HOUSATONIC VALLEY CONSTRUCTION CO., INC.,	)	**AGBCA No. 1999-181-1**
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Appellant	)	
	)	
Representing the Appellant:	)	
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Kim A. Coolbeth, President Housatonic Valley Construction Co., Inc. 365 Kent Hollow Road Kent, Connecticut 06757	)	
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Representing the Government:	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

April 6, 2000

Before HOURY, POLLACK, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge WESTBROOK. Separate Dissent by Administrative Judge HOURY.

This appeal arises out of Contract No. 50-04M3-8-0022 for the construction of a sand filter sewer system in the Starkey Experimental Forest of the Wallowa-Whitman National Forest in Oregon. The contract was awarded June 4, 1998, to Housatonic Valley Construction Co., Inc., of Kent, Connecticut (Appellant or the contractor), by the Forest Service, U. S. Department of Agriculture (FS or Government).

The contractor appeals a decision of the Contracting Officer (CO) dated May 7, 1999, in which the CO denied its claim for an equitable adjustment of $29,081.35 for remobilization following a suspension of work ($13,110) and unabsorbed overhead during the suspension period ($15,971.35). For the reasons set out below, the appeal is denied.

The Board has jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended. The parties have submitted this appeal for decision on the written record pursuant to Board Rule 11.

FINDINGS OF FACT

1. Contract No. 50-04M3-8-0022 was signed by the CO and Appellant's president on June 4, 1998, and June 5, 1998, respectively (Appeal File (AF) 138-39). The scope of work included the installation of six septic tanks in existing sewer lines where none previously existed; the pumping and removal of two existing septic tanks and the replacement of one; installation of a dosing tank in a new sewer line; installation of 470 linear feet of gravity sewer line, and approximately 50 linear feet of pressure sewer line; installation of an intermittent sand filter assembly, including a dual pumping system installed in the dosing tank, with electric controls and power supply for the pumps; and construction of 750 linear feet of sewer line. The system was to be installed by a DEQ-licensed installer.[1] (AF 43.)

2. Clause 5, COMMENCEMENT, PROSECUTION AND COMPLETION OF WORK (FAR 52.211-10) (APR 1984) required the contractor to commence work within 10 days after the date the contractor received the Notice to Proceed and allowed 45 days for completion of work (AF 43).

3. The contract contained clause 6, SUSPENSIONS FOR OTHER THAN GOVERNMENT'S CONVENIENCE, which reads as follows:

> The Contracting Officer may issue orders to suspend the work wholly or in part for such period of time as deemed necessary because of: (1) Weather or ground conditions when further prosecution of the work might cause environmental or resource damage to the project, access roads to the project, or adjacent property. Such action would include but not be limited to instances such as siltation of streams, damage to access roads, rutting of project roads which causes otherwise suitable soils to become muddy or unsuitable; or (2) Failure of the Contractor to comply with Specifications such as but not limited to placement of frozen material in fills, placing of asphalts at temperatures lower than those specified, performing work prior to prerequisite approvals, operating equipment not meeting fire requirements, or when conditions exist which do not meet safety requirements. Whether or not a suspend work notice is issued, the Contractor shall be responsible for correcting any damage caused by his/her operation,

[1] DEQ is an acronym for Department of Environmental Quality, an Oregon state department. While only the acronym is used in the Scope of Work, the Department's name is spelled out in Division 11, Mechanical, Sand Filter and Pumping Station 11301 of the technical specifications.

> whether inside or outside project limits, at no cost to the Government. Such suspensions shall not be considered as suspensions for the Convenience of the Government under FAR 52.242-14, Suspension of Work, and shall not qualify for equitable adjustment.

(AF 44.)

4. The contract incorporated by reference FAR clauses 52.236-2, DIFFERING SITE CONDITIONS (APR 1984); 52.236-3, SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984); 52.242-14, SUSPENSION OF WORK (OCT 1995); and 52.243-5, CHANGES AND CHANGED CONDITIONS. The Suspension of Work clause prohibits adjustment thereunder where an equitable adjustment is provided for or excluded under any other term or condition of the contract. (AF 52-53.)

5. The contract also contained clause 7, POST AWARD CONFERENCE (AGAR 452.215-73) (NOV 1996), advising that a post award conference with the successful offeror was required and would be scheduled and held within 10 days after contract award at the Starkey Headquarters (AF 44).

6. The ALTERNATE PAYMENT PROTECTIONS (FAR 52.228-13) (JUN 1996) clause specified types of payment protection which the contractor could elect to provide and required the submission of payment protection prior to beginning work (AF 53). (Emphasis in original.)

7. Division 2, SITE WORK, SUBSURFACE ABSORPTION SYSTEMS 02747, of the technical specifications, provided specifications for construction and installation of subsurface absorption systems and required that work meet the requirements of State or local regulations. It also informed the contractor that a permit, which the Government would obtain, was required for the project. This section dictated that the contractor "not excavate when soil is wet enough to smear or compact easily." (AF 87.) This and other sections of the technical specifications required that work meet the requirements of State or local regulations or of the DEQ (AF 83, 85, 87, 91).

8. The DEQ issued the permit for major repair of an onsite sewage disposal system to the FS Wallowa-Whitman National Forest on March 16, 1998. The permit provided a space to list "special conditions (follow attached plot plan)." This permit added the wording "+ attachments."[2] The permit also stated the requirement that the system be installed by a DEQ-licensed installer. (AF 332.)

9. The contract drawings consist of an unnumbered title page and three sheets numbered 1 through 3 (AF 132-135). Sheet 2 of 3 is the Plan and Profile Sheet (AF 134). The full-size copy of

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[2] The plot plan and attachments are not attached to the copy of the permit in the Appeal File. The FS brief states that plot plan and attachments were the contract specifications. Appellant's reply brief does not dispute this statement.

this sheet contained in the Appeal File is dated "2/98" and does not bear a stamp and marking by the DEQ. However, the record also contains two letter-size sheets each containing a copy of a portion of that sheet. This small copy indicates a stamp by DEQ bearing the signature of Robert Brown, the date "3/16/98" and the notation "Permit # 31 52902." In two places on this copy are stamps with the following notation: "Work shall only be done when the soil moisture content is low. If the soil at the depth of the trenches forms a 'wire' instead of breaking apart when attempting to roll it between the hands then it is too wet." (AF 344-45.)

10. The contract was awarded June 4, 1998. In the award transmittal letter, the CO stated "we are anxious to get started on this project." In addition, she said that she was allowing Appellant 10 days to provide the required alternate payment protection. (AF 138-39.) The record is sparse in this regard, but it appears that telephonic negotiations were ongoing during the May 27-28, 1998 time frame. During this period, Appellant elected to drive across country and viewed the site on June 1, 1998 (AF 423). On June 5, 1998, Appellant's president called the CO and said that he had looked at the site on Monday (June 1, 1998) and would have a license by Wednesday. He also indicated that supplies were on order, Appellant would have its bond the next week and would start work on or about June 15. (AF 140.) Although not required until June 14, 1998, Appellant's payment bond was executed June 5, 1998, and faxed to the CO June 8, 1998 (AF 142-45). On June 10, Appellant faxed a time schedule projection to the CO which showed a start date of June 15 for submittals, mobilization and clearing and grubbing. It also indicated a projected end date for completion of July 10, 1998. (AF 148-49.)

11. The pre-work conference was held June 15, 1998. In attendance were the CO, the CO's Representative (COR), Appellant's president and DEQ representative, Robert D. Brown. (AF 161.) Notice to Proceed was issued at that time, but contract time would begin June 16, 1998 (AF 69, 170).

12. Notes of the conference report other pertinent items discussed as follows:

> After completing paperwork, we walked through worksite. Bob from DEQ dug a test pit to check soil moisture. Based on moisture, they cannot begin work on the leach field. Kim will start on septic tanks tomorrow. Today he'll put in curtain drain, if his pipe shows up. It was supposed to be delivered hours ago. 7/6 - Contractor will be leaving for trip to Alaska. If he can't complete leach field before that, he'll come in August. Most likely, his son (Kim Jr.) will finish the work. They'll take their equipment back to CT when they leave and then rent some equipment to finish. If septic tanks fill up before system is complete, who will pay to pump? I said FS because we allowed them to start, knowing the soil was too wet to work. MK Klinger 6/15/98.

13. The DEQ Notice of Inspection dated June 15, 1998, and signed by DEQ representative, Robert D. Brown reports that soil was found to be "TOO WET" for trench installation. The installer was to start with tanks installation, effluent sewer lines and the sand filter. He might also put in

curtain drain to help dry the area. Attendees discussed moving the vegetation in the area to aid in the soil drying. (AF 343.)

14. As of June 29, 1998, Appellant had completed virtually all work except the drain field and the single connection of the compound sewer line to the main sewer line. The COR planned to issue a suspension of work order until the drainage area dried out. (AF 201.)

15. On June 30 and July 1, 1998, Appellant's president left messages for the CO requesting what Appellant referred to as a "stop work order" until the area dried out so he could work (AF 208-09). On July 1, 1998, the COR issued a partial suspension of work order, effective close of business June 29, 1998. The order states: "Do not install drain field until soil conditions are dry enough to be approved by the Oregon Dept. of Environmental Quality." The order showed that it was pertinent to item No. 02747, which the Board interprets as a reference to work under specification section 02747 (AF 87). The order also indicated that no charge would be made against contract time for the period of suspension. (AF 210.)

16. On August 13, 1998, the COR issued a resumption of work order again referencing specification section 02747 (AF 87). The effective date was beginning of business August 13, 1998. (AF 223.)

17. The following day, August 14, 1998, the parties exchanged several communications. By facsimile, Appellant sent a change order request in the amount of $13,110. Appellant stated that its original bid reflected one mobilization/demobilization charge and that due to the FS stop work order "per DEQ" it requested additional mobilization/demobilization costs. Appellant asked that the modification be expedited so "we can schedule move." The change order request was described as being due to "Suspension of Work 6/29/98." No mention was made of a differing site condition or of a change. (AF 224-25.) On the same date, the CO responded denying the request for an equitable adjustment citing clause 6, SUSPENSIONS FOR OTHER THAN THE GOVERNMENT'S CONVENIENCE. She informed Appellant of its rights under the DISPUTES clause and that it must perform pending resolution of the dispute. In addition, she said that since Appellant's president had earlier stated that he would probably have his son complete the project with rented equipment, she might consider the mobilization/demobilization costs excessive. (AF 226.) Also on August 14, Appellant wrote the CO stating that the request for adjustment represented expense incurred when the Government had to issue a suspension of work "due to the high water level." Appellant contended that demobilizing was an attempt to control costs to the Government rather than staying on the site and billing equipment costs on a daily basis for the duration of the suspension. Again no mention was made of a differing site condition. (AF 229.) By letter of August 17, the CO directed Appellant to complete the work "within the time allotted" (AF 230).

18. From August 18 through August 24, 1998, Appellant and the CO communicated by telephone and facsimile regarding the schedule for resumption of work. Originally, Appellant indicated that it would resume work the week of September 20, 1998. The CO was concerned that ground conditions could change and the ground would again be too wet. She asked if Appellant would agree

to a termination for the convenience of the Government accompanied by a retention of $8,000. Appellant did not specifically respond to that offer, but rescheduled its remobilization to resume work the week of August 24, 1998. (AF 233-48.)

19. Work actually resumed August 31, 1998. DEQ approved trench excavation and all other aspects of drain field excavation on that date, as well as hooking up all sewer lines to the dosing tank. (AF 251.) The following day DEQ inspected and approved the drain field construction. The COR concluded that the project was ready for final inspection. Final inspection was conducted September 2, 1998, and the inspecting engineer reported that all work had been satisfactorily completed except (1) electrical inspection and approval; (2) DEQ grading inspection and approval and (3) submission of as-built drawings to the Government. (AF 252-54.)

20. On September 3, 1998, Appellant transmitted its Request for Equitable Adjustment (REA) to the CO. Therein, Appellant claimed a total of $33,660.83 for demobilization, remobilization, equipment move in and off charge, consultant's costs, general and administrative expense, home office overhead, and bond. (AF 263-64.)

21. Appellant's REA states that "the following facts are irrefutable." The Government issued notice to proceed on June 16, 1998, and a suspension of work order on June 29, 1998. On June 29, 1998, Appellant had 2 days work remaining to complete work on the drain field. The suspension of work was "rescinded" August 13, 1998. Appellant's bid included one mobilization and one demobilization. Government action caused Appellant to incur two mobilizations and demobilizations. Government action caused a delay of 48 calendar days, calculated as the period from June 29 to August 13 plus 3 days "to optimistically mobilize on the project." Appellant remobilized on August 31, 1998, and completed work on September 1, 1998. The Government did not issue the suspension of work under clause 6 of the contract. The contract includes other clauses, including FAR 52.242-14, SUSPENSION OF WORK. Appellant then argues that the suspension of work was issued under FAR clause 52.242-14, SUSPENSION OF WORK and is, therefore, compensable to Appellant. Appellant contended it to be impossible to apply clause 6 only 13 calendar days after notice to proceed. According to the REA, no abnormal weather conditions were encountered during those 13 days which would cause clause 6 to apply. Therefore, continued Appellant, "this was a pre-existing condition that the Government had prior knowledge of or should have had prior knowledge of but did not inform [Appellant] prior to bid or Notice to Proceed. This Suspension of Work could have been caused by Differing Site Conditions (FAR 52.236-2) or Changes and Changed Conditions (FAR 52.243-5) or other sections of the FAR that deal with defective contract documents." (AF 263-64.)

22. The parties conducted unsuccessful telephonic negotiations on October 7, 1998. Appellant stated that when he had made his June 1, 1998 site visit the ground had not looked wet to him. There was also a discussion of the DEQ permit information which was stamped on the FS copy of the plans, but were not on the copy provided to offerors with the solicitation. The CO questioned Appellant's costs. The CO also opined that no conditions had changed. The CO's letter of the

following day provided information concerning the disputes procedure. (AF 140, 344-45, 338-39 and 342).

23. By letter dated November 30, 1998, Appellant requested a written CO decision (AF 387). The CO requested additional information (AF 338). By letter dated April 9, 1999, Appellant presented a claim for $15,971.35 in Eichleay overhead costs for the period of the suspension and $13,110 for a second mobilization and demobilization. Appellant contended that when the FS obtained the DEQ permit "(prior to contract bidding or at least to contract signing)," the FS became aware "of when the project could be done due to soil conditions." Appellant argued that the Government had prior knowledge of what the ground conditions would be and therefore should not have issued notice to proceed on the date it was issued. Appellant also contended that this alleged information about when work could be performed should prohibit the Government from claiming clause 6 as the basis for denying the claim. Additionally, Appellant asserted that it had negotiated with the understanding that it could move on the site and complete "within the time frame approved by [the CO's] office. Finally, Appellant stated its reliance on FAR 52.236-2, FAR 52.243-5 and other sections dealing with defective contract documents.[3] (AF 399-401.)

24. The CO's May 7, 1999 final decision denied Appellant's claim on several grounds. She found that, having made a site investigation, Appellant was responsible for determining ground conditions. According to the CO, the provision in specification section 02747, Subsurface Absorption System, prohibiting excavation when soil is wet enough to smear or compact easily would have alerted an experienced sand filter contractor such as Appellant to check soil moisture during such a visit. She interpreted Appellant's president's remark during the October 7, 1998, telephonic negotiation that "the ground didn't look wet to him" to mean that he had not actually tested for soil moisture. She denied any superior knowledge on the part of the Government as to soil conditions, stating that Appellant and the Government learned of the soil conditions simultaneously. She pointed out that the contract required that the installer be licensed by the Oregon DEQ and that DEQ requirements provide that DEQ may limit the period that a system may be installed due to soil conditions, weather, groundwater or other conditions which could affect the reliability of the system. According to the CO's decision, this requirement caused the insertion in the contract of the Suspensions for Other than the Government's Convenience clause, prohibiting reimbursement for costs incurred in the suspension. She also pointed out that the "Suspension of Work," "Differing Site Conditions" and "Changes and Changed Conditions" clauses were inapplicable. (AF 420-26.)

25. Appellant appealed the adverse decision to the Board of Contract Appeals. The parties agreed to submit the appeal for decision on the record under Board Rule 11. The record consists of the Appeal File. The Board has also considered the opening and closing briefs of both parties.

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[3] FAR 52.236-2 is the Differing Site Conditions clause. FAR 52.243-5 is the Changes and Changed Conditions clause.

DISCUSSION

Contentions of the Parties

Appellant argues it is entitled to an equitable adjustment because the "stop work" order did not cite clause 6 and because the FS had additional information not included on the plans and specifications, or revealed to Appellant during negotiations. Appellant also contends that the FS was anxious to start and finish the project and left out information pertinent to when the project would be able to be done. Appellant disputes that the project's start date was for its convenience. Appellant also argues that the FS had superior knowledge prior to the scheduling of the preconstruction meeting as to when work could begin on the project.

The Government argues that the issue before the Board is whether the suspension of work order was issued for other than the Government's convenience. In addressing this question, it contends that the contract authorized the Government to suspend work to prevent environmental damage or for failure to comply with specifications; both the DEQ and the specifications required that excavation work on the drain field be done only when the ground moisture content was low; both the Government and Appellant were required to comply with DEQ directives and at the pre-work conference both parties realized that the drain field could not be worked in until August; and since Appellant had his equipment on site, the CO let him begin work to spare him extra expense.

Analysis

Appellant claims an equitable adjustment for an additional mobilization and demobilization and unabsorbed overhead costs for the period of a suspension from June 29 through August 18, 1998, plus an additional 3 days (Finding of Fact (FF) 21). The suspension was ordered by the Government because soil was too wet to install the drain field and all other work had been completed. Appellant also requested the suspension. In arguing that the suspension was not pursuant to clause 6, which does not provide for an equitable adjustment, Appellant points out that the suspension of work order did not specifically cite clause 6, SUSPENSIONS FOR OTHER THAN GOVERNMENT'S CONVENIENCE. It did, however, reference specification section 02747 which prohibits work when the soil is wet enough to smear or compact easily. Moreover, it specifically stated that work was not to resume "until soil conditions are dry enough to be approved by the Oregon Dept. of Environmental Quality." (FF 15.) The DEQ, although not a party to the contract, was a major participant in the project which had a clearly environmental purpose, the safe disposal of sewage from the project area. DEQ's authority was disclosed by multiple sections of the specifications. (FF 7.) Along with the parties, DEQ took part in the pre-work conference (FF 11-13).

The work suspended effective June 29, 1998, was the same work which could not be started due to the finding of the DEQ on the day of the pre-work conference that the ground was too wet. DEQ's role in the project was one of testing and approval for environmental reasons. Nothing in the record indicates that the original prohibition against installation of the drain field, or the suspension of work when that was the only work remaining, was for any reason other than that DEQ found it

environmentally unsafe. Appellant contends that the failure of the COR to cite clause 6 in the suspension of work order prevents the application of the clause, but Appellant provides no evidence of any reason for the suspension of work other than the environmental strictures of DEQ. If other reasons exist for the inclusion of section 02747 of the prohibition against excavation in wet soil or for the original prohibition on installation of the drain field or for the suspension when no other work remained, Appellant has failed to so prove. The contract anticipated the possibility that the ground might be too wet to gain DEQ approval for drain field installation and made provision for a no-cost suspension of work in that circumstance under clause 6, SUSPENSION FOR OTHER THAN THE GOVERNMENT'S CONVENIENCE.

The contract also contained FAR clause 52.242-14, SUSPENSION OF WORK, but that clause specifically provides that no adjustment shall be made under it where an equitable adjustment is provided for *or excluded* under any other term or condition of the contract (FF 4). The record contains no evidence that the suspension was for any reason other than environmental ones under the authority of DEQ.

Appellant argues that the Government's failure to provide offerors with plans containing the DEQ stamp deprived Appellant of full information and should therefore entitle Appellant to an equitable adjustment. Appellant has not, however, explained exactly what information was withheld. The specifications required that excavation on the sand absorption system not take place when "soil is wet enough to smear or compact easily" (FF 7). The additional language contained on the stamp merely provides a simple test for determining when the soil smears or compacts easily, i.e., "if the soil at the depth of the trenches forms a 'wire' instead of breaking apart when attempting to roll it between the hands then it is too wet" (FF 9). While the wording is not identical, we do not find that the substance differs enough to conclude that information was withheld from Appellant and other offerors.

Appellant now argues that notice to proceed should not have been issued June 15, 1998. Rather, Appellant argues that the FS issued notice to proceed because it was anxious to start and finish the project. Appellant is correct that the CO stated that the FS was anxious to start the project. Appellant was also eager to do so. Appellant's president called the CO on June 5, 1998, and reported that he had looked at the site on Monday, June 1. He reported that he expected to have the license by Wednesday, June 10. He said that he would start on or about June 15. He furnished bond June 8, 6 days earlier than required. Moreover, at the preconstruction conference Appellant's president said that he planned to leave by July 6 for a trip to Alaska. There is no evidence that when DEQ tested the soil and found it too wet for drain field installation either party wished to postpone issuance of the notice to proceed. The weight of the evidence is that both parties wished to begin work.

Further, there is no evidence of superior knowledge on the part of the Government. Appellant's arguments that the Government's knowledge in March of the information on the DEQ stamp somehow provided it with prior knowledge "of when the project could be done due to soil conditions" is fallacious. The requirement for the installer to be licensed by the DEQ and the many

references in the technical specifications that work must meet the requirements of state and local regulations informed Appellant that DEQ would be involved in enforcement of contract requirements as they pertained to environmental conditions. Contemporaneous documents do not indicate that Appellant believed that the Government had superior knowledge. At the preconstruction conference, Appellant's president suggested alternatives for completion if soil conditions did not allow work on the leach field prior to July 6 when he would leave for a trip to Alaska (FF 11). On June 30 and July 1, he requested a stop work order (FF 14).

Appellant experienced a suspension of work for environmental reasons. The relevant contract clause provides that no adjustment shall be made in such a circumstance.

Appellant's contention that the Differing Site Conditions (DSC) and Changes and Changed Conditions clauses apply is not well founded. To prove a DSC, a contractor must show that there exist either (1) subsurface or latent physical conditions at the site which differ materially from those shown in the contract or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract. Paragraph (b) of the Changes and Changed Conditions clause contains similar provisions. A contractor who wishes to recover under either clause must promptly notify the CO, in writing, of subsurface or latent physical conditions differing materially from those indicated in the contract or unknown physical conditions at the site before proceeding with the work. At no time during performance did Appellant notify the FS in writing or otherwise of its belief that such conditions existed. Neither party has indicated that the contract contains representations of subsurface or other conditions at the site, and the Board has found none. Hence, there can be no Type I DSC. In addition, there is no evidence in the record of unknown unusual physical conditions at the site differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract. The presence of such conditions are necessary to support a finding of a Type II DSC. The wet soil found when the DEQ tested on the day of the pre-work conference was neither unknown nor unusual. The possibility of wet soil occurring was anticipated and provision made for that eventuality by the inclusion of clause 6 in the contract.

Finally, as stated above, the suspension of work here was a clause 6 suspension. However, even were we to find that the suspension was issued under FAR clause 52.242-14, SUSPENSION OF WORK, the contractor would still not be entitled to recovery. The delay in issue was caused by wet conditions and not by any wrongful act or failure of the Government. The decision to go forward and issue the Notice to Proceed at the pre-work conference was a joint decision. At that time, Appellant knew of and, indeed, had discussed the risk and real possibility that a stoppage could occur after work began because of continuation of wet conditions. Appellant interposed no objection to going forward. In fact, because it had moved its equipment to the site from the east coast, Appellant wished to start, notwithstanding the possibility of a later stoppage.

On the day that the Notice to Proceed was issued, the contractor, aware of the potential of a delay, told the Government that he would come back if the ground was still too wet for the leach field

work. The contractor made no indication at that time that it would charge the Government and we find that its affirmative statement regarding returning to the site, was a representation that it did not intend to file a claim. It was on the basis of the contractor's desire to move forward that the Government issued the Notice to Proceed. What occurred thereafter is exactly the scenario that the parties addressed at the pre-work conference. There were no intervening events or actions by the Government which increased or changed the risk recognized by the contractor at the pre-work meeting. To pay the contractor compensation for what it agreed to do for free is not warranted or supportable.

Regarding the dissent, we disagree with several of its positions. First, the suspension affected only one portion of the work. The Appellant immediately began work in several areas. Second, there is no contract requirement that the work be completed in 45 consecutive days. Rather, the contract contained clauses allowing adjustment of the contract time for various reasons. Clause 6 was the applicable contract adjustment clause under the factual circumstances. We have considered the theories of recovery suggested in the dissent. As explained above, we find nothing in the record to support deciding that Appellant experienced a DSC. Appellant has failed to allege, much less prove, the four-prong basis for a mutual mistake, for which the remedy is reformation. Finally, we find the specifications were replete with indications of the environmental nature of the project, the role of DEQ and how suspensions for environmental reasons would be treated. We find no breach of the implied warranty of specifications. Under the facts of the case, the possibility of encountering wet conditions and experiencing a suspension should not have been unexpected.

DECISION

The appeal is denied.

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ANNE W. WESTBROOK
Administrative Judge

I concur:

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HOWARD A. POLLACK
Administrative Judge

Separate Dissenting Opinion by Administrative Judge HOURY.

I dissent from the majority opinion. I would sustain the appeal on entitlement, but do not reach the issue of quantum at this time.

The facts are not in dispute, and no citations to the record are made. The contract was awarded June 4, 1998, and required Appellant to complete the installation of septic tanks, sewer lines, and leach fields within 45 days of the Notice to Proceed (NTP). The site did not appear to be wet when Appellant visited the site prior to submitting a quote. It is undisputed that Appellant was not required to dig a test pit to determine the conditions prior to submitting a quote. On June 15, the day of the pre-work conference, the Government dug a test pit revealing that underground conditions were too wet to construct the leach fields.

The Government issued the NTP effective June 16, 1998, making the contract completion date July 30. Appellant completed all work except for the leach fields on June 29. The Government then suspended work on the leach fields June 29, because of the wet conditions discovered June 15. In suspending the work the Government relied on specification section 02747, precluding excavation when soil conditions are too wet. Again referencing specification section 02747, the Government did not allow work to continue until August 13, 14 days after the contract July 30 completion date. Appellant filed a claim for increased costs. In denying the claim, the Contracting Officer, for the first time, relied on contract clause 6, SUSPENSION FOR OTHER THAN GOVERNMENT'S CONVENIENCE, rather than section 02747 of the specifications. Clause 6 precludes an equitable adjustment when the suspension is for environmental reasons.

Even granting for the sake of argument that the Government suspension was for environmental conditions, rather than conditions that simply did not meet specification section 02747, it is undisputed that: (1) the contract required completion of all work within 45 days, (2) as awarded, the contract was <u>impossible</u> to complete within 45 days because of the pre-existing wet condition, requiring the suspension, (3) prior to the award of contract, neither party was aware of the wet conditions precluding performance within 45 days, and (4) Appellant incurred unanticipated additional cost. Appellant is entitled to recover under a multitude of legal theories including: (1) differing site condition (the pre-award condition was not discoverable by reasonable inspection), (2) mutual mistake (both parties must have assumed the contract, as awarded, could be completed within a "consecutive" 45-day period), (3) implied warranty of the specifications (here, even when the specifications were complied with, the work was impossible to be completed within 45 days), and (4) impossibility (as awarded, the contract was impossible to complete in 45 days).

The legal theories above all relate to the underlying assumptions leading to the <u>formation</u> of the contract. Under these circumstances, clause 6 can be interpreted reasonably only to preclude equitable adjustments for conditions arising <u>after</u> award. Otherwise, clause 6 defeats the purpose of the differing site conditions clause, and the legal theories of mutual mistake, implied warranty of the specifications, and impossibility, by shifting to the contractor all risks for increased costs from pre-award, unknown conditions. Here, the wet site conditions existed prior to award, and continued

beyond the end of the performance period until August 13, 1998, making it impossible for the contractor to complete performance within the 45-day, July 30, completion date.

The majority has left Appellant without a remedy for a pre-award site condition that could not have been found without digging a test pit.

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EDWARD HOURY
Administrative Judge

Issued at Washington, D.C.
April 6, 2000