

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -- )  
)  
Giuliani Associates, Inc. ) ASBCA Nos. 51672, 52538  
)  
Under Contract No. NAS5-96139 )

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OPINION BY ADMINISTRATIVE JUDGE JAMES

National Aeronautics and Space Administration (NASA) awarded a construction contract to Giuliani Associates, Inc. (GAI) to upgrade the sewage treatment plant at Goddard Space Flight Center (GSFC), Wallops Island, VA. NASA terminated the contract for default, and GAI appealed therefrom (ASBCA No. 51672). GAI submitted a \$2,193,506 convenience termination settlement proposal to NASA, and appealed from the contracting officer's (CO) deemed denial thereof (ASBCA No. 52538). We consolidated the two appeals. The Board has jurisdiction of the appeals under the Contract Disputes Act of 1978, 41 U.S.C. §§ 605(c)(5), 607. After the hearing, the parties submitted post-hearing and reply briefs. Twenty months after the hearing, respondent moved to dismiss these appeals

based on GAI's President's guilty plea to a violation of 18 U.S.C. § 1001 under another NASA contract, which motion we took under advisement pending the decision on the merits of the appeals. We deny the motion to dismiss and the appeals.

## FINDINGS OF FACT

### A. The Contract.

1. On 26 September 1996, NASA awarded to GAI Contract No. NAS5-96139 (contract 39) to upgrade the sewage treatment plant at the GSFC, Wallops Island, VA (R4, tab 1 at 2-3).
2. Contract 39's work scope included site work (clearing, grading, fencing, paving and soil stabilization), and constructing, *inter alia*, an influent pump station, sewage treatment plant, control building, sludge drying beds (SDBs), drainage pump station, piping, and effluent outfall structure (R4, tab 1 at 14).
3. Contract 39 incorporated by reference, *inter alia*, the following FAR clauses: (a) 52.232-5, PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (APR 1989), which at (c) required GAI to submit, with its requests for progress payments, a certification that it had made payments to subcontractors and suppliers from payments previously received, it would make timely payments from the current request, and the request did not include any amounts which GAI intended to withhold from subcontractors or suppliers; (b) 52.233-1 DISPUTES (OCT 1995) with ALT. I (DEC 1991); (c) 52.236-2, DIFFERING SITE CONDITIONS (APR 1984), which allowed an equitable adjustment for subsurface or latent physical conditions at the site that differed materially from those indicated in the contract, required that GAI give written notice of the condition before it was disturbed, and provided that the CO would promptly investigate the site condition after receiving notice; (d) 52.236-4, PHYSICAL DATA (APR 1984), which referred to indications of physical conditions in the site investigations by "Soil Boring Data by Atec Associates attached to NASA Specifications S-51277"; and (e) 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984), which authorized respondent to terminate the contract for default if GAI failed to prosecute work with the diligence that would insure completion within the time specified in the contract or failed to complete the work within such time, unless the delay in completion arose from unforeseeable causes beyond the control and without the fault or negligence of GAI or its subcontractors or suppliers at any tier (R4, tab 1 at 41-42).
4. "NASA Specifications S-51277" included § 01300, "SUBMITTALS," which described "SD-09 Reports" (§ 1.3), and required GAI to provide to the CO for approval a schedule of submittals required by the specifications and drawings within 30 days of notice of award (§ 1.5.1); § 02200, "EARTHWORK," which required excavation, filling and grading defined work areas "to within 1.5 meters of any building or structure" and sub-grade preparations for pavements and slabs (§ 1.1); § 02224, "EXCAVATING, BACKFILLING,

AND COMPACTING FOR STRUCTURES,” which required excavation, backfill, compaction, and grading, necessary to install each structure shown on the drawings, and extending 1.5 meters therefrom (§ 1.1); and § 02225, “EXCAVATING, BACKFILLING, AND COMPACTING FOR UTILITIES,” which required excavation, backfill, compaction, and grading required to install each below-grade utility shown on the drawings (§ 1.1) (R4, tab 97).

5. Specification § 02200: (a) defined “satisfactory materials” as “AASHTO M 145 [1990 ed.], (ASTM [American Society for Testing and Materials] D 3282 [1988 ed.]) Soil Classification Groups A-1, A-2-4, A-2-5, and A-3” and stated that: “Satisfactory materials shall be select materials as specified by V.D.O.T. Section 207, Type II select material”; (b) defined “Unsatisfactory soil materials” as “AASHTO M 145, Soil Classification Groups A-2-6, A-2-7, A-4, A-5, A-6, and A-7, peat and other highly organic soil” (§ 1.3); (c) required “SD-09 . . . written Test Reports of soil test results within 3 working days” in accordance with § 1.6 “Quality Control Testing During Construction” (§ 1.4); (d) stated in § 1.5.1:

Soil survey for satisfactory soil materials and samples of soil materials shall be furnished and paid for by the Contractor. A certified soil-testing service approved by the [CO] shall be provided by the Contractor at no cost to the Government. Testing shall include soil survey for satisfactory soil materials; sampling and testing soil materials proposed for use in the work, and field-testing for quality control during construction period.

Testing agencies shall conform to the requirements of ASTM D 3740.

without specifying who was to identify the locations, depths or amounts of samples; (e) required sampling, coarseness, liquidity, plasticity, mechanical and moisture-density testing of each source of materials to determine its conformity to “satisfactory soil materials” and that “materials shall be approved by the [CO] prior to start of work” (§ 1.5.2); (f) required a soil survey and daily coarseness and moisture testing during construction of each source of material, and moisture-density testing of soil materials prior to and after their compaction (§ 1.6); (g) required fill and backfill to be “satisfactory soil materials, free from clay clods, rock or gravel larger than” 50 mm. (§ 2.1); and (h) required excavation of unsatisfactory soil materials extending below required elevations “to the depth directed by the [CO]” (§ 3.3.7) (R4, tab 97).

6. Specification § 02224: (a) required “SD-09 . . . Test Reports . . . for soil test results within 3 working days” in accordance with § 1.5.3 “Quality Control Testing During Construction” (§ 1.3); (b) required a soil survey, testing of proposed soil materials, and quality control testing during construction in terms essentially identical to those in

specification § 02200 (¶¶ 1.5.1, 1.5.2, 1.5.3); (c) defined satisfactory and unsatisfactory materials for fill and backfill as in § 02200, except “satisfactory” materials included materials acceptable to the CO (¶¶ 2.1.1, 2.1.2); (d) required that “[u]nsatisfactory soil materials encountered that extend below the required elevations shall be excavated to the depth directed” (¶ 3.8); and (e) required soil under structures and building slabs to be compacted to 95% of maximum density (¶ 3.12.1) (R4, tab 97).

7. Specification § 02225: (a) required “SD-09 . . . Test Reports . . . for soil test results within 3 working days” in accordance with ¶ 1.5.3 “Quality Control Testing During Construction,” (b) required a soil survey and testing of proposed soil materials in terms essentially identical to those in specification § 02200 (¶¶ 1.4, 2.1.1); (c) defined satisfactory and unsatisfactory materials for backfill the same as in § 02200 (¶¶ 2.1.2, 2.1.3); and (d) stated that “[u]nsatisfactory soil materials encountered that extend below the required elevations shall be excavated to the depth directed” (¶ 3.5) (R4, tab 97).

8. V.D.O.T. § 207 and ASTM D 3282 (1988), referenced in specifications §§ 02200, 02224 and 02225, are not in evidence. Respondent attached AASHTO M 145 (1990 ed.) to its reply brief, and appellant stated it “would have no objection if the Board desired to consider these documents. . . .” (ltr. dtd. 14 Feb. 2001). M 145 generally classified seven non-organic soil groups, of which Groups A-1 through A-3 are “Granular Materials,” Groups A-4 through A-7 are “Silt-Clay Materials” and Group A-2 included subgroups A-2-4, A-2-5, A-2-6 and A-2-7 (“Silty or clayey gravel and sand” which are “borderline” between the granular and the silt-clay groups). The Unified Soil Classification System (USCS) in ASTM D 2487-98, cited by both parties (app. br. at 22; gov’t reply br. at 12-15) classified, *inter alia*, the following soil groups:

<u>Group</u>	<u>Typical Names</u>
SP	Poorly graded sands and gravelly sands
SM	Silty sands, silty sand with gravel
SC	Clayey sands, clayey sand with gravel
CL	Lean clays

(Ex. R-24, attach. 5)

9. Drawing G2 listed the following general work sequence: (a) Install silt fence and maintain erosion control structures. (b) Clear and grub vegetation and trees. (c) Minimize clearing, grading, and stockpiles, and stabilize disturbed areas. (d) Strip and stockpile topsoil. (e) Rough grade site to approximate elevations shown on drawings. (f) Construct buildings and other structures, channels, piping, concrete slabs, aprons, sidewalks, access road, parking area, fencing and electrical controls (R4, tab 98).

10. Drawing G3 depicted the locations of (a) treatment tanks B-1 and B-2, a control building, a treatment plant, a paved road, a circular paved “cul-de-sac,” and SDBs, and (b) 9 soil borings. Borings B-1 and B-2 were centered in tanks B-1 and B-2, respectively; borings B-3 and B-4 were within the east and west sides of the control building; borings B-5 and B-6 at the southeast and northwest corners of the SDBs; boring B-7 in the paved road south of the treatment plant; boring B-8 north of the SDBs, west of the paved road; and boring B-9 in the center of the influent pump station. No boring was at or near the effluent outfall structure. (R4, tab 98)

11. The log of soil borings B-1 through B-9 in specifications “Appendix A” described the color, moisture, density, plasticity, size and properties of soil samples by words and the symbols “SM,” “SP,” “SM/SP,” “SP/SM” and “SC/SM.” Boring log B-7 alone showed a layer of “Clayey SAND some silt (SC/SM).” The boring logs do not state whether they described the soil by visual-manual means or laboratory tests. (R4, tab 97)

#### B. Contract Bid and Performance.

12. On 16 August 1996 NASA solicited bids for construction of the new GSFC sewage treatment facility, intended to permit compliance with new wastewater discharge limitations that the Virginia Department of Environmental Quality required by 17 August 1998 (R4, tab 1 at 3; SR4, tab 62; ex. R-26 at 2-4).

13. GAI’s project manager John Hearn and President Joseph Giuliani reviewed the specified boring logs to prepare its bid. Neither Hearn nor Giuliani was a soils expert. (Exs. R-6 at 11, R-3 at 29, 32, 37) Mr. Hearn compared the solicitation’s boring log data to the specified definitions of suitable and unsuitable soils, and interpreted the logs to show that all structural excavations would be in sand with traces of silt, which was within the definition of “suitable soil” and which he knew drained well and would compact to the specified levels. Because GAI expected the excavation to be “relatively simple” and drainage and compaction were not seen as a problem, it made no cost or time allowances to replace unsuitable soils with suitable backfill at indicated bearing levels, and planned to complete the earthwork and structures by mid-summer 1997. (Ex. A-13 at 1-2)

14. Contract 39 required GAI to begin work within 15 days after receiving notice to proceed and to “complete the entire work ready for use” not later than 540 days after notice to proceed (R4, tab 1 at 16, § C.1). NASA gave GAI notice to proceed on 29 October 1996, thus establishing the contract completion date on 22 April 1998 (R4, tab 4; SR4, tab 146 at 2446). Contract 39 included no representation about the number of days of work delay or stoppage due to unusually severe weather that the contractor should anticipate during the 540 day contract performance period (R4, tab 1).

15. GAI’s 15 October 1996 “Preliminary Submittal Register,” submitted to NASA on 26 October 1996 included:

Item	Spec. Sec. . . .	SUBMITTAL OF	Sub Type	Title	Planned Submittal . . .
.... 23	02200	Soil Testing	SD-09	Reports	as needed
.... 26	02224	Soil Testing	SD-09	Reports	11/22/96
.... 33	02225	Test	SD-09	Reports	--

On 1 November 1996, William Bott, NASA’s project manager and alternate CO’s technical representative (COTR), found GAI’s Preliminary Submittal Register acceptable. (R4, tab 3 at 1; SR4, tab 69 at 837-42)

16. GAI mobilized at the site on 12 November 1996, finished clearing and grubbing on 11 December 1996, and started stripping topsoil and grading in early December 1996 (exs. A-13 at 3-4; R-17 at 2; SR4, tab 70 at 869-938).

17. On 19 December 1996 GAI reported to NASA via its contract inspector that GAI “Used front end loader to punch thru clay spots . . . on site” (SR4, tab 70 at 923). GAI’s 7 January 1997 daily report stated that Hillis-Carnes Testing Engineers took four soil samples for laboratory proctor testing from contract 39 site areas where structures were to be built and a fifth sample from “some sandy clay.” GAI’s 8, 14-15, 17, and 20-23 January 1997 daily reports stated that GAI excavated and stockpiled “clay”, “questionable clay”, or “clay-sand mixture” material. GAI’s 13 January 1997 daily report stated that unidentified “NASA employees want any excess clay or top soil we cannot use on site.” GAI’s 15 January 1997 daily report stated that it “Discussed with [COTR] Bill Bott where we can use clayey material.” The daily reports cited in this finding did not state that GAI characterized such material as a differing site condition (DSC) and were signed by GAI superintendent Jack Butts and Robert Clim, employed under a NASA contract with FKW, Inc. to inspect contract 39 (SR4, tab 70 at 945-69; ex. R-17, ¶ 1).

18. At a 27 January 1997 meeting with COTRs Bott and Wall, and Mr. Clim, GAI’s John Hearn said that there were discrepancies with boring logs; field excavations showed a lot of clay material, but the boring logs showed clay only at boring B-7. NASA did not inspect or give GAI instructions with respect to such excavation at that time, except NASA told GAI that it wanted a “soil survey grid system on all of the soils samples taken [and] to receive all of the data directly from the testing company via fax.” (SR4, tab 146 at 2449-53)

19. On 30 January 1997 GAI gave NASA the four Hillis-Carnes laboratory test reports of 7 January 1997, of which test sample 4, taken from a “stockpile,” was described

as “Brown fine to medium SAND and CLAY” and classified as “SC” (USCS) and “A-4” (AASHTO). (Ex. A-10, attach. B at 2-3, 5, 8, 11)

20. On 13 February 1997 NASA gave GAI permission to use 120 cubic yards of Government rock as backfill for the B-1 tank and cul-de-sac. GAI continued to excavate what it described as clay, to backfill and to compact that subgrade (SR4, tab 70 at 999, 1009-20; SR4, tab 71 at 1708-09). During February, Hillis-Carnes took soil samples near the cul-de-sac and treatment tanks for laboratory testing, and GAI began grading at the SDBs and control building (SR4, tab 70 at 1009, 1013, 1015).

21. On 11 March 1997, GAI used the NASA-provided stone in the B-1 tank and cul-de-sac areas (SR4, tab 70 at 1033). There was not enough such stone to complete backfilling those areas, so on 12 March 1997 GAI excavated on site for suitable backfill (SR4, tab 70 at 1035). By 18 March 1997 GAI exhausted that borrow site (SR4, tab 70 at 1043). NASA disagreed that sufficient suitable material could not be found on-site (ex. A-13 at 9). GAI began excavating the footings for the SDBs (SR4, tab 70 at 1057-60).

22. GAI’s 24 March 1997 letter to the CO, which bears the handwritten note “FAX RECEIVED 3/24/97 9:41a,” stated that DSCs were severely hampering GAI’s earthwork operations; although the boring logs indicated that the soil at the site was sand with a trace of silt, GAI actually found a clay mixture that made the site much harder to work and, as a result, GAI had to bring fill from off-site and experienced increased costs and delays; and GAI asked the CO to investigate and provide GAI direction on how to proceed (R4, tab 10).

23. On 24 March 1997, Hillis-Carnes faxed the results of 21 February to 11 March 1997 soils testing to COTR Bott. Test reports numbered 4-7 did not classify samples under the USCS or AASHTO, were taken from the B-1 and B-2 tank areas, “offsite, leftover from road work” and “on site (native),” and described the samples as fine to medium sand with silt and a trace of clay, except sample 6, which was described as “CR-6” without further definition. (SR4, tab 143 at 2412, 2422-25)

24. In the period 7 January to 8 April 1997, GAI worked on all but rain days, and on 12 days reported removing clay and unsuitable material from the site (SR4, tab 70 at 945-1075), which, considering other site work performed, we find delayed contract performance by 6 days. GAI’s three letters of 8 April 1997 to the CO stated that: (a) GAI had stopped work and could not proceed until a determination was made as to the DSC described in its 24 March 1997 letter (R4, tab 12), (b) the outfall structure endwall could not be built as required because the area where it was to be located was under water, a DSC (R4, tab 13); (c) GAI could not obtain compaction in the area of the SDB footings because “the material encountered is not as indicated,” and (d) GAI requested direction from the CO (SR4, tab 144). We find that water in the area of the outfall structure endwall footing (SR4, tab 146 at 2458) was a site condition about which contract 39 made no positive indication (see finding 10).

25. During the 65 calendar day period from 8 April through 11 June 1997, except for receiving purchased materials, soil sampling, and checking ground and water table elevations, GAI unilaterally ceased work at the job site awaiting the CO's "further instructions" on how to proceed due to allegedly "different soil conditions" (SR4, tab 70 at 1075-1165, tab 146 at 2458).

26. On 17 April 1997 GAI's Messrs. Hearn and Butts met with the CO and COTRs William Bott and Jerry Wall regarding, *inter alia*, the alleged DSC. Mr. Hearn stated that GAI's test results showed more clay than had been indicated in the boring logs, and the clay was causing compaction problems and delaying the work. In the presence of the CO, Mr. Bott said that some clay was allowable and did not make soils "unsuitable" under the AASHTO soil classifications, GAI had run rubber-tired vehicles over the site which impacted the soil, and GAI had not submitted any soil survey results required by specification § 02200, ¶ 1.5, to substantiate the alleged DSC. The parties agreed that further soil testing would be done by McCallum Testing Laboratories, but did not agree on whether GAI could resume any site work. Neither the CO nor the COTRs directed GAI to resume work, expressly or by reasonable implication. (R4, tab 14; SR4, tab 146 at 2456-59)

27. On 7 and 23 April 1997, McCallum issued test results on five soil samples taken at the NASA site on 27 March and 8 April 1997, from material excavated northeast of the control building, at the B-2 tank, the SDBs, and the control building, and in a stockpile blend, four of which McCallum classified under ASTM D 2487 as "CL," "SM-SC," or "SC" (SR4, tab 4 at 510-18). On 23 April 1997 GAI sent the foregoing test results to the CO and COTR Jerry Wall, stating that the results showed that the soils sampled were different than that shown in the boring logs, additional testing would be futile, and GAI needed direction on how to proceed (*id.*, at 507-08).

28. The CO's 7 May 1997 letter to GAI responded to GAI's letters of 24 March and 8 April 1997, and stated that the specified soil boring results were classified by visual means and were provided only to give bidders a general idea of the expected soil conditions, whereas the specifications required classification by laboratory testing and allowed clay in some of the satisfactory soil types, and GAI had not provided soil test results in accordance with contract procedures. He directed GAI to proceed with construction and to provide soils testing in accordance with specification §§ 02200 and 02224. He stated that if unacceptable soils were found, NASA would pay for removing and replacing them in identified areas, and specification § 02200, ¶ 3.1, forbade use of rubber-tired construction equipment during wet conditions which changed the soil structure by reducing its shear strength and bearing capacity and making the specified compaction extremely difficult. (R4, tab 15) We find that GAI's work stoppage from 8 April until 7 May 1997 when the CO directed GAI to resume work, was reasonable, and delayed contract completion by 29 days.



29. GAI's 13 May 1997 response to the CO's 7 May letter said that GAI would submit a claim for DSCs based on "the unexpected quantities of clay found in otherwise suitable material," since soils encountered were in classifications not indicated in the specifications and resulted in delays and additional work in handling and replacing soil to obtain the required compaction (R4, tab 16).

30. On 15 May 1997, GAI's consultant, Dr. Peter Rebull, McCallum, and NASA representatives met at the job site and took soils samples on the east and west sides of the SDBs, on the west side of the control building, near the edge of the B-1 tank, in the center of the B-2 tank, on the north side of the cul-de-sac, and from the stockpile of material removed from the B-1 tank and cul-de-sac (SR4, tab 70 at 1129; ex. A-10, attach. B). McCallum picked up two additional soil samples from a proposed off-site borrow pit on 16 May 1997 (SR4, tab 70 at 1131).

31. On 19 May 1997 McCallum sent the test results of the 15-16 May 1997 samples to NASA (R4, tab 19), of which four samples were classified "CL" or "SC" under ASTM D 2487, and A-4 or A-6 under AASHTO M-145 (Ex. A-10, attach B). On 29 May 1997 NASA accepted McCallum's test results, and commented that A-4 soils were considered "silty soils" in AASHTO, use of the word "clay" in the test results was subjective unless verified by sieve test in all samples except No. 5, and the extent of unsatisfactory soils would have to be defined before or during excavation (SR4, tab 115 at 2060).

32. In a 3 June 1997 telephone call to the CO and COTRs Wall and Bott, GAI's Mr. Hearn discussed the alleged DSC. NASA stated that GAI's problems had been caused by wet site conditions. (SR4, tab 146 at 2462-66)

33. GAI's 9 June 1997 letter to the CO said that absent any response or direction from the CO, GAI would import soils for backfill in order to meet the specified compaction requirements (R4, tab 21).

34. The CO's 12 June 1997 letter, responding to GAI's May and June letters, and the 3 June teleconference, stated that: (a) in accordance with the FAR 52.236-4 PHYSICAL DATA, and 52.236-3 SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK clauses, it was GAI's responsibility to determine the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered in performing the contract work; (b) specifications § 02224, ¶ 3.8, allowed for the recovery of costs associated with the removal of unsatisfactory materials; (c) NASA believed that until GAI used all suitable on-site soil, it would not reimburse GAI for importing soils to the job site; and (d) GAI was directed to proceed with work so as to meet the 22 April 1998 contract completion date. (R4, tab 22)

35. On 12-13 June 1997 GAI remobilized at the site, arranged for the delivery of off-site soils, began filling with the area of the treatment tanks and cul-de-sac with imported soils, awaited direction on the excavation of the SDBs, and continued work until 26 June 1997 (SR4, tab 70 at 1167-87). McCallum took a soil sample from the open air SDBs on 16 June 1997 (SR4, tab 70 at 1171).

36. On 18 June 1997, GAI requested a letter from NASA stating that the material used for fill in the B-2 tank and the compaction achieved there were satisfactory (R4, tab 28). During the 15 calendar day period from 12 through 26 June 1997, GAI worked on 11 days and recorded no rainfall or work stoppage due to weather, clay, or unsuitable sub-soil (SR4, tab 70 at 1167-87).

37. On 26 June 1997, COTR Wall and Inspector Clim told GAI not to excavate in the SDBs more than two feet below existing grade and only directly under the building and footings. GAI asked that such direction be given in writing. (SR4, tab 70 at 1187)

38. On 27 June 1997 GAI received the test results on McCallum's 16 June sample at the SDBs, which it classified as ASTM "SC" and AASHTO A-4 (ex. A-10, attach. B). NASA approved GAI's results on 15 July 1997 (SR4, tab 120).

39. During the 17 calendar day period from 27 June through 13 July 1997, GAI unilaterally stopped site work, except for some electrical work, while awaiting NASA instructions on how to proceed with excavation of unsuitable subgrade material in the SDBs (SR4, tab 70 at 1189-1210). We find that those 17 days of work stoppage were reasonable, and delayed contract completion by 17 days.

40. GAI's 2 July 1997 letter to the CO stated that the clauses recited in the CO's 12 June 1997 letter did not overcome the DSC clause, the clay soil encountered on site differed from the specified boring logs, GAI was not required to undertake an extensive investigation to determine the nature of the soils, and GAI would continue to import soils to complete the job in a satisfactory manner (SR4, tab 7 at 546).

41. On 5 July 1997, GAI sent respondent a 30 June 1997 letter from Dr. Rebull based on his 15 May 1997 site visit and review of soil tests. Dr. Rebull stated that samples from the treatment tanks, control building, and SDBs were different from the materials described in the boring logs, and that the use of rubber-tired equipment at this site could not change the classification of its soils. (SR4, tab 8 at 549-51)

42. The CO sent GAI unilateral contract Modification No. 1, signed on 10 July 1997, directing GAI to remove unsatisfactory soils, as defined by the contract and tested by GAI's testing service; to backfill, compact, and test as directed by the CO; and when all on-site soils that tested satisfactory were used, to haul in off-site borrow material. GAI was authorized to incur not more than \$30,000 in costs without the CO's prior approval, and was

required to assert its right to an adjustment under the Changes clause within 30 days of receipt of “this Change Order.” (R4, tab 1 at 1, tab 143 at 2399)

43. From 14 to 17 July 1997, GAI resumed work, excavated what it described as clay from the SDBs, removed 10-12 cubic yards of asphalt in that area, and took soil samples therefrom for compaction testing (SR4, tab 70 at 1213-20). On 18 July 1997 two compaction tests of exposed subgrade under the SDBs failed. McCallum advised GAI that it could not achieve 95% compaction of that subgrade. (SR4, tab 70 at 1221)

44. On 21 and 22 July, the parties agreed that GAI could proceed at its own risk with concrete work at the treatment tanks without an approved equipment submittal, the SDBs compaction problem was to be resolved shortly, and GAI was to submit a proposal for an equitable adjustment on its DSC (SR4, tab 146 at 2470-76).

45. At GAI’s request, on 29 July 1997 Dr. Rebull inspected the SDBs site. On 31 July 1997 Dr. Rebull recommended to GAI an additional undercut of about two feet throughout the SDBs area, and backfilling with off-site select material. (R4, tab 33)

46. On 1 August 1997, COTR Wall told GAI to proceed with 6" (not 2') of additional excavation in the SDBs. From 1 to 8 August 1997 GAI excavated, compacted and tested the SDBs subgrade. (SR4, tab 70 at 1241-52) On 6 August 1997 GAI sent to NASA Dr. Rebull’s 31 July 1997 recommendation, and Hardin-Kight Associates, Inc. (HKA) took soil samples at the SDBs for NASA (R4, tab 33; SR4, tab 70 at 1248).

47. On 8 August 1997, GAI submitted to the CO an uncertified, \$320,361.49 claim for delay and additional earthwork and a “180-days” extension for delays from 15 January to 15 July 1997 (R4, tab 34). GAI’s daily reports and April 1998 progress chart for earthwork show: (a) GAI completed earthwork on 15 August 1997, and (b) GAI removed clay and unsuitable material from the site, and excavated to elevations below the specified sub-grade elevations for the SDBs, on 9 days in June-August 1997, which, considering other site work performed on those days, we find delayed contract performance by 6 days (SR4, tab 76 at 1928-29, tab 70 at 1187, 1213, 1215, 1217, 1221, 1227, 1246, 1248).

48. NASA’s 14 August 1997 letter to GAI said that Dr. Rebull’s recommendation of additional SDBs excavation was not necessary because McCallum’s 16 July 1997 soils test showed that the SDBs subgrade material was satisfactory (AASHTO A-3), and thus additional excavation and backfill were at GAI’s expense (R4, tab 38; SR4, tab 70 at 1262, 1268).

49. From 13 to 27 August the parties exchanged correspondence regarding additional documentation of GAI’s 8 August 1997 claim (R4, tabs 37, 43; SR4, tab 147).

50. From 18 August to 2 September 1997, GAI prepared forms and installed rebar preparatory to installing concrete footings and foundations. On 19 August 1997 NASA approved installing concrete for the tank B-1 foundation, and on 3 September 1997 approved installing concrete in the SDBs basin. On and after 4 September 1997 GAI installed concrete footings and foundations for site structures. (SR4, tab 70 at 1213-92)

51. On 3 September 1997, the CO and GAI negotiated and orally agreed upon a \$175,000 price increase and a contract completion date extension of two months for GAI's DSC and delay claim (tr. 324-325, 866-67).

52. On 30 October 1997 the CO sent proposed Modification No. 2 (Mod. 2), unsigned to GAI for its signature. Mod. 2 had an effective date of 3 September 1997, was described as a "supplemental agreement" to resolve GAI's "27 August 1997" claim, proposed to increase the contract price by \$175,000, to extend the contract completion date from 22 April to 22 June 1998, and to resolve the issues of: "(1) delay and additional work, (2) replacement of all unsatisfactory soils including those as directed by Modification 1 . . . , (3) existing soils conditions on the site both past and future, (4) the level of the watertable, (5) the effluent outfall construction, (6) the Sand Filter and Ultraviolet Disinfectant System; and (7) any other issues, either identified or unidentified as of the effective date of the modification." Under Mod. 2, GAI was to release respondent from "any and all liability under [the] contract for further equitable adjustments attributable to" the facts or circumstances giving rise to the proposal for adjustment. The CO also sent proposed Mod. 3, to provide a \$23,397 price increase for the "previously approved" carbon to stainless steel bridge beam change. (R4, tab 48) Neither party signed Mod. 2 or Mod. 3 (tr. 327, 406-07).

53. From 16 June 1997 through 12 March 1998, 20 additional soil tests were done, of which 7 were classified as AASHTO A-2-4 and A-3 "satisfactory materials" and 13 were classified AASHTO A-4 and A-6 "unsatisfactory soil materials" (ex. A-10A).

54. On 29 December 1997, GAI requested a time extension to 21 September 1998 for alleged DSCs, a dimensional error on the sand filter trough drawing, and improper rejection of GAI submittals (R4, tab 65). The CO's 20 February 1998 letter to GAI stated that GAI had not signed proposed Mod. 2, regarding "unsatisfactory soils," and Mod. 3, regarding the bridge beam material change, requested additional information on cost and time impacts regarding GAI's other allegations, and said that a modification would be issued for the dimensional error on the sand filter trough drawing (R4, tab 79; tr. 389). The record contains no evidence of which, and for how many, days such changes delayed completion of the contract.

55. The CO initiated the process to terminate contract 39 for default on 26 February 1998. The CO's justification for default termination did not expressly mention the factors in FAR 49.402-3(f), but discussed a few of them. (SR4, tabs 1-3)

56. (a) The following 22 soil samples classified by the testing laboratory as “SC,” “SM-SC,” “SC-SM” or “CL” under USCS, including 18 samples classified “A-4” or “A-6” under AASHTO M-145, were encountered at site locations other than under the paved road south of the treatment plant stated in contract boring log B-7 (finding 11):

<u>Sample Date</u>	<u>Lab. . . . I. D.</u>	<u>USCS Class.</u>	<u>AASHTO Class.</u>	<u>Location</u>	
1-7-97		4	SC	A-4	Stockpile east of proposed fence area
3-27-97	46	CL			Subgrade material
4-8-97	044-2	CL			[SDB]
4-8-97	044-3	SM-SC			Control Building
4-8-97	044-4	SC			Stockpile blend
5-15-97	081-1	CL	A-4		[SDB], East Side
5-15-97	081-5	CL	A-6		Cul-De Sac
5-15-97	081-6	SC	A-4		[SDB], NW side
5-15-97	081-7	SC	A-4		B-1 and Cul-De-Sac
6-16-97	155	SC	A-4		[SDB]
7-8-97	184	SC	A-4		Influent Pump Station
7-29-97	217-2	SC	A-6		Sand Filter Area
8-7-97	970129	SC	A-4		S-2-2.5'E face [SDB] . . . excavation
8-7-97	970130	SC	A-4		S-3-2.5'E face [SDB] . . . excavation
8-7-97	970131	SC-SM	A-4		S-4-1'W face [SDB] . . . excavation
8-7-97	970133	SC-SM	A-4		S-6-1'E face [SDB] . . . excavation
1-30-98	460	SC	A-4		5 Ft. North of MH S1
2-16-98	472-1	CL	A-4		Trench Side Wall
2-16-98	472-2	SC	A-4		Trench Side Wall
2-16-98	472-3	CL	A-6		Trench Side Wall
2-25-98	485	CL	A-4		Effluent line to Sand Filter at 90 Elbow
3-12-98	511	SC	A-6		Flow equalization overflow line at B-2

(Ex. A-10A), (b) from 1 May 1997 to 11 March 1998 GAI submitted 12 submittals citing specification § 02200, ¶ 1.5.1, with results of particle size, moisture content, Atterberg limit tests and percentage of fines less than #200 sieve tests, of which NASA approved 10 and disapproved 2 submittals (SR4, tabs 112-16, 120, 122-23, 127, 133, 142 at 2249, 2377), and (c) from 19 June 1997 to 20 May 1998 (after contract termination) GAI submitted 23 submittals citing specification § 02224, ¶ 1.5.1, with compaction test results, of which NASA approved 16 and disapproved 7 submittals (including three after contract termination) (SR4, tabs 117-19, 121,32, 134-35, 142 at 2249, 2269, 2388, 2390).

57. The CO's 3 April 1998 letter to GAI stated that he was considering default termination because it was unlikely that GAI would be able to complete the contract within the required time, asked GAI to present in writing within 10 days whether its failure to perform arose from excusable causes, and said that although the parties had negotiated an extension of the completion date to 22 June 1998, GAI had not executed the modification and the completion date remained 22 April 1998. The CO stated that, *inter alia*, based on the 22 April 1998 completion date, 99% of contract work should have been completed while NASA estimated that only about 40% had been done, GAI did not meet most contract milestones, its submittals had not been made timely and often had to be resubmitted, and it had not provided adequate work oversight. (R4, tab 87)

58. GAI's 9 April 1998 letter replying to the CO's show cause letter stated that the parties had agreed to extend the contract completion date to 22 June 1998, GAI would accomplish "substantial completion" by that date, GAI would need six months beyond 22 June 1998 to complete the control building, SDBs and the contract, and the 22 June 1998 completion date had been based on unsatisfactory soil conditions encountered before September 1997 and NASA's insistence on proprietary equipment. GAI stated that it had encountered additional unsatisfactory soils after August 1997 which, with unusually wet conditions, had further delayed its work, its February billing indicated that it had completed about 65% of work under the contract (not 40% as the show cause letter stated), and asked to resolve "a revised completion date past June 22, 1998." (R4, tab 92)

59. GAI's daily reports recited the following rain/snow days, rainfall amounts and work stoppages due to rainfall at the contract 39 job site:

<u>Period</u>	<u>Rain Days</u>	<u>Amount</u>	<u>Rain Days Stopped</u>
11/21/96 to 4/7/97	26	3.75"	10.5
4/8/97 to 6/26/97*	6	2.45"	0
6/27/97 to 7/11/97*	1	.2"	0
7/14/97 to 5/4/98	54	42.5"	15.375

\* GAI's work stoppage periods.

(SR4, tab 70 at 885-1073, 1189-1692) The record contains no historical rainfall data at the Wallops Island Job site prior to 26 September 1996.

60. GAI's Invoice No. 12, dated 5 May 1998, stated that a cumulative total of 61.91% of work was completed at the end of April 1998. NASA did not pay Invoice No. 12 due to the impending termination for default. (SR4, tab 76 at 1921, -23, -27)

61. The CO's 6 May 1998 letter terminated contract 39 "for default for failing to prosecute the work, endangering timely contract performance, and failing to complete the contract within specified timeframes." The CO determined that about 55% of the work had been completed, and found that GAI's default was not excusable because it failed to provide sufficient evidence of DSCs, unusual weather conditions, or the extent of the delay they caused, Mod. 2 was not executed by the parties, and GAI admitted it required six months beyond 22 June 1998 to complete the contract. (R4, tab 2)

### C. Post Termination Assessments.

62. COTRs Bott and Wall filmed the project site surface and structures shortly after the default termination, showing the extent of, and deficiencies in, the work GAI did by that time and a considerable inventory of materials and equipment not installed in the new structures. GAI did not introduce evidence to rebut that video. (SR4, tab 73)

63. In May 1998 NASA retained Brown & Root Services (BRS) to assess the condition and stage of completion of the Wallops Island sewage treatment plant. BRS' June 1998 assessment report stated, and we find, that there were many deficiencies in GAI's work: uncapped reinforcing steel, "non OSHA compliant" equipment on site, erosion control measures in disrepair, debris throughout the site, extensive areas of placed concrete that were out of true, honeycombed and cracked, and problems with most of the mechanical piping, connections and aeration tanks that would have to be fixed. BRS stated that the required additional work could be completed in five months. (Ex. R-15b)

64. We find that the video and BRS report support the CO's estimate that GAI completed no more than 55% of the contract by 6 May 1998, the work completed had several defects requiring repair or replacement, and the sewage treatment plant was not substantially complete or beneficially usable at the time of the termination for default.

65. GAI offered Dr. Rebull as an expert and his written report (ex. A-10), which the Board received in evidence over respondent's objection (tr. 4/11). We affirm that ruling. Dr. Rebull opined, *inter alia*, that: (a) the contract boring logs indicated that the bearing layers for the main structures would be soils specified as "satisfactory," and do not show clay in the relevant locations; (b) there were substantial amounts of unsatisfactory clayey soils at the site, including the SDBs area, which required additional excavation and replacement of soils; and (c) such soils prevented compaction during wet conditions and resulted in delays (ex. A-10). Dr. Rebull did not estimate the number of days delay resulting from these conditions.

66. NASA offered Mr. Jack Hardin, P.E., as an expert in soil conditions (tr. 15) and his written report. GAI objected to the substance of Mr. Hardin's views as outside the mainstream of geotechnical and soils expertise (tr. 10). The Board overruled that objection and accepted his testimony and report (tr. 16). We affirm that ruling. Mr. Hardin opined,

*inter alia*, that: (a) GAI's soil test results were not representative of the site's soil conditions (but his criteria for representative sampling were not specified in contract 39 and he did not question the accuracy of the soil sample USCS or AASHTO classifications); (b) "unsatisfactory" soil did not refer to undisturbed soil (without mentioning the specification requirement to excavate unsatisfactory soil materials extending below the required elevations to the depth directed by the CO (findings 5-7)); and (c) the contract boring samples were reported by a visual classification, indicated by the lack of laboratory test data on the logs (ex. R-24; tr. 935, 981-85). Mr. Hardin admitted that ASTM D 2488, "Standard Practice for Description and Identification of Soils (Visual-Manual Procedure)," in ¶ 5.3 states that since both ASTM D 2487 and ASTM D 2488 use the same symbols and names to identify and to classify soils, "it shall be clearly stated in reports and all other appropriate documents, that the classification symbol and name are based on visual-manual procedures" (tr. 935-36). Mr. Hardin did not estimate the number of days delay resulting from the soil conditions if the Board should determine there was a differing site condition.

67. By way of summary, we find that GAI was excusably delayed in completing contract 39 for 6 days during the period 7 January to 8 April 1997 (finding 24), for 29 days from 8 April to 7 May 1997 (finding 28), for 17 days from 27 June through 13 July 1997 (finding 39) and for 6 days in June-August 1997 (finding 47), for a total of 58 days of excusable delay.

#### D. Subcontractor and Supplier Payments.

68. During performance of contract 39, GAI submitted twelve invoices to NASA, each including a certification reciting the terms specified by FAR 52.232-5(c), and signed by its President Joseph A. Giuliani (SR4, tabs 75-76).

69. GAI did not make timely payments to its subcontractors and suppliers, including Clow Water Systems Company (exs. R-39, -41), C. Lee Davis, Inc. (exs. R-16, -95, -93), Shore Disposal, Inc. (ex. R-75), Harkins Concrete Construction, Inc. (exs. R-13, -47, -50), T.J. Equipment Co. (ex. R-71), Water Pollution Control Corp. (exs. R-78, -79), 84 Lumber Company (exs. R-98, -102), DiCarlo Precision Instrument Incorporated (exs. R-96, -97), B.A. Equipment and Supplies (exs. R-85, -87), Kappe Associates, Inc. (exs. R-12, -106 to -108), and Parkson Corp. (exs. R-2, -14, -42). The record contains no evidence that any untimely payment or payments to GAI's subcontractors or suppliers delayed receipt of their materials and equipment or GAI's completion of contract 39. We grant GAI's 14 February 2001 motion to strike Attachments 3 and 4 to NASA's reply brief, which were pleadings regarding GAI's payments to subcontractor U. S. Filter in a Florida District Court suit, which were not introduced into the record of these ASBCA appeals.

#### E. Appeals and Motions.

70. GAI timely appealed the default termination on 3 August 1998.



71. In September 1998, NASA moved to dismiss ASBCA No. 51672 on jurisdictional and standing grounds, citing the Anti-Assignment Act, 41 U.S.C. § 15(a) and GAI's alleged 30 September 1997 sale of "Purchased Assets," including contract 39, to Giuliani Construction, Inc. (GCI). In October 1998, NASA moved to dismiss for failure to state a claim. The Board treated those motions as for summary judgment, since material beyond the pleadings was presented and the motions involved, in part, the validity of the default termination. We denied the motions in February 2000, because the parties disputed the material fact of whether GAI had sold its assets to GCI. *Giuliani Associates, Inc.*, ASBCA No. 51672, 00-1 BCA ¶ 30,780 at 152,008. Before the record was closed to receipt of factual evidence in these appeals, respondent adduced no further proof that GAI sold its assets to GCI in 1997-1998.

72. GAI submitted a termination for convenience settlement proposal to the CO in April 1999 under contract 39. The CO did not respond thereto, and in January 2000 GAI filed an appeal based on his deemed denial.

73. In June 1997, NASA awarded GAI contract No. NAS5-97036 (contract 36), for construction and repair of a water restoration project at NASA's Goddard Space Flight Center, Wallops Island, VA (Gov't Mot. to Dismiss, attach. 2 at ¶ 5). Contract 36 included the FAR 52.232-5 Progress Payments clause (*id.*, ¶ 6). Under contract 36, GAI invoiced NASA for work from various subcontractors and suppliers, provided the FAR 52.232-5 certifications, and was paid by NASA (*id.*, ¶ 7).

74. In December 2001, a federal grand jury issued an indictment charging Joseph Giuliani with violations of federal criminal statutes with respect to his FAR 52.232-5 certifications under contract 36 in *United States v. Joseph A. Giuliani*, Criminal Action No. 2:01cr232 (E.D. Va.). "Count Ten" therein alleged a violation of 18 U.S.C. § 1001, *viz.*, that in GAI's invoice No. 5 of 2 June 1998, Giuliani certified that payments to its subcontractors and suppliers had been made from previous Government payments and that timely payments would be made from the current Government payment under contract 36, when he knew that such payments had not been made and would not be made (Gov't mot., attach. 2 at 9).

75. In an 18 April 2002 Plea Agreement, Mr. Giuliani agreed to plead guilty only to "Count Ten" of the indictment, the United States of America said that it would not "further criminally prosecute the defendant for any alleged criminal offense related to NASA Contract NAS5-96139" and the agreement provided that it "does not limit or bind the United States, the defendant or GAI in any administrative or civil action relating to the defendant or GAI" (Gov't mot., attach. 1 at ¶¶ 1, 6).

76. In January 2002, NASA moved to suspend proceedings in these appeals pending resolution of Criminal Action No. 2:01cr232, and in May 2002 NASA moved to dismiss

these appeals or to sustain the default termination on the “affirmative defense of fraud” (mot. at 1, 4). Respondent’s pleadings included no affirmative defense of fraud. In September 2002, the Board denied the motion to suspend as moot and stated that the motion to dismiss would be decided in conjunction with the disposition on the merits of these appeals.

## DECISION

### I.

Respondent moves to dismiss the appeal for “lack of jurisdiction,” or to sustain the default termination based on its “affirmative defense of fraud,” due to Joseph Giuliani’s conviction of a false statement under 18 U.S.C. § 1001, arising from his certification of progress payment No. 5 under contract 36. Respondent argues that, since contracts 36 and 39 were performed at the same time, at the same location, by the same company (GAI), with the same personnel (Joseph Giuliani and John Hearn), and with several of the same subcontractors and vendors, Mr. Giuliani’s false statement conviction under contract 36 tainted contract 39.

In the legal authorities respondent cites to support its motion, the contractor or its officer or employee was convicted of fraud or false claims under the same contract under which its appeal was taken or the suit was filed. In *Daff v. United States*, 78 F.3d 1566, 1573-74 (Fed. Cir. 1996), there was fraud in performance of the terminated contract. In *Beech Gap, Inc.*, ENG BCA Nos. 5585, 5600, 95-2 BCA ¶ 27,879 at 139,076, the fraud and default termination arose under one contract. In *Brown Construction Trades, Inc. v. United States*, 23 Cl. Ct. 214, 216 (1991), the fraud was committed in the course of the “very contract” to which the suit pertained. In *Joseph Morton Co., Inc. v. United States*, 757 F.2d 1273, 1277-78 (Fed. Cir. 1985), a fraud supported a default termination of the contract under which the fraud was practiced. *Brown v. United States*, 524 F.2d 693, 705, 207 Ct. Cl. 768, 789 (1975), limited judgment to those contracts and purchase orders included in the indictment on which the contractor was convicted of 18 U.S.C. § 1001 violations. In *Little v. United States*, 152 F. Supp. 84, 87-88, 138 Ct. Cl. 773, 778-79 (1957), the contractor’s claims under contract V3020V-241 were held forfeited because of fraud against the Government thereunder for services from 1 January to 30 April 1949.

Respondent has not cited, and our research has not uncovered, any decision dismissing an appeal or suit, or sustaining a default termination, on the basis of a fraud-tainted contract other than the contract in issue in the pending appeal or suit, here, contract 39. We deny the motion to dismiss these appeals under contract 39 due to Mr. Giuliani’s fraud conviction under contract 36.

### II.

Respondent has the burden to prove that its default termination was justified. *See Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 763-65 (Fed. Cir. 1987). On 6 May 1998 the CO terminated contract 39 “for default for failing to prosecute the work, endangering timely contract performance” and for “failing to complete the contract within specified timeframes” (finding 61).

To justify termination for endangering contract performance, respondent must prove that the CO had the reasonable belief that there was “no reasonable likelihood that the [contractor] could perform the entire contract effort within the time remaining for contract performance.” *See Lisbon*, 828 F.2d at 765. FAR 49.402-3(d) further requires the CO to give the contractor a “cure notice” providing 10 days in which to cure specified performance failures. The CO’s 3 April 1998 letter to GAI (finding 57) amply specified GAI’s performance failures, and satisfied the FAR requirement for a “cure notice.”

The parties orally agreed on 3 September 1997 to extend the contract completion date by 60 days to 22 June 1998 (finding 51). Mod. 2, adjusting the completion date to 22 June 1998, was not executed (finding 52). This fact did not abrogate NASA’s duty to adjust the contract due to Modification No. 1, which directed GAI to remove unsatisfactory soils and to replace them with satisfactory soils (finding 42) and for any valid DSC. *See Daly Construction, Inc. v. Garrett*, 5 F.3d 520, 522 (Fed. Cir. 1993) (despite no signed agreement, Government had duty to compensate the contractor for agency-caused delay).

By the date of termination, GAI had completed no more than 55% of the contract work (finding 64). As found by the CO, based on the 22 April 1998 contract completion date, 100% of the performance time had elapsed on 6 May 1998. Based on our finding 67 that GAI was entitled to a 58-day extension, the contract completion date would have been 19 June 1998. On 6 May 1998, therefore, 92.6% of the performance time had elapsed. At the time of termination, there was a considerable inventory of materials and equipment not installed in the new facility, the completed work had several defects requiring repair or replacement, and the new facility was not substantially complete or usable (findings 62-64). Respondent has shown that the CO had reason to believe that there was no reasonable likelihood that GAI could have completed the remaining 45% of the contract work by 19 June 1998.

The CO’s 26 February 1998 default termination justification did not expressly mention the factors in FAR 49.402-3(f), but discussed a few of them (finding 55). The CO’s failure to consider one or more of the FAR 49.402-3 factors does not require conversion of a default termination to a convenience termination. *DCX, Inc. v. Perry*, 79 F.3d 132, 135 (Fed. Cir.), *cert denied*, 519 U.S. 992 (1996) . We hold that respondent has met its burden and proven its *prima facie* case for default termination.

### III.

A defaulted contractor has the “burden of proving that its nonperformance was excusable” under the provisions of the default termination clause, including the occurrence of an event that was unforeseeable, beyond its control, and without its fault or negligence. *DCX, supra*, 79 F.3d at 134; *accord Switlik Parachute Co. v. United States*, 573 F.2d 1228, 1234, 216 Ct. Cl. 362, 369-70, 373 (1978).

GAI argues that its “principal ground for excusable delay” is a Type I DSC (app. br. at 12), due to encountering inorganic, lean clays (USCS “CL”), and clayey sands or clayey sand with gravel (“SC”), and AASHTO M-145 Groups A-4 to A-7, “Silt-Clay Materials” which specifications §§ 02200, 02224, and 02225 stated were “Unsatisfactory soil materials” (findings 5-8), and that the carbon to stainless steel bridge beam material change in proposed Mod. No. 3 and the dimensional error in the sand filter drawing admitted by the CO (finding 54) caused further excusable delays (app. br. at 58-59).

To recover for a Type I DSC, GAI must prove that: (1) the contract documents positively indicated the site conditions that form the basis of the claim; (2) the contractor reasonably relied upon its interpretation of the contract documents; (3) the conditions actually encountered differed materially from those indicated in the contract; (4) the conditions encountered were reasonably unforeseeable based on all the information available at the time of bidding; and (5) the contractor was damaged as a result of the material variation between the expected and the encountered conditions. *Stuyvesant Dredging Co. v. United States*, 834 F.2d 1576, 1581 (Fed. Cir. 1987).

The contract soil boring logs positively indicated subsurface soil described as silty sands or sand-silt mixtures (“SM”) and poorly graded and gravelly sands (“SP”) in all site areas geotechnically investigated, except for one stratum of “Clayey SAND some silt (SC/SM)” in boring B-7 at the paved road south of the treatment plant (findings 8, 10-11). GAI reasonably relied on those logs in preparing its bid (finding 13). From 7 January 1997 through 12 March 1998, GAI actually encountered lean clays (“CL”) and clayey sands and clayey sand with gravel (“SC” and “SM-SC”) in 22 soil samples from the subgrade and excavated at the site, including northeast of the control building and at the SDBs, cul-de-sac, tank B-1, influent pump station, sand filter, effluent line, and flow equalizer overflow line (finding 56). The subsurface lean clays and clayey sands or clayey sand with gravel, which GAI encountered at the contract site, were reasonably unforeseeable at the time GAI bid on contract 39, since they were subsurface conditions and it is not reasonable to expect bidders to conduct pre-bid, geotechnical investigations. *See Stock & Grove, Inc. v. United States*, 493 F.2d 629, 637, 204 Ct. Cl. 103, 119 (1974). GAI was damaged as a result of encountering such subsurface materials (findings 24-28, 39, 47, 67). We conclude that GAI established the elements of proof of a Type I DSC.

Respondent argues that some of GAI’s soil samples were classified A-2-4 and A-2-5, silty or clayey gravel and sand, under AASHTO M 145, which were “satisfactory materials” under specification § 02200, ¶ 1.3 (reply br. at 5-6). Such statement is true but

immaterial, since GAI did not contend that A-2-4 or A-2-5 soils were “unsatisfactory” or constituted a DSC.

GAI’s 8 August 1997 claim alleged that the DSC caused a “180 days” delay from 15 January to 15 July 1997 (finding 47). GAI’s brief designates 15 January to 10 July 1997 (176 days) as excusable delay arising from the subsurface soils DCS (app. br. at 17-19, 40-44), and alleges, but does not identify, further delays due to the DSC after 10 July 1997. There are factual and legal barriers to accepting the number of days GAI asserts it was excusably delayed by the DSC.

Contract 39’s Differing Site Conditions clause required GAI to notify the CO of differing site conditions before their disturbance and required the CO to investigate the condition promptly (finding 3(c)). On 19 December 1996 and 7 January 1997 GAI notified Robert Clim, inspecting under a NASA contract with FKW, Inc., that GAI encountered “clay” and “clay-sand mixture” material in site excavations, but did not state that such material was a DSC (finding 17). GAI first told the COTRs that field excavations showed clay material, differing from the contract boring logs, on 27 January 1997. We impute the COTRs’ knowledge to the CO. NASA did not inspect or give GAI instructions with respect to such excavation at that time. (Finding 18) On 13 February 1997 NASA allowed GAI to use Government rock to backfill the B-1 tank and cul-de-sac subgrades (finding 20). We construe this as NASA’s first instruction to GAI on what to do about the clay subsurface materials GAI had encountered.

GAI exhausted NASA’s rock supply and satisfactory borrow site backfill on 18 March 1997 and requested the CO’s instructions on how to proceed on 24 March 1997 (findings 21-22). GAI unilaterally stopped site work for 82 days during the periods 8 April through 11 June, and 27 June through 13 July 1997 (findings 25, 39). On 7 May 1997 the CO directed GAI to resume work with stated instructions (finding 28). On 10 July 1997 the CO sent GAI unilateral contract Modification No. 1, directing GAI to remove unsatisfactory soils, and to backfill, compact and test as directed by the CO (finding 42).

After receipt of those CO’s instructions, GAI was obliged by ¶ (i) of the contract’s Disputes clause (finding 3(b)) to proceed diligently with performance in compliance with the CO’s direction pending final resolution of any claim for relief. *See* FAR 52.233-1(i), Alt. I; *Protech-Atlanta*, ASBCA No. 51252, 01-2 BCA ¶ 31,624 at 155,231. GAI did not proceed diligently after receipt of the CO’s 7 May 1997 instructions, but instead continued the work stoppage until 11 June 1997 (finding 25). Delay due to that work stoppage from 7 May to 11 June 1997 clearly was not beyond GAI’s control and without its fault and negligence.

We found that GAI has proven that it was entitled to 58 days of excusable delay (finding 67). We included those 58 days in our analysis (in point II above) of the percentage of contract work performed at the time the CO terminated the contract for

default. Therefore, 58 days of excusable delay for the DSC and for over-excavation, removal and replacement of unsatisfactory backfill materials analyzed above are insufficient to justify overturning that termination.

The parties do not dispute that NASA proposed to change the steel bridge beam material from carbon to stainless steel in proposed Modification No. 3, and the CO said he would issue a modification for the dimensional error in the sand filter trough drawing. Apart from GAI's 29 December 1997 letter seeking an extension to 21 September 1998 for such changes and other alleged causes, the record contains no evidence of which, and for how many days, the foregoing material change and dimensional error delayed completion of contract performance. (Finding 54) Unsupported allegations do not constitute proof or evidence. *See Grady & Grady, Inc.*, ASBCA No. 48629, 96-1 BCA ¶ 28,025 at 139,917. These changes do not provide any basis for further excusable delay or overturning the CO's default termination decision.

Finally, GAI's alleged DSC for the outfall structure area under water was invalid, because it was a site condition about which contract 39 made no positive indication (findings 10, 24). Rainfall on the site was not shown to be unusually severe, for lack of historical rainfall data (finding 59). Those allegations do not justify any further excusable delay days or reversing the default termination decision.

Since that default termination has not been converted to a convenience termination, GAI's convenience termination claim in ASBCA No. 52538 is without the necessary predicate.

Accordingly, for the foregoing reasons, we deny the appeals.

Dated: 9 September 2003

I concur

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DAVID W. JAMES, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

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ALEXANDER YOUNGER  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 51672 and 52538, Appeals of Giuliani Associates, Inc., rendered in conformance with the Board's Charter.

Dated:

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