ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Optimum Services, Inc.	)	ASBCA No. 57575
	)	
Under Contract No. W912EP-09-C-0033	)	

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OPINION BY ADMINISTRATIVE JUDGE TING

Optimum Services, Inc. (OSI) claimed $2.3 million as equitable adjustment contending that completion of a disposal area on Lost Creek Island, Florida, was delayed as a result of (1) encountering a differing site condition at the location where a weir riser system and associated structures were built, (2) the Corps of Engineers' (Corps) late return of its submittals, and (3) defective specifications in requiring extra-long timber piles that were long lead-time special-ordered items.[1] The Corps' contracting officer (CO) denied the claim and OSI appealed. We deny the appeal.

FINDINGS OF FACT

1. On 19 June 2009, the Corps' Jacksonville Regional Contracting Center in Jacksonville, Florida, awarded Contract No. W912EP-09-C-0033 to OSI. The contract was in the amount of $4,073,158.96. (R4, tab 4) The project involved the "Aquatic Ecosystem Restoration" at Rose Bay, Volusia County, Florida (WB[2], tab 25 at 761). Rose Bay is located in east-central Volusia County, Florida, immediately south of the city of Port Orange and is intersected by U.S. Highway 1. Lost Creek Island, the site of the

[1] OSI first raised the defective specifications issue in counsel's opening statement (tr. 1/10).

[2] At the hearing, both parties used witness books containing selected documents from the Rule 4 files. OSI's witness books are referred to in this decision as "WB," and the Corps' as "RW."

project's disposal area, is located adjacent to the Intracoastal Waterway approximately two miles east-southeast of Rose Bay. (WB, tab 1 at 395)

2. The contract required the restoration of inter-tidal and sub-tidal benthic substrate and hydrologic processes within Rose Bay by removing up to 152,000 cubic yards of unconsolidated sediment from the Bay. The contract was divided into a base and three option items: The base item included reconstruction of an existing upland disposal area on Lost Creek Island by constructing a new dike and gravel drainage; removing two existing weirs; and constructing two new weir structures. The three option items covered the dredging work of 104,000, 21,000, and 27,000 cubic yards respectively. The dredged material was to be placed in the upland disposal area on Lost Creek Island to be constructed about two miles from the dredging area. (WB, tab 1 at 395) Lost Creek Island is not accessible by land (tr. 1/56). Access required a trip of half an hour by boat (tr. 1/55). Materials must be brought to a staging area then onto a barge; they would also have to be off-loaded onto the island, and either stockpiled or put in place (tr. 1/56).

3. The contract required OSI to begin work within 30 calendar days and to complete the work within 324 calendar days after receiving notice to proceed (NTP) (R4, tab 4). The 324-day contract performance period included (1) 30 calendar days for mobilization, (2) 116 calendar days for the base item, (3) 130 calendar days for Option A, (4) 20 calendar days for Option B, and (5) 28 calendar days for Option C (*see* FAR Clause 52.211-10, COMMENCEMENT, PROSECUTION, AND COMPLETION OF WORK, WB, tab 1 at 155). The contract was awarded with all options (R4, tab 4). Among the standard FAR clauses incorporated by reference were: FAR 52.236-2, DIFFERING SITE CONDITIONS and FAR 52.242-14, SUSPENSION OF WORK[3] (WB, tab 1 at 144).

4. The disposal area to be constructed consisted of a berm (also referred to as an embankment or a dike) enclosing the disposal area and was to be constructed from materials on the site together with gravel to be imported by barge. Once constructed, the disposal area would provide a containment area in which the wet dredged materials could be deposited. The water from the material would then drain out of the disposal area through the drain pipes in the weir into the Intracoastal Waterway. (Compl. and answer ¶ 14)

5. The contract required OSI to design the weir structures with 36-inch diameter outfall pipes. The weirs were intended to allow water to drain out of the disposal area through the pipes. The weirs were to be constructed using a flashboard riser system, which would permit the weirs to operate from water surfaces ranging from an elevation of 9.5 feet to an elevation of 25.5 feet. Permitting the disposal area to drain was critical

[3] The contract FAR clauses did not specify which versions of the clauses were applicable. We assume the April 1984 version of the clauses current at the time the solicitation was issued were incorporated.

to facilitating consolidation and drying of the dredged material. The weir system was to be anchored by timber piles. It was critical to the design that the weir system be properly anchored to maintain its structural integrity and the elevations of the pipes and the risers. (Compl. and answer ¶ 16)

6. By way of analogy, the weir is like a bucket placed in water. Water flows over the flashboards and discharges through the outfall pipes into the Intracoastal Waterway. In order for the weir system to stay in place, uplift from the water around it must be addressed. The weir system or structures must therefore be anchored with suitable timber piles or other anchoring devices. (Tr. 1/52-53) The weir structures are accessed through a walkway. The walkway is anchored by separate piles. The walkway, not being a bucket submerged in water, does not experience uplift from water. (Tr. 1/53)

The Contract's Boring Information

7. The contract specifications include a "Geotechnical Data Report" at Section 00 31 32 (WB, tab 1 at 283-390). Paragraph 1.2.2.2 indicates the soil borings taken on Lost Creek Island: CB-LCI03-01 through CB-LCI03-12 along the proposed dike alignment and CB-LCI03-13 through CB-LCI03-20 located at the central spoil mound (*id.* at 284). This report described the soil characteristics encountered:

> Consistently throughout the site, the spoil material is comprised of light brown clean medium dense fine quartz sands with minor amounts of shell and trace silt.... [N]ative material is present below the fill. The material is predominantly medium dense gray quartz silty sand to slightly silty sand, with minor organic and shell content.... Below the fine layer and in the other borings, medium dense clean fine quartz sand with minor shell and trace silt is present. This clean sand layer goes to elevation -38.0 ft. NGVD29 as found in boring CB-LCI03-10.

(*Id.*)

8. Of all the contract borings, the one that is important for purposes of this appeal is CB-LCI03-10. This boring was located approximately 75-100 feet from the planned new weir structures on the toe or exterior side of the dike between Sta. 2+00 and Sta. 2+50 (tr. 1/208, 2/115; WB, tab 60 at 2269). The drilling log for boring CB-LCI03-10 is included in the contract specifications. Blow counts (N values), an important factor in determining pile length, are shown in the drilling log for CB-LCI03-10 (WB, tab 1 at 333-36).

The Contract's Timber Pile Design Criteria

9. The specifications contemplated the use of round timber piles to support the weir structures. It also specified the method of static analysis and the design requirements for the contractor to design the appropriate piles. Section 31 62 20, "ROUND TIMBER PILES," provides at Paragraph 3.1.2:

> The Contractor may choose a design of either 2 or 4 piles per weir. The tip elevations for the piles shall be determined using a static analysis method based on the subsurface data provided in the appendix. The method that the Contractor shall use for the static analysis is that outlined in EM 1110-2-2906, Design of Pile Foundations, or the SPT97 complete program. The design requirements of EM 1110-2-2906 shall apply for both design methods. For example, no load tests shall be performed. Therefore, the required factor of safety against uplift shall be 3.0 as per paragraph 4-2.c of this EM whether the design method of the EM or SPT97 is used to determine the tip elevation....

(WB, tab 1 at 532)

The Contract's Submittal Requirements

10. Section 01 33 00 of the specifications pertains to "SUBMITTAL PROCEDURES." It provides, at Paragraph 1.10, Scheduling, that "Submittals covering component items forming a system or items that are interrelated shall be scheduled to be coordinated and submitted concurrently." The same paragraph requires the contractor to "[s]chedule submittals with sufficient time to obtain a Government response prior to delivery of applicable equipment and materials, and commencement of applicable work." For submittals requiring government QA review, the paragraph provides the government has 30 calendar days from the date of receipt to review, code, and return comments, and the contractor has 10 calendar days after return to resubmit disapproved submittals (coded "E") or approved submittals requiring resubmission (coded "C").[4] (WB, tab 1 at 425)

11. A complete submittal for the new weir system would include the walkway, the weir, the pilings associated with the weir, and the weir risers, under several different sections of the specifications (tr. 1/72). As the Corps explained at the hearing, submittals could be reviewed more efficiently and quickly if everything pertaining to a system was

[4] Codes A through G and X are defined under Paragraph 1.11.1, Section 01 33 00 (WB, tab 1 at 426).

submitted together. If submittals were submitted piecemeal, the reviewer would not be able to find conflicts between designs, or how various components of a design would work together. (Tr. 3/186) Because of compatibility issues, a submittal approved earlier could be disapproved subsequently. Reviewing components of a system piecemeal could actually take longer because the reviewer would have to go back and see how components fit with the rest of the system. (Tr. 2/143-44) That said, piecemeal submission and review do have some benefits in that obviously wrong design components could be caught early and sent back to the contractor for correction (tr. 3/186). Initially, the Corps "started reviewing just some of the components of the weir system" (tr. 2/142). The Corps explained "At the time we were trying to...partner with [OSI], and as things came in, look at it to expedite the overall review process" (*id.*).

12. OSI subcontracted the construction of the weir structures and the walkway to Derrico Construction Co. of Melbourne, Florida (Derrico) (tr. 1/41). Through Contech Construction Products, Inc. (Contech) (*see* WB, tab 49 at 2201), a timber pile supplier, Derrico/Contech hired CBC Engineers & Associates, Ltd. of Centerville, Ohio (CBC) (*see* WB, tab 49), to design the timber piles for the weir structures (tr. 1/45).

OSI's Schedule

13. OSI submitted a "Bar Chart" schedule to the Corps on 21 August 2009 (R4, tab 251). The schedule showed OSI planned to construct the "Embankment/Dike" between 17 September to 13 November 2009, to install the "Weir and Outfall [discharge pipes]" between 19 September to 6 October 2009, and complete the disposal area by completing seeding between 20 and 28 November 2009 (*id.*). Thus, OSI planned to complete installation of the weir structures before completing the elliptical dike containment area. Fabrication of the weir system would take up to two weeks and installation would take about five days (tr. 1/91). While OSI "built the fabrication time and procurement time in the schedule," it did not incorporate submittal review time (30 calendar days) into its schedule (tr. 1/117-18).

14. OSI acknowledged receipt of the NTP on 5 August 2009 (R4, tab 2 at 2), thus establishing 25 June 2010 as the contract completion date. OSI mobilized in early September 2009 (WB, tab 8 at 3413; tr. 1/99).

15. OSI submitted its timber pile design (Static Pile Capacity Analysis) by Transmittal No. 31 62 20-1 on 9 September 2009 (WB, tab 12 at 2018). CBC's calculations were based on CB-LCI03-10 and the static analysis method outlined in EM 1110-2-2906 (R4, tab 244 at 2330). As reflected in CBC's calculations, its design called for two 12" timber piles of 50' in length "driven a minimum of 25 feet" into sand (R4, tab 244 at 2330; WB, tab 12 at 2018, 2040). The Corps coded the submittal "C" meaning "Approved, except as noted on drawings (Resubmit)" (*see* WB, tab 1 at 426, § 01 33 00, ¶ 1.11.1). Among the Corps' 18 September 2009 comments were (a) "Does not appear

that the piles are adequate in wind loading"; (b) "The pile does appear to [be] adequate for uplift"; (c) "No mention of piles for walkway"; and (d) "Resubmittal required" (WB, tab 12 at 2020).

16. The Corps' 18 September 2009 response to OSI's Static Pile Capacity Analysis submittal (timber pile design) was sent through the Corps' Quality Control System (QCS), a computer program that allowed the parties to share information (WB, tab 92 at 1; tr. 1/81). There was a limitation to the use of QCS, however; the Corps' comments made directly on the submittal drawings could not be sent back electronically (tr. 3/126). In the case of OSI's Static Pile Capacity Analysis, through "misrouting" (tr. 3/135) in the Corps' offices and events relating to Modification P00005 described later, the complete hard copy of the submittal was not returned to OSI until 25 November 2009, 77 days after submission. (WB, tab 92 at 1) OSI's submittal on the flashboard, weir riser and walkway design (Transmittal 33 40 01-3) was submitted on 28 August 2009. The submittal was coded "E" (Disapproved (See Attached and Resubmit)) and the Corps' comments were not visible on QCS. The complete hard copy of the submittal was not returned to OSI until 25 November 2009, 89 days after submission. (WB, tab 92 at 3)

17. On 22 September 2009, OSI representatives met with John H. Wilson (Wilson), the Corps' quality assurance specialist, and requested that the Corps group Transmittal 31 62 20-1 with several other submittals and review all of them together (WB, tab 67 at 903). The CO found "Optimum did not provide a complete submittal package for the weir system design until September 23, 2009" (WB, tab 6 at 21).

Discovery of Unsuitable Material

18. In the meantime, by email attachment to the Corps on 23 September 2009, OSI's project manager, Matthew W. Conneen (Conneen), sent pictures of an area at the site said to be between Station 2+00 and Station 4+00 showing "substantial yielding under our equipment at the existing embankment elevation" (WB, tab 21 at 757). The email went on to say:

> This area is located approximately under the center line of the proposed levee spanning the proposed Weir Riser System. Upon further investigation with our QC this isolated area is at an unknown depth and consists of a mixture of peat and clay/marl material. Boring Designation CB-LCI03-10 doesn't identify this material nor do any other surrounding borings. We feel that it is a differing site conditions and would like to be advised on how to proceed.
>
> We have located away from this area until a USACE representative is able to verify this condition.

(WB, tab 21 at 757-58) OSI's 24 September 2009 email notified the Corps that it "will need to be working in this area no later than within a week, after which [we] will be impacted" (WB, tab 23 at 2119).

19. Conneen testified that the "muck" found was described to be dark gray in color, different from the light sandy color materials typical on Lost Creek Island and not consistent with what was shown in contract boring CB-LCI03-10 (WB, tab 20, photographs; tr. 1/127). As reflected in its 24 September 2009 internal email, the Corps' initial assessment was that the area coincided with the location of the old weir structures and the materials could be "fine grained material that settled out" in front of the old weirs when the site was active, and the extent of the material should be limited and could be easily dealt with (WB, tab 22).

20. According to OSI, the Corps was "very quick in responding" to the differing site condition (DSC) notice (tr. 1/130-31). David R. Tolle, the Corps' Administrative Contracting Officer (ACO) and Area Engineer, and a Corps geotechnical representative visited the site on 25 September 2009 (tr. 2/107-08; RW, tab 6). While OSI had reported a potential DSC area between Sta. 2+00 and Sta. 4+00, roughly 200 feet long, Tolle, using a five foot probing rod determined that the maximum limits of the DSC area to be between Sta. 2+86 and Sta. 3+86, an area of approximately "50 feet by 100 feet" (tr. 2/88-89). He also determined that the DSC or "muck area" did not extend to the area where the timber piles for the new weir structures would be constructed (tr. 2/90).

21. After the site investigation, Tolle's 25 September 2009 email advised his colleagues that "the muck is located within the footprint of the dike foundation on the Northeast side of the disposal area, near the location of the new weirs." His email stated that the Corps would need to develop a scope of work to address the issue so that the impacts to the contractor's dike construction could be minimized. (WB, tab 24) Because the upland disposal site was designed to contain dredged materials from Rose Bay, the Corps' 2 October 2009 trip report on the 25 September 2009 investigation concluded that "[t]hick layers of unsuitable, fine grained material within the embankment footprint are not acceptable," and recommended that "[t]he contractor shall remove the material to EL-1 in accordance with Note 5 on sheet CN 714" (RW, tab 6).

22. So that the location of the DSC (muck) encountered could be clearly shown for purposes of the record, Conneen drew a sketch at the hearing on Contract Drawing No. ST 715. His sketch shows the 50' by 100' muck area (marked in blue cross-hatch) did not intrude into the area where the new weir structures and their supporting timber piles were to be built. His sketch also shows the location of contract boring CB-LCI03-10 to the north (green dot) and the new borings (B-1, B-2 and B-3) (blue dots) OSI's subcontractor would later drill. (WB, tab 3 at 3; tr. 1/140)

23. By letter dated 28 September 2009, ACO Tolle advised OSI that the Corps' initial investigation revealed the presence of a potential DSC and the Corps was continuing its investigation. The letter directed OSI to stop work in a limited area:

> In order to ensure the conditions at the area in question are not disturbed, you are instructed to not work in the area identified (between Sta. 2+85 and Sta. 3+85[5]) until such time as you are provided additional direction. However, you may continue to work in all other areas of Lost Creek Island.

(WB, tab 25 at 761)

24. ACO Tolle's 8 October 2009 letter asked OSI for a proposal to address the DSC described as "peat and clay/marl" located "between Station 2+86 and Station 3+86" approximately 50 feet wide. The scope of work of the requested proposal included (1) removal of the unsuitable material (peat and clay/marl) to Elevation -1 NGVD; and (2) placement of a bridging lift over the area where the unsuitable material was removed until the fill elevation matched that of the surrounding area. (WB, tab 28) In response to the Corps' request for proposal (RFP), OSI by letter of 12 October 2009 submitted a proposal of $14,291.69 plus a time extension of three calendar days for the work (WB, tab 29 at 768).

25. In a 13 October 2009 email to OSI, Wilson expressed concern whether OSI's "submittal design data" based on contract boring CB-LCI03-10 "accurately represent the soil conditions at and around the proposed location for pile driving" in light of the muck discovered nearby, and whether test pits should be excavated to confirm the soil type used in the design. The email asked OSI for "Any information...that could shed additional light...in addressing our concerns about the design data used in your submittal and expediting our review." (WB, tab 31)

26. OSI's 13 October 2009 email reply stated that it would forward the Corps' inquiry to the designer/builder and that delivery of material would be held "until further direction is provided." The email also mentioned that while OSI would assist with any test pits needed, it would only be available on overtime "provided direction is given by the Contracting Officer or authorized representative." (WB, tab 34) Conneen testified that since the "area of muck was outside the piles," he had no "big concern," but when he forwarded the Corps' 13 October 2009 email to CBC, CBC did have a concern (tr. 1/161).

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[5] Elsewhere the record describes the area as between Sta. 2+86 and Sta. 3+86. The minor differences have no significance.

27. To remediate the DSC problem (muck), the parties negotiated an increase of $13,110.22 to the contract price plus an extension of three calendar days to the contract completion date (WB, tab 39 at 791). Michael A. Presley (Presley), the Corps' Contracting Officer Representative (COR), who negotiated Modification P00004 with Conneen (tr. 2/175), testified that before negotiating the modification, the Corps believed the DSC area was contained. He testified he would not otherwise have negotiated a modification if he knew he had to issue another RFP to address other potential DSC areas. (Tr. 3/154-55)

28. By letter dated 21 October 2009, ACO Tolle forwarded Modification P00004 to OSI with instruction to sign and return the copies to the Corps' area office. Paragraph A of the modification set out the "SCOPE OF WORK":

> 1. In an area approximately 50 feet wide and 100 feet long between Station 2+86 and Station 3+86, remove the unsuitable material (peat and clay/marl) to Elevation -1 NGVD....
>
> 2. The Contractor shall place a bridging lift over the area where the unsuitable material was removed.... From this elevation, construction of the dike (in accordance with the provisions of Section 35 41 00, DIKE CONSTRUCTION, shall continue until the fill elevation matches the elevation of the surrounding area (subsequent to clearing and grubbing operations).

(WB, tab 39 at 790-91)

The modification included the Corps' standard "CLOSING STATEMENT" or release clause at Paragraph D:

> In consideration of the modification, agreed to herein as complete equitable adjustment for the Change Request NM004 proposal for adjustment, the Contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to Change NM004 for adjustment.

(WB, tab 39 at 792)

29. Because Modification P00004 included the release language, OSI became concerned that signing it might affect any future claims it might have outside of the DSC

(muck) area addressed. It decided not to execute Modification P00004 "until a subsequent request for proposal [relating to geotechnical investigation of the area where piles were to be driven] was submitted to us." (Tr. 1/155)

30. Conneen's 21 October 2009 email advised ACO Tolle that OSI was unwilling to sign Modification P00004 in view of its release language "until review of the design drawing submittals are received, an RFP is received, or further clarification is given to the design of the flashboard riser system and walkway." His email explained that since CBC's design was "based on geotechnical information provided in the contract documents," OSI was "requesting an RFP on the additional geotechnical investigation needed to satisfy the concerns of our design engineer for flashboard rise[r] system and walkway." (WB, tab 40) Conneen acknowledged at the hearing that he essentially told the Corps that OSI was not going to do any more design work until there was a geotechnical investigation of the area where the weir structures and the walkway were to be built (tr. 1/203). Where the weir structures were to be constructed took up "may be five percent" of the total elliptical embankment/dike area. Except for "a large valley in that one specific area," OSI was able to perform 95% of its embankment/dike work. (Tr. 1/104-05)

The Corps' Three-Phase Approach in Addressing Further Potential Differing Site Conditions

31. When OSI refused to sign Modification P00004 over its concern that the release language might preclude it from recovery if the DSC extended beyond Sta. 2+86 and Sta. 3+86, ACO Tolle came up with a three-phase strategy to move the project forward: Phase 1, already implemented, was to use Modification P00004 to remediate the 50' by 100' DSC; Phase 2 was to have OSI conduct a geotechnical investigation to determine if the DSC muck area covered by Modification P00004 extended to the area where the new weir structures were to be built, and to redesign the piling if necessary; Phase 3 would implement any physical aspects of redesign if a DSC was found (tr. 2/185). ACO testified that since "everything in the original differing site condition had been addressed by P4," he did not consider OSI's 21 October 2009 email to be "a continuation of the differing site condition that had been identified by Optimum on September 23rd" (tr. 2/112).

32. OSI actually began a geotechnical investigation on its own that would later be covered by Modification P00005 (the Corps' Phase 2) before that modification was signed, and even before Modification P00004 was signed. OSI selected Universal Engineering Sciences (UES) on or about 26 October 2009 to determine the subsurface conditions where the new weir structures and the timber piles were to be built. (WB, tab 59 at 811-12) As the design engineer, CBC chose the locations of the borings (tr. 1/216, 219). UES drilled three borings: B-1 at 54' to the west of the centerline of the

weir structures; B-2 at 24' to the west of the weir structures; and B-3 at 80' from the weir structures (*see* Sketch at WB, tab 3; tr. 3/21).

33. UES performed the borings on or about 29 October 2009 (tr. 1/217-18), before Modifications P00004 and P00005 were signed. By letter dated 11 November 2009, UES forwarded to OSI the results of its field exploration and its recommended soil design parameters for use in timber piling design for the proposed weir structures. UES visually classified the samples in accordance with the Unified Soil Classification System (USCS), finding:

> The soils encountered at the borings generally consisted of fine sand (SP) (fill) within the upper 2.0 to 4.0 feet, underlain by soft organic silt (OH) to depths varying between 4.0 and 7.0 feet. Below the organic soil zone, loose to medium dense fine sand (SP), fine sand with silt (SP-SM), and shell with sand was then encountered to depths varying between approximately 21.0 and 35 feet (Boring termination depth at B-3 location). Loose clayey fine sand (SC) and silty fine sand (SM) was encountered to depths of 26.0 and 31.0 feet below grade at Boring B-1 and B-2 locations, respectively. Loose sand with shell was then encountered to the boring termination depths....

(R4, tab 231 at 2264-65) UES' report provided its recommended soil design parameters for use in the timber pile design on Sheet No. A-2 attached (*id.*).

34. While OSI's own geotechnical investigation was proceeding, as Phase 2 of his three-phase approach, ACO Tolle's 26 October 2009 letter asked OSI to respond to a Corps' RFP to "evaluate the effect of the deposit of peat and clay/marl on the weir design and the design of the associated pilings." The RFP specified that "[t]he Contractor shall obtain sufficient geotechnical information needed for the design of the piling system for the proposed weir structure," and "shall include Standard Penetration Test borings SPT boring(s) in accordance to ASTM D 1586-84 (Standard Test Method for SPT and Split-Barrel Sampling of Soils)." The Corps' RFP went on to say that "[t]he Government intends to include all costs, to include redesign of the pile lengths, associated with the geotechnical investigation with the costs of removing the unsuitable material from the dike foot print." (WB, tab 44) We find at the time the Corps issued this RFP, neither party knew whether the location where the new weir structures were to be built contained unsuitable material. Thus, if unsuitable material or DSC was found, supporting piles would have to be redesigned accordingly. If, however, soil conditions were found to be consistent with contract boring CB-LCI03-10, CBC's original pile design (submitted 9 September 2009), if designed in accordance with EM 1110-2-2906, should suffice.

35. Mr. Richard Evans (Evans), OSI's Vice President, signed Modification P00004 on 3 November 2009, and ACO Tolle signed the modification on 6 November 2009 (R4, tab 8 at 746). Up until 6 November 2009, OSI could work everywhere else on Lost Creek Island (tr. 3/108). Modification P00004 authorized OSI to resume work between Sta. 2+86 and Sta. 3+86 covered by the Corps' 28 September 2009 stop work order. We find that execution of Modification P00004 in effect lifted the stop work order even though the Corps did not formally lift the stop work order by separate letter. OSI removed the muck and backfilled the area as specified by Modification P00004 in three days, starting 5 November 2009 (tr. 2/15, 3/107-08, 166).

36. OSI's Evans and ACO Tolle signed Modification P00005 respectively on 17 and 18 November 2009, increasing the contract price by $12,320.06. The "SCOPE OF WORK" of this modification was set out in Paragraph A:

> The Contractor shall conduct a geotechnical investigation of the location where the weirs will be constructed. The purpose of the investigation shall be to evaluate the effect of the deposit of peat and clay/marle [sic] on the weir design and the design of the associated pilings.

Paragraph D, "CLOSING STATEMENT," included these three paragraphs:

> Please note that this modification does not include the costs for any changes in the physical construction of the project such as additional lengths of pilings or increased diameters of piling.
>
> This modification includes the geotechnical investigation for the weir structure and the re-evaluation and/or redesign of the pilings for [the] weir structure and the walkway.
>
> In consideration of the modification, agreed to herein as complete equitable adjustment for the Change Request NM005 proposal for adjustment, the Contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to Change Request NM005 for adjustment.

(R4, tab 8 at 749-50)

37. At the hearing, Presley explained the reason he included the cost of "reevaluation and/or redesign of the pilings for weir structure and the walkway" as a part of Modification P00005 or Phase 2: He testified that based on his discussion with OSI, the cost of having the design engineer evaluate the effect of the geotechnical investigation "was very close in cost to redesigning" (tr. 3/171-72). The Corps therefore decided to pay for a redesign it might or might not need. If there was no DSC at the location where the new weir structures were to be built, then OSI could simply "go ahead with their initial design" (tr. 3/172). If, on the other hand, a DSC was found, with the redesigned pilings in hand, it "would allow us to finish phase two without another mod [for re-design], and then a fourth mod for the changes" (*id.*).

38. Based on UES' 11 November 2009 report, CBC redesigned the timber riser support piles. On 20 November 2009, OSI forwarded to the Corps a new Static Pile Capacity Analysis submittal (timber pile design). CBC's calculations showed it designed four 78-foot (28' embedment plus 50') piles at the weir riser. (WB, tab 49 at 2200, 2213) OSI's pile design submittal was not approved by the Corps. The Corps' review found "[t]he uplift capacity (skin friction) calculations...incorrect" for five reasons, and commented "Uplift capacities will likely be much less than those currently calculated." (*Id.* at 2199) The Corps assigned an "E" code to the redesigned support piles and so advised OSI by email on 23 November 2009 (*id.* at 2197). Under ¶ 1.11.1, § 01 33 00, SUMBITTAL PROCEDURES, code "E" means "Disapproved (See Attached and Resubmit)" (WB, tab 1 at 426).

39. CBC obtained the "net" skin friction values on all three borings from UES on 2 December 2009. Using these values, CBC redesigned the timber piles on 3 December 2009 calling for 94-foot (58' + 36' embedment) piles. (App. supp. R4, tab 244 at 2330-31). This design (Transmittal No. 31 62 20-1.3) was coded "E" or disapproved, by the Corps on 21 December 2009 (R4, tab 27 at 830). Based on the Corps' comments to use the contract safety factor of 3.0 (finding 9) on the net friction values, CBC redesigned the timber piles yet again on or about 23 December 2009, this time calling for pile length of over 100 feet (app. supp. R4, tab 244 at 2331). The record does not show the parties acted on this latest design. Thus, since its original pile design submitted on 9 September 2009 (finding 15), CBC redesigned the timber piles three more times, from 50 feet to 78 feet to 94 feet, and finally, to over 100 feet in length.

Use of Helical Anchors

40. Timber piles up to 60 feet in length are stocked items (tr. 1/49). Timber piles over 60-feet typically have to be custom ordered. The lead-time for ordering 90-foot long piles was three to four months. (Tr. 1/50) Faced with this reality, the parties explored other options so that the project would not be unnecessarily delayed.

41. Various methods can be used to overcome uplift. Piles can be weighted down with the use of a "block of concrete" tied to a structure with rebars or a cable system. A saddle filled with concrete can be used to weigh down the structure. Concrete, however, was "a bulky item to get delivered." Helical anchors are not piles; they are a part of a "composite system" that can be tied into timber piles with U bolts. Helical anchors are stocked items that could be installed with a Bobcat. (Tr. 1/54-56)

42. At a brainstorming session in late November or early December 2009, the Corps proposed the use of concrete dead weights to counter the uplift which had been successfully used on other projects. OSI suggested the use of helical anchors which were "lighter and cheaper and easier to move to the island." (Tr. 3/179)

43. Meanwhile, CBC, having redesigned the timber piles three times, was unwilling to discard its calculations and come up with a "complete new design starting from scratch" (tr. 1/184), and was "looking for more money" (tr. 1/51). Once the Corps indicated that it was willing to accept the use of helical anchors, OSI went to another designer, MBV Engineering, Inc. (MBV), which had experience with helical anchors (tr. 1/51, 183). OSI asked MBV to design the weir structure support using UES' borings and helical anchors (tr. 1/180-81). OSI submitted the helical anchor submittals on 14 January 2010. They were reviewed and approved on 26 January 2010. (WB, tab 62 at 2273; tr. 3/130-31) By January 2010, OSI's flashboard riser submittals had been approved (tr. 1/186). The helical anchors were delivered to the job site by the end of February 2010 (tr. 1/187). Due to its piecemeal submission and repeated inability to have its timber pile design (Static Pile Capacity Analysis) submittals approved, we find OSI was, in whole or in part, responsible for the weir system submittal delays.

44. As shown in MBV's Drawing S-1, the weir riser structure was held in place by four timber piles which were embedded in deep concrete footers. The concrete footers, in turn, were tied to helical anchors. Under this design, the timber piles were kept completely above ground, the concrete footers and the helical anchors were kept below ground. (WB, tab 4; tr. 1/57)

COE's Expert Report and CBC's Engineering Report

45. In August 2010, the Corps engaged the services of Dr. Nicholas W. Hudyma (Hudyma) to look into whether the soil conditions shown in UES's borings (B-1, B-2 and B-3) varied from that shown in boring CB-LCI03-10 presented in the contract's Geotechnical Data Report (R4, tab 33). Dr. Hudyma, a professor at the University of North Florida, was accepted by the Board as an expert in geotechnical engineering (tr. 3/13, 17). He visited Lost Creek Island on 18 August 2010 (tr. 3/19), and prepared a report on his findings (R4, tab 33).

46. Soil characteristics are one of the factors used in determining the appropriate piles to use (tr. 3/54). In comparing the three UES's borings with the Corps' boring CB-LCI03-10, Dr. Hudyma found "consistency in materials with depth":

> The sandy materials encountered below the soft silt layer have several different classifications. The USACE boring classifies the materials as poorly graded sand with localized zones of shell. UES boring B-3 shows two zones of SP materials; the upper zone without shells and the lower zone with shells. In terms of materials, the two borings are almost identical.
>
> The other two UES borings, B-1 and B-2, further subdivide the sandy materials beneath the soft silt layer. B-1 consists of zones, in order of depth, of SP, shell with sand, SC, and SP. B-2 consists of zones, in order of depth, of SP, SM-SP, SM, and SP. It is imperative to note that all the materials identified in the UES borings below the silt layer are sandy materials. The original boring (CB-LCI03-10) also consists of sandy materials below the silt layer.

(R4, tab 33 at 951) Dr. Hudyma testified that he did not find in UES' borings any classification of muck prevalent between Sta. 2+86 and Sta. 3+86 (tr. 3/66).

47. Dr. Hudyma also looked into blow counts. Blow counts are used to determine soil properties for geotechnical design (tr. 3/32). Blow counts would impact uplift analysis because soil shear strength parameters are based on blow counts (tr. 3/74). In terms of pile design, a high blow count is better than a low blow count for uplift analysis (tr. 3/100). In terms of blow counts, Dr. Hudyma's report found:

> Based on blow counts from the four borings in the vicinity of the timber piles, the UES boring B-3 shows the most desirable blow count profile with depth. The sandy materials below the soft organic silt are all medium dense. The other three borings, CB-LCI03-10, B-2, and B-1, show a less desirable blow count profile with depth. However the blow count profiles for these three boring are nearly identical with the exception of one anomalous blow count in boring CB-LCI03-10 (N=26 at an elevation of -24 feet).

(R4, tab 33 at 952)

48. According to ACO Tolle, pile length is determined by a number of factors including "geotechnical wind loading, dead loading, friction factors, uplift," safety factor and others (tr. 2/126). To have its piles approved, OSI's Static Pile Capacity Analysis submittal must demonstrate that its designer's calculations adequately took into consideration the various analysis criteria outlined in EM 1110-2-2906 (*see* finding 9).

49. Dr. Hudyma's report has not been rebutted. OSI did not call a witness from UES or a soils expert to explain how UES' material classification on borings B-1, B-2 and B-3 differed materially from that shown in the contract boring CB-LCI03-10. We find that the muck found between Sta. 2+86 to Sta. 3+86 did not extend into the area where the new weir structures were to be built. Nor did OSI call its pile designer from CBC to explain its redesign starting with 50' piles and finally ending with 100' piles. We are not told whether and to what extent UES' borings made a difference. Finally, OSI has not challenged the Corps' reviews and comments on the Static Pile Capacity Analysis calculations provided with its submittals.

50. There is in the record an engineering report dated 18 October 2010 submitted by CBC. The purpose of this report was to "provide circumstances chronologically relating to the differing site conditions which resulted in four (4) separate designs for the [weir] structures." (R4, tab 244 at 2330) While the report stated that CBC used UES' borings and EM 1110-2-2906 to come up with the 78-foot timber pile design, used "net" skin friction to come up with the 94-foot pile design, and finally used a safety factor of 3.0 to come up with over 100-foot pile design, the report did not explain how the soil characteristics shown in UES' borings differed from those shown in CB-LCI03-10 (*id.*). While CBC's multiple redesigns resulted from the Corps' reviews, the report did not challenge the validity of the Corps' review as exceeding the design parameters called for by EM 1110-2-2906. OSI did not call the CBC designer as a witness to explain what specifically drove the need for the repeated redesign.

Summary of Progress

51. Aerial photographs of Lost Creek Island shows the progress of work between September 2009 and May 2010. The aerial photograph shows that by 18 September 2009, OSI had cleared the site and was proceeding with the "embankment stage" of the work (WB, tab 7 at 3419-20; tr. 1/106). The aerial photograph of 21 October 2009 (when OSI announced that it was halting its design work until the area where the weir structures were to be built was investigated for DSC) shows OSI was still embanking, and the elevation at the north end where the weir structures were to be constructed was completed to Elevation 0 (WB, tab 7 at 3421; tr. 1/107). The aerial photograph of 19 November 2009 (just after OSI submitted its 78-foot pile design based on UES's borings) shows OSI was still in the process of embanking, and was installing filter material (WB, tab 7 at 3423; tr. 1/108). The aerial photograph of 21 December 2009 shows the embankment being close to completion, "except for the area" where the weir structures were to be

constructed (WB, tab 7 at 3426; tr. 1/108). The aerial photograph of 20 April 2010 shows the pilings and the weir structures were installed, the walkway was being installed, and the crane was being disassembled (WB, tab 7 at 3430; tr. 1/110). Around 19-20 February 2010, OSI began to seed the area (WB, tab 7 at 3428; tr. 1/109).

52. Thus, when measured against OSI's planned bar chart schedule, it completed the weir and outfall installation on or about 20 April 2010 as opposed to 6 October 2009, the embankment/dike construction sometime prior to 20 May 2010 (WB, tab 7 at 3431) as opposed to 13 November 2009, and seeding around 20 February 2010 as opposed to 28 November 2009. According to OSI, the project was completed in about 480 days as opposed to the 324-day contract performance period, or about five months (480 days – 324 days) late (tr. 1/93).

Claim and CO Decision

53. By letter dated 10 May 2010, OSI submitted to ACO Tolle an equitable adjustment proposal for $2,297,066.45 plus a five-month time extension. The proposal was not certified as a claim but sought a meeting with the CO and the Deputy District Engineer to try to negotiate a settlement on two issues relating to "[1] the Differing Site Conditions and [2] Delays in approval of submittals by the government." (WB, tab 66 at 832, 837) OSI's proposal assigned responsibility for the delays encountered in completing the upland disposal area to the Corps. OSI appeared to contend not only did it encounter a DSC between Sta. 2+86 and Sta. 3+86, but in the area where the weir structure was built, and this, in turn, caused delay in redesigning the proper piling for the weir structures:

> Clearly the delay was precipitated by the Differing Site Condition which required Geotechnical review by the owner, designing an approach for resolution, pricing of the change, accomplishing corrective work (Muck removal) in stages, accomplishing new testing, development of a new design, and the approval process of the new design which was changed as a result of the Differing Site Condition.
>
> ....
>
> Little did anyone know at this time that the material encountered was going to require wood pilings 99' long! This would also require a complete new design including the totally unanticipated use of helical anchors and additional time for resolution of the design and approval of the system and design.

(*Id.* at 834) OSI did acknowledge that "[o]nce we were all in the middle of a redesign...the government probably was reasonable in not returning the submittals with the appropriate comments as they did not expect them to be used." (*Id.* at 834-36)

54. CO Griselle Gonzalez (CO Gonzalez) rejected OSI's 10 May 2010 equitable adjustment proposal and issued her notice of intent to issue a CO decision (WB, tab 78). By letter dated 29 November 2010, OSI requested that the CO issue a decision and provided its claim certification (WB, tab 83).

55. CO Gonzalez issued her decision by letter dated 4 March 2011 (WB, tab 6). The decision summarized OSI's claim as follows:

> Optimum claims it was required to stop work from September 28, 2009 until January 29, 2010 in the area where the weirs were to be constructed while a workable design was being developed to address the DSC identified on September 23, 2009. According to Optimum, it experienced methodology changes due to the DSC and untimely submittal reviews by the Government.

(*Id.* at 13) In denying the claim, the CO addressed three issues: (1) Differing Site Conditions; (2) Submittal Review and Approval; and (3) Concurrent Delay (*id.* at 19-21). On the DSC issue, the CO took the position there were actually two potential DSCs under which OSI "gave two separate notices, the Government initiated two separate investigations, and two different results were found" (*id.* at 19). On the DSC that OSI provided notice on 23 September 2009, the CO acknowledged the muck "was not a natural feature, but rather was due to the deposit and settling of fine sediments from previous dredging operations" (*id.* at 19). As to this DSC, the CO concluded that "Contract Modification P00004...was executed to fully compensate Optimum for the additional cost and delay associated with DSC No. 1" (*id.* at 20). The CO considered OSI to have given a second notice of DSC when it told the Corps it was stopping work on the weir structure design until the Corps conducted an additional investigation to determine if the DSC extended to the weir area. Given that no DSC was found, the CO concluded that Modification P00005 "fully addressed the costs for the geotechnical investigation and any reevaluation or redesign required for the weir structure" (*id.* at 20). On the submittal review issue, the CO concluded that when OSI decided to stop designing unless it was shown that there was no DSC in the area where the weirs were to be built, it was reasonable for the Corps to wait until OSI provided a revised submittal package or was notified that there would be no change to the existing submittal (*id.* at 21). On concurrent delay, the CO contended even if the Corps delayed returning the submittal drawings, OSI was unable to produce an approvable design for the weir system

(1) prior to notifying the Corps it was stopping design work and (2) after it was found no DSC existed (*id.*).

56. OSI appealed the CO's decision by notice dated 28 March 2011. The Board docketed the appeal as ASBCA No. 57575.

DECISION

Has OSI Proved the Existence of a Differing Site Condition at the New Weir Location?

OSI contends that it encountered a Type I DSC, and that the DSC extended into the weir area (app. br. at 29). As proof of the DSC, OSI contends that based upon the contract boring CB-LCI03-10, it originally designed two 55-foot timber piles[6] for each weir, and as a result of additional borings by UES, CBC, its designer, ultimately had to redesign four 100-foot plus timber piles for each weir (*id.* at 31). The Corps' brief acknowledges that OSI did encounter a DSC referred to as "muck" located in a small 50-foot by 100-foot area, but contends that the DSC did not extend into the area where the weir structures were to be built (gov't br. at 30). The Corps tells us that the only qualified expert, Dr. Hudyma, opined that the soil characteristics shown in contract boring CB-LCI03-10 did not differ materially from those shown by UES' borings, and Dr. Hudyma did not observe muck in the UES' borings (finding 46).

Because the parties bilaterally dealt with the muck DSC in the contained 50-foot by 100-foot area between Sta. 2+86 and Sta. 3+86 through Modification P00004, we agree with the Corps that whether a DSC existed in the area where the weir structures were to be built was a separate and unrelated DSC issue. A Type I DSC consists of "subsurface or latent physical conditions at the site which differ materially from those indicated in [the] contract." FAR 52.236-2. To establish entitlement to an equitable adjustment due to a Type I DSC, a contractor must prove, by a preponderance of the evidence, that:

> [T]he conditions indicated in the contract differ materially from those actually encountered during performance; the conditions actually encountered were reasonably unforeseeable based on all information available to the contractor at the time of bidding; the contractor reasonably relied upon its interpretation of the contract and contract-related documents; and the contractor was damaged

[6] Although OSI says that CBC initially designed 55-foot piles, CBC's calculation indicates that it designed 50-foot piles: "TOTAL LENGTH OF PILE = 25' + 25' = 50' LENGTHS" (WB, tab 12 at 2040).

> as a result of the material variation between expected and encountered conditions.

Comtrol, Inc. v. United States, 294 F.3d 1357, 1362 (Fed. Cir. 2002) (citing *H.B. Mac, Inc. v. United States*, 153 F.3d 1338, 1345 (Fed. Cir. 1998)).

To recover under a Type I DSC claim, the contractor bears the burden of proof showing that conditions actually encountered differed materially from those "indicated" in the contract. *Foster Constr. C.A. & Williams Bros. Co. v. United States*, 435 F.2d 873, 881 (Ct. Cl. 1970). A contractor cannot be eligible for an equitable adjustment for Type I changed conditions unless the contract indicated what those conditions would supposedly be. *P.J. Maffei Bldg. Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984); *S.T.G. Construction Co. v. United States*, 157 Ct. Cl. 409, 414 (1962). Contract borings are the most significant indicator of subsurface conditions. *Nova Group, Inc.*, ASBCA No. 55408, 10-2 BCA ¶ 34,533 at 170,322.

In comparing the three UES borings with contract boring CB-LCI03-10, Dr. Hudyma found "consistency in materials with depth." He found that CB-LCI03-10 showed poorly graded sand with localized zones of sand below the soft silt layer. He found UES' boring B-3 showed "almost identical" material, with sandy materials (SP) with an upper zone without shells and with a lower zone with shells. In B-1 and B-2, he found sandy materials below the soft silt layer. (Finding 46)

Blow counts are used to determine soil properties for geotechnical design. Blow counts would impact uplift analysis because soil shear strength parameters are based on blow counts. (Finding 47) In comparing the UES blow counts with the blow counts shown in CB-LCI03-10, Dr. Hudyma found UES borings B-1 and B-2, closest to the new weir location, and CB-LCI03-10 were "nearly identical with the exception of one anomalous blow count in boring CB-LCI03-10." UES B-3 showed more favorable blow counts for pile design purpose than CB-LCI03-10. (Finding 47)

Dr. Hudyma's findings have not been effectively challenged. OSI did not call a witness from UES or a soils expert to explain how UES' material classification on borings B-1, B-2, and B-3 differed materially from that shown in CB-LCI03-10 (finding 49). Significantly, Dr. Hudyma did not find in UES' borings any muck prevalent between Sta. 2+86 and Sta. 3+86 (finding 46).

We conclude that OSI has failed to prove the existence of a DSC at the location where the new weir structures were built.

Has OSI Proved Delay Caused by the Corps' Submittal Review?

OSI contends next that the Corps failed to timely review and return submittals (app. br. at 32). OSI tells us that its Static Pile Capacity Analysis (timber pile design) was submitted on 9 September 2009 and a complete hard copy with comments made on the drawings was not returned until 25 November 2009, 77 days later (*id.* at 33). OSI contends that it submitted its flashboard riser system submittals – another component of the weir system – on 28 August 2009 and a complete hard copy with comments made on the drawings was not returned until 25 November 2009, 89 days later (*id.* at 34).

The contract required submittals covering component items forming a system or items that were interrelated be submitted concurrently (finding 10). This requirement was to enable the Corps to find potential conflicts between designs, and to see how various components of a design would work together. Reviewing components of a system piecemeal could actually take longer because the reviewer would have to go back and see how components fit with the rest of the system. (Finding 11) The contract gave the Corps 30 calendar days from the date of receipt to review, code, and return comments, and the contractor had 10 calendar days to resubmit any returned submittals requiring resubmission (finding 10). The 30-day review period presupposed complete submission of interrelated components (finding 10). To the extent the Corps chose to review piecemeal submittals as an accommodation to OSI this accommodation did not impose on the Corps a 30-day review obligation as if OSI submitted all components of an interrelated system completely and concurrently (finding 11).

OSI's argument that it was delayed did not take into account its own actions that caused the Corps to put its review of OSI's submittals on hold. In this case, OSI did not submit the weir system components, including the timber pile design and the weir riser system concurrently in a coordinated fashion as required by the contract (findings 10, 15-17). But, even assuming, *arguendo*, that OSI submitted complete submittals for the entire new weir system on 9 September 2009, the Corps would have 30 calendar days or until 9 October 2009 to review, code and return comments to OSI. With OSI's submittal coded "C" by the Corps on 18 September 2009 (finding 15), requiring resubmission in 10 calendar days, the Corps' final approval could not be obtained until at least 19 October 2009. By then, on 23 September 2009, over three weeks earlier, muck was discovered between Sta. 2+00 and Sta. 4+00. The Corps investigated and agreed that OSI encountered a DSC in a 50-foot by 100-foot area between Sta. 2+86 and Sta. 3+86, and OSI's designer, CBC, however, expressed concern on or about 13 October 2009 that the muck might extend to the area where the new weir structures were to be built (finding 26). OSI then notified the Corps on 21 October 2009 that it was not going to do any more design work until there was a geotechnical investigation of the area where the weir structures and the walkway were to be built (finding 30).

OSI has acknowledged that "[o]nce we were all in the middle of a redesign...the government probably was reasonable in not returning the submittals...as they did not expect them to be used" (finding 53). In light of the foregoing, we conclude that the Corps acted reasonably in not returning OSI's submittals until such time when (1) a DSC was found in the weir area to be investigated and OSI submitted a redesign or, (2) a DSC was not found and the Corps could resume its review of the submittals already provided.

As it turned out, without sufficient justification that a DSC existed at the location where the weir structures were to be built, and based on UES' borings, CBC went ahead to redesign the timber piles (before Modification P00005 was signed). OSI transmitted a new Static Pile Capacity Analysis (or new pile design) submittal on 20 November 2009 (finding 38). In doing so, OSI reset the Corps' 30-day review clock to 20 December 2009. Between 20 November 2009 and 23 December 2009, CBC redesigned the piles two more times (findings 38, 39), and the parties began to explore using other anchoring devices to avoid the lead time necessary to procure non-stocked extra-long timber piles (findings 40-43). These developments rendered continued review of OSI's original 9 September 2009 Static Pile Capacity Analysis (pile design) a useless endeavor or, as the Corps put it, a "moot" point (gov't br. at 36).

Even though the contract specified timber piles, the specifications assigned to OSI the task of designing the appropriate timber piles to support the new weir structures. We conclude that the specifications are of the performance variety. *Penguin Industries, Inc. v. United States*, 530 F.2d 934, 937 (Ct. Cl. 1976) (holding specifications to be performance type where a contract left to contractor the duty of using its own judgment and experience in determining how to manufacture certain aspects of cartridge). Here, Section 31 62 20, ¶ 3.1.2 of the specifications does not specify the size or length of the timber piles to use. OSI was told that it could choose a design of either 2 or 4 piles per weir. Based on the use of static analysis method outlined in EM 1110-2-2906, the timber pile specifications let OSI's designer determine the tip elevations, and hence the length, of the piles. OSI and its designer, were expected to design the appropriate piles that would resist uplift, consider wind load, and include a proper safety factor. (Finding 9)

In designing the timber piles, OSI's designer was unable to get it right. CBC's first design calling for two 50-foot piles per weir was approved with the qualification that it must be resubmitted for final approval due to inadequate wind loading (finding 15). CBC's first redesign calling for four 78-foot piles per weir was disapproved for incorrect uplift calculations (finding 38). Its second redesign calling for four 94-foot piles per weir was not approved for failing to use the right safety factor (finding 39). Its third redesign calling for four 100-foot plus piles per weir was abandoned in favor of using timber piles in combination with helical anchors (finding 44). OSI's pile designer, CBC, did not testify. Nor did CBC challenge the Corps' comments on various submittals as erroneous but accepted the comments and made the necessary corrections.

Despite the Corps' failure to return the marked-up submittal drawings and its "misrouting," we conclude that the delays in having the disposal area completed were driven primarily by (1) OSI's piecemeal submissions of its weir system submittals; (2) OSI's unwarranted decision to suspend its design efforts pending a geotechnical investigation of the area where the new weir structures were to be built, (3) CBC, OSI's designer's decisions to redesign the timber piles without sufficient justification that a DSC existed at the location where the new weir structures were to be built; and (4) CBC, OSI's designer's repeated inability to properly design acceptable timber piles.

Jurisdiction Over OSI's Defective Specification Argument

OSI argues that the specifications were defective in that (1) they required the use of timber piles, and (2) they required the use of 100-foot plus timber piles whose four-month lead time to obtain would consume the entire four months (116 days) OSI had to complete the base item of the contract (app. br. 28-29). The Corps urges us not to consider this argument because OSI did not raise the issue of defective specifications in its certified claim, and "[n]one of the serial letters or other correspondence in the record discusses defective specifications" (gov't br. at 28).

The CDA requires all claims by a contractor be submitted to the CO for decision. 41 U.S.C. § 7103(a)(1). We lack jurisdiction over claims raised for the first time on appeal, in a complaint or otherwise. *Versar, Inc.*, ASBCA No. 56857, 10-1 BCA ¶ 34,437 at 169,957. Whether a claim before the Board is new or essentially the same as that presented to the CO depends upon whether the claims derived from common or related operative facts. The requirement that the appeal brought before us be based on the same claims previously presented to and denied by the CO "does not require ridged [sic] adherence to the exact language or structure of the original administrative CDA claim" if the claim "arise[s] from the same operative facts, claim essentially the same relief, and merely assert differing legal theories for that recovery." *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003); *see also The Public Warehousing Co.*, ASBCA No. 56022, 11-2 BCA ¶ 34,788 at 171,228.

Here, OSI's claim and the CO's decision were based on three issues: (1) whether a DSC existed at the location where the weir structures were built; (2) whether the Corps delayed returning the OSI's weir system submittals; and (3) whether OSI was responsible for concurrent delays even if the Corps delayed returning the weir system submittals. The operative facts relating to these issues centered upon the subsurface soil conditions at the location where the weir structures were built and the submittal review process. The operative facts of these issues were separate and distinct from any facts relating to whether piles made out of timber were suitable or appropriate for anchoring the weir structures and from any facts surrounding the timber piles' availability which was not specified.

We conclude that OSI's defective specification argument, presented for the first time as a part of its opening statement, involved different operative facts from those presented in its claim to the CO for decision. Consequently, we have no jurisdiction over OSI's defective specification claim.

CONCLUSION

Because (1) OSI failed to prove that a DSC existed at the location where the weir structures were built, (2) OSI was responsible, in whole or in part, for the weir system submittal delays, and (3) the Board has no jurisdiction over OSI's belated defective specification argument, we deny the appeal.

Dated: 10 September 2013

PETER D. TING
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

JACK DELMAN
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 57575, Appeal of Optimum Services, Inc., rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals