ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
International Technology Corporation	)	ASBCA No. 54136
	)	
Under Contract No. N62474-93-D-2151	)	

APPEARANCE FOR THE APPELLANT: Peter B. Jones, Esq.
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Newport Beach, CA

APPEARANCES FOR THE GOVERNMENT: Susan Raps, Esq.
Navy Chief Trial Attorney
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Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DELMAN

International Technology Corporation (appellant or ITC) seeks reimbursement of costs on behalf of itself and a subcontractor, in the amount of $1,148,545, over and above the contractual cost ceiling of its cost-reimbursement contract. The contracting officer (CO) denied the claim contending, *inter alia*, that appellant failed to comply with the Limitation of Cost clause in the contract, and the government was not obligated to pay for unauthorized costs that exceeded the contract's cost ceiling. We have jurisdiction under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (CDA). Both entitlement and quantum are before us.

FINDINGS OF FACT

1. The contract was awarded to appellant on 23 February 1994 in the amount of $800,000 by the Department of the Navy, Western Division, Naval Facilities Engineering Command (Navy or government). Section C, paragraph 1.1 of the contract describes the work generally as follows:

> The objective of this procurement is to obtain services for performing remedial actions at environmentally contaminated sites predominately located at Department of Navy and Marine Corps installations and other Government Agencies. These site locations range throughout the states of California and Nevada. These sites consist of those ranked on the Superfund National Priority List (NPL) as well as non-NPL

> sites, Resource Conservation and Recovery Act (RCRA), Underground Storage Tanks UST, and other sites which might be determined to require remedial action.

(R4, tab 1 at C-1) The contract term was for one base year with four annual option periods. The contract was an indefinite delivery, indefinite quantity/cost plus award-fee type contract that included the clause entitled FAR 52.232-20, LIMITATION OF COST (APR 1984) (LOC) (R4, tab 1 at I-2).

2. Insofar as pertinent, the LOC clause states as follows:

> LIMITATION OF COST (APR 1984)
>
> (a) The parties estimate that performance of this contract, exclusive of any fee, will not cost the Government more than (1) the estimated cost specified in the Schedule . . . .
>
> (b) The Contractor shall notify the Contracting Officer in writing whenever it has reason to believe that—
>
> (1) The costs the contractor expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of the estimated cost specified in the Schedule; or
>
> (2) The total cost for the performance of this contract, exclusive of any fee, will be either greater or substantially less than had been previously estimated.
>
> (c) As part of the notification, the Contractor shall provide the Contracting Officer a revised estimate of the total cost of performing this contract.
>
> (d) Except as required by other provisions of this contract, specifically citing and stated to be an exception to this clause—
>
> (1) The Government is not obligated to reimburse the Contractor for costs incurred in excess of (i) the estimated cost specified in the Schedule . . . and

(2) The Contractor is not obligated to continue performance under this contract (including actions under the Termination clause of this contract) or otherwise incur costs in excess of the estimated cost specified in the Schedule, until the Contracting Officer (i) notifies the Contractor in writing that the estimated cost has been increased and (ii) provides a revised estimated total cost of performing this contract. . . .

(e) No notice, communication, or representation in any form other than that specified in subparagraph (d)(2) above, or from any person other than the Contracting Officer, shall affect this contract's estimated cost to the Government. In the absence of the specified notice, the Government is not obligated to reimburse the Contractor for any costs in excess of the estimated cost . . . .

. . . .

(g) Change orders shall not be considered an authorization to exceed the estimated cost to the Government specified in the Schedule, unless they contain a statement increasing the estimated cost.

(h) If this contract is terminated or the estimated cost is not increased, the Government and the Contractor shall negotiate an equitable distribution of all property produced or purchased under the contract, based upon the share of costs incurred by each.

(*Id*.)

3. Section G, paragraph G3 of the contract provided in pertinent part as follows:

G3 ORDERING PROCEDURES

. . . .

(e) Each delivery order shall include as a minimum:

(1) The date of the order;

(2) Contract and Order number;

(3) Statement of Work, including references to applicable specifications;

(4) The delivery date or period of performance;

(5) Accounting and appropriation data; and

(6) An estimated cost of performance and award fee. **Under no circumstances shall the contractor exceed 100% of the estimated costs (excluding award fee) without prior written authorization by the Contracting Officer.** [Emphasis added]

. . . .

(f) The contractor shall notify the Contracting Officer if any apparent difficulties with regard to performance according to the terms of the order are anticipated or any time difficulties in performance arise. Each delivery order shall be deemed to include the clauses LIMITATION OF COSTS [sic] (FAR 52.232-20) and LIMITATION OF FUNDS (FAR 52.232-22) which are located in Section I1, and such clauses shall be applicable to each delivery order individually. The Contractor shall notify the Contracting Officer 60 days in advance of reaching 75% of the estimated cost of the delivery order. If at any time during performance of an order, it appears that additional funds shall be required to complete performance of the delivery order, the contractor shall promptly notify the Contracting Officer in writing. Such notification shall include the costs expended, an estimate of costs required to complete the order, and an explanation of why the originally negotiated estimated cost was not adequate. The Government shall have the right to require the contractor to continue performance up to the originally estimated cost level and to suspend work thereafter; to negotiate a new set of work priorities to be completed within the remaining funds; or to modify the order, increasing the estimated cost to the level appropriate for completion of the work without additional fee. Fee may be increased only if there is an increase to the original scope of the order. [Emphasis in original]

(R4, tab 1 at G-1-G-3)

4. Paragraph G4 of the contract provided in pertinent part as follows:

> G4 NOTIFICATION REQUIRED UNDER LIMITATION OF COST AND LIMITATION OF FUNDS CLAUSES
>
> LIMITATION OF COST, FAR 52.232-20, and LIMITATION OF FUNDS, FAR 52.232-22, incorporated by reference in Section I1, are applicable to each delivery order individually. Limitation of Cost applies if the delivery order is fully funded at the time of issuance. Limitation of Funds applies if the delivery order is incrementally funded. "Delivery Order" is substituted for "Schedule" wherever that word appears in the clauses. The contractor shall notify the Contracting Officer in writing whenever it has reason to believe:
>
> (a) For LIMITATION OF COST:
>
> (1) The costs the contractor expects to incur under the delivery order in the next 60 days (unless varied in the delivery order) when added to all costs previously incurred, will exceed 75 percent (unless varied in the delivery order) of the estimated cost specified in the delivery order;
>
> (2) The total cost for the performance of the delivery order, exclusive of any fee, will be either greater or substantially less than had been previously estimated. [Emphasis in original]
>
> (b) For LIMITATION OF FUNDS:
>
> . . . .
>
> NOTE: Notification requirements aspects of LIMITATION OF COST and LIMITATION OF FUNDS are restated here for emphasis.

(R4, tab 1 at G-3-G-4)

5. The work under the contract was to be authorized through the issuance of delivery orders, each of which was to contain the LOC clause. Delivery Order (DO) No. 0102 was issued to appellant on 29 August 1997 in the amount of $1,267,842 for Line Item No. 1, Base Effort, "Treatment of DDT-Contaminated Soil, Naval Communication Station, Stockton, California." The period of performance for the DO was 395 calendar days, commencing on 1 September 1997 and concluding on 30 September 1998. Specifically, the amount available for payment to appellant and allotted to the DO, subject to the LOC clause, excluding fee, was $1,228,409. (R4, tab 39) On 25 September 1997, the Navy exercised Line Item No. 2, Option No. 01, and the amount available for payment under the LOC clause, excluding fee, was increased to $1,668,801 (R4, tab 40).

6. On or about 17 April 1998, over 7 months after the award of the DO, appellant entered into a fixed price subcontract with Terra Kleen Response Group, Inc. (TK or subcontractor) for the treatment of the contaminated soil (R4, tab 99).

7. The DO Scope of Work (SOW) required examination of a "*Terra Kleen Solvent Extraction Technology Evaluation Report"* dated December, 1996 (SETER); and a "*Focused Feasibility Study for DDT-Contaminated Soil,"* dated December, 1996 (FFS) (R4, tab 39, SOW at 2). The SETER provided the results of a bench-scale study and a pilot-scale treatability study performed by TK in the 1990s for the decontamination of soil at the subject sites at Stockton using solvent extraction technology. In the pilot study, TK was tasked to decontaminate roughly 400 cubic yards of soil from the sites (tr. 1/188). Appellant obtained copies of both reports on or about 31 July 1997 (R4, tab 51).

8. One factor that limited the effectiveness of TK's extraction process was soil of low permeability. Generally, soil of low permeability made it more difficult and time consuming to remove the DDT from the soil. (R4, tab 51, ex. A at 3-3) Relatively speaking, substances like silts and clay had low permeability, and substances like sand and gravel had high permeability and were easier to work with. (Tr. 3/70-71)

9. Table 2-15 of the SETER provided a number of soil samples taken from the Stockton sites. Clay content in these samples ranged from 6% to 11%, and silt content ranged from 15% to 52%. (R4, tab 51, ex. A) Mr. Alan B. Cash, president of TK, testified that he relied on this soil data to prepare his proposal to IT (tr. 1/199-200). Table 2-16 of the report identified a range of soil conditions at the Stockton sites, stating insofar as pertinent, a percentage of silt and clay between 24% and 63% (R4, tab 51, ex. A) It is unclear to what extent, if any, TK considered this information to prepare its proposal.

10. Insofar as pertinent, the SETER also stated as follows:

> **The primary difficulty encountered at NCS Stockton was the low permeability of the soil**. Removal of DDT from soils containing a large quantity of fine particles was extremely difficult. **Particle size analysis indicated silt and clay levels in the soil ranged from 24 percent to as high as 63 percent by volume. The solvent extraction cycles took much longer than expected due to the reduced permeability, thereby increasing treatment time and cost**. A soil composed primarily of silt and clay may not be suitable for solvent extraction because of the excessive time required to perform the necessary number of solvent extraction cycles to remove DDT. The soil also tended to form clay lumps when compacted. This resulted in the formation of soil aggregates which were difficult to saturate with solvent, resulting in less particle contact and lower DDT removal efficiencies (Terra-Kleen 1995a). This was a particular problem with the soil at the base of the treatment tank.
>
> **The low permeability of the soil also significantly increased treatment time and energy costs** because providing adequate energy to the soil to vaporize the solvent was extremely difficult. The low permeability also increased the time required for bioremediation.

(Emphasis added) (R4, tab 51, ex. A at 3-4)

11. The FFS report provided a comparative analysis of alternatives for treatment of the DDT contaminated soil at the subject sites at Stockton, and included an evaluation of TK's solvent extraction process and its treatment of soils during the above referenced pilot study. Insofar as pertinent, Tables A-3, -4, -5, -6 and -7 of this study identified a number of soil samples taken from the Stockton sites. Many of the soil samples were classified as "CL", "CH", or "ML". A CL classification meant that the majority of the weight of the soil sample was clay. A CH classification meant a clay of high plasticity, including high compressive strength and low permeability. The ML designation referred to silt of low plasticity. The higher the clay and silt content, the lower the permeability of the soil. (Tr. 3/65-66)

12. With respect to the above tables and the soil descriptions, Mr. Cash testified that these were items "you kind of tuck under your hat and think about" (tr. 1/207). He testified that the tables did not contain any analytical data, and "we didn't rely on these very much" (tr. 1/208). We find that Mr. Cash's understanding of how these samples were taken was hearsay and was not credible.

13. During the performance of the DO, the Navy granted a number of time extensions to appellant, and increased the contract cost ceiling for additional work ordered by or otherwise attributable to the government.[1]

14. In or around early 1999, TK began to experience difficulties in treating the contaminated soil. By Contract Performance Report No. 005 dated 2 February 1999, IT advised the government as follows:

> Processing the first twenty bins has been delayed as a result of several factors. First, the soil loaded in these first bins has shown to be contaminated with pesticides at a higher level than originally expected. Secondly, the amount of clay in the soil has hindered the ability for the soil to break up easily during solvent extraction. In December, it was found that if the bin is placed into the drying area following three-extraction cycles, the clay matrix breaks up and additional extraction cycles can be conducted at a much higher removal efficiency. This approach has been implemented and contamination removal has dramatically increased.

(R4, tab 58)

15. TK took a number of soil samples from the site for purposes of analysis. The laboratory reported clay content ranging from roughly 23.2% to 28.8%, and silt content from roughly 45.5% to 47.2% (app. supp. R4, tab 206). On 10 March 1999, TK's Lanny Weimer (Weimer) made a power point presentation to IT and government personnel that discussed, *inter alia*, elevated clay content in the soil and production delays. This presentation was silent on whether TK would absorb any related production costs. (R4, tabs 92, 125) Weimer did not testify.

16. However, by letter to the CO dated 4 June 1999, IT sought an increase in the contract cost ceiling for these production delays, in the amount of $300,424, stating as follows:

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[1] Under Modification No. 02, dated 2 June 1998, the DO completion date was revised to 30 April 1999 and the amount available for payment subject to the LOC clause, excluding fee, was increased to $1,672,353 (R4, tab 41). Pursuant to Modification No. 04, dated 19 August 1998, the amount available for payment subject to the LOC clause, excluding fee, was increased to $2,246,530 (R4, tab 43). Under Modification No. 06, the amount available for payment subject to the LOC clause, excluding fee, was increased to $2,426,588 (R4, tab 45).

> [T]reatment of DDT contaminated [soil] at NCTS Stockton will not be completed within the original schedule or budget. Treatment time has extended primarily as a result of a higher clay content in the soil than was observed during treatability studies . . . . Attached is a cost estimate for IT to complete this project based on the current schedule.

(App. supp. R4, tab 209) Appellant sought reimbursement for its own additional costs, not those of TK. Appellant sought reimbursement for, *inter alia*, an additional seven months of sample technician time, field management, project management, and equipment rental. However it was TK that was actually performing the soil decontamination work that was delayed. The record does not show that appellant solicited TK's input prior to the submission of this proposal to the government, or that TK otherwise affirmatively advised appellant that it would absorb any additional costs due to these delays.

17. The Navy's remedial project manager recommended that the CO accept the appellant's proposal (app. supp. R4, tab 210). The parties executed Modification No. 08 to the DO on 29 June 1999. The CO accepted appellant's proposal and increased the total estimated cost ceiling by $300,424 to $2,726,888 (R4, tab 47). Insofar as pertinent, the modification contained the following language:

> FAR 52.232-20 Limitation Of Cost (APR 1984) and FAR 52.232-22 Limitation Of Funds (APR 1984) apply to this Contract Task Order.

18. By letter dated 31 August 1999, TK advised appellant of its intent to submit a request for equitable adjustment (REA) to recover additional costs to treat the contaminated soil (R4, tab 133).

19. In appellant's next contract performance report, dated 19 October 1999, appellant advised the government about the planned REA, as follows:

> As of October 12, 1999 a total of 1,173 cubic yards of soil have been treated and stockpiled. At this time it appears that there will only be a total of approximately 1400 cubic yards of soil which is 500 cubic yards less than was originally scoped. As a result, Terra Kleen Response Group has forwarded a notice to IT indicating that a claim for equitable adjustment would be prepared and submitted to IT for review since there [sic] cost proposal was based on treatment of 1900

> cubic yards. Once received, IT will evaluate the claim and forward to the Navy for review.

(R4, tab 63) Under paragraph 4.0, Cost Status and Trends, appellant stated in this report as follows:

> The current DO contract is $2,781,071. The DO has a current actual cost of work performed of $1,990,616 which is a negative variance of $268,113 relative to budgeted cost of work performed $1,722,503 for the activities completed.
>
> The current forecast at completion of the scoped activities is $2,707,724 or $72,496 under the original DO budget.

(*Id*.)

20. By letter dated 15 November 1999, TK submitted an REA to appellant, in the amount of $703,034 (R4, tab 64). Appellant did not serve the government with a copy of the REA at this time (tr. 1/84). Appellant contends that it otherwise advised the government of the existence of the REA, but no written notice was offered into evidence, nor did appellant provide any substantiating details of any oral notice, and we question this contention.

21. Appellant's next contract performance report, dated 16 December 1999, did not advise the government that it had received the REA from TK. Insofar as pertinent, the report merely stated as follows:

> [TK] has forwarded a notice to IT indicating that a claim for equitable adjustment would be prepared and submitted to IT for review. Once received, IT will evaluate the claim and forward to the Navy for review.

(R4, tab 65)

22. Under paragraph 4.0 of the report, Cost Status and Trends, appellant advised the government that actual costs of work performed were now $2,239,946 and that the current contract/DO amount was $2,780,221 (*id*.). Based upon these figures, we find that appellant had already exceeded 75% of the estimated cost of the DO, but had not provided the government with timely notice of this fact 60 days earlier pursuant to the LOC clause. In addition, the sum of TK's REA claimed cost ($703,034) and appellant's actual cost ($2,239,946), exceeded the DO contract cost ceiling amount ($2,780,221). Appellant did not advise the government of this fact in this report, or in any separate

notice under the LOC clause. This was the last contract performance report filed by appellant.[2]

23. On 3 May 2000, the parties executed Modification No. 09 to the DO. Appellant performed certain additional work and the CO increased the estimated cost ceiling. The parties agreed that the amount available for payment subject to the LOC clause, excluding fee, was increased to $2,830,553, and the parties also agreed to a revised completion date of 15 July 2000. Insofar as pertinent, the modification contained the following language:

> FAR Clause 52.232-20 Limitation of Cost (APR 1984) and
> FAR Clause 52.232-22 Limitation of Funds (APR 1984)
> apply to this CTO [Contract Task Order]."

(R4, tab 49) The total estimated cost of the DO, including fee, was $2,887,348 (*id*.). As far as the record shows, the CO made no further increases to this amount. *See also* appellant's "memo to file" dated 6 June 2001, which also confirms this figure (app. supp. R4, tab 213 at 1).

24. According to appellant's final post-construction report, IT completed demobilization of the work during the week of 26 June 2000, and the project was accepted as complete on or about 30 June 2000 (R4, tab 82, ex. C at 3-9). The Navy does not dispute that it accepted the work, but contends that appellant did not fully reduce the measured levels of DDT in the soils to the levels required by the DO.

25. On 27 May 2000, towards the end of the work on the DO, appellant provided the government with a "Notice of Potential Impact" related to a TK claim in excess of $500,000 based upon, *inter alia*, unanticipated soil conditions. Presumably, this referred to the REA filed with appellant in November, 1999. Appellant indicated in this letter that TK had not provided appellant with comprehensive supporting cost information for the claim, but IT would evaluate the material submitted and would advise the government accordingly. Appellant stated in this letter that it "does not require any response from the Navy." (R4, tab 67)

26. By letter to appellant dated 2 June 2000, TK expressed its impatience with appellant for its delay in forwarding its REA to the Navy:

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[2] Appellant suggests that appellant's actual cost figure in its December, 1999 report may have included TK's REA amount (br. at 29 n.4). However, the report does not so indicate, appellant offered no evidence on this point and we believe this argument is no more than speculation.

> Terra-Kleen has asked for processing of this equitable adjustment since November 1999 when we presented the cost estimate. We are greatly concerned that the request is taking this long to present to the Navy. We are especially concerned that IT has waited until the job at the site was completed before the equitable adjustment was presented to the Navy. This places Terra-Kleen at tremendous risk, ...

(App. supp. R4, tab 211)

27. By letter to the administrative contracting officer dated 8 August 2000, appellant advised "we now believe that the Subcontractor may be entitled to an additional payment roughly in the range of between $100,000 and $900,000, greatly depending upon the Subcontractor's ability to prove and document its assertions" (R4, tab 68 at 1). Appellant sought guidance from the contracting officer, but did not request additional funding over and above the cost ceiling in any specific amount. As of this date, it is undisputed that appellant had already demobilized, and TK had already incurred the claimed costs. On 10 August 2000, two days after sending the above letter, appellant advised TK in writing that TK had no basis for a differing site condition claim, and the REA, overall, had "considerable weaknesses" (R4, tab 69 at 3).

28. By letter to the CO dated 12 December 2000, appellant requested "additional funds" in the range of "$900K to $1.1M [million]" as a result of changed soil conditions. In this letter appellant clearly stated it was seeking funding over and above the DO cost amount -- appellant stated that "the estimate at completion is equal to the limitation of costs, $2,830,553, exclusive of the subject claim." (R4, tab 73)

29. Appellant requested additional funding in a sum certain by letter to the government dated 3 January 2001, wherein appellant submitted an REA on behalf of TK in the amount of $923,833 (R4, tab 74). According to the appellant, it made the government aware of these additional costs pursuant to its contract performance reports and the power point presentation in March, 1999. However we find that the record does not support this contention.

30. By letter to the CO dated 21 November 2001, appellant submitted an updated REA in the amount of $1,181,535, claiming additional funding in the amount of $965,347 on behalf of TK and $216,188 for itself (R4, tab 75). The CO denied the REA by letter dated 29 November 2001, stating that there was no support for appellant's claim of differing site conditions (R4, tab 76). There was no differing site conditions clause in appellant's contract with the government, or in appellant's subcontract with TK.

31. By email to appellant dated 14 January 2002, however, the CO stated that there may be technical merit to the REA, and the government was analyzing the proposal and working with the Defense Contract Audit Agency (DCAA) to try and reach a negotiated settlement (R4, tab 77). The REA was audited by DCAA, and a report was issued on 11 February 2002. Of TK's proposed costs, DCAA questioned $73,054. (App. supp. R4, tab 215) However, the CO believed she did not have all the information she needed from appellant to support the claim, and did not pursue negotiations (tr. 2/238-39).

32. On 16 January 2002, appellant filed a petition for reorganization under Chapter 11 of the federal bankruptcy law (R4, tab 153). By Order dated 24 June 2002, the bankruptcy court authorized TK, as subcontractor, to act upon behalf of appellant in the prosecution of the REA (R4, tab 80, Agreement at 2-4).

33. By letter dated 26 August 2002, TK transmitted appellant's certified claim to the CO in the amount of $1,148,545 which included appellant's claim, TK's claim and additional fee. The claim was certified by Mr. Frank C. Rice, vice president and authorized agent of appellant, who certified that he was "duly authorized to certify the claim on behalf of IT Corporation. (R4, tab 84)[3]

34. The CO did not issue a decision within 60 days, nor did she advise appellant when such a decision would issue within 60 days of receipt of the claim. Pursuant to Board Rule 1(e), appellant requested an order from the Board directing the issuance of a CO decision within 30 days. The government replied that it would issue a decision by 3 March 2003, and the Board so ordered. (*See* ASBCA No. 54002-891 and related documents in the Bd. Corres. file.)

35. The CO issued a decision dated 28 February 2003, denying the claim. Insofar as pertinent, the CO stated as follows:

> IT [appellant] seeks an adjustment that exceeds the cost limitation in the delivery order but it did not provide the required notice to the Contracting Officer in advance of the costs being incurred. The Government is not obligated under the contract to pay for unauthorized costs that exceed the cost limitation.

[3] The government has challenged the legality of TK's prosecution of this appellant-sponsored claim. We rejected the government's position in our decision on appellant's motion for summary judgment. *International Technology Corp.*, ASBCA No. 54136, 04-1 BCA ¶ 32,607 at 161,373, n.1.

(Ex. G-157 at 8) This appeal followed.

36. During the appeal, appellant filed a motion for summary judgment, contending that it was entitled to recover its cost overruns without regard to the government's "asserted (but unpleaded) defense" of the LOC clause (mot. at 8). The Board denied the motion. *International Technology Corp.*, ASBCA No. 54136, 04-1 BCA ¶ 32,607.

37. At the hearing, appellant called as a witness Ms. Brenda Safreed, appellant's purchasing and subcontracts manager for this DO (tr. 1/9). Ms. Safreed executed Modification No. 09 on behalf of appellant, and issued a number of the letters to the government referenced herein relating to the claim. We find instructive the following testimony from Ms. Safreed:

> Were we – were we confident that either Terra Kleen would be paid or IT would be reimbursed for those efforts? That was not the case. We exceeded the limitation of cost under our contract and, if in fact Terra Kleen was eligible under changed conditions, then we believed it was something that the Government would consider but we're [sic] not bound to reimburse.
>
> . . . .
>
> It's very clear in all of our contractual documents that we may not exceed the limitation of cost clause in our contracts without a modification to the contract. If we undertake any work that results in additional costs, the Navy is not liable.

(Tr. 1/37, 55)

DECISION

We believe the dispositive issue in this appeal is whether appellant complied with, or was excused from complying with the LOC clause and related clauses in DO No. 0102.

Under the LOC clause, the estimated cost to the government set out in the contract is considered a ceiling of the government's cost liability. The clause provides material benefits to both contracting parties by limiting their exposure to this agreed upon cost ceiling absent written modification of the cost ceiling by the CO, and as such, it is

important that the clause's requirements be followed. *Advanced Materials, Inc. v. Perry*, 108 F.3d 307, 310 (Fed. Cir. 1997). One of the requirements of the clause is for the contractor to provide the CO with timely notice of projected costs – as defined by the clause -- *before* the cost ceiling is reached so that the government has the opportunity to assess contract status and determine whether it desires to extend funding beyond the cost ceiling. It is the contractor's burden to show that it complied with the notice requirements of the clause, or had good reason for not doing so, *e.g.*, because cost overruns were unforeseeable. *RMI, Inc. v. United States*, 800 F.2d 246 (Fed. Cir. 1986); *F2 Assocs., Inc.* ASBCA No. 52397, 01-2 BCA ¶ 31,530 (Limitation of Funds clause).[4]

Specifically, the LOC clause, coupled with ¶¶ G3 and G4 of the contract, required appellant to notify the CO when it anticipated that within the next 60 days it would exceed 75% of the estimated cost of the DO (findings 3, 4). The LOC clause also required appellant to provide the CO with a revised estimate of the total cost of performing the work, which would include any additional costs incurred and claimed by its subcontractors. Appellant failed to timely provide the Navy with these notices, and failed to show that the TK cost overruns for which it now seeks reimbursement were reasonably unforeseeable so as to excuse its failure to timely provide these notices.

As early as March, 1999, appellant became aware of TK job delays due to difficulties with the clay content of the soil, and appellant sought reimbursement of its own costs related to these job delays in June, 1999. Appellant was actually notified of TK's intent to file an REA in August, 1999, and became aware of TK's claimed costs in November, 1999 when TK filed the REA. Appellant's contract performance report to the government dated 16 December 1999, however, made no mention of this REA or TK's claimed costs, nor did appellant notify the government that these costs, when added to actual costs incurred under the DO, would exceed the contract ceiling. Even TK was perturbed by appellant's failure to timely advise the Navy of its REA (finding 26). It was not until 8 August 2000 – roughly 6 weeks after DO completion -- that appellant first advised the Navy that TK "may" be entitled to some additional payment (finding 27). Appellant's request to the government for additional funding in a sum certain, in the amount of $923,833, was not filed until 5 months later, on 3 January 2001 (finding 29).

Under these circumstances, appellant has not shown that the claimed additional costs were not reasonably foreseeable.

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[4] Given this case law, and absent any authority to the contrary, we conclude that appellant's claim that compliance with the notice requirements of the LOC clause is an affirmative defense that must be affirmatively pleaded by the government is without merit.

Appellant contends that since it was responsible to review TK's REA, it could not file a timely notice under the LOC clause until its review of the REA was completed and it was convinced that the claimed costs were allowable and payable. However, the LOC clause does not limit a contractor's notice obligations to those costs proven to be allowable to a certitude. Rather, the notice is required when the contractor "has reason to believe" of expected cost increases (finding 2). Moreover, ¶ G3, subsection (f) of the contract provided for prompt notice to the CO when "any apparent difficulties" in performance are anticipated, or "any time difficulties in performance arise,"or whenever "it appears that additional funds shall be required" (finding 3). The DO and the contract do not forbid a prime contractor's review of an REA, but there is no inconsistency with undertaking such a review and providing the timely notice required by the subject notification clauses.

Appellant's related argument that the LOC clause simply did not apply to appellant under the circumstances finds no support in the record. Indeed, it flies in the face of the uncontradicted evidence: (1) that appellant executed DO contract modifications throughout the performance period that stated that the LOC clause *did* apply (findings 17, 23); and (2) the testimony of appellant's subcontracts manager to the effect that the LOC clause applied (finding 37).

Appellant's failure to comply with the LOC and related notification clauses materially prejudiced the Navy's ability to timely assess the status of the contract from a cost and technical perspective. It precluded the Navy from determining whether it wished to fund TK's additional effort *before* the claimed costs were incurred, or suspend performance when the cost ceiling in the contract was reached.

Appellant contends that the government's so-called "LOC clause defense" must fail because the government failed to prove that a full reimbursement of appellant's certified claim, in the amount of $1,148,545 (finding 33), would cause total cost payments to exceed the estimated costs in the DO (br. at 28). This contention is also groundless. Clearly, appellant's request for "additional funding" of the DO in December, 2000, indicated that that the subject claim amount was over and above the DO cost ceiling (finding 28), and the record shows no further increases in that ceiling. Appellant's subcontracts manager also conceded that appellant had exceeded the Limitation of Cost set out in the DO (finding 37).

We also believe that appellant failed to show that the government breached this DO. Neither the SETER, the FFS nor any DO provisions generally warranted soil content or soil conditions at the Stockton sites, nor warranted a low clay content of the soil. Indeed, both reports, when read as a whole, reflect information showing that certain soil samples were of relatively high clay and silt content (findings 9, 11). In addition, TK cannot show that it was misled about soil conditions since it had personal knowledge of

these conditions, having earlier treated the soil from these same sites in the pilot study. The SETER indicated that TK had difficulties with low permeability of soil and with the clay at the sites at that time (finding 10).

Misrepresentation in the contractual context constitutes a knowing or negligent untrue representation of fact or failure to disclose, requiring proof of government culpability beyond showing a mere variation between conditions stated in the contract and those actually encountered. *Foster Construction C.A. and Wiliams Brothers Co. v. United States*, 435 F.2d 873, 880-81 (Ct. Cl. 1970). Appellant failed to make a case of misrepresentation on this record.

While it is true that the CO agreed under Modification No. 08 to provide additional funding in the amount of $300,424 due to elevated clay content in the soil (findings 16, 17), it does not follow that the CO was required to grant additional funding above the contract ceiling for a later claim in the amount of $1,148,545, roughly quadruple that amount. This underscores the need for timely submission of anticipated costs as defined by the LOC clause so that a CO can make the appropriate assessments.

We conclude that appellant inexcusably failed to comply with the LOC clause and related DO notice requirements, and that the CO did not abuse her discretion in failing to authorize an increase in the contract cost ceiling for the costs in issue. We have considered appellant's remaining arguments, but believe they are without merit. We conclude appellant is not entitled to reimbursement for its claimed costs.

Nor do we believe that appellant is entitled to an "equitable distribution" of property under subsection (h) of the LOC clause (finding 2). Appellant has not shown that it produced or purchased specific property that could be subject to equitable distribution under the clause. This contract and delivery order were for soil remediation services. The equitable distribution of property contemplated by the LOC clause has no application to such services. *See Systems Engineering Associates Corp.*, ASBCA Nos. 38592 *et al.*, 91-2 BCA ¶ 23,676 at 118,578.

The appeal is denied.[5]

Dated: 17 July 2006

JACK DELMAN

[5] Given our disposition, we need not address the other reasons asserted by the government to deny this appeal.

Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)
I concur

I concur

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

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 54136, Appeal of International Technology Corporation, rendered in conformance with the Board's Charter.

Dated:

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