

In the United States Court of Federal Claims

No. 07-183C

(Filed: October 30, 2009)

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J.H. PARKER CONSTRUCTION  
CO., INC.,

*Plaintiff,*

v.

THE UNITED STATES,

*Defendant.*

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OPINION  
\_\_\_\_\_

BRUGGINK, *Judge.*

This case arises out of a contract awarded by the National Resources Conservation Service (“NRCS”) to John H. Parker Construction Company (“Parker”) for the construction of a dam in Franklin County, Mississippi. Parker’s complaint alleges defective specifications, change orders, differing site conditions, and breach of the duties of cooperation, good faith, and fair dealing. Parker claims damages in the amount of \$3,040,960.00, plus interest and costs. After trial, for the reasons set out below, we conclude that Parker is entitled to recover damages in the amount of \$297,383.01.

## PROCEDURAL HISTORY

NRCS terminated Parker from the contract at issue for default. That termination was the subject of a suit previously filed in this court, *J.H. Parker Construction Co. v. United States*, No. 04-471C, in which Parker sought to convert the termination for default into a termination for convenience. The suit was ultimately settled in September 2006. The government agreed as part of the settlement to convert the default termination to one for convenience. The agreement settled all claims for costs incurred by Parker after April 11, 2003, but left open Parker's present claim for costs incurred prior to April 11, 2003 (plus any applicable profit or overhead), as well as attorney fees and other costs.

Consistent with the settlement agreement, Parker submitted a certified claim to NRCS on September 26, 2006, requesting an equitable adjustment to the contract price based on defective specifications, government-caused delays, change orders, and differing site conditions encountered during the course of the project. On December 1, 2006, after sixty days had passed without a contracting officer's decision on the claim, as required pursuant to 41 U.S.C. § 605(c) (2006), Parker inquired as to the status of its claim. On December 4, 2006, NRCS counsel informed Parker that the claim had not been received. The following day, NRCS discovered that Parker's claim had, in fact, been timely delivered but that the claim had been left in a supply room. The agency acknowledged that it had received the claim and stated that it would issue a decision within sixty days. NRCS counsel informed Parker on February 9, 2007, that no decision would be issued as originally stated and that Parker's claim was deemed denied. Parker filed its complaint on March 16, 2007, challenging the denial of its claim.

Trial was held June 1-5, 2009, in Jackson, Mississippi and continued on June 16 and 17, 2009, in Washington, DC. The witnesses in order of appearance were: John Parker, President of John H. Parker Construction Company; Ruben McCoy, Engineering Technician and Surveyor for Parker; Alan Lyles, Project Manager and Estimator for Eutaw Construction Company ("Eutaw"), Parker's primary subcontractor; Mitchell Hutson, Superintendent

for Parker; Verlene Ratliff, NRCS Administrative Contracting Officer (“ACO”); Reginald “Kim” Harris, NRCS Project Engineer; Scott Culberson, NRCS Project Engineer; Ray Oliver, NRCS Chief Inspector; Mike Green, NRCS civil engineering technician and shift inspector; E. Berkley Traugher, plaintiff’s geotechnical expert; William Connole, plaintiff’s damages and scheduling expert; and Danny McCook, former engineer in NRCS’ National Design, Construction, and Soil Mechanics Center, who appeared as both a fact witness and as defendant’s expert on geotechnical issues. Excerpts from the trial testimony of these witnesses are referred to herein as “Tr.” The parties also designated deposition testimony from five witnesses: Janice M. Dempsey, NRCS Contracting Officer; Robert Daniel, engineer for Spencer Engineers, Inc.; Kenneth Grimm, an auditor for the Defense Contract Audit Agency; David Pacheco, NRCS project engineer; and John Parker’s June 4, 2004 deposition in preparation for Parker’s lawsuit against Eutaw.

Closing argument was heard on July 9, 2009, in Washington, DC. For the reasons stated below, the court concludes that Parker has failed to meet its burden of proof with respect to both liability and damages for Claim A. With respect to Claim B, it has established liability for and entitlement to a portion of the delay damages from October 2002 to January 2003.

## BACKGROUND

This case arises out of disputes surrounding the construction of an earthen embankment dam on Porter Creek in the Homochitto National Forest in Franklin County, Mississippi (“the project”). The contract required construction, for NRCS, of a dam, a principal spillway, an auxiliary spillway, a reinforced concrete grade control structure, and other appurtenant items. The dam was designed to be approximately 97 feet tall, 0.5 miles long, and 625 feet wide at the base. It would contain an estimated 1.8 million cubic yards of earthen materials. The completed dam would impound a recreational lake.

Prior to involvement with the project at issue, Parker had substantial experience in the field of earthen construction. It had built catfish ponds, roads, levees, wastewater treatment plants, and airport runways. Some of

Parker's projects included building dams for NRCS, including two in 1993. These dams were much smaller than the one involved here. Parker's experience did include a large levee project that called for approximately 1.8 million cubic yards of earthfill at Lake Providence in Louisiana. That job was bid approximately six months prior to the bidding on this project. The dam at issue here, however, was the largest Parker had ever attempted to construct and was the second tallest dam ever built in the state of Mississippi.

NRCS issued its solicitation for bids on March 17, 2000, giving Parker and other potential bidders approximately a month and a half to prepare their bids. John Parker testified that he prepared the bid by himself, without the aid of computers or electronic technology. He alleged that his prior experience in bidding the Lake Providence levee project, along with his extensive experience in the construction industry, allowed him to accurately price and bid the project based on the solicitation requirements and on quotes from multiple subcontractors and suppliers. He also visited the site on three occasions and performed further calculations using a basic calculator. Mr. Parker stated that he had used computer programs to estimate the Lake Providence bid and inferred that this would be unnecessary for the Franklin County project, because, in his opinion, the two projects were substantially similar.

In addition to the provided contract materials and drawings, Sheet 82 of the contract drawings made reference to "investigation data, reports, logs of borings, and laboratory tests" that were available for review in the Project Engineer's office in Natchez, Mississippi. Jt. Ex. 2 (Sheet 82). These consisted of a geology report and a soil mechanics report (referred to hereafter collectively as the "soils reports"). Jt. Exs. 7 & 9. It is undisputed that Parker made no effort to obtain these reports prior to the bidding.<sup>1</sup>

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<sup>1</sup>An issue plaintiff introduced at trial, but did not pursue to conclusion, was whether these reports were, in fact, available at the Natchez office prior to the bid opening. The testimony of Mike Green, David Pacheco, and Scott Culberson persuades the court that they were. Even if the reports were not available, it is not clear to the court why plaintiff raised the issue, as we are persuaded that the reports are fully consistent with the information furnished directly to bidders, including the statements about settlement of the earth fill.

Parker ultimately submitted a total bid price of \$6,881,922.00 on May 4, 2000. It was the second-lowest bid. Parker was subsequently awarded the construction contract after the lowest bidder was allowed to withdraw due to a mistake.

Construction began in August, 2000. From commencement of the project until January 2001, the contract work consisted of clearing, grubbing, and stripping in order to remove trees and prepare the ground for excavation. No damages are alleged to have resulted during this time period.

Plaintiff divides its claim into two distinct periods. Claim period A encompasses all of the events and asserted damages from January 1, 2001 through September 30, 2002, the date after which plaintiff's damages expert states he can begin to price damages discreetly. These damages are calculated using a modified total cost method. Claim period B encompasses the events and damages from October 1, 2002 through Parker's default termination on April 8, 2003, because plaintiff's damages expert concluded that he could discreetly price damages for this time frame. We begin with claim period A.

#### I. Claim Period A

To give some context to the facts implicated by claim period A, we have attempted to organize what we understand to be plaintiff's theory of liability. In sum, plaintiff's theory is that four different site conditions, two sets of change orders, a false representation in the contract drawings, and an inadequate design for erosion control, all acting in ways which cannot be segregated, impacted the efficiency of the work.

The four different site conditions were: the presence of unsuitable material in borrow area ("BA") A; inaccuracy of boring logs (falsely depicting the presence of useable clay); the presence of highly dispersive (erosive) soils; and underground water draining into the auxiliary spillway. The change orders relate to where soil could be removed from BA 4 and whether plaintiff had to

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The reports, moreover, did not contain information necessary to a complete bid.

place lifts of soil in the various zones across the surface of the dam roughly in tandem. The asserted misrepresentation in the contract involved how much soil plaintiff could expect to place and be paid for. Plaintiff contends that the contract affirmatively warrants that the amount paid for earthfill would be virtually identical to the amount placed. It contends that, in fact, compaction during construction meant that more soil would have to be placed than plaintiff was paid for. Plaintiff argues that, if it had known how much compaction and erosion there would be, it could have adjusted its bid. The defective design plaintiff alleges relates to the amount of silt fencing called for in the drawings. Plaintiff contends that the fencing for which it was paid was inadequate to the task.

Plaintiff contends that there were so many problems attributable to the government that it could not do its work consistently with its intended plan of action. These factors, in combination, caused inefficiencies which cannot be isolated, Parker argues. It theorizes that dispersive soils, lack of fencing, and unexpected compaction all resulted in plaintiff having to place more material than it was paid for. Plaintiff claims that, because its bid was reasonable, it is entitled to all of its actual expenses, less certain adjustments.

The government does not seriously dispute that the conditions in BA A constituted a differing site condition. Defendant does, however, challenge all the other elements of plaintiff's case. It also contends that plaintiff and its earth fill subcontractor, Eutaw, did a poor job of executing the work. We now proceed to the background facts and the individual claims.

Porter Creek flows north through the center of the construction site. The embankment was to measure approximately 0.5 miles long from its western end, noted on the contract drawings as 22+00, to its eastern end, noted as 46+00. Waters would thus be impounded to the south of the dam. The original creek bed lay west of the center line of the dam, at approximately point 30+00. For engineering reasons, however, the principal spillway, formed by a concrete conduit approximately ten feet square, was to be constructed at the toe of the center line of the dam, at marker 34+00.

The auxiliary spillway (“ASW”) was a feature designed as an emergency route for water to bypass the dam should future flooding threaten to overtop the embankment. It was located immediately adjacent to the east end of the dam, running roughly parallel to the original creek bed. NRCS’s designers anticipated that much of the earthfill that was to be used in the construction of the embankment would be excavated from the ASW and from the footprint of the dam itself. Whether the soil was needed in the dam or not, however, the contractor had to cut the ASW down to a specific excavation profile, in order to permit movement of water in the event of a flood.

The contract designated seven borrow areas, to be used as necessary and as directed by the project engineer. BAs 4, A, 5, and 6 were located on the west side of Porter Creek, between the creek and Highway 98. BA 4 was the largest and stretched from the western edge of the embankment to Highway 98. BA A, much smaller, was just south of BA 4 and was concentrated much closer to Highway 98. BAs 5 and 6 were just southeast of BA A. BAs 1, 2, and 3 were located on the east side of the creek, close to the ASW. BA 1 was located between the future recreation pool and the ASW, just southwest of the southernmost edge of the ASW. BA 2 was a small strip that abutted the ASW and ran east thereof, just north of the embankment dam. BA 3 was even further east of the ASW.

The embankment design, if viewed from the east side of the dam, calls for an earthen pyramid, approximately 625 feet wide at its base, tapering to a thirty foot wide top. It consists of several “zones” of earthfill, each requiring a slightly different type of material. The slope declines from the top at a three-to-one ratio. Once the area of the embankment had been cleared of trees and debris, and any topsoil stockpiled, unsuitable soft soils were to be removed. Once that happened, a three foot wide slurry trench would be cut into the center of the length of the base of the embankment. Fill would then be placed above it in various zones.

Zone 1 forms the core of the dam and consists of CL and CH material<sup>2</sup>,

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<sup>2</sup>CL and CH are the symbols for low-plasticity and high-plasticity clays, respectively; ML stands for low-plasticity silts; SC stands for sandy clays; SM

or what Mr. Parker referred to as fatty clays. Zone 2, just to the left (or upstream) of Zone 1, consists of CH, CL, ML, and SC materials, which Mr. Parker characterized as slightly sandier than Zone 1. It forms much of the southern edge of the embankment, that is, the portion directly in contact with the lake. Zone 2 stretches from the base of the dam at elevation 215 feet all the way to the top of the dam at elevation 303.6 feet. Zone 4 is just south of Zone 2 and forms the toe of the dam that would eventually be submerged in the future recreation pool. It stretches from the base of the dam to elevation 245 feet. Further up the embankment, near the water level of the future recreation pool and stretching from elevation 282 feet to 292 feet was Zone 5. Zone 5 consists of SM and SP-SM material, in other words, sandy material designed to stabilize a concrete cellular block wave protection system (“CCB”), a feature discussed in greater detail below.

On the downstream side of the dam, just north of the Zone 1 core, lies an eight foot wide zone, 3A, which is designed as a filter for the chimney drain, another narrow zone to the immediate north of Zone 3A. The function of Zone 3A is to filter any excess water which flows from the inside of the dam so that it does not enter the chimney drain. Zone 3A runs parallel to the edge of Zone 1 from an elevation of 280 feet down to the base of the dam. It consists of sandy material, which is slightly less coarse than that used in the chimney drain. The chimney drain required gradation number 1 sand. The last large zone is Zone 3, which lies to the north of Zone 3A and the chimney drain. It consists of SC, SM, and SP material. The contractor was also required to place a thin layer of topsoil, stockpiled from the strippings from the footprint of the dam and the ASW, on top of Zone 3, which would form the final northern zone, Zone 2A. Zone 6 refers to the clay and gravel that forms a road across the top of the embankment dam at elevation 303.6 feet and continues into the ASW.

#### *1. Borrow Area A*

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stands for sandy silts; SP-SM stands for poorly-graded sands mixed with sandy silts.

In addition to the base of the embankment itself and the ASW, the contract documents designated several borrow areas from which Parker was to excavate material, if necessary, for placement on the earthen embankment. The contract specified the order of priority for using the borrow areas. Sheet 10 of the drawings specifically stated, "If specified type of material is available, use Borrow Areas in following priority: A, 4, 2, 3, & 5." Jt. Ex. 2 (Sheet 10). BA A was thus the first borrow area to be used for embankment fill materials.

When Parker began excavation, however, it discovered garbage and waste material in BA A. Apparently BA A had been used in the past as an unregulated landfill. Parker notified NRCS by letter on February 6, 2001, and requested that the agency investigate the area to evaluate its availability as a borrow area. NRCS responded that dumped waste was "readily apparent" in BA A, but that it should have no effect on the excavation operations. NRCS did not provide any other information to verify that the area was clean or safe for Parker's employees.

On April 9, 2001, Parker informed NRCS by letter that landfill waste was present at least seven feet below the surface and that NRCS Inspector, Ray Oliver, was a witness to the contamination. Parker specifically noted the presence of concrete rubble, assorted discarded steel, household garbage, tires, medical IV bottles and needles, broken glass, and old crushed drums. Plaintiff concluded that "[d]ue to the fact of encountering this differing site condition we are not going to disturb Borrow Area 'A' anymore and we are going to proceed with clearing and excavating material from Borrow Area 4." Jt. Ex. 59. Mr. Oliver confirmed Parker's allegations in a handwritten facsimile transmitting Parker's April 9, 2001 letter to the NRCS contracting officer's representative. He noted that the simplest solution would be to go out of sequence and start digging in BA 4.

Following both notes, NRCS permitted Parker to move to BA 4. Between April 2001 and February 2002, Parker excavated materials exclusively from the ASW and BA 4 for placement as embankment fill.

It is clear to the court that the contamination of BA A interfered with its use, at least initially. It is also clear that the agency should have acknowledged the problem sooner than it did. If the contamination in BA A was not cleaned and removed, it would plainly constitute a differing site condition, either Type I or Type II<sup>3</sup>. Fairly early in the process, however, NRCS permitted Parker to shift to BA 4. The court is left with no specifics from plaintiff as to how this initial confusion affected the progress of its work. There is no delay claim associated with BA A. Like a number of plaintiff's arguments (see *supra* note 2, for example), it lead nowhere.

## 2. Asserted Differing Site Conditions

### *a. Excessive Erosion Due to Inadequate Silt Fencing, Dispersive Soils, and Springs*

The contract provided for silt fences, straw bales, and temporary seeding to be placed at specified locations and times in order to control and minimize erosion. *See* Construction Spec. 5; *see also* Contract drawing sheet 15. Parker alleges that it placed the silt fences and other erosion control measures at the locations and times specified by the contract but that the silt fences were constantly overwhelmed due to significantly greater erosion than either party anticipated, particularly in the ASW. Parker suggests that the additional erosion was due to the presence of dispersive soils and underground springs.

Parker further alleges that, contrary to the recommendations of the government's soils reports, the contract<sup>4</sup> called for placement of highly erosive soils on exposed surfaces of the embankment.<sup>5</sup> This is supposedly evidenced

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<sup>3</sup> The difference between these types is discussed later in this opinion.

<sup>4</sup> *See* Jt. Ex. 2 (sheet 10 of the drawings).

<sup>5</sup> NRCS engineers dispute this claim and state that no dispersive soils are required to be placed on the embankment face. Instead, they claim that dispersive soils are only permitted within the inner zones of the embankment, which would pose no risk of erosion. More pertinent, however, is the fact that

from the soil mechanics report, which plaintiff alleges demonstrates the presence of dispersive soils throughout the project site. This requirement allegedly led to heavy erosion during construction, which in turn caused Parker to excavate and handle more material than it reasonably could have anticipated would be necessary for the dam to reach the contractual elevations. It is also alleged that the dispersive characteristics of the soils made for longer cleanup times following rains, due in part to erosion.

Parker also contends that, during excavation in the ASW area, it exposed several springs, resulting in water draining from the exposed banks during excavation. That, in turn, caused erosion and made the processing of earthfill materials more time-consuming.

Parker argues that it could not have anticipated the springs, despite the fact that Boring Logs 209 and 210 indicated groundwater at fifteen feet and ten feet below surface level, because the borings “reflect perched water located in sandy material that easily drains and has little effect on excavation operations.” Pl.’s Cont. of Fact & Law 26. Plaintiff explains that, in actuality, flowing springs were encountered at elevation 323 feet from Station 13+00 to 17+00 and at elevation 305 feet from station 18+00 to 22+00.

Despite plaintiff’s characterization to the contrary, the preponderance of the evidence is that this water flow constituted a minor problem during construction. Parker did not complain about the water until late 2002, after much of the embankment and the ASW were complete and the earthwork subcontractor, Eutaw, had demobilized. Eutaw’s project manager, Mr. Lyles, made no mention of water seepage during Eutaw’s involvement with the project. NRCS engineer Scott Culberson testified that any seepage due to the springs was limited to two locations and affected no more than approximately 2% of the ASW. Another government engineer, Kim Harris, believed that any springs affected less than 1% of the ASW. Culberson also noted that when he visited the ASW, no seepage was visible.

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plaintiff’s own expert, Mr. Traughber, testified that the contract did not require dispersive soils to be placed on the surface of the embankment.

In early 2001, attempting to assist in better controlling erosion, NRCS directed Parker to install five additional silt fences in the ASW. Parker alleges that this was inadequate and that the reason the government failed to direct it to install further erosion control devices was because the NRCS project engineers believed that it would be more economical to repair erosion damage than prevent it in the first place.

Testimony from NRCS project inspector, Ray Oliver, and contemporary notes in Mr. Oliver's field diary, however, tell a different story. Mr. Oliver lists numerous times over a period of several months that Parker failed to adequately maintain its silt fences by clearing them of dirt and re-erecting them. He also testified that Parker failed to do any temporary or permanent seeding. The government argues that this demonstrates that it was Parker's failure to maintain the contractual erosion controls, not an inadequate design, that caused excessive erosion.

*b. Excessive Settlement of the Embankment*

Plaintiff interprets the contract to warrant that the embankment would settle no more than 0.8 feet during the construction of the dam. It refers to the contract drawings, which include a diagram of the dam, including its height and slope specifications. Jt. Ex. 2 (Sheet 9). The drawing shows a dashed line 0.8 feet below the top of the dam, accompanied by a note, "solid line above dashed line represents additional fill for settlement. Earth Fill Yardage includes additional fill for settlement." *Id.* The Earthfill Yardage is specified on the drawings as 1.825 million cubic yards ("cy") of earthfill. *Id.* (Sheet 2). The soil mechanics report, which was referenced (though not incorporated) in the contract, likewise speaks of 0.8 feet, but refers to it as "overbuild." Jt. Ex. 9 at 28. Though plaintiff references the soil mechanics report, in part, as further evidence that the government warranted 0.8 feet of settlement during construction, Mr. Parker did not read the soil mechanics report prior to bidding the project or beginning construction.

In a February 6, 2001 letter to NRCS, Mr. Parker opined that the excavation of soft soils in the foundation surrounding the Principal Spillway

(PSW) conduit, which runs along the middle of the dam near the foundation, was insufficient as directed by the contract and the project engineer. Parker recommended more excavation to ensure the removal of all soft soils, which would have been a separate pay item. In response, NRCS stated that no additional soft soil removal was necessary. Later in the project, in August 2002, the PSW conduit cracked, leaving a 0.1 to 0.2 inch gap, which had to be repaired. Mr. Parker says that the crack occurred at the precise point where he suggested removing additional soft soils.

In addition, Parker's engineering technician, Mr. McCoy, testified that he believed that the dam was settling more than he expected. He described the difficulty the surveyors had in aligning their lasers to conduct finish work. The difficulty, according to McCoy, was that the wooden stakes used as reference markers kept moving, as though "someone would have driven it down with a hammer . . . [o]ver a tenth of a foot." Tr. 797. This occurred over a period of a "few days." Tr. 798. Parker cites this as proof that additional soft soil should have been removed to prevent excessive settlement and that failure to do so caused the embankment to settle more than the anticipated 0.8 feet.

Plaintiff further claims that NRCS negligently failed to include in the contract a method of measuring settlement during construction, namely settlement plates. Parker references this failure in justifying its method of calculating the additional fill that it alleges was required to account for the excessive settlement. It argues that the best available method to calculate the additional fill was to compare the NRCS topographic surveys of the ASW and borrow areas taken before construction with the NRCS surveys of the same areas that were taken after Parker was terminated. Using this method, if one assumes no loss of material due to any plaintiff-caused inefficiencies, there was an additional 282,285 cy of earthfill placed beyond the 1.825 million cy anticipated on Sheet 2 of the contract drawings. Plaintiff also notes that this additional earthfill would account for any earthfill lost due to the excessive erosion onsite. In other words, because plaintiff cannot specifically account for how much excessive settlement occurred or how much excessive erosion occurred, it believes the best way to measure the additional earthfill placed to

compensate for both occurrences is to compare pre-construction and post-construction topographic surveys.

### *3. Eutaw Construction Co.'s Pass-through Claim*

In January 2002, once the embankment was approximately 50% complete, Parker subcontracted with Eutaw to complete the bulk of the earthfill and excavation work, including hauling 900,000 cy of material. It reserved to itself the completion of the chimney drain and the CCB system near the top of the embankment. Eutaw was familiar with the work to be performed, as it also had bid on the project. While there were no haul limits in the contract between Parker and the government, the subcontract with Eutaw specifically limited the distances that Eutaw would have to haul dirt to 3,000 feet, while simultaneously incorporating the prime contract by reference. Though Parker was paid \$1.55 per cy of earthfill in the prime contract, the subcontract paid Eutaw \$1.05 per cy of earthfill.

Eutaw's relationship with Parker soured almost immediately upon commencing work in February 2002. Parker says that this development was due to differing site conditions preventing Eutaw from locating suitable fill materials in the ASW and BA 4, in addition to the government restricting Parker from excavating in additional borrow areas (1, 2, 3, and 5). The trial record is replete, however, with continuous criticism directed by Parker at Eutaw for its asserted ineptitude in locating clay. During trial, Mr. Parker took the position that these criticisms were, in retrospect, a mistake. Plaintiff now takes the position that the contract documents indicated the availability of clay in certain areas that, according to plaintiff, did not in fact contain clay. It explains that it initially believed that Eutaw's difficulties stemmed from its failure to excavate efficiently and to sufficient depths to extract the required material. According to Parker, however, it was differing site conditions that caused Eutaw's inability to perform efficiently.

This argument turns on an alleged differing site condition. Plaintiff claims that it discovered, during construction, that the location and quantities of the specified materials in the borrow areas and the ASW were different than

represented in the soil borings and in the Embankment Placement Detail.<sup>6</sup> It particularly asserts a lack of sufficient zone 1 clay material, coupled with the fact that the government did not allow Parker or Eutaw to excavate for further clay material beyond BAs A and 4 and the ASW. It explains that this phenomenon, coupled with the excessive settlement of the embankment, caused Parker and Eutaw to haul the loads of material from much longer routes than it anticipated, resulting in increased costs.

Parker also contends that, because of Eutaw's inability to readily locate suitable material, the fill had to be placed in the various zones of the embankment unevenly, in violation of contract provisions.<sup>7</sup> The result was that NRCS initially did not order Parker to halt the uneven placement. However, after a February 2002 visit from the Ft. Worth, Texas-based inspection crew noted that the chimney drain material was being placed at significantly higher elevation than the other zones, the government ordered Parker to place the zones evenly, refusing to pay for further earthfill until Parker complied. Parker, in turn, stopped any further payment to Eutaw until it also complied with this directive. Eutaw eventually contacted the contracting officer in September 2002 to complain that Parker was refusing to pay.

Ultimately, Eutaw sued Parker in the United States District Court for the District of Mississippi on February 26, 2003. Parker counterclaimed, alleging that it had suffered damages due to Eutaw's negligence in performing its work and for breach of the subcontract. The case was settled, with an agreement that Parker would pay Eutaw the first \$556,487.00 of any recovery in this action against the government.

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<sup>6</sup> Sheet 10 of the contract drawings (Jt. Ex. 2) specified the locations of various embankment material within the borrow areas and the ASW that were required for each particular zone of the embankment. The table entitled Embankment Placement Detail on that sheet referred to the boring logs and indicated the depth and basic quantity of certain materials at each boring's location.

<sup>7</sup> The earthfill specification required that "Earthfill shall be placed in approximately horizontal layers" in accordance with the contract drawings. Jt. Ex. 1 at 111.

#### *4. Damage Method: Modified Total Cost*

Plaintiff argues that the aforementioned differing site conditions and change orders occurred simultaneously and were so intertwined that it is impossible to discretely price damages. It therefore offers a modified total cost claim in an attempt to account for any issues that arose during claim period A which were severable from those damages caused by the government. The result is a claim for \$2,445,238.00 for claim period A.

#### II. Claim Period B

##### *1. Concrete Cellular Block Design Defect and Delay*

Parker's damages for claim period B encompass the period from October 1, 2002, when the CCB system initially failed, until default termination on April 8, 2003. The majority of the damages claimed by plaintiff come from a delay claim of \$454,646, however, the calculation also encompasses additional work associated with modifications 1, 2, and 3, as well as direct costs for correcting the CCB system. Parker alleges that, because the CCB failure essentially shut down the project and prevented earthfill activities that were on the critical path, the costs associated with this period are more easily discretely priced. The total damages asserted for this claim period amount to \$595,722.

The contract specifications, particularly construction specification 95, specified placement of a layer of concrete cellular blocks on the upstream slope of the embankment. Generally, the specification called for a layer of geotextile to be placed, on top of which a layer of earthfill would be placed. The blocks were to be placed on top of this earthfill so that each block would be firmly in contact with all adjacent blocks. The CCB system generally provides protection and stabilization of the embankment's slope from the waters of the recreation pool.

Construction on the CCB system began in September 2002. Multiple

failures of the system occurred shortly thereafter. The primary problem occurred at the toe of the system, where underlying sandy embankment material escaped during heavy rainfall, causing the blocks that rested on the surface to be displaced. After the failures, NRCS representatives and Parker met at the site to review the damage. Both agreed that the system had failed. On October 1, 2002, Parker wrote to NRCS, asserting that the CCB system design was defective.

Although initially denying that the CCB system design was defective, the Contracting Officer's representative and NRCS inspectors directed some field design changes. Incorporating these changes, Parker attempted once again to install the CCB system on October 16, 2002. The system failed again following heavy rains on October 28, 2002. Parker notified NRCS of the second failure.

On November 14, 2002, NRCS provided an informal design change to remedy the problem. The proposal contemplated installation of an anchorage (informally known as a "sausage roll") at the toe of the geotextile. The intent was to prevent the underlying sand from escaping.

Although NRCS provided the informal design proposal in November 2002, it did not issue a formal contract modification until January 10, 2003, when it issued modification number 4, directing the construction of the sausage roll anchor. Accompanying this modification was a direction from NRCS to place topsoil over the blocks of the CCB system. In response to Parker's notification that it believed that the allowed borrow areas (BA 4 and the ASW) did not contain enough topsoil to meet that requirement, NRCS designated the pool area of the dam as an additional borrow area for the required topsoil.

Parker alleges that when it attempted to excavate topsoil from the pool area, the area was so saturated with water that it was impossible to excavate. It asserts that any delay in implementing the design changes after the formal modification were the result of being unable to excavate topsoil from the pool area. Throughout this time period, NRCS maintained that Parker was not

completing the work, and, as a result, it terminated Parker for default on April 8, 2003.

### *2. The Impact of Seepage on ASW Work Due*

In October and November 2002, while attempting to complete excavation in the ASW so that the slopes were at the required subgrade elevations, Parker encountered water seepage, which caused water to flow out of the slopes of the ASW at approximately station point 19+00. Parker alleges that this caused the slopes to become saturated and slough into the level area of the spillway. Parker claims costs related to repairing the damage during claim period B. A similar issue was raised in connection with claim A.

### *3. Modifications 1, 2, & 3*

The government issued modification 1 on March 8, 2002, to clarify that the roadway in BA 4 would be left at an elevation of 305 feet. Modification 2 was issued on April 26, 2002, and superceded modification 1 by adjusting the height of the roadway to 303.6 feet elevation and clarifying the degree of slope required at the top of the borrow area. The net effect of these changes, plaintiff asserts, was that some suitable fill material was lost. The government argues, however, that plaintiff actually gained some potential fill as a result.

Modification 3 was issued on November 27, 2002, the period of time during which Parker asserts that it was delayed due to the CCB failure. The government directed Parker to place sand along a portion of the recreation pool to create a beach area. The sand was excavated from BA A and placed during November 2002. Parker includes costs related to these modifications in claim B because they can be discretely priced.<sup>8</sup>

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<sup>8</sup> The parties stipulated to the following facts: (1) the garbage present in BA A made the material in BA A unsuitable for use as fill in the embankment; (2) NRCS' design of the CCB system as provided in the Solicitation was defective; and (3) the "sand claim" that was the subject of defendant's pre-trial motion to dismiss, was not submitted to the contracting officer as required under the CDA, meaning the court did not have jurisdiction to hear it. 41

#### 4. Miscellaneous Items

Parker also claims costs for topsoil added and placed on the upstream slope of the embankment and for removal of rock from the ASW during this time period. Although plaintiff did not elaborate on these costs, the government did not contest them either.

### DISCUSSION

This is an action brought under the Tucker Act, 28 U.S.C. § 1491(a) (2006) and the Contract Disputes Act, 41 U.S.C. § 601-13 (2006) (“CDA”). The Tucker Act grants the court jurisdiction to hear contract claims brought pursuant to the CDA. *See* 28 U.S.C. § 1491(a)(2). For the court to exercise jurisdiction over such a suit, the contractor must have presented a written claim to the contracting officer (“CO”), and the CO must have rendered a final decision thereon. *See* 41 U.S.C. § 605(a); *James M. Ellett Constr. Co. v. United States*, 93 F.3d 1537, 1542 (Fed. Cir. 1996). Jurisdiction in this matter is not disputed, as plaintiff has submitted a certified claim to the CO, which was deemed denied after the CO failed to respond within the statutorily prescribed period.

#### I. Claim Period A

Plaintiff alleges that a number of differing site conditions increased its costs for Claim Period A. FAR part 52.236-2, which is incorporated into Section I of the contract, describes two types of differing site conditions. Type I describes the situation in which a contractor discovers sub-surface or latent physical conditions at the site that materially differ from those indicated in the contract documents. *Servidone Const. Corp. v. United States*, 19 Cl. Ct. 346, 356 (1990). In a Type I differing site condition claim, the contract’s express and implied indications are compared with the conditions on the ground.

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U.S.C. § 601(a) (2000); *see also H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1565 (Fed. Cir. 1995). The sand claim is thus dismissed due to lack of jurisdiction.

A Type II differing site condition claim, on the other hand, requires Parker to demonstrate that it experienced “unusual physical conditions differing materially from those ordinarily encountered and generally recognized as inhering in the work of the character provided for in the contract.” *Lathan Co. v. United States*, 20 Cl. Ct. 122, 128 (1990) (internal citation omitted). The Type II condition carries a heavier burden of proof, because, “[u]nlike in a Type I case, where the contract serves as the basis of comparison, in a Type II case, there is no clear written point of reference.” *Servidone*, 19 Cl. Ct. at 360; *see also Charles T. Parker Constr. Co. v. United States*, 193 Ct. Cl. 320, 333 (1970).

Typically, contractors present their differing site condition claims as either Type I or Type II. In this case, however, Parker has been less specific. Six different conditions are asserted to be either Type I or Type II conditions: unanticipated subsurface conditions in the embankment foundations causing excessive settlement; unanticipated waste in BA A; unexpected lack of clay in the ASW and borrow areas; unexpected rock in the ASW; unanticipated subsurface springs in the ASW; and unexpected dispersive soils at the site generally.

#### *1. Borrow Area A*

The parties stipulated prior to trial that the garbage present in BA A made the material therein unsuitable for use as fill in the embankment. The contract makes no affirmative representations regarding BA A’s sub-surface or latent conditions. The only reference that the builder would have to use is the note on Sheet 10 of the contract drawings that states, “[i]f specified type of material is available, use Borrow Areas in following priority: A, 4, 2, 3, & 5. No soil samples taken in Borrow Area A.” Jt. Ex. 2 (Sheet 10).

This scant language is insufficient to support a Type I differing site condition. Nevertheless, toxic garbage in a potential borrow area would constitute a Type II differing site condition. Contractors would not ordinarily expect to encounter that sort of material in a contract-specified area to extract

earthfill. The government has, in any event, admitted that the garbage made the borrow area unsuitable for use as embankment fill. We find that the government is liable for any resulting damages.

After taking a substantial amount of trial time to establish the presence of garbage in BA A, plaintiff did not spend much time discussing any causation or damages resulting therefrom. Mr. Reuben McCoy, Parker's engineering technician and surveyor, testified merely that the garbage affected Parker's "sequencing and construction on the project." Tr. 752. He did not further elaborate.

We do know that upon discovering the garbage, Parker notified NRCS of the fact, and shortly thereafter, Parker was permitted to excavate from BA 4. No specific proof was offered linking the presence of garbage to any particular delay or damages.<sup>9</sup>

## *2. Excessive Erosion*

Parker alleges that excessive erosion took place on site due in part to dispersive soils, water seepage, and inadequate government specifications for pollution control. As to the first assertion, dispersive soils, testimony from both parties' witnesses indicates that no dispersive soils were required to be placed on the surface of the embankment. Inexplicably, there was no testimony regarding precisely where the dispersive soils were to be placed. Further, while there was much talk of what the dispersive soils' properties

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<sup>9</sup> Parker's counsel during closing arguments appeared to admit the lack of a link between the differing site condition at BA A and any specific damages. In response to the court's questioning, he explained, "[n]ow, yeah, okay, there's not a cost for necessarily attributing to that short of, hey, go back out to A, use A, you run out of clay, I'm sorry, A and 4 only. And yet the government knew that borrow area A was unusable." Tr. 2305.

were, there was never an adequate definition given of when a soil's moisture levels were sufficiently high to deem it "dispersive."

Regarding water seepage, it was unreasonable for plaintiff to assume no subsurface water or springs based upon only two borings. The government did not affirmatively warrant the absence of springs. In fact, the contract included an entire section dedicated to the removal of surface and ground water. In any event, as previously discussed, plaintiff never complained about this condition until very late in the project after Eutaw had left and the CCB system had failed. Government inspectors testified that it affected a very small portion of the ASW and that it should not have affected final sloping and grading. Impact to the plaintiff's construction operations—if any—was thus relatively minor.

Moreover, it is not possible to determine how much fault the government bears for the erosion of materials versus how much fault is due plaintiff. There is extensive evidence of Parker's failure to abide by the contract's requirements for erosion control. The contract directed plaintiff to construct and maintain silt fencing and to do temporary seeding. The silt fence specifications required that "bottom of fence and filter fabric must be placed in trench and secured by backfilling with soil material by tamping to 6" above ground." Jt. Ex. 2 (Sheet 7). This drawing also required that "silt fence should be inspected after each rainfall and sediment deposits must be removed when they reach ¼ height of fence." *Id.* The silt fence was to be three feet from ground to its highest point, meaning that Parker was required to remove sediment anytime it accumulated at nine inches or more in height. The contract further mandated the use of temporary seeding and protective cover to control erosion and sediment. *See generally* Jt. Ex. 1 at 81-87 (particularly page 81) ("temporary vegetation and other erosion control measures shall be implemented and maintained during the construction in order to control erosion and sediment. Temporary vegetation shall comply with the following requirements . . .").

Testimony from NRCS inspector Ray Oliver, along with his diary entries, indicate a substantial failure on Parker's part to comply with the above

erosion control measures. Numerous NRCS diary entries from November 2000, as well as January, February, March, April, and May 2001 all indicate that Parker failed to maintain the silt fence. The entry from May 22, 2001, notes that “[t]hey have not maintained [the silt fence] since sometime last year.” Def. Ex. 48. Then, on July 23, 2001, Oliver notes that “silt fences and temp[orary] seeding are still out of contract compliance this week.” *Id.* The August 31, 2001 entry stated that,

Bennett stopped at office and asked about water pollution in Porter’s creek and Mr. Oliver informed Mr. Bennett that we have been asking [Quality Control officer] King about silt fences since contract started in 2000. Mr. Oliver also told Mr. Bennett that contractor is not following pollution control spec[ifications] with . . . seeding.”

*Id.*

Silt fence maintenance continued to be a problem well into 2002. On January 22, 2002, Oliver wrote that “[n]o silt fences installed around grade control structure. No silt fences repaired after Saturday’s rain.” *Id.* Again on June 22, 2002, he noted that “[n]one of the silt fences on the site are up to contract requirements.” *Id.* The entry from July 16, 2002, shows that “[n]o effort was made by contractor to clean or repair silt fences.” *Id.* Even on October 11, 2002, inspector Greene noted that “I checked silt fences in ASW [and] no work has been done on these in a few weeks.” *Id.*

Plaintiff also failed to utilize temporary seeding to control erosion. Apparently only one small area of the construction site was ever seeded. Ray Oliver testified:

Q: . . . Let me just ask you about temporary seeding. What temporary seeding should Mr. Parker have been doing at this point?

A: Well, when you finish something, you can just temporary seed it to just stop the erosion on it,

and it was one slope on the auxiliary spillway that was relatively close to being finished, and it was temporary seeding, and that's the only temporary seeding that I can recall that he did, and it was just one short slope; say 600 feet.

....

THE COURT: Well, I got the impression you were talking about putting temporary seeding on slopes that were not at final grade or final cover.

THE WITNESS: That's what it is; it's temporary. Yes, sir. Say it hasn't been topsoiled yet; you want to do your topsoil operation at one time. You seed this stuff to hold those slopes in place. Okay? And then you go and you just disk it up and you topsoil it, and then you seed.

What happened there, the embankments was being built and built and built, and nothing was ever being done to protect the slopes. And if you see some of the pictures of these slopes, it's terrible. I mean, it's just awful, the amount of erosion that happened on the front and back slope of that embankment, because no pollution-control efforts were made one time.

Tr. 1468-69.

Mr. Culberson's testimony is consistent with Mr. Oliver's regarding Parker's failure to conform to the contract's requirement to temporarily seed the site. When discussing the work that needed to be done in the Fall and Winter of 2002 and 2003, Culberson testified that:

THE WITNESS: . . . there was a lot of other work that could be done.

THE COURT: Like what?

THE WITNESS: Like I said, we had a punch list probably. . . . There was a lot of seeding that had to be done.

THE COURT: Are we talking about permanent or temporary?

THE WITNESS: We needed both of them.

THE COURT: Did the contract require any temporary seeding on the face of the dam?

THE WITNESS: It required temporary—or temporary seeding was part of the pollution control.

THE COURT: Was that on an interim basis, even before finished fill?

THE WITNESS: Yes, sir, if it was not—the way the contract was set up, if it was not going to be disturbed for awhile, you know, this is a multi-year contract, that temporary seeding should have been done if it was a period—a good bit of period of time that you weren't going to need an area. And I think the contract required seeding to be done when you get an area completed.

THE COURT: Are you saying the contractor didn't do any temporary seeding?

THE WITNESS: That's what I'm saying, Your honor.

Tr. 1284-85. Plaintiff therefore bears some substantial responsibility for the excessive erosion on the project site. It is impossible to quantify what portion of the blame for the erosion should be laid at the feet of the contractor.

### *3. Excessive Settlement of the Embankment*

Parker interprets the contract documents to mean that the government warranted that there will be no more than 0.8 feet of total settlement in the foundation during construction. It alleges that there was a great deal more settlement than that, which lead to the need for additional fill. It bases this interpretation on Sheet 9 of the contract drawings, which features a diagram of the embankment, including specific height and slope specifications. Jt. Ex. 2 (Sheet 9). Also on this diagram is a dashed line 0.8 feet below the top of the embankment, and a note which reads "solid line above dashed line represents additional fill for settlement. Earth Fill Yardage includes additional fill for settlement." *Id.*

Parker construes this to be a warranty that no more than 0.8 feet of settlement would occur during construction. Parker argues that there is evidence that the dam settled much more than 0.8 feet. It points to the PSW conduit crack, Mr. McCoy's testimony regarding the movement of the surveyors' finish work stakes, and plaintiff's calculations that it placed more than 1.8 million cubic yards of fill.

The question of the government's responsibility for a differing site condition with respect to excessive settlement begins with whether the contract itself warranted only 0.8 feet of settlement, a question of law to be decided by the court. *See Blinderman Constr. Co. v. United States*, 39 Fed. Cl. 529, 537 (1997) (citing *P.J. Maffei Bldg. Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984)). The foremost principle to be applied here is that an "interpretation that gives a reasonable meaning to all parts of the contract will be preferred to one that leaves portions of the contract meaningless." *Id.*

(quoting *Fortec Constructors v. United States*, 760 F.2d 1288, 1292 (Fed. Cir. 1985)). The contract's words "are to be given their plain and ordinary meaning." *Id.* (quoting *Thanet Corp. v. United States*, 591 F.2d 629, 633 (Fed. Cl. 1979)).

Although the note on Sheet 9 of the contract drawings could, in isolation, be construed as a government representation that no more than 0.8 feet of total settlement would occur during construction, consideration of the entire contract eliminates this possibility. Sheet 24 of Joint Exhibit 2 is another view of the embankment. Like Sheet 9, it also shows the top of the embankment as 303.6 feet, with a dotted line below to depict 0.8 feet of settlement. This drawing, however, has the caption: "El. 302.8 (Settled Height)." The contractor was required to bring the dam to completion at a height of 303.6 feet. The phrase "settled height" of 302.8 feet thus could only represent *post-construction* settlement. This is consistent with the language of Sheet 9 that 0.8 feet represents additional fill for settlement and that the estimated 1,825,000 cubic yards of earthfill includes such additional fill. If the government wished to represent anticipated settlement *during construction*, as plaintiff suggests, it would seem much more appropriate to identify that at the base of the dam, where such settlement would be occurring, rather than at the top.

It is also telling that plaintiff's own expert in geotechnical engineering, Dr. Traugher, suggested that the contract makes no representation regarding settlement:

THE COURT: . . . What do you understand the contract to say about settlement?

THE WITNESS: Basically it doesn't say anything to me about settlement. It gives the impression from a note that there may be .8 feet of settlement. Somebody could interpret it that way. But it doesn't really account for it.

Tr. 1367. We agree. The contract, read as a whole, does not warrant that there will only be 0.8 feet of settlement during construction.

The contract is not silent, however, with regard to the method of payment for earthfill. The contract provisions for the payment of earthfill only compensate the contractor for the amount of compacted fill placed between the foundation and the specified “neat lines” of the earthfill surface:

Measurement and payment for all types and classes of earthfill, including settlement requirements, will be by Methods 2 and 6. Pay limits shall include topsoil spread on embankments, dikes and levees. Payment will constitute full compensation for related subsidiary items.

Jt. Ex. 1 at 116. Methods 2 and 6 state the following:

Method 2 The pay limits shall be the measured surface of the foundation when approved for placement of the earthfill and the specified neat lines of the earthfill surface.

Method 6 Payment for each type and compaction class of earthfill and earth backfill will be made at the contract unit price for that type and compaction class of earthfill. Such payment will constitute full compensation for all labor, materials, equipment and all other items necessary and incidental to the performance of the work.

*Id.* at 114. In other words, the difference between the bottom profile and the finished top, at elevation 303.6 feet, amounts to 1.8 million cubic yards of fill. This represents the volume the contractor was to place and for which it would be paid.

Mr. Parker's trial testimony demonstrates that he was fully aware that the contract paid for earthfill according to the cross-sectional area between the neat lines:

Q: How did you understand that you would be paid, how did you understand the measurement and payment on this project for the earthfill?

A: On this earthfill we were going to be paid for the embankment where we placed the material—that's where it's measured. . . .

. . . you cross-section, you measure, you topo that cleaned surface, you get a good accurate measurement, and then you start putting your fill in. And the difference between where you started, the clean surface, versus where you finish, that's your computed volume of material.

. . . .

Q: And Method 2 was what applied. Correct?

A: Yes, sir.

Tr. 122-24. The settlement claim thus fails because the contract contains no warranty regarding settlement during construction. In the absence of such a warranty, the contractual method for payment is the earthfill placed between the "neatlines." Parker understood that it is only entitled to payment according to this method.

Furthermore, there is no credible evidence that plaintiff placed more than 1.8 million cubic yards of earthfill. Indeed, plaintiff's experts' method

of calculating and demonstrating settlement have significant flaws.<sup>10</sup> There were two areas from which material was extracted to construct the embankment: the ASW and BA 4. Mr. Connole asked Mr. McCoy to digitize the contours of the original topography from the original contract drawings, compare that with the digitized design grades, and thus calculate volumes of the materials in the ASW. For BA 4, since modification 2 altered its height from the original topography, Mr. McCoy used the original topography and the modification to set the proper road elevation as built. He then overlaid a satellite drawing from a computer program to calculate the alignment of the road and the width of the excavations.

Mr. McCoy next utilized a computer aided design (“CAD”) system to determine the volume of material between the original surface elevations (pre-bid) and the design elevations. Mr. Connole then compared the quantities calculated from these locations with the NRCS quantities for the same locations. In other words, rather than using the contract’s method for measuring fill in place, plaintiff measured the hole created by excavation. This method for arriving at the conclusion that settlement must have occurred on the project assumes that (1) there is a precise one-to-one density ratio between the undisturbed earthfill in the borrow areas and the compacted earthfill in the embankment after placement and (2) there was no significant amount of fill lost due to Eutaw’s inefficiencies or erosion.

Both assumptions are problematic. First, Mr. Connole never convincingly demonstrated a one-to-one correspondence between unexcavated soil *in situ* and compacted fill in the embankment. In analyzing soil samples to determine if this ratio existed, he only analyzed samples from the ASW and not BA 4, despite the fact that BA 4 accounted for over a third of the earthfill placed in the embankment:

Q: Okay. Now the material came from Borrow Area 4 and the auxiliary spillway that was used in the embankment. Is that correct?

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<sup>10</sup> Mr. Connole eventually conceded that this method would encompass not only settlement, but also any material lost due to excess erosion.

A: That's correct. About 1.6 million came out of the auxiliary spillway, and 575,000 or something like that came out of Borrow Area 4.

Q: Okay. Now, in Summary Exhibit No. 7 you do not have any data from Borrow Area 4. Is that correct? Any density data from Borrow Area 4.

A: I do not have any proctor data from Borrow Area 4, and I don't think I had any undisturbed sample data from Borrow Area 4.

Tr. 1922.

The second deficiency in his analysis was the fact that out of the 1.6 million cubic yards of fill that were ultimately extracted from the ASW, Mr. Connole's determination that the density comparison ratio was one-to-one was based on data from only two boring samples. The lack of BA 4 samples and the limited number of ASW samples causes us to hesitate in accepting Mr. Connole's one-to-one density conclusion, particularly given the testimony of Mr. Traugher, plaintiff's other expert, that it is difficult and perhaps unwise to extrapolate from a limited amount of borings.<sup>11</sup> Two borings from an area as large as the ASW is an unjustified extrapolation.

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<sup>11</sup> In responding to a question regarding the reliability of estimating the degree of settlement of the embankment prior to designing the project, Mr. Traugher went into a detailed explanation of utilizing borings to come to such a conclusion, wherein he stated, ". . . we take a boring, and it's either a 3 inch diameter sample or a 5 inch is the biggest one. If you compose that over this big dam, basically you've just got needles and that's your information. Now some people will say I'm going to assume this sand strata here connects to this one, but that's a big assumption. It's not even good enough to call it interpolation. It's extrapolation." Tr. 1357.

Even if we did accept Mr. Connole's conclusion regarding the density ratio, however, plaintiff's lack of erosion control and Eutaw's poor execution of the subcontract, something we deal with below, introduce inefficiencies which are not accounted for. We conclude that this method of calculating settlement is unreliable.

#### *4. Eutaw's Pass-through Claim*

Plaintiff's claim A incorporates a pass-through claim from Eutaw in the amount of \$487,522.<sup>12</sup> Parker contends that Eutaw incurred that much more in costs than it anticipated in its subcontract, primarily due to the lack of availability of suitable clay for earthfill. It contends that the specifications were defective in that they suggested that clay was more readily available than in fact was the case. Three other allegations are also made. Parker contends that Eutaw experienced unanticipated water drainage, resulting in the need to double handle material. It also argues that Eutaw's work was made less efficient for two contractually-related reasons. First, at the time Eutaw took over responsibility for the earthfill work, it was under the impression that the government was not going to enforce the contractual requirement that earthfill be placed in uniform lifts across the top of the dam. Second, its subcontract with Parker only obligated Eutaw to haul dirt up to 3000 feet. In fact, it had to haul dirt from greater distances.

With respect to Eutaw's asserted difficulties with wet material, we note that Eutaw made no complaints about underground water seepage during contract performance, and Parker did not raise the issue of springs until well after Eutaw had left the project. The contract also does not warranty that double handling will not be required.

To the extent that Eutaw's cost estimate included the assumption that it could ignore the contract requirement to place lifts uniformly, it assumed a risk not underwritten by the government. It had no legal right to assume that

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<sup>12</sup>Parker is entitled to rely on the pass-through claim because it remains a potential liability to Eutaw. *See Severin v. United States*, 99 Ct. Cl. 435 (1943).

the government would not enforce the contract. While inspectors may have permitted deviation from the ‘uniform-lift’ requirement for a brief time, the government’s forbearance did not constitute a waiver. Similarly, the government was not bound by Parker’s agreement that Eutaw would not have to haul material over greater than 3000 yard distances. The prime contract, incorporated into the subcontract, made no such warranty and none of the haul locations were beyond the borrow areas contractually designated.

With respect to the principal claim made by Eutaw—that the lack of readily available clay constituted a differing site condition—the short answer is that the dam was ultimately constructed exclusively from suitable materials found either under the footprint of the dam, from the ASW, or BA 4. Indeed the overwhelming evidence, much of it from Parker itself,<sup>13</sup> is that there was more than enough readily available clay on site.

For instance, Mr. Parker wrote Eutaw that its complaints about a clay shortage were unfounded: “CH and CL for Zone 1 material was and had been readily available to be excavated in Borrow Area 4 . . . . We can not understand why your personnel did not use this readily available material when we told them to.” Jt. Ex. 85.<sup>14</sup>

Most persuasive to the court is Mr. Parker’s deposition testimony. We

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<sup>13</sup>See Jt. Ex. 403 (Parker Dep. 46-47) (there was more than sufficient amount of CH and CL (clay) material in the ASW and BA 4 to complete zone 1).

<sup>14</sup>Eutaw, in response, argued that while there was clay available, it was Parker’s fault that it was inaccessible:

Your letter details that the heavy clays that we needed were readily available in the Borrow Pit 4. We were aware that this material was available in Borrow Pit 4: however, your personnel had not completed construction on the base-sub-structure of the dam to allow us access to the area where this material is to be placed.

Jt. Ex. 90. Neither interpretation of the situation helps Parker in this case.

quote it at length here because it is so fundamentally at odds with Eutaw's pass-through claim, not simply in respect to the availability of clay, but even more tellingly, with respect to Parker's assertion that Eutaw's prosecution of the work was inefficient:

Q: Based on your own personal knowledge, how did Eutaw prosecute its work on the job?

A: After a week or two of work, it was obvious to me that they were having some problems in the way they were doing the work. They were going – if they kept going like they were going, they were going to create problems.

Q: All right. What did they do that made that apparent to you?

A: They were placing the embankment contrary to the terms of the prime contract and their subcontract.

Q: What do you mean by that?

A: They were filling zone two and zone three, and they were not filling zone one, and we were getting complaints from the inspectors.

Q: Is it your testimony that they were doing basically the two outside zones and they were not doing the middle zone. Is that what I understand?

A: Yes, sir.

.....

Q: And what did Eutaw tell you?

A: They said they knew they were not building it according to the specifications, but they said that the way we're excavating it, we need to do it like that until we get down into the clay and then we can fill up the center, something to those terms, or effect.

Q: And is it fair to say that Eutaw told you that the material required for zone one was not readily available, is the reason they were doing the work the way they were performing it?

A: I mean, it's obvious that you can look out there and see the reason why it's not available is because of the way they were sequencing their excavation.

....

Q: And where was this? This was in the auxiliary spillway?

A: Auxiliary spillway. They were working over the entire area. And the way they were performing their work, there was no way they could uncover clay because of the way they were doing it. They were causing a situation there by the way they were excavating.

Q: And was the entire area covered with the material—zone two and zone three material?

A: Generally, I would say that's correct.

Q: And they were scraping [sic] the entire area in the auxiliary spillway, is that what you're saying?

A: Yes, sir.

Q: How should they have done it, in your view?

A: There's quite a few different ways they could have done it that would not have caused the problem that they were experiencing. One way is, instead of having the scrapers all spread out over the areas, to define it down into a smaller area and let them take the sand off of it so that now they have clay exposed. They also could have taken some of those scrapers and sent them to borrow area four and been hauling simultaneously out of two borrow areas.

Q: Was the material required for zone one readily available in borrow area four at that time?

A: Yes, sir.

....

Q: This area in the auxiliary spillway where they were hauling, is that the same area that you told me earlier about where you had some concerns as to the accuracy of the government soil borings?

A: Yes.

....

Q: And what did that discussion and checking discover?

A: I believe they identified some difference between what the government was showing on the boring sheets versus what was actually there in the field.

Q: Who identified those differences?

A: I believe Mitchell Hudson, with some of the surveyors that we had on the job site, in conjunction with Eutaw's superintendent, Don Whitehead. I believe that group of people did some checking on that.

Q: But you don't have any personal knowledge of that yourself?

A: I was not involved with that. It didn't—after they checked it, it didn't appear it was significantly different.

Q: That's what they reported to you?

A: There was some difference, but I don't think it was a large difference.

....

Q: Okay. We've kind of started down this path, Mr. Parker. I'd like to visit with you about the problems that you contend Parker had with Eutaw's work once it started on the project, okay. And you've told me about this issue of the

noncompliance by failing to bring zone one up at the same time that zones two and three were brought up. So I don't want to go back over that one. But what other problems did you have with respect to Eutaw's work on the job?

A: Eutaw was not performing their zone 3A work. They were not constructing their fills with what you call positive drainage. In other words, you always build your fills so that when it rains, water doesn't pond on the fills. Eutaw was asked to provide spotters to help their operators know where to place certain type of material. In other words, they would excavate in the—a scraper operator would go get loaded up in the cut area and would bring a load of material down, and that operator a lot—some of the time didn't know where he was supposed to put the material. And we asked Eutaw to provide spotters so that they would keep their people dumping the material in the right place. That's a standard thing that eliminates that problem.

....

Q: Okay. Do you have any notes or any records that would help you in terms of remembering any other problems that you encountered with their performance?

....

A: The entire time they—they butchered the borrow areas. They butchered them. They also in the auxiliary spillway cut outside of their work

area.

. . . .

A: They dug some pits in borrow area four that caused ponds as deep as 7 feet – 6, 7, 8 feet deep to be created. Towards the end, they would not man the job with enough finish equipment or finish personnel to complete the work in a timely fashion. . . .

. . . .

Q: I have that you mentioned is that Eutaw did not construct the fills with a positive drainage. Tell me about that one, please.

A: In general, throughout the course of the embankment, they would not place the material to keep it crowned. So there's a lot of times that the top of the embankment had a lot of low depressions in it, so when it rained, water would significantly pond on the embankment area. And they also had that problem in the borrow areas.

Q: What impact did that have on Parker?

A: The impact was that the material would become more and more saturated so it would take more days for Eutaw to process the material, get it ready to—get back to work. And so Parker quality control and Parker supervision was extended because of that.

. . . .

And Eutaw would at times, to help themselves [sic] get back to work, take bulldozers and push that material off of the top of the levee over onto the slopes to get it out of the way. The only thing wrong with it, it had gotten saturated. They'd push it out of the way so they could get back to dirt that was dryer and then start their filling operation.

....

Q: Okay. Spotters. Tell me about that problem.

A: There were periods where Eutaw had either new or inexperienced operators or however you want to categorize it. But their operators would haul material into the wrong zones and dump it.

....

Well, it added additional work because you had to pick it up and move it and—

....

Q: The next one I wrote down was butchering of the borrow areas. Tell me what the problem was there.

A: The—you're supposed to cut and excavate and leave the borrow areas in a dressed, nice way. In borrow area four, it was changed to a more complicated engineering grading scheme. Eutaw had no resemblance whatsoever to that grading scheme. They had undercut slopes as much as 20

feet plus.

Jt. Ex. 403 (Parker Dep. 126-46).

This damning testimony is utterly incompatible with Eutaw's claim of government-caused inefficiency and of Parker's ability to assert even a modified total cost claim. In this long recitation, Mr. Parker makes it impossible for plaintiff to credibly argue that the government was responsible for Eutaw's increased costs and dismisses the current contention that the boring logs mislead plaintiff about the availability of useable material as well. In addition, as a result of Eutaw's mistakes that Mr. Parker discusses, plaintiff was left with work that it had to correct after Eutaw left the job in September, some of which Parker never finished.<sup>15</sup>

We conclude that none of the asserted grounds for shifting Parker's costs to the government are sustainable. Parker did not establish government responsibility for costs associated with BA A, for excessive erosion, for placement of additional fill due to excessive settlement, or for Eutaw's claimed inefficiencies due to the alleged unavailability of suitable material. The pass-through claim cannot survive.

##### *5. Utilization of the Modified Total Cost Method*

Having found no liability on the part of the government for Parker's additional costs, there is no rationale for considering Parker's damages model. Nevertheless, the model, which is based on the modified total cost method has its own independent shortcomings.

The modified total cost claim is a compromise between the total cost method and the segregated damage method of calculating damages. It establishes the reasonableness of the contractor's bid, and then deducts from the contractor's total costs any contractor-caused losses. Like the total cost

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<sup>15</sup>Items that needed repair included earthfill that had washed out, temporary and permanent seeding that had not been done, and topsoil that had to be placed in various areas.

method, the modified total cost approach can only be used if the contractor proves that normal costs incurred in performing the original, as-planned contract work cannot be segregated from costs associated with differing site conditions or change orders. Costs have become so “inextricably intertwined” that it is impracticable to use the court-preferred segregated damage method. *See Neal & Co., Inc. v. United States*, 36 Fed. Cl. 600 (1996), *aff’d*, 121 F.3d 683 (Fed. Cir. 1997); *Municipality of Anchorage v. Frank Coluccio Const. Co.*, 826 P2d 316 (D. Ala. 1992) (refusing to accept the use of the modified total cost method due to failure to prove that “the nature of its losses makes it impossible or highly impractical to determine them with a reasonable degree of certainty”).

In order to utilize the modified total cost method to demonstrate its claim A damages, Parker must prove “(1) the impracticability of proving its actual losses directly; (2) the reasonableness of its bid; (3) the reasonableness of its actual costs; and (4) lack of responsibility for the added costs.” *Propellex Corp. v. Brownlee*, 342 F.3d 1335, 1338-39 (Fed. Cir. 2003). Parker maintains that it has proven all four elements. We disagree.

We will ignore the first and third elements of plaintiff’s attempt to prove its modified total cost claim and focus on the remaining two elements: the reasonableness of plaintiff’s bid and its asserted lack of responsibility for added costs. As to the first of these elements, Parker offers the testimony of Mr. Parker as to how he arrived at his bid, the testimony of Ms. Ratliff, the ACO, that Parker’s bid was reasonable, and Parker’s damages expert, Mr. Connole, who testified that the bid was reasonable.

Mr. Parker was the only person involved in the bidding process, although he did not attend any of the site showings. His engineering technician, Ruben McCoy, attended in his stead but did not participate in any of the bid calculations. When asked by government counsel how he arrived at the \$1.55 per cubic yard figure for earthfill, Mr. Parker responded that he relied on the plans, specifications, and his experience on other projects, such as the Lake Providence levees.

These facts give the court little direct evidence from which to determine if plaintiff's bid was reasonable. We only know that Mr. Parker did a mental calculation based in part on the Lake Providence bid, but we have no analysis or calculations which demonstrate that the Lake Providence bid was reasonable. We likewise have no analysis of what actually took place in Mr. Parker's preparation of the bid, except for the final figures and the general factors he took into account. We have no knowledge of whether Mr. Parker accounted for differences between the two projects, which include a substantially higher embankment at the Franklin County project.

Ms. Ratliff's testimony is of no real help to Parker. She testified that Parker was a responsive and responsible bidder and that she believed his bid was reasonable at the time. It is not the ACO's responsibility to evaluate how the bid was constructed or whether a bid will be profitable.

The only documentary evidence submitted by plaintiff to demonstrate that its bid was reasonable is Joint Exhibit 32, which is a summary prepared by Mr. Connole of all eighteen bids that NRCS received for the project. Mr. Connole testified that he began by disregarding the lowest bid, TCB Construction Co., because it was based upon a mistake. He then eliminated all bids that were more than 25% above the government's estimate of \$7,609,930, because, in his experience working with the Corps of Engineers, he believed that anything over that amount would be rejected. That left him with five bids. He then examined the amounts bid for earthfill, a separate item on the bid sheets, as it involved the issues most relevant to the claim. He then concluded that Parker's bid price for earthfill was within one standard deviation of the average price per cubic yard of earthfill, presumably making it reasonable.

On examination by government counsel, Mr. Connole conceded that he had made a significant mathematical error. Even using his 25% cut-off threshold, more bids should have been included in his analysis. In fact, he should have used a total of twelve bids. After re-analyzing the additional bids during a break, Mr. Connole's conclusion remained the same; he believed Parker's bid to be reasonable.

The court has no way of knowing why Mr. Connole's conclusion remained the same because it was not expressed in terms of standard deviation units. We can, however, conduct the same analysis Mr. Connole did, while correcting for his mathematical error. Focusing specifically on the earthfill line item in isolation, Parker's earthfill bid of \$1.55 per cubic yard is actually slightly outside the one standard deviation range.<sup>16</sup> Using the twelve bids within 25% of the government estimate by utilizing Joint Exhibit 32, the mean comes to \$1.84417, with a standard deviation of 0.2899. While close to the standard deviation, Parker's \$1.55 bid nonetheless falls just outside the lower limit. Had Parker bid the average price for earthfill, its price would have increased by \$821,250.

We are also unpersuaded that Connole's limitation of his analysis to the earthfill line item is appropriate. A modified total cost analysis is built around the reasonableness of the total bid price, not one line item. If one averages the total bid amounts which fall within 25% of the government estimate (the lowest 12 bids, excluding TCB Construction), the average comes to \$8,461,138.57. The standard deviation thereof is \$855,493.44. This puts plaintiff's bid of \$6,881,922.20 well outside the one standard deviation unit that Mr. Connole found to be important. Nor are we aware of any legal significance to his use of a 25% cut-off threshold, or to the use of the mean plus one standard deviation unit. In sum, Mr. Connole's analysis of the reasonableness of Parker's bid is unpersuasive.

The final element of a modified total cost claim is the extraction from the total cost of the contractor's own contribution to increased costs. We have set out in detail above the evidence that Eutaw, and therefore Parker, contributed significantly to the inefficient prosecution of the work. This

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<sup>16</sup> We take judicial notice that standard deviation is calculated using the formula  $S = \sqrt{(\sum (X - M)^2) / (n - 1)}$ , where S = the standard deviation;  $\sum$  = the "sum of"; X = each individual bid or line item; M = the mean of all of the bids or line items; and n = the sample size, which is twelve in this case. See Sarah Boslaugh & Paul A. Watters, *Statistics in a Nutshell* 61 (2008); Michael O. Finkelstein & Bruce Levin, *Statistics for Lawyers* 18-22 (2d ed. 2001).

phenomenon was not limited to Eutaw's own work. The two contractors worked contemporaneously on occasion, and Parker asserted that Eutaw interfered with its own work.<sup>17</sup> Further, it is plain that Parker took little interest in protecting the job site and preventing erosion. Therefore, even if Parker had established potential government responsibility for additional work, or for work inefficiencies, it would be impossible for the court to extract Parker's own contribution to its increased costs. The claim for period A fails completely.

## II. Claim Period B

### *1. Liability*

The government chose not to challenge many of the specific line items in claim B as presented in Mr. Connole's summary. Specifically, defendant does not challenge the price adjustments for modifications 1, 2, and 3, the amounts claimed for topsoil added and placed on the upstream slope of the embankment, and for the cost of removal of rock from the ASW. The government concedes that NRCS' design of the CCB system as provided in the Solicitation was defective. It thus does not deny that it is liable for any direct costs that stem from the defective CCB specifications. Instead the government focuses its challenge to claim B on Parker's claim for delay damages. The government contends that, because Parker has not offered any critical path analysis to demonstrate that the CCB failure caused the rest of the project to

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<sup>17</sup>Mr. Parker outlines Eutaw's mistakes and inefficiencies in his May 6, 2002 letter to Mr. Lyles, complaining about Eutaw's prosecution of its subcontract. Within the thirteen page letter, Mr. Parker accuses Eutaw of failing to maintain an adequate number of workmen and equipment on the project, failing to adhere to the contract's specifications regarding earthfill placement, shutting down Parker's work on the chimney drain for a twenty-three day period, and placing inappropriate material in the zones of the embankment.

go on standby, it is entitled at most to additional days, but not to a monetary recovery.

Parker bases a large portion of its second claim upon recovery of the home office overhead costs that allegedly resulted from the government's delay in providing a suitable alternative borrow area for topsoil. Home office overhead costs are calculated according to the *Eichleay* formula if liability is proven by the contractor. See *Wickham Contracting Co. v. Fischer*, 12 F.3d 1574, 1577 (Fed. Cir. 1994). The *Eichleay* formula addresses only time-related costs, not activity-related costs, and is thus inappropriate for use when delay is caused by extra work for which the contractor is separately compensated. See generally *C.B.C. Enterprises*, 24 Cl. Ct. at 190-91 (1991), *aff'd*, 978 F.2d 669 (Fed. Cir. 1992). To demonstrate entitlement to *Eichleay* damages, the contractor must prove that (1) the government caused a delay to contract performance that was not concurrent with a delay caused for any other reason; (2) the original time for contract performance was thereby extended; and (3) the contractor was required to remain on standby during the delay period. *P.J. Dick Inc. v. Principi*, 324 F.3d 1364, 1370 (Fed. Cir. 2003).

In applying these factors, the court looks to Parker to make out a prima facie case that the government-imposed delay was uncertain and that the government required the contractor to remain on standby, ready to resume full work immediately." *E.R. Mitchell Const. Co. v. Danzig*, 175 F.3d 1369, 1375 (Fed. Cir. 1999). If Parker can prove this much, then the burden shifts to the government to show "(1) that it was not impractical for the contractor to obtain 'replacement work' during the delay, or (2) that the contractor's inability to obtain such work, or to perform it, was not caused by the government's suspension." *Id.*

"Properly understood, the 'standby' test focuses not on the idleness of the contractor's work force . . . but on suspension of work on the contract." *Interstate Gen. Gov't Contractors, Inc. v. West*, 12 F.3d 1053, 1057 (Fed. Cir. 1993). The award of *Eichleay* damages "requires at least some element of uncertainty arising from suspension, disruption or delay of contract performance." *Id.* (quoting *C.B.C. Enterprises, Inc. v. United States*, 978 F.2d

669, 675 (Fed. Cir. 1992)). The phrases “stand by idly” and “suspend its work”, when taken together, “clearly refer to standing by in the sense that no work is being performed on the contract, not that there must be workers physically standing by idly. *Id.*

The court’s inquiry regarding whether a contractor is on standby is “multifaceted.” *P.J. Dick*, 324 F.3d at 1371. For instance, if the CO has issued a written order suspending the contract work for an uncertain duration but requires the contractor to remain ready to resume work immediately, then there is no need for further proof on the standby issue. *Id.* If this is not the case, however, the contractor must prove standby indirectly by establishing three factors: (1) the government-caused delay was substantial and of an indefinite duration; (2) the contractor was required to be ready to resume work immediately and at full speed; and (3) much, if not all, work on the contract was effectively suspended. *Id.* at 1371-72.

To prevail on a claim for additional costs due to delay, the contractor must demonstrate that government action affected activities on the critical path. *George Sollitt Const. Co. v. United States*, 64, Fed. Cl. 229, 240 (2005). This is important because “only construction work on the critical path had an impact upon the time in which the project was completed.” *Id.* (quoting *Wilner v. United States*, 24 F.3d 1397, 1399 (Fed. Cir. 1994)). The preferred method of documenting delay is the use of Critical Path Method (CPM) schedules and analysis of the effect of government-caused events upon the project’s critical path. *Id.* This method is required if the contract utilizes CPM scheduling. *Id.*

This contract did not require the use of CPM scheduling, however,<sup>81</sup> and thus a critical path analysis is not necessary. Nevertheless, “[i]n order to hold defendant liable for delays, plaintiff must supply specific proof that plaintiff’s performance was affected by the Government’s undue delays.” *Commercial Contractors, Inc. v. United States*, 29 Fed. Cl. 654, 662 (1993).

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<sup>18</sup> Mr. Culberson testified that CPM is not required under the contract in order to get a time extension. Tr. 1315.

We are satisfied that Parker has met its burden in this respect. Mr. Parker described the CCB system failures that occurred on October 1, 2002, and October 29, 2002. Witnesses for both plaintiff and defendant confirmed that Parker could not complete the dam to its required height without completing the CCB system. While discussions regarding the scope and pricing of the future modification to the CCB system were ongoing throughout November 2002, December 2002, and January 2003, no formal direction was given until modification 4 was issued on January 11, 2003. While Parker did complete some contract work during this period, this work could have and would have proceeded concurrently with construction of the CCB system. More importantly, Parker could not begin work until the government designated a borrow area for the required topsoil for the CCB modification. The government did not direct Parker to utilize the pool area for the needed topsoil until January 24, 2003. We therefore find that Parker was effectively idled between October 1, 2002, and January 24, 2003.

Parker also claims delay damages from January 24, 2003, until the April 8, 2003 termination. Parker contends that during at least part of the months of January, February, and March, it was unable to properly mine the topsoil from the pool area due to wet weather conditions. In addition, Mr. Connole testified that, but for the defective CCB specifications, Parker would have been able to complete that portion of the contract by Thanksgiving 2002, thereby avoiding the wet months.

This line of reasoning must fail. First, Mr. Connole's assertion is inconsistent with Mr. Parker's January 2003 letter to Ms. Ratliff, in which he asserted that he still needed ninety "working days" to complete the CCB system. Jt. Ex. 199. If Parker still needed ninety working days to complete the CCB system, it would have been unable to complete the system before the end of November 2002. *Id.* This "but for" assertion by Mr. Connole, unsupported by any updated contemporary progress schedule, is insufficient to demonstrate causation for the post-January 24, 2003 damages. *See Interstate Gen. Gov't v. United States*, 12 F.3d 1053, 1060 (Fed. Cir. 1993) (noting that testimony which is a "post-facto, conclusory, self-serving assertion by [plaintiff's] own

witness, especially when uncorroborated by and in fact is contradicted by other evidence . . . is legally insufficient to prove causation”).

In addition, the contract contemplates that the completion date could be affected by bad weather and provides for weather delays:

The number of actual adverse weather days shall include days impacted by actual adverse weather (even if adverse weather occurred in the previous month), and be calculated chronologically from the first to the last day of each month, and be recorded as full days. If the number of actual adverse weather delay days exceeds the number of days anticipated in paragraph (b) above, the contractor may submit a written request for a modification for extension of performance time due to unusually severe weather.

Jt Ex. 1 at 15. The provision goes on to state that it should be read in conjunction with FAR Clause 52.249-10 and that unusually severe weather merely authorizes time extensions. *See GASA, Inc. v. United States*, 79 Fed. Cl. 325, 364-65 (2007); *Vicari v. United States*, 47 Fed. Cl. 353, 358 (2000) (“The plain meaning of the contract establishes that delays arising from severe weather are governed by FAR § 52.249-10 . . . . The sole remedy for severe weather provided for in FAR § 52.249-10 is a time extension for completion of the project).

Even if the contract did not contain this provision, the wet conditions of the pool area did not prevent Parker from mining topsoil on each work day between January 24, 2003, and April 8, 2003. Although there were heavy rains that kept the pool area flooded for several days in late February 2003, the overwhelming evidence is that there were many other days in which the site was dry enough to work. Mr. Culberson and Mr. Oliver, both of whom the court found to be credible witnesses, testified that on several occasions between January and April of 2003, the soil in the pool area could have been harvested. Their testimony and contemporary photographs persuasively contradict Parker’s own quality control reports, which we find to be

untrustworthy in this respect. *See also* Jt. Ex. 251 (Culberson letter to Ratliff).

If the soggy nature of the topsoil during the winter months was the only thing preventing Parker from resuming work, then one would expect Parker to have worked on completing other parts of the project or, at minimum, to have maintained erosion and pollution controls. This did not happen. The evidence shows that Parker stopped work on finishing the ASW slope, neglected to maintain the silt fences, and did not install temporary seeding. Parker also failed to provide the government inspectors with the required daily reports until they were past due for several weeks. Parker could have performed contract work after January 24, 2003, yet chose instead to pursue a claim.

In sum, we find no proof that plaintiff was idled after January 24, 2003. Accordingly, delay damages are disallowed from January 24, 2003 onward.

## *2. Damages Calculation*

Having determined that plaintiff is owed its claimed costs for Modifications 1, 2, and 3, the topsoil added on the embankment, the removal of rock from the ASW, and a portion of its Modification 4 CCB delay claim, we now turn to the issue of damages. Particularly with regard to the CCB delay claim, we must keep in mind that a “claimant need not prove his damages with absolute certainty or mathematical exactitude. It is sufficient if he furnishes the court with a reasonable basis for computation even though the result is only approximate.” *Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 968 (Fed. Cl. 1965).

Plaintiff’s damages expert, Mr. Connole, summarizes his calculations and conclusions for each part of claim period B in plaintiff’s summary exhibit 14. The costs for modifications 1, 2, and 3 are not contested by the government and amount to \$21,310. Likewise, the topsoil added to the upstream slope of the dam and the removal of rock from the ASW was not contested by the government and amounts to \$14,134.<sup>19</sup>

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<sup>19</sup>The only other issue outstanding from claim period B is the \$18,965 Parker spent to conduct repair work in the ASW, allegedly due to seepage in an

Parker claims \$454,646 for delay and disruption caused by failure of the CCB system. We adjust it for several reasons. First, as discussed above, delay costs end on January 24, 2003, not April 11, 2003, as Connole calculates them. Second, while Connole properly removes unanticipated weather days, federal holidays, sundays (the contract only authorized a six day work week), and original contract work days in the month of October, he fails to do the same for November, December, and January. Using Plaintiff's Summary Exhibit 33 along with the contractor's daily reports and Mr. Oliver's diaries, we have determined that there were seven workable delay days in November, twelve in December, and eighteen in January. Along with plaintiff's claim of eight work days for October, this yields forty-five days of delay. Because the government has previously suggested that no more than forty-eight delay days are cost-related, we defer to that slightly higher number.

Mr. Connole bases his field office overhead rates on plaintiff's summary exhibit 15. Within that exhibit, the daily field office overhead rates for October, November, December, and January are \$1,228.07, \$823.14, \$768.29, and \$718.67, respectively. Connole incorrectly applied a higher rate of \$1,330.16 to the October delay days. We will apply the rate shown on the exhibit. Multiplying these figures by the delay days for the corresponding month yields a total of \$40,043.74 in costs for field office overhead damages.<sup>20</sup>

Mr. Connole has calculated Parker's home office overhead rate at \$1,222.95/day for the year 2002 and \$981.05 for the year 2003. Multiplying the thirty delay days by \$1,222.95 and the eighteen delay days by \$981.05 yield \$36,688.50 and \$17,658.90 respectively, for a total of \$54,347.40 in damages for home office overhead.

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underground spring. The underground spring issue has already been addressed in our discussion of claim period A. There is no proof that the spring was a differing site condition or that it gave rise to any substantial costs to Parker. Accordingly, that element of damages is rejected.

<sup>20</sup> The additional three work days were multiplied by the average of home office overhead for the months of November 2002, December 2002, and January 2003.

Defendant does not contest the \$120,706.68 in direct job costs that make up item 1 on Plaintiff's Summary Exhibit 14D. Nor does it contest the estimate for installing and removing the concrete cellular blocks in item 4, which amounted to \$8,462.00.

When the modification adjustments, topsoil item, rock removal item, direct costs item, geoproducts item, and home and field office delay damages are added, the total is \$259,003.82. The parties stipulated that a profit of 10% was reasonable. That addition would bring the total to \$284,904.20. On top of that, the parties also agreed that bond at 0.88% and Mississippi sales tax of 3.5% would be due. Adding those two figures, \$2,507.16 and \$9,971.65 respectively, brings the total amount due plaintiff to \$297,383.01.

Pursuant to the CDA, interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim. 41 U.S.C. § 605(a). Such interest is to be paid at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board. *Id.* Because the CO received the certified claim on September 26, 2006, interest accrues from that date.

### III. Bad Faith

The concluding argument presented at trial was that the government acted in bad faith in its administration of the contract and in its handling of plaintiff's certified claim. Parker alleges that the government knew about the garbage present in BA A prior to bid, yet designated it as the first priority borrow area anyway and continued to insist on Parker utilizing that borrow area even after Parker notified NRCS about the garbage there. Plaintiff also alleges that the government's limitation of earthfill excavation to BAs A and 4, along with change orders relating to the elevation of BA 4, were in bad faith. It also finds bad faith in the agency's initial refusal to investigate the CCB failure and in designating the pool area for topsoil. Finally, Parker believes that the handling of its certified claim was in bad faith.

The plaintiff who alleges a breach of the duty of good faith and fair dealing must overcome a “strong presumption that government contract officials exercise their duties in good faith.” *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239 (Fed. Cir. 2002) (citations omitted). Bad faith claims require clear and convincing evidence that the government acted with intent to injure the plaintiff. *Am-Pro*, 281 F.3d at 1240.

There is no such evidence here. The bill of particulars plaintiff assembles is no more than the typical litany of disagreements and misunderstandings that frequently occur in construction contracts. The only clear mistakes made by the government in our judgment were the loss of the certified claim, the delays in recognizing the unsuitability of BA A, and the failure of the CCB system. There is no evidence that the loss of the claim was anything other than a bureaucratic error. The delays were accompanied by discussion and negotiation, which, although wrong-headed on occasion, were far from the level of proof required to support a finding of bad faith. In addition, our findings above demonstrate that it was the plaintiff who was in error on most of the disagreements which developed on this project.

Plaintiff has likewise failed to prove its case that designating the pool area for topsoil was in bad faith. Testimony from Scott Culberson suggests that the government settled on the pool area as a source of topsoil because (1) it was already cleared and grubbed; (2) it was a convenient area close to the embankment, thereby reducing Parker’s haul distances and lowering its costs; and (3) the NRCS did not wish to clear another area of the national forest solely to obtain the amount of topsoil necessary to complete the CCB portion of the project. None of these reasons was unreasonable. The claim of bad faith treatment by the government is rejected.

## CONCLUSION

Based on the foregoing, we award damages to plaintiff in the amount of \$297,383.01, plus interest. The Clerk is directed to enter judgment for plaintiff in this amount. Costs to plaintiff.

s/ Eric G. Bruggink  
ERIC G. BRUGGINK  
Judge