ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Conquistador Dorado Joint Venture	)	ASBCA Nos. 60042, 60620, 60942
	)	60943, 61111, 61733
	)	61952, 62796
	)	
Under Contract No. N69450-08-C-1267	)	

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OPINION BY ADMINISTRATIVE JUDGE O'CONNELL

These appeals arise from a contract at the Naval Air Station Key West that provided for vegetation removal and the improvement of drainage conditions. The appeals fall into four categories:

Most of the testimony at the hearing concerned two claims that are based on the differing site conditions and changes clauses. ASBCA No. 60042 is appellant's claim for $12,256,852 during Phase I of the project. ASBCA No. 62796 is appellant's claim for $1,227,179.67 in Phase II.

ASBCA No. 60620 and ASBCA No. 61111 are overlapping appeals in which appellant seeks payment for its December 2014 and March 2016 invoices totaling $1,448,131.43.

ASBCA No. 60942 is the Navy's claim for liquidated damages of $834,400. ASBCA No. 61952 is appellant's claim for a time extension that would nullify the liquidated damages claim.

Finally, ASBCA Nos. 60943 and ASBCA No. 61733 are Navy claims totaling $4,313,655 related to appellant's deposit of excavated material in an area on the base known as Dead 8.

The Board conducted a five-day hearing in November 2022 during which we received into evidence more than 5,000 Rule 4 tabs or exhibits. Although appellant chose to present its evidence through testimony at this hearing, the Navy elected to proceed via Board Rule 11 and thus did not call any witnesses, but it has submitted four affidavits. Only entitlement is before us.

FINDINGS OF FACT

Background/Contract Award

1. During an airfield inspection in February 2002, Naval Air Systems Command found Naval Air Station (NAS) Key West to be out of compliance with airfield safety zone criteria due to vegetation (mangroves and trees) that protruded on the airfield (R4, tab 3 at 9[1]).

2. On September 3, 2008, the Navy awarded a design-build, firm, fixed-price, contract to appellant, Conquistador Dorado Joint Venture (CDJV), (R4, tab 9 at 1-2). The contract contained various clauses, including Federal Acquisition Regulation (FAR) 52.236-2, DIFFERING SITE CONDITIONS (APR 1984), FAR 52.236-23, RESPONSIBILITY OF THE ARCHITECT-ENGINEER CONTRACTOR (APR 1984), FAR 52.243-4, CHANGES (JUN 2007), DFARS 252.201-7000, CONTRACTING OFFICER'S REPRESENTATIVE (DEC 1991), NAVFAC 5252 201-9300, CONTRACTING OFFICER AUTHORITY (JUN 1994), and NAVFAC 5252.242-9300, GOVERNMENT REPRESENTATIVES (OCT 1996) (*id.* at 30-31, 40, 43).

3. Dorado Services, Inc. (Dorado) managed the work for the joint venture (tr. 1/18, 47-48). Dorado had a prior contract at NAS Key West trimming the vegetation that protruded on the airfield, which gave Dorado some familiarity with the site. But 90% of Dorado's business is trash removal, and it had not performed any contracts similar to the contract at issue. (Tr. 1/31, 50-51) Dorado would experience a difficult introduction to federal construction contracting.

4. The initial award amount was $11,195,000 and included work on Phase I of the project only. On December 16, 2008, a contracting officer (CO) issued Modification No. (Mod.) P4 exercising the options for the Phase II work, which

[1] Rule 4 file citations are to the .pdf page of the electronic file.

increased the contract amount to $21,769,000. A different CO subsequently extended the completion date to July 31, 2012. (R4, tab 10 at 19-20, 37-38)

The Project Work

5. The work was divided into 23 vegetation conversion areas (VCAs) laid out in roughly a clockwise manner. Phase I provided for work in VCAs 1-3 and 20-23, with the remaining VCAs in Phase II. (R4, tab 9 at 21-23; app. supp. R4, tab 93)

6. As described in a Project Program that was incorporated in the contract and discussed more in detail below, the work included the conversion of wetland forests, including mangroves, that interfered with the operation of aircraft to a different vegetation mix that was easier to manage. (R4, tab 3 at 35; *see also* tab 9 at 1-2; tr. 3/59-60, 75). Before CDJV began the conversion, it first had to perform "mitigation," which involved the creation of new wetlands outside the project footprint to offset the conversion areas (tr. 3/70).

7. The work was complicated by the presence of the endangered Lower Keys Marsh Rabbit, which meant that the Navy had to ensure that there was no overall loss of rabbit habitat (R4, tab 3 at 15, 17, 51; tr. 3/50-51, 61). Thus, before CDJV could convert areas with rabbit habitat it had to create new habitat elsewhere (tr. 1/89).

8. The existing vegetation was generally classified as Treatment Types A through E. As a point of reference, the Type A work required CDJV merely to cut the existing woody vegetation to grade and remove it, along with any debris or trash (R4, tab 3 at 39).

9. Treatment Types C and D are the most relevant because they required the most work and because CDJV alleges that the work areas for these types increased in size. The only difference between Treatment Types C and D was that the former was existing low saltwater marsh, while the latter were mangrove swamps and exotic wetland hardwoods. The Project Plan required CDJV to remove the vegetation in these areas, grub (remove the root ball), and excavate "[s]oft compressible surficial materials such as silt, organic matter, or other deleterious materials . . . ." CDJV would place general fill and a special planting mix, grade to provide positive drainage, and plant with high salt marsh or maintainable wetland vegetation. (R4, tab 3 at 39, 47, 59; tr. 1/66-67) In other words, CDJV would transform the existing areas into grassland wetlands that could be maintained simply by mowing them (tr. 3/60).

10. The Project Plan identified 236.3 acres of Treatment Types A through E. Treatment Type D covered the single largest area at 104.45 acres. In addition, there were 25.91 acres of Type C work. (R4, tab 3 at 37) Despite these numbers calculated

to the one-hundredth of an acre, the Project Plan stated that the "limits of the various treatment areas . . . are provided for Contractor proposal purposes. Actual limits shall be developed during the design phase as the site is further investigated and understood" (*id.* at 41).

11. Separately, the Project Plan stated that there were "approximately 250 acres" that required treatment (*id.* at 17).

12. The Project Plan also contained a miscellaneous category that required CDJV to remove woody vegetation within the VCAs even if it was not designated as Treatment Types A-E. The contract required removal of the vegetation, as well as grubbing, and limited grading and placement of fill to remove high and low spots. The contract did not specify the amount of miscellaneous work. (R4, tab 3 at 39-41) This led one potential offeror to ask whether the miscellaneous work was about 14 acres, that is, the difference between 236.3 and 250. The Navy's response was that the 250 acres was a "conservative approximation" that did not include the miscellaneous areas (R4, tab 6 at 18).

13. The soft compressible material in the Treatment Type C/D areas is peat, which is a spongy, organic material that the parties refer to as "muck" (app. supp. R4, tab 18 at 9). There is limestone under the peat or soil (*id.* at 4). The parties refer to it as "caprock" (tr. 3/115)).

14. The contract provided that CDJV could use the excavated muck as a component of the special planting mix used in the Treatment Type C/D areas (R4, tab 3 at 19, 47). CDJV used it for this purpose (tr. 1/77-78).

15. As discussed below, both parties began with the assumption that the contract required excavation of all muck down to caprock and that the finished ground surface had to be capable of supporting an aircraft that had careened off the runway. But the contract did not actually specify removal of all muck, nor the excavation of all materials down to caprock. The Project Plan suggested this would not be necessary because it allowed for the use of geosynthetics, such as a geogrid, to provide soil stabilization (R4, tab 3 at 63). Such products would support the backfill and prevent it from sinking into the area below (tr. 1/224).

CDJV's Site Investigation

16. The Project Plan stated that "[m]any of the low areas and lagoons [on the site] contain from a few inches to several feet of silts and organics with low permeabilities" (R4, tab 3 at 15). The Project Plan included geotechnical information from previous projects, but it stated that this information was "included for the

Contractor's information only, and is not guaranteed to fully represent all subsurface conditions" (*id.* at 57). The Project Plan placed responsibility for the geotechnical investigation and any additional soil borings or testing on CDJV. It required CDJV to retain a professional engineer specializing in geotechnical engineering, who was to produce a report and recommendations to be shared with the CO (*id.*). The Project Plan directed CDJV to include the cost of this work in its bid price (*id*.).

17. Prior to the project at issue, another contractor, CH2M Hill, performed a similar project at the airfield referred to as the Runway 7 Pilot program that served as a proof of concept (tr. 1/115-17). The work area for that project was at the western end of Runway 7, adjacent to VCAs 1 and 23 (R4, tab 3 at 47, tab 5I.2 at 3; app. supp. R4, tab 93).

18. At a kickoff meeting on December 15, 2008, the Navy informed CDJV that the Runway 7 site contained almost twice as much muck as expected, with some areas containing almost 11 feet of muck (app. supp. R4, tab 48 at 1). On or before May 18, 2009, the Navy directed CH2MHill to stop work (app. supp. R4, tab 13 at 2). On August 26, 2009, the Navy wrote to CDJV and its designer, reiterating its concerns about the muck:

> the amount of muck required to be removed from the CH2MHill portion was hugely underestimated. At first it was assumed that the muck was only 1'-2' deep. Only later did they find that the muck extends sometimes 10' plus deep and "pits" in which the groundwater level is tidally influenced. I thought to let you know since this may become relevant as you proceed with your design.

(App. supp. R4, tab 15 at 1)

19. CDJV's original designer for the project, DeRose Design Consultants, Inc. (DeRose) retained Dunkelberger Engineering & Testing, Inc., to conduct the site investigation required by the contract. Dunkelberger issued a report dated November 11, 2009 (app. supp. R4, tab 18).

20. Dunkelberger was not able to access 4 of the 108 acres of Treatment Type C/D areas due to environmental concerns.[2] But overall, Dunkelberger appears to have achieved satisfactory access to the site. Dunkelberger employed a surveyor who was able to locate boring and probe locations. The report identifies only one boring and

[2] It is not clear how Dunkelberger calculated 108 acres of Treatment Types C/D. The Project Plan indicated that there was about 130 acres (finding 10).

one probe that could not be performed due to dense vegetation, although some had to be field adjusted. (*Id.* at 3-5) A comparison of the Dunkelberger report with an aerial photograph taken before construction began shows that Dunkelberger conducted borings or probes in areas of dense vegetation, such as in VCA 3 – the area for which CDJV claims the largest increase in the work area (*compare* app. R4, tab 18 at 18, *with* app. supp. R4, tab 93, *and* tr. 3/169-70). Dunkelberger achieved a relatively uniform spacing of probes and borings throughout most of the site (app. supp. R4, tab 18 at 4, 18-31).

21. Dunkelberger explored the Type C/D areas using 104 augur borings and by probing at 236 locations with a solid steel penetrometer (*id.* at 4). Dunkelberger found peat in some areas that extended as far as 13 feet below the surface. But in most areas, Dunkelberger found a layer of fill ranging from a few inches to 6-feet deep. In some places, the caprock was at the surface; at other places, a few inches below the surface. Dunkelberger found an average of 12 inches of naturally occurring soil before reaching caprock. (*Id.* at 6)

22. Dunkelberger was aware of the supposed requirement for surfaces that would support a wayward airplane. It performed calculations assuming a 175,000-pound airplane. It concluded that, even in areas where the muck extended far below the surface, it was not necessary to remove all of it by excavating to caprock. Rather, it recommended excavation to 4.5 feet below final grade, placement of a geogrid (*see* finding 15), and then placement of fill in lifts. Dunkelberger calculated that this would cut costs in half compared to excavating to 9 feet. (App. supp. R4, tab 18 at 12-14)

23. CDJV did not complain to the Navy that CDJV, DeRose, or Dunkelberger were not receiving adequate site access to determine the actual soil conditions or the boundaries of the treatment areas. Dunkelberger did not preface its report with a disclaimer that the report was of limited value or of questionable accuracy.

24. CDJV did not call any of the Dunkelberger engineers as a witness during the hearing.

25. On April 11, 2011 CDJV submitted a Joint Application for Environmental Resource Permit to Florida Department of Environmental Protection (FDEP) and the U.S. Army Corps of Engineers (USACE) (R4, tab 562). Dorado's owner, Fernando Neris (tr. 1/18), certified that the information in the application was correct (R4, tab 562 at 7). The application included representations with respect to the acres of habitat conversion and mangrove removal (*id.* at 8).

26. CDJV included a design by DeRose in the permit package. The DeRose design did not incorporate Dunkelberger's proposed 4.5-foot limit on excavation and

did not provide for placement of a geogrid. Rather, in the Treatment Type C/D areas, it provided for excavation to caprock or materials meeting the definition of general backfill and fill. (R4, tab 564 at 34) (General fill or backfill is a type of fill that could structurally hold the materials placed on top of it (tr. 1/79; R4, tab 3 at 39, 47)).

27. No one from the DeRose firm testified at the hearing to explain its design decisions.

28. On April 28, 2011 CDJV submitted a request for equitable adjustment (REA) that contained two elements. First, citing the Dunkelberger report, CDJV contended that both the amount of unsuitable soil to be excavated and the backfill with which it would be replaced had increased from its bid numbers, for which it sought $12,784,013. It is not clear from the REA if CDJV based this on Dunkelberger's proposed 4.5-foot limit on excavation but CDJV did not mention or seek payment for placement of the geogrid Dunkelberger recommended. Second, CDJV contended that the cost of fill had increased since it submitted its proposal. It requested an additional $3,871,641 due to an increase in price of $18/CY (cubic yard) from the time of its original proposal. (R4, tab 1506)

29. CDJV did not state that the Dunkelberger report was of limited value because it had not received sufficient access to the site. To the contrary, an underlying premise of the REA was that the Dunkelberger report was sufficiently reliable for the Navy to increase the contract price by more than $16 million. Among other things, CDJV stated that the Dunkelberger investigation had been performed "throughout the entire conversion area so that CDJV could understand and calculate the actual volume of soil to be excavated and backfilled" (R4, tab 1506 at 1). In an April 8, 2011 email to DeRose, Mr. Neris described Dunkelberger's work as an "extensive study" (R4, tab 4467).

30. As part of its due diligence in analyzing the REA, the Navy requested documentation from CDJV to prove its 2008 bid price for backfill (R4, tab 126). Apparently, a written quotation did not exist. Mr. Neris worked with CDJV's excavation subcontractor to fabricate a quote dated June 12, 2008, without disclosing this to the Navy (R4, tabs 129-30, 132-33).

31. An REA for more than $16 million caused consternation in the Navy and led to greater scrutiny of the project. On May 18, 2011, NAVFAC's Chief Civil Engineer, Albert Romero, opined: "This whole project appears to be questionable. In all my years with NAVFAC, I have never heard of replacing soil on the airfield, just in case there is an aircraft that might go off the pavement." (R4, tab 1625 at 3) On May 23, 2011, Mr. Romero confirmed that areas outside the runway shoulder (which included much of the Treatment Type C/D areas) need not support aircraft (*id.* at 1).

32. The Navy then revised the Treatment Type C/D criteria to make it clear that the finished surface need only support maintenance equipment, not airplanes. On May 23, 2011, contract specialist Gloria Colón provided the following revised requirement for the Type C/D areas and directed CDJV to submit a revised proposal:

> Soft compressible surficial materials such as silt, organic matter, or other deleterious materials, shall be excavated *sufficiently to meet the design intent*. General fill and special planting mix fill shall be provided to adjust surficial grades to elevations conducive for project plant materials. Grading shall be performed to provide positive drainage characteristics, and the area shall be planted with high salt marsh or maintainable wetland vegetation as appropriate. *The design intent is for the finish surface to: be capable of supporting periodic loads from Government maintenance vehicles (tractor mounted mowers and pickup trucks) without occurrence of rutting or instability; maintain stable surface elevations without continuing or long term settlements that could compromise the grading and desired vegetation types; provide positive drainage without creating areas of standing water; and support the establishment of the desired vegetation.*

(R4, tab 16 at 1-3) (new language highlighted by Board). The parties refer to these criteria as the "revised basis of design."

33. There is no evidence that CDJV asked Dunkelberger whether the revised basis of design had any effect on its recommendations, including whether the 4.5-foot excavation limit could be reduced further to save more money.

34. CDJV submitted a revised proposal on May 26, 2011, in which it lowered its calculations for additional excavation and backfill (R4, tabs 1672, 1673).

35. On August 9, 2011, CDJV and the Navy received an Environmental Resource Permit from the FDEP (app. supp. R4, tab 29). The parties received a permit from USACE on October 4, 2011 (app. supp. R4, tab 31).

36. In response to the May 26, 2011 REA, on May 3, 2012, the CO issued bilateral Mod. P10, increasing the contract price by $10,355,453[3] for a total contract

[3] The parties have not explained how the price evolved from the April 28, 2011 REA to the amounts in Mod. P10. Mr. Neris included only a brief, somewhat

price of $44,056,536.66, and extended the completion date to September 30, 2014 (R4, tab 18 at 1, 3). Mod. P10 did not specifically include the revised Treatment Type C/D descriptions but did state that it was "in accordance with . . . contractor's final revised REA proposal dated 26 May 2011 . . . ." (*Id.* at 5). The modification provided: "Acceptance of this modification by the contractor constitutes an accord and satisfaction and represents payment in full for both time and money and for any and all costs, impact effect, and for delays and disruptions arising out of, or incidental to, the work as herein revised" (*id.*).

37. By this point in time, CDJV had replaced the original designer, DeRose, with Rick Milelli of Meridian Engineering LLC (R4, tab 1877). On May 10, 2012, (one week after Mod. P10), CDJV submitted a final design package prepared by Mr. Milelli (R4, tabs 19, 19A). With respect to the Treatment Type C/D areas, Mr. Milelli used the identical language as DeRose, specifying that CDJV should remove unsuitable materials until it reached limestone or to materials meeting the requirement for general backfill and fill (R4, tab 19A at 166). Accordingly, neither the Dunkelberger report nor the Mod. P10 revised basis of design had any effect on CDJV's final design because it still required removal of all muck.

38. CDJV did not call Mr. Milelli as a witness at the hearing.

39. On July 5, 2012, the CO accepted the final design and issued a notice to proceed with construction activities. (R4, tab 10 at 143-44)

I. THE PHASE I CLAIM – ASBCA No. 60042

A. Alleged Increases in the Size of Treatment Areas

40. At the hearing, Mr. Neris testified that CDJV told the Navy as early as August 2010 that the treatment areas in some of the VCAs were larger than portrayed in the RFP drawings (tr. 1/104-06). However, there is evidence that during this period the parties discussed that the drawings overstated the acreage that needed treatment, which led to a bilateral modification in which the Navy paid CDJV to "remap" three VCAs to reduce the areas requiring treatment (R4, tab 10 at 87-89; tab 4823 ¶¶ 5-8;

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confusing, narrative with the revised REA on May 26, 2011. Mod. P10 starts with a series of unexplained decreases to CLINs 12-15, 17, 19-21 (R4, tab 18 at 3-4). It includes $8,797,805.99 in increases related to backfill, which presumably stem from the REA (*id.* at 5-7). It also has $2,981,723 in increases related to stormwater repairs, which may be separate from the REA (*id.* at 4-5). We feel confident in stating only that Mod. P10 contained at least $7,373,730 to resolve the REA.

app. supp. R4 tab 24 at 1, 3-5). But there are no documents in which CDJV informed the Navy that the areas requiring treatment in some VCAs had been understated and would require extra work.

41. If Mr. Neris knew in 2010 that there were additional areas that would require treatment, this would suggest that his certification of the 2011 permit application was false with respect to the number of acres requiring treatment. When the Navy's attorney pointed this out on cross examination, Mr. Neris alleged that CO Jeanette Sweeting pressured him to sign the application because they "did not have time" to correct the drawings (tr. 2/212-14). The Board doubts that such a conversation took place because, as described in this opinion, CDJV blames its unfortunate decisions on alleged verbal directions that in many cases are contradicted by what the COs stated in writing.

42. After the July 5, 2012 notice to proceed, CDJV began work in Phase I. As described below, it contends that the treatment areas, particularly Treatment Types C and D, were larger than portrayed in the RFP and required deeper excavation than CDJV expected. But the problem for CDJV is the absence of contemporaneous documentation that supports this assertion. While the record contains extensive communications between the parties by email and in other formats, CDJV did not send any written communication to the CO informing her that there were additional wetlands not identified in the RFP, or that CDJV was receiving pressure from Navy officials to perform work not identified in the contract. CDJV did not send the CO an email or any other written communication notifying her that it would begin performing millions of dollars in additional work.

43. The record does contain some indication that the Navy knew in 2012 that CDJV was modifying the work. On November 19, 2012, the contracting officer's representative prepared a briefing for visiting Navy officials (R4, tabs 3341, 3342). The briefing stated, in part: "Contractor designer is in the process of redesigning areas as work progresses in order to meet airfield requirements" (R4, tab 3342).

44. But that is a very general statement that could have a variety of meanings. The most probative evidence is contained in written communications from Mr. Neris directly to CO Sweeting. Emails from Mr. Neris as late as February 2013 conveyed the message that the work areas were evolving but not growing. In a February 5, 2013 email to various Navy officials including the CO, Mr. Neris stated that CDJV was modifying some of the work areas to make future maintenance easier for the Navy and to create more beneficial rabbit habitat. However, he also promised to comply with all permit requirements, which included "keep[ing] the same amount of acreages for each type of conversion . . ." (R4, tab 3896 at 1)

45. Ten days later, in an email to the CO, Mr. Neris stated that CDJV was modifying "planting and conversion areas as I mentioned previously to either make the maintenance more feasible, to lessen the impact to air operations; or to improve or maximize the sustainability of the rabbits" (app. supp. R4, tab 107 at 1). However, he reiterated that "CDJV will convert the permitted amount of areas, and that the project will comply with all permits" (*id.*). Thus, neither of Mr. Neris's emails communicated to the CO that CDJV was expanding the Treatment Type C/D areas or that Navy employees in the field were directing CDJV to expand the Treatment Type C/D areas or to excavate more muck than required by Mod. P10. The emails communicated that CDJV, as the design-builder, was finetuning the work, but did not convey that CDJV expected additional money for these efforts.

46. CDJV's February 2013 representations to the CO that it was complying with the permits by keeping the same acreage for each treatment type leads to the question of whether CDJV was providing the same information to the permitting authorities (FDEP and USACE).

B. CDJV Told FDEP/USACE That Treatment Type C/D Areas Were Declining

47. CDJV's Environmental Manager, Dr. Philip Frank, testified that "if you have a permit that says you can fill 100 acres and you end up filling 120, you have a compliance problem" (tr. 3/137). He met with FDEP on March 13, 2013 (R4, tabs 3634, 3635). Dr. Frank submitted an April 22, 2013 memorandum to FDEP summarizing the meeting. He represented to FDEP that CDJV was changing the work but "typically" the changes were from Treatment Type C/D to Treatment Type A and that the VCAs would not be expanded. (R4, tab 3635 at 2) Because Treatment Type A did not require CDJV to grub, excavate muck, place suitable fill, or plant appropriate vegetation (findings 7-8), this meant that the changes would make the work easier, less time consuming, and less costly.

48. In a follow-up email to FDEP on April 25, 2013, Dr. Frank stated that "We will stay within the limits of the work areas as proposed; all that will change is what happens within the permitted work area (R4, tab 3646 at 2). Dr. Frank understood that he had conveyed to FDEP that the changes were "pretty minor" (tr. 3/147).

49. FDEP approved the request. In a May 1, 2013, letter from FDEP to the Navy (on which Dr. Frank was copied), FDEP stated that it understood that only "minor changes to the scope of the project" were at issue. (R4, tab 3666 at 1)

50. In May 2013, Dr. Frank met with USACE. According to a May 22, 2013 summary of the meeting he emailed to Navy environmental officials, USACE agreed that modifications to treatment types were acceptable and had a "net environmental

benefit" because they resulted in an increase in Treatment Type A areas, which reduced the discharge of fill in wetlands caused by the more invasive Type C/D work. (R4, tab 3697 3899) Thus, once again, Dr. Frank represented that the work was changing, but in a way that made it easier for CDJV to perform.

51. In sum, the Board has not seen any convincing evidence that, prior to May 2013, CDJV reported to the CO (or anyone at the Navy) that it had undertaken a major expansion of Treatment Type C/D areas. The weight of the evidence is that CDJV was informing all government agencies that the Type C/D areas were staying the same or declining in favor of Type A.

C. CDJV Notifies the CO of Expanded Treatment Areas and Submits an REA

52. On May 2, 2013, CDJV informed the CO that it had performed an additional 28.37 acres of Treatment Type C/D work and requested that it be allowed to use as fill stockpiled materials owned by the Navy (app. supp. R4, tab 111 at 1, 17-18). CDJV did not allege that the Navy had directed it to perform this work. CDJV did not even request money. In fact, CDJV stated that it had already been told by the Navy that there were no funds to pay for additional work and that it was requesting use of the stockpile to defray the costs. (*Id.* at 18) On May 23, 2013, the Navy denied the request because the Navy needed the stockpile for another purpose (R4, tab 3702 at 1).

53. On June 10, 2013, CDJV submitted an REA seeking $7,775,883 for an additional 30.03 acres of Treatment Types C/D in Phase I of the project (R4, tab 22 at 1, tab 3792 at 1, 5). CDJV did not contend that it had notified the CO prior to performing the work, nor did it contend that the Navy had directed it to perform the work, nor that the CO had promised to pay for the work. Rather, it contended that if it had not performed the work, the objectives of the project would not have been achieved (R4, tab 3792 at 3).

54. CDJV also stated that it had "consulted and negotiated with all of the permitting agencies and verified that all of these post permitting changes are acceptable" (*id.*). But this was false. CDJV did not tell FDEP or the Corps that the Type C/D areas were increasing by more than 30 acres; it had represented that "typically" they were declining in favor of Type A (findings 47, 50).

55. CO Sweeting met with the CDJV project team (and Mr. Neris separately) on June 13, 2013. The following day, after she received a draft of the meeting minutes from CDJV, she directed CDJV to amend them to include the following statements:

> Mrs. Jeanette Sweeting stated [at the meeting] that CDJV is NOT to incur any additional expense on this contract. This

> contract has reached its maximum cost limitation and additional funds cannot be added to this contract or issued under a separate contract, even if the Base CO had additional funds available .....Per meeting held on 6/13/13 between Jeanette Sweeting and Fernando Neris, proper notification to the Contracting Officer of a Differing Site Condition was not provided pursuant to FAR clause 52.236-2 and an REA cannot be considered due to the cost limitation for this project.

(R4, tab 4783 at 2). CO Sweeting also stated that the parties had discussed various courses of action, including descoping some of the remaining work (*id.*).

56. Mr. Neris testified in an April 17, 2019, declaration that he informed CO Sweeting multiple times starting in December 2012 that "CDJV was forced to perform less Treatment Type A work and significantly more of the more-costly Treatment Types C and D work." He testified that CO Sweeting promised to pay for the work. (R4, tab 142 at ¶ 6).

57. At the hearing, Mr. Neris went further, alleging that these conversations with the CO started during the first VCA, which would have been several months earlier, in August 2012 (tr. 1/165-68, 171, 178-79, 205-06). This is, of course, inconsistent with what he told CO Sweeting in February 2013 (finding 44-45) and with Dr. Frank's representations to FDEP and USACE in the spring of 2013 (findings 47-48, 50). It is also in direct conflict with CO Sweeting's statements at the June 13, 2013 meeting and leads to the question of why he did not challenge her if she had made such contradictory statements. Mr. Neris testified that he did not do so because he "did not think that contradicting or embarrassing Ms. Sweeting in front of other Navy personnel would be appropriate or productive . . . ." (R4, tab 142 at ¶ 14) The Board does not believe this testimony and finds that the CO never made multiple promises to pay for the work and that CDJV never provided her notice of the differing site conditions.

58. Mr. Neris further testified that CO Sweeting did not state to him on June 13, 2013 that CDJV had failed to provide notice of the differing site condition, that she did not state that the Navy lacked funds, or that there was a cost limitation for the project, as she had stated in her amendment to the meeting minutes (tr. 2/65, 70-71). When asked why he did not challenge her on these supposedly false statements, Mr. Neris once again said he did not want to embarrass her (tr. 2/71). The Board finds CO Sweeting's contemporaneous account to be much more credible than Mr. Neris' testimony.

D. CDJV Alleges An Increased Depth of Excavation

59. As we have already found, neither the original specification allowing the use of geosynthetics, nor the Dunkelberger report proposing excavation of no more than 4.5 feet, nor the Mod. P10 revised basis of design, had any effect on CDJV's designers, who specified the complete removal of unsuitable materials (findings 26, 37). The record further demonstrates that during construction three key people on the CDJV team were either unaware of, or had lost sight of, the revised basis of design and failed to understand that the modified contract did not require CDJV to excavate to caprock or remove all soft compressible materials (findings 60-66).

60. On July 16, 2012, Dr. Frank and Mr. Milelli (the new designer) exchanged emails with a subject line "Working Dwgs." In his email to Mr. Milelli, Dr. Frank included language that he said was "Directly from Project Program." He then quoted at length from the original Treatment Type C/D design requirements, rather than the relaxed Mod. P10 basis of design. (R4, tab 155)

61. Almost a year later, on June 25, 2013, Mr. Neris sent the CO two emails about an alleged increase in muck removal and backfill. He stated in these emails that he had reexamined VCAs 22 and 23 and had found that most, if not all, of the excess excavation of unsuitable material and the backfill placed had occurred in these VCAs (R4, tabs 30, 31).

62. Mr. Neris stated in the June 25, 2013 emails that CDJV had encountered muck at deeper levels than anticipated, up to approximately eight feet in some places with an average depth of 6.5 feet (R4, tab 30 at 1). He also suggested that the backfill increase was not due to clearing additional acres as CDJV had alleged in the June 10, 2013 REA (*see* finding 53), but was rather due to the depth of excavation (R4, tab 31 at 1).

63. Also on this date, Mr. Neris sought input from Dr. Frank. He asked whether it would be accurate to say that 90% of VCA 23 excavation had been at least 6 to 7 feet deep. (R4, tab 3924 at 1) In his response, Dr. Frank seemed to be unaware of the revised basis of design, stating:

> The issue of excavating down to firm rock, as specified in the RFP, was always a problem from the start, and a huge unknown. We were always struggling with it, wanting to do the right thing but not wanting to waste fill/money. I think it is important to remind the Navy this was their specification and we did our best to comply . . . .

(R4, tab 3924 at 1)

64. The Navy responded to Mr. Neris by asking why CDJV was excavating so deep, but he did not know. On July 10, 2013 (roughly a year after work started), he wrote to Mr. Milelli stating "[c]an you send me a quick email on why we had to remove the unsuitable fill and go to cap rock. The navy needs an engineering explanation of why we had to remove the muck" (R4, tab 143). Mr. Milelli responded by stating "[i]t was required in the RFP" (*id.*).

65. That same day, Mr. Neris sent an email to the CO, in which he demonstrated a complete lack of awareness of the revised contract terms. He contended that the contract "clearly required CDJV to excavate all soft compressible surficial materials . . . ." In support of this contention, he quoted at length from the original basis of design. (R4, tab 36 at 1) When the Navy's attorney asked him about this incident on cross examination, his explanation was that he was "stressed out" (tr. 2/190).

66. At a meeting two days later on July 12, 2013, the Navy had to explain to CDJV that the revised basis of design did not require excavation to caprock and only required a finished surface that would support maintenance vehicles (R4, tab 37 at 3).

67. On July 12, 2013, CDJV was less than three months from completion of Phase I (finding 86) and it had long since begun excavation in all seven of the Phase I VCAs. Excavation in all seven of the VCAs was complete, or nearly complete, by this date (app. supp. R4, tab 234 at 173 (VCA 1 - completed on January 24, 2013), 177 (VCA 23 - completed on February 7, 2013 except for planting), 178 (VCA 21 – 100 percent complete on February 7, 2013), 211 (VCA 22 – demucking and backfilling 100 percent complete on May 23, 2013), 217 (VCA 3 – 98 percent complete on June 13, 2013, concrete pad remains), 231 (VCA 2 – 90 percent complete on July 12, 2013 and VCA 20 – demucking and backfilling 80 percent complete). Thus, CDJV did all, or almost all, of the Phase I excavation based on the mistaken belief that the contract required excavation to caprock.

68. The Board notes that Mr. Neris testified concerning a video purportedly demonstrating the difficulty of excavating in VCA 3 (tr. 1/187-88). The video shows CDJV excavating in what looks like a pit filled with water (app. supp. R4, tab 120). CDJV cited the video in its post-hearing brief in support of a contention that the work throughout the VCAs was more difficult than predicted by Dunkelberger (app. br. at PFF ¶¶ 85-87, at p. 86).

69. Mr. Neris testified that the video showed work in the northwest corner of VCA 3 (tr. 1/189). However, when the Board viewed the video after the hearing, we

observed that the video shows work next to a large parking lot (*e.g.*, app. supp. R4, tab 120 at 1:08-10), which does not exist in that part of VCA 3 (*see*, *e.g.*, app. supp. R4, tab 93).

70. In its reply brief, the Navy has made a lengthy, but very convincing, case that the work shown in the video was not in VCA 3, or in any of the VCAs (gov't reply at 18-31). Rather, it involved drainage work that was separate from the vegetation work and is not a subject of the claims. The video, therefore, is not probative of the difficulty of the conversion work in the VCAs. The Board will construe Mr. Neris' testimony on this matter not as a deliberate attempt to mislead the Board but as evidence of his lack of familiarity with the work.

71. Finally, the Board acknowledges CDJV's citation to a letter it submitted to CO Sweeting and other Navy officials on October 15, 2012, in support of its assertion that Navy officials were directing CDJV to excavate to caprock (app. br. at 91, 97; compl. exs. 7-8). The Board finds this reliance baffling. The letter addressed the types of material that would make acceptable backfill. It did not allege that Navy officials were directing CDJV to excavate to caprock. (App br. at 91; compl. ex. 7)

72. The Board concludes that CDJV's problems concerning depth of excavation were caused by its own ineptitude. CDJV failed to manage properly the work of its designers and failed to understand what the modified contract required.

E. CDJV Submits a Revised REA

73. CO Sweeting was not present at the July 12, 2013 meeting with CDJV due to an illness that would end her involvement with the project, and which made her unavailable as a witness. A new CO, Mary Thompson, replaced her at this meeting. In addition to reminding CDJV that it was not necessary to excavate to caprock, one of the Navy officials present stated that all potential changes that affected time or money had to be approved by the CO in advance and that CDJV had not done this with respect to the additional excavation/fill. The Navy once again stated that there was no additional money available for the project and suggested various cost saving strategies including the use of a geogrid. (Tr. 2/82-83; R4, tab 37 at 3)

74. CDJV revised the June 10, 2013 REA and resubmitted it on September 11, 2013. It continued to contend that there were an additional 30.03 acres of Type C and D work, and it increased the amount sought to $8,556,409. (R4, tab 38 at 1-5)

75. As described above, CDJV contends that CO Sweeting had known about the additional Treatment Type C/D work and had promised to pay for it (findings 56-57). If this had really occurred, we would expect a contractor to apprise the new CO of such

malfeasance at the first opportunity. But in the revised REA, CDJV did not do so, stating only that if it had "constructed the VCAs as they were presented in the RFP the Project objectives would not have been achieved . . . ." (R4, tab 38 at 3)

76. A CO denied the REA on March 25, 2014 (R4, tab 44)

F. CDJV Submits a Certified Claim Citing Both Increased Depth of Excavation and Expanded Treatment Areas

77. On June 11, 2014, CDJV submitted a certified claim for $12,256,852 (R4, tab 45). The claim incorporated by reference the September 11, 2013, REA that alleged an increase in the sizes of the Type C/D areas. But the claim included a narrative in which CDJV contended that there were latent physical conditions at the site and contended that unidentified Navy employees had directed CDJV to excavate to the original design standards. (The narrative did not mention Navy employees directing CDJV to expand the footprint of the treatment areas). (*Id.* at 3, 6)

78. With respect to the allegation that the Navy directed excavation to the original design standards (that is, to caprock), CDJV had not asserted this in either of the 2013 REAs, nor in the June and July 2013 meeting with the COs and other Navy officials. When asked at the hearing why he had not done so, Mr. Neris stated that he "didn't have a lot of experience explaining situations" (tr. 2/192).

79. A spreadsheet attached to the claim stated that the Phase I plan had been to perform 72.82 acres of Treatment Type C/D work but the as-built was 97.17 acres[4] (app. supp. R4 tab 177 at 2). Thus, CDJV's final calculation is that it performed 24.35 acres of additional Treatment Type C/D work (app. br. at 86).

80. CDJV suggests in its brief that because of dense vegetation, CDJV could not have known the extent of the areas requiring treatment until after it started work and cleared the vegetation (app. br. at 87-88). This raised a question in our mind as to whether CDJV is claiming that there were areas of unexpected difficulty hidden deep inside densely vegetated VCAs that could not be identified beforehand. But, as far as we can tell, the claim is not so much that the work changed within the Treatment Type A-E footprints depicted in the RFP but rather that the footprints increased in size.

81. For example, the largest increase in Type C/D work claimed by CDJV was in VCA 3 (10.9 acres) (app. supp. R4, tab 177 at 2). A review of the drawings that CDJV submitted with its claim shows that the footprint of the treated areas grew

[4] CDJV also alleged an increase in Treatment Type A and B areas (app. supp. R4, tab 177 at 2).

substantially (*compare* app. supp. R4, tab 9 at CDJV000051 *with* CDJV000059[5]). CDJV claimed the second largest increase of Type C/D in VCA 1 at just over five acres (app. supp. R4, tab 177 at 2). The drawings submitted with the claim showed a large increase in the footprint of the treated areas in VCA 1 (*compare* app. supp. R4, tab 9 at CDJV000049 *with* CDJV000057).

82. A comparison of the VCA 3 areas CDJV claims to have treated with an aerial photograph taken about two months before the notice to proceed demonstrates that the vegetation in the expanded areas is not dense and in some instances is close to roads or a runway (*compare* app. supp. R4, tab 9 at CDJV000051, CDJV000059 *with* app. supp. R4, tab 93). Looking at this aerial photograph, Dr. Frank testified that the expanded areas in VCA 3 were "some type of grass" that the Navy had been "mowing" (tr. 3/169). Similarly, Dr. Frank testified that, other than an area around a ditch, VCA 1 was largely grass (tr. 3/171).

83. In addition to the surveyor that worked for Dunkelberger (finding 20), CDJV brought a surveyor to the site on at least one other occasion prior to the start of work (R4, tab 2516 at 1).

84. The Board finds that the expanded treatment areas were accessible and would have been visible to CDJV and its team while it performed its site investigation and prepared the design.

85. A CO denied the claim on April 6, 2015. CDJV filed an appeal on June 26, 2015 that the Board docketed as ASBCA No. 60042.

II. The Phase II Appeal – ASBCA No. 62796

86. CDJV completed Phase I by the September 30, 2013 completion date (R4, tab 10 at 144; tr. 2/83-84). As described below, the parties now agree that the Phase II work continued until December 9, 2014. Thus, it appears that CDJV did at least some of the Phase II excavation after the CO directed CDJV not to do extra work unless approved in advance by a CO (*see*, *e.g.*, app. supp. R4, tab 234 at 324, 349-50).

87. On August 21, 2019, CDJV submitted a certified claim for $1,236,951.48 for additional work in Phase II (R4, tab 71), which it amended and reduced to $1,227,179.67 on November 19, 2019 (R4, tab 72). The claim cites both an increased depth of excavation and additional Treatment Types C/D (*id.* at 7). CDJV contended, as in the Phase I claim, that Navy officials directed it to excavate to caprock, but in

[5] We cite Bates numbers because the Board only has a paper copy of this particular document.

this claim it added a contention that the Navy had directed it to expand the footprint of the treatment areas (*id.*).

88. The actual discussion of the Phase II work appears to focus on additional depth of excavation (*id.* at 17-18). The largest dollar components of the claim are described as "excess backfill" and "excess unsuitable material excavated" (*id.* at 20-21, 23). Moreover, the cost summary states that while Treatment Type C areas increased by 5.98 acres, Treatment Type D areas declined by 13.43 acres, which would have been a net benefit for CDJV (*id.* at 23).

89. One might think that if Navy field officials were directing CDJV to excavate to caprock, CDJV would have known during Phase II that it should not do so without written direction from the CO. But CDJV contended in the claim that it performed excavation to caprock at the direction of Navy officials and that it "continued to notify the Contracting Officer of these conditions and directives," including CO Thompson (*id.* at 18). There are no documents supporting this. As we have found, Ms. Thompson started her tenure as CO by directing CDJV in writing not to incur any additional costs without written approval from a CO (finding 73).

90. During his direct examination, Dr. Frank (who was not a CDJV employee) initially appeared to support Mr. Neris's testimony that Navy field personnel directed CDJV to excavate to caprock (tr. 3/117). But on cross examination, Dr. Frank admitted that he had never actually heard a Navy official direct CDJV to excavate to caprock (tr. 3/200).

91. In the Phase II claim, CDJV distanced itself from its own geotechnical investigation. CDJV contended that Dunkelberger had to operate under a variety of restrictions that prevented it from uncovering the true conditions. It contended, among other things, that discovery of the true conditions would have required bringing heavier equipment on the site (R4, tab 72, at 6, 13) Dr. Frank testified that bringing heavier equipment on-site to perform would have required a permit that might take six months to obtain (tr. 3/78). But, even if this is true, CDJV did not express any concerns to the Navy at the time about the equipment selected by Dunkelberger, or even during the next several years, and there is no evidence that CDJV requested permission to obtain such a permit.

92. At the hearing, Mr. Neris went so far as to testify that Dunkelberger was not legally permitted to even walk-through areas containing mangrove vegetation (tr. 2/178). But Dunkelberger's report does not support this. For example, VCA 3 contained areas of dense mangroves (tr. 3/169-70; app. supp. R4, tab 93). Dunkelberger's map of its work in this VCA demonstrates that it did enter the mangrove areas and that it took

at least 15 probes and borings (app. supp. R4, tab 18 at 18). The Board finds Mr. Neris' testimony on this issue not credible.

93. The gap between what CDJV alleges and what the record shows is illustrated by an incident that occurred during Phase II in VCA 16 on August 15, 2014. On that date, LT Michael Mitsch, the Navy's Facilities Engineering and Acquisition Director (FEAD) (R4, tab 4822 ¶ 3), issued CDJV a notice of noncompliance after a CDJV dozer sank in the muck (app. supp. R4, tab 185 at 6). Mr. Neris testified that this document shows that LT Mitsch was "complaining [that] we were not removing all the muck down to caprock . . . ." (Tr. 1/218) But the notice of non-compliance does not say anything about excavating to caprock. LT Mitsch issued the notice of non-compliance after an on-site Navy official notified him by email that CDJV had been placing fill without removing any muck and that, as a result, the dozer sank up to the cab (app. supp. R4, tab 186 at 1). The on-site official attached photos that show a dozer that had sunk where little or no muck had been excavated (app. supp. R4, tab 186 at 2-4).

94. On August 28, 2014, Mr. Neris responded to this incident by submitting what he called a Request for Information (RFI) for "unforeseen site conditions" in which CDJV sought more than $13 million for the VCA 16 work due to an increased depth of muck from that portrayed in the Dunkelberger report (app. supp. R4 tab 188 at 3-5). Mr. Neris did not contend that CDJV had performed additional excavation at the direction of the Navy.

95. When LT Mitsch denied the August 28, 2014 RFI on September 12, 2014, he stated "[y]ou are reminded that, per the change to the basis of design in P00010, you are only required to excavate what is necessary to support the weight of maintenance vehicles" (app. supp. R4, tab 196 at 2). In other words, LT Mitsch was aware of Mod. P10 and was directing CDJV to comply with the revised basis of design.

96. On November 14, 2014, Mr. Neris reduced CDJV's request to $5,112,330, which included the proposed use of a geo-fabric (app. supp R4, tab 185 at 11-12). LT Mitsch denied this on December 18, 2014 (app. supp. R4, tab 208 at 1).

97. At the conclusion of the hearing, the Board left the record open so that (now) LCDR Mitsch could testify in December 2022, but CDJV later decided not to call him as a witness (Bd. Corr. File, email from D. Miktus dated December 12, 2022). The Navy filed an affidavit from LCDR Mitsch (R4, tab 4822).

98. LCDR Mitsch denied that he directed CDJV to excavate to caprock in contravention of the contract terms under Mod. P10. He testified that he merely instructed CDJV to follow the contract. He testified that the caprock was not

at uniform depths and that in some places it was close to the surface, in which case it might have been necessary to excavate to caprock. He further testified that he told Mr. Neris and other CDJV officials that CDJV was excavating more than necessary to accomplish the goals of the contract, but because this was a design-build contract, "the means and methods were ultimately up to CDJV." (R4, tab 4822 ¶¶ 7, 9)

99. The Board finds the testimony of LCDR Mitsch to be credible and consistent with other parts of the record, including the Dunkelberger report that described the varying elevations of the caprock and muck, LCDR Mitsch's September 12, 2014 denial of RFI 16, and the numerous statements from the CDJV team demonstrating a lack of awareness of the design requirements (findings 21, 60-65, 93, 95). The Board finds Mr. Neris' allegation that the Navy directed CDJV to excavate all of VCA 16 to caprock to be completely incredible.

100. The parties could not come to an agreement about VCA 16 and the Navy eventually descoped the work from the project (app. br. at PFF ¶ 118; R4, tab 53 at 5).

101. With respect to CDJV's allegations that Navy officials directed it to excavate all muck down to caprock, it does cite one document that, on the surface, provides strong support for that allegation: an email from Navy Project Manager José Deliz to CO Thompson on September 10, 2014, during the VCA 16 episode. Mr. Deliz stated "it is apparent the Contractor continued to excavate the entirety of the much [sic] at FEAD direction. Perhaps the idea was not communicated properly or not passed forward as FEAD personnel cycled through" (R4, tab 4247 at 3-4). The short answer to this is that CO Thompson immediately refuted this assertion (*id.* at 3). A longer answer requires us to make findings on Mr. Deliz's activities and the ethical corners that he and CDJV cut.

102. Mr. Deliz served in the Navy Reserve with Fernando Labrada, CDJV's project manager (tr. 1/35-36; 3/179). Unbeknownst to the Navy until long after this litigation commenced, Mr. Deliz was favorably disposed to CDJV and put his thumb on the scale in its favor at key moments. He used a personal email address to communicate with CDJV so that the relevant documents did not enter the contract file. While it is not necessary to list all of them, the Board notes the following incidents:

- On October 24, 2010, using his personal email address, Mr. Deliz sent the technical evaluation factors for an upcoming solicitation to Mr. Labrada prior to the release of this information to the public. Mr. Labrada forwarded the information to Mr. Neris. (R4, tabs 134-35; tr. 4/158-61);

- On May 25, 2011, Mr. Neris requested advice from Mr. Deliz concerning the pending April 28, 2011 REA. Mr. Deliz provided analysis to Mr. Neris (R4, tab 1654);

- Later that same day, Mr. Deliz forwarded to his personal email address documents containing the Navy's analysis of the REA and its negotiation position. He then forwarded the documents to Mr. Neris (R4, tabs 1656-59). CDJV submitted the revised REA the following day (finding 34);

- Sometime in 2011, Mr. Deliz informed Mr. Labrada that he was in the process for separation from the Navy Reserve for failure to meet body composition standards. They discussed retaining an attorney. On December 21, 2021, Mr. Deliz sent an email to Mr. Labrada in which he stated "I sent the signed retainer to [the attorney], can you take care of the payment for now? I'll pay you back somehow next year." Mr. Labrada forwarded this email to Mr. Neris. In response, Mr. Neris either paid, or agreed to pay, Mr. Deliz or the attorney approximately $800[6] (tr. 1/36-37; R4, tab 547 at 5-7);

- On June 7, 2013, (three days before submission of the REA that led to the Phase I appeal), Mr. Neris sent Mr. Deliz a draft of the REA and asked him to review it. The email indicated that Mr. Deliz had already advised CDJV to threaten to shut down the project if CDJV did not get what it wanted (R4, tab 3774);

- After CDJV submitted the REA on June 10, 2013, Mr. Deliz feigned surprise with his Navy colleagues (R4, tab 171 at 3);

- The very same day, Mr. Deliz opined to, among others, CO Sweeting: "I think the CKT has a good case . . . ." (*Id.* at 2); and

[6] Mr. Deliz admitted that he discussed his separation and the attorney fees with Mr. Labrada but he stated that he rejected Mr. Labrada's offer of assistance (tr. 4/164).

- Although the Board does not see any evidence that Mr. Deliz also saw an advance copy of the April 28, 2011 REA, we observe that in that instance he also quickly advised his Navy colleagues "I believe the Contractor has a valid claim . . . ." (R4, tab 1519 at 1)

103. Due to these actions, the Board finds that statements by Mr. Deliz promoting CDJV's interests are not reliable evidence.

104. A CO denied the Phase II claim on December 17, 2020 (R4, tab 73). CDJV filed an appeal on January 21, 2021 that the Board docketed as ASBCA No. 62796.

III THE UNPAID INVOICES CLAIM – ASBCA No. 60620 and ASBCA No. 61111

105. It is undisputed that the Navy did not pay CDJV's December 2014 or March 2016 invoices. CDJV submitted a claim and filed an appeal that the Board docketed as ASBCA No. 60620 concerning the December 2014 invoice. CDJV subsequently submitted an invoice for March 2016 for $1,448,131.43, which included the unpaid amounts from December 2014. After the Navy failed to pay, CDJV submitted a certified claim dated June 20, 2016 (R4, tab 51).

106. In a final decision dated September 29, 2016, a CO denied the claim because the Navy was asserting its own claims for liquidated damages and incomplete work that exceeded the amount of the invoice (R4, tab 53), as discussed below. CDJV filed an appeal on December 19, 2016 that the Board docketed as ASBCA No. 61111.

IV. THE DEAD 8 APPEALS (ASBCA Nos. 60943 & 61733)

107. As described above, the contract allowed CDJV to use the excavated muck as a component of the special planting mix for Type C/D areas (finding 14). However, there was more than enough muck for this purpose, which led to a dispute as to whether the contract required CDJV to remove the excess materials from the base. The Navy agrees that it approved CDJV's use of an area not within any of the VCAs known as Dead 8 to deposit the materials on a temporary basis (gov't br. at PFF ¶ 157 (citing R4, tab 2409)); *see* app. supp. R4, tab 93 (Dead 8 is the area bordered by VCAs 13, 14, and 15 and is distinguished by the presence of two white circles that look somewhat like an "8"). Mr. Neris testified that Dead 8 was an area that the Navy used to store "dead planes," which the Navy has not disputed (tr. 1/54).

108. At some point in April or May of 2014, the Navy directed CDJV to stop work in Dead 8 after unexploded ordinance (UXO) was found in the excavated material (app. br. at PFF ¶ 134; gov't br. at PFF ¶ 163). CDJV could not resume work in Dead 8 until the Navy removed the UXO. The Navy never did so (gov't reply at 58). On February 26, 2015 (after the Navy accepted the project), the Navy requested a proposal from CDJV to delete removal of this material from the contract (R4, tab 57 at 2).

109. On September 20, 2016, the Navy issued a unilateral modification deleting the removal work from the contract for a price reduction of $665,000 (R4, tab 52 at 2-3). The Navy calculated this amount based on an estimated quantity of 76,000 CY and a price of $8.75/CY (R4, tab 65 at 2). [7]

110. In the September 29, 2016 final decision rejecting CDJV's unpaid invoices claim and assessing liquidated damages (finding 106), the CO also asserted a government claim for $665,000 for removal of the Dead 8 material (R4, tab 53 at 5, 8). CDJV filed an appeal on December 19, 2016 that the Board docketed as ASBCA No. 60943.

111. On June 4, 2018, a CO issued a second final decision on the Dead 8 material. In this decision, the Navy reduced the amount of material remaining in Dead 8 to 59,369 CY. But the Navy increased the price to $55.65/CY, which increased the overall claim amount to $4,313,655. The decision does not state how the Navy calculated the CYs, citing only an "independent investigation." (R4, tab 68) CDJV filed an appeal on August 3, 2018 that the Board docketed as ASBCA No. 61733.

112. The Navy refers us to a one-page document containing an aerial photograph of Dead 8 with a chart indicating that the Navy used a drone and a LIDAR (light detection and ranging) sensor to calculate the amount of soil to be removed (R4, tab 67). The document indicates that the calculations are based on 12 areas identified in the photograph, several of which appear to be heavily wooded.

113. As stated earlier, the Navy elected Rule 11 and did not present any witness testimony. While it did submit affidavits concerning the Phase I and II claims, it did not submit affidavits addressing any of the other appeals. Thus, we know nothing about the qualifications of the person who interpreted the data produced by the sensor and it is not clear what efforts the Navy made to ensure that the materials being

[7] The correspondence documenting this calculation uses 78,000 CY, not 76,000 CY for the approximate amount of material in Dead 8 but this appears to be an error (*see* gov't br. at PFF ¶ 165).

counted had been placed there by CDJV. Nor do we have evidence demonstrating that the sensor was maintained and operated correctly. The underlying premise seems to be that if the Navy has a document that says it used LIDAR, *ipso facto*, it must be reliable. The Board declines to make this finding.

114. The Navy also points us to an October 30, 2014, REA signed by Mr. Neris in which CDJV sought $2,217,216 based on an estimate that there "are approximately 40,000 CY remaining to be hauled off site" (R4, tab 48 at 2). However, the basis of this calculation is not clear.

115. The Navy has not proven by preponderant evidence the number of CY of material that CDJV left in Dead 8, nor has it proven that the price of $55.65 CY is reasonable.[8]

V. APPEALS CONCERNING LIQUIDATED DAMAGES (ASBCA No. 60942 and ASBCA No. 61952)

116. The contract as awarded contained FAR 52.211-12, LIQUIDATED DAMAGES—CONSTRUCTION (SEPT 2000). The clause provided for liquidated damages of $5,960 "for each calendar day of delay until the work [was] completed or accepted." (R4,tab 9 at 32)

117. On October 19, 2009, the parties entered into bilateral Mod. A00002, which, among other things, established a single completion date of July 31, 2012, for all the work based on the exercise of the Phase II options. The modification, without explanation, doubled the liquidated damages to $11,920 per day. (R4, tab 10 at 37-38) While this conceivably could be explained by the now simultaneous completion dates, the contract as awarded did not provide for an assessment of liquidated damages per phase (R4, tab 9 at 32).

118. After several changes, the Navy reverted to separate completion dates for the two phases, with the completion date for Phase I set at September 30, 2013, and for Phase II set at September 30, 2014 but it did not change the liquidated damages amount (R4, tab 10 at 115, 144)

119. On October 10, 2013, CO Renee Mims wrote to Mr. Neris, stating that the Navy was concerned about Phase II progress and that liquidated damages of $5,960

[8] Based on documents that the Navy improperly attempted to add to the record by attaching them to its post-hearing brief, the $55.65 CY price was the work of a Navy cost engineer who did not testify or submit an affidavit. The Board declines to add the documents to the record.

per day would be applied for late completion (app. supp. R4, tab 145). CDJV by that point had completed the Phase I work on time and had not been assessed liquidated damages (tr. 1/95-96). After receiving the letter from CO Mims, Mr. Neris believed, understandably, that the liquidated damages were $5,960 for Phase II (tr. 1/95).

120. In the same final decision rejecting CDJV's unpaid invoices claim and demanding payment for the material left in Dead 8 (findings 106, 110), the CO asserted a claim for liquidated damages of $1,585,360 based on CDJV's failure to complete the project until February 10, 2015 and a daily rate of $11,920 (R4, tab 53 at 5).

121. CDJV appealed the Navy's liquidated damages on December 19, 2016. The Board docketed the liquidated damages claim as ASBCA No. 60942.

122. On October 18, 2017, CDJV submitted a claim contending that work on Phase II was substantially complete by December 9, 2014, or 70 days after the contract completion date, and it was entitled to 70 days of excusable delay. However, it stated that, because the Navy had not accepted the project until February 10, 2015, it was entitled to an extension through that date. (R4, tab 69 at 55) If granted, this claim would negate the government's liquidated damages claim.

123. A CO denied the claim on October 29, 2018 (R4, tab 70). CDJV filed an appeal on January 24, 2019 that the Board docketed as ASBCA No. 61952.

124. During litigation the Navy reduced the amount sought. It now accepts the December 9, 2014, completion date and seeks $834,400 in liquidated damages in ASBCA No. 60942. (Gov't mot. to amend counterclaims, Sept. 16, 2022)

125. During the hearing, CDJV presented testimony from Thomas D. Fertitta, an expert in construction scheduling and delay analysis (tr. 4/179). Mr. Fertitta wrote a report that detailed his opinions (app. supp. R4, tab 229).

126. Mr. Fertitta testified credibly that as of July 28, 2014 CDJV had a reasonable schedule for completion of work by the September 30, 2014 contract completion date. Based on his analysis of CDJV's payment applications, he concluded that CDJV had completed 96.7% of the work by September 19, 2014, which the Navy does not challenge. Mr. Fertitta found that CDJV's failure to complete all work by September 30, 2014, was due to causes beyond its control, namely, work shutdowns

caused by operation of the runways and excessive flooding. (Tr. 4/203-04; app. supp. R4 tab 229 at 32)

127. The contract provided that CDJV "shall anticipate that up to 20 random work days will be lost over the course of this project's construction due to airfield operations preventing the Contractor from performing any project work" (R4, tab 2 at 65). CDJV could mitigate these delays by moving its forces elsewhere but, as the project neared its end, it had fewer options to change work locations. Based on Mr. Fertitta's review, CDJV experienced 16 calendar days of delay due to airfield operations in addition to the 20 days specified in the contract. (App. supp. R4, tab 229 at 34-36)

128. With respect to flooding, Dr. Frank (a resident of the Florida Keys) testified credibly about the problems caused by increasingly high tides that did not occur when he moved there in 1992. (Tr. 3/155-56) He testified that the tides crest the roads and, when the tide goes out, the water remains, and it can take weeks to dry out (tr. 3/157). As a result, some of the VCAs were underwater in the summer and fall of 2014, which, among other things, prevented CDJV from placing topsoil or planting vegetation (tr. 3/160-61).

129. Mr. Fertitta cites in his report numerous examples of tides affecting the work in the August to October 2014 timeframe. For example, the daily reports for October 27-31, 2014, state that no work could be performed in VCAs 8 and 13 because they were drying out. (App. supp. R4, tab 229 at 40) In his testimony, Mr. Fertitta demonstrated how the tides CDJV experienced from August to October 2014 were higher than historical averages, resulting in shorter drying periods (tr. 4/212-16; Fertitta demonstrative ex. at 30-33).

130. Mr. Fertitta calculated that the shutdowns caused by runway operations and the flooding combined to cause CDJV 77 calendar days of delay (app. supp. R4, tab 229 at 75).

131. The Navy submitted reports from an expert on scheduling and delay (R4, tab 559.0) but the Navy did not call him as a witness. As a result, he was not subject to cross examination, and he was never recognized by the Board as an expert. The Navy discusses the report in a single proposed finding of fact. The expert's conclusion was that CDJV completed the project on February 10, 2015 (R4, tab 559.0 at 6), a position that the Navy has since abandoned. The Navy did not submit an updated report after it accepted the December 9, 2014, completion date. The basis of the expert's analysis was that CDJV's failure to remove material in Dead 8 was a critical path delay (gov't br. at PFF ¶ 175).

132. The Board does not understand the Navy's case with respect to delays caused by the material at Dead 8. The Navy informs us that it directed CDJV to stop work in Dead 8 "[i]n or about May 2014" after discovery of the UXO (gov't br. at PFF ¶ 163) and does not mention any direction to resume work. In fact, the Navy's reply brief indicates that the UXO remains at the site (gov't reply at 58). Yet, the Navy faults CDJV for not progressing the Dead 8 work (gov't br. at PFF ¶ 175). As CDJV sums it up, "the Navy seeks to assess [liquidated damages] based on a failure to perform work that CDJV was not allowed by the Navy to perform" (app. reply at 70).

133. The Dead 8 site was not within the footprint of the project and it does not appear that the muck in Dead 8 prevented the government from having complete use of the project (*see* app. supp R4, tab 47 at 11 (post-award kickoff meeting agenda advising CDJV that "substantial completion" means that "the work is complete to the extent that it allows the customer to use it for its intended purpose..... Substantial completion stops liquidated damages.")). At most, Dead 8 was a side issue that did not prevent CDJV from reaching substantial completion.

134. The Navy also relies on its expert to challenge CDJV's contention that the site experienced more tidal flooding than expected from August to October 2014. In his rebuttal report, the expert identified other years in which the site experienced worse flooding than in 2014 (R4, tab 560.0 at 15-16). While this appears to be true, Mr. Fertitta explained in his testimony that in most of these instances the higher flooding was due to a hurricane or tropical storm (tr. 4/220-21; Fertitta demonstrative ex. at 38-39). In any event, the Board finds Dr. Frank's testimony as a percipient witness to be credible as to whether flooding conditions prevented CDJV from planting. The Navy has not submitted an affidavit from any witness contradicting Dr. Frank.

135. The evidence presented by CDJV is more credible than that presented by the government. Accordingly, the Board finds that CDJV has demonstrated entitlement to a time extension to December 9, 2014.

DECISION

ASBCA No. 60042 and ASBCA No. 62796

CDJV relies on the Differing Site Conditions (DSC) and Changes clauses in support of its claims (app. br. at 79-80, 106). CDJV contends that it is entitled to recover for the differing treatment type areas and deeper excavation areas under the DSC clause as a Type I condition. CDJV further contends that it is entitled to recover

under the Changes clause for differing treatment type areas and improper directives to excavate to caprock. (*Id.*)

Somewhat different considerations govern the depth of excavation claim and the increase in size of the treatment areas claim. We discuss them separately.

A. Additional Depth of Excavation

1. Jurisdiction

The Navy contends that the Board does not possess jurisdiction to consider CDJV's DSC claim related to depth of excavation during Phase I (gov't br. at 90). The Board does not possess jurisdiction if a contractor submits a claim but on appeal pursues a claim that is materially different either factually or legally. *K-Con Bldg. Sys., Inc. v. United States*, 778 F.3d 1000, 1005 (Fed. Cir. 2015) (citing *Contract Cleaning Maint., Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987)).

The problem that the Navy identifies is that CDJV's Phase I claim narrative builds up to an assertion that Navy officials directed CDJV to excavate deeper than necessary, namely, to the depths required by the original basis of design (finding 77). This would appear to be a directed change rather than a DSC.

While hardly a model of clarity, the claim states that "our claim does involve latent physical conditions at the site, which arose as a result of incomplete plans and specifications in the RFP" (R4, tab 45 at 6at 3). CDJV then creates confusion by moving on to the allegation that the Navy officials directed the extra work, which leads to the question of whether CDJV excavated deeper because the subsurface conditions were different, or simply because the Navy directed it to do so?

The Board also recognizes that before submitting the Phase I claim, CDJV had emailed CO Sweeting alleging the increased depth of excavation (findings 61-62). CDJV did not assert in those emails that the Navy had directed the additional excavation and the CO would have been on notice from those emails of a possible DSC claim. Moreover, when CO Renee Comfort denied the Phase I claim, she understood that CDJV was asserting a DSC claim related to depth of excavation because she stated: "you allege that latent physical conditions at the site due to incomplete plans and specifications provided by the Government resulted in added costs not compensated for in a previously granted equitable adjustment" (R4, tab 49 at 1).

Based on these considerations, the Board holds that CDJV provided enough information for the CO to have "adequate notice of the basis . . . of the claim." *K-Con*,

778 F.3d at 1005 (citing *Contract Cleaning*, 811 F.2d at 592). Accordingly, the Board possesses jurisdiction to consider this aspect of the claim.

2. The Alleged DSC

A Type I DSC exists when "subsurface or latent physical conditions at the site . . . differ materially from those indicated in [the] contract." FAR 52.236-2(a) (finding 2). The Board evaluates whether the appellant acted as a reasonable and prudent contractor in interpreting the contract. *H.B. Mac, Inc. v. United States*, 153 F.3d 1338, 1345 (Fed. Cir. 1998). The appellant must prove that: [1] "the conditions indicated in the contract differ materially from those actually encountered during performance;" [2] "the conditions actually encountered were reasonably unforeseeable based on all information available to the contractor at the time of bidding;" [3] "the contractor reasonably relied upon its interpretation of the contract and contract-related documents;" and [4] "the contractor was damaged 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*, 153 F.3d at 1345).

Even if there had been a DSC (which, below, we find there was not), CDJV would have no one to blame but itself for its difficulties on this contract. The record demonstrates that Dorado's prior experience in trimming trees and trash removal did not prepare it to manage this contract. Dorado had no experience converting wetlands and thus had no experience excavating through layers of peat, or constructing on peat that remained in place (finding 3). The leader of the effort, Mr. Neris, appeared overwhelmed at key points during the project. He failed to understand how the basis of design changed after Mod. P10 and that it did not require excavation to caprock (findings 63-65). CDJV did not act in a reasonable and prudent manner in bidding on a contract that it lacked the capability to manage and did not act in a reasonable and prudent manner in ensuring that it understood the contract requirements.

One of the areas in which CDJV fell short is illustrated by the Responsibility of the Architect-Engineer Contractor clause (finding 2). It provides:

> (a) The Contractor shall be responsible for the professional quality, technical accuracy, and the coordination of all designs, drawings, specifications, and other services furnished by the Contractor under this contract.

FAR 52.236-23

CDJV failed to comply with this clause because it failed to manage and coordinate the work of the designers, and its team in general. At a minimum, compliance with the clause would have meant ensuring that both the design professionals and the workers in the field understood what the contract required. But after Dunkelberger, the geotechnical engineer, recommended soil excavation of no more than 4.5 feet, DeRose nonetheless submitted a design for the permit application calling for the removal of all unsuitable soils. This might have been a minor error – if it had been corrected in the final design. But DeRose's successor, Mr. Milelli, submitted a final design incorporating the same language as DeRose requiring complete removal of the unsuitable materials, even though the Navy had reduced the design requirement. This suggests that the DeRose language was simply cut and pasted into the final design. An email Mr. Milelli submitted a year after work began makes us wonder if he even knew about Mod. P10, or if he had forgotten what it required. The result of all of this was that CDJV performed all, or nearly all, of the Phase I excavation based on the incorrect belief that the contract required excavation to caprock. (Findings 26, 37, 67)

Even if CDJV did not excavate too deep, the facts do not lend themselves to a DSC claim. This is not a case where the contract made various representations about the site conditions and the contractor submitted a claim contending that the conditions were different than represented. While this contract made some statements about the site conditions, the Navy was clear that they were not guaranteed (finding 16). The Navy paid CDJV to perform a geotechnical investigation and then cooperated with CDJV in negotiating a bilateral modification that added at least $7.3 million to the contract price (*id.*; finding 36). Thus, the Navy did everything that could be reasonably expected of it. The contract was priced, and the work performed, based on CDJV's geotechnical investigation, not the Navy's.

To meet the first element of a Type I DSC claim, the contractor is required to show that the contract represented what the site conditions would be. *Int'l Tech. Corp. v. Winter*, 523 F.3d 1341, 1349 (Fed. Cir. 2008); *Comtrol, Inc.*, 294 F.3d at 1363. For example, in *International Technology*, the Federal Circuit held that a reasonable contractor would not have read the contract as representing that the soil contained less than 10% clay based only on nine soil samples, when the contract did not state the contractor could rely on the representations or that the test results were intended to be representative of the soil. *Int'l Tech*, 523 F.3d at 1350-52. Similarly, in *Comtrol*, the Court held that even though the contract stated that "hard material . . . may be encountered," this did not amount to a statement that only hard material would be encountered. *Comtrol*, 294 F.3d at 1362-63. In *Kato Corporation*, the Federal Circuit affirmed our decision finding that, although the contract stated that it was "not anticipated that contaminated soil will be encountered," this was not a representation as to soil conditions, only a statement as to what the Air Force anticipated. *Kato*

Corp., ASBCA No. 51513, 02-1 BCA ¶ 31,669 at 156,495, *aff'd*, *Kato Corp. v. Roche*, 60 Fed. App'x 324, 327-28 (Fed. Cir. 2003). In these appeals, CDJV has not proven the first element of a Type I DSC claim because the Navy did not represent what the actual conditions would be. The work was priced and performed based on Dunkelberger's representations.

To meet the second and third elements of the Type I test, CDJV must show that the conditions encountered were reasonably unforeseeable in light of all the information presented and that it relied upon its original interpretation of the contract. *Int'l Tech.*, 523 F.3d at 1352 (citing *Renda Marine Inc., v. United States*, 509 F.3d 1372, 1376 (Fed. Cir. 2007 (further citation omitted)). At the time of award, CDJV knew that there were organic materials on site, but also knew that the Navy did not guarantee the information and that the Navy was charging it (CDJV) with responsibility for performing the site investigation (finding 16). Certainly, one foreseeable outcome was that the amount of muck would grow. To the extent that CDJV's claim is that large amounts of muck were unforeseeable at the time of award, this is defeated by the disclosure of organics in the Project Program, the Navy's refusal to guarantee that information, and the placement of responsibility for site investigation on CDJV. *See H.B. Mac*, 153 F.3d at 1347-48 ("a reasonable and prudent contractor, who was to perform excavation to a depth significantly below the water table at a site within 700 yards of the ocean that was intersected by streams . . . would have foreseen the need for sheet piling"). In any event, the proper measuring point is Mod. P10, not the original contract award. By the time the parties signed that modification, the evidence of muck was quite clear (findings 18, 21).

For similar reasons, CDJV could not reasonably have relied on the original contract information when that information was not guaranteed. *See H.B. Mac*, 153 F.3d at 1346-47 (logs of borings 300 yards from the site were too far away to be reasonably relied upon).

CDJV's brief lacks a coherent response to these problems. One of the main problems it faces is that the claims represent a disavowal of its own geotechnical report. CDJV tells us repeatedly in its brief that the Dunkelberger report was "limited." For example, it states:

> CDJV's design-phase geotechnical study was necessarily limited to means, methods, and equipment that would not disturb any vegetation, wetlands, or mangroves, because CDJV was not allowed by law and the Contracting Officer to disturb the vegetation and conduct a more robust geotechnical investigation until permits were issued and other predecessor work was complete.

(App. br. at 4). In support of these contentions, CDJV mainly cites Mr. Neris's testimony at the hearing (app. br. at 24-25, 83, 88).

There are three problems presented by CDJV's attempt to minimize the Dunkelberger report. First, to the extent that it is based on Mr. Neris's testimony, the Board has found that testimony to be, in large part, not credible (findings 41, 57-58, 92, 99; *see also* finding 30).

Second, there is no contemporaneous evidence in which either CDJV, its designer, or Dunkelberger complained that it did not have adequate access to the site to uncover the true conditions, or that it was in any way prevented from using appropriate measures to determine the site conditions (finding 23). To the contrary, at the time Mr. Neris viewed the investigation as "extensive" (finding 29). An underlying premise of the original (2011) REA was that the Dunkelberger report was sufficiently reliable to justify a $16 million increase in the contract price (*id.*). Moreover, despite the alleged restrictions, Dunkelberger was able to find muck stretching 13 feet below the surface, (finding 21).

This leads to the third problem: accord and satisfaction. "To prove accord and satisfaction, the government must show '(1) proper subject matter; (2) competent parties; (3) a meeting of the minds of the parties; and (4) consideration.'" *Bell BCI Co. v. United States*, 570 F.3d 1337, 1341 (Fed. Cir. 2009) (quoting *O'Connor v. United States*, 308 F.3d 1233, 1240 (Fed. Cir. 2002)). There is no dispute that the subsurface conditions were a proper subject matter for a modification, that there were two competent parties, or that the Navy provided consideration in terms of more than $7 million paid. The only possible question is whether there was a meeting of the minds. Our review of the record indicates that there was a meeting of mind as to the additional work beyond what was shown in the RFP. Specifically, the Navy paid CDJV to perform the geotechnical investigation, CDJV alleged that the investigation indicated that the site conditions were much worse than it expected, and the parties thereafter negotiated a bilateral modification through which CDJV received more than $7 million.

Conversely, there is a complete lack of evidence in either the April or May 2011 REAs or the resulting modification that this was only a partial settlement or that the Navy would entertain a new REA if the Dunkelberger investigation proved to be inadequate. It was incumbent on CDJV in this situation to put the Navy on notice that this was only a partial settlement and that it was reserving its rights to submit a second REA on the very same issue. *Merritt-Chapman & Scott Corp. v. United States*, 458 F.2d 42, 44-46 (Ct. Cl. 1972).

Lastly with respect to the DSC claim, CDJV suggests in its brief that Mod. P10 should be construed as a Navy purchase of the amount of soil and backfill that CDJV had calculated in the REAs. It further contends that because it failed to include the cost of off-site disposal of muck in the REAs it should be allowed to pursue that now. (App. br. at PFF ¶ 129, and p. 82; app. reply at 27) The Board disagrees.

After Mod. P10, the contract remained a fixed-price contract. It was not converted into a cost-reimbursement contract. CDJV bore the risk of under-estimating the amount of excavation and backfill. "[A] fixed-price contract does not normally impose on [the government] any responsibility for whether or not the contract work can be done within the contract bid price." *Sperry Rand Corp. v. United States*, 475 F.2d 1168, 1175 (Ct. Cl. 1973) (citing *Aerojet-General Corp. v. United States*, 467 F.2d 1293, 1301 (Ct. Cl. 1972)). A contractor performing such a contract "shoulders the responsibility for unexpected losses, as well as for his failure to appreciate the problems of the undertaking." *Id.* (quoting *Macke Co. v. United States*, 467 F.2d 1323, 1328 (Ct. Cl. 1972)). CDJV must bear the responsibility if it did not make proper calculations based on the Dunkelberger report, or if it miscalculated how much muck it would be able to recycle into a planting mix and ended up with more muck to dispose of than it had expected (*see* app. br. at PFF ¶ 128).

3. Alleged Navy Directions to Excavate to Caprock

CDJV's other attempt to avoid the effects of its own geotechnical investigation and Mod. P10 is the contention that Navy officials directed CDJV to excavate to caprock, which would implicate the Changes clause. The Board simply does not believe that Navy officials were to blame for CDJV's depth of excavation. As we have found, the great weight of the evidence is that CDJV failed to understand what the contract required; that the Navy had to remind CDJV that it was not necessary to excavate to caprock; that CDJV never sent a CO an email or other written document stating that Navy field employees were directing CDJV to excavate to caprock; and that the CO told CDJV that it should not incur additional costs without written direction from a CO (findings 42, 60-66, 95).

CDJV's Phase II claim is that the Navy field officials continued to demand excavation to caprock even after CDJV had been told in writing not to incur extra costs without CO approval and that it was not necessary to excavate to caprock (finding 89). The Board believes that, if Navy field officials had instructed CDJV to excavate to caprock in defiance of their own COs, a reasonable and prudent contractor would have written to the CO and demanded instructions.

Accordingly, the Board finds that CDJV's claims as far as they relate to additional depth of excavation are unfounded.

B. Additional Acres Converted

The Changes clause (finding 2) provides:

> (a) The Contracting Officer may, at any time . . . by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract . . .
>
> (b) Any other written or oral order . . . from the Contracting Officer that causes a change shall be treated as a change order under this clause; *provided*, that the Contractor gives the Contracting Officer written notice stating (1) the date, circumstances, and source of the order and (2) that the Contractor regards the order as a change order.
>
> . . .
>
> (d) . . . no adjustment for any change under paragraph (b) of this clause shall be made for any costs incurred more than 20 days before the Contractor gives written notice as required.

FAR 52.243-4

To prove entitlement to a constructive change, the contractor must show "(1) that it performed work beyond the contract's requirements, and (2) that the additional work was ordered, expressly or impliedly, by the government." *BGT Holdings LLC v. United States*, 984 F.3d 1003, 1012 (Fed. Cir. 2020) (citing *Bell/Heery v. United States*, 739 F.3d 1324, 1335 (Fed. Cir. 2014)).

To begin, we consider what the contract contemplated in determining the final number of acres to be treated. As we have found, the contract was somewhat confusing, in that it identified 236.3 acres of Treatment Type A-E, stated that there were "approximately 250 acres" of treatment areas, and also provided for an unquantified miscellaneous treatment category. In response to a question from a potential bidder, the Navy stated that the miscellaneous category was not the difference between 236.3 and 250 acres, but rather was in addition to the Treatment Type A-E areas. (Findings 9-12)

The contract further provided that the "limits of the various treatment areas . . . are provided for Contractor proposal purposes. Actual limits shall be developed during the design phase as the site is further investigated and understood" (finding 10).

In construing these provisions, the Board will take the most favorable interpretation for CDJV. Specifically, CDJV's bid price was to include only 236.3 acres of work (in part, because 236.3 is about 6% less than 250 and, therefore, is arguably within the confines of "approximately 250").[9] But the phrase "Actual limits shall be developed during the design phase. . ." is important because it places a temporal limitation on when CDJV could identify increased acreage. Further, because this was a fixed-price contract, both parties were restricted in their ability to impose unilateral changes on the other. Specifically, the Navy could not require CDJV to perform additional acres without further payment, while CDJV could not unilaterally increase the number of acres and then present the Navy with a large bill at the end of the project.

The Board interprets the contract to mean that during the design phase (that is, before construction began), CDJV would investigate the site and determine if there were additional acres that required treatment. If, for example, CDJV had determined that there were 500 acres that required treatment, the CO and the Navy could have verified whether this work was necessary to meet the needs of the air station and weighed the options, which presumably would have included (1) paying CDJV to perform some or all of the additional acres, (2) directing CDJV to perform no more than 236.3 acres of work, or (3) terminating the contract for convenience.

The record demonstrates that CDJV had sufficient access to the site to determine the extent of the work during the design stage. In addition to the Dunkelberger investigation, CDJV brought surveyors onto the site on at least one other occasion. With limited exceptions, the Dunkelberger workers were able to access the most densely vegetated areas of the site. (Findings 20, 83)

CDJV contends that it could only determine the true extent of the work after it began construction and removed other vegetation (finding 80). According to Mr. Neris, Dunkelberger faced legal restrictions that prevented it from entering

[9] The Navy contends that the additional acres converted by CDJV were not Type C/D, but rather were the miscellaneous category and that CDJV is not entitled to additional money for work that was identified in the RFP (*e.g.*, gov't br. at 82). This is a topic that should have been addressed by percipient witnesses (or perhaps even by an expert who examined the site). The Navy failed to present any such testimony. While the Navy's attorneys doggedly present this theory in its briefs, we are left unconvinced.

mangrove areas. CDJV has not identified the precise nature of these legal restrictions, but the fact of the matter is that Dunkelberger did enter those mangrove forests and performed borings and probes (findings 20, 92). Perhaps more importantly, the additional areas for which CDJV seeks payment are not areas hidden behind an impenetrable line of vegetation. Rather, they are grassy areas. At least some of these grassy areas were close to runways or roads. (Findings 80-82) Thus, they would have been visible to a reasonable and prudent contractor.

Why CDJV did not investigate the extent of the treatment areas during the design phase is not entirely clear. But the most likely answer is that it was an oversight due to CDJV's lack of experience. While we consider below CDJV's contentions that the Navy ordered it to expand the treatment areas, CDJV's first two REAs in 2013, and its claim in 2014, said no such thing. CDJV instead contended that it needed to do the work for the Navy to receive the full benefit of the project (findings 53, 75). But the contract did not grant CDJV the authority to unilaterally determine what the Navy needed.

If ever there was a case where a contractor performed work at its own peril, this is it. The record demonstrates that, whether intentionally or through incompetence, from February to May 2013 CDJV provided false information to the CO, FDEP, and USACE representing that the Type C/D areas were staying the same size or shrinking (findings 44-45, 47, 50). CDJV also knew that the Navy had no money to pay for additional work (finding 52). Yet, CDJV did the work anyway.

The Board finds that CDJV has not proven that various (non-CO) Navy employees ordered CDJV to perform the additional work. Even if they had done so, several contract clauses barred Navy employees other than the CO from ordering extra work.

The Contracting Officer Authority clause (finding 2), provides:

> In no event shall any understanding or agreement between the Contractor and any Government employee other than the Contracting Officer on any contract, modification, change order, letter or verbal direction to the Contractor be effective or binding upon the Government. All such actions must be formalized by a proper contractual document executed by an appointed Contracting Officer. The Contractor is hereby put on notice that in the event a change in work to be performed or increases in the scope of the work to be performed, it is the Contractor's

> responsibility to make inquiry of the Contracting Officer before making the deviation.

FAC 5252 201-9300

The Contracting Officer's Representative (COR) clause (finding 2) provides in relevant part that "The COR is not authorized to make any commitments or changes that will affect price, quality, quantity, delivery, or any other term or condition of the contract." DFARS 252.201–7000(b).

The Government Representatives clause (finding 2) provides that:

> The contract will be administered by an authorized representative of the Contracting Officer. In no event, however, will any understanding or agreement, modification, change order, or other matter deviating from the terms of the contract between the Contractor and any person other than the Contracting Officer be effective or binding upon the Government, unless formalized by proper contractual documents executed by the Contracting Officer prior to completion of this contract.

FAC 5252 242-9300

These clauses make it very clear that no Navy employee other than the CO had the authority to change the contract or order additional work. Thus, CDJV cannot meet the second element of the constructive change test because Navy employees other than the CO did not have actual or implied authority to modify the contract. *BGT*, 984 F.3d at 1012-13.

CDJV could overcome the lack of authority if a CO had ratified the changes. *BGT*, 984 F.3d at 1013-14. To prove ratification, CDJV would have to show that a CO knew of the constructive changes and approved of them. *Winter v. Cath-dr/Balti J.V.*, 497 F.3d 1339, 1347 (Fed. Cir. 2007).

CDJV cannot show that a CO ratified changes. The record clearly shows that on May 2, 2013, when CDJV first told the CO of the increase in Treatment Type C/D areas CDJV had already been told by the Navy that there was no money for additional work (finding 52). When the COs met with CDJV in June and July 2013, they told CDJV not to incur any extra costs and to obtain written approval from a CO before it did any extra work (findings 55, 66). This was not ratification; it was a rejection of CDJV's unauthorized performance of additional work. Bearing in mind Mr. Neris's

serious credibility problems throughout the performance of the contract, (including the fabrication of a document), and the litigation, we find that it is far more likely that the story that CDJV presented at the hearing -- that CO Sweeting knew of, approved, and promised to pay for the extra work from the start of the project (finding 57), -- is an opportunistic fabrication taking advantage of her illness and inability to speak for herself.

The Board acknowledges that CDJV contends that it informed at least two other COs (including CO Thompson) of the additional work (R4, tab 72 at 16), and that it identifies four non-CO employees (including LCDR Mitsch) who supposedly ordered it (app. br. at PFF ¶ 84). The problem for CDJV is that Sweeting, Thompson, and Mitsch created written records that say otherwise. CDJV essentially alleges that multiple Navy employees ordered additional work and others acted so as to cover it up. But the Board does not see a scintilla of evidence that supports this.

CDJV also seeks to recover for the additional Treatment Type areas under the DSC clause. The work in question was not a subsurface or latent condition but rather was visible. *Ivey's Constr., Inc.*, ASBCA No. 47855, 95-1 BCA ¶ 27,584 at 137,462 ("Vegetation is neither subsurface nor latent. Rather, it is visible for all to see."); *Schmalz Constr.*, Ltd., AGBCA ¶ 86-207-1 *et al.*, 91-3 BCA ¶ 24,183 at 120,952 ("trees cannot be a differing site condition"). Moreover, because it was supposedly ordered by the Navy, the claim is appropriately viewed under the Changes clause.

ASBCA Nos. 60620, 60942, 60943, 61111, 61733 and ASBCA No.62796

The main focus of the Navy's presentation, including 151 of its 175 proposed findings of fact, relate to the Phase I and II claims. The Navy did not present any witness testimony, even from its retained expert, on the remaining six appeals. Thus, its attorneys are left to cobble together a case from documents in the record. For the most part, it is not persuasive.

The contract does not state specifically what CDJV was to do with excavated muck/peat. The government contends that CDJV was obligated to remove the muck from the base, while CDJV contends that it was not. Both parties present analyses of various contract provisions that support their position. The Board agrees with the Navy because the contract, among other things, provided: "Remove unsatisfactory soil materials from the site in accordance with the Project Program and replace with satisfactory soil materials . . ." (R4, tab 4 at 27) To the extent that CDJV had a contrary interpretation, any ambiguity in the contract would have been patent and it had a duty to seek clarification. *K-Con, Inc. v. Sec'y of Army*, 908 F.3d 719, 723 (Fed. Cir. 2018). CDJV did not do so but, under the circumstances, this makes no difference.

The Navy bears the burden of proof for its claim totaling $4,313,655 for the removal of muck that CDJV left in Dead 8. The Navy has not satisfied that burden of proof because it has not demonstrated how much material CDJV left in Dead 8 nor how its removal should be priced. While the Navy contends it employed a LIDAR sensor, it did not present any testimony from the person who performed the analysis describing how he or she ensured that the sensor was maintained and operated correctly, produced accurate results, and excluded materials not placed by CDJV (finding 113).

As a fallback position, the Navy cites a CDJV REA in which it stated that there were approximately 40,000 CY of material remaining, but, as we have found, it is not clear if CDJV was referring solely to material in Dead 8 (finding 114). Moreover, we observe that the Navy's citation to an REA signed by Mr. Neris is inconsistent with the main force of the Navy's argument, which is that Mr. Neris is not a reliable person, to put it mildly. In a similar vein, we observe that the Navy explains the rather dramatic increase from $8.75 to $55.65 per CY in its claim by stating that it relied on CDJV for the original figure (gov't br. at PFF ¶ 165). Thus, CDJV's figure was off more than six-fold.

With respect to the Navy's reliance on Dead 8 in support of its assessment of liquidated damages, the Board is also not persuaded. The Navy acknowledges that it granted CDJV permission to place the materials in Dead 8 (finding 107). Accordingly, CDJV was not in breach of the contract when it placed the materials there. CDJV did not put the UXO in those materials. It may have been a fortuitous outcome that the material was placed in Dead 8 and the UXO discovered while still at NAS Key West. The record indicates, for example, that the sites CDJV considered for disposal of this material included a golf course (R4, tab 48 at 2). Because the Navy was responsible for removing the UXO from Dead 8 and never did so, and because the presence of the material in Dead 8 did not prevent the project from being substantially complete, CDJV cannot be charged with a delay for failing to remove the materials from Dead 8 (findings 108, 133). *Matthew Andrew Kalosinakis*, ASBCA No. 41337, 91-2 BCA ¶ 23,744 at 118,908-09.

The Board also finds that CDJV has demonstrated that the late completion of the project was caused by runway delays and flooding of the project site (findings 126-30). These issues were beyond its control and not reasonably foreseeable. CDJV is entitled to a time extension to December 9, 2014 due to those delays. *Ken Laster Co.*, ASBCA Nos. 61292, 61828, 20-1 BCA ¶ 37,659 at 182,855 (citing *Sauer Inc. v. Danzig*, 224 F.3d 1340, 1345 (Fed. Cir. 2000)).

The Board sustains CDJV's appeal of the Navy's affirmative claims for the removal of material in Dead 8, that is, ASBCA Nos. 60943 and 61733.

The Board sustains CDJV's appeal for a time extension, ASBCA No. 61952, and sustains CDJV's appeal of the Navy's claim for liquidated damages, ASBCA No. 60942.

The Board sustains CDJV's invoice appeal, ASBCA No. 61111 in the amount of $1,448,131.43 because the Navy has been unsuccessful on its affirmative claims and is, therefore, not entitled to a setoff (*see* finding 106). Because all amounts CDJV sought in ASBCA No. 60620 were included in ASBCA No. 61111, the Board dismisses ASBCA No. 60620 as moot.

CONCLUSION

ASBCA Nos. 60042 and 62796 are denied. ASBCA Nos. 60942, 60943, 61111, 61733, and 61952 are sustained. ASBCA No. 60620 is dismissed as moot.

Dated: October 18, 2023

MICHAEL N. O'CONNELL
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

J. REID PROUTY
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. 60042, 60620, 60942, 60943, 61111, 61733, 61952, 62796, Appeals of Conquistador Dorado Joint Venture, rendered in conformance with the Board's Charter.

Dated: October 19, 2023

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals