ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeals of -- | ) | |
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| J. E. McAmis, Inc. | ) | ASBCA Nos. 54455, 54456, 54457 |
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| Under Contract No. DACW05-00-C-0020 | ) | |

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OPINION BY ADMINISTRATIVE JUDGE VAN BROEKHOVEN

Appellant timely appealed a contracting officer's final decision denying three claims submitted by its subcontractor, Nordic Industries, Inc. (Nordic) in the total amount of $281,542.75. *J. E. McAmis, Inc.*, ASBCA Nos. 54455, 54456, 54457, 04-2 BCA ¶ 32,746. In ASBCA No. 54455, appellant sought recovery for its increased quarry and haul costs due to weight and speed limitations imposed by Butte County Board of Supervisors on a number of the roads in the haul routes. In ASBCA No. 54456, appellant sought recovery for additional testing of rock coming from a quarry operated by appellant's subcontractor. In ASBCA No. 54457, appellant sought recovery of increased costs associated with the government's alleged rejection of certain rock from Nordic's quarry that looked "wormy." Entitlement only is before the Board for decision.

FINDINGS OF FACT

1. The government's Army Corps of Engineers, Sacramento District, awarded the subject contract to appellant on 24 February 2000 following a formally advertised solicitation for the construction of a riprap and sheet pile, riverbed gradient facility and associated bank protection for the Sacramento River at the GCID Intake, California. The contract was a fixed-price construction contract with an estimated price of $9,794,798.00, of which $5,350,000.00 were obligated at the time of award due to the availability of funds. The contract schedule provided that the contractor was required to commence performance within 10 calendar days and complete performance within 274 calendar days

of the receipt of the notice to proceed. However, appellant was advised at the time of award that in planning its operations for fiscal year 2000, it should not plan on expending an amount larger than $5,350,000.00, the contract award obligated amount. (R4, tab 3) Subsequent modifications increased the contract price to $13,409,409.63 (compl. and answer ¶ 3).

2. The Glenn-Colusa Irrigation District (GCID) was established to provide irrigation water to the agricultural needs of an area of Northern California (tr. 2/138-39). In doing so, GCID created a pumping structure in what is known as the Oxbow in the Sacramento River. During flooding of the Sacramento River, migratory fish in the river lost their sense of direction and ended up in the intake of the pump structure. The National Marine Fisheries and the Fish and Wildlife Service required the Irrigation District to stop its operation if it did not stop fish from entering into the pump intake. The purpose of the Gradient Facility, designed by the Bureau of Reclamation and constructed by the Corps of Engineers, was to create a hydraulic gradient by putting a rock structure in the river that would backflow a raise in the water elevation so that more water would be conveyed to the Oxbow and thereby reduce the number of fish entering the intake structure. The gradient structure was a control structure to help the flow of water to keep small salmon from being attracted to the intake channel that led to a large pumping station owned by the GCID. (Tr. 1/37-38, 2/138-39) The structure consisted of three sheet pile walls across the river and rock structures lining the river channel to provide fish habitat and prevent erosion of the river.

3. The solicitation and the contract contained two drawing sheets, Drawing Sheet Nos. C-1 and C-2, labeled Site Access Map/Haul Routes, which were pertinent to the project (R4, tabs 10, 11). These drawings depicted the access to the construction site and the state, county, and private haul routes. Drawing C-1, labeled "GENERAL HAUL ROUTES" depicted the interstate, state, and county public roads, including I-5, State Highway 99, State Highway 32, Nord Cana Highway, Wilson Landing Road, Meridian Road, Wyo Road, and Canal Road. Drawing C-2, labeled "HAUL ROUTES," depicted what appeared to be the private access gravel roads on private property or within the general project site, and depicted the access to the project site on these roads from Wilson Landing Road and Canal Road. In other words, the only access haul routes to the job site were as represented on these two drawings (tr. 2/141). Notes on drawing C-2, provided:

CONSTRUCTION ACCESS NOTES

1. CONSTRUCTION SITE SHALL BE ACCESSED ONLY BY ROADS DESIGNATED ON THE DRAWING.

2. CONTRACTOR SHALL BE RESPONSIBLE FOR ALL PRIVATE ACCESS ROAD IMPROVEMENTS. ALL DESIGNATED GRAVEL ACCESS ROADS SHOWN ON THE DRAWING SHALL BE IMPROVED FOR TWO-WAY TRAFFIC. EXCEPT THE ROADS ON EITHER IMMEDIATE BANK OF THE GF.

3. ALL ACCESS ROADS OUTSIDE THE LIMITS OF THE GF ARE EXISTING. BUT WILL REQUIRE IMPROVEMENTS BY THE CONTRACTOR.

4. ALL DESIGNATED ACCESS ROADS WILL BE MAINTAINED FOR PERMANENT ACCESS. WITH THE EXCEPTION OF THE SPECIFIED TEMPORARY ACCESS RAMP SECTION.

5. CONTRACTOR SHALL CONSTRUCT ALL SHOWN ACCESS ROADS WITHIN THE GF FOOTPRINT. INCLUDING ACCESS RAMPS AT THE RIVER BANKS.

6. CONTRACTOR SHALL PROVIDE TRAFFIC CONTROL PERSONNEL AT THE REMOVABLE BRIDGE TO DIRECT ALTERNATING ONE-WAY TRAFFIC.

8. CONTRACTOR SHALL FIELD VERIFY THAT ALL BRIDGES AND CULVERTS CAN SUPPORT HAUL VEHICLE LOADS AND MAKE ALL REPAIRS TO EXISTING OR BETTER CONDITIONS.

9. CONTRACTOR SHALL PROVIDE BRIDGE DECK FOR REMOVABLE BRIDGE LOCATION (SEE SPECIFICATION SECTION 1500. PARAGRAPH 1.12.4.8).

(R4, tab 11) Appellant interpreted these notes to apply to both drawing sheets and to anything involving site access, map, and haul routes to the gradient structure (tr. 3/5-7). These general notes set forth the conditions for the two sides of the river, the private roads, and conveyed the right-of-entry agreements (tr. 2/142-43). These two drawings did not, however, depict or prescribe the quarries, which were the contractor's option (tr. 2/141).

4. The project site was bounded on the north and east by Tehama County and south and west of the Sacramento River by Glenn County, and bounded on the east by Butte County. (R4, tab 10, drawing C-1) Haul routes on the west side included State Highway 32, 6th Avenue, Wyo Road, and Canal Road, in Glenn County. The haul routes on the east side included State Highway 99, Nord-Cana Highway, Wilson Landing Road, Meridian Road, and State Highway 32. The haul lines were depicted in bold lines on the drawing (*see also* tr. 2/6-9). There were different property owners on the east and west side of the river (tr. 2/141-42). The property on the east side of the river was owned by Deseret Farms, a private company. The access road off of the Wilson Landing Road ran through the Deseret Farms on to the east side of the river. The Corps of Engineers had entered into a right-of-entry agreement with Deseret Farms to allow the successful contractor for this project to use this private road. The property on the west side of the river belonged to the GCID. Canal Road was the entry point to the Glenn-Colusa property and to its private roads. The Corps of Engineers had a right-of-entry agreement with GCID.

5. The contract contained clauses pertinent to fixed-price construction contracts, including: FAR 52.233-1, DISPUTES (DEC 1998); FAR 52.236-3, SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984); FAR 52.236-7, PERMITS AND RESPONSIBILITIES (NOV 1991); FAR 52.236-15, SCHEDULES FOR CONSTRUCTION CONTRACTS (APR 1984); and FAR 52.243-4, CHANGES (AUG 1987) (R4, tab 3 at 00700-69, -72, -73, -75, -78). The Site Investigation and Conditions Affecting the Work clause provided in pertinent part:

> (a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but not limited to (1) conditions bearing upon transportation, disposal, handling, and storage of materials; (2) the availability of labor, water, electrical power, and roads; (3) uncertainties of weather, river stages, tides, or similar physical conditions at the site;.... Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.

> (b) The Government assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the Government. Nor does the Government assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its officers or agents before the execution of this contract, unless that understanding or representation is expressly stated in this contract.

The Permits and Responsibilities clause provided:

> The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work. The Contractor shall also be responsible for all damages to persons or property, that occur as a result of the Contractor's fault or negligence. The Contractor shall also be responsible for all materials delivered and work performed until completion and acceptance of the entire work, except for any completed unit of work which may have been accepted under the contract.

(R4, tab 3 at 00700-73)

6. Section 01500 of the specifications, provided in paragraph 1.6.2, Use of Public Roads:

> This project is located in a rural area of California. The Contractor shall investigate the existing conditions of highways and county roads planned for haul routes. The allowable load limits on these roads and bridges shall be verified. The Contractor shall contact the Public Works Departments in each of the Counties that have roads that will obtain heavy usage during the length of this contract and inform them of the planned usage and approximate number of trips during the contract. The Contractor shall provide to the Contracting Officer verification that the contacts have been made along with an acknowledgment that the Counties responded. The following is a list of the contacts for the surrounding counties.

(R4, tab 3 at 01500-4) This paragraph then listed the named contacts in each of the Public Works Departments of the respective counties, Butte County, Glenn County, and Tehama County. This paragraph further required appellant to video tape the planned haul routes prior to initiation of hauling to document the existing condition of the road pavements and bridges. A copy of this video tape was to be provided to the contracting officer.

7. Paragraph 2.1.1 of Section 02271 of the Technical Specifications provided, in pertinent part:

> The Contractor shall make all arrangements, pay all royalties, and secure all permits for the procurement, furnishing and transporting of material. The sources from which the Contractor proposes to obtain the material shall be selected and a sample submitted a minimum of 45 days in advance of the time when the material will be required in the work. Stone from a proposed source where exploratory investigations and compliance test reports or satisfactory service records are not available, will be tested by the Government for quality compliance. The Government will test one sample of quarry rock at its expense. If the material fails the tests or if the Contractor desires to utilize more than one source, additional testing will be accomplished by the Government for the prevailing rate for each sample tested. The costs of such tests will be deducted from payment due the Contractor.

(R4, tab 3 at 02271-5) Paragraph 2.1.1, Section 02271 identified paragraph 2.1.6 as listing sources from which acceptable quarry rock has been obtained, and stated that that paragraph was for information only. Although a Woods Creek Quarry was listed as an acceptable source for the rock, it is unclear from the record whether this quarry is the same quarry as the Woods Pit Vina Quarry. There was no listing of Paynes Creek Quarry in paragraph 2.1.6.

8. Paragraph 2.1.4, Gradation Sampling and Testing for Stone Protection, of Section 02271, provided:

> Tests shall be performed by the Contractor's quality control organization (or approved testing laboratory) on samples selected by the Contracting Officer. The Government reserves the right to perform check tests and to use the

> Contractor's sampling and testing facilities to make the tests. Each sample shall consist of not less than 5 tons of materials and shall be selected at random from the production run. One gradation test is required at the beginning of production prior to delivery of stone to the project and a minimum of one additional test for each 15,000 tons of material placed. The Government reserves the right to require a gradation test of a channel slope sample at any time at the expense of the Contractor. All sampling and gradation tests performed by the Contractor shall be under the supervision of the Contracting Officer.

(R4, tab 3 at 02271-7)

9. Paragraph 2.1.5 of Section 02271 set forth the technical specifications, including gradations, of both types of riprap or quarry rock. According to paragraph 2.1.5.a, "[i]f test results show that the stone does not meet the required grading, the hauling operations will be stopped immediately and will not resume until rock processing procedures are adjusted and gradation test is completed showing gradation requirements are met." (*Id.*)

10. Contract drawing C-2 depicted gravel access roads to the site, which were to be constructed by appellant, as specified in Construction Access Notes on drawing C-2, note 5, and including access ramps at the river bank. Paragraph 1.6.3 of Section 01500 of the specifications required appellant to construct at its own expense these access roads, and that upon completion of the work, to remove access roads designated for removal, and restore the ground to its original condition (R4, tab 3 at 01500-4).

11. On 23 March 2000, appellant entered into a standard subcontract with Nordic Industries, Inc. (R4, tab 25) According to the scope of this subcontract, Nordic was required to furnish and place a portion of CLIN Item No. 0010 type I riprap and CLIN Item No. 0011 type II riprap as set forth in appellant's contract schedule, to haul and place approximately 62,200 tons of type I riprap, and approximately 28,350 tons of type II riprap. The contract schedule, CLIN Item No. 0010, required the delivery of a total estimated quantity of 124,400 tons of type I riprap, and the delivery of a total estimated quantity of 43,900 tons of type II riprap under CLIN Item No. 0011 (R4, tab 3 at 00010-5). The subcontract price per ton of both type I and type II riprap was $9.50, which was the cost of the riprap at the quarries. Nordic Industries was to provide approximately 50 percent of the required riprap, with Carl J. Woods Construction, Inc. providing the remaining approximately 50 percent. (R4, tab 25; ex. A-11; tr. 1/80-82)

12. Nordic owned and operated the Paynes Creek Quarry, which was in Tehama County, northeast of Red Bluff (R4, tabs 10, 7(R); ex. A-21). Carl J. Woods operated the Woods Pit at the Vina Quarry, which was also in Tehama County, north of the project site and of the Tehama and Butte Counties line.

13. Nordic was to provide all the hauling for both its production from the Paynes Creek Quarry and for that of Carl J. Woods from the Woods Pit Vina Quarry. The subcontract specified hauling prices for rock delivered to the east side of the river at $5.80 per ton, and the hauling price for rock to be delivered to the west side of the river at $6.30 per ton. The subcontract provided that Nordic was to provide appellant with scheduling information that conformed to appellant's progress schedule, including any changes made by appellant to the scheduling of work. The special provisions of the subcontract provided that delivery of rock was to begin on 15 April 2000, and that Nordic was to deliver up to 1,500 tons of rock per day, delivering six days per week, ten hours per day. Under the contract, appellant agreed to take rock five days per week and to eliminate Saturday delivery if possible. (R4, tab 25)

14. Appellant and Nordic examined the contract drawings that depicted the haul routes prior to submitting appellant's bid and concluded that these were the specified haul routes and that the project site could be accessed only by these routes (R4, tabs 10, 11; ex. A-21; tr. 1/42-43, 2/6-9).

15. In preparation for the Nordic bid for the subcontract, Nordic's dispatcher examined the drawings and drove the actual routes depicted in the drawings from each quarry and calculated the time cycles to determine the per ton haul price for the job (tr. 2/6). He was familiar with those routes prior to undertaking work on this project (tr. 2/6-9). Based on his reviews of the drawings, he had assumed that the government had discussed this project with Butte and Glenn Counties authorities, and that since they were designated as haul routes on the drawing with the note that the project site could be accessed only by the roads, Nordic could carry its rock on these designated roads.

16. Nordic's dispatcher plotted the haul route from the Paynes Creek Quarry, which is northeast of Red Bluff, California, and north of the job site, to both the west and east side of the river and construction site. (Exs. A-14, -20, -21; tr. 2/11-14) He drove the routes, noted speed limits, truck crossings, weight limits, "no trucks allowed" signs, and entered this information in a computer program. The computer program performed the calculation on the number of minutes of travel on these routes from the pit to the construction site. The dispatcher then calculated the time for loading and dumping the rock, the tonnage that the truck can legally haul, and the computer program then provided the per ton haul rate. Nordic's dispatcher repeated this process for determining the per ton haul rate for hauling the rock from the Woods Pit Vina Quarry to the west side of the river (exs. A-15, -21; tr. 2/13-14), and from the Woods Pit Vina Quarry to the east bank

upstream from the stockpile area (exs. A-14-16, -20, -21; tr. 2/14-19). In mid-January 2000, he called Butte County officials to discuss the routes and what Nordic planned for haul routes according to drawing C-1, and understood that county officials were not aware of the project but that they did not foresee problems with these routes. He informed them that he would be hauling riprap from the Vina Quarry and the Paynes Creek Quarry, and that this hauling of rock would take him to both the east and west side of the Sacramento River.

17. Nordic's dispatcher submitted copies of his calculation on the routes (exs. A-14-16, -20) to Nordic's estimator for the bid preparation (tr. 2/19-20). He knew that he would need 15-30 trucks depending upon how much tonnage appellant wanted. Since Nordic had only two trucks, the remaining trucks required for the work would be owner-operated trucks.

18. Appellant submitted its proposed performance schedule to the government during the pre-construction meeting which was held in the Sacramento Resident Office on 28 February 2000 (R4, tabs 19, 20; tr. 1/85-89). Appellant's general intent was to commence work on the east side of the river, and then start work on the west side.

19. There was some preliminary work that had to be performed in order to access the job site (tr. 1/85-88). The project site was surrounded by private property on both the east and west sides. As a result, and as reflected on drawings C-1 and C-2, appellant had to develop private roads to get to the job site from Wilson Landing Road on the east side of the river, and from Canal Road on the west side. (Tr. 1/85-88) Although the private roads were in existence, appellant was required to improve them in order to have access to the site. The public road access on the west side terminated at the private property line closer to the river than was the case on the east side.

20. According to this proposed schedule, clearing and grubbing was to begin in April 2000. Appellant's general intent was to commence work on the east side of the river. (R4, tab 20; tr. 1/85-96) Appellant then needed to build a bridge on the west side of the river to cross over some open water to get to the project site. This was included in appellant's estimated costs in its bid. However, since Nordic had been hauling rock there before, appellant decided to lease Nordic's bridge. The next item on the schedule was a center pier that consisted of small islands connected with railroad cars, and according to the schedule, to be constructed from the first of May to middle of June 2000. The next activities included the placement of type I and type II riprap which were to be placed on both the west and east bank of the river and across the river bottom so that it encompassed the entire flow of the river. The proposed schedule for the placement of the type II riprap called for placement extending from mid-August 2000 to early October 2000.

21. The contracting officer issued the notice to proceed on 2 March 2000, which appellant received on that date (R4, tab 4). The contract schedule required appellant to begin performance within 10 calendar days and complete it within 274 calendar days after receiving the notice to proceed; the completion date was 1 December 2000 (R4, tab 3).

22. According to the Corps' Resident Engineer and Administrative Contracting Officer (ACO), appellant could have gone into the next year, but that it was to appellant's advantage to complete the project within calendar year 2000. (Tr. 2/149-50) Historically, the Sacramento River flow rises and falls, and if the project was not completed prior to winter, there were risks to appellant and its work over the winter in the event of high river flows. As appellant presented its schedule to the government, it communicated its intent to finish before the winter season. There were also restrictions on habitat relating to migrating fish, to the Swainson's hawk, to giant garter snakes, and to nestling swans on the Sacramento River. Those restrictions had been included in the contract by date to regulate when appellant could work and could not work. Thus, in SAACONS 52.0211-4852, Performance Period clause, "All In-River Activities" were to take place between 1 April 2000 to 31 October 2000, which dates were "consistent with the requirements of the State and Federal Biological Opinions issued for this project by the California Department of Fish and Game, U.S. Fish and Wildlife Service and the National Marine Fisheries Service." Moreover, according to this provision, failure to comply with these requirements could result in fines, jail time, or both. (R4, tab 3 at 00800-3)

23. The ACO wrote appellant on 6 April 2000 in response to appellant's three to four week schedule showing its future activities (R4, tab 7(A)). Of particular note, the ACO requested additional information with respect to appellant's on-site traffic control plan and use of public roads. The ACO further instructed appellant to review the requirements of the specification paragraphs 01130-1.6.5, 01500-1.6.2, and EM 385-1-1, and expressed anticipation for receipt of the final plan prior to the start of "Type I Start Delivery." Moreover,

> The three counties listed [in] 01500-1.6.2 are anxious to review and have an opportunity to comment on your final plan. I would like to suggest that our staffs conduct a joint inspection of all proposed haul routes to verify your video taping of existing conditions. Please coordinate this meeting with Ms. Baksys at your earliest convenience.

(*Id.*)

24. On 19 April 2000, when appellant was mobilizing, appellant's president saw that Butte County had posted signs limiting vehicle weight to seven tons. (Tr. 1/44-46) As a result, appellant could not bring its heavy equipment on those roads to access the

project site, and was forced to shut down its operations and forced to move its operations from the east side to the west side of the river. Appellant had initially planned to start work on the east side of the river because there was a substantial amount of clearing and excavation required on the east side of the river in order to construct the rock wall. Moreover, there were environmental restrictions that drove the schedule. Rock delivered to the east side of the river was less expensive than rock delivered to the west side.

25. By letter dated 19 April 2000, appellant informed the contracting officer that Butte County Board of Supervisors had met and passed an ordinance limiting the weight per vehicle to 14,000 pounds (7 tons) on Hampton Nord Cana Highway, Wilson Landing Road and Meridian Road from Wilson Landing Road to State Highway 32 (R4, tab 7(B)). According to appellant's letter, the newly imposed weight limits on these roads would prevent appellant from proceeding with work on the east side of the gradient structure until the Corps of Engineers provided access. Appellant's president further stated:

> Fifty-six percent of all riprap is scheduled to the east side and in addition to the riprap, there is road base, clean fill, bedding material, embankment, delivery of sheet pile and the equipment necessary to perform these features of work. As [sic] present we simply have no access to the east side of the gradient structure and await your decision. We also hereby give notice that we will claim for impacts and the costs that me [sic] incurred due to the lack of access.

(*Id.*) The action of the Butte County Board of Supervisors and appellant's discovery of the haul limitations on the Butte County roads were made after appellant had executed its subcontract with Nordic and after appellant had prepared its proposed project schedule and work plan (tr. 1/84-86).

26. On 19 April 2000, the government's Deputy District Engineer for project management wrote the Director of Butte County Department of Public Works in response to a Butte County letter of 7 April 2000 and discussions on 14 April 2000 regarding the proposed use of Butte County roads in the vicinity of the river gradient facility project in the Sacramento River near the GCID. According to the Deputy District Engineer, the Corps had determined that the Urgency Ordinance did not apply to this project for the reasons set forth in this letter. (R4, tab 7(E)) Noting that the Butte County Planning Department had been furnished the Environmental Impact Statement/Environmental Impact Report (EIS/EIR) in October 1997, which adequately addressed the project-related impact of this construction project for review and comment, Butte County had not commented or objected to the document. The Deputy District Engineer stated that the Access Management Plan referred to in the EIS/EIR, with the "Traffic Plan," which

addressed construction site access, construction traffic conditions and management methods, and traffic safety considerations had been submitted to the County Planning Department in September 1999.

27. Asserting that legal counsel have advised the District Engineer that Corps contractors are exempt from the Urgency Ordinance, the Deputy District Engineer wrote that:

> The Butte County Urgency Ordinance enacted on April 14, 2000 prohibits the use of signed county highways by commercial vehicles exceeding a maximum gross weight of 14,000 pounds. The Board of Supervisors' Urgency Findings make it clear that this ordinance is targeted exclusively at the Corps project. The ordinance allows for the use of certain designated roads if it is first agreed that any road damage will be remedied without cost to the County. During the April 14 meeting, the Corps agreed to investigate the possibility of this option. It noted equally that the Corps or its contractors are exempt from the Urgency Ordinance under California Vehicle Code Section 35720.

(R4, tab 7(E) at 2) The government further quoted in this letter the cited California Vehicle Code section which provided in pertinent part that the Urgency Ordinance would not be effective to any vehicle owned, operated, controlled, by a "licensed contractor in connection with the construction, installation, operation, maintenance, or repair of any public utility facilities or public works projects" (*id.* at 3). In light of the foregoing, the Deputy District Engineer informed the County that the Corps intended to proceed with the project, as planned, and that it would assist the County in addressing its concerns about road damage. Copies of this letter were furnished to appellant in addition to the local Congressman, the Butte County Counsel Office, the Butte County Board of Supervisors, and the GCID.

28. Appellant's president received a copy of the Corps' letter to Butte County and understood it to instruct him that he could continue to use the roads as planned (tr. 1/47-49). Although appellant understood this letter to entitle appellant to ignore the ordinance or weight limit on the Butte County roads, the California Highway Patrol started issuing traffic tickets and threatening arrests if Nordic's drivers violated the ordinance, thereby essentially requiring appellant to shut down its operations on the Butte County roads it was using for haul routes.

29. The government's ACO responded to appellant's 19 April 2000 letter to the contracting officer concerning the "ROAD CLOSURE," by letter dated 24 April 2000.

The purpose of the ACO's letter was to confirm the guidance the ACO provided appellant during their meeting on 19 April 2000. (R4, tab 7(F)) According to this letter, the California Vehicle Code expressly exempted vehicles operated by licensed contractors in connection with the public works project from the Urgency Ordinance of Butte County. In concluding, the ACO instructed appellant:

> Please continue your coordination with Butte County in obtaining any and all necessary licenses and permits per FAR 52.236-7 Permits and Responsibilities. Because the referenced Urgency Ordinance is inapplicable to this contract, our office does not and will not recognize any claims for delays, impacts or costs related to the Urgency Ordinance. As you are aware, FAR 52.236-7 imposes on the contractor the costs of incurring all necessary expenses, including the unexpected, in complying with applicable regulations in performing the construction work. Because the Urgency Ordinance is inapplicable to this project your failure to proceed in accordance with the established schedule is done at your own risk, and subject to the Government's rights under the agreement for failure to proceed.

30. On 25 April 2000, appellant requested the Corps' Resident Engineer to convene a meeting immediately with representatives from Congressman Wally Herger's office, the U.S. Army Corps of Engineers, Sacramento District, the Director of Public Works, Butte County, GCID, and appellant. (R4, tab 7(G); tr. 1/49-53) Appellant believed that it was caught in the middle between the Corps of Engineers and Butte County without a solution to the imposed weight limitations and haul road restrictions imposed by Butte County. Appellant asserted that its options at that time were to (1) violate the new Butte County ordinance, which according to the Corps, was unlawful, but would not support appellant with regard to its violation of the ordinance; (2) abide by the Butte County ordinance and not haul rock on the roads with haul restrictions and face the consequences imposed by the Corp due to appellant's failure to comply with the contract; (3) sign an agreement with Butte County to repair Wilson Landing Road 100 percent, pay for the additional trucking costs to use Highway 99 to Wilson Landing Road rather than the shorter Nord Cana Highway, which was shown on the contract drawings. Asserting that appellant and its subcontractors bid the project according to the plans and specifications, and that drawing sheet C-1 of the contract depicted the preferred haul routes which appellant used for its bid, it was only after appellant "was awarded the project that [it] learned that the Corps of Engineers and Butte County failed to communicate and reach a road way agreement that would be acceptable to Butte County which should have been part of the contract documents" (R4, tab 7(G) at 2). The requested meeting was held and nothing was resolved (tr. 1/50-52).

31. A second meeting was held on or about 27 April 2000 at the Corps District Headquarters Office. (R4, tab 7(H); tr. 1/51-53) The County had wanted appellant to enter into a road repair agreement with the County and had presented to appellant a Draft Special Transportation Permit Conditions which was provided to the Corps. The Corps advised appellant not to enter into the agreement for a number of reasons. The permit made no provision for existing road conditions or for the remaining life of the roadways and contained open-ended contingencies that the Corps would not accept. The Corps did agree that it could conditionally pay for damages to roads caused by the projects, but would not pay for road use. However,

> The condition for determining damage would require an independent study to determine remaining life of the proposed roadways and a continual traffic survey to determine frequency of use by J.E. McAmis trucks versus all other traffic. The analysis for determining payment for damage would need to account for credits obtained from fees normally paid such as fuel taxes, tire taxes, vehicle taxes, and/or other fees.

(R4, tab 7(H) at 2-3) The Corps scheduled a follow-up meeting with representatives of Congressman Wally Herger's office to continue discussions and attempt to agree to a resolution to the use of the public roads for transporting materials to the site. At this time appellant was not conducting any hauling on the east side of the river (tr. 1/53). Although it was the Corps' position that Butte County did not have the authority to put these restrictions on the roads and that appellant did not need to follow the Urgency Ordinance, there was no question that appellant was not able to proceed with the project as planned (tr. 2/144-45).

32. By letter dated 12 May 2000, the Sacramento District Engineer and the president of the GCID, informed the Director, Department of Public Works, Butte County, of the joint project of the Corps and the GCID, which was jointly funded by them, and of their intent to seek authority to repair certain damages to Butte County roads which may result from the construction activity on the Sacramento River Gradient Facility (ex. A-3; tr. 1/53-55). Glenn-Colusa owned the intake facility in the small river channel of the Sacramento River, which was the basic reason for this project.

33. According to this letter, a meeting was held on 2 May 2000, with the staffs of Congressman Wally Herger and Congressman Doug Ose, representatives of Butte and Glenn Counties, the GCID, the Corps of Engineers, and appellant. (Ex. A-3; tr. 1/53-55, 2/144-47) Indeed, there were a number of meetings in which the Congressman Herger's staff, the Corps of Engineers, appellant, Nordic, Butte County Public Works directors,

and counsel from Butte County and the Corps participated. (Tr. 2/144-47) The participants came to realize that there was an impasse, and that the reason for the impasse was that the Corps did not have authority to pay for the road damages. They, therefore, concluded that the Corps of Engineers would seek the approval from the Chief of Engineers to provide the road repairs sought by Butte County and to monitor the road condition by performing a survey prior to commencement of the hauling and following completion of the work. Butte County agreed to provide for limited lifting of the weight restrictions, provided that appellant provide labor to patch potholes on a daily basis and place signage if shoulder started to erode. The Corps agreed to enter into a contract modification with appellant to authorize appellant to perform these road monitoring and repair functions. The extent of repairs would be determined on the basis of actual, non-negligent damages attributed to appellant's use of these roads as verified by a qualified, third party assessor acceptable to all the parties. This assessor was to survey the road conditions before and after construction and provide a report regarding the necessary repairs to bring the roads back to their pre-project conditions. The agreement provided that a Butte County representative would be authorized to observed the survey work of the assessor.

34. According to this letter, the parties agreed during this meeting of 2 May 2000, that the Corps and the GCID, would share the repair costs, which the Corps would attempt to expedite the process. Appellant would be responsible for all damages to persons or property that occurred as a result of appellant's fault or negligence, including damage to the roads. (Ex. A-3)

35. As a result of this agreement, appellant arranged with Chec Engineering Consultants to provide the road survey on the Butte County roads and informed the Corps' Resident Engineer as to the projected date and time. Appellant needed this particular survey to determine the condition of the roads prior to the commencement of hauling of rock. According to the testimony of appellant's president, the subject contract was amended to provide for government payment of the survey. There is no such modification or change order in the appeal record. However, payment for the road surveys is not in dispute. (R4, tab 7(I); tr. 1/55-56)

36. Nordic Industries wrote appellant on 18 May 2000, complaining of the disruptions caused by the hauling limitations imposed by Butte County, and informing appellant that this constituted notice that Nordic would require an equitable adjustment to its haul prices (R4, tab 7(J); tr. 1/56). The issue here as stated by Nordic, was:

> Also, as you know, Nordic's haul prices are based on hauling 50% of the riprap to each side of the river from its Paynes Creek Quarry and hauling 50% of the riprap to each

> side of the river from the Vina Quarry of Carl J. Woods Construction Company, Inc. (Woods).
>
> The haul route from Nordic's quarry to the west side of the quarry has not been impacted. However, the haul route from Woods' quarry to the west side of the river includes hauling south on the Hamilton Nord Cana Highway thru Nord to Hwy 32 and this section plus adjacent roads have been posted with 7 Ton Load Limits and therefore, they are unusable.
>
> The haul route from both quarries to the east side of the river requires the use of the Hamilton Nord Cana Highway and the Wilson Landing Road and haul on these roads is also prevented by the same 7 Ton Load Limits.

Appellant forwarded this letter to the Resident Engineer at the Sacramento Engineer District Resident Office by letter dated 19 May 2000. (R4, tab 7(J); tr. 1/56-58) The point was that there would be increased haul costs due to these road restrictions that were implemented subsequent to appellant's preparation of the bid and award of the contract, on routes that were shown on the contract drawing as available to appellant. Moreover, appellant informed the Resident Engineer that as a result of these road restrictions, appellant has "strictly been hauling from the Paynes Creek Quarry, this has impacted both quarries production schedule and may result in acceleration and or standby costs at either quarry" (R4, tab 7(J)).

37. Nordic informed appellant on 22 May 2000 that as a result of the haul route disruption caused by Butte County Urgency Ordinance, the only rock being delivered was to the west side of the river from Nordic's Paynes Creek Quarry. (R4, tab 7(K); tr. 1/58-60, 80-81) Nordic stated that, although appellant had asked Nordic to accelerate production and to deliver 2,500 tons per day from Paynes Creek, Nordic could not sustain that level of production and that it may run out of specification quality rock later that week. According to Nordic, the only alternative to this was to haul riprap to the west side of the river from the Woods Vina Quarry, avoiding the restricted Butte County roads and using the Woodson Bridge haul route, which would be an extremely costly option. Nordic proposed an additional $2.20 per ton should appellant direct Nordic to haul the rock on this alternative route.

38. Appellant, by letter dated 24 May 2000, forwarded Nordic's letter of 22 May 2000 to the government's Resident Engineer, stating:

> This letter is to advise you that currently due to the Butte County Road restrictions, we have strictly been hauling out of the Paynes Creek Quarry to the west side of the project. As the attached letter from Nordic Industries states, the Paynes Creek Quarry alone will not be able to meet our demands and will be out of rock by the end of this week. Therefore, it has become necessary to begin hauling from the Vina Quarry.

(R4, tab 7(K); tr. 2/80-81)

39. Once again, appellant addressed the problem of the road restrictions and informed the Resident Engineer that appellant had been hauling out of the Paynes Creek Quarry to the west side of the project. (R4, tab 7(K); tr. 1/59-63, 2/80-81) However, Paynes Creek Quarry would not be able to meet the demands for rock by the end of the week, and that as a result, appellant would have to begin hauling rock from the Woods Vina Quarry using the Woodson Bridge haul route, which would result in additional trucking costs of $2.30 per ton. Appellant informed the government that it would be submitting these additional trucking costs to the government for an equitable adjustment. Appellant also informed the Corps' Resident Engineer that appellant had signed the Butte County permit, but had not received the signed copy back from Butte County, that the permit was only a temporary permit which would expire on 16 July 2000, and was contingent on the Corps of Engineers confirming that the road would be repaired.

40. On 24 May 2000, appellant again wrote the Resident Engineer in the Sacramento Engineer District Office, stating that before appellant could start work on the east side of the gradient facility, it would need, in writing from the Corps, the following:

> 1) Confirmation from the Corps of Engineers that the permanent access road/easement and agreement has been accepted and signed by Deseret Farms and that J. E. McAmis, Inc. can start using the access road as built through Deseret Farms.
>
> 2) Confirmation that the revetment trench access as shown on the drawings is available or a modification is being issued to allow construction access to the Revetment Trench.
>
> 3) That the Corps of Engineers has secured the usage of all haul routes shown on the contract drawings for transport of any and all materials or a modification directing us to

> use alternate routes, such as Meridian Road rather than Nord Cana Highway between Wilson Landing Road and Highway 32.

(R4, tab 7(L); tr. 1/59-63)

41. Also by letter dated 24 May 2000, appellant informed the Corps' Resident Engineer that the Glenn County Public Works Department was considering an Urgency Ordinance similar to that of Butte County that would place weight restrictions on the haul routes running through Glenn County (R4, tab 7(M); tr. 1/64-65). This then raised a problem with haul routes on the west side of the Sacramento River and gradient facility. According to this letter, the County intended to place the weight restrictions on the designated haul routes if it did not receive an agreement from the Corps of Engineers stating that the Corps would restore the roads to the pre-existing condition at the end of this project. Moreover, appellant stated that it would start hauling rock out of the Woods Vina Quarry on 30 May 2000, and that if the road issue with Butte County was not settled, it would be forced to bring the material in through Glenn County, thereby doubling the truck traffic on Glenn County roads, at an increased trucking cost. Appellant sought immediate government attention to the road problems, and asserted that if there is no road usage agreement between the Corps of Engineers and Glenn County, hauling through Glenn County would be shut down as well. According to appellant, both counties threatened to stop progress on appellant's performance without repair agreements. (R4, tab 7(M); tr. 1/65)

42. The ACO responded to appellant's letters of 19 May and 24 May 2000 concerning the haul routes on 26 May 2000. (R4, tab 7(N); tr. 1/65-66, 2/39-41) There were several things addressed in the government's response. First, the ACO stated his understanding of the meeting, which according to the ACO was held on 2 June 2000 (sic) in the office of Congressman Herger, that Butte County was issuing a two-stage permit, which would allow transportation of "Baldwin Materials" type II riprap and sheet piling in the first stage, and in the second stage, allow for the transportation of any other materials with an end destination on the east side of the project. While it is not clear from the record, it appears that the ACO was referring to the meeting held in Congressman Herger's office on 2 May 2000. In any event, it was appellant's and the ACO's understanding that Butte County would not permit the transportation of materials destined for the west side of the project. Further, according to this letter, the government asserted that there were no express guarantees what specific traffic routes would be available to appellant for the transportation of materials into the project. Indeed, the contract required appellant to obtain all necessary permits, and appellant had not obtained the necessary permit from Butte County to use its roads for hauling materials to the west side of the project. Moreover, according to this letter, the government disagreed that appellant had been denied access to the project site. In any event, the government

commiserated with appellant concerning the haul routes problems appellant faced in Butte and Glenn Counties and stated that "[i]t is now unfortunate that your selected quarry cannot meet your production schedule." Nevertheless, although appellant had suggested alternative routes for transporting material from its alternate quarry site to the west side of the project, the costs for transporting these materials was not considered a government responsibility.

43. When Butte County imposed the speed limit on Wilson Landing Road, which affected the transportation of the rock from the Woods Vina Pit to the east side of the river upstream from the stockpile area, appellant had to reduce the speed of the trucks as well. (Ex. A-24: tr. 2/30-31) In the original estimate for the bid, appellant had estimated trucks driving at a speed of 35 mph loaded and 40 mph empty. The reduced speed on this road was then 32 mph for both loaded and empty trucks. Whereas the original estimate for this route was $4.51 per ton, with the lowered speeds for the haul route from the Woods Vina Quarry to the east bank upstream from the stockpile, the cost was $4.89 per ton (exs. A-12, -24; tr. 2/32). Appellant used the same hourly rate for this revised cost as it used in the original pre-bid estimate.

44. Appellant initially intended a haul route from the Paynes Creek Quarry to both sides of the river. (Ex. A-21; tr. 2/36-39) However, appellant was unable to transport material from the Woods Vine Quarry to the east side of the river until after Butte County lifted the restrictions on the Butte County roads. Similarly appellant was unable to transport any material from the Paynes Creek Quarry to the east side of the river until Butte County lifted the restrictions on its roads. As a result, although appellant was delayed in transporting the rock to the east side, the haul routes did not change. With respect to transporting material from the Woods Vine Quarry to the west side of the river, appellant had to change the haul routes from those originally planned.

45. By letter dated 30 May 2000, the ACO, in response to appellant's letter of 24 May 2000, informed appellant that the Corps and GCID were signing a letter of intent with both Butte and Glenn Counties addressing the road damage issue resulting from the construction of the subject project. Chec Consultants was to begin the road survey on 30 May 2000, and appellant was requested to provide Chec's report to the Corps as soon as possible. (R4, tab 7(O); tr. 1/67)

46. On or about 7 June 2000, the Army Chief of Engineers executed a "Finding Pursuant to 33 U.S.C. § 701r-1(b)," which provided in pertinent part as follows:

> 1. Pursuant to authorization in the Flood Control Act of 1917 (39 Stat. 949) approved March 1, 1917, as amended, the Government is constructing the Glenn-Colusa Irrigation District (GCID) riverbed gradient facility in the Sacramento

River, California. Implementation of the project may result in significant, non-negligent damages to local county roads in Glenn County and Butte County, California, due to the hauling of construction materials. Repair of project-related damages to public roads falls within my statutory authority pursuant to 33 U.S.C. § 701r-1(b) when it is determined to be in the public interest to utilize existing public roads as a means of providing access to the authorized project. Because no suitable private roads currently exist that would provide the necessary access, and because the undertaking to construct such roads may result in significant environmental impacts, real estate acquisitions, and project delays, utilization of the existing public roads is determined to be in the public interest.

2. Further, because the cost to repair project-related road damages is estimated not to exceed $600,000 versus the expected cost of several million dollars to construct private access roads, utilization of existing public roads would result in a substantial Federal cost savings. The extent of necessary repairs will be determined by verifying actual, non-negligent damages attributable to this construction contractor's use of the affected roads through a qualified third party assessor. The third party assessor will survey road conditions before and after construction and provide a report regarding what repairs would be necessary to bring the roads back to pre-project condition. The project's non-Federal Sponsor, GCID, has expressed its intent to cost share the repairs in accordance with the cost sharing requirements of the project.

....

4. I find that repair of project-related damages to county public roads in Glenn County and Butte County, California, is necessary to implement the GCID riverbed gradient facility project. I hereby include the necessary road repairs in the authorized project and assign such repairs as a project construction cost to be cost shared in accordance with the cost sharing requirements of the project.

(Ex. A-5)

47. The government, in coordination with the GCID, entered into an agreement with Butte County regarding the use and repair of the Butte County roads in the process of constructing the Riverbed Gradient Facility Project (ex. A-1). Under this agreement, the county would allow access to these roads by issuance of a Butte County Encroachment Permit. Once access was allowed by Butte County on its roads, Nordic was able to take the shorter routes, although at slower speeds, from both Paynes Creek Quarry and Woods Vine Quarry down state road 99 to both west and east sides of the project site. (Ex. A-21; tr. 2/ 27-33, 34-39) The Corps, or its contractor, would perform the needed repairs as a result of the use of the roads for the project, and that the type and extent of necessary repairs would be determined by a third party consultant, Chec Consultants on the basis of a pre- and post-project Pavement Condition Index.

48. Appellant planned to start construction on the east side because there was a large amount of dirt on that side that needed to be removed, and there was clearing and grubbing and removal of an orchard required, together with some rock placement out of the water. (Tr. 1/150-54) There were not the environmental problems on the east side and so it was easier to start there. However, once Butte County passed its ordinance on 14 April, appellant had to stop its work on the east side of the river and move the majority of its operations to the west side of the river. There was some road construction, approaches to the bridges, improvement of haul routes, preservation, and installation of signs and fences. There were a number of areas in the project site on the west side in which appellant could not enter with its equipment and personnel. According to the schedule attached to pay estimate no. 3 (ex. A-8 at 2 of 8), type I riprap was scheduled to be placed on the west side of the river beginning on 5 June 2000. Had both sides been available, appellant could have worked simultaneously on both sides of the river. As presented in this pay estimate and schedule, completion of the placement of type II riprap on the east side was predicted for 20 September 2000 and completion of type I riprap placement on the east side was 5 August 2000 (ex. A-8 at 1 of 8). Type I stone is the larger and heavier stone and takes longer to place because of its size and the bucket capacity.

49. The schedule attached to pay estimate no. 4, reflects delayed work on the east side of the river due to the issue with the Butte County roads and due to appellant waiting for the government's decision on the revetment trench. (Ex. A-8 at 3 of 8; tr. 1/154-56) The placement of type I riprap on the east side was predicted to start on 10 July 2000 and to be completed on 5 August 2000. Type II riprap placement was scheduled to begin on 20 May and be completed on 20 September 2000. There was no change to these completion dates from pay estimate no. 3.

50. Deliveries of type I riprap to east side began in July from the Paynes Creek Quarry, and in June from the Vina Quarry. (Ex. A-9 at 3 of 3; tr. 1/156-59) Type II riprap deliveries began in July to the east side from the Paynes Creek Quarry, and in June

from the Vina Quarry. Appellant usually started placing the rock within a day after its delivery. Most of the type II riprap was placed above the heavy flow of the river and used for bank protection. Type I riprap was placed in the bottom of the river in the fish growings.

51. According to the construction progress chart attached to pay estimate no. 5, dated 1 August 2000, the estimated date for the completion of placement of type II riprap was 20 September 2000 for the east side of the river, and estimated completion for the placement type I riprap on the east side was 12 August 2000. (Ex. A-8 at 4 of 8; tr. 1/160) There was some type II riprap that could be placed before placement of type I riprap placement was completed. However, as a general rule, the schedule called for placing the type I riprap in the bottom of the river, and then return to place the type II riprap on the bank. It was important to complete the in-river work first, before there was a fish-window problem. There was no fish-window problem with type II riprap.

52. Appellant's construction progress schedule for pay estimate no. 6, dated 1 September 2000, reflected estimated completion of placement of type I and type II riprap on 20 August 2000 on the west side. (Ex. A-8 at 5 of 8; tr. 1/161-62) This included the placement of type I riprap for the bridge system. The decision on the revised revetment trench did not impede the placement of either type I or type II riprap. Nevertheless, notwithstanding the projected scheduled progress, according to the pay estimate schedule, this work was not completed as of 1 September 2000.

53. The schedule attached to pay estimate no. 7, dated 1 October 2000, reflected appellant's projected completion of the placement of type I riprap on the east side on or around 20 September 2000. Similarly, the schedule reflected the projected completion date for type II riprap as approximately the same date. (Ex. A-8 at 7 of 8; tr. 1/162-64) The completion dates for the type I and type II riprap were projected for the west side as approximately 10 and 22 September respectively (ex. A-8 at 8 of 8). Nevertheless, actual delivery of type I riprap to the east side of the river in October 2000 from Vina Quarry was 15,372 tons (ex. A-9; tr. 1/169-70). Similarly, there were deliveries of type II from both Vina Quarry and Payne Creek Quarry in October to both sides of the river.

54. As reflected in the pay estimate no. 7 construction progress chart, placement of type I riprap on the east side was projected to start on or about 10 July 2000, and be completed on 5 or 6 August 2000, or approximately four weeks (ex. A-8 at 7 of 8; tr. 1/168-73). However, as reflected on this chart, the actual completion was approximately 20 September 2000, or about 11 or 12 weeks. Similarly, with respect to the delivery and placement of type I riprap on the west side of the river, the estimated period was approximately five weeks, with completion scheduled for early July, 2000, but in actuality, completion of placement of the riprap was on or about 10 September, or approximately 12 or 13 weeks to complete. (Ex. A-8 at 8 of 8; tr. 1/173-74)

55. Nothing changed either with respect to the haul route or the timing for the hauling of riprap from the Paynes Creek Quarry to the west side of the project (tr. 2/44). However, with respect to hauling of riprap from the Paynes Creek Quarry to the east side of the project, although the planned route did not change, the timing when appellant could haul the riprap on this route did change, and it was not until the Butte County road restrictions were lifted in July 2000 that appellant was able to use the route it planned to use (tr. 2/44-46).

56. With respect to the hauling from the Woods Vina Quarry to the east side of the river, Nordic was able to use the routes that it had initially planned to use, that is, state highway 99, Hampton Nord Cana Highway, Wilson Landing Road to the job site after the Butte County road restrictions were lifted. (Ex. A-21; tr. 2/46-48) However, there were differences for the hauling from the Woods Vina Quarry to the west side. Appellant originally planned to use a haul route from Woods Vina Quarry proceeding down the Nord-Cana Highway to Highway 32. After the restrictions were lifted, appellant had to use Wilson Landing Road and Meridian Road to Highway 32 to the west side of the river. Nordic ultimately had to travel approximately 9 more miles each way to get to the west side than initially planned. This route also required a slower speed because of the turns in the roads.

57. During the period in which Butte County had imposed the road restrictions, Nordic's haul route from the Woods Vina Quarry to the west side of the river proceeded down South Avenue, across the Sacramento River to I-5, to Wyo Ave and up the Canal Road (ex. A-21; tr. 2/48).

58. As a result of the road restrictions, the changes in planned haul routes, and the effect those changes had on Nordic's haul times and costs, Nordic negotiated price increases with the owner operator truckers which were performing the bulk of the hauling services from the quarries to the project site. There was no difference in the rates Nordic had been paying for the hauling of rock from Payne Creek Quarry to either side of the project site. (R4, tab 7(R); tr. 2/48-53)

59. The Woods Vina Quarry did not produce any rock for the project during May 2000 because Nordic wanted to take the less expensive haul to the east side of the project and Woods Vina was the quarry which was closer to the east side of the job site. Until appellant was ready for more rock and tonnage, Nordic could supply the rock from Payne Creek Quarry and would start to haul from Woods Vina only when that rock and tonnage was needed. (Tr. 2/54-55)

60. Nordic submitted a proposal for equitable adjustment in the amount of $266,009 to appellant by letter dated 2 December 2000 (R4, tab 7(R); tr. 2/97-98, 131). Appellant in turn forwarded the proposal to the Corps. According to Nordic:

> Nordic's subcontract with McAmis required Nordic to produce 50% of the riprap for the project. Carl J. Wood Construction, Inc. by similar subcontract, was to produce the other 50%. Nordic furnished 110,483.27 tons and Woods furnished 111,597.00 tons; at [sic] total of 222,080.37 tons.
>
> Nordic mobilized to the Paynes Creek Quarry in April, 2000 with the capability and capacity to produce approximately 1,500 ton to 2,000 ton per day as required by the subcontract with McAmis. Based on the 110,483.27 tons produced by Nordic at 1,500 ton per day production required 74 days; not quite 3 months at 6 days per week. Therefore, Nordic could easily have produced the riprap by the end of July (50% April, May, June and July). Nordic did in fact accomplish this production. Nordic demobilized some of its equipment leaving basically the equipment required to load out the riprap. Nordic was to complete loading and hauling from Paynes Creek by the end of August. Sufficient riprap for McAmis' September placing would be stockpiled in August at the site with any minor residual requirement coming from the Vina Quarry.
>
> However, due to the lack of access to the East side of the project, redesign and scheduling delays by others, Nordic was required to maintain its presence and loading capabilities at its Paynes Creek quarry thru November 9, 2000.

(R4, tab 7(R)) Nordic's accounting record showed the cost of operating Paynes Creek Quarry for the months of June through November 2000 as $147,173.00 (R4, tab 7(R) at 2-12; exs. A-19, -27; tr. 2/90-91, 97-98). Nordic only hauled rock from that quarry a few days in November. Indeed, Nordic hauled 40 percent of the total rock deliveries to the site from both Paynes Creek Quarry and Woods Vina Quarry during September, October, and November 2000. (Exs. A-9, -17; tr. 2/100-01) This included quantities in excess of the estimated quantities specified in appellant's contract with the government, that is, a total of 139,311 tons of type I riprap and 82,769 tons of type II riprap, the actual quantities delivered. The added costs for maintaining operations at the Paynes Creek Quarry during the months of September, October, and November 2000 were the result of the delays to the project due to the lack of access to the east side of the project because of

the road restrictions imposed by Butte County. In addition to costs associated with keeping the Paynes Creek Quarry operational throughout September, October, and into November, Nordic had increased cost associated with the road restrictions on the Butte County road, both prior to the agreement between the Corps and the County, and after the agreement due to increased trucking haul bills which were based on per ton prices, and because truckers were required to go slower on the Butte County roads, the price of fuel had increased, and the routes (prior to the agreement) were different than reflected on drawings C-1 and C-2. (R4, tab 7(R); ex. A-18; tr. 2/90-98)

61. On 20 April 2000, appellant submitted to the government the quality compliance sample and test (R4, tab 8(A)). The government conditionally approved stone material pending further tests. Nordic had previously submitted to appellant the Kleinfelder and Fiberquant Analytical Services test results of the Paynes Creek Quarry rock which tests were performed on or before 18 April 2000 (R4, tab 8(b)).

62. In early May to mid-May, Nordic delivered rock from the Paynes Creek Quarry to the stockpile at the job site that appeared, on visual inspection to the quality control inspector, to appellant, and to the government, to be out of specification and bad (R4, tabs 9(A)-(K); tr. 2/84-85). Appellant's Quality Control Report (QCR) and daily log No. 67, dated 8 May 2000 stated:

> Rock delivered today looks bad. Called the quarry and told Nordic to clean up rock. Too much vesicular rock being delivered to the site.

(R4, tab 8(B)) The government's Inspectors Quality Assurance Report (QAR) No. 37 for 9 May 2000, stated that:

> On site inspection this morning at approx 0730 hrs checking the Type 1 rip rap being delivered. It seemed apparent to me that the material differed from the rock being delivered and placed last week. I called this to the attention of the QC (Leo Santa Cruz). We concurred after a closer inspection.

(R4, tab 8(C))

63. Over the next week, Nordic delivered type I riprap to the job site, which according to appellant's quality control (QC) appeared to be bad, wormy, and out of specification. Appellant's QC and the government's quality assurance (QA) inspector agreed that the rock should be segregated separating the good rock from the bad, and ultimately returning the bad rock to the Paynes Creek Quarry. (R4, tabs 8(B)-(J))

64. According to appellant, the government rejected 531.32 tons of type I riprap and required Nordic to remove it from the stockpile and haul it back to Paynes Creek Quarry (R4, tab 9(K)). However, according to the government's QAR No. 40, dated 12 May 2000:

> Drew Perry called to say that Payne's Creek Quarry is not [being] rejected based upon his and the [government's] geologist's inspections yesterday, but that the contractor is going to have to do a better job of inspecting and rejecting bad loads.

(R4, tab 9(G) at 2) There had been some riprap in the pile that Nordic delivered to the site which was regarded as being in compliance with the specifications. Nordic rented an excavator and brought an operator in to separate the riprap that appeared to be bad and out of specification from the good riprap that was accepted. This rock that had been rejected subsequently was tested by Kleinfelder and passed all the tests reflecting its compliance with the specifications. Nordic was never paid for the removal and return of the rock to the site.

65. By letter dated 9 June 2000, Nordic requested reimbursement for the cost of testing rock from the Paynes Creek Quarry for quality compliance. (App. supp. R4, tab 7 at 27; tr. 2/82-83) The amount sought by Nordic was $1,720.00, which included two Kleinfelder invoices in the amounts of $335.00, and $1,285.00 respectively, and an invoice from Fiberquant in the amount of $100.00. Attached to this letter were the invoices from Kleinfelder and Fiberquant. The first Kleinfelder invoice, in the amount of $1,285.00, was for services performed 18 March 2000 through 14 April 2000. In light of the timing of the services performed by Kleinfelder and Fiberquant, we find that these were the tests which were performed in accordance with paragraphs 2.1.1, 2.1.2, 2.1.3, 2.1.4, and 2.1.5 of Section 02271 of the Technical Specifications. The second Kleinfelder invoice in the amount of $335.00 was dated 9 June 2000, for services performed 15 April 2000 through 12 May 2000. The Fiberquant invoice was dated 25 April 2000, but does not identify the date when the services were performed. The government had previously had its own laboratory in Sausalito, CA, do the testing, and the contractors hauled samples to that laboratory to be tested. Nordic called a Corps representative asking him for an approved soils laboratory to do the compliance testing of the rock, and was told that the government had used several referenced laboratories, including Kleinfelder.

66. As we found above, Nordic delivered rock from the Paynes Creek Quarry in early to mid-May 2000 that appeared on visual inspection to be bad and out of specification. Appellant's QCR, dated 8 May 2000 and the government's QAR daily log for 9 May 2000 reflected the rejection of this type I riprap and the requirement that Nordic remove it from the stockpile. The Kleinfelder Laboratory Test Result Reports

were dated 17 May and 24 May 2000 for tests performed on samples dated 16 May 2000 (R4, tab 8(H)); app. supp. R4, tab 7 at 23-25). The laboratory test report dated 24 May 2000, stated that three of the samples tested were from material collected from a small stockpile which was rejected at the project site and returned to the quarry. There was no invoice attached to Nordic's letter of 26 June 2000 from Kleinfelder for this testing (R4, tab 9(K)). However, Nordic's vice president testified that he did not submit an invoice for Kleinfelder for the testing of the rejected rock, that the government paid for the testing of the rejected rock, and that the Kleinfelder and Fiberquant invoices in the total amount of $1,720.00 pertained only to the initial compliance testing of rock prior to the first deliveries from the Paynes Creek Quarry to the job site.

67. On 26 June 2000, Nordic, noting that the government had rejected a total of 531.32 tons of type I riprap which had been delivered to the site from the Paynes Creek Quarry, asserted a claim in the amount of $13,813.75, and requested appellant to forward this claim to the government. (App. supp. R4, tab 7 at 18-25, tab 9(K) at 3; tr. 2/83-84) Nordic's claim reflected the asserted costs for 531.32 tons of riprap material delivered to the site from the Paynes Creek Quarry, the costs for hauling the riprap to the job site, and the cost of hauling the rejected riprap back to the Paynes Creek Quarry. It also included $1,772.36 for the rental excavator to separate the riprap at the site, the labor costs for the operator with pickup truck, and overhead and profit additions. Samples of rejected rock from the Paynes Creek Quarry were tested by Kleinfelder and determined to be in compliance with the specification as set forth in paragraph 2.1.2 of Section 02271.

68. Appellant forwarded Nordic's claim on 11 July 2000 to the government's resident engineer, stating:

> On May 15, 16, 30, 2000 Corps of Engineers on site personnel rejected 531.32 tons of Type I riprap that was delivered to the west side of the project because they did not think it met the contract specification. J. E. McAmis, Inc. and our supplier Nordic Industries had no choice but to sort, reload, and haul this riprap back to the Paynes Creek Quarry.
>
> This rejected rock was re-tested again by Nordic Industries and the tests showed that the riprap did meet the Corps of Engineers specifications. This rejected rock should have been accepted and therefore, J. E. McAmis, Inc. and Nordic Industries need to be compensated for the additional costs associated with sorting, reloading and hauling this riprap back to the quarry.

(R4, tab 9(K))

69. The ACO in the Corps of Engineers Resident Office rejected appellant's request for an equitable adjustment for the cost relating to the sorting, reloading, and hauling of the rejected riprap back to the Paynes Creek Quarry as being without merit. (R4, tab 9(L)) According to the ACO:

> J. E. McAmis, Inc. is responsible for monitoring and controlling all materials both at the quarry and on the project site. Mr. Chartrand and Mr. Santa Cruz made visual inspections of riprap delivered to the project and concluded it did not resemble riprap previously delivered or approved. J. E. McAmis, Inc. contacted Nordic who indicated they had not been vigilant about sorting out vesicular rock and by mistake allowed rock to be sent to the project site that otherwise would not have been shipped. Nordic went on to state that the "original vein of material had been exhausted and a new area of excavation was being investigated."
>
> The Corps of Engineers raised concern that rock delivered to the project site did not appear to be the same rock submitted and approved or that the rock met contract specifications. J. E. McAmis and Nordic made the decision to segregate and remove questionable rock from the project site. There was never a question from McAmis regarding extensive testing to show rock met the specifications. J. E. McAmis was concerned about schedule and the impact of questionable rock blocking access to previously stockpiled rock and maintaining a consistent rock placement activity. J. E. McAmis made decisions to reject additional materials independently of the Corps of Engineers as part of your Quality Control Program.

70. As we found above (finding 60), Nordic submitted to appellant its proposal for an equitable adjustment on 2 December 2000, for the increased costs to produce the riprap at its Paynes Creek Quarry and haul the riprap, plus overhead and profit (R4, tab 6). Nordic subsequently submitted its 2 December 2000 request for an equitable adjustment as a properly certified claim on 6 August 2002 (*id.*). Nordic requested appellant to forward this certified claim to the government and requested that appellant not sign a final release for the project pending resolution of Nordic's issues.

71. Nordic, also on 6 August 2002, certified its claim in the amount of $1,720.00 for its testing costs in connection with the initial compliance testing for the rock to be

delivered from the Paynes Creek Quarry, which claim had been previously presented to the government as a request for reimbursement of its compliance testing costs on 9 June 2000. Nordic also requested that appellant forward its certified claim to the government and that it not sign any final release for the project until all of Nordic's issues had been resolved. (R4, tab 6)

72. Additionally, on 6 August 2002, Nordic forwarded its previously asserted claim of 26 June 2000 for $13,813 for costs associated with the rejection of the riprap from the Paynes Creek Quarry, including its delivery to the job site and removal from the job site, the rental of the excavator to separate the riprap at the job site, and cost of the operator, together with overhead and profit. (R4, tab 6) As in the other two claims, Nordic had certified this claim and requested that appellant forward it to the government, and that it not sign any final release until all of the pending Nordic issues had been resolved.

73. Appellant did so by certified claim dated 20 August 2002 referencing the three claims submitted by Nordic, totaling $281,542.75 (R4, tab 6).

74. The contracting officer issued a final decision denying appellant's claims for increased quarry and haul costs, the cost of testing of the rock, and the claim for the cost of disposing rejected rock in their entirety (R4, tab 2). Appellant timely appealed the denial of its claims.

## DECISION

Appellant first contends that the government warranted the availability of the haul routes and site access depicted on contract drawings C-1 and C-2. In this regard, appellant argues that such a warranty can be implied from the contract language and surrounding circumstances; that it need not be expressly stated in the contract. First, these contract drawings specifically illustrated which haul routes were to be used by appellant in accessing the gradient facility. Appellant understood prior to bidding on the project that these drawings were to be read in tandem as they both regarded the site access and haul routes as indicated in their associated title blocks. Moreover, construction access note 1 on drawing C-2 stated that the construction site "SHALL BE ACCESSED ONLY BY ROADS DESIGNATED ON THE DRAWING" (finding 3). As a result, appellant interpreted the drawings as the only routes the government would permit for access to the site, relied on that interpretation and planned and prepared its bid accordingly. However, the Urgency Ordinance promulgated by Butte County resulted in all meaningful access to the east side of the gradient facility blocked thereby causing substantial increase in the cost of hauling riprap. Although not clearly argued, the thrust of appellant's argument here is that when the haul routes designated as such on the contract drawings became restricted or unavailable due to the Butte County Urgency

Ordinance, appellant was entitled to an equitable adjustment under the Changes clause of the contract.

The government, on the other hand, contends that the Permits and Responsibilities clause obliges the contractor to comply with any federal, state, and municipal laws, codes, and regulations applicable to the performance of the work. The government, therefore, contends that the government is not obligated to reimburse additional costs under this firm fixed-price contract, which additional costs were incurred as a result of local government action in absence of any contractual basis by which the government assumed responsibility, explicitly or implicitly. We are not persuaded that the Permits and Responsibilities clause is dispositive of the dispute in this case.

In *Dravo Corp.*, ENG BCA No. 3800, 79-1 BCA ¶ 13,575, discussed by the parties here, the issue on entitlement was whether the Washington Metropolitan Area Transit Authority (WMATA) had warranted the specific designation in the contract of certain space as work/storage space for a muck bay. The contract drawings depicted certain areas as "contractor's work/storage area," which included an area along the side of 7th Street just south of D Street, which the appellant Dravo intended to use as a muck bay which was an opening in the deck through which material was brought to the surface and where material from the tunnels was loaded onto trucks to be hauled to disposal sites. Because this was a public area, District of Columbia regulations required the appellant to obtain a permit for the muck bay from the Department of Highway and Traffic (DHT). However, before the appellant could apply for the necessary permit, an organization of merchants objected to the proposed location of the muck bay, and the appellant was required to relocate the muck bay. When the appellant sought an equitable adjustment for the relocation of this muck bay, WMATA denied both the request and claim on the basis that appellant was responsible for obtaining the necessary permits and that the refusal of the DHT to issue the desired permit did not entitle the appellant to an equitable adjustment under the contract. The Board held that the case turned on the extent to which WMATA warranted the availability of the work/storage areas designated on the contract drawings and described in the specifications.

The Board held that it would be unreasonable to read the boilerplate Permits and Responsibilities clause to bar the appellant's recovery from WMATA for its denial of the use of the 7th Street and D Street location for the muck bay for the tunnel excavation. Indeed, the Board stated that it did not agree with WMATA that the Permits and Responsibilities clause was dispositive of the case. Quoting from *ABC Demolition Corp.*, GSBCA No. 2288, 68-2 BCA ¶ 7096 at 32,869-70, a case which according to the Board was somewhat similar, the Board said:

> If the Government's contention was accepted, it would mean that the Superintendent of the National Park Service, who was

> not a party to the contract, could have refused to issue a special trucking permit which would have made performance of the contract impossible, or he could have imposed such onerous restrictions on the successful bidder that performance would have been made extremely difficult and expensive....
>
> ....
>
> ...Whatever the outer limitations of the warranty of availability in this case, this use falls clearly within its ambit. Since the warranty applies it is not significant that the warranted use was prevented by a third party rather than by WMATA.

*Dravo*, 79-1 BCA ¶ 13,575 at 66,516.

The government here argues that it is not obligated to reimburse appellant's additional costs which were incurred as a result of the action of Butte County in a firm, fixed-price contract in absence of any contractual basis by which the government assumed responsibility, either explicitly or implicitly, inasmuch as the Permits and Responsibilities clause imposes on the contractor the obligation to comply with any Federal, State and municipal laws, codes and regulations applicable to the performance of the work, citing *Oman-Fischbach Int'l, A Joint Venture*, ASBCA No. 44195, 00-2 BCA ¶ 31,022. The government quotes *Oman-Fischbach,* 00-2 BCA at 153,218, for the proposition that "[u]nless the parties contract in unmistakable terms to shift the risk of increased costs due to acts by a third-party government, no liability on the part of the Government attaches from such acts." Here, the government distinguishes our decision in *Oman-Fischbach* from the *Dravo* decision, on the basis that there was an implied representation in *Dravo* that "the Government would secure access from the non-party local government because the Government gave no 'hint of a specific restriction' to the prescribed access." What the government argues here is that the government did not in this contract warrant "unfettered access to the East-side via Butte County's road system." (Gov't br. at 15)

The government in *Oman-Fischbach*, awarded a firm, fixed-price contract for the construction of fuel tank facilities at Lajes Field in the Azores. Under the terms of an international agreement, the base and supporting facilities were under the command of the Portuguese Armed Forces. The specifications required in pertinent part that the contractor was to dispose of waste materials in an area as directed by the contracting officer, which, except for soil impregnated with lead, was to be one of the following generally designated sites indicated on one of the contract drawings. Neither the specified drawing, nor any other drawing, depicted these waste site locations. The contractor planned to use one of the sites which allowed the use of on-base streets. There

was nothing in the record to indicate this intention. The contractor disposed of waste materials at one of the waste disposal sites identified in the specification or in other locations not delineated in the contract, but which were advantageous to the contractor in terms of cost and time. During contract performance, the Portuguese converted an unsecured area of the base to a secured area and closed the gate, thereby effectively preventing the contractor from using the on-base route to get to the site which appellant allegedly planned to use. The contractor conceded that there were no contractual documents indicating or depicting any particular route to any of the three disposal sites identified in the specifications as possible sites that could be designated by the contracting officer for disposal of waste materials. Rather, the contractor asserted that there was an implied warranty due to the fact that, first, the contract specifications designated three possible waste disposal sites and provided that the contracting officer could direct the contractor to use one of those sites, and, secondly, that the contract specified an eleven-hour work day, six days a week. We held that there was no warranty and that the contractor erroneously read the specification as permitting it to choose the least costly of the three dump sites for disposal of excavated material. As we pointed out in examining cases in which the courts or boards had found explicit or implied warranties in similar situations, in those cases the Court or Board found something much more substantial than what the contractor would have us use to find a warranty.

On appeal, the Court in *Oman-Fischbach Int'l v. Pirie*, 276 F.3d 1380 (Fed. Cir. 2002), affirmed our decision, ruling that:

> Thus, to be successful Oman must establish that the Navy provided a warranty either explicitly or implicitly in its contract by showing that: "(1) the Government assured the plaintiff of the existence of a fact, (2) the Government intended that the plaintiff be relieved of the duty to ascertain the existence of the fact for itself, and (3) the Government's assurance of that fact proved untrue." ... The board concluded that Oman could not establish a warranty in this case because the contractual language is contrary to such an interpretation. We agree.

*Id.* at 1384. The contractor, Oman, asserted, in part, that the implied warranty was created because the Navy used a route through the Lajes Base during the pre-bid site visit and made general comments about obeying traffic regulations and keeping the roads clean.

The Court held that there was no warranty and no breach of implied warranty, and that the government was not liable for the actions of the Portuguese in closing a gate as it converted an unsecured area of the base to a secure area. The settled rule is that absent

fault or negligence on the part of the government or its representatives, or an unqualified warranty on the part of the government or its representatives, the government is not liable for damages resulting from the action of a third party. In holding that there was no warranty, the Court relied, in part on the FAR 52.236-3, SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984) clause, the same clause included in the instant subject contract in this appeal. As the Court held:

> Paragraph (a) [of the clause] makes clear that the burden of determining the availability of roads is the responsibility of the contractor, and paragraph (b) disclaims representations made by officers or agents before the execution of the contract. This includes the representations made during the pre-bid site visit.

*Oman-Fischbach*, 276 F.3d at 1385. The Court also relied on a provision in the solicitation in *Oman-Fischbach*, "Conditions Affecting the Work," which provided in pertinent part that bidders should visit the site and take such steps as may reasonably be necessary to ascertain the nature and location of the work, and the general and local conditions affecting the work. This provision stated that the government will assume no responsibility for any understanding or representations concerning the conditions made by any of its officers or agents prior to the execution of the contract. The Court held that the contractor bore the responsibility for determining what roads would be available to it to haul the rubbish and debris, and that the exculpatory language in the provision was applicable to the representations upon which the contractor relied. Moreover, Oman had not identified any contractual provision under which the Navy assumed the increased costs resulting from the actions of the Portuguese Armed Forces.

We hold that appellant here has established that the government (1) assured appellant of the existence of a fact, namely, the existence of haul routes by which access to the project site was restricted; (2) that by specifying the haul routes, intended appellant to be able to proceed with the project without establishing its own haul routes and negotiating with the three counties to obtain access to the site by the contractually specified routes; and that (3) notwithstanding the government's assurance of the availability of these haul routes and urgings to appellant to ignore Butte County's Urgency Ordinance and proceed with the project, the government's assurance of the availability of the specified routes without additional post-contract limitations applicable to appellant proved untrue.

Moreover, the facts and contract indications in the present appeal are distinguishable from those in *Oman-Fischbach*. There, the contract did not contain any specified haul routes, and it left ambiguous which disposal site was to be used by the contractor. *See D & L Constr. Co. v. United States*, 185 Ct. Cl. 736, 749-53, 402 F.2d

990, 997-99 (1968) (holding that the government implied a warranty where the contract documents contained a small vicinity map depicting the main roads in the vicinity of the White Sands Missile Range, the contract provided that the government would make available existing off-site improvements, such as roads, and that the contractor could use only established roadways or construct temporary roads as authorized by the contracting officer) distinguished in *Oman-Fischbach*, 276 F.3d at 1384. Further, in *Oman-Fischbach*, pursuant to the Portugal Technical Agreement of 1984, in implementing the Defense Agreement, the Lajes Air Base and its supporting facilities were under the command of the Portuguese Armed Forces. Neither the Portuguese Armed Forces, nor any other Portuguese entity was a party to the contract. Moreover, although some of the cautionary language in the *Oman-Fischbach* solicitation provision, "Conditions Affecting the Work," may have been reflected in the Site Investigation and Conditions Affecting the Work clause of appellant's contract, the instant contract did not have a similar solicitation provision with that specific language as contained in the *Oman-Fischbach* solicitation. All these factors, according to the Court in *Oman-Fischbach*, prohibit an implied warranty of access to a route through the Lajes Base.

While we agree with the government that the contract is to be interpreted as a whole giving reasonable meaning to all of its provisions, we hold that there is nothing ambiguous in the depictions of the haul routes in contract drawings C-1 and C-2, and specifically in the "CONSTRUCTION ACCESS NOTES" on drawing C-2, and more specifically, in Note 1. Paragraph 1.6.2 of Section 01500 of the specifications required the contractor to investigate the existing conditions of the highways and county roads planned for haul routes, to verify the allowable load limits on the roads and bridges, and to contact the Public Works Departments of each of the counties listed, that is, Butte County, Glenn County, and Tehama County.

As we found above, appellant and Nordic examined the contract drawings that depicted the haul routes prior to submitting appellant's bid and concluded that the project site could be accessed only by these routes. Moreover, as we found, Nordic's dispatcher drove the actual routes depicted in the drawings, noting the speed limits, truck crossings, weight limits, and signs that indicated that trucks were not allowed. He was also familiar with the haul routes prior to undertaking this project. As required by paragraph 1.6.2 of Section 01500 of the specifications, he contacted the Butte county officials to discuss the routes Nordic planned to use. Indeed, the ACO requested appellant to provide information regarding its on-site traffic control plan and its use of public roads, and suggested that appellant and the ACO's staff conduct a joint inspection of the proposed haul routes to verify appellant's videotaping of the existing conditions. Under these circumstances, appellant's interpretation of the drawings and specification is reasonable, and must be adopted rather than that of the government, the drafter of the contract. *Bennett v. United States*, 178 Ct. Cl. 61, 64, 371 F.2d 859, 861 (1967).

The government further argues that under the Permits and Responsibilities clause and the contract, appellant "*assumed the risks* for and was required to work around any public road restrictions." According to the government, there being no warranty, there was no breach. We disagree, notwithstanding the government's argument that the ordinance was unenforceable because it was preempted by state law. The government's first reaction to the Butte County Urgency Ordinance was to inform appellant that the ordinance did not apply to this project and that appellant could ignore the ordinance or weight limit and proceed with the project as planned. Although this enforcement of the ordinance prevented appellant from transporting the rock on the Butte County roads identified in the contract drawings to the east side, the government adhered to its position with respect to these roads and the ordinance from 19 April 2000 when appellant discovered the newly promulgated ordinance to 7 June 2000 when the Army Chief of Engineers executed a Finding Pursuant to 33 U.S.C. § 701r-1(b) authorizing the repair of project-related damage to county roads in Glenn and Butte Counties and the subsequent agreement between the government and the county regarding the use and repair of the Butte County roads (finding 46). That the government's interpretation of the contract drawings regarding the haul routes is consistent with appellant's, militates against any argument here that there was no implied warranty with respect to access to the project site, thereby forcing appellant to bear the risk of increased costs due to the enforcement of the Urgency Ordinance. Indeed, to suggest here that appellant find its relief from the enforcement of the ordinance through injunction action in state courts under state law by *writ of mandamus* is unreasonable.

Similarly we fail to find the government's arguments with respect to the sovereign acts doctrine persuasive here. According to the government, "[t]he Government is not liable for the *sovereign acts* of Butte County" (gov't br. at 17). Of course it is not, but that is not the point here. Moreover, the government misapplies the defense of sovereign act to the claim here. Indeed, the government has not directed our attention to any precedent or legal theory that applies the doctrine to a situation as presented here where the U.S. government is the contracting party and the asserted sovereign is a state or local government authority. *Orlando Helicopter Airways, Inc. v. Widnall*, 51 F.3d 258 (Fed. Cir. 1995), cited by the government does not advance its position.

Thus, for example, in *Deming v. United States*, 1 Ct. Cl. 190 (1865), the government contracted with the plaintiff, Deming, for rations to be furnished daily to the Marine Corps during the year 1861. The U.S. Congress subsequently imposed additional duties on articles which constituted a part of the rations to be furnished. Deming performed the contract, but suffered a loss due to the additional duties. A similar contract was awarded Deming for rations during the year 1862, and the U.S. Congress passed a legal-tender act whereby the cost of the rations increased. Deming again performed the contract and suffered a loss, thus his claim for his increased costs in the performance of these two contracts, on the basis that the government, through these enactments changed,

and in effect, imposed new conditions on the performance of the contract. In denying the claim and Deming's assertions, the Court held:

> This statement of his case is plausible, but is not sound. And herein is its fallacy: that it supposes general enactments of Congress are to be construed as evasions of his particular contract. This is a grave error. A contract between the government and a private party cannot be *specially* affected by the enactment of a *general* law. The statute bears upon it as it bears upon all similar contracts between citizens, and affects it in no other way. In form, the claimant brings this action against the United States for imposing new conditions upon his contract; in fact he brings it for exercising their sovereign right of enacting laws. But the government entering into a contract, stands not in the attitude of the government exercising its sovereign power of providing laws for the welfare of the State. The United States as a contractor are not responsible for the United States as a lawgiver. Were this action brought against a private citizen, against a body corporate, or against a foreign government, it could not possible be sustained. In this court the United States can be held to no greater liability than other contractors in other courts.

*Id.* at 191.

Similarly, in *Jones v. United States*, 1 Ct. Cl. 383, 384-85 (1865), the Court expanded on the reasoning of *Deming v. United States*, making clear the law that it is the government in its capacity as contractor and as lawgiver that gives rise to defense of sovereign act, held:

> The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct, or violate the particular contracts into which it enters with private persons. ... This distinction between the public acts and private contracts of the government – not always strictly insisted on in the earlier days of this court – frequently misapprehended in public bodies,

> and constantly lost sight of by suitors who come before us, we now desire to make so broad and distinct that hereafter the two cannot be confounded; and we repeat, as a principle applicable to all cases, that the United States as a contractor cannot be held liable directly or indirectly for the public acts of the United States as a sovereign.

As defined in *Orlando Helicopter Airways*, 51 F.3d at 262:

> A sovereign act is public and general in nature, not private and contractual.... The focus of the inquiry is thus the nature of the conduct, not the identity of the government agent responsible.... Moreover, no express or implied provision of the contract obligates the government to pay others for a criminal investigation it undertakes.

Thus, in *Orlando Helicopter*, the act that gave rise to the claim was a criminal investigation of Orlando Helicopter resulting from some allegations of fraud in connection with the performance of the contract. As stated by the court, a government's exercise of police powers in its law enforcement capacity is an "ancient and fundamental indicia of sovereignty." Here, a whistle-blower accused the contractor of flight safety violations and fraud in the performance of the contract. During a criminal investigation by the Defense Criminal Investigative Service and the Department of Justice, the contracting office issued a stop work order and directed the contractor to provide a detailed response to the whistle-blower's accusations. The U.S. Attorney declined to bring charges. In affirming our decision, the Court recognized that there were costs incurred under the stop work order and the technical review that were compensable under the Changes clause, as distinguished from those costs associated with the contractor's response to the criminal investigation. We held in *Orlando Helicopter Airways, Inc.*, ASBCA No. 45778, 94-2 BCA ¶ 26,751 at 133,080:

> We agree with OHA that the Government acted in a contractual capacity when the contracting agency issued the stop work order, requested a response to the allegations, conducted the technical review, and directed the documentation and part-removal requirements at the end of that review. Those actions are not compensable under the FAR cost allowance provision cited in OHA's claim, but they may be compensable under the Stop Work Order and Changes clauses of the contract if they exceeded contract requirements and caused additional costs of performance.

> The costs of responding to the DCIS/DOJ investigation, however, are not recoverable. That investigation was undertaken by the Government in its sovereign, law-enforcement capacity.

This is in accord with the holdings of *Deming v. United States*, 1 Ct. Cl. 190 and *Jones v. United States*, 1 Ct. Cl. 383, where it is the United States acting both in its contracting capacity and in its sovereign capacity.

In *Carter Construction Co.*, ENG BCA No. 5495 *et al.*, 90-1 BCA ¶ 22,521, the firm, fixed-price contract for bank stabilization work at various locations within the McClellan-Kerr Arkansas River Navigation System required the contractor to obtain permits from the government in accordance with the Rivers and Harbors Act of 1899 and the Clean Water Act. The contractor's general permits were suspended and its permit application denied with respect to its rock loading facility and as a result, the contractor was required to seek a new loading facility distant from its original loading facility, thereby increasing its hauling costs for the rock. The Board held that the suspension and denial of permits "which would have allowed the Appellant to use its preferred loading facility were actions of the Government in its regulatory or sovereign capacity." *Id.* at 113,028. Although the Board recognized that there might be a basis of a contractual remedy for sovereign acts that adversely affect a contractor's work, there was no such remedy provided in these contracts, inasmuch as the government did not prescribe where the stone was to be obtained or how it was to be transported, or that would have in any way led a reasonable bidder to believe that a particular loading facility was available or guaranteed. *Broadmoor Corp.*, ASBCA No. 37028, 89-1 BCA ¶ 21,441, cited by the government in the instant appeal is inapposite.

As we found above, there were no restrictions noted on the haul routes which were depicted on contract drawing C-1 at the time Nordic's dispatcher plotted and drove these routes in preparation of Nordic's bid. When he contacted Butte County, as required in the solicitation, county officials were not aware of the project nor did they believe that there would be any problems with Nordic's use of those roads for the hauling of rock. It was not until after contract award and shortly before the time of appellant's mobilization that Butte County Board of Supervisors met and passed the Urgency Ordinance limiting the weight per vehicle and imposed lower speed limits. The restrictions remained in place until approximately 7 June 2000 when the Chief of Engineers executed a Finding Pursuant to 33 U.S.C. § 701r-1(b) and the government, together with the GCID entered into an agreement with Butte County regarding the use and repair of the roads. Nevertheless, we have held above that the government impliedly warranted the access to the job site and the adequacy of the haul routes. The government has not suggested or established that appellant failed to do anything it was required to do under the Permits and Responsibilities clause of the contract.

> It has long been established that while the United States cannot be held liable directly or indirectly for public acts which it performs as a sovereign, the Government can agree in a contract that if it does exercise a sovereign power, it will pay the other contracting party the amount by which its costs are increased by the Government's sovereign act, and that this agreement can be implied as well as expressed. [Citations omitted] It is also settled that although the Government is not liable for damages resulting from the action of third parties, it may be held liable if it extended to the contractor a warranty which was breached. [Citation omitted]

*D & L Constr.*, 185 Ct. Cl. at 752, 402 F.2d at 999.

Accordingly, we hold that appellant is entitled to an equitable adjustment for its increased haul costs and delay costs due to the Butte County imposed weight and speed limits on the road and appellant's lack of access to the east side of the project site.

Paragraph 2.1.1 of Section 02271 of the Technical Specifications provided that the government would test one sample of rock at its expense. The context for this commitment by the government was that when the appellant proposed a source for the stone, the contract required it to submit a sample for testing a minimum of 45 days before the time the material was required in the work. When appellant proposed to furnish stone from a source where exploratory investigation and compliance text reports or satisfactory service records were not available, the stone had to be tested for quality compliance. Appellant conceded that there were no exploratory investigations, compliance test reports, or satisfactory service records for the Paynes Creek Quarry. As a result, Nordic contacted the government's representative and inquired as to government-approved laboratories in which the testing of the rock could be done. He was given the names of several laboratories, including Kleinfelder. Nordic then provided stone sample from the Paynes Creek Quarry to that laboratory for testing prior to delivery of stone to the job site.

Appellant contends that it is entitled to recovery for the cost of testing under the terms of paragraph 2.1.1 of Section 02271 of the specification. The government concedes that it is liable for the initial tests to prove the rock source, that is, Paynes Creek Quarry, was satisfactory. According to the government, these tests should have occurred prior to the beginning of work, which would be prior to 15 April. The government further states in its brief that:

> The claim contains two invoices which appear to cover some tests conducted prior to April 14, and one invoice after April 14. If these were the initial approval tests then the Government would be responsible for these costs.

(Gov't br. 26) We have found that the Kleinfelder and Fiberquant invoices submitted with appellant's letter of 9 June 2000 applied only to the pre-delivery material compliance testing of the stone from the Paynes Creek Quarry. Accordingly, we hold that appellant is entitled to reimbursement for these pass through costs.

Appellant contends that between 15 May 2000 and 30 May 2000, the government rejected 513.32 tons of type I riprap produced by Nordic at its Paynes Creek Quarry. As a result of visual inspection of the stockpiled rock, appellant alleges that the government rejected the rock and ordered its removal from the job site. The record is not this clear, and indeed, appellant overstates the case. Nevertheless, the record does establish that according to test results from Kleinfelder and Fiberquant, the rock was in compliance with the specifications. Citing *E. W. Eldridge, Inc.,* ENG BCA No. 5269, 89-3 BCA ¶ 21,899, appellant contends that the rejection of rock that met the specifications constitutes a constructive change to the contract for which appellant is entitled to an equitable adjustment.

The government contends that with respect to the rejected rock, appellant, not the government, directed Nordic to remove the rock because of its appearance. According to the government, appellant could have waited for the test results before ordering Nordic to remove the rock. The government simply quotes from paragraph 2.1.4 and from several QCRs and the QAR of 9 May 2000 in which the government's QA and appellant's QC inspector addressed the issue of the appearance of the rock and the decision that it should be segregated and returned to the Paynes Creek Quarry.

*E. W. Eldridge,* 89-3 BCA ¶ 21,899 is inapposite. There, the specifications called for stone which was "sound, durable, hard and...free from laminations, weak cleavages, undesirable weathering and...such character that it will not disintegrate from the action of the air, water, or the conditions to be met in handling and placing." *Id*. at 110,188. The decision, thus, turned on whether the word, "sound," was clear and unambiguous to a prospective bidder. The government inspectors rejected stone because according to the government, the stone did not meet the criteria of sound, durable, hard, etc. The Board held that the appellant had proved that the rejected stone met the specifications, and the government failed to prove that its rejection of the stone was proper. The Board, therefore, held that the criterion for acceptable stones was clearly general and ambiguous, and that the stringent inspection system used by inexperienced government inspectors was unreasonable, and inappropriate for evaluating the stone.

In the instant appeal, there was no ambiguity of the specification for the stone. Although both appellant's QC and the government's QA inspector visually observed the type I riprap delivered to the site, and determined that it was unacceptable, there is no persuasive evidence that the government rejected the rock notwithstanding appellant's assertion in its letter of 11 July 2000. We hold that there is no basis of government liability here with respect to the riprap that was returned to the quarry and retested, notwithstanding the fact that the laboratory determined that it met the requirement of the specifications.

In light of the foregoing, we sustain the appeals docketed as ASBCA Nos. 54455 and 54456 as to entitlement, and deny the appeal docketed as ASBCA No. 54457.

Dated: 18 November 2010

ROLLIN A. VAN BROEKHOVEN
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. 54455, 54456, 54457, Appeals of J. E. McAmis, Inc., rendered in conformance with the Board's Charter.

Dated:

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