ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Curry Contracting Company, Inc.	)	ASBCA No. 53716
	)	
Under Contract No. DACW01-95-C-0140	)	

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OPINION BY ADMINISTRATIVE JUDGE REED

This appeal concerns contractor claims under a construction contract. The contractor asserts that directed or constructive changes, attendant delays, and constructive acceleration resulted in extra costs and time for performance. In addition, the contractor challenges the government's assessment of liquidated damages (LDs). The government argues that the claims and the appeal should be denied because deviations from the contract's requirements initiated by the contractor are at the root of the claims. The Board considered entitlement only. We deny the appeal.

FINDINGS OF FACT

The Project, the Solicitation, and the Contract

1. Prior to 1994, "a potentially hazardous navigation condition [had been identified] for downstream barge tows approaching the [Meridian and Bigbee Railroad (RR)] bridge," also known as the Naheola Bridge, located at Tombigbee River Navigation Mile 173.5, Marengo and Choctaw Counties, Alabama (government's Board Rule 4 appeal file (R4), tab 50 at 7, ¶¶ 1.a., 1.c.). The government (the U.S. Army Corps of Engineers or the Corps) proposed the following:

> . . . excavation of an alternate approach channel along the east [left descending] bank [of the river] and under the east span for the [RR] bridge. Ancillary to the excavation work would be the placement of riprap material in the vicinity of the bridge to stabilize the newly excavated bank, additional structural support for the east bank bridge support pier to allow excavation of the alternate approach channel immediately adjacent to the existing bridge pier, and . . . construction of a bridge fender adjacent to the east bank pier to prevent damage to the bridge pier or to barge tows using the alternate approach channel. An approximately 185-foot-wide alternate navigation channel would be excavated along the left bank and within the eastern bridge span, beginning approximately 300 feet upstream of the bridge and extending approximately 300 feet downstream of the bridge. Approximately 15,000 cubic yards of material would be excavated, using barge-mounted mechanical dredge equipment . . . . All excavated material would be loaded onto barges and transported for unloading at the . . . barge loading slip located approximately 0.25 mile upstream of the bridge on the right [opposite or west] bank, for transfer to an existing upland disposal site located within the barge loading facility property limits.

(R4, tab 50 at 4, ¶ 1.)

2. On this basis, an environmental assessment (EA) dated 13 September 1994 was prepared, resulting in a finding of no significant impact (FONSI), approved by the District Engineer (DE), U.S. Army Engineer District, Mobile (the Mobile District) on 29 September 1994 (R4, tab 50 at 6, 7). Among the alternatives considered and rejected was placement of the excavated material within the construction easement and the RR right-of-way (ROW) easement on the left (east) bank. That option was rejected in part on account of "potential impact to the wetlands within the floodplain, as well as potential alteration of flood elevations." (*Id.* at 5, ¶ 2.b.) In part, the recommended plan for the project provided: "Any easements for access via the [RR ROW] on the east bank would be the responsibility of the contractor to obtain, and would provide for placement of mats across wet areas. No fill for temporary access roads is proposed" (*id.* at 14). In connection with the environmental impact of the recommended plan, the EA provided, in relevant part (*id*. at 16):

> Because staging of equipment and materials will be conducted on barges, clearing within the construction

> easement will be limited to that required to allow equipment to operate along the top of the bank during excavation and placement of riprap materials. In the event limited equipment access is required to reach the project site via the existing [ROW] rather than by barge, mats would be placed across the wetland swales. Minimal clearing would be required to allow access from the paved road at the east approach to the [ROW]. No temporary fill roads are proposed for access into the work site.

(Hearing transcript, vol. 3 at 8-15 (tr. 3/8-15), 40-41; R4, tab 8, ¶¶ 7.a, 8., tab 29, ¶¶ 5.b., c.)

3. The RR ROW on the east bank of the river was further described in the EA as an "east trestle [extending] approximately 2,235 feet through the seasonally flooded flood plain, crossing several wetland sloughs within an approximately 100-foot-wide easement [to the intersection] with the paved [Marengo] County [, Alabama] Road No. 114" (R4, tab 50 at 9, ¶ 2.a., and at 23, fig. 1).

4. In Request for Proposal No. DACW01-95-R-0089 (the RFP), dated 5 May 1995, the government described the proposed work as follows, in pertinent part:

> The scope of work consists of rebuilding an existing concrete [RR] bridge pier . . . located at the water's edge of a navigable river. The work will have to be accomplished using a floating plant with access from the opposite bank of the river and without interruption to [RR] or barge traffic. The work will also include excavation of the bank and placement of riprap to widen the navigation channel after the bridge pier has been stabilized. Excavated material will be loaded onto barges, transported to an unloading site on [the opposite bank], and then transported by truck or mechanical equipment to the designated contained disposal site.

(Tr. 2/134, 149-52; R4, tab 206, § 00100 at 2, ¶ 2)

5. The drawings included with the RFP indicate, among other things, that the river generally runs north to south at the project site and the bridge is oriented east-west. Construction limits are shown to extend less than 200 feet east of the existing concrete RR bridge pier and east river bank that is the subject of the major portion of the work. (Tr. 1/51-59, 73-74, 183, 2/150; R4, tab 208, drawing sheet reference nos. (drawings) F-0, F-2)

6. By letter dated 7 June 1995, Lacy S. Curry, president, Curry Contracting Co., Inc. (CCC, the contractor, or appellant), submitted an estimate for the work to be contracted (R4, tab 56). Material and subcontractor quotes were supplied by CCC letter dated 15 June 1995. Among those quotes was a proposal of the same date for drilled shafts from Long Foundation Drilling Co. (Long). The quote provided, *inter alia*, that it was reliant on barges, tugboats, crew boats, and any other required riverine equipment to be furnished by others. (R4, tab 57 at 11, ¶ 2) It further stated: "Crew boats or other means to bring crew to and from work location each day will be provided by others." Long proposed to provide a "crane to remain on the bank at the loading facility to assist with loading our tools. All matting and decking required for loading equipment onto and off barges is to be the responsibility of others." (*Id.* at 1, 9, 11, ¶ 5, at 12, ¶ 17) In its pre-award proposal, Morris-Shea Bridge Company, Inc. (M-S) included no costs for access to the site and relied on CCC for access (tr. 2/89, 103-06; R4, tab 225). A separate quote was included from H.G. Harders & Son, Inc. for rental of a spud barge with pedestal crane and two deck barges (R4, tab 57 at 17).

7. The contractor's final revised proposal dated 17 July 1995 included, among other things, costs for a boat crew consisting of a captain and a deckhand, a spud barge with ramp, a 600-horsepower tugboat and fuel (100 gallons per day for 173 days), plus riverine equipment maintenance for 8 months. Those costs were further supported by a quote dated 14 July 1995 from MOBRO Marine, Inc. (MOBRO) which included monthly rental for a bareboat charter of a 600-horsepower tugboat and a spud barge as well as a one time charge for ramp installation. A separate quote dated 26 July 1995 for captain and deckhand wages was also supplied by MOBRO. (Tr. 2/131-40; R4, tab 62 at 1, 22-23, tab 65 at 4, 14, tab 67 at 9-10)

8. Pre-award negotiations between Mr. Curry and the government's pre-award contract negotiator, Ronnie A. Hathorne, Sr., on 7-8 and 11 August 1995, were based in part on CCC's price proposals from MOBRO for rental of a 600-horsepower tugboat and a spud barge as well as quotes for a ramp fee, riverine equipment insurance, wages for a boat captain and deckhand, and longshoreman and harbor insurance. Representatives for M-S (Richard J. "Dick" Shea, Jr. and Dave Dabney) participated in the first day of the pre-award negotiations. CCC presented no price proposal or specific plan to access the project site by land. No discussions or negotiations with Mr. Hathorne addressed land access to the site of riverside work. (Tr. 1/77-80, 143-44, 202-03, 2/47, 140-41; R4, tab 71 at 1, 8-11, 14-15)

9. On 1 September 1995, as a result of sole source negotiations, Contract No. DACW01-95-C-0140 (the contract) was awarded pursuant to § 8(a) of the Small Business Act, 15 U.S.C. § 637(a). The tripartite award document was signed by Mr. Curry on 24 August 1995, by contracting officer (CO) Joyce L. Thurmond for the

U.S. Small Business Administration on 1 September 1995, and by CO Toni S. Carney for the Mobile District, also on 1 September 1995. The contract included the following pertinent standard contract clauses: FAR 52.233-1, DISPUTES (MAR 1994) (*inter alia* making the contract subject to the Contract Disputes Act, 41 U.S.C. §§ 601-13 (the CDA)); 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). (Tr. 1/82; R4, tab 206, at 25-27, § 00700 at vi, 00700-80 through -82, -87, -95, -96)

10. The estimated contract price for modifications to the Naheola Bridge amounted to $1,850,000.00. That amount was the total of 4 estimated-quantity unit-priced payment items and 3 lump sum fixed-price payment items. (Finding 1; tr. 1/81-82; R4, tab 206 at 25-26, BS-1)

11. Under a special contract requirements provision entitled COMMENCEMENT, PROSECUTION, AND COMPLETION OF WORK, CCC was to begin work within 8 calendar days after the date of receipt of the notice to proceed (NTP), was to complete caisson work and bridge modifications (payment item Nos. 5 and 6, respectively; hereinafter "bridge work") not later than 75 calendar days after receipt of the NTP, and was to complete all other work (including unclassified excavation, riprap, bedding stone, filter fabric, and sitework, payment item Nos. 1-4 and 7, respectively; hereinafter "shoreline work") not later than the final completion date of 379 calendar days after receipt of the NTP. Except for bridge work, the contractor was precluded from scheduling ("shall not schedule") work activities "between" 15 November and 31 May. If the contractor failed to complete all work timely, the government could assess LDs of $320.00 *per diem* for each day of delay beyond the final completion date. Mr. Curry understood and agreed that if CCC performed shoreline work between 15 November and 31 May, the contractor was at risk for high water delays and disruption. (Tr. 1/84-85, 208-09; R4, tabs 72, 206, § 00800, ¶¶ SC-3, -5 and at BS-1)

12. In section 01560 of the technical specifications, ENVIRONMENTAL PROTECTION, paragraph 3, the contract required that CCC comply with all permits obtained or invoked by the government for the project. Among those permits was Nationwide Permit 33 (NWP 33), listed at ¶ 3.1 of the specifications. (R4, tab 206, § 01560, ¶ 3) NWP 33, which may be found at 33 C.F.R. § 330, App. A (1991), is entitled TEMPORARY CONSTRUCTION, ACCESS, AND DEWATERING.[1] NWP 33 allows, as

[1] The cited version of NWP 33 was amended effective 21 January 1992 (56 Fed. Reg. 226 at 59110 *et seq.* (22 November 1991)) (R4, tab 87) and was next amended effective 11 February 1997 (61 Fed. Reg. 241 at 65874 *et seq.* (13 December 1996)).

pertinent here, for temporary structures necessary for construction activities or access fills. It further requires that temporary fill "be entirely removed . . . following completion of the construction activity and the affected areas restored to the pre-project conditions." If NWP 33 is to be invoked for matters not already considered and approved in the applicable EA-FONSI, the prospective permittee (in this case, the contractor if its work plan deviated from previous approvals) was required to notify the DE, Mobile District, and to include with that notification a "restoration plan." The DE could "add special conditions, where necessary, to ensure that adverse environmental impacts [were minimized]. Such conditions [could] include: . . . modifying the restoration plan; and requiring alternative construction methods (e.g. construction mats in wetlands where practicable)." Internal government coordination concerning a request to invoke a NWP requires about 30 days. (Tr. 3/24-26; R4, tab 87)

13. The contract specifications further provided as follows:

> 3. PERMITS OBTAINED BY THE CORPS . . . .
>
> 3.1 Copies of the following permits and/or certifications required for this project may be obtained by contacting Joanne Brandt, [government environmental study and compliance manager,] Inland Environment Section, [telephone number].
>
> > General Permits [GP] for Minor Structures and Activities within the State of Alabama Located within the Regulatory Boundaries of the Mobile District . . . , Joint Public Notice Nos. ALG0292-ALG2392, dated July 1992. (Permits required pursuant to Section 404 of the Clean Water Act)
> >
> > [NWP] (33 CFR 330, Appendix A, B. 13, 14, 18, 25, 33), dated 22 November 1991. (Permits required pursuant to Section 404 . . .)
>
> 3.2 Special Permit Conditions:
>
> (1) No vegetated wetlands may be filled.
>
> . . . .
>
> (3) Fill placed for temporary access . . . must be of materials and placed in a manner that will not be eroded by

expected high flows. All temporary fills must be entirely removed to upland areas following completion of the construction activity and the affected areas restored to the pre-project conditions.

4. SUBMITTALS: The Contractor shall submit an Environmental Protection Plan [EPP] . . . .

. . . .

4.1 [EPP]: The [EPP] shall include but not be limited to the following:

(1) A list of Federal, State and local laws, regulations, and permits concerning environmental protection . . . that are applicable to the Contractor's proposed operations and the requirements imposed by those laws, regulations and permits. NOTE: The Contractor shall perform all work in compliance with the provisions of the Contract and applicable Federal, State, and local environmental laws and regulations. Section 3.1 lists those permits and/or certifications obtained by the Corps . . . . The Contractor is advised that it is the Contractor's responsibility to obtain all other necessary permits, licenses, and authorizations for a project.

(2) Methods for protection of features to be preserved within authorized work areas. . . . the Contractor shall comply with any mitigation measure specified in an [EA], [EIS] or other NEPA [National Environmental Protection Act] document.

(3) Procedures to be implemented to provide the required environmental protection and to comply with the applicable laws and regulations. . . .

. . . .

4.2 Implementation: After receipt of Notice of Award of the Contract and at least 7 days prior to the Preconstruction Conference [precon], the Contractor shall submit in writing the above [EPP] and shall meet with representatives of the [CO] to develop [a] mutual understanding relative to

compliance with this provision and administration of the environmental protection program. No physical work at the site shall begin until the [CO] has approved the [EPP] or provided specific authorization to start a phase of the work. Preparation and submittal of supplemental plans may be required if additional environmental protection planning is found necessary for later phases of work. . . .

. . . .

7.8 Government Performed [EA]: The Contract specifications have been prepared to comply with the special conditions and mitigation measures addressed in the [EA] or other [NEPA] document for this work. The Contractor is advised that deviations from the drawings, specifications (e.g., proposed alternate . . . disposal areas, staging areas, alternate access routes, etc.) could result in the requirement for the Government to prepare an additional or amended EA pursuant to NEPA. An EA requires a minimum of 90 days for review, processing, and approval time by the Government. Before the Government will commence the [additional or amended EA], the Contractor must submit all required information necessary to evaluate the alternate proposal . . . . The [CO] reserves the right to disapprove the alternate proposal if located in woodlands, wetlands or other sensitive areas.

(R4, tab 206, § 01560)

14. No contractor EPP is in the record (tr. 1/176-77, 2/207, 3/6-17). We find that no EPP was prepared.

15. Additional pertinent contract technical provisions follow:

SECTION 02223

EXCAVATION, FOUNDATION PREPARATION AND EMBANKMENT

. . . .

1. SCOPE: The work covered by this section consists of . . . the following [shoreline work] items:

. . . .

(b) Excavation for channel grading . . . .

(c) Excavation and foundation preparation for construction of riprap slope protection . . . .

. . . .

4. FOUNDATION CONDITIONS AND SPECIAL REQUIREMENTS: . . . Slope excavations should not proceed until the bridge . . . work has been completed. . . .

(R4, tab 206, § 02223)

SECTION 02411

STEEL SHEET PILING

. . . .

3.2.1 PLACING

The installation of any piling shall not proceed until the pier caissons and collar have been installed and approved by the [CO]. Excavation required in front of the area where sheet pilings are to be installed shall be completed after placing sheet pilings and the anchorage. . . .

(R4, tab 206, § 02411)

16. The contract drawings show bridge work to be placed around the existing RR bridge pier. Features of the work include, among other things, a foundation of drilled caisson piers, a concrete collar (with lower and upper portions), concrete fillets, structural concrete aprons, a sheet pile fender, timber cushion mats, and timber wale guards. The lineal distance in front of the bridge work area along the river bank, within and more or less bisecting the shoreline work area, is about 150 feet. The entire shoreline work area along the river is more than 500 lineal feet. The disposal area is shown west of the river. (Finding 1; tr. 1/57-63, 121-24; R4, tab 208, drawings F-2, F-3, F-4, S-1 through S-7)

There is no indication that construction of a haul road to the designated disposal area would be necessary.

17. Drawing S-8 provides the construction sequence in 5 phases. "PHASE - 4" on that drawing shows "TASK: PLACE THE STRUCTURAL CONCRETE APRONS. PLACE THE UPPER PORTION OF THE CONCRETE COLLAR INCLUDING EXISTING COLUMN WEB FILLETS. PLACE THE TIMBER CUSHION MATS ALONG THE FRONT, SIDES AND ON THREE SIDES ATOP THE UPPER POR[T]ION OF THE CONCRETE COLLAR." "PHASE - 5" indicates "TASK: EXCAVATE NAVIGATION CHANNEL AND PLACE RIPRAP." During performance, Mr. Curry did not interpret the work phases, as indicated on drawing S-8, as absolute or logical restraints. However, pier stabilization was required prior to excavation in the vicinity of the pier. (Finding 15, § 02411, ¶ 3.2.1; tr. 1/63-68, 2/14-15, 82-84, 223-24, 250-56; R4, tabs 91, 208)

Preparation for Commencement of Work and Environmental Concerns

18. The preconstruction conference (precon) was conducted on 14 September 1995 by the government resident engineer and administrative CO (ACO) Wayne Saucer. Among others, Messrs. Curry and Dabney attended for CCC and M-S, respectively. Pertinent environmental concerns were addressed as follows (a copy of the environmental concerns document was provided to Mr. Curry):

> 1. All construction and clearing of vegetation must be confined to the limits of the construction easements as shown on the contract drawings. (. . . [W]etland areas . . . must be avoided.)
>
> 2. Primary access to and staging of equipment and materials on the east bank will be by barge and within limits of the construction easements shown on the contract drawings. . . .
>
> 3. In the event limited equipment access is required to reach the project site via the existing [RR] ROW on the east bank rather than by barge, mats must be laid across wetland swales. Minimal clearing would be required to allow access from the paved [County] road at the east approach to the ROW. No clearing may be conducted without adjacent property owner's permission! No environmental clearances have been obtained for temporary road fill or other fill activities in wetlands within the [RR] ROW on the east bank!

. . . .

5. All excavated materials and clearing debris must be loaded onto barges and transported across the river . . . .

6. Clearing within the construction limits should be limited to the minimum area necessary to provide for access of equipment to the bank excavation and pier support work areas. Clearing and grubbing is not to be used to provide for additional staging and stockpile areas, since such staging and stockpiling is to be by barge or on the west bank staging area.

7. Conditions of [NWP and GP] pursuant to Section 404:

a. No vegetated wetlands may be filled. . . .

. . . .

8. Contractor must submit an [EPP] consistent with details of [¶] 4.1 of . . . Specification [§] 01560.

. . . .

10. Note [¶] 7.8 of Environmental Protection Specification . . . .

(R4, tab 81 at 4, ¶ A., at 11, ¶ K., and at 12-14) After the precon, in late 1995, Ms. Brandt gave several copies of the EA to CCC. Concerning paragraph 3 in the environmental concerns document, the words "limited equipment access" are not mentioned in the contract. That reference was intended to be notice to the contractor that no environmental clearance and no real estate easement for access had been obtained by the government. It was described at paragraph 3 as a contingency that, if it occurred, would require reexamination of environmental documentation. Limited equipment access or limited access was internally defined by government personnel as moving a single equipment item into and out of the RR ROW and/or light truck traffic (pickups and SUVs). No temporary road would be required for such access, only mats over wetland swales. In contrast, a temporary road, as was ultimately placed by the contractor, allows unlimited access. (Tr. 1/82-95, 151-56, 2/199-208, 3/18-23, 36-37, 46-54, 61-64, 72-74, 136-37)

19. When Mr. Curry signed and returned the minutes of the precon, the following was typewritten below his signature: "* [CCC] reserves the right to negotiate access to water by land if the property owners agree." No discussion of this particular matter

between Messrs. Curry and Saucer occurred during the precon. Mr. Curry did not disagree with any other portion of the precon minutes as rendered by ACO Saucer. (Tr. 1/86-88, 143-48, 2/235, 263; R4, tab 81 at 11) Mr. Curry assumed that the lack of land access to the project site was solely a matter of the government's inability to secure property owners' permissions. Mr. Curry interpreted conversations with Joe Birindelli, the government project manager, to mean that if property access could be obtained, the government had already given CCC permission to access the project site by land. Mr. Curry did not know the extent, if any, of Mr. Birindelli's contractual authority. Mr. Birindelli had informed Mr. Curry that land access had been eliminated as a possibility during the design process because of problems with an adjacent landowner and with wetland areas at the project site. (Tr. 1/70-77, 88-94, 108, 143-56, 183-84, 206-10, 224, 3/134-36) Regarding any environmental constraints for access by land, Mr. Curry interpreted the stated environmental concerns to mean: "As long as we stayed within the guidelines of applying mats to wherever there was a potential wetland, then there would be no problem" (tr. 1/90-92). Concerning limited access, Mr. Curry believed "that we had access to come that way [by land], provided we put the mats over the swells [sic - swales]. . . . [W]e felt that we could bring whatever we needed in there until someone would tell us that this is something that we meant" (tr. 1/93, 108); *i.e.*, that a different definition for limited equipment access was intended. On the other hand, Mr. Curry was aware that "if you have any deviations from the particular drawings . . . and specifications, there might need to be . . . an [EA]," that attempting to access the river project site by land was CCC's risk, and that some fill would be required if the existing RR ROW was to be used for access (tr. 1/95, 207-08, 2/8-11, 34-35).

20. M-S originally "bid the job for [CCC] to provide access by land. [M-S] modified [its] price to be provided access by water;" however, M-S was concerned with risk and safety matters associated with performing the job from barges. (Tr. 2/76-78; R4, tab 218, tab 225 at 2, last paragraph) As early as August 1995, CCC and M-S discussed building a road to access the project site on the east river bank. On or about 25 September 1995, CCC and M-S discussed price and conditions for constructing a "work road for access to the east bank of the river . . . . The road [would] be approximately 2,200 feet in length and have a width of 24 feet. [The road would have an] average fill depth of 3 feet after the transition from the existing [county road] embankment [and would include] a layer of filter cloth under the fill, pipes for cross drainage, and maintenance of the road surface during the time we are working." M-S proposed to "begin this work immediately" at an "estimated cost of $130,000.00." (Tr. 1/140-41, 149-50, 223-24; R4, tabs 144, 215, 218, 225) From the time of pre-award negotiations in August 1995, the contractor intended to access the project by land if it could obtain permissions needed to do so (findings 8, 19; tr. 2/32, 58-60, 75-76, 90-91).

21. Performance and payment bonds were to be supplied by CCC in connection with the contract. By letter dated 27 September 1995, CO Carney notified CCC that

submission of the required bonds was tardy. The letter provided that the lack of bonds was endangering timely performance and could result in a default termination. A second letter dated 9 November 1995, set a deadline of 1 December 1995 for the bonds and again threatened a termination for default. (R4, tabs 75, 79)

22. On 10 October 1995, Mr. Curry spoke with Leo J. Hickman, later the successor CO (finding 44 below). Messrs. Curry and Hickman agreed that the NTP "will be postponed until March of 1996 with no increase in price. . . . and we agree to a completion date of October 15, 1996," all as confirmed in Mr. Curry's letter of the same date to Mr. Hickman. (Tr. 1/178-79, 3/80-83, 110-13; R4, tab 206 at 3) A memorandum of understanding (MOU) signed by Mr. Hathorne on 16 October 1995 and by Mr. Curry on 17 October 1995, states among other things that the NTP would be issued between 18 October and 1 December 1995, that "irrespective of the date that [NTP] is issued" all work would be completed by 15 October 1996, that "physical" work at the site would commence within 8 calendar days after 1 June 1996 or an earlier date if agreed by the parties, and that bridge work would be completed "not later than 75 calendar days after commencing physical work." (Tr. 1/95-105, 142-43; R4, tab 81 at 15, ¶¶ 1-2, 5-6, at 16) The concern was that work in the river be concluded prior to the onset of high river flows which usually begin in the fall (finding 11; tr. 1/102-03). There is no record evidence that Mr. Hathorne is an authorized CO or otherwise empowered to bind the government by way of contract modifications. Mr. Curry was "not sure" if Mr. Hathorne was an authorized CO. The MOU provides that a bilateral modification to the contract for the changes set out in the MOU would be prepared and signed by the parties; however, no such modification was issued. (Tr. 1/105, 144, 2/269, 3/111-13; R4, tab 81 at 15, ¶ 7) M-S was not informed of the fixed completion date until 25 July 1996 (tr. 2/88; R4, tab 225). Messrs. Curry, Hickman, and Saucer believed that CCC was required to be substantially complete with all work under the contract by 15 October 1996 (tr. 1/218-19, 2/268-69, 3/108-13).

23. By letter dated 14 November 1995, CCC submitted the performance and payment bonds that are required under the contract. No government action caused the bonds to be submitted late. (Findings 9, 21; tr. 1/106-07, 141; R4, tabs 80, 206, § 00100, ¶ 1) The timing of this submittal established that the only work that could be accomplished at the site prior to 31 May 1996 was bridge work (finding 11).

24. In a subcontract dated 1 December 1995, between CCC and Ellard Construction, Inc. (ECI), ECI agreed, pursuant to the contract between CCC and the government, to provide a bond, to mobilize to the site, to excavate test holes, to perform testing, to furnish and install caissons, to perform bridge modifications, and to demobilize. CCC agreed, *inter alia*, to pay ECI "an additional $130,000.00 if a road is needed." Further, CCC consented to allow ECI to subcontract the work under the subcontract to M-S. The price proposed by M-S was based on completion of its work in

75 days, not including the time needed by CCC to provide access to the site. On 29 February 1996, CCC modified the subcontract with ECI "adding the cost of the access road." (Tr. 2/53-54; R4, tab 216 at 1-2, §§ 1-2, 4, at 10, at 15, ¶ 17, tab 225)

25. On or about 5 March 1996, CO Carney issued the NTP letter. CCC acknowledged receipt on that date. (Tr. 1/103-07; R4, tab 82) Accordingly, under the contract (not considering the MOU dated 16-17 October 1995), CCC was to begin work not later than 13 March 1996, was to complete bridge work not later than 20 May 1996, and was to complete all other work not later than 19 March 1997. However, no work, except bridge work, would be allowed after 15 November 1996. The NTP was not issued sooner (*i.e.*, soon after the bonds were submitted) because Mr. Hickman construed the MOU to mean that the NTP would not be issued until Spring 1996. Further, his view was that work other than bridge work could not be performed prior to 1 June 1996. (Findings 11, 22; tr. 3/94)

26. In a projected schedule of work and payments dated 4 April 1996, transmitted by Mr. Curry to ACO Saucer, CCC, for the first time, listed "ACCESS ROAD" as an item of work (in lieu of "Sitework," payment item No. 7). At the hearing, Mr. Curry testified that this transmittal gave notice to the government that CCC intended to access the project site by land, not water. The schedule indicated completion of shoreline work concurrently with bridge work. However, Mr. Curry understood that the government would not allow "any excavation . . . until the other parts of the collar and things had been put together and put on in the pier." CCC asserts that this government prohibition pushed shore protection work into the highwater season. The schedule projected completion of all work, except cleanup, during the three-month period of May-July 1996. (Tr. 1/107-14, 124-31, 170-71, 3/147-48; R4, tabs 83, 206 at BS-1, tab 212 at I-2, I-3, II-2, III-1, subexhibit 1, sheet 1 (tab 212/1/1), tabs 212/2, 213 at 8-11)

27. By memorandum from CCC to the government dated 10 June 1996, Mr. Curry asked the government to provide:

> . . . official notification . . . as to whether or not there are "wetlands" on either side of the [RR] tracks.
>
> This information is necessary to determine our ability to ingress and egress. Should a site visit be necessary . . . to make this determination, please do so as soon as possible, to avoid causing delay on this project.

On or before 12 June 1996, CCC's memorandum was forwarded to Ms. Brandt. (Tr. 1/111-14, 3/20; R4, tabs 84, 86)

28. CCC (Mr. Curry), in a memorandum to M-S (Mr. Shea) dated 11 June 1996, took the following position concerning access to the work site:

> The road issue was budgeted at $130,000.00 for the south side of the [RR] Bridge. Mrs. McAlpine's property is [situated on] the north side of [the RR] Bridge. No road was ever discussed for the north side. After discussions with all involved, it has come to our attention that it is not feasible for [CCC] to close a deal on this (McAlpine) north side at this time. However, this does not affect your $130,000.00 earlier agreement for the road on the south side. Legal has informed CCC that no "change order" is needed at this time, until you propose the costs of having a road elsewhere. . . . Included in the "road" is CCC['s] right to use said road to both ingress and egress the site, with [M-S/ECI] leaving [the] road in place for CCC's use. CCC will be happy to look into your other efforts and alternatives. CCC must know the costs involved and plan in writing.

(R4, tab 217)

29. By letter addressed to Mr. Curry dated 12 June 1996, signed by Mr. Shea, M-S replied to CCC's memorandum dated 11 June 1996.

> First, we made it clear to [CCC] from the very first discussion about the project that we would not be interested in doing the work with access to and from the site by barge . . . .
>
> . . . On September 14, 1995, a [precon] was held in which the Corps made it clear that any access other than by river had to be arranged by "CCC" without their assistance.
>
> On September 27, 1995, at your request, we estimated a cost of a temporary road from the East end of the bridge to the construction area. In a telephone conversation I had with you on September 29, and confirmed in a letter dated October 2, 1995, we stated we would build a road. We did not give the exact location of the road but obviously planned to build it along side [sic] the existing bridge. We received a contract from you in December, 1995 [which] agrees to pay us $130,000.00 if a road is needed. . . . the exact location is not stated.

We found in the spring of this year that beavers had built dams on the adjoining land causing water to back up across the [RR ROW] in several locations along the propose[d] roadway site. We discussed with the Corps . . . in Mobile the possibility that this area would be classified as wetland causing us considerable additional cost to build a road. . . . The additional cost of wetland access will be a big added cost we did not anticipate. . . . You know full well that the job cannot be built without a road and the Corps is concerned about why the project has not begun.

Again, if the price [for the road] was merely a budget price and you want us to reprice it, we will be glad to do so as soon as the Corps makes the wetland determination. Meanwhile, nothing can be done on the project.

. . . .

To this time, you have never shared with us how you intend to do your work. You bid the job to remove the excavation and existing riprap by barge and you indicated to me last week that you were still planning on that method since your attempt to negotiate disposal onto Mrs. McAlpine's property fell through.

If in fact you change your mind and it becomes more cost effective for you to dispose of the material by truck using the "road", you certainly can do so. The only stipulation is that we are being paid by "CCC" to maintain the road during our construction work and you will not do any earthwork to speak of until we are done. . . .

In summary, we will build the road adjacent to the bridge . . . . We must have a change order before we do the additional work. . . .

If "CCC" determines that no road is necessary then we would ask both [ECI and M-S] be released from our subcontract . . . .

(R4, tab 218, underlining added) In explaining the above letter, Mr. Shea testified, concerning coordination between CCC and M-S and the timing of the work, that the work to be performed by M-S was "completely separate." In his view, M-S had to perform all concrete and sheet piling work before CCC "could effectively do any individual work. . . . There was maybe a little bit of stuff on either upstream, downstream that [CCC] could do away from the bridge. I don't recall that that would have been cost-effective . . . ." (Tr. 2/82-84) Other legitimate concerns include possible destabilization of the bridge pier by premature river channel excavation if followed by erosion and, given the limited work area, less than 200 feet wide from the river bank, crowding of construction equipment and vehicles leading to inefficiency (findings 4-5, 15, § 02223, ¶ 4, § 02411, ¶ 3.2.1, finding 17; tr. 2/223-24).

30. In a letter dated 12 June 1996, ACO Saucer acknowledged CCC's request for a wetlands determination related to both sides of the RR as that determination might affect CCC's access to the work site and CCC's concern that the government's actions to make wetlands determinations might delay the work. In pertinent part, Mr. Saucer wrote:

> . . . As you know this contract was negotiated based on water access only. If you choose an alternate land access route, then any delays associated therewith will not be considered grounds for granting additional contract [completion] time. Furthermore, any land-based access will be required to comply with all applicable wetlands regulations.
>
> It is imperative that this project be completed during low water this Summer. Paragraph 5 of the [MOU dated 16-17 October 1995] states that physical work [is to] begin within 8 calendar days after June 1, 1996. All work is to be completed by October 15, 1996. As of this date, no apparent physical work has begun.

(Finding 22; tr. 1/112-13, 2/208; R4, tab 85)

31. At a meeting on 18 June 1996 among Mr. Hickman, other government personnel, and Mr. Curry, the parties discussed allowing M-S to use the RR ROW to access the site using mats to cross low areas, some of which had already been placed. A geotechnical engineer for the government, Mr. McKown, cautioned that frequent, heavy traffic, such as concrete trucks on production runs, could break through a crust of organic river bottom soils materials and create a quagmire. Such an occurrence would allow erosion, thereby filling and adversely affecting wetland areas. In response, Mr. Curry stated that he could use additional mats to counter any problems and he suggested that CCC might construct an improved road base. (CCC, in addition to multiple truckloads of

reinforcing steel, riprap, and other materials, actually brought in about 100 truckloads of concrete and removed at least 300 dump truck loads of excavated materials.) It was discussed that bridge work to be performed by M-S was on the critical path to completion of the work and that excavation and riprap placement was to be accomplished "after the pier is stabilized." Mr. Curry persisted in his efforts to dispose of excavated materials on the east side of the river. The government responded that "environmental clearances do not cover any disposal on the east bank" and that additional environmental work would be required when "[a]ctual boundaries for alternate disposal site(s) could be delineated in the field." Mr. Curry was responsible "to provide a written plan for alternatives, as well as written easements/permissions from the property owner to conduct work, place excavated material, and/or obtain access to the work site . . . ." During the discussions, it was noted that environmental coordination of CCC's alternate plan would require about 60 days. (Tr. 2/68, 164, 209, 225-27, 258-67, 3/27, 82-84; R4, tabs 91, 101, 163 at 9, tab 212 at III-12)

32. On or about 21 June 1996, M-S was ready to mobilize to the site and to begin test hole drilling to be followed by caisson pier hole drilling. On that date, government environmental and construction management personnel inspected proposed disposal sites on the McAlpine property and the proposed RR ROW access route. The inspectors were accompanied by Mr. Curry, Daniel Barkley (CCC's site superintendent), and Mr. Shea. In a written report dated 16 August 1996, Ms. Brandt noted that two proposed disposal areas on the McAlpine property were environmentally suitable if a wetland swale in one area was avoided and if runoff and erosion could be controlled; however, possible indigenous people group archaeological sites were noted by a Corps archaeologist ("including burial mounds and an 'Indian village site' . . . several artifacts were scattered over the site"). (R4, tab 101 at 1, 2) Further discussions with an Alabama State Historic Preservation Office archaeologist were recommended. Concerning access by way of the RR ROW, the inspection found "dirt" and/or crushed stone fill on filter cloth and small culvert pipes in a wetland swale where construction of a ramp had begun from the paved County road to the north side of the ROW. Several other wetland swales were marked within the RR ROW. CCC was told that filling the wetlands was subject to Section 404 permitting requirements, that work on the access road should cease, that fill material placed in the wetland swale had to be removed, and that limited equipment access, including a drill rig, could continue but that heavy, repetitive truck traffic (concrete trucks and excavation disposal truckloads) would require construction of a temporary road. The report opined: "Due to soft soils, high water table, and heavy loads, it is likely that the entire [RR] ROW . . . would have to be filled to provide a sufficient road bed if access . . . for heavy truck traffic is proposed instead of access by barge." (*Id.* at 3) Construction of a temporary road would require additional environmental coordination and, if environmentally permissible, additional work to protect environmentally sensitive areas and to restore the area. (Tr. 1/113, 184-85, 2/62-64, 110-13, 157-63, 210, 3/27-33;

appellant's supplemental Board Rule 4 appeal file (app. supp. R4), tab A1, subexhibit B (tab A1/B); R4, tab 163 at 1, 3-4, 12-13, tab 212 at III-2)

33. By letter dated 28 June 1996 concerning the site investigation on 21 June 1996, ACO Saucer informed CCC:

> No further construction for alternative access will proceed until detailed plans [have] been submitted for review . . . and approval [has] been given. Access to the bridge work site can continue in conformance with the current contract specifications, which allow limited access of equipment over mats placed in wetland areas. The current contract specifications require delivery of concrete and hauling of excavated material from the site by barge, and do not allow for heavy traffic within the [RR] bridge ROW.
>
> Temporary access fills for construction activities may potentially be authorized under . . . [NWP] 33 . . . .

The referenced mats are so-called "dragline mats"—two parallel lines of wooden mats, 4 feet wide by 24 feet long by 1 foot thick, laid end-to-end if necessary to span a wetland area. The letter further described probable requirements and restrictions that would attend the use of NWP 33 authorization in this instance. Mr. Saucer again noted that an additional or amended EA would be required to document

> . . . the alternate access corridors and disposal areas, historic resources and endangered species coordination, etc. . . . Coordination of the environmental documentation and [NWP] would likely require 30-60 days and cost about $15,000.00. Since this is a deviation from the contract for your convenience, any cost to the Government would be charged to you and no additional contract time would be granted for any related delays.

When asked at the hearing, Mr. Curry testified with regard to this letter "that all we would need would be to have the mats over the wetland areas and then we should be able to go ahead and come into the site." (Tr. 1/180-81, 2/64-65, 210, 3/23-24; R4, tabs 87, 90) By this testimony, Mr. Curry is describing unlimited access by way of the RR ROW.

34. By 1 July 1996, the government had made a preliminary wetlands determination, which allowed M-S to provide a plan to CCC for the proposed access road. By letter dated 1 July 1996, with an attached sketch, M-S proposed to use dragline

mats. Each line of mats would be placed end-to-end through four wetland locations. Mat delivery and placement was expected to be accomplished during 2-10 July 1996 (mats actually were delivered to the site and some were placed during 9-15 July 1996). Areas between wetland locations would be filled and compacted "to allow normal traffic" but fill would not be placed until approved by CCC. In a letter to CCC dated 3 July 1996, Mr. Shea wrote on behalf of M-S:

> . . . It would be our hope that by using the mats in the wetlands, . . . access for concrete, resteel [steel reinforcing bars], steel sheeting, and other construction materials would be allowed using the [RR] ROW. . . .
>
> . . . I feel that how the road is built in non wetland areas, is the responsibility of the property owner [the RR], and does not fall under the Corps' permitting responsibility.
>
> . . . .
>
> I think that the use of wood mats in the wetlands and compacted fill in the upland areas should be approved under the [NWP].

(Tr. 2/64-65; R4, tabs 92, 95, 165 at 5, tab 166 at 3, tab 212 at III-2)

35. In response to ACO Saucer's letter dated 28 June 1996, Mr. Curry stated, by memorandum dated 9 July 1996, that he had devised a more efficient and practical method of performance by way of land access and had obtained permission from landowners (presumably the RR and the McAlpine property specifically was mentioned) for access to the site and for disposal of excavated materials. He characterized the requirements for submission of plans, an EA, and coordination of environmental documentation as "unnecessary permits" and a "bureaucratic 'road-block'" that violated the government's duty not to interfere with CCC's performance. Mr. Curry believed that CCC had "a right to use any road, [ROW], etc. as long as we have permission and as long as we do not violate the law." (R4, tab 93)

36. In a letter to CCC dated 12 July 1996, Mr. Saucer noted that the government had marked wetland areas in the RR ROW that would require matting "for limited access for your equipment." Mr. Saucer also wrote that the contractor could "continue to use the [RR ROW] for limited access only." (R4, tab 94)

37. By memorandum dated 17 July 1996, Mr. Curry asked ACO Saucer to define "LIMITED ACCESS" in connection with access to the work site via the RR ROW (R4,

tab 95). M-S understood limited equipment access to mean that it could bring in a drill rig and pickups and could "get equipment out if the river flooded quickly plus the ability to get emergency help in by land if needed" (tr. 2/60-63, 93-95, 115-16; R4, tab 227 at 1, sixth paragraph). Mr. Curry's pre-award understanding was that "everything [was to be] worked with tugboats and this type of thing off of the barges, including the concrete" (findings 6-8; tr. 1/75-76).

38. In a letter dated 25 July 1996, CCC submitted its plan for land access to the work site for all purposes and for disposal of excavated materials on the east side of the river. The plan provided:

> 1. The [RR ROW] . . . being used for "Limited Access" would be used also for the delivery of materials i.e., steel sheeting, equipment, rock, concrete, filter fabric, etc. and the removal and transport of excavated material for disposal on the nearby adjacent McAlpine property.

By letter to Mr. Curry dated 24 July 1996, Coralie E. McAlpine consented to disposal of excavated materials on her property. On 25 July 1996, government field personnel forwarded CCC's plan and property use authorization for an evaluation of whether "additional environmental assessment is necessary." (R4, tabs 96-98)

39. As of 5 August 1996, CCC had not obtained necessary environmental clearances for land access or for the alternate disposal area. On that date, ACO Saucer called a meeting attended by Messrs. Curry, Shea, Saucer and others. At the meeting, government representatives opined that limited access along the RR ROW meant that equipment and materials could enter and exit by way of the ROW "so long as no fill was required to maintain access." Mats had been placed across areas determined by the government to be wetlands; however, the government position was that intermittent mats, when supplemented by temporary fill, required a wetlands permit. At that point, Mr. Curry or Mr. Shea asked "if matting the entire length [*i.e.*, placing a temporary road] would require [a] permit or environmental clearance." Government field personnel consulted with Ms. Brandt by telephone and agreed that "mats could be used without further clearances" by relying on NWP 33 and references in the EA FONSI, all subject to a contractor plan and any conditions directed by the DE. CCC indicated that it would consider that option. M-S had not mobilized its caisson drill rig to the site because the access issue (by barge or by land) had not been resolved by the contractor. CCC had informed M-S that "he never intended to provide access for [M-S] by water" and that M-S was to provide its own access; however, M-S had included no costs for access. CCC had not yet authorized completion of the road for which M-S had proposed an additional estimated cost of $130,000.00, even though some road work had already been accomplished and M-S had mobilized some equipment to the vicinity of the site. Additional so-called "oil field mats," wider than

dragline mats, laid end-to-end to create a temporary wood plank road for the entire access route, were delivered beginning 28 August 1996. A double thickness of mats was placed at some points on account of heavy truck traffic. M-S blamed CCC for delayed access. Mr. Shea, in a letter to the contractor dated 30 August 1996, opined that "[t]his entire problem could have been avoided had [CCC] submitted an alternate plan of access by land . . . for review prior to June 6, [1996] but certainly no later than that time." Concerning disposal of excavated materials, CCC was informed that use of any disposal area other than the area designated in the contract (on the opposite, west side of the river) would require an environmental review. (Findings 1-2, 13, ¶¶ 3.1-3.2, findings 20, 24, 26-36, 38; tr. 2/66-70, 87-88, 114, 179-82, 211-17, 238-39, 263-64, 3/30-32, 67-72; R4, tabs 99-100, 167 at 1, 6, tab 225 at 3)

40. In a letter dated 22 August 1996, ACO Saucer confirmed and elaborated on the results of the meeting on 5 August 1996. He wrote:

> . . . access along the [RR ROW] will not stand up to repeated heavy loads without either temporary fill or matting the entire length of the access. Temporary fill will require environmental coordination which will require additional time and money. Matting will not require any additional coordination and may be started immediately.

Concerning disposal of excavated materials on the McAlpine property, Mr. Saucer informed CCC: "those sites will require extensive environmental and archeological coordination." (R4, tab 102)

41. By CCC memorandum to Mr. Saucer dated 22 August 1996, Mr. Curry proposed a second alternate disposal site on the east side of the river, on the property of Douglas M. Barkley. The parcel lay between County Road 114 and the RR. Mr. Douglas Barkley's written permission statement dated 20 August 1996, asserted that the area was not environmentally sensitive and would require no permit based on verbal confirmation from Steve Foster, an employee of the State of Alabama Department of Environmental Management. (R4, tab 103) On 27 August 1996, after receiving written confirmation that CCC would pay for the Corps' environmental assessment of the second proposed disposal site on the Barkley parcel, Mr. Saucer contacted Ms. Brandt by e-mail to request that she proceed with planning an environmental site visit. (Tr. 2/217-18; R4, tabs 104, 106-07) Ms. Brandt coordinated an examination for hazardous or toxic substances to begin on 5-6 September 1996 and an environmental site visit for 12 September 1996 (R4, tabs 109, 111, 116). The government determined that the second alternate disposal site was beyond the river floodplain, that no wetlands or other permits were required, that the site had low potential for cultural resource discovery, and that no hazardous or toxic areas of concern were discovered (tr. 3/32-34). Environmental

coordination with State of Alabama and United States agencies was conducted concerning the disposal area and the temporary access road within the RR ROW. A supplement dated 10 October 1996 to the previous EA dated 13 September 1994 was prepared to address the second alternate disposal area. On 24 October 1996, the DE signed a FONSI based on the supplemental EA, thereby removing any environmental impediment to CCC's planned access and use of the second alternate disposal area. (Finding 2; tr. 3/33-36, 70-71; R4, tabs 117-27, tab 135 at 1, ¶ 2)

42. Concerning access to the riverside construction site, the supplemental FONSI stated the following:

> 2. ALTERNATIVES CONSIDERED: . . . .
>
> . . . .
>
> c. Construction of Fill Access Road within the [RR ROW]. The contractor also proposed construction of a permanent fill road . . . . This action would be subject to Section 404 permitting requirements . . . . Mitigation could be required to compensate for the loss of wetlands due to the road construction, and impacts to the floodplain. The construction timeframe would not allow for the additional delays which would be involved, in the event permits could be obtained. Construction of a temporary fill access road, with the fill material to be removed in its entirety following construction was also considered. At a minimum, this alternative would require coordination with State and Federal commenting agencies, and placement of adequate culverting across the wetland swales. [NWP] 33 allows for temporary construction access fills, subject to the [Corps] notification, to include details of the restoration plan. However, [NWP 33] also includes the stipulation that alternative techniques, such as placement of matting across wetland areas, may be required where practicable. Placement of the temporary board road met conditions of [NWP 33].

The supplemental EA described how the plan had been revised by reference to the original EA and by a description of the contractor's alternate plan.

> 3. DESCRIPTION OF THE RECOMMENDED PLAN:

> . . . The contractor for this project has proposed to provide all access to the construction site using a timber road constructed within the [RR ROW] on the east bank. Access to the bridge via placement of timber matting across wetland swales was addressed in the previous environmental documentation and specifications in order to allow for limited equipment access. A timber road is currently in place and is being used for construction activities associated with the bridge pier. . . .
>
> Following construction activities at the Naheola Bridge site, the temporary timber mat road would be removed in its entirety, and the disturbed floodplain areas will be returned to pre-project conditions, in accordance with the conditions of [NWP] 33.

(Tr. 3/34-35; R4, tab 127 at 2-3, 7)

Work Performance

43. The contractor worked during 21 June-23 October 1996 prior to finalization of the supplemental EA-FONSI and related contract documents. Some work had been accomplished prior to 21 June 1996; however, the record includes no daily reports addressing work performed before that date. Little work was accomplished between 12 July and 27 August 1996. Prior to 11 September 1996, most of the work was preparatory. Work performed during 21 June-23 October 1996 by the contractor and/or subcontractors included placing mats on the access road in the RR ROW, clearing and grubbing (starting 11 September 1996), mobilization of drilling equipment, demolition, drilling of caisson pier holes, preparation of concrete reinforcement, placement of reinforced concrete in the pier holes, and placement of forms for the lower portion of the concrete collar. Some of this work involved mobilization to the site and use of heavy construction equipment, including a dozer, a 100-ton crane, a concrete pump truck, and concrete delivery trucks. (Findings 31-32, 39, 47 (below); tr. 2/196; R4, tab 163 at 1, 5, tabs 164, 165 at 11-12, tab 167 at 3, tabs 168, 169 at 8, tab 170 at 6, tabs 171, 172 at 3, tabs 173-75, 212 at III-2, tabs 212/1/1, 213 at 10, tab 214 at 1-4, 7, 10, 25-26, 28)

44. The government issued to CCC an interim unsatisfactory performance evaluation regarding the contract work. Signed by ACO Saucer on 5 September and by successor CO Hickman on 9 September 1996, the evaluation rates CCC lowest in the category of timely performance. Even though the evaluation form indicates, at item 10.c., REVISED CONTRACT COMPLETION DATE "03/21/97," the evaluation comments related to item 17., TIMELY PERFORMANCE, in an attachment to the evaluation form, are

based on a purported contract completion date of 16 October 1996 (41 days after 5 September 1996). (Finding 25; R4, tab 112)

45. By letter dated 6 September 1996, ACO Saucer informed CCC, among other things, that "Major effort at this point should be focused on finishing the job by October 15, 1996" (R4, tab 113). The contractor forwarded the letter to subcontractors ECI and M-S, noting that "our Bonding Company has a great concern" regarding "plans . . . to meet the deadline" (R4, tab 114).

46. In a summary schedule dated 10 October 1996, provided to ACO Saucer by letter dated 15 October 1996, CCC indicated that the project would be substantially complete (all physical work at the site except cleanup work) on or about 23 November 1996. The schedule submittal was incomplete in that actual dates for work already performed, clearing and grubbing and bridge work, were not shown. The submittal scheduled work on the haul road to the second alternate disposal area starting one week prior to shoreline work, shoreline work starting about four days before completion of the placement of concrete and steel as part of the bridge work and two weeks prior to finish of the timber cushion system. (Tr. 1/127-31, 222, 3/151; R4, tab 209, subtab 5 (209/5), tab 212 at I-3, III-12, tab 212/1/1)

47. Unpriced, unilateral contract Modification No. DACW01-95-C-0140-P00004 (modification 4), dated and effective 17 October 1996, was issued by Mr. Hickman. The modification allowed unlimited access by land to the riverside site of work dependent on "the Contractor's compliance with applicable environmental requirements," use of timber equipment and/or oil field mats to construct the access road, removal of the mats, and restoration of the area. No cost increase was allowed; however, a possible contract price decrease was implied in that the modification provided, in pertinent part: "Price adjustments will be definitized in a subsequent modification." (Tr. 2/244; R4, tab 129 at 1, 2)

48. By letter dated 25 October 1996, ACO Saucer issued Change Order Request No. SG-5-140-006 (change order request 6)

> . . . to allow [CCC] the option to use the [second] alternate disposal on the Barley [sic - Barkley] property in lieu of the disposal site designated in the contract. It must be emphasized that this is a request for proposal and in no way authorizes [the contractor] to use the [Barkley] site. Final approval to use the site depends on reaching a[n] equitable adjustment to the contract price. Since this contract action is at [CCC's] request, there will be no additional contract time

> associated with this change. Your contract completion date remains October 15, 1996.

(R4, tab 131)

49. On or before 28 October 1996, M-S agreed with the RR to perform work at or near the site. This work for the RR was not within the scope of the contract and may have impeded progress by M-S on work for CCC under the contract. The alleged costs to perform that work, $61,425.24, were later included in the claim submitted by M-S to ECI. M-S performed the work to maintain a good working relationship with the RR and to be allowed access to the river by way of the RR ROW. The government was not responsible for the arrangement between M-S and the RR. (Tr. 1/171-72, 2/27, 95-98; R4, tabs 132, 134, 228)

50. The contractor's revised schedule dated 9 November 1996 shows shoreline work on 2-24 December 1996 (23 days). That work, beginning with filter fabric, was scheduled to begin one day before completion of concrete and steel bridge work (miscellaneous steel, scheduled for completion on 3 December 1996) and was shown as concurrent with timber cushion installation, which was scheduled for 5-14 December 1996. Bridge work was to be completed on 14 December 1996. The schedule does not include a separate work activity for river channel excavation, although one activity is named EXCESS DISPOSAL, which we presume relates to that excavation and removal of the excavated materials. That activity was scheduled for 16-24 December 1996; that is, it was scheduled to start 13 days after completion of concrete and steel bridge work and 2 days after completion of all bridge work. (Tr. 1/166-68; R4, tab 136 at 2-3, 6-7, work activities 17-18, 20, 22-25, tab 212 at I-3, tab 213 at 8)

51. Bridge work continued after issuance of the supplemental EA-FONSI, including placement of the lower and upper portions of the concrete collar, installation of sheet piling and timber cushions, and placement of concrete fillets and aprons. On 16 November 1996, M-S began installing sheet piling on the south side of the 3-sided, (south, west or front, and north facing), chevron-shaped new collar and apron. High river flows disrupted work on 2-4 December 1996 but did not stop all work. Sheet piling was started in front of the collar on 6 December 1996. During Monday, 2 December 1996 through Saturday, 14 December 1996, M-S worked every day without a break. During 20-25 December 1996, CCC shut down for "Christmas holidays." On 26 December 1996, M-S began installing sheet pilings on the north side of the collar. Bridge work, except final placement of timber for cushions and wale guards, was completed on 7 January 1997. M-S began to demobilize some of its equipment on 8 January 1997. Rising or high water disrupted some work on 9-10, 13-14, and 27-28 January and 3-4 February 1997. M-S started its final cleanup on 10 January 1997. All production work at the river was interrupted on 25 and 29-31 January 1997 by rising or high river

water. M-S completed all bridge work on 5 February 1997 and demobilized all remaining equipment on 6-8 February 1997. M-S returned to the site to perform repair work on the concrete apron on 24 April 1997. Apron repair work was interrupted by rising or high water on 28-30 April and 1, 5, and 7-11 May 1997, and disrupted on 6 May 1997. All work was substantially completed on 22 May 1997. (Tr. 1/169-70, 2/164-73; R4, tabs 175-77, 178 at 18, tabs 179-80, 181 at 3-8, 11, tabs 182-83, 184 at 2-3, tabs 185, 186 at 1-2, 8-11, 14, tab 187 at 1, 3-4, 6, 8, tabs 188, 189 at 2, 16, tab 190 at 2-4, 7-8, 11, tab 191 at 1, 3-9, tab 201 at 11, tab 202 at 1, 3-4, 6-10, tabs 203, 208, drawing S-1, tab 212 at III-4, III-7, tabs 212/1, 212/2, 212/3, 227 at 4)

52. Daily reports after 22 May 1997, if any, are not in the record. An annotated calendar presented with the pre-filed testimony of Charles F. Truett, Jr., appellant's contract administration, scheduling, concrete placement, and grading expert witness, indicates that M-S was unable to work on account of adverse weather conditions on 23 and 26 May and may have completed all repair work on 27 May 1997 (tr. 1/228-29, 237; app. supp. R4, tab A1 at 1-8, tab A2 at 9 of 10).

53. By letter to ACO Saucer dated 20 November 1996 concerning modification 4, Mr. Curry asserted that access to the work site by land was more costly than access by water. He requested a no-cost contract modification. Mr. Curry further wrote: "We are in dire need of having your approval to proceed on as soon as possible. . . . The Barkley site is ready for [CCC] to get started. Some excavation could be performed now with your approval." (Tr. 1/173-76, 2/219; R4, tab 137)

54. On or before 13 December 1996, the government began withholding LDs. In a letter of that date to ACO Saucer and CO Hickman, Mr. Curry demanded that the government stop withholding LDs and other retained earnings. The letter also asserted that CCC was entitled to time extensions for failing to allow the contractor to commence work in Fall 1995, for delaying issuance of the NTP, for denying access to the site, and for failing to approve the contractor's borings "for a number of weeks." (R4, tab 226) Neither the time periods nor lengths of time for which time extensions are demanded are specified; however, implicit in CCC's assertions here is a request for a time extension encompassing at least the number of days for which LDs were being withheld (appellant's brief (app. br.) at 20, 26).

55. On Saturday, 28 December 1996, before the bridge work was completed, CCC commenced grading the slope of the river bank south of the collar in preparation for placement of riprap. Work along the river bank and sometimes in the disposal area was interrupted by rising or high river water or the effects of weather on 30 December 1996, 8-10, 13-15, 25, and 29-31 January, 9-18 and 22-28 February, 1-12 March, 28-30 April, and 1-12, and 21-22 May 1997. CCC did not work on 31 December 1996. From not later than 7 January 1997, using a backhoe, a limited amount of material was excavated

by CCC along the river bank at unspecified locations away from the bridge pier. That material was stockpiled at the river bank. Work to provide a haul road to the second alternate disposal area began on 14 January 1997. CCC did not work at the river bank on 17-18 January 1997; however, work continued at the upland disposal area. Some of CCC's river bank work was disrupted by rising or high water or the effects of weather on 23-24 and 27-28 January, 3-5, 8-15, and 17-18 February, 13 March 1997, and 25 April 1997. CCC's dragline crane, to be used for excavation of the river channel, was mobilized to the river site on or about 28 January 1997; however, it failed a safety inspection on that date. The crane was repaired, passed a re-inspection on 5 February 1997, and was allowed to begin production work. Excavation by the dragline and hauling to the disposal area began on 7 February 1997. The contractor worked every day without a break, including weekends, during 13-29 March, 14-25 April, and 13-20 May 1997. Work at the disposal site, only, was disrupted by the effects of weather on 23 April 1997. All work was substantially completed on 22 May 1997. (Finding 51; tr. 1/79-80, 126-33, 2/45-46, 164-78, 188, 197, 258; R4, tab 184 at 7, tab 185 at 3-5, 7-12, tab 186 at 10, 12-14, tab 187 at 3-4, 6, 8, tab 188 at 1, 3, tab 189 at 2-4, 13, 15-17, tab 190 at 1-3, 7-11, tab 191 at 3-8, 11, tab 192 at 1, 4-7, 9, 11, 13-15, 17-18, tab 193 at 2-6, tabs 194, 195 at 3-4, tabs 196-205, 212 at III-5, III-6, III-7, tabs 212/1, 212/2, 212/3, 213 at 18-19)

56. Daily reports, if any, after 22 May 1997 are not in the record. Mr. Truett's annotated calendar indicates that the contractor was unable to work on account of adverse weather conditions during 23-27 and 29-31 May and 1-3 June 1997. All work was completed on 15 July 1997. (Finding 52; tr. 2/42; app. supp. R4, tab A1 at 9, tab A1/A at 3, tab A2)

Claims

57. Some shore protection work had to be performed again and shore protection work was performed inefficiently on account of high water. However, CCC provided no specific number of days or dates on which work was thereby delayed. (Tr. 1/126-33)

58. A total of $13,760.00 in LDs was withheld for 43 days of alleged late performance ($13,760.00 divided by $320.00 per day) for the period 16 October-27 November 1996. The contractor, in a memorandum to ACO Saucer dated 6 January 1997, characterized the withholding of LDs as a "gross misunderstanding" and "inaccurate." However, no particular time extension was requested by CCC. (Findings 11, 54; tr. 2/268, 3/115-17; R4, tabs 140, 148, 151 at 2-4, tab 152; app. br. at 20, 26)

59. By unilateral contract modification 6, dated and effective 13 January 1997, CO Hickman approved the contractor's use of the second alternate disposal site and unilaterally imposed a reduction in the contract price of $54,738.00. In a letter to CO Hickman dated 22 January 1997, CCC objected to modification 6 and returned it

unsigned. The contractor further noted that the government had taken "no consideration for 'access' delays and the impact of time lost along with other circumstances surrounding these matters." Again, CCC made no request for a specific time extension. (R4, tabs 141-42) On or after 15 July 1998, the price decrease in modification 6 was rescinded and the money withheld was paid to CCC. (Tr. 2/221-22, 269-70, 3/91-92; R4, tab 157)

60. In a letter to ACO Saucer dated 17 June 1997, Mr. Curry asserted that the government had delayed access to the site which forced CCC "to work in high water with significant costs far and beyond those I would have had if I had been allowed to work when I expected" (R4, tab 146). Further, by letter to ACO Saucer dated 15 July 1997, Mr. Curry posited that access denied by the government "forced us into a period of high water which caused numerous delays some as long as 30 days, with very 'spaced' work due to high water." The contractor demanded release of money being withheld, including LDs. (R4, tab 148)

61. Based on an analysis completed in August 1997, ACO Saucer concluded that CCC was entitled to a 63-day time extension for interspersed weather-related delays during the period 25 October 1996 through 11 May 1997. The analysis is based on a day-for-day time extension for each day of adverse weather or high water flow after 15 October 1996. (R4, tab 149) No contract modification to this effect was issued because the contractor would not concur with the government's determination (tr. 3/117-19; R4, tab 162 at 8, third paragraph).

62. M-S submitted its final revised claim to ECI by letter dated 23 September 1997. M-S alleged that it was denied access to the work site during 1 June-7 September 1996, that extra costs were incurred to place and to remove the mat road, that extra work was performed for the RR, and that delays on account of high river flows were encountered on 1-3, 18-25, and 28-31 December 1996 and 8-14 January 1997. (Finding 49; tr. 2/71-74; R4, tabs 209/12 at 3, 212 at III-7, III-8, tab 228)

63. ECI forwarded the M-S claim letter to CCC. CCC and the government exchanged correspondence and conducted discussions concerning potential claims arising under or related to the contract. By letter dated 4 August 2000, received by the government on 10 August 2000, CCC submitted claims under the contract in the amount of $1,005,859.00. The claim certificate, signed by Mr. Curry, was, in part, "dependent upon the certification submitted by . . . major subcontractor, [M-S]" (R4, 209 at 1). Claim cost components include extended home office overhead during an alleged 273-day delay period (15 October 1996-15 July 1997), extended field office overhead for the same period plus subsistence and other miscellaneous expenses during February-May 1997, equipment rental during 28 October 1996-22 August 1997, equipment repair and repair parts (allegedly caused by high water), fuel, lubricants, and supplies during 16

October 1996-1 October 1997, CCC labor cost overruns for re-performance and overtime during November 1996-June 1997, extra survey expenses (re-performance caused by high water) during November 1996-May 1997, extra costs for the river channel excavation (dragline) subcontractor during February-March 1997, extra costs claimed by M-S for denied access to the site during 1 June-7 September 1996, access road construction and removal, high water delays, and CCC profit and bond markups. Implicit in the claim is a request for a time extension until 15 July 1997 and return of LDs withheld. (Findings 52, 54, 56; tr. 1/136-40; R4, tab 209 at 21, tabs 209/6-12, tab 228)

64. CCC's requests for equitable adjustment and claims were prepared by Mr. Truett. At that time, Mr. Truett was retained by the contractor on a contingent recovery basis. When Mr. Truett testified at the hearing in support of identical claims, he was being compensated on an hourly basis. (Tr. 1/186-87, 229-37, 245-48; app. supp. R4, tab A1 at 1-8; R4, tabs 161, 209)

65. Based on a contractor proposed schedule, Mr. Truett generally opined that CCC could have substantially completed all riverside work in 130 calendar days. He did not prepare his own version of an as-planned schedule, did not specifically analyze the contractor's proposed schedule, and did not consider alleged contractor delays related to the dragline crane or deficient contractor work. (Tr. 2/20-23, 34, 3/161-63; app. supp. R4, tab A1 at 7-8; R4, tab 209 at 14)

66. The government's expert schedule analysis, estimating, and construction means and methods witness, Stuart Ockman, developed an as-planned schedule based on the contractor's initial schedule of work and payments, dated 4 April 1996, and the more detailed activity descriptions and durations shown on the summary bar chart dated 10 October 1996 (findings 26, 46; tr. 3/145-49; R4, tab 212 at I-2, I-3, II-1, II-2, III-1 through III-7, tabs 212/1, 212/2, 213 at 1-10). Mr. Ockman then analyzed the effect of actual delays and work durations as applied to that as-planned schedule. His analysis indicated that eight delays identified by him were the contractor's responsibility or caused by high water flows. According to Mr. Ockman, the first two delays, late start of construction in June 1996 and late finish of the access road through the RR ROW in September 1996, pushed CCC beyond 15 October 1996 and into the high water period starting on about 15 November 1996. (R4, tab 212 at II-2, III-1 through III-14, tabs 212/1, 212/2, 212/3, 213 at 7-13) We find Mr. Ockman's analysis generally to be correct, except as explained below.

67. The third delay indicated by Mr. Ockman's analysis involves an actual contractor work duration for placement of the lower concrete collar (25 days) that exceeded the planned duration (7 days, based on the contractor's schedules submitted through 10 October 1996). This 18-day delay is not the subject of a claim by the contractor. It occurred during 25 October-11 November 1996, a period when there were

no high water disruptions or interruptions. Mr. Ockman found 19 days, extending the delay through 12 November 1996; however, we could find no evidence for lower concrete collar work on 12 November 1996. During this delay period, in a contractor schedule dated 9 November 1996, CCC extended the lower concrete collar activity duration to 13 days without explanation. (R4, tab 136, activity 13, tabs 174-78, 209/5, activity 13, tab 212 at III-3, tabs 212/1/1, 212/2, 213 at 14) We find a contractor delay of 18 days in this instance.

68. The fourth delay opined by Mr. Ockman, 18 days, also concerns an actual contractor work duration (34 days) that exceeded the planned duration (16 days, based on the contractor's schedules submitted through 10 October 1996) for upper concrete collar placement. Prior to the delay period, in a contractor schedule dated 9 November 1996, CCC decreased the lower concrete collar activity planned duration to 10 days, without explanation, to be finished on 29 November 1996. We find that this contractor delay of at least 17 days occurred during 30 November-16 December 1996. It was not the subject of a claim by CCC except to the extent that bridge work was disrupted during the delay period by high water flows on 2-4 December 1996. (Findings 51, 62-63; R4, tab 136, activity 16, tabs 178-83, 209/5, activity 16, tabs 212/1/1, 212/2, 213 at 15-16)

69. The fifth delay indicated by Mr. Ockman's analysis again involved an actual contractor work duration for placement of the concrete fillet and apron (22 days) that exceeded the planned duration (7 days, based on the contractor's schedules submitted through 10 October 1996). Prior to the delay period, in a contractor schedule dated 9 November 1996, CCC decreased the concrete fillet and apron activity planned duration to 2 days, without explanation. We find that this is a contractor delay of at least 15 days, that the delay occurred during 24 December 1996-7 January 1997, and that it is not the subject of a claim except to the extent that bridge work allegedly was disrupted during the delay period by high water flows. The contractor elected not to work during 20-24 December 1996. High water flows did not disrupt or interrupt bridge work during the delay period. (Findings 51, 62-63; R4, tab 136, activity 17, tabs 183-86, 209/5, activity 17, tab 212 at III-4, III-5, tabs 212/1/2, 212/2, 213 at 16-17)

70. The sixth delay analyzed by Mr. Ockman, in his amended opinion, concerns an alleged late start of disposal of material excavated from the river and river bank. According to the analysis, the contractor was delayed in its disposal of excavated material from and including 8 January 1997, the conclusion of the previous delay period, to 5 February 1997, when CCC began river channel work with its dragline. Mr. Ockman assigns this delay to the contractor because the dragline was not mobilized to the site and ready to perform until 5 February 1997. High water flows interrupted or disrupted shoreline work during 17 of the 29 days during 8 January-5 February 1997 (8-10, 13-15, 23-25, and 27-31 January and 3-5 February 1997). The CO approved CCC's use of the second alternate disposal area on 13 January 1997. The haul road to that disposal area

was readied for use during 14-18 January 1997, consistent with the time scheduled by the contractor for completion of that work. Work on the disposal area haul road after 18 January 1997 was maintenance and improvement. (Finding 55; tr. 3/151-54; R4, tabs 187-89, 192-93, 209/5, 212 at III-5, III-6, tabs 212/1/2, 212/2, 213 at 17-18)

71. Consistent with the last schedule, dated 9 November 1996, submitted by CCC prior to the high water delays, shoreline work should have begun with filter fabric activity on 6 January 1997, one day prior to completion of concrete and steel bridge work. Grading work at the shoreline actually was started earlier by CCC on 28 December 1996. Channel excavation and disposal of excavated materials should have begun on 20 January 1997, at the earliest, *i.e.*, 13 days after completion of concrete and steel bridge work. Minor excavation work actually began on 7 January 1997, using a backhoe. Major excavation work was dependent on the dragline crane, which was not mobilized to the site until on or about 28 January 1997. (Findings 50-51, 55)

72. Mr. Ockman, concerning a seventh delay, evaluated the effects of high water, finding that work was precluded during 22 February-13 March 1997, a 21-day period. We find that high water flow interrupted or disrupted bridge and shoreline work, intermittently, from 2 December 1996-22 May 1997. (Findings 51, 55; R4, tabs 209/5, 212 at III-6, III-7, tabs 212/1/2, 212/2, 212/3, 213 at 18-19)

73. The eighth and final delay analyzed in Mr. Ockman's opinion related to placement of filter fabric, bedding stone, and riprap at the river bank. Those activities were scheduled to be completed in 11 days. Prior to the delay period, in CCC's schedule dated 9 November 1996, the planned duration for these activities was increased to 20 days, without explanation. Mr. Ockman suggests that this work was performed during 13 March-14 May 1997, a period of 63 days; however, some preparatory work related to riprap placement was started as early as 28 December 1996. Using the completion date analyzed by Mr. Ockman, these activities were completed over a period of 139 days (28 December 1996-14 May 1997). However, high water flows, the concrete fillet and apron delay, and excavation and disposal delays overlap that time period. Further, M-S returned on 24 April 1997 to perform remedial work through no fault of the government. (Findings 50-51, 55, 69-72; R4, tabs 209/5, 212 at III-6, III-7, tabs 212/1/2, 212/2, 212/3, 213 at 18-19)

74. By letter dated 11 September 2000, Mr. Curry submitted a corrected claim certificate that did not rely on the claim certificate submitted by M-S (R4, tab 211).

75. In a final decision by CO Hickman dated 10 December 2001, CCC's claim was denied (tr. 3/92; R4, tab 162). The contractor timely appealed the claim denial to the Board by counsel's letter dated 8 March 2002, mailed to the Board on that date.

DECISION

Law Applicable to the Claims

The claims to be decided here include allegations of directed changes and constructive changes, delays caused by those changes, and acceleration. Among other monetary aspects of the claims, appellant seeks return of liquidated damages withheld by the government. The government contests all liability.

A constructive change results when a contractor performs work that differs from the contract requirements, not as a volunteer, without a formal directive, under the Changes provision of the contract, due either to an informal order from, or as a consequence of government action or inaction by a CO. The contractor is entitled an equitable adjustment in the event of a directed or constructive change. *Ets-Hokin Corp. v. United States*, 420 F.2d 716, 720 (Ct. Cl. 1970); *M.A. Mortenson Co.*, ASBCA No. 53229, 05-1 BCA ¶ 32,837 at 162,469; FAR 52.243-4 (finding 9).

To establish entitlement to a performance time extension based on excusable delay, a contractor must show that the delay resulted from "unforeseeable causes beyond the control and without the fault or negligence of the Contractor," that it took reasonable action to perform the contract notwithstanding the occurrence of the delay, and that the delay extends overall contract completion, *i.e.*, the critical path. *Sauer Inc. v. Danzig*, 224 F.3d 1340, 1345 (Fed. Cir. 2000); *Roy McGinnis & Co.*, ASBCA Nos. 28338, 29094, 86-3 BCA ¶ 19,165 at 96,876; FAR 52.249-10 (finding 9). In addition, to recover extra costs for an excusable and compensable delay, a contractor must demonstrate that delays of a specific length were caused by the government and that such delays were not concurrent with delays within the contractor's control. *T. Brown Constructors, Inc. v. Pena*, 132 F.3d 724, 734 (Fed. Cir. 1997); *C.H. Hyperbarics, Inc.*, ASBCA Nos. 49375 *et al.*, 04-1 BCA ¶ 32,568 at 161,149-50.

The appellant also claims acceleration and constructive acceleration. According to *Fraser Construction Co. v. United States*, 384 F.3d 1354, 1360-61 (Fed. Cir. 2004):

> A claim of acceleration is a claim for the increased costs that result when the government requires the contractor to complete its performance in less time than was permitted under the contract. The claim arises under the changes clause of a contract; the basis for the claim is that the government has modified the contract by shortening the time for performance, either expressly (in the case of actual acceleration) or implicitly through its conduct (in the case of constructive acceleration), and that under the changes clause

> the government is required to compensate the contractor for the additional costs incurred in effecting the change. . . .
>
> A claim of constructive acceleration ordinarily arises when the government requires the contractor to adhere to the original performance deadline set forth in the contract even though the contract provides the contractor with periods of excusable delay that entitle the contractor to a longer performance period. . . . [T]he elements of constructive acceleration . . . include the following . . ., each of which must be proved by the contractor: (1) that the contractor encountered a delay that is excusable under the contract; (2) that the contractor made a timely and sufficient request for an extension of the contract schedule; (3) that the government denied the contractor's request for an extension or failed to act on it within a reasonable time; (4) that the government insisted on completion of the contract within a period shorter than the period to which the contractor would be entitled by taking into account the period of excusable delay, after which the contractor notified the government that it regarded the alleged order to accelerate as a constructive change in the contract; and (5) that the contractor was required to expend extra resources to compensate for the lost time and remain on schedule. . . . *R.J Lanthier Co.*, [ASBCA No. 51636, 04-1 BCA ¶ 32,481 at 160,668] . . . .

To properly withhold LDs, the government initially must prove that the contractor failed to achieve substantial performance of the contract work by the agreed-upon completion date. If the government establishes that the contractor failed to meet the contract completion date and the period of time for which the LDs were withheld is correct, then the contractor has the burden to show why the failure to complete the work timely was excusable. The government continues to have the overall burden of proof. If the responsibility for delays is unclear or if concurrent delays occur, then the government must prove a clear apportionment of the delay attributable to each party. *Sauer*, *supra,* 224 F.3d at 1347; *C.H. Hyperbarics, supra,* 04-1 BCA at 161,152.

Appellant's Claims

We examine the contractor's claims as presented in its post-hearing brief with due regard for the chronological order in which the events occurred. The first claim relates to alleged denial of access via the RR ROW.

a. RR ROW Access

The claim alleges that the government "precluded [CCC's] access to the Project site by implicitly disallowing access by the existing [RR ROW] contrary to the contract specifications." Appellant characterizes this as a "denial of access [which] constituted a change to the contract, and resulted in additional costs and delay." Related to those assertions are contentions by appellant that "[t]he government's failure to perform original wetland delineations of the [RR ROW] delayed work" and that requiring "[p]lacement of matting [for] the entire length of the [RR ROW] corridor was an extra under the contract." (Findings 59-60, 62-63; app. br. at 25-26, ¶¶ 1, 7-8, 11)

It was clear from the beginning of CCC's involvement with this project that the work was to be accomplished primarily by access from the water. That access was available throughout the relevant time period. Potential environmental impacts to wetlands in the river floodplain, including the RR ROW, and the fact that the designated disposal area was on the opposite side of the river made access via the RR ROW secondary and limited. If the contractor wished to make the RR ROW the primary access route, then it was obliged to obtain the necessary approvals. (Findings 1-8, 18, 20, 33, 37) Any necessary permits in addition to those already obtained by the government were the contractor's responsibility. FAR 52.236-7 (finding 9).

Limited equipment access or limited access, as applied to the RR ROW, meant that a contractor could move a single item of equipment into and out of the work area, could access the area in light vehicles, such as pickups or SUVs, would have emergency ingress and egress in the event of personal injury, and could evacuate equipment in the event of high water flows. However, even limited equipment access required the use of mats across wet areas, was constrained by minimal clearing, and could not be accomplished by placement of fill. (Findings 2, 13, 18, 37)

The contract, by reference to NWP 33 and otherwise, specified that placement of any fill or a temporary road in the RR ROW would require notification to the Corps, submission of a restoration plan, and internal government environmental review and coordination. It further could be subject to consideration of possible environmental impacts and special conditions for approval in order to mitigate any such impacts. (Findings 12-13)

Prior to award and continuing, CCC's intent was to obtain unlimited access to the river by a land route. Unlimited access required fill and/or the construction of a temporary road. Mr. Curry was aware that such work was a deviation from the contractual requirements. However, no specific, comprehensive plan as required by the contract was submitted for the government's review and approval. Mr. Curry's note on the precon minutes and appellant's indication of an access road work activity on the

summary schedule dated 4 April 1996 did not alert the government to take action with regard to CCC's plan to obtain unlimited land access through the RR ROW. (Findings 12, 13, ¶¶ 4-4.2, findings 14, 18-20, 24, 26, 29, 31-32, 34-35, 38, 42)

Mr. Curry's views concerning conversations with Mr. Birindelli and government approval of land access if CCC could obtain private property owners' permissions were unreasonable. Messrs. Curry and Shea were also incorrect regarding the applicability of environmental constraints to private property on which wetlands abut a navigable waterway. (Findings 1-5, 16, 19, 29, 33-35) It is well-established that the Corps has jurisdiction, under § 404 of the Clean Water Act, 33 U.S.C. § 1344, over wetlands that actually abut a navigable waterway, including wetlands on private property. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 124, 129 (1985).

On or about 10 June 1996, CCC made a request for "official notification" of wetlands so that the contractor could "determine our ability to ingress and egress" the site. This was the first specific request for government action with regard to CCC's plan to obtain unlimited land access for the purposes of performing the contract work. However, as of that date, CCC had no firm deal with adjacent landowners or its subcontractors with respect to the access road. (Findings 24, 27-28)

From receipt of the contractor's request dated 10 June 1996 until approval of the contractor's plan for a temporary road on 5 August 1996, the government acted properly and with reasonable speed. CCC was on notice that determinations by the Corps related to environmental requirements would be required but that the contract work could proceed by water and limited access. As of 5 August 1996, CCC and its major subcontractor recognized that approval of unlimited access by land required construction (and subsequent removal) of a temporary road. (Findings 27, 30-33, 36, 38-40)

The delay in obtaining access to the riverside work site and to the start of work there, which extended from 5 March 1996 to about 11 September 1996, was caused by the contractor's deviation from the contractually-required water access and tardy submission of a specific request for land access that could be evaluated and approved by the government (findings 25-27, 30-39, 43, 66). When CCC deviated from the planned water access to unplanned land access, it was at risk for the delay that followed. *Earth Tech Industries, Ltd.*, ASBCA No. 46450, 99-1 BCA ¶ 30,341 at 150,043.

The government did not unreasonably deny or delay land access. Instead, the government worked with the contractor to delineate wetlands and to develop a method whereby CCC could properly obtain unlimited land access. The contractor and its subcontractor, so that they could obtain the land access desired by them, agreed to construct a temporary road; that work was not directed change by the government. (Findings 27, 30-32, 34, 36, 39, 66)

Appellant's expert testimony ignored or misconstrued the contractor's delay and was otherwise not as credible as the government's expert delay analysis. He had no "as-planned" schedule as a benchmark and did not analyze the contractor's proposed schedule with specificity. Moreover, he had a financial interest in the outcome when he prepared his reports. (Findings 64-66) We are entitled to take his interest in the outcome into consideration in evaluating his report. *California Federal Bank v. United States*, 395 F.3d 1263, 1270 (Fed. Cir.), *cert. denied*, 126 S.Ct. 344 (2005); *Simplix*, ASBCA No. 52570, slip op. at 35, 2006 ASBCA LEXIS 26 at *71, 2006 WL 694607. We find his report too badly flawed to be persuasive. The government's expert delay analysis was more complete, more credible, and supports our findings and conclusions (finding 66).

b. Alternate Disposal Site

This claim asserts that "[t]he Government's failure to timely process Claimant's request for an alternate disposal site delayed contract performance" (findings 59, 63; app. br. at 25, ¶ 2). The government-designated existing disposal site was on the west side of the river, opposite the main site of the shoreline work. If the contractor proposed an alternate disposal site, the contract made clear that environmental review and coordination "could result." (Findings 1, 4-5, 13, ¶ 7.8, findings 16, 18, ¶ 5)

CCC was not prepared to indicate the boundaries of the first alternate disposal site (McAlpine property) until on or about 21 June 1996. On or about that same date, the government made a preliminary environmental examination of the first alternate disposal site. Within about one week, by letter dated 28 June 1996, ACO Saucer informed the contractor that the first alternate disposal site, if suitable, would require "environmental documentation" (an additional or supplemental EA) and that environmental coordination and documentation would require 30-60 days. That is, it would not be completed until late July-late August 1996 at the earliest. However, CCC did not submit a specific and authorized plan for use of the McAlpine property as a disposal site until about 25 July 1996 because the owner did not agree to that use until 24 July 1996. Given those circumstances, the environmental coordination and documentation would not have been completed until late August-late September 1996 at the earliest. The government timely began its environmental consideration of the McAlpine property. (Findings 31-33, 38)

On or about 16 August 1996, government environmental personnel made a preliminary determination that the McAlpine property could be used for disposal if certain environmental conditions were met. However, further archaeological coordination would be required. The contractor, rather than pursue that further, proposed the use of the second alternate disposal (Barkley) site on or about 22 August 1996. Favorable preliminary environmental determinations were made on or about

12 September 1996 (21 days after the Barkley property was proposed) and were finalized on 24 October 1996. (Findings 32, 41, 43)

ACO Saucer thereafter attempted to negotiate a price reduction for allowing use of the second alternate disposal site. Bridge work was ongoing but ACO Saucer did not allow work related to the Barkley site to go forward. On or about 20 November 1996, the contractor claimed that the lack of permission to access the second alternate disposal site was delaying shoreline excavation work. However, CCC's current schedule at that time showed disposal work set to begin on 16 December 1996. Therefore, it was not yet on the critical path to completion. (Findings 43, 48, 50, 53, 59)

CO Hickman allowed CCC to begin work on the Barkley property on or about 13 January 1997. By that date, contractor-caused delays on account of the RR ROW had occurred as explained above. Work may also have been delayed by the subcontractor in performing a side job for the RR. Performance was delayed when M-S took longer than planned to perform lower concrete collar work, upper concrete collar work, and concrete fillet and apron work. The latter two delays were exacerbated by high water flows starting on 2 December 1996. None of these delays were government-caused. (Findings 49, 51, 59, 62, 67-69)

Appellant argues that it should have been finished prior to the onset of the high water season starting on 15 November 1996 and blames the government for pushing the work into that season. However, we have found contractor-caused delay through the delay in completion of the concrete fillet and apron work, which continued until 7 January 1997 (finding 69). Therefore, contractor delay, not government-caused delay, extended performance into the high water season. Thereafter, some work was performed inefficiently on account of high water flows. (Findings 51, 55, 57, 66)

As performed, the contractor did not begin major excavation until 7 February 1997. The contractor's then-current schedule indicated that the work, as planned, was to begin on 16 December 1996. Based on that schedule only, one could conclude that the major excavation work activity was delayed because CO Hickman did not authorize work at the Barkley property until 13 January 1997. However, that schedule also showed, consistent with pertinent contract provisions and the subcontractor's work plan, that major shoreline work was not to start until 13 days after concrete and steel bridge work was completed and 2 days after completion of all bridge work. Concrete and steel bridge work was actually completed on 7 January 1997 through no fault of the government. All bridge work (except remedial work, performed in April-May 1997) was completed on 5 February 1997. (Findings 15, 17, 29, 50-51, 55, 59)

As built, consistent with the contractor's schedule, use of the disposal area did not become a critical path activity until 20 January 1997 (13 days after 7 January 1997), at

the earliest, based on completion of concrete and steel bridge work (finding 71). Work to construct the haul road to the second alternate disposal area was performed on 14-18 January 1997. There is no indication that use of the government-designated disposal area would have required construction of a haul road; therefore, construction of the haul road into the Barkley property was extra work and a contractor delay to the major excavation work activity caused by the contractor's chosen method and location of work. If CCC had intended to start major excavation work earlier, it would have mobilized its dragline sooner; however, the dragline crane was not brought to the site until 28 January 1997. We conclude that ACO Saucer's delay in allowing work on the Barkley property was concurrent with ongoing contractor delays and did not delay the overall completion date. Critical path delays were the responsibility of the contractor. (Findings 16, 55, 70-71)

c. Concurrent Bridge and Shoreline Work

Appellant suggests that the government's "refusal to allow concurrent performance of work . . . delayed contract performance and resulted in extending contract performance into the high water performance time frame" (app. br. at 25-26, ¶ 3). As explained above, contractor-caused delays initially pushed contract work into the high water period.

Concerning concurrent performance of shoreline work with bridge work, the contract work area has a limited width from the shoreline inland (less than 200 feet) but does extend along the shoreline in each direction past the bridge pier work area (more than about 175 lineal feet along the river bank in each direction past the bridge pier work area that runs about 150 feet along the shoreline). The entire work area is rectangular and about 200 x 500 feet. That rectangle is bisected by the RR trestle and, as-built by CCC, the parallel access road within the RR ROW. The bridge pier work area is also rectangular, is about 200 x 150 feet and includes the footprint of the RR trestle and the RR ROW access road. Within that area, bridge work equipment was operated and bridge work was performed. Bridge work expanded the footprint of the RR trestle pier by placement of concrete aprons. The contract cautioned against river channel slope excavation at all locations within the larger construction area until after bridge work was completed. Excavation was forbidden by the contract in front of the 150-foot lineal distance within which sheet piling was to be placed around the expanded bridge pier structures. (Findings 3, 5, 15-17)

The government did not want CCC to perform any channel excavation until all bridge work, except installation of the timber fender, mats, and wale guards, was completed. The government's legitimate concern was the possible effect of erosion on the bridge pier. Both the bridge work subcontractor and the government were of the

opinion that little if any excavation work could be performed efficiently because the work space was limited (Findings 26, 29, 31)

The contractor planned to perform some shoreline work concurrently with bridge work. The schedule in effect when bridge work was completed and shoreline work began shows shoreline work to begin one day prior to completion of concrete and steel bridge work and 12 days prior to completion of all bridge work. Major excavation in the river channel was scheduled to begin 13 days after concrete and steel bridge work was completed and 2 days after all bridge work was completed. (Findings 26, 46, 50)

Shoreline work actually began at least 9 days prior to the finish of concrete and steel bridge work and 39 days before completion of all bridge work. Major excavation in the river channel was actually started 31 days after concrete and steel bridge work was completed (18 days later than scheduled) and 2 days after all bridge work was completed. (Findings 51, 55, 71)

As explained above, the delay in starting major excavation was contractor-caused (construction of haul road, mobilization and repair of dragline). The government did not refuse to allow concurrent performance of some shoreline work while bridge work was being completed. The government did not delay contract performance in connection with this claim. The contractor actually performed some shoreline work concurrently with bridge work. To any extent that the contractor could not perform as planned or timely, it was on account of contractor delays and high water flows after the work was pushed into the high flow season by contractor delays.

d. The Contract Completion Date, Acceleration, and LDs

Appellant claims that the government enforced an incorrect contract completion date, 15 October 1996, thereby accelerating the work, and improperly withheld LDs based on that date (findings 58, 63; app. br. at 26, ¶¶ 4, 6, 9-10) The parties do not dispute that the contract performance period was to be 379 days from receipt of NTP and that a daily rate for LDs, $320, attached to the overall completion date (finding 11). The parties also do not dispute that bonds required of CCC under the contract were not submitted timely and that the government was considering a default termination for that reason (findings 9, 21, 23). There was no disagreement during performance of the contract and in particular during the time when the bonds were delayed and the government was considering a default termination, that Mr. Curry, a principal for CCC, and the successor CO, Mr. Hickman, entered into an agreement which delayed NTP but set aside any default termination based on tardy submission of bonds by the contractor. That agreement also kept in place what would have been the approximate original contract completion date if the bonds had been timely submitted followed closely by NTP issuance. (From award on 1 September 1995 to 15 October 1996 is 410 days,

which allows 31 days (410-379 days) for submission of bonds and issuance of NTP). There was no dispute that the parties, prior to litigation, agreed to issuance of the NTP in March 1996 and contract completion by 15 October 1996. The contract was performed by both parties in accordance with that agreement. (Findings 9, 11, 22, 25-26, 30, 44-45, 48) In its reply brief, at 4, appellant admits that "prior to June 1, 1996, [*i.e.*, prior to the onset of delays alleged in CCC's claims], Claimant was content with the agreement to maintain the October 15, 1996, construction completion date insisted upon by the [Corps]."

The contractor first disputed the withholding of LDs on or about 13 December 1996 in connection with alleged government delays. However, CCC's argument at that time and its later claims did not explicitly contest the 15 October 1996 completion date. To the contrary, claim cost components presented by the contractor for extended home office overhead, field office overhead, and equipment use proceed from that date. (Findings 54, 63)

The parties' conduct during performance and prior to litigation is persuasive evidence that the contract should be construed by the Board now as was performed by the parties then. "It is a familiar principle of contract law that the parties' contemporaneous construction of an agreement, before it has become the subject of a dispute, is entitled to great weight in its interpretation." *Blinderman Construction Co. v. United States*, 695 F.2d 552, 558 (Fed. Cir. 1982); *accord WSCON Corp.*, ASBCA Nos. 38894, 39874, 91-3 BCA ¶ 24,293 at 121,395 (parties agreed to fixed start date, thereby waiving contract-specified 120-day start-up period and/or 45-day identification period). Accordingly, we conclude that the contract completion date was 15 October 1996. There was no directed acceleration by adherence to the agreed completion date.

The claim for constructive acceleration relates to contractor assertions of government-caused delay coupled with the government's insistence that CCC comply with the completion date of 15 October 1996. As explained above, we find no compensable delay for which the government is responsible. Therefore, the linchpin for appellant's acceleration claim, government-caused delay, is absent.

LDs were withheld for 16 October-27 November 1996 only. The first occurrence of an arguable excusable delay was on 2 December 1996, the first day of high water flow that disrupted but did not interrupt bridge work. All high water flow delays occurred after the dates for which the government withheld LDs (findings 51, 54-55, 58, 72). Therefore, to the extent that the contractor encountered excusable delay and satisfied the first element of a constructive acceleration claim, it was after LD withholding had ceased.

Even if we consider that the first element of a constructive acceleration claim has been satisfied by encountering excusable delays attributable to high water flows, such

delays were encountered on account of contractor-caused delays. Further, CCC made no timely and sufficient request for an extension of the contract schedule. The first specific request for extension of the contract schedule made by the contractor in connection with high water flows was presented after performance when the claims were submitted in August 2000. An earlier attempt by the government to agree on excusable delays was rebuffed by CCC. (Findings 55-56, 61, 63)

Prior to submitting the claims, CCC had expressed concerns about the possibility of delays; however, the delays that were the subject of those concerns occurred prior to the high water season and were contractor-caused (findings 27, 59-60) or did not delay overall completion (findings 53, 59-60). When the contractor complained about LDs after the initial high water flow, the arguments presented by CCC related to alleged delays other than high water flows or were very general with no particular days or dates provided and no time extension analysis (findings 54, 57-58). There was no specific request on which the government should have acted. To the extent that appellant argues that it was pushed into the high water season by delays, we explained above that those delays were contractor-caused. We conclude that the second and third elements of a constructive acceleration claim have not been proved.

Even if the high water flows were excusable delays, there is no evidence that the government insisted on any particular completion date after withholding of LDs was stopped. From that point, the contractor was taking the risk of working in the high water flow season. Element four fails for lack of proof.

As to the fifth element of a claim of constructive acceleration, we see no probative evidence of acceleration costs that are connected with the completion date of 15 October 1996 or withholding of LDs. M-S worked every day for 13 days during 2-14 December 1996, about the time when high water flows began. Those dates include 3 weekend days; however, M-S then was off 6 days for Christmas during 20-25 December 1996, which included 3 non-holiday weekdays. (Finding 51) CCC took off an extra day, Tuesday, 31 December 1996, for the New Year holiday. The contractor did not work extra days, including weekends, until mid-March 1997, long after the alleged delays had occurred. (Finding 55) There is no evidence of an increased labor force, additional construction equipment, or expenditure of other extra resources to compensate for lost time. The claim for constructive acceleration fails.

Concerning LDs withheld for the period 16 October-27 November 1996, the contractor did not achieve substantial completion until after those dates (findings 55, 58). As explained above, appellant has not shown any excusable delay prior to or during those dates; however, contractor delay caused performance during those dates. LDs were properly withheld.

SUMMARY

The appeal is denied.

Dated: 28 March 2006

STEVEN L. REED
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

CARROLL C. DICUS, JR.
Administrative Judge
Acting 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. 53716, Appeal of Curry Contracting Company, Inc., rendered in conformance with the Board's Charter.

Dated:

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