ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
C.R. Pittman Construction Company, Inc.	)	ASBCA No. 54901
	)	
Under Contract No. DACW29-00-C-0075	)	

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OPINION BY ADMINISTRATIVE JUDGE WILSON
PURSUANT TO BOARD RULE 11

This appeal stems from a contracting officer's decision denying additional relief to C.R. Pittman Construction Company, Inc. (appellant) for increased costs associated with government-caused delays. Appellant contends that it is entitled to additional costs associated with the government-directed replacement of weather-damaged "timber mats" and delay costs in excess of the relief granted because the government used an incorrect method for calculating quantum. In response to the Board's Order dated 20 December 2006, appellant submitted its Proof of Costs (and subsequent Amended Proof of Costs) alleging that it was entitled to $211,697.98 for the cost to purchase 100 new timber mats as directed by the contracting officer and $331,367.66 for delay costs, less $278,576.32 awarded by the government, resulting in a total claim of $264,489.64. Both entitlement and quantum are before us for decision.

FINDINGS OF FACT

A. *The Contract*

1. On 25 July 2000, the United States Army Corps of Engineers (government or Corps) awarded Contract No. DACW29-00-C-0075 to appellant in the amount of $14,426,258.00 for the "Southeast Louisiana Urban Flood Control Project Improvements to Soniat Canal" in Jefferson Parish, Louisiana (R4, tab D). The fixed-price contract required appellant to increase the drainage capacity of the existing drainage canal by lining the canal with concrete and increasing the canal cross-sectional area by shallow excavation (*id.* at 183). Upon completion of the project, the canal would convey storm runoff from Metairie, Louisiana towards a pumping station in Jefferson Parrish and ultimately into Lake Pontchartrain (*id.*). The contract further required completion of the work within 900 calendar days of the "Notice to Proceed" (*id.* at 2), which was issued on 28 July 2000 (R4, tab C-2).

2. The contract contained the following standard clauses: Federal Acquisition Regulation (FAR) 52.233-1 DISPUTES (DEC 1998); FAR 52.236-13 ACCIDENT PREVENTION (NOV 1991); FAR 52.243-4 CHANGES (AUG 1987); Defense Federal Acquisition Regulation Supplement (DFARS) 252.243-7001 PRICING OF CONTRACT MODIFICATIONS (DEC 1991); and DFARS 252.243-7002 REQUESTS FOR EQUITABLE ADJUSTMENT (MAR 1998) (R4, tab D). The Accident Prevention clause contained the following language:

> (a) The Contractor shall provide and maintain work environments and procedures which will
>
> (1) safeguard the public and Government personnel, property, materials, supplies, and equipment exposed to Contractor operations and activities;
>
> (2) avoid interruptions of Government operations and delays in project completion dates; and
>
> (3) control costs in the performance of this contract.
>
> . . . .
>
> (c) If this contract is for construction or dismantling, demolition or removal of improvements with any Department of Defense agency or component, the Contractor shall comply with all pertinent provisions of the latest version of the U.S.

> Army Corps of Engineers Safety and Health Requirements Manual, EM 385-1-1, in effect on the date of the solicitation.
>
> (d) Whenever the Contracting Officer becomes aware of any noncompliance with these requirements or any condition which poses a serious or imminent danger to the health or safety of the public or Government personnel, the Contracting Officer shall notify the Contractor orally, with written confirmation, and request immediate initiation of corrective action. This notice, when delivered to the Contractor or the Contractor's representative at the work site, shall be deemed sufficient notice of the noncompliance and that corrective action is required. After receiving the notice, the Contractor shall immediately take corrective action. If the Contractor fails or refuses to promptly take corrective action, the Contracting Officer may issue an order stopping all or part of the work until satisfactory corrective action has been taken. The Contractor shall not be entitled to any equitable adjustment of the contract price or extension of the performance schedule on any stop work order issued under this clause.

(R4, tab D at 106-07). Additionally, the contract contained the following special provisions in pertinent part:

> 52.231-5000 EQUIPMENT OWNERSHIP AND OPERATING EXPENSE SCHEDULE (MAR 1995) EFARS
>
> . . . .
>
> (b) Allowable cost for construction and marine plant and equipment in sound workable condition owned or controlled and furnished by a contractor or subcontractor at any tier shall be based on actual cost data for each piece of equipment or groups of similar serial and series for which the Government can determine both ownership and operating costs from the contractor's accounting records. When both ownership and operating costs cannot be determined . . . , costs for that

> equipment shall be based upon the applicable provisions of EP 1110-1-8, Construction Equipment Ownership and Operating Expense Schedule, Region III.

(*Id.* at 88)

> SECTION 01100 – GENERAL PROVISIONS
>
> . . . .
>
> 2. DAMAGE TO WORK
>
> The responsibility for damage to any part of the permanent work shall be as set forth in the Contract Clauses . . . . However, if, in the judgement of the Contracting Officer, any part of the permanent work performed by the Contractor is damaged by flood, earthquake, hurricane, or tornado which damage is not due to the failure of the Contractor to take reasonable precautions or to exercise sound engineering and construction practices in the conduct of the work, the Contractor shall make the repairs as ordered by the Contracting Officer and full compensation for such repairs will be made at the applicable contract unit price or lump sum prices as fixed and established in the contract. If, in the opinion of the Contracting Officer, there are no contract unit or lump sum prices applicable to any part of such work, an equitable adjustment pursuant to the Contract Clause entitled "CHANGES" will be made as full compensation for the repairs of that part of the permanent work. Any costs associated with flooding of dewatered areas as directed by the Contracting Officer will be paid for by an equitable adjustment pursuant to the contract clause entitled "Changes."

(*Id.* at 141)

SECTION 02242 PART 3 EXECUTION

3.1 OPERATION

> The Contractor shall perform dewatering and maintain the work areas in a dry condition as long as is necessary for the work under this contract. . . . In the event that flooding is deemed necessary by the Contracting Officer, the protected area shall be flooded in accordance with the sequence of flooding proposed by the Contractor and approved by the Contracting Officer. If flooding is directed by the Contracting Officer, the Contractor will be compensated for damages in accordance with the applicable requirements of the General Provisions entitled "DAMAGES [sic] TO WORK", and the Contract Clause entitled "CHANGES".

(*Id.* at 258)

3. The contract gave appellant the option to perform the work from an elevated work platform or an adjacent bank to the canal where available (*id.* at 160). Appellant chose to build an elevated platform in order to construct the Temporary Retaining Structure (TRS) required by Item 0008 of the contract (R4, tab GS-2). Item 0008 called for appellant to provide the TRS for a total price of $4,575,000.00 (R4, tab D at 3). According to the record, $245,000.00 of the aforementioned price was used to procure the timber matting system (R4, tab GS-2). The full cost of the timber matting system was paid to appellant by 18 January 2001 (*id.*).

B. *Performance*

4. Due to heavy rains beginning as early as 28 March 2001 and continuing throughout the duration of the project, the worksite was damaged by flooding (R4, tab C-3 at 3). Specifically, these rains caused the government to direct appellant to remove a portion of its dewatering system to open the canal to allow the rainwater to flow through the canal (compl. ¶ 5, answer ¶ 5). After the water passed through the canal, appellant was required to dewater the canal and continue construction (*id.*). The effect of the government's direction regarding these weather events delayed completion of the work (gov't br. at 6).

5. Mr. Stephen B. Hinkamp, Administrative Contracting Officer (ACO), noted during a 28 October 2003 inspection at the worksite that several of the timber mats on the elevated platform were in a state of disrepair (R4, tab GS-1). In fact, the ACO noted:

> [O]n one occasion I observed the foreman of Pittman's resteel subcontractor partially fall through a section of deteriorated mat on the west side of the work platform. One of the foreman's legs fell completely through the deteriorated mat but he caught himself on other areas of the mat which were less deteriorated.

(*Id.*) The written summary of the meeting was memorialized in a letter to appellant dated 4 November 2003 (R4, tab C-6). The ACO noted:

> [A]pproximately one hundred (100) timber mats [were] unsuitable for use on an elevated work platform. Many of the timber mats on the work platform are clearly deteriorated to such a point where they presented a serious and immediate safety hazard to workers on and below the work platform. These timber mats shall be immediately removed from the work platform as discussed at the site meeting. Please provide us your plan for removal and replacement of all timber mats that are no longer suitable for use on the work platform.

(*Id.*) Appellant did not dispute that the aforementioned timber mats were unsafe; however it did advise the ACO by letter dated 5 December 2003 that it viewed the direction to remove the 100 timber mats as a change to the contract (R4, tab C-7). Appellant contended that replacement costs for the timber mats totaled $212,898.42 (*id.*). Eventually, the deteriorated mats were removed from the elevated platform and replaced (R4, tab GS-6). Based upon the record, appellant only replaced 100 mats during the course of performance.

C. *The Dispute*

6. Several contract modifications (A00009 – A00022, but excluding A00019) were bilaterally executed in order to compensate appellant in a lump sum fashion for "Flood Repairs" for "standby costs and repairs made by the contractor due to flooding that is not the fault or negligence of the contractor" associated with the excessive rainfall (R4, tab C-3 at 3). With the exception of modifications A00018 through A00022, the early contract modifications contain an accompanying "Price Negotiation Memorandum." These memoranda, which were written by the contracting officer for inclusion in the official contract file, stated the parties' position with regard to entitlement for costs associated with the weather events. Although several references were made to

equipment costs, there were no references made with regard to timber mats. Nonetheless appellant's representative, Mr. Michael Pittman, asserts, and the government has not disputed, that the government treated the timber mats as equipment for these modifications (*id*.; aff. Michael Pittman ¶ 1).

7. Commencing with Modification No. P00023 which was bilaterally issued on 31 May 2002, the parties apparently reached an impasse with regard to the delay costs associated with various items (R4, tab C-5 at 38). Accordingly, the government began issuing modifications that specifically excluded any delay costs related to the elevated platform, and included, *inter alia*, the following language in subsequent modifications for cost increases resulting from weather delays:

> This adjustment constitutes compensation in full on behalf of the contractor and its subcontractors and suppliers for all costs and markups directly or indirectly attributable to the change ordered for all delays, impacts, and extended overhead relative thereto and for performance of changes within the time frame stated, except for time extension costs associated with the contractor's sheetpile cofferdam, bracing and bridging materials, **timber mats**, steel forms, and pontoon which are currently in dispute and will be resolved by separate action. [Emphasis added]

(R4, tab C-5 at 39). The net effect of this was that the parties agreed that the excluded costs for the timber mats would be the subject of a separately-negotiated settlement (R4, tab C-13 at 2).

8. None of the correspondence from the government in the record during this time frame specifically addressed appellant's 5 December 2003 removal and replacement of the 100 timber mats. Accordingly, appellant sent further correspondence to the government dated 20 January and 13 March 2004 requesting the issuance of a modification to the contract "[d]ue to the magnitude of the costs and the fact that the costs have been fully incurred" (Proof of Costs, ex. B). By memorandum dated 9 February 2004, the government stated that it had prepared an Independent Government Estimate (IGE) to evaluate appellant's 5 December 2003 proposal and that the government's settlement objective was $149,461.50 (R4, tab C-8). This IGE noted that the differences in appellant's and the government's quantum stemmed from appellant treating the costs of the timber mats as a direct cost, while the government considered these costs as indirect "Field Office Overhead" and preferred settling the matter by paying a daily rate (*id.*). Further, in calculating the daily rate, the government assumed that the normal useful life for timber mats was three years and the average workdays per year were 260 (R4, tab C-9 at 6). The government calculated an amount before markups

(overhead, profit, and bond percentages) of $126,028.45 ($1.90 per mat per work day for a total of 223 mats and 297.05 days) (*id.*). Once markups were factored in ($23,433.05) the government's position prior to entering into negotiations was $149,461.50 (*id.* at 4).

9. The parties commenced negotiations and, by fax memo dated 18 February 2004, appellant provided its position on the appropriate method of establishing the "useful life" and daily rate for the timber mats (R4, tab C-10). Attached to this memo was a letter dated 24 March 2000 from a different contracting officer (Mr. Domingo Elguezabal) under a separate contract which stated that "timber mats will be paid on the value of replacement given an annual usage of 200 days and a life expectancy of two years" (R4, tab C-11). Mr. James Barr, contracting officer, responded, by letter dated 2 April 2004 indicating:

> Your request that I revert back to the method of agreement described in the March 24, 2000 letter is denied. My evaluation of the timber mat issue after this letter was written reveals that the previous agreement was not reasonable. Any previous price settlements will not be adjusted; however, this negotiation and future negotiations will be based upon current information.

(R4, tab C-12)

10. In an internal price negotiation memorandum dated 29 June 2004, the government recapped its strategy to settle appellant's claims. The memorandum, signed by William R. Rossignol, Estimator/Negotiator, Stephen Hinkamp, Lead Negotiator/ ACO, and Diane K. Pecoul, Contracting Officer, reads in pertinent part:

> [S]ince the time of Mod P00023, when the Government began denying timber mat costs, the Government has revised its position on timber mats and will provide the contractor with an equitable adjustment in the form of a daily rate for mats. The basis for this decision was that the Government now believes that the timber mats weather and wear out (rot) whether or not they are physically used (walked upon, handled, etc…). When the contract is extended by Government direction (mod), additional costs are due the contractor for the timber mat deterioration, and the subsequent need to replace worn out mats.

(R4, tab C-13 at 2)

11. The parties continued negotiations whereby the government revised its position upwards to $278,576.32 (R4, tab C-13). This amount was based on: (1) a unit price of $2.89 per mat per work day; (2) "a decrease from a three-year useful life for the timber mat to a two and a half year life" and from 260 work days per year to 240; (3) using the actual invoice cost for the mats, including a sales tax of 4%; (4) adding the labor and equipment costs for disposal of the damaged mats; (5) markups; and (6) a delay period of 364.25 work days (*id.* at 4). Appellant, by facsimile dated 21 April 2004, maintained that the daily rate for the timber mats should be $4.24 per mat, which was derived by the depreciation formula prescribed in the Corps' Construction Equipment Ownership and Operating Expense Schedule (EP 1110-1-8) (R4, tab C-14). According to Mr. Pittman, he spoke to a representative of the Corps in the Walla Walla District, "who agreed with C.R. Pittman's position that timber mats did qualify as equipment" (aff. Michael Pittman ¶ 4). To support its position, appellant used the following formula:

Description	Symbol	Value
Total Equipment Value	TEV	$2,114.42
Number of Years	N	3
Current Cost of Money	FCCM	0.0498
Working Hours Per Year	WHPY	1530
Salvage Value	SLV	0
Life =WHPY x N	LIFE	4590
Average Value Factor =((N-1)(1=SLV))+2/2N	AVF	1.00000000
[FCCM] Per Hour =((TEV)(AVF)(FCCM)/WPHY	FCCM/HR	0.0688
Depreciation Per Hour =((TEV)(1-SLV)/LIFE	DEPCR/HR	0.460658

DEPCR/HR+FCCM/HR = 0.53

0.53 per hour per mat x 8 hours per day = $4.24 per mat per day

(*Id.* at 2) If we put aside the question of whether appellant is entitled to use the factors in the equipment schedule, appellant has not proved that there was any error in the government's calculations of the daily rate or that it was entitled to a greater daily rate.

12. By letter dated 25 June 2004, the government confirmed that the parties were at an impasse. Specifically, the contracting officer stated:

> The main point of contention continues to be the use of the formula from the Construction Equipment Ownership and Operating Expense Schedule (EP 1110-1-8). Your latest proposal, dated April 21, 2004, uses this formula as the basis for establishing an hourly rate. I do not agree that this formula is appropriate for use with timber mats. This formula was developed to obtain hourly rates for construction and marine equipment. Attempts to reach a mutual settlement on a bottom line costs for the mats, regardless of the formula chosen, were unsuccessful as well.
>
> I will prepare a unilateral modification which will include the costs the Government believes you are due for the timber mats.

(R4, tab C-16). Accordingly, on 2 July 2004, the government issued unilateral Modification No. P00068, which provided "an equitable adjustment for time extension costs associated with timber mats" (R4, tab C-17). This modification provided appellant with an adjustment in the amount of $278,576.32 as payment in full for the timber mat dispute (*id.*).

D. *Claims*

13. Appellant filed numerous certified claims with the contracting officer, which in sum totaled $1,109,709.18, relating to two events: (1) the refusal to reimburse the contractor for 100 timber mats replaced at the elevated work platform as directed by the contracting officer (claim dated 12 July 2004); and (2) non-payment for various stand-by cost items that were specifically withheld from modifications P00023 -P00067 and A00026 – A00093 (claims dated from 15 January 2003 to 18 June 2004) (R4, tab F). As these matters were deemed in dispute, each claim requested a contracting officer's final decision (*id.*).

14. By letter dated 30 November 2004, Cynthia Nicholas, contracting officer, rendered a final decision denying appellant's claims for additional cost (R4, tab A). In its denial, the government chose not to separate the claims as submitted by appellant (*id.*). Specifically, the contracting officer noted:

> Pitman's correspondence through October 7, 2004 continues to refer to "100 Timber Mats". However, the Government's prior efforts to negotiate a settlement of this issue, as well as unilateral Modification P00068, both considered 223 timber mats to be at issue. This claim is considered based upon my finding that 223 timber mats were on the job site, that these 223 timber mats were being used as part of the contractor's elevated platform, and that the necessity of either acquiring or extending the use of these mats was due to flood events and other modifications beyond the control of the contractor.

(*Id.* at 8)

15. Additionally, the contracting officer stated: "[t]his dispute between Pittman and the Government is one of quantum, not entitlement" (*id.*). The dispute, the contracting officer proffered, was "largely a result of differing opinions between [the parties] over which cost principles and methodologies are appropriate for calculation of the quantum due" (*id.*).

16. The contracting officer computed the damages as an indirect cost that should be paid in the Field Office Overhead daily rate; and determined that EP 1110-1-8 was inapplicable because the aforementioned publication does not specifically reference timber mats or any equivalent items (*id*. at 12). Thus, the contracting officer concluded that timber mats are materials and not construction equipment. As such, the contracting officer computed the delay costs based upon a daily cost of $2.89 per mat per workday plus markups and concluded that appellant was entitled to $278,576.32, the amount previously awarded via unilateral Modification No. P00068 (*id*. at 13). Accordingly, appellant's claims for additional costs were denied (*id*. at 14).

17. By letter dated 18 January 2005, appellant filed its Notice of Appeal with the Board alleging that its claim for the total cost to replace the 100 timber mats was treated as if it was a request for extra charges for timber mats due to the flood delays (¶ 10).[1] In its complaint, however, appellant states that the total amount claimed for timber mats

[1] Appellant indicated in its Notice of Appeal that the contracting officer never issued a final decision regarding its flood delay claims. We disagree. The record shows that the parties were negotiating a global resolution of the timber mat issue, including the replacement cost of the 100 damaged mats. Although the contracting officer's final decision could have been clearer with regard to separating the claims out, the denial covers the appeal before the Board.

resulting from flood delays was $381,301.78, and the amount claimed for the purchase cost of the 100 replaced mats was $212,989.42 (compl. at ¶ 14). [2]

18. Both parties agree that the appropriate basis for recovery with regard to delay is a daily rate and there were 364.25 days of delay not already compensated by bilateral modifications (Amended Proof of Costs at 4). The record reflects that prior to 5 December 2003, which was the date 100 damaged mats were purportedly replaced, appellant had accumulated 333.5 days of government caused delay (*id.*). The remaining 30.75 delay days accrued after the 100 replacement mats were put into service (gov't br. at 6).

DECISION

This matter involves two separate, yet related claim items. First, the government disputes whether appellant is entitled to the costs of replacing the 100 damaged timber mats. Additionally, the government maintains that although it does not dispute that appellant is entitled to timber mat costs due to government delays, it does dispute appellant's method of quantum calculations regarding such delays. Accordingly, we will discuss the claims separately.

Claim 1: Replacement Costs for 100 Timber Mats

Appellant contends that due to construction delays that the government concedes were its responsibility, appellant was required to provide and use timber mats at the construction site for a period longer than contemplated under the original terms of the contract (Amended Proof of Costs at 3). The direction by the contracting officer to remove and replace the deteriorated timber mats, appellant argues, was a change to the contract pursuant to the Changes clause (FAR 52.243-4) (*id.*). As such, appellant maintains that it is entitled to the replacement costs for the mats.

The government contends that the contracting officer's directive to remove the deteriorated timber mats is non-compensable because the damaged mats presented a safety hazard and, as such, appellant was required, pursuant to the Accident Prevention Clause (FAR 52.236-13(d)) and the Corps' "Safety and Health Requirements Manual" (EM 385-1-1), to replace the unsafe timber mats at its own expense (gov't br. at 1). In support of its position, the government cited portions of the aforementioned clause and EM 385-1-1 as well as *Santa Fe Engineers, Inc.*, ASBCA No. 23408, 91-3 BCA ¶ 24,317, and *MK-Ferguson Co.*, ASBCA No. 42436, 93-2 BCA ¶ 25,751. If recovery is granted, the government further contends, appellant would receive a windfall because the

[2] This amount was later revised to $211,697.98 (Amended Proof of Costs at 2).

deterioration attributable to government-caused delay was paid for as part of the $278,576.00 payment for all 223 timber mats (*id*. at 5-6). We agree with the government.

The contract required appellant to maintain a safe work environment. Section (d) of the Accident Prevention clause required the contractor to correct any condition "which poses a serious or imminent danger to the health and safety of the public or Government personnel." Upon notice, the clause states, "the Contractor shall immediately take corrective action." The record reflects that appellant did not comply with this provision by allowing the timber mats to fall into a state of disrepair, thereby creating an unsafe work environment. The government acted within its rights under the contract to require appellant to correct the obvious safety hazards.

Moreover, the daily rate calculated by the government, as a result of the flood events for which it acknowledged responsibility, reflects the cost of the mats, and, therefore, gradually compensates the contractor for the need to replace any and all mats. As of 5 December 2003, when appellant purchased the 100 replacement mats, it was already entitled to $251,705.38[3] based on the government's daily rate and appellant's markups; which was more than sufficient to replace the 100 deteriorated mats. Accordingly, we find that appellant's Claim 1 is without merit and is denied.

Claim 2: Timber Mats Cost Associated With the Government-Caused Delay

Both parties agree and we concur that appellant is entitled to recover under this claim pursuant to the Damage to Work and Changes clauses. The main disagreement lies with the methodology of calculating the costs associated with the timber mats. Appellant contends that the equitable adjustment should be calculated in accordance with the Corps' Equipment Ownership and Operating Expense Schedule, Region III[4] (EP 1110-1-8), as was the alleged prior course of dealing between the parties prior to contract modification A00023. By treating timber mats as equipment, as allegedly advised by an unnamed Corps representative from the Walla Walla office, appellant used the formulas

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[3] This amount is based on the government's daily rate of $2.89 per mat, multiplied by the total number of mats (223), multiplied by the total number of delay days the parties agree occurred prior to removal and replacement of the 100 damaged mats by
5 December 2003. Thus, ($2.89 x 223 mats) x 333.5 days = $214,930.74. Once appellant's mark ups (overhead 8.83%, profit 7.46%, and bond 0.82%) are computed ($36,774.65), appellant was entitled to $251,705.38 for delays prior to 5 December 2003.

[4] Region III includes the following states: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, Missouri, North Carolina, South Carolina, and Tennessee (R4, tab E at 1).

found in EP 1110-1-8 to derive a daily cost of $4.24 per mat (findings 6, 11). Since both parties agree that there were 364.25 compensable delay days attributable to the government, appellant proffers that it is entitled to the following:

$ 4.24 x 223 mats x 333.5 days =	$315,330.92
$ 4.24 x 123 mats x 30.75 days[5] =	$ 16,036.74
TOTAL:	$331,367.66

(Amended Proof of Costs at 3-4)

The government argues that the methodology provided by EP 1110-1-8 is inappropriate for timber mats because timber mats are not equipment, but materials. EP 1110-1-8 is based upon hourly equipment rates and "working hours per year" for certain equipment, neither of which are applicable to timber mats. Equipment, the government contends, incurs certain ownership costs, such as depreciation and current cost of money; both of which are accounted for in EP 1110-1-8, but neither of which is recognized by appellant as a cost of owning the timber mats. The government adds that appellant's cost calculations fail to account for the fact that this claim is for stand-by costs and, under EP1110-1-8, appellant's quantum should be reduced to an amount substantially less than what the government has already paid appellant under Modification P00068. As such, the government contends that the equipment manual does not contain a method for computing the daily rates for materials.

The government further argues that the applicable contract clause EFARS 52.231-5000 proscribes use of the formulas and cost schedules contained in EP 1110-1-8 when actual cost data is not available. In computing a daily cost of $2.89 per mat per workday, since the actual cost data is readily available and agreed to by the parties, the government maintains that there is no basis to resort to EP 1110-1-8. Finally, the government contends that its prior application of EP 1110-1-8 to timber mat delay costs was in error and, as such, was corrected and cannot be used to bind the government. We agree.

EP 1110-1-8 is the publication that assists contractors and Corps personnel in pricing equipment by the use of predetermined equipment ownership and operating expense hourly rates for construction and marine equipment (R4, tab E at 1). The

[5] Appellant contends "[a]ccording to the schedule of delays 333.5 days occurred before December 5, 2003" (the date when the 100 timber mats were directed to be replaced) and 30.75 days occurred after the new timber mats were allegedly installed (Amended Proof of Costs at 4). Thus appellant's calculation takes into account the removal and replacement of the 100 timber mats as directed by the contracting officer.

publication reads: "this pamphlet is for rate determination on construction contracts, . . . and relates only to contractor-owned equipment" (*id*. at 8). The hourly rates are determined by formulas that factor in the type of equipment, ownership costs, depreciation, facilities capital cost of money, and operating cost (*id*. at 23-29). The term "equipment" is not explicitly defined in EP 1110-1-8, however the pamphlet does provide examples of construction equipment covered by the instruction. Table 2-1 of the pamphlet lists numerous types of construction equipment, including, *inter alia*, spreaders, cranes, air compressors, asphalt paving equipment, generators, landscaping equipment, excavators, and truck trailers (R4, tab E at 31-201). However, Table 2-1 does not reference timber mats or any other similar lumber or foundation "equipment." Section X "Rate Calculation Example" reads as follows:

> 2.28 Computation Example
>
> . . . .
>
> a. When an hourly rate for a specific unit of equipment is not included in this pamphlet and a rate must be computed, the methodology contained in chapter 2 shall be followed. However, when a unit of equipment is not included in this pamphlet and the necessary factors to compute a rate are not found in appendix D, please contact the Chief, Cost Engineering Branch, Engineering Division, Walla Walla District, U.S. Army Corps of Engineers, for assistance as explained in chapter 1.

(*Id*. at 23)

Basically, appellant rests its entire case with regard to this portion of its claim on the advice from a vague and unsupported source in the Corps' Walla Walla office and the prior course of dealings by the Corps' contracting officers under two contracts. Appellant fails to cite any authority, case law or the plain language of the pamphlet itself, to support its position that the mats fall under the auspices of EP 1110-1-8. (Findings 6, 9, 11)

Section 223(1) of the Restatement (Second) of Contracts (1981) defines a course of dealing as: "a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." Section 1-205(1) of the Uniform Commercial Code (U.C.C.) defines "a course of dealing" as: "a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." The courts

have held that a single transaction cannot constitute a "course of dealing" within the meaning of U.C.C. § 1-205(1). See *International Therapeutics, Inc. v. McGraw-Edison Co.*, 712 F.2d 488, 492 (5th Cir. 1983); *Product Components, Inc. v. Regency Door and Hardware, Inc.*, 568 F. Supp. 651 (S.D. Ind. 1983). We have said in *Western States Construction Company, Inc.*, ASBCA No. 37611, 92-1 BCA ¶ 24,418 at 121,894:

> While there is no magic number of contracts that must be performed before this principle is applicable, the parties' prior dealings must be regular and/or numerous enough to cause a reasonable expectation that the conduct relied upon was not mere accident or mistake, but was the performance actually expected by the other party.

In this matter, appellant has not offered sufficient evidence to establish a prior course of dealing argument to support its claim that timber mats should be treated as equipment. At best, all we have here is thirteen modifications with back-up Price Negotiation Memoranda that vaguely reference certain equipment and terms that are germane to EP 1110-1-8.[6] Absent the contracting officer's final decision, which admits that the timber mat costs included in Modifications A0009 through A00022 (excluding A00019) were derived using EP 1110-1-8, the record does not contain any other document that shows a well established prior course of dealing with regard to timber mats as equipment. Accordingly, appellant has not made the requisite showing of a consistent practice that the timber mats should be treated as equipment under the above-mentioned pamphlet. As such, appellant's timber mat daily costs calculations are untenable. See *Longmire Coal Corp*., ASBCA No. 31569, 86-3 BCA ¶ 19,110, *recon. denied*, 87-1 BCA ¶ 19,454 (a prior course of dealing must relate to a sequence of previous conduct between the parties, not just one prior contract); *Kvaas Construction Co.*, ASBCA No. 45965, 94-1 BCA ¶ 26,513 (Government approval of alternative expansion devices under four prior contracts having substantially the same provisions held insufficient to constitute a course of dealing).

We agree that the contracting officer's practice, commencing with Modification No. P00023, of correcting the erroneous treatment of timber mats as equipment was proper. The alleged course of conduct by the parties does not change our view. We need not, therefore, reach the government's other arguments with respect to this issue.

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[6] Several of the Price Negotiation Memoranda mention trucks, bull dozers, and other equipment (See R4, tab C-3 at 25, 29, 34, 39, 44, 48, and 53-55). These documents also reference terms such as "TEV" or total equipment value and "FCCM" or Facilities Capital Cost of Money, which can be found as a variable in the rate calculation formulas in EP1110-1-8 (R4, tab E at 16-17).

As we found above, if we put aside the question of whether appellant is entitled to use the factors in the equipment schedule, appellant has not proved that there was any error in the government's calculations of the daily rate or that it was entitled to a greater daily rate than allowed by the government. Accordingly, appellant has not otherwise proved that it is entitled to any additional compensation.

CONCLUSION

The appeal is denied.

Dated: 22 January 2008

OWEN C. WILSON
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 54901, Appeal of C.R. Pittman Construction Company, Inc., rendered in conformance with the Board's Charter.

Dated:

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