D & L CONSTRUCTION CO., INC.,	)	**AGBCA No. 97-205-1**
	)	
Appellant	)	
	)	
Appearing for the Appellant:	)	
	)	
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	)	
Appearing for the Government:	)	
	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

July 3, 2000

Before HOURY, POLLACK (presiding), and VERGILIO, Administrative Judges.

Opinion for the Board by Administrative Judge HOURY. Dissenting Opinion by Administrative Judge POLLACK.

This appeal arose under Contract No. 50-0109-5-00329, between the Forest Service, U. S. Department of Agriculture, and D & L Construction Co., Inc., of Coopers Landing, Alaska (Appellant). The contract was for reconstruction of approximately 2.5 miles of the Resurrection Creek Road in the Chugach National Forest in Alaska.

The contract identified three possible source sites for aggregate needed to perform the work. The Forest Service did not guarantee the suitability of these sources, and contractors were free to use aggregate sources of their own. Appellant bid the contract planning to use other than one of the three Forest Service identified source sites. Appellant planned to use a location within the one site that was not described by the Forest Service as the location of the aggregate.

After award when the discrepancy became apparent, Appellant obtained the Government's permission to use another aggregate source site not originally contemplated by either party.

Appellant seeks $21,514 for the added costs of developing the mutually agreed to site, $24,450 for missing aggregate, $2,734 for pit restoration for pit materials removed by others, $5,000 for missing "D-1 material" that Appellant had processed, $9,333 for equipment rental expenses allegedly caused by Forest Service delays, $16,650 for mobilization expenses for having to work an added construction season, $335 for changes to geotextile material quantities, $64,820 in equipment standby expenses, and $18,769 for unabsorbed overhead using the Eichleay formula for a total of $163,605.

FINDINGS OF FACT

Pre-Bid Activity

1. The Government issued the Solicitation for Bids on April 5, 1995. The work involved reconstruction of approximately 2.5 miles of road known as the Resurrection Creek Road on the Chugach National Forest, approximately 73 miles from Anchorage, Alaska. (Appeal File (AF) 438, 450.) The solicitation identified three possible sources of Government material for the project. However, the Government did not guarantee the suitability of any of the three sources. Contractors were free to provide their own sources. (AF 473, 503-04.) May 4, 1995, was specified as the bid opening date. Bids were to remain open a minimum of 60 days. Contractors were to furnish performance and payment bonds within 15 days of award (AF 439). The contractor was required to commence work within 15 days after receipt of a Notice to Proceed (NTP) and to complete the work no later than 120 days after receipt of the NTP (AF 485). The solicitation estimated that the NTP would be issued on or about June 12, 1995 (AF 450).

2. Two of the material sources were located at mileposts 42 and 49, and had material stockpiled in gravel pits. However, as the solicitation stated, the stockpiled material might require mixing with other material to meet the specification requirements. Also, the quantity of material might have been inadequate (AF 473, 504).

3. The third possible source of material was located on the Hope Mining Company claim No. 26 (HMC 26) (AF 473). HMC owned the rights to the locatable gold on HMC 26, while the Government owned the remainder of the materials (Transcript (Tr.) I-149; Tr. II-35). The Government obtained from HMC a waiver of HMC's rights to any gold contained in the material used for the project. The February 16, 1995 waiver authorized removal of material from the east one-half of HMC 26, but only during the period March 1, 1995, through June 24, 1995. (AF 52.)

4. The Special Project Specification 611.02 of the solicitation stated that the removal of material from the east one-half of HMC 26 was to be from a location near Resurrection Creek which was a planned salmon fishery enhancement excavation, and that "most materials must be removed from within the staked channel location and from an adjacent tailing pile." The channel would be staked by the Forest Service prior to the start of operations if HMC 26 was selected by the contractor. A pit development plan was to be submitted by the contractor in consultation with the Forest Service. The plan was to be approved by the Forest Service within 7 days, prior to any work being

accomplished. All equipment and materials were to be removed prior to June 24, 1995, to allow work on the salmon enhancement project. (AF 473-74.) The Forest Service had concems that the June 24, 1995 date for completing the removal of materials from the channel and adjacent tailings pile made use of this site unfeasible. However, the site was available for pre-bid viewing, the June 24 date was known to all bidders, bidders who inquired were advised that the June 24 date was firm, and the Forest Service specifically did not guarantee the suitability of any of the three identified material sources (Finding of Fact (FF) 1; AF 78, 79.)

5. Sheet 7 of the construction drawings identified the HMC 26 material source as approximately 0.35 miles from station 1+60 (AF 473, 504, 585, 591). The specification referred to the distance as approximately 0.35 miles, in the vicinity of 0.35 miles, and at 0.35 miles (AF 460-61, 473-74). Clause H.26, Local Material Sources, referred to the distance as approximately 0.35 miles (AF 503-04). The eastern half of HMC 26 included two distinctive areas referred to by the parties as the creek area and the upper bench, a bluff with an elevation of 60 to 80 feet above the creek. (Tr. I-54; Tr. II-93-95.)

6. Appellant visited the site prior to bidding. Appellant followed the road it thought to be the correct road to find the material in HMC 26. Appellant came to a locked gate, parked and walked, came to "another" fork in the road, investigated both road segments, ending up down by the creek. Appellant did not testify that it relied upon the 0.35 mile distance. (Tr. I-46.) Appellant saw the tailings piles near the creek that was referred to in the specifications (FF 4; Tr. II-90). Nevertheless, Appellant testified that it based its bid on a cleared and grubbed portion of the upper bench area, 60 to 80 feet above the creek, that Appellant considered to be an ideal location for the material source (Tr. II-88).

7. Although Appellant testified that it based its bid on the upper bench as a material source, Appellant intended to use a subcontractor to crush the necessary material (Tr. I-110). The subcontractor did not accompany Appellant on its site visit (Tr. II-80, 84) and did not visit HMC 26 until June 18, 1995, after the award of the contract (AF 62-63; Tr. II-75-77). No bid calculations or bid documents were produced by Appellant.

Bidding, Award, and Performance

8. Bids were opened on May 4, 1995. The Appellant's bid did not indicate its intended source of material. By letter dated May 11, 1995, the Forest Service informed Appellant that it had been awarded the contract and advised that performance and payment bonds must be returned within 15 days (AF 54). Appellant provided these bonds May 29, 1995 (Tr. II-56). The contract includes three pertinent clauses that preclude the submission of requests for equitable adjustments after final payment: Differing Site Conditions (FAR 52.236-2) (APR 1984) (AF 488-89); Changes (FAR 52.243-4) (AUG 1987) (AF 540-41); and Suspension of Work (FAR 52.212-12) (APR 1984) (AF 485-86). A pre-work meeting was conducted June 12, 1995. The Contracting Officer (CO) intended to issue the NTP effective June 13, 1995. Because the Forest Service had not completed road staking and the Appellant wanted the entire road staked before beginning, the Appellant and

CO mutually agreed to an effective date for the NTP of June 19, 1995. (Tr. I-72, 122; Tr. II-260; Tr. III-26.) Staking was not completed until July 10. However, by June 19 Appellant could have begun clearing and shaping the first 5,800 feet of the 2.5 mile road (Tr. IV-99).

9. At the time of the pre-work meeting, Appellant was completing a contract for the U. S. Fish & Wildlife Service. Appellant testified that it was prepared to begin developing a material source and advised the Forest Service that it planned to use HMC 26. However, Appellant did not consult with the Forest Service engineer, file a pit development plan, as required, or otherwise indicate an immediate readiness to work on HMC 26. The Forest Service concluded that HMC 26 was not feasible to use as a material source because of the June 24, 1995, deadline for removal of all materials. During the pre-work meeting, the parties agreed to meet on June 18, 1995, at HMC 26 to explore other possible material sources. (AF 60; Tr. I-73; Tr. II-120-23, 223, 229, 260-61; Tr. III-98, 266.)

10. During the June 18, 1995 meeting and site visit, Appellant's crushing subcontractor ruled out use of the area near the stream because of the difficult access and the alleged unsuitability of the material (AF 62-63; Tr. I-77, 151-52; Tr. II-123; Tr. III-272). Appellant then discussed other possible sites with HMC. (Tr. I-154; Tr. III-276-77.) By letter dated June 24, 1995, received by the Forest Service June 28, Appellant submitted a pit development plan to the Forest Service for development of a pit on the upper bench, indicating that the creek area was not suitable, and that the June 24, 1995 date to complete removal of material from the creek area should not be applicable to other areas on HMC 26 not involving work by the creek (AF 66).

11. By letter dated July 12, 1995, the CO denied Appellant's request, stating that the project went to bid with the June 24 deadline applicable to the "east half of HMC 26," that this requirement had not been changed for other bidders, that Appellant's bid allegedly based on the use of the upper bench portion of HMC 26 was unreasonable, and that allowing Appellant to use the upper bench as a material source after June 24 would be unfair to other bidders. The CO then stated that it appeared that Appellant's alternatives were to use one of the option sources, furnish the aggregate itself, or, if Appellant preferred, the CO offered to consider a mutual termination and readvertisement of the project. The CO suspended performance pending resolution of the pit issue. (AF 70.) At the time Appellant had not yet mobilized (Tr. II-238).

12. By letter dated July 15, 1995, Appellant requested use of the HMC American Way No. 2 claim (Am Way) as the pit material source (AF 80-81). Prior to approving Am Way the Forest Service needed to document certain National Environmental Policy Act (NEPA) requirements regarding cultural resources. This documentation was completed in about a week. During the same time frame, it was necessary for the Forest Service to obtain a waiver from HMC regarding the Am Way mineral rights. HMC was not willing to grant the waiver until it had reached an agreement with Appellant regarding use of Am Way. On July 31, 1995, Appellant entered into an agreement with HMC regarding Am Way use (AF 83-89, 329, 331; Tr. I-219). The CO issued a resumption of work order August 3, 1995 (AF 90).

13. On August 8, 1995, Appellant executed a materials permit with the Forest Service authorizing removal of 6,000 cubic yards for no charge for use on the project, plus 2,000 cubic yards for $1,400 for use on another contract Appellant had, the Kenai Borough contract. The permit included an October 31, 1995 expiration date. (AF 92-93.) On August 11, Appellant sent a pit development plan to the Forest Service, began clearing for the pit the same day, and continued clearing until August 17. The CO Representative (COR) did not receive Appellant's plan until August 14. On August 15, the COR issued Work Order A stating that additional information was necessary before the Forest Service could approve the plan. The COR also requested that Appellant submit a revised construction schedule. (AF 102-05.) By September 9, Appellant had failed to provide the additional information for the plan or the revised construction schedule, even though Appellant's subcontractor was processing material for Kenai Borough. Appellant supplemented the pit development plan and submitted the revised work schedule September 12. These were approved September 19. (AF 117-21, 131.) Appellant did not conduct any substantial work on the contract between August 17 and September 11 (AF 115, 124-26; Tr. II-149).

Contract Modification No. 1

14. By letter dated August 11, 1995, Appellant filed a $5,300 claim, demanding a 5-day extension for not being able to use HMC 26 as a disposal site for clearing and grubbing debris. On September 15, 1995, the parties finalized Modification No. 1 to the contract wherein the Government agreed to compensate Appellant in the requested amount of $5,300. The modification also approved use of Am Way as the material source for the road aggregate for $0 increase in the contract price. Contract time was extended by "45 days due to Government delay in construction staking and working out the details with mining claimant for a material source site for crushed aggregate." The modification included standard language that "Except as provided herein, all terms and conditions of [the contract], as heretofore changed, remains unchanged and in full force and effect." The modification recites that it compensated "the contractor for all work, materials, labor and equipment associated with this change." (AF 99, 425-30.) When asked by the presiding judge, Appellant stated that it generally saw the Government's "justification statement" for all contract modifications and, in fact, saw the one for Modification No. 1 (Tr. I-254-55). However, when Appellant's counsel noted that the judge had made an important point, Appellant subsequently stated that it had not seen the justification (Tr. I-255-56).

Access to Am Way

15. Appellant concluded that the access road to the Am Way claim was on private property (AF 110). However, Appellant never stopped using the road, and never was denied access over the road (Tr. I-238; Tr. II-155). Appellant was concerned about its liability for having cut and trimmed trees along the road (Tr. I-238-39).

Additional Cost Of Lease Equipment Resulting From Delay

16. Appellant claims $9,333 for the additional cost of renting a John Deere 644 loader and a Dynapac compactor during 1995, after the resumption of work, because of the disruptions caused by the alleged Forest Service delays. However, the evidence indicates that Appellant was claiming for the loader during the August 5 - September 4, 1995 period, when the loader was not at the work site. The evidence also indicates that the need for a compactor was because Appellant's compactor broke down. (AF 102, 110, 117, 171, 175-76.)

Cut Slope and Glaciation Design

17. On October 15, 1995, Appellant expressed concerns that the cut slope between stations 73 +00 to 83+00 was unsuitable as staked. Appellant had cleared and grubbed this area and then skipped over it to perform work elsewhere. Forest Service engineers met with Appellant and concluded that the road should be built as staked. (AF 157, 160, 169, 180; Tr. I-269-70; Tr. III-84, 136-37, 295; Tr. IV-57, 68-72.)

18. The Forest Service was concerned with glaciation[1] between stations 73+00 and 83+00. On or about October 24, 1995, this section of road had been cut by Appellant, but Appellant had not shaped the road and no ditch had been constructed. (Tr. IV-72, 73.)

19. The Forest Service issued a winter shutdown to Appellant November 9, 1995. On November 20, 1995, the Forest Service requested Appellant to build a ditch to eliminate the possibility of glaciation. By letter dated November 21, 1995, Appellant declined to do so. (AF 186, 190-92; Tr. IV-73.) The Forest Service built an ice dam to hold back the glaciation (AF 197; Tr. IV-75).

Winter Shutdown/Contract Modification No. 4

20. Over the winter shutdown, the Forest Service redesigned the road by moving it back into the cut slope by 2 feet and including a ditch in the 2-foot area. The slope remained the same. The design and staking were completed by the first week in June 1996. (Tr. III-190-93; Tr. IV-78; AF 202.) Appellant's start of work for the 1996 season was not delayed by the redesign (AF 204; Tr. I-285; Tr. III-193; Tr. IV-40, 43, 79). The parties entered into contract modification No. 4 for the road, increasing the contract price by $2,119.50. Modification No. 4 included other changes and added 20 days to the performance period. (AF 410-15.)

[1] Glaciation occurs when water seeps from the cut slope of the road and freezes on the road surface forming "black ice," making the road slippery and impassable (Tr. III-191; Tr. IV-120).

The Alleged Material Losses / Geotextile Fabric Claim

21. Generally, the Forest Service owns and controls all minerals and materials obtained from national forest land. Ownership of materials in excess of the needs of a Government contractor is owned by the Forest Service. The contract specifically authorizes the Forest Service to award other contracts at or near the site of the present contract, so long as the other contractor cooperates regarding the scheduling and conduct of the present work. (Clause 8, Other Contracts (FAR 52.236-8) (APR 1984) (AF 491).) Under the Permits and Responsibilities clause (FAR 52.236-7) (NOV 1991) the contractor is generally responsible for all materials delivered and all work performed until acceptance (AF 491, clause H.7). Appellant was permitted to remove 6,000 cubic yards of material for work under the present contract at no charge, and 2,000 cubic yards of material for use under another contract for a charge of $1,400. Materials generated for use on the contract that exceeded Appellant's needs remained Government property (AF 92-93; Tr. II-255-56; FF 13).

22. On October 31, 1995, the Forest Service discussed use of excess materials by others (AF 176; Tr. III-330; Tr. IV-7). On November 7, 1995, the Forest Service executed a permit with a Mr. Skogstad allowing the removal of 500 cubic yards of sorted rock or pit run materials remaining from the Am Way pit (AF 324; Tr. II-50-60). Mr. Skogstad removed pit run and 4-inch material from the east end of the pit. Appellant was working the west end (Tr. II-36, 37, 50-51; Tr. III-314, Tr. IV-10, 11, 17). Appellant was required to perform pit restoration work in the area where material was removed by Mr. Skogstad. Appellant expended 17.5 hours using an excavator to restore the entire pit, but did not allocate the time required to restore the Skogstad worked area. Appellant claimed $2,734 for the restoration work using $125 per hour as the rate for the excavator plus a 25 percent markup (Tr. I-314-15). The Government's primary objection to paying this claim is that Appellant did not apportion the hours (Government Post-Hearing Brief, page 80). Appellant was required to provide 1-inch (or less) material for its work (AF 180). HMC constructed a road using 1,000 to 1,200 cubic yards of reject material left over from Appellant's crushing operation that was larger than 2 inches. HMC had not obtained Forest Service authorization to construct the road. (AF 350-56; Tr. I-181-85, 198, 280; Tr. II-68; Tr. IV-93.)

23. By letter dated May 14, 1996, Appellant claimed that up to 2,000 cubic yards of processed gravel that had been stockpiled for use was used to construct the HMC road, and that up to 400 cubic yards of "D-1 material" was missing (AF 199). An investigation by the Chugach National Forest concluded that only sorted pit run material had been used by HMC to construct the road, and that "there is no indication the material from the crushed rock stockpile was ever used in the construction of the [HMC] road" (AF 396; Tr. IV-92-94). The Forest Service Engineer testified that he was not convinced that any material was missing from the stockpile of rock, because the pile did not look like it had been disturbed by a recent removal. He conceded that he had not seen the stockpile prior to his the report that material was missing (Tr. IV-92-94.) Appellant testified that there was about 1,000 cubic yards of D-1 material remaining at the end of the 1995 construction season (Tr. II-138), and that Appellant had to replace 200 cubic yards of D-1 material (Tr. II- 280-81; Tr. III-78). Appellant asserts it traveled a 50-mile round trip, by highway, for four loads of the replacement material, with each trip taking 10 hours. Appellant applied a $75 per hour rate to the 40 hours, added

$600 for 4 hours of loader, $100 for an administrative fee, and $120 for the material that it paid at $.60 per yard. (AF 332-34; Tr. I-280-82, 317.) The Forest Service asserted that the 10-hour haul time for a 50-mile trip over highways was excessive.

24. Pay Item 203(16)G of the contract was for a "design quantity" of 4,800 square yards of geotextile material for use in the subgrade of the road. Items denoted as "design quantities" are generally paid for based upon the design quantity. However, Specification EM-7720-100R (1985), section 106.04, incorporated by reference, authorizes different amounts when the actual quantity varies from the design quantity by 15 percent or more. The actual quantity used was 3,534 square yards, a variation of more than 15 percent. Contract Modification No. 5 addressed the quantity variation and compensated Appellant based upon the reduced quantity. The modification was signed by both parties. (AF 406 - 09, 447, 451.)

Performance After The Winter Shutdown - Release And Final Payment

25. After the winter shutdown, Appellant began work July 1, 1996. The Forest Service conducted a final inspection on August 19, 1996, and accepted the work (AF 297-98; Tr. IV-96). Appellant signed a release in consideration of final payment on November 29, 1996, "subject to pending claims in the amount of $65,529.65." In the release, Appellant referred to a four-page letter dated November 27, 1996 (AF 265).

26. Appellant's November 27, 1996 letter can be summarized as follows:

1. Almost 4 weeks for Government to complete staking and survey work at beginning of contract.

2. Wrongful denial of use of HMC 26 and defective design between stations 73+00 to 83+00. All the above delays caused $7,946.25 in unnecessary remobilization expenses.

3. $24,450 for "illegally" removed 3,000 cubic yards of screen and crushed material. $2,734.38 for HMC Am Way pit restoration.

4. $5,175 for extra haul costs to replace 200 cubic yards of crushed D-1 material from stockpile.

5. 10 percent increase in overhead expenses to 20 percent. $24,889.

6. $335 for a 1,266 square yard reduction in the 4,800 square yard bid quantity of Item 203(16)G, Geotextile Fabric.

(AF 261-64.)

The Government made the final payment of $10,500 on December 2, 1996, 3 days after Appellant signed the release (AF 39).

Appellant's Claims Filed with the CO

27. After the final payment, by letter dated April 25, 1997, Appellant filed the following $199,202.68 claim and supporting documentation with the CO (AF 285-401).

1. $25,508.50, defective specifications regarding the location of HMC 26, costs for leasing additional equipment not contemplated due to delay.

2. Unreasonable Notice to Proceed date because of need to complete HMC 26 work by June 24, 1995; July 12, 1995 suspension of work.

3. $19,861 increased cost of pit development because of having to use Am Way mistake of HMC 26.

4. Delay in HMC 26 pit development plan rejection from June 24, 1995, through July 12, 1995. Delay in approval of Am Way plan from August 11, 1995, through September 19, 1995.

5. Improper interference in operations, use of Appellant's materials by Mr. Skogstad and HMC with complicity of Forest Service.

6. Cost of improperly used materials $24,450 for 3,000 cubic yards of stockpiled material and $5,175 for additional costs of replacing 200 cubic yards of crushed aggregate.

7. Delay due to defective design based on Eichleay formula. Between the May 11, 1995 contract award date, and the September 3, 1996 completion date, Appellant claims to have only worked on site for 72 days. Appellant divides contract billings of $248,890 by total billings of $1,710,497 to arrive at a factor of 15 percent. Appellant multiplies the alleged total overhead of $169,723 by the 15 percent to arrive at $25,458.45, or $353.59 per day when divided by the 72 days worked. Appellant uses the 440 total days in Modification No. 6, subtracts the 120 contract days to arrive at 320 days of delay at $353.59 per day for a total of $113,148.80.

Appellant certified the claim in accordance with 41 U.S.C. § 605(c)(1).

28. The CO considered Appellant's claims of November 27, 1996, and April 25,1997. The CO denied Appellant's claims by decision dated June 25, 1997 (AF 3-28). Appellant filed a timely appeal. Appellant essentially reiterated its $199,202.68 claim in its complaint.

Appellant's Claims Presented At The Hearing

29. At the hearing (Appellant's Exhibit B), Appellant reduced its total claim to $163,605, and changed certain of the claim bases and amounts as follows:

1.0	DEVELOPMENT OF AMERICAN PIT DUE TO LOSS OF GOVERNMENT SOURCE ALREADY DEVELOPED	$	21,514	
2.0	REPLACEMENT OF STOCKPILED MATERIALS SOLD AND USED FOR ROAD	$	24,450	
2.0	PIT RESTORATION - AREA WHERE MATERIALS REMOVED	$	2,734	
2.0	PURCHASE AND HAUL OF D-1 TO REPLACE MISSING D-1	$	5,000	
3.0	ADDITIONAL COST OF LEASE EQUIPMENT RESULTING FROM DELAY	$	9,333	
4.0	WINTER DEMOBILIZATION AND SPRING REMOBILIZATION	$	16,650	
NA	CHANGE IN GEOTEXTILE QUANTITIES	$	335	
	TOTAL DIRECT COST CLAIMS			**$ 80,016**
5.0	EXTENDED EQUIPMENT STANDBY COST - FIRST CONSTRUCTION SEASON	$	64,820	
6.0	UNABSORBED HOME OFFICE OVERHEAD	$	18,769	
	TOTAL DELAY CLAIMS			**$ 83,589**
	TOTAL CLAIM AMOUNT			**$ 163,605**

DISCUSSION

Burden of Proof

This appeal represents claims by Appellant. The Appellant must show that the claims remain viable and are properly before the Board. Appellant bears the burden of proving all the claim elements by a preponderance of the evidence. Where there are concurrent (Government and contractor) causes of delay, the contractor must prove that the Government's cause was the sole and proximate cause of the delay, and damages resulting. William F. Klingensmith, Inc. v. United States, 731 F.2d 805

(Fed. Cir. 1984); Hoffman Constr. Co. v. United States, 40 Fed. Cl. 184 (1998); Blinderman Constr. Co. v. United States, 529 Fed. Cl. 529 (1997); and Mega Constr. Co. v. United States, 29 Fed. Cl. 396 (1993). As an inherent part of this proof, Appellant must show that the delay affected the work on the critical path since only work on the critical path has an impact on completion. Hoffman Constr., 40 Fed. Cl. at 198; and Mega Constr., 29 Fed. Cl. at 425.

Release/ Claims/ CO Decision and Jurisdiction

There are inconsistencies between the substance and amounts of the claims reserved and excepted in the release signed by Appellant in consideration of final payment (FF 25, 26), the claims submitted by Appellant to the CO after final payment and denied by the CO (FF 26-28), and the claims asserted after the appeal was made (FF 29). It is necessary to consider and attempt to resolve these inconsistencies to determine the scope of the Board's jurisdiction over the various claims, and then to decide whether any of the claims are precluded by the final payment release. Claims for equitable adjustment are generally precluded from being asserted after final payment by the clauses in the contract applicable to Appellant's claims including Differing Site Conditions, Changes, and Suspension of Work (FF 8). See Mingus Constr., Inc v. United States, 812 F.2d 1387 (Fed. Cir. 1987). The Government made final payment on December 2, 1996. (FF 24-25).

Certain of Appellant's claims were submitted to the CO by letter dated April 25 1997, after final payment had been made. The CO also considered the claims specifically set forth in the release signed by Appellant. The CO specifically mentioned the $65,529.63 dollar limitation in the release in his decision denying the Eichleay portion of Appellant's $113,148.80 claim (AF 27-28). On appeal, the Government has not asserted that the substance of the individual claims included in the release, the individual claim amounts, or the $65,529.63 total claimed, limited Appellant's recovery. The jurisdictional limitations over claims not having been presented to the CO, and the limitations on recovery imposed by the release, are considered below in connection with the individual claims presented at the hearing and subsequently briefed.

Schedule 1.0 - Development of Am Way in Lieu of HMC 26 Material Source

Appellant claims $21,514 as the alleged increase in gravel pit development costs, between the HMC 26 source, that Appellant contends it based its bid upon, and the Am Way pit that Appellant actually used because the Government refused to allow use of HMC 26. The Government specifications identified three possible material sources including HMC 26, but did not guarantee the materials in any of the three sources, allowing the contractor to use these three sources or furnish its own.

The specifications and drawings generally identified the HMC 26 source as approximately 0.35 miles from milepost 1+60, and specified that the removal materials were to be taken from the east half of HMC 26 from a location near Resurrection Creek which was planned as a salmon fishery enhancement excavation, and that most of the materials must be removed from within a staked channel location, and from an adjacent tailing site. The Forest Service would stake the channel prior

to the start of operations if HMC 26 was selected. A pit development plan was to be submitted by the contractor and approved by the Forest Service within 7 days (FF 4-5).

Appellant visited the sites of the three sources prior to bidding and allegedly decided to bid on the basis of developing a pit on HMC 26, but on a bluff, 60 to 80 foot above the creek/channel. Appellant asserts that this area was ideal for a pit and was located 0.35 miles from milepost 1+60. The Appellant saw the creek and a tailing pit near it below the bluff.

The specifications were not ambiguous. If, in fact, Appellant traveled "approximately" 0.35 miles and did not reach the actual creek area, but the bluff above the creek, Appellant was on notice from the material source description that the creek area with tailing pile, not the "ideal" bluff area, was the material source. Even if the specifications were ambiguous regarding the source location, Appellant was obligated to inquire and clarify the ambiguity because the ambiguity, if any, was patent. In any event, Appellant used a subcontractor to develop the material source and the subcontractor did not visit the site until after the contract had been awarded. (FF 7.) The subcontractor ruled out use of the creek area because of access problems and the unsuitability of the materials. Appellant provided no bid calculations regarding its alleged intended use of HMC 26.

Indeed, with the benefit of hindsight, it is apparent that, at best, Appellant (if one believes the unsupported assertion) made a unilateral mistake in making assumptions contrary to the express terms of the contract. Once the CO determined that this situation existed, by letter dated July 12, 1995, the CO offered Appellant a mutual termination and readvertisement (FF 11). The Appellant did not opt for such a termination.

Since Appellant failed to elect to use any of the material sources identified in the solicitation, the Forest Service was under no obligation to allow Appellant to use the upper bluff (which was not identified as a material source), particularly after June 24, 1995, because this would have conferred an advantage to Appellant not allowed other bidders (FF 11). Protection of the integrity of the bidding process was sufficient reason to deny Appellant's request. Alfa Laval Separation, Inc. v. United States, 40 Fed. Cl. 215, 235 (1998); Fry Communications, Inc. v. United States, 22 Ct. Cl. 497, 504 (1991); Vangaurd Sec., Inc. v. United States, 20 Cl. Ct. 90, 113 (1990). Delays, if any, by the Forest Service through July 12, 1995, were (at best) concurrent delays, and therefore not compensable. See William F. Klingensmith; Hoffman Constr.; Blinderman Constr., and Mega Constr. Appellant, and the dissent, seek to fault the Government for its actions in attempting to accommodate the Appellant in finding an alternative. The Government acted with reasonable promptness throughout, and incurred no liability under this contract for its related actions.

Since Appellant was not entitled to use the upper bench of HMC 26 as the material source, increased expenses, if any, to develop the Am Way pit are not recoverable. In any event, Appellant signed Contract Modification No. 1, on August 11, where, among other things, the Forest Service approved the use of Am Way. The modification recited that the agreements therein were for "$0" increase in the contract price (FF 14). Therefore, Modification No. 1 acts as an accord and satisfaction of Appellant's claim, precluding recovery.

Finally, Appellant's failure to reserve a claim in the release for final payment for the alleged increased costs of developing the Am Way material source, and the fact that this claim was submitted after final payment, preclude recovery for separate and independent reasons (FF 8, 25, 26).

Schedule 2.0 - Replacement of Stockpiled Materials Sold and Used for Road

Appellant was issued a permit allowing it to use materials from the Am Way pit on another contract. Appellant was required to pay for these materials, unlike the materials needed for the Resurrection Creek Road reconstruction, which was provided to Appellant at no cost. Appellant's permit for use of the materials for the separate contract work expired October 31, 1995, and Appellant retained no ownership interest in the materials not removed prior to the expiration of the permit. 36 C.F.R. § 228.43(d). Under the terms of the contract, the Forest Service was specifically authorized to contract for other work in the vicinity of Appellant's work, so long as the Forest Service exercised due care not to have the contracted for work interfere with Appellant's work. Moreover, Appellant was responsible for all materials until acceptance of the work. The Forest Service authorized a Mr. Skogstad to remove 500 cubic yards of sorted rock or pit run material from the east end of the Am Way pit, away from where Appellant was working (FF 22). The pit material used by HMC, without Forest Service authorization, was pit material left over from Appellant's operations (FF 22). Consequently, Appellant is not entitled to recovery under this claim, because it has shown neither that it was entitled to any recovery under any of the terms of the contract, nor that Appellant suffered any damages.

Schedule 2.0 - Pit Restoration - Area Where Materials Removed

Appellant was required to restore the entire Am Way pit including the area used by Mr. Skogstad to remove the 500 cubic yards. Appellant claimed $2,734 for the pit restoration but did not allocate between the contractual restoration work and the added work. The Government's primary objection to payment was that Appellant failed to apportion its claim. Since Appellant was authorized to remove 8,000 cubic yards of material, and Skogstad only 500 cubic yards (FF 21, 22), a reasonable allocation would be 500/8,500 of its $2,734 claim, or $161.

Schedule 2.0 - Purchase and Haul of D -1 to Replace Missing D - 1 Material

Appellant claims $5,000 as the cost of replacing 200 cubic yards of D-1 material that was allegedly stolen from the work site. As a factual issue the evidence is less than persuasive that 200 cubic yards of D-1 material were taken from Appellant's processed rock stockpile (FF 23). Moreover, the contract contains the Permits and Responsibilities clause which essentially provides that Appellant remains responsible for material at the site until the work is accepted (FF 21). The missing material was in process and had not been accepted. Appellant has not shown that any action by the Forest Service would render it responsible. Therefore, the appeal of the denial of this claim cannot be sustained.

Schedule 3.0 - Additional Cost of Lease Equipment Resulting From Delay

Appellant seeks $9,333 as the alleged additional expense of leasing equipment as a result of alleged Forest Service delays during 1995. This claim was presented at the hearing only, and was not presented to the CO. Therefore, the Board has no jurisdiction over this claim. In any event, the evidence indicates that Appellant has failed to adequately establish either the cause (see discussion for Schedule 1.0) or the amount of this claim (FF 16). Further, Modification No.1, which included 45 days of additional contract time for "$0" increase in cost, acts as an accord and satisfaction, precluding recovery based on this claim. Finally, this claim was submitted after final payment, and was not reserved by Appellant in the release signed to secure final payment (FF 8, 25, 26), and should be denied for these additional independent reasons.

Schedule 4.0 - Demobilization and Mobilization

Appellant seeks $16,650 because alleged Forest Service delays caused Appellant to perform the work over two construction seasons instead of one, thereby causing Appellant to unnecessarily demobilize for the winter of 1995, and to mobilize for the spring of 1996. Appellant states that with a June 12, 1995, anticipated NTP date, and a 120-day construction season, Appellant could have completed the work before the winter shutdown on November 8, 1995.

Appellant presented this claim at the hearing, but did not present it to the CO, or reserve it in Appellant's release in consideration of final payment. Therefore, the Board has no jurisdiction over the appeal of this claim. Even with jurisdiction (if one broadly reads the first assertion in the letter of November 27 (FF 26)), the release precludes recovery. Moreover, contract Modification No. 1 specifically addressed the delay period about which Appellant now complains, increasing the contract time by 45 days for "$0." The bilateral modification acts as an accord and satisfaction, precluding recovery based on this claim.

Finally, the delays through July 12, 1995, were Appellant's responsibility, and not compensable. See discussion regarding Schedule 1.0. Once Appellant requested use of AmWay on July 15, the continued suspension of work until August 3, pending Forest Service determination that use of the Am Way pit was consistent with NEPA, and allowing Appellant time to negotiate use of Am Way with HMC, has not been shown to have been unreasonable or otherwise compensable. Therefore, the alleged delay for the period from June 12 through August 3, 1995, a period of 53 days, is Appellant's responsibility. Forest Service causes, if any, were concurrent causes not the direct or actual cause of Appellant's delays, and as stated above, are therefore not compensable.

Change In Geotextile Quantities

Recovery for this claim is precluded because contract Modification No. 5 represents an accord and satisfaction (FF 24). In any event, Appellant has not demonstrated that it is entitled to greater

compensation. Given the variation between the actual and design quantity, the Government invoked the clause permitting a price adjustment. Appellant has not shown that the Government acted contrary to the clause.

Schedule 5.0 Extended Equipment Standby Cost - First Construction Season

In footnote 12 on page 89 of its post-hearing brief, the Government asserts that the Board lacks jurisdiction over Appellant's $64,820 first-season, equipment standby claim that Appellant presented after the appeal, because this claim was never presented to the CO (AF 261-64, 285-90). Apparently, the standby cost claim is based upon claims 2 and 4 that Appellant filed with the CO, but which did not have dollar values. Claim 2 was for alleged delays caused by the Forest Service's staking the road, and the July 12, 1995 suspension of work. Claim 4 was for the Forest Service rejection of the first pit development plan and delay in approval of the second plan. These delays apparently contributed to Appellant's $113,148.80 Eichleay claim, but Appellant asserted no amount to the CO for the $64,820 equipment standby expenses now claimed on appeal.

Therefore, the equipment standby expense does not represent a mere increased amount for a cognizable claim submitted to the CO, since no standby claim was submitted. Moreover, it does not represent an increase in the Eichleay claim, since Eichleay represents an allocation of indirect expense and equipment standby is a direct expense. The fact that the equipment standby cost might be based on some of the same delays asserted in the Eichleay claim provides no basis for jurisdiction, since the equipment standby is a separate and distinct claim, not previously asserted. Therefore, the Board lacks jurisdiction over the equipment standby cost claim.

In any event, this claim was submitted after final payment, and was not exempted and set forth in the release in consideration of final payment (FF 8, 25, 26). Thus, even if the Board had jurisdiction, recovery under such a claim theory is precluded on the merits by the release for these additional and independent reasons.

Schedule 6.0 - Unabsorbed Home Office Overhead

Appellant seeks to recover $18,769 for unabsorbed home office overhead for a period of 342 days that it asserts it was delayed by Government actions. Appellant used the Eichleay method of calculating the amount claimed. To recover using the Eichleay formula the contractor must show that its work was suspended for an indefinite duration, and that it was unable to acquire other work during the period of the suspension. West v. All State Boiler, 146 F.3d 1368 (Fed. Cir. 1998). The record fails to support Appellant's claim that it was delayed by Government causes. At best, any Government-caused delay was a concurrent delay. Under these circumstances, Appellant is not entitled to recover. In any event, this claim was submitted after final payment, and was not reserved in Appellant's release in consideration of final payment (FF 8, 25, 26), and must also be denied for these separate and independent reasons.

The Dissent

In large part, the dissent fails to accurately reflect the record as well as our analysis. Differences in factual conclusions should be apparent from a reading of the two versions. Of the legal discussion, the dissenting opinion merits a few specific comments.

The dissent approaches this appeal by largely disregarding the express requirements of the solicitation. The solicitation provides that one of three optional sites for material (HMC 26) is available for material removal only through June 24. The inquiries of bidders resulted in a consistent interpretation. The date was fixed. This limitation was a given in the competition. The dissent explores parole evidence and speculates on altering the date and limitations, without regard to the actual language of the solicitation and contract or the underlying competition. The dissent offers no reason to depart from the clear language of the solicitation regarding the fixed date of June 24, particularly given that any reliance by this contractor on oral representations would be contrary to the solicitation clause L.4, Explanation to Prospective Bidders, FAR 52.214-6 (AF 575).

The dissent creates Government obligations not found in the contract and reallocates risks. As of the post-award, pre-work meeting, the Government reasonably (and correctly) concluded that the Appellant would be unable to utilize HMC 26 by June 24. The Appellant had not mobilized. The Appellant had yet to prepare and submit a pit development plan, which required Government approval before the Appellant could proceed. The Government cannot be faulted for not staking a channel when such an action would be a wasted effort.

Regarding HMC 26, the Government was obligated to stake a channel only if the Appellant selected that source--an area within the channel and an adjacent tailing pile. Thereafter, the Appellant, in consultation with the engineer, was to draw up and submit a pit development plan, which the Government would approve or disapprove within seven calendar days of receipt by the engineer. The Appellant's selection of the upper bench area as a source was contrary to the terms of the solicitation and contract, which limit the use of materials outside of the staked area: "Materials outside of the staked locations may be made available upon request to the Engineer, if needed to meet the specified gradation" (AF at 474 (¶ 611.02)). Contrary to the conclusions of the dissent, the Appellant's selection of an area not identified as an optional source, the upper bench, does not obligate the Government to act within the time frames established in the contract for an identified source. The Government acted expeditiously and reasonably as it endeavored to assist the Appellant in obtaining an alternate source. Therefore, the Appellant has failed to establish compensable delay regarding the pit ultimately utilized.

The dissent fails to distinguish between excusable and compensable delay. The Government granted time extensions through various contract modifications. Extra time does not automatically equate to an Appellant's entitlement to additional money. Here, the overriding factor in the Appellant not performing for several weeks was its failure to secure a source of material (an obligation and risk of the contractor). This overriding Appellant-caused delay makes compensation inappropriate.

Signing a release is not an action necessarily without consequences. In following the rationale of Miya Brothers Construction Co. v. United States, 12 Cl. Ct. 142 (1987), the dissent acts contrary to the dictates of our appellate authority referenced in that decision, A.L. Coupe Construction Co. v. United States, 134 Ct. Cl. 392, 399, 139 F. Supp. 61, 65 (1956), holding that a contractor is barred from pleading for any amount in excess of the value specifically identified in a release. The dissent opts to give no discernable meaning to the language of the release, in terms of the claims preserved or the dollar amounts in dispute. Such an interpretation eliminates the certainty, from the Government's viewpoint, of the limits of its potential obligations.

DECISION

The appeal is sustained in the amount of $161.

_____

EDWARD HOURY
Administrative Judge

Concurring:

_____

JOSEPH A. VERGILIO
Administrative Judge

Dissenting Opinion by Administrative Judge POLLACK.

FINDINGS OF FACT

PRE-AWARD

1. On April 5, 1995, the Forest Service (FS) issued a solicitation for reconstruction of approximately 2.5 miles of the existing Resurrection Creek Road on the Chugach National Forest, Alaska. Work included clearing and grubbing; excavation and embankment construction; pit development; hauling and disposing of debris; and furnishing, spreading and compaction of from 6 to12 inches of crushed aggregate on the roadway. The excavation involved some ditching; however, the majority of excavation was laying back a very steep slope and increasing the width of the roadbed along a thousand-foot section. (Appeal File (AF) 438, 450, 580.)

2. The solicitation addressed the bid opening date and time for submission of bonds. It called for a 120-day performance period, provided that there would be no pre-bid conference or showing and stated bids were due on May 4, 1995. At Section C.1(f), the description of work statement provided, "Estimated Start Work Date: It is estimated that notice to proceed will be issued on or about June 12, 1995." The solicitation called for the successful bidder to commence work within 15 days of receiving notice to proceed. (AF 431-438; Stipulation (Stip.) 4.) The road construction season for work of this nature on the Kenai Peninsula (the locale of this contract), Alaska, typically closes down around the first of November (Transcript (Tr.) II-83).

3. The contract stated at Section H.25, that the Government would provide all initial construction staking for the project, which would include the marking of clearing and grubbing limit, and construction staking for the road and all appurtenances for the road. It continued that the contractor would use the stakes to establish all other staking required to complete the project. The Government did not stake the road prior to issuing the invitation for bids nor was the road staked at the time of bid opening. The FS still had not performed its construction staking as of June 12, 1995, the date the FS directed Appellant to appear for a pre-construction conference. (AF 503; Stip. 5.) Appellant understood Section H.25 to mean that the FS would complete the construction staking of the 2.5 miles of road, prior to the contractor having to start work. Contemporaneous actions of the FS show that the FS understood the obligation in that same manner. First, the FS postponed the issuing of the Notice to Proceed (NTP) to give it time to complete the staking; second, at the meeting on June 12, the FS promised to have the staking completed by June 19 (the modified NTP) (AF 60-62; Stip. 12; Tr. I-71-72, 87-88, 111; II-125, 260; III-286); and finally, the FS in Modification No. 1, provided as part of the justification for the granting of time, the statement that the Government delayed construction because of the lack of construction staking. (AF 429.)

4. The solicitation identified three optional government material sources of gravel for possible use on the project. Two already had crushed aggregate, while the third, Hope Mining Company 26 (HMC 26), required excavation and processing. It was the contractor's responsibility to determine the quantity and material suitability to meet contract specifications. In one instance, the specifications warned that the quantity of processed material at one of the aggregate sites might not be sufficient. That warning did not apply to HMC 26. (AF 473, 503-504.) There were several documents, which to a limited extent, identified the location of HMC 26. Those was a general vicinity map on the construction drawings (Sheet 1), as well as some aerial photographs which were available in Anchorage. These sources lacked specificity as to the source site at the "east half" of HMC 26. In the case of the photographs, the photographs identified what was later determined to be HMC 26 as HMC 15, an entirely different mining location. (AF 583; Stip 7; Tr. I-47-48, 59-62, (Government Exhibit (G) G-M; Appellant Exhibit (A) A-A).

5. Prior to bidding, Appellant visited the three optional source sites. It ruled out one because the material did not appear to meet specifications and another because there was insufficient material (Tr. I-52). Appellant then settled on HMC 26. The following provisions deal with the source selection sites for the project and specifically the HMC 26 site:

DESCRIPTION

611.01 Work

The following is added after the first paragraph:

The optional Government material source for crushing aggregate is located at approximately mile 0.35 of the Hope Mining Claim Road, which starts at station 1+60 of this project.

In addition, optional Government sources for crushed aggregate are located at gravel pits near Mile 42 and Mile 49 of the Seward Highway. See LOCAL MATERIAL SOURCES, in the Special Contract Requirements, Section "H" of this specification.

CONSTRUCTION

611.02 General

The following is added:

Optional Government material Source at mile 0.35 Hope Mining Company Road:

Removal of materials from the east one-half of Hope Mining Company Claim No. 26, AA# 064444, as shown on page 1 of the design plans, is from a location near Resurrection Creek which is planned for salmon fishery enhancement excavation. If this source is selected by the Contractor, a channel will be staked in the field by the Forest Service prior to the start of operations.

Most materials must be removed from within the staked channel location and from an adjacent tailing pile; however, precise excavation and final shaping will not be necessary. Prior to removal, brush and other debris shall be stockpiled and left at the edge of the planned excavation. Some small trees (approximately 20) will be marked by the Forest Service and shall be removed whole with most of the root mass intact and also placed at the edge of the excavation.

A pit development plan shall be drawn and submitted by the Contractor in consultation with the Engineer. The pit development plan shall be approved prior to commencement of any work on the pit site. The pit development plan will be approved or disapproved within seven calendar days of receipt by the Engineer. The pit development plan shall show the area being developed, location of clearing and grubbing piles, overburden piles, and location of

oversize material pile. Seeding and fertilizing will not be required as specified under Section 625.

The site must be kept free of contamination. To avoid contamination; no fuel, oil, or other contaminants shall be stored at the pit location.

All equipment and materials must be removed prior to June 24, 1995 to allow time for completion of the salmon enhancement project within Alaska Fish and Game Department timeliness. NO MATERIALS WILL BE AVAILABLE FROM THIS AREA AFTER JUNE 24, 1995.

Materials may be stockpiled, and equipment stored, at a location near the pit site, as directed by the Engineer.

Materials outside of the staked locations may be made available upon request to the Engineer, if needed to meet the specified gradation.

611.10 Restoration

This Subsection is deleted and the following is added:

Optional Government Material Source at mile 0.35 Hope Mining Company Road:

Final shaping of the excavation is not required, except that unstable slopes shall be flattened as directed by the Engineer to mitigate danger to persons working in the excavation.

Optional Government Crushed Aggregate Sources near MP 42 and MP 49 of the Seward Highway:

After crushed aggregate is removed from the pit, any remaining aggregate shall be piled neatly and the surrounding area restored to its original condition.

(AF 473-474.)

6. In addition to the above, the specifications also referenced HMC 26 in relation to clearing and grubbing. There the specifications provided:

SECTION 201 - CLEARING AND GRUBBING

Sec. 201.03 - Utilization of Timber

> The location for decking merchantable logs shall be in the vicinity of mile 0.35 of the Hope Mining Claim Road, which is located at station 1+60 of the project. The exact location will be designated by the Engineer.

Sec. 201.05 - Slash Treatment

> (10) Removal. Clearing and grubbing debris, construction slash, unsuitable excavation material and other construction debris shall be removed, hauled, and as DIRECTED by the Engineer, burned or scattered, at the clearing which is located on Hope Mining Claim Road, approximately 0.35 miles from station 1+60 of the project. Pile location for burning to be DESIGNATED ON THE GROUND by the Engineer.

(AF 460-461.) The above location description (mile 0.35 of the Hope Mining Company Road) is essentially the same description used by the FS in contract clauses 611.01 and 611.02 for the HMC 26 source site for Finding of Fact (FF) 5.

7. Hope Mining Company held the unpatented mining claims at HMC 26. In order for the FS to allow a contractor to use HMC 26 as an optional source, the FS had to secure a waiver of rights from HMC as to locatable minerals (on this claim, gold) on the site. On an unpatented mining claim, the Government remains the owner of any mineral materials located on the claim, such as common varieties of sand, gravel and stone. (36 C.F.R 228.42.) (AF 50; Tr. I-149; II-35.)

8. In a February 8, 1995 letter from the FS to the President of HMC, Al Johnson, the FS confirmed a tentative agreement with HMC, where HMC would grant the FS a waiver for removal of approximately 6,000 cubic yards of material from the east half of the HMC 26 site. The FS stated that it would designate the material source "from within the planned excavation" for Johnson's Resurrection Creek diversion project.[2] The letter explained that no permit would be required for removal operations prior to proceeding with extraction of material. However, HMC would need a permit from the Corps of Engineers prior to any creek altering operation and for subsequent diversion of the creek. Under this scenario, both the miner and the FS would benefit as HMC would have material excavated and the FS would benefit by a fisheries enhancement project. (AF 50; Tr. I-172.)

9. By letter of February 16, 1995, Mr. Johnson agreed to allow removal of gravel from HMC 26, subject to a number of conditions. HMC limited removal to no more than 6,000 to 10,000 cubic

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[2] HMC had a plan to move the existing creek at HMC 26 from its channel. HMC planned to do this by creating a new channel nearby. The source material discussed in the waiver would have come from the area where the new channel would be placed. Thus, in large measure, the contractor, by using the source site would be creating a channel for the miner by taking the material from the intended location of the new stream channel. (Tr. 1-172.)

yards of leveled and piled tailing material and specified that any tailing materials were to be processed only during the time period of March 1 through June 24, 1995, and if necessary stockpiled at the top of the bench at the claim. The above was the sole reference in the waiver to the June 24 date. Nothing in the letter permitted the use of HMC 26 as a disposal site for slash material or called for the decking of timber on HMC 26. As Mr. Johnson explained, permitting the FS to have its contractor put disposal on the site would have created more material for the miner to remove, once the miner wanted to dig in that area. (AF 52-53; Tr. I-175.)

10. The east half of the HMC site consisted of two distinct physical areas, referred to during the hearing as the stream area and the upper bench. The upper bench was at the entry to the project from the HMC Road, at 0.35 miles, as referenced in the specifications. It consisted of some vegetated areas as well as a large cleared area, which contained a trailer. The site then dropped approximately 60 feet from the upper bench to a stream and bank area, which extended approximately 100 feet to 250 feet from the bottom of the rise, at the stream elevation, to the east side of the existing stream. (Tr. 3-232.) Two dirt roads went from the upper bench down to the stream. The entire stream area, including the potential area of the source site (the channel to be staked in the field by the FS) was a flood plain. (Tr. III-262.) There was no physical marking on either the upper bench or lower area which identified where the source site channel was to be staked and thus until the FS staked it, the Appellant could not know where to set up its operation. The overall location and size of the potential area to be staked was best illustrated in A-A (a photograph and overlay) and G-M. Looking at the photograph alone, the potential area for where the FS could place the channel, was the area that forms a letter D and is a light color. The dark color on the photograph is the tree line and the photograph also shows the location of the upper bench and trailer. The Appellant, however, had no way of knowing, until told by the FS, where within the D-shaped area, the FS was going to put the channel. During his testimony, Mr. Kohlhase, the FS engineer identified on G-W where the FS would have placed the channel. He also noted it was not staked prior to bid to save on labor for the FS. (AF 52-53, G-M-U; Tr. III-106, 232, 262.)

11. HMC had specified June 24 as the date for completion of work in the stream area in order to give it time to meet Alaska Fish and Game requirements relating to diversion of the existing stream. The state limited work in an existing salmon stream to the period between May 15 and July 15. Under state requirements, this time limit would not apply to removing material from what was to be the new channel (the FS's planned source of material for the road project), since that new channel was not an existing salmon stream, but rather, was basically a gravel area adjacent to the creek. At the time of bid opening, HMC's fishery project plans were still barely intact, however, as the date for the start of removal of material on the FS contract kept slipping, and as it got closer to June 24, the miner realized the diversion could not go forward because there would not be adequate time for the miner to secure permits for the actual diversion. At some point, after bid opening in May, the miner concluded that he would not divert the creek until some later date. Once he no longer intended to immediately divert the existing salmon stream, the miner was no longer concerned with enforcing the June 24 date, and that is why, on June 18, he told both the FS and Appellant that he had no objection to Appellant using any portion of HMC 26 (be it the stream or upper bench) for

the source site, nor did he care to enforce the June 24 date. (Tr. I-76-77, 150, 155-156, 206-207; III-273-276.)

12. Although the specifications stated that the FS expected to issue the NTP on June 12, 1995, no explanation was provided as to why that date was chosen or why it was not moved up. The FS was aware at the time bids went out that because of the short time span between June 12 and June 24 (the later date being the date the FS was requiring all work on HMC 26 to stop), the solicitation provided a very tight time frame for possible use of HMC 26 at the stream. The FS nevertheless made no change to either the June 12 or June 24 date (even though as noted below, Mr. Johnson had abandoned the idea of moving the stream and no longer had any objection or need for source work to be prohibited on any part of HMC 26). (Tr. III-8, 22.) In a Determination and Findings (D&F) dated July 17, 1995 (AF 78-79) (written to memorialize the events surrounding the FS deliberations after bid, as to the June 24 date), the Contracting Officer (CO) addressed some of the events that had surrounded bid opening and early administration of the contract. In discussing his view of the specifications at the time of bid, the CO confirmed in the D&F that the FS had serious concerns at bid time regarding the adequacy of the specifications. In that determination, the CO stated,

> Members of the Chugach Engineering Staff knew prior to bid opening that the closure date made the use of HMC 26 unfeasible. The prudent thing would have been to designate another source by amendment to the solicitation. The fact remains that the project went to bid with the June 24 deadline.

The CO continued, that no representations had been made to loosen the requirement and "to the contrary" bidders who talked to the Engineering Staff were "apparently" told that the deadline for closure was applicable to the entire area within the east half of the claim. In addition to the CO, Mr. Clark, the CO's Representative (COR) also had his own independent concerns. He was concerned that the amount of quantities needed from the stream area would make what was described as the new channel into a lake. (Tr. III-262.)

13. In addition and notwithstanding the CO's statement that FS engineers considered completing by June 24 as "unfeasible," the CO further contended at the hearing that had the June 12 NTP date remained in place, a contractor could have successfully used HMC 26 as a material source, even with the June 24 closure date (Tr. III-22). The NTP, however, was not issued on June 12 and all parties agree that once the NTP was postponed, the work could not be done at the stream by June 24. From the CO's perspective, he concluded at the site on June 12, that there was not sufficient time. (Tr. 3-28.) The CO, however, disclaimed FS responsibility and instead blamed it on Appellant not being ready to crush material on that date. According to the CO unless the Appellant started crushing at the stream on June 12, it was not possible to finish. (Tr. III-24.)

14. In addition to the specifications providing insufficient time to complete source work at the stream area, there were many inconsistencies and errors in the FS specifications. The specifications described the source site as being 0.35 miles from Station 1+ 60 on the Hope Mining Company

Road, which when measured by the Appellant, put it on the upper bench at the cleared area near a trailer, a distance from the stream area. While at the site for its pre-bid site visit, Appellant explored the area, including the two roads and ended up along the stream (Resurrection Creek). The stream was approximately 0.5 to 0.6 miles from Station 1+ 60. The FS also provided findings as to the accuracy of the 0.35 miles, with the project engineer and COR disagreeing as to the distance of the stream from Station 1+ 60. The FS project engineer contended that 0.35 miles put Appellant at the stream and not at the upper bench. The COR, however, stated that 0.35 put him at the cleared area and 0.46 to 0.5 miles put him at the stream. When a map, prepared for the hearing by the FS, was scaled at the hearing, it supported that .35 put Appellant on the upper bench. (AF 66, 74-75; Tr. I-42-46, 52-57, 82; II-88, 90; III-85, 116, 181, 183, 270, 325-326, 4-49-50; G-E, page (p.) 10, G-T, A-A, A-CC.)

15. Notwithstanding the above inconsistencies and errors, the solicitation did say that the HMC 26 source site was to be "from a location near Resurrection Creek which is planned for salmon fishery enhancement." Further, the contract said that when HMC was selected, the FS would stake the channel in the field. While Mr. Smith, Appellant's President, presented explanations as to how he was able to reconcile such provisions with the source site being on the upper bench, his explanations do not overcome the clear reference to working in a "staked channel." That implicitly indicates the stream level. Mr. Smith said he interpreted the reference near the creek to be erroneous because 0.35 miles from the HMC road was at the upper bench. In other testimony, he said that the upper bench was near the creek, but not as near as standing in water. (Tr. I-80-81.)

16. Mr. Smith explained how he understood the operation of the June 24 date. He said that various contract provisions, specifically those that called for disposal of material and decking lumber on HMC 26 (also described as being .35 from HMC Road) led him to conclude that the statement in the provision as to equipment and material being removed by June 24, only applied to the stream area and the fisheries project. Since the Appellant was planning to use the upper bench for its source site, the June 24 date did not present a problem to it. (AF 66, 74-75.)

17. Notwithstanding his explanation of how he understood how the June 24 date would apply, Mr. Smith still had concerns prior to bid, as to the application of the June 24 date and as a result, telephoned the CO's office on May 3, 1995, the day before bid opening, to inquire as to an explanation. He was turned over to the project engineer, Mr. Kohlhase. Although he initially said that he asked Mr. Kohlhase about location and time, Mr. Smith later candidly clarified his testimony to state that while he was clear that the June 24 date came up, he did not think that the matter of location was raised, as he was satisfied that he understood the location. (Tr. II-178-183.)

18. Once Appellant reached Mr. Kohlhase, he was told to wait a minute and during that time overheard another FS official say something to the effect that Appellant was making a mountain out of a molehill. Given that response, Appellant concluded that the FS did not take the question seriously. Since Appellant did not get clarification, he concluded the date did not mean a lot and therefore, made no further inquiry. (Tr. I-65-66; II-102-103, 179-181; G-E, p. 20.)

19. Mr. Kohlhase confirmed that he spoke to Appellant on May 3 and said he did not recall the Appellant asking about the June 24 date. His notes of the conversation (which show May 3 at 9:15 a.m.) referred to a discussion about embankments. (Tr. III-160-161, 243, G-K.) Phone company records produced by Appellant, show that the call to the FS was made at 9:03 a.m rather than 9:15 a.m. and lasted only 3 minutes. The Appellant said that they did not discuss embankments. (AF 301, A-L, G-K; Tr. II-179-181.)

20. In addition to the Appellant, several other prospective bidders called the FS prior to bid opening to inquire about the June 24 deadline. They were told that no material would be available from the HMC source after June 24. (AF 78.) There is no documentation for those calls, and when asked why not, the CO stated that he only documented calls that struck him as important. (Tr. 3-43-44.) No pre-bid amendment was issued regarding June 24 or addressing the explanations provided to bidders on the matter by the FS.

21. The CO consistently took the position that the June 24 limitation, which disallows the use of equipment and material after that date, had to be read to apply not only to the channel area, but to the entire east half of HMC 26, which includes the upper bench. The CO stated that he understood Mr. Johnson's waiver authorization letter to cover the entire east half of HMC 26. (Tr. III-69.) The CO's reading of Johnson's letter as well as his reading of the specification, was not reasonable. Both Mr. Kohlhase, who drafted the contract and Mr. Rivers, another FS engineer, interpreted the contract and apparently Mr. Johnson's letter, differently. Mr. Kohlhase pointed out that in preparing the contract estimate, he anticipated and understood that the successful bidder would be allowed to use part of HMC as a disposal site after June 24. Mr. Rivers testified that he understood the contract to call for disposal of organic material on HMC 26 regardless of where a contractor secured his source material. He also conceded that equipment and material would be needed on HMC 26 after June 24 to perform the disposal. (Tr. III-144-146; IV-108.) In that same vein, the miner's letter did not call for applying June 24 to the upper bench. The miner's letter was simply concerned with the stream area. Finally, the CO also provided no meaningful reconciliation of his position with the other provisions calling for use of HMC 26 for disposal and decking, activities that had to be running well beyond June 24. While Mr. Rivers would not agree that the specifications discussed above were defective, he did finally admit that they could have been clearer. (Tr. IV-110.)

22. Returning to the dispute over whether the contract language limited the source site at HMC 26 to the stream area and precluded taking borrow from the upper bench, Appellant attempted to read around the fisheries language in Section 611.02 by contending that it did not believe it would be working in the stream area because of a lack of requirements for permits, the absence of directions relating to working in water, and the fact that to get to the lower site one had to cross flowing water that was backed up by a beaver dam. Appellant asserted that one does not normally go near such waters without a permit, and the absence of permits caused it to believe that it could use the upper bench. Mr. Clark confirmed that the stream was in a flood plain and that once work began there, he saw it developing into a lake. (Tr. I-64-65; II-175-177; III-262, A-66.)

POST-AWARD

23. Bids were opened on May 4, 1995. Appellant was second low bidder with a price of $206,025.50. Appellant's bid, as stipulated, was based on using HMC 26 as the source site. The FS has never contested that. The first low bidder was found non-responsive. (AF 439; Stip. 14; Tr. II-255.) The FS notified Appellant on May 11, 1995, that its bid was accepted, that bonds needed to be returned within 15 days of receipt of the May 11 letter and that a copy of the awarded contract would be sent shortly to Appellant (AF 54; Tr. II-255). Appellant provided bonds on May 24, 1995 (Stip. 11). The FS then followed with a letter to Appellant dated May 24, 1995 but mailed on May 30. In the letter, FS confirmed the award and enclosed two copies of the contract. The letter also included the following:

> A post award conference will be held to discuss the contract specifications, schedule of work, and other matters pertaining to this contract. Your Notice to Proceed will also be issued at that time. We will contact you to establish the place, date and time for this meeting. Work cannot be started until you receive official Notice to Proceed. (Emphasis Supplied)

(AF 58.)

24. Appellant was thereafter contacted by the FS regarding the scheduling of a meeting set up at the Kenai Lake work center for June 12 (Tr. I-70). Giving meaning to the wording of the May 24 letter, Appellant expected that the FS would issue the NTP on June 12. Appellant testified that as of June 12, it was prepared to perform (AF 58; Tr. I-221).

25. The pre-work meeting was held as scheduled on June 12, 1995 (AF 60; Stip. 12). Initially, the CO said that he was going to issue the NTP on June 13, however, because construction staking for the road had not yet been completed, he told Appellant at the meeting that the NTP would not be issued until June 19, which was the new date the FS projected for completing the road staking. As of June 12, the FS had staked 4,000 feet out of 13,000 feet of road, and there was very little work which Appellant could perform (maybe a day and a half). Since Appellant wanted to have the entire road staked prior to it beginning work (as it understood that to be called for in the contract), it did not object to the new NTP date. (AF 60-62; Stip. 12; Tr. I-71-72, 87-88, 111; II-125, 260; III-286.) The CO acknowledged that the primary underlying reason for the 7-day delay in issuing the NTP was the Government staking problem (Tr. III-24; IV-228).

26. At the June 12 meeting, the parties discussed the optional sources and Appellant said that it wanted to use HMC 26 as a material source site (Tr. I-73; III-26). The FS expressed some concerns about how using HMC 26 could interface with the June 24 ban on equipment and material. The FS however, did not advise Appellant at that time that it was definitely foreclosing use of HMC 26 after June 24. Appellant did acknowledge at the hearing that the FS did make comments at that time about the June 24 date being a problem area, and the FS indicated it might be a problem because it was a date noted by the miner and because it was set out in the contract. Nevertheless, Appellant said it was still proceeding with plans to use the upper bench of HMC 26. (Tr. I-73-75.) On June 12, Appellant did not know the status of the salmon stream project, nor was the matter

addressed at the meeting (Tr. I-74). According to Appellant, it was prepared to start work as early as June 12 and would have been ready to go on June 19, and later on July 12 (Tr. I-221).

27. At the June 12 meeting, the parties did not discuss the exact location of the source site within HMC 26. The CO acknowledged that he had no recollection of the parties discussing the bench area versus the creek channel. The CO further acknowledged that on June 12, the Appellant identified HMC 26 as the source site it wanted (Tr. II-223, 260; IV-260-261). The CO tried to back out of that by contending that what Appellant did at the meeting "may have been a notification of his desire to use it" (HMC 26), but it did not qualify as selection under the contract. The following exchange took place,

> Q. So when he announces to you that he intends to use HMC 26, that to you is not a request to use the site?
>
> A. Well, his request would have had to have been a pit development plan. (Tr. 4-230.)

However, when asked to show where the contract stated that the staking of the channel will be done after the pit development plan is submitted, the CO could find nothing which had such a requirement. (Tr. III-230-231.) What is clear is that neither party knew on June 12 that the other was interpreting the source site differently (when asked the CO said he did not recall a discussion of bench versus stream). Thus, as far as the FS knew, Appellant read the source site to be the stream. Thus, actions taken by the FS at the June 12 meeting were done in a context where the FS expected that Appellant had selected the stream area option. Therefore, the fact Appellant bid incorrectly as to the source site, was not known nor was it a factor, when the FS decided, on June 12, to look for a different source site. Since the CO did not even know how Appellant had bid on June 12, it follows that there is no evidence that Appellant's bidding had anything to do with the CO's decision on June 12 to look for a new site. (AF 62-63; Tr. II-261.) The driving factor for looking for a new source site, was the conclusion reached by the CO on June 12, that if the FS was to enforce the June 24 ban on material and equipment on HMC 26, the lack of time would make it impossible for Appellant to conduct the stream work (Tr. III-28, 34). Later the CO came up with an alternative twist on the argument, that being that because the Appellant did not have its crusher on site on June 12 (nowhere required in the contract), then the stream area could not be used. (Tr. II-224.)

28. What the FS understood as of June 12 is important because the contract specified that once Appellant stated that it wanted to use HMC 26, the FS was to then stake the channel in the field. The specific wording was (AF 473-474):

> If this source is selected by the contractor, a channel will be staked in the field by the FS prior to the start of operations.

29. On June 12, however, notwithstanding Appellant's selection of HMC 26 (again at a time that the FS did not yet know that Appellant had read the contract to allow it to take borrow from the

upper bench), the FS took no action to stake the channel as required by the contract. (AF 60, 70.) The CO admitted that Mr. Smith indicated he wanted to use HMC 26 and admitted that the contract documents provide that when someone makes a determination as to the material source site they will use, in this case HMC 26, the Government will stake it. (Tr. II-223-224.) The FS, in defending why it did not comply with this requirement, provided several explanations. The FS said that although Appellant said it wanted to use HMC 26, the announcement on June 12 was not a request that triggered the FS staking the channel, because to be a request that triggered staking, the Appellant had to submit a pit development plan. According to the CO, all Appellant did on June 12 was give notification of his desire to use HMC 26. (AF 60, 70; Tr. II-223, 229-230; III-98, 106, 266, G-T.) Section 611.02, however, says as to HMC 26 and the requirement to select, "If this source is selected by the contractor, a channel will be staked in the field by the FS prior to the start of operations" (AF 473). There is no wording which requires the request to be in the form of a pit development plan. Further, instead of the pit development plan being a precondition of staking, just the opposite was true. The operative language (see Section 611.02) of the pit development plan states,

> A pit development plan shall be drawn and submitted by the Contractor in consultation with the Engineer. The pit development plan shall be approved prior to commencement of any work on the pit site. The pit development plan will be approved or disapproved within seven calendar days of receipt by the Engineer. The pit development plan shall show the area being developed, location of clearing and grubbing piles, overburden piles, and location of oversized material pile. . . .

(AF 473-474). The CO further stated, in explaining why the FS did not stake, "It was not feasible for him to utilize the site. It was obvious." (Tr. II-224.) In further explanation, the CO said that he believed staking would have been done, "if it would have been practical", and contended that it was not practical because the Appellant did not have a crusher on the site on June 12. (Tr. II-224.) When asked if that was what he based his actions on (failure to stake) the CO replied, "Well, thats [sic] why we indicated that they would have to look for another alternate source." Particularly pertinent to this appeal is the CO's acknowledgment that "we," referring to the FS, indicated that they would have to look for another site. (Tr. II-260.)

30. One of the requirements in the pit development plan was for the contractor to show the location of various items. As to one of the most critical, the location of the pit itself (which in this contract is to be from a channel staked in the field by the FS), it was logically impossible for Appellant to show that location until the FS staked the channel as required. Otherwise, the Appellant and not the FS would be determining the location of the source site. In addition, another indicator that the staking of the channel had to precede the Appellant submitting the pit development plan was the progression of paragraphs in Section 611.02, which included the pit development plan requirements and described the sequence of operations for the pit. The progression first had the contractor selecting the location, then it had the FS staking the channel so as to identify the pit site, and then it had the contractor submitting its pit development plan. The FS attempt to shuffle the sequence was inconsistent with the contract and logic. (AF 473-474; Tr. II-124-125.)

31. The second basis cited by the FS to excuse its not staking the channel, was that Appellant did not have its equipment, specifically the crusher, on site on June 12. From the CO's perspective, because the crusher was not there, the work could not be done without extending the June 24 date (which the FS was not prepared to do). The requirement for a crusher on June 12, has no contract basis. Further, there is no evidence that the CO gave Appellant the option of proceeding at the stream, even with the inadequate time. The FS, instead unilaterally decided to abandon the stream site and look elsewhere, thereby scheduling the June 18 site meeting. (Tr. II-222-224.) Also, to put into perspective the FS contention that it was Appellant's lack of a crusher which caused it to change sites, I again need to emphasize that under the contract, crushing could not start until the channel was staked by the FS and the Appellant submitted and FS approved a pit plan. Also, Appellant under the contract and as reiterated in the award letter, could not proceed with any work absent the NTP and according to the CO he was not planning to issue the NTP until June 13. In point of fact, the NTP was then postponed to June 19. (AF 58.) The evidence thus shows that the crusher was a post hoc rationalization and the decision to seek another site was no more than a simple recognition, (as expressed by FS engineers, pre-bid) that the combination of a start on June 12 and finish by June 24 was not feasible. It appears that the FS took the risk that the successful bidder would not anticipate using HMC 26, but the FS guessed wrong. Finally, Appellant did not object on June 12 to looking for a new site, as the FS had raised concerns about enforcing the June 24 date and more important, the FS had control over the project. As Appellant explained, there had been considerable discussion as to whether the June 24 date would apply or not. The FS indicated they thought it would but were not sure. Appellant agreed to another meeting to look at sites, because if they found another site, the June 24 date became a moot point. (AF 78, 79; Tr. I-73-75; II-120.)

32. There was some competing testimony as to whether a start on June 12 would have allowed completion by June 24. The COR stated that he thought D & L could have done the crushing if it had notice on June 12, but the Appellant could not have completed it by June 24, once the NTP was changed to June 19. (Tr. III-287-288.) Mr. Kohlhase said Appellant could have done the crushing operation in 8 days, taking 2 days to set up and 2 days to demobilize, and he believed that an end dump could have navigated the hills. As to staking, he said that the FS could have staked the channel in a day. (Tr. III-233-235.) Appellant in its testimony, as indicated by the majority, took a less optimistic view of completing the source site excavation in the stream area by June 24. Appellant's crushing subcontractor had concerns as to time needed to set up the crusher, difficulties with the roads leading down to the stream and potential difficulties because of high ground water and wet material. That said, the sense of the testimony was that even at the more difficult stream area, it should not have taken Appellant more than 3 weeks to remove the material. Thereafter, the material would be stockpiled and used on the road as needed. (Tr. II-188, 194-195.) The above is important for several reasons. First, the entire reliance on how long it would have taken the crushing is misplaced. It is misplaced because the Appellant did not need to have the source site in order to start work. Mr. Smith testified that the crushing of material did not have to occur prior to starting any work on the road. He could have secured a crushing site, well after beginning on the road. Both he and Mr. Rivers of the FS went through some of the tasks needed before crushed aggregate could be placed and those tasks were not insubstantial. (Tr. II-127-131; IV-99.) Second, since the FS took the option of the stream off the table, there is no way of knowing what efforts the Appellant would

have or could have made to get either all or part of the material out of the stream area by June 24. Nothing in the contract would have prevented him from securing additional material from another site, either as a substitute or supplement.

33. At the June 12, 1995 meeting, the FS decided to look at other potential source sites. Toward that end they set a meeting for June 18. (Tr. II-118-119.) The Appellant, and its subcontractor, met with the COR and Mr. Johnson on June 18, for the purpose of looking at the HMC and other sites. They looked at both the upper bench and the stream (still not staked). The FS was indicating through the COR that it had wanted to use the stream area, although the COR's diary indicates that he was not even sure of the boundaries of HMC 26. (AF 62-63.) Neither the COR nor the miner expressed problem with Appellant using the stream or upper bench. Mr. Johnson pointed out that the June 24 date had only applied to the stream area. At the meeting, the COR left open the possibility that the HMC site (including the upper bench) could be used despite the June 24 date. (Tr. I-75-80; II-151-152; III-266-267, 271, 274.) The matter was sufficiently open, however, that D & L had hopes that it would be allowed to proceed with the upper bench (AF 307; Stip 13).

34. Appellant's subcontractor, as the majority points out, did express concerns on June 18 as to potential difficulties in performing at the stream, including access difficulties and possibly having to work with wet material. It must again be reiterated, however, that the subcontractor's concerns were being raised on June 18, which was 6 days after the CO had already decided to abandon the stream site and find an alternative. Further, NTP had not yet been issued. Thus the concerns expressed by the subcontractor played no part in the CO's June 12 decision. (AF 62-63; Tr. I-77-80, 151, 154, II-123; III-272-274; Stip. 12.)

35. A second critical issue arose at the June 18 meeting, which from that date forward, drove the delay. The COR testified that during the June 18 meeting he was discussing the specifications, which provided that HMC 26 would be used for disposal of timber and root wads during the contract. (FF 6.) Mr. Johnson responded that there was no agreement which permitted any portion of HMC 26 to be used as a disposal site. Nothing in HMC's waiver letter nor in the FS letter on the use of the HMC site, indicates or allows disposal of construction generated material or timber on HMC 26. The COR agreed that under his reading of the waiver, disposal on HMC 26 was never part of the bargain. Thus, for the first time, the FS learned on June 18, that the site it specified for disposal was not available and would have to be replaced in order for the Appellant to perform the contract. (AF 50-53; Tr. III-267.)

36. On June 19, the FS issued the NTP. It did this, even though as of June 19 it had not yet completed the staking (as promised on June 12) and even though it had been told the day before that the contract had no disposal site. To do the road work, one had to have a disposal site. Without such a site, there was no place to put the clearing and grubbing debris, construction slash, unsuitable excavation material, small boulders and other construction debris. Since the purpose of the contract was to reconstruct the existing road, this was obviously critical. (FF 6; AF 460-462; Stip. 12; Tr.I-71-72, 87-88; II-125, 222; III-267.) While staking was not completed as of June 19, the FS did continue to stake, however, it took the FS until July 10, 1995, approximately another 20 days to

complete staking (Stip. 12). The Appellant had asked on June 19 for a timetable for completion of the staking of the road but all that he was told was that they would get it. Appellant had his equipment dedicated to this project but had not yet moved it to the site because of the lack of staking (Tr. 1-94, 98-111). The Appellant did have some other projects he could sometimes use equipment on but was not confident that he could use it on another project for any length of time (Tr. I-112). The FS, at least initially, viewed the failure to complete staking as its delay. That was reflected in Modification No. 1, where the FS specifically provided that some of a 45-day extension of time was due to the Government's delay in construction staking, as well as working out the details with the mining claimant for a material source site for crushed aggregate. (AF 429.)

37. Notwithstanding the admission in Modification No. 1, the FS argued that the delay in staking had no real effect on delaying Appellant's progress. The FS contended that at the time Appellant was still evaluating options for a material source for the project and that needed to be resolved in order for work to begin. Mr. Rivers contended that Appellant could have proceeded because as of June 19 there was enough of the road staked to allow some clearing and shaping of the roadway. However, Mr. Rivers included provisos to that opinion. Thus, although Mr. Rivers testified that he disagreed with Mr. Smith and Mr. Clark that there was not enough staking on June 18 to warrant mobilization, Mr. Rivers based his expectation on the premise that had Appellant begun, the FS would have put on extra crews for staking (as it was, the FS, despite its June 12 estimate of completing staking by June 19, did not complete staking until July 10). When asked if there was work to be performed on that first mile, Mr. Rivers said, "They could have, although it wasn't a lot. They could have cleared the first 5,000 feet, they could have shaped the roadbed, and if they had a material source, they could have laid the material. . ." (Tr. 4-99.) The fact is that Mr. Rivers does not really contradict Appellant's clear position that there was not much to do nor does he contradict Appellant's position and that the lack of construction staking did not warrant mobilization on June 19. Further, Appellant described the limited area that had been staked by the FS as of June 19. Appellant noted that it was an area that did not have enough clearing and grubbing to justify bringing on equipment for the limited work that could be performed. (Tr. I-71-72, 88; II-125.) In order to sequence its work, Appellant wanted the entire road staked. That was not unreasonable. Appellant also pointed out that crushing of material did not have to be done prior to starting work on the project. Appellant explained how a project of this nature worked. Typically the contractor starts at the beginning of the project and works into the project. The work is sequenced so that first the contractor sends in his clearing and grubbing equipment. That is done first. Eventually, the contractor gets far enough in front of the work so that the rest of the work can progress behind it. It is a progression and once clearing and grubbing is done, then the excavation equipment and the pipe crew can come in. In the meantime, the contractor moves in the crusher. Once the road prism is accepted, the contractor can then begin to put down the crushed material. It is of note, that Appellant's description of the sequence is essentially the same as that of Mr. Rivers, which first requires clearing and grubbing and then some excavation to shape the roadbed. (Tr. I-127, 233-234; II-21-22; IV-99.) Critical to this appeal, and which in large measure renders the lack of staking (as of June 19) moot, is that as of June 18, the Appellant and FS learned that they had no disposal site because of FS error. Mr. Clark, the COR, confirmed the necessity of having a disposal site in order to proceed with work. (Tr. 4-36.):

> The clearing and grubbing was the first phase of this project, yes, and they needed the disposal site so they could meet the contract specifications as far as clearing and grubbing and the earth work specification went, yes.

So even if the Appellant could have theoretically proceeded with initial road clearing, starting on June 19, it had nowhere to place the slash and other disposal it would generate (Tr. II-267-268). Road work was therefore not an option.

38. But for the FS issuing the NTP, the Appellant and FS then had no further significant contact until June 24, at which time, after hearing nothing, the Appellant submitted a schedule and pit development plan. The plan was faxed and received by the COR on June 26. It was somehow not provided to the CO until June 28. (AF 66-70; Tr. I-112.) Along with the plan, the Appellant again reiterated how it bid, and cited the reasons it believed it was justified in bidding on the upper bench (AF 66). The schedule provided was consistent with and confirmed a sequence of work that had clearing and grubbing and then road excavation occurring for the first weeks of the job and then, after some time, the start of crushed aggregate placement (AF 65).

39. Although the contract required that a submitted pit development plan be approved or disapproved within 7 days of receipt, Appellant did not receive a response until July 10. It had made regular calls to the FS as to status, in the interim and at one point Mr. Clark indicated verbally that "it sounds like the FS was going to approve" the upper bench area. He suggested the Appellant take a sample of the material for testing. Within a day or so of the conversation, however, Appellant, in another conversation with Mr. Clark, was told that it looked like the proposed pit site was not going to be approved. (Tr. I-125-127.) On July 10, the same date the FS responded to the pit plan, it also coincidentally completed staking of the road. Appellant, however, was not notified until several days later about the completion of staking. By that point, however, the FS had suspended all performance. (Tr. I-112.)

40. Then, on July 12, 1995, the CO took two separate actions. He issued a letter denying the Appellant's pit plan for the upper bench and issued a suspension of work order. The suspension period was indefinite. The order stated as the reason, "pending resolution of issues regarding optional pit source." Although the CO decided not to allow Appellant to use any of HMC 26 as the material source, the CO conceded that he and the COR had been "struggling over the issues surrounding the optional pit site on mining claim 26," and they considered allowing D & L to use HMC 26, notwithstanding the June 24 date. The CO stated, "While it is true that the government should have amended the invitation for bids to delete the June 24 closure of the optional source, once it was no longer applicable, the fact remains that the project went to bid with the June 24 deadline applicable to the east one half of Hope Mining Claim No. 26. . . And it appears that no other representations were made to bidders, either orally or in writing, that would have indicated a loosening of that requirement. To the contrary, it is likely the bidders who called the Forest Service regarding the aggregate source were told that the deadline for closure was applicable to the entire area within the east half of the claim." As such, the CO did not see the upper bench area being available to Appellant under the terms of the contract, and refused to amend or delete the date. He

continued in the letter that he did not find Appellant's interpretation allowing the bench area within the east half of the site compelling nor did he find Appellant reading that he bid the site that way as reasonable. (AF 70-71; Stip. 15-16.) It is noteworthy, that while the CO had apparently advised bidders that none of HMC 26 could be used after June 24, that was not the way that the drafters of the contract, Mr. Kohlhase and Mr. Rivers understood the document nor what they intended. Both considered the June 24 limitation to be applicable, only to the stream area. (Tr. III-143-146; IV-108-110.)

41. Finally, the CO closed his July 12 letter by stating that the parties could agree to a mutual termination and further, "Work and the count of contract time is suspended effective July 12, 1995, pending resolution of the pit issue." (AF 70-71.) The CO documented the file in his D&F of July 17, 1995 (discussed earlier in relation to other issues), and there said that he believed amending the contract to extend or waive the date would have been unfair to other bidders (AF 78-79). Appellant said that until it was given the suspension letter on July 12, it did not know that June 24 was an absolute (Tr. I-114-115; II-192-193).

42. The FS said that the time it took to reach its July 12 decision was reasonable due to its consideration of all of its options and given the significance of Appellant's challenge to the FS interpretation of section 611.02. The CO said that he had to deal with approval or disapproval of the pit development plan because Appellant was alleging the solicitation was deficient (Tr. II-26; IV-3-4.)

43. By letter of the same day, Appellant responded to the rejection and asked the CO to reconsider both the decision on HMC and the suspension of work. Appellant specifically said, "We wish to complete the project and hope you will be reasonable and reconsider your decision." The letter continued with the Appellant saying that there were many more options than that stated in the FS letter, noting that the FS could provide another source, Appellant could find its own source and file a claim for changed conditions, or use one of the other Government sources and file a claim for increased costs. (AF 74-75; Stip. 17.)

44. Appellant then went on to repeat many of the points made in its earlier June 24 letter, including charging that the June 24 date was arbitrary, that it had no bearing on work on the east half of HMC 26 but was applicable only to work in the creek. It made other arguments, including repeating that it had called the Anchorage office on May 3 with questions regarding the project and the response he received was flippant and suggested that Appellant was making a mountain out of a molehill. (AF 74-75.) The FS took no action on Appellant's letter and did not lift the suspension.

45. With the suspension of work still in place, the Appellant met with the COR, Mr. Rivers and Mr. Johnson on July 15 to look for alternate Government sources in the proximity of HMC 26 (AF 76-77, 80; Tr. I-131). During the meeting it was decided to use the American Way (AW) 2 site, another unpatented mining claim owned by Mr. Johnson, located immediately adjacent to the north of HMC 26 and which had a common boundary with HMC 26 (AF 50; Tr. I-131). The primary physical differences between AW 2 and the upper bench bid by Appellant, was that the miner had

not conducted development or mining activity on AW 2 and therefore there was considerably more clearing and grubbing necessary to prepare AW 2 for excavation (Tr. I-132-133; IV-22).

46. By letter of July 15, 1995, Appellant told the CO that it would use AW 2 and requested the CO issue any and all necessary documents, including a notice to resume work (AF 80; Stip. 19). Matters, however, did not move forward quickly and the CO again took no steps to lift the suspension. At about this time, July 17, 1995, the CO prepared a D&F to provide documentation for actions taken to resolve a dispute over use of the local pit source. (AF 78, 79.)

47. Just as was the case at HMC 26, HMC had a plan of operation (for mining) in effect for AW 2. Both HMC 26 and AW 2 (5 or 6 years previous) had each undergone a National Environmental Policy Act (NEPA) and archeological review. Nonetheless, when AW 2 was selected for use on this project, the FS, through the District Ranger, determined that the site needed an additional archeological resources survey before allowing work. The FS said that notwithstanding earlier study, the use here was different (the earlier involved the impacts of the mining operation) and therefore it wanted to make sure that the pit area was covered more thoroughly. When the CO was pressed for an explanation at the hearing as to why this added survey was conducted, he simply stated that the decision had been up to the District Ranger. The survey report, titled Cultural Resource Project Clearance, was finally generated on July 31, 1995, and found no historical or archeological sites. According to the report, the clearance used a survey crew of six and the entire study involved 2 hours in the field and 1 ½ hours of administrative time. (AF 85, 89; Tr. I-167-169; II-34-35; III-48; G-R.)

48. In addition, and because HMC held mining rights to AW 2, the FS had to secure a waiver as to locatable materials from HMC, just as the FS had been required to do for HMC 26 (AF 83). Mr. Johnson, however, was not willing to provide such a waiver until he could conclude an agreement with Appellant regarding not just the use of AW 2 but also the new disposal site which the FS now needed to secure, in order to proceed with the project. Negotiations between Appellant and HMC as to use of the AW 2 site dragged on and floundered on the disposal site problem. At the same time, the FS conducting its own negotiations with Mr. Johnson over the disposal site, even as Mr. Johnson and the Appellant attempted to reach an agreement. As early as July 17, FS engineering officials expressed concerns about securing agreements with Mr. Johnson regarding mineral rights and the disposal site and cited the disposal site as the primary problem. (AF 83-87; Tr. I-129.)

49. In a message of July 21, 1995, Mr. Rivers advised the CO that they were getting closer with the miner. Mr. Rivers then continued, "There is a new twist. Al and I have agreed on final wording for his material source rights waiver, and designated waste site, but Al won't sign until he and Larry Smith can work out arrangement for rehab. of the disposal site. Sam is aware and has the lead. I still hope this can be worked out Monday, but won't hold my breath." A message of July 28 from the CO to the COR indicated that problems still existed as to getting Mr. Johnson to agree as to the disposal site. (AF 83-87; Tr. I-129.) Other messages made it clear that the FS was very much engaged in negotiating language with HMC and that an agreement on AW 2 as the source site was being held hostage to the Appellant agreeing to rehabilitate the new disposal site (the disposal site

which had to be substituted because the FS had never received authorization from the miner to use the site the FS set out in Appellant's contract) for the miner. During this time, Appellant remained under a suspension order. (AF 83-87.)

50. In the CO's message of July 28, 1995, to the COR, the CO acknowledged that changing the disposal site and performing reclamation would be a modification to the contract. The CO said in the message that he had expressed to Appellant that the FS would be willing to modify the contract to allow for a different disposal site, if all parties were in agreement and it was a no cost change to the Government. The CO stated that he could not agree to a modification which resulted in extra costs to the FS for mining claim rehabilitation on a totally different claim from the one being utilized as a pit source. The CO was taking this stand despite the fact that the disposal site problem was entirely a FS creation. Appellant was reported to have told the CO that he would try to work with the miner on the matter over the weekend. The CO knew as of July 28, 1995, that they were already "pushing the field season" and as such had concerns about getting the work started. Nothing in the message addressed costs regarding the source site. (AF 87.) As to the FS assertion that the Appellant agreed to a no cost change regarding the source, the FS provided no evidence to support that allegation. Rather, the record shows that CO's conversations and messages during the project were solely with other FS officials and not with the Appellant. Finally, on July 31, 1995, Appellant and HMC entered into a revokable license which among other things allowed Appellant to dispose of clearing and grubbing debris and to extract up to 10,000 cubic yards of natural undisturbed gravel deposits for use on the project. (AF 329-331.) Mr. Johnson then amended his previous agreement with the FS to allow use of AW 2 as the material source site. Included in the agreement with the FS was the proviso that debris would be disposed of on HMC 14, a totally different and new site. (AF 88.) On August 2, 1995, the CO sent a message to the COR advising him that the crew had finished the archeological survey of the area "last week" and did not find anything significant (AF 89). On August 3, the FS finally presented a resumption of work order to Appellant (AF 90). Concurrent with the resumption order, the COR directed Appellant to provide its cost proposal on the disposal site work (AF 91). Thus, although Appellant was now free to begin, 7 weeks had passed from the original June 12 date for the NTP. It then took Appellant time to bring its forces and equipment onto the site. Appellant began work on August 11. (A-B.)

51. The FS argued that it had no requirement that Appellant enter into an agreement with HMC (Tr. II-238). However, as a practical matter, Appellant had no choice. The FS notwithstanding Appellant's July 12 and 15 requests refused to lift the suspension and allow Appellant to proceed with securing its own source site elsewhere. Further, the FS needed to secure a disposal site and negotiations over the source site were clearly tied into the FS solving its disposal site problem with the miner. It took until August 3 for the FS to finally conclude that the disposal and source sites were resolved. That is despite the fact that on July 15, the miner indicated to Appellant that in principle, Appellant could use AW 2 for the source site. That was reflected in Appellant's July 15 letter to the FS. It cannot be ignored that negotiations over an agreement centered on the disposal site and the FS was not prepared to take any action to lift the suspension until the disposal site matter was resolved. Yet, the FS now says, it has no responsibility for delays due to the suspension of work and the delay is Appellant's responsibility. (AF 74, 75, 80, 83, 85-88; Tr. III-8.) Particularly

troubling in this regard, is the FS attempt to justify suspension on the basis of NEPA considerations, in reality not a NEPA review but simply an archeological review wanted by the District Ranger. First, there is serious question as to whether an archeological review was needed at all. Mr. Johnson stated that a NEPA review and Environmental Assessment (EA) had been made of AW 2 as well as of HMC 26, years earlier (in fact three times prior to 1994). Further, no additional archeological review of HMC 26 had been conducted in preparation of the original contract. When the CO was questioned as to why the review was needed here for AW 2, he could provide no details to justify it. Rather, he simply said that the District Ranger made that decision. Second, while it is not clear when the FS finally acted to have the archeological survey conducted, it is a fact that the task appears to have been done on or about the last few days of July, even though Appellant and the miner had identified AW 2 as the new source site on July 15. Further, the entire archeological survey took a total of 3.5 hours (with a crew of six) to conduct. Yet, the FS uses this to justify not lifting the suspension and to claim concurrent delay. Again, it must be pointed out that in its July 12 letter the Appellant had offered to go to a non-FS related site but was turned down. Further, the real reason driving this delay was the need of the FS to find a disposal site. The lack of a source site was not what was driving the delay of this contract. (Tr. 1-167-169; II-46, G-R.)

52. On August 8, 1995, Appellant as part of its use of AW 2, entered into a contract with the FS for the sale of mineral materials (mineral materials permit). The permit authorized it to remove 6,000 cubic yards of pit run gravel as free use. The free use material was to be used for this project. Although a mineral material permit did not need to be issued for the removal of material, the mineral materials permit also authorized the removal of 2,000 cubic yards of pit run gravel at a cost of $1,200 to the Appellant. (AF 92-93; Tr. II-54.) Appellant purchased this additional material for a contract it had entered into with Kenai Borough (Tr. II-54). It had bid on the Kenai Borough project after it was awarded this job and intended to use the AW pit and the same subcontractor who was to perform crushing on this project for the screening operation (a different process) on the Kenai project. Appellant's mineral materials purchase permit for the 2,000 yards from AW 2 expired on October 31, 1995. No permit was required as to the other 6,000 yards because that was free material. (AF 93; Tr. II-54.) While it was useful to the Appellant to use the same pit for two jobs, Appellant explained that it would not have been difficult for it to secure gravel from separate sources as gravel was a common commodity on the Kenai Peninsula. (Tr. II-132-134.)

53. Appellant began working at the site on August 11. It started at the pit site. It proceeded with a hydroaxe and laborers with hand saws to begin clearing the pit and removing trees. (AF 94-98; Tr. I-234.) Although the disposal site was approved on August 3, the Appellant did not get access to that site until August 15 and Mr. Johnson was adamant that disposal of clearing and grub material had to be on HMC 14. In addition, as the job progressed Appellant wound up using four different areas for disposal, instead of one, which was how it had contracted. (Tr. I-223-227, 234.)

54. On August 11, 1995, Appellant submitted, by letter, a notice of a claim for $5,300 and 5 days due to utilizing a different site for the disposal of clearing and grubbing debris (AF 99). The COR prepared Modification No. 1 for $5,300. That modification, however, addressed more than just the disposal site change. In addition to the $5,300 increase, the modification identified an item

designated as crushed aggregate pit and quarry development. That portion went on to say, "Contractor proposal to use HMC American Way #2 claim for a material source site for crushing aggregate item 304(10) is hereby approved." There was a notation of $0 under the column for amount of increase or decrease. The modification also added 45 days to the contract time. Finally, as an introduction to the description of the above two items, this modification, as well as all other modifications on the contract, contained on the continuation sheet the following wording, "This modification shall compensate the Contractor for all work, materials, labor and equipment associated with this change." (AF 425-426; Tr. III-299.) The modification, once issued, carried an effective date of August 15, however, it was not finally signed by the Appellant until September 4 and by the CO on September 15. As part of the process, the COR prepared a FS justification statement (not part of the modification and noted on the SF -30 continuation sheet as for internal use). The justification statement stated that the 45 days was due to Government delay in construction staking and working out details with the mining claimant for a material source site. (June 12 to August 3 is 45 days). (AF 425-430; Tr. I-252-255.)

55. The CO has contended in defending the appeal, that the FS and the Appellant mutually agreed, prior to entering into Modification No. 1, that use of AW 2 as the material source would be approved only at no additional cost to the Government. The CO also said that Appellant gave no indication that he did not agree with modifying the contract in that manner and the CO considered this modification, and all others, to be an accord and satisfaction as to each change. (AF 87; Tr. III-9-10.) The CO, however, acknowledged that he did not personally engage in negotiations with Mr. Smith (that being done by the COR) and also confirmed that the delays and other claims in dispute in this appeal had not been discussed or considered in negotiations. Given the fact that the COR conducted negotiations, the subjective perceptions of the CO are not persuasive or particularly helpful. (Tr. III-15, 52-53.) In contrast to the position taken by the CO, Mr. Smith stated that Modification No. 1 only compensated Appellant for the specific work spelled out and not for all work. He said that Appellant never reached an agreement with the FS waiving additional claims nor was there an agreement that Appellant had been fully compensated for delays and changes from the original material source. (Tr. 1-256.)

56. There was no substantial work performed on the project from August 17 through September 11. During this time, Appellant's crushing subcontractor was performing screening work at AW 2 for the Kenai Borough project and that continued through September 10. (AF 117; Tr. I-242-243; II-135, 148-149.) The Appellant explained that in the summer of 1995, it had no way of knowing when it would be able to commence work under the FS contract and in the interim, the Borough had put out to bid another project on another part of this road. Appellant bid that project, which required screened aggregate but not crushed aggregate. Appellant was the successful bidder on the Borough project and it ultimately bought the gravel for screening on that municipal project from the FS, out of AW 2 (the 2,000 cubic yards it paid for). (Tr. I-243-244.) There were approximately four portable crushing operators who worked on the Kenai Peninsula and therefore, in the summer it would have been difficult to locate another crusher to take Appellant's subcontractor's place. Further, the Appellant had a commitment and ongoing relationship with the subcontractor for this project. (Tr. I-246-248.)

57. Appellant said that the Borough project was not a replacement for this project and did not replace the intended work on this job. The crushing subcontractor aside, Appellant was capable of doing both jobs, and the various delays with staking, material source site and the pit development caused the crusher to totally reschedule the projects. Further, Appellant had its own screening capability, but chose to use its subcontractor for the Borough project. (Tr. I-248-251.)

58. Appellant received no pass-through claim for the crusher, as Appellant was able to give the subcontractor additional work. Appellant says that the other work it performed during the contract period was work it had contemplated procuring or routinely procured each year. Thus, the work was not replacement work. (Tr. I-248-251.)

59. Appellant also pointed out that after it received notice to resume, it had to order material, such as the culvert pipe and fabric. In addition, the subcontractor needed time to set up and Appellant had to get the pit cleaned up, which caused the subcontractor to reschedule his projects. Because Appellant lost 45 days, its subcontractor moved to another project. (Tr. I-249-250.)

60. Appellant resumed work on September 11 and started excavation (Tr. I-251-252; G-E, p.7). On or about September 22, Appellant encountered design problems as to two sections of the road, however, it was at a location that Appellant could work around (Tr. I-260-261). The design problem was dealt with by Modification No. 2, dated September 28, 1995, which increased the contract by $28,840, which included the costs covering the supply, loading, hauling and placing rip rap for $10,000, additional crushed aggregate at the unit price in the contract for $10,840 and then an additional $8,000 for a new item, which basically upgraded some of the subbase material used. There were no specified delay costs. Although the Appellant did not ask at the time for additional days, the FS granted 15 days in the modification. All of these items involved work in the fall. (AF 419-424; Tr. I-262-264.)

61. In early October, the parties recognized a potential problem regarding the stability of the designed slope between Stations 73+00 and 83+00 (AF 142). The FS had its hydrologist look at the matter and he confirmed that there was a legitimate concern as to whether the cut slope at the bottom of the hill would hold. Appellant was approximately halfway through the project at the time and adjusted its work so as to skip over the area and perform work elsewhere. The FS continued to consider the matter and thereafter brought in a geotechnical engineer who visited the site on October 24. The FS decided that the best way to handle the design concerns was to wait until spring to deal with the matter and avoid a delay situation. This was reflected in the engineer's report of November 3, 1995, which recommended that the cut slope remain as staked and designed. (AF 142-143, 151-152, 157, 160, 169-170, 179-181; Stip. 25, G-T; Tr. I-266-271; III 3-136-137, 190-191, IV-68-72.)

62. In addition to the stability problem, separate design concerns arose as to glaciation in essentially the same location. Starting around October 24, the FS was internally discussing the need to cut a ditch to deal with the matter. Glaciation occurs in cold but humid winter climates and occurs when water seeps from a cut slope and ice forms. As water continues to seep, additional layers of

ice form into a "mini glacier" that could be 2 feet thick against the cut slope and a few inches thick at the outside. This creates an impediment for driving on the road. At the time glaciation concerns arose, the Appellant had excavated the section of road but had not yet shaped it. No ditch existed. Late in the fall of 1995, Appellant was approached by the COR regarding building a ditch along the side of the road to contain the glaciation, however by the time the request was presented, the Appellant had already requested a winter shut down, starting November 9. (AF 180; Tr. III-190-191; IV-72-78, 120.) As to both the area associated with the slope stability and the glaciation area, the Appellant was able to do some clearing and grubbing and minor excavation, however, it could not proceed with major excavation because it did not know if the FS was going to redesign the area (Tr. II-20).

63. As of November 9, freezing weather was making it impractical to work and therefore the request to stop work until spring was granted (AF 186-190; Tr. I-272). The FS addressed the winter shutdown in Modification No. 3, where it granted a total of 204 additional days (AF 416-418). Appellant did not make reference to any claim for delay when it requested winter shutdown nor when it was issued Modification No. 3. It did later raise additional costs associated with delay upon closure of the contract and those delays included the winter period (AF 261-264).

64. The FS made some efforts to design a solution to the glaciation problem during the winter of 1995/1996, however, a new design was not immediately produced (Tr. III-189,190; IV-74-76). The glaciation was thereafter addressed during the spring of 1996 in messages involving the COR, the CO and engineering officials. In a June 4, 1996 message from engineering to the CO, FS officials noted that they had received conflicting recommendations as to how to deal with the glaciation. The FS finally settled on redesigning and restaking the segment of road to include a 2-foot ditch to retain glaciation and to better divert to culverts. The FS decided to leave the design of the cut slope as it was, noting that whatever unraveling would occur on the slope in the first year or two would collect in the oversized ditch and could be removed with road maintenance. The restaking for the ditching was completed by early June 1996 at which time the COR notified the Appellant. (AF 201-202; Tr. III-189-193; IV-74-79.) The FS then issued Modification No. 4. While it carries an effective date of June 24, 1996, the FS justification document shows July 10 and the Appellant's signature is dated July 11, 1996. Among the items covered in the modification was the redesign for the ditch to handle the glaciation. The FS added an additional 20 days to the contract. (AF 410-415.)

65. Appellant resumed its second season of work on July 1, 1996 (G-G, A-B). When asked to explain that start date, Mr. Smith testified that it was probably due to Appellant completing work on other jobs (AF 211; Tr. I-185). The completion date for the glaciation design and staking did not appear to impede the Appellant from starting earlier that spring, however, even if it did affect the operations, there was other work that spring that could have been started. Appellant, however, has not claimed delay costs for the second year of work and the only element of Appellant's claim, but for remobilization, which involves the second year of work, is the Eichleay matter, which is discussed separately. (Tr. III-193; IV-43, 79.)

THEFT OF MATERIAL

66. Prior to resuming work, Appellant came out to the site in early May 1996, and discovered that processed gravel material, which had been stockpiled for road use, had been removed from its pit area and used to construct a new access road for HMC. Further, Appellant estimated that from 200 to 400 cubic yards of crushed D-1 surface aggregate was removed and displaced to locations unknown. Considerable correspondence was exchanged on these matters. Appellant told the FS that it would need additional compensation and added time due to the improper removal of the material by others. (AF 198-199, 203-208.) In calculating costs, Appellant did not seek the price of the removed material, but rather sought compensation based on the added value to the material for the processing performed by his subcontractor (Tr. III-76-78). Included in this stolen material was 500 cubic yards of screened rock by Appellant that was sold to Jim Skogstad, whose purchase and role will be addressed in more detail below (Tr. II-138).

67. What occurred was as follows. Some time between the Appellant leaving the site in November 1995 and May 1996, Mr. Johnson constructed a new mining road using what he characterized as 1,000 to 1,200 cubic yards of reject material from Appellant's crushing operation at AW 2, which Mr. Johnson described as material pushed off to the side. He said that at the time there was approximately 4,000 yards of material and Appellant had completed building the majority of the Resurrection Road. He said that the material was otherwise going to be leveled, buried and recontoured. (Tr. I-182-187; IV-92-94.)

68. The FS' role in the HMC road construction was contested. The District Ranger, Mr. Harp, stated that while the road was included in HMC's plan of operations, in this particular instance, Mr. Johnson constructed the road without FS knowledge or authorization. Mr. Harp said that he first learned of the road after it had been constructed. (Tr. II-67-68.) Mr. Johnson disagreed. He said that while he was notified, after the fact, by Mr. Harp that the FS had a problem as to the construction of the road, the FS (through Mr. Harp) had known about the road building and in fact participated. (Tr. I-185-187.) A law enforcement report indicates that Mr. Harp told Mr. Johnson he could build the road but never told Mr. Johnson that he could use the rock (AF 273-274). Finally, the FS said that regardless of what was done, Appellant had no right to the material because when mineral materials are located on a National Forest and are designated for use in a contract, title to excavated material, in excess of that needed for a contract, remains with the United States. Further, even if the material was from the permit for sold materials to be used on the Borough project, that permit had expired on October 31, 1995. (AF 207.)

69. Regardless of the respective arguments and debate over quantity, it is clear that the material used by Mr. Johnson for his road was going to be excess material and thus was not needed for the project. As such, this was not material which Appellant had to replace. (Tr. III-77-78.)

70. In addition to the material taken by Mr. Johnson, Appellant identified another 200 cubic yards of material (D-1) which had been removed from the pit without the Appellant's knowledge (Tr. I-279-280). On November 7, 1995, at about the point of the winter shutdown, the FS, through

the District Ranger, entered into a permit (Sale of Mineral Materials), with Mr. Skogstad, under which Mr. Skogstad was to be permitted, for a fee, to remove material from another side of the pit being used by Appellant. The permit authorized Mr. Skogstad to remove up to 500 cubic yards of sorted rock left from the project or pit run materials from the AW 2 gravel pit. Nothing permitted Mr. Skogstad to take processed material that Appellant was still using for the work. (AF 324; Tr. II-59-60.)

71. The District Ranger said that he first cleared this with the COR and said the COR indicated to him that Mr. Skogstad's presence would not cause any interference. The Ranger then apparently issued the permit. Thereafter, Mr. Skogstad removed materials of the Appellant. This was confirmed by Mr. Clark. (Tr. IV-16-17.) Appellant had not been told that Mr. Skogstad had been given access and was working in the Appellant's pit. (Tr. II-36-37; 50-51; III-314.) When Appellant visited the site in May 1996, prior to starting its second season, it discovered that material had been taken, among which was approximately 200 cubic yards of D-1 needed for the contract work. Appellant immediately addressed it in a letter to the FS dated May 14, 1996. (AF 119.) This 200 cubic yards was material that was needed for this project and therefore, had to be replaced. As it turned out, Appellant was able to secure substitute material from another Ranger District for nominal cost, however, where Appellant was particularly impacted, was that rather than having material nearby the site, Appellant now had to haul the material from a considerable distance. It was mainly the hauling costs which Appellant sought as compensation. Finally, although Mr. Skogstad removed material from the pit developed by Appellant, Mr. Skogstad was not required to perform any pit restoration in areas where he took out material. (AF 480; Tr. I-314.) The FS provided no substantive or credible challenge to the taking of the 200 cubic yards of D-1. Its challenge consisted of a statement by Mr. Rivers, who said he was not convinced that the material was taken. However, he admitted that he never saw the pile from which it was taken until after the claim came in. (Tr. IV-92-94.) This contrasts with the testimony of Mr. Clark, who said that he observed Skogstad working on the Appellant's side of the pit and taking processed material out of Appellant's stockpile, rather than taking it from the pit as in his permit. (Tr. IV-17.)

COMPLETION OF WORK

72. Within days of restarting in 1996, Appellant was nearly complete with the excavation portion of the project. However, it now had nearly 2,000 cubic yards of excess excavation material from the road and needed direction as to what to do with it. This excess excavation was dealt with in Modification No. 4, which was discussed earlier and which also dealt with the ditch redesign, which had come up during the previous fall. As part of this modification, Appellant had asked in a letter of July 9, for $5,000 for hauling and disposing of the excess material. The FS accepted Appellant's equipment costs and time to perform as consistent with local rates. (AF 219, 410-415; Stip. 28.) Appellant did not raise a delay claim associated with glaciation at the time of discussions on this modification. The FS added 20 days to the contract in Modification No. 4. (AF 262, 410-415; Tr. I-288; III-292.)

73. Upon returning to work in the spring, Appellant wrote several letters to the FS among which was its letter of July 3, 1996, where it advised the FS that it would be 200 or more cubic yards short of material and asked for a free use permit. This referred to the D-1 material which had been taken by Mr. Skogstad. (AF 215.) Modification No. 5, signed August 5, 1996, essentially adjusted quantities, however, none of the quantities in Modification No. 5 related to the stolen material. Modification No. 5 provided Appellant with $3,954 and added 10 days to the contract. (Tr. I-289; AF 406-409.) The final modification on the contract was Modification No. 6, which involved a clearing adjustment and some additional seeding and granted Appellant $1,300. It was effective August 6, 1996, and granted 26 days at the end of the contract. (AF 403-405; Tr. I-289-291.)

74. The FS conducted a final inspection of the project on August 19, 1996, with the last day of work being August 22, 1996 (AF 247-248). On November 11, 1996, Appellant executed a contract release, subject to certain claims (AF 265; G-E, p. 23). The parties disagreed on substantial completion, with the FS using July 26, 1996, and Appellant using August 2 (AF 239; A-B).

75. Although Appellant was not allowed to use HMC 26 as its gravel source, it is noteworthy that the FS had the Appellant use HMC 26 throughout the project as a staging area for its equipment and materials, to regularly park vehicles and equipment, to stockpile culvert pipe, and to place some of the root wads, as well as 10-foot or larger tree trunks. During the first work season (1995), Appellant had to drive through HMC 26 in order to get to AW 2. (Tr. I-128-129.)

MODIFICATION, ACCORD AND SATISFACTION

76. The FS issued six modifications and contended that Appellant's claims and delays were barred by the following language, set forth in each. "This modification shall compensate the contractor for all work, materials, labor and equipment associated with this change." The CO testified that in a deposition, he had earlier acknowledged that the modifications did not include compensation for delay. Further, there was no modification covering mobilization or demobilization. Appellant testified that while the modifications compensated it for all work that was spelled out in the modification description, that was not necessarily all of the work and Mr. Smith further testified that he did not reach agreement with the FS under any of these change orders that he was waiving additional claims or that he had been fully compensated for delays. (Tr. I-256; III-52.) In total the FS granted 320 days in modifications. (Tr. III-402.) Each of the change orders appeared to accept the cost set out by Appellant. At no time, when Appellant submitted change orders on the project was Appellant told that its rates were out of line. (Tr. I-301.)

TRESPASSING ON PRIVATE PROPERTY

77. Appellant asserted that it was hindered because of lack of access to private property. Appellant, however, never proved that it was denied access to the road in issue. Further, even if I would find that it did not use the road because of concerns as to trespass, Appellant did not identify any delay or monetary damages associated with what appears at best to be a failure of the FS to properly secure an easement.

SUBMISSION OF CLAIMS

78. On or about November 10, 1996, Appellant submitted a copy of an invoice for a progress payment. The CO wrote to Appellant in response to that submission, advising Appellant that since the contract was complete, another progress payment was not warranted. Instead, the CO noted that to make final payment, the FS needed a final invoice and release. Appellant was advised that if it had a claim or other reservations, then it needed to list that on the release as to amount and basis. (AF 251.) Appellant submitted a release on November 20, 1996, which stated, "Subject to all pending claims by contractor, D & L Construction Co., Inc. We do not waive any of our rights by agreeing to final payment." (AF 255.)

79. The CO reacted to the above release by first communicating with his COR. In that communication the CO told the COR that he could not accept the release as the release was a "blunderbuss exception." The CO told the COR that the courts have ruled that a claim is barred if not specifically delineated in the exception. The CO continued that the contract requires a release that specifies exceptions in stated amounts that the contractor specifically excepts from operation of the release. The CO said he would get Appellant a letter, once again asking for release and final invoice. (AF 256.)

80. The CO then provided Appellant a letter dated November 26, 1996 (AF 257). The CO again stated that "Exceptions must not be vague or broad; claims are barred if not 'specifically delineated'; and 'specifically delineated' claims must be in stated amounts." The CO then continued:

> Once again, please submit a final invoice, and contract release with any exceptions delineated in the "Reservations" section of the form. Exceptions must be in stated amounts and specific as to the basis for the claim(s). The requirement for stated amounts does not bar you from adjusting the amount(s) in the process of finalizing and certifying (if applicable) the claim(s). However, the requirement for specificity is intended to prevent later broadening the basis for the claim (s) or adding new claims.

81. By letter of November 27, 1996 (AF 261-264), D & L responded to the above, and submitted a formal claim of $65,529.63 for purposes of reservation of rights and securing its final progress payment. Appellant stated, "This claim is based upon unreasonable owner caused delays and subsequent suspension of work, delayed Notice to Proceed, owners failure to make site available, changed conditions, defective design, plans and specifications and intentional interference in our contract by owners agents . . . ." Appellant then stated that its claim is based upon the following, and proceeded to further detail its claim on the next four pages. Among the matters it addressed were problems caused by FS construction staking, the FS refusal to approve Appellant's proposed source site, the ordered suspension of work, the effects of defective design, the need to have to remobilize and the issues involving stolen material. Appellant then priced its claim as follows:

Remobilization	$7,946.25

Screened/stockpiled material	24,450.00
Gravel Pit Restoration	2,734.38
D-1 labor & equipment	5,175.00
Increased overhead	24,889.00
Fabric	335.00
Total	$65,529.63

(AF 261-264.)

82. Along with the above claim, Appellant submitted a Contract Release, which it executed on November 29, 1996, on the FS standard form. Under reservations the Appellant provided the following:

> Subject to pending claims in the amount of $65,529.63 (sixty five thousand five hundred twenty nine and 63/100 dollars). We do not waive any of our rights by agreeing to final payment. See our four (4) page letter of claim dated 11/27/96.

83. Thereafter there were telephone conversations as well as correspondence regarding the fact that Appellant and FS were gathering supporting data and facts regarding the claims. By letter of March 24, 1997, the CO advised Appellant that unless it had the backup by April 25, the CO would issue a decision on the information it had. Appellant, in response to the CO's letter, filed a more specific certified claim dated April 25, 1997, for $199,202.68, which also contained substantial backup material. (AF 283-385.) This claim was broken down into eight elements with a brief synopsis for each.

> Allegation 1: Defective/faulty specifications.
>
> This dealt with alleged errors related to location of site and failure of the FS to clarify application of Appellant's telephone request for clarification as to June 24 date.
>
> Allegation 2: Owner fails to make the site available/denies access to site.
>
> This deals with delayed notice to proceed, failure of FS to stake the road and how that was totally unreasonable in light of June 24 date. This also deals with the suspension of work of July 12.
>
> Allegation 3: CO misinterprets specifications resulting in constructive changes.
>
> This deals with what Appellant calls improper denial of its right to use upper bench area.

Allegation 4: Owner breaches contract re approval of pit development plan.

Deals with initial submission of plan on June 24, subsequent denial on July 12, and then further delays as to the AW site.

Allegation 5: Tortious interference with the contract.

Allegation 6: Owner taking use of AW 2 material source and contractor material.

These involve the use by others of material processed by Appellant from its pit and its costs of having to restore the pit.

Allegation 7: Defective/faulty design of Resurrection Creek Road.

This involves the design problems associated with the toe of the slope and the glaciation.

84. Accompanying the letter was not only extensive backup of correspondence, bills and other memoranda but also included was a "Chronological Sequence of Events." This document not only identified what Appellant considered as critical dates and events (including the disposal site change), but also included a commentary as to many of the dates, including charges as to various actions and events causing unreasonable delay. (AF 392-395.)

85. By letter of June 25, 1997, the CO issued his 26-page final decision. The CO noted that he reviewed the claim letters of November 27, 1995 and April 25, 1997. The CO noted that the April 27 claim increased the amount and presented the claim in a "very different format and sequence." The CO addressed both letters. (AF 3-27.)

86. Appellant timely appealed the decision. Subsequently, during the litigation phase, Appellant, through counsel, met with a claims consultant and some time thereafter, revised its claim to $163,000 (A-B). Set out below is Appellant's claim breakdown. I will address the quantum of each segment:

D & L CONSTRUCTION CO., INC.

RESURRECTION CREEK ROAD CONSTRUCTION
CONTRACT NO. 50-0109-5-00329

CLAIM SUMMARY
(REVISED)

REF	DESCRIPTION	DETAILED AMOUNT	CATEGORY TOTAL
DIRECT COST CLAIMS			
1.0	DEVELOPMENT OF AMERICAN PIT DUE TO LOSS OF GOVERNMENT SOURCE ALREADY DEVELOPED	$ 21,514	
2.0	REPLACEMENT OF STOCKPILED MATERIALS SOLD AND USED FOR ROAD	$ 24,450	
2.0	PIT RESTORATION - AREA WHERE MATERIALS REMOVED	$ 2,734	
2.0	PURCHASE AND HAUL OF D-1 TO REPLACE MISSING D-1	$ 5,000	
3.0	ADDITIONAL COST OF LEASE EQUIPMENT RESULTING FROM DELAY	$ 9,333	
4.0	WINTER DEMOBILIZATION AND SPRING REMOBILIZATION	$ 16,650	
NA	CHANGE IN GEOTEXTILE QUANTITIES	$ 335	
	TOTAL DIRECT COST CLAIMS		**$ 80,016**
DELAY CLAIMS			
5.0	EXTENDED EQUIPMENT STANDBY COST - FIRST CONSTRUCTION SEASON	$ 64,820	
6.0	UNABSORBED HOME OFFICE OVERHEAD	$ 18,769	
	TOTAL DELAY CLAIMS		**$ 83,589**
	TOTAL CLAIM AMOUNT		**$ 163,605**

87. As a general matter, the equipment rates used by Appellant were based on the Corps of Engineers (COE) manual rates (App. Supp. 37). The alternative costs, developed by the FS, were generally from a national publication, Cost Reference Guide for Construction Equipment (adjusted for Alaska) and the Forest Service Estimating Guide, which was based in part on the Cost Reference

Guide. The FS took the equipment costs from the Guide, which covered ownership and operating costs and then adjusted the labor cost for maintenance and overhaul to reflect wages that a Davis-Bacon mechanic would earn in Alaska. (Tr. III-195-197; G-X, Z.) Mr. Kohlhase, who prepared the FS position as to costs, stated that he was not familiar with the COE manual (Tr. III-243). Generally, Mr. Kohlhase arrived at lower hourly figures than that used by Appellant, however, on some items he was higher. The differences, given the number of hours in issue, were not significant. Further, in some instances, the FS used comparable equipment for comparison because the equipment used by Appellant was not listed in the Guide. While Mr. Kohlhase stated that the Guide and rates were the source documents normally used by the FS and its costs are normally higher than costs for performing work on the Kenai Peninsula, the COR stated that he rarely uses the Guide, but rather relies on historical data and local rates. (Tr. III-194-199, 307-308; G-X, Z.) Appellant challenged the FS use of the FS Estimating Guide, asserting that it had never seen that Guide previously used on FS jobs. (Tr. II-8.)

SCHEDULE 1, Development of American Way Pit Due to Loss of Government Source Already Developed

88. Appellant claims $21,513.75, the entire cost for developing the AW 2 pit. According to Appellant, it would have incurred virtually no development costs for the pit, had it been allowed to use the upper bench. That is because AW 2 contained significant vegetation, while the upper bench area was already cleared. (A-B; Tr. I-298-300.) Since I have already concluded that the contract did not call for the use of the upper bench, the comparison used by the parties at the hearing and in their briefs is not helpful. Rather, the issue is whether the use of AW 2 was greater than what Appellant would have expended at the stream, had that option not be removed by the FS. There would have been virtually no clearing at the stream, since the area was essentially gravel. (A-A.)

89. Appellant broke its costs for developing AW 2 into four categories, totaling 193 hours, which was all work Appellant performed from August 11 through August 17. Each category includes equipment and labor. (A-B.) During the period Appellant also spent 10 to12 hours clearing along the Resurrection Creek Road on work not specifically related to pit development. There was no evidence as to the specific days or day on which the 10 to 12 hours was expended nor was any evidence presented which allocated the hours for road work between the hydroaxe and laborers. (Tr. II-146-147.)

90. The payrolls for the first 7 days of work on the project showed 53 hours of operator time and 57 hours of laborer time and not the 193 hours claimed by Appellant. The payroll time correlates with the hours claimed for operation of the hydroaxe and the time spent by laborers. (AF 100, 106, A-B, Schedule 1.) The remaining hours used to arrive at 193 hours are 48 hours of dozer operation and 35 hours of excavator operation. That was performed by Larry and David Smith, who as salaried employees of Appellant were not on the certified payrolls. Appellant claimed $100 per hour for the hydroaxe and $48 an hour for the laborers/chainsaws. Appellant then added what it described as customary (for the area) overhead and profit of 25 percent. (Tr. I-316-317; A-B.)

91. The FS also took exception to paying for use of the hydroaxe, since its use was not permitted under the contract specifications. That said, however, the hydroaxe was used for clearing, the FS was aware of it at the time and the FS did not stop its use. (AF 103-104; Tr. II-153.) The FS proposed hourly rate for the hydroaxe and for the laborers with chainsaws was $102.25 and $57.28 respectively, which included overhead and 10 percent for profit and risk (G-Z, G-AA, G-BB).

SCHEDULE 2, Costs to Replace Materials Stockpiled at American Way Pit

Replacement of Material

92. This part of the claim was divided into three segments. First, Appellant claims $24,450 for costs to replace material (which it says was processed) that was removed from the pit it had developed on AW 2. It says the material in issue is 2,500 cubic yards of processed material which it says that Mr. Johnson used to construct the HMC road, and 500 cubic yards of its material which Appellant says the FS sold to Mr. Skogstad (but not the 200 cubic yards of D-1 material which had to be replaced). Appellant takes the total amount of material removed, 3,000 cubic yards and multiplies that yardage by $8.15 (a figure not contested), which is what it had cost Appellant to process each yard of material. The FS contests both entitlement and the quantities. (Tr. I-302-303; A-B, Schedule 2.0, Part 1.)

93. While it is clear that Mr. Johnson took material from Appellant's stockpile at AW 2 and used it to construct his road (and apparently also used some material from Mr. Skogstad, but not the 200 cubic yards of D-1 material, which is separately claimed) it is equally clear that Appellant did not have to replace any of that material and the material would have been excess. (AF 447; Tr. I-303-304.)

Restoration of Pit

94. Appellant, at the close of the project, had to restore the entire pit area, including the area worked by Mr. Skogstad. Mr. Skogstad was not required to do any pit restoration. Appellant claims 17.5 hours, which was the time it took for the Kobelco excavator to go around the perimeter of the pit and conduct the necessary operations. Appellant attributed much of its costs to the added size of AW 2 as compared to the upper bench site, the added work due to the AW 2 site not being cleared as was the upper bench and to Mr. Skogstad's operation. (Tr. I-314-315.) Appellant claims $2,734.38 which is 17.5 hours multiplied by $125 which is the hourly rate claimed for the equipment and operator, plus a markup of 5 percent. (A-B, Schedule 2.0, Part 2; Tr. I-314-315.) As to the rates, the FS noted that the combined rate assigned the excavator and operator, based on the FS Estimating Guide and Davis-Bacon labor rates, is $112.04 per hour and reiterated the FS opinion that the Guide rates are high compared to work on Kenai Peninsula and Davis-Bacon (Tr. 3-197, 307). Thus at most, the FS saw liability of $1,960.70 ($112.04 x 17.5).

95. In making this claim, Appellant did not provide any allocation of costs between the restoration work that was required under this contract and restoration due to use of the pit for other

project. (Kenai Borough). Neither the FS nor Appellant provided a breakdown of pit use, however, the permit at AW 2 had 6,000 cubic yards for the Resurrection Creek project and 2,000 for other uses (Kenai Borough project). (AF 92-93.)

The 200 Yards of D-1

96. Mr. Skogstad took 200 cubic yards of D-1 material which had been processed by Appellant. Appellant had to replace that material for work on the project. This material had nothing to do with the Johnson road. Appellant's claim is primarily for the additional costs in having to go to a site at Glacier Ranger District, approximately 25 miles away, to secure substitute material. But for Mr. Skogstad removing this D-1 material, Appellant would not have had to make this additional haul. Appellant claims $3,000, which is 40 hours to haul four belly dumps of replacement D-1 material at a rate of $75 per hour. Appellant did not include loading costs but did include 4 hours at $150 an hour ($600) to move the loader out to do the work and to move it back. The haul of each load involved a 50-mile round trip, mostly on highways. In addition, Appellant noted that it was charged $.60 a yard by Glacier, which would not let it have the material for free. Additionally, Glacier charged the Appellant another $100 as an administration fee. (Tr. I-280-282; 317-319, 2-141; A-B.) The FS challenged the claimed hauling time, contending that under Appellant's claim, each load of the replacement D-1 would have taken 10 hours of truck time and for Appellant to haul each belly dump 50 miles in 10 hours, the truck would have to be moving at 5 miles per hour, a speed the FS considered highly unlikely.

97. Further Appellant acquired more than simply 200 cubic yards of replacement material from the Glacier District (although only 200 is involved in the haul costs). Appellant acquired a total of 1,000 cubic yards of material. Appellant had been paid for processing the original 200 yards under the contract, and thus did not claim for the cost of material or processing. It did claim the 200 yards, for the additional $.60 per yard charged by Glacier. (AF 332-334; Tr. I-281-282.) Glacier $100 administration fee was paid against the total 1,000 cubic yards, and Appellant did not allocate the $100 fee against the total (AF 332-334; Tr. I-281-282; A-B). The FS contested the rate for the loader, stating that the proper rate was $127.35 per hour (G-A-A) as compared to Appellant's $150 per hour plus 25 percent markup (A-B).

SCHEDULE 3, Rental Equipment

98. Appellant claimed additional rental costs. It said that because of the disruption of its sequence of construction and due to delays during the fall of 1995, it used equipment it had planned for this job on other work, and as such, had to replace the owned equipment with more expensive leased equipment. Appellant asserts that but for the delays, it would have used owned equipment. The rental equipment in issue was a John Deere loader and a Dynapac compactor. The claim is the difference between owned and leased equipment. Appellant took what it paid in actual rentals, $21,332.50 for the two pieces, over the time frame indicated, and applying to that figure a 35 percent additional premium and then a markup of 25 percent. When questioned as to how the determination

was made, Appellant indicated that he did not recall how it was established and that it was placed in the damages calculation by a consultant. (Tr. I-319-322; II-13.)

99. The FS presented several challenges. It asserted that Appellant could not establish that rental for the first month, August 5, 1995 to September 4, 1995 related to the project, as the first time that the COR's daily diaries identified a loader on site was on September 9, 1995 (AF 117). As to the Dynapac compactor, Appellant showed the rental from October 30 to November 12, 1995. The COR's contract daily diaries indicate that Appellant's compactor broke down on October 27 and remained in that state until October 31, when another compactor appeared on site (AF 171, 175-176). Appellant shut down its operations for the winter on November 8, 1995 (AF 188; A-B).

SCHEDULE 4, Mobilization and Demobilization

100. Appellant claimed additional costs associated with mobilization and demobilization of equipment, stating that it could not reasonably leave the equipment at the work site over the winter, as it would have been unsecured from theft or vandalism. Appellant removed everything from the site with the exception of one loader Cat 12 grader, which it had difficulty starting because of water. Modification No. 3 gave Appellant 204 days for the winter shut down but did not add any additional dollars or work to the contract. (Tr. I-274-276.)

101. When Appellant remobilized in the spring of 1996, it brought back most of the equipment it had in November 1995. The equipment listed on Appellant's schedule for this claim represents what was brought back. Equipment such as the hydroaxe, the Komatzu dozer and John Deere dozer were not listed as part of mobilization and demobilization, since they were not used for the second season. (Tr. I-285-286; A-B.)

102. Once again the parties disagreed over the proper costs for each item. On the whole the Appellant's figures were somewhat higher but not significantly so. On some items, Appellant used a lower figure. (Tr. I-98-110; A-B, G-A-A.) The costs included both labor and equipment. So for example, while laborers with chainsaws were paid $33 under Davis-Bacon, once one added to that figure burdens of approximately 35 percent and overhead and profit, the contractually required Davis-Bacon figure was substantially above that reflected in the FS Guide. (Tr. I-101; G-X.)

103. Appellant asserts that the hours to transport equipment that it identified in calculating its additional demobilization and remobilization costs were determined by using its time cards for driving the equipment. Appellant alleges it submitted the cards to the CO. (Tr. II-3-6, 15.) The only time cards in the record relate to the apparent haul of D-1 or borrow material from October 31, 1995 through November 7, 1995 by an employee named Robert Dederick and were attached to Appellant's claim letter of April 25, 1997 (AF 285-294). Mr. Dederick does not appear as an employee on the project in the payrolls submitted for late October and early November 1995. However, Mr. Dederick is shown as an employee of B&J Enterprises, not D & L, and is listed at a rate of $72 per hour for belly dumps. (AF 182, 188.) Although the claim lists 55 hours to transport equipment and 15 pilot car hours, payrolls for final work day in November 1995 do not show 70 hours to transport

equipment identified in Schedule 4. The COR's daily diary indicates that Appellant's equipment was still on the site on November 7, 1995 and the payroll for the final day of operations on November 8, 1995 identifies only 10 hours of work. (AF 186,188.) The list of equipment on Schedule 4 is consistent with the equipment shown on the site toward the end of the job by the daily diary entries of the COR and there is no dispute that the equipment was all removed from the site for the winter (AF 186).

SCHEDULE 5, Equipment Standby Claim

104. According to Appellant it is entitled to standby equipment costs for various days between June 12, 1995 and November 8, 1995, a period when it had the equipment dedicated to this project (Tr. I-94, 99; II-6-14; A-B). The equipment is listed in Schedule 5 and Appellant arrives at its daily costs by using the COE manual, which includes the age factor and has a conversion factor for Alaska. (Tr. II-7.) For the 18 pieces of equipment listed, Appellant came to a daily standby cost of $1,301.66. Other than Mr. Smith testifying that the figures were reasonable, Appellant put on no other testimony taking the Board through the items and matching the claimed costs with the COE manual. The FS, in its brief, did compare the costs claimed by Appellant against the COE manual and, using COE rates it concluded that the maximum allowable daily rate for the combined equipment was $790.14 per day. The FS identified, in a table included in its brief, various errors in the Appellant's calculation (by setting out numbers from the COE manual which differed from numbers used by Appellant). While the FS, as was the case with Appellant, did not provide any testimony connecting their dollar figures with a specific reference in the COE manual, when one takes the FS chart and cross references the chart against some of the alleged errors cited by the FS in the manual (App. Supp. 37), the FS figures appear accurate. For example, the FS shows on the chart that the Appellant used the improper identification for the Kobelco 909 excavator. The identification shown by Appellant, is for a loader, not an excavator. Similarly, for the Mack End Dump, the Appellant used Terex rear dump. Further, the FS contested most of the age factor numbers used by Appellant. Appellant in its reply brief provided no rebuttal to the FS chart challenging the equipment standby costs. (App. Supp. 37.)

105. As to the days for which Appellant claimed standby, the Appellant broke its calculation into three periods, with the third covering the resumption of work in the spring. Only the first two are relevant to the claim, as Appellant claims no standby for resumption of work in the spring. (A-B.)

106. There are 55 calendar days and 39 work days in the first period set out by Appellant, which is from the original NTP date of June 12, 1995 to August 5, 1995 (Tr. II-10; A-B). Appellant deducted 20 work days from the 39 work days to arrive at 19 days of standby. The 20 days it deducted reflected those days on which Appellant was able to use the equipment on either the Kenai Borough or some other project. (Tr. 2-10.) Appellant's second calculation covered August 6, 1995 to November 8, 1995, which is 95 calendar days and 68 working days. Appellant deducted 50 days for when it was able to use equipment and thus sought 18 days of standby for that time frame. Appellant then added the 19 days and 18 days to arrive at standby of 37 days. That was multiplied

by the $1,301.66 that Appellant used for its equipment rate and totals $48,347. (Tr. II-10-11, 142-143; A-B.)

107. The FS issued the NTP on June 19, 1996 and did not thereafter order the stop of work until issuing the suspension order on July 12. Appellant, however, did not work between those dates and did not mobilize because of the lack of staking and the fact it was waiting for word from the FS as to the source site. Appellant indicated that during that period its equipment was at times working on other jobs and at times idle. (Tr. I-111.) Appellant had various road maintenance projects during this time period and was finishing up work on Jim's Landing, a project which required the use of crushed aggregate. Typically during any construction season, from beginning to end, Appellant is performing some kind of contract. (Tr. II-121.) Appellant was not confident that it could use the equipment it had dedicated for this job on another job for any length of time and did not know when the staking would be complete (Tr. I-110-111). On July 12 the FS issued the order suspending all contract work. That order had no time set for resumption and was not lifted until a resume order was issued on August 3. Appellant thereafter began work at the pit on August 11. Appellant still could not start road work as the disposal site for the road work was not approved until August 15. (Tr. III-35; A-B.)

108. Appellant worked from August 11 through August 17, essentially in preparing the pit. Then, it did not perform work between August 18 and September 11, 1995. During those days, it was principally working on the Kenai Borough project. (Tr. II-149.) To the extent that Appellant used equipment on the Kenai Borough, such as loaders, graders and compactors, it backed those days out of its standby claim (Tr. I-112, 251). Appellant thereafter generally worked the Resurrection Creek project from September 11 to November 8, 1995. It was idle on a number of days during that period and claimed those days in its standby calculation. Appellant provided no explanation for why it could not work on specific days after September 11, nor did it identify the specific dates on which it was able to use its equipment on other projects. (A-B.)

109. In addition to challenging this claim on the merits, the FS also defended this part of the claim on jurisdictional grounds. The FS asserts that the standby cost claim was not submitted to the CO for decision in either the November 1996 or April 1997 revision of the claim. (AF 261-264, 285-290.) The FS says that the Board has no jurisdiction to review a standby claim not submitted to the CO and therefore, not certified. 41 U.S.C. § 605(a), (c).

SCHEDULE 6, Unabsorbed Overhead

110. This contract had a 120-day performance period, which using June 12, 1995 as a start date, would have required finish by October 12, 1995. Throughout the project the FS granted time with several of the modifications, however, of the 320 days granted through modifications, Appellant had only expressly asked for 5 days (although the 240 days for winter shut down were implicit in Appellant's request). Modification Nos. 1 and 2, which involved work performed during 1995 granted 60 additional days. (AF 419-430.) Appellant began performance for the second season on

July 1. Appellant says it was substantially complete by August 2, with the FS using July 26. (Tr. I-288-289.)

111. Appellant stated that it worked on six other contracts during the contract period attributed to this project. The contracts were described as work that Appellant would have normally performed and were not replacement work for this contract during the delay period. (Tr. II-19, 74-82.)

112. Appellant claimed that it was entitled to 342 days of delay and $18,769 for the extended contract period. It calculated the above figure by using an Eichleay formula to arrive at a daily rate of $54.88 per day and multiplying that figure by 342 days. In coming up with the daily rate, Appellant set the contract period as June 12, 1995 until September 3, 1996. (Tr. II-14-18; A-B.)

DISCUSSION

Jurisdictional Question as to the Release

I find that none of the claims in this appeal are barred by the release. The majority, to the contrary, determines that the following claims should be denied because the Appellant failed to reserve them in its release of November 29, 1996, for final payment: Schedule 1, costs of developing AW 2; Schedule 3, additional cost of lease of equipment resulting from delay; Schedule 4, mobilization and demobilization; Schedule 5, extended equipment standby costs; and Schedule 6; unabsorbed home office overhead.

The November 1996 release said that it was subject to pending claims of $65,529.65 and identified the claims as what was set forth in its four-page letter of claim dated November 27, 1996. (FF 81-82.) The majority cites Mingus Constructors, Inc. v. United States, 812 F. 2d 1387 (Fed. Cir. 1987) as authority for its position that the above matters are barred as not properly excepted.

Mingus says that exceptions to a release are to be narrowly construed. As the majority applies Mingus, in this appeal, the majority does not permit a contractor to increase the claim beyond the specific dollars stated in the release and further does not allow a contractor to expand or modify the claim, even though the modifications arise out of the same operative facts, as the specific claim elements which were excepted. The majority's narrow reading of Mingus is legally incorrect and takes the case beyond what the court clearly intended and beyond how Mingus has been applied. The majority reading is also in direct conflict with the directions of the CO in his letter to Appellant of November 26, 1995. There the CO stated that a request for stated amounts does not bar Appellant from adjusting the amounts requested in the process of finalizing and certifying the claim. (FF 80.) Appellant responded to that letter.

At issue in Mingus was the effect of an exception to a release by the contractor, which read:

> Pursuant to correspondence we do intend to file a claim(s) -- the amount(s) of which is undetermined at this time.

Clearly the above does not identify, the subject matter of the excepted claim nor the dollars. Some time after the filing the above release and after exchanging correspondence with the Government, Mingus submitted a certified claim. It identified various issues and claimed a specific sum. The CO responded to that submission by taking no action other than returning the claim. The CO said that the reason for the return was that it was untimely received, the contract required claims to be made before final payment and no "claim" as defined by the Disputes section of the contract had been submitted. Mingus challenged that position. It thereafter lost its appeal at the Court of Federal Claims, where that court concluded that none of the claims being put forth by Mingus were submitted to the CO prior to the final payment and payment by the Government barred consideration of any subsequent claims for damages under the contract. The court rejected Mingus' argument that the exception made on the general release was sufficient to put the Government on notice as to the specific claims. The court also held that the Government would be prejudiced to such a degree that it warranted barring the plaintiff's claims as untimely. Finally, the court specifically stated that it did not decide the issue of whether the language contained in the release was sufficient to except the claims subsequently submitted.

Mingus appealed. The appellate court sustained the Govemment decision. However, unlike the lower court, the appellate court rested its decision on the issues surrounding the adequacy of the exception to the release. More specifically, the court stated, "Unlike the Claims Court, we decide directly whether Mingus' asserted claims were barred by the release executed on October 29, 1982. As we stated, the release is what bars the submission of subsequent claims and the effect of the release depends upon whether what was excepted on the release was adequate to constitute a 'claim' under the contract." The court then went on to reject out-of-hand the lower court's reliance on the prejudice issue.

It is the meaning and application of the appellate decision which I find has been read much too narrowly by the majority. Mingus does not lock a contractor into the exact wording and dollars set out in a release. Instead, Mingus allows for reasonable adjustment and amplification of properly excepted claims. The adjustments and amplifications are not without limits, and the criteria which must be met is that changes in dollars and legal theories must arise out of the same operative facts as the matter specifically released. The claims here meet that criteria.

Mingus contains specific language which can only be reasonably read to hold that changes and adjustments to what is excepted in a release are permitted. The Court states:

> Our holding should not be read to require contractors to have their final, certified claim prepared and submitted prior to executing the release required to receive their final payment. But as the Court of Claims observed in Adler Construction Co. v. United States, 423 F.2d 1362, 1364 (Ct. Cl. 1970) cert. denied, 400 U.S. 993 (1971), a case involving claims due to changed conditions and related delays not included in the exceptions to a release signed by the contractor-

> The time to have reserved such claims was upon the execution of the release. . . . Plaintiff's contentions now urged that he lacked sufficient information at the time of the release to frame proper exceptions to reserve his present claims, and that he obtained the necessary data only in the course of discovery proceedings in this actions, do not excuse his failure to state his exceptions covering his present claims in general terms which would have sufficed the purpose of preserving his right to pursue them.

In the above, the Court of Appeals provides that stating exceptions in "general terms" in conjunction with a dollar amount was sufficient to preserve a claim and that the contractor could make later adjustments in both the claim and dollars to finalize its certified claim. The court in Mingus was requiring that in order for there to be an effective exception to a release, the exception had to at least describe the substance of the claim and the amount demanded. The court wanted to avoid what it called the "blunderbuss" release, where the release is so vague and unspecified that the Government could not fairly know what was being excepted. As the court stated, "Vague, broad exceptions as used by the contractor in H.L.C. & Associates and by Mingus in the present case are insufficient as a matter of law to constitute "claims" sufficient to be excluded from the required release. See Vann v. United States, 420 F.2d 968, 972 (Ct. Cl. 1970) (a claim not specifically delineated in an exception to a release is thereafter barred.)

Unlike the vague, broad or "blunderbuss" exceptions rejected by the court in Mingus, the Appellant here has presented detailed claims and arguments in the November 27 letter cited in the release. The substance of its claims as well as dollars associated with its claims were set forth in detail in the body of that letter. The Appellant in its letter stated, "This claim is based upon unreasonable owner caused delays and subsequent suspension of work, delayed the Notice to Proceed, owners failure to make the site available, changed conditions, defective design and plans and specifications and intentional interference in our contract . . ." Appellant then went on to further address the matters in more detail, discussing in turn over the next four pages, issues including the suspension due to staking, the denial of its use of the source site when it submitted its pit development plan on June 26, the suspension of the job on July 12, delays and interruption associated with securing the optional source site and the road design problems in the fall. Turning to quantum, the Appellant in the November letter attributed two specific dollar items to the delays and disruption claim, those were $7,946.25 for remobilization due to having to come back for the next season and $24,889 in increased overhead. In addition, the Appellant addressed the taking of material by Mr. Johnson and Mr. Skogstad, as well as the cost and impact of those actions. (FF 81-82.)

The items addressed and excepted in the November letter related to the same delays and issues now being barred from consideration by the majority. While I agree that no specific dollar was set out in the November letter for the added costs of preparing AW 2 (an adjustment for this, however, was made in Appellant's April 1997 letter), the added costs of preparing AW 2 were a direct result and outgrowth of the "owner's failure to make the site available and the defective design" (the failure to allow adequate time to do the work and the lack of a disposal site). (FF 81-82.)

As the Court of Federal Claims stated in Miya Brothers Construction Co. v. United States, 12 Cl. Ct. 142, 146 (1987), a release does not prevent a litigant from increasing its quantum during litigation of the excepted claim when the increase in quantum does not amount to a "new claim." The court said:

> This court has the jurisdiction to hear and decide the value of each claim. We are persuaded by the holdings in Shea and Spradlin Corporation that once a claim is presented to this court, the value of the claim may increase (or decrease) based upon information gained from the moment the claim is first presented to the government until today, and it may even change tomorrow.

The court concluded that the plaintiff could properly increase the value of its claims notwithstanding how it valued them at the time of execution of the release.

The Government moved for reconsideration in Miya. In responding, the court further explained its position and quoted the following from Shea:

> This Court and its predecessor have consistently held that it is a jurisdictional prerequisite to a direct access suit in this court that the claim at issue be first certified and submitted in writing to the contracting officer pursuant to 41 U.S.C. Secs. 605(a), 605(c)(1). Grad Partnership v. United States, 1 Cl. Ct. 616, 619 (1982); Skelly and Loy v. United States [231 Ct. Cl. 370], 685 F.2d 414, 417 (Ct. Cl. 1982); W. H. Moseley Co. v. United States [230 Ct. Cl. 405] 677 F.2d 850, 851 (Ct. Cl. 1982). However, as litigation in this court includes pretrial proceedings, including discovery, it must be recognized that additional facts may be developed which could increase or decrease the amount of a claim. It would be most disruptive of normal litigation procedure if any increase in the amount of a claim based upon matters developed in litigation before the court had to be submitted to the contracting officer before the court could continue to a final resolution on the claim. In this circumstance, it has been ruled that, after certification is complete, a contractor is not precluded from changing the amount of the claim or producing additional data in support of increased damages. Newell Clothing Co., ASBCA No. 24482, 80-2 BCA ¶ 14,774 at 72,916 . . . .The certification requirement assures that the plaintiff is submitting a claim in an amount it then honestly believes is due and that the data furnished at the time of certification are accurate and complete to the best of plaintiff's knowledge and belief.

Shea, 4 Cl. Ct. at 54 (emphasis in original).

J. F. Shea , Inc. v. United States, 4 Cl. Ct. 46 (1983); Spradlin Corp., ASBCA No. 23974, 81-2 BCA ¶ 15,423.

The court then went on to set out its own explanation, stating as follows in relation to the above quoted material from Shea:

> The court considers this analysis, regarding the assertion of a claim beyond the amount presented to the contracting officer, to be equally applicable to the effect of an increased claim under a release, because the exact amount of a claim is considered irrelevant to the general principle that a monetary claim has been properly excepted through a release. See Tecom, Inc. v. United States, 732 F.2d 935, 938 (Fed. Cir. 1984) referring to Shea on the certification of claims requirement). This court finds no violation in either the letter or purpose of a release to push contractors into being careful and reasonably precise in stating the amount of excepted claims in the release. See id. at 937. The increased amount of plaintiff's claim that was not submitted to the contracting officer for decision does not represent a new "claim." See Curley, Inc. v. United States, 6 Cl. Ct. 274, 276-78 (1984); Spradlin Corp. ASBCA No. 23974, 81-2 BCA ¶ 15,423 at 76, 430-431 (1981) Thus, defendant's alleged distinction between cases involving an increased claim under a release and cases involving an increased claim that was not presented to the contracting officer is meritless. The factual basis for the claims are identical to the claims that were filed on August 28, 1981, after being certified to the contracting officer. Plaintiff has simply presented additional evidence purporting to justify a higher dollar worth of the original claim. LDG Timber Enter., Inc. v. United States, 8 Cl. Ct. 445, 452 (1985) (allowing the presentment of an increased claim "as the result of newly discovered or newly developed evidence.") . . . .

This Board, in its decision in Ronald Adams Contractor, Inc., AGBCA Nos. 91-155-1, 91-208-1, 92-219-1, 93-1 BCA ¶ 25,501, has cited Miya for support in stating that valuation of a claim at the time of release is not necessarily dispositive.

The General Services Board of Contract Appeals (GSBCA) came to a similar conclusion in GARZA Corp., GSBCA No. 13332, 96-1 BCA ¶ 28,120. There the contractor had submitted a claim for an equitable adjustment for excusable delays that it contended were not its direct responsibility. It requested 7 days for temporary power delays and 92 days for an easement grant and permanent hook up delay. It asked for $59,423.59 as an equitable adjustment for extended overhead. Later it added a claim for release of liquidated damages. The claim encompassing these specific items was referred to later as Claim 1. Thereafter, Appellant signed a release which released the United States from any and all claims arising by virtue of the modification or change except as follows. Under the exception GARZA wrote, "Claim #1 - $28,000 Liquidated Damages, $59,423.59 Equitable Adjustment plus all interest due." The CO denied the claim and GARZA appealed. Thereafter, in its complaint, the Appellant adjusted its quantum claim by $20,110.94 "for the direct costs of changes due to the delay in the utilities hookup." The Board looked at the matter and concluded that the additional sum was part of Claim #1 and not a new claim. It stated:

> We consider GARZA's quantum adjustment for $20,110.94 for the direct cost of changes due to the delay in the utilities hookup to be part of the "Claim No. 1" excepted in the release, rather than a new claim. In one case, a contractor amended its complaint to allege delay damages when it had submitted the direct costs, but not

> the delay damages arose out of the same claim as the changes claim: "delay costs are merely additional areas of alleged damages all of which arose from the complaint which formed the basis of appellant's claims to the contracting officer." E.C. Schleyer Pump Co., ASBCA 33900, 87-3 BCA ¶ 19,986, at 101,264. This case presents the converse issue: does the quantum request for direct costs arise from the extended overhead claim for delay associated with lack of access to utilities? We think the same analysis applies here. The claim of $20,110.94 is a claim of direct costs arising from the utilities delay raised in GARZA's "Claim No. 1."

When I apply the full wording of Mingus, along with the reasoning of GARZA and Miya (and the cases cited therein) to the facts regarding the release by D & L, it is clear that the claims being barred by the majority all fall within the umbrella of the matters addressed in the November 27 letter and therefore should not be barred. (FF 81-82.) It is of note that both GARZA and Miya follow the Contract Disputes Act (CDA) model, where there is an extensive body of law that clearly allows modifications and adjustments to claims as to additional dollars and allows additional theories, as long as the matters arise out of the same claim and operative facts as was before the CO. In a CDA claim, a contractor is not precluded from increasing the amount of a claim or producing additional data in support of a claim. Essex Electro Engineers, Inc., ASBCA No. 40553, 91-2 BCA ¶ 23,712, *aff'd on reconsideration*, 91-2 BCA ¶ 23,900. Where later raised elements of quantum arise from the same operative facts in the dispute, there is no new claim. Transco Contracting Co., ASBCA No. 28,620, 85-2 BCA ¶ 17,977. New elements of increased cost such as costs allocable to particular causes or impacts do not constitute additional claims. Norman Engineering Co., NASA-1189-12, 1189-13, 48-0691, 92-2 BCA ¶ 24,900. To the extent that arguments concern the same operative facts, then a court can consider arguments on new theories. Tecom, Inc. v. United States, 742 F. 2d 935, 937 (Fed. Cir. 1984); Glenn v.United States, 858 F.2d 1577, 1580 (Fed. Cir. 1988); Miya Brothers Construction Co. v. United States, 12 Cl. Ct. 142, 146 (1987); GARZA, supra; Christopher D. Constantinidis Construction Co. S.A., ASBCA Nos. 34393, 34394, 90-1 BCA ¶ 22, 267.

To accept the majority's narrow reading in this case, creates a situation where a party by excepting the claim in a release, puts itself in a position, where it is constrained and confined to the narrow limits formed by the precise words it chooses to use in setting out the exception. Releases are typically signed by contractors without bringing in counsel. Following the majority here, the skill in wordsmithing becomes paramount and not what the parties recognize as matters in dispute.

The law favors closing out contracts and entering into releases. That is to be encouraged and not discouraged by fear that a misstep in the choice of words will eliminate a contractor's intended claim or create a new round of litigation. Certainly, a contractor can chose to refuse to sign a release. However, that is not a practical solution as the Government then has the right to hold the remaining balance. What is logical and what I believe Mingus clearly holds, is that the contractor must lay out the general substance of its excepted claims and provide a dollar figure (although it need not be final). Once a contractor does that the claim is reserved and the contractor is permitted to modify and adjust the claim as to dollars and theories of recovery as long as the modifications and

adjustments arise out of the same operative facts which were addressed in the excepted claim. That is all the Appellant did here.

Alternatively, even if the majority is found correct in its narrow reading of Mingus, the facts and law here mandate that the Appellant still must be permitted to proceed on the matters at issue before the Board. The application of a release is not intended to be a technical trap for a contractor. It is not intended to be a means for thwarting what was clearly the parties understanding. Accordingly, there is case law regarding what happens when claims continue to be considered by the Government and when the evidence shows that the parties did not consider or understand the release to bar the claims in issue. See J. G. Watts Construction Co. v. United States, 161 Ct. Cl. 801 (1963).

This record is uncontroverted that subsequent to the signing of the release and through early December, the FS and Appellant continued to talk and correspond as to finalizing the claim and securing a CO decision. That culminated in the Appellant's April 27 letter, which was in response to a deadline set by the FS, demanding that Appellant provide any additional data and finalize its claim. The CO then proceeded to issue his final decision and in doing that addressed and considered all claims raised in both the November and April letters. At no time did the CO say that he could not accept or consider the matters and dollars discussed in Appellant's April 27 letter, which was a refinement of the November letter. At no time did the CO claim that any of the matters discussed in the April 27 letter had not been excepted. (FF 81-85.) Thereafter, Appellant proceeded with its appeal and the processing of litigation. Again, the FS did not raise the release at any time during these proceedings (including briefing), except for one matter which was the issue of idle equipment. In its brief, the FS did contend that the idle equipment claim was a new claim that had not been secured by the release exceptions. There, however, can be no debate that the cost for idle equipment is a delay cost. No one also can debate that delays have been the subject matter of the claims and that damages because of delays was clearly addressed in the November letter and thereafter repeated in Appellant's April letter. (FF 81-84.) These costs were attributable to the same delays that caused the remobilization costs and the extra overhead and one cannot argue that those two items were set forth in the November 1996 letter. These delays had been in dispute both before and after the signing of the release.

The following is therefore not contested on the record. The actions of the CO demonstrate that at a minimum, the FS always considered the claims in issue (excepting the equipment standby dollar claim) to be claims that were not barred by the release. (FF 85.) The decision of the majority would run counter to this clear understanding. As to the idle equipment, as noted above, it is simply a new legal theory and element of damages. Therefore, none of these claims are barred.

If we decide this issue on the intent of the parties, then there clearly is no bar. The practical interpretation of a contract (here what was excepted in the release) as shown by the conduct of the parties is of great weight in interpreting what the parties understood to be the scope of the release. See, Dynamics Corp. of America v. United States, 389 F.2d 424 (Ct. Cl. 1968). Here both parties treated the claims at issue in this appeal as if the claims were not barred by any release. (FF 81-85.)

By concluding, like the majority, that the various claims were not excepted from the release and therefore barred, the Board substitutes its understanding of the release for that of the parties and further comes to a contrary conclusion.

As noted above, the law is well settled even where a release is otherwise effective, there are circumstances in which a claim may still be prosecuted. One of those circumstances is, "where the conduct of the parties in continuing to consider a claim after the execution of the release makes it plain that they never construed the release as constituting an abandonment of the claim, Winn-Senter Construction Co. v. United States, 110 Ct. Cl. 34, 65-66 (1948). . ."; J. G. Watts Construction Co., supra. The action of the parties here put the claims in issue in this appeal squarely within the Watts exception.

This Board has in the past recognized that one must go beyond the mere language. In Ronald Adams, supra, the Board noted that the Government may waive the release requirement in certain circumstances, one of which was when the parties are aware of the matter in dispute, even if its effect is not fully known or quantified. There, this Board cited as authority the Court of Claims in Jo Bar Mfg. Corp. v. United States, 210 Ct. Cl. 149, 535 F.2d 62 (1976), also cited in Mingus. According to the Board in Ronald Adams, "the cited case . . . held that when a CO knows or should know at the time of final payment that the contractor is asserting a right to additional compensation, even if no formal claims have been filed, final payment does not bar consideration." See also Joy Dirt Construction, AGBCA Nos. 87-408-1, 87-409-1, 91-2 BCA ¶ 23,308, *reconsideration denied,* 91-3 BCA ¶ 24,305.

C&C Excavating and Construction Co., AGBCA No. 88-124-1, 89-1 BCA ¶ 21,385, is another case where this Board dealt with Mingus. In that appeal, the Government filed a motion for summary judgment alleging that consideration of Appellant's claims was barred by contract execution of a release for final payment which failed to adequately reserve its claims. The contractor had provided the CO, prior to release, a total cost claim for $762,374.49 based on alleged differing site conditions, changes and unreasonable suspension of work. Later, the Appellant was presented with a release to sign for final payment and in it, the contractor released all claims, "except as herein stated claim filed with Mr. Warren Elliot Contracting Officer, [CO], dated March 17, 1987. Any and all items connected with said claim." The Government in its motion claimed that the release failed to meet either a contract requirement or the Mingus standard. By that point (some time after the appeal) the Appellant had presented 11 separate sets of facts under differing site conditions claim, ten separate sets of fact under changes, and eight under the delay heading. Only the delay portion had a specific dollar figure stated in an amount. The Board rejected the Government's position and found it distinguishable from Mingus. It noted that the claim was before the CO at the time of the release and when final payment was made. It then went on to cite that while total cost claims are not favored, they are allowed under circumstances. The Board then concluded, " to dismiss on grounds that the various claims are not in stated amounts would in our opinion be inconsistent with the decisions allowing total cost claims. In addition, such a ruling would extend Mingus beyond any decision yet issued by the Court of Appeals for the Federal Circuit."

As noted above, the FS, in its brief, did assert that the claim for equipment standby was a new claim and thus not excepted from the release. Thus, I deal with this item separately. The FS is correct that no specific dollars were earmarked for idle equipment in either the November 27 letter or in the April 1997 revision of the claim. However, at all times Appellant claimed compensation attributable to the delayed NTP, to the defective specifications, to the lack of access to the site, to the failure to approve Appellant's pit plan, to the FS issued suspension of work and to the various design errors in the road and had claimed money, albeit under different cost theories due to those matters. (FF 81-84.) The costs for the idle equipment is simply an additional cost element to the damages from the delays which have always been the subject matter of the appeal and which were addressed in the November 1996 letter referenced in the release. An increase in dollars and even a new legal theory, will not deprive the Board of jurisdiction over a claim or portion thereof, as long as the claim or additional dollars arise out of same operative and related facts. Stroh Corporation v. General Services Administration, GSBCA No. 11029, 96-1 BCA ¶ 28,265. That is certainly the case here. Accordingly, none of the claims presented and argued in this appeal by Appellant are barred by the release.

Accord and Satisfaction

The FS claims that even if Appellant is able to prove liability for additional delay costs and for costs of having to use the AW 2 site, Appellant has waived entitlement to any such damages through accord and satisfaction language in Modification Nos. 1 through 6. The FS relies on the following language contained in each modification. "This modification shall compensate the contractor for all work, materials, labor and equipment associated with this change." (FF 76.) The FS says that the language bars Appellant from any relief, absent the Appellant establishing that it specifically excluded the delay and other costs now claimed from the coverage of the above language. The majority agrees. The FS position and that of the majority is not legally correct. It gives the modifications much too broad a reading as to what is covered by accord and satisfaction and incorrectly applies the law.

In a case such as this, the burden is not on Appellant to establish that it excluded certain costs from waiver. Rather, the party claiming release or waiver as a shield, in this case the FS, must establish that what is claimed to be barred was encompassed within the modification and intended to be settled by the parties. In that regard, we start with the language of the modification. It is well established that absent totally clear language of release for all items, a board or court will look beyond the language, to the negotiations of the parties, to determine whether a particular modification is a full accord and satisfaction. Applying the well settled law to the facts involved in the D & L modifications, there is no bar by accord and satisfaction.

First, there is no waiver or release language in the modifications. The modification does not include language such as that in Federal Acquisition Regulation (FAR) § 43.204, which suggests that the following language be used to assure that a modification covers all related costs, "the contractor hereby releases the Government from any and all liability under this contract for further adjustments

attributable to such facts or circumstances giving rise to the 'proposal (s) for adjustment' (except for_____)." The language here does not even come close. It simply says, "This modification shall compensate the contractor for all work, materials, labor and equipment associated with this change." Where, as here, there is no release language, the board must look at the agreement itself to determine its scope. Sawyer Tree Co., ASBCA No. 50545, 99-1 BCA ¶ 30,326.

Through the years there have been many cases dealing with the matter of delay claims and modification language. In Chantilly Construction Corp., ASBCA No. 24138, 81-1 BCA ¶ 14,863, impact costs resulting from change orders were found compensable even though the contractor had executed formal modification agreements covering the changes. The rationale was based on the fact that the impact costs were not mentioned in the modifications and the Government failed to secure a waiver and release of claims from the contractor. In Chantilly, the Government had granted the Appellant 190 days through modifications. The formal modifications compensated Appellant solely for direct costs and included no compensation for extended field or home office overhead and costs. The Government contended nevertheless that Appellant was barred by accord and satisfaction from pursuing the delay damages.

The Board ruled in favor of the Appellant. It found it was not necessary for the contractor affirmatively to reserve his claim. Absent an indication on the face of the modification that it covered more than the specific additional work required by the changes, the agreement settled no other claims. The court noted that to reach an accord and satisfaction there must be mutual agreement between the parties in satisfaction of a claim, citing among other authorities, Brock & Blevins Co. Inc. v. United States, 176 F.2d 73, 76 (10th Cir. 1949).

The Board in Chantilly found that there was no mutual agreement for the reason that there was no meeting of the minds on delay and impact costs. Such costs were not mentioned or considered by the parties during the negotiations leading up to the modifications. The modifications contained no language that would indicate the parties agreed to any such release or waiver. The Board noted that although the Government's chief negotiator subjectively believed that Appellant's proposals included all overhead costs, he was not led into that belief by anything that was said or done by Appellant, nor did he advise Appellant of that belief (subjective unexpressed intent regarding settlement does not bind the other party).

In a case with no release language, where there is a question whether claimed costs were considered when an adjustment was negotiated, the case law holds that absent clear release language, price adjustment modifications are narrowly construed. Dana, Inc., ASBCA No. 33394, 97-2 BCA ¶ 29,184. Without an express disclaimer, a contract provision providing an extension of time does not relieve the Government from liability for delay damages. Fuller Co. v. United States, 108 Ct. Cl. 70, 69 F. Supp. 409 (1948). Accord Cedar Lumber, Inc. v. United States, 5 Cl. Ct. 539, 550, 552 (1984); Alaska Lumber and Pulp Co. Inc., AGBCA No. 82-107-1, 91-2 BCA ¶ 23,824 at 119,370. See also Superior Timber Co., Inc., IBCA No. 3459, 97-1 BCA ¶ 28,736. Also, in Comdata Systems, Inc., ASBCA No. 19893, 77-1 BCA ¶ 12,463, modifications granting extension due to

Government delays were not an accord and satisfaction barring monetary recovery for such delays - the subject of monetary compensation was never raised in connection with the issuance of them and the modifications contained no text clearly barring them. Also in Virginia Electronics Co., Inc., ASBCA No. 18778, 77-1 BCA ¶ 12,393, the Board concluded that a modification extending delivery date does not compromise any monetary delay claims arising from the delay which necessitated the extension, absent clear evidence from the parties intended such a compromise. Garcia Concrete Inc., AGBCA No. 78-105, 82-2 BCA ¶ 16,046 is another case dealing with this matter. There, after first offering the contractor other options, including contract termination, the FS agreed to suspend the contract for 30 days because the CO had not yet obtained a required permit. The Board found the Government liable for delay damages and rejected the Government's assertion that the suspension agreement which had been proposed by the contractor, constituted an accord and satisfaction. In Dana, Inc., supra, the Board ruled that modifications did not cover delay and disruption costs because such costs were not addressed by the parties during negotiation. In A.A. Conte & Son, Inc., ENG BCA No.6104, 96-2 BCA ¶ 28,581, the modification covered only the specific issues addressed in claim and negotiation. In Scott Timber Co. IBCA No. 3771-97, 99-1 BCA ¶ 30,184, the Board held that a modification granting time extension does not bar claim for delay compensation.

The finding of accord and satisfaction requires that there be a meeting of the minds as to what is being settled. "To reach an accord and satisfaction there must be mutual agreement between the parties with the intention clearly stated and known to the contractor." Asbestos Transportation Services, Inc., ASBCA No. 46263, 98-1 BCA ¶ 29,502 at 146,376. Moreover, the FS bears the burden to prove the affirmative defense of accord and satisfaction. Asbestos Transportation, supra; Whitton Construction Co., ASBCA No. 40756 , 94-1 BCA ¶ 26,341. As the Board stated in Dana, Inc., supra.

> Meeting of the minds is an essential element of an effective accord and satisfaction. Mil-Spec Contractors, Inc. v. United States [34 CCF ¶ 75,412], 835 F.2d 865, 867 (Fed. Cir. 1987) quoting Brock & Blevins Co. v. United States [10 CCF ¶ 72,981), 343 F.2d 951, 955 (Ct. Cl. 1965). In addition, "[w]here there is a question whether claimed costs were considered when the adjustment was negotiated, absent clear release language, price adjustment amendments are narrowly construed." Wright Associates, Inc., ASBCA No. 33721, 87-1 BCA ¶ 20,056 at 101,535; accord, Comdata Systems, Inc., ASBCA No. 19893, 77-1 BCA ¶ 12,463 at 60,446-47.

Mil-Spec is not premised on reading purported accord and satisfaction language with blinders. Thus, applying case law, even seemingly conclusive language is not an automatic bar. Here, the language in dispute is not at all conclusive in indicating any agreement as to settling delays. In fact, the absence of language addressing settlement of delays clearly indicates the opposite. Thus, the modifications at best are limited solely to the specifics which the parties discussed and settled. As the GSBCA pointed out in Cardinal Maintenance Service, Inc. v. General Services Administration, GSBCA No. 12829, 95-2 BCA ¶ 27,606:

> Respondent misstates the law. It has long been recognized that alleged conclusive language in a release will not bar consideration of a claim which was clearly not within the contemplation of the parties at the time the document containing the release language was signed. John A. Volne Construction Co., GSBCA No. 2570, 70-1 BCA ¶ 8070; see also Gardner Zemke Co., IBCA No. 2626, 90-3 BCA ¶ 23,604 (citing L. W. Packard & Co. v. United States, 66 Ct. Cl. 184 (1928)). The scope of an accord and satisfaction agreement is determined by the specific language used and the intent of the parties as manifested by the events and communications which preceded execution. Bick-Com Corp., VACAB No. 1320, 80-1 BCA ¶ 14,285; Shaw Metz & Associates, VACAB No. 774, 71-1 BCA ¶ 8679. Releases must be scrutinized to determine the true intent of the parties as shown by the course of action or negotiation. B & M Roofing and Painting Company, ASBCA No. 26998, 86-2 BCA ¶ 18,833, reconsideration denied , 96-3 BCA ¶ 19,306.

In addition, consideration must also be given as to whether the parties continued to consider the claims following execution of the modification. The conduct of the parties is evidence that the parties never understood the modification as settling the disputed matter. Community Heating & Plumbing Co. v. United States, 987 F.2d 1575 (Fed. Cir. 1983); Metric Constructors, Inc., ASBCA No. 46279, 94-1 BCA ¶ 26,532.

Here, the evidence establishes that costs associated with using the AW 2 site as well as the costs associated with the change or source and disposal sites were not the subject of discussion or negotiation for Modification No. 1 (FF 50, 54, 55, 76). Moreover, the evidence is uncontroverted that the parties did not discuss delay or impact costs as to any modifications. Rather, the best the FS could put forth was that it was the CO's subjective belief that the parties were settling all matters. But the CO also acknowledged that he did not take part in modification discussions. Under the law, the subjective intent of a party who was not even involved in the discussions and negotiations cannot bind the Appellant when the Appellant clearly states it did not agree to any agreement as to time and delay damages and there is no evidence which contradicts the Appellant. (FF 51-52, 55, 57, 70-74.)

If the FS wanted to preclude all costs and bind the Appellant as to delay costs, it could have drafted a broader and more effective release and discussed the matter with Appellant. That would have led to a different result. What the majority is doing here is ignoring what the parties actually settled and imposing on the parties an agreement which simply never existed nor was understood to be the case.

As to the FS assertion that the CO and Appellant mutually agreed prior to entering into Modification No. 1 that use of AW 2 as a material source would be approved only at no additional cost to the FS, again there is no credible evidence. The documents relied on by the FS are internal documents that Appellant neither participated in nor knew about. Again, as the CO acknowledged, negotiations with Appellant were conducted by Mr. Clark. In sharp disagreement with the CO, Appellant has stated that he never agreed to waive delay damages and in the case of Modification No. 1, dealing with the pit, intended only to include the costs for the new disposal site. That is reflected in the letter

sent by Appellant with its proposal for $5,300. We thus have an affirmative statement by Appellant, who participated in negotiations, on one hand, to be weighed against, at most, the CO's perception of what was negotiated by Appellant with Mr. Clark. Mr. Clark was at the hearing and if there was an agreement settling delays, then the FS should have been able to elicit that from him. The fact that it did not, verifies that no such agreement was ever made. (FF 50, 54, 55.)

Recently, the Armed Services Board of Contract Appeals (ASBCA) addressed the matter of waiving future claims in Sedona Contracting, Inc., ASBCA No. 52093, 99-2 BCA ¶ 30,466 (in the context of a final release). There, the Board had before it a release which it described as unqualified. The release provided "all liabilities, obligations and claims whatsoever in law and in equity under and arising out of. . ." Nevertheless, the Board stated that "Even where a release is complete on its face and unqualified, as is the case here, we will review the circumstances surrounding its execution in order to effect the true intentions of the parties." Hunt Building Corp., ASBCA No. 50083, 97-1 BCA ¶ 28,807. Conduct of the parties after the execution of a release can serve to show that they never construed the release as encompassing a particular claim. J.G. Watts Construction Co. v. United States., 161 Ct. Cl. 801, 807 (1963). The Board continued that where there was no mention of liability for delay in the "release" language, in the absence of language expressly waiving such liability, the Government was required to "set forth undisputed facts showing that [the] claim [was] encompassed by the release language in the modification." York Industries, Inc., ASBCA No. 44370, 93-2 BCA ¶ 25,592.

Looking at the facts surrounding negotiation in this case, there was neither an intent on the part of Appellant to release claims associated with delay, nor do we see any evidence that the FS thought that was the case. Further there is no accord and satisfaction on the costs now before us. The facts support the finding that neither delay nor any of the direct costs being claimed were matters of negotiation on the modifications nor were any of the matters understood by the parties to be waived and released. (FF 50, 54, 55.)

As to the claim for direct costs incurred in changing the source site, I agree that this matter is not as clear cut a situation as the costs arising from the delays, since Modification No. 1 did specifically have an item for the source site and designated $0. That said, however, as explained below, I find no accord and satisfaction as to the added source site costs and find that Appellant can legally pursue that claim. There is no dispute that Modification No. 1 addresses two separate matters. First it addresses the change in the disposal site because of the failure to have secured the miner's agreement before designating the area. The modification also addresses the substitution of AW 2 for the prior specified source site. There is no dispute that under amount of increase and decrease on the modification, the Government placed $5,300 next to the wording dealing with the disposal site and the notation "$0" next to the wording dealing with the source site change. The $5,300 was solely the amount that Appellant had requested and identified for the clearing and grubbing work associated with the new disposal site. No one has suggested that any of that sum related to the source site and there is no dispute that the Appellant was not paid any compensation for either direct or indirect costs related to changing the source site. There is further no evidence that there was any discussion

as to dollars or as to waiver of claim between the parties as to additional costs which might be associated with the source site. In fact, Appellant has clearly stated that there was no such discussions. The FS has provided no evidence to the contrary, even though its negotiator, Mr. Clark provided testimony at the hearing. (FF 50, 54, 55.)

The conclusion to be drawn is therefore, straightforward. Because there was no discussion and no meeting of the minds, because there is no evidence that Mr. Clark (the negotiator) believed that the modification covered dollars for the source site, and because it appears that all the parties believed that the modification, as regards the source site, was nothing more than granting approval and permission for Appellant to use AW 2, it would be legally incorrect to read the language in Modification No. 1, that it "shall compensate the Contractor for all work, materials, labor and equipment associated with this change," to include or waive any dollars other than those costs associated with preparing and utilizing the new disposal site. On that matter the parties did agree as to direct costs. (FF 50, 54, 55.) Simply put, to find accord and satisfaction as the majority does in this case would modify the clear intent of the parties and substitute the Board's inclination for the legally required meeting of the minds.

THE CLAIMS

To read the majority decision, one would conclude that the FS did a commendable job in putting together and administering the contract, that it was the FS which was going out of its way and bending over backwards to accommodate the Appellant and that all delays on this project were either caused by or were concurrent with delays attributed to Appellant's error in misidentifying the source site area. The majority presents an inaccurate picture of the facts, its decision runs counter to the actions of the FS in granting 320 days of delay (284 of which directly involve events prior to the resumption of work in the spring of 1996) and additionally, the decision ignores the FS's own admissions of FS responsibility, implicit within those modifications. (FF 54, 60, 63, 64, 72, 73.)

The majority decision on the merits is in large measure founded on the premise that all delay on the project was either caused or was concurrent with delays caused by Appellant's initial misbidding of the source site. As is evident from the facts and as is addressed below, the misbidding was not the cause of the delays to Appellant's work. The misbidding did not drive the staking of the road delay (FF 25); did not cause the FS not to stake the channel (FF 27-29); did not cause the FS to have to find a new disposal site (FF 35); did not cause the FS to not comply with the 7-day turn around on the pit plan approval (FF 27-29); and was not the proximate or driving cause of the July 12 FS ordered suspension of work (FF 40-42). Moreover, even if one could conclude (and the evidence says otherwise) that the source site contributed to the delay from June 19 through the FS ordered suspension of July 12, any impediment caused by the source site was removed, when Appellant in its July 12 letter told the FS that it was willing to find its own site and the FS refused by keeping the suspension in effect (FF 43). Finally, the majority fails to recognize that Appellant did not have to have a source site in order to proceed with other contract work. The source site was not critical for performance at the front end of this project. But for other impediments, Appellant could have

proceeded with the road work, an activity it had to complete before it could begin to lay crushed aggregate from the source site. (FF 37.) In order to proceed with road work, however, the FS first had to stake the road, as the FS, not the Appellant, was the designer of the reconstruction. In addition, even with the road staked, Appellant could not proceed, for from the date of the NTP until August 15, the Appellant did not have a disposal site for the material to be generated by clearing, grubbing and initial excavation and shaping of the road (FF 35, 50). The evidence is non-disputed that the disposal site specified by the FS in the contract was in error; was not available until August 15; and, that the FS, and it alone, was responsible for creating that problem (FF 35, 50).

ACTIONS OF FS ACKNOWLEDGING CULPABILITY AND RESPONSIBILITY

In Modification No.1 the FS added 45 days to the contract. In its internal justification the FS stated, "due to Govt delay in construction staking and working out details with mining claimant for a material source site." In the body of Modification No. 1, the FS addressed having to change the disposal site and agreed to pay Appellant extra for that item. The need to find a new disposal site was solely due to a FS error, as was the failure to complete the road staking. (FF 35, 54.) In Modification No. 2, the FS added 15 days, all attributable to either its design errors or its design changes. There was no contractor cause. (FF 60.) In Modification No. 3, the FS added 204 days because work had been thrown into winter weather and thus could not continue until the spring. Nothing in the paperwork surrounding this modification even suggests Appellant culpability. (FF 63.) In Modification No. 4, the FS added another 20 days . This modification dealt with several design errors, one of which was the glaciation problem which Appellant identified in October 1995 and which was not corrected by the FS until the spring of 1996. (FF 64.) Finally, while not issued as a modification, the FS issued a suspension of work order on July 12, 1995, which it refused to lift until August 3, 1995. While the FS has attempted to found its defense on its contention that all delay was either attributable or concurrent with the substitution of a new source site, the record belies the FS position. All else said, even taking matters at a worst case scenario for Appellant, the fact still remains that Appellant could have proceeded without using the HMC 26 source site or AW 2. It could have secured its own site and could have done that well after starting other work, had significant other work been available to it. The suspension was issued and not lifted, because it took from July 12 to August 3, for the FS, through and with efforts of Appellant, to satisfy the miner as to the terms on a disposal site. Again, the disposal site was only in issue because of FS error. (FF 40-44, 48-51.) I cannot see, given the above (not even taking into account other delaying and hindering actions by the FS), how the majority can conclude that the FS has no responsibility for compensable delays or how the misidentification of the original source site can be described as sufficiently material and concurrent so as to negate FS responsibility.

The specifications and actions of the FS on this contract do not reflect a commendable job, but are replete with significant specification errors, misinterpretations of the contract, and attempts to foist responsibility for FS errors and deficiencies upon the Appellant. To ignore that takes this project out of context and portrays the actions of the FS in a much better light than deserved. It also fails to recognize what I clearly find to be a pattern by the FS, of taking strained and hyper-technical

positions in an attempt to avoid any responsibility. A primary example of this was the CO's contention that the Appellant did not "select" the source site properly and had to do it through a pit plan submittal, even though, when challenged, the CO conceded that the contract had no such requirement. Another example is the CO attempting to blame the change in source site decision on the Appellant's misbidding, even though the CO made the decision (on June 12), 6 days before he even learned that Appellant had made an error. (FF 27-29, 30, 34.)

The administration of this contract is replete with FS errors and hindrances. Rather than providing an accurate site plan showing the location of the proposed channel at HMC 26, the FS (as the COR conceded) misidentified the location of the source site and designated a distance in the contract, that put the Appellant at the upper bench and not at the stream. (FF 4, 10-14.) Although the FS intended that Appellant bid on the stream location, it failed to include any specifications or directions as to what to do in dealing with a location near or in water, notwithstanding the proposed channel being on a flood plain and being in the midst of some standing water. (FF 22, A-A.) The FS issued its specification and proceeded with bid opening even though its own staff believed that if the FS held a contractor to a June 24 close date for work at the stream, completing work at the stream was "unfeasible." (FF 5, 12, 31.) These deficiencies and problems could and should have been avoided, but the FS chose not to act. Further, once things began to fall apart, the FS attempted to shift responsibility to the Appellant.

Prior to bid opening, the FS was questioned by the Appellant as to the operation of the June 24 date. The FS soft-pedaled the matter and told Appellant that it was making a mountain out of a molehill. The FS was additionally questioned by other bidders, who also expressed confusion regarding the FS intentions as to the June 24 date. Notwithstanding those inquiries, the FS chose not to issue an amendment or written clarification. Instead, it provided verbal clarification for some of the bidders who called. The CO, however, had no notes, for he only recorded what he considered important, and apparently this matter did not qualify as such. (FF 17-20) Moreover, the CO chose to interpret the June 24 date to preclude any activity beyond that date, anywhere on the HMC site, including the upper bench. That, in large measure, was why the CO decided not to approve the upper bench as a substitute site and is reflected in his July 17 D&F. It is noteworthy that the CO held to this interpretation of the specifications despite the fact that both Mr. Kohlhase, the drafter of the contract, and Mr. Rivers, the FS engineer, disagreed with his interpretation, and each intended and understood the contract to allow the use of upper bench for other activities after June 24. Therefore, the June 24 limitation applied only to the stream area. It is also noteworthy that in his July 17 D&F, the CO said that he had consulted with FS engineers as to the application of the June 24 date. Apparently the CO either did not consult with them or ignored them. Finally, the miner never intended the June 24 date to apply to anything but the stream and that is in fact clear from reading the miner's letter of permission to the FS. (FF 9, 12, 21, 40, 41.)

At the onset of this contract, the FS failed to meet its responsibility to stake the road. It intended and expected to have the road staked prior to issuing the NTP, but did not accomplish that. It then expected to complete the staking by June 19 and that is why (on June 12) it set June 19 as the new

NTP date. But again, it misjudged the time and effort needed. Then, even though it had missed the date and only a small segment of the road was staked and absent additional staking there was little for Appellant to do (therefore not enough to warrant bringing on men and equipment), the FS decided to issue the NTP anyway (that being effective November 19). The FS did that despite having been told the day before, on June 18, that Appellant could not use the disposal site set out in the contract and that a new disposal site for the roadway work had to be secured before work could begin. (FF 3, 25, 35, 36.)

The facts are clear that once the FS changed the date for NTP to June 19, the FS recognized that it had created a dilemma. If it allowed Appellant to proceed at the stream without extending the June 24 date, it would have had to contradict its verbal directions to various bidders. It was unwilling to take back those verbal directions. Accordingly, the only choice open to the FS was to look for another source site. The Appellant simply complied. (FF 12, 13, 40-43, 44-46.) The FS action was not driven by altruistic motives. It was not done because the FS wanted to accommodate the Appellant. It was done because the FS had boxed itself into a corner.

Moreover, the Appellant did not need a source site in order to proceed with work. While that may have been preferred, it was not necessary or controlling. All other things being equal, the Appellant could have proceeded with road work and later secured a source site. However, the FS made that impossible. It made it impossible because the Appellant could not reasonably proceed without sufficient road staking to warrant it bringing on its men and materials. Further, and even more important, the first activities of road work, which are clearing and grubbing, initial excavation and shaping, all create waste material. As of June 19 and until August 15, the Appellant had no access to a disposal site for such road work generated material. In attempting to blame delay on the source site, the FS and majority are elevating the source site problem to a critical level so as to excuse the FS's own failures. (FF 35-37.)

Any fair reading of the facts mandates that the FS issued its suspension on July 12, because work could not proceed until the matter of the disposal site was resolved (FF 35-37). Resolution of the disposal site complicated, drove and extensively delayed the process of Appellant finding a new source site. Independent FS actions drove and contributed to the length of time needed to secure the disposal site. The FS engaged in its own dialogue with the miner and the CO (as reflected in messages) was unwilling to expend any additional money for a disposal site, even though the disposal error was solely that of the FS. Moreover, the miner, knowing the FS needed a disposal site, would not sign off on a source site until it secured concessions on the disposal site from the FS (at the expense of the Appellant). (FF 46, 48-51.)

Once the FS acted to issue the July 12 suspension order, it took full control of the contract. It refused to lift the suspension, even though Appellant said by letter that it would go elsewhere for material. The FS continued to refuse to lift the suspension when the Appellant again asked that it be allowed to proceed in Appellant's July 15 letter. (FF 43-44, 46.) Thus, even if it was possible to conclude that Appellant was somehow responsible for delays up until the suspension order or that Appellant

would have been delayed anyway to that point because of misidentifying the source site(and I find the evidence does not support that conclusion), clearly, when Appellant offered to go elsewhere for material and kept requesting the lifting of the suspension, any delay which follows, must fall on the FS.

The record shows that Appellant could not start on the day the FS finally lifted the suspension. First, Appellant had to order materials and other items and then it took the Appellant, who had been suspended for an uncertain period, several days, until August 11, to bring on men, equipment and material to begin some of the work. This was a reasonable time to restart. Through July, the Appellant attempted to mitigate, by using men and equipment on other jobs, when possible. But it could not fully dedicate those forces to another job because of the uncertainties associated with this suspension. Thereafter, Appellant was occupied from mid-August with other work it had taken on, and resumed in September. Appellant then worked through the fall but could not complete before the onset of winter. The record is replete with discussions and postponed decisions regarding design problems with the slope and with glaciation. Ultimately, the design problem was turned over to FS consultants and engineers, who did not finally resolve the various issues until the spring of 1996. (FF 60-65.)

The above is not intended to be inclusive. However, it provides a very different picture of what happened on the project, from what one derives from reading the majority opinion.

The FS is Responsible for Delays:

There are three basic segments to the Appellant's claim. First, there is a direct cost claim for the additional clearing and preparation costs Appellant incurred because of having to use the AW 2 site instead of the stream area. Second, there is a claim for several items associated with the taking of Appellant's processed material. The third, and the claim with the greatest dollar impact, is the claim for delay damages caused by FS errors and actions. Rather than discussing the delays in conjunction with the individual Schedule issues, which is the format followed by the majority, I will instead address the delays on an overall basis and thereafter rely on this analysis when later discussing specific dollar elements.

The first FS-caused delay on this project was the delay from June 12 to June 19, when the FS chose to postpone issuing the NTP, after directing Appellant to appear at the pre-work meeting. The FS postponed its intended NTP because the FS had failed to stake the road as called for in the contract and instead had only completed a small segment. The FS conceded responsibility for this delay in Modification No. 1 and through testimony of Mr. Clark and others. (FF 25, 36.)

A delay in meeting an estimated NTP date does not in and of itself mandate finding compensable delay. By its nature, an estimated date is not a guarantee. However, actions of the Government can make what previously was an estimate into a binding commitment. That occurred here. On May 24, 1995, the FS issued a letter in which it confirmed the Notice of Award to Appellant and created a

binding contract. In that letter, the FS said that a post-award conference would be held to discuss the contract specifications and other matters. The FS also stated, "Your Notice to Proceed will also be issued at that time. We will contact you to establish the place, date and time for this meeting. Work cannot start until you receive an official notice to proceed." The FS then set the post-award conference for June 12. (FF 2, 23.) Appellant relied on that and was prepared at the June 12 meeting to accept the NTP and begin. The FS, however, decided to postpone the NTP until June 19, because it had not staked the road as it had planned. It based the new date on its belief that it would have the staking completed by that time. Had the FS staked as promised, Appellant (not yet knowing that it had no disposal site) would have been able to proceed with the clearing and grubbing and other initial road work. It did not need a source site in order to begin. (FF 25, 26, 32.)

This contract had a short time frame of 120 days. The parties knew that the work had to be completed before the onset of winter, or otherwise, portions would have to wait for the next spring. (FF 2.) When looking at a delay involving the NTP, one of the issues is the reasonableness of the Government actions in relation to time and the overall work required on the contract. See Ross Engineering Co. v. United States, 92 Ct. Cl. 253 (1940); L.O. Brayton & Co., IBCA No. 641-5-67, 70-2 BCA ¶ 8,510, and Head Construction Co., ENG BCA No. 3537, 77-1 BCA ¶ 12,226. While the FS has attempted to use the source site as its shield for avoiding delay responsibility, the evidence is undisputed that Appellant could have performed other work before securing a source site. (FF 32.) It could not, however, reasonably start without a disposal site, nor had the FS completed sufficient staking to warrant Appellant bringing on personnel and equipment. There is no evidence that any part of the delay from June 12 to June 19 was Appellant's responsibility. To the contrary, the evidence establishes that Appellant was prohibited from starting without the NTP and was thus put into a holding pattern from June 12 to June 19. For the source site problem to serve as a concurrent delay, the FS would have to show that Appellant was equally stopped because it needed a source site. The fact is that the FS cannot show that. Rather, Appellant could have proceeded with significant road work, provided (1) it had the NTP; (2) once the NTP was issued, the FS had staked enough road to warrant the Appellant bringing on men and equipment; and, finally (3) the Appellant had somewhere to dispose of the material to be generated in the early road work tasks. There was no concurrent delay here. Therefore, Appellant is entitled to 7 compensable days from June 12 through June 19 and thereafter entitled to the days from June 19 to the suspension on July 12. (Appellant did not learn that the FS finally completed the staking until July 15 and at that time it still had no disposal site). (FF 25, 26, 35-37, 43.)

June 12 Meeting and Decision to Find Alternate Disposal Site

As noted above, the FS, after award, scheduled the pre-work meeting for June 12. As explained in the Findings of Fact, the FS designated optional source sites, which a contractor could choose to use on this project. One of the requirements associated with using an optional site was for the contractor to select its disposal site. Although having a disposal site was not immediately critical to begin performance at some point, after road work had begun, Appellant would have had to secure a source site, as a precondition to laying aggregate. (FF 36, 37.) Throughout this appeal, the FS has ignored

the fact that the source site was not immediately critical. The FS has done that because source site is the linchpin of its concurrent delay defense. The FS contends, and majority accepts, that because of the bidding error, all delays up through and including August 2, is Appellant's responsibility.

I do not dispute that Appellant made a bid error. While I can see how Appellant was confused by a less than clear specification, I also find that at a minimum, the language as to location of the site was a patent ambiguity, and Appellant should have inquired. That said, however, I strongly disagree that Appellant's actions and error in bidding was, in any manner, the proximate cause of the delays involved in this claim. How Appellant bid clearly had nothing to do with the FS decision to seek a new site. Since the majority opinion and the FS defense contend otherwise, I find myself compelled to address matters surrounding the source site, even though the evidence establishes that other more critical work was what caused the delay. The facts are that the source site has nothing to do with the June 12 to June 19 postponement of the NTP; it does not excuse the FS failure to stake the channel as required in the contract; it does not excuse the delay by the FS in responding to Appellant's pit plan; it does not excuse the FS refusal to lift the suspension when Appellant offered to go elsewhere; and, it does not excuse the design problems which caused Appellant to return in the spring of 1996. (FF 5, 10, 26, 29, 30.)

The contract specified that several Government source sites were available for contractor use. Appellant opted to use the site designated as HMC 26. Critical to the start of any work at the HMC source site, was the following language set out at section 611.02 of the specifications. (FF 4, 5, 26.)

> If this source is selected by the contractor a channel will be staked in the field by the FS.

That was to be the contractor's first step as to using HMC 26 and is reflected as such in the sequence set out in the specifications. The sequence first calls for selection, then calls for the FS to stake the channel in the field; and, then calls for the contractor to submit its pit development plan (a requirement of which is to set out the location for the source site within the FS designated HMC 26 area). (FF 5, 29, 30.) The potential source area at the stream covered an area running from 100 to 250 feet between the existing creek and a rise to the upper bench. Absent the FS staking the channel in the field, there was no way for Appellant to know where, within the rather large area, the FS wanted the source site channel to be located. Appellant was not free to place the channel wherever it wanted. That was clearly to be determined by the FS in the field and certainly a task that needed to be done before Appellant could submit a pit plan using the channel. (FF 5, 10, 29, 30.)

The CO, as well as other FS officials, admits that on June 12 the Appellant said it wanted to use HMC 26 as the source site. Appellant thus met its obligation under Section 611.02. No one was confused as to the Appellant's intention. (FF 26.) However, the FS did not stake the channel and in defending that action, the CO claimed that the Appellant "only indicated" it wanted to use HMC 26 but did not "select it." The CO said that selection could only be done by submission of a pit development plan. However, when asked where the contract said that, he conceded it did not. He

was grasping at straws. The Appellant made its selection. Further, it follows that until the FS staked the channel, Appellant could not proceed in that area. To conclude otherwise would render meaningless the plain language of the contract as to staking and progression of the specifications which clearly have FS staking as a predicate to submission of a pit plan. Such a conclusion would also have the Appellant and not the FS determining the "channel to be staked in the field." (FF 5, 27, 30.)

In addition to the above, the CO presented as an another defense to its failure to stake, an equally strained alternative. The CO claimed that the Appellant was responsible for making the FS go to another source site, because the Appellant did not have a crusher at the site on June 12. Testimony from the CO establishes that he concluded on June 12, that Appellant was not ready to start and therefore, Appellant could not finish the stream by June 24. The CO concluded that the use of the stream was impractical and it was on that basis, coupled with the fact that the CO had told other bidders that he would not change the date, that the CO decided on June 12 to seek a new source site. (FF 29, 31, 41.)

To understand the above, it is important to recognize that prior to and at the time bids were opened, the FS had such serious doubts as to the adequacy of the specifications dealing with the HMC source site, that prior to bid opening, the FS discussed taking the June 24 date out. The CO, however, opted to let it stand, notwithstanding that the CO and other FS officials knew that if the FS stayed with the start date of June 12 and enforced the June 24 limitation, that the contractor could not finish its stream area work. Prior to bid opening, FS engineers had described performance within the stated (June 24) window as "unfeasible." The CO stated in his testimony that on June 12, 1995, the date of the pre-work meeting, he considered it impractical. (FF 2, 29, 46.) The FS knew there had been confusion among bidders as to the effect of the June 24 date, yet, the FS chose to leave the solicitation as it was because, as the CO explained, the FS had verbally told some bidders that the date was going to be enforced. There was no written amendment or clarification. (FF 12, 31, 40, 41.) Finally, the FS elected to enforce the June 24 date, even though the reason for the date and choice of that location, a fish enhancement project, was no longer viable. The FS chose to apply the June 24 limitation to the entire area of HMC 26, including the upper bench, even though that was not what the miner said, nor how the FS drafting officials understood and read the contract specifications. (FF 11, 33, 40.) The FS had the right to leave the June 24 date in; however, that right does not relieve it of responsibility for the compensable consequences.

There is therefore, no question, giving the FS all benefit of doubt, that the FS understood or should have understood on June 12 that once Appellant said it wanted to use HMC 26, the FS had an obligation to immediately stake the channel, or otherwise Appellant could not possibly prepare the pit plan and proceed to start operations. Once that was delayed, even for a day (and the CO said that on June 12 he considered completion impractical because the crusher was not there), the FS by not staking made it impossible for Appellant to use the site. (FF 3, 32, 40, 41.) Had the FS staked the channel, then we might be arguing over impossibility and other matters; however, the FS never staked and instead postponed the NTP to June 19, a date when everyone agrees, it was impossible

for Appellant to use the stream. (FF 32.) How the majority can conclude, given these facts, that the Appellant caused the delays to the job because of the source site, is beyond my understanding.

I cannot here decide how Appellant would have chosen to proceed if it had been given the option of proceeding with the stream area. Overriding that, however, is that Appellant could have opted at that point to go off site. But in any case, a delay in June from starting the site, would not have prevented other road work (the work unfortunately that was independently held up because of the failure to stake and lack of notice to proceed). Thus, the FS decisions not to issue the NTP; not to stake the channel; and, then not to change the June 24 cut off date, made it impossible for Appellant or any contractor to use the HMC 26 stream site. It is universally agreed that it was not possible to complete the work at the stream, once a June 12 or June 13 start was eliminated (which occurred at the end of the June 12 meeting) and once the CO decided to go elsewhere and postpone the NTP. (FF 31, 32.)

It is in the context of the above that I must look at the actions of the parties on June 12. The FS knew it was faced with an untenable situation. If it was to permit the contractor to proceed at the stream, it had to change the June 24 date. It was unwilling to do that because of what it had verbally told other bidders. It therefore, through the CO, made the decision not to stake the channel and further initiated the process of looking for a new site to replace the "unfeasible" site that had been specified. It is particularly critical here to point out that at the time the FS made its decisions on June 12, it was not aware and did not know that Appellant had misread the specification as to the source site. The FS did not learn that Appellant read HMC 26 as the upper bench until at best June18. In fact at the June 18 site meeting, the first place that Mr. Clark took Appellant was the stream. There, it became apparent that Appellant had not bid with the stream in mind, but instead, on the basis of the upper bench. Therefore, and without any doubt, at the time that the CO made his decision on June 12 to find another source site, the CO did not know how Appellant had bid. Thus, the decision to change sites had nothing to do with any error in Appellant's bid. (FF 12, 26, 27, 33.)

As noted earlier, the CO put forth a second alternative for why Appellant was responsible for the need for a new site. The FS asserted that Appellant was obligated to have a crusher on site and ready to proceed on June 12, and that Appellant's failure in that regard, was the cause of the FS deciding to go to a new site. The FS argument is illogical, factually incorrect and has no contractual basis. First, there is no provision or contract requirement which in any way obligates Appellant to have a crusher on site before or on the day of the NTP. In fact, the contractor has 15 days after NTP to begin work. As of June 12, even had Appellant bid on using the stream area, it would not have been logical to have a crusher on site. First, Appellant could not know until the FS staked the channel, where within the stream area it was to dig the channel. Second, the contract required that once the selection was made and the channel staked, the contractor was to provide a pit development plan which was to be reviewed by the FS (the FS had 7 days to accept or deny). Third, the contractor had to test the material and have it approved. (FF 39.) Since the crushing subcontractor

was local, it would have made no logical sense to have him on site until the above was at least underway, if not approved. This attempt to make the Appellant responsible is unreasonable.

In regard to the crusher, the majority points out that the crusher subcontractor said at the June 18 meeting that he did not want to work at the stream area. While that is correct, it is clearly not dispositive, if even relevant. Again, the crusher was not a factor on June 12, the date the FS postponed the NTP to June 19 and the date the FS decided to look for a new site. The FS first contact with the crusher subcontractor was on June 18. What the crusher subcontractor wanted to do and what he said on that date is therefore not important. It would only be important if the FS had not decided to change the site. Then, if Appellant had refused to proceed with the stream, something which never occurred here, that would need to be considered. However, the FS chose to go elsewhere and did that well before the FS had any contact with Appellant's crushing subcontractor. (FF 6, 25, 30-32.)

On June 18, a second bombshell dropped, which the evidence shows drove the delays through July and into August, and which when looked at objectively, was the real justification for the FS issuing its suspension order on July 12. At the June 18 meeting, during a discussion of the specifications, the FS and Appellant learned that the FS had failed to secure the permission of the miner to place any disposal on the upper bench of HMC 26, the area the FS had designated in the contract for disposal of the material generated by the road work. This stopped any possible progress on the job. It is axiomatic that even had the FS completed sufficient road work staking so as to make Appellant's start reasonable, Appellant still could not have proceeded. It could not have proceeded because it had no place where it could dispose of material generated by that work. The first activity of road work is clearing and grubbing and then shallow excavating. All this creates disposal material. (FF 35, 36, 50.) Inexplicably, both the FS and majority ignore this critical issue.

Although the FS still had not staked most of the road, and although it had no disposal site for the Appellant to use, the FS issued the NTP on June 19. What work the FS thought Appellant could do is a mystery. The NTP was a hollow action but it did start the time running. As of June 19, Mr. Clark confirmed that the road was not sufficiently staked to justify Appellant bringing on crews. (FF 36, 37.)

The Appellant thus could not move forward on the road. As to the search for a source site, the FS then continued to "consider" what to do. At the June 18 meeting both the miner and the COR indicated that they did not have any problem with Appellant proceeding on the upper bench, with the COR Clark, even indicated to the Appellant, that he thought the FS would approve its use. However, any decision as to use of HMC 26 was tied in with the CO's concerns about holding to the June 24 limitation on work. (FF 39-42.)

As of June 24, the Appellant still had not received an answer regarding whether it could proceed with using the upper bench, as had been discussed with the COR on June 18. The Appellant attempted to jump start the matter by submitting to the FS a pit development plan for the upper bench, which

the COR received on June 26. The contract specified that once the Appellant submitted a pit development plan, the FS had 7 days to either accept it or deny it. For some reason the CO did not get the plan from the COR until June 28. The FS did not reject the plan out of hand, but continued to consider its options. The CO admitted that he seriously considered using the upper bench but vetoed it because the CO believed that the contract specified that no work could be done anywhere on HMC 26 after June 24 and that is what he had told inquiring bidders. (FF 38-41.) He made that decision despite the fact that both Mr. Kohlhase and Mr. Rivers of the FS did not read the contract to prohibit use of the upper bench after June 24. (FF 40.)

Appellant did not receive a response to his pit development plan within 7 days (by July 2), as required by the contract. It finally received the FS response on July 12, in a letter where the FS told Appellant it could not use the upper bench and told it that a new source site, at a location separate from HMC 26, must be secured. It had taken the FS 10 days beyond the 7 days set in the contract to respond to the Appellant's pit plan. Even if the source site problem can be laid at Appellant's feet and even if it can be shown that the source site was the task driving the schedule, then in either situation, the 10 extra days it took the FS to review the plan warrants a 10-day extension to the contract. (FF 39, 40, 49, 50.)

In addition to denying use of the upper bench as a substitute, the FS then issued a suspension of all work on July 12. At that point, Appellant was prohibited from proceeding. The FS justified the suspension on the need to secure a new source and new disposal site. The suspension was for an indefinite period. By this point, on July 10, the FS had finally completed the staking. However, since no work could proceed under the suspension order, the completion of staking did nothing for the Appellant. The suspension was not lifted until August 3 (FF 40, 50).

During this time frame, another critical action took place which further demonstrates the unreasonableness of the FS actions and its culpability as to the delays. By letter of July 12, 1995, the Appellant responded to the CO's July 12 letter ordering suspension. The Appellant asked again to use the upper bench but also stated its willingness to look elsewhere for a source site and asked that it be allowed to proceed. (FF 43-44.) In direct regard to the suspension and in an attempt to move forward with work, the Appellant in pertinent part stated; (FF 25, 35, 40.)

> The fact is that you allowed this project to be bid with defective specifications, i.e. CF SPS 611. And now by denying us the use of this optional government material source you are attempting to shift the burden of the increased costs to us.
>
> Furthermore, we believe that we have many more options than those suggested in your letter. The government can provide another source in close proximity to Hope Mining Claim No. 26, we can find our own source and file a claim for changed conditions, we can use one of the other government sources and file a claim for increased costs, etc.

> We wish to complete this project and hope that you will be reasonable and reconsider your decision. Also please be advised that we have been delayed because the staking that was to be complete by June 17, 1995 was not complete until July 10, 1995. And the contract states that our pit development plan will be approved or disapproved within 7 calendar days.

(AF 74, 75; FF 39, 47.)

The FS, however, took no action in response. It did not lift the suspension nor allow the Appellant to go elsewhere to secure material. The suspension stood until August 3, 1995 (FF 50). Left with no choice, the Appellant proceeded to meet again with the COR and on July 15, 1995, met to try to find a source site so that it could continue with the project. (FF 45-46.) From July 12 forward, the work was stopped because of the FS suspension order. Under any scenario, once the Appellant offered to secure its own site, independent of AW 2, and asked that the FS reconsider its action and allow Appellant to complete the contract, the source site (even if it was an issue) should no longer have been an impediment. At that point the FS was obligated to allow the Appellant to go elsewhere and to lift the suspension. The FS did not. Therefore, any delay after July 15 was attributable to the FS refusing to lift the suspension.

One might ask why the FS did not simply lift the suspension. The answer in my view is obvious. That would not have solved the problem of the disposal site. While lifting the suspension may have allowed Appellant to proceed with working on a pit site, the project would still have been delayed. Appellant could not proceed with the road work because it had nowhere to dispose of material which it would generate in the initial stages of the work. Clearly, the need to find a disposal site became the driving issue in relations between the parties, and the miner, now with leverage, coupled agreement on the disposal site with the source site. The miner was looking for concessions, which included having the contractor clear an entirely new area. While the Appellant struggled to satisfy the miner, the FS held its own negotiations with Mr. Johnson. Finally, by August 3, the miner had been satisfied and he agreed to let the FS use AW 2 for the source site, however, part of the bargain required the Appellant to clear a new site HMC 14 for the disposal area. Internal FS correspondence confirms that the disposal site was the real impediment to an agreement with the miner. (FF 45-51.)

Given the facts above, I conclude that the actions and inactions of the FS as to not staking the road caused a 7-day delay from June 12 through July 19. The lack of road staking then continued to impact and delay the project through July 10, when the FS finally completed the staking. In the midst of that, the lack of a disposal site, in conjunction with inadequate staking, became the primary impediment to work and the disposal site ultimately drove the delay from June 18 through August 3. During that time and as a direct result of the disposal problem, the FS directed suspension and refused to lift the suspension, even when Appellant offered to look elsewhere for a source site. The FS has shown no concurrent delay, which excuses it from its culpability. Finally, the FS is responsible for an additional 8 days from August 3 to August 11, as a ripple effect, for the time Appellant needed to bring its forces onto the site, after the FS finally lifted the suspension order. I

find the time between August 3 and August 11 to be reasonable for that effort. Further, Appellant had been using its personnel and equipment, where possible, on other jobs so as to mitigate damages and should not be penalized for those steps. (FF 53-59.)

Appellant worked starting on August 11 but ceased work on August 17 and did not substantially restart until September 11. While Appellant asks for idle equipment costs for days from August 17 to September 11, I do not find that Appellant is entitled to that compensation. Although, the Appellant contended that the delay was caused by the scheduling of the crusher subcontractor, which had to be changed because of the earlier FS delays, the fact remains that in mid-August, the crusher subcontractor first started with screening work for the Kenai Borough project and did not begin crushing for this project until the Kenai Peninsula work was essentially completed. (FF 53, 56-60.) While Appellant established that alternative crushers may not have been available, Appellant has not established that it was precluded during this time from other portions of the road work. Crushing did not have to start in order for road work to proceed. (FF 53, 56, 101.) Thus, to the extent that Appellant did not work from August 17 to September 11 that was at least in part, its election.

As to delays from September 11 through the stop of work in early November, the FS granted 20 days in Modification No. 4 for design changes and errors, most of which occurred in the fall of 1995. Also, the record is clear that the Appellant identified design problems with the slope and glaciation in the fall, Mr. Clark felt that the concerns were justified and the FS engaged in its own reviews as well as secured views from consultants. All this caused Appellant to jump around and adversely affected its progress. Design issues were not resolved until the spring of 1996. (FF 61-65.) In addition, 15 of the days granted under Modification No. 2, again specifically related to work all performed in the fall. (FF 60.) The FS granted 204 days in Modification No. 3 for winter weather delay. These time extensions indicate FS and not Appellant culpability. (FF 60-65.)

As the Armed Services Board noted in Dana, supra, in relation to a similar set of modifications and what those modifications meant as to culpability:

> However, appellant seeks no additional time beyond that already granted in bilateral modifications. In this context, respondent's granting of the time extensions "amounted to a recognition by it that the overall project was delayed to that extent and an administrative determination that the delay in question was not due to the fault or negligence of appellant. It also raised a presumption, subject to rebuttal, that respondent was responsible for the delay." Robert McMullan & Son, Inc., ASBCA No. 19023, 76-1 BCA ¶ 11,728 at 55,903; see also Page Construction Co., ASBCA No. 30266, 89-1 BCA ¶ 21,488 at 18,254-55; Hoyer Construction Co., Inc., ASBCA No. 32178, 87-3 BCA ¶ 20,184 at 102,157.

To suggest, given the facts and the law that the FS is not responsible for Appellant having to come back for a second season, is completely unwarranted.

Two final points need to be made. The FS says, and the majority accepts, that even if the FS was responsible for some of the delay, then Appellant is still responsible for part because it added to the delay because of its negotiations with the miner over the substitute site. (FF 29, 30, 48, 51.) This is clearly not supported by the facts and again demonstrates the FS approach of asserting a defense, regardless of whether it is founded on fact or not. The record shows that problems with the miner all involved the disposal site portion of his demands. The FS knows, and it is reflected in the FS internal correspondence, that this was not Appellant's responsibility and its arguments to the contrary, clearly put its credibility into issue. (FF 48-51.)

Finally, I must comment as to the majority's acceptance of the NEPA review as an excuse for finding FS delay. The evidence shows that even if Appellant were responsible for the FS securing a new site, then at a minimum, its offer of July 15 to go elsewhere would have negated any NEPA question. More important, however, I have serious concerns about administration of the archeological survey matter. I have serious questions as to why it took the FS until August 3 to designate it complete. Its juxtaposition with problems associated with gaining agreement for a disposal site, raise more questions then are answered. Mr. Johnson pointed out that it had already been done. Additionally, I find it inexcusable and unreasonable that the FS justifies a delay until August 3, on the basis of a task (claimed to involve six people) which took a total of 3.5 hours combined field and administrative work to perform (excluding 5 hours travel time). (FF 51.)

Work was stopped in November 1995 for the winter and then resumed the next season. (FF 63-65.) Appellant has not claimed delay costs associated with the spring, other than as part of its Eichleay calculation. I reserve my discussion of the spring time frame, for the Eichleay portion of this decision.

Calculation of Costs and Entitlement on Non-Delay Issues

Source for Adjusting Equipment Costs:

Before addressing the dollars in the specific cost claims, it is worthwhile to first settle out the dispute over what rates were to be used in calculating both idle and active equipment. The FS used the Forest Service Estimating Guide (Guide) and the Appellant used the Corps of Engineers' Handbook (Handbook). During the actual project, Mr. Clark represented the FS in negotiating changes. He used local rates rather than the Forest Service Guide. (FF 87.) In many instances, the Guide did not have the same piece of equipment listed as that used and identified by Appellant. In those instances, the FS made substitutions of similar equipment. Finally, while in most instances the FS challenge centered on the Guide, that was not the case for standby costs. There, the FS identified errors in Appellant's use of the Handbook. That was the only instance where the FS showed errors as opposed to challenges to reasonableness. Thus, but for idle equipment, where I adopted the FS rates, the rates used by the Appellant were accepted. (FF 104.)

SCHEDULE 1

Appellant claims it is entitled to $21,513.75 for the additional costs it incurred in preparing AW 2 versus what it would have cost to prepare the pit site at the upper bench. The question of entitlement rests on whether the FS caused Appellant to have to utilize a source site that was more expensive to prepare than what Appellant would have expended had it been able to perform as specified in the contract. There is no question that the FS changed the source site to AW 2 from the stream area specified in the contract. For purposes of this claim, the measure of damages is what it cost Appellant to prepare AW 2 as opposed to what it would have cost had Appellant performed at the staked channel, in accordance with the contract. Therefore, the parties' analysis of comparing AW 2 and the upper bench is only somewhat helpful. The evidence does show however, what Appellant expended at the upper bench and further shows that it would have been more expensive to conduct operations at the stream than at the upper bench. That is taken into account in my analysis. (FF 22, 31-32, 34, 88-91.)

The majority denies this claim because it says Appellant had no right to use the upper bench and therefore, cannot claim additional costs. As set forth in detail in the entitlement discussion, how Appellant bid played no part in the decision of the FS to change the location. Therefore, to the extent a FS change caused Appellant to expend more than he would have had Appellant been held to the contract, Appellant is entitled to relief.

While neither party developed a specific dollar figure for the cost of performing at the stream, versus the cost of preparing AW 2, I find that AW 2 involved significantly more clearing costs than that which would have been necessary at the lower stream, an area without heavy vegetation. Those additional costs are thus an extra for which Appellant is entitled to be compensated. However, as to the non-clearing costs or added development costs at AW 2 (the dozer and excavator), I do not find that Appellant is entitled to compensation. I find that those costs must be offset by additional costs the Appellant would have incurred by having to conduct its operation from the stream area. As was pointed out by Appellant's crushing subcontractor and by Mr. Smith, the stream area presented greater difficulties than the upper bench in a number of areas, including access and the actual crushing operation. Accordingly, compensation is limited to the labor and equipment costs for the hydroaxe and chainsaws used in the clearing operation. (FF 10, 32, 88-91.)

The record shows that Appellant spent 10 to 12 hours on clearing, which was not related to clearing the pit area. Neither party identified how much of the 10 to 12 hours was attributed to the hydroaxe and how much for the chainsaws. I therefore split the 12 hours equally between the two categories. Accordingly, I allow 51 hours for the laborers with chainsaws (57 hours - 6 hours = 51) at $48 per hour and 47 hours for the hydroaxe (53 hours - 6 hours = 47) at $100 an hour. The total is $7,148. To that I add 25 percent for OH and profit of $1,787 for a total recovery of $8,935. (FF 88-91.) I use the Appellant's rates rather than those of the FS. I do that because both sets of estimates are based on guide books which are an aid to estimating; many of the rates used by the FS are based on "comparable" rather than the same equipment; and the differences are not substantial. Further, the FS has shown no flaw in Appellant's rates (as contrasted with what it showed on idle equipment

rates) other than that the FS believes its rates are more accurate. Finally, throughout the project the FS accepted Appellant's rates and during negotiations, the rates from the FS guide were not used by the COR, the primary FS negotiator. (FF 87.)

SCHEDULE 2

I find that the FS poorly handled matters relating to Appellant's claim for cost to replace material used in the Al Johnson road and Appellant's claim as to the materials taken by Mr. Skogstad. The FS should have notified Appellant prior to the removal of material, which it did not. Nevertheless, the facts are clear that the material used by Mr. Johnson was excess material, which if not used, would have simply remained at the site. The Appellant had no ownership interest, as the terms of Appellant's permit gave ownership to the FS of any excess material. Since Appellant did not have to purchase or haul material to replace the Al Johnson road material, it suffered no damage. The fact that Mr. Johnson or even the FS may have been unjustly enriched, because it was able to use processed material, is not a basis for the Board awarding damages. Nothing the FS or Mr. Johnson did here caused Appellant to spend any more than it otherwise would have. I come to a similar conclusion as to the 500 cubic yards (not the 200 cubic yards of D-1 material) which Appellant says were sold to Mr. Skogstad, for again there was no evidence that Appellant had to replace that material. Thus, I find no entitlement for the $24,450 claimed for material used in the Johnson road. (FF 66-69.)

Appellant has claimed $5,000 as entitlement for the 200 cubic yards of D-1 material, which was taken from Appellant's stockpile by Mr. Skogstad and which it did have to replace. Appellant is entitled to the cost of having to haul that replacement material and the other incidental costs, all of which would not have been incurred but for the taking of the material. (FF 70-71, 96-97.)

The majority has found otherwise regarding the 200 yards of D-1 material. The majority says that it finds the evidence less than persuasive that 200 cubic yards of D-1 was taken. I strongly disagree and find the majority's position to lack a foundation in the evidence. The Appellant stated that 200 cubic yards were taken. That is reflected in early correspondence, including Appellant's letter of May 14, 1996, written almost immediately after the discovery of the missing 200 cubic yards. In that letter Appellant said his figure was an estimate. The material was no longer there. The only evidence which even approaches a challenge is the statement of the station Forest Service Engineer stateing that he was "not convinced" that material was missing from the stockpiled rock in issue. This same engineer, however, also conceded that he had not seen the stockpile prior to his report that the material was missing. His testimony is pure speculation. I cannot fathom how on the basis of the record here, the majority concludes that Appellant has not met its burden. Further, there is no question that Appellant did go to an offsite source to secure the needed 200 cubic yards and provided that in the spring of 1996. It is illogical to conclude that Appellant would not have had the material (what it reported was stolen) completed by its crusher in 1995 before the crusher moved off the site. (FF 70-71, 96-97.)

The majority has also rested on a legal defense relating to the permit which allowed the Appellant to take material from the site, and on the basis of the Permits and Responsibilities clause. The majority says that under the clause the Appellant is responsible for material at the site until accepted. The majority says it sees no action by the FS that would render it responsible.

I do not dispute the majority reading of the Permits and Responsibilities clause; however, that clause must also be considered in conjunction with the legal principle that the Government may take no action which would unreasonably hinder a contractor's performance. Here the FS entered into a contract with Mr. Skogstad, which for a fee gave him access to the same pit as that of the Appellant. Absent the FS entering into a contract for sale of material to Mr. Skogstad, he would not have been on the site. Moreover, the FS did not notify Appellant of the sale to Mr. Skogstad, or of his removal of material and thus the Appellant had no reason to suspect that the Appellant's processed material would be at risk. We are dealing here with a pit site, in the winter, in Alaska. This is not a construction site where one can put up a fence for reasonable security. This matter must be treated with some rule of reason and thus compensation is warranted. Here, the FS created a situation where for FS profit, it put Mr. Skogstad into the same area as Appellant. The FS did not monitor Mr. Skogstad's operation nor did it even advise Appellant that another contractor was now on site. Under the circumstances, I find undue hindrance and rule in favor of Appellant. (FF 70, 71.)

The FS, however, raises a valid question as to the reasonableness of Appellant's claim that it took 40 hours for four belly dumps to travel a round trip of 50 miles each. The FS says that if there is entitlement, then at best Appellant is only entitled to a total of 5 hours for all four trucks. I agree that 10 hours per belly dump appears excessive. While this inconsistency was first raised in the FS brief, Appellant did not provide any alternative explanation in its reply brief. Nevertheless, I am convinced that there was time spent and believe from my sense of the record that the time was for more than simply driving and would have involved waiting time for the vehicles, as well as other matters. I take that into account in making an adjustment. As such, I adjust the time to 6 hours per vehicle or 24 total hours. At $75 per hour, the recovery is $1,800. In addition, the Appellant is entitled to the other costs of $600 for the loader and $180 for the grader, the portion of the administrative fee of $20 (200 cubic yards out of 1,000 yards total) and $12 for material ($.06 per cubic yard) charged Appellant by Glacier. Appellant is also entitled to overhead and profit of 25 percent. I thus grant $2,612 + $653 (OH and profit) for a total of $3,265. (FF 96-97.)

Appellant also asks for pit restoration costs. It attributes the costs to the added clearing and grubbing at AW, to Mr. Skogstad's presence and to the added size of the area. I find that Appellant is entitled to some costs for pit restoration; however, do not believe that it is entitled to its entire costs. As the FS pointed out, the permit for AW 2 called for 6,000 cubic yards for this project and 2,000 yards for the Kenai Borough project. The Appellant included no allocation for the Kenai Borough material in Appellant's claim. Further, I find that some restoration would have been required regardless of whether the site was at the stream or at AW 2. However, since the digging at the stream was for purposes of creating a channel, it logically follows that any restoration would have been substantially less, particularly since the object was eventually to divert the stream. Accordingly, I

allow 50 percent of the sum claimed by Appellant for additional restoration and base it primarily on the fact that but for the change to AW 2, the restoration costs would have been substantially less. Appellant sought $2,734 for this item (including overhead and profit) and I allow $1,367. (FF 71, 94-95.)

SCHEDULE 3, Premium for Rental

Appellant has claimed that it is entitled to $9,333 which is 35 percent premium for having to use rental rather than owned equipment. As the FS correctly points out, when Mr. Smith was asked how the 35 percent was arrived at he stated that he did not recall how that was established and stated that it was placed in the damages by the consultant. The FS has also provided testimony that some of the equipment for which Appellant claimed rental was unrelated to any delay but caused by breakdowns. (FF 98-99.) On this item, Appellant has simply not met its burden either as to the cause, the necessity of rental nor the reasonableness, if any, of the 35 percent figure. Accordingly, I deny this part of the claim.

SCHEDULE 4, Mobilization and Demobilization

As has already been addressed under delays, the job was delayed and thereby caused Appellant to have to demobilize and return to the site during the next season. Appellant had 120 days to perform and I have identified 53 days of delay from June 12 to August 11, 1995. That, before adding the time granted to Appellant for delays due to design errors and added work in the fall under Modification No. 2 (15 days) and Modification No. 4 (20 days). The record shows that the various delays and changes put Appellant into winter and thereby caused it to have to demobilize and return in the spring. (FF 2, 60, 63, 65, 100-103.)

In challenging Appellant's mobilization and demobilization costs, the FS has pointed out that the COR's diaries are not consistent with Appellant's claim as to when equipment was removed. While it is correct that the diaries do not show that all of the claimed equipment was at the site on November 8, the diaries do establish that in the days preceding the official winter shut down, the equipment listed by Appellant was on the project. I also conclude that the listed equipment was returned in the spring and in that regard, Appellant excluded various pieces, such as the hydroaxe, because it was not needed for the second season. (FF 100-103.) On this item I again have competing costs as to the equipment. I apply here the same reasoning as used in my discussion of Schedule 1 and find that Appellant's figures are reasonable. I therefore allow the $16,650 Appellant has claimed for this item.

SCHEDULE 5, Equipment Standby

As discussed under delays, the project was delayed due to the actions of the FS from June 12 through August 11, 1995. As to the time beyond August 11, I find, as discussed below that there are no delays which entitle Appellant to equipment standby from that point forward. Appellant claims

$64,820 for equipment standby costs, using a daily rate of $1,301.66 multiplied by 37 work days. It covers the time period June 12 through November 8, 1995. (FF 104-109.)

After deducting work days on which Appellant was able to mitigate by using its equipment on other jobs, I have determined that during the delay period of June 12 to August 5, there were 19 days for which Appellant is entitled to idle equipment cost. Following the same procedure as to deductions, Appellant arrived at 18 days for the time frame of August 6 through November 8, 1995, when it demobilized for the winter. However, unlike the 19 days, I do not find that the evidence supports granting, on the basis presented, those 18 days claimed for this second period. I deny the 18 days or several reasons, among which are that Appellant did work for substantial periods from August 6 to November 8 on this project and its evidence does not explain why it could work on some days and why not on others. Further, while crushing might have been prevented because of taking on another commitment, there was work that could have been done during August 1995 on the road. That said, however, I find entitlement for idle equipment for the time period of August 6 through August 10 (time Appellant needed to begin operations after the lifting of the suspension), with August 7-9 being work days. Thus, Appellant is entitled to 3 additional work days beyond the 19 already identified. (FF 104-109.)

As to the rate to be used, I use the FS daily rate of $790.14 and multiply that by 22 days. I use the FS daily rate because the FS has shown verifiable errors in Appellant's use of the COE Handbook in this application. A comparison of the rate for a number of pieces of equipment with the COE manual rate show that Appellant's figure is overstated. Appellant in its reply brief took no exceptions nor provided us with any basis to question the errors identified by the FS. I thus find the FS calculations to be more reliable. Accordingly, Appellant is entitled to $17,383. (FF 104-109.)

SCHEDULE 6, Eichleay

Appellant claims $18,769 in unabsorbed overhead, using the Eichleay formula: Under Eichleay Corp., ASBCA No. 5183, 60-2 BCA ¶ 2688, a contractor must show that it was required to be on standby during a Government-caused delay of indefinite duration and it was unable to take on other work as a result. The burden then shifts to the Government to prove that it was not impractical for the contractor to obtain replacement work during the delay or that the contractor's inability to obtain the replacement work was not caused by the Government's suspension. West v. All State Boiler, 146 F.3d 1368 (Fed. Cir.1998). A contractor may use the Eichleay formula to recover unabsorbed home office overhead barring proof by the Government that the contractor could have taken on true replacement work. Melka Marine, Inc. v. United States, 187 F.3d 1370 (Fed. Cir. 1999)(No. 98-5149). The court said in Melka, "additional work is not automatically considered replacement work which will preclude relief under Eichleay." Instead, true replacement work is work that contributes the "same amount of money for the same period as the government contract." If the additional work only replaces a portion of the overhead, then the contractor should be able to recover the remainder as Eichleay damages. Similarly, the fact that a contractor bids work during the standby period does not necessarily invalidate an Eichleay claim. However, if a contractor performs other contract work,

but in a different sequence or other contract work is available, then Eichleay relief is not appropriate. A contractor is not on standby if work on the contract continues "uninterrupted," albeit in a different order than originally planned. Melka, supra.

In applying Eichleay to this case, I arrive at different results for different periods. First, from June 12 to August 11 the work was suspended for an indefinite duration. The contractor could not dedicate its forces to a new project as it did not know when the source and disposal site problems would be resolved and it would have to return to work. There is no question, however, that Appellant did mitigate during the above period and used its equipment where possible on other jobs. Being able to mitigate does not preclude Eichleay relief. Accordingly, I find entitlement to Eichleay for the 60-day period in which it was on standby and could not mitigate, which is comprised of June 12 through August 10. (FF 46, 50, 99-100.)

Appellant was on a standby status from June 12 through August 10, a period of 60 days. The delay was of uncertain duration and Appellant could not reasonably dedicate its equipment to some other long term project during the suspension period. The fact that Appellant was able to mitigate by using its equipment when available, does not negate entitlement under Eichleay. (FF 27, 36, 97, 99-100.)

The next period is August 17 through November 8. From August 17 through September 11, the Appellant did not work on the project. During that time frame, its crusher subcontractor was occupied because of the Kenai Borough project. However, there was other road work available, and the evidence does not establish that Appellant could not have worked during that time frame. Rather, for purposes of efficiency, Appellant appeared to make that choice. Where there is contract work available for which the Government has not prevented performance, Eichleay is not available as the Government has not forced the contractor to remain on standby. (FF 53-56, 101.)

As to the winter delay, which was triggered by the earlier delays and changes to the contract, I find no entitlement to Eichleay. First, there was no uncertainty that work would be required in the winter in Alaska on this project, as there is a known limited working season. Further, the stop of work for the winter did not prevent Appellant from securing any available winter work as this project. Regardless of the delay, this project was not going to occupy the Appellant during the winter. (FF 2.)

Appellant restarted work on July 1, 1996, and finished on August 2, 1996. As to the spring of 1996, Appellant has not shown that there was any unreasonable delay during that time period. The FS did not press Appellant into starting by a particular date, but rather left that to the Appellant. (FF 62.) Thus, no Eichleay is warranted for that time frame.

As to calculation of the daily rate, I have used Appellant's daily rate of $54.88 per day, even though it was developed using a contract time period of June 12, 1995 to September 3, 1996 for both total contract billings and overhead. While I recognize that the time frame that should be used, ends well before September 3, I do not find that the use of the longer time frame will materially change the

result for the daily rate. Also, I do not have sufficient accounting data to modify the billings and overhead to reflect the actual time period. I therefore find that Appellant is entitled to 60 days x $54.88 per day for a recovery of $3,292.80. (FF 71.)

Offered Termination

In July 1995, the FS did state as a potential option that the parties terminate the contract at no cost. The Appellant did not pursue that nor was it legally obligated to accept that no cost termination, particularly given that it had bid the project in May, and by July 12 had almost lost 2 months of a limited working window. I know of no case law, nor has the FS provided any, which allows the FS to use this as a shield in this case.

DECISION

I would grant Appellant's appeal in part as set out above. Appellant is entitled to $50,892.80 plus applicable interest.

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HOWARD A. POLLACK
Administrative Judge

Issued at Washington, D. C.
July 3, 2000.