ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
United Pacific Insurance Company	)	ASBCA Nos. 52419, 54270, 54271
	)	
Under Contract No. F28609-95-C-0037	)	

APPEARANCES FOR THE APPELLANT: Gary A. Wilson, Esq.
Salil P. Patel, Esq.
Duane Morris LLP
Philadelphia, PA

APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF
Chief Trial Attorney
William M. Lackermann, Jr., Esq.
Senior Trial Attorney
MAJ Brian T. Varn, USAF
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DICUS

These appeals are taken from contracting officer's decisions denying claims of appellant United Pacific Insurance Company (UPI). The disputes arose under a Takeover Agreement between UPI, a surety, and the United States Air Force. UPI undertook completion of the contract after the original contractor, Castle Abatement Corp. (Castle) was terminated for default by the Air Force. The underlying contract was for repair of a POL Secondary Containment System at McGuire Air Force Base, New Jersey. Both entitlement and quantum are before us. We dismiss portions of ASBCA No. 52419 and deny the remainder. We sustain ASBCA No. 54270 in the amount of $1,228.99 and deny ASBCA No. 54271.

PROCEDURAL MATTERS

Prior to the hearing, respondent filed a motion to dismiss. Based on the parties' pre-existing agreement on a schedule for dispositive motions, we held the motion *sub judice* for decision with the appeal on the merits. In order to cure any jurisdictional problems with two of the issues on which respondent sought dismissal (the contract balance and whether there had been an agreement settling portions of the claim), appellant filed two new claims which the contracting officer denied. The contracting officer's decisions were appealed and docketed as ASBCA Nos. 54270 (contract balance) and 54271 (settlement agreement), thereby eliminating the jurisdictional issues raised in respondent's motion as to those two matters. The record in ASBCA No. 54270 was

supplemented with affidavits and additional documents. The parties further agreed that the record in ASBCA No. 52419 would apply to both new appeals and that all three appeals should be consolidated.

OTHER PRELIMINARY MATTERS

In *United Pacific Insurance Company*, ASBCA No. 52419, 01-1 BCA ¶ 31,296 (*UPI I*), we dismissed the claims of UPI that arose prior to the Takeover Agreement ("pre-takeover" claims). We retained jurisdiction over the post-takeover claims and the equitable subrogation claim for the contract balance. In light of *Fireman's Fund Insurance Co. v. England*, 313 F.3d 1344 (Fed. Cir. 2002), we revisit the latter holding *infra*. Except as necessary to determine whether we have jurisdiction or to understand the nature of the dispute, we do not make factual findings where we conclude that we do not have jurisdiction under ASBCA No. 52419.

FINDINGS OF FACT - GENERAL

The Contract

1. Contract No. F28609-95-C-0037 between Castle and the Air Force was executed on 28 September 1995. Contract Line Item No. (CLIN) 0001 of the contract called for all necessary work and material for repair of the POL Secondary Containment System at McGuire AFB, New Jersey, for a fixed-price of $1,957,630.00. CLINs 0002 through 0008 set forth estimated quantities of contaminants to be removed and disposed of at fixed unit prices, with a total not-to exceed price for CLINs 0001 through 0008 of $2,312,367.00. (R4, tab 1 at 4 of 37) Castle obtained payment and performance bonds from UPI in the penal sums of $1,156,134.00 and $2,312,267.00, respectively (R4, tab 1(g)). The contract performance period was 365 days after Notice to Proceed (R4, tab 1 at 01020-2).

2. On 4 September 1995, prior to obtaining the bonds, Castle had executed an Indemnity Agreement for the benefit of UPI, as well as other insurance related companies. The Indemnity Agreement was not signed by any representative of UPI or the parent company, Reliance. The Agreement indemnifies UPI and assigns various rights of Castle to UPI. The government was not a party to the Indemnity Agreement. (App. supp. R4, tab 137; tr. 36-37) There is no evidence the government had notice of the Indemnity Agreement before Castle's default.

3. The contract incorporated by reference the following relevant clauses: FAR 52.212-5, LIQUIDATED DAMAGES--CONSTRUCTION (APR 1984) ($75 for each day of delay); FAR 52.232-5, PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (APR 1989); FAR 52.233-1, DISPUTES (DEC 1991)--ALTERNATE I (1991); FAR 52.236-2, DIFFERING SITE CONDITIONS (APR 1984); FAR 52.243-4, CHANGES (AUG 1987); FAR

52.246-21, WARRANTY OF CONSTRUCTION (APR 1984); and FAR 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) (R4 tab 1 at 7, 16-18 of 37).

4. The contract specifications contained the following relevant provisions:

DIVISION 1

GENERAL REQUIREMENTS

SECTION 01040

COORDINATION AND SITE CONDITIONS

PART 1 - GENERAL

1.01 SECTION INCLUDES:

A. Requirements for sequencing the work under the contract, and requirements regarding existing site conditions.

B. Requirements for cutting and patching of new and existing work.

1.02 SITE CONDITIONS:

A. Information on Site Conditions:

General: Information obtained by the engineer office from other sources regarding site conditions, topography, subsurface information, groundwater elevations, existing construction of site facilities as applicable, and similar data will be available for inspection at the office of the engineer upon request. Such information is offered as supplementary information only. The Contracting Officer will not assume any responsibility for completeness or for the Contractor's interpretation of such information.

. . . .

G. 1. The site has historically and is presently used for the storage and transferring of virgin petroleum based materials. Therefore, the potential exists that soil and ground water contaminated with virgin petroleum products will be encountered. The Contractor shall be prepared to manage, but not remediate, virgin petroleum contaminated soil and ground water in accordance with the New Jersey Department of Environmental Protection and Energy (NJDEPE) and federal requirements.

2. If so directed by the Contracting Officer, the Contractor will provide workers who meet the training requirements of the OSHA Hazardous Waste Operations and Emergency Response Standard (29 CFR 1910.120). As a minimum, this requires workers who have participated in a suitable training program and participate in a medical surveillance program.

3. The presence and extent of petroleum contaminated material cannot be quantified at this time. This information is provided so the Contractor can make appropriate preparations. The Contractor shall prepare their bid for clean site conditions, but must have the capabilities to meet the requirements of this section with minimal interruptions to schedules. Any work performed beyond preparation activities specified in these documents will be considered out of scope work and the Contractor will be reimbursed in accordance with the Contract Documents.

(R4, tab 1, specifications at 01040-1, -4)

5. The contract was modified five times before Castle was terminated for default (R4, tabs 1(a)-(e)). The first two modifications were administrative. Bilateral Modification No. P00003, dated 29 July 1996, added $7,611.37 for movement of a government-furnished oil/water separator and waste oil tank and installation of three kits for government-supplied pumps (R4, tab 1(c)). Unilateral Modification No. P00004, dated 6 June 1997, decreased the contract price by $61,449.29 for Addendums 12 and 15,

which changed the specifications and drawings by, *inter alia*, adding via Addendum 12, Section 02610, Elastomeric Joint Sealant, which required use of "a non-sag elastomeric joint sealant between all construction joints on cast-in-place concrete flooring and connections between precast concrete walls." The specific product required was Sikaflex -2C, NS/SL as manufactured by Sika Construction Products. (R4, tab 1(d) at 02610-1, -3) Unilateral Modification No. P00005, dated 15 July 1997, assessed liquidated damages commencing 24 June 1997 (R4, tab 1(e)).

6. By letter of 17 June 1997 to Frederick M. Zauderer, Esq. of UPI, Castle requested financial assistance. UPI was told that if financial assistance was not forthcoming, "we regret to advise that we will be unable to cure our default and continue with work." (R4, tab 7) By letter of 15 July 1997, Castle informed its employees that it was unable to continue work on the contract "due to the discontinuance of financial support from our bonding company" (R4, tab 8). Modification No. P00006, dated 22 July 1997, terminated the contract for default. It stated "THIS NOTICE CONSTITUTES THE CONTRACTING OFFICER'S FINAL DECISION THAT THE CONTRACTOR'S FAILURE TO PERFORM IS NOT EXCUSABLE." (R4, tab 1(f)) There is no evidence that Castle had any claims against the government at the time of default. We find there were no such claims pending at time of termination. There is no evidence that Castle appealed the default termination. We find Castle did not appeal the termination.

The Takeover Agreement

7. A Takeover Agreement was drafted by UPI (tr. 167) and executed by the Air Force and UPI on 5 August 1997. Portions of the agreement are set forth below:

TAKEOVER AGREEMENT

. . . .

> WHEREAS, on July 21, 1997, the GOVERNMENT has determined that the CONTRACTOR is in default, has terminated the rights of the CONTRACTOR to proceed under the CONTRACT and has made demand upon SURETY to arrange for completion of said CONTRACT; and
>
> WHEREAS, the GOVERNMENT desires to effect the completion of the work covered by the CONTRACT in order to expedite completion and to avoid the delay and inconvenience of reletting; and
>
> WHEREAS, SURETY is willing and desires to complete or to procure the completion of the CONTRACT in

accordance with the terms of this AGREEMENT, as a measure of cooperation with the GOVERNMENT, and to minimize excess costs, and keep such within the monetary limits of its bonds; and

WHEREAS, under its performance bond, SURETY is willing to cause the CONTRACT to be completed in accordance with the provisions of this AGREEMENT, provided that in so doing it will receive the contract balance as hereinafter set forth;

WHEREAS, the parties acknowledge that as of the date of Contractor's termination the Contractor has been paid through Payment Application No. 6 the following:

Fixed Price Portion of Contract:

Contract Price (Item No. 1)	$1,957,630.00
Net Change Orders	(53,837.92)
Adjusted Contract Price	$1,903,792.08
Amount Paid (Applications 1 thru 6)	904,928.44
Contract Balance	$ 998,863.64

Estimated Quantity Portion of Contract:

Contract Price Estimated (Item Nos. 0002 thru 0008)	$354,737.00
Amount Paid (See Exhibit "A")	299,466.00
Estimated Contract Balance	$ 55,271.00

("Contract Balance").

NOW, THEREFORE, in reliance upon the matters set forth above and in consideration of SURETY'S promise to complete through Lattimer & Associates,[1] 228 North Route

[1] Hereinafter referred to as "Lattimer."

73, Berlin, New Jersey, the work required by said CONTRACT in accordance with the terms and conditions of the CONTRACT, including all plans and specifications referred to therein, and all change orders issued pursuant thereto, and in consideration of the mutual covenant set out below, the GOVERNMENT and SURETY further agree as follows:

1. SURETY will cause the performance of all the duties and obligations of CONTRACTOR by the Completing Contractor, as contained in said CONTRACT, including all Contract documents as described herein, and all change orders issued pursuant thereto, and will have the work of CONTRACTOR completed in strict accordance with the terms and conditions of said CONTRACT, pursuant to performance bond provisions.

2. The GOVERNMENT agrees that it will pay direct to SURETY, as the same shall become progressively payable in accordance with the payment provisions of the CONTRACT, all sums now due and payable and to become due and payable upon the CONTRACT, including all unearned Contract balances, all earned retainage percentages, all earned but unpaid estimates and any and all money contracted to be paid hereunder, as would be or would have been payable to the original contractor, if there had been no declared default, provided however, that:

a. The costs and expenses incurred in the performance of the work to be paid to SURETY shall include its accountant, attorney, consultant and engineering fees, if any, incurred by SURETY in discharging its obligations under SURETY'S performance bond given in connection with the CONTRACT; and

b. The unpaid earnings of the defaulting contractor, including retained percentages and progress estimates for work accomplished before termination, shall be subject to debts due the government by the contractor, except to the extent that such unpaid earnings may be required to permit payment to SURETY of its actual costs and expenses incurred in the completion of the work, exclusive of its payments and obligations under the payment bond given in

connection with the CONTRACT; however, nothing in this AGREEMENT shall prevent payments of the claims consented to be paid in Paragraph 2c.

c. F.A.R. 49.404 (e)(3) provides that:

If the contract proceeds have been assigned to a financing institution, the surety may not be paid from unpaid earnings, unless the assignee consents to the payment in writing. For an assignment to have occurred, it must comply with the Assignment of Claims Act 1940 as amended and its implementing regulations found in F.A.R. 32.8. The GOVERNMENT is aware of SURETY'S position that the conditions set forth in F.A.R. 32.8 have not been satisfied by any alleged assignee, and that under applicable case law, no assignment could be effectuated after knowledge by United States Air Force of the Principal's alleged default on the project without the discharge of SURETY'S obligations pro tanto and the SURETY under the present circumstances, has a priority to unpaid earnings over any alleged assignee. The GOVERNMENT is aware of SURETY'S position that the above-quoted language from F.A.R. 49.404 (e)(3) is inapplicable and contrary to law, and no consent to payments from unpaid earnings shall be required by any alleged assignee before payment to SURETY.

d. This AGREEMENT shall not waive or release the GOVERNMENT'S right to claim liquidated damages for delays in completion of the work, except to the extent that such delays, if any, may be excused under the provisions of the CONTRACT; and SURETY is likewise entitled to such extensions of contract time as are provided for under the CONTRACT and is to be relieved of any delays excused under the CONTRACT.

e. In no event shall SURETY be entitled to be paid any amount in excess of its total expenditures necessarily made in completing the work and discharging any liabilities it may have, if any, under the payment bond of the original Contractor. Those claims under the payment bond paid to date, and claims not paid to date, are listed in Exhibit ___ to this AGREEMENT. SURETY is entitled to be paid for all such amounts eventually paid. Proof of actual

payment will be provided to the GOVERNMENT upon its request.

3. Notwithstanding anything herein to the contrary, SURETY shall remain liable to the GOVERNMENT under the bond issued by SURETY, provided, however, nothing contained in this AGREEMENT shall be deemed to enlarge SURETY'S obligation under the bond issued by it on behalf of the original Contractor, and under no circumstances, shall SURETY be held liable to the GOVERNMENT for any amount in excess of the Penal Sum of $2,312,267.00 as set forth in the performance bond.

. . . .

7. The GOVERNMENT acknowledges that SURETY, in entering into this AGREEMENT does not acknowledge the validity of the GOVERNMENT'S assessment of any liquidated damages by the GOVERNMENT or any other action taken by the GOVERNMENT, except as provided herein. Furthermore, in entering into this AGREEMENT, SURETY does not thereby waive prejudice, that in any way adversely affect any claim that it, as SURETY, or the Contractor might have against the GOVERNMENT.

. . . .

9. The GOVERNMENT agrees that SURETY'S right to proceed to complete the CONTRACT shall not be terminated nor SURETY charged additional liquidated damages if further delay in completing the work arises from conditions or events which are excusable under the original CONTRACT and that SURETY shall be entitled to such additional compensation or equitable adjustment and time extensions as are recognizable under the original Contract Documents.

10. SURETY expressly reserves all prior rights, including but not limited to overpayment by the Government to the Contractor, equitable liens and rights to subrogation that would be the United States', the laborers' or materialmen's or the contractor's under the CONTRACT or

at law or equity, as well as its own rights dating back to the execution of the performance and payment bonds, including, but not limited to those rights and remedies that may accrue during the completion of the CONTRACT. No waiver of such rights is agreed to or implied or intended regardless of any provisions of this TAKEOVER AGREEMENT to the contrary. Any disagreement between the GOVERNMENT and SURETY shall be considered a dispute within the Disputes Clause contained within the CONTRACT and SURETY shall be entitled to exercise such rights as are afforded by the Disputes Clause and the Contract Disputes Act of 1978, as amended.

11. All terms and conditions of the original CONTRACT shall be and remain the same.

. . . .

Exhibit "A"
Contract No. F28609-95-C-0037

Item No.		Estimated Quantity	Unit	Unit Price	Estimated Amount	Actual Quantity Performed*	Amount Paid
0002	Removal of contaminated soil (IAW spec. 01570, para. 3.03.)	6,500	TN	3.09	20,085.00	6,500	$20,085.00 (100%)
0003	Disposal of hazardous soil classified as hazardous waste	1,625	TN	82.40	133,900.00	1,103	90,891.00 (67.88%)
0004	Disposal of contaminated, non-hazardous soil	4,575	TN	41.20	188,490.00	4,660	188,490.00 (100%)
0005	Disposal of contaminated construction debris	25	TN	41.20	1,030.00	-0-	-0-
0006	Disposal of hazardous waste tank bottom sludge	15,000	GL	0.67	10,150.00	-0-	-0-
0007	Disposal of wastewater from decontamination and cleaning	1,000	GL	0.67	679.00	-0-	-0-
0008	Disposal of contaminated protective gear	20	DR	20.60	412.00	-0-	-0-
	Total				354,737.00		$299,466.00

***All actual quantities performed are subject to verification and adjustment if those quantities prove to be inaccurate.**

(R4, tab 1(g)) Work under the Takeover Agreement was physically complete by the end of July 1998 (tr. 609).

8. Mr. Zauderer testified that Sections 2 and 2 a. of the Takeover Agreement went "hand-in-hand" with the Indemnity Agreement and gave UPI direct payment of "all the

rights to all the monies that were to be paid . . . off this job . . . and that under the surety bond relationship the most I'm required to expend is to bond penalty sum [including] additional costs for consultants, attorneys, accountants, engineers. . . ." (Tr. 45) By Modification No. P00007, dated 18 August 1997, the Takeover Agreement was incorporated into the contract and the name of the contractor was changed to "RELIANCE NATIONAL" (R4, tab 1(g)). By Modification No. P00008, the name was changed to "UNITED PACIFIC INSURANCE CO C/O RELIANCE NATIONAL" (R4, tab 1(h)).

9. A letter dated 6 August 1997, was sent to UPI's counsel by Mr. Clyde Lattimer. The letter, which was not signed by UPI, was "considered by [Mr. Zauderer] to be the contract that [UPI] had with Lattimer." (Gov't supp. R4, tab 13B at 39-40; tr. 48-50) The text of the letter is set forth below:

> I think it would be much simpler if the following format and items were to be issued as a contract to us. First of all, Lattimer and Associates would manage all work on this project and complete the work in accordance with the contract documents and change orders that have been issued by the government, as well as handling and negotiating claims, for all four projects.
>
> Item 2. Employees on the project will be paid by Lattimer and Associates with a markup of 39% on top of raw cost. The 39% will pay for workman's compensation, general liability, FICA, state and federal unemployment insurance and other items necessary to be paid to the state and federal government. All other payments, such as payments to subcontractors, vendors, and suppliers will be paid by Lattimer and Associates with a markup of 1.25% on these items. This 1.25% is to pay cost of the insurance, which I have previously sent copies of a letter to Fred. Subcontractors employed by Clyde N. Lattimer and Son or Lattimer and Associates will either work on a lump sum basis or on a time and material basis as determined by the type of work they are doing. As for payments to the Supervisory people of Lattimer and Associates, they will be billed as follows:
>
> Clyde and Scott Lattimer will be billed at $95 per hour, for each hour worked plus out of pocket expenses, such as automobile expenses, meals and so forth.

Project Managers and accounting personnel will be billed at the rate of $75 per hour which is an all inclusive rate. No additional expenses or charges will be incurred on these numbers.

Secretarial work will be billed at $35 per hour.

Lattimer and Associates will provide and pay all insurance required for this project. Subcontractors are to provide their own insurance in accordance with the contract documents.

Project Superintendents will be paid for at the rate of $68 per hour. This is a fully loaded rate, including insurance, taxes, vehicles, health insurance, and so forth.

All of the above rates are fully loaded rates with workman's compensation, general liability, pickup trucks, cars, and other expenses related to these employees.

The Bonding Company has agreed to fund this project with payroll and other deposits into Lattimer's account at the time the moneys are being dispersed. If the money is not transferred Lattimer will meet the payroll and will be allowed to charge interest until the money has been received.

Lattimer and Associates will not be responsible for any incorrect work done on the project prior to its coming there or during the completion phase of this work. There are so many records that are missing that no one could be sure as to exactly what has been changed and what has not. We are going to limit our liability, and are not taking responsibility for the accuracy of what we are doing, in terms of change orders, etc. In addition we require that the bonding company would pickup all legal cost should any of these jobs go to litigation, arbitration, etc.

Lattimer will also review phases of work that have not been subbed out and try to find contractors to perform this work. We will review these numbers with Fred Zauderer. If the numbers appear to be too high, it would be our intent to do the work on a time and material basis. This judgement will be discussed with Fred as work consists.

Accounting will be kept by individual jobs and turned over to Fred Zauderer at least on a monthly basis. I believe this is an accurate statement as to what we intend on doing and I would like to see the contract written on this basis. Thank you.

ASBCA NO. 52419 - THE CLAIM

10. By letter of 23 October 1998, a request for equitable adjustment (REA) was submitted to the Air Force by UPI. The REA was properly certified. The individual claim items and the amounts were as follows:

1. Excess Superintendence	$ 180,000.00
2. Safety Officer	$ 5,000.00
3. Contaminated Soil	$ 700,743.36
4. Delay Costs	$ 566,502.72
5. Pre-Cast Walls	$ 109,440.00
6. Footing Washout	$ 3,023.00
7. Concrete Cure	$ 11,420.00
8. Health and Safety Plan	$ 28,212.74
9. Grade Elevation Change	$ 125,625.00
10. Pump Station 5	$ 30,000.00
TOTAL OF CLAIMS	$1,759,966.82

(App. 2d supp. R4, tab 141, vol. 1 at 0009)

11. After issuance of *UPI I*, UPI dropped several of its claim items. At the hearing, UPI presented only the following claim items:

Contamined Soils	$372,404.23
Grade Elevation	$125,625.00
Post-Takeover Delay	$213,558.27

Concrete Cure	$ 11,420.00
Contract Balance	$ 46,288.37
TOTAL	$769,295.87

UPI alternatively presented a claim theory based on a settlement agreement as follows:

Settlement Agreement (5/21/99)	$214,745.00
Contaminated Soils	$372,404.23
Contract Balance	$ 46,288.37
TOTAL	$633,437.60

(Ex. A-1)

12. UPI's percipient witnesses on the claim items were Mr. Zauderer, Mr. Goldsmith, and Mr. Scott Lattimer. None were regularly at the job site. Mr. Zauderer was the sole claims person for the surety business of Reliance (tr. 34). Based on his overall testimony (tr. 31-377), we find that he had no knowledge of the performance of the work gained from personal observation. Mr. Goldsmith, project manager, visited "periodically," but his primary job was "office work" (tr. 669, 690-91). We find his personal observation knowledge of work performed at the job site was limited. Mr. Lattimer "oversaw" the work of Mr. Goldsmith and talked to the superintendent, Mr. Britton (tr. 609). We find, based on his overall testimony (tr. 606-67), that he had limited knowledge of the performance of the work gained from personal observation at the job site. The job superintendent, Mr. Britton, did not testify.

CONTAMINATED SOILS

13. UPI originally alleged that the job site was severely contaminated and that this was known to the Air Force but unknown to either Castle or Lattimer. It claimed additional costs of $700,743.36. (App. 2d supp. R4, tab 141, vol. 1 at 00002-06, 00014-015) The amount sought was subsequently reduced to $372,404.23 (ex. A-1).

14. Castle dug up the contaminated soil. Lattimer did not remove, dispose of, or test any contaminated soil. UPI did not pay Lattimer for removing or disposing of contaminated soil. (Gov't br., app. reply br., ¶¶ 170-79)

GRADE ELEVATION

15. UPI alleged that the contract drawings showed erroneous grade elevations and that additional costs of $125,625.00 were incurred as a result of corrections which included deeper excavation and use of a stone base (app. 2d supp. R4, tab 141, vol. 1 at 00021). The work was done by Castle, not Lattimer (gov't br., app. reply br., ¶ 182).

POST-TAKEOVER DELAY

16. The record contains a document titled "POL TANK FARM CRITICAL PATH ANALYSIS." That document has a facsimile transmission date in the margin of 7 June 1999. (App. supp. R4, tab 93) Mr. Lattimer was unable to testify that Lattimer prepared that or any other schedule before or during performance of the contract (tr. 644-46). There is no other evidence of a Lattimer schedule prepared before or during contract performance. We find Lattimer did not prepare a schedule at any time meaningful to planning the sequence of the work required in performance of the contract.

17. Lattimer's work on the project began shortly after the Takeover Agreement was executed. The project was physically complete in July 1998. According to Mr. Lattimer "[t]here was close-out work going on after that, finalizing punch lists and paperwork stuff through October - November of '98." (Tr. 609) UPI has provided no specific dates for alleged delays. It has provided no evidence that it suffered through any "stand by" periods.

18. The delay claim of $213,558.27 is for overhead (tr. 624; ex. A-1). Overhead was calculated using 100 percent of all Lattimer billings to UPI for superintendent ($109,930.00) and accounting ($15,337.50) from September 1997 through November 1998, 100 percent of billings to UPI for project manager from September 1997 through April 1998 ($63,748.40), and 90 percent of project manager billings from May 1998 through November 1998 ($24,542.37) (ex. A-5; tr. 621-24). The rationale for excluding 10 percent of project manager billings in May - November 1998 is that Mr. Goldsmith spent an estimated 5 percent of his time on another project and the reduction was for 10 percent "just to be fair" (tr. 622-23). An Eichleay per diem computation was not made (tr. 631-32, 955-57). However, the Board understands the delay claim to be for Eichleay damages (tr. 621-22, 629-31)

CONCRETE CURE

19. UPI claimed that additional costs of $11,420.00 were incurred because of defective specifications affecting a joint sealant (app. 2d supp. R4, tab 141, vol. 1 at 00020). Of the amount claimed, $5,710.00 was for work estimated by Mr. Goldsmith of Lattimer to have been done by Castle even though Mr. Goldsmith did not talk to any

Castle employees regarding any work done regarding concrete cure (gov't. br., app. reply br., ¶¶ 185-87).

20. The specification set forth three liquid membrane curing compounds, or approved equals: "Masterseal," "A-H 3 Way Sealer," and "Kure-N-Seal" (R4, tab 1, specification at 03300-6). The contract was subsequently amended (pre-takeover) to change the joint sealant for concrete to Sikaflex (finding 5). The record does not establish whether the named membranes were compatible with Sikaflex (tr. 927). The concrete curing compound was required to be approved by the contracting officer (R4, tab 1, specification at 03300-11, ¶ 308 C.5). If a membrane was not compatible with the Sikaflex, the Sikaflex would not adhere to the concrete (tr. 922-23).

21. Castle was directed to and used two curing methods, a membrane and wet burlap (gov't 2d supp. R4, tab 93). Post-takeover, Lattimer did not use a curing compound listed in the specifications and had not submitted an alternate curing compound for approval. Lattimer was told on or about 26 August 1997 by Parsons Engineering Science, Inc. (Parsons),[2] to use wet burlap to cure concrete. (*Id.*, tab 59)

22. By letter of 27 August 1997, Mr. Goldsmith informed the Air Force that Lattimer had been told (presumably by Parsons) to use both wet burlap and a membrane curing compound to cure concrete. He asserted that Lattimer would only use a membrane curing compound. (App. 2d supp. R4, tab 141, vol. 1 at 00418) In a letter of 12 September 1997, Parsons informed the contracting officer of its action in telling Lattimer to use wet burlap and advised as follows:

> Lattimer is correct in that specification 03300-3.13-B requires membrane curing compound for the exterior slabs. However, Lattimer was not using one of the membrane curing compounds specified in 03300-2.08 nor has Lattimer submitted and received approval for an alternate curing compound. In light of these facts, Lattimer was instructed to use the wet burlap for the slab placed on August 26, 1997. Lattimer is due no additional costs for curing of this slab due to their failure to properly submit.
>
> For future slabs, Lattimer should promptly submit the proposed curing compound for approval. As per specification 03300-3.13-B2, the curing compound will need to be reviewed for compatibility with the sealant to be applied to the joints between slab sections, Sikaflex 2CNS. The manufacturers of both the curing compound and sealant will

[2] Parsons was a contractor providing oversight inspection services (tr. 918).

> need to be consulted for this review. Prior to approval, Lattimer should not use of the curing compound but rather one of the other allowable curing methods.
>
> If curing compounds are not compatible with the sealant, Lattimer would have grounds for a claim for the cost difference, if any, between membrane curing and wet curing. Parsons ES does not estimate a cost increase for this change, if required.

(Gov't 2d supp R4, tab 59)

23. On 17 September 1997, Lattimer submitted for approval "Liquid Membrane Curing Compound L & M Dress & Seal," which the Air Force disapproved on 22 September 1997 because it was incompatible with Sikaflex (tr. 921-22; gov't 2d supp. R4, tab 61). On 25 September 1997, Lattimer submitted for approval "L & M Curing Compound," which was approved by the contracting officer on 8 October 1997 (gov't 2d supp. R4, tab 62). During the period from disapproval of the first submittal to approval of the second submittal, Lattimer used the wet burlap method to cure concrete (tr. 920). All of the Lattimer portion of the claim ($5,710) arises from use of the wet burlap method (app. 2d supp. R4, tab 141 at 00436; tr. 682).

24. By letter of 26 September 1997, Lattimer informed the Air Force that it considered the disapproval of its original submission because of its incompatibility with Sikaflex a change to the specifications because the listed curing compounds (finding 20) were also incompatible, and because Lattimer's original submission was equal to the compounds listed in the specification (app. 2d supp. R4, tab 141, vol. 1 at 00416). The letter provides no support for the assertion that the product was an equal, and we find that the assertion is inadequate to establish that the product was, in fact, equal. Mr. Bonanno, who served as the Air Force project manager, did not know whether it was equal (tr. 932, 934-35).

25. We have carefully considered Mr. Goldsmith's testimony (tr. 682-84). It does not support a finding that additional costs were incurred by Lattimer. UPI seeks alleged additional costs for use of the wet burlap curing method by Lattimer (finding 23). The contract required that concrete be cured and the wet burlap method was specifically designated as acceptable (R4, tab 1 at 03300-10-11). Mr. Goldsmith did not testify that Lattimer used two methods at the same time, *e.g.*, two methods to cure the same concrete slab. He did, however, send a letter refusing to use two methods (finding 22). Moreover, the claim prepared by Mr. Goldsmith does not provide dates (app. 2d supp. R4, tab 141, vol. 1 at 00435-36). Mr. Bonanno who visited the site ("sometimes . . . once a week, sometimes . . . every day"), and had some personal knowledge of the situation as well as reviewing the daily logs, testified that Lattimer had used both membrane curing and wet

burlap curing, but at separate points (tr. 915-18). He further testified that Lattimer started out using an unapproved membrane, used wet burlap (which the contract treated as an approved method) after the first membrane was disapproved, and commenced using an approved membrane after the second submittal was approved (tr. 920-22). Finally, Mr. Goldsmith's testimony and the REA address only the cost of wet burlap without comparing the cost of using the membrane curing compound, which is the only other curing method mentioned (tr. 682-84; app. 2d supp. R4, tab 141, vol. 1 at 436).

26. We find, based on our analysis of the evidence (findings 19-25), that Lattimer did not use two curing methods at the same time. While both membrane curing and wet burlap were used, we find that between the instruction from Parsons on 26 August 1997 and approval of the L & M Curing Compound on 8 October 1997, it is more likely than not that Lattimer used the wet burlap method exclusively. We further find it is more likely than not that both before and after Lattimer used exclusively membrane curing.

ASBCA No. 54270 - CONTRACT BALANCE

27. The Takeover Agreement represented that the contract balance on the fixed-price portion of the contract was $998,863.64, based on payments to Castle totaling $904,928.44. The balance on the estimated quantity portion of the contract was estimated at $55,271.00, based on orders of $354,737.00 and payments of $299,466.00. (Finding 7) The total of the two payment amounts, and thus the total paid to Castle according to the Takeover Agreement, is $1,204,394.44.

28. Air Force and UPI personnel reviewed payments at the time the Takeover Agreement was being drafted. Both looked at the numbers making up the contract balance, and the Air Force gave UPI paperwork showing what the Air Force had as paid documents and the invoices submitted for payment. (Tr. 1102-04)

29. Mr. Goldsmith of Lattimer sent a facsimile transmission dated 1 November 1999 to the facsimile number of the law firm representing UPI. In the document transmitted, a double asterisk appears next to the number $1,204,394.44 with the following note: "** Note: This amount paid is what is written in the takeover agreement. My record and the AF records indicate that $1,250,895.55 was paid to Castle." The same note appears on an accompanying document dated 24 May 1999, only this document shows the amount paid to Castle as $1,252,329. (Gov't 2d supp. R4, tab 103) Thus, although the record is silent as to precisely when and how UPI became aware, by 24 May 1999 UPI was aware that the contract balance was inaccurately stated in the Takeover Agreement.

30. On 3 March 2003, UPI filed a claim which sought the contract balance, alleged to be $46,288.37. The claim was certified on 28 March 2003 and denied in a contracting officer's decision dated 30 May 2003. (ASBCA No. 54270, R4, tabs 1-3)

An appeal was taken on 5 August 2003. Ms. DeMito's (the contracting officer) analysis shows a difference of $46,500.23 between actual payments and the payments stated in the Takeover Agreement (*id*., tab 10 at 3).

31. UPI has filed an affidavit from Mr. Zauderer in which he states that in negotiating the Takeover Agreement he relied on the government's representation that the contract balance was $998,863.64. He further states that the government did not inform him prior to completion of the contract that the contract balance of $998,863.64 was inaccurate. Had he known the contract balance was overstated he would have sought to negotiate different terms in order to compensate for the lower balance. (Affidavit of Frederick M. Zauderer) We find that at the time the Takeover Agreement was executed both parties believed the contract balance as stated therein was accurate.

32. Ms. DeMito states in her affidavit (ASBCA No. 54270, R4, tab 10) that two errors were made by the Air Force in computing the contract balance. With regard to the estimated quantity portion of the contract, the amount paid is represented as $299,466.00 in the Takeover Agreement (finding 7). However, Castle's Progress Reports of 9 May 1996, 2 July 1996, and 11 July 1996 show the amounts paid for estimated quantity line items as $17,807.50, $90,904.50 and $191,982.11, for a total of $300,694.11 as opposed to the Takeover Agreement total of $299,466.00 (*id*.; ASBCA No. 54270, R4, tab 9 at 4-9).[3] She calculated this as an error of $1,234.19 in the amounts for CLINs 0002 through 0008. We calculate the error as $1,228.11. A second error occurred in calculating the amount paid to Castle for the fixed-price portion, stated in the Takeover Agreement as $904,928.44 (finding 7). Ms. DeMito believes the second error occurred in part because progress payments 1-6, referred to in the Takeover Agreement as the source of amount paid (finding 7), include both estimated and fixed-price CLINs (ASBCA No. 54270, R4, tab 10 at 3). According to her calculations, the Air Force paid Castle $1,250,894.67. As the contract value of base bid ($1,957,630.00), estimated quantity payments ($300,694.11) and the negative value of pre-takeover modifications ($53,837.92) equals $2,204,486.19, the balance at takeover was $953,591.52 ($2,204,486.19 - $1,250,894.67). (*Id.*, tab 10 at 5) Vouchers, invoices and progress reports involving payments to Castle support Ms. DeMito's calculations (ASBCA No. 52470, R4, tabs 4-9). We find there is no evidence of affirmative misconduct by Ms. DeMito or any Air Force representative with respect to calculation of the contract balance as it appears in the Takeover Agreement.

33. Ms. DeMito's calculation continued, starting with the contract balance at takeover of $953,591.60, with modifications post-takeover of negative $238,980, and payments to UPI post-takeover of $713,382.53 (*id*). Based on the foregoing, she calculated the contract balance as $1,229.07 ($953,591.60 - $238,980 - $713,382.53) in

[3] Ms. DeMito erroneously calculates the total as $300,694.19 (DeMito aff.). We use $300,694.11 in our calculations.

the contracting officer's decision on the contract balance issue (ASBCA No. 54270, R4, tab 3 at 2, tab 10 at 5). This is based on her conclusion that the Air Force was only obligated to pay UPI the actual contract balance at takeover, regardless of the Takeover Agreement (*id.*, tab 10 at 3).

ASBCA No. 54271 - SETTLEMENT AGREEMENT

34. The parties met on or about 21 May 1999 to discuss settlement (gov't br., app. reply br., ¶ 236). Mr. Zauderer testified that he came away from the meeting believing that 7 of 10 items had been resolved for $214,745. The open items were safety officer, contaminated soil and footing washout. The claims he believed to be settled and the amounts he alleged the Air Force offered were:

Excess superintendence	$ 29,250
Delay Costs	11,250
Pre-cast walls	3,500
Concrete Cure	11,420
Health & Safety Plan	3,700
Grade Elevation Change	125,625
Pump Station 3	30,000
Total	$214,745

UPI's last settlement offer was $730,000. The Air Force did not accept that offer. (App. 2d supp. R4, tab 142 at 2, 5, 8, 9; tr. 137-41, 189)

35. Mr. Zauderer's notes from the meeting also show Air Force offers of zero for the following items: safety officer, contaminated soil, and footing washout. The final page of his notes includes the following chart and a handwritten comment, as follows:

	Claim	**Gov't Initial Offer**
1. Excess Superintendence	146,250	29,250
2. Safety Officer	5,000	0
3. Contaminated Soil	660,865	0
4. Delay Costs	172,483	11,250
5. Pre-Cast Walls	109,440	3,500
6. Footing Washout	3,023	0
7. Concrete Cure	11,420	11,420
8. Health & Safety Plan	28,212	3,700
9. Grade Elevation Change	125,625	125,625
10. Pump Station 5	30,000	30,000

> Kathleen [DeMito] refused to provide a counteroffer—her position is that the gov't stands by its prior position $214,745

(App. 2d supp. R4, tab 142 at 10)

36. Ms. DeMito maintains that no agreement was reached (tr. 1112-13). She was pursuing a "global settlement" under which all 10 items would be disposed of and litigation thereby avoided (tr. 1077). She recounted various areas of disagreement and open items that remained after the settlement meeting (tr. 1079-85).

37. In a letter of 26 May 1999 to Ms. DeMito, UPI's counsel stated:

> As discussed during our meeting of May 21, 1999, this will confirm that Fred Zauderer and I will be able to attend the next meeting scheduled for June 8, 1999 at 8:30 a.m. I would request that you confirm in writing the extension of your final decision on the claim submitted with regard to the above referenced project.
>
> . . . .
>
> To date, the Government has made the following offers (total = $214,745) with regard to the ten claims asserted in connection with the subject project:

	Claims	Offers
Excess Superintendence	$ 146,250	$29,250
Safety Officer	5,000	0
Contaminated Soil	660,865	0
Delay Costs	172,483	11,250
Pre-Cast Walls	109,440	3,500
Footing Washout	3,023	0
Concrete Cure	11,420	11,420
Health & Safety Plan	28,212	3,700
Grade Elevation Change	125,625	125,625
Pump Station 5	30,000	30,000
	$1,292,318	$214,745

> No further discussion is anticipated with regard to claim items 1, 2 and items 5 through 10. Our continuing discussion will concentrate upon claim item 3, Contaminated Soil, and claim item 4, Delay Costs. We will be prepared to continue our

> discussion of the legal and technical components comprising these claims.

(Ex. A-4)

38. Upon receipt of the letter, Scott Wilson, McGuire's deputy base civil engineer, sent a 2 June 1999 internal memorandum in which he asserted that the Air Force did not make an offer of $214,745. He stated the total offer should be less than $45,000 and that the contracting officer should respond immediately to "clear the air." (App. supp. R4, tab 156) He followed this with a 3 June 1999 e-mail to Ms. DeMito which he copied to UPI's counsel:

> [UPI's counsel's] letter contains false assertions about what we offered in settlement discussions. Attached is a letter that I'll send in hardcopy tomorrow. I only see about $45K max that we've offered to date, **not $214K!!!**
>
> I think you need to send him something formal to make sure the record is clear. I think he's trying to set us up on this! [Emphasis in original]

(Gov't 2d supp. R4, tab 100)

39. Ms. DeMito replied to the UPI letter with a 3 June 1999 e-mail that provided in relevant part:

> 3. Further clarification of your letter dated May 26, 1999:
> a. Excess Superintendence: the Government did offer 45 days, but we were looking at a cost of $250/day for a grand total of approximately $7,500.
> b. Delay Costs we agreed that they would be based on a DCAA confirmed Eichley [sic] formula amount and never stated $11,250 as the rate has never been confirmed.
> c. Pre-Cast Walls, Concrete Cure, and Health and Safety Plan are fine as stated[.]
> d. Grade Elevation Change was paid for by previous modification which we supplied you a copy of at the meeting. No additional funds were agreed to at all.
> e. Pump Station 5 we agreed to pay for the dig which was cancelled due to workers overcome by fumes. The amount of $30,000 was never agreed on.
>
> 4. I did not mention in my telecon but I am still waiting for your logs.

> 5. If you have additional information to validate your claim, I would ask you supply it before our meet date so the government can review it can be ready to discuss with you.

(App. supp. R4, tab 157)

40. In a 4 June 1999 letter, UPI's counsel took exception to the Air Force's position as set forth in the 3 June 1999 e-mail. He requested a contracting officer's decision and asserted again that a settlement was reached and that recordings of the meeting would support UPI's contention. (Gov't 2d supp. R4, tab 162) The tape was provided, but it was inaudible (tr. 138-39). UPI had also taped the meeting, but its tape was never produced to the Air Force (tr. 1133). Neither tape is part of the record.

41. Thereafter, UPI requested and the contracting officer issued a decision on or about 20 July 1999. She denied UPI's claims as to delay costs and grade elevation. On contaminated soils, $2,914.05 was allowed. On concrete cure, $2,257.20 was allowed. No mention is made of contract balance. As to settlement, the DISCUSSION section states:

> . . . At one time, the Contracting Officer offered to settle for a delay of forty-five (45) days for those items associated with the review of the Health and Safety Plan. On 3 Jun 99, the Contracting Officer issued the Government's final offer addressing items: 1, 4, 5, 7, 8, 9 and 10. By letter of 4 Jun 99, the surety's attorney rejected the offer as "an absurd and totally unsupportable position." Without further support by the surety of its' [sic] various claims, the Contracting Officer hereby renders the final decision for each of the claims.

(R4, tab 11; tr. 1085)

42. By letter of 26 July 1999, UPI took exception to the contracting officer's decision and further alleged:

> Notwithstanding United Pacific's general objections and rights to appeal, United Pacific must also specifically address your statement on page 2, first full paragraph, which states:
>
> > "By letter of 4 June 1999, the Surety's attorney rejected the offer."

> This statement is inaccurate. What actually occurred was a settlement meeting on May 21, 1999, which was confirmed in subsequent correspondence sent to your attention dated May 26 1999. As set forth in the May 26, 1999 correspondence, the Government and United Pacific agreed upon settlement amounts for claim items 1, 2, and 5 through 10. The total agreed upon amount was $214,745. It was agreed that there would be further discussion with regard to item 3, Contaminated Soil and item 4, Delay Costs. Subsequently, you responded to the May 26, 1999 correspondence with your e-mail of June 3, 1999. Your e-mail of June 3, 1999 was contrary to the settlements reached on May 21, 1999. The record on this matter clearly supports that offers were accepted by United Pacific with regard to claim items 1, 2, and 5 through 10 in the total amount of $214,745 (which was recorded by Saul Lefkowitz). United Pacific has previously requested copies of these tapes and furthermore, has again requested copies of same pursuant to its Freedom of Information Act Request. Therefore, please provide copies of such tapes, which recorded all of the meetings between the Government and United Pacific, including the meeting of May 21, 1999.
>
> Therefore, it is the position of United Pacific that the settlement of these claim items is not properly reflected in the Contracting Officer's Decision. Furthermore, this affects the recommended ADR procedure since it should properly address only claim items 3 and 4, which were not finally resolved in the prior May 21, 1999 meeting.

(R4, tab 12 at 2)

43. As of 10 February 2003, a certified claim seeking enforcement of the alleged settlement agreement had not been submitted (tr. 166). Owing to concerns about jurisdiction, a claim based on the alleged settlement was submitted on 3 March 2003, certified on 28 March 2003, and denied in a contracting officer's decision on 30 May 2003 (ASBCA No. 54270, R4, tabs 1 through 3). An appeal was taken on 5 August 2003.

DECISION

ASBCA No. 52419

JURISDICTION

In *UPI I* we held that appellant had standing, and we had jurisdiction, only over appellant's equitable subrogation and post-takeover claims. Appellant argued that it had standing to pursue pre-takeover claims (1) because respondent allegedly was guilty of fraud and misrepresentation with respect to soil contamination; (2) because the principles of *pro tanto* discharge were present; and (3) because the takeover agreement amounted to an assignment. We rejected the arguments in the main, but found that appellant had standing to pursue an equitable subrogation claim for the contract balance. *UPI I*, *supra*, 01-1 BCA at 154,506-09. We were not asked to, and thus did not, address specific claims. We confined our holding to the broad categories of pre-takeover and post-takeover claims. Appellant withdrew certain pre-takeover claims. As to the remaining claims, we erred on the side of caution and allowed UPI to present evidence where it had a colorable argument that a claim was either post-takeover or, although arising pre-takeover, was included through the Takeover Agreement, Indemnity Agreement, equitable subrogation rights, the facts, or some combination thereof.

United Pacific Insurance Company, ASBCA No. 53051, 03-2 BCA ¶ 32,267 (*UPI II*), appeal docketed, No. 03-1622 (Fed. Cir. Sept. 11, 2003), also involved UPI, the Air Force, and Castle. Under a virtually identical Takeover Agreement, we considered anew our jurisdiction in surety cases because of the Federal Circuit's opinion in *Fireman's Fund Insurance Co. v. England, supra* (*Fireman's Fund*). In *Fireman's Fund*, the Federal Circuit concluded that boards of contract appeals do not have jurisdiction to consider the pre-takeover claims of a surety, including claims arising from the doctrine of equitable subrogation. In *UPI I*, we held that we had equitable subrogation jurisdiction, but that appellant's rights thereunder were limited to pursuit of the retained contract balance and post-takeover claims: "Appellant's standing to pursue the contract balance under its equitable subrogation rights . . . do[es] not extend to the pre-takeover claims in this appeal." *Id.* at 154,508. However, following *Fireman's Fund*, in *UPI II* we held that we did not have equitable subrogation jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended. Also, in *UPI II*, appellant argued that the Air Force, through faulty inspection, had paid the original contractor more than the progress toward completion warranted, thereby reducing the contract balance available to appellant after termination of the original contractor (Castle). Under the doctrine of *pro tanto* discharge, appellant sought recovery of the alleged overpayment. We analyzed the issue under both *National Surety Corp. v. United States*, 118 F.3d 1542 (Fed. Cir. 1997), upon which appellant had relied and which we interpreted as treating *pro tanto* discharge as a prong of equitable subrogation; and *Security Insurance Company of Hartford*, ASBCA No. 51759, 00-2 BCA ¶ 31,021, which treated *pro tanto* discharge as an

independent doctrine. We concluded that, whether viewed as a prong of equitable subrogation or as a right of the surety independent of equitable subrogation, *pro tanto* discharge was no different than equitable subrogation "with respect to the waiver of sovereign immunity [under the CDA] as articulated in *Fireman's Fund*." *UPI II*, *supra*, 03-2 BCA at 159,622. Thus, we concluded that appellant lacked standing and we lacked jurisdiction with respect to appellant's claim that it was entitled to relief because the Air Force had overpaid the original contractor.

In the current appeal, we are again confronted with pre-takeover claims and arguments of UPI that this case is distinguishable. The claims that arose pre-takeover for work done by Castle are contaminated soils, grade elevation and parts of the concrete cure and delay claims. We conclude that under *Fireman's Fund* and *UPI II* appellant lacks standing and we lack jurisdiction over pre-takeover claims and equitable subrogation claims.

UPI argues that the Indemnity Agreement assigned all of Castle's rights to UPI and that it reserved Castle's rights in the Takeover Agreement. As to the Indemnity Agreement, it cannot serve as the vehicle to transfer Castle's unliquidated claims. First, the Anti-Assignment Act constitutes a bar:

> What is commonly called the Anti-Assignment Act consists of two statutory provisions. Title 41 of the United States Code, Section 15(a) (2000) (which deals with "Public Contracts") provides that "no contract . . . or any interest therein, shall be transferred by the party to whom such contract . . . is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned." Subsection (b) of that provision states that "the provisions of subsection (a) . . . shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof . . . are assigned to a bank, trust company, or other financing institution, including any Federal lending agency."
>
> Title 31 of the United States Code, Section 3727(a)(1) (2000) (which deals with "Money and Finance") provides that an "assignment of any part of a claim against the United States Government or of an interest in the claim . . . may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued." Subsection (c) makes subsection (b) inapplicable "to an assignment to a financing institution of money due or to

> become due under a contract" provided certain conditions (not here involved) are met.
>
> These two provisions together broadly prohibit (with narrow exceptions discussed below) transfers of contracts involving the United States or interests therein, and assignment of claims against the United States. Such contracts (or interest therein) may not be transferred and such claims may be assigned "only after" they have been allowed in a specific amount and provisions made for their payment.
>
> Under the General Indemnity Agreement, in case of breach of the construction contract between Summit and the United States, Summit assigned to Fireman's Fund "all of their rights under the contracts" and " all . . . their right, title, and interest in and to . . . all . . . claims . . . which the Principal may have in any way arising out of or relating to" the bonds Fireman's Fund provided. The assignment by Summit of "all of their rights under the contracts" violated the prohibition in *41 U.S.C. § 15*(a) against the transfer of "any interest" in any contract involving the United States. At the time the assignment of the claims was made, no claims had been allowed. Indeed, any claims against the United States arising from a default in the construction contract had not even arisen. Under Section 3727(a)(1), (b), the assignment of those claims in the General Indemnity Agreement was invalid. [Footnotes omitted]

Fireman's Fund, 313 F.3d at 1349. Moreover, an insurance company such as UPI is manifestly not a financing institution. *Id.* at 1350. Finally, "the Board may [not] presume to construe and enforce the [indemnity agreement] between [a contractor] and its surety." *Admiralty Construction, Inc. v. Dalton,* 156 F.3d 1217, 1222 (Fed. Cir. 1998).

As to UPI's argument that the Takeover Agreement gives it standing under the CDA for pre-takeover claims, UPI relies on parts of sections 2, 7, 9 and 10 (finding 7). With respect to section 2, UPI relies on the opening paragraph and paragraph a. However, the opening paragraph of section 2 of the Takeover Agreement sets forth a list of sources for payment that we interpret as linked directly to the contract balance – unearned contract balances, retainages, earned but unpaid estimates, money contracted for but unpaid *(id).* As to paragraph a, it lists the costs of accountants, attorneys, engineers and consultants as payable. However, the placement of that subparagraph is such that it must be read as a listing of expenses payable from, but not in addition to, the contract balance. Indeed, UPI

argues that the Takeover Agreement contains language, quoted from section 2, which "was drafted based on long-standing equitable subrogation principles holding that a surety is benefited to all of the rights of the contractor whose debts it paid." App. br. at 36. This is consistent with our reading of the parties' agreement that UPI shall be entitled only to the contract balance (unless, of course, changes arise during performance under the Takeover Agreement), because, under those "long-standing equitable subrogation principles," a surety's entitlement is to retained funds, i.e., the contract balance. *Prairie State Bank v. United States*, 164 U.S. 227, 232 (1896). UPI thus argues for equitable subrogation rights over which we have no jurisdiction and which would only entitle it to the contract balance in any event. As a practical matter, the issue is moot because, while there is a dispute as to the amount of the contract balance, there is no dispute as to UPI's entitlement to the contract balance for its performance under the Takeover Agreement. We note as well that the Takeover Agreement in paragraph e. of section 2 affords UPI the opportunity to include claims for payment under the payment bond. It did not include any such claims.

Our interpretation is aided by the next to last "Whereas" paragraph, which specifically recites that UPI will complete the contract for the contract balance (finding 7). Recitals such as the foregoing may, if untrue, be disproved by contrary facts. *Fulton v. L & N Consultants, Inc.*, 715 F.2d 1413, 1416 (10th Cir. 1982). However, such recitals are evidence and entitled to weight. RESTATEMENT (SECOND) OF CONTRACTS § 218 cmt. b (1981). Mr. Zauderer's testimony as to the meaning of Section 2 and subparagraph a, which he tied to the Indemnity Agreement, is, at best, too amorphous to outweigh the clear language of the "Whereas" clause (finding 8). His interpretation of subparagraph a seemed more concerned with what UPI was required to spend than with what it was to receive. Thus, the weight of the evidence persuades us that section 2 of the Takeover Agreement does not somehow bestow standing on UPI and CDA jurisdiction on the Board with regard to pre-takeover claims.

UPI cites also to the last sentence of section 7, under which it does not waive any claim that it or Castle might have against the Air Force. We do not interpret the non-waiver provision to affirmatively bestow on UPI Castle's right to pursue claims against the Air Force. This would effect an assignment of such claims, which the Anti-Assignment Act "broadly prohibit[s]." *Fireman's Fund*, 313 F.3d at 1349.

Section 9 provides in part that "SURETY shall be entitled to such additional compensation or equitable adjustment and time extensions as are recognizable under the original Contract Documents." However, read in the context of the preceding portion of section 9 (finding 7), we believe the Takeover Agreement merely gives UPI the right to pursue claims which accrue during its performance of the work in accordance with the original contract which is incorporated into the Takeover Agreement by section 11. Thus, if, for example, we found the Air Force had constructively changed the contract specifications post-takeover, UPI would be entitled to an equitable adjustment under the

Changes clause. We do not, however, construe this provision as assigning to UPI any of the rights Castle might have exercised under its pre-takeover performance.

As to section 10, it refers to prior rights. We have previously held that no prior rights accrued to a surety under a nearly identical Takeover Agreement since UPI was not a party to the original contract, had no rights arising from that contract between Castle and the Air Force, no third-party beneficiary rights, and there was no implied-in-fact contract arising from the bonds. *UPI II*, *supra*, 03-2 BCA at 159,623. Additionally, we note that the language in that section effectively describes rights traditionally considered part of a surety's equitable subrogation rights, which we have no jurisdiction to consider.[4] *See* such cases as *Pearlman v. Reliance Insurance Co.*, 371 U.S. 132 (1962), and *Trinity Universal Insurance Co. v. United States*, 382 F.2d 317 (5th Cir. 1967), *cert. denied*, 390 U.S. 906 (1968), for a discussion of a surety's equitable subrogation rights.

UPI also argues that "the combination of the Takeover Agreement . . . and the Indemnity Agreement . . . establish the totality of the circumstances prescribed by the Board and the Federal Court of Claims in determining a valid assignment." App. br. at 4. UPI cites for support *Security Insurance Co. of Hartford and National American Insurance Co.*, ASBCA No. 51813, 01-2 BCA ¶ 31,588, and *Tuftco Corp. v. United States*, 614 F.2d 740 (Ct. Cl. 1980). In *Security Insurance Co. of Hartford*, we found conduct on the government's part that constituted a waiver of the Anti-Assignment Act, 31 U.S.C. § 3737, and recognition of the assignment to the surety of the original contractor's claims. In so doing, we specifically distinguished *UPI I*. *Security Insurance Co. of Hartford*, *supra*, 01-2 BCA at 156,090. In that case the contractor was bankrupt and the trustee executed an affidavit stating that he had assigned all of the contractor's claims to the surety in a settlement agreement (*id*. at finding 8). He agreed to provide a specific assignment if necessary (*id*. at finding 15). Further, the government had raised the standing issue and the surety responded by asserting that the Assignment of Claims Act had been waived. The government thereafter continued to negotiate and actually awarded recovery for one of the surety's claims in the final decision. *Id.* at 156,089. We concluded that the "totality of the circumstances militates toward waiver . . . ." *Id.* at 156,090. We cannot reach the same conclusion here, where UPI's argument is based solely on the Indemnity Agreement,[5] which we "may [not] presume to construe and enforce," *Admiralty Construction, Inc.*, *supra*, and the Takeover Agreement, to which Castle was not a party. Moreover, waiver (or recognition) of the assignment would require that the contracting officer have notice. *Beaconware Clothing Co. v. United States*, 355 F.2d 583, 589 (Ct. Cl. 1966). Notice is missing here (finding 2).

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[4] We express no opinion as to whether UPI may have some of the rights for which it argues under the Takeover Agreement before another forum. We simply hold it has made the wrong choice of forums under *Fireman's Fund*.

[5] We also note that the Indemnity Agreement was not executed by UPI (finding 2).

UPI also cites *Tuftco Corp, supra*. We relied on that case, which does not involve a surety, in *Security Insurance Co. of Hartford*. The Court in *Tuftco* identified two purposes for the Anti-Assignment Act: (1) to prevent the buying up of claims against the United States, which might be improperly urged on government officers, and (2) to eliminate the confusion of conflicting demands for payment and possible multiple liability. *Tuftco Corp*., 614 F.2d at 744. The Court acknowledged that the government can choose to recognize an assignment and concluded that the circumstances there warranted a finding that the assignment had been recognized. However, unlike the instant appeal, there were assurances from the contracting officer that the assignments were proper and would be recognized. *Id*. at 745. We find *Tuftco* to be inapposite.

We hold that UPI lacks standing and we do not have jurisdiction to consider the contaminated soils, grade elevation, and parts of the concrete cure and delay claims that arose pre-takeover for work done by Castle.

POST-TAKEOVER DELAY

UPI claims, in addition to the contract balance and payments already received, it is entitled to all of Lattimer's post-takeover overhead costs for the entire period of performance. The essence of UPI's argument, as we understand it, is that but for the soil contamination UPI would not have had to take over the project. Assuming, *arguendo*, that UPI has standing to contest the issue, the argument fails because Castle abandoned the project, was default terminated, and did not appeal the default termination. When a contracting officer's decision terminating the contract for default is not appealed, the contractor's failure to perform is established under the CDA and not thereafter subject to review: "The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this Act." 41 U.S.C. § 605(b). *See also Combined Arms Training Systems, Inc.*, ASBCA Nos. 44822, 47454, 96-2 BCA ¶ 28,617 at 142,891.[6] The contracting officer's decision specifically states "THIS NOTICE CONSTITUTES THE CONTRACTING OFFICER'S FINAL DECISION THAT THE CONTRACTOR'S FAILURE TO PERFORM IS NOT EXCUSABLE." (Finding 6) We may not, therefore, review the reasons for Castle's default, but must treat the failure to appeal as conclusive as to the lack of excusability. Stated another way, Castle's failure to contest the default establishes its responsibility for performance failure and takes the soil contamination issue, or other causes, out of play as a government-caused excuse for the default. Castle's performance-based default has therefore been unassailably established,

[6] We recognize that under *Fulford Mfg. Co.,* ASBCA No. 2144 (1955), a government claim for reprocurement costs can reinvigorate a contractor's appeal rights. As more than six years has passed since the termination, the period for filing a government claim has expired. 41 U.S.C § 605(a).

and "[w]here, as here, a performance-based termination for default has been established, the surety becomes liable and stands in the place of the principal." *UPI II*, *supra*, 03-2 at 159,627. UPI must, therefore, independently establish government-caused delay during UPI's performance under the Takeover Agreement if it is to prevail on its delay claim.

The record here does not support UPI on post-takeover delay and the claim fails for lack of proof. For one thing, UPI never prepared a schedule, so we have no baseline from which we may proceed (finding 16). For another, UPI must show "the nature and extent of the various delays for which damages are claimed and . . . connect them to some act of commission or omission on [the government's] part." *Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 969 (Ct. Cl. 1965). UPI has failed to do so.

Further, even if a government-caused delay had been established, this proceeding encompasses both entitlement and quantum. UPI has presented this part of its claim as for Eichleay damages (finding 18). The costs sought are overhead consisting of project manager, superintendent, and accounting costs allegedly incurred in Lattimer's performance under the Takeover Agreement. The costs for the project manager, who did "office work" (finding 12) and accounting are home office overhead. Superintendent costs could conceivably be treated as site costs, but UPI has lumped those costs with accounting and project manager costs, so we conclude that UPI treated superintendent costs as home office overhead as well. Such costs are recoverable only as Eichleay damages. *West v. All State Boiler, Inc.*, 146 F.3d 1368 (Fed. Cir. 1998). As there was no "stand by" period (finding 17), UPI cannot establish entitlement to Eichleay damages. *Id.* at 1372. It has also failed to provide sufficient information for the Board to do an Eichleay computation.[7] UPI's delay claim is denied.

CONCRETE CURE

We have found that UPI lacks standing to pursue the pre-takeover portion of the concrete cure claim. As to the post-takeover portion, UPI claims it is entitled to an equitable adjustment because the specifications were defective. The record does not support the claim, as UPI has simply failed to prove facts essential to its entitlement to an equitable adjustment for its efforts in curing concrete. The contract required contracting officer approval for the membrane curing compound (finding 20). Lattimer did not file a

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1. $\frac{\text{Contract billings}}{\text{Total billings for contract period}}$ x Total overhead for contract period = Overhead allocable to the contract.

2. $\frac{\text{Allocable overhead}}{\text{Days of performance}}$ = Daily contract overhead

3. Daily contract overhead x No. days delay = Amount claimed.

Eichleay Corp., ASBCA No. 5183, 60-2 BCA ¶ 2688 at 13,568.

submittal for contracting officer approval until after it was told by Parsons on or about 26 August 1997 to use wet burlap because it was at the time using an unapproved and not contractually-specified compound. Its original submittal, dated 17 September 1997, was turned down because it was incompatible with the Sikaflex joint sealant added by Addendum 12. (Findings 21-23) UPI argues that it is entitled to costs incurred attempting to comply with defective specifications and that "the Specifications were defective because the curing method employed by Lattimer was not compatible with the Contract modification [which added the Sikaflex joint]." (App. br. at 40) The predicate to UPI's argument is proof that the curing methods and compounds listed in the specification would not work because of the Addendum 12 change to a Sikaflex joint. There is, however, no showing that the specified products or their equals were incompatible with Sikaflex. UPI has also failed to show that the membrane originally submitted was an equal to one of the products called for by the contract. (Findings 20, 24) Accordingly, we hold the Air Force was thus within its rights to reject the first submittal, as the contractor bears the burden of proving that an "or equal" product is equal in quality and performance. *North American Construction Corp.*, ASBCA No. 47941, 96-2 BCA ¶ 28,496. Similarly, given Lattimer's failure to submit a membrane curing compound for approval, the Air Force was within its contractual rights to direct use of wet burlap, a method set forth in the contract that required no further approval and was therefore readily available. UPI does not argue that wet burlap was incompatible with the Sikaflex joint. Its second submittal, dated 25 September 1997, was approved on 8 October 1997 (finding 23). Thereafter, Lattimer used the membrane curing compound. It never used both wet burlap and a membrane curing compound at the same time. (Finding 26)

On this record, we are at a loss to understand how the specifications were defective or how UPI was damaged. To recover for defective specifications, the contractor must prove, *inter alia*, that a satisfactory product could not have been reasonably supplied following the specifications and that it was damaged as a direct result of its efforts to perform under the defective specification. *Electrical Contracting Corp. of Guam, Inc.*, ASBCA No. 33136, 90-3 BCA ¶ 22,974 at 115,381. UPI has not established that use of the membrane curing compounds listed in the contract, or their equals, would not have been compatible with the Sikaflex joint. Moreover, the contract provided for wet burlap as an alternative, and there is no contention that the desired result could not be obtained through use of that method with the Sikaflex joint. In this regard, we note that at the time of the Takeover Agreement, Addendum 12 was part of the contract and UPI agreed to perform the contract "and all change orders," which would have included Addendum 12 and the Sikaflex joint (findings 5, 7). Use of the Sikaflex joint was not a change to the Takeover Agreement and it is not disputed that the Sikaflex joint and wet burlap curing were compatible. UPI thus has failed to prove one of the required elements of a defective specification claim, *i.e.*, that a satisfactory product could not have been provided by following the specifications.

UPI's argument also suffers from a failure to prove that it was damaged. We equate damage here to proof of additional costs. UPI has failed to prove it incurred additional costs. All we are given is the alleged cost of performing the wet burlap curing. There is no comparison with the cost of the membrane curing compound, which would be necessary to prove that the wet burlap method caused *additional* costs (finding 25). Further, we have found that Lattimer never used two methods at the same time (finding 26). UPI's claim for additional costs for curing concrete is denied.

ASBCA No. 54270 - CONTRACT BALANCE

UPI has argued its position from two points of view. It argues for entitlement to the contract balance under the doctrine of equitable subrogation. We lack jurisdiction under that doctrine, as discussed *supra*. It also argues that the government expressly agreed to pay it the amount specifically set forth in the Takeover Agreement. The Air Force argues that the contract balance included in the Takeover Agreement is overstated. Normally, this would trigger an analysis based on mutual mistake and contract reformation, with the burden of proof on the Air Force. Here, such an analysis must give way to an analysis based on the law governing untrue recitals, because the specific amount of the contract balance is in a "Whereas" clause.

Recitals are found in "Whereas" clauses. *Henderson County Drainage Dist. No. 3 v. United States*, 53 Fed. Cl. 48, 54 (2002). UPI drafted the Takeover Agreement and thus bears responsibility for placement of the specific amount of the contract balance in a "Whereas" clause. Neither party has argued that the Takeover Agreement is not an integrated agreement, and we conclude that it is an integrated agreement. Nevertheless, the recital of a fact in a "Whereas" clause in an integrated agreement is merely evidence of that fact. Contrary facts may be proved. "[I]t is standard contract law that a Whereas clause, while sometimes an aid to interpretation, 'cannot create any right beyond those arising from the operative terms of the document.' *Abraham Zion Corp. v. Lebow*, 761 F.2d 93, 103 (2d Cir. 1985) (quoting *Genovese Drug Stores v. Connecticut Packing Co*., 732 F.2d 286, 291 (2d Cir. 1984))." *Grynberg v. Federal Energy Regulatiory Commission*, 71 F.3d 413, 416 (D.C. Cir. 1995). The operative terms of the Takeover Agreement do not include a specific amount, but refer, for example, to "sums now due and payable and to become due and payable upon the CONTRACT, including all unearned Contract balances" (finding 7). *See, also*, RESTATEMENT (SECOND) OF CONTRACTS § 218(1), *supra*. ("A recital of a fact in an integrated agreement may be shown to be untrue.") Where contrary facts are proved, and "[i]n the absence of estoppel, the true facts have the same operation as if stated in the writing." *Id.* at cmt. b.

Notwithstanding the $.08 error (n.3, *supra*), Ms. DeMito has credibly calculated the actual contract balance at takeover as $953.591.60. The Takeover Agreement balance of $998,863.64 was thus overstated by $45,272.04. We have found that both parties believed at takeover that the amount stated in the Takeover Agreement was accurate, that

UPI relied on the Air Force's representation, that the Air Force did not inform UPI of the discrepancy during performance, and that Mr. Zauderer would have attempted to negotiate different terms to compensate for the lower contract balance if he had known at the time (finding 31). However, based on Ms. DeMito's affidavit, Mr. Goldsmith's memos, and contemporaneous documents (finding 29-33), we think there is no doubt that the contract balance stated in the Takeover Agreement was inaccurate and overstated. Given UPI's reliance on the amount in the "Whereas" clause, we must next determine whether estoppel prevents this contrary proof from overriding the contract balance amount in the "Whereas" clause.

The RESTATEMENT, § 218 cmt. c, provides as follows:

> c. *Estoppel*. In some circumstances a recital may embody a representation of act by one party to the other, and the party making such a representation may be barred by estoppel from showing the truth contrary to the representation after another has relied on the representation. See Comment a to § 90.

Section 90, comment a states "This Section is often referred to in terms of 'promissory estoppel,' a phrase suggesting an extension of the doctrine of estoppel." Promissory estoppel has been described as a "sword," while equitable estoppel has been called a "shield," in that the former is used to create a cause of action, while the latter prevents the raising of a defense to an action. *Jablon v. United States*, 657 F.2d 1064, 1068 (9th Cir. 1981). Notwithstanding the quote from RESTATEMENT § 90, cmt. a, we consider the applicable doctrine of estoppel in this instance to be equitable estoppel, in that it would prevent the Air Force from "showing the truth contrary to the representation," which we consider to be the raising of a defense. RESTATEMENT, § 218 cmt. c, *supra*. The Federal Circuit has held that, in addition to traditional requirements of estoppel, some form of affirmative misconduct must be shown before equitable estoppel is available against the government. *Zacharin v. United States*, 213 F.3d 1366 (Fed. Cir. 2000). We have not found a similar holding with respect to promissory estoppel. One could consider that UPI is pursuing an action here based on a perceived promise to pay the contract balance as stated in the "Whereas" clause, in which case the estoppel here could be promissory. We are persuaded that the *Zacharin* standard should be applied whether one considers the applicable estoppel to be promissory or equitable. *See Heckler v. Community Health Services*, 467 U.S. 51, 60 (1984). There has been no showing of affirmative misconduct with respect to the contract balance. Based on Ms. DeMito's affidavit, the problem apparently was created because the progress payment amounts included both estimated and fixed price CLINs. There was no effort to deceive. (Finding 32) Accordingly, the element of affirmative misconduct is missing and estoppel is not applicable.

Our calculation of the contract balance due UPI is as follows:

Contract Fixed Price	$1,957,630.00
Approved Estimated Quantity	300,694.11
Change Orders	(53,837.92)
Adjusted Contract Price	2,204,486.19
Payments to Castle	(1,250,894.67)
Contract Balance	953,591.52
Value of Post-Takeover Mods	(238,980.00)
Payment to UPI	(713,382.53)
Contract Balance	**$1,228.99**

(Findings 7, 32, 33) The appeal is sustained to that extent and otherwise denied.

ASBCA No. 54271 - SETTLEMENT AGREEMENT

UPI argues that it and the Air Force agreed to settle 7 of 10 claims at a 21 May 1999 meeting for the sum of $214,745.00. The Air Force argues there was no such agreement, in part because it would only have entertained a global settlement. We hold there was no settlement.

It is undisputed that a meeting or meetings were held to discuss settlement. After that, the parties' positions become polarized, with UPI, through Mr. Zauderer, asserting that items 1, 4, 5, and 7-10 were settled for $214,745. The Air Force, through Ms. DeMito, asserts that it was seeking a global settlement to avoid any litigation, and that it needed additional back-up material from UPI before a settlement could be reached in any event. Shortly after the meeting and upon receiving a 26 May 1999 letter from UPI's counsel, McGuire's deputy civil engineer appears to have "hit the ceiling" over UPI's claim that the Air Force had offered $214,745. (Findings 34, 36-38) As a result, Ms. DeMito sent an e-mail which had such a profound chilling effect that UPI requested a contracting officer's decision (findings 39, 40). In our view, the key to resolving this dispute is the 26 May 1999 letter from UPI's counsel.

An agreement to settle a dispute is a contract, the interpretation of which is a matter of law. *Musick v. Department of Energy*, 339 F.3d 1365, 1369 (Fed. Cir. 2003). There is no written, express instrument here, so any contract which may have arisen from the settlement meeting was oral and implied. For us to have jurisdiction, the contract must be implied-in-fact, and not implied-in-law. *UPI II*, *supra*, 03-2 BCA at 159,623. An implied-in-fact contract requires a meeting of the minds which is inferred from the parties' conduct and shows their tacit understanding and agreement. The same elements are required as for an express contract: offer, acceptance, and consideration. *Fincke v. United States*, 675 F.2d 289, 295 (Ct. Cl. 1982). When the United States is a party, the government representative whose conduct is relied upon must have the requisite

authority. The burden of proof on the issue of contract formation is borne by the party asserting the existence of an enforceable contract. *Novecon Ltd. v. Bulgarian-American Enterprise Fund*, 190 F.3d 556, 564 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1037 (2000). The evidence here is equivocal at best, and insufficient to carry UPI's burden. Mr. Zauderer's notes and testimony are countered by Ms. DeMito's testimony, and Mr. Zauderer's assertion of an agreement is, as discussed below, in conflict with his counsel's 26 May 1999 letter.

In this regard, and assuming, *arguendo*, that Ms. DeMito made a $214,745 offer to settle only the 7 items claimed by UPI, we conclude there still was no agreement, and that any settlement was still executory. We base this conclusion on the 26 May 1999 letter from UPI's counsel which unequivocally does not accept the Air Force's alleged offer of $11,250 for delay costs (finding 37). Mr. Zauderer's notes and testimony establish that UPI's position that there was a settlement is based on inclusion of an allegedly agreed-to amount of $11,250 for delay costs (finding 34). The 26 May 1999 letter from UPI's counsel seeks to continue negotiations for delay costs and thereby establishes conclusively that UPI considered delay costs to be subject to further negotiation. Accordingly, we find there was no offer and acceptance, and thus no settlement agreement, that resulted from the 21 May 1999 meeting. Ms. DeMito then informed UPI that $214,745 was not on the table and UPI requested a contracting officer's decision. There could be no clearer manifestation of impasse. ASBCA No. 54271 is denied.

SUMMARY

ASBCA No. 52419 is denied in part and dismissed in part. It is resolved as follows:

We lack jurisdiction, and UPI lacks standing, for the contaminated soils and grade elevation portions of the appeal in their entirety; and for the segments of the concrete cure and delay portions of the appeal attributable to work performed by Castle. Those portions of the appeal are dismissed. We deny the concrete cure portion of the appeal for work done post-takeover and the post-takeover delay portion of the appeal.

ASBCA No. 54270 is sustained in the amount of $1,228.99 with interest pursuant to the CDA from date of receipt of the 3 March 2003 claim.

ASBCA No. 54271 is denied.

Dated: 23 December 2003

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

I concur

I concur

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

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 52419, 54270, 54271, Appeals of United Pacific Insurance Company, rendered in conformance with the Board's Charter.

Dated:

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