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	)	
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	)	
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RULING ON GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

January 8, 2004

Before POLLACK, VERGILIO and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge WESTBROOK, with separate opinions by each judge.

This appeal arises out of Contract No. 50-9A28-9-1E37, between the U. S. Department of Agriculture Forest Service, Shasta-Trinity Acquisition Office, of Redding, California (FS or Respondent), and Hat Creek Construction, Inc. of Burney, California (Hat Creek or Appellant) . The contract required road construction work on various sites, the work to include realignment, placement of core drain, machine-placed riprap, dumped riprap, geotextile, placement of pit run aggregate, removing culvert, culvert installation, and downpipe installation.

Hat Creek submitted a claim alleging a Type I differing site condition, which was denied by the Contracting Officer (CO) in a decision dated June 21, 2002. Hat Creek's timely appeal was received at the Board July 3, 2002. Respondent filed a motion for summary judgment. Appellant has responded. The Board grants Respondent's motion.

FINDINGS OF FACT

1. Contract No. 50-9A28-9-1E37 was awarded to Hat Creek on September 24, 1999 (Appeal File (AF) 81-84). The contract contained Federal Acquisition Regulation (FAR) clause 52.236-2, Differing Site Conditions (April 1984) (DSC), providing for an equitable adjustment to the FAR contract in cost or time for subsurface or latent physical conditions at the site which differ materially from those indicated in the contract (known as a Type I differing site condition) (AF 114). Notice to Proceed was issued and acknowledged July 20, 2000 (AF 267).

2. The contract identified ten work sites, one of which was a borrow pit to be used as a source for riprap (AF 180, 182). The riprap pit identified in the contract was not used by Hat Creek due to a concern regarding quantity of available riprap there. An alternate pit was used. Appellant alleges that use of the alternate pit was directed by the FS. Respondent alleges that it was approved at the request of Hat Creek. The contract was not modified to reflect the use of a pit other than that originally specified in the contract documents. Appellant alleges that it worked at the second site for approximately one month without success. Appellant further alleges that the lack of success was due to unsuitable overburden which constituted a differing site condition. Appellant alleges that it was then permitted by the FS to move to a third site where it found sufficient material to complete the work.

3. The contract incorporated by reference the Forest Service Standard Specifications for Roads and Bridges (AF 98). Section 203.03 of these specifications provides that borrow excavation is to consist of the excavation and utilization of material from the sources shown on the drawings or described in the special project specifications (page (p.) 06/12 of facsimile to Board and Appellant 10/23/03). Section 611.07, Development of Pits and Quarries, provides that removal of overburden to expose rock material for aggregate production and the stockpiling or placement of overburden in embankment within the limits of the pit or quarry shall be in accordance with Section 203 and AS SHOWN ON THE DRAWINGS (emphasis in original) (unnumbered p. between AF 105 and 106). The drawings show "PIT LOCATION RIPRAP"and "PIT RIPRAP" with no additional notation (AF 180, 182). The contract provides no representations regarding conditions at the riprap, or any other pit. The contract did not specify gradations for riprap or aggregate. Determination of suitability of materials was left to the contractor. (p. 06/12 cited above; unnumbered p. between AF 105 and 106).

4. By letter dated August 3, 2000, Hat Creek notified the FS that the riprap pit was more of a dirt pit than a rock pit. Appellant stated that a decent riprap borrow pit should be made up of a majority of rock and a minority of dirt. The letter further stated that per the Differing Site Conditions clause, Hat Creek had suspended work. (AF 279.) On September 11, 2000, Hat Creek wrote that it had continued working for the past few weeks and repeated the description of the pit being more of a dirt pit than a rock pit (AF 291). In both letters, Hat Creek compared the pit to other projects. It did not compare the pit to contract representations. In a letter dated August 17, 2001, Hat Creek presented a "Type I Differing Site Conditions claim" in the amount of $79,235.01 (AF 325). Later, in a letter dated November 2, 2001, Appellant presented a "breakdown of our Type I differing site conditions claim." The total claim was $87,144.06 less previously paid "pit development costs of $8,470" for a net claim of $78,020.73 [sic]. (AF 11.)

5. The CO denied the claim in a letter dated June 21, 2002 (AF 1). The timely appeal to the Board followed.

6. In its complaint before the Board, Appellant alleged that the Government directed it to move its operations to a second riprap borrow pit, and to utilize material from that pit. Appellant further alleged that the Government directed it to continue to work the pit and that it did so without success until permitted to move yet to another pit. (Complaint §§ 4.56.)

DISCUSSION

Respondent moves for summary judgment on the grounds that (1) the riprap pit for which Hat Creek claims a differing site condition was not identified in the contract and (2) the contract contained no indications of subsurface conditions at the riprap pit shown in the contract documents.

In response, Appellant cites Morrison-Knudsen Co. v. United States, 397 F.2d 826 (1968) where the U. S. Claims Court granted an equitable adjustment when the government directed the contractor to use substitute borrow pits after the pits originally described in the contract documents failed. Appellant argues that the strength of its position lies in the fact that "*the government approved and directed Hat Creek's use of the alternate riprap*" (emphasis in original).

A forum may grant a motion for summary judgment when no genuine issue of material fact remains and the movant is entitled to judgment as a matter of law. Summary judgment may be granted if the non-moving party fails to present evidence sufficient to establish an essential element of its case. Fed. R. Civ. P. 56(e); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 255 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Moreover, "the party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient." Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). When considering and assessing facts to determine if there is a genuine issue of material fact, we are obligated to apply to the evidence presented by the non-moving party all reasonable inferences in its favor. Dairyland Power Coop. v. United States, 16 F.3d 1197 (Fed. Cir. 1994). We are not permitted to assess the moving party's evidence in that same favorable light. United States v. Diebold, 369 U.S. 654 (1962). Our task is not to weigh competing evidence, but rather to simply determine whether there exists a genuine disputed issue of material fact that is suitable for resolution at trial. Mingus Constructors, Inc. v. United States, 812 F.2d 1387 (Fed. Cir. 1987); Alvarez & Associates Construction Co., ASBCA No. 49341, 96-2 BCA ¶ 28,476; EFG Associates Inc., ASBCA No. 50546, 99-1 BCA ¶ 30,231. A material fact is one which will make a difference in the outcome of the case. Anderson v. Liberty Lobby, Inc.

The parties agree that the riprap pit employed by Hat Creek was not identified in the contract documents. Respondent has alleged that the contract did not contain indications of the subsurface conditions at the identified riprap pit. Appellant has not disputed that contention nor has Appellant directed the Board's attention to such indications in the contract. The only factual dispute between the parties is whether the FS directed or merely approved the use of riprap pit that was used. That difference is not material to a claim relying on the Differing Site Conditions clause discussed infra.

When, as here, there is no genuine issue as to any material fact, summary judgment is appropriate if the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2509, 91 L.Ed.2d 202 (1986); Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987). Furthermore, summary judgment is appropriate where the sole dispute concerns the proper interpretation of a public contract. Muniz v. United States, 972 F.2d 1304, 1309 (Fed. Cir. 1992); P.J. Maffei Bldg. Wrecking Corp. v. United States, 732 F.2d 913, 916-17 (Fed. Cir. 1984).

In order to succeed on a Type I claim, a contractor must establish, among other things, that the contract documents affirmatively indicate or represent the subsurface conditions which form the basis of the plaintiff's claim; that the contractor acted reasonably in interpreting the contract documents to make such an official representation; and that the subsurface conditions actually encountered in fact differed materially from the subsurface conditions indicated in the same contract area. Neal & Co., Inc., 36 Fed. Cl. 600 (1996); Youngdale & Sons Constr. Co. v. United States, 27 Fed. Cl. 516, 528 (1993). As the Court of Federal Claims held in Neal & Co.:

> The first step in proving that a Type I differing site condition existed is to establish that the contract documents affirmatively indicated or represented the subsurface conditions upon which NCI's claims are based. Weeks Dredging & Contracting, Inc. v. United States, 13 Cl.Ct. 193, 219 (1987), aff'd, 861 F.2d 728 (Fed. Cir. 1988). See Stuyvesant Dredging Co. v. United States, 834 F.2d 1576, 1581 (Fed. Cir. 1987); Pacific Alaska Contractors v. United States, 193 Ct.Cl. 850, 869, 436 F.2d 461, 468-70 (1971). Although, where the contract is silent, a claim cannot arise, Ragonese v. United States, 128 Ct.Cl. 156, 159, 120 F.Supp. 768, 768-69 (1954), "contract 'indication[s]' need not be explicit or specific" so long as they provide sufficient grounds by which the contractor can justify his 'expectation of latent conditions materially different from those encountered.' P.J. Maffei Bldg. Wrecking Corp. v. United States, 732 F.2d 913, 916 (Fed. Cir. 1984). Thus, in order to meet this requirement, NCI must prove that the CG explicitly, or implicitly, indicated within the contract documents subsurface conditions opposite to those actually encountered.

To prevail on a Type I differing site conditions claim, a contractor must demonstrate that the conditions "indicated" in the contract differ materially from those it encounters during performance. As a threshold matter, then, a Type I claim is dependent on what is "indicated" in the contract. A contractor is not entitled to an equitable adjustment unless the contract indicated what those conditions would reasonably be. Determining whether the contract contained "indications" regarding the conditions at the riprap pit is a matter of contract interpretation, and thus presents a question of law. P.J. Maffei Building Wrecking Corp. v. United States at 916 (Fed. Cir. 1984). The only mention in the contract of riprap are the location identifications, "PIT LOCATION RIPRAP" and "PIT RIPRAP" and the references to suitable materials in the specifications (Finding of Fact (FF) 3). I do not find the mere location of a riprap pit or the general requirement to use suitable materials to rise to the level of an indication of subsurface or latent physical conditions as described

in the DSC clause.

Thus I find, as a matter of law, that the contract contained no indications of conditions at the riprap pit and therefore, Hat Creek could not have relied on any such indications.

The final four factors which must be demonstrated to establish a Type I differing site conditions are: (2) the contractor reasonably relied upon its interpretation of the contract documents; (3) the conditions actually encountered differed materially from those indicated in the contract; (4) the conditions encountered were unforeseeable based on all the information available at the time of bidding; and (5) the contractor was damaged as a result of the material variation between the expected and the encountered conditions. See Stuyvesant Dredging Co. v. United States, 834 F.2d 1576, 1581 (Fed. Cir. 1987). Having concluded, as a matter of law, that the first prong of the test has not been met, it is unnecessary to inquire whether the latter ones have been met.

Appellant's reliance on Morrison-Knudsen is misplaced. The contract there included a set of 98 drawings prepared on the basis of the Government's field engineering surveys and material studies furnished to the bidders as a part of the bid proposal. These drawings provided quite detailed information including the specific number of cubic yards to be obtained from each of the 38 pits which were identified by station number and numbers of feet to the left and right of project station. Other data furnished included designation of fixed stations with the following specific information regarding the quantities of work to be performed between such stations: (1) excavation in cubic yards; (2) borrow in cubic yards; (3) embankment in cubic yards; (4) overhaul in station yards; (5) borrow overhaul in cubic-yard miles; (6) the specific borrow pit locations as designated on one of the drawing sheets, from which the quantities of borrow to be used between the fixed stations were to be obtained; and, (7) the quantities of unsuitable excavation material that were to be wasted. The court concluded that these drawings constituted material representations for the guidance of the bidders as to the location of the borrow pits and quantity of borrow materials that was to be obtained from each.

In relying on Morrison-Knudsen, Appellant focuses on the fact of changes in pit locations present in that case and the appeal before the Board, without appreciating the significant distinguishing factor - that the contract here contained no indication of subsurface or latent physical conditions. Appellant's inability to demonstrate that threshold element is, as a matter of law, fatal to its claim of a Type I differing site condition.

In addition, it is significant that the pit utilized by Appellant, and which was the site of the conditions at issue here, was not the pit identified in the contract at all. Appellant's claim of a

differing site condition fails for this reason as well. It is undisputed that the bidding documents made no representations as to the pit actually used by Appellant.

The cases cited by Judge Vergilio relating to "indications" are inapposite. In both cases, the contracts contained "indications" of expected conditions; the instant contract did not. In Stock & Grove, Inc. v. United States, 204 Ct.Cl. 103, 493 F.2d 629 (1974), not only did the contract indicate

a rock cliff alongside the road between certain stations as "Quarry No. 1", but the bidders were also furnished a memorandum discussing in some detail the rock formations at identified stations drawing conclusions regarding the superiority of some of the locations as a source for large riprap stone and recommending a blasting technique. The information contained in the memorandum was obtained from two separate site officials by Government officials, including a geologist with considerable experience in blasting work. The contract in Mann Construction Co., AGBCA No. 76-109, 80-2 BCA ¶ 14,674, provided borrow locations in section 01400 and in section 02210 specified the type and gradation of the materials. There the Board held that by specifying the gradations of aggregate required for select materials and designating the borrow pit from which those materials could be obtained, the contract indicated that the pit would yield the specified material. The instant contract contains no such indications of expected conditions (FF 3).

Judge Vergilio also concludes that regardless of conditions at the pit, the Government may have directed the contractor to utilize the disputed pit and its claim fails for that reason as well. Judge Pollack and I agree that if the claim before us on summary judgment were a Changes clause claim, the question whether use of the second pit had been directed would constitute a disputed material fact requiring denial of a motion for summary judgment. That is not the case, however.[1] Appellant clearly presented to the CO and appealed to the Board a differing site conditions claim. The evidence before us, taken in the light most favorable to the non-moving party, does not prove that the contract affirmatively indicated conditions to be found at the site so as to support a Type I differing site conditions claim.

RULING

Respondent's motion for summary judgment is granted.

ANNE W. WESTBROOK
Administrative Judge

[1]My decision here contains no impediment to the Board's future consideration of a Changes clause claim if properly filed and timely appealed.

POLLACK, Administrative Judge, concurring.

As a preface to my discussion, it needs to be noted that the CO decision addresses solely a Type I differing site condition claim. A Type I claim requires that a contractor show that the Government represented conditions at the site and that the contractor, in performing the work, encountered conditions which differed materially from those representations. In general, absent an error in bidding, the amount a contractor bid, based on the original representation of site conditions, serves as a baseline against which to measure any damages. I agree with Judge Vergilio and disagree with Judge Westbrook as to whether the site conditions were represented in the contract. Indications need not be explicit and in this case the labeling of Pit 1, "PIT LOCATION RIP RAP" represented that the pit had material that could satisfy the requirement for rip rap. The contract documents did not represent how difficult it might be for a contractor to remove such material nor the overall quality of the material. While the absence of such information, particularly as to the difficulty of removal, would make it more difficult for a contractor to establish its damages, the representation in the contract of "PIT LOCATION RIP RAP" does indicate the presence of the material, if a contractor was willing to put in the needed effort. Therefore, I agree in principal with Judge Vergilio's dissent that there was a representation as to conditions. Notwithstanding my agreement with the dissent that there was a representation, for reasons discussed below, I concur with Judge Westbrook in concluding that the FS motion should be granted.

In Appellant's letter of March 26, 2002 (AF 386) (submitted after Appellant's November 2, 2001 claim letter where Appellant described the damages as "breakdown of our Type I differing site condition claim" (FF. 4)), Appellant acknowledges that the original numbers it estimated had no bearing on the claim because the pit it utilized for work was completely different from the pit anticipated for the bid. Moreover, the record is undisputed that the bidding documents did not represent conditions as to Pit 2, the actual site used. Rather, the choice as to Pit 2, whether made by Appellant or the FS, was made after award and after the parties choose not to use Pit 1. Since Appellant acknowledges in the March letter that its costs for completing the first pit has no bearing on the claim, it follows that to the extent Appellant is submitting a Type I claim, that claim must relate to the second site. The contract, however, as noted above, had no representation of conditions at that second site. Consequently, there can be no Type I condition as to Pit 2 nor as to Pit 1 and in that ultimate conclusion, I agree with Judge Westbrook.

That, however, does not end the matter. Here, when the Appellant filed its Complaint, among its allegations, it asserted that the FS directed it to use the second site (Pit 2) and that the FS directed Appellant to continue work on the second pit even after it was evident that the pit was inadequate. Appellant, in its brief in opposition to the FS motion, argued many of these same facts regarding being directed to use Pit 2 and not finding suitable material there. These matters, although they involve the same dollars presented to the CO in the Type I claim, constitute a different factual basis for the claim than what was presented and addressed by the CO. Although neither party has addressed whether the claim, relating to the alleged FS direction to use Pit 2, arises from the same

operative facts as the Type I claim, I raise the matter sua sponte, since in my view it should not be ignored.

Recently, in Scott Timber Company v. United States, 333 F.3d 1358 (CAFC 2003) the court stated the following in regard to what constitutes the same claim:

> An action brought before the Court of Federal Claims must be based on the same claim previously presented to and denied by the contracting officer. Cerberonics, Inc. v. United States, 13 Cl. Ct. 415, 417 (1987), 41 U.S.C. 605(a) (2000). The standard, however, does not require rigid adherence to the exact language or structure of the original administrative CDA claim. The Court of Federal Claims correctly found that it had jurisdiction over Scott's claims in this case because they arise out of the same operative facts, claim essentially the same relief, and merely assert differing legal theories for that recovery. See Scott I, 40 Fed. Cl. at 499-500; Scott III, slip op. at 51-52.

Here although the Appellant in both the original claim (addressed by the CO) and in the claim set out in the Complaint seeks damages due to work on the second pit, the rationale and facts needed to prove the claims are quite distinct. In the appeal now before us, Appellant contends it should be paid for a Type I differing site condition, because the material it removed was more difficult than what it expected. However, in its complaint and opposition to the FS motion, Appellant contends it should be paid because it was directed to use the second pit and because the FS continued to direct it in the face of its losing effort. There is also allegations as to an agreement to pay between the parties. The CO, however, was never asked to address anything other than a Type I claim. That is reflected in the CO's decision, which denies the claim based on a determination that Appellant failed to prove the elements of a Type I claim. There was no discussion at all, as to the Appellant being directed to use Pit 2 nor whether there was an informal agreement between the parties to pay Appellant for the change in pit. It is possible that faced with the new claim, the matter can be resolved without coming back to the Board. If not, the short time frame needed for Appellant to restate the claim and for the FS to issue a decision would be well spent, as it would at a minimum focus the claim and provide clarification that would ultimately be needed if the appeal went forward. The question of whether a matter falls outside of the operative facts is often a matter of degree and one that requires the exercise of judgement. In this matter, the balance favors the conclusion that the matters surrounding the alleged direction to use Pit 2, are a different claim than the Type I claim presented to the CO.

The appeal of the Type I differing site condition claim can be decided legally on the record before us. The elements needed to sustain a Type I claim are not there. In contrast the elements dealing with directed work set forth a claim for a constructive change and while facts relating to representations as to the two pits and their actual contents may indeed be evidence supporting Appellant's claim, they are elements of a changes claim and not a Type I differing site condition claim for either Pit 1 or Pit 2. As to the dissent, I agree with Judge Vergilio that there are indeed matters that require resolution, albeit I find not under the Type I claim. Where he and I differ, is that I find that resolution of those matters are outside of the scope of the very narrow claim

presented by the Appellant, a Type I recovery. As a consequence, in order to proceed on the claim as to directed work, the Appellant first must submit that claim to the CO.

HOWARD A. POLLACK
Administrative Judge

VERGILIO, Administrative Judge, dissenting.

I write in dissent because the contractor has raised a differing site conditions claim which should survive the Government motion for summary judgment and should not be foreclosed at this stage of the proceedings.

The contractor seeks relief under the Differing Site Conditions clause (APR 1984), 48 CFR 52.236-2, of the contract (Appeal File at 114 (¶ H.2)).

The parties agree that, at the time of contracting, the contractor was to excavate and use riprap from a single pit identified in the signed contract. The contractor did not excavate (or use the material from) the contract-specified pit (pit one). The contractor utilized another pit (pit two). The contractor maintains that the Government directed and approved the use of pit two; this assertion is to be deemed true for purposes of resolving this Government motion for summary judgment, as the Government recognizes in its motion for relief.

Regarding pit one, in its complaint, the contractor states:

> At the commencement of the Work, the Government was concerned with the amount of riprap available at one of the borrow pits that have been identified by the Government in the contract documents. As a result of its concern, the Government directed [the contractor] to move its operation to another borrow pit and excavate and utilize the materials from that borrow pit.

(Complaint at 1 (¶ 3).) Regarding pit two, the contractor states: "After two days of work, [the contractor] notified the Government that the new borrow site did not contain the necessary riprap for the Work and contained too much overburden, resulting in a differing site condition." Further, this "site, even as the excavation continued, contained unsuitable overburden that would not permit [the contractor] to continue with the work. This condition represented a different site condition for which [the contractor] gave the Government a timely Notice of Potential Claim." (Complaint at 2 (¶¶ 4, 5)). The Government's answer contains a general denial of portions of these paragraphs of the complaint, but references no proof demonstrating that the contractor asserts a fact which cannot be proven. By letter dated August 3, 2000, the contractor provided a notice of a differing site condition, as it formally informed the contracting officer's representative "regarding the conditions that we have encountered at the Rip Rap Pit Site" (Appeal File at 531). The contractor submitted a timely notice of a differing site condition and a claim seeking relief under the clause. Over several months of correspondence and communications, the Government did not disavow the existence of a differing site condition, as it sought further proof of the contractor's anticipated and actual costs (Appeal File at 437, 549, 552-56, 558, 573, 575-578).

The existing record does not resolve the question of the adequacy or not of pit one. If pit one is proven to be inadequate, a differing site condition would exist. Alternatively, through a memorandum over the name of a Government inspector, the existing record suggests that the contracting officer's representative had made pit two available to the contractor as an alternative to

pit one before equipment was placed and before excavation began (Appeal File at 278). Regardless of the adequacy of pit one, a fully developed record may support the assertion of the contractor (that is, making reasonable factual assumptions in favor of the non-moving party) that the Government identified pit two as a suitable source for riprap which could be utilized under the contract or that the Government directed the use of pit two; that is, pit two became a riprap source under the contract.

In its motion for summary judgment, the Government identifies two reasons in support of its entitlement to summary judgment: "the riprap pit for which Hat Creek claims a differing site condition was not identified in the Contract; and, as to the riprap pit that *was* identified in the Contract, the Contract contained no indication of its subsurface conditions. Either one of these facts, on its own, defeats Hat Creek's claim." (Government's Motion at 4.) I conclude that neither reason is sufficient to support a granting of summary judgment in favor of the Government.

Regarding the first argument, the Government contends that a differing site condition cannot exist with respect to pit two because the contract did not identify that pit. This argument fails for two reasons. First, an unresolved and disputed question of fact exists with respect to the adequacy of pit one. If pit one constitutes a different site condition, the contractor would be entitled to relief under the clause. Such relief does not automatically exclude the costs sought by the contractor here. Second, regardless of the conditions at pit one, the facts viewed when resolving the Government motion suggest that the Government directed the contractor to utilize pit two or identified the pit as a riprap source available under the contract. In either case, pit two was identified in the contract as modified by the Government's actions. Under such facts, the differing site conditions clause provides a potential basis for the relief the contractor has sought with its notice of a differing site condition submitted by letter dated August 3, 2000.

Regarding the second argument in support of its motion, the Government mistakenly contends that the contract contains no indication of the subsurface conditions of pit one. By identifying a pit to be utilized for the excavation and utilization of material, the contract indicates that the pit will be adequate to supply the designated material. Stock & Grove, Inc. v. United States, 204 Ct. Cl. 103, 134-35, 493 F.2d 629, 646 (1974) (in finding relief under the Changed Conditions clause, the predecessor to the Differing Site Conditions clause, the court relied upon "the representation that the Government considers the designated quarry as suitable, for it would assuredly not recommend one that it thought unsuitable"); Mann Construction Co., AGBCA No. 76-109, 80-2 BCA ¶ 14,674 (in finding a Type I differing site condition, the Board noted, "The contract did not expressly state that the Government would not guarantee the adequacy of the borrow pit material or that the Government refused to take responsibility for the deficiencies of the borrow pit it designated.") Because the contract identifies pit one as a source for riprap, the Government did indicate that the pit would be adequate for performance. Arguably, the same rationale applies to pit two, if ultimately the record demonstrates that the Government represented the pit as an available source for riprap under the contract or directed the contractor to utilize that pit.

I conclude that the Government is not entitled to summary judgment. Accordingly, I deny the Government's motion.

JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D.C.
January 8, 2004