ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Environmental Safety Consultants, Inc.	)	ASBCA No. 53485
	)	
Under Contract No. N62472-90-C-5164	)	

APPEARANCE FOR THE APPELLANT: Mr. Peter C. Nwogu
President

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Ellen M. Evans, Esq.
Trial Attorney
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OPINION BY ADMINISTRATIVE JUDGE TODD

This is a quantum appeal arising from our decision in *Environmental Safety Consultants, Inc.*, ASBCA 47498, 00-1 BCA ¶ 30,826. We held there that appellant was entitled to an equitable adjustment for certain additional costs incurred in performance of its contract to remove, transport, and dispose of industrial waste sludge from two lagoons at a Navy facility. The amount in issue is $210,492. Pursuant to the Board's order, appellant filed its Statement of Costs detailing its increased costs and providing supporting documentation. The government presented several defenses to appellant's quantum entitlement before submitting the detailed response in schedule format required by the Board's order. A four-day hearing was held in Atlanta, Georgia. Mr. Peter C. Nwogu, appellant's president, represented appellant *pro se* and was the only witness on behalf of appellant. Appellant did not submit a post-hearing brief but relied on its hearing presentation (tr. 1/27-126, 2/124-99) and lengthy pre-hearing submissions (exs. A-8, -15, -60). The government filed a post-hearing brief. Familiarity with the Board's prior decisions in this appeal is presumed.[1]

[1] *Environmental Safety Consultants, Inc.*, ASBCA No. 47498, 00-1 BCA ¶ 30,826, sustaining in part the appeal on entitlement; *Environmental Safety Consultants, Inc.*, ASBCA No. 53485, 03-2 BCA ¶ 32,298, denying appellant's motion for summary judgment; and *Environmental Safety Consultants, Inc.*, ASBCA No. 53485, 04-1 BCA ¶ 32,626, denying appellant's motion for reconsideration, the government's motion to dismiss, and the government's cross-motion for partial summary judgment.

FINDINGS OF FACT

1. On 23 May 1991, Contract No. N62472-90-C-5164 was awarded to appellant Environmental Safety Consultants, Inc. (ESCI) by the U.S. Navy, acting through the U.S. Naval Facilities Engineering Command, Lester, Pennsylvania, in an amount not to exceed $299,125 (00-1 BCA at 152,129). The contract incorporated by reference the standard clauses "Supplemental Cost Principles (Apr 1984)" (DFARS 252.231-7000) and "Pricing of Adjustments (Apr 1984)" (DFARS 252.243-7001) (R4, tab 1 at I-4).

2. Appellant bid to perform the fixed-price lump sum work at a unit price of $95 to collect, transport, and dispose of 1400 cubic yards of lagoon # 1 sludge and a unit price of $165 to collect, transport, and dispose of 525 cubic yards of lagoon # 2 sludge at the Naval Air Development Center (NADC). Appellant's total bid price for the fixed-price lump sum work was $229,925; the balance was for indefinite quantity work that is not in issue. (R4, tab 1 at 16-17) Appellant planned to dispose of lagoon # 1 liquid sludge in a nearby Publicly Owned Treatment Works (POTW), which would cost less than its alternative of subcontracting with Envirite for disposal in a treatment, storage, and disposal (TSD) facility. Since appellant did not know whether it could obtain a POTW permit, its bid papers show the cost of both POTW and TSD disposal. (47498, exs. A-5, G-19 at 46-50, 63-65; tr. 1/103, 3/33, 113, 125)

3. Before bidding appellant received the applicable ordinance and permit application for disposal of industrial waste, including charges, which were routinely sent out by the Warminster POTW upon request. Mr. Geoffrey Smith, then the Assistant Manager of the Warminster Municipal Authority, did not recall Mr. Nwogu or ESCI, but acknowledged it was quite possible that he spoke to Mr. Nwogu (tr. 2/13, 26-27). The Warminster POTW would not accept the lagoon # 1 sludge because it only accepted waste from an industrial user directly connected to the POTW facility, and NADC had its own wastewater treatment system. (47498, ex. A-15 at 4-5; tr. 2/14, 22, 53, 3/173, 4/185) Mr. Smith did not so inform appellant before bidding (tr. 3/173). The practice of the Warminster POTW is not indicated in the ordinance, and it is not apparent that NADC as a federal facility or federal enclave within the Township of Warminster may not have been governed by the ordinance (47498, ex. A-74; tr. 2/37-38, 57-60). Mr. Nwogu reasonably believed that appellant could use the POTW for disposal of the lagoon # 1 sludge. Appellant calculated its bid, however, on the basis of the higher costs of TSD disposal (ex. A-5). At the time of bidding, there was a question as to whether appellant's bid was low (00-1 BCA at 152,132). We find based on Mr. Nwogu's testimony that appellant's bid was realistic (tr. 4/183). Appellant learned after bidding and before contract award that appellant could not dispose of lagoon # 1 sludge in the POTW because of its chemical content (00-1 BCA at 152,133; ex. A-60 at 2).

4. Mr. Nwogu established ESCI in 1991 as a small business. ESCI's first government contract is the subject of this appeal and was the only significant contract it

had in 1991.[2] ESCI's only employee was Mr. Nwogu. ESCI entered into agreements in 1991 with several subcontractors, vendors, and suppliers for performance of the contract work (00-1 BCA at 152,132; 47498, ex. A-20; tr. 2/170-71, 3/229). ESCI was not able to pay all of its subcontractors without receiving payment from the government.

5. On 25 June 1992, Robert Chambers, Esquire, of Smith Currie & Hancock, Atlanta, Georgia, forwarded appellant's claim, certified by Mr. Nwogu in the amount of $150,588, to the contracting officer by Federal Express. We infer that the contracting officer received the claim on 26 June 1992. The 29-page claim was supported by 45 tabbed exhibits. Over a year and a half later, the contracting officer denied most of appellant's claim by final decision, dated 2 February 1994. The contracting officer found appellant was only entitled to the amount of $10,869, which represented liquidated damages assessed on lagoon # 2. (00-1 BCA at 152,142 and 152,149; R4, tab 4; 47498, ex. A-78)

6. Since the termination of the contract, some of appellant's subcontractors have attempted to collect amounts due and owing from appellant in litigation. Appellant disputed its liability on these claims. (Tr. 2/171-72, 174, 180) Specifically, Waste Conversion, Inc. (WCI) sued appellant on its unpaid invoices for approximately $37,549 in an action that was settled for payment of $7,000 (ex. G-20, tab X at 21; 47498, ex. G-19 at 257-58; tr. 4/157, 163). A lawsuit filed by Central New York Industrial Services, Inc. (CNYIS) against appellant was voluntarily dismissed (finding 40, *infra*). Appellant intends to pay its subcontractors in accordance with its agreements when it receives payment from the government regardless of whether the subcontractors have written off the debts as uncollectible (ex. A-8, tab 12; tr. 2/173, 3/198, 201, 207-08, 4/81, 209).

7. The timely appeal of the denial of appellant's claim was decided in February 2000. The parties were unable to resolve quantum. On 14 August 2001, the Board docketed this appeal.

8. Bankruptcy filings are part of the record in this appeal, but there has been no discharge of appellant's debts as a result of court confirmation of an ESCI reorganization plan. The court dismissed two petitions because appellant failed to file required information and pay trustee fees. (Ex. G-6) Mr. Nwogu explained why appellant did not list as creditors the subcontractors for which it is seeking recovery of costs in this appeal. Appellant identified an estimated $100,000 claim against a government agency for work completed in ASBCA No. 47498 as an account receivable and asset of the estate.

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[2] ESCI's 1991 financial statements show $26,685 in revenues earned from other contracts (ex. A-59, tab 5). ESCI did not incur significant expenses in performance of the only other contract it had in 1991, which was for a site investigation in South Carolina (tr. 3/231-32).

Mr. Nwogu understood, on the advice of counsel, that all the information within the ASBCA documents, including identification of subcontractors, vendors and suppliers owed, was incorporated in the bankruptcy petition and that it was not necessary to list them separately as creditors. (Tr. 4/112, 121, 131, 135-36, 138-45)

9. James R. Harvey, III, Esquire, of Vandeventer Black LLP, Norfolk, Virginia, counsel appointed by the bankruptcy court to pursue the appeal, prepared appellant's Statement of Costs with Mr. Nwogu (ex. A-17; tr. 4/11, 93). Counsel withdrew shortly after the appeal was filed and returned all the documents it had received to ESCI. The Statement of Costs, dated 21 September 2001, included nine cost categories: (1) lagoon # 1 costs due to higher solids content, (2) lagoon # 1 subcontractor surcharges due to higher solids content, (3) lagoon # 1 subcontractor surcharges due to contaminants, (4) lagoon # 1 additional testing, (5) lagoon # 2 costs due to higher solids content, (6) improper interference in failing to approve subcontractors, (7) improper interference in withholding analysis of lagoon # 1 sludge, (8) improper interference in restricting CNYIS work, and (9) lagoon # 1 and lagoon # 2 liquidated damages. The Statement included the following breakdown with references to exhibits to appellant's claim and other supporting documentation:

I.	Lagoon # 1		
	Costs due to higher solids content		$54,182
	Equipment rental	$17,977	
	Labor	22,471	
	Travel	4,771	
	Materials	698	
	Overhead @ 3 %	1,378	
	Profit[3]	6,888	
	Subcontractor surcharges due to higher solids content		21,201
	Subcontractor surcharges due to contaminants		26,390[4]

[3] The Statement of Costs included profit at the rate of 15 percent on each category of costs (ex. A-15, tab A). We have corrected the typographical errors in the claim so that travel reads $4,771 and profit reads $6,888.

[4] The amounts in this cost category were explained by Mr. Nwogu at the hearing (tr. 1/103) and later corrected with Board permission by appellant's letter, dated 20 January 2004 (tr. 4/318-19). The correction deleted stand-by or demurrage charges, which decreased the CWM transportation costs by $1,551 which changed the total of $9,306 to $7,755. The transportation cost for each CWM quantity was amended to read $440. The total costs were $20,441 rather than $21,992 before addition of overhead and profit. Appellant stated the amended total claimed for this category as $24,529.

	CWM & WCI		21,992	
	Overhead @ 5 %		1,100	
	Profit		3,299	
	Additional testing			9,967
	Law & Company		350	
	Analytical Services, Inc		1,265	
	Labor		6,804	
	Overhead @ 5 %		81	
	Overhead @ 3 %		204	
	Profit		1,263	
II.	Lagoon # 2			
	Costs due to higher solids content			51,974
	Labor and field		14,260	
	Additional sample analysis		1,550	
	Law & Company	1,100		
	Envirite	450		
	On-site subcontractors		24,060	
	Enpro	3,248		
	Continental	5,475		
	ECP	8,353		
	CBS Environmental	6,984		
	Off-site subcontractors		36,267	
	CWM	12,460		
	Envirite	21,807		
	Horwich Trucking	2,000		
	Overhead @ 3 %		428	
	Overhead @ 5 %		3,094	
	Profit		11,420	
	Total actual costs		91,079	
	Less as-bid costs[5]		39,105	
III.	Improper interference			
	Failure to approve subcontractors			4,628
	ACES		3,000	
	Labor		871	
	Overhead @ 3 %		26	
	Overhead @ 5 %		150	

[5] On 31 October 1991, appellant billed the government $39,105 for disposal of 237 cubic yards of Lagoon # 2 sludge at the contract unit price of $165 per cubic yard (finding 2, *supra;* 47498, ex. A-78, tab 42).

	Profit	581	
	Withholding disposal analysis		4,673
	Labor	3,960	
	Overhead @ 3 % & profit[6]	713	
	Restriction from work		27,786
	CNYIS	23,155	
	Overhead @ 5 % & profit[7]	4,631	
IV.	Remission of liquidated damages		11,553
	Lagoon # 1	684	
	Lagoon # 2	10,869	

The total amount of costs plus profit was $212,354. Appellant's corrections change the total amount claimed to $210,492.[8] (Ex. A-15, tab A) The amount increased from appellant's $150,588 certified claim because of the inclusion of surcharges due to contaminants in lagoon # 1 sludge and three categories related to improper interference of the work (47498, ex. A-78; exs. A-8, -15; tr. 3/9-10, 4/14).

10. The government's Response to the Statement of Costs, dated 7 July 2003 (the Response), stated all the costs, whether they were supported by what it considered appellant's limited documentation, and why they were compensable or noncompensable costs. The government agreed that appellant was entitled to recover the amount of $10,869 claimed for the remission of liquidated damages in accordance with the contracting officer's final decision. The government continued to state in its Response that appellant had not met its burden of proof and there was an absence of any reliable or credible records. (Ex. G-19)

11. The government did not audit appellant's certified claim or its Statement of Costs. The government first requested an audit in February 2002 (ex. G-13; tr. 4/224,

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[6] Appellant calculated the amount of $713 by applying 18 percent (3 % overhead + 15 % profit) to the direct costs of $3,960 instead of applying the profit rate to direct costs plus overhead.

[7] Appellant calculated the amount of $4,631 by applying 20 percent (5 % overhead + 15 % profit) to the direct costs of $23,155 instead of applying the profit rate to subcontractor costs plus overhead.

[8] Appellant included an additional amount as an estimate for interest from the date of the certified claim. We do not consider this amount in our decision. Interest is added to the amount of an appellant's entitlement as a matter of law. All amounts are rounded up or down to whole dollars in this decision.

293). Mr. Nwogu initially refused to cooperate with the government's request for production of original, contemporaneous source documentation of the claimed costs as overly burdensome and unnecessary in light of the documentation in its claim and the opportunity the government had had for nine years to conduct an audit. The Board ordered appellant to make available source documentation that pertained to the quantum issues in the appeal in response to a motion filed by the government. Mr. John Dery, a certified public accountant (CPA) and Defense Contract Audit Agency (DCAA) auditor; Mr. Howard H. Haynes, Jr., a certified cost engineer; and Government counsel inspected appellant's books and records at appellant's offices for two days in March 2002. The government had not received any documents from appellant in response to its letter requests, but some of appellant's books and records related to the contract were made available during the inspection. Appellant later sent the government its bank statements and other documentation. (Tr. 4/225, 229-30, 307) Mr. Dery, who has had 22 years experience with DCAA, had copies of supporting documents in appellant's claim, appellant's 1991 unaudited financial statements, checkbook ledger, and bank statements to conduct an audit, but did not prepare an audit report. Appellant did not make available any general ledger, sales journal, job-cost ledger, payroll register, quarterly 941s for FICA payroll taxes, employee time cards, or travel expense reports. (Tr. 4/217, 224-27, 229, 235-36, 241, 248, 266, 293) Mr. Nwogu furnished the Board with copies of the appellant's books and records that the government inspected and copied to show appellant's cooperation in discovery (ex. A-59). Appellant had a complete set of original 1991 cancelled checks at the hearing which were not offered in evidence, but reviewed by the government. They had not been previously disclosed. The government considered it irregular that appellant's travel costs were supported by checks made payable to cash or Master Card and questioned certain G&A (general and administrative) expenses, but did not change its response to the Statement of Costs after its review of the 1991 checks. (Ex. G-3; tr. 1/62, 72, 4/237, 248, 310-11)

12. The government relied on appellant's 1991 financial statements to attempt to discredit appellant's Statement of Costs. Mr. Dery could not resolve the discrepancy he saw between the total costs claimed in the Statement of Costs and the amount shown to have been incurred in the financial statements without ledgers showing the components of various amounts in the financial statements. He did not know which was more reliable. He read the Statement of Costs as including total costs of over $250,000 when the financial statements show $150,000 as the total cost incurred during 1991, the year of performance of appellant's contract (tr. 4/250). The Board has not been able to reconcile the Statement of Costs and the 1991 financial statements without more information from the parties in contemporaneous accounting records, analysis, or explanation, but has reviewed the record sufficiently to be satisfied that the financial statements do not discredit the claim. To the extent the costs itemized in appellant's Statement of Costs are supported by copies of contemporaneous supporting documentation that the costs were reasonably incurred and not disputed by evidence from the government, we find the Statement of Costs credible.

13. DCAA was also unable to identify unpaid subcontractors and vendors in the $49,214 amount of accounts payable in appellant's 1991 financial statements (ex. A-59, tab 5; tr. 4/257-59). Mr. Nwogu explained that accounts payable included amounts owed to subcontractors based on what was received on the contract, and the balance was included in the amount of $162,189 accounts receivable as of 31 December 1991, approximately the amount of appellant's certified claim (ex. A-59, tab 5; tr. 3/217, 221). Mr. Dery interpreted the omission of the unpaid subcontractor expenses from accounts payable as indicating appellant did not have a legitimate liability (tr. 4/258, 270). He clarified on appellant's cross-examination that he was referring to "liability" as the term is used in the context of "assets and liabilities" in financial statements and not pertaining to the claim (tr. 4/291-92). Mr. Dery found "most invoices" missing, but made no specific reference to cost items in appellant's Statement of Costs that were not supported by an invoice or a copy of an invoice (tr. 4/236-37).

14. The hearing held in November 2003 was contentious. As a result of the manner in which the parties elected to present witness testimony at the hearing, the Board does not have a record fully focused on the quantum issues in the appeal. Government counsel chose not to depose Mr. Nwogu and, having spent more than a day and a half with his examination, had little remaining scheduled hearing time to offer a full presentation of the testimony of the government witnesses. The lack of cooperation and failure of the parties to maintain the civility and decorum expected in a Board proceeding also adversely affected the record we have for decision. The government received extensions of time for filing its post-hearing brief that was not received until 16 June 2004. The government stated that it was unable to adequately present its case at the hearing as a result of Mr. Nwogu's conduct (gov't br. at 4).

1. Lagoon # 1 Costs Due to Higher Solids Content

15. Appellant initially estimated the cost to break down the solids in lagoon # 1 to dispose of liquid sludge upon discovery of the changed condition as a proposal in the nature of a fixed price contract. The estimated amount for labor, equipment, materials, overhead, and profit at the rate of 10 percent was $61,455. (Ex. A-59, tab 39; tr. 1/55-59, 3/18-19) The government did not accept the proposal for negotiations, but directed appellant to submit a claim and request a contracting officer's final decision (47498, ex. A-24; tr. 1/53). Appellant's request for payment, dated 26 August 1991, in the amount of $58,585, was submitted to the government with supporting details, but it was also not accepted as a basis for negotiation (47498, exs. A-38, -42; tr. 3/25). Appellant claims $54,182 for this category of costs in its certified claim and Statement of Costs (ex. A-15; 47498, ex. A-78 at 15). Appellant has identified the supporting evidence that was furnished to the government and is in the record (ex. A-8, tab 1; 47498, ex. A-78, tab 20; tr. 3/30-31)

16. The supporting documentation for the direct labor component of $22,471 is in Mr. Ngowu's handwritten payroll records that show dates and hours worked and amounts

paid, with copies of checks made out to two employees that were hired, to which Mr. Nwogu testified. Appellant hired and paid ESCI employees primarily as the result of the presence of the solids which precluded its planned disposal of the liquid using only one original subcontractor. (47498, exs. A-26, -50; tr. 1/75) Appellant stated that Mr. Nwogu spent 261 additional hours breaking solids and in supervision of the project at the rate of $60 per hour agreed for his time in Modification No. P00002 (47498, ex. A-78 at 14). The government's Response allocated one half of the direct labor costs claimed to additional work and stipulated entitlement of $8,848 (ex. G-19). The government found the maximum amount of time Mr. Nwogu was on site and estimated in its Response that 50 percent of the time would have been spent on supervision of performance of the original work and a balance of 124 hours was for the additional work. Mr. Nwogu spent more time on the project as a result of the changed conditions, including time breaking solids, and we find that a half time division is reasonable. The parties negotiated Modification No. P00002, dated 25 November 1991, which provided compensation for disposal of sludge from the apron of lagoon # 2, to include hours of Mr. Nwogu's time at the rate of $60 per hour (R4, tab 1; 47498, ex. A-54 at 13). The cost thus found to have been incurred at the rate of $60 per hour is $7,440. We also accept the estimate in the Response of one half of the costs of the employees who were also engaged in other work, or $1,408. Mr. Haynes, the government's certified cost engineer, prepared the Response and was qualified to testify as an expert witness (tr. 4/306, 309). He was able to find a fair and reasonable amount of direct labor costs incurred as a result of the changed work even though appellant does not have job cost records, timecards, and computer payroll records (ex. G-14). Appellant has not provided sufficient evidence of contributions for payroll taxes, unemployment, or fringe benefits for this amount to be determined. There is some documentation of payroll taxes and workmen's compensation, but appellant did not offer any connection of the amounts to the costs for which the government is responsible (ex. A-59, tabs 5, 15, 34). We reject Mr. Haynes' untimely change of opinion at the hearing, without any persuasive testimony, that the labor costs were not supportable (ex. G-14; tr. 4/311). The total of direct labor costs attributable to changed conditions is $8,848.

17. Appellant has stated equipment rental costs of $17,977 (ex. A-15; 47498, ex. A-78, tab 20). Appellant rented diesel pumps and submersible pumps and hoses from Godwin Pumps of America, Inc. (Godwin) to have the liquid sludge removed by WCI and was required to rent additional equipment after 14 June 1991, as a result of the higher solids content (47498, 00-1 BCA at 152,133). The initial equipment for the base contract work was charged C.O.D. and is not part of the claim (47498, ex. A-21; tr. 3/141, 194). Appellant's direct costs amount of $15,227, to which the Response did not take exception, is supported by invoices, the work papers of Mr. Andrew Slizewski, appellant's accountant, dated 31 May 2001, and a letter, dated 7 October 1991, from Godwin regarding accounts payable that evidences the amounts invoiced, paid, and due (ex. A-15, -59, tabs 18, 22; ex. G-19; 47498, ex. A-78, tab 20; tr. 3/141, 194, 4/185). Appellant paid Godwin a portion of the amount due, and owes the balance pursuant to the understandings of the parties evidenced in the rental contracts (ex. A-59, tab 22;

ex. G-19). In August 2003, Godwin confirmed that it expects payment of the amount of $14,408 which remains due (ex. A-12; tr. 3/195, 198). Appellant incurred additional costs of $15,227 for rental of the Godwin pumps and related equipment.

18. Appellant rented an extendahoe from S. Wagner, Inc. which was invoiced in the amount of $1,000, at a rate of $100 per day plus delivery and pick-up. Appellant reasonably anticipated removing the solids in lagoon # 1 with this equipment, but the government did not authorize it for use because of the liner in the lagoon. (00-1 BCA at 152,134; 47498, ex. G-19 at 168, ex. A-23) The Response verified the cost and stated that appellant did not pay the invoice (ex. G-19). The costs for delivery and pick-up of the equipment and one-day rental were $300. (Ex. A-59, tab 23) Appellant should have removed the extendahoe promptly to avoid the additional rental of $700 for an additional seven days.

19. Appellant rented scales from Industrial Weighing Systems, Inc., the cost of which is stated as $1,750, pursuant to a rental agreement, dated 26 July 1991, after the initial disposal of lagoon # 1 sludge by WCI (exs. A-15, -59, tab 10; ex. G-19; 47498, ex. A-42). The Response verified the cost and stated that appellant paid this subcontractor $350 for what appears to be base contract work. Appellant's claim is for idle equipment as a result of improper government actions, but there is no evidence of when the scales were to be used or why they were not used. Chemical Waste Management (CWM) was beginning disposal of lagoon # 1 waste, which may have required weighing, and appellant was contractually required to provide portable scales. Weighing and disposal of lagoon # 2 waste could not proceed due to the government's interference, but appellant failed to attribute an amount of claimed costs segregated from costs of the contract base work to the government. (00-1 BCA at 152,136, 152,139; R4, tab 1 at C-6, ¶ C.5.2.b.(3)(b); ex. A-8 at 2).

20. Appellant stated travel costs for five trips by Mr. Nwogu from his place of business near Atlanta, Georgia to the job site involving air fare, hotel and related expenses, car rental, and meals in the amount of $4,711 (ex. A-15; 47498, ex. A-78, tab 20). The Response verified the costs and stated that travel was necessary to perform the base contract work and cannot be solely attributable to the increased solids content. The costs of airfare are supported by Delta Airlines, Inc. passenger receipts and the record includes receipts for other travel expenses. (Ex. A-59, tab 14; 47498, ex. A-78, tab 13 at 19-21, tab 20) Appellant used an estimate made by Mr. Nwogu that the cost of meals was at a per diem rate of $25 (tr. 4/69). Appellant planned trips to the job site to provide supervision as evidenced by its bid, which included amounts for air travel, lodging, and meals (47498, ex. A-5; tr. 3/107). Appellant did not, however, anticipate a return trip on 24 June 1991, after the changed conditions of lagoon # 1 sludge required making decisions as to how the changed work would be performed. We find this one trip

attributable to the changed conditions. The amount of $610[9] is reasonable for these travel expenses.

21. Appellant stated the cost of materials as $698, including an estimate of $650 for diesel fuel for pumps and an amount of $48 for waders and boots which was incurred at the request of the government for protection against the hazardous material in the lagoon (ex. A-15; 47498, ex. A-78, tab 20, tab 13 at 29; tr. 1/79). The Response verified the costs of the waders and boots as due and stated that the costs of fuel were not shown by any receipts to have been incurred and if they were, they were part of the base contract work (ex. G-19). The government has suggested, but not established, that the same protective clothing would have been purchased and used by appellant for disposal of hazardous waste from lagoon # 2 (47498, ex. G-19 at 521-26). The cost of materials attributable to the waders and boots in the amount of $48 was reasonably incurred as a result of the changed conditions in lagoon # 1.

2. Lagoon # 1 Subcontractor Surcharges Due to Higher Solids Content

22. Appellant stated the increased costs for disposal of lagoon # 1 sludge as a result of surcharges for higher solids in the sludge as $21,201 on the basis of invoices from CWM (ex. A-15; 47498, exs. A-78, tab 22, A-42 at 2, 7; tr. 1/91). The cause of these increased costs was a compensable change in the scope of work (00-1 BCA at 152,144). The amount of additional direct charges, after correction of an apparent typographical error, has been verified by the Response as $17,577 before the addition of overhead and profit (47498, ex. A-78, tab 22; ex. G-19). The Response stated that the claim was based on a reasonable allocation of the amount invoiced by CWM, ESCI had paid CWM, and ESCI should be reimbursed these costs (ex. G-19). Appellant subcontracted with CWM for disposal of lagoon # 1 sludge based on the percentage of solids in the sludge plus standard unloading charges (00-1 BCA at 152,136; 47498, exs. A-32, -33, -40). In its post-hearing brief, the government notes that some stand-by and unloading charges relate to shipments that were within the specification limits for solids content of lagoon # 1 sludge. The government submits that stand-by charges were not related, or exclusively related to, percentage solids and should not be recoverable. The government calculated a deduction of $1,826 for stand-by charges. (Gov't br. at 20-21) We find that only the stand-by and unloading charges on shipments that were within the specification limits were improperly billed. The appropriate deduction is $891. (47498, ex. A-78, tab 22) The amount of the subcontractor surcharges in this cost category was $17,577, or, taking into account the error in billing, $16,686. In September 2003, CWM advised appellant that the $21,201 receivable, the amount that was the

[9] The plane ticket was $228; the motel charges were $232 including tax, and the per diem charge of $25 per day, which we find reasonable, for six days totaled $150. There is no documentation of car rental for this trip, and we find no description for additional miscellaneous charges on Mr. Nwogu's motel bill.

subject of appellant's inquiry, no longer appears on CWM's books (exs. G-1, -12; tr. 4/314).

3. Lagoon # 1 Subcontractor Surcharges Due to Contaminants

23. Appellant stated the increased costs for disposal of lagoon # 1 sludge as a result of surcharges for contaminants in the sludge as $26,390. The amount reflects a portion of invoices from CWM ($13,782) plus an amount calculated from bills of lading from WCI ($10,469), as verified by the Response from supporting invoices and manifests. (Ex. A-15, tabs A, C; ex. G-19; 47498, exs. A-22, -42, G-5) The Statement of Costs worksheet in support of these costs calculates the increased disposal costs as the difference between a $.20 or $.21 per gallon cost, for WCI and CWM, respectively, and appellant's bid cost of $.10 per gallon. The worksheet states that the costs do not include additional costs of solids surcharges. It shows $9,306 for increased transportation costs, including stand-by or demurrage charges. (Ex. A-15, tab C) The Response disputed the costs stated for WCI because appellant did not pay WCI invoices. With respect to CWM charges, the Response stated that appellant's actual costs did not exceed the reasonable cost for disposal and transportation in appellant's bid as the cost of using Envirite as a subcontractor for disposal in a TSD. (Ex. G-19)

24. We are persuaded that the spreadsheet of additional charges from WCI and CWM is a generally accurate statement of the alleged increased costs resulting from the changed conditions involving contaminants (ex. G-19; tr. 1/94, 102, 4/146). The government has objected to the inclusion of 5011 gallons on the WCI manifest P57615 because no quantity was written on the manifest (gov't br. at 21). The manifest was written "no load," and the amount of $726 was, therefore, improperly included on the spreadsheet (47498, ex. A-23 at 4). We are not persuaded by appellant's proof that its transportation charges were increased as a result of the contaminants in the lagoon # 1 sludge, and the costs of transportation can accordingly be deleted from the amount of additional costs claimed.

25. The government's witnesses believed that these CWM costs duplicated CWM increased costs resulting from the higher solids content in lagoon # 1 sludge (tr. 4/250, 276, 311-13). Mr. Haynes alleged without foundation that appellant was engaged in "a deliberate attempt" to include the costs more than once (tr. 4/312). Appellant has agreed that stand-by or demurrage charges ($1,551) should not have been included in CWM transportation costs claimed due to contaminants because they appear as increased costs claimed due to higher solids content (n. 4, *supra*). We have found no other duplication of costs. Appellant used numbers other than CWM invoice numbers on its spreadsheet, apparently to conform to the use of manifest numbers for WCI charges (47498, exs. A-42, -78, tab 22; ex. G-15 at 4). Appellant used only the last four digits of the reference number on the invoices, which is the same as the manifest number, because all the numbers began with the same six letters and numbers, "NJA123" (ex. A-59, tab 20; 47498, ex. A-37).

26. After deducting the transportation costs and the amount related to the one WCI manifest, we find the alleged WCI additional disposal costs were $6,818. We find the alleged CWM additional disposal costs less transportation costs were $6,951. Appellant has identified Philip Services Corporation as the successor to WCI and Waste Management as the successor to CWM (exs. A-65, G-1; tr. 4/298).

4. Lagoon # 1 Additional Testing

27. Appellant has stated the increased direct costs for performing additional testing of lagoon # 1 sludge required by the changed condition of the sludge as $8,419. Laboratory costs are supported by invoices from Law & Company and Analytical Services, Inc. in the total amount of $1,615 (ex. A-15; 47498, ex. A-78, tab 23). The Response compared these costs to the amount appellant anticipated as the costs of testing in its bid and disputed them as not exceeding the amount bid (ex. G-19). The testing, however, was not that routinely required for contract performance, but additional work necessitated by the changed condition of the sludge, as we previously found (00-1 BCA at 152,137; tr. 3/76-77).

28. Appellant stated additional direct costs of $6,804 incurred for the testing: Mr. Nwogu's time in project management, his travel, time of ESCI employee David Wagner, and professional services of Les Hill, an accountant (ex. A-15; 47498, ex. A-78, tab 23 at 2-4). The Response disputed all of these costs as not having been properly substantiated as direct costs or not related to the changed conditions (ex. G-19). Mr. Nwogu spent time at the site to obtain samples for testing and then deliver them for laboratory analysis, which was more in the nature of environmental engineering services than project management (47498, exs. A-27, -62 through -65; tr. 1/106, 4/167, 171-74, 3/185-86, 4/184). The estimate of time for Mr. Nwogu was three hours in August 1991, the time of the Law & Company analysis, and 40 hours during the period 10 November 1991 through 20 December 1991, or $2,580 (47498, ex. A-78, tab 23 at 4-5). The samples obtained in the later period of time required Mr. Nwogu's time, which we estimate as approximately two days. We find a reasonable estimate of this time and the expenses for which we have documentation to be $1,110.[10] The services of an accountant were not reasonably required as a part of the additional testing. Appellant has not provided a basis for the quantum of the other claimed costs.

5. Lagoon # 2 Increased Costs Due to Higher Solids Content

29. Appellant has stated increased costs of testing and extra work due to higher solid content in lagoon # 2 sludge as $51,974. Appellant has presented the costs in a total

[10] This estimate is based on two eight-hour days of Mr. Nwogu's time at the rate of $60 per hour, two nights of lodging expenses at a rate of $50, and per diem expenses of $25 per day.

cost form based on bid costs as $39,105 deducted from total actual costs of $91,079 to calculate the amount of $51,974, which includes overhead and profit (finding 9, *supra*). We find it was impracticable for appellant to collect and segregate all its additional costs during contract performance in response to the discovery of specific changed conditions in lagoon # 2. The direct costs are claimed to have been incurred for additional sample analysis ($1,550), on-site subcontractors ($24,060), off-site transportation and TSD charges ($36,267), and ESCI labor and field costs ($14,260), which is a total of $76,137, of which $37,032 is claimed. (Ex. A-15) The on-site subcontractors were Environmental Professionals, Inc. (Enpro); Continental Vanguard, Inc; ECP, Inc.; and CBS Environmental Services, Inc. The off-site subcontractors for disposal and transportation were Envirite, CWM Chemical Services, Inc. (Model City), and Horwich Trucking. (47498, ex. A-78, tab 45). The Response included the amounts invoiced by the subcontractors which we calculate as a total amount of $60,327. With respect to Enpro, the Response stated that the costs were compensated in Modification No. P00002. The Response objected to subcontractor costs on the basis that ESCI did not pay invoices submitted by subcontractors Envirite, Continental Vanguard, CBS Environmental, and Horwich Trucking. (Ex. G-19) The Response, based on Mr. Haynes' analysis, took the position that appellant's actual costs incurred for disposal of 237 cubic yards of lagoon # 2 sludge did not exceed its bid costs (*id.* at 7-8, 11).

30. Appellant's additional work to dispose of lagoon # 2 sludge has previously been found by the Board and is also documented by appellant (00-1 BCA at 152,137-40; ex. A-8, tab 11; tr. 2/185-87, 3/90, 105). Appellant has not presented supporting documentation for the amount of direct labor and field costs, but only referred to its claim. Appellant compiled its costs associated with the lagoon # 2 sludge removal and cleaning during the period September 1991 to November 1992 as Mr. Nwogu's time, payroll taxes, estimated air fare, hotel, meals, rental car and per diem in the total amount of $12,964 without further support. Appellant has increased its claim by ten per cent, or $1,296, to $14,260 without explanation. We find that these costs are not properly substantiated (47498, ex. A-78, tab 45). Appellant estimated 160 hours of Mr. Nwogu's time for management and supervision and provided a detailed chronology of 10-hour days for management, site administration, and site work, but the estimate is not related to the additional work. There are no airfare, hotel, or car rental receipts for an estimated 16 days of work. (Ex. A-8, tab 9) Appellant substantiated the amount claimed for additional sample analysis with invoices in the amount of $1,550, which were verified by the Response, but considered base contract work (ex. G-19; 47498, ex. A-78, tab 45). The Law & Company testing in the amount of $1,100 was performed after the change in conditions of the sludge in order to evaluate disposal methods, and was additional work (tr. 3/89). Appellant was not compensated for the portion of costs for testing apron soil in Modification No. P00002 (47498, ex. A-54). Envirite's invoice for $450 was for "waste acceptance," which it performed in connection with its disposal of the sludge, and thus amounted to testing that appellant contemplated in bidding and not additional work (47498, ex. A-78, tab 45 at 18).

31. Appellant's subcontractor costs that were verified by the Response are supported by invoices (ex. G-19; 47498, ex. A-78, tab 45). We find appellant deducted $3,475 from the $6,723 invoiced by Enpro that was paid by the contract modification and is only claiming the balance of $3,248. (R4, tab 1; 47498, ex. A-78, tabs 3, 45 at 5) Appellant has not received full compensation for the costs charged by Enpro.

32. We find appellant bid $165 per cubic yard to collect, dispose, and transport 525 cubic yards of lagoon # 2 sludge, which was reasonable (finding 2, *supra;* 47498, ex. A-5; tr. 4/183). Appellant claims it incurred costs of $384 per cubic yard.[11] Appellant argues that these costs were reasonable compared to the government's estimate of $435 per cubic yard for disposal of the balance of the lagoon # 2 sludge and other bids of $577 and $783 per cubic yard for completion of the lagoon # 2 work. (Ex. A-62, -63; tr. 2/188, 4/189-90) On the basis of its subcontractor costs and adding overhead and profit, we find appellant reasonably incurred costs of at least $294 per cubic yard and that it was not responsible for the added expenses.[12] We thus reject the government's findings that appellant's estimated cost for disposal and transportation of lagoon # 2 sludge was $145 per cubic yard and its actual costs for the 237 cubic yards disposal did not exceed its bid. The government's calculations were based on a 1991 cash flow projection which was not appellant's bid, but summarized by Mr. Haynes in a bid analysis sheet attached to the Response. The government did not present testimony regarding the bid analysis sheet. We are unable to find that the government's analysis reflects appellant's bid or its actual costs incurred in disposal of lagoon # 2 sludge. (Ex. A-8, tab 5 at 6; ex. A-60 at 2, tab 3 at 18; ex. G-19 at 11; tr. 3/32-33; 47498, ex. A-5) Appellant reasonably used the services of subcontractors for disposal of lagoon # 2 sludge and incurred costs of $294 per cubic yard, or $69,677. Of this amount appellant has been paid $39,105 (47498, ex. A-57). Appellant incurred additional costs for disposal and transportation of lagoon # 2 sludge of $30,572.

6. Improper Interference in Failing to Approve Subcontractors

33. Appellant has stated that it incurred costs for Associated Chemical & Environmental Services, Inc. (ACES) to perform services with respect to lagoon # 2 sludge in the amount of $3,000 (ex. A-15). The Response to the Statement of Costs verifies the amount, but states that ACES was performing base contract work (ex. G-19). The subcontract work performed by ACES on 24-26 June 1991 on lagoon # 2 has been found to have been without benefit to the contract due to a compensable government change in contract requirements that prevented appellant from proceeding with disposal

[11] This amount includes overhead and profit. Appellant calculated the amount as total actual costs divided by actual cubic yards disposal ($91,079 ÷ 237 = $384) (finding 9, *supra*; ex. A-8, tab 11).

[12] The calculations are $60,327 + 3,016 (overhead at 5 %) = $63,343 + 6,334 (profit at 10 %) = $69,677 ÷ 237 = $294.

of lagoon # 2 sludge (00-1 BCA at 152,134). Appellant's advance payment to ACES of $3,000 is supported by an invoice, dated 28 June 1991, and Mr. Nwogu's testimony on behalf of appellant (47498, ex. A-78, tab 44; tr. 2/151, 159-62, 185).

34. Appellant states direct labor costs in the amount of $871 for Mr. Nwogu's time on 25 and 26 June 1991, of six hours on each day at the rate of $60 per hour, and including fringe benefits and field overhead (ex. A-15). The Response objected to compensation for Mr. Nwogu's time (ex. G-19). Appellant asserts these costs as the costs of disruption because it was not allowed to begin the on-site lagoon # 2 operations in June. The government's prevention of performance on those dates caused appellant to incur additional costs of $720, but appellant has presented no documentation for the other costs claimed (finding 16, *supra;* tr. 2/160-62).

7. Improper Interference in Withholding Analysis of Lagoon # 1 Sludge

35. Appellant has stated that it incurred direct labor costs of $3,960 for 60 hours of Mr. Nwogu's time as a result of the government's unreasonable delay in providing analysis of lagoon # 1 sludge required for its disposal (ex. A-15). The Response objected to compensation for Mr. Nwogu's time (ex. G-19). The Board's decision on entitlement found improper interference with appellant's performance during the period 29 August 1991 through 13 November 1991 that caused appellant to "unnecessarily expend resources in seeking disposal facilities" (00-1 BCA at 152,145). Mr. Nwogu "conservatively" estimated he spent 60 hours in this effort (ex. A-15 at 5), but appellant has not sufficiently tied the amount of time to particular projects (ex. A-8, tab 7). Mr. Nwogu described the amount as "a lot of hours going around trying to figure out what to do, waiting for results" (tr. 2/170). The preparation of a revised work schedule for removing lagoon # 1 sludge, the execution of Modification No. P00001, the review of an analysis performed for the government by QC, Inc., and contacts with Mobile Dredging & Pumping Co. have been found related to lagoon # 1 sludge during this period (00-1 BCA at 152,139-41). We find the estimated amount of Mr. Nwogu's time reasonably affected by the government's failure to cooperate with the continuation of lagoon # 1 sludge disposal to be no more than 12 hours. Appellant incurred $720 in increased direct labor costs as a result of the government's withholding of analysis of lagoon # 1 sludge.

8. Improper Interference in Restricting CNYIS Work

36. Appellant has stated that it incurred $23,155 owed to CNYIS for the mobilization of CNYIS to the site when the government interfered with its performance in requiring a percentage completion of lagoon # 1 disposal before beginning disposal of lagoon # 2 sludge (ex. A-15). The Response verified that this amount represented incurred costs that are supported by two invoices issued by CNYIS, but stated that appellant has not paid CNYIS (ex. G-19; 47498, ex. A-51). Appellant's obligation to CNYIS is in a letter proposal, dated 8 July 1991, from CNYIS to appellant that appellant

accepted on 18 July 1991 (47498, ex. A-31, tr. 4/22, 106; tr. 2/154, 4/134). CNYIS mobilized with NADC approval but did not perform any contract work for several reasons: an extra-contractual requirement of 90 percent completion of lagoon # 1 had not been fulfilled, appellant did not submit CNYIS evidence of insurance as required by the contract, appellant did not submit a certificate from a disposal facility that it would accept sludge for disposal, and appellant did not pay or provide a requested letter of credit to CNYIS. CNYIS was qualified to perform the contract work. CNYIS was later awarded the contract for completion of the work in lagoon # 2 after the termination of appellant's contract. (00-1 BCA at 152,135 and 152,141; 47498, tr. 4/87, 96-97; tr. 2/154-59, 3/233, 4/122)

9. Liquidated Damages

37. Appellant has stated a claim for remission of liquidated damages in the amount of $11,553, with respect to both lagoons # 1 and # 2 (ex. A-15). The Response has verified the amounts of $684 and $10,869, respectively, with reference to the contracting officer's final decision (ex. G-19). The government withheld an amount of $10,964 from payment of appellant's invoice, dated 31 October 1991, for work unperformed in disposal of lagoon # 2 sludge and other amounts totaling $684 for a different calculation for cubic yards of lagoon # 1 sludge disposed of, and turf restoration and liner damage for lagoon # 1 (47498, ex. A-57; tr. 2/82, 188). The government has admitted that the unexplained lower amount of $10,869 related to unperformed work in lagoon # 2 is due to ESCI (finding 10, *supra*). The government has not explained the difference between the amount of $10,869 in the contracting officer's final decision and the amount of $10,964 in the government documentation of the amount of the assessment (R4, tab 4; 47498, ex. A-57). We have accepted the amount of $10,964 as the correct amount of liquidated damages withheld. Appellant has not shown that any other withholding was improper.

10. Overhead and Profit

38. Appellant has stated home office overhead on its direct costs as three percent and overhead on its subcontractor costs as five percent on the basis of rates in Modification No. P00002 (ex. A-15). The Response did not comment on overhead costs (ex. G-19). Appellant's proposed rates of three and five percent were accepted by the government in negotiations of the modification (R4, tab 1; 47498, exs. A-54 at 14, -78, tab 3; tr. 1/91, 2/162). Appellant maintained an office during contract performance. Appellant did not hire office employees, but incurred overhead expenses, which are in appellant's financial statements and have generally been verified by DCAA to appellant's checkbook register. (Ex. A-59, tab 5; tr. 4/248)

39. Appellant has stated profit at the rate of 15 percent on all its costs without providing justification for this particular rate (ex. A-15). The Response stated that no more than ten percent profit was due appellant because on contract modifications

appellant agreed to that profit rate (ex. G-19). Appellant's proposal that was accepted in Modification No. P00002 included profit at the rate of 10 percent. (R4, tab 1; 47498, exs. A-54 at 14, -78, tab 3) Mr. Nwogu acknowledged at the hearing that 10 percent would be an appropriate rate of profit (tr. 2/166-67).

POSITIONS OF THE PARTIES

Appellant's position was provided in its opening statement at the hearing. Mr. Nwogu said that his presentation was based on the Statement of Costs, appellant's motion for reconsideration, dated 29 July 2003, and his letter, dated 8 October 2003 to the Board (exs. A-8, -15, -60; tr. 1/42). Appellant maintains that the documents of record show the costs incurred for performing the compensable changed work, and the costs were reasonable compared to the amount the government required to finish the contract. Mr. Nwogu considers it unfair and an injustice that during the past 13 years since award and performance of the contract, the government has not made any payment to appellant after making agreements that it would provide an equitable adjustment. The government received benefit from appellant's work but has not provided compensation. (Tr. 1/29-30, 34-35) Appellant borrowed money but did not pay the people he could not pay (tr. 1/36). Mr. Nwogu complained of the company's loss of credit as well as the personal harm he suffered in connection with this contract (tr. 1/37-39). Mr. Nwogu has personally persisted in the litigation for a fair result in the interest of justice (tr. 1/29-30, 36).

The government submits that appellant has failed to meet its burden of proof to show in its accounting records, without proper allocation and segregation of costs for base work and changed work, that it incurred the increased costs solely because of the changes. The government objects to appellant's resistance to producing specific records, particularly the 1991 original cancelled checks, some of which were found "suspicious" when they were made available at the hearing, and ledgers that it expected a contractor to maintain (gov't br. at 34). The government disputes the claims for subcontractor costs if appellant did not pay them. The government maintains that appellant has no present, legal liability to its subcontractors and, therefore, the costs were not incurred and are not compensable. Since the statute of limitations has run in jurisdictions where appellant could be sued for nonpayment of invoices, the government argues that there is now no legal liability and the costs were not "incurred costs." The government also argues that appellant cannot recover on behalf of subcontractors that no longer exist or have written off outstanding debts owed by appellant. In addition, the government argues that appellant's costs claimed for disposal and transportation of the sludge, with the exception of surcharges due to higher solids content in lagoon # 1 sludge, were included in its bid price and do not represent increased costs that exceeded its bid costs (gov't br. at 35, 38).

PRELIMINARY MATTERS

Appellant filed several motions before the hearing to which the government did not respond (reply to government's motions and appellant's cross-motions, dated 8 October 2003 (app. reply)). The Board deferred the matters presented for consideration with the merits of the appeal. We deny appellant's motions or find them moot as discussed below. Appellant filed a motion to strike certain exhibits from the government's motion to dismiss, dated 9 September 2003, to prevent the government from introducing affidavit evidence from Mr. Dery, Mr. Haynes, and Ms. Elizabeth McKay as prejudicial, irrelevant, nonprobative, misleading, and inflammatory (app. reply at 13). Appellant's argument that the affidavits and declarations present defenses that were not raised in the entitlement hearing and the government should be estopped from using them at the hearing is without merit as this material bears on the costs claimed for recovery. The Board advised the government that affidavit evidence was generally not admissible without a stipulation from appellant, and, in any event, is less probative than witness testimony at a hearing. Appellant's objections to the declaration of Mr. Haynes, an expert witness, are that his qualifications did not show him to be an expert, and his opinions were not based on expertise with respect to environmental waste disposal methods or personal knowledge of contract performance events, but are speculative assertions that set forth conclusions that are matters for the Board to decide as the legal issues presented in the appeal (app. reply at 15-16). The opinion testimony of an expert in government contract accounting is admissible under the Federal Rules of Evidence Rule 704 where the Board concludes that the testimony may assist it in understanding the evidence and in the determination of facts in issue even though it embraces an ultimate issue. *Orbital Sciences Corporation,* ASBCA No. 50171, 00-1 BCA ¶ 30,860. The Board admitted the written statement of Mr. Haynes, who was qualified as an expert in cost engineering, as an expert report (exs. G-14, -15; tr. 4/309, 316). The other named individuals were present during the four-day hearing, but the government did not allocate sufficient time to present their testimony. As a result, the Board admitted in evidence the sworn declaration of Ms. McKay in response to the government's request (ex. G-16; tr. 4/325, 330). The government did not seek admission of the sworn declaration of Mr. Dery.

Appellant filed a motion for estoppel to prevent the government from introducing evidence to deny the facts established during the entitlement hearing with respect to appellant's bid (app. reply at 21). Appellant renewed this motion in a submission to the Board after the hearing (app. response to government's request for reconsideration, dated 17 July 2004 (app. resp.)). We deny the motion. We have not revised any of our entitlement findings.

Appellant filed a motion for equitable tolling to prevent the government from asserting that appellant is not entitled to recover for incurred subcontractor costs because the statute of limitations has run (app. reply at 24). Appellant renewed this motion after the hearing (app. resp. at 33). Appellant submits that its subcontractors are not barred

from suing it to collect amounts payable on outstanding invoices although the time elapsed since 1991 exceeds the statutory period for suit because the pendency of the ASBCA appeals has tolled any applicable state statute. Appellant has not shown how the pendency of the appeals would have precluded the subcontractors from filing timely actions. Both WCI and CNYIS did file lawsuits against appellant (finding 6). Accordingly, we have considered the government's evidence and argument related to the statute of limitations.

Appellant filed a motion in limine to prevent the government from introducing and using unrelated, prejudicial documents (app. reply at 27). Appellant identified these documents as litigation documents involving two of its subcontractors and one of its attorneys, and its bankruptcy petitions. Appellant has alleged that the government has acted in bad faith or for discriminatory purposes in presenting documents to support its position that certain costs claimed do not constitute incurred costs. The government argued that the failure to list subcontractors as creditors in its bankruptcy filings is "probably the best evidence ESCI has no actual liability to any of them" and suggests that, if Mr. Nwogu believed all his creditors were included, his submissions were "fraudulent and he committed perjury" (gov't br. at 35). The documents are public records and have not been excluded from evidence.[13]

On 10 June 2004, the government filed a request for reconsideration of the Board's decision[14] that denied its motion for partial summary judgment that appellant was not entitled to recovery of costs on behalf of unpaid subcontractors who could not sue appellant because the statute of limitations has run (gov't request). The government submits that the Board's decision adopts a new definition of "incurred costs" that is contrary to FAR 31.201-5. The government also requested that the motion be referred to the Senior Deciding Group for decision. The Chairman has determined that the issues presented by the motion are not of such unusual difficulty, significant precedential importance, or dispute within the normal decision process as to justify referral to the Senior Deciding Group. *AEC Corporation, Inc.*, ASBCA NO. 42920, 03-1 BCA ¶ 32,071. Accordingly, he has denied this request. Appellant has responded in support of the Board's decision and in opposition to the government's request (app. resp.). The government has presented no new evidence in support of its motion. Its arguments in reliance on a 2000 federal appellate decision are not new arguments that could not reasonably have been offered to the Board prior to its decision. We have considered them only to ensure that our decision was not erroneous and to clarify for the government the legal principles applicable to the disposition of this appeal.

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[13] Appellant's reply makes reference to a motion for judgment on the pleadings and a motion for damages, which were discussed in the reply with respect to the merits of the appeal and need not be considered here as separate matters (app. reply at 1, 50).

[14] *Environmental Safety Consultants, Inc.*, ASBCA No. 53485, 04-1 BCA ¶ 32,626.

In *Southwest Marine, Inc. v. Danzig*, 217 F.3d 1128 (9th Cir. 2000), the government was held entitled under the credit provision clause in FAR 31.201-5 to recoup the portion of the amount paid to a contractor for which the contractor no longer had an obligation to pay subcontractors because of the voluntary relinquishment of claims from subcontractor creditors after the bankruptcy of the contractor. The government submits here that "a cost initially 'incurred' can cease to be an 'incurred' cost where the contractor's potential liability for it is removed or compromised based upon subsequent events" (gov't request at 6-7). The contractor's liability for its debts may be removed or changed, for example, by a settlement agreement after litigation. Under a statute of limitations a claim is generally not extinguished after the statutory period has elapsed; it is only unenforceable. *See Nan Sing Marine Company, Ltd.*, ASBCA No. 30285, 86-2 BCA ¶ 19,006 at 95,993, *aff'd*, 811 F.2d 1495 (Fed. Cir. 1987). The bankruptcy discharge in the *Southwest Marine* case did not extinguish the debts, but merely protected the contractor from personal liability. Rather it was the voluntary action of the creditors that reduced the amount of the contractor's incurred costs. The government's argument here that appellant no longer has incurred costs payable to subcontractors by operation of statutes of limitation is without merit. The operation of statutes of limitations is not an event that removes a contractor's liability for incurred costs and causes the costs to cease to be incurred costs. We also reject the government's argument that appellant did not incur costs because of an absence of a "general ledger or other competent corporate accounting records" (gov't request at 7). "Incurred costs," as defined in court and Board precedents have been discussed in our prior decision. 04-1 BCA at 161,429. They do not depend on their accounting treatment. Upon further consideration, we affirm our decision that denied the government's motion for partial summary judgment.

At the hearing the government moved to strike Mr. Nwogu's testimony concerning appellant's dispute with WCI and his statement that he would pay WCI when he received payment as "fabricated" (tr. 2/176). Appellant did not disclose the WCI litigation documents to the government in response to a Board order to compel discovery. After the hearing the government requested the sanction of an adverse inference that ESCI has no liability to WCI other than its $5,000 payment to WCI or at most the $7,000 settlement (gov't br. at 23). The nondisclosure of the prior WCI litigation provides a basis for an adverse inference that WCI compromised its claim for liability of $7,000. We do not infer from appellant's position in prior litigation or the failure to disclose litigation documents that appellant will not pay WCI and other subcontractors when it receives payment from the government. We have found to the contrary (finding 6). The government's motion to strike is denied. The government's motion for sanctions is granted.

At the hearing the government moved the admissibility of deposition testimony of Mr. Andrew J. Slizewski that he did not prepare the Statement of Costs to contradict Mr. Nwogu's testimony that he had a role in the preparation of the document. The government argued that Mr. Slizewski was an appellant-aligned witness unavailable for

testimony. Appellant objected to the introduction of the deposition testimony as including discussion of legal matters that were prejudicial and unrelated to the costs in issue in the appeal. (Tr. 4/18; ex. G-20, tab Z) The government's motion is denied.

DECISION

Appellant has the burden of proving quantum with respect to its affirmative claims. To meet its burden of proof, appellant must establish not only that the costs were incurred, but also that the costs are reasonable, allowable and allocable to the appropriate contract. *See ITT Federal Services Corp. v. Widnall*, 132 F.3d 1448, 1451 (Fed. Cir. 1997); *C.H. Hyperbarics, Inc.*, ASBCA No. 49375 *et al.*, 04-1 BCA ¶ 32,568. The contractor must prove the amount of loss with sufficient certainty so that determination of the amount for which the government is liable will be more than mere speculation. *See Lisbon Contractors, Inc.*, 828 F.2d 759, 767 (Fed. Cir. 1987). Where liability is clear and a fair and reasonable approximation is possible, it is "legal error for the board to fail to enter an award for damages in the nature of a jury verdict." *S.W. Electronics & Manufacturing Corp. v. United States*, 655 F.2d 1078, 1088 (Ct. Cl. 1981); *LA Limited, LA Hizmet Isletmeleri*, ASBCA No. 53447, 04-1 BCA ¶ 32,478. Appellant does not have the benefit of a presumption of correctness to its statement of costs, but is required to present supporting evidence for the items of cost claimed. Appellant can thus make a *prima facie* showing of facts to establish its quantum recovery, and the government is then required to come forward with evidence to contest the *prima facie* case. If the other party fails to do so, the *prima facie* case stands uncontroverted and the party with the burden of proof will have established its case by a preponderance of the evidence. *See Frank Lill & Son, Inc.*, ASBCA Nos. 44523, 44524, 96-1 BCA ¶ 27,951.

Before addressing appellant's quantum claims directly, the government defended against providing any reimbursement of appellant's increased costs on the basis that appellant cannot prove its claim without more accounting records. Mr. Nwogu has not been fully cooperative in permitting the inspection and copying of all of appellant's 1991 financial records. Appellant's delay in providing its bank statements and cancelled checks from 1991 for government inspection is without justification (finding 11). We will not, however, deny the appeal on this ground, and the government has not suggested other sanction for these violations of a Board order. The government attempted to invalidate appellant's claim on the basis of its experience with Mr. Nwogu in performance of the contract and its perception of Mr. Nwogu.[15] The Board did not find the government's approach persuasive, but has addressed the merits of the claim and the more specific defenses contained in the government's brief.

[15] The government's characterization of Mr. Nwogu's personality and conduct will not be discussed here (gov't br. at 4, 7, notes 3-4). Ms. Evans' impression of Mr. Nwogu has been provided to the Board in her undated sworn declaration (ex. G-20, tab 4 at 3). Appellant has objected to her "unconscionable" views of and beliefs about Mr. Nwogu (app. resp. at 2).

The government has also asserted to the Board that it was unable to adequately present its case because of Mr. Nwogu's conduct at the hearing (gov't br. at 4). The record is to the contrary (finding 14). The government cannot legitimately complain of not having sufficient time to proceed with its defense of appellant's claim after freely choosing its allocation of more than half the scheduled hearing time and receiving ample time to prepare a post-hearing brief.

The government arguments that appellant did not properly allocate and segregate its costs for base work and changed work and that no unpaid subcontract costs are compensable because they were not incurred costs do not support denial of the appeal. Appellant submits that it was impossible to record actual cost data attributable to each change made during performance of the contract (app. resp. at 43). Where a contractor does not accumulate cost data and cannot identify its actual costs attributable to changes, estimates may be used to quantify the increased costs a contractor incurred. *See Coastal Dry Dock and Repair Corp.,* ASBCA No. 36754, 91-1 BCA ¶ 23,324 at 117,002. The government's position that appellant's subcontractor costs that were not paid are not incurred costs is erroneous. Appellant has noted the rejection of this contention by the Labor Board of Contract Appeals in *Kumin Associates, Inc.*, LBCA No. 94-BCA-3, 98-2 BCA ¶ 30,007, at 148,435, where the Board stated in reliance on court and other Board precedents, that a contractor has "incurred costs" not actually paid, and they may be included in a claim for equitable adjustment on behalf of subcontractors (app. resp. at 9). We have previously held that an incurred cost includes an amount paid out in the past or an obligation to be paid out in the future. 04-1 BCA at 161,429 The government is concerned about a windfall for a contractor that is not required to pay its subcontractors, but the Board has held that a contractor is to be paid its incurred subcontractor costs even if it is delinquent in paying those costs. *Patel Enterprises,* ASBCA No. 41529, 93-2 BCA ¶ 25,863 at 128,680-81.

The government has argued with respect to all of appellant's claims except category 9 for liquidated damages and category 2 for subcontractor surcharges due to higher solids content in lagoon # 1 sludge that appellant has failed to establish that its costs increased in performing the changed work. Where appellant's costs were included in its bid and not attributable to the changed conditions, they are not recoverable. The analysis offered by Mr. Dery and documented by Mr. Haynes in the government's response to the Statement of Costs was not persuasive to show that appellant's costs did not exceed its bid costs. The government improperly relied on a cash flow analysis prepared after award of the contract rather than appellant's bid (finding 32). As we have noted, DCAA did not prepare an audit report. The Board has relied on the government's detailed Response to the Statement of Costs although there was little government testimony at the hearing concerning its analysis of specific costs.

With respect to category 1 of appellant's Statement of Costs, appellant is entitled to recover the reasonable additional costs of removing and disposing of the lagoon # 1

sludge that resulted from the change in the solids content of the sludge, provided they are established as having been incurred by contemporaneous financial records or by reasonable estimates. The government has primarily relied on the absence of complete records that would generally be found in an established corporate government contractor accounting system to dispute appellant's recovery for these costs. The fact that appellant's accounting system may have been unsophisticated and incomplete does not affect the credibility of the documentation provided in support of the costs claimed.

The government disputes entitlement to costs incurred for Mr. Nwogu's time because he did not, as sole owner of the company, receive a regular salary from appellant. When the number of hours and costs allowable for the owner's time can be determined, however, the costs may be reimbursed to the contractor. *Paul E. McCollum, Sr.,* ASBCA No. 23269, 81-2 BCA ¶ 15,311 at 75,822. The government compensated appellant for Mr. Nwogu's time in Modification No. P00002 at a negotiated rate of $60 per hour, and there is no reason for the government to change its position on appeal.

The government disputes entitlement to Mr. Nwogu's labor costs and his travel and related expenses because appellant has not adequately segregated claimed costs from those related to requirements to perform the base contract work. The government objects that appellant is relying "almost exclusively on [Mr. Nwogu's] self-serving testimony about segregation of costs and how his claim was prepared" (gov't br. at 39). Mr. Ngowu did not have the financial resources to retain experts and present their testimony to prove appellant's claim at the hearing and could do no more than point to the supporting documentation and provide relevant explanation. Appellant has not claimed all labor and travel and related expenses as the government suggests, and we have found sufficient basis in the record to limit the recovery of costs to those attributable to the changed conditions.

We have found the costs of direct labor, some of Mr. Nwogu's time on the project, some costs of his travel to the site, some of the equipment rental, and some material costs substantiated as costs incurred in performing the work using a method different than what appellant planned in bidding (findings 16-18, 20-21). The amount of direct costs that appellant is entitled to recover is $25,033.

With respect to category 2 of appellant's Statement of Costs, appellant met its burden of proving that it was billed increased costs by CWM based on solids content in shipments that exceeded the maximum solids content set forth in the specifications (finding 22). The government's argument that appellant failed to meet its burden of proving causation is without merit (gov't br. at 19). We have held to the contrary in deciding entitlement. The government has acknowledged that these costs were increased costs (gov't br. at 38). The surcharges were billed as a result of the solids content of the sludge. The amounts recoverable, however, in the absence of further explanation from appellant, need to be limited to the charges related to shipments that exceeded the solids

limit in the specifications. Accordingly, we deduct the amount of $891 for stand-by charges and unloading charges that CWM appears to have charged in error.

The government submits that it is "unclear" whether appellant paid all of CWM's invoices. The government maintains that any amounts claimed above what was paid to this vendor are not incurred costs and should not be allowed. (Gov't br. at 20) The government submits that if an amount owed by ESCI no longer appears on the company's books, it is not a "current, legal liability" (gov't br. at 20). We have addressed this argument above in affirming our denial of the government's motion for partial summary judgment. In July 1991, ESCI subcontracted with CWM for the disposal of lagoon # 1 sludge and agreed to payment of its charges. Appellant's accounting system does not change the fact of this legal obligation, nor does the fact that CWM has written off the debt as uncollectible. The amount of direct costs that appellant is entitled to recover is $16,686.

With respect to category 3 of appellant's Statement of Costs, appellant incurred increased costs as a result of the contaminants in lagoon # 1 sludge that prevented disposal of the sludge in a POTW as appellant planned in bidding (findings 3, 23). The government points out that neither WCI nor CWM exist anymore in its prior corporate status (gov't br. at 23). Appellant has identified the successors to these corporations for making payment, and this fact would not prevent recovery of the costs we have found resulted from the changed conditions (finding 26). The government has alleged that "the duplication [of CWM charges from another category of costs] and the [deliberate] manner in which it was concealed sheds light on the credibility and reliability of appellant's quantum presentation" (gov't br. at 22). We have found appellant's presentation of these costs, which appellant has corrected, negligently prepared in listing a relatively small amount of the costs twice (finding 25). We do not draw the negative inferences the government suggests from appellant's use of manifest numbers rather than invoice numbers in itemizing the claimed costs. The amount of direct costs for these charges is $13,769 (finding 26). Appellant's claim is based on the difference between the cost of disposal it allegedly bid for POTW disposal and the higher cost it incurred. We have found, however, that its bid in fact contained the higher TSD disposal costs and it cannot, therefore, recover on this portion of its Statement of Costs (finding 3).

With respect to category 4 of appellant's Statement of Costs, we have found that appellant substantiated some of the increased costs incurred for the additional testing required by the changed conditions of the lagoon # 1 sludge (findings 27-28). The amount of direct costs that appellant is entitled to recover is $1,110 for appellant costs and $1,615 for subcontractor costs.

With respect to category 5 of appellant's Statement of Costs, appellant incurred increased costs in disposal of lagoon # 2 sludge that we have held compensable. The government disputes entitlement to these costs on the grounds that appellant's "billed costs for disposal and transportation for lagoon # 2 did not exceed its bid costs" (gov't br.

at 38). The government has argued that no transportation costs increased as a result of the changed conditions, but it is apparent that the cost of transportation for lagoon # 2 sludge as hazardous waste was significantly greater than that for lagoon # 1 sludge (*id.* at 39). The substantiated costs that appellant incurred, *i.e.* the charges by all its subcontractors for disposal and transportation of lagoon # 2 sludge, were more than the amount appellant bid. Appellant is entitled to recover the additional amount of $30,572 incurred (finding 32) plus the increased costs of the testing performed by Law & Company for which there was a charge of $1,100 (finding 30).

With respect to category 6 of appellant's Statement of Costs, appellant has established that it incurred increased costs paid to subcontractor ACES and was disrupted when the government did not permit it to proceed with lagoon # 2 work (findings 33-34). The government argues that appellant did not propose to use ACES as a subcontractor and did not have approved submittals at the time it began work with ACES, and therefore, the government cannot be held responsible for the increased costs that were incurred. The government has also argued that this portion of lagoon # 2 work was base contract work. (Gov't br. at 29) We have held to the contrary in deciding entitlement (finding 33). The amount of the costs claimed is not disputed except with respect to time charges for Mr. Nwogu. We have found the additional hours spent by Mr. Nwogu on the contract in a capacity other than management and supervision anticipated in bidding was reasonable (finding 34). They are compensable at $60 per hour. The amount of direct costs that appellant is entitled to recover is $3,000 paid to appellant's subcontractor ACES plus $720 for appellant's costs.

With respect to category 7 of appellant's Statement of Costs, appellant has estimated the additional hours spent by Mr. Nwogu as a result of the government's improper withholding of the required analysis of lagoon # 1 sludge. The government argues that these claimed costs are "pure fiction" (gov't br. at 31). The government objects to compensating appellant for any time spent by Mr. Nwogu and was unable to determine when the costs were incurred or for what (*id.* at 30-31). The Board has reviewed the record and found basis to estimate 12 hours as the reasonable amount of time spent by Mr. Nwogu on additional work (finding 35). They are compensable at $60 per hour. The amount of direct costs that appellant is entitled to recover is $720.

With respect to category 8 of appellant's Statement of Costs, appellant has established the amount of $23,155 owed to CNYIS when it mobilized to the site to dispose of lagoon # 2 sludge but did not perform any contract work (finding 36). The government disputes the costs claimed as having resulted from appellant's fault that CNYIS did not perform (gov't br. at 31). We held that the government failed to cooperate with appellant in rejecting appellant's proposed subcontractors for performance of lagoon # 2 work. Appellant was entitled to compensation for improper interference with its performance of the contract where the government did not challenge a subcontractor's qualifications or justify its disapproval (00-1 BCA at 152,145). With respect to CNYIS, we held that the government had a reasonable basis to reject

appellant's proposal in requiring evidence of current insurance. Furthermore, we decided that, to the extent other factors were also the basis for the government's interference, appellant did not satisfy its heavy burden of proof to show that the acts and failures to act of the government were in bad faith.

With respect to category 9 of appellant's Statement of Costs, there is no dispute that appellant is entitled to recovery of liquidated damages for work unperformed in disposal of lagoon # 2 sludge (finding 37). The government could not determine the exact amount withheld from the record (gov't br. at 32). We conclude that appellant is entitled to recovery of the amount of $10,964.

Appellant has claimed overhead costs on the basis of the rates that were approved by the government in negotiation of a contract modification. The government argues that appellant cannot recover office overhead because compensation for home office overhead is "inappropriate" where a contractor does not have an office or employees (gov't br. at 41). We have found that appellant incurred overhead expenses (finding 38). An equitable adjustment is calculated to include overhead on the costs of the added work. *Clauss Construction,* ASBCA No. 53953, 04-1 BCA ¶ 32,627; *C. H. Hyperbarics, Inc.,* ASBCA No. 49375 *et al.,* 04-1 BCA ¶ 32,568. Appellant has applied the rates of three percent and five percent for contractor and subcontractor costs, respectively, that were accepted by the government in negotiating a modification to the contract (finding 38).

Appellant has claimed profit at the rate of 15 percent of its direct costs, including subcontractor costs. The government disputes the profit rate as unjustified on any part of the claim. The government objects to a rate in excess of the ten percent applied previously by the parties. (Gov't br. at 41) Appellant has submitted no justification for the profit rate claimed and acknowledged at the hearing that ten percent would be an appropriate rate (finding 39). We allow ten percent.

CONCLUSION

We accept appellant's proof of the following increased costs: lagoon # 1 ESCI costs of $25,023, lagoon # 1 CWM subcontractor costs of $16,686, lagoon # 1 testing subcontractor costs of $1,615, lagoon # 1 testing ESCI costs of $1,110, lagoon # 2 subcontractor costs of $30,572, lagoon # 2 testing subcontractor costs of $1,100, improper interference ESCI costs of $1,440, improper interference subcontractor costs of $3,000, and liquidated damages of $10,964. The total of ESCI increased costs is $27,583. The total of subcontractor increased costs is $52,973. We have concluded that overhead rates of three percent for ESCI costs and five percent for subcontractor costs

and a profit rate of 10 percent are appropriate for the added work. Thus we calculate the equitable adjustment for the added sludge disposal work as follows:

Added ESCI costs	$ 27,583		
Overhead @ 3 %	827		
Subtotal	28,410		
Profit @10%	2,841		
Subtotal		31,251	
Added subcontractor costs	52,973		
Overhead @ 5 %	2,649		
Subtotal	55,622		
Profit @ 10 %	5,562		
Subtotal		61,184	
Liquidated damages		10,964	
Total			$103,399

Appellant is entitled to an equitable adjustment of $103,399 plus interest from the date of the contracting officer's receipt of appellant's certified claim on 26 June 1992, pursuant to 41 U.S.C. § 611. The appeal is sustained in part and otherwise denied.

Dated: 8 March 2005

LISA ANDERSON TODD
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. 53485, Appeal of Environmental Safety Consultants, Inc., rendered in conformance with the Board's Charter.

Dated:

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