ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
G & C Enterprises, Inc.	)	ASBCA No. 53067
	)	
Under Contract No. DAHA28-94-C-0002	)	

APPEARANCE FOR THE APPELLANT: Paul T. DeVlieger, Esq.
Harry R. Blackburn & Associates, P.C.
Philadelphia, PA

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Acting Chief Trial Attorney
MAJ Leslie A. Nepper, JA
CPT Peter G. Hartman, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE GRUGGEL

Appellant seeks an equitable adjustment in the amount of $747,412.69, plus Contract Disputes Act interest, for alleged extra work associated with the government's alleged direction to move stockpiled materials a second time to an off-site location. A three-day hearing was conducted at the Board's facilities. Only entitlement is before us for decision (tr. 9).

FINDINGS OF FACT

1. On 18 February 1994, the New Jersey Air National Guard (hereinafter, "government") awarded firm fixed-price Contract No. DAHA28-94-C-0002 to G & C Enterprises, Inc. for the construction of an Aircraft Parking Apron and Jet Fuel Storage Facility at McGuire Air Force Base, New Jersey, in the total amount of $10,380,390.00 (R4, tab 1).

2. The contract incorporated by reference the standard FAR 52.232-17 INTEREST (JAN 1991), FAR 52.233-1 DISPUTES (DEC 1991), FAR 52.236-3 SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984), FAR 52.236-5 MATERIAL AND WORKMANSHIP (APR 1984), FAR 52.236-7 PERMITS AND RESPONSIBILITIES (NOV 1991), FAR 52.236-10 OPERATIONS AND STORAGE AREAS (APR 1984), FAR 52.236-12 CLEANING UP (APR 1984), FAR 52.243-4 CHANGES (AUG 1987) and FAR 52.246-12 INSPECTION OF CONSTRUCTION (JUL 1986) construction contract clauses (R4, tab 1).

3. Section 02050 (DEMOLITION) of the technical specifications for both the parking apron and the jet fuel storage facility provides, *inter alia*:

> 3.3 DISPOSITION OF MATERIALS
>
> Title to materials and equipment to be demolished, excepting Government salvage items, is vested in the Contractor upon receipt of notice to proceed . . . .
>
> 3.3.1 Salvageable Items and Materials
>
> Contractor shall salvage items and materials to the maximum extent possible . . . .
>
> 3.3.1.1 Material Salvaged for the Contractor
>
> Material salvaged for the Contractor shall be stored as approved by the Contracting Officer and shall be removed from Government property before completion of the contract. Material salvaged for the Contractor shall not be sold on the site.

(Supp. R4, tabs 1-P, 1-R) The technical specification for the parking apron included an additional provision:

> 3.4.2 Unsalvageable Materials
>
> Concrete, masonry, and other noncombustible materials, except concrete permitted to remain in place, shall be disposed of off the site. Combustible materials shall also be disposed of off the site.

(Supp. R4, tab 1-P) Section 02210 (GRADING) of the technical specifications for the jet fuel storage facility provides, *inter alia*:

> 1.4 DEFINITIONS
>
> 1.4.1 Satisfactory Materials
>
> Materials classified in ASTM D 2487 as GM, GW, GP, and SW, and free from roots and other organic matter, trash, debris, and frozen materials and stones

larger than 15 centimeters in any dimension are satisfactory.

1.4.2 Unsatisfactory Materials

Materials which do not comply with the requirements for satisfactory materials are unsatisfactory. Materials classified in ASTM D 2487 as CH, Pt, OH, and OL are unsatisfactory. Unsatisfactory materials also include, refuse.

. . . .

3.1 CONSERVATION OF TOPSOIL

Topsoil shall be removed to full depth and shall be stored separate from other excavated materials and piled free of roots, stones, and other undesirable materials at a location approved by Contracting Officer Representative (COR). Topsoil shall be stockpiled in accordance with Standards for Soil Erosion and Sediment Control in New Jersey. Any surplus of topsoil from excavations and grading shall be removed from the site.

3.2 EXCAVATION

After topsoil removal has been completed, excavation of every description, regardless of material encountered, within the grading limits of the project shall be performed to the lines and grades indicated. Satisfactory excavation material shall be transported to and placed in fill areas within the limits of the work. All unsatisfactory material, including any soil which is disturbed by the Contractor's operations or softened due to exposure to the elements and water, and surplus material shall be removed from site . . . .

(Supp. R4, tab 1-R) Section 02222 (EXCAVATION, TRENCHING, BACKFILLING FOR UTILITY SYSTEMS) for both projects provides, *inter alia*:

2.1 MATERIALS

2.1.1 Satisfactory Materials

Satisfactory materials shall consist of any material classified by ASTM D 2487 as GW, GP, SW, SP, GW-GM, GP-GM, SW-SM, SP-SM, ML, SC, SM-SC, SM, GC, GM-GC, GM.

2.1.2 Unsatisfactory Materials

Unsatisfactory materials shall be materials that do not comply with the requirements for satisfactory materials. Unsatisfactory materials include but are not limited to those materials containing roots and other organic matter, trash, debris, frozen materials and stones larger than 3 inches, and materials classified in ASTM D 2487 as PT, OH, OL, CH, MH, CL, ML-CL. Unsatisfactory materials also include man-made fills, refuse, or backfills from previous construction.

. . . .

3.1 EXCAVATION

Excavation shall be performed to the lines and grades indicated. Rock excavation shall include removal and disposition of material defined as rock in paragraph MATERIALS. Earth excavation shall include removal and disposal of material not classified as rock excavation. During excavation, material satisfactory for backfilling shall be stockpiled in an orderly manner at a distance from the banks of the trench equal to 1/2 the depth of the excavation, but in no instance closer than 2 feet. Excavated material not required or not satisfactory for backfill shall be removed from the site or shall be disposed of by using in other grading areas. Grading shall be done as may be necessary to prevent surface water from flowing into the excavation, and any water accumulating therein shall be removed to maintain the stability of the bottom and sides of the

excavation. Unauthorized overexcavation shall be backfilled in accordance with paragraph BACKFILLING AND COMPACTION at no additional cost to the Government.

. . . .

3.1.1.6 Stockpiles

Stockpiles of satisfactory materials shall be placed and graded as specified. Stockpiles shall be kept in a neat and well drained condition, giving due consideration to drainage at all times. The ground surface at stockpile locations shall be cleared, grubbed, and sealed by rubber-tired equipment, excavated satisfactory and unsatisfactory materials shall be separately stockpiled. Stockpiles of satisfactory materials shall be protected from contamination which may destroy the quality and fitness of the stockpiled material. If the Contractor fails to protect the stockpiles, and any material becomes unsatisfactory, such material shall be removed and replaced with satisfactory material from approved sources at no additional cost to the Government. Locations of stockpiles of satisfactory materials shall be subject to prior approval of the Contracting Officer.

(*Id.;* Supp. R4, tab 1-P) Section 02225 (EARTHWORK FOR ROADWAYS AND AIRFIELDS) of the technical specification for both projects provides, *inter alia*:

1.5 DEFINITIONS

1.5.1 Satisfactory Materials

Satisfactory materials shall comprise any materials classified by, [sic] ASTM D 2487 as GW, GP, SW, SP, GWGM, GPGM, SWSM, SPSM, ML, SC, SMSC, SM, GC, GMGC, GM.

1.5.2 Unsatisfactory Materials

Unsatisfactory materials shall comprise any materials classified by ASTM D 2487 as Pt, OH, OL, CH, MH, CL, MLCL.

. . . .

1.9 UTILIZATION OF EXCAVATED MATERIALS

All unsatisfactory materials removed from excavations shall be disposed of in designated waste disposal or spoil areas. Satisfactory material removed from excavations shall be used, insofar as practicable, in the construction of fills, embankments, subgrades, shoulders, bedding (as backfill), and for similar purposes. No satisfactory excavated material shall be wasted without specific written authorization. Satisfactory material authorized to be wasted shall be disposed of in designated areas approved for surplus material storage or designated waste areas as directed. Newly designated waste areas on Government-controlled land shall be cleared and grubbed before disposal of waste material thereon. No excavated material shall be disposed of in such a manner as to obstruct the flow of any stream, endanger a partly finished structure, impair the efficiency or appearance of any structure, or be detrimental to the completed work in any way.

. . . .

3.1 STRIPPING OF TOPSOIL

Where indicated or directed, topsoil shall be stripped to a depth of 6 inches. Topsoil shall be spread on areas already graded and prepared for topsoil, or when so specified topsoil shall be transported and deposited in stockpiles convenient to areas that are to receive application of the topsoil later, or at locations indicated or specified. Topsoil shall be kept separate from other excavated materials, brush, litter objectionable weeds, roots, stones larger than 2

> inches in diameter, and other materials that would interfere with planting and maintenance operations.
>
> 3.2 EXCAVATION
>
> The Contractor shall perform excavation of every type of material encountered within the limits of the project, to the lines, grades, and elevations indicated and as specified herein. Grading shall be in conformity with the typical sections shown and the tolerances specified in paragraph FINISHING. Satisfactory excavated materials shall be transported to and placed in fill or embankment within the limits of the work. Unsatisfactory materials encountered within the limits of the work shall be excavated below grade and replaced with satisfactory materials as directed. Surplus satisfactory excavated material not required for fill or embankment shall be disposed of in areas approved for surplus material storage or designated waste areas. Unsatisfactory excavated material shall be disposed of in designated waste or spoil areas. During construction, excavation and fill shall be performed in a manner and sequence that will provide proper drainage at all times. Material required for fill or embankment in excess of that produced by excavation within the grading limits shall be excavated from the borrow areas indicated or from other approved areas selected by the Contractor as specified herein.

(*Id.*)

4. Amendment 0002 of the Solicitation for the contract herein contains "questions asked regarding the plans and specifications and their appropriate answers" including, *inter alia*:

> Question 44: Which of the following site generated materials can be reused for this project as subbase and/or crushed aggregate base course provided they meet the gradation requirements: (a) bituminous pavement, (b) asphalt penetrated aggregate and (c) concrete pavement, sidewalk, curb, slabs, foundations, etc.?

> Answer 44: Site generated materials may be reused only if they meet all applicable specifications of their proposed use (not only gradation requirements).
>
> Question 45: Does the contract provide an area for permanent stockpiling of suitable and/or unsuitable soils? If so, where; and does it require clearing and/or other site preparations?
>
> Answer 45: Disposal of suitable and/or unsuitable materials is to be done in designated areas, as specified, upon proposal by the contractor and subsequent review and approval by the Contracting Officer. No guarantee is made however that such disposal area is available on site. Bidders should consider adequate off site areas.
>
> Question 46: If some of the excavated soils, other than topsoil, are determined to be unsuitable for use as fill on this project, will the encounter [sic] receive additional compensation for disposal and replacement with off site borrow?
>
> Answer 46: No additional compensation will be provided for disposal and replacement of unsuitable excavated materials.

(Supp. R4, tab 1-00)

5. Contract drawing No. C-1 (KC-135 Aircraft Parking Apron (SITE PLAN)) depicts, *inter alia*, the location of a "TOPSOIL STOCKPILING AREA," in the shape of a square, at the southeastern side of and within the delineated project limits (supp. R4, tab 1-v at dwg. Nos. C-1, T-2; tr. 377-79, 381, 405-06, 588; exs. A-1, G-1). Note 1 of the site plan provides:

> LIMIT OF PROJECT IS APPROXIMATE WITH RESPECT TO REQUIREMENTS DUE TO ACCESS, UTILITIES AND DRAINAGE FEATURES [sic] RELOCATIONS AND CONNECTIONS (SEE DRAWINGS C-3, C-4, U-1, E-2 AND E-3 FOR RESPECTIVE DETAILS), AND TEMPORARY TOPSOIL STOCKPILING AREAS.

(*Id.*). The site plan contains a north-south orientation reference and is drawn on a scale of "1" - 100'" (*id.*). The "TOPSOIL STOCKPILING AREA" delineated on the site plan is located approximately 340 feet northwest of a terrain feature identified as elevation "x125.2". Said terrain feature is located outside of the "limit of project" approximately 320 feet southeast of the southeastern side thereof (*id.*). Additional terrain features identified as elevations "x119.7", "x118.7", "x118.7", "x119.8" and "x120.5" are located between the above-described "Topsoil Stockpiling Area" and elevation "x125.2" landmarks (*id*.). Appellant established and utilized a stockpile for topsoil at said Topsoil Stockpiling Area soon after beginning project performance through approximately October 1997 (tr. 373, 381-94, 404-13, 466-67, 531, 573-77, 584, 590-91; exs. A-1, G-1, G-7 – G-10, A-3-1 – A-3-3; findings 19-20(a), 23(c), 25(e), 26(b)). During the course of contract performance, appellant allowed this topsoil stockpile to become partially commingled with recycled bituminous by-product material, recycled concrete by-product material, organic materials and debris (*id*.; findings 18, 21(c), 22(c), 25(b)). As the size of the stockpile increased during appellant's construction activities, the shape of the stockpile expanded and became rectangular with its length extending to the north and south (*id.*). Comparison of the pertinent construction site photographs in evidence (*i.e.*, exs. G-10 dtd. 15 September 1994, G-7 dtd. 19 February 1997, G-8 dtd 8 August 1997 and G-9 dtd. 2 October 1997) fully corroborates that the location of the stockpiled materials in issue remained static in the Topsoil Stockpiling Area vicinity throughout construction until its partial removal during August 1997 and contained organic materials (*id*.). Each of these photographs shows a tree line and a power line situated in the same location relative to the stockpile in issue (exs. G-7 – G-10).

6. Sometime during early May 1994, one of appellant's subcontractors began "vibro replacement field operations" pursuant to § 02243 (VIBRO REPLACEMENT) of the technical specification (R4, tabs 2, 2(A); supp. R4, tab 1-R; tr. 417-19). Appellant was allegedly unable to attain proper densification of the soils when utilizing the vibro replacement method due to the presence of "too many fines" (*id*.). After numerous communications between the government, its consultants, appellant and appellant's subcontractor regarding the feasibility, *vel non*, of achieving proper densification of the soils using the methodology prescribed in § 02243, the parties agreed sometime during July 1994 to try an alternative method of soil densification — *i.e.*, surcharge loading (R4, tabs 2-10; supp. R4, tabs 50-59, 63; tr. 420-23). The evidentiary record does not adequately resolve whether proper densification could have been achieved under § 02243 (*id*.; *passim*). Surcharge loading involved "placement of temporary load (earthwork) equivalent to the design load over the tank site to consolidate the underlying soil" (R4, tabs 10-12; tr. 142-44, 420). Appellant proposed that the surcharge method of achieving required soil densification would be utilized at no additional cost to the government (R4, tabs 3-12; tr. 420-23). Utilization of said surcharge method resulted in the addition of approximately 9,730 cubic yards of surcharge material at the site (R4, tabs 34, 48, 49 at ex. N, 50; tr. 61-2, 145, 328, 331, 343, 417, 424, 595). Appellant subsequently requested

and was granted permission to use the surcharge material as fill material on an adjacent hangar project (R4, tab 50 at 2; supp. R4, tab 63; tr. 424-38, 594-96; exs. G-3, G-4). Appellant did, in fact, use the surcharge material as fill on appellant's adjacent hangar project (*id.*; gov't br. at 18, 65; app. reply br. at 6).

7. Between 31 August 1994 and 20 March 1995, government representatives observed and documented approximately ten instances wherein appellant's personnel utilized improper soil management practices contrary to specification requirements — *e.g.*, use of unacceptable stockpiles of borrow material containing organic materials and debris, unapproved fill material placed before proper sub-grade preparation, use of recycled bituminous materials for backfill and stabilization and placement of material containing clumps of clay (R4, tabs 13-22). In each of these instances, appellant complied with government-issued directions to remove the unsuitable material (*id.*).

8. During the April-May 1995 period, appellant obtained approximately 8000 cubic yards of base course material from the "New Hope" quarry and placed it on the western portion of the parking apron area (R4, tabs 23-5; tr. 334-37, 417, 596-98). The "New Hope" base course material did not, however, "meet the specified gradation requirements" and, at the government's direction, was removed and replaced by appellant (*id.*; R4, tabs 26-8; tr. 445-50; ex. G-5). By Request For Information (RFI) 150, dated 28 August 1995, appellant requested permission to use the New Hope base course materials as "fill material under the parking apron and roadways, select material subbase course under asphalt paving, and, as a deviation to the specification, as base course under asphalt paving . . . ." (R4, tabs 28-9). On 30 August 1995, the government granted appellant's request with respect to these proposed uses of the New Hope material (*id.*; tr. 334-37). Appellant thereafter placed said New Hope materials at various locations on the project site; none of the New Hope materials were ever stockpiled (*id.*; tr. 338-42, 445-50, 596-98).

9. By RFI 167, dated 3 November 1995, appellant asked the contracting officer, as follows:

> As a result of removal of unsuitable sub-grade materials, there is a considerable amount of stockpiled unsuitable soil which is surplus (it can not be used anywhere). Per above referenced specification [§ 02225.3], we request your direction of a designated waste or spoil area. Extra costs are associated with this, as the material is in the way of ongoing construction operations.

(R4, tabs 32-3; tr. 545) By letter, dated 6 November 1995, to the contracting officer, appellant explained that the "unsuitable soils" described in RFI 167 resulted from "extra

work to existing subgrade as identified by Change Order Requests No. 055 (unsettled) and No. 061 (unsettled) and No. 074" and "not for contaminated materials but were unsuitable subgrade material, which was below the contract excavation limits for the apron" (R4, tabs 34-5). The "surplus unsuitable soils" amounted to approximately 4,000 cubic yards of spongy material (R4, tabs 34, 50; tr. 328, 546-47, 561, 563, 567-68, 583-84, 636-37).

10. By RFI 212, dated 17 April 1996, appellant asked the contracting officer to "[p]rovide designated waste disposal or spoil areas for unsatisfactory excavated materials . . . [and p]rovide designated areas approved for surplus material storage or designated waste areas for satisfactory excavated materials" (R4, tab 37). Appellant did not quantify the volume of "unsatisfactory excavated materials," "surplus material" or "satisfactory excavated materials" (*id*.). Appellant referenced §§ 02225.1.9 and 02225.3.2 of the specification which address excavation and utilization of excavated materials associated with § 02225 (EARTHWORK FOR ROADWAYS AND AIRFIELDS) (*id*.; finding 3). Appellant never "proposed" any on or off-site "disposal areas" for either suitable or unsuitable materials as required by Amendment 0002 of the specification (finding 4, *passim*).

11. By RFI 213, dated 17 April 1996, appellant asked the contracting officer to provide "disposal direction[s]" for "debris" uncovered during excavation of utilities and retention ponds (R4, tab 38). Appellant did not either quantify the volume of "debris" encountered during excavation of the utilities and the retention ponds or identify the nature of said debris (*id*.; R4, tab 40). Again, appellant never "proposed" any on or off-site "disposal areas" for either suitable or unsuitable material (finding 10).

12. By memorandum for the record, dated 6 June 1996, Captain Novello, a Base Civil Engineer at McGuire AFB, recommended that the government direct appellant to remove approximately 4400 cubic yards of unsuitable material (the "3689 cubic yards, say 4000cy" of unsuitable material described in RFI 167, *supra*), plus an increase of 10%, "bringing the total volume to 4400 cy" (R4, tab 41). With respect to RFI nos. 212 and 213, *supra*, Captain Novello recommended that "all unsuitable materials encountered during utility installation (which includes detention basin excavation)" be removed from the site at the contractor's expense in accordance with § 02222.3.1 of the specification.[1] Captain Novello also stated:

[1] Section 02222 is entitled "EXCAVATION, TRENCHING, BACKFILLING FOR UTILITY SYSTEMS" and is thus properly applicable to the debris uncovered during excavation of the utilities and retention (*i.e.*, detention) ponds described in RFI 213 (findings 3, 11). RFI 212, however, addresses unsatisfactory excavation material, surplus material and satisfactory excavated materials that are subject to the provisions of § 02225 (EARTHWORK FOR ROADWAYS AND AIRFIELDS) (findings 3, 10).

> The additional volume of the stockpile was generated by the contractor utilizing the overburden soil from the jetfuel storage tank consolidation, the use of the New Hope material and the volume of suitable material stockpiles contaminated by improper soil stockpile management practices. This volume of material is to be removed from the site at the contractors [sic] expense.

(R4, tab 41) By letter dated 14 June 1996, the contracting officer responded to RFIs 167, 212 and 213 by directing appellant "to haul the excess/unsuitable materials from the job site" (supp. R4, tab 84). The government stated that appellant would be paid only for hauling "3,689 square [sic] yards of materials" and requested that appellant provide "a cost estimate associated with this change" (*id*.). Further, ". . . additional materials to be hauled are the responsibility of the contractor" (*id*.).

13. By letter, dated 14 June 1996, appellant proposed to "[h]aul off-base 4,000 CY of excess unsuitable materials generated by change order work; (currently stockpiled on site as previously negotiated)" for the sum of $499,989.00 (R4, tab 42). The government's estimate to haul off-base 4400 cubic yards of unsuitable material was $81,000.00 (*id*.).

14. (a). The government apparently issued another consolidated response to RFI nos. 167, 212 and 213, with attached sketch of "Additional Stockpile Area", dated 31 October 1996 (R4, tabs 43-43(A), 49 at ex. C, H; finding 12).[2] The sketch shows that the location of the trapezoid-shaped "Additional Stockpile Area" was situated southeast and outside of the designated project limits (*id*.; tr. 39-40, 50, 93, 116-18, 152-55, 307, 325-26, 548-50, 556-59, 620-21). The eastern side of the "Additional Stockpile Area" abutted and was parallel to the terrain feature identified as elevation "x125.2" (R4, tabs 43-43(A), 49 at ex. C, H; finding 5). The southwestern side of the Additional Stockpile Area ran parallel to the line on the sketch that depicted a "30" R.C.P." that connected "MH-28" to "MH-29" (*id*.). The northwestern corner/western side of the Additional Stockpile Area appears to be approximately 120 feet southeast from the southeastern corner of the project limits delineated on the site plan (*id*.).

[2] The referenced document is a "memorandum" from LT COL Sain, the Base Civil Engineer, to then CPT Simms, the contracting officer. Sain's memorandum begins, "1. The purpose of this letter . . ." (R4, tabs 43, 43(A), 49 at ex. C, H). Both parties accept this document as constituting the government's communicated response to RFI nos. 167, 212 and 213 (app. br. at 2; gov't br. at 26).

(b). The government's response to RFI 167 stated:

> The contractor reported that the existing stockpile consists of approximately 20,000CY of excess material. Through change orders 47 (677cy), 55 (1600cy), 61 (459cy) and 74 (952cy) the total amount of unsuitable excess material agreed to by the Government is 3688cy. The remaining volume of 16,000cy is equal to the volume of fill generated by the soil overburden for the fuel tank foundation consolidation and the New Hope material. G&C requested permission to use this material onsite, and [sic] was used on both contracts. As far as the material being in the way, the contractor was aware of the limits of construction, and should not have stockpiled any material within the confines of construction.

(R4, tabs 43-43(A), 49 at ex. C, H; tr. 78-80)

(c). With respect to RFI 212, the government simply stated: "[s]ee attached sketch for stockpile area" (*id*.).

(d). With respect to RFI 213, the government stated:

> The contractor reports approximately 4000cy of material remains to come out of the pond area. This material is to be placed per the sketch stockpile area. The contractor is to provide the Government the cut sheets for this area.

(*Id*.). Neither party has directed our attention to the "cut sheets" that appellant was to provide to the government (*passim*).

(e). The contemporaneous documentary record does not establish that appellant or its representatives had already utilized any portion of the trapezoid-shaped, 31 October 1996 "Additional Stockpile Area," except for a small pile of debris, prior to appellant's 23 July 1997 request for a government decision (*passim;* findings 14(d), 25(f)). In this regard, the contemporaneous documentation is silent as to any activity by or on behalf of appellant that could reasonably be construed as relating to removal of stockpiled materials from the rectangular-shaped, on-site Topsoil Stockpiling Area to the trapezoid-shaped, off-site "Additional Stockpile Area."

15. By memorandum, dated 21 February 1997, Captain Novello informed the contracting officer that he had "found a contractor that will remove a portion up to the full amount of the approximate 4000cy of excess soil" generated by "government directed change orders for the removal of unsuitable soils under the apron. This removal will be at no cost to the Government, or G&C Enterprises" (R4, tab 44; see findings 9, 12).

16. (a). By letter dated 23 July 1997, appellant's president, Mr. Gray, informed the government, *inter alia*:

> . . . [O]ne of the critical items will be excavation of the retention basin. Unfortunately, the stockpile of excess excavation material is obstructing that evolution and will have to be removed or relocated immediately.
>
> It has long been, and continues to be, G & C's position that removal or relocation of the stockpile is the Government's responsibility. The contract contemplated such a stockpile and the contractor was directed to locate it in its present location. As you know, some time ago G & C submitted a proposal to remove this material to a landfill . . . .

(R4, tab 45; tr. 31) Mr. Gray requested a government decision with respect to the stockpile removal question (*id.*).

(b). Mr. Gray apparently then believed that the stockpile of excess excavation material would be permanently located in the original Topsoil Stockpiling Area location, as depicted on the site plan and unilaterally expanded by appellant during the contract performance period (*see* findings 5, 25(b, e-g), 26(b-c), 27). Mr. Gray does not mention or otherwise account for the "temporary" nature of the Topsoil Stockpiling Area set forth in Note 1, Site Plan, the provisions of amendment 0002 and the applicable off-site disposal requirements of the technical specification (*id.*; findings 3-4).

(c). The retention basin area was located west of the westernmost edge of the original "Topsoil Stockpiling Area" depicted on the site plan (supp. R4, tab 1-v at dwg. no. C-1; exs. A-1, G-1; finding 5). The westernmost edge of the "Additional Stockpile Area," identified by the government on 31 October 1996, appears to be located more than 200 feet away from the retention basin area and was outside of the project limits (*id.*; R4, tabs 43-43(A), 49 at ex. C; finding 14(a)).

17. Sometime between the late fall of 1996 and July 1997, Cashin Associates, P.C. ("Cashin") was retained by the surety on the contract involved herein to assist appellant with completion of the project (tr. 29-31, 103-04, 600-01; R4, tab 46; supp. R4, tab 98 at 3, 16). In turn, Cashin subcontracted the remaining completion work to C&T Associates, Inc. ("C&T") (tr. 46, 73-76, 104-11; app. R4, tab 104(G)). By letter dated 6 August 1997, Cashin informed the contracting officer that appellant had commenced removing the stockpile of excess soil stored at the project site, but would temporarily suspend its removal operations to enable the contracting officer to issue a decision as to whether appellant or the government was responsible for removing the stockpile (R4, tab 46; tr. 520-21).

18. By letter to appellant dated 7 August 1997, the contracting officer stated that the government did not recognize either appellant's 23 July 1997 letter (finding 16(a)) or Cashin's 6 August 1997 letter (finding 17) as constituting a "claim" (R4, tab 48). The contracting officer expressly disavowed any intention of issuing a contracting officer's "Final Decision" therein. Rather, he cited appellant's continuing obligation under the Disputes clause of the contract to continue to perform the contract and stated that "it is my intention to resolve this matter and to expedite any and all remaining work" (*id*.). The contracting officer directed that "the disposal of the questioned excess soil shall be the responsibility of the contractor at no cost to the Government" based upon five "factors":

> a. A portion of the excess soil was generated by the contractor based on the contractor's decision to place a soil surcharge in the dike area to accomplish soil compaction and consolidation of the tank farm. This is approximately 9,730 cubic yards (see enclosure #1 for sketch of [the surcharge] stockpile).
>
> b. An additional portion of the excess soil was generated by the contractor re-use of the base course material in the parking apron. The parking apron base course was rejected for failure to meet specifications and was re-used on site. This is approximately 8,243 cubic yards (see enclosure 2 for quantity summary).
>
> c. An additional portion of the excess soil was generated by the mis-management of the stockpile material. Unsuitable material was mixed with satisfactory material, thereby rendering it unsuitable in the project.

> d. There was a volume of approximately 4,000 cubic yards generated by various change orders (itemization contained in . . . memorandum, dated 6 June 1996). This material was removed by the Government at no cost to the contractor . . . .
>
> e. It should be noted that in amendment #2 to the solicitation, that question and answer #46 clearly states that "no additional compensation will be provided for disposal and replacement of unsuitable excavated materials" It should be further noted that in question and answer #33 in amendment #1 to the solicitation, it discusses the "analysis indicated that borrow material will be needed". This clearly demonstrates that a contractor would need to bring in material to accomplish the project, not have an excess stockpile.

(*Id*.). The contracting officer did not direct appellant to move the "excess soil" to any specific location on or off the Base. Instead, appellant was directed to "dispose" of said soil "at no cost to the government" (*id*.). Enclosure #1 (the sketch of the actual surcharge soil stockpile) shows the height thereof as of various dates when the surcharge materials were first brought on-site by or on behalf of appellant during the July-August 1994 time period. The stockpile depicted thereon is identified as "SP-3" and "is located on undisturbed soil." The surcharge stockpile is depicted as being 164 feet wide at its base tapering up approximately 21-25 feet to a width of 120 feet at the top thereof (*id*.; *see* findings 25(c), (g)).

19. By letter dated 12 August 1997, appellant told the contracting officer that "in accordance with your direction [*i.e.*, the 7 August 1997 letter from the contracting officer to appellant, *supra*] and in the interests of maintaining job progress, [appellant] has begun removing the stockpiled materials" (R4, tabs 46(A), 48). The actual removal of the stockpiled materials in issue herein was performed by C&T's subcontractor, Stanley Horner, Jr., Inc. ("Horner") (tr.104-11; supp. R4, tab 88; finding 26(d)). Appellant did not then specify the location from which the stockpiled materials were removed or the new location where the stockpiled materials were re-deposited by or on behalf of appellant (*id*.). Appellant reserved "its rights and remedies under the Contract Disputes Act" since appellant did "not accept the Contracting Officer's position that removal of the stockpile is not the Government's responsibility . . ." (*id*.).

20. (a). Cashin's on-site representative, Mr. Vagell, contemporaneously maintained a "daily diary" with respect to activities at the contract site during, *inter alia*,

August-September 1997 (tr. 172-76, 357-65). He testified that he observed a subcontractor (Horner) removing the stockpile from a rectangular-shaped, off-site area, situated in the general vicinity of the government-designated "Additional Stockpile Area,"[3] during the period 5-28 August 1997 to a location "off of base" (tr. 173-75, 307, 316-17, 358-65; exs. A-1, G-1). Mr. Vagell contemporaneously stated in his diary that Horner removed approximately 18,000 cubic yards of "dirt, debris, whatever you want to call it out there, in that stockpile" (tr. 360-65). Mr. Vagell testified that the stockpile was almost entirely comprised of unsuitable materials — *i.e.*, stone, concrete, organics (tr. 308-09).

(b). The evidentiary record does not contain any invoices from Horner that purport to represent the cost of removing the stockpiled materials off-base (tr. 61-70, 315).

21. Appellant's 17 May 2000 certified claim for an equitable adjustment in the amount of $1,245,192.45 for appellant's off-site disposal of excess soil was submitted by Cashin and certified by appellant's then authorized attorney, David L. Rost, Esq. (R4, tab 49; app. R4, tab 106; tr. 647-49).

(a). Appellant contended that the excess soil generated by the surcharge method of compaction ("approximately 9,730 cubic yards") was caused by the inadequacy of the "Vibro-Replacement" method set forth in the specification to achieve the required soil consolidation and compaction (R4, tab 49 at 2-3). According to appellant, its removal of excess soils, generated in connection with the surcharge method, to the "Government designated stock pile area" – *i.e.*, "designated waste or spoil areas" referenced in §§ 02225.1.9 and 02225.3.2 – "clearly equated to work, which was above and beyond the scope of the original contract documents, some of which was performed at no cost to the Government" (*id.*). Appellant stated that neither the Topsoil Stockpiling Area, depicted on the site plan, nor the Additional Stockpile Area, identified by the government on 31 October 1996, were of adequate size "for holding the entire volume of excess soil" (*id.*). Appellant did not, however, then specifically identify the location either from which the "excess" materials were removed or the new location where the "excess" materials were re-deposited by or on behalf of appellant (*id.*).

[3] Mr. Vagell testified that "the stockpile was always there" from August 1997, the time he first arrived at the job site as an employee of Cashin (tr. 173-74, 477). He testified that "there" was located, to his recollection, in the rectangular-shaped, off-site area identified earlier during the hearing by Mr. Stos, Cashin's on-site representative (tr. 31, 93, 173-74; ex. A-1; finding 23(a)). He acknowledged that he could not "locate it by surveying it . . ." and "did not have any Global Positioning devices to locate it. So it's just where it is." (Tr. 173-74)

(b). With respect to the excess material generated by appellant's reuse of the non-compliant New Hope materials (*i.e.*, the rejected base course -- "approximately 8,243 cubic yards"), appellant stated that it placed said excess material in the "Government-designated stockpile area" thereby satisfying all applicable specification requirements (*i.e.*, § 02233.3.7.2). Appellant claimed that it was owed compensation both for "off-site disposal" of "the material generated by unacceptable base course material" and for the "extra work performed relating to removing and replacing that material" (R4, tab 49 at 2-5).

(c). With respect to appellant's estimated quantity of "3,000" cubic yards of excess soil rendered unsuitable due to appellant's mismanagement of the stockpiles, appellant stated that its only contractual obligation was to place said soils in Government-designated areas (R4, tab 49 at 2, 5, ex. N). Since "the Government-designated areas were inadequate," the excess soil required off-site disposal (*id.* at 5). According to appellant, the suitability or unsuitability of the soils was not relevant since the soils were "excess" (*id.*)

(d). With respect to the "approximately 4,000 cubic yards" of soil "generated by various change orders," appellant admitted that said soil was removed by the government "at no cost" to appellant (R4, tab 49 at 2, 5).

(e). Appellant's "ESTIMATED COST TO DISPOSE EXCESS SOIL" represents that 44 days of labor (13 individuals) and "fuel/greese [sic]" would be expended during removal and off-site disposal of the excess soil (R4, tab 49 at ex. N). A "loader" and 10 "tandem dump trucks" were to be used for "2.25" months, and a "Tractor/Dozer" was to be used for "1.0" months during the removal and off-site disposal of the soils (*id.*). Appellant's "dump fees" would have amounted to $12.00 per cubic yard for the "20,973" cubic yards of excess soil (*id.*).

22. (a). By final decision, dated 24 August 2000, the contracting officer denied appellant's 17 May 2000 claim in its entirety (R4, tab 50). With respect to the 9,730 cubic yards of soil allegedly generated by the surcharge methodology, the contracting officer contended that the parties had agreed that said method was not a change under the contract (*id.* at 1-2). The contracting officer also noted that appellant "reused surcharge soil for backfill beneath the hangar slab in another concurrent contract [at McGuire AFB] and the excavation for oil water separator #2 of the aircraft parking apron project" (*id.*).

(b). With respect to the 8,243 cubic yards of soil allegedly generated by the defective base course material, the government cited FAR 52.246-12(f) INSPECTION OF CONSTRUCTION (JUL 1986) as establishing contractor responsibility for the "segregation and removal of rejected material from the premises" (*id.* at 1-2).

(c). With respect to the "excess soil . . . generated by the mismanagement of the stockpile material," the government contended that appellant allowed the "crushed concrete from existing runway apron areas" to become "mixed with bituminous materials, removed topsoil materials, removed embankment materials and removed base course materials" (*id.* at 1, 3). Appellant's alleged mismanagement "resulted in "unsuitable materials generated from [appellant's] failed base course materials and the contractor's recycling operations" (*id.* at 3). In accordance with § 02222.3.1.1.6 of the specification, appellant's failure to "protect the stockpiles" thus causing "material to become unsatisfactory" allegedly gave rise to the requirement to remove and replace such material "with satisfactory material at no additional cost to the government" (*id.*). The quantity of excess soil caused by mismanagement of the stockpile is not set forth in the final decision.

(d). With respect to the approximately 4,000 cubic yards of unsuitable or contaminated soils generated by various change orders, the government agreed that disposal thereof "was the responsibility of the Government" (*id.* at 3).

(e). Neither appellant nor the government ever contemporaneously stated that either appellant or its representatives removed 20,000 cubic yards of material from or in the vicinity of the "Topsoil Stockpiling Area" shown on the site plan to the "Additional Stockpile Area" shown on the government's sketch (tr. 570-71, 582, 633-35, 639; findings 9-19).

(f). Appellant timely appealed the final decision to the Board where the appeal was docketed as ASBCA No. 53067. In its complaint, appellant sought damages of $747,412.69 for "costs incurred by G&C in removing stockpiled excess soil from Government property" (compl. at 3). Appellant did not appeal as to the New Hope issue (the balance of the claimed damages).

23. (a). At trial, Cashin's project representative (Mr. Stos) testified that the stockpiled materials from the "detention pond" portion of the site and the "surcharge, . . . the Mount Hope material and . . . the mismanagement [soils]" were first removed from the on-site stockpile area, designated on the site plan as the "Topsoil Stockpiling Area," to a rectangular-shaped, off-site location, situated approximately 100 feet east thereof (tr. 32, 39-40, 49-51, 60-1, 73-4, 78-80, 93-9, 102-03, 116-18; app. R4, tab 104(G); exs. A-1, G-1; finding 5). Mr. Stos identified this off-site location as the "Additional Stockpile Area" designated by the government on 31 October 1996 (tr. 78-80, 93-8; R4, tab 49 at ex. H; ex. A-1; finding 14(a)). His description of the new off-site removal location shifts that location approximately 100-150 feet north of the actual "Additional Stockpiling Area" designated by the government (*id.*). Mr. Stos did not specify the dates when the stockpiled materials were removed off-site to the "Additional Stockpile Area" (*id.*).

(b). According to Mr. Stos, the government subsequently directed appellant to "remove that entire stockpile . . . off the base" sometime "in 1997" — *i.e.*, by letter to appellant dated 7 August 1997 (tr. 40-6, 52-3; R4, tab 48).

(c). Mr. Stos also testified that he probably first saw the rectangular-shaped stockpile "towards the ends [sic] of 1996, beginning of 1997" (tr. 30-1, 123-26; exs. A-1, G-1). He stated:

> Well, there was an issue and a dispute between the government and G&C, meaning that there was a pile of soil on-site or off-site. Wherever it was at that time I wasn't sure exactly where it was, but there was a pile of soil that G&C contended was not their responsibility to remove. The government contended that it was the contractor's responsibility to remove.

(*Id*.). According to Mr. Stos, most of the stockpile was comprised of suitable materials (tr. 108-09).

24. (a). Major Simms assumed the duties of contracting officer for the contract involved herein "in late 1995" (tr. 323-24).

(b). Major Simms "saw" the same rectangular-shaped, off-site location described, *supra*, by Mr. Stos as constituting the actual "off-site disposal" location to which appellant first moved the stockpile from the "Topsoil Stockpiling Area" (tr. 326-27, 333; ex. A-1; finding 23(a)). Major Simms did not testify either as to the frequency of his visits (*i.e.*, daily, weekly, monthly or intermittent) to the site. He did not specify when or how appellant allegedly moved said stockpile (*passim*).

(c). With respect to the excess soil generated by the surcharge method, Major Simms stated that the government and appellant agreed to use said method "to compact the ground and then it could be removed" (tr. 330-32). He stated that appellant removed said surcharge material "[t]o the designated area" — *i.e.*, the off-site location described, *supra*, by Mr. Stos (tr. 333; finding 24(b)). Major Simms stated that he did not "know" the basis of his contractual position relative to asking appellant "to move it again" (*id*.).

(d). With respect to the defective New Hope base course materials, Major Simms testified that he did not know whether appellant disposed of the total quantity of said materials in the so-called off-site disposal area (tr. 337-38, 340-42). He also testified that he did not know the quantity of "mismanaged soils contained in the stockpile at issue" (tr. 343).

(e). With respect to the nature of the materials comprising the stockpile in issue, Major Simms acknowledged that his denial of appellant's claim herein was not premised on any government contention that the materials allegedly removed by appellant were "predominantly made up of grading and trenching and utilities material" (tr. 352-53; R4, tabs 49(b), 50, 97).

(f). Major Simms testified that he never "formally expand[ed] the contract limits of this project or of this contract" (tr. 356).

25. (a). Mr. Pearce "was employed by Lewis Berger [the government's consulting engineer firm for the contract herein] as the resident engineer on the project, in an advisory capacity for the [government]" (tr. 370-73, 502-04). From approximately August 1994 through contract completion, Mr. Pearce was present at the job site on a "full time" daily basis except for "leave" periods (tr. 373).

(b). Mr. Pearce testified that appellant utilized the "Topsoil Stockpiling Area," designated on the site plan, as the embankment stockpile area during the construction period. According to Mr. Pearce, the actual location of the embankment material stockpile expanded to extend both to the north and south of the originally delineated "Topsoil Stockpiling Area as the unilateral result of appellant's construction activities and ultimately covered a rectangular-shaped area approximately 260 feet in length and 100 feet in width" (tr. 377-81, 393, 404-13, 467-73, 534; ex. G -1 – G-2(A), G-7 – G-10, A-3-2 – A-3-3). The southernmost portion of appellant's embankment materials stockpile included an area approximately 75 feet in length and 100 feet in width located south (*i.e.*, outside) of the project boundary limits (*id*.). Mr. Pearce personally observed appellant's stockpiles of bituminous by-product and concrete re-cycling by-product (*i.e.*, crushed concrete) and their location(s) immediately north of the actual embankment materials stockpile area but within the project limits during construction (tr. 384-87, 400-10, 467-68, 495-97; exs. A-1, G-1, G-6 – G-10, A-3-2, A-3-3). Appellant also conducted "re-cycling operations" immediately west of the crushed concrete stockpile (*id*.). The bituminous by-product, crushed concrete and pre-crushed, re-cycled concrete stockpile(s) were stored by appellant on the existing/planned aircraft taxiway situated adjacent to and immediately north of the "Topsoil Stockpiling Area", as extended, portion of the project site (*id*). Appellant allowed the concrete and bituminous by-product materials to partially commingle with the abutting embankment materials over the course of construction activities (tr. 382-94, 404; exs. G-7 – G-8, G-10). Appellant also allowed organics with roots to grow on the embankment materials (tr. 393-95, 406; exs. G-8, G-10). Mr. Pearce estimated that more than half of the stockpile consisted of suitable materials (tr. 487-89).

(c). With respect to the surcharge soil, Mr. Pearce testified that appellant initially established a surcharge stockpile on or about August 1994 approximately 1200 feet west of the "Topsoil Stockpiling Area", *supra* (tr. 421-31; exs. G-1, G-3 – G-4; R4,

tab 1(V)). He further testified that by September 1994 said surcharge stockpile had been used for compaction, had been removed and was used in its entirety for the sub-base portion of the primary hangar, the oil water separator and a nearby portion of a pipeline (tr. 432-41, 481; exs. G-1, G-3 – G-4, G-10).

(d). With respect to the New Hope crushed stone for base course material, Mr. Pearce testified, without contradiction, that said material contained a "percentage of fines [that] exceeded the maximum allowable" for placement as sub-base beneath the aircraft apron (tr. 441-43; finding 8). He stated unequivocably that appellant utilized the New Hope materials elsewhere throughout the project and explained "this was potentially the most expensive material . . . imported to the site . . . so it would be the last material to just dump on the stockpile for disposal" (tr. 444-50, ex. G-5; finding 8).

(e). With respect to the embankment materials stockpile located at the "Topsoil Stockpiling Area," shown on the site plan, Mr. Pearce established that the actual rectangular-shaped embankment stockpile was still located at the original square-shaped, site plan location, as extended to the north and south by appellant during construction operations, during the February-August 1997 period (tr. 404-06, 451-54, 475-77, 494-95, 534; exs. G-1, G-7 – G-10). He also established that said embankment materials stockpile was "being knocked down and used as the topsoil of" the detention pond area and the area to the west thereof during October 1997 and that the remaining concrete and bituminous by-product piles and the portion of the embankment stockpile consisting of commingled materials and organics were hauled away by Horner during August 1997 (tr. 404-13, 455-56, 477-91, 546-47, 565; ex. G-9; findings 19, 20(a), 26(d)).

(f). With respect to the area designated by the government as the off-site "Additional Stockpile Area," Mr. Pearce stated that the south portion of the original "Topsoil Stockpiling Area," as extended by appellant, actually "may have come close to the northwest corner of this designated additional stockpile [area] but essentially it did not fill this area" (tr. 477-87; exs. G-1, G-7 – G-9; R4, tab 43(B)). He noted that appellant only placed a "pile of debris . . . some timber material, particularly trees that had been excavated in the detention pond area" in the government designated "Additional Stockpile Area" as of October 1997 (*id*.). In fact, as depicted in the photographs, the same pile of debris is present at the same location during the period from 19 February 1997 through 2 October 1997 (exs. G-7 – G-9). The evidentiary record does not establish that this particular pile of debris was, in fact ever removed by or on behalf of appellant (*passim*). No other materials were placed by or on behalf of appellant in said government-designated additional stockpile area except for the approximate 4,000 cubic yards of "unsuitable soil" described in RFI 167 which had been removed by the government prior to August 1997 (tr. 560-64, 569-70; findings 9, 12-13, 15, 18, 21(d), 22(d)).

(g). Mr. Pearce's above-described testimony is fully corroborated by contemporaneous photographs of the project site activities and aerial composite photographs of specified dates (exs. A-1, A-3-1 – A-3-3, G-1 – G-10).

26. (a). LT COL Sain performed the duties of Technical Representative for the contracting officer on the contract involved herein from its inception through completion thereof as well as performing the duties of the Base Civil Engineer (tr. 573-76, 601, 608). He visited the site either on a daily basis or weekly basis, "according to the construction activities that were going on, and the problems that were associated with the construction" (tr. 576).

(b). LT COL Sain testified that appellant utilized the "Topsoil Stockpiling Area," *supra*, during 1997 as its stockpile location for approximately 18,000 – 20,000 cubic yards of materials comprised of topsoil suitable for use and other materials he described as "junk, in terms of perhaps some concrete, perhaps some asphalt, perhaps some organic materials [*i.e.*, trees] not suitable for use" (tr. 577, 584, 588-93, 610-11; exs. A-1, G-1). LT COL Sain stated that no more than half of the stockpile was comprised of suitable materials (tr. 593, 611). He stated that the actual rectangular-shaped area, as utilized by appellant, included the square-shaped "Topsoil Stockpiling Area" depicted on the site plan and extended both north and south thereof (tr. 590, 593, 627-28; ex. G-1).

(c). With respect to the trapezoid-shaped area later designated by the government as the off-site "Additional Stockpile Area", LT COL Sain stated that said area was "never . . . utilized for stockpiling material" by appellant (tr. 587-88; exs. A-1, G-1). He testified further that the "Additional Stockpile Area" was within 100 feet of the rectangular-shaped "Topsoil Stockpiling Area," as extended by appellant during contract performance (*id*.; tr. 589-90, 620-21).

(d). LT COL Sain stated that the rectangular-shaped stockpile comprised of approximately 18,000 – 20,000 cubic yards of material located in the vicinity of the "Topsoil Stockpiling Area" was either "re-utilized on the site" or hauled away to an off-base location on behalf of appellant by Horner (tr. 593, 610-11). He explained that approximately one-third to one-half of said stockpile material was used by or on behalf of appellant for "dressing up, so to speak, the retention pond area, conforming it to the shape and line that the detention basin needed to become" (*id*.; tr. 599, 627-28).

(e). LT COL Sain opined that appellant's utilization of the surcharge material resulted in "an equivalent volume of material . . . left over that equated to the amount generated by the surcharge" (tr. 604-05, 609; R4, tab 47). He also opined that appellant's utilization of the New Hope base course materials, as was the case with the utilization of the surcharge materials, resulted in an equivalent volume of material left over that equated to the quantity of the New Hope materials (tr. 605; R4, tab 47).

27. None of appellant's personnel who worked on the contract involved herein during the construction period testified at the hearing of this appeal (*passim).* None of C&T's personnel who completed the project involved herein testified at the hearing of this appeal (*passim*). None of Horner's personnel who removed the stockpile materials involved herein testified at the hearing of this appeal (*passim).*

DECISION

The linchpin of appellant's argument is that it "fulfilled its disposal obligations under the parties' Contract . . . regardless of their source of origin" when it allegedly complied with the government's alleged direction of 31 October 1996 to remove the stockpiled materials from the on-site Topsoil Stockpiling Area to the government-designated, off-site Additional Stockpile Area (app. br. at 4-6). It argues that "[s]ince the parties' Contract did not require G&C to again move the stockpiles off of the government's property as the government directed in this case, G&C is entitled to be compensated for its costs in performing the extra work" (*id.* at 4, *see also* app. reply br. at 9).

In support of its position, appellant contends that a portion of the excess stockpiled excavation materials was caused by the government's defective vibro replacement specification and the resultant utilization of the surcharge method of soil densification (app. br. at 5-7). With respect to the New Hope materials, appellant states that the material was not stockpiled but, rather, was "used . . . as fill on the site, as authorized" and is thereby "irrelevant to [appellant's] claim for its costs of removing the stockpiles at the end of the project" (*id*. at 9). Appellant also relies on several, allegedly binding factual admissions by the contracting officer during his testimony while simultaneously attacking both the basis of the government's denial as asserted at trial and the credibility of other government witnesses.

The government denies that appellant removed the stockpiled materials from the on-site Topsoil Stockpiling Area to the off-site Additional Stockpile Area before it again removed said materials to an undisclosed off-base location (gov't br. at 46-54; gov't reply br. at 5-6, 13-14). Instead, the government asserts that appellant "reused material which was suitable for reuse and hauled away material [*i.e.*, from the Topsoil Stockpiling Area directly to the undisclosed off-base location] which had been rendered unsuitable for reuse because of appellant's negligence" (gov't br. at 67). Appellant, thus "did only what was required by the contract, not extra work" (gov't reply br. at 15).

Appellant has the burden of proving by a preponderance of the evidence that, *inter alia,* it removed the stockpiled materials twice — first, from the on-site Topsoil Stockpiling Area to the off-site Additional Stockpile Area designated by the government on 31 October 1996; and, again from the Additional Stockpile Area to the undisclosed off-base location. *See Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994) (*en banc*) ("the contractor has the burden of proving the fundamental facts of liability and

damages de novo"); *accord T&W Edmier Corp.*, ASBCA No. 53347, 04-1 BCA ¶ 32,483 at 160,681, *aff'd*, 112 Fed. Appx. 56 (Fed. Cir. 2004). Appellant has not satisfied this burden. Appellant has not pointed to any contemporaneous documents or credible testimony that adequately establishes that it or its representatives first removed the stockpiled materials from the-on-site, rectangular-shaped Topsoil Stockpiling Area to the off-site, trapezoid-shaped Additional Stockpile Area.

Nothing in the contemporaneous documentary record adequately supports the contention that appellant or its representatives removed any stockpiled materials from the rectangular-shaped Topsoil Stockpiling Area, as extended during construction,[4] between the time (*i.e.*, 31 October 1996) when the government identified the off-site, trapezoid-shaped area (*i.e.*, the Additional Stockpile Area) and the time (*i.e.*, 5-28 August 1997) when Horner actually removed the stockpiled materials to the undisclosed, off-base location (findings 9-20(a)). In fact, the evidentiary record herein only establishes that the stockpiled materials were removed off-site on only one occasion — when Horner removed them to the off-base location during August 1997 (*id.*; finding 26(d)).

The testimonial basis of appellant's argument is equally lacking. None of appellant's own personnel who were present at the project from the beginning of construction ever testified (finding 27). The testimony (*i.e.*, Mr. Stos, Mr. Vagell, Major Simms[5]) adduced by appellant during its case in chief did not identify who

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[4] The plain language of note 1 on the site plan provides that "LIMIT OF PROJECT IS APPROXIMATE WITH RESPECT TO REQUIREMENTS DUE TO . . . TEMPORARY TOPSOIL STOCKPILING AREAS" (finding 5). Appellant's unilateral expansion of the original, on-site Topsoil Stockpiling Area during construction to include adjacent areas north and south of the "LIMIT OF PROJECT" does not, therefore, transform said location into an off-site status (findings 5, 25(b, e), 26(b)).

[5] Despite appellant's frequent urgings (app. br. at 7; app. reply br. at 2), Major Simms' testimony does not constitute an admission of entitlement that is conclusively binding on the government in these proceedings and our disposition of this appeal is not confined to the grounds identified by the contracting officer in his final decision. Our decisions are *de novo*. In this regard, appellant's reliance on *Wilner, supra* and *Integrated Logistics Support Systems International, Inc. v. United States*, 47 Fed. Cl. 248 (2000), is misplaced. In its decision in the *Wilner* case, the Federal Circuit simply stated that "[s]ubject to the Federal Rules of Evidence, in any given case contracting officer testimony is certainly admissible." (24 F.3d at 1403) Indeed, *Wilner* stands for the proposition that a contracting officer's decision is not "an evidentiary admission of the extent of the government's liability" and "[s]pecific findings of fact [by the contracting officer] . . . shall not be binding in any subsequent proceeding." *Wilner* at 1402 n.7, 1403.

allegedly removed the stockpiled material before August 1997 from the original site plan location, as extended during construction, to the government-designated Additional Stockpile Area (findings 20(a), 23(a), 24(b)). Their respective testimonies also did not state with adequate specificity either when or how the alleged removal operation was accomplished during the 31 October 1996 - 4 August 1997 period (*id*.). Nor did their respective testimonies address, much less refute, the photographs of the project area taken during construction which conclusively show that the stockpiled material was not removed from its original location, as extended during construction, until after 4 August 1997 when Horner removed some portion thereof to the off-base location (findings 5, 20(a), 23(a-c), 24(a-b), 25(a-g), 26(a-d)).

We also note that the credibility of Mr. Stos is undermined by the fact that he was not "sure exactly where it [*i.e.*, the stockpile that was allegedly first removed from the original, rectangular-shaped Topsoil Stockpiling Area to the Additional Stockpile Area] was" -- *i.e.*, "on-site or off-site" (findings 23(a-c)). Moreover, Mr. Vagell identified the same site described by Mr. Stos but stated that he could not "locate [the stockpile as of August 1997] by surveying it . . ." and "did not have any Global Positioning devices to locate it. So it's just where it is" (finding 20(a)).

We are also cognizant of Major Simms' testimony that he "saw" the off-site location to which the stockpile was first removed and his statement that it was moved again (findings 24(b-c)). His testimony, however, is not bolstered by any evidence that he visited the site on a regular basis and is directly contradicted both by the credible eye-witness accounts of his own personnel (*i.e.*, Mr. Pearce, LT COL Sain) who did monitor and visit the project site on a daily or weekly basis throughout the construction period (*id*.; findings 25(a-g), 26(a-d)) and by the contemporaneous photographs of the site which establish that nothing but a small pile of debris was ever placed in the

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The same holds true for a contracting officer's testimony that adds nothing to his decision (*id.* at 1400). And in *Integrated Logistics Support Systems International, Inc., supra,* the Court of Federal Claims only observed that apparently contradictory testimony by a contracting officer, government counsel's concession that the government's counterclaim was weak, and an absence of other evidence equated to a "fail[ure] to introduce sufficient evidence to prevail on [the government's] counterclaim." *Id.* at 261. Viewed properly, Major Simms' testimony, while it certainly constitutes an item of evidence, is "*not in any sense final or conclusive*. [The government], whose utterance it is, may nonetheless proceed with [its] proof in denial of its correctness; it is merely an inconsistency which discredits, in a greater or less degree, [its] present claim and [its] other evidence." 4 WIGMORE, ON EVIDENCE §§ 1058-59 (Chadbourne rev. 1972) (emphasis in original); *cf. Technitrol, Inc. v. United States,* 440 F. 2d 1362, 1370 (Ct. Cl. 1971).

government-designated location — *i.e.*, the Additional Stockpile Area (findings 5, 25(b-g)).

The preponderance of the evidence thus establishes that the stockpile materials were only partially removed during August 1997 from the on-site Topsoil Stockpiling Area, as extended during construction, directly to an off-base location (findings 5, 9-12, 14(b-e), 16(b), 25(e-g), 26(c-d)).

With respect to the suitability, *vel non*, of the materials that comprised the stockpile, appellant failed to offer any eyewitness testimony from either its own representatives, representatives of C&T, or representatives of Horner with first-hand knowledge of the composition thereof (finding 27). According to Cashin's Mr. Vagell, the stockpile removed by Horner essentially consisted of unsuitable materials — stone, concrete, organics (finding 20(a)). Cashin's Mr. Stos disagreed, however, and stated that most of the stockpile removed by Horner consisted of suitable materials — detention pond excavation, surcharge materials, New Hope base course materials — and some soil mismanagement materials (findings 23(a, c)). Neither Mr. Vagell nor Mr. Stos were present at the site during the time when the stockpile was constructed by or on behalf of appellant (findings 17, 20(a), 23(c)). Mr. Stos' statement that the stockpile consisted, to some undefined extent, of surcharge materials and New Hope base course materials is incorrect and contrary to the evidence as discussed, *infra.* The government's consulting engineer, Mr. Pearce testified, on the basis of first-hand knowledge, that a bit more than half of the stockpile consisted of suitable embankment materials with the remainder thereof consisting of unsuitable concrete and bituminous by-product materials and organics with roots (findings 25(a-b)). LT COL Sain essentially agreed, testifying, on the basis of first-hand knowledge, that the stockpile was comprised of approximately equal amounts of suitable material — topsoil — and unsuitable material — concrete, asphalt, organics (findings 26(a-b, d)).

The contemporary photographs of the site taken before, during and after Horner's removal operations establish that unsuitable materials (concrete, asphalt and organic materials) were removed by Horner and suitable materials were reused by or on behalf of appellant at the site (findings 25(b, e, g)). Messrs. Vagell, Pearce and Sain agree that the unsuitable materials were, in fact, removed by Horner (*id*.; findings 20(a), 26(b, d)). Messrs. Pearce and Sain agree that suitable materials were used by or on behalf of appellant on the project site or on adjacent project sites at the Base (findings 25(e), 26(d)). We find the above-described evidence with respect to the disposition of the unsuitable and suitable portions of the stockpile to be credible and persuasive. We therefore reject Mr. Stos' testimony to the extent that it stands for the proposition that unsuitable material was not removed by Horner and suitable material was only removed from the site and not utilized elsewhere on the project or adjacent projects by or on behalf of appellant (*id.*; findings 23(b-c)).

With respect to the notion that the stockpile included actual surcharge and New Hope base course materials, the contemporaneous documents, eyewitness testimony and photographs of the site taken during construction establish that appellant utilized the surcharge and New Hope materials elsewhere on the project involved herein as well as on adjacent projects (findings 6, 8, 24(c-d), 25(c-d, g), 26(d)). We therefore reject any contention that the stockpile was comprised of either surcharge or New Hope materials (*id*.; findings 18, 21(a-b), 23(a), 24(c-d)).

The government has abandoned its earlier position that the use of the surcharge and New Hope materials displaced an equivalent volume of material which was added to the stockpile over the course of construction on the basis that all of the suitable material in the stockpile were reused on site, not hauled away (gov't br. at 65-67; gov't reply br. at 7; *see*, findings 6, 8, 14(b), 18, 21(a), 25(e), 26(d, e)). Appellant maintains that the portion of the displaced materials allegedly forming a part of the stockpile resulted from a defective vibro-replacement specification that necessitated the use of surcharge to achieve soil densification (app. br. at 6; app. reply br. at 9). However, appellant has failed to prove that the vibro replacement method of soil densification could not be achieved (finding 6). We have also determined, *supra*, that the suitable materials contained in the stockpile were used on the project site or on adjacent project sites. With respect to the New Hope material, appellant does not assert that it displaced an equal volume of material that ultimately became a part of the stockpile (app. br. at 9; app. reply br. at 6). This basis of appellant's claim is thus denied.

We next address the propriety, *vel non*, of the removal of the stockpiled materials from the Topsoil Stockpiling Area, as unilaterally expanded by or on behalf of appellant during contract performance. The contract scheme for the disposition of suitable surplus materials and unsuitable materials is set forth in §§ 02050 (Demolition), 02210 (Grading), 02222 (Excavation . . . For Utility Systems) and 02225 (Earthwork For Roadways and Airfields) of the technical specification and Amendment 0002 of the contract (findings 2-4).

The materials hauled away during August 1997 by Horner from the expanded Topsoil Stockpiling Area included the remaining piles of concrete and bituminous by-product materials as well as the portion of the excavation stockpile that contained these same by-product materials (findings 5, 25(b, e, g), 26(b, d)). These by-product materials were generated as a result of demolition operations performed at the site by or on behalf of appellant (findings 2-4, 6, 20(a), 25(b, e, g), 26(b, d), 27). Pursuant to § 02050.3.3 of the specification, title to these by-product materials was vested in appellant (finding 3). Section 02050.3.3.1 requires that appellant remove salvaged by-product materials "from Government property before completion of the contract" (*id.*). Horner's removal of these materials to an off-base location thus fully comported with the contract requirements and did not constitute extra work.

We have found, *supra*, that the satisfactory embankment materials that comprised a portion of the stockpile were utilized by or on behalf of appellant at various locations throughout the site and were not hauled off-base by Horner (findings 5, 20(a), 25(b, e, g), 26(b, d), 27). As such, the utilization of satisfactory materials fully comports with the requirements of §§ 02210.1.4.1, 02210.3.1-02210.3.2, 02222.2.1.1, 02222.3.1, 02225.1.5.1. 02225.1.9 and 02225.3.2 of the specification and Amendment 0002 of the specification and cannot constitute extra work (findings 3-4).

With respect to the approximate 4,000 cubic yards of "unsuitable sub-grade material" that formed the basis of appellant's RFI 167, we have determined that this material was removed by the government without cost to appellant (findings 9, 12-13, 15, 18, 21(d), 22(d), 25(f-g), 27). Consequently, this material was not hauled away by Horner and can not constitute extra work.

Insofar as any of the "unsatisfactory excavated materials" and "debris" referenced, respectively, in RFIs 212 and 213 may have been included in the materials removed by Horner, §§ 02050.3.4.2, 02222.2.1.2, 02222.3.1, 02225.1.5.2, 02225.1.9 and 02225.3.2 direct that such materials, depending on the source thereof, be "disposed of off the site," "removed from the site" or "disposed of in designated waste disposal or spoil areas" (finding 3). Amendment 0002 of the contract provides, *inter alia*, that "[n]o guarantee is made however that such disposal area is available on site. Bidders should consider adequate off site areas" and "[n]o additional compensation will be provided for disposal and replacement of unsuitable excavated materials" (finding 4). Although appellant never proposed any on-site or off-site location for these alleged unsatisfactory excavated materials, the government did, ultimately, designate a disposal area for, *inter alia*, said materials (findings 3-4, 10-12, 14(a, c)). We cannot and will not speculate as to why appellant did not utilize the designated off-site Additional Stockpile Area. In any case, Horner's alleged removal and hauling of these alleged materials is ultimately not compensable in view of Amendment 0002, *supra*, which provides that no additional compensation will be provided therefore.

In accordance with the foregoing discussion, appellant's appeal is denied in its entirety.

Dated: 26 July 2005

J. STUART GRUGGEL, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continue)

I concur

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

I concur

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

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. 53067, Appeal of G & C Enterprises, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals