ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
McKenzie Engineering Company	)	ASBCA No. 53374
	)	
Under Contract No. DACA25-96-C-0044	)	

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OPINION BY ADMINISTRATIVE JUDGE YOUNGER

In this appeal under a contract to perform concrete work on the intake bays at a hydropower facility, appellant claims additional costs based upon acceleration, alleged interference, and the alleged cumulative impact of changes. Respondent denies that there was any acceleration, interference, or cumulative impact, and asserts that it paid for any changes that occurred. Only entitlement is before us. We dismiss the appeal in part and deny it in part.

FINDINGS OF FACT

A. *The Contract*

1. By date of 18 September 1996, respondent awarded Contract No. DACA25-96-C-0044 to appellant to perform concrete work both upstream and downstream of a spillway and powerhouse known as Building No. 160 at the Rock Island Arsenal in Rock Island, IL. The contract work was more particularly described as:

> Remove and replace concrete on upstream and downstream retaining walls, seal large vertical crack in downstream retaining wall, remove and replace concrete in the spillway (walls, floor, and ceiling), remove and replace concrete on wall of powerhouse, clean erosion and undermined areas on downstream side of powerhouse and fill with concrete, removal of bulkhead storage structure, and fabrication and installation of new bulkhead.

(R4, vol. 6 of 6, tab C at 1)

2. Building No. 160, where the contract work was to be performed, is a hydroelectric powerhouse that spans the Sylvan Slough, which is located between Arsenal Island and Sylvan Island near Rock Island, IL (tr. 1/100). The main channel of the Mississippi River, on its southward course, flows between Davenport, IA and Arsenal Island; on the other side of the Sylvan Slough lies the City of Rock Island (tr. 1/100; ex. G-5 at X2). Building No. 160 was built in 1917 and contains eight identical upstream turbine intake bays through which water in the slough flows through the powerhouse (*id.*; tr. 1/71-72, 1/79-80). The slough itself is a shallow body of water in which silt, rocks, tree limbs, entire trees and other debris accumulate in the area leading into the intake bays of Building No. 160 (tr. 1/83-84).

3. The contract contained various standard clauses, including FAR 52.211-10, COMMENCEMENT, PROSECUTION AND COMPLETION OF WORK (APR 1984), which specified a performance period of 180 days from receipt of notice to proceed; FAR 52.211-12, LIQUIDATED DAMAGES - CONSTRUCTION (APR 1984), which set the sum for each day of delay at $290.00; FAR 52.211-18, VARIATION IN ESTIMATED QUANTITY (APR 1984); FAR 52.236-2, DIFFERING SITE CONDITIONS (APR 1984); FAR 52.236-3, SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984); FAR 52.236-7, PERMITS AND RESPONSIBILITIES (NOV 1991); FAR 52.243-4, CHANGES (AUG 1987); and FAR 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) (R4, tab C at 00700-21, 00700-89, 00700-90, 00700-92, 00700-101, 00700-121, 00800-1).

4. The contract also included the bidding schedule from the solicitation, with the components of appellant's bid filled in for various items. Additive Item No. 0042, Flashcoat Shotcrete on Downstream Side of Powerhouse, is relevant here. It reflected that appellant's price for the specified quantity of 2,571 square feet was $96,412.50. (R4, vol. 6 of 6, tab C at 00010-5) Flashcoat shotcrete is a thin overlay of sand and cement that is applied with a spray gun (tr. 1/280) and principally serves an aesthetic purpose (tr. 2/197-98).

5. The contract also contained special contract requirements. Paragraph 1.4 of section 00800, EXCLUSION OF PERIODS IN COMPUTING COMPLETION SCHEDULES, provided that "[n]o work will be required during the period between 15 November and 15 May inclusive, and such period has not been considered in computing the time allowed for completion." The contractor could, however, perform work during this period with the prior approval of the contracting officer. (R4, vol. 6 of 6, tab C at 00800-1) It is undisputed that, taking this winter exclusion period into account, the original contract completion date was 25 October 1997 (compl., ¶ 5; answer, ¶ 5). In addition, paragraph 1.22, TIME EXTENSIONS FOR UNUSUALLY SEVERE WEATHER[] (ER 415-1-15) (31 OCT 89), specified the procedure for determination of such extensions in accordance with the DEFAULT clause (*see* finding 3) (R4, vol. 6 of 6, tab C at 00800-12-13).

6. The contract also contained specifications. Section 01560, ENVIRONMENTAL PROTECTION, included paragraph 1.1, SUBMITTALS, which provided in part that, "[w]ithin 10 calendar days after Notice to Proceed and prior to commencement of the work at the site," the contractor was to "[m]eet the representatives of the Contracting Officer to review and alter [its] proposal as needed for compliance with the environmental pollution control program." (R4, vol. 6 of 6, tab C at 01560-1) Section 01560 also contained paragraph 3.5, PROTECTION OF WATER RESOURCES, which required appellant to "comply with applicable Federal, State, County and Municipal laws concerning pollution of rivers and streams while performing work under this contract" (*id*. at 01560-3).

7. Specification section 02140, PROTECTION AND DEWATERING, contained paragraph 3.1.1, Protective Structures. Paragraph 3.1.1.5, General, provided in part that "[t]he upstream and downstream turbine bay bulkheads and spillway bulkheads will be made available to the Contractor at the site." (R4, vol. 6 of 6, tab C at 0-2140-2) In addition, specification section 02223, SILT, LOOSE ROCK AND DEBRIS REMOVAL, contained Part 3, EXECUTION. Paragraph 3.1, REMOVAL OF MATERIALS, provided in paragraph 3.1.2 that "[t]he sequence and procedures proposed (including any permits or other required documentation) for the accomplishment of removal work shall be submitted, . . . for approval of the Contracting Officer before any construction operations will be allowed" (*id*. at 02223-1). Paragraph 3.1.3 provided in part that "[m]aterials removed shall be disposed of outside the limits of Government property at the Contractor's responsibility in accordance with all applicable local, state, and Federal laws, codes, and rules" (*id*.).

8. The contract also contained drawings. The following are of particular relevance. (a) Drawing C1, sheet 3 of 12, SITE PLAN, provided in part at note 2 that "bay 8 must be dewatered when the spillway is dewatered. Existing upstream bulkheads . . . are stored on the east side of the building." Note 5 of the same drawing

provided that "THE CONTRACTOR SHALL FIELD VERIFY ALL ELEVATIONS AND DIMENSIONS BEFORE WORK BEGINS." Note 6 on the drawing provided that "[r]eference drawings are drawings of record, included solely for the contractor's benefit. No required work under this contract is shown on the reference drawings. The drawings are not 'as built' and may not necessarily represent actual field conditions. The drawings may not have been reproduced to scale." (b) Drawing S2, sheet 5 of 12, UPSTREAM RETAINING WALL REPAIR, contained an unnumbered note providing that "existing rock surface may be rough. Inspect before constructing cofferdam to verify condition for design to insure successful dewatering." (c) Drawing S4, sheet 7 of 12, DOWNSTREAM RETAINING WALL REPAIR, contained an unnumbered note pointing to an area on the wall requiring concrete repair and stated "verify existing concrete conditions before designing cofferdams." (d) Drawing S5, sheet 8 of 12, RESURFACING DOWNSTREAM SIDE OF POWER HOUSE, depicted, at Section A, a cross section of Piers Nos. 1–7, but at "no scale." The sides of the pier depicted in profile are covered by an "existing steel form." The top of the pier has a pentagonal cap, and an arrow directs the contractor to "remove 4" of concrete and replace with formed concrete. Slope to drain." (Ex. G-5)

B. *Performance*

9. By date of 19 July 1996, before issuance of the solicitation, the Rock Island Arsenal had obtained from the Enforcement Section of the Corps of Engineers' Rock Island District Regulatory Branch a two-year Clean Water Act permit under Nationwide Permit 3 (Maintenance) for the work contemplated under the contract (ex. G-9 at 10-11; tr. 2-91). In granting the permit, however, the Regulatory Branch stipulated that "[c]offerdam(s) associated with the project can not be addressed at this time based on the information provided. When plans are available for the cofferdam(s), a copy should be submitted to this office for review and appropriate authorization necessary before construction commences" (ex. G-9 at 11). We find that the Regulatory Branch added this stipulation because the Arsenal had left the design of cofferdams on the project up to the contractor, and did not want to restrict the construction methods that a contractor would use once the contract was awarded (tr. 2/92).

10. Appellant acknowledged receipt of notice to proceed on 28 October 1996 (R4, vol. 1 of 6, tab B-2).

11. The parties held a preconstruction conference on 4 November 1996. The resident engineer prepared a memorandum, which both he and Mr. McKenzie signed, regarding the conference (ex. G-32). From this contemporaneous memorandum, and from testimony at trial, we find no credible evidence that the parties discussed environmental permits at the conference. The memorandum refers only to a confined space entry permit (*id*. at 2), which is not relevant, and reflects generalized discussion of

appellant's responsibility to comply with specification section 01560 (*id*., ¶ f at 5; *see* finding 6). While Mr. McKenzie testified that respondent's personnel agreed at the preconstruction conference with his proposed use of a clamshell bucket (tr. 1/149), we find from the contemporaneous memorandum of the conference and from other testimony that no such discussion or agreement occurred (ex. G-32; tr. 2/212, 216-18, 3/70).

12. The contract did not require a Critical Path Method schedule (tr. 1/153), and by date of 16 January 1997, appellant submitted to respondent a Construction Progress Chart, which was in the nature of a bar chart portraying the planned sequence of construction (R4, vol. 1 of 6, tab B-3). On this chart, appellant divided the contract work into nine principal features. Line Item No. 2 was described as "Spillway Walls (consisting of protect & dewater, remove & replace concrete, remove & replace non-shrink grout in ceiling beams, shotcrete walls)" (*id*. at 2). Line Item No. 3 was described as "Downstream Face of Powerhouse (consisting of protect & dewater, concrete removal and shotcrete, repair pier 8, clean & paint crane rail & brackets, remove bulkhead storage steel, flashcoat, repair crane rail ledge)" (*id*.). By date of 10 February 1997, the resident engineer approved the schedule (*id*. at 1).

13. By date of 17 March 1997, appellant tendered its submittal under paragraph 3.1.2 of specification section 02223 (*see* finding 7), describing its planned sequence and construction procedures for the removal of silt, loose rock and debris. Appellant stated:

> 1. The spillway and downstream scour areas will be flushed out simply be [sic] opening the related bulkheads or turbines before work commences. This naturally washing out should remove the vast majority of unwanted materials from the work sites.
>
> 2. Method #2 will be to hook up our air lift sucker, which is a[n] L-shaped 12" diameter pipe system. This unit will underwater remove silt, small rock and various other materials. The system operates totally underwater.
>
> 3. Method #3 will be to crane-clamshell remove the various earthen, rock, and debris materials, again in an underwater method.
>
> 4. If a large flood occurs this year as predicted, hopefully the flood will wash clear much of the present debris and silt. . . .

(Ex. G-30 at 3) With respect to "Method #3," we find that a clamshell bucket, or clamshell, is a piece of excavation equipment suspended from a crane with sides that bifurcate from the hinge point. It opens and closes much like a clam shell and is lowered below water to dredge subsurface silt and debris (tr. 1/91-92, 188, 2/14-17, 109).

14. Appellant did not include with its 17 March 1997 submittal copies of any of the "permits or other required documentation," called for by paragraph 3.1.2 of specification section 02223 (*see* finding 7), for any of the construction methods that it described (tr. 3/72-73). Respondent returned the submittal by date of 17 June 1997. In his remarks following review, the resident engineer directed appellant to "[p]rovide copy of permit or other materials showing that permits are not required" (ex. G-30 at 2).

15. By letter to the administrative contracting officer dated 14 May 1997, appellant requested "a 2 week time extension," with no additional costs, due to high flow levels on the Mississippi River and the predicted time necessary before the river slowed sufficiently to permit appellant to place its marine equipment on the downstream end of the job site (ex. G-12).

16. We find that, before work started in June 1997, respondent's inspector alerted Mr. McKenzie to the possibility that appellant might need a permit to use a clamshell bucket. While Mr. McKenzie testified that the inspector "read me the specification concerning the environmental part of it and he said you need to go to the [Corps administration building] and – and get a permit" (tr. 1/189), the inspector testified, and we further find, that he believed that the absence of permits with appellant's March 1997 submittal (*see* findings 13, 14) meant that it "wasn't good" and that later, on site:

> [Mr. McKenzie] told me he was going to clamshell and lift the silt or sediments, move them underwater, never break the surface or drop them. I said, "My understanding is that may be a problem and you should probably check and see if you've got the appropriate permit or need a permit."

(Tr. 2/257)

17. We find that the record is equivocal regarding an industry practice establishing which party, owner or contractor, typically applies for environmental permits in the Rock Island area (tr. 2/97-99, 126-27, 134-36, 3/88-89). Donna Jones, the chief of the Enforcement Section of the Regulatory Branch (*see* finding 9), testified, and we further find, that her office would look to whoever has the best knowledge of the work to prepare the application (tr. 2/135).

18. In June 1997, Mr. McKenzie appeared at the Enforcement Section of the Corps of Engineers' Rock Island District Regulatory Branch to inquire about the necessary permits for the contract work (tr. 2/92-93). He met with Ms. Jones. The testimony of the two participants to this meeting conflicts in several particulars, and we need not resolve the majority of the differences. We find, however, that Ms. Jones advised Mr. McKenzie that the requisite permits at both the federal and state levels would take at least four to six weeks, assuming that there were no complications (tr. 1/192-93, 2/112-114). We further find that, as Ms. Jones testified, the Enforcement Section imposed "no requirement that there be a submittal approval by a contracting officer" before applying for a permit (tr. 2/95) and, as the inspector testified, appellant could employ any construction methodology for which it had received a permit (2/279-80).

19. As a result of his exchange with Ms. Jones, Mr. McKenzie concluded that it was pointless to pursue his planned method of using a clamshell bucket for cofferdam excavation (*see* finding 13) and decided to resort instead to an airlift pump or an airlift suction unit (tr. 1/195). We find that the airlift pump or suction unit employed by appellant functioned in a manner similar to a vacuum cleaner, except that it employed a combination of compressed air and water to create a suction reaction with the water in the river so that silt and other material could be sucked up and shot out to the side of the area being excavated (tr. 1/195-96). By contrast to the clamshell, however, the airlift unit could not handle the plentiful quantities of trees and other large debris in the slough (*see* finding 2), and appellant removed them by crane after a diver lashed them together with steel cable (tr. 1/196-99).

20. Instead of mobilizing on 16 May 1997, after the end of the winter exclusion period (*see* finding 5), appellant did not mobilize on the upstream side of the job site until 23 June 1997, due to the rise in the Mississippi River in May from heavy rainfall (tr. 1/159-60).

21. Appellant began using its airlift unit on or about 24 June 1997, and the excavation process took approximately 17 work days (tr. 1/201, 206). While Mr. McKenzie testified that the same work with a clamshell would have consumed two days, it is undisputed that the clamshell would have been more efficient than the airlift unit (tr. 1/206, 2/214; R4, vol. 1 of 6, tab B at 6). We find that, while the inspector on the project advised appellant that he should not use a clamshell bucket without inquiring about permits, no Corps of Engineers employee told Mr. McKenzie that he could not employ a clamshell (tr. 1/160-61, 189, 2/169, 239, 258), and no employee directed or urged Mr. McKenzie to use an airlift unit (tr. 2/169, 239, 258).

22. By bilateral Modification No. P00002 dated 1 October 1997, the parties agreed to certain changed work, to increase the contract amount by $15,087, and to extend the performance period "by six calendar days to and including 27 October, 1997"

(R4, vol. 1 of 6, tab B-7 at 2). We find that the parties addressed impact in their negotiations regarding this modification and "it was determined that all impact costs had been considered in the agreed upon price" (*id*. at 5; tr. 2/148, 261).

23. By letter to the administrative contracting officer dated 27 October 1997, appellant requested a time extension, with no additional costs, "for the remaining working time left in this year – up through November 15, 1997" because, *inter alia*, "high river stages in this 1997 working season greatly delayed the planned work on this contract" (R4, vol. 1 of 6, tab B-9 at 5).

24. By letter to the area engineer dated 4 November 1997, appellant notified respondent that "we will want additional compensation for extra job costs, including extended overhead, labor costs, equipment costs, and other costs resulting from inefficiencies incurred by work late in the normal working season" (ex. A-5). Appellant also stated that "[w]e will also consider that the contract will remain open over the winter, and will be expecting extended overhead costs as damages for delays" (*id.*).

25. By unilateral Modification No. P00003 dated 8 December 1997, respondent increased the contract price to pay for additional work on a crack in the downstream retaining wall. The modification was issued under the DIFFERING SITE CONDITIONS clause (*see* finding 3). Because of the urgency of the situation, the modification was issued as an unpriced notice to proceed and appellant was directed to submit a cost proposal and an itemized accumulation of costs once work commenced to permit a tracking of costs before agreement. (R4, vol. 1 of 6, tab B-8 at 2-3, 6) We find that this additional work was not included in the claim. Respondent had internally designated this additional work as case 006 (*id*.). Respondent also internally designated the only three items of additional work that were included in the claim as cases 003 (*see* finding 31), 004 (*see* finding 33) and 005 (*see* finding 36). With respect to these three items, respondent requested proposals, but appellant did not provide them. Instead, appellant "elected to pursue payment [for cases 003, 004 and 005, but not case 006] through his attorney . . . and has formally certified the request for adjustment previously submitted . . . ." (R4, vol. 3 of 6, tab B-34 at 3)

26. By bilateral Modification No. P00004 dated 3 February 1998, the parties agreed to change paragraph 1.4 of section 08800 (*see* finding 5) because of the high river level to provide that "[n]o work will be required during the period between 15 November and 15 May inclusive and no work will be required during the period between 15 November 1996 and 22 June 1997 inclusive and such periods have not been considered in computing the time for completion." The parties also agreed that, "because of this modification the contract completion date is extended from 31 October 1997 to 7 June 1998." They did not change the contract price. The parties included a release in the modification, which provided as follows:

> It is further understood that the adjustment provided herein constitutes compensation in full on behalf of the contractor, his subcontractors and suppliers, for all costs and markup directly or indirectly attributable to the change ordered, for all delays related thereto, and for performance of the change within the time frame stated.

(Ex. G-A at 1-2; R4, vol. 1 of 6, tab B-9 at 1-2; tr. 1/183-84)

27. With respect to Modification No. P00004 and the accelerated performance allegedly caused by its delayed issuance, we find that:

(a) as Mr. McKenzie admitted (tr. 1/303-04), the parties had a verbal understanding before the modification was issued that appellant would receive a time extension (tr. 2/151-52, 206-07, 256), part of the delay in issuance being attributable to uncertainty over when the flood waters would recede, permitting commencement of work (tr. 1/167-68, 303-04, 2/151, 205-07, 3/28-30), and part of the delay being attributable, as the resident engineer testified, to "basically an error in my office's part" (tr. 2/151, 205);

(b) Mr. McKenzie was unable to specify the date on which appellant's performance was accelerated by the delayed issuance of the modification (tr. 1/300-03);

(c) appellant had already incurred whatever costs were associated with the time extension when it executed the modification (tr. 1/304);

(d) appellant sought time alone (tr. 1/181-83, 2/208, 292, 299-300), and the underlying business clearance memorandum states that "[a] technical, cost, and price analysis of the contractor's [27 October 1997] proposal [*see* finding 23] was not performed since this change involves time only. Impact costs were not evaluated for the same reason." (R4, vol. 1 of 6, tab B-9 at 3);

(e) while the parties did not address cost (tr. 2/208), there is no indication on the face of the modification itself of any reservation of rights (R4, vol. 1 of 6, tab B-9 at 1-2), and we find no evidence of any unarticulated intention to reserve any right to claim costs for delayed issuance of the modification (tr. 2/299-300; *see also* tr. 3/113-14); and

(f) while Mr. McKenzie perceived that the delay in issuing the modification constituted a threat to assess liquidated damages, spurring appellant to accelerate and work during the exclusionary period (tr. 1/173, 184-85, 300-03), liquidated damages were never assessed (tr. 1/173) and there is no credible evidence that any government

official ever threatened to assess them or directed appellant to work during the winter exclusionary period.

28. By bilateral Modification No. P00005 dated 23 February 1998, the parties agreed to increase the contract price by $7,000, with no additional time, to repair the crack in the downstream retaining wall (R4, vol. 1 of 6, tab B-11 at 1-2).

29. It is undisputed that the contract was substantially complete on 23 February 1998 (R4, vol. 1 of 6, tab B-10; tr. 2/152).

30. By unilateral Modification No. P00006 dated 17 August 1998, respondent increased the contract price to pay for additional work on downstream scour holes. The modification was issued under the VARIATION IN ESTIMATED QUANTITY clause (*see* finding 3). Respondent adjusted the quantity of bid Item No. 027, which called for filling in the eroded rock areas on the downstream side of the powerhouse with concrete, and increased the contract price by $3,000 with no change in either unit price or time. (R4, vol. 2 of 6, tab B-17 at 1-2) The modification was issued unilaterally after appellant returned it unsigned with proposed changes to the terms of the release (*id.* at 7-8). We find that this additional work was not included in the claim. Respondent had internally designated it as case 011, which differentiates this additional work from cases 003, 004 and 005, the three items of additional work that were included in the claim (*see* finding 25).

31. By unilateral Modification No. P00007 dated 9 June 1999, respondent increased the contract price to pay for additional work, *inter alia*, in supplying steel reinforcement on the upstream facing of the powerhouse walls (R4, vol. 3 of 6, tab B-34 at 1). The modification was issued under the DIFFERING SITE CONDITIONS clause (*see* finding 3). We find that the items covered by the modification were included in appellant's claim. Respondent had internally designated these items as "Case 003 – 'Supply Steel Reinforcement,'" and had requested appellant to submit a proposal relating to case 003, but appellant never did so. Instead, according to the price negotiation memorandum, appellant "elected to pursue payment [for cases 003, 004 (*see* finding 33) and 005 (*see* finding 36)] through his attorney . . . and has formally certified the request for adjustment previously submitted . . . ." (R4, tab B-34 at 3) With agreement impossible, respondent issued the modification for the items in case 003, increasing the contract price $3,448 for the steel reinforcement on the upstream facing and for other items (*id*. at 2).

32. We find no persuasive evidence that the price increase in Modification No. P00007 failed to compensate appellant adequately either for the direct costs of supplying steel reinforcement on the upstream facing of the powerhouse walls, or for the impact the work had on contract performance. Mr. McKenzie testified that:

> [O]n this upstream retaining wall, we had to put in some I call them diwo dags, but they're holes we had to drill in the retaining wall. Then you put a rebar in and you grout it and it's just a - - it's like reinforcing [sic] the wall . . . . - -
>
> . . . .
>
> THE WITNESS: . . . It was no problem whatsoever. We - -we - - what we bid and what we did was the same and that was on half of the small bid items [such as steel reinforcement of the upstream retaining wall] and some of the small bid items took say twice as long to do.

(Tr. 1/282-83) The record does not reflect other evidence that this item occasioned additional time or cost beyond that recognized in the modification.

33. By unilateral Modification No. P00008, dated 9 June 1999, the contracting officer deleted additive bid Item No. 0042 regarding the application of flashcoat shotcrete on the downstream side of the powerhouse (*see* finding 4), as well as specification section 03360, SHOTCRETE, and corresponding portions of the drawings (ex. G-31; *see also* R4, vol. 3 of 6, tab B-35, tr. 2/154-55, 165-66). The modification was issued under the CHANGES clause and decreased the contract price by $79,752, with an adjustment to appellant of $16,660.50 for deletion of the bid item, and no change in time (ex. G-31). We find that the item covered by the modification, which respondent had internally designated as "Case 004 - - Delete Bid Item #42" (R4, vol. 3 of 6, tab B-35 at 1) was included in appellant's claim (*see* finding 31).

34. We find that the relevant sequence of events preceding Modification No. P00008 was as follows:

(a) in or about May 1997, Mr. McKenzie proposed to the resident engineer that "in lieu of shotcreting" the "repair areas" in the wall on the downstream side of the powerhouse, "we use a form system where we put concrete, use forms to hold the concrete, and put some concrete in those areas instead of shotcrete" (tr. 2/149);

(b) appellant "start[ed] on the backwall (D/S) wall repairs," seemingly as called for in the contract, on 9 September 1997 (ex. G-14, Daily Log No. 316);

(c) on or about 12 September 1997, Mr. McKenzie made another proposal, whereby, "instead of doing the back wall as shown on the drawing, . . . he prepared to go up, . . . remove the concrete across that back wall to the approximate depth of five inches,

and replace all of that with formed in-place concrete" for $210,975, an unattractive proposal to respondent because of the cost and because "[m]ost of the area of the back wall was fine" (ex. G-14, Daily Report No. 319, attachment at 3; tr. 2/262);

(d) while Mr. McKenzie testified that respondent's inspector "came up to me and I think it was in mid-September and . . . he said I think we're going to cancel the flashcrete part of your contract" (tr. 1/278), the closest documentary corroboration of any such statement is a notation in the 10 September 1997 Daily Log that both the inspector and the construction representative had told Mr. McKenzie "that he is not to go over the quantities in the contract" on backwall repairs (ex. G-14, Daily Log 317);

(e) work on the backwall was underway throughout October and November 1997, entries in the parties' respective Daily Logs and Daily Reports for those months reciting, for example, that appellant was: "FORMING UP BACKWALL ETC." on 10 October; "[c]ontinu[ing] to work on the D/S wall of the plant, placing concrete at the 3 foot level and on the walkway" on 23 October; "[c]ontinu[ing] with concrete placement and prep for future placements" on 29 October; "FORM[ING] UP UPPER AREA of BACKWALL for 5 CONCRETE PLACEMENTS" on 3 November; "FORM[ING] UP LAST BACKWALL AREA" on 12 November; and "[f]inishing concrete" on 20 November (ex. G-14, Daily Report No. 347, Daily Log Nos. 360, 366, Daily Report Nos. 371, 380, and unnumbered (11/20));

(f) on 24 November 1997, the parties met and, because, as appellant noted two days later, the "[b]ackwall visually looks very good" (ex. G-14, Daily Report No. 394), respondent's representatives announced that "it was the intent of the Corps" to delete bid Item No. 0042 and to make corresponding adjustments on other concrete items (ex. G-14, Daily Log No. 392 at 1); and

(g) the form-and-pour work was seemingly completed by the beginning of December, a 2 December 1997 Daily Log reciting that on that date "[t]wo Men [had been] stacking concrete forms on barge" (ex. G-14, Daily Log No. 400).

35. We find no credible evidence that respondent delayed the decision to delete the flashcoat shotcrete (*see* finding 34(f)) or that it delayed its response to appellant's alternate proposal for work on the back wall (*see* finding 34(c)).

36. By unilateral Modification No. P00009 dated 9 June 1999, the contracting officer made "final adjustment to quantities of the listed unit price bid items to conform to actual variations under the Variations in Estimated Quantities Clause" (R4, vol. 3 of 6, tab B-36 at 1-2). As a result of the modification, the contract amount was decreased by $1,119.68 (*id*. at 2). We find that the item covered by the modification, which

respondent had internally designated as "Case 005 - - Final Quantity Adjustment" (*id.* at 1) was included in appellant's claim (*see* finding 31).

37. By unilateral Modification No. P00010 dated 11 June 1999, the contracting officer modified "the contractor-furnished cofferdam to accommodate the 4-inch offset with existing pier #7 profile." She also increased the contract price by the lump sum of $6,551 and extended performance time by two days, to and including 9 June 1998 (R4, vol. 3 of 6, tab B-37 at 1-2). The modification was issued under the DIFFERING SITE CONDITIONS clause (*id*. at 1).

38. We find no persuasive evidence that the price increase in Modification No. P00010 failed to compensate appellant adequately either for the direct costs of the work or for the impact and inefficiency that it caused. The modification indisputably involved retrofitting appellant's cofferdam so that it would fit against downstream Pier No. 7 (tr. 2/158). While there is confusion in the record (*e.g.*, tr. 3/97-108) because this item of the claim is styled as relating to a "metal cap" on Pier No. 7, the item in fact relates to a cylindrical steel encasement, rather than a cap, on the pier. Mr. McKenzie himself testified that:

> [i]t's a steel encasement and it came down below the water line about to here, about four foot under the water line and – and the steel encasement came around. So, actually, instead of being the size of the pier, it was six inches bigger. So, and it was made out of steel.

(Tr. 1/227) While Mr. McKenzie testified that drawing S5 section D "does not show the steel encasement that went around that [downstream] pier which caused us all sorts of problems" (tr. 2/77), the encasement is the "existing steel form" depicted on Section A of the same drawing (*see* finding 8(d)). As a result of the encasement, when appellant sought to install its cofferdam, it had "a six-inch opening" between pier and cofferdam, precluding the requisite watertight fit (tr. 1/227-29). Mr. McKenzie testified that, during performance, investigating the encasement and retrofitting the cofferdam cost additional time because "the diver's not doing anything while the guys are welding, but, of course, when the diver's doing something, the other guys aren't doing anything" (tr. 1/229). Respondent's claims expert testified that respondent's employees in the field were "very fair and more than fair" in the adjustment made in Modification No. P00010 (tr. 3/125-26).

C. *Claim and Appeal*

39. By letter to the administrative contracting officer dated 1 September 1998, appellant submitted a certified claim for $1,003,772.26, which was said to represent the

difference between the contract price and the "appropriate contract price for the project as performed" (R4, vol. 2 of 6, tab B-19A at 2). In one paragraph relevant to the jurisdictional defense in this appeal, appellant stated:

> During the course of performance of the contract the Corps directed McKenzie to perform substantial amounts of additional work, the total impact of which materially effected (sic) McKenzie's ability to complete the project in the efficient manner in which it had planned. The cumulative impact of all of the additional items of work adversely effected (sic) the entire contract performance.

(R4, vol. 2 of 6, tab 19A at 3)

40. By decision dated 29 March 2001, the contracting officer found merit to that portion of the claim relating to the clamshell permit (*see* findings 16-19), concluding that "the Army Arsenal and the Corps [of Engineers] had the responsibility to obtain for you a more encompassing Clean Water Act Regulatory Permit than was available to you, and to do so timely" (R4, vol. 1 of 6, tab B at 6). Nonetheless, although recognizing that respondent's permit action affected appellant's time and cost, the contracting officer stated that the time already granted on bilateral contract modifications left no further time to be granted. Hence, additional costs would be determined by government estimate and paid through unilateral modification. With respect to the portion of the claim relating to "substantial amounts of additional work" (*see* finding 39), the contracting officer stated that:

> [S]ome of the directed changes that added work were the subject of bilaterally executed contract modifications, through agreement of both parties. All the other additional work changes were the subjects of unilateral contract modifications for which the Corps determined the appropriate compensation. . . .[T]he Corps requested your proposals for compensation prior to issuing the unilateral modifications, however, they were not received from you. I am aware of no uncompensated cumulative impact from changes.

(R4, tab B at 5-6) The contracting officer denied the remainder of the claim in its entirety (*id.* at 7). This timely appeal followed.

41. In its complaint, appellant alleged that:

> The Contracting Officer's decision admits that the Corps of Engineers did not permit McKenzie to utilize the established technique for clearing the area for locating the coffer dams. As a result, as the Contracting Officer concedes in her final decision, McKenzie incurred excess costs throughout the contract performance period for maintaining and requiring the cofferdam and for consequential inefficiencies and delays in performing the work.

(Compl., ¶ 8) In its answer, respondent denied the allegations concerning its:

> [F]ailure to "permit" Appellant to utilize a particular technique, and by way of further answer and correction, Respondent alleges that Respondent did not timely obtain a more encompassing Clean Water Act Regulatory Permit than that which was already available to Appellant; . . . .

(Answer, ¶ 8) Elsewhere in its complaint, appellant alleged that the contracting officer "acknowledged that McKenzie experienced delays and cost increases as a result of the Corps' failure to cooperate with McKenzie in obtaining a Clean Water Act Regulatory Permit sufficiently broad to permit McKenzie to excavate debris for the placement of the cofferdam on the upstream side of the dam . . . ." (Compl., ¶ 18) In answering this allegation, respondent admitted that "the Contracting Officer's Final Decision acknowledged that Appellant likely experienced some increased time and cost of performance in connection with the Clean Water Act Regulatory Permit" but denied that respondent had failed to cooperate with appellant (answer, ¶ 18).

42. Respondent subsequently changed its position and moved for leave to amend paragraphs 8 and 18 of its answer. Respondent sought to amend the quoted portion of paragraph 8 of its answer to state that, "while the Contracting Officer's decision speaks for itself, the Government denies the allegations that the Corps of Engineers did not permit McKenzie to utilize the established technique for clearing the area for locating the cofferdams and that any action or omission on the Government's part caused McKenzie excess costs." (Motion to Amend the Government's Answer (mot. to am.) at 1) With respect to paragraph 18, respondent sought to amend its answer to read that, "while the Contracting Officer's decision speaks for itself, the Government denies the allegations that McKenzie experienced delays and cost increases as a result of the Corps' failure to cooperate with McKenzie in obtaining a Clean Water Act regulatory permit." (*Id*.) During a subsequent conference call, appellant's counsel advised that appellant did not oppose the motion to amend, which the Board accordingly granted (recorder's order of 30 May 2003).

DECISION

In support of its claimed entitlement to an equitable adjustment under its concrete repair contract, appellant advances four arguments. It first confronts respondent's continuing objection at trial that the claim litigated in this appeal differs from the claim submitted to the contracting officer. Appellant undertakes to demonstrate the correspondence between the evidence and the claim. (McKenzie's Post-Hearing Brief and Proposed Findings of Fact and Conclusions of Law (app. br.) at 16-18) Appellant next urges that respondent's nine-month delay in issuing a time extension for the 1997 flood constituted a constructive acceleration (*id*. at 19-23). Appellant's third argument is that respondent's failure to obtain a permit for use of the clamshell bucket, and respondent's placing of the burden on appellant to obtain environmental permits, adversely impacted performance (*id*. at 23-28). Finally, appellant details the defective specifications and differing site conditions that it insists merit an equitable adjustment (*id*. at 28-33). Appellant also moves to strike paragraphs 159 and 160 of respondent's posthearing brief (app. rebuttal br. at 8). We deny the motion.

Respondent denies any liability, asserting first that it did not accelerate appellant's performance and that, in any event, appellant waived entitlement to matters related to the flood incident when it agreed to the release in Modification No. P00004 (Posthearing Brief of Respondent (resp't br.) at 37-42). In addition, respondent denies that it interfered with appellant's performance by requiring it to obtain a permit, to delete flashcoat, or by rejecting appellant's proposal to repair the entire backwall (*id*. at 43-47). Finally, addressing the remaining items of defective specifications and differing site conditions cited by appellant, respondent insists that appellant is not entitled to compensation for the direct or indirect impact of contract changes. Respondent also asserts that three matters were not included in the claim. (*Id*. at 47-53) We address the parties' arguments below.

A. *Jurisdiction*

At trial, respondent objected that parts of appellant's case were beyond our jurisdiction because they had not been included in appellant's claim (*e.g.*, tr. 1/214-16, 258-59). Respondent has now narrowed these jurisdictional objections to the contention that three matters "were never presented to the Contracting Officer . . . the downstream scour holes; the crack in the downstream retaining wall; and repair of reinforcing steel in the upstream facing of the powerhouse walls" (resp't br. at 51). These items comprise three of the four components of appellant's current argument that it encountered defective specifications and differing site conditions during contract work. *See* section E, *post*. Alluding to the relevant paragraph in the claim submitted to the contracting officer, respondent maintains that "the language of McKenzie's claim, 'substantial amounts of additional work,' is not sufficiently specific to alert the contracting officer to claims for

the downstream scour holes, the crack in the downstream retaining wall, and repair of reinforcing steel in the upstream facing of the powerhouse walls." (Resp't br. at 51)

In opposing respondent's argument regarding these three items, appellant contents itself with the assertion that its claim to the contracting officer "clearly raises the following: . . . (f) McKenzie had to perform substantial 'additional work,'. . . ." (App. br. at 17)

The applicable principles are well established. Under 41 U.S.C. § 605(a), "[a]ll claims by a contractor against the government relating to a contract . . . shall be submitted to the contracting officer for a decision." Where a contractor fails to comply with this jurisdictional prerequisite, we cannot entertain the appeal. *E.g.*, *England v. Sherman R. Smoot Corp*., 388 F.3d 844, 852 (Fed. Cir. 2004). "Hence, we have no jurisdiction to entertain a new claim, not submitted to the contracting officer, but asserted for the first time here on appeal." *Facilities Engineering & Maintenance Corp*., ASBCA No. 39405, 91-3 BCA ¶ 24,239 at 121,212.

We have found that only one of the three disputed items of additional work was submitted to the contracting officer as part of the claim. That item relates to the repair of the reinforcing steel on the upstream facing of the powerhouse walls. Respondent internally designated the item as case 003, and the contemporaneous documentation reflects that appellant eschewed submitting a proposal for the work as requested and instead sought payment through the claim (finding 31). By contrast, the contemporaneous documentation reflects that the other two items of additional work – the downstream scour holes and the crack in the downstream retaining wall – were not included in the claim submitted to the contracting officer (findings 25, 30). Hence, we do not have jurisdiction to entertain them.

B. *Delayed Issuance of Flood Modification*

Appellant's claim for additional costs regarding Modification No. P00004 is based solely upon "the [nine month] delay in the issuance of that time extension and the consequences that flowed from that delay" (app. br. at 19). There is no dispute between the parties regarding either the sufficiency of the time extension or whether appellant was excusably delayed (*id*.; resp't br. at 37). Rather, appellant argues that, when it "received no contract time extension by the 1997 exclusionary period, McKenzie was constructively ordered to accelerate performance by working through the exclusionary period" (app. br. at 20). In contrast, the government contends that appellant failed to establish acceleration and that appellant waived entitlement to costs by executing the release in Modification No. P00004 (*see* finding 26). (Resp't br. at 37-42)

We conclude that appellant is not entitled to recover for delayed issuance of Modification No. P00004. We reach this conclusion principally because appellant has failed to establish that it was constructively ordered to accelerate. The elements of acceleration have been summarized as: "(1) excusable delay; (2) respondent's knowledge of such delay; (3) statements or acts that can be construed as an acceleration order; (4) notice that the order constitutes a constructive change; and (5) additional costs." *DANAC, Inc.*, ASBCA No. 33394, 97-2 BCA ¶ 29,184 at 145,152; *see also R. J. Lanthier Co., Inc.*, ASBCA No. 51636, 04-1 BCA ¶ 32,481 at 160,668.

Regardless of the strength of its showing on the other elements, appellant has failed to establish the third element with persuasive evidence that the delayed issuance of Modification No. P00004 produced a threat that liquidated damages would be assessed and hence compelled appellant to work during the winter exclusionary period. That is, the record establishes that, as appellant's president himself admitted, the parties had a verbal understanding that appellant would receive a time extension to cover its inability to begin performance because of flood conditions in May and June (finding 27(a)). In addition, there is no evidence that any government official directed appellant to work during the winter exclusionary period (finding 27(f)). Moreover, while Mr. McKenzie testified that the looming threat of liquidated damages spurred performance into the exclusionary period (*id.*), no such damages were ever assessed and there is no evidence that any government official threatened to do so (*id*.).

In view of our conclusion regarding the merits of appellant's acceleration argument, we need not reach the issue of whether this portion of the claim is barred by the release in Modification No. P00004.

C. *Clamshell Permit*

The broad issue separating the parties regarding the permit to use a clamshell bucket to excavate the cofferdams relates to which party was responsible for obtaining the requisite permit called for by section 404 of the Clean Water Act, 33 U.S.C. § 1344. Appellant insists that respondent bore that responsibility and, after it was on notice that appellant intended to employ a clamshell bucket, its failure to obtain the permit forced appellant to resort to the less efficient airlift unit (*see* findings 19, 21) and constituted constructive interference with the contract work. In particular, appellant insists that it made "exquisitely clear" to respondent at the preconstruction conference that it intended to employ a clamshell bucket, that it "communicated the same information" to respondent in the submittal process, and that Mr. McKenzie himself mentioned this planned method "on numerous occasions" when visiting the resident office. (App. br. at 23) Appellant dismisses the argument that it was obligated under the PERMITS AND RESPONSIBILITIES clause (*see* finding 3) to obtain the permit, asserting that the Rock Island Arsenal "was specifically told to get back with the Permittor once they had the [cofferdam] design,"

and, in any event, it is customary for the owner to obtain the requisite environmental permits. (App. br. at 24-27)

For its part, respondent denies that it breached either its duty to cooperate or its implied duty not to hinder performance in the permitting dispute. It submits that the PERMITS AND RESPONSIBILITIES clause, as well as specification sections 01560 and 02223 (*see* findings 6, 7), put the onus on appellant to obtain the permit. (Resp't br. at 43-45)

We understand appellant to contend that respondent's failure to obtain the clamshell permit breached the implied duty not to hinder performance, or noninterference. By contrast to the implied duty to cooperate, *see Coastal Government Services, Inc.*, ASBCA No. 50283, 99-1 BCA ¶ 30,348 at 150,088, the implied duty of noninterference is a negative obligation that "neither party to the contract will do anything to prevent performance thereof by the other party or that will hinder or delay him in its performance." *Lewis-Nicholson, Inc. v. United States*, 550 F.2d 26, 32 (Ct. Cl. 1977) (internal quotation marks omitted). On this record, we disagree that respondent breached the implied duty of noninterference.

We disagree first because, even assuming *arguendo* that respondent bore the responsibility to obtain the permit, we nonetheless cannot harmonize appellant's position with the record. Appellant's argument is constructed around the premise that it supplied respondent with "the information [that] the [A]rsenal needed to complete the application process." (App. br. at 25) Thus, while appellant asserts that it made "exquisitely clear" to respondent at the November 1996 preconstruction conference that it would use a clamshell bucket to set the cofferdams in place (app. br. at 23), we have found no credible evidence in either the contemporaneous documentation or the trial testimony to support that proposition (finding 11). In addition, while appellant insists that it "communicated the same information as part of the Submittal process" (app. br. at 23), the submittal itself, which we have set out virtually in its entirety, contains only a one-sentence reference to a clamshell as appellant's "Method #3" (finding 13). Absent some clarifying testimony, we cannot conclude that appellant's statement that it intended to "crane-clamshell remove the various earthen, rock and debris materials, again in an underwater method" (*id.*) provided sufficient specificity to complete the permit process.

In any event, the broad terms of the contract language put the permitting burden on appellant. The first sentence of the PERMITS AND RESPONSIBILITIES clause (*see* finding 3) requires appellant "without additional expense to the Government, [to] be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State and municipal laws, codes, and regulations applicable to the performance of the work." FAR 52.236-7. We have had little difficulty in reading this language to require contractors to assure compliance with relevant laws and regulations. *E.g.*, *R.P.M.*

Construction Co., ASBCA No. 36965, 90-3 BCA ¶ 23,051 at 115,721 (holding that contractor bore burden of ascertaining scope and extent of local requirements that might impinge on work); *E.L. David Construction Co.*, ASBCA Nos. 29924 *et al.*, 90-3 BCA ¶ 23,025 at 115,600 (holding clause put onus of foreign customs law compliance on contractor); *see also*, *C'n R Industries of Jacksonville, Inc. d/b/a/ Cooper Mechanical Contractors*, ASBCA 42209, 91-2 BCA ¶ 23,970 at 119,980 (sustaining government claim against contractor for penalty caused by subcontractor's noncompliance with environmental regulation).

The import of the PERMITS AND RESPONSIBILITIES clause is not limited in any way by specification sections 01560 and 02223, which simply provide more particularized applications of the principle expressed in the first sentence of the clause. Most significantly, paragraph 3.1.2 of section 02223 conditioned removal operations upon the contractor's submission of "permits or other required documentation" (finding 7). Acceptance of appellant's argument that the permitting burden shifted to respondent would impermissibly render this provision "useless, inexplicable, inoperative, [or] void," *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991) (internal quotation marks omitted). Other portions of these specification provisions are at odds with shifting the compliance burden. Thus, paragraph 3.5 of section 01560 articulated appellant's duty to comply with "laws concerning pollution of rivers and streams" (finding 6) and paragraph 3.1.3 of section 02223 made it "the Contractor's responsibility" to follow environmental requirements in disposing of materials outside of government property (finding 7).

We cannot agree with appellant that the obligation imposed by these clauses should be altered by the claimed circumstances of the permitting dispute. Thus, while appellant asserts that the Rock Island Arsenal "was specifically told to get back with the Permittor once they had the [cofferdam] design" (app. br. at 25), the permit itself contains no such requirement. The Enforcement Section spoke in the passive voice, stating only that "[w]hen plans are available for the cofferdam(s), a copy should be submitted to this office for review" (finding 9) by somebody; it did not state who should do the submitting. Nonetheless, the Enforcement Section expects whoever has the best knowledge of the work to prepare the application (finding 17), and in this case that party was appellant (*see* finding 13).

We also cannot agree with appellant that our decision in *Marine Construction & Dredging, Inc.*, ASBCA Nos. 38412 *et al.*, 95-1 BCA ¶ 27,286, shifted the burden to respondent to obtain the clamshell permit because of trade custom. *Marine Construction* is inapposite, chiefly because it rested on a record establishing that "it is a customary practice in the dredging industry for the project owner, including the Government, to obtain the wetlands permits . . . ." *Marine Construction*, *supra*, 95-1 BCA at 135,955 (finding 73). By contrast, the record before us establishes no such practice (finding 17).

Similarly, *Century Concrete Services, Inc.*, ASBCA No. 48137, 97-1 BCA ¶ 28,889 at 144,053 is inapposite inasmuch as there, "only the Government could obtain, or arrange for, the necessary permit."

Finally, we are not swayed in our conclusions by events in the post-claim stage of this appeal. Thus, the contracting officer's opinion that the Arsenal and the Corps "had the responsibility to obtain for [appellant] a more encompassing Clean Water Act Regulatory Permit" (finding 40) is not binding in this *de novo* proceeding, *Wilner v. United States*, 24 F.3d 1397, 1402 (Fed. Cir. 1994), and does not comport with the relevant contract clauses (*see* findings 3, 6, 7). In addition, similar considerations apply to respondent's averments regarding its permit obligations in paragraphs 8 and 18 of its answer (*see* finding 41), which were in any event later amended by respondent itself (finding 42).

D. *Deletion of Flashcoat Shotcrete*

Appellant contends that respondent's deletion, in Modification No. P00008 of the additive item relating to flashcoat shotcrete on the downstream side of the powerhouse (*see* finding 33) interfered with its planned work. In particular, appellant insists that it planned to spray on the flashcoat shotcrete to fill voids in the deteriorated concrete on the downstream side, and that, because this item was deleted "in mid-September," appellant was "forced to build forms for each of the varied locations" on the wall requiring repair, attaching the forms to the wall, and then pour concrete between the forms and the wall. (App. br. at 33; app. reply br. at 16) In addition to this contention, appellant argues that respondent also interfered by delaying: (a) "the final decision to eliminate the flashcoat;" and (b) "a response to McKenzie's alternate proposal for the back wall work." (App. br. at 15, 33) By contrast, respondent chiefly asserts that deletion of the flashcoat could not have interfered with appellant's work plan, inasmuch as appellant's work in forming and pouring concrete on the wall "had largely been performed" by the time the additive item was deleted. (Resp't br. at 46)

We are unable to reconcile appellant's contentions with the evidence of record. Thus, appellant's major contention – that deletion of the flashcoat shotcrete interfered with its planned work – is at odds with the sequence of the work. As we have found, the form-and-pour work was underway throughout October and November 1997 (finding 34(e)), and on 20 November, appellant noted in its Daily Report that it was "[f]inishing concrete" on the back, or downstream, wall of the powerhouse (*id.*). That was four days before respondent's representatives announced at a meeting, according to the contemporaneous Daily Log, that "it was the intent of the Corps" to delete the flashcoat (finding 34(f)). Given this sequence, we cannot credit appellant's principal argument that appellant "was forced to build forms" and employ the more onerous form-and-pour method *as a result of* the deletion of the flashcoat. (App. br. at 33) We

likewise cannot credit appellant's contention in its reply brief that the decision to delete the flashcoat was made "in mid-September." (App. reply br. at 16) This contention derives from Mr. McKenzie's testimony recounting what would be little more than a prognostication from the inspector regarding a matter under discussion between the parties (*see* findings 34(a), 34(c), 34(d)), and is insufficient to outweigh the documented announcement of a decision on 24 November 1997(*see* finding 34(f)).

With respect to appellant's two other arguments, we have found no credible evidence to support either appellant's claim of unspecified delays in the decision to eliminate the flashcoat, or its claim that respondent delayed responding to appellant's alternate proposal for the work on the back wall (finding 35).

E. *Defective Specifications and Differing Site Conditions*

Appellant groups four matters under the rubric of defective specifications and differing site conditions. They are: (1) metal caps on downstream Pier No. 7; (2) downstream scour holes; (3) crack in the downstream retaining wall; and (4) repair of reinforcing steel in the upstream facing of the powerhouse walls and associated work. (App. br. at 28-32) No jurisdictional challenge has been interposed regarding the first item, metal caps on downstream Pier No. 7. However, respondent has challenged our jurisdiction over the last three items, and we have concluded in section A, above, that we lack jurisdiction over two items, relating to the downstream scour holes and the crack in the downstream retaining wall. We accordingly address below solely the merits of the metal caps on downstream Pier No. 7 and the repair of reinforcing steel in the upstream facing of the powerhouse walls and associated work.

1. *Metal Caps On Downstream Pier No. 7*

Appellant contends that, while the $6,551 price adjustment in unilateral Modification No. P00010 (*see* finding 37) paid for the direct costs of the work, it is entitled to further recovery for the impact and inefficiency associated with this differing site condition (app. br. at 30). For its part, respondent insists that the caps were actually encasements "plainly visible above the water line" and that appellant should bear the risk of error for designing its cofferdams without conducting an inspection as cautioned by the contract documents (resp't br. at 48-49).

We conclude that appellant is not entitled to recover. While Modification No. P00010 was issued under the DIFFERING SITE CONDITIONS clause (finding 37), we are unable to conclude that appellant in fact encountered a differing site condition. The contract drawings contained representations and admonitions regarding the steel encasement that caused the retrofitting of the cofferdam to enable a watertight fit against Pier No. 7. The encasement itself was depicted on the drawings at "no scale"

(findings 8(d), 38). Note 5 on drawing C1 provided a site plan and directed that "THE CONTRACTOR SHALL FIELD VERIFY ALL ELEVATIONS AND DIMENSIONS BEFORE WORK BEGINS" (finding 8(a)). We are not bound by the contracting officer's findings or conclusions regarding government fault in Modification No. P00010, *Sherman R. Smoot Corp*., *supra,* 388 F.3d at 856-57, which appear to result from "very fair and more than fair" dispute resolution (*see* finding 38). Given the lack of evidence of a differing site condition, we conclude that there is no basis for additional adjustment.

2. *Repair Of Reinforcing Steel*

Appellant urges that the $3,448 price adjustment in unilateral Modification No. P00007 (*see* finding 31) for the repair of the reinforcing steel in the upstream face of the powerhouse walls "was not reasonably related to the effort and the impact the work had on contract performance" (app. br. at 31). Appellant characterizes the item as "another example of additional unanticipated work levied on the contractor as a direct result of the Government's lack of a reasonable site investigation to determine existing conditions prior to solicitation of bids." (*Id*. at 31-32) In opposing additional compensation, respondent asserts that the work that appellant did in repairing the reinforcing steel was "not clearly different from the work specified in the contract." (Resp't br. at 50)

We conclude that appellant has failed to establish entitlement regarding this item by a preponderance of the evidence. Mr. McKenzie's testimony that the additional work "was no problem whatsoever," and that "what we bid and what we did was the same" (finding 32), appears to be at odds with the entitlement recognized in the modification itself (*see* finding 31). In any event, the record does not reflect additional evidence that would lead us to conclude that the adjustment contained in Modification No. P00007 is insufficient (finding 32).

CONCLUSION

The portions of the appeal relating to the downstream scour holes and the crack in the downstream retaining wall are each dismissed for lack of jurisdiction without prejudice to the submission of a proper claim to the contracting officer. In all other respects, the appeal is denied.

Dated: 30 September 2005

ALEXANDER YOUNGER
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. 53374, Appeal of McKenzie Engineering Company, rendered in conformance with the Board's Charter.

Dated:

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