopes, soil materials were not always placed in horizontal lifts, lifts were sometimes too thick, slopes were too steep, at least 2500 lineal feet of the dike was misaligned, portions of the dike were overbuilt, adequate drainage was not always maintained, and petroleum spills at the site continued. Corrective work was required. (Tr. 1/266-67, 3/99-101, 232, 4/50-82; exs. A-6, -25, G-110, -111)

58. During portions of June and July 1995, the subcontractor stopped work allegedly for lack of payment. The subcontractor's superintendent also had adverse personal and health circumstances that were leading him toward immediate retirement. Corps officials mediated the dispute between the subcontractor and Randolph. (Tr. 3/103-13, 187-94; exs. A-22, -45, G-17, -18, -22, -24, -114)

59. In June and July 1995, Randolph planned to again enlarge its equipment spread to overcome lack of performance by its major subcontractor. However, from June through October 1995, resources at the site were being reduced by Randolph and employees were leaving the project. Appellant's field engineer resigned and an inadequate number of equipment operators were available. (Tr. 1/222-26, 3/120-40; exs. A-6, G-17, -21, -24).

60. The above-described problems delayed performance (findings 57-59; tr. 3/103-07).

61. As of 10 October 1995, the Navy needed to place materials excavated on shore into a 43-acre portion of the disposal area sometime after 20 October 1995. Randolph was directed to complete the portion of the dike from Station No. 120+00 to about Station No. 157+00, for that purpose, by 20 October 1995. The work at Station No. 122+00 to Station No. 157+00 (22% of the overall dike length) and a portion of the containment area (about 43 acres of the 250-300-acre containment area or between about 14% and 17% of the surface area) were completed and accepted on 29 November 1995. (Finding 9; tr. 1/245-46, 3/126-27, 197-202, 4/76, 112-13; exs. A-9, G-28, -30, -31, -38, -65, -67, -69, -70, -71, -111)

62. As of 30 November 1995, between about 1200 lineal feet (more than 7% of the total length) and about one-half lineal mile of the dike (about 16%) was incomplete.

Randolph estimated the project overall was 85.6% complete as of 30 November 1995. Appellant's letter dated 15 December 1995 indicates that 1200 lineal feet of dike and some clearing and ditch backfilling were incomplete. (Tr. 1/247-50, 3/202-03, 4/76-77; exs. A-9, G-34, -35, -38)

63. The Corps accepted all work as substantially complete on 2 February 1996. The dike was usable for its intended purpose on 30 January 1996. (Tr. 3/234, 4/82-88, 124-25, 180-81; exs. A-11, -54, G-46, -73)

64. LDs were withheld after 20 June 1995, continued at least until 2 February 1996, and possibly were withheld as late as 21 February 1996 (finding 32; tr. 1/246-47; exs. A-9, G-31, -38; Gov't br. at 188-19).

Claim and Appeal

65. By letter dated 27 June 1997, received on that date, Randolph submitted its certified "Notice of Claim." The two-page letter, in outline form, set forth certified[12] total cost claims amounting to $858,800.13, including release of any unpaid balance of the contract amount and return of all LDs being withheld (as well as an implicit claim for delay for the period during which LDs were withheld). The claim was for the total costs of performance plus "fee" on additional costs, minus (1) previous payments from the Government, (2) certain corrective work valued by Randolph at $87,500.00 for which it took responsibility, and (3) a deductive modification to the contract involving grassing. The claim amounts allegedly due were assigned to various constructive changes, the SWO, differing site conditions and quantity overruns, return of LDs, and any unpaid balance of the contract amount, as modified. (Finding 19a.; exs. A-14, -55, G-C)

66. By written decision dated 5 November 1997, the CO denied Randolph's claims for lack of proof. Appellant submitted its notice of appeal letter dated 2 February 1998. (Exs. G-A, -B)

DECISION

I. Scope of the Appeals and Decision

In its complaint under the appeal, also denominated the "Appeal and Claim," which we construe based on the claim letter (finding 65) and other pre-claim correspondence, Randolph elaborated on its total cost claim and/or alternative claim theories as follows:

a. Weather delays, the impact of weather on the work to excavate and place soils materials on the dike, and an extended period during which subsidence occurred at the site on account of weather delays; Randolph also seems to assert that the specified contract performance period and/or the data at Special Contract Requirement ¶ H.13 are defective

specifications or the product of a mistake of fact or that constructive changes arose when the CO required that appellant remove all costs related to weather delays from its pre-award proposal;

b. Differing site conditions and variations in estimated quantities connected with subsidence at the site and/or related to elevations indicated on the contract drawings;

c. The SWO, over-inspection by the Corps, and economic waste arising from Government-directed corrective work on the dike;

d. Government-directed deductive modification to the contract which deleted certain grassing requirements;

e. Delayed site access;

f. LDs withheld after substantial completion;

g. Claim preparation costs and interest.

h. Extra work to restore damage by hunting vehicles and/or vehicles operated by the Government; and

i. Legal fees.

II. ASBCA No. 52953

A. Weather Delay

Appellant argues that it experienced 208 days of adverse weather and weather impact during the time that work at the site was ongoing (October 1994 to mid-February 1996). The contractor says that Special Contract Requirement H.13 predicted 36 days for the original performance period and that the Corps allowed time extensions for weather amounting to 91 days. Therefore, Randolph seeks an additional time extension plus compensation for inefficiency caused by weather delays and the costs of excavation and placement of additional quantities of soils materials during the extended time.

The premise of the contractor's argument for monetary compensation, that it rained more than was expected based on historical average weather data projected and thus the weather data and performance period are defective specifications, runs contrary to well-established risk allocation rules applicable to Federal construction contracts. Adverse weather and its impact that exceed the norm entitle a contractor to excusable, non-compensable delay time and relief from LDs, a concept familiar to the contractor's GM when he negotiated the contract (findings 16, 19f., 20). *Arundel Corp. v. United States*,

103 Ct. Cl. 688, *cert. denied*, 326 U.S. 752 (1945); *Sperry Rand Corp. v. United States*, 201 Ct. Cl. 169, 475 F.2d 1168 (1973); *Luhr. Bros., Inc.*, ASBCA No. 52887, 01-2 BCA ¶ 31,443 at 155,292; *Randolph*, 99-2 BCA at 150,534.

Nothing in the record provides a reason to depart from the above-stated general rule. To the extent that adverse weather conditions were normal and foreseeable, based on historical weather records, the contractor is not entitled to a time extension. However, when the actual adverse weather exceeds the historical average number of days to be expected within a given time, then time extensions will be allowed. *Skip Kirchdorfer, Inc.*, ASBCA Nos. 40515, 43619, 00-1 BCA ¶ 30,622 at 151,168-69 (and cases cited).

Appellant's performance period began on 22 September 1994, which established a completion date of 21 March 1995. The normal, foreseeable adverse weather that should have been anticipated during that time amounted to 38 days. All of the work was dependent on fair weather. (Findings 1-4, 12, 21 (¶ H.13), 23 (¶¶ 3.-6.2), 26, 28-30)

We have examined the daily record of site work, other evidence in the record, and the summary chart of alleged rain delay and impact attached to the contractor's brief. From that evidence and information, we determined the number of days on which rain and its ongoing effects adversely impacted work days. In administering the contract, the CO was more liberal and allowed time extensions on account of weather to 20 June 1995. We conclude that other delays were not weather-related but were contractor performance delays. (Findings 17, 21, (¶ H.13 and n.6), 26-33, 37-41, 45, 47-60). Appellant is entitled to no further relief for weather delay.

B. Defective Specifications

The contractor contends that the specified performance period, 180 days, and Special Contract Requirement H.13, the expected adverse weather days chart, are defective specifications. The performance period is characterized by the contractor as the product of fiscal constraints on the Navy. Appellant also suggests that "when the performance in 180 days was not possible because of weather, it is logical and equitable that the Corps should be responsible for all costs *and impacts* from the work not being completed in 180 days." (App. br. at 25-27 (italics in original)) We disagree.

As explained above in connection with weather delays, the general suggestion that the risk allocation scheme for adverse weather time extensions embodied in the contract is the product of defective specifications is contrary to settled law. To the extent that the contractor argues that the specified 180-day performance period is susceptible of warranty as held in *United States v. Spearin*, 248 U.S. 132 (1918), we are not convinced, as a matter of law, that that doctrine is applicable. *American Ship Bldg. Co. v. United States*, 228 Ct. Cl. 220, 224-25, 654 F.2d 75, 78-79 (1981). In that case, the court determined that a completion date for construction of a ship was a due date to which the contractor had

agreed, not a warranty by the Government guaranteeing completion within the specified performance time. The court reasoned that a prospective contractor, before agreeing to perform within a specified period, would examine the complexity of the contract requirements, its own capabilities, and then make a business judgment in deciding whether it could complete the work within the time allowed by the contract. The same considerations pertain here.

In this case, the Government specified the overall performance period and incorporated average adverse weather days from historical data derived by others. However, the details of performance within that completion period, with due consideration for the effects of weather, were left to the experience, expertise, and ingenuity of the contractor. There is no evidence of error in the performance period estimate or in the compilation of historical weather data. Therefore, the claim also fails for lack of proof as neither the performance period nor the weather data provision has been shown to be improvidently derived or impracticable. (Findings 3-4, 15-17, 20, 21 (¶ H.13), 26)

Concerning the Navy's fiscal constraints, the record shows that the available funds needed to be obligated by way of contract award prior to 1 October 1994. There was no requirement that the contract work be accomplished by 30 September 1994. Given the timing of the solicitation, negotiations, and award, those dates were never a concern. (Findings 5, 8, 10, 13-15, 18)

C. Superior Knowledge

The contractor contends that the Corps withheld knowledge vital to performance in that it did not include in the contract provisions or otherwise make available "(1) the history of efforts to raise the dike and the particular problems with [subsidence] that [were] encountered, including the size and location of the failure area; (2) the calculations which resulted in the representation in the plans and specifications that the typical or average [subsidence] at the site was [0.20 foot] per year; (3) the calculations which would have shown that the *actual* average [subsidence] of the site (including all areas of the dike) was [0.45 foot] per year; and (4) specifically the information regarding the precipitous [subsidence] encountered upon attempting to raise the failure area, i.e., that [subsidence] of a foot *after only a week* that the area was raised during construction [sic]." In testimony quoted in Randolph's brief, the GM's concern was not of a specific event during performance of Randolph's contract that caused extra costs or time for performance. Rather, he complained that the "degree of risk" that the contractor was "taking on that would, if we had known, would not have been acceptable under any circumstance." (App. br. at 31 (italics in original))

To recover based on the theory of superior knowledge, a contractor must prove (1) that it undertook to perform without vital knowledge of a fact that affects performance costs or duration, (2) that the Government was aware the contractor had no knowledge of

and no reason to obtain such information, (3) any contract specification supplied misled the contractor or did not put it on notice to inquire, and (4) the Government failed to provide the relevant information. That the facts withheld, if any, could possibly have affected appellant's performance is not enough. As the first element indicates, the improperly withheld vital facts or misleading specifications must actually have had an impact on appellant's performance by making performance under the contract more difficult, thereby adversely impacting the cost or duration of performance. The fundamental facts of liability, causation, and some evidence of resultant injury must be shown for entitlement to be proved. *Hercules, Inc. v. United States*, 24 F.3d 188, 196-97 (Fed. Cir. 1994), *aff'd on other grounds*, 516 U.S. 417 (1996); *Servidone Constr. Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991); *EFG Assocs., Inc.*, ASBCA No. 49356, 00-1 BCA ¶ 30,638 at 151,275.

Exhibit A-73, the focus of the argument that vital facts were withheld, is a two-page handwritten memorandum dated 18 January 1994, described in our findings. While the contract did not explicitly include the information in the same format as indicated in Exhibit A-73, the contract did warn of a specific rate of average, general subsidence at the site, and the contract drawings required placement of a new exterior berm from about Station No. 78+50 to about Station No. 84+50, indicating the need for structural enhancement at that location. The solicitation further alerted the contractor that "bearing capacity failure" and "localized slope failures" were probable if the dike was placed too rapidly. The RFP cautioned that available borrow materials had "low shear strengths" and a prominent note alerted appellant that localized subsidence of up to a foot per year was "not uncommon." The dike and berms were to be placed gradually and in thin layers ("lifts") to facilitate consolidation of the soils materials. (Findings 1, 23 (¶¶ 4.1, 4.3), 24c.)

Survey data compiled in 1990 and subsequent survey data from January-February 1993 were used, as documented in A-73, correctly to compute the historical average subsidence rate of 0.20 foot per year. The surveys and calculations are comprehensive of the entire dike, including the failure area. That specific quantification was included in the solicitation. (Findings 1, 23 (¶ 4.1))

Concerning the first element that must be shown, we compare the allegedly withheld vital information with that provided by the Corps. In our view, the Government summarized the basic information from which the contractor could determine that a particular area of the dike was in need of stabilization and that an additional quantity of soils materials would need to be placed on account of expected subsidence. The specifications also included guidance for Randolph's construction methods to minimize the likelihood of excessive subsidence. Rather than limit appellant's concern to 5%-7% of the dike, the Corps took the responsible approach of extrapolating and broadening the expected subsidence. The RFP applied expected subsidence to 100% of the dike. Performance of the contract shows that this was more accurate. During performance the contractor may have experienced above-average subsidence between Station No. 78+00 and Station No. 88+00, caused at least in

part by Randolph's performance methods, and did experience dike failure between Station No. 67+00 and Station No. 73+00, for which no extra costs were incurred. Neither of these locations is within the failure area as defined by A-73. (Findings 1, 37 (n.8))

Regarding the calculations underlying the quantification of expected subsidence, no evidence shows that appellant made any inquiry. If the underlying basis had been important to the contractor, the specific quantification of 0.20 foot per year is notice that the expected average subsidence had been derived by some method. By agreeing to submit a proposal, negotiate, and accept award of the contract, without discussion of the average rate of subsidence and the underlying method by which it was derived, the contractor acceded to it.

The contract provides indications by which an experienced heavy construction earthwork contractor, such as Randolph, would estimate the volume of soils materials to be excavated and placed. Information related to the average subsidence rate at the site over time, construction methods that would mitigate subsidence, survey data and date, and a quantity of additional soils materials not included in the survey, were available to the contractor either as a contract provision or based on the pre-award site visit. The Corps estimators and Randolph's GM each used that data to determine a quantity of soils materials to be excavated and placed on the dike and berms. Those estimated quantities were close enough that the need to negotiate over the quantity was obviated. Further, the parties do not dispute the estimated quantity of soils materials that would be needed to raise the dike and berms on account of average expected subsidence. (Findings 1, 6-11, 15, 19c., 23 (¶¶ 4.-4.1, 4.3), 24b.-d., 36)

Contrary to its assertions, the contractor did not have to "guess" the elevations of the dike on the commencement date of the work and at the end of the expected contract performance period. Given the contract indications of historical subsidence, the specified dike and berms template, the overall site plan, and the projected dates for award and performance, the quantity of soils materials needed to compensate for subsidence at the site was calculable. Such calculations were not theoretical but were accomplished by each party prior to negotiation of the contract. (Findings 1-3, 10-11, 13-16, 20, 23 (¶¶ 4.-4.1), 24b.-d., 36)

To the extent that excessive local or overall subsidence occurred during the work, it was either (1) caused by the contractor's imprudent construction and QC methods, which varied from informal guidance provided by the CDE and/or from the requirements specified in the contract, (2) occurred over time as a result of contractor delay and non-compensable weather delay, or (3) did not cause the contractor to incur additional costs. (Findings 8, 18, 19b.-c., 22, 23 (¶¶ 4.-6.2), 25-33, 37-41, 45, 47-60)

Subsidence was expected, quantified, and not within the exclusive knowledge of the Government. Randolph has not proved that the Corps knew of a construction method or

characteristic of this site of which appellant was not informed and/or could not have learned. *Bermite Div. of Whittaker Corp.*, ASBCA Nos. 19211, 20474, 77-2 BCA ¶ 12,675 at 61,506 and cases cited. Randolph took an acceptable risk, and cannot now recover for the occurrence of that risk. Randolph has failed to prove that the Corps did or failed to do anything that caused a loss by withholding alleged superior knowledge.

D. Pre-Award Negotiations

The contractor attacks the overall fairness of the pre-award negotiations and makes the specific complaint that the Government unfairly refused to bargain over anticipated adverse weather days and the specified performance period. At the time of award, FAR Subpart 15.8 spoke to the conduct of price negotiation. In addition, FAR 19.806 through 808-1 provided information related to 8(a) contract pricing and negotiation. Appellant makes no reference to those provisions even though Randolph contends that the CO "refused to bargain with Randolph about additional rain days" and that such refusal "was a failure to bargain in good faith and a reason why a fair and reasonable price could not be established" (app. br. at 24).

We have examined the record as it relates to the solicitation and negotiations and find nothing that would cause us to question the general fairness of their conduct. The specified performance period was derived in a rational manner that has not been convincingly disputed. The expected adverse weather delay days were based on historical data that was not attacked except by speculative conjecture. We can find no probative evidence that bargaining over the performance period was either intense or extensive. Some discussion was conducted related to the expected weather and its affect on performance and costs; however, the contractor opted to plan around the specified performance period, which it considered feasible at the time, and to include a cost contingency for possible additional weather delays rather than walk away from the negotiations. We agree with Randolph's GM: at the time of the negotiations, the process was thorough but fair and the risk to appellant acceptable. The contractor's less than credible later complaint averments and testimony concerning contacts and discussions with the CO, prior to and during negotiations, detract from the probity of appellant's presentation with regard to conduct of the negotiations. (Findings 3-4, 9-16; compl. at 2, 5)

Our conclusion that the price and time negotiations were fair is further supported by specific contractor attributes and actions and the major subcontract that was let by Randolph. The contractor was experienced in construction work, in Federal contracting, and in negotiating. Appellant's GM favorably checked his estimates against production rates and work cycle times achieved by two local dike construction firms. Appellant planned to accomplish the work timely as specified if not a bit early. Randolph's major subcontractor tended to confirm the reasonableness of the contract price by agreeing to perform about 68% of the work for about 64% of the contract price. (Findings 6-8, 11, 17, 20, 35)

E. Equitable Reformation

Consistent with its total cost claim, appellant seeks reformation of the contract from "firm-fixed price" to a total cost contract or from lump sum pricing to estimated quantity unit-pricing by way of equitable reformation. The basis for equitable reformation is alleged to be a violation of FAR 16.202-2, which Randolph asserts "sets boundaries on the use of firm-fixed price contracts . . . ." (App. br. at 20) The cost reimbursement demanded in appellant's brief, in the main, concerns the volume of soils materials to be excavated from the containment area and placed on the dike. Reference is also made to the Corps' alleged refusal to bargain over additional rain days.

For legal authority, appellant cites *LaBarge Prods., Inc. v. West*, 46 F.3d 1547 (Fed. Cir. 1995), *Northrop Grumman Corp. v. United States*, 47 Fed. Cl. 20 (2000), and *Promac, Inc.*, VABCA No. 1901, 98-2 BCA ¶ 29,749. When the Government fails to follow or violates regulations promulgated for the contractor's benefit, reformation may follow. *LaBarge*, 46 F.3d at 1552 (prohibited auctioning techniques used by Government to obtain best and final offers in violation of FAR 15.610(d)). However, citing *LaBarge* at 1555, the United States Court of Appeals for the Federal Circuit has recently held, concerning selection of the appropriate contract type, that applicable regulations "grant the [CO] the discretion to select the type of contract [and that] in a negotiated procurement . . . the regulations entrust the [CO] with especially great discretion, extending even to [the] application of procurement regulations." *Am. Tel. and Tel. Co. v. United States*, No. 01-5044, slip op. at 8, 2002 U.S. App. LEXIS 21036 at *13, 2002 WL 31246051 at *5 (Fed. Cir. Oct. 8, 2002). The court then states that "[e]ven if the [CO] abused his discretion by negotiating [a] contract on a fixed-price basis . . . that finding still would not provide [the contractor] a remedy." *Id. at 9, *14, *5*. Accordingly, there is no basis here for equitable reformation.

F. Mistake of Fact

Mistake of fact is mentioned in the claim but not explicitly argued by the contractor in its post-hearing brief. We deem that theory of recovery abandoned or, in the alternative, it is bound up in our discussions concerning defective specifications, superior knowledge, and/or equitable reformation, above.

Having considered the various arguments concerning rain-related claims, we conclude that ASBCA No. 52953 must be denied.

III. ASBCA No. 52954, Differing Site Conditions and Variations in Estimated Quantities

Neither differing site conditions nor variations in estimated quantities are discussed in Randolph's post-hearing brief. To the extent that differing site conditions relate to

subsidence at the site, see our discussion above concerning superior knowledge. Differing site conditions were not proved (findings 36-37). No evidence was presented to attempt to prove variations in estimated quantities. Further, all site work and placement of the dikes and berms is lump sum, fixed-priced (finding 15). There is no contractual basis for re-pricing based on variation of estimated quantities. Accordingly, ASBCA No. 52954 is denied.

IV. ASBCA No. 52955, SWO, Over-inspection, and Economic Waste

The contractor asserts that issuance of the SWO was simultaneous with notice to Randolph of noncompliance with contract requirements. Discounting the previous notices, cautions, and warnings provided to the contractor by the Government, at the job site and over the telephone, Randolph argues that the contract provision that specifies a notification of noncompliance "implies the giving of something physical, a message, a note or a writing . . . [something] special or different than normal notice so that special effort could be called for *before* drastic action was taken." (App. br. at 33-34 (italics in original)). In furtherance of that contention, appellant suggests that the SWO itself was the first notification of noncompliance, thereby precluding any effort by the contractor to avoid the SWO by taking corrective actions. Therefore, the delay and costs caused by the work stoppage are said to be on the Corps' account.

Related to the SWO is Randolph's complaint that the Government over-inspected and enforced requirements beyond those specified in the contract after appellant submitted to the Corps a request for equitable adjustment by letter dated 17 March 1995 (REA letter). Prior to presentation of the REA letter, according to Randolph, the lines, grades, and alignment of the raised dike were "not significantly at issue" but that "the Corps began to apply more stringent requirements, and . . . required the work to be done to a higher technical standard than required by the plans and specifications" after the REA letter was submitted (app. br. at 36). Appellant focuses on two technical aspects of the project: (1) horizontal alignment of the dike and berms, asserting that none could be established based on the contract specifications and drawings, and (2) the tolerance to be allowed for placement of the dike and berms, whether to the nearest foot or the nearest 0.1 foot.

Appellant correctly recites the general rule that the Government will be liable for the contractor's extra costs and performance time when the Government requires work to be accomplished to a higher standard than is required by the contract. *Fox Valley Eng'g, Inc. v. United States*, 151 Ct. Cl. 228, 236-37 (1960); *Johnson & Son Erectors*, ASBCA No. 24564, 81-1 BCA ¶ 15,082 at 74,604, *aff'ing on recon.*, ASBCA Nos. 23689, 24564, 81-1 BCA ¶ 14,880, *aff'd*, 231 Ct. Cl. 753, *cert. denied*, 459 U.S. 971 (1982). However, the Government has the right to insist on performance in strict compliance with the contract requirements and may require a contractor to correct nonconforming work. *S.S. Silberblatt Inc. v. United States*, 193 Ct. Cl. 269, 288, 433 F.2d 1314, 1323 (1970);

Atherton Constr., Inc., ASBCA Nos. 44293, 46053, 51178, 02-2 BCA ¶ 31,918 at 157,714.

The contract is clear that the contractor is responsible for the quality of work performed by it and by its subcontractors. If noncompliance is detected by the contractor's QC personnel, as it should be, it is to be corrected as a part of the ongoing work. If noncompliance is found by the Corps and noticed to the contractor, that deficiency must also be corrected as soon as practicable. If not corrected, the Corps may, within reasonable limits related to the importance of the work to the overall project, issue an order without further notice stopping all or part of the work until corrective action is taken. In addition to the placement lines and grades within the specified dike and berms template, Randolph was responsible for safety, environmental compliance, clearing of the containment area, dewatering, drainage, and initial layout of the template to be accomplished by way of third order survey, among other things. (Findings 21 (¶¶ H.3, H.7), 22 (¶¶ E.1-E.2), 23-24)

From the outset, appellant experienced performance problems for which it was responsible. Noncompliance with the contract specifications was not timely corrected in some instances and some corrective measures were themselves noncompliant. Corps personnel provided ample notice of noncompliant work to appellant prior to issuance of the SWO. Based on notices from the Corps and pursuant to their own observations, Randolph's QC personnel, superintendent, and GM were all aware of performance problems prior to the SWO, in particular as such problems related to placement, proper compaction, and alignment of the dike and berms. (Findings 30, 33, 37-40, 45-50) We conclude that issuance of the SWO was reasonable.

Randolph's position that a notification of noncompliance, to conform to the pertinent contract provision, must take a certain and special form, is unpersuasive. It has no basis in the contractual language and no legal precedent has been cited in support.

It is true, as appellant asserts, that the contractor was trying to correct its problems. However, those efforts fell short of the mark, starting in October 1994, when work at the site began, and continuing to April 1995, the date of the SWO. (Findings 30, 33, 38-39, 41, 47-49, 51)

Alignment of the dike was an issue between the parties before the REA letter. The ongoing performance problems being experienced by Randolph, not the REA letter, were the cause of increased Government oversight of the contractor's work. (Findings 38, 45) A higher level of inspection is warranted when the record includes "abundant evidence that Appellant's performance reflected major deficiencies." *O'Neal Constr. Co.*, ENG BCA No. 5038, 87-2 BCA ¶ 19,935 at 100,890. We conclude that no general basis exists for Randolph's claim of over-inspection.

Concerning the two specific aspects of appellant's over-inspection argument, horizontal alignment and tolerances, the contractor has not proved that the Corps misinterpreted the contract or imposed additional requirements not found in the contract. The record shows that horizontal and vertical survey controls could have been established based on data in the contract without more. No error in the Government's survey data was demonstrated by appellant. On the other hand, we found that the contractor's survey data and execution were faulty. Survey failings by the contractor were the root of many of Randolph's performance problems. We conclude that Randolph's interpretation of tolerances was unreasonable. The proper vertical tolerance was 0.1 foot, not 1 foot. We note that appellant's superintendent thought that a grade differential of about a foot was remarkable. If a tolerance of one foot was reasonable, the superintendent would not have thought such a difference was worthy of comment. Horizontal misalignment of the dike by 20-30 feet was clearly noncompliant. (Findings 34, 36-38, 41, 46, 49-57)

Economic waste is not suggested by appellant's post-hearing brief. We deem that theory of recovery abandoned or, in the alternative, included within our discussion above which addresses the SWO and alleged over-inspection.

Having considered all of the contractor's contentions related to the SWO and alleged over-inspection, we conclude that no basis for recovery has been proved. Accordingly, ASBCA No. 52955 is denied.

V. ASBCA No. 52956, Deductive Modification for Grassing

The Government-directed deductive modification for grassing, a lump sum, fixed-price payment item, pursuant to the Changes provision of the contract is not disputed as to entitlement and will not be addressed further here as to the merits of the amount due appellant, if any (findings 15, 19e.; Gov't br. at 111). Appellant apparently claims only that the Government deduction for deleted grassing work was excessive. Accordingly, matters under ASBCA No. 52936 are returned to the parties for resolution of the correct deduction amount.

VI. ASBCA No. 52957

A. Site Access Delay

The contractor contends that the contract performance period did not begin until 3 October 1994, as it could not access the site on account of NWS security requirements. Therefore, relief from liquidated damages is requested.

The contract was awarded on 29 July 1994, Randolph received notice of award on 2 August 1994. Bonds were submitted to the Government by appellant 31 days later, the contractor delayed the precon an additional 6 days, and then asked that the NTP be withheld

for another 30 days until 8 October 1994, when it would be ready to work at the site. The Corps, in partial compliance with Randolph's request, did not issue the NTP until 19 September 1994. When appellant received the NTP on 22 September 1994, it had only to submit minimal identification and insurance documentation to NWS officials to gain access to the site. (Findings 18, 25-27) Appellant has not proved that it should not have been ready to proceed by the date on which it received the NTP, 51 days after receipt of the notice of award and 20 days after the bonds had been submitted. Further, there is no evidence that Randolph was turned away by NWS security or other personnel.

The claim of delayed access is devoid of proof. In fact, it is belied by the contractor's own actions which indicate that it did not plan to begin work at the site until 12 October 1994, and was not able to mobilize to the site until 10 October 1994 (findings 26, 28). Nothing the Government (either the Corps or the Navy) did or failed to do caused Randolph any delayed access to the site.

B. Substantial Completion and LDs

Randolph claims that the project was substantially complete no later than 15 December 1995, when only 1,200 linear feet of the dike (about 7.6% of the length) remained incomplete and after the Government took control of 22% of the dike length and a portion of the containment area for the purpose of depositing excavated materials. Therefore, appellant claims that LDs withheld after that date must be returned. (Finding 62)

The Government contends that the "dike (not including berm) was not essentially completed until January 30, 1996" but later argues that "the Government was generous in determining February 2, 1996 as the date of substantial completion." (Gov't br. at 114, 118)

A project is substantially complete when it "is capable of being used for its intended purpose." To determine whether a project is capable of being used for its intended purpose, one must "consider the specific provisions laid out in the contract [and] identify the contract provisions defining the parties' expectations as to the owner's reasonable use of its facility." When the Government has obtained, "for all intents and purposes, all the benefits it reasonably anticipated receiving under the contract," then a finding of substantial completion is proper. The Government should not be "compelled to accept a measure of performance fundamentally less than had been bargained for." *Kinetic Builder's, Inc. v. Peters*, 226 F.3d 1307, 1315-16 (Fed. Cir. 2000), quoting *Franklin E. Penny Co. v. United States*, 207 Ct. Cl. 842, 858, 524 F.2d 668, 677 (1975).

"Whether a contractor who has performed some, but not all, of its obligations under a contract has substantially performed is a question of fact, which is to be determined in large measure based upon the character and extent of the contractor's partial failure, *i.e.*, the relative importance of that failure to the party affected by it. *Thoen v. United States*, 765

F.2d 1110, 1115 (Fed. Cir. 1985); A. Corbin, *Corbin on Contracts* §§ 704-06 (1960)." *Gassman Corp*., ASBCA Nos. 44975, 44976, 00-1 BCA ¶ 30,720 at 151,742. "Occupancy of [a] space by the Government does not necessarily mean that the project or job is ready for its intended use." *Tyler Constr. Co*., ASBCA No. 39365, 91-1 BCA ¶ 23,646 at 118,447. Acceptance of a portion but not all of the project, when the full project is not operational, does not constitute acceptance of the entire work. *Montgomery Constr. Corp*., ASBCA No. 5000, 59-1 BCA ¶ 2211 at 9664.

The primary purpose of the dike and containment area was to receive hydraulically dredged materials, consisting of a slurry of water and soils materials excavated underwater. That purpose was specified in the contract provisions by requirements for a completely enclosed dike, a fully cleared containment area, a pipe ramp adjacent to the river for connection to a hydraulic dredge, and spillways at the dike. Appellant's GM was aware of the project's primary purpose. (Findings 1, 9, 23 (¶¶ 3.-4.2.2, 11.-11.1 (4), 24a.-c.)

Final acceptance of the dike could be made in whole or in part. Following adverse weather delays, contractor delays occurred during the SWO and continued after the SWO to project completion. Given those delays and the needs of the Government to use a part of the containment area for placement of soils materials excavated on shore, the Government accepted as complete, on 29 November 1995, a portion of the dike (about 22% of its length) and containment area (between 14% and 17% of the surface area). (Findings 9, 19c.-d., 22 (¶ E.3), 29, 52, 54-61)

A significant reach of the dike was not yet accepted, was not complete as of 29 November 1995 (about one-half mile or about 16%), was admittedly not complete as of 15 December 1995 (about 1,200 feet or about 7.6%), and could not have been used to contain hydraulically dredged materials. The dike was not completed to the extent that it could hold such materials until 30 January 1996; therefore, the project's primary purpose could not be served until that date. Use by the Government to stockpile materials excavated on shore did not put the facility to its primary use. (Findings 61-63; app. br. at 41)

We conclude that the contractor's argument for substantial completion prior to 30 January 1996, would compel the Government to accept a measure of performance fundamentally less than that for which it had bargained. To that extent, ASBCA No. 52957 is denied.

LDs were withheld at least through 2 February 1996 and possibly as late as 21 February 1996. (Finding 64; Gov't br. at 118-19) LDs may not be withheld after substantial completion has been achieved by Randolph. *Gassman Corp*., 00-1 BCA at 151,742. To the extent that LDs were withheld after 30 January 1996, ASBCA No. 52957 is sustained.

VII. ASBCA No. 52958, Claim Preparation Costs and Interest

In a previous decision, the ENG BCA was unclear on what was intended by Randolph's claim for claim preparation costs and reserved ruling pending further development of the record. *Randolph*, 99-2 BCA at 150,537. No additional evidence was introduced by appellant on this issue and it is not addressed in the contractor's post-hearing brief. We consider the claim abandoned or it fails for lack of proof.

Concerning interest, Randolph states that interest is due pursuant to the CDA and "under the [PPA] . . . . from the date payment was due or 30 days after being invoiced" (app. br. at 43). Interest under the CDA is not a separate claim but flows automatically, as a matter of law, from any meritorious portion of a money claim presented to the CO under the CDA. 41 U.S.C. § 611. ASBCA No. 52958 is sustained to the extent that CDA interest may be due under ASBCA No. 52956 (deductive modification for grassing work) or under ASBCA No. 52957 (LDs).

In contrast, interest pursuant to the PPA, to be appropriate for resolution by the Board, must be the subject of a separate claim under the CDA. 31 U.S.C. § 3907; *The Swanson Group, Inc.*, ASBCA No. 53496, 02-1 BCA ¶ 31,800 at 157,081; *Oxwell, Inc.*, ASBCA No. 25703, 81-2 BCA ¶ 15,392 at 76,257-58. The record reveals no claim presented to the CO for PPA interest; therefore, the Board lacks jurisdiction presently to adjudicate any such potential claim. To that extent, ASBCA No. 52958 is dismissed in part without prejudice to the submission of a claim to the CO.

VIII. ASBCA No. 52959, Hunting Vehicles or Government Vehicles

The alleged extra work caused by hunting vehicles or Government vehicles is not mentioned in appellant's post-hearing brief and we deem the claim abandoned. In any event, no extra work was proved (findings 42-44). Accordingly, ASBCA No. 52959 is denied.

IX. Legal Fees

Recovery of legal fees, as alleged by Randolph under the Equal Access to Justice Act, was dismissed in a previous decision under these appeals and will not be addressed further here. *Randolph*, 99-2 BCA at 150,536-37.

SUMMARY

ASBCA Nos. 52953, 52954, 52955, and 52959 are denied.

ASBCA No. 52956 is not disputed as to entitlement to the extent that the Government deleted certain grassing work and took or proposes to take a credit. The appeal is sustained to this extent. Matters related to quantum are returned to the parties for settlement.

ASBCA No. 52957 is sustained in part to the extent of any LDs withheld for dates after 30 January 1996, and otherwise denied.

ASBCA No. 52958 is (1) dismissed in part without prejudice to the submission of a claim for PPA interest, (2) sustained in part to the extent that CDA interest may be due on any amount owed by the Government under ASBCA Nos. 52956 and/or 52957, and (3) otherwise denied.

Dated: 6 November 2002

STEVEN L. REED
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continue)

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

NOTES

[1] Following that decision, the ENG BCA docketed and consolidated an additional appeal, No. 6472.

[2] The ENG BCA was merged into the Armed Services Board of Contract Appeals (ASBCA) on 12 July 2000. The appeals previously docketed by the ENG BCA were re-docketed by the ASBCA as docket Nos. 52953, 52954, 52955, 52956, 52957, 52958, and 52959.

[3] A dike is defined as "a bank usually of earth constructed to control or confine water." WEBSTER'S THIRD NEW INT'L DICTIONARY 632 (1986)(unabridged).

[4] The contractor contends that the calculation by which the subsidence rate of 0.19 foot per year was derived excludes the failure area, described below (app. br. at 6, 31). This assertion is factually inaccurate. The calculations shown on exhibit A-73 reveal that average subsidence between September 1990 and January-February 1993 for the dike, excluding the failure area, was 0.17 foot per year. Including the failure area increased the average subsidence to 0.19 foot per year, rounded up to 0.20 foot per year in the solicitation. The failure area was estimated to have subsided an average of 0.46 foot per year, as shown in A-73, rounded down to 0.45 foot per year.

[5] The dimensions are approximate because no as-built surveys were accomplished prior to September 1990.

[6] All documents attached to appellant's complaint, appeal file documents submitted by the Corps pursuant to Board Rule 4, appeal file supplements filed by each party prior to the hearing, and a limited number of exhibits admitted at the hearing were consolidated and uniformly marked in accordance with the Board's Scheduling Order (2 September 1999). Documents submitted by appellant are "A" exhibits; the Government's documents are "G" exhibits.

[7] Randolph's GM, in arriving at the proposal to be submitted, formulated, on or about 1 April 1994, draft proposals priced as high as about $920,000. No contemporaneous copy of any such proposal was produced by Randolph. No proposal other than the one described above in Finding 13, as later supplemented, was submitted to the Government. The GM did not, at any time, discuss any draft proposal with the CO, as the GM asserted for the first time in an affidavit dated 11 January 1999, which was attached to appellant's response to the Government's motion for summary judgment. Portions of the GM's explanation at the hearing concerning the draft proposals are not credible. (Tr. 1/52-58, 2/5-89, 139-40, 187-88, 243-47, 4/142-47, 189-91, 214-15; exs. A-81 (attached ex. A), G-1, -3, -7, -10, -26, -44, -51, -56, -78, -89, -90, -100, -101; affidavit of Henry Randolph, Jr.)

[8] Given Randolph's plan to work an average 5.5-day work week and the anticipated adverse weather day chart's use of a five-day work week, a 1.1 conversion factor applies (5.5/5=1.1). The adjusted anticipated adverse weather days for each month, beginning with January, are 9, 7, 9, 3, 7, 6, 6, 7, 4, 3, 4, and 8. (Finding 17)

[9] *Civil Eng'g Handbook* 1-96, 1-97, Table 9 (Leonard Church Urquhart *et al*. eds., McGraw-Hill Book Co. 4th ed. 1959).

[10] The parties agree that average subsidence at the entire site during the expected performance period at the rate indicated in the contract would create a need for at least 18,000 CY of additional fill to raise the dike to the specified lines and grades. (Tr. 1/176-78; exs. G-6, -E)

[11] During performance, the dike did not fail at the failure area; however, it did subside on or after 7 February 1995, between about Station No. 78+00 and about Station No. 88+00, when Randolph stockpiled soil materials at that location on or before 6 February 1995, rather than spreading the materials in lifts over the area. The Government QA representative warned appellant against this practice at least once on 7 February 1995. (Tr. 3/17-30, 4/17-34, 107-12; exs. G-110, -111) Failure was also later experienced from about Station No. 67+00 to about Station No. 73+00, more than 300 lineal feet from the failure area. Appellant was not required to repair the failure fully but was directed to fill cracks and keep the cracks sealed and the area sloped. No extra costs were incurred. (Finding 1; tr. 1/162-64, 239, 2/307-14, 3/132-33, 203-10, 4/107-12; exs. A-3, G-29, -68, -110) No claim related to that particular incident has been submitted.

[12] The claim certification was corrected, as supplemented, in a sworn declaration dated 17 February 2000 by the contractor's GM and vice president (ex. A-16).

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 52953, 52954, 52955, 52956, 52957, 52958, and 52959, Appeals of Randolph and Company, Inc., rendered in conformance with the Board's Charter.

Dated:

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