ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
C.E.M.E.S. S.p.A.	)	ASBCA Nos. 56253, 57355
	)	
Under Contract No. DACA90-02-D-0082	)	

APPEARANCE FOR THE APPELLANT: Mr. Antonio Madonna
President

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
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OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD

ASBCA No. 57355 is an appeal pursuant to the Contract Disputes Act of 1978 (CDA), as amended, 41 U.S.C. §§ 601-613, from a deemed denial of a claim for €102.964,96 for alleged increased costs of performing certain excavation work. An earlier appeal, ASBCA No. 56253, which was later found to contain jurisdictional infirmities and which is dismissed herein, formed the basis for a hearing which was held at Camp Darby, Italy, as well as initial and reply briefs filed by the parties. The record made in ASBCA No. 56253 is stipulated as the record in ASBCA No. 57355 (Bd. corr. memo of conf. call dtd. 31 August 2010). In addition to the transcript of the hearing (tr.), the record includes the government's initial rule 4 file (R4, tabs 1-37); the government's supplement to the rule 4 file (R4, tabs S-1 to S-9); government exhibits introduced at trial (G-1, G-2); appellant's exhibits attached to its notice of appeal (app. supp. R4, tabs 1-27); and appellant's supplemental documents (app. supp. R4, tabs 28-29, 32-57). While Mr. Madonna continues to represent appellant, the record should reflect that at trial he was represented by Vincenzo Pinto, Esq. Only entitlement is before us for decision (Bd. corr. memo of conf. call dtd. 13 May 2008).

FINDINGS OF FACT

1. On 9 September 2002, the Contracting Division, United States Army Corps of Engineers, Europe (government), awarded Contract No. DACA90-02-D-0082 (the

contract) to C.E.M.E.S. S.p.A., of Pisa, Italy (CEMES).[1] The contract was described as an "Indefinite Delivery/Indefinite Quantity (IDIQ) Multiple Award Task Order (MATOC) for general building renovation, road and pavement repair [and] general environmental work [including], but not limited to, construction, excavation, plumbing, demolition, electrical, structural, mechanical, concrete work, and incidental landscaping, in the Livorno, Italy area." (R4, tab S-1)

2. The MATOC contract included USEUCOM SUP 52.236-9900, PERMITS AND RESPONSIBILITIES (JUNE 1965), which in part provides:

> The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any applicable laws, codes, and regulations, in connection with the prosecution of the work. It shall be similarly responsible for all damages to persons or property that occur as a result of his [sic] fault or negligence. It shall take proper safety and health precautions to protect the work, the workers, the public, and the property of others.

(R4, tab S-1 at 24 of 140)

3. The STANDARDS OF WORK SAFETY clause made the contractor "responsible for ensuring compliance with the most current Italian Laws concerning safety and health, including 494/96 and 528/99 as applicable" (R4, tab S-1 at 25 of 140).

4. The MATOC contract also included a SAFETY REQUIREMENTS FOR PROJECTS IN ITALY, clause which states:

> 1. This contract is design build in nature. The Government may provide the contractor with a complete design or may provide only a partial design or a scope of work. For those task orders where the Government furnishes a partial design or scope of work, the contractor will be responsible for designing the work or completing the design in accordance with Italian law.
>
> 2. For task orders where the contractor has responsibility for design or for completing design, the contractor will be

[1] C.E.M.E.S. stands for Costruzioni Elettroferroviarie Meccaniche - Edili - Stradali, even though the contract seems to have been awarded to the entity under its acronym rather than the full name of the company.

> responsible for complying with the design safety requirements of Italian Law, including Law 494/96, as amended. In the case of task orders meeting the thresholds established in the law, this includes designation of a qualified design safety coordinator and preparation of a design safety plan/risk analysis meeting the requirements of the law. The design safety plan/risk analysis must be submitted to the Government for review.
>
> 3. For all task orders, regardless of whether designed by the Government or the contractor, the contractor is responsible for conformance to the requirements of Italian law, including Law 494/96, as amended, relating to construction safety.
>
> 4. In the case of task orders meeting the thresholds established in Law 494/96, as amended, the contractor must engage the services of a qualified independent construction safety coordinator, who shall perform the duties specified in the law. The contractor must submit to the Government its construction safety plan and the credentials of the designated construction safety coordinator prior to commencement of any physical work on site.
>
> 5. The requirements of this clause are in addition to other safety requirements in this contract, including compliance with the requirements of EM 385-1-1.
>
> 6. The costs for compliance with the requirements of this clause shall be included in task order price.

(R4, tab S-1 at 25 of 140)

5. The contract also included the Federal Acquisition Regulations (FAR) clauses: FAR 52.211-13, TIME EXTENSIONS (SEP 2000); FAR 52.233-1, DISPUTES (DEC 1998); FAR 52.236-2, DIFFERING SITE CONDITIONS (APR 1984); FAR 52.243-4, CHANGES (AUG 1987); FAR 52.236-3, SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984); and FAR 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) (R4, tab S-1 at 2, 74-75, 77-79, 84-85, 97 of 140).

6. In accordance with 252.233-7001, CHOICE OF LAW (OVERSEAS) (JUNE 1997), the contract was to be "construed and interpreted in accordance with the substantive laws of the United States of America" and the contractor agreed to "waive any rights to invoke

the jurisdiction of local courts and to accept the jurisdiction of this Board or the United States Court of Federal Claims" (R4, tab S-1 at 108 of 140).

7. The contract's Special Technical Requirements included a Safety Requirements clause which required the contractor to "comply with all applicable local laws and the pertinent provisions of [the] latest EM 385-1-1, U.S. Army Corps of Engineers SAFETY AND HEALTH REQUIREMENTS MANUAL" (R4, tab S-1 at 118 of 140).

8. In 1951, the United States and Italy entered into an agreement whereby the United States would occupy an area on the Tyrrenian Coast between Pisa and Livorno. Since that time, the area became and remains the seat of the U.S. military base, Camp Darby. (R4, tab S-3 at 5) In the 1950's an area of Camp Darby southwest of the base was used as a landfill for the disposal of perished or dented canned food products coming from the United States. In the 1960's this same area was used as a location for burning and burying various types of waste which continued mainly between the 1960's and the 1970's and sporadically into the early 1980's. (R4, tab S-3 at 5-6)

9. Between 1997 and 2003, at least five site surveys were conducted to determine the extent of the landfill–the boundary and the types of waste it contained. The government also performed geological surveys and drilled over 37 core holes during this phase. Throughout this period, the government never considered the risk of unexploded ordnance in that area. (Tr. 2/9)

10. The government applied for a permit to remediate the landfill and on 7 December 2004, the City of Pisa granted approval for the remediation of the landfill at Camp Darby and so notified the government (R4, tab S-8). The design approved by Italian regulators was not in the format for award of a contract, so the government entered into an agreement with STID Engineering Company for the development of the design for a working contract. STID took the basics from the Italian regulators approved remediation design and transformed it into contracting documents. (Tr. 2/9-10) The contract with STID included the development of the design safety plan and the quality control plan (tr. 2/10). Pier Massimiliano Launaro (Launaro) testified for appellant.[2] Launaro was an engineer who was also an owner of STID who personally authored the remediation design plan. He also prepared the design safety plan and coordination plan for the government. (Tr. 1/85, 87, 95-96, 174)

11. The U.S. Army Corps of Engineers issued a request for proposals on 1 April 2005 under the MATOC contract for performance of the remediation project in accordance with an enclosed Scope of Work. Following several revisions, the Scope of Work with a revision date of 9 May 2005, provided as follows:

[2] The transcript incorrectly spells this name Lavnaro.

> DESCRIPTION OF WORK: The objective of this project is to remediate waste and soil from a landfill area with an approximate size of 34,500 square meters located on the Leghorn Depot, 22nd Area Support (ASG) in Livorno, Italy. The remediation work includes, but not limited to, removal of topsoil; excavation and sorting of wastes and soils from the landfill area; sampling and analysis of the excavated materials; treatment of excavated materials, as necessary; proper disposal of materials off-site; and final backfilling and grading of the excavated area. The Contractor shall adhere to the latest edition of all applicable Italian laws and regulations, including but not limited to, technical regulations for construction services, Article 10 of Ministerial Decree 471/99, Legislative Decree 152/99, Legislative Decree 22/97, Italian safety laws and accident prevention regulations, and trade association regulations/safety rules/basic and instruction (info) sheets, as well as the US Army Corps of Engineers Safety and Health Requirements Manual (EM 385-1-1) and all applicable US Army regulations.

(R4, tab S-2 at SOW-1)

12. The scope of work also included the project specifications, IT 528-Depot, 100% Final Design, which described the type of waste included in the landfill and included boring and geological data. Metal was one of several types of waste specifically named in the Final Design. (R4, tab S-2 at SOW-7, tab S-3) It did not explicitly include geo-radar and electromagnetic data from the site.

13. CEMES, in joint venture with Tecnologia al Servizio dell'Ecologia (TESECO) (collectively referred to as CEMES), submitted a proposal on 9 May 2005 to perform the base item No. 0001 outlined in the SOW in the amount of €2.700,000 (R4, tab S-4).

14. On 1 June 2005, the contracting officer notified CEMES as follows:

> You are hereby notified of our acceptance of your proposal…in accordance with the clauses and provisions of subject Contract and Request for Proposal.
>
> Contract Number DACA90-03-D-0082 task order 0005, has been assigned to your contract…in the amount of EU2,700,000.00. … [P]eriod of service under this contract is 730 calendar days after receipt of Notice to Proceed.

> "You are authorized and invited to begin initial site preparation at this time. Acquisitions of any materials requiring long lead time at this time. An NTP for full mobilization will be issued once your BLG [Bank Letter of Guaranty] is received and approved".

(R4, tab S-2 at 6th page)

15. On 7 June 2005, a Coordination/Partnering Meeting was held which was attended by representatives of CEMES, TESECO, and the Corps of Engineers. Among other things, at the meeting it was agreed that the contractor would prepare the digging permit application which was to include a drawing indicating where the digging would occur and submit it for review and approval by 20 June 2005. A Digging Permit form was furnished by the Corps to the contractor and a completed form was submitted by CEMES that same day. It was also decided that a pre-construction conference would be held after Notice to Proceed was issued and, prior to said conference, CEMES agreed to submit several documents, including a "Contractor's Safety Plan." (R4, tab 5)

16. By letter of 14 June 2005, CEMES requested issuance of the digging permit and "War Bombs Reclamation Certification" for the area on which they would be performing digging operations (R4, tab 6). The digging permit application was approved on 20 June 2005 (R4, tab 7).

17. CEMES advised the Corps on 30 June 2005 that since notice of award it had ordered materials with long lead times and installed the job site sign. CEMES was meeting with Corps technicians on that same date and planned to prepare connections for water and electricity after that meeting. However, CEMES advised that it still awaited receipt of notice to proceed and had not received a reply to its 14 June 2005 letter concerning, *inter alia*, the digging permit and the War Bombs Reclamation Certification. CEMES made clear that it wanted to cooperate with the government and perform the work in a timely fashion. CEMES also stated that its BLG was sent to the government on 7 June 2005. (R4, tab 8)

18. CEMES submitted its Safety Operation Plan on 7 July 2005 (R4, tab S-9). As of 11 July 2005, CEMES still awaited notice to proceed with full mobilization and still awaited a reply to its request for a War Bombs Reclamation Certification (R4, tab 9).

19. The record does not reflect precisely when notice to proceed with full mobilization was issued. However, CEMES submitted its construction schedule on 4 July 2005 and it was approved by the government on 7 August 2005. The schedule shows that work was to start on 6 June 2005 and be completed by 4 June 2007. The

schedule is portrayed in weeks, comprising 104 weeks of scheduled performance which equates to the 730 days or 2 years allowed under Task Order 5. (App. supp. R4, tab 54)

20. On 22 September 2005, CEMES corresponded with the Corps regarding the reclamation project and again requested issuance of War Bombs Reclamation Certification, this time citing Italian Law D.L.L. 320 (12 April 1946) and D.P.R. 303/56 as the requirement for such certification. Further, CEMES advised it could not start digging operations for remediation of the soils for Lot 1 until said certification was received. (R4, tab 10) Yet again on 17 October 2005, CEMES asked for the certification and stated the work was delayed due to the government's fault in not providing said certification and that CEMES awaited a decision (R4, tab 11).

21. In October 2005, Giancarlo Heusch (Heusch) of the Department of Public Works, asked Launaro to assess the risk of unexploded ordnance (UXO) (tr. 1/100-01) and this was the first time Launaro had any notion that UXO should be considered (tr. 1/102). When Launaro designed the safety plan he did not consider UXO to be a risk because under his understanding of Italian law, he did not have to consider the UXO risk in writing the design safety plan and because the area in question had been surveyed several times previously (tr. 1/99-100). Launaro provided the revised safety plan to the government by letter of 28 October 2005, prescribing less risky techniques for performing the work and basing it on electromagnetic surveys previously performed by or for the government (tr. 1/92-93, 2/13-14), but the letter is not in the record.

22. Heusch recalls the conversation with Launaro in October 2005 and acknowledges that Launaro modified the safety plan as a result of that conversation and took the risk of UXO into consideration. While he does not know precisely when that modification was communicated to CEMES, he remembers it was several months later. (Tr. 2/14-15)

23. Appellant still had not received its requested War Bombs Reclamation Certification on 17 November 2005 when it stated in a letter to the Corps that through government fault the work was suspended since 22 September 2005 and that the cost to date was €28.224,00. Further CEMES stated that the cost was likely to rise after the following Monday, 21 November 2005, at the end of plant erection due to idle equipment. (R4, tab 12) Based upon the foregoing we find as fact that plant erection was completed by approximately 21 November 2005.

24. On 30 November 2005, the Corps responded by email to CEMES's 17 November letter, as follows:

> The Government has directed no suspension of work under the terms of this contract. We consider this delay of excavation to be a unilateral decision made by CEMES.

> There is no known history of explosives being stored, disposed of, or dropped in this area, and your current Joint Venture partner, TESECO has completed extensive excavations in these areas and has never indicated that they found anything to indicate the possibility of the existence of explosives in this area. The Government will not accept responsibility for any additional costs resulting from a delay caused solely by the actions of CEMES.
>
> The Contracting Officer and our Office of Counsel are reviewing your correspondences and will issue an official response by Serial Letter.

(R4, tab 13) As far as we can determine, this is the first time that the Corps responded to CEMES's several requests which began on 14 June 2005.

25. CEMES communicated its disagreement with the government position in a letter dated 7 December 2005, maintaining that the suspension of digging operations was a result of government actions. The contractor did not agree that there was no known history of explosives in the area, citing a recent contract in the vicinity for the Defense Reutilization and Marketing Office (DRMO), which was modified to include geophysical and topographical tests performed by a firm specializing in bomb rescue and stating that during World War II, military operations took place in the area (*see* finding 50). The contractor based its position asking for the certification on numerous Italian laws, citing: D.L.L. 320 (12 April 1946); R.D. 733 (18 June 1931); Executive Regulation TU PS 773; Circular 300/46 (24 November 1952); and Technical Specification of Army Ministry (ed. 1984). (R4, tab 14) These laws however are those listed in the general conditions of Italian Railroad construction contracts and do contain provisions concerning war bombs reclamation work, but they solely apply to the reclamation of sites where mines or bombs have actually been found. They have no application to the work here at issue. (Ex. G-1 at 9)

26. On 21 December 2005, George Fedynsky (Fedynsky), the contracting officer, advised CEMES as follows:

> We [] will cooperate with you on the War Bombs Reclamation Certificate issue on task order DACA90-02-0082 #005. However, pending resolution of the problem you are advised that the Government expects you to comply with the terms and conditions of the contract and to safely and diligently proceed with work.

I will be sending you a response to your concerns shortly.

(R4, tab 15)

27. Later, on 29 December 2005, Fedynsky provided further clarification to CEMES on what the government would do with respect to a War Bombs Reclamation Certification, stating in part as follows:

> Based on our telephone conference and exchange of emails, please be assured that we will cooperate with you to resolve the issue of the War Bombs Reclamation Certification. We will look into all information provided, to include the modification to your previous contract in Livorno. However, you may not necessarily be entitled to a price increase in the event a survey or other work may be needed on your part to comply with the terms and conditions of this contract.
>
> In order to clarify your position, we request that you provide the following information:
>
> (1) Cite the specific requirement from the pertinent Italian law to support your position (rather than referencing the entire law).
>
> (2) Provide a copy of the bomb survey report prepared under your previous contract at Livorno to provide us with a better understanding of the survey requirements. (Note: We have many subsurface surveys and studies that have already been conducted in this area. Depending on the information provided in the bomb survey report, we may be able to address your concerns with information and data currently available for the area.)
>
> Another question we do have is about the timing of your inquiry. The modification to your previous contract was issued on June 21, 2004. If this was a significant concern, then you should have advised us of any problems or anticipated contingencies at the time you submitted your proposal. We relied on your proposal and considered it to [be] complete and accurate and that you would complete all of the required work on time and at the agreed contract price.

> By failing to notify our office in a timely manner, you may have waived your rights to any price adjustments.
>
> It is our understanding that you will prosecute the contract work in a safe manner, in accordance with all contract requirements, which includes Italian laws and regulations. By nature of the landfill remediation work, detailed information has been provided in the contract, describing the history of the area, borings, geological characterizations, and other subsurface conditions. It is pertinent to note that this information is provided in far greater detail than in a typical construction contract. For instance, the history of the landfill starting from 1950 through the early 1980's includes information on the type of wastes disposed (cans, vehicle parts, waste drums, batteries, etc.) along with the common practices conducted in the area to include flattening with tracked vehicles, burial with soil, burning of wastes, etc. Boring locations with depths of typical wastes found is provided in the contract characteristics of contamination.
>
> We are looking into any additional information that can be helpful to address your concerns, however, we await your submittal of the items requested above to clarify this matter. In addition, we would like to know what has changed since you submitted your proposal and were issued the task order. Why are you bringing up the issue of a certificate now? Why wasn't the issue brought up when you submitted your proposal? Request your submittal of the above information to this office within 14 calendar days from receipt of this letter. Upon further clarification of these questions and concerns, we will provide further direction on this matter.

(R4, tab 16)

28. Following a reminder from the contracting officer for CEMES to respond to the Contracting Officer's 29 December 2005 letter (R4, tab 17), the contractor did so by letter dated 18 January 2006. CEMES listed the Italian laws previously cited in letters, with no specific reference to any section of the laws listed and stated that the entire laws could be found on the internet. The contractor stated that this is a customer safety issue because it was a government design to be performed on base property. CEMES noted that if this was an important matter, it should have been addressed in the Safety Plan.

The contractor requested details of all of the subsurface surveys already conducted in the area. CEMES further stated that they could not start digging operations without obtaining assurance that the entire area does not contain unexploded bombs. (R4, tab 18)

29. By letter dated 2 February 2006, CEMES advised the contracting officer that it had obtained an electromagnetic survey of the surface of Lot 1 and determined that there were no metal course wastes or unidentified metal objects inside the first 40-50 centimeters of soil depth. It indicated that excavation would proceed on Lot 1 within the 40 cm level. CEMES also noted that at the end of this preliminary excavation phase, it would require formal assurance that the entire area is free of unexploded bombs. (R4, tab 19)

30. On 20 February 2006, CEMES pointed out that the government had not replied to its 2 February 2006 letter wherein it advised it would start digging operations on 14 February 2006. CEMES expressed its surprise when the Contracting Officer Representative told them during a weekly meeting that they would not be allowed to start digging operations pending approval by the user activity, which CEMES contended was not required by the contract and which was delaying performance without its own fault. (R4, tab 20)

31. By letter dated 21 February 2006, the Administrative Contracting Officer (ACO) advised CEMES that prior to the start of on-site work, several contractual requirements had to be completed, including designation of a qualified design safety coordinator; submission of a design safety plan/risk analysis meeting the requirements of Italian Law 494/96; engagement of the services of a qualified independent construction safety coordinator; submission of a safety plan and an updated construction schedule. Finally, the ACO advised that the required items were to be submitted within 14 calendar days of the letter or prior to the requested onsite start date, whichever came first. He made clear that the government viewed any delay due to the submission of the required items to be contractor caused. (R4, tab 21)

32. The government issued a cure notice on 22 February 2006. By this notice, the government notified CEMES that it considered the statements in the contractor's 18 January 2006 letter as a condition endangering performance of the contract. CEMES was requested to provide, within 10 days of the cure notice, adequate assurances to the contracting officer that work would continue to be performed within the contract schedule. Thus, the contractor was advised that if said assurances were not provided within ten days, the government might terminate for default under FAR 52.249-10. (R4, tab 22)

33. Effective 23 February 2006, CEMES updated the Safety Operation Plan by adding paragraph 3.6, Unexploded Ordnance. Said new provision avers that unexploded ordnances might exist in areas where excavation is required, and thus before starting

digging operations, the contractor planned to ask the government for authorization to perform an electronic inspection of the work areas to prevent danger to personnel and loss of equipment from "inadvertently exploding old ordnance." (R4, tab S-9 at 16)

34. CEMES responded to the cure notice on 1 March 2006. The contractor indicated that it would continue to perform the work on the contract within the scheduled timelines starting on 6 March 2006. However, CEMES made clear that it would not assume the cost for depth inspection for verification of unexploded ordnance; that it was not its duty to engage the services of an independent Design Safety Coordinator or a Construction Safety Coordinator; that their actions in conformance with Italian law were completed and they had prepared their Operative Safety Plan; and that the government was responsible for all measures to prevent the hazardous conditions presented by the presence of unexploded ordnance. (R4, tab 23)

35. On 7 March 2006 attorneys for CEMES wrote to the government and reiterated positions previously taken with respect to UXO and Italian law (R4, tab 24). By letter of 7 March 2006, CEMES requested a response to its 1 March 2006 letter (R4, tab 25).

36. In February 2006, the government contract with STID as safety coordinator was rescinded (tr. 1/89-90). Thereafter, CEMES hired Launaro as its execution safety coordinator (tr. 1/91), a function required by paragraph 2 of the Safety Requirements for Projects in Italy clause. On 9 March 2006, the contractor submitted the name of Launaro as their independent Construction Safety Coordinator, together with his credentials. CEMES noted that Launaro would perform the duties specified under Italian Law 494/96 for the contractor's engagement. (R4, tab 26) This letter, as well as a subsequent letter dated 27 March 2006 advised the Corps that CEMES awaited a reply to its previously submitted updated safety plan and that work was stopped pending a government decision (R4, tabs 26, 27).

37. The government, by letter dated 4 April 2006, acknowledged receipt of the contractor's selection of independent safety coordinator, requested the contractor to submit its Safety and Coordination Plan, asked that it make sure the Safety Operation Plan is updated accordingly, and asked for assurance that said plans are in compliance with the contract and with Italian Law 494/96. Further, the contracting officer stated, with regard to the adequacy of CEMES's response to the cure notice:

> You have provided no other information in response to the items identified in my letter; however your statements indicate you will continue to perform in accordance with the timelines established in the task order. The government will continue to monitor your progress, performance, and compliance with the Contract terms and conditions. Any

> assistance rendered to you on this contract or acceptance by the Government of delinquent goods or services, will be solely for the purpose of mitigating damages, and is not to be construed as a waiver of any rights the Government may have under subject contract.

(R4, tab 28)

38. The Contracting Officer responded to the letter from CEMES's counsel on 4 April 2006, stating that he considered the letter to be a reservation of rights under the contract and that he accepted the assurances in response to his cure notice that the contractor would continue performance in accordance with the contract (R4, tab 29).

39. By letter dated 11 April 2006, CEMES stated its understanding that the government had accepted its designation of Launaro as Independent Safety Coordinator during the execution phase of the project. It made clear however, that its view was that it is the government's responsibility to ensure compliance with Italian Law 494/96, not CEMES's and that it should have occurred during the design phase, prior to any involvement by CEMES. Mr. Madonna pointed out that Launaro was in fact the Design Safety Coordinator and Construction Safety Coordinator during the design phase, hired by the government, and that CEMES only retained him due to the insistence of the government and for the purpose of mitigation of damages. Its own Safety Operation Plan was prepared timely on 7 July 2005 and was updated on 23 February 2006 thus complying with the contract and the law. The contractor requested clarification as to what proofs and assurances are sought to guarantee that the plans are in compliance with the contract and with 494/96. (R4, tab 30)

40. In reply to the above, on 13 April 2006, the contracting officer advised that prior to the start of onsite work, the Operational Safety Plan (POS)[3] must be approved in writing by the Independent Construction Safety Coordinator who has to verify that the POS is consistent with the Safety and Coordination Plan (R4, tab 31).

41. Launaro, on behalf of CEMES, devised a plan for performing the work while taking precautions against UXO by designating some areas as red flag zones. These red flag zones resulted from a geo-radar survey of the area received by CEMES from the government on 21 April 2006. Launaro says one could not tell metal from potential UXO from the surveys so he prescribed manual digging in those red flag zones. In his view, manual digging was not necessary for normal excavation work. The metal objects later

[3] The parties use the acronym "POS" for the Italian "Il **P**iano **O**perativo di **S**icurezza" as well as several English translations, "Operational Safety Plan", "Safety Operation Plan" and "Operative Safety Plan".

found under the red flags included large metal bottles, artillery bullets, metal spheres and metal cylinder tanks requiring hand excavation for removal. There is no evidence and no allegations that any unexploded ordnances were ever encountered in this remediation project. (R4, tab 37; tr. 1/91-94)

42. According to Launaro, CEMES complied with these measures and digging operations effectively started in the second half of April 2006 (tr. 1/94-95). Dorianno Raggi (Raggi) was an engineer and technical director for CEMES from 1983 until 2008 when he went to work for the United States government (tr. 1/136). Raggi was there for all phases of the work from beginning to final certification (tr. 1/136). According to Raggi, CEMES planned to start digging operations at the beginning of October 2005 (tr. 1/150-51).

43. Stefano Toni (Toni) was a subcontractor to CEMES performing the excavation work for the remediation project, having entered into an agreement shortly before work was due to start in 2005 (tr. 1/110, 116-17). Work did not start as planned by Toni because of an interruption, the cause of which he was unaware (tr. 1/117-18). When he did start working, Toni recalls that there were six red flag areas in each of three lots that were to be remediated. To perform the digging in the red flag zones, they utilized a very small excavator and generally had two workers manually digging with shovels. (Tr. 1/110-11) To perform this work Toni's crews worked double shifts on a rotating basis (tr. 1/115-16). They in fact found metal objects, pieces of iron, parts of old tanks (tr. 1/114), but no unexploded ordnance.

44. Toni did not charge CEMES for the hand digging rather than the use of regular excavation equipment, nor did he charge for the double shifts, but did charge for what he called or was translated as "interruption of work, interruption of machinery" (tr. 1/118-19). Raggi confirmed that CEMES did not have to pay extra for the double shifts, but did have to pay 500 or 600 Euros per day for what he testified was 160-170 days of delay from October 2005 to March 2006 for the idle equipment during the suspension (tr. 1/151-53).

45. CEMES started topsoil excavation to 40 centimeters on the entire Lot 1 on 19 April 2006 and completed same on 27 April 2006 (R4, tab 3 at 4). It is undisputed that work progressed thereafter and all of the work required by Task Order 5 was actually completed within the scheduled period (app. supp. R4, tab 55).

46. According to the schedule submitted before the dispute arose, CEMES planned to complete the purchase and installation of equipment needed to perform the work by the end of week 22 of the contract performance period (app. supp. R4, tab 54, items 6, 7). Moreover, the schedule showed that excavation operations for Lots 1, 2 and 3 were sequenced between weeks 22 and 90 (*id*, items 10-25). According to the schedule

CEMES planned to remove that equipment sometime between week 90 and week 104 (*id*., item 15).

47. Appellant's as-built schedule is less detailed than its planned schedule, but it shows that excavation began on Lot 1 during week 40, Lot 3 excavation work began in week 65, and the final Lot 2 was started in week 81. All work was completed by week 104, but the schedule does not tell when the equipment was removed, although we may infer that it was at least removed between week 90, when excavation of the last lot was completed and week 104, when all work was complete. (App. supp. R4, tab 55)

48. The motivation for CEMES requesting a War Bombs Reclamation Certification came from three circumstances. Each is discussed below.

49. A few weeks prior to 14 June 2005, unexploded ordnance was found during a construction operation adjacent to the Pisa Airport and it was near an area where another contractor had found unexploded ordnance buried in the sand (tr. 1/160-61). Pisa Airport is about 5 kilometers from the Camp Darby worksite at issue in this appeal, but the area between the Pisa Airport and Livorno was a location where military action had occurred during World War II in that there had been some bombing in that area (tr. 1/161-62). Raggi, who testified about this issue, did not recall when the Pisa Airport discovery was made in relation to when the proposal was made for Task Order 5 to the government (tr. 1/167).

50. The second motivation resulted from a contract modification issued by the government under an earlier CEMES contract for surveying and clearing of underground explosives and war surplus in the area of the DRMO Storage Yard and Maintenance Area at Livorno. The work at DRMO was performed in 2004, about a year prior to the task order for the remediation work under Task Order 5. (Tr. 1/162-64) CEMES had completed the modification work in 2004 and no unexploded ordnance was found (tr. 1/167).

51. The third motivation emanated from a subsequent MATOC contract entered into with CEMES which included a clause not included in the MATOC contract at issue (tr. 1/164). That contract included Special Conditions for Projects in Italy, which included Clause 1.18, UNEXPLODED ORDNANCE (app. supp. R4, tab 3). Clause 1.18 advised that unexploded ordnance might exist in areas where excavation work is required and made the contractor responsible for performing visual and electronic inspections to prevent danger to personnel and loss of equipment. In the event such unexploded ordnance was found, this clause set forth procedures to follow for removal of same.

52. To the extent appellant relies on those motivations for requesting a War Bombs Reclamation Certification or relies on those events to prove the existence of a reasonable risk of encountering UXO, we find as fact that the proof is not sufficient to

carry that burden. No expert was called to testify about that risk. The UXO found at Pisa Airport was 5 kilometers away and appellant failed to show that it learned of this event subsequent to submitting its bid for Task Order 5. The contract modification under an earlier CEMES contract for surveying and clearing of underground explosives and war surplus in the DRMO storage yard, was completed a year before the start of work on Task Order 5 and was known to CEMES at the time it submitted its bid. The third motivation, which resulted from a new clause in a subsequent MATOC contract is similarly of no help. That clause merely provided that UXO might be in areas that were to be excavated and that the contractor would be responsible for them for future task orders where applicable.

53. The government called Dr. Giorgio Cosmelli (Cosmelli) as an expert in Italian law regarding safety in the design and construction of projects by the United States Forces in Italy under international agreements. He was also offered as an expert on Italian law as it relates to unexploded ordnance. (Tr. 1/25-28) The Board accepted Dr. Cosmelli as an expert in Italian law with the proviso that while he may make assumptions in his opinions as to the interpretation of the contract in order to form a basis for his opinions on Italian law, the Board would not rely on his interpretation of the contract, a function reserved for the Board (tr. 1/28-29). Cosmelli's expert report is also part of the evidence in this case (tr. 1/63-64, 2/17; ex. G-1). We find his testimony and his report to be credible. The findings that follow are based upon Cosmelli's testimony and his report.

54. Italian Legislative Decree 494, dated 14 August 1996, as amended by Legislative Decree No. 528 of 16 November 1999 and by Legislative Decree No. 276 on 10 September 2003 (hereinafter "Law 494"), was enacted with the aim of assuring the protection of the health and safety of individuals working within civil construction sites.[4] Law 494 does not provide for a War Bombs Reclamation Certification. (Ex. G-1 at 7, 9)

55. The application of Law 494 depends upon the number of site personnel required for the work and the amount of time estimated for the work. The work under Task Order 5 exceeded that threshold making Law 494 applicable to the work. (*Id.* at 7-8)

56. Law 494 requires the appointment of a Design Safety Coordinator during the design phase of the project to prepare a Safety and Coordination Plan (SCP) which is to include a plan for the prevention of accidents. The Law also requires the appointment of a Construction Safety Coordinator responsible for preparing a POS which is to include

[4] Law 494 was subsequently incorporated into Legislative Decree 81, enacted on 9 April 2008, which consolidated all Italian laws concerning work safety into one piece of legislation. This change, however, occurred after the events giving rise to the claim examined herein.

the specific rules and prescriptions for the safety of the work as it is performed. Launaro properly performed both functions, first while under contract with the government and later while under contract with CEMES. (*Id.* at 8)

57. Neither Law 494 nor any other Italian law requires the government as a contracting party to perform a residual survey for the presence of unexploded ordnance or to provide a clear site, free from unexploded ordnances. However, under general principles of Italian law, if either party is aware of or has valid reasons to believe that UXO may be found on the work site, such suspicion shall be disclosed before entering into the contract.

58. Sometime, probably in April 2006, CEMES filed an action in an Italian court seeking to enjoin the bank with whom it had the guarantee from paying on a demand by the contracting officer. On 2 May 2006, the government, having learned of the lawsuit, wrote to CEMES and advised that such filing violated the contract requirement that disputes be resolved pursuant to the Disputes clause and was endangering performance under the contract and amounted to a breach of the explicit terms of the contract (R4, tab 32). On 3 May 2006, CEMES replied taking issue with the government contentions and arguing that the court action was not based on the MATOC contract so it was not precluded and that it sought to prevent a judicial execution of a mandate. In the same letter CEMES raised apparently for the first time, its belief that the government should recognize a differing site condition and grant an equitable adjustment "for supplementary work[] about the possibility of unexploded ordnance." If the differing site condition were recognized, CEMES said it would move ahead in the common interest of both parties and withdraw the law suit. (R4, tab 33)

59. The government denied the contractor's request for an equitable adjustment under FAR 52.236-2, Differing Site Conditions, by letter dated 19 May 2006. The government also sought to address CEMES's concerns regarding revisions to the Safety Operation Plan by referring to Italian Safety Law 494/96, Articles 4, 5, 12 and 13 which provided for adjustments and coordination during construction work, and the role of the Independent Safety Coordinator in this process. The government confirmed that Launaro, the Construction Safety Coordinator, "is well within his prescribed duties under the requirements of the Italian Safety Law to adjust the Safety Coordination Plan [Safety Operation Plan], as necessary." (R4, tab 34)

60. On 7 June 2006, CEMES acknowledged the government's letter of 19 May 2006 and took issue with the decision to deny the request for a differing site condition, arguing that the survey had "ascertained the possibility of unexploded ordnance in the excavation area" and burdensome work, including manual excavation is necessary to prevent risks to persons and property (R4, tab 35).

61. Reiterating that the request for an equitable adjustment for a differing site condition was without merit, the government, on 7 June 2006 explained that the presence of metal, in itself, does not confirm the presence of unexploded ordnance, since the contract advised that the landfill contained buried metal objects. The contractor was reminded that if an actual condition involving unexploded ordnance is encountered, the contractor should stop work immediately and follow emergency procedures as outlined in the Safety Plan and notify the proper authorities. (R4, tab 36)

62. On 27 February 2007, CEMES submitted a claim to the contracting officer for €102.964,96 (an amount exceeding $100,000) and a 171-day time extension. The claim did not include a certification as required by the CDA, 41 U.S.C. § 605(c)(1). (R4, tab 2)

63. On 14 September 2007, the contracting officer issued a final decision wherein he stated that the "27 February 2007 letter did not include a certification of the claim, and therefore was not a valid claim." In a footnote, the contracting officer further explained:

> The 27 February 2007 claim letter did not include a certification as required under the Contract Disputes Act. See FAR Clause 52.233-1 Disputes. FAR Clause 52.233-1 DISPUTES requires the certification of claims over $100,000. The certification must include the following four elements: (1) the claim is made in good faith; (2) the supporting data are accurate and complete to the best of the certifier's knowledge and belief; (3) the amount requested accurately reflects the adjustment for which the contractor believes the Government is liable; and (4) that the certifier is authorized to certify the claim on behalf of the contractor. No valid claim exists without a proper certification. See FAR 33.201.

However, the contracting officer then went on and denied the claim on the merits and advised the contractor of its appeal rights. (R4, tab 2)

64. On 20 November 2007, the contractor submitted a notice of appeal of the final decision to the Armed Services Board of Contract Appeals, which indicated a copy was furnished to the contracting officer. The notice of appeal included the proper claim certification executed by CEMES's President. (R4, tab 1) We docketed the appeal as ASBCA No. 56253. A hearing was held and briefs were filed. In the process of writing the decision, the absence of a certification for the claim submitted on 27 February 2007 was noted. Since there was doubt as to whether this Board had jurisdiction, a conference call was convened wherein government counsel confirmed that the contracting officer did in fact receive the certification accompanying the notice of appeal and that receipt completed the formation of a proper claim. CEMES agreed to submit an appeal from the deemed denial of the now certified claim and the Board would docket a new appeal.

Thus on 3 September 2010, CEMES filed an appeal from the deemed denial of the claim it perfected on 20 November 2007 and presumed to have been received by the contracting officer on 23 November 2007. We docketed the new appeal as ASBCA No. 57355. The parties thereafter agreed to stipulate to the record made in ASBCA No. 56253, including the briefs, for a decision in ASBCA No. 57355.

DECISION – ASBCA No. 56253

The claim filed with the contracting officer on 27 February 2007 exceeded $100,000 and was not certified as required by the CDA. Accordingly we lack jurisdiction over that claim. *Samuel Gallin*, ASBCA No. 53365, 01-2 BCA ¶ 31,481. It is therefore dismissed for lack of jurisdiction.

DECISION – ASBCA No. 57355

Appellant's claim dated 27 February 2007 but certified on 20 November 2007 states that CEMES was forced to change the method and manner of performance of the work instead of proceeding per the specifications in paragraphs "6.2.1 and 6.2.2 where it was stated that the excavation operations should have been completely separate from the sieving operations, to be able to proceed very quickly and in two different operations." Instead it states they were directed in writing by Launaro and thus:

> [W]e were obligated to proceed in a different way during the execution of work, by preventively locating the zones in which electromagnetic anomalies for potentially dangerous metallic buried objects were found (i.e. Red Flag zones), and subsequently the localized pre excavation operations and sieving operations also manual, sieving with the apprehension of working in areas where danger had not been demarcated. Only after performing these preliminary operations to obtain reasonable conditions of safety, were we able to perform the works as per the original specifications.

Appellant argues also that the government never produced an answer to the question repeatedly asked as to whether the landfill area had been officially cleared of World War II UXO. According to appellant that information was not public knowledge and it was unreasonable for appellant to obtain the information on its own. Therefore, the failure of the government to provide an answer acceptable to appellant constituted a constructive suspension of work.

In its notice of appeal dated 3 September 2010, CEMES incorporates the arguments made in its notice of appeal that resulted in ASBCA No. 56253. Therein it

sought entitlement to an equitable adjustment under the Changes clause, and also under the Differing Site Conditions clause, stating that:

> **[I]t had been verified, after the geo-radar surveys and manual excavations, that the sub-surface of the digging presented unknown conditions which can not be recognized as inhering to the contractual performance. Under the digging site were found not only normal metal objects (to which refers the officially history background cited by the Contracting Officer in his Final Decision), but also *not ordinary* metal object that, for their dimension and for their characteristics, could suspected to be dangerous and could seem to be an unexploded ordnance (as large metal bottles, empty artillery bullets, metal spheres, and metal cylinder tanks: see Relevant Facts, par. 6, letter *d*4)[.]** [Emphasis in original]

(ASBCA No. 56253, notice of appeal at 15). CEMES says it promptly notified the contracting officer of the differing site condition; the Army did not investigate the alleged condition, and refused to recognize liability for the differing site condition.

While appellant has shown that it changed the manner in which it performed the excavation work, it has not demonstrated that the contracting officer issued a written order designated to be a change nor has it demonstrated that any other written or oral order, including "direction, instruction, interpretation or determination from the Contracting Officer" caused a change. FAR 52.243-4. Instead, CEMES contends that the action of Launaro caused the change (*see* finding 41). Launaro was not the contracting officer neither while under contract with the government nor after he was hired by CEMES to perform safety coordination functions during construction. This function was required by Italian law and it was properly delegated by the contract from the government to the contractor.

Similarly, the conditions which led CEMES to make the decision to take extra measures do not amount to a differing site condition. The Differing Site Conditions clause in the contract allows an equitable adjustment when a contractor encounters "subsurface or latent physical conditions at the site which differ materially from those indicated in" the contract or it encounters "unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract." CEMES encountered nothing new at the site. It merely suspected there "might" be a risk of unexploded ordnance. At no time did CEMES encounter a subsurface or latent condition which differed from what was represented in the contract. Metal was shown to be present in the contract documents and metal was encountered. Nor did CEMES encounter an

unknown condition not ordinarily encountered in work of this nature. Thus there is no recovery as a differing site condition.

We also dispense with the notion that the government was obligated to issue a War Bombs Reclamation Certification and that, therefore, there was a constructive suspension of work. From June 2005 to March 2006, CEMES continuously demanded the issuance of a War Bombs Reclamation Certification, citing several Italian laws. But it never pointed to any provision of any of those laws to support its demand for a War Bombs Reclamation Certification. Indeed CEMES has not shown such a requirement ever existed and if it did that it applied in the circumstances of this case. (*See* findings 25, 57)

In its post-trial brief appellant now contends that the question of the interpretation of Italian law is of no concern in this case, but that:

> It is simply a question of interpretation of the Contract signed between CEMES and U.S. Army, in order to determine which party had the duty to *evaluate* the risk of the possible presence of UXO under the digging site and to *declare* to the other party that the risk is effective (and to indicate the cautions aimed to prevent that risk) *or, at least, that there is no risk at all*. [Emphasis in original]

(Post-trial br. at 6) CEMES answers that it was the U.S. Army that had that duty – the duty to cooperate with the contractor in providing all available information since the Army designed the project, had responsibility for safety in the design phase and then failed to communicate relevant information about risks until April 2006, when it provided a geo-radar survey (*see* finding 41), causing a suspension of work. The argument fails because it fails to demonstrate that there were risks which had to be communicated. Moreover, it does not demonstrate that either party had the duty to evaluate the risk of possible presence of unexploded ordnance. The argument presumes there was a risk and that someone had the duty to evaluate the risk without demonstrating under the contract that someone did.

Moreover, by not including anything in the scope of work about UXO, the government was saying to CEMES as it prepared its offer, that the government perceived no risk. This is confirmed by Launaro who testified that when he designed the safety plan he did not consider UXO to be a risk because his understanding of Italian law was that he did not have to consider the risk of UXO in writing the safety plan and because the area in question had been surveyed several times before. (Finding 21) Indeed the evidence shows that the documents upon which the CEMES offer was based clearly indicated the presence of metal and clearly indicated it had been a landfill.

Based on the foregoing, appellant has not demonstrated entitlement to additional costs. Accordingly, the appeal is denied.

Dated: 29 December 2010

RICHARD SHACKLEFORD
Administrative Judge
Armed Services Board
of Contract Appeals

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 Nos. 56253, 57355, Appeals of C.E.M.E.S. S.p.A. , rendered in conformance with the Board's Charter.

Dated:

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