ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
T&W Edmier Corporation	)	ASBCA No. 53347
	)	
Under Contract No. DACW23-90-C-0042	)	

APPEARANCES FOR THE APPELLANT: Peter M. D'Ambrosio, Esq.
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OPINION BY ADMINISTRATIVE JUDGE FREEMAN

T&W Edmier Corporation (Edmier) appeals a contracting officer's final decision on items that were not included in a partial settlement of Edmier's claim under an excavation contract. The contracting officer allowed a price adjustment of $2,484,839.41 for the excluded items. We find Edmier entitled to a price adjustment of $1,211,261.04.

FINDINGS OF FACT

I. Award and Performance of the Contract

1. On 22 June 1990, the Corps of Engineers (COE) awarded Edmier a contract for excavation and related work for a flood control reservoir and new river channel in Deerfield, Illinois (R4, tab C at A-2, B-3). The site was known as Reservoir Site 29A. The estimated total contract price at award, a combination of fixed unit prices for estimated quantity line items and lump sum line items, was $4,775,790.50 (R4, tab C at B-1, B-2, B-3). The contract included among other provisions the FAR 52.236-2, DIFFERING SITE CONDITIONS (APR 1984) clause and the FAR 52.212-21, SUSPENSION OF WORK (APR 1984) clause (R4, tab C, contract clauses at 8, 56).

2. Edmier received notice to proceed on 19 July 1990. The required contract completion date was 11 December 1991. (R4, tab C at A-1, tab D-14) At a pre-construction conference on 25 July 1990, Edmier told the government that it planned to "mass excavate" the reservoir using a single haul road, working nine-hour days, six days a week, and without a break over the winter months of 1990-91 (R4, tab D-15 at 1-2; app. supp. R4, tab 162; tr. 73)

3. A pond (sometimes referred to as a "lake") was at the center and covered approximately half of the 27-acre primary work site. A gun club was previously located on the site. (App. supp. R4, tab 159; tr. 51, 70) Edmier began work on 4 August 1990 with site clearing, topsoil stripping, construction of barrier walls and perimeter fencing, draining two borrow pits on the south side of the site, and excavating the new river channel on the north boundary of the site. Edmier began excavating the reservoir area south of the pond on 29 August 1990. (R4, tab E)

4. When Edmier started work, another contractor was salvaging lead shot from the bottom of the pond. Edmier's daily reports do not indicate that this delayed the draining of the pond. Edmier began pumping water from the pond on 21 September 1990. The pond was drained by 26 October 1990. (R4, tab E; tr. 620)

5. On 27 October 1990, lead pellets were noticed on the previously submerged banks of the pond. On 29 October 1990, Edmier was directed by the contracting officer's representative (COR) not to excavate any material from the drained pond. On 12 November 1990, soil samples were taken from the pond bottom and sides to determine the extent and severity of lead contamination (R4, tab D-19). While excavation was suspended in the pond area, it continued on the south half of the reservoir site and on the new river channel. (R4, tab E; tr. 672)

6. On 23 November 1990, Edmier began stripping and stockpiling the topsoil from the sides and bottom of the drained pond. On 7 December 1990, Edmier began the excavation and off-site disposal of material from the pond area. (R4, tab E) From 23 November 1990 through 20 May 1991, there were no restrictions on the excavation work in the pond area or on any other part of the site, other than where the topsoil from the sides and bottom of the pond was stockpiled (R4, tabs D-29, E). As of 20 May 1991, Edmier had excavated and disposed off-site approximately 315,000 cubic yards of material (R4, tab D-35). This was approximately 40 percent of the total material that was ultimately excavated to create the reservoir and new river channel. *See* finding 17 below.

7. On 21 May 1991, the COE directed Edmier to suspend excavation in the pond area pending further testing for hazardous levels of lead contamination (R4, tab D-35). This direction was prompted by a 5 April 1991 ruling of the Illinois Environmental Protection Agency (IEPA) that the lead-contaminated topsoil from the pond area was subject to the Illinois hazardous waste regulations (R4, tab D-30).

8. In July and August 1991, Edmier was directed to consolidate the lead contaminated topsoil stockpiles into a single stockpile on the northwest side of the site (R4, tabs C-12, -14). On 17 and 22 July 1991, the government authorized resumption of excavation in most of the eastern half of the pond area (R4, tabs D-37, -38; app. supp. R4,

tab 164). The movement of all contaminated material to the single stockpile was completed by 20 August 1991 (R4, tab E).

9. Edmier's daily reports show excavation in both the north and south halves of the site on and after 3 September 1991. A COE report to the Mayor of the Village of Deerfield, dated 4 October 1991, stated that the excavation of the reservoir was completed except for the area where the lead-contaminated topsoil was stockpiled (R4, tab D-42). On this evidence, we find that, on and after 3 September 1991, Edmier was permitted to excavate throughout the reservoir site with the exception of the area where the contaminated topsoil was stockpiled.

10. By letter dated 21 October 1991, Edmier told the government that it had completed all of the excavation other than that beneath the contaminated topsoil stockpile. Edmier further stated:

> . . . We are seeking direction from you as to what to do with the equipment that is assigned to this project. Should you direct us to leave the equipment on the job site, we will do so at your expense. Should you not desire to keep the equipment on the job site, we will move it out at our expense, with the understanding that the move back and final move out expenses will be paid for by The Corps of Engineers.

(R4, tab D-43)

11. By letter dated 23 October 1991, the COR acknowledged that "the contaminated material precludes completion of the reservoir excavation." He further advised that: "In view of the uncertainty regarding the timing of the corrective measures and the upcoming winter months, I feel that it is most cost effective to demobilize all equipment presently on-site that will not be utilized during the winter months." (R4, tab D-46) By letter of the same date, Edmier told the COR that it was moving a part of the contaminated stockpile on the west side of the site to improve safety and drainage "[s]ince we will be moving our equipment off the job site shortly" (R4, tab D-47). The COR approved the move of the stockpile, and made no objection to Edmier's stated intent to move its equipment off-site (R4, tab D-49).

12. As of 23 October 1991, Edmier had excavated and disposed off-site approximately 585,317 cubic yards of material from the reservoir and new river channel excavations (gov't supp. R4, tab 13 at 2-3, as corrected for line item 5.c. by tab 15 at 2). From 24 October 1991 through 7 January 1992, construction work proceeded on structural components and support facilities for the reservoir (R4, tab E). From 9 January through 16 August 1992, no work was performed on the contract. Edmier's daily report for 8 January 1992 stated that all remaining work, including approximately 200,000 cubic

yards of excavation, "is to be performed when answer on lake bottom material is given." (R4, tab E)

13. On 27 August 1992, the State of Illinois approved a COE plan to bury the contaminated topsoil in a clay-lined and capped containment trench to be excavated around the site perimeter (R4, tab D-56). On 25 September 1992, the government directed Edmier to proceed with the containment trench (R4, tab D-59). Edmier began soil testing for the trench on 29 September 1992 and excavation of the trench on 5 October 1992 (R4, tab E). This work was billed on a time and materials basis pending agreement on a price adjustment (tr. 489, 1225). Edmier billed the equipment cost of the trench excavation at rates approximating the average operating condition rates in the applicable COE Construction Equipment Ownership and Operating Expense Schedule, and not at the severe operating condition rates in those schedules (gov't supp. R4, tabs 19-30; R4, tabs D-84, -85).

14. The excavation, lining, filling and capping of the containment trench, and excavation of the reservoir continued for the remainder of 1992 and throughout 1993 (R4, tab E). As of 22 December 1993, 774,061 cubic yards had been excavated from the site. Approximately 16,000 cubic yards remained to be excavated. From 23 December 1993 through 31 March 1994, no excavation or other work was performed on the site. (R4, tab E; gov't. supp. R4, tabs 26 at 2-3, 30 at 2-3)

15. In an attempt to get Edmier to return to the site and complete the work, a new contracting officer wrote to Edmier on 7 February 1994 as follows:

> CE Serial Letter No. 27, dated May 21, 1991, directed the suspension of excavation activities in the area originally bounded by the pond area . . . .
>
> As you are aware, testing for lead has been completed. The test results indicate that the stripped pond area has lead levels below the IEPA specified threshold level. Accordingly, permission is hereby given to continue construction activities in the pond area.

(R4, tab D-77)

16. The last of the lead testing referred to in the 7 February 1994 letter had been completed in the summer of 1991, and was the basis for Edmier excavating on and after 3 September 1991 throughout the reservoir site area, with the exception of the contaminated stockpile area. *See* findings 7-9. Moreover, removal of the contaminated stockpile to the containment trench had been substantially completed by Edmier in December 1993. It is also clear that Edmier was not waiting for government permission

to return to work. It did not in fact return to work on the site until 1 April 1994, more than seven weeks after the 7 February 1994 letter was issued. (R4, tab E) On this evidence we find that Edmier's failure to work on the site from 23 December 1993 through 31 March 1994 was not due to any on-going lead testing or lack of permission from the government.

17. From 1 April through 24 October 1994, Edmier completed the excavation, completed the containment trench, filled the old river channel, and graded and seeded the site. (R4, tab E) At the completion of the contract, Edmier had excavated and disposed of a total of 790,103 cubic yards of material to create the reservoir and new river channel (gov't supp. R4, tab 30 at 2-4, 8-11).

18. The total incurred cost of performing the contract[1] as reported on Edmier's certified financial statements for the years 1990-96 was $10,446.851.98 (app. supp. R4, tab 174, "Financial Statements"). The undisputed total adjusted contract price for the contract through Modification No. P00049 was $11,703,951.52. Of that amount, $6,459,351.92 was in price adjustments for costs caused by the lead contamination problem. (R4, tabs C, C-1 through C-49) The total revenue from the sales of the excavated materials was $736,698.50. The total cost of those sales[2] per Edmier's certified financial statements was $1,034,110.40. (App. supp. R4, tab 174, "Financial Statements")

II. The Claim

19. On 21 January 1997, Edmier submitted what its cover letter called a "changed condition proposal" for "all of the additional costs and the impact costs caused by the presence of higher than acceptable lead concentrations in the material to be excavated and the various work suspensions that occurred" on the Site 29A contract. The claimed amount ($33,357,926.13) was the alleged total costs incurred on the contract, plus profit, bond and "cost of money" ($44,187,820) less "cash received" ($10,829,894). Although called a "changed condition proposal," the document included a claim certification in the form required for claims under the Contract Disputes Act of 1978 (CDA). (R4, tab D-80 at 1-6) We find the "changed condition proposal" to be in fact a certified claim under the CDA on which Edmier intended CDA interest to run from the date of receipt by the contracting officer.

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[1] "Cost of Revenues" plus allocable "Indirect Construction Expenses" and "Selling & Administrative Expenses" for Jobs 114, 135, 136, 139, 145 and 146.

[2] "Cost of Revenues" plus allocable "Indirect Construction Expenses" and "Selling & Administrative Expenses" for Jobs 115, 116 and 122.

20. On 21 September 1998, a Defense Contract Audit Agency (DCAA) report "questioned" or found "unresolved" $26,693,671 of the total claimed amount (R4, tab D-82 at 5). On 14 April 2000, the parties in bilateral Modification No. P00048 settled five claim items for a net price increase of $1,122,414.20 (R4, tab C-48). On 15 May 2000, Edmier submitted a claim "supplement" for a total payment of $37,234,662. This supplement included, among other items, $1,089,336 for "Change order preparation costs" (R4, tab D-83 at 1-4). Apart from a reduced version of that item, the supplement is not part of Edmier's claim that is presently before the Board (tr. 440).

21. On 21 November 2000, the parties in bilateral Modification No. P00049, modified the settlement in Modification No. P00048, and settled an additional four claim items (R4, tab C-49). Modifications Nos. P00048 and P00049 both included the following provision: "Subject to the exclusions set forth above and in consideration of the modification agreed to herein, Contractor hereby releases the government from any and all liabilities under this contract for further equitable adjustments attributable to [the settled items]" (R4, tab C-48 at 5, tab C-49 at 5). Findings 22 through 25 describe the settled items.

22. Direct Expenses - Claimed Actual Costs: This item in the amount of $9,456,776.08 was the alleged total "direct expenses" of the contract shown on Edmier's general ledger from 1 January 1990 through 31 October 1996 (R4, tab D-80, "Direct Expenses" at 1-2). The claimed amount included, among other items, $3,103,349 for the actual ownership, lease and operating cost of all equipment (both owned and leased) used in performing the contract (R4, tab D-82 at 23-24). With the exception of a claimed reallocation of $265,089.00 in direct labor costs from the excavation sales contracts to the excavation contract (the "labor cost transfer claim"), the parties in Modifications Nos. P00048 and P00049 settled the entire direct expenses—claimed actual costs item for $8,510,461.07 (R4, tab C-48 at 5, tab C-49 at 3, 5).

23. Direct Expenses - Claimed Accruals: This item in the amount of $4,081,535.32 consisted of nine sub-items of allegedly "accrued" direct expenses which do not appear on the general ledger as direct expenses. Seven of these accrued items (street sweeper, backhoe transportation, Henderson lawsuit settlement, import of topsoil, import of stone, E Company costs, and Construction S & E costs) were settled by the parties for $541,404.98. The remaining two items (loss of clay sales and Henderson lawsuit legal expenses) were reserved for later determination. (R4, tab C-48 at 5, tab C-49 at 3-5)

24. Allocated Overhead: This item in the amount of $1,623,920.25 was the overhead allegedly due on the claimed actual and accrued direct costs. The parties agreed on $1,424,493.51 as the overhead allocable to the actual and accrued direct costs that were allowed in Modifications Nos. P00048 and P00049. The agreed allocable overhead was 15.74 percent of the allowed direct costs. It was also subject to an

exception for any additional allocable overhead that might result from the settlement or adjudication of the labor cost transfer claim or a claim for the direct allocation of expenses booked as overhead. (R4, tab C-48 at 4, 5, tab C-49 at 4, 5)

25. Profit and Bond: Edmier claimed profit at 12 percent of costs, and bond at .89 percent of costs and profit. The parties agreed upon 10 percent profit on the agreed costs, and .83 percent bond on the agreed costs and profit. The agreed profit percentage in both modifications was stated to be "for purposes of this contract modification only." (R4, tab C-48 at 4, tab C-49 at 4)

26. By final decision dated 5 April 2001, and in unilateral Modifications Nos. P00050 and P00051 dated 11 May and 22 June 2001, the contracting officer allowed the following amounts on claim items that were excepted from the settlement in Modifications Nos. P00047 and P00048: (i) operating equipment expense: $1,491,865.26; (ii) idle equipment expense: $501,438.21; (iii) unabsorbed overhead: $298,835.80;[3] (iv) profit on (i) through (iii): $174,202.58; (v) bond on (i) through (iv): $18,497.56; (vi) interest on (i) through (v): $ 680,045.62; and (vii) interest on the amounts allowed in Modifications Nos. P00048 and P00049: $ 314,141.78. The contracting officer's decision denied entirely the claim items for (i) lost clay sales; (ii) Henderson lawsuit legal expenses; (iii) labor cost transfer; (iv) claim preparation costs; and (v) calculated cost of money. (R4, tabs B, C-50, -51) That final decision and the implementing unilateral modifications are the subject of this appeal.

III. The Appeal

27. Edmier's brief on appeal claims that it is entitled to an additional price adjustment in the total amount of $32,056,174.99 over and above the $6,459,351.92 in adjustments previously allowed for the lead contamination problem through and including bilateral Modification No. P00049 (app. br. at 26-44; finding 18). That claimed amount when added to the total adjusted contract price through bilateral Modification No. P00049 ($11,703,951.52) would result in a final contract price of $43,760,126.51 on a total incurred contract cost of $10,446,851.98 as shown on Edmier's certified financial statements. *See* finding 18. Our findings on the specific claim items before us on the appeal follow.

[3] The contracting officer did not address in her decision the reallocated overhead claim as submitted by Edmier (tr. 794). She did allow an "Eichleay" unabsorbed overhead recovery of $298,835.80 for Government delay (R4, tab B at 146; tab C-50 at 2) Edmier's brief on appeal, however, does not ask for an Eichleay unabsorbed overhead recovery and continues to assert its reallocated overhead claim (app. br. at 35-37).

A. Operating Equipment Expense

28. Edmier's operating equipment expense claim is based on gross claim amounts of $5,597,156.60 for contractor-owned operating equipment and $1,300,292.03 for leased equipment.[4] These gross claim amounts are derived by multiplying the total recorded operating hours for each item of equipment times the severe operating condition rates for that item in the applicable COE Construction Equipment Ownership and Operating Expense Schedule. The gross claim amount for the contractor-owned equipment also includes the sum of the assumed operating hours for ten items of equipment, for which actual operating hours were not recorded, times the applicable COE standby rates for that equipment. The gross claim amount for the leased equipment also includes a labor cost component separate from the equipment cost component. (App. br. at 25-29; R4, tab D-80 at 6, 11, 45-107)

29. Clause L.8 of the contract required that Edmier's proposed equipment ownership and operating cost for contract modifications be determined in accordance with Clause H-24, EQUIPMENT OWNERSHIP AND OPERATING EXPENSE SCHEDULE (JUL 1989) (EFARS 31.105). Clause H-24 stated that the ownership and operating cost of construction equipment "shall" be based on the COE schedules "[w]hen both ownership and operating costs cannot be determined for any piece of equipment or groups of similar serial or series equipment from the Contractor's accounting records." (R4, tab C at H-12, H-13) Edmier's job cost accounting records did not show the ownership and operating cost by individual item of equipment used on the job. They did show, however, the total ownership, operating and lease costs for all equipment used on the job. *See* finding 22.

30. Clause H-24 further provided that: "Working conditions shall be considered to be average for determining equipment rates using the schedule unless specified otherwise by the Contracting Officer" (R4, tab C at H-12, H-13). Guides for determining whether severe or average operating conditions are present are provided in the COE schedules. Average conditions are described in such terms as working with "[g]ravels," "silts," "broken rocks," "clay," "[v]arying loading and haul road conditions," etc. Severe conditions are described in such terms as working with "[e]xtremely abrasive tough materials," "impact breakout," "dozing in hard rock," "[c]onsistently poor haul road conditions," etc. (R4, tab D-84, schedules at C-1 et seq.)

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[4] Edmier's operating equipment expense claim as submitted to the contracting officer deducted from the gross claim amounts the actual incurred equipment ownership, lease and operating expenses ($3,103,349) which were part of the direct expense-claimed actual costs item settled in bilateral Modifications Nos. P00048 and P00049 (R4, tab D-80 at 4; finding 22). For reasons unexplained, the operating equipment expense claimed in appellant's brief on appeal does not make this deduction.

31. The lead contamination problem prevented Edmier from "layered [sic] cake" excavation, forced it into less efficient "pit" excavation and required the use of more and rougher haul roads (tr. 115-16, 120-21, 289-91). But, Edmier's daily reports did not at any time indicate the presence of severe operating conditions as described in the COE schedules (R4, tab E; tr. 439). This contemporaneous documentation supports the government project engineer's testimony that, while the lead contamination issue made the excavation less efficient and more time-consuming than it otherwise would have been, it did not increase the stress on the equipment to the extent of the severe operating conditions described in the COE schedules (tr. 712-14, 720-21). Moreover, Edmier did not request, nor did the contracting officer authorize, the use of severe operating condition rates in billing the extensive containment trench excavation or in the pricing of any of the modifications involving excavation that were negotiated during performance of the contract (tr. 443, 705, 952-53). *See* finding 13. On this evidence, the contention that all equipment operating hours incurred in performing the contract were incurred in severe operating conditions is not proven.

32. Paragraph (b) of Clause H-24 of the contract stated in relevant part: "Equipment rental costs are allowable, subject to the provisions of FAR 31.105(d)(ii) and FAR 31.205-36 substantiated by certified copies of paid invoices." Paragraph (b) further provided for the use of the COE rates only where equipment was rented from an organization "under common control." (R4, tab C at H-13) There is no evidence that the leased equipment used on the excavation contract was leased from an organization under common control with Edmier.

33. The total cost of the truck/trailer leases actually incurred by Edmier for the excavation contract, as shown on its books and records, was $808,075 (R4, tab D-82 at 31). At hearing, Mr. Edmier admitted that these lease payments included the cost of the drivers, which were provided by the lessors with the trucks (tr. 437-38). The operating costs of the rental vehicles paid by Edmier (fuel, oil, tires and some repairs) were also charged direct to the job (R4, tab D-82 at 25), and with the lease payments were part of the direct expenses—claimed actual costs item settled in Modifications Nos. P00048 and P00049. *See* finding 22.

34. The contracting officer in her final decision and unilateral Modification No. P00050 allowed $1,491,865.26 for the operating equipment expense claim by applying the COE "average conditions" rates to the total operating hours of the contractor-owned equipment performing work on the contract and subtracting the booked actual costs for various items which she considered to be included in the COE rates (R4, tab B at 31-56). Both the contracting officer's calculation, and Edmier's claim, fail to distinguish the added operating hours caused by the hazardous lead contamination from all other operating hours, and the evidence otherwise fails to show the number of added operating hours so caused.

35. On this record, Edmier's operating equipment expenses caused by the hazardous lead contamination are not proven in any amount over and above the equipment expenses recorded in its job cost accounting system and settled by the parties in Modifications Nos. P00048 and P00049. It is not disputed, however, that the excavation for the reservoir area was less efficient as a result of the lead contamination than it otherwise would have been, and that the added equipment operating hours and expense so caused were substantial. In the absence of a more reliable method of ascertaining the additional equipment expense, we find, in the nature of a jury verdict, that a fair and reasonable approximation of the added operating equipment expense is one half of the amount computed by the contracting officer, or $745,932.63.

B. Idle Equipment Expense

36. As restated in its 22 May 2002 letter, Edmier's idle equipment expense claim has two parts. The first part is for $13,824,896.65 in gross revenues allegedly lost in the years 1990, 1991, and 1992 "when [Edmier's] equipment was required to remain committed to Reservoir 29A Project pending resolution of the hazardous material condition and implementation of the remediation." (App. supp. R4, tab 174 at 4-5) Edmier alleges that, but for the lead problem on the reservoir contract, it would have earned in each of those years the average annual gross revenue of the four preceding and four following years. The claimed amount is the assumed gross revenue less the actual revenue from other jobs over the three years. Edmier's lost revenue calculation includes no deduction for the estimated cost of producing the lost revenue. (App. supp. R4, tab 174 at 4, attach. 1)

37. The second part of the idle equipment claim is $2,562,711.45 for an alleged 307,656.25 idle equipment hours on items of equipment which were assigned to work on the contract at various times between 11 July 1990 and 31 October 1994. The claimed idle hours for each item are 40 hours per item per week less the recorded operating hours for the item during the period assigned to the contract. (App. supp. R4, tab 174, "Summary of Machine Idle Time," "Machine Idle Time-Detail Report")

38. The claimed hours include 22,309.50 incurred before 29 October 1990, which was before the presence of the lead had any significant effect on performance of the excavation work, and 143,422.25 hours incurred after 4 October 1992 when Edmier began the remedial action directed by the government (app. supp. R4, tab 174, "Summary of Machine Idle Time" at 1-3, 17-33; findings 4, 5, 13). These claimed idle hours were not caused by the lead contamination or by the government delay in directing remedial action. If Edmier incurred excessive idle hours on its equipment on site after 4 October 1992, it was due to its own inefficient management of the equipment or the lack of other work on which it could be employed. The claimed idle equipment hours also include 58,042.25 hours incurred between 24 October 1991 and 16 August 1992,

during which period Edmier was expressly authorized to demobilize its equipment from the site (app. supp. R4, tab 174, "Summary of Machine Idle Time" at 10-16). To the extent Edmier left idle equipment in a standby status on the site during this period, it did so voluntarily and not at the direction of the government. *See* findings 10-12.

39. Of the remaining 83,882.25 claimed idle equipment hours, 74,483.25 were incurred during the period from 29 October 1990 through 23 October 1991 and 9,399.00 were incurred during the period from 17 August 1992 through 4 October 1992. During these periods, Edmier was working on site concurrent with the delay in the government decision on the required remediation for the lead contamination, and the delay for the soil testing in preparation for the containment trench excavation. The claimed hours for the period from 29 October 1990 through 23 October 1991, however, include 21,976 hours on holidays and adverse weather days during the original contract period when no excavation was or could have been performed for reasons unrelated to the lead contamination. (R4, tab E; app. supp. R4, tab 174, "Summary of Machine Idle Time" at 3-10, 16-17)

40. We find that the ratio of claimed idle hours to claimed working hours for actual working days during the period before 29 October 1990, when the lead contamination had little if any effect on performance of the work, represents a reasonable measure of the ratio to be expected on this project if there had been no lead contamination. Comparing that base period ratio with the claimed idle hour to claimed working hour ratios for the periods from 29 October 1990 through 23 October 1991 and from 17 August through 4 October 1992, we find that none of the claimed idle hours for the first period are proven to have been caused by the lead contamination,[5] and only 6,454.53 of the remaining claimed idle hours for the 17 August 1992 through 4 October 1992 period are so proven.[6] At the average hourly COE standby cost rate in

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[5] The ratio of claimed idle hours (12,991.00) to claimed working hours (7,393.75) for the period 6 August through 28 October 1990, not including holidays and adverse weather days, was 1.76 (R4, tab E; app. supp. R4, tab 174, "Summary of Machine Idle Time" at 1-3). The ratio of claimed idle hours (52,506.75) to claimed working hours (32,197.50) for the period 29 October 1990 through 23 October 1991, not including holidays and adverse weather days, was 1.63 (*id*., at 3-10).

[6] The ratio of claimed idle hours (9,399.00) to claimed working hours (1,676.50) for the period 17 August through 4 October 1992 was 5.61, or 3.85 more than the ratio for the base period of 6 August through 28 October 1990 (1.76) (*id*., at 1-3, 16-17). Applying 3.85 to claimed working hours of 1,676.50 results in 6,454.53 idle hours over and above the idle hours that would have been incurred in the absence of the lead contamination. Since the 17 August though 4 October 1992 period was beyond the original contract completion date, we include in the idle/operating hour calculation the idle and operating hours on holidays and adverse weather days.

the claim applicable to the 17 August 1992 through 4 October 1992 period ($9.18), the standby cost for those hours was $59,252.59 (app. supp. R4, tab 174, "Summary of Machine Idle Time" at 33).

C. Reallocated Overhead

41. Edmier claims $1,579,353.83 for the direct allocation to the contract of various percentages of the cost of 11 officers and employees that were charged to overhead in the regular course of business during performance of the contract (app. br. at 35-37; R4, tab D-80 at 6, "Overhead"). The reallocation percentages are estimates made by Edmier's president in September 1996 of the time that the officers and employees worked on matters involving the reservoir contract from 1990 through 1996 (app. supp. R4, tab 8 at 4; tr. 251-53). Asked at hearing why the officers and employees in question did not charge their time direct to the contract when they were working on it, Edmier's president answered: "we do not do timecards for these individuals" (tr. 253). Edmier's accounting expert testified that: "It could have been done" (tr. 873). We find the percentage estimates of the work of eleven officers and employees over a period extending six years into the past, lacking in credibility and the alleged percentages not proven.

D. Lost Clay Sales

42. Edmier alleges that, but for the government's delay in resolving the lead contamination problem, it could have sold 786,568 cubic yards of excavated material from the reservoir site in 1990-91 and earned a gross revenue $3,410,000 on the sales (app. br. at 38, 41; R4, tab D-80, "Direct Expense" at 37). The evidence shows that during 1990-91, Edmier excavated and removed 585,317 cubic yards of material from the site, but sold only 204,457 cubic yards of that material (gov't supp. R4, tab 13 at 2-3; R4, tab D-82 at 9, tab D-83 at 12). On this evidence, the contention that it could have sold 786,568 cubic yards if it had been able to excavate that amount without delay is not credible, and the claim item is not proven.

E. Henderson Lawsuit Legal Costs

43. Edmier claims $65,624 for legal expenses incurred in defending a lawsuit by Joseph J. Henderson and Son, Inc., its concrete subcontractor. Henderson claimed fraud, an unpaid balance due, and government-caused extras and delays. Edmier counterclaimed for a declaratory judgment on liability for a pump failure and for the value of services allegedly provided to Henderson. (R4, tabs D-108, -109, -110) On 24 June 1997, Edmier and Henderson settled the suit with a payment by Edmier of $105,500.00 and a promise to sponsor Henderson's claim for extras and delays against the government (R4, tab D-111 at 2). In bilateral Modification No. P00049, the government and Edmier settled the Henderson claim for extras and delays for $50,759.64 (R4, tab C-49 at 5).

44. Edmier's legal expenses for the Henderson lawsuit have been verified by the DCAA (R4, tab D-82 at 7). The claimed expenses, however, are for the entire suit and are not limited to the claim for government-caused extras and delays. Absent a breakdown of the expenses by specific matter, we apportion the expenses equally to the four principal issues (*i.e.*, fraud, unpaid balance, government-caused extras and delays, and counterclaim), and find that Edmier reasonably incurred $16,406 in legal expenses for defending the Henderson claim for government-caused extras and delays.

F. Labor Cost Transfer

45. Edmier claims $265,089 in trucking labor costs that were incurred in the sale of excavated material from the reservoir contract to other contractors for use as fill on their job sites. Edmier initially charged these costs to the reservoir contract. Its independent auditors, however, determined that the costs should be charged to the sales contracts (Jobs 116 and 122). The costs were so charged on Edmier's 1991 financial statements which were certified by auditors as being "in conformity with generally accepted accounting principles." (R4, tab D-112 at 1; app. supp. R4, tab 174; tr. 305-07) Edmier's president testified that allocation of the labor costs to the sales contracts was "for tax purposes only" and that Edmier "used those numbers for paying the taxes to the government on those two jobs" (tr. 307). Since numbers used "for paying taxes" on a job purport to show the costs incurred for that job, we consider this testimony as an admission that the allocation to the sales contracts was the proper accounting treatment.

G. Allocated Overhead

46. Edmier claims $1,623,920.25 as the overhead allocable to the reservoir contract from 1990 through October 1996, after deducting the claimed reallocated overhead (*see* finding 41) from the overhead pool (app. br. at 37). In bilateral Modification No. P00048, the parties settled the allocated overhead claim for $1,424,493.51 (15.74 percent of direct expenses), subject to any additional overhead that might be owed as a result of the settlement or adjudication of the labor transfer or reallocated overhead claims. *See* finding 24 above. We have found no merit in either claim, and no additional overhead is due with respect to the labor cost transfer claim. *See* findings 41, 45. The denial of the reallocated overhead claim, however, means that the claimed amount ($1,579,353.83) must be added back into the overhead pool (and subtracted from the direct cost base) and a new rate applied to the direct costs allowed in Modifications Nos. P00048 and P00049. Based on Edmier's certified financial statements, the restoration of the claimed reallocation to overhead increases the overhead rate by 3.25 percent to 18.99 percent, and the amount of allocable overhead by $294,185.65, over and above the amount allowed in Modification No. P00048.

H. Contract Close Out Costs

47. Edmier claims $671,870.43 under the title "Contract Close Out Costs" for "preparation, auditing, and negotiation of the CCP (App Supp. R4, tab 180)" (App. br. at 43). The "CCP" referred to in appellant's brief is the "changed condition proposal," dated 21 January 1997, which we have found to have been in fact a CDA certified claim. *See* finding 19. The amount claimed on appeal, a reduced version of the "Change order preparation costs" item in the 15 May 2000 claim supplement, consists of: (i) $430,761.24 in "overhead wages" for four officers and employees of Edmier; (ii) $224,362.83 for legal and accounting counsel; and (iii) $16,746.36 for travel, meals, telephone/fax and miscellaneous expenses. (App. br. at 43; R4, tab D-83, § 15; app. supp. R4, tab 180)

48. There is no credible contemporaneous documentation supporting the allegation that the claimed overhead wages, $54,542.11 of the claimed legal fees, $6,475.37 in claimed credit card charges, and $2001.00 in claimed monthly telephone bills for the Phoenix, Arizona residence of Edmier's president,[7] were in fact incurred for preparation, audit support and negotiation of the certified claim (app. supp. R4, tab 180).

I. Profit

49. The parties have submitted structured analyses of the appropriate profit to be awarded on the allowed costs. Their analyses agree on: (i) the factors to be considered; (ii) the "rate" which each factor is to be given as a percent of the analysis as a whole; (iii) the range of "weights" (.03 to .12) to be given each factor; and (iv) the guidelines for assigning the weights. They disagree on the weights to be given each factor. Edmier gave itself a maximum .12 for every factor to arrive at a claimed profit of 12 percent. The contracting officer gave various weights to arrive at a profit of 7.6 percent. (App. supp. R4, tab 168 at 5; R4, tab B at 170-72)

50. Using the same structured analysis that the parties used, we assign the lowest weight (.03) to the risk factor (20 percent of the whole) because the claim involved "after the fact" pricing. We assign the highest weights (.12) to the contractor investment and government assistance factors (5 percent and 5 percent of the whole). The contractor's investment in the allowed costs was total, and there was no government assistance as to the claimed costs. We assign weights of .075, .086, .11, and .06 respectively to the difficulty, subcontracting, size of job and period of performance factors (15 percent, 25 percent, 15 percent and 15 percent of the whole) in accordance with the guidelines on the COE profit evaluation sheet. Applying these weights to the factor rates, we find that a

[7] Edmier's corporate offices before, during and after this period were located in Elmhurst, Illinois (R4, tab C at 2; complaint at 1).

reasonable profit on the costs we have allowed is 7.6 percent. (App. supp. R4, tab 168 at 5)

J. Bond

51. Edmier claimed .89 percent bond on its total claimed costs and profit in its 21 January 1997 certified claim, and one percent bond in its brief on appeal (R4, tab D-80 at 6; app. br. at 44). The contracting officer's final decision and the government's reply brief on appeal allowed .75 percent bond, allegedly on the basis of an agreement by the parties (R4, tab B at 173; gov't reply br. at 16). In the absence of evidence of the alleged agreement, we allow bond at the .89 percent rate stated in the certified claim.

K. Contract Disputes Act Interest

52. The contracting officer's final decision and her unilateral Modification No. P00050 allowed $314,141.78 for CDA interest on the claim items settled in bilateral Modifications Nos. P00048 and P00049 (R4, tab B at 170, tab C-50 at 3). In unilateral Modification No. P00051, the contracting officer allowed $680,045.62 for CDA interest on the claim items allowed in her final decision (R4, tab C-51 at 3-4). The government on appeal does not contest the contracting officer's allowance of interest on the settled claim items. The interest due on the items allowed in the final decision depends on our decision below on the merits of those items.

53. In its post-hearing brief, Edmier claims CDA interest on two invoices dated 31 December 1991, as well as on the claim items in the 21 January 1997 claim (app. br. at 45). The December 1991 invoices were both in excess of $100,000, and were submitted respectively for extended overhead and idle equipment expense, for the period May through December 1991. Stapled to the copies of the 31 December 1991 invoices as submitted in evidence to the Board were two identical claim certifications, dated 22 October 1990. These claim certifications, dated 14 months before the invoices, contain on their face no indicia that they were prepared or executed with reference to the 31 December 1991 invoices, and there is no evidence of the circumstances under which they became attached to the copies of the invoices. (App. supp. R4, tab 29) On this evidence, the invoices were not certified claims.

DECISION

At issue in this appeal are the items in Edmier's 21 January 1997 claim plus the claim preparation cost item in its 15 May 2000 supplemental claim which were decided in the contracting officer's 5 April 2001 final decision and in her unilateral Modifications Nos. P00050 and P00051. In that decision and in her subsequent unilateral modifications, the contracting officer allowed an aggregate price increase of $3,479,026.81 including interest. *See* Finding 26. On appeal, "[t]he contractor has the

burden of proving the fundamental facts of liability and damages de novo." *Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994) (*en banc*).

The hazardous lead contamination was a differing site condition governed by the terms of the FAR 52.236-2, DIFFERING SITE CONDITIONS (APR 1984) clause. The government delay in determining the remedial action was a partial constructive suspension of work governed by the terms of the FAR 52.212-12, SUSPENSION OF WORK (APR 1984) clause. The measure of recovery for a differing site condition is specified in the Differing Site Conditions clause as follows: "If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract . . . an equitable adjustment shall be made . . ." (emphasis added). The measure of recovery for a suspension of work is specified in the Suspension of Work clause as follows: "an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable suspension, delay or interruption . . ." (emphasis added).

Since the parties agreed in the contract to price adjustment clauses for differing site conditions and government suspensions of work, the hazardous lead contamination and the government delay in determining the remedial work were not breaches of the contract, and Edmier is not entitled to breach damages on its claims. *See Triax-Pacific, A Joint Venture*, ASBCA No. 36353, 91-2 BCA ¶ 23,724 at 118,747, *aff'd*, 958 F.2d 351 (Fed. Cir. 1992). Moreover, the overriding basic principle of price adjustments under these clauses is the cost impact on "this contract." *See Metric Constructors, Inc.*, ASBCA No. 46279, 94-1 BCA ¶ 26,532 at 132,058.[8]

On its operating equipment claim, Edmier has failed to prove that the excavation conditions were severe, or the number of additional operating equipment hours caused by the hazardous lead contamination. *See* findings 28-31, 34. Nevertheless, the government does not dispute that the excavation work was less efficient as a result of the lead contamination and we have found, in the nature of a jury verdict, that a fair and reasonable approximation of the added operating equipment expense is $745,932.63. That amount is based on one-half of the total operating hours at the COE "average conditions" rate less one-half of the booked operating cost of that equipment. *See*

[8] While *Metric* involved a changes claim under the FAR 52.243-4, CHANGES (AUG 1987) clause, the terms of that clause are substantially the same with respect to the purpose of the price adjustment as the terms of the Differing Site Conditions and Suspension of Work clauses in Edmier's contract. The Changes clause in *Metric* states in relevant part: "If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract . . . the Contracting Officer shall make an equitable adjustment . . ." [emphasis added].

findings 34-35. This adjustment is due only for the contractor-owned equipment, which is subject to the COE rates. Edmier can recover the additional operating hours of its leased equipment only at the actual booked cost, and it settled that cost for the leased equipment in Modification No. P00048. *See* findings 32-33.

The gross revenue component of the idle equipment claim is without merit as a matter of law. *See* finding 36. As noted above, the express terms of the Differing Site Conditions and Suspension of Work clauses provide price adjustments only for increases, or decreases, in the contractor's costs of performance of "this contract." They do not provide price adjustments for gross revenues that might have been earned on other contracts that might have been awarded if the differing site condition or suspension of work had not occurred. Moreover, even if the hazardous lead contamination, and the government delay in directing the remedial action, were breaches of contract and outside the scope of the price adjustment clauses of the contract, the claimed gross revenues from other independent and collateral undertakings are too uncertain and remote to be considered damages caused by the breach. *Wells Fargo Bank, N.A. v. United States*, 88 F.3d 1012, 1022-23 (Fed. Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997); *Ramsey v. United States*, 101 F. Supp. 353, 357-58 (Ct. Cl. 1951), *cert. denied*, 343 U.S. 977 (1952); *Myerle v. United States*, 33 Ct. Cl. 1, 26 (1897).

The standby component of the idle equipment claim item is in substance a total cost claim in which all of the non-operating hours of the equipment assigned to the site (up to 40 hours per week) are claimed as being caused by the lead contamination problem. *See* finding 37. An essential element of proof for a total cost claim is proof of "lack of [contractor] responsibility for the added cost." *Servidone Construction Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991). The evidence shows government responsibility for only 6,454.53 hours of equipment idle time at a standby cost of $59,252.59 during the period from 17 August through 4 October 1992. Edmier has failed to prove its own lack of responsibility for the balance of the idle time claimed. *See* findings 37-40.

Edmier is entitled to recover the $16,406.00 allocable to the defense of the claim for government-caused extras and delays in the Henderson lawsuit. *See* findings 43-44; *Travis Industrial Painters, Inc.*, ASBCA No. 46256, 95-1 BCA ¶ 27,321 at 136,202. Edmier is also entitled to recover an additional $294,185.65 in allocable overhead. No other mark-ups for overhead are due. *See* finding 46. The remaining claim items are not proven or otherwise without merit. The percentage estimates in the reallocated overhead claim are not credible. *See* finding 41. The claim for lost clay sales fails for lack of proof that Edmier could in fact have made the claimed sales. *See* finding 42. The claim for the labor cost transfer fails for lack of proof that the allocation of the costs by its independent auditor was in error. *See* finding 45. To the extent the claim preparation costs ("Contract Close Out Costs") were in fact incurred as alleged, they are barred by FAR 31.205-47(f)(1). *See* findings 47-48; *Bechtel National, Inc.*, ASBCA No. 51589,

02-1 BCA ¶ 31,673 at 156,527 (findings 41-42), 156,529, *aff'd*, 65 Fed Appx. 277 (Fed. Cir. 2003).

Edmier has proven in this appeal that it is entitled to an equitable adjustment in the amount of $1,211,261.04 for the hazardous lead contamination on the site as follows:

(a)	Operating equipment (finding 35)	$ 745,932.63
(b)	Idle equipment (finding 40)	59,252.59
(c)	Lawsuit legal expenses (finding 44)	16,406.00
(d)	Allocated Overhead (finding 46)	294,185.65
(e)	Profit @ 7.6 percent (finding 50)	84,799.04
(f)	Bond @ .89 percent (finding 51)	10,685.13
(g)	Total	$1,211,261.04

This amount is in addition to that already agreed to by the parties in Modifications Nos. P00048 and P00049.

The appeal is sustained in the amount of $1,211,261.04 for the price adjustment determined above, with interest pursuant to 41 U.S.C. § 611 from the date the 21 January 1997 certified claim was received by the contracting officer. The appeal is also sustained in the separate amount of $314,141.78 for the undisputed interest due on the amount allowed in Modifications Nos. P00048 and P00049. *See* finding 52. No interest is due on the latter amount. *See Firth Construction Co., Inc.*, ASBCA No. 51660, 00-1 BCA ¶ 30,587 at 151,047. The appeal is in all other respects denied.

Dated: 11 December 2003

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 53347, Appeal of T&W Edmier Corporation, rendered in conformance with the Board's Charter.

Dated:

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