



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

(Opinion issued on June 18, 2013, without redactions or protective legends)

GRANTED IN PART: May 24, 2013

CBCA 1559

FLUOR INTERCONTINENTAL, INC.,
d/b/a J.A. JONES INTERNATIONAL,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

William A. Roberts, III, Daniel P. Graham, W. Barron A. Avery, Richard B. O'Keefe, Jr., Christopher M. Mills, W. Barron A. Avery, and Tara L. Ward of Wiley Rein LLP, Washington, DC; and James A. Hughes, Jr. of Fluor Government Group, Arlington, VA, counsel for Appellant.

John C. Sawyer and Thomas D. Dinackus, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Rosslyn, VA; and Erin M. Kriynovich, Sarah G. Lounsberry, Kelly A. Yankowski, Philip Gennarelli, Alexandra Wilson, and Jenna Lynn Ellis of IE Discovery, Inc., Arlington, VA, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **VERGILIO**, and **DRUMMOND**.

VERGILIO, Board Judge.

On April 14, 2009, the Board received a notice of appeal from Fluor Intercontinental, Inc., doing business as J.A. Jones International (JAJI) (contractor), concerning its firm, fixed-price contract with the Department of State to design and construct a new embassy compound in Port-au-Prince, Haiti. The contractor seeks \$38,026,410, plus interest, under theories of differing site condition (asserting that subsoil at the site was collapsible and represents a type I and type II differing site condition), failure to disclose superior knowledge (concerning the

agency's knowledge regarding the conditions in Port-au-Prince, specifically, and Haiti, generally), breach of the duty of good faith and fair dealing (arising from the agency's failure to acknowledge that the changed security environment constituted a changed condition, and direction that the contractor return to Haiti and continue performance under the conditions), and constructive acceleration (claiming that excusable delays and changed conditions arose from the deteriorated security conditions, which the agency initially denied, and ultimately recognized in an untimely manner only days before the contract was to be completed, thereby requiring the contractor to expend resources to accelerate its performance).

This opinion focuses upon the facts material to the resolution of the various aspects of the claim, paring down the extensive evidentiary record (of exhibits and hearing transcripts), detailed position papers, and pre-hearing and post-hearing briefs to what is essential to understand the context of the dispute and resolve it. Through their submissions, the parties have brought order to the materials. References to the record are not all-inclusive, but highlight the support for the conclusions. The transcript is rarely referenced, only because documents often summarize information, while testimony offers embellishments, context, and repetition, supporting but not altering the material findings.

Contrary to the agency's suggestions, the firm, fixed-price design-build contract does not fully shield the agency from providing additional time and/or money under the terms and conditions of the contract that includes Excusable Delay, Changes, and Differing Site Conditions clauses, among others. That is, although the contract was established with a firm, fixed-price, with specific dates for completion of various tasks, neither the dollars nor dates are immutably fixed. The specific claims of the contractor must be addressed and resolved.

While the opinion is written with findings and discussions occurring sequentially by topic (part 1 involves the contract, conditions in Haiti, and interpretation; part 2, the subsurface soil; part 3, performance, excusable delay, and acceleration), the Board's decision on each aspect of the claim is readily summarized. The Board finds that the record does not establish that the subsoil was collapsible. Accordingly, there was no differing site condition. The unsettled security situation was well recognized, with the possibility of security and stability deteriorating over the performance period. The agency did not withhold information or mislead the contractor. The record does not support the superior knowledge basis of the claim. There was no breach of the duty of good faith and fair dealing, because the contract places on the contractor the risks of performing during periods with a deteriorated security environment. The security conditions did not constitute a change to the contract. However, the contractor has established that excusable delays occurred arising from Government acts--the ordered departure at the embassy and related urging of American citizens to depart. The contractor has not established entitlement to more days for performance than the agency

granted; however, because the agency failed to timely extend the performance period, the contractor reasonably took actions to accelerate its performance as it attempted to complete performance within a shorter period than the contract afforded. The record supports recovery of \$1,253,710, plus interest pursuant to statute calculated from July 28, 2008. Accordingly, the Board grants in part the appeal.

PART 1: THE CONTRACT & CONDITIONS IN HAITI

Findings of Fact

The contract

1. The agency issued a solicitation, on August 30, 2004, to obtain, through a negotiated procurement, design and construction services for a new embassy compound (NEC) in Port-au-Prince, Haiti, covering approximately ten acres. Exhibits 1 at 1, 10 at 624, 775 (¶ C.1) (all exhibits are in the appeal file). The compound would not be in downtown Port-au-Prince; it would be in what was viewed as a safer area than the existing embassy. Exhibits 956, 21665.

2. On November 9-10, 2004, the agency held a pre-proposal conference in Haiti with potential offerors. Exhibit 6 at 176-78. Following initial proposals, the contractor submitted its final proposal revision on December 21, 2004. Exhibits 7, 8. There followed discussions, and the submission of final price proposals on January 7, 2005. Exhibit 9. Explaining its understanding of the importance of this project, the contractor stated that its entire resources were available, if necessary, to ensure that the project is completed on time and on budget. Exhibit 7 at 310. This was repeated, with the contractor also recognizing, in its proposal: the objective to provide a secure and safe environment for personnel, materials, and equipment; its teaming partner's local construction presence and understanding of Haitian culture and subcontractor community; and the project's unique aspects due to the location and political climate, including security, among various factors. Exhibit 7 at 319-24.

3. The parties entered into a firm, fixed-price, design-build contract on January 14, 2005, with a total price of \$74,408,634. Exhibit 10. The performance period was 851 days from issuance of the limited notice to proceed, Exhibit 10 at 652 (¶ F.1), thereby requiring substantial completion on July 3, 2007. Exhibit 21192 at 372-73. The agency extended the performance period, adding 210 calendar days (with various of these days added for excusable delays) resulting in a substantial completion date of January 29, 2008. Exhibit 25908. Substantial completion occurred on March 31, 2008. Exhibit 25563.

4. Consistent with the terms of the solicitation, the contract contains particular provisions. The contract contains a War Risks clause, dealing with loss or damage to and/or destruction of work or materials, as well as a Disputes (JUL 2002) clause, 48 CFR 52.233-1, and the Disputes, Alternate I (DEC 1991) clause, 48 CFR 52.233-1. Exhibit 1 at 63 (¶ H.20), 104 (¶¶ I.153, I.154). Under the Liquidated Damages--Construction (SEPT 2000) clause, 48 CFR 52.211-12, the contractor was obligated to pay the Government \$11,463 for each calendar day of delay until the work was completed or accepted. Exhibit 1 at 30 (¶ F.3). A Type of Contract clause states: "No additional sums will be payable on account of any escalation in the cost of materials, equipment or labor, or because of the contractor's failure to properly estimate or accurately predict the cost or difficulty of achieving the results required by this contract." Also: "Changes in the contract price or time to complete will be made only due to changes made by the Government in the work to be performed, or by delays caused by the Government." Exhibit 1 at 7 (¶ B.3).

5. Despite this stated limited nature of changes (only due to changes made by the Government or Government-caused delays), the contract contains Changes--Fixed Price (AUG 1987) and Alternate II (APR 1984) and Changes and Changed Conditions ((APR 1984) clauses, 48 CFR 52.243-1, 52.243-5, Exhibit 1 at 99 (¶¶ I.132-134); a Differing Site Conditions (APR 1984) clause, 48 CFR 52.236-2, Exhibit I at 93 (¶ I.79); and an Excusable Delays clause:

F.9.1 The Contractor will be allowed time, not money, for excusable delays as defined in FAR [Federal Acquisition Regulation] 52.249-10, Default (see Section/Paragraph I.162). Examples of such cases include (1) acts of God or of the public enemy, (2) acts of the United States Government in either its sovereign or contractual capacity, (3) acts of the government of the host country in its sovereign capacity, . . . and (12) unusually severe weather.

F.9.2 In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor, and the failure to perform furthermore (1) must be one that the Contractor could not have reasonably anticipated and taken adequate measures to protect against, (2) cannot be overcome by reasonable efforts to reschedule the work, and (3) directly and materially affects the date of final completion of the project.

Exhibit 1 at 31 (¶ F.9). The referenced Default (APR 1984) clause, 48 CFR 52.249-10 (found at I.163, not I.162), identifies delay in completing the work arising from unforeseeable causes beyond the control and without the fault or negligence of the contractor. It also contains a similar list of examples, with the addition of delays of subcontractors or

suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the contractor and the subcontractors or suppliers. 48 CFR 52.249-10 (2004); Exhibit 1 at 109 (¶ I.163).

6. The new embassy compound contains several structures. Of relevance here are the one-story structures and the perimeter fence. The contractor maintains that the soil beneath the footprint of these structures represents a differing site condition, in that the soil was unexpectedly collapsible, deviating from what was anticipated by the details in the solicitation (and its accompanying preliminary geotechnical report) and by known soils in Haiti.

Conditions in Haiti

7. The contract contains an Information Concerning the Host Country clause:

E.6.1 Information Concerning Host Country. The offeror shall confirm and verify all information and shall not rely on data provided by the Government concerning the host country, such as climatological data at the site, local laws and customs, currency restrictions, taxes, or the availability of local labor, materials and transportation, etc. It is the responsibility of the Offeror to determine and gather the information necessary to perform this contract.

E.6.2 Information Obtained by Offeror. Before submitting a proposal, each Offeror shall, at its own expense, make or obtain any additional examinations, investigations, explorations, tests and studies, and obtain any additional information which the Offeror requires.

Exhibit 1 at 15-16 (¶ E.6). Additionally, a Review of Documents and Local Conditions clause specifies that the contractor is responsible for ascertaining the availability of all materials and equipment necessary to produce the work required by the proposed contract documents, of sufficient skilled labor to perform the work, and of the availability of transportation to the site. Exhibit 1 at 64-65 (¶ H.22).

8. In 2004 Haiti had experienced significant turmoil, particularly surrounding and following the departure in February of its president, Jean-Bertrand Aristide; American citizens were evacuated and the United States embassy placed on ordered departure status. Ordered departure required dependents and certain embassy employees to depart the country. In contrast, authorized departure status meant that certain embassy employees and dependents could, but were not required to, depart. Exhibits 989 at 19, 18128. The

Department of State, Bureau of Consular Affairs issued a Travel Warning (used to communicate information to American citizens) in February 2004, “to inform American citizens that the security situation in Haiti has deteriorated significantly and that safe travel out of the country by regularly scheduled commercial means is not possible at this time.” Exhibit 989. In March 2004, a Travel Warning noted that, although the United States embassy in Haiti had reopened, the situation in Haiti remained dangerous and unpredictable, warned American citizens to defer travel to Haiti until the situation stabilized, and advised those citizens remaining in Haiti to take precautions to avoid uncertain security situations in public areas. Exhibit 990. These and other Travel Warnings were publicly available to the contractor pre-and post-award.

9. A Travel Warning issued in May 2004 indicated that the security situation in Haiti remained unpredictable and potentially dangerous, advising United States citizens to defer travel in Haiti. The warning noted that the ordered departure of dependents and non-emergency personnel of the embassy remained in effect. The issuance warned that travel into and around Haiti could still involve serious risks, with the potential for looting, roadblocks set by armed gangs, and violent crime. “A number of kidnappings for ransom have been reported during recent weeks. In some cases U.S. citizens were victims.” “[E]ven within Port-au-Prince, travel can be hazardous. The embassy’s ability to provide emergency services to American Citizens anywhere in Haiti and particularly outside of Port-Au-Prince is extremely limited.” Exhibit 991.

10. In June 2004, a United Nations Stabilization Mission in Haiti (MINUSTAH) assumed responsibilities in Haiti; with various responsibilities, it was to provide assistance in restoring and maintaining safety and public order and facilitating the peaceful election of a new government. Exhibit 1062.

11. A Travel Warning issued in July 2004, specified that although the ordered departure of embassy personnel and dependents had been lifted, the security situation in Haiti remained unpredictable and potentially dangerous. The warning encouraged United States citizens to defer non-emergency travel to Haiti. Although many areas had calmed considerably since earlier in the year, “the Department warns U.S. citizens that travel in Haiti still involves serious risks. Visitors and residents must remain vigilant due to the absence of an effective local police force in Haiti; the potential for looting; the presence of intermittent roadblocks set by armed gangs or by the police which may disrupt travel; and the possibility of random violent crime, including kidnapping.” The deployment of MINUSTAH is noted, with the cautionary detail that the international presence throughout Haiti will remain limited for some time to come. Exhibit 992.

12. An early October 2004 Travel Warning provided similar information. It also repeated information from July, warning that travel can be hazardous within Port-au-Prince, with some areas off-limits to embassy staff, noting an embassy-imposed night-time curfew on staff members and limitations on travel outside Port-au-Prince, and specifying that businesses of United States companies continued to operate in Haiti, but take special precautions to protect facilities and personnel. Exhibit 993.

13. On October 14, 2004, the authorized departure from Port-au-Prince of eligible family members and non-emergency employees at the embassy was approved for a period not to exceed thirty days; within that period the Chief of Mission was to re-evaluate conditions and request a continuation or termination of evacuation status. Exhibit 16061.

14. A Travel Warning dated October 14, 2004, reflected the worsening of conditions and the authorized departure issuance at the embassy. The warning urged United States citizens to avoid travel to Haiti due to the volatile security situation. Additionally, "U.S. citizens in Haiti are urged to consider departing until the situation is stabilized as travel in Haiti still involves serious risks." Further,

Visitors and residents must remain vigilant due to the absence of an effective police force in Haiti; the potential for looting; the presence of intermittent roadblocks set by armed gangs or by the police; and the possibility of random violent crime, including kidnapping, car-jacking, and assault. There has been a noticeable escalation in criminal and gang activity since September 30.

Exhibit 994. The warning repeated the cautions of earlier issuances, regarding the hazards of travel, curfews, and continuing operations of United States businesses. Exhibit 994.

15. Each Travel Warning either (1) noted that as the Department of State continued to develop information on potentially dangerous demonstrations and political unrest in Haiti, it would share that information through its Consular Information Program documents, and identified an internet address and telephone numbers to obtain up-to-date information on security conditions, or (2) indicated that travelers should consult the Consular Information Sheet for Haiti, again with an internet address and telephone numbers to obtain up-to-date information on security conditions. Exhibits 989-94.

16. Consular Information Sheets dated June 4, December 1, and December 23, 2004, and January 10, 2005, began by describing Haiti as one of the least developed and least stable countries in the Western Hemisphere. Regarding safety and security, the sheets stated that United States citizens should avoid travel to Haiti at that time. The sheets summarized

much of what was found in the Travel Warnings. As to crime, the sheets stated that there “are no ‘safe areas’ in Haiti. Crime, already a problem, has mushroomed in recent years.” Further, “Reports of death threats, murders, drug-related shootouts, kidnappings, armed robberies, break-ins or carjackings occur almost daily. These crimes are primarily Haitian against Haitian, though some foreigners and U.S. citizens of Haitian origin have been victimized.” “Neighborhoods in Port-au-Prince once considered relatively safe, such as the Delmas road area and Petionville, have been the scenes of an increasing number of violent crimes.” Exhibits 981-84. The December 1 sheet specified that “nine kidnappings involving U.S. citizens have already been reported during 2004.” Exhibit 982 at 385. The Consular Information Sheet dated December 23, 2004, repeated this information and stated: “Violent incidents take place without warning including attacks against government facilities and random shootings. While U.N. personnel from several countries have been in Haiti since the change in government, there are relatively few of them and their mission in Haiti does not include guaranteeing the safety of visitors.” Exhibit 983 at 715. The January 10, 2005, Consular Information Sheet was not more optimistic and did not suggest that the reported-on matters had improved since the last information sheet. Exhibit 984.

17. On November 8, 2004, an extension of the authorized departure status from Port-au-Prince for an additional thirty days was requested with the justification:

Although the security situation in Port-au-Prince is manageable, the levels of lawlessness and potential for violence in Port-au-Prince remain high. While MINUSTAH forces continue to build up their capability to counter that threat, the process has been slow going with some deployments delayed. MINUSTAH capability will continue to build in the coming weeks. . . . Post would like to hold off on any recommendation to lift authorized departure until we have seen additional forces made operational. It appears that capability will largely be complete by the end of the month.

Exhibit 16085. This justification was not available to the offerors.

18. Within this context, in early November 2004, with the embassy on authorized departure, and the day after the requested extension of that status, the agency held a pre-proposal meeting with potential offerors, attended by the contractor, among others. During this meeting, the United States Ambassador to the Republic of Haiti and the Regional Security Officer for Haiti each made remarks. These remarks were not made part of the solicitation or contract. Exhibits 1, 10. As reflected in notes taken by attendees, the Regional Security Officer seemingly made the comment that the security situation in Haiti had improved with the arrival of MINUSTAH. Exhibits 5 at 165-66, 6 at 176 (¶ 1.1). In

contrast, notes of the meeting indicate that the Ambassador commented that MINUSTAH forces were trying to assert control and the Regional Security Officer noted the country was in a period of increased unrest and that problems would continue through the election process in September and November 2005. Exhibit 5 at 165. Further, notes by another individual attribute to the Regional Security Officer comments that September and October had been a period of increased unrest, that UN peacekeepers and new police were trying to establish government control in areas not under government control before the departure of President Aristide, and that he thought security was getting better as more UN troops arrive, as they get better organized, and as the police are better trained. Exhibit 20164 at 162-63. Specific questions were not posed by the contractor regarding the security situation. Transcript (May 15) at 274-75. No assurances as to present or future security conditions in Haiti are found in any solicitation amendment or in the contract.

19. During proposal preparation, the contractor was aware of an evacuation monitor, dated November 10, 2004, issued by an independent security support service firm utilized by the contractor; the publication categorized Haiti at alert state two (security situation or country instability represents a risk to staff, their families, and physical assets), with a stated reason for the categorization:

Despite temporary stabilization of security situation due to the interim government and the presence of foreign troops, the process of restoring law and order, staging legitimate elections and fomenting sustainable political stability will be problematic and lengthy.

Exhibit 6144 at 783-84.

20. On November 22, 2004, the contractor sought and received a specific response from the independent security firm concerning the conditions in Haiti, as the contractor was preparing its proposal. The firm's response stated, in pertinent part:

The security situation remains problematic and security risks are HIGH. However, the situation has stabilised following the arrival of foreign peacekeeping forces and rebel forces have taken a more conciliatory stance. Companies can now consider returning foreign staff and personnel can undertake essential business travel.

Despite the recent stabilisation, the situation remains fragile and business personnel and travellers alike should remain vigilant. All personnel arriving in the country should be met by a trusted contact. Economic difficulties have

also produced a widespread increase in criminal activity, particularly kidnap-for-ransom. Continued economic deterioration will lead to an increased incidence of crime, especially kidnapping and armed robbery. The rise in rates of armed crime, murder and carjacking remains a concern. Public security has dropped dramatically, particularly in Port-au-Prince. Lower-income areas of Port-au-Prince . . . are particularly unsafe. However, all areas, including the affluent suburb of Petionville, suffer from random crime.

The police force remains a largely ineffective force and foreign troops are principally responsible for protecting key infrastructure and diplomatic assets. . . . Demonstrations and clashes between pro-Aristide and opposition groups will continue.

The expiry of a deadline for rebel disarmament further increases the lik[e]lihood that unrest will persist. Personnel should be aware that the situation could deteriorate rapidly.

On 13 Nov 2004 it was announced that Mr Aristide would be issued with a warrant for his arrest for financing a wave of unrest in Port-au-Prince. Any move against Mr Aristide will anger his supporters and make the peace process in Haiti even harder.

Exhibit 6145.

21. While preparing its proposal, the contractor was aware of various warnings concerning Haiti, as it made its own assessments and reached its own conclusions. As one contractor employee, who was involved in proposal preparation but did not attend the pre-proposal conference, testified, "By the November prebid meeting, . . . we have the Department of State inviting U.S. citizens to come down for a prebid. Obviously, reflective of the stabilization that had been achieved as a result of the peacekeeping forces." Transcript (May 15) at 62, 63 ("obviously MINUSTAH was ramping up very rapidly, and the effect was having a stabilizing effect"), 239. The individual also concluded that the Ambassador and Regional Security Officer were providing updates and highly customized assessments, although neither made any statement to such an effect. Transcript (May 15) at 258-61. The contractor opted to review, or not, various available information, and to give that information the weight it deemed appropriate. The contractor focuses on the pre-proposal conference statement that MINUSTAH was a stabilizing force; however, a similar statement was contained in the report of the independent firm obtained by the contractor, with the notice that there was a widespread increase in criminal activity and that the situation could

deteriorate rapidly. Finding 20. These statements are found in the context of the security situation remaining problematic and security risks high.

22. The authorized departure for Port-au-Prince, Haiti, for both eligible family members and non-emergency employees of the embassy, in effect during proposal preparation and at the time of award and thereafter, was terminated on March 11, 2005. Exhibit 16186.

23. Based upon the record, and as highlighted by these findings, the Board concludes that during proposal preparation through the time of award, in Haiti generally, and in Port-au-Prince and its environs, there existed significant concerns for safety over the performance period. The instability, with the recognized potential for demonstrations, violence, kidnappings, and other incidents, posed particular threats whose occurrence could not always be predicted in terms of time and place. These conditions could affect local workers (and their families), who would be individuals known to be employed with earnings, and who had to get to and from work; local businesses supporting the contractor, which would be subject to the same local conditions in getting materials and equipment to the jobsite; foreign businesses supporting the contractor which also would have to get people and/or products to the jobsite; and foreign hires to assist in the project. Although the NEC jobsite was in a relatively safe environment, issuances by the agency and the independent security firm used by the contractor noted concerns that could affect performance. A volatile security situation existed; businesses were being advised to take precautions at the same time that travel to Haiti was being discouraged. The agency did not promise a safe environment for the contractor.

24. Pre-award and post-award, the agency had significantly more knowledge about Haiti than is referenced in this opinion or is contained in the record. Some information was revealed contemporaneously in warnings and issuances, and in various documents and conversations. Some information is in the record through testimony. Some information was and remains classified. The solicitation and contract do not provide that the contractor will have access to all of the information and views that may lead to agency issuances or determinations. The solicitation and contract specify that it is the contractor's responsibility to determine and gather the information necessary to perform this contract. Finding 7.

Discussion

Contract Interpretation

This firm, fixed-price, design-build contract includes a Type of Contract clause stating that changes in the contract price or time to complete will be made only due to changes made by the Government in the work to be performed, or by delays caused by the Government. Finding 4. The clause allocates substantial risks to the contractor. *Spearin v. United States*, 248 U.S. 132, 136 (1918) (“Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered.”); *McNamara Construction, Ltd. v. United States*, 509 F.2d 1166, 1169-70 (Ct. Cl. 1975) (“We have consistently held that the contractor in a fixed-price contract assumes the risk of unexpected costs. In firm fixed-price contracts, risks fall on the contractor, and the contractor takes account of this through his prices.” (citations omitted)).

Contrary to the agency’s suggestions, the firm, fixed-price contract does not absolutely shield the agency from being obligated to provide additional time and/or money under the terms and conditions of this contract. This is so because the contract includes an Excusable Delays clause and a Differing Site Conditions clause, among others. The excusable delays identified in the clause are not all Government-caused. Similarly, a differing site condition does not involve a Government change to the contract. Thus, although the contract was established with a firm, fixed-price and a defined completion date, neither the dollars nor the date is immutably fixed; the inclusion of these specific clauses recognizes that a situation may merit revising the completion date and/or contract price for performance. Interestingly, the agency acknowledged the effects of these clauses in its responses to the requests for adjustments: the agency treated each clause as permitting a modification with no absolute bar to the recovery sought; however, because these facts constitute parol evidence, they are not material or determinative. The contractor seeks relief under the express contract clauses for what it contends was a differing site condition (the existence of collapsible soils) and for matters relating to the security environment actually encountered during performance.

Haiti posed various challenges to the contractor, in terms of safety and security, and their impact on performing, hiring and retaining a satisfactory workforce, and acquiring and transporting equipment and materials throughout the performance period. The contract places upon the contractor the burden of obtaining information regarding Haiti and ascertaining the availability of labor, materials, equipment, and transportation. Finding 7. The contract establishes no expected conditions in Haiti or thresholds, which if exceeded,

would entitle the contractor to additional payment, and identifies no particular dollars to be earmarked for security purposes.

The unpredictable nature of the situation in Haiti was known at the time of contracting. The embassy was on authorized departure during proposal preparation and at the time of award. Agency issuances described Haiti as one of the least developed and least stable countries in the Western Hemisphere. Regarding safety and security, the issuances stated that United States citizens should avoid travel to Haiti at that time, noted that there were no safe areas in Haiti, and advised that crime, already a problem, had mushroomed in recent years. Further, the issuances specified that death threats, murders, drug-related shootouts, kidnappings, armed robberies, break-ins, or car jackings occurred almost daily, with areas once considered relatively safe becoming the scenes of an increasing number of violent crimes. As of December 1, nine kidnappings involving American citizens had been reported during 2004. The contractor was also aware of information found in publications of an independent security firm which categorized Haiti at alert state two (security situation or country instability represents a risk to staff, their families, and physical assets). The publication attributed temporary stabilization to the presence of foreign troops, in part. The same firm reported, after the pre-proposal conference, that the security situation remained problematic with high security risks, but noted that the situation had stabilized following the arrival of foreign peacekeeping forces and that rebel forces had taken a more conciliatory stance. This informed readers that economic difficulties had produced a widespread increase in criminal activity, particularly kidnap-for-ransom, and indicated that continued economic deterioration would lead to an increased incidence of crime, especially kidnapping and armed robbery, while the rise in rates of armed crime, murder, and car jacking remained a concern. Public security dropped dramatically, particularly in Port-au-Prince; lower-income areas of Port-au-Prince were noted as being particularly unsafe, while all areas, including the affluent suburb of Petionville, suffered from random crime. The issuance specified that personnel should be aware that the situation could deteriorate rapidly.

The contractor maintains that it sought and obtained assurances from the agency regarding the conditions in Haiti at the pre-proposal conference. The contractor did not actively seek any such information; it did not pose questions. Rather, the contractor relied upon statements made by the United States Ambassador to Haiti and by the Regional Security Officer. The Board concludes that the statements were not assurances. Most significantly, the statements are not incorporated into the solicitation or contract. Finding 18. Moreover, in the context of the overall statements, which contain references to MINUSTAH trying to establish (not having established) control and the past two months having been a period of increased unrest, with problems to continue through the elections, the comments cannot be viewed as assurances of present or future conditions. Rather, the statements expressed views

of particular individuals at a moment in time. Neither the Ambassador nor the Regional Security Officer made commitments regarding the conditions that would occur during the performance period.¹

Superior Knowledge

The contractor contends that the agency failed to disclose superior knowledge relating to the security conditions in Haiti. To prevail under the superior knowledge doctrine requires specific evidence that the contractor:

- (1) undertook to perform without vital knowledge of a fact that affects performance costs or direction,
- (2) the government was aware that the contractor had no knowledge of and had no reason to obtain such information,
- (3) any contract specification supplied misled the contractor, or did not put it on notice to inquire, and
- (4) the government failed to provide the relevant information.

AT&T Communications, Inc. v. Perry, 296 F.3d 1307, 1312 (Fed. Cir. 2002) (quoting *GAF Corp. v. United States*, 932 F.2d 947, 949 (Fed. Cir. 1991)). On each of these elements, the contractor fails; the Board need not go into details of classified information, even as it may be assumed that the agency had greater knowledge than the contractor of the up-dated circumstances in Haiti.

The contractor contends that it was not privy to information known to the agency about and relating to security threats in Haiti during the pre-award period. Undoubtedly, the agency had much information that it did not share with the contractor prior to and after award. However, the solicitation put the contractor on notice that the contractor was responsible for gathering its own information relating to Haiti and performing under the actual conditions. Authorized departure procedures in effect at the embassy. Through Travel Warnings and Consular Information Sheets, the agency put offerors on notice of a wide

¹ During the pre-proposal conference a statement was made, again not incorporated into the terms and conditions of the contract, that Americans would be treated as embassy employees should an evacuation occur; that is, that emergency medical coverage and evacuations would be covered. Such expressed the policy of the United States. That statement is not relevant, because the ordered departure was not an emergency evacuation within the policy, and emergency medical coverage was not required during the performance of this contract.

variety of security concerns. Additionally, from an independent security firm, the contractor obtained information that noted a widespread increase in criminal activity, particularly kidnap-for-ransom, and suggested that continued economic deterioration would lead to an increased incidence of crime, especially kidnapping and armed robbery. The information indicated that a rise in rates of armed crime, murder and car jacking remained a concern, expressly noted that public security has dropped dramatically, particularly in Port-au-Prince, with all areas suffering from random crime, explained that the expiry of a deadline for rebel disarmament further increased the likelihood that unrest would persist, and specified that personnel should be aware that the situation could deteriorate rapidly. This information makes it unnecessary for the Board to itemize other sources of material, including contacts the contractor had in Haiti, and the media, for reports of daily occurrences and other conjectures of future conditions. The contractor knowingly competed and set its pricing based upon information it garnered, aware that it was not privy to all the agency knew, and that it had not sought any additional information through questions which could be answered in a solicitation amendment. It was evident that the future in Haiti contained many uncertainties with respect to security and safety; such was a component of the competition and performance.

No information identified by the contractor as known to the agency but not the contractor can be deemed vital knowledge considering the backdrop of then-current and potential security obstacles. The agency could not be aware of the contractor's actual knowledge, particularly when the contractor noted in its proposals its awareness of the political and security environment, and a partner's presence and experience in Haiti. Finding 2. The agency did not mislead the contractor and expressly put it on notice of its need to inquire. With no specific information truly vital, the agency did not fail to provide vital relevant information. Thus, the contractor has failed to demonstrate any of the four elements necessary to prevail under the superior knowledge doctrine.

PART 2: SUBSURFACE SOIL

Findings of Fact

25. The site description provisions of the solicitation and contract do not indicate specifics of the subsurface conditions; however, the clause notes that the site is covered with vegetation, without trees, and that formerly the area was used for sugar cane cultivation. Exhibit 10 at 775-76 (¶ C.1.3). Site design requirements relating to geotechnical engineering specify:

C.2.2.1.2.1

A preliminary geotechnical report for this project is provided in Section J for use in developing a proposal for this project. This geotechnical investigation was performed primarily for site acquisition purposes and contains general site development recommendations, generic recommendations for structural support, as well as subsurface information. The Contractor's geotechnical engineer/consultant shall use the subsurface information (boring logs, field testing, and laboratory testing) contained in this report to develop preliminary project specific design recommendations for use in preparing the Contractor's proposal.

C.2.2.1.2.2

Following contract award, the Contractor shall develop the actual project specific field geotechnical exploration program to provide the recommendations for the geotechnical-related design. The Contractor is responsible for all geotechnical related design (foundation engineering, ground modifications, slope stability of soils, etc.). The Contractor is responsible for the assessment of subsurface properties.

Exhibit 10 at 780-81.

26. Further, regarding geotechnical engineering, the solicitation and contract state:

The Contractor shall engage the services of a geotechnical consultant to perform all necessary geotechnical work for the project. . . . The Contractor shall identify the type and cost of Foundation System required. The Contractor's proposed Foundation System shall be based solely on the Contractor's independent analysis and knowledge of the site and subsurface conditions. The contractor will provide as a requirement of the Proposal a detailed description of the proposed Foundation System and a [sic] shall breakout the cost for the foundation work as a lump sum.

Exhibit 10 at 803-04 (¶ C.5.8).

27. The solicitation and contract recognize that the contractor must obtain the subsurface information needed for the design of the project, with the contractor's geotechnical consultant to submit an exploration and testing program to the agency for

review as part of the design development submittal. Exhibit 10 at 813 (§ C.A.2.1.b). In particular, the contractor was to evaluate the conditions of the various soils for stability and for short-term and long-term effects of various foundation elements and structures. Exhibit 10 at 813-14 (§ C.A.2.2.c).

28. The preliminary geotechnical investigation report referenced in the solicitation (and to be relied upon in proposal preparation) contains information regarding subsurface conditions, based upon sampling and testing of soils taken at various identified locations within the compound footprint. The report includes subsurface soil classifications with boring logs from twelve locations, liquid and plastic limits, grain size, and standard penetration test (SPT) data. The report does not specify void ratios, compressibility, or collapsibility; no collapse tests were performed for the report. Exhibit 405 at 462-596. The report notes a vegetal soil on the top layer. Beneath that layer and above a silty sandy gravel layer (found in each boring) are one or two layers (either of clayey silt and/or silty fine sand and/or marl) with total depths ranging from 2.0 to 4.5 meters. Exhibit 405 at 487-90. The parties refer to the soil beneath the top layer and above the gravel layer as the upper silt layer. The report states in one portion, generally describing the foundation carrying level of the strata, that the clayey silt layer “is not recommended to receive the foundations because of its weak mechanical characteristics and its too great heterogeneity.” Exhibit 405 at 503. While that reference to foundations is non-specific (whether applicable to all structures or only those of greater height than one story), the conclusions and recommendations section of the report discusses the stratified alluvial soil with lateral and vertical heterogeneity, the great variation of thickness in the layers from one point to another, and the options for the variety of structures to be constructed. The report states regarding one story structures, “foundations on footings in the first meters of the ground made up primarily of argillaceous silt could be envisaged, by decreasing the stress of this layer.” Separately, for fencing, the report concludes: “When building the perimeter fence, the foundations might be established in the silty layer located above the sandy silty layer if continuous concrete footings are chosen to connect the columns.” Exhibit 405 at 505-06.

29. The contractor utilized an engineering and consulting firm in the proposal preparation process. With a date of November 22, 2004, a geotechnical engineer from that firm provided the contractor with an analysis. Regarding foundations for the structures here in question, the analysis states:

Shallow spread footings bearing in the granular fill and designed for allowable bearing pressure in the range of 3 ksf [kips (thousand pounds of force) per square foot] would likely be feasible for [the building structures here at issue]. The clayey silt zone would not generally need to be removed completely, but

would require significant preparation and inspection by proofrolling and stabilizing or undercutting weak or soft zones.

. . . [T]he perimeter wall . . . would also generally have acceptable support conditions in the granular fill placed over existing site grades with limited inspection preparation.

Exhibit 13084 at 599-600; Transcript (June 1) at 11-17 (detailing some of the underlying efforts and analysis leading to the represented conclusions).

30. The contractor priced its proposal in accordance with the recommendations of the geotechnical engineer so as not to price removing the entirety of the upper silt layer for the areas here in question. After award, the contractor utilized the same engineering and consulting firm and the same geotechnical engineer it had used preaward to investigate the site and prepare the required geotechnical report. Based upon field testing and observations, the geotechnical engineer noted that soil samples slaked when dropped into a jar of water, seemed to have low apparent density, and had a dry consistency. Further, he noted vertical root holes. He maintains that these are indicators of potentially collapsible soil. Transcript (June 1) at 33. The geotechnical engineer took acceptably undisturbed test pit samples from the site on March 15 and 16, 2005. Exhibit 949 at 511-18; Transcript (June 1) at 24-25, 34-36. On March 21, 2005, the samples (identified with a specific location and depth of sample) were received at the associated laboratory. Various tests were conducted on portions of some samples. Exhibit 13091. Of four samples identified for consolidation testing (to measure decreases in soil height under particular loads), the geotechnical engineer at some point initially ordered a collapse test on one sample, TP7 (test pit 7). Exhibit 13091 at 286-89 (two undated lab assignment sheets do not specify a collapse test, at 286-87, two other undated lab assignment sheets identify a collapse test for TP7, at 288-89); Transcript (June 1) at 34. On March 23, 2005, the geotechnical engineer informed the contractor that he had samples from the upper silt layer and noted, regarding the two to four meters of very stiff dry gray fine sandy silt: “Minor concern that this may be collapsible.” Exhibit 21270 at 28. The TP7 and TP8 samples were not taken from under or adjacent to the footprint of any structure here at issue. Exhibit 949 at 478; Transcript (June 1) at 78.

31. The American Society for Testing and Materials (ASTM) International D5333, Standard Test Method for Measurement of Collapse Potential of Soils, defined collapse as a “decrease in height of a confined soil following wetting at a constant applied vertical stress.” Exhibit 5288 (¶ 3.2.1). In conducting a collapse test pursuant to this recognized standard, a sample of the soil (approximately one inch high and two and one-half inches in diameter) at its natural moisture content is trimmed to fit into a ring and placed in a machine.

The height of the material is measured initially, and at timed increments as the material is subjected to given weight loads. At a given load, the sample is inundated with water, with the height measured at timed increments. A decrease in height attributable to the water inundation reflects the collapse of the soil, and is categorized based upon the percentage of collapse. Under this standard, the test would have involved five loadings, with each stage lasting one hour (dry loading total 5 hours), then an additional 24 hours for the wet loading, for a total test time of 29 hours. Exhibit 5288; Transcripts (June 1) at 42-43, (June 4) at 168. The degree of collapsibility of soil is pertinent to designing foundations. With significant collapsibility, soil may be removed, with volume replaced, as an economical method of dealing with collapsible soil in the design phase. Transcript (June 4) at 18, 87.

32. The TP7 sample was collected at a depth of 1.2 to 1.6 meters. Exhibit 13091 at 321. A single consolidation/collapse test was run on a portion of that sample. The test began on March 24, 2005; the sample was flooded at a given load on April 8; and the flooded portion of the test at the given load was completed on April 11. Exhibit 13091 at 328-30. This test was not conducted pursuant to ASTM D5333. The periods of time between loading the sample and inundating with water exceeded the recognized standard times; the sample was no longer at its in situ moisture content. The reports indicate no deviations from the ASTM standard. The test report was not initialed as having been reviewed. Exhibit 13091 at 328. Initially, the test report depicts a collapse of eight percent, viewing the percent strain, which is a moderately severe collapse potential under the standard. Exhibits 13091 at 378, 5288 at 908. A later test report depicts a collapse of twelve percent, which is a severe collapse potential under the standard. Exhibits 13113 at 565, 5288 at 908.

33. The TP8 sample was collected at a depth of .6 to .8 meters. Exhibit 13091 at 340. A single consolidation test of a portion of the TP8 sample began March 24, 2005, and was run through April 18, 2005. Exhibit 13091 at 354-57. A test sheet was annotated: "Flood when finished - just to see what happens[.]" A collapse test was then performed on that sample which was flooded on April 18 with results recorded for April 18-19, 2005. Exhibit 13091 at 358. The periods of time between loading the sample and inundating with water exceeded the recognized standard periods; the sample was no longer at its in situ moisture content. The reports indicate no deviations from the ASTM standard. The test report was not initialed as having been reviewed. Exhibit 13091 at 354. At first, a consolidation test report was produced which does not indicate the results of flooding. Exhibit 13091 at 346. A later consolidation test report shows a collapse of seven percent, viewing the percent strain. Exhibit 13113 at 5665.

34. In an initial report, dated April 29, 2005, the geotechnical engineer concluded that the upper silt layer (that is, the layer beneath the top soil and above the gravel layer) is

collapsible and unsuitable for supporting foundations intended to be used by the contractor. Exhibit 949 at 452. The report includes the consolidation/collapse test results for TP7, but only the consolidation test results for TP8. Exhibit 949. The report describes the characteristics of the upper silt layer as including numerous, generally vertical holes, collapse tests (plural) showing severe collapse potential, relatively high void ratio, low in situ density, low moisture content, and slaking. Exhibit 949 at 460-61 (¶ 2.4.2).

35. On April 29, 2005, the contractor informed the agency that, based upon the geotechnical investigation, and as confirmed by tests, the upper layer of soil at the site is unacceptably collapsible. The notification specified that pursuant to clauses H.29 and H.30, the contractor deemed this condition to constitute a differing site condition, and anticipated cost and time impacts. The contractor sought agency concurrence with recommendations and immediate direction. Exhibit 13103.

36. A project executive for the agency responded on May 3, 2005, noting that a review of the final geotechnical report had not occurred. However, the response identified a paragraph of the preliminary investigation report referenced in the solicitation that states that the layer is not recommended to receive foundations because of its weak characteristics and its too great heterogeneity, Finding 28. The project executive stated that, based upon this, he intended to recommend to the contracting officer that a request for an equitable adjustment be rejected in its entirety. Exhibit 13107 at 43. The contractor provided a response, noting that the solicitation gave no indication of the need for removing the soil here at issue. Exhibit 13106 at 15-16. On May 5, 2005, the agency acknowledged receipt of the notice of what the contractor deemed to be a differing site condition, and stated, "please also note that our representatives do not agree with this determination." Exhibit 13114. The contractor responded to the agency, with a letter seemingly of May 5, 2005 (although dated April 5, 2005), recognizing that the agency had written:

Since this is a design build contract we are not in a position to direct you to over excavate or not. This is a design problem and not a change to the contract. You need to provide a[n] engineered solution that meets the requirements of the contract taking into consideration the questionable bearing capacity of the soils th[at] was clearly noted in the RFP [request for proposals].

Exhibit 13116 at 27-28. Acknowledging the design-build nature of the contract, the contractor sought "clear direction," as it asserted that it "is imperative that we understand precisely what you want us to do." Exhibit 13116 at 27-28.

37. With on-going discussions (internal within the agency, between the contractor and geotechnical engineer, and between the parties), e.g., Exhibit 405 at 561-64, on May 10, 2005, the agency informed the contractor that the agency would not provide a directive to over excavate and backfill; the agency found no differing site condition. The correspondence acknowledged and made a matter of record that the contractor might on its own select as a means and methods to over excavate and backfill. Exhibit 13119 at 28.

38. Recording the depth of each sample, the contractor's geotechnical engineer took additional acceptably undisturbed soil samples from the site between May 23 and 25, 2005; consolidation/collapse testing was performed on four samples. Testing of sample B1 began on June 6, flooding occurred on June 9 (with flooded results recorded through June 13), and testing concluded on June 21, 2005. Exhibit 13091 at 374-77. Testing of sample B4 began no later than June 9, flooding occurred on June 9 (with flooded results recorded through June 13), and testing concluded on June 20, 2005. Exhibit 13091 at 365-67. Testing of sample B8 began on June 6, flooding occurred on June 9 (with flooded results recorded through June 13), and testing concluded on June 20, 2005. Exhibit 13091 at 360-63. Testing of sample B9 began on June 6, flooding occurred on June 9 (with flooded results recorded through June 13), and testing concluded on June 21, 2005. Exhibit 13091 at 369-72. The geotechnical engineer has written that the collapse tests were conducted pursuant to ASTM D5333, Exhibit 13113 at 559; no deviations were noted. The geotechnical engineer used by the contractor characterizes the results of these tests as being based upon a Navy Facilities Design Manual (not the ASTM D5333 standard), with two showing slight collapse (about one-half percent) and two showing little collapse. Exhibit 13113 at 560-61, 568, 570, 573, 574. As with the earlier collapse testing, the periods of time between loading each sample and inundating with water exceeded the recognized standard periods; each sample was no longer necessarily at its in situ moisture content. Transcript (June 4) at 186. The reports indicate no deviations from the ASTM standard. As interpreted by one of the experts for the contractor, these samples showed either no or negligible collapse. Transcript (June 4) at 177.

39. The contractor submitted a request for equitable adjustment, dated July 1, 2005, based upon an unforeseen condition (the existence of collapsible soils). The request sought \$1,159,619 in direct and delay costs, with delay costs reflecting an estimated forty days of extended site overhead. The report includes an independent party's review and analysis in support of the contractor's position; the Board finds that, because of the limited nature of the analysis, the conclusions are not persuasively supported. Exhibit 405 at 930-58.

40. In a July 5, 2005, addendum to the report of April 29, 2005, the geotechnical engineering and consulting company summarized its further investigations and results. The report states:

Neither density, plasticity, liquid limit, classification, nor geographic location appear to be reliable predictors of collapse potential. As indicated in the [solicitation's preliminary] report, the Upper Silt appears to be heterogeneous. The variability may be further complicated by the presence of significant lime in the soil which may substantially impact the behavior of the clay fraction of the soil, causing it to behave more like silt. This may explain why soils do not always behave as anticipated[.]

Exhibit 13113 at 561. As in earlier versions, this report concludes that all of the upper silt layer should be considered suspect of having an unacceptable collapse potential, and recommends that all of the upper silt, defined to the depth of the upper gravel layer, be removed from beneath structures. Exhibit 13113 at 561.

41. The contractor acted pursuant to the recommendations of the geotechnical engineer in removing the upper silt layer, while the agency refused to acknowledge the existence of a differing site condition.

42. On August 3, 2005, the contractor sought from the agency an update on the status of the request for an equitable adjustment concerning the alleged differing site conditions. On August 11, 2005, the agency informed the contractor that the request would not be accepted. Exhibit 405 at 1149. By letter dated October 17, 2005, the agency formally rejected the request of July 1, 2005. Exhibit 43 at 510.

43. Experts for each side have opined, in submissions, expert reports, expert responses, depositions, and hearing testimony, on the nature of the soil under the structures at issue. The record also includes published articles authored or co-authored by these experts and others. The experts presented by the contractor are absolutely certain of their position that the upper layer of soil is unacceptably collapsible, meriting removal, as they find support in the test results as well as the characteristics of the soil. *E.g.*, Transcript (June 4) at 14-18. The experts presented by the agency are not convinced of that conclusion, as they find the test results unreliable and the characteristics as not necessarily indicating collapsible soil. *E.g.*, Transcript (June 5) at 67, 72, 98-100.

44. Having weighed the evidence, the Board concludes that the collapse tests were not performed pursuant to acceptable standards and the test results have not been shown to be reliable. The characteristics of the soil, without a valid collapse test, do not demonstrate the degree of collapsibility of the soil. Accordingly, the Board does not conclude that the soil was collapsible, or collapsible to a degree significant to the design of the foundations.

45. In explanation of these conclusions, some matters are particularly noteworthy. The record does not satisfactorily establish, by a preponderance of the evidence or more-likely-than-not standard, the degree, if any, that extending the period from sample collection and the start of testing to the conclusion of collapse testing affected the collapse test results, be that insignificant, significant, or somewhere in between. The contractor is correct, first, that testing the effects of drying recompacted soils is not directly helpful in determining the effects of drying undisturbed soil, and, second, that the agency did not test actual soils from Haiti. However, the contractor has presented no actual test results on the effects of drying on undisturbed soils (hypothesizing is not the equivalent of actual test results; one typically would use tests to support a hypothesis), and no test results on soil from Haiti were run pursuant to the recognized standards. The contractor, with the burden of proof, has not presented sufficient evidence. It was within the contractor's ability to obtain and test samples according to standards.

46. The characteristics of the soil and site observed by the geotechnical engineer did not lead him to the conclusion that the upper silt (or any layer thereof) must be collapsible. The concern was minimal, as expressed in a contemporaneous email message, and revealed by the ordering of a single collapse test. Finding 30. The totality of the soil characteristics (including post-award testing other than collapse testing) may well demonstrate that the soil is potentially collapsible. However, the actual collapse of the soil and the degree of collapse are not determined on those characteristics alone. Exhibit 18861 at 4-7. The record does not establish a reasoned basis to conclude that the soil in fact was unacceptably collapsible.

47. These findings and conclusions that the collapse test results have not been shown to be reliable, and that the record does not convincingly demonstrate that the soil reflected a differing site condition, resolve the differing site conditions claim. Moreover, the testing of such few samples, even if valid tests were performed with reliable results, leaves additional questions relating to the appropriateness of deeming the soil unacceptably collapsible, or of extrapolating the particular instances of collapse at TP7 and TP8, each taken at a specific depth, in a particular soil in the upper silt layer, to areas in the footprints of the structures here at issue. Stated differently, the experts for the contractor deem unacceptable the risks of collapse at the entire site (or at least the footprints in question) with the degree of collapse shown by TP7 alone, or with TP8; the experts for the agency reach a more limited conclusion. Transcript (day 15) at 72, 99-100 (would advise of the need for more testing). Journal articles warn against characterizing a site with just one test. Exhibit 5305 at 136. The contractor has not supported adequately its characterization of the soil conditions here at issue with the observations and test results (even if deemed properly performed).

Discussion

Differing Site Condition Claim

The contractor bears the burden of proof under the Differing Site Conditions clause, Finding 5. The contractor asserts the existence of both a type 1 and a type 2 differing site condition. A necessary element of proof under the clause, for either type, is the existence of a differing site condition. Here, the assertion is that the upper silt layer of soil is collapsible. Factually, the Board has determined that the contractor has not met its burden of proof.

The testing of the soil was not performed pursuant to recognized standards. The test results have not been shown to be reliable indicators of the collapsibility of the soil, either in terms of collapse versus no collapse, or the degree of collapsibility. The totality of the evidence does not demonstrate the soil is unacceptably collapsible so as to require the removal of the soil. Without this necessary element of collapsibility, the claim of a differing site condition fails. Although the contractor complied with the recommendations of its geotechnical engineer, those recommendations were based upon visual observations and results of collapsibility tests that had not been performed in accordance with accepted standards. The Board recognizes that an engineer with the totality of the test results and observations may be unable to propose a design which leaves the undisturbed soil layer in place; however, adequate, reliable testing could enable a different conclusion or recommendation. Sufficient proof of a differing site condition is lacking in this record. The speculation required by the inadequate and insufficient testing does not enable a conclusion that a differing site condition existed. Without adequate support for the existence of a differing site condition, the contractor is not entitled to receive additional time or money for its efforts under the design-build contract.

The contractor asserts that the agency should not now be heard, several years after-the-fact, to complain about the contractor's testing plan and methodology (e.g., the number of borings made, locations of borings and test pits, number of tests performed--including response-to-wetting tests--or the type of tests performed). The agency timely put the contractor on notice that the agency was not accepting the differing site condition conclusion proposed by the contractor. The agency suggested that further testing would be required. The contractor had further testing performed. Those results indicated no significant collapsibility of the samples tested. That the six collapse tests were performed with deviations from the ASTM D5333 standards was not noted in the reports to the agency.

The contractor also references the Differing Site Conditions clause as imposing a duty on the contracting officer promptly to investigate after receiving notice of alleged differing

site conditions, with an obligation on the agency to provide direction. The agency did provide direction, rejecting the conclusion that a differing site condition existed and permitting the contractor to proceed as it deemed appropriate under the design-build contract. The agency is not contending that the ultimate foundation design was improper; rather, the agency contends that it is not obligated to provide additional time and/or money under the contract because the contractor has not established the existence of collapsible soils (that is, no differing site condition has been demonstrated to have existed). On this point, the agency is correct.

PART 3: PERFORMANCE, EXCUSABLE DELAY, AND ACCELERATION

Findings of Fact

Post-award Conditions and Performance

48. Shortly after award, on January 17, 2005, the contractor received another message from the independent security firm concerning Haiti. The message indicates that a colleague in Port-au-Prince, working on a kidnap-for-ransom case, thought Kabul compared favorably in terms of law and order. The message notes that even with the United Nations peacekeeping troops, the country remained unstable and violence persisted, with continued volatility likely to hamper economic recovery in the medium term, and with elections likely to cause further unrest. The email message continues:

Economic difficulties have produced a widespread increase in criminal activity, particularly kidnap-for-ransom. Criminal gangs target wealthy individuals and demand ransoms . . . to release their victims. The rise in rates of armed crime, murder and carjacking also remains a concern. Public security has deteriorated dramatically, particularly in Port-au-Prince. Lower-income areas of Port-au-Prince, especially the Cite Soleil, Bel Air and Carrefour areas, are particularly unsafe. However, all areas, including the affluent suburb of Petionville, suffer from random crime.

Business personnel should only undertake essential travel to Haiti.

Exhibit 6147 at 249.

49. As noted, the authorized departure for non-emergency personnel and family members of embassy employees terminated on March 11, 2005. Exhibit 16186. A Travel Warning issued that date reported the lifting of the authorized departure, but warned United

States citizens of the dangers of travel to Haiti due to the volatile security situation. “Americans are reminded of the potential for spontaneous demonstrations and violent confrontations between armed groups.” The warning encouraged vigilance in light of the potential for looting, the presence of intermittent roadblocks set by armed gangs or the police, and the possibility of random violent crime, including kidnapping, car jacking, and assault. It noted that travel could be hazardous within Port-au-Prince, and that United States businesses continued to operate in Haiti, but took special precautions to protect their facilities and personnel. Exhibit 995 at 782-83. An agency press guidance issuance of that date notes the termination, and explains why the agency reissued a Travel Warning: “While security has stabilized somewhat, we still believe that conditions warrant a travel warning.” Exhibit 16188 at 468.

50. On May 26, 2005, ordered departure from Port-au-Prince was approved for a period of thirty days (with continuation or termination to be requested following re-evaluation) of eligible family members and non-emergency personnel at the embassy. Exhibit 21717. This ordered departure did not apply to the contractor. A Travel Warning (#17) was issued on May 26, 2005,

to warn American citizens of the continued dangers of travel to Haiti. Due to the volatile security situation, the Department has ordered the departure of non-emergency personnel and all family members of U.S. Embassy personnel. The Department of State warns U.S. citizens to defer travel to Haiti and urges American citizens to depart the country if they can do so safely.

Exhibit 996 at 435. The warning states, “Americans citizens who remain in Haiti despite this warning are urged to consider departing.” Exhibit 996 at 436. As in the Travel Warning of March 2005, Finding 49, the warning reminded Americans of the potential for spontaneous demonstrations and violent confrontations between armed groups, the potential for looting, the presence of intermittent roadblocks set by armed gangs or the police, and the possibility of violent crime, including kidnapping, car jacking, and assault. Also, as in earlier warnings, it noted that travel could be hazardous within Port-au-Prince, and that United States businesses continued to operate in Haiti, but took special precautions to protect their facilities and personnel. As in the earlier warnings, this warning also advises, “U.S. citizens who travel to or remain in Haiti despite this Travel Warning must remain vigilant with regard to their personal security and are strongly advised to register online . . . or contact the Consular Section of the U.S. Embassy in Port-au-Prince” Exhibit 996 at 435-36.

51. On May 27, 2005, the contractor informed the agency: “We are following the instructions contained in the Department of State instructions [in the Travel Warning]. All

of our expat [expatriate] staff will leave Haiti no later than Tuesday after we secure our temporary establishments.” The contractor advised of contractual implications relating to delays and additional costs. Exhibit 21731 at 35-36.

52. Later that same day, the agency responded to the contractor:

This email is to inform you that at the current time no directive to stop work or suspend work at the site will be forthcoming from this Department to you for this project. Safety is a primary concern for all of us and this condition is being monitored. Your firm can stop performance on this site unilaterally if it deems that force majeure conditions make performance impossible, but in such a case even if the USG [United States Government] agrees as to the existence of force [ma]jeure conditions your firm would only be entitled to a time extension and not an equitable adjustment for delay costs.

Exhibit 21731 at 35.

53. On May 31, 2005, the contractor notified a subcontractor performing excavation on site:

As a result of actions and directions by our client, the U.S. State Department related to recent security incidents in Port-au-Prince, the management of J.A. Jones, International has ordered that our expatriate personnel depart from Haiti. Accordingly, we will be departing tomorrow morning. It is our expectation and our hope that the State Department will provide definitive direction to JAJI that will allow us to proceed with this project shortly.

Our Contract does not permit permanent works to proceed without an American supervisor present. Therefore, [you are] hereby directed to suspend all excavation of soils and placement of backfill effective at the close of business today. You are further directed to ensure that the excavations are properly bermed and stockpiles are properly shaped to protect the existing works from storm damage to the extent possible by the end of today's work.

Exhibit 21782. On June 1, 2005, expatriate personnel of the contractor departed Haiti; American citizens in the employ of the contractor did not remain. Exhibit 21785. Work on the critical path of performance ceased.

54. The Department of State issues Warden Messages which provide safety or travel information concerning countries or localities, with such messages sent by email to those registered for such receipt; the messages convey timely information on changing conditions. A Warden Message (#18) of June 3, 2005, noted that all United States embassy personnel had been advised that all travel to and from the airport must be in lightly armored vehicles (LAVs), with specified roads approved for airport travel. The message repeated information in the Travel Warning referenced above (reminding Americans of the potential for demonstrations and confrontations, and summarizing the variety of violent crimes). Exhibit 5609 at 435-36.

55. During the ordered departure period, which was extended, the agency approved travel to Haiti for specific individuals. Exhibits 5666-73, 5700. One such approval issued on June 13, 2005, permitting the visit of one individual to provide supervision of on-site security personnel in support of the construction project, specifies:

The crime situation has reached critical levels in Port-au-Prince. Demonstrations occur at irregular intervals in and around the Embassy area. At times, demonstrations have blocked roads leading to the Embassy with burning tires and garbage. Carjackings and armed robberies are on the increase within Port-au-Prince area and can occur at any time of day or night. To avoid being a victim of crime, [temporary duty] personnel are strongly advised to observe the following common-sense rules: . . . In Port-au-Prince traffic is gridlocked and driving is dangerous. The Cite Soleil area of Port-au-Prince is currently off-limits to all personnel. Visitors are reminded to lock vehicle doors and keep their windows rolled up at all times. When traveling outside the Port-au-Prince area, personnel are requested to travel with at least two vehicles for safety reasons.

Exhibit 5674.

56. By letter dated June 17, 2005, the contractor informed the agency of its position “that these recent events represent changed circumstances that are compensable under the terms of the contract and that any resulting delay is excusable.” The letter specifies further,

With respect to alternative options, we wish to reiterate that JAJI remains committed to the project and wants to find a way to make this work. We must however have adequate assurances that the Government will recognize its contractual responsibility to fund the various measures which will allow JAJI to execute the work in a safe environment.

Exhibit 21995 at 218. In terms of proceeding with performance, the contractor stated:

Given the current situation, in order for JAJI to return its personnel to Haiti, we would have to implement extraordinary security measures. These include, but are not limited to, providing additional armored vehicles, changing the plan for individual housing to a “camp style” situation nearer to the project site, and additional security personnel and equipment. These measures will require time to implement before we can return the expatriate personnel to Haiti. Furthermore, it is expected that the security situation and measures to cope with it will severely impact JAJI’s ability to prosecute the work in an efficient and timely manner. We therefore wish to caution that a resumption of work in [Port-au-Prince] is certain to involve substantial additional initial costs and subsequent inefficiencies in productivity if we are directed to return.

Exhibit 21995 at 225-26. In a conversation with the contractor on June 23, 2005, the agency indicated that it considered there to be no changed conditions in Haiti, and that no assurances were provided during the preproposal conference. The agency requested that the contractor determine the security enhancements it thought necessary to return to the site; that is, develop a plan and cost of implementing the plan, with information from proposal calculations to demonstrate what the contractor had included in its pricing. Exhibit 16330.

57. On June 25, 2005, the ordered departure was authorized to continue for a period of thirty days. Exhibit 22157 at 911. A Warden Message (#19) issued on June 26, 2005, stated that due to the volatile security situation in Port-au-Prince, the United States embassy had further reduced the number of its non-emergency personnel and required the departure of all family members of United States personnel. The message urged citizens to depart Haiti, if they could do so safely, and repeated the information referenced above (reminding Americans of the potential for demonstrations and confrontations, and summarizing the variety of violent crimes. Also, “As unrest continues, it is important for U.S. citizens to assess their personal security situation and decide whether to depart Haiti.” And, “Ordered departure status of an Embassy signals that the US Government is concerned for the safety of its employees and should be considered a strong signal to private U.S. citizens.” Exhibit 22143 at 133.

58. On June 28, 2005, the embassy established, for all of its direct-hire American staff, mandatory rules relating to curfew and the requirement to travel in a LAV with an armed escort. These rules did not apply to the contractor. Exhibit 22159.

59. On July 1, 2005, the contractor responded to the agency request of June 23, providing “concept plans and alternatives” instead of any pricing information. In part, the contractor stated:

It is, therefore, imperative that we mutually understand the available options, and not under-estimate the financial and schedule implications of this difficult and complex undertaking.

In order for JAJI to resume permanent construction work in Haiti, we will require some type of clearly documented contractual agreement, defining the terms and cost/schedule elements associated with such efforts.

Exhibit 405 at 1081.

60. By letter dated July 12, 2005, the contracting officer notified the contractor that its demobilization from the jobsite was endangering performance. Further, “the Government regards [your] firm’s stated unwillingness to resume construction activities in Haiti until the Government agrees to a substantial renegotiation of your contract as tantamount to a repudiation of your contractual obligations amounting to anticipatory breach of contract.” Exhibit 16381 at 334. The letter noted the agency’s position that no changed conditions had arisen since the award of the contract, and that the civil unrest was essentially the same condition that prevailed at the time of contract award. The agency asserted that the Travel Warning of May 26, 2005, was not an order to demobilize, but rather contained language substantially the same as those since March 2004. The contracting officer opined that the contractor’s unilateral suspension of on-site activities would warrant a cure notice or an immediate termination for default. “We will defer any such action for ten days in the hope that you will reaffirm your contractual undertakings and provide an acceptable plan for progressing the work under its terms.” Exhibit 16381 at 334-35.

61. The contractor responded by letter dated July 15, 2005, expressing its belief that significantly changed conditions in Haiti presented a unique circumstance that is compensable under the contract, and specifying that it did not intend to repudiate its obligations, as it intended to perform and had continued to perform (e.g., design, procurement, and shipping) while not on site. The contractor stated that it did not view the Travel Warning as a de facto suspension of work.

Rather, JAJI directed its employees to leave [Port-au-Prince] (and to attempt to continue working from the Dominican Republic) because it assessed the security situation as having deteriorated to the point where it could not

reasonably allow them to remain without implementing substantially enhanced security measures. This assessment was substantiated and reinforced by the May 26 Travel Warning, which “ordered the departure of non-emergency embassy personnel,” and “urge[d] American citizens to depart the country if they can do so safely.” Just as the Department’s ordered departure reflects its concern for the safety of its employees, JAJI’s decision reflects its own concern and duty to reasonably ensure the safety of its employees.

Exhibit 18065 at 729-30. The contractor further opined that any direction to come back under current conditions would be a constructive acceleration entitling it to additional compensation, and noted that it would resume permanent construction work as soon as it was assured that it could adequately protect its employees “given the new reality of significantly increased violence and civil unrest that was not present at the time of contract award” and the agency “recognizes that the additional costs of providing such protection are not included within the current fixed-price of the contract.” Exhibit 18065 at 731.

62. On July 21, 2005, the ordered departure was extended for a period of thirty days, through August 23, 2005. Exhibit 5705 at 970.

63. The contractor provided the agency with a request for equitable adjustment (REA) dated July 26, 2005, setting forth security costs and general concepts from its proposal, and estimates for additional security measures (LAVs, enhanced communications, security housing measures, and additional guards), credits if requirements for cleared Americans (CLUS) were reduced, and increased labor costs reflecting incentives under the difficult security circumstances to obtain and retain personnel. Exhibit 16437.

64. The contracting officer provided a response, by letter dated July 29, 2005, explaining, while assuming that crime and civil unrest in Haiti had materially worsened since award, that there was no contractual basis for additional compensation for performing the contractual scope of work under the firm, fixed-price contract: “such worsening of civil conditions, as may have occurred in Haiti since contract award, was neither unforeseeable nor has it necessitated a delay in the work.” The letter concludes, “In the absence of a plan for JA Jones to resume work on-site, the Government will consider whether it is appropriate to issue a show cause letter with respect to your progress on the project.” Exhibit 18070.

65. In a responsive letter dated August 9, 2005, the contractor expressed its disagreement with the views of the contracting officer: “JAJI’s position has been that where, as here, the security environment substantially deteriorates far beyond the point where the reasonable security measures that a contractor should have been expected to employ to

perform the work are no longer adequate to protect its workforce, the fixed-price nature of the contract does not preclude the contractor from recovering the costs associated with providing additional security when the Government directs (explicitly or implicitly) continued performance.” However, the contractor specified that consistent with the direction of the agency, “JAJI will now continue the implementation of all necessary security measures and seek the compensation to which it is entitled through the claims process.” Exhibit 22584 at 369-70.

66. Also on August 9, 2005, the agency provided clearance for entry to Haiti for an agency employee to provide project director support for this project. The clearance states, in part:

The crime situation has reached critical levels in Port-au-Prince. Demonstrations occur at irregular intervals in and around the Embassy area. At times, demonstrations have blocked roads leading to the Embassy with burning tires and garbage. Carjackings and armed robberies are on the increase within Port-au-Prince area and can occur at any time of day or night.

Exhibit 22596 at 870. (The reference to the embassy area is to the existing embassy, not the project under construction, which is distant from the existing facility.)

67. The contractor began remobilizing to the jobsite, with a phased approach dependent upon its defined set of security measures to accommodate the increased staff. Exhibit 405 at 0698. On May 29 and 31, 2005, the contractor had eleven and nine personnel, respectively, in Haiti. As of June 2, 2005 (the day after departures), the contractor had five personnel, the number that remained until August 1, 2005, when it rose to seven. For the remainder of 2005 (at least through November): From August 20 and thereafter, there were at least nine personnel; by September 12, there were at least twelve personnel; and by October 22 there were at least fourteen personnel. Exhibit 25909. On September 21, 2005, critical path work resumed (excavation for the main building). Exhibit 3903.

68. On September 14, 2005, the contractor submitted a request for equitable adjustment for a compensable time extension, seeking time due to the alleged security-related issues, that is, relating to its departure from the site (111 days) and the alleged differing site condition (26 days) as discussed in Part 2 above, and a total of \$1,002,081 in costs known to date. Exhibit 185 at 54-55. The agency rejected project execution schedules submitted by the contractor, because the schedules did not reflect completion by July 3, 2007. Exhibit 15519 (Nov. 7, 2005) at 333. By letter dated December 9, 2005, the contractor informed the agency that it deemed the agency’s refusal to allow additional time to be a constructive

directive to accelerate performance. Exhibit 188. By letter dated December 11, 2006, the agency informed the contractor that the agency would withhold 10% retainage from monthly progress payments based upon the contractor's projected completion date of May 31, 2008, instead of the contract completion date of July 3, 2007. Exhibit 18164.

69. Superseding the Travel Warning issued May 26, 2005, a Travel Warning dated November 22, 2005, was issued to alert American citizens to the continued dangers of travel to Haiti. The warning noted that the ordered departure of non-emergency employees and adult dependents had been lifted (not so for dependents under age twenty-one). Other items in the warning included a reminder of the potential for spontaneous demonstrations and violent confrontation between armed groups, and for looting, the presence of intermittent roadblocks, and the possibility of random violent crime, including car jacking and assault. The warning states that travel could be hazardous within Port-au-Prince, notes that some areas are off-limits to embassy personnel, and indicates the existence of an embassy-imposed curfew. Further, "Kidnapping for ransom remains a particular threat, with over 25 American citizens including children kidnapped over the past year. National elections have been scheduled for late 2005 and early 2006. These elections may become a stimulus for further social tension, which could include violence." Exhibit 997 at 998-99.

70. By email message dated December 20, 2005, the agency stated that it was not responsible for any delay, thereby rejecting the contractor's view that constructive acceleration existed. Exhibit 405 at 1217.

71. A Warden Message (#21) of December 29, 2005, stated that due to the recent increase in kidnappings, the embassy had instituted a more restrictive travel policy and earlier curfew for embassy employees. Exhibit 5612.

72. On July 7, 2006, a Travel Warning noted that the State Department had lifted the ordered departure of embassy employee dependents under age twenty-one, and repeated the earlier warnings of the dangers of travel to Haiti and hazards within Port-au-Prince. Also, "Kidnapping for ransom remains a serious threat, with more than 50 American citizens, including children, kidnapped over the past year." Exhibit 998 at 755-56.

73. The security situation in Haiti continued to pose various risks over the course of performance. Although there has been much testimony and numerous documents addressing the situation, the next Travel Warning, of January 10, 2007, summarized the difficult situation in 2006 and urged caution in 2007. The warning began by noting that it is a reminder to American citizens of ongoing security concerns in Haiti, including frequent kidnappings of Americans for ransom. Travelers were strongly advised to thoroughly

consider the risks before travel to Haiti, and to take adequate precautions to ensure their safety if they did so. The warning further specified:

2. U.S. citizens traveling to and residing in Haiti are reminded that there is a chronic and growing danger of kidnappings. Most kidnappings are criminal in nature, and the kidnappers make no distinctions of nationality, race, gender or age; all are vulnerable. Over 60 Americans were kidnapped in 2006, most in Port-au-Prince. Many abductions are the result of carjacking or home invasions. Past kidnappings have been marked by deaths, sexual assault, shooting and physical assault of Americans. The lack of civil protections in Haiti, as well as the limited capability of local law enforcement to resolve kidnapping cases, further compounds the element of danger surrounding this trend.

3. U.S. citizens are also reminded of the potential for spontaneous protests and public demonstrations that can occur at any time, day or night, and may result in violence. . . . [There exists t]he potential for looting; the presence of intermittent roadblocks set by armed gangs or by the police; and the possibility of random violent crime, including carjacking and assault.

4. Travel can be hazardous within Port-au-Prince.

Exhibit 999.

74. A Travel Warning dated August 31, 2007, reinstated and updated the warning of January 10, 2007, and reminded “American citizens of ongoing security concerns in Haiti, including frequent kidnappings of Americans for ransom. Travelers are strongly advised to thoroughly consider the risks before travel to Haiti, and to take adequate precautions to ensure their safety if traveling to Haiti.” Exhibit 1000 at 30. The Travel Warning continued:

2. U.S. citizens traveling to and residing in Haiti are reminded that there is a chronic danger of violent crime, especially kidnappings. Most kidnappings are criminal in nature, and the kidnappers make no distinctions of nationality, race, gender or age; all are vulnerable. As of the date of this travel warning, there have been 12 Americans kidnapped in 2007, most in Port au Prince. Past kidnappings have been marked by deaths, physical and sexual assault, and shooting of Americans. The lack of civil protections in Haiti, as well as the limited capability of local law enforcement to resolve kidnapping cases, further compounds the element of danger surrounding this trend.

3. U.S. citizens are also reminded of the potential for spontaneous protests and public demonstrations that can occur at any time, day or night, and may result in violence. American citizens are advised to take commonsense precautions and avoid any event where crowds may congregate. Visitors and residents must remain vigilant due to the absence of an effective police force in much of Haiti, the potential for looting, the presence of intermittent roadblocks set by armed gangs or by the police, and the possibility of random violent crime, including carjacking and assault.
4. Travel is hazardous within Port-au-Prince. Some areas are off-limits to embassy staff, including downtown Port-au-Prince, after dark. . . .
5. Due to the current security situation in Haiti, the Department of State reminds U.S. citizens traveling to or residing in Haiti to remain vigilant with regard to their personal security

Exhibit 1000 at 30-31.

75. On June 29, 2007, the agency unilaterally issued a contract modification (number 14) with an effective date of June 28, 2007. The modification stated that its purpose was to extend the period of performance by 143 days; the new period of performance ended on November 24, 2007. Exhibit 25296 at 205. Without the modification, the contract completion date had been July 3, 2007. In a cover letter, the contracting officer explained the modification includes a time extension in response to various requests for equitable adjustments filed by the contractor. Exhibit 25296 at 204. The 143 days equates to the sum of the 111 days relating to the contractor's departure from the site and lack of work on the critical path, 26 days relating to the alleged differing site condition, 4 days relating to a labor strike, and 2 days relating to a transportation strike. For these final incidents totaling six days, the modification issued approximately five weeks or less after a request for an equitable adjustment. Exhibit 25907. The extension for these six days was reasonably prompt; the record does not indicate that the contractor expended any particular resources to overcome these six days of delay.

76. Subsequent to modification 14, when a contracting officer recognized excusable delays of 143 days, the agency issued various other contract modifications, extending the performance period by an additional fifty-four days. Some of those days related to additional or changed work, others to strikes, weather, a Haitian government holiday, and demonstrations. Time extensions for thirty-nine of the days were issued after

substantial completion. Exhibit 25907. The record does not demonstrate that the contractor was required to expend any particular additional resources to overcome any of these delays.

77. A Travel Warning, dated April 11, 2008, which was after substantial completion, Finding 3, was issued to inform American citizens of violent demonstrations in Haiti and to urge American citizens to defer non-essential travel to Haiti. The warning, which superseded that of June 29, 2007, noted that official American citizens were restricted from travel to Haiti, and stated that American citizens visiting Haiti should consider departing as soon as circumstances permitted. The warning specified that travel is always hazardous within Port-au-Prince. Exhibit 1001 at 33-35.

78. During the performance period, Port-au-Prince, as well as Haiti generally, experienced ups and downs in security and violence, with hours or days of unrest, shootings, kidnappings, and crime. The numbers of kidnappings of American citizens and children were not insignificant; kidnappings affected those directly involved and those living and working in that environment. The levels and spread of violence and insecurity that occurred during the period of performance were not unanticipated during proposal preparation. As previously found, Haiti was known to be an unstable country, with portions of Port-au-Prince particularly unsafe (i.e., around the existing embassy, the cement plant used by the contractor, and the embassy warehouse). Unsafe areas and conditions can affect the transportation of workers, materials, and equipment. The violence and security concerns did not cease or abate with contract completion; had performance continued the contractor would have faced similar challenges to those during performance. The contractor performed amidst the conditions, taking actions it deemed necessary to provide for the security of its personnel and property. Its efforts included the purchase of additional LAVs and the creation of a man camp near the work site to house personnel.

79. The contracting officer received a certified claim from the contractor on July 28, 2008. The contractor sought an upward adjustment of \$43,808,837 in the contract price, an additional extension of 234 calendar days in the contract's substantial completion date, and a determination that the agency is not entitled to assess liquidated damages against the contractor. Exhibit 404. The contracting officer denied the claim. Exhibit 403. The contractor has refined that claim to now seek \$34,848,562, to which it adds profit of \$3,177,848, for a total of \$38,026,410, plus interest from July 28, 2008. That basic amount is composed of the following:

\$ 532,125	additional earthworks subcontractor/geotechnical engineering
967,408	evacuation, remobilization, and security change costs
2,159,807	time-sensitive costs

12,091,187	man camp costs
7,579,332	craft labor and small tools costs
1,757,535	additional equipment and fuel, oil and grease costs
7,367,957	staff labor costs
722,508	local labor lunches due to acceleration
117,979	OBO/CST/CAG overtime due to acceleration
1,552,724	general and administrative costs

Exhibit 18980 at 51. (OBO--Department of State's Bureau of Overseas Building Operations; CST-- Construction Surveillance Technician, and CAG--Cleared American Guard). The contractor states that these costs represent the agency's share of the contractor's incurred costs.

80. The contractor incurred costs of approximately (all amounts are approximate) \$12.6 million to install and demobilize the man camp, and \$6.3 million for occupancy, security, and miscellaneous costs. From the sum of those figures, \$18.9 million, it deducts \$1.6 million as credits for payments received from agency and other visitors, housing costs avoided, and lunches not supplied. Of that difference, \$17.3 million, the contractor seeks 72%, the percentage of the acceleration it attributes to the agency. Exhibits 15201 at 27-28, 25920 at 2.

81. For craft labor and small tools costs, the contractor's supporting summary does not seek \$7,579,332, but rather \$8,306,386, composed of estimated small tools costs attributable to acceleration; costs for cleared United States workers wage uplift (increased pay to hire or retain individuals); craft labor costs attributable to acceleration; and an amount for loss of productivity. Exhibit 15201 at 29-31, 291-301.

82. The contractor seeks to recover costs for equipment and fuel, oil, and grease (FOG) that the contractor attributes to its efforts to recover excusable delays for which the agency failed to provide a timely contract extension. The contractor seeks \$1.7 million for rented equipment, \$.36 million for purchased equipment less \$.12 million for its salvage value, and an agreed-upon percentage for the FOG. The parties disagree on one particular aspect of the costs of rented equipment; namely, the rental costs of \$1 million incurred by the contractor when it rented equipment from a wholly-owned subsidiary. Exhibits 15201 at 31, 25920 at 4, 10. The contractor's determination of its costs for that rented equipment is supported by the record and reflects reasonable costs given the circumstances in Haiti. The agency views the contractor's charges as other than actual costs, so the agency utilizes ownership costs pursuant to rates of the United States Army Corps of Engineers. The rates used by the agency are not comparable to those for performance in Haiti.

83. Of \$7.4 million the contractor seeks related to staff labor costs, the contractor attributes \$5.9 million to total staff labor and overheads, to which it applies its 72% acceleration factor; \$2.3 million to loss of productivity (based upon 25% of staff labor costs); \$.4 million to security and differing site condition staff labor costs and a security uplift on expat staff; and \$.4 million to expat staff travel and subsistence. Exhibit 15373 at 72. These figures are not reconcilable fully with others in the record. Exhibits 15201 at 33-34, 308-42, 25920 at 4, 8, 10. The agency contends that the contractor did not add all personnel as a result of delay or acceleration for which the agency is responsible, that certain of the costs should be part of the time sensitive category, and that although additional payments were paid to original project staff, there is no agreement as to the reason or basis for agency liability. Exhibit 25920 at 4, 10. The calculation of staff costs includes hours expended in 2005, prior to any claim period for excusable delay. The costs are minimal. Exhibit 15201 at 318-33 (schedules 7.1.1, 7.2.1). The record does not tie the identified security/differing site condition staff labor costs to the excusable delay and acceleration claim. Other costs relate to the contractor's overall effort in performing the contract and overcoming the various delays.

84. The contractor expended \$1 million for lunches for local labor, of which it attributes \$.7 million to efforts to recover excusable delays for which the agency refused to provide a timely extension. Exhibits 15201 at 34-35, 15373 at 73, 25920 at 4, 8. Finally, the contractor incurred \$163,860 in overtime costs for agency and other personnel, said to be incurred because of delays. The contractor seeks to recover \$117,979, based upon the 72% factor it used it allocating acceleration costs. Exhibits 15201 at 35-36, 15373 at 73.

85. In this proceeding, the parties have reached a joint stipulation covering many of the costs incurred by the contractor; that is, the parties agree that the record supports the conclusion that the contractor incurred most costs as stated. Of note, the parties have reached no agreement on entitlement to any dollars or for any particular areas of costs. Exhibit 25920. Regarding acceleration, the agency disputes the contractor's assertion that it accelerated performance and its entitlement to any recovery for the claimed acceleration costs. However, the parties stipulate that if the contractor proves that the agency constructively accelerated the project, it is appropriate to allocate the acceleration costs based on each party's share of the delay that caused the acceleration. Exhibit 25920 at 4 n.15. The parties have stipulated to a rate for general and administrative (G&A) costs (4.68%) and a rate for profit (9.15%).

86. One of the experts for the contractor summarizes his view of the contractor's actions:

JAJI began its acceleration efforts in late 2005 when it began working on all available buildings and structures in an attempt to meet the original Contract Completion Date. Had JAJI been granted the time extension for delays experienced as of that time, it could have followed its original plan to pursue the work in a more sequential than concurrent method. This would have allowed for a more efficient use of its resources. Ultimately, JAJI's acceleration was insufficient to overcome all Project delays as a result of slower than planned production due to on-going security impacts and the skills of the local workforce. The costs associated with this multiple work front approach, while more than anticipated at the time it prepared its bid, paled by comparison to the costs JAJI was forced to expend in the fall of 2006 in an attempt to mitigate the Project delays.

In the fall of 2006, JAJI changed its approach to the Project and made the decision to invest significant additional resources in an attempt to complete the Project as expeditiously as possible. JAJI decided to add additional U.S. expatriate supervision and import additional skilled labor in order to recover delays associated with the differing site conditions, the evacuation, the on-going security impacts and the lower productivity on the Project.

Exhibit 15401 at 57. The decision to initiate work on various buildings simultaneously related to the excavation and fill resulting from what the Board has concluded was not a differing site condition. This change in approach from the schedule was not induced by lack of having been granted additional time to perform.

87. The record demonstrates that the contractor had devised and implemented performance plans that were insufficient to complete the contract within the original and the modified performance period. Factors in this include its foreign teaming partner, the situation in Haiti (security, the skill level of the available local work force, and available concrete and other resources) and its impact on recruitment and performance, and the contractor's security and management oversight. The period of departure and the lack of a timely excusable delay extension were not the significant factors in shaping many of the contractor's efforts and expenditures of dollars the contractor attributes to acceleration related to excusable delay. The security situation in Haiti required the contractor to commit substantial additional resources in order to accomplish performance. The reallocation of resources and resequencing of performance, with work occurring on multiple fronts, as well as the hiring of additional labor and supervisors, the purchase and rental of additional LAVs, equipment and tools, and the creation of a man camp near the new embassy facility, were efforts largely to cope with the security environment and to complete performance as

expeditiously as possible. Even with these efforts, substantial completion occurred after the modified contract date. However, without a timely modification for the days of excusable delay, the substantial completion date in the contract reflected a shorter period than was required. The shortened performance period affected the contractor's scheduling and planning to some degree. The Board has the task of ascertaining the costs arising from the untimely granting of the excusable delay, apart from the costs arising from the extra excavation and fill (the non-differing site condition) and the general security environment, under which the contractor was obligated to perform. The acceleration and associated costs cannot be measured precisely.

88. The contractor has introduced evidence of expert-prepared measured mile analysis said to reflect labor inefficiencies in the concrete work on the main building, which the contractor extrapolates to its work as a whole. The Board concludes that such analysis is of limited value. Regarding just the concrete work, which required rebar and form work to pour slabs (horizontal), walls (vertical), and other components, there were variations in the work (vertical versus horizontal versus other components), sizes of pours, and the availability of concrete. While the experts from both sides arrive at differing degrees of efficiency by grouping work periods differently, the analysis does not explain the causes of the seeming inefficiency. It may be that the variations over the performance period are normal or anticipated based upon differences in work done; even if inefficiencies exist, attributing any portion to the accelerating work is not certain. In short, the experts have not convincingly demonstrated that the work was inefficient or what the cause (be it acceleration or otherwise) was of any inefficiency.

89. Even if the Board found meaningful inefficiencies in the performance of the concrete work, it is another step to conclude that such rates of inefficiency should apply to other work on the project. Any limitations or inefficiencies affecting the concrete work have not been shown to have affected or be replicated in other work. Other trades performed work at the project that encompassed several buildings. Additional workers distributed over different buildings, or on different floors, or in different rooms, may or may not have performed with interference or obstruction. We recognize that performance can become inefficient or slow down with an overlapping of trades, whether the overlap is caused by acceleration or otherwise. The precise degree of inefficiency of the workforce because of acceleration actions has not been demonstrated in this record. In part, this is due to the contractor hiring laborers from outside of Haiti, who were more skilled than those initially hired, enabling quicker performance, albeit at a higher labor rate, with added costs of recruitment.

90. Having dealt with its own erroneous expectations and scheduling, and various delays (its own, agency, excusable, and other), the contractor achieved substantial completion on March 31, 2008. The contractor claims that it expended additional efforts and resources to achieve an accelerated substantial completion date, that is, finishing sooner than it would have otherwise. With acceleration, some efforts and expenditures are off-set by savings on labor and supervision, man camp, rental, and other costs that the contractor would have incurred with a lengthened performance period.

91. Most of what costs the contractor describes as costs of acceleration simply represent costs of performance under the given security environment and as required under the contract as the contractor attempted to minimize liquidated damages and complete performance in case the security situation worsened. Even with its efforts, the contractor was 72 days late in completing substantial performance beyond the modified contract completion date. Moreover, the agency extended the completion date by modification 14 at the end of June 2007, at which point the contractor had additional time to complete performance.

92. After conducting an analysis of delays occurring over the course of performance, the experts for the contractor assign responsibility for calendar days of delay, also broken down by time periods, with adjustments made for contractor acceleration: 211 to the agency, 47 to the contractor, and 35 to other causes, for a total of 293 calendar days of delay. Exhibit 15401 at 49. The Board does not accept these figures as helpful in determining or allocating the actual acceleration or the acceleration costs, given that they reflect assignment to the agency and not the contractor of many of the security related delays. Further, the analysis credits the contractor with a disproportionate number of days of delay recovered.

93. Through June 2007 the contractor was proceeding without a time extension and had resequenced its work as it changed its approach in an attempt to complete the job earlier than ultimately required. With this revised approach the contractor overcame some of its own shortfalls, as well as delays (agency, excusable, and other). The agency's position that the contractor incurred no additional, compensable costs of accelerating performance is not supported by the record. Had the agency initially granted the excusable delay claimed by the contractor, the contractor could have planned for performance with a different schedule and sequence of work. The months of excusable delay were a significant portion of the performance period; after resuming performance, the contractor could allocate resources differently based upon the period for completion. That said, however, the contractor did not achieve substantial completion within the original or modified periods. The actual costs of acceleration arising from the delayed granting of the excusable delay days are far more

modest than those derived with the contractor's allocation of responsibility to the agency of 72% of the contractor's costs.

94. The majority of the contractor's costs were for dealing with the security situation and not related to any agency-caused acceleration efforts. In developing a percentage, the Board finds that five percent is a figure that represents the overall or general percentage of costs attributable to acceleration efforts caused by the agency's initial denial and eventual granting of an excusable delay. The five percent figure lacks a mathematical formula for its derivation, but is based upon a consideration of the record (with particular attention paid to the reports and testimony of the experts and the testimony and submissions of the contractor's personnel) and the ultimate conclusions that a differing site condition did not exist and that the security environment did not represent a changed condition affecting the entire performance period. Most of the contractor's costs do not represent costs of acceleration tied to the excusable delays. In particular, the contractor expended significant funds and time in dealing with the situation in Haiti, and to a lesser extent in dealing with the alleged differing site condition. Completing performance earlier than otherwise saved the contractor various costs.

Discussion

Worsened and Varying Conditions

The contractor ties much of its claim for monetary relief and additional time to the deteriorated conditions in Haiti, especially in and around Port-au-Prince. The conditions required the contractor to implement security measures for which it had not budgeted. The contractor was impacted in the hiring, retention, and housing of laborers and supervisors, in the transportation of personnel, material, and equipment, and by the daily environment in which performance occurred. At times work was less efficient as workers were concerned about their safety at, and getting to and from, the job site, and the safety of spouses, children, and others who also resided in Haiti. Conditions occasionally delayed deliveries and transportation, for example, because of closures and actual or threatened unrest in the streets.

The worsening of and variations in the conditions in Haiti, by themselves over the period of performance, do not represent an excusable delay or otherwise compensable basis for a change under the contract. The conditions in Haiti were known to pose security risks and issues that would and could impact performance. Prior to award, it was not unexpected that conditions could deteriorate during performance. As detailed in the facts and summarized above, the potential for rising crime and security problems was real and substantial, and expressed as a concern for individuals and businesses in Port-au-Prince,

specifically, as well as Haiti. Further, just after award, with ordered departure still in effect at the embassy, the contractor learned from the independent security firm it utilized that (a) economic difficulties had produced a widespread increase in criminal activity, particularly kidnap-for-ransom (criminal gangs were targeting wealthy individuals and demanding ransoms); (b) a rise in rates of armed crime, murder and car jacking remained a concern; (c) public security had deteriorated dramatically, particularly in Port-au-Prince; and (d) lower-income areas of Port-au-Prince were particularly unsafe, while all areas, including the affluent suburb of Petionville, suffered from random crime. This information came with the suggestion that business personnel should undertake only essential travel to Haiti. Finding 48. With the foreseeable obstacles ahead, a prudent contractor would take actions to ensure that the contract could be performed on schedule. Ultimately, the contractor took adequate measures to protect against and perform under the security threats. The contractor performed its contractual duties; there were not compensable changed conditions under the contract.

The contractor underestimated what its performance entailed. Given the place of performance, what transpired does not represent unexpected impediments; the variations in and deteriorations of the security environment fall within the foreseeable and probable. *United States v. Brooks-Callaway Co.*, 318 U.S. 120 (1943) (the examples of excusable delay itemized in the clause are not always unforeseeable; the attendant circumstances must be considered). Under the contract, the contractor assumed both expected and unexpected risks. *Northrop Grumman Corp. v. United States*, 47 Fed. Cl. 20, 56-57 (2000). The risks of deteriorated security conditions should have been recognized and anticipated prior to award, given the conditions in Port-au-Prince and Haiti and that the solicitation and contract expressly noted that the contractor bore risks with respect to labor, transportation, and materials, and emphasized the fixed nature of the contract price, Findings 4, 7.

Even if the changes in security are deemed to be unforeseen, the risks are on the contractor. As the Federal Circuit has stated: “Because fixed-price contracts do not contain a method for varying the price of the contract in the event of unforeseen circumstances, they assign the risk to the contractor that the actual cost of performance will be higher than the price of the contract.” *Dalton v. Cessna Aircraft Co.*, 98 F.3d 1298, 1305 (Fed. Cir. 1996). Using the guidance found in *McNamara*, the contractor assumed the entrepreneurial risk associated with the conditions in Haiti. “Plaintiff would convert this fixed-price contract into a cost-plus contract and make the defendant an insurer upon the assumption that Congress wanted the project so badly that it would pay any additional price.” 509 F.2d at 1171-72. For these reasons, while the contractor references its actual costs expended compared to the contract price, the agency contract price estimate, and other proposed prices, those comparisons are not material. Had the contractor’s price better anticipated its actual costs, it may not have received the award, or the agency may not have awarded a contract because

the contract would have been too costly or beyond its budget. After the award of a fixed-price contract, these circumstances do not permit reformation or a reallocation of risks or a payment above the fixed price for contract performance.

Excusable Delay

The above conclusions do not resolve this dispute. The contractor also seeks relief under the contract because of excusable delays. The contract expressly recognizes an entitlement to additional time, not money, for excusable delay. Acts of the United States Government in either its sovereign or contractual capacity may constitute excusable delays. An excusable delay must arise from unforeseeable causes beyond the control and without the fault or negligence of the contractor. 48 CFR 52.249-10 (2004); Finding 5.

As discussed above, the decline in security after award that affected performance routinely was identified during the formation stage of the procurement as a concern and potential challenge. By itself, the actual change in the security situation, even with prolonged periods of widespread and serious crime, does not here form a basis for excusable delay. An excusable delay must arise from unforeseeable causes.

Significantly, one element was added to the equation at the end of May 2005: the Government-ordered departure of non-emergency personnel and dependents at the embassy. This was a Government act that did not directly apply to, but impacted, the contractor. The agency issued a Travel Warning that referenced the ordered departure, warned of continued dangers, highlighted the volatile situation, and stated: "The Department of State warns U.S. citizens to defer travel to Haiti and urges American citizens to depart the country if they can do so safely." Finding 50. As the agency points out, this quoted language does not differ markedly on its face from the language issued in conjunction with the authorized departure in effect during contract formation: "U.S. citizens in Haiti are urged to consider departing until the situation is stabilized as travel in Haiti still involves serious risks." Finding 14. However, the difference between ordered and authorized departure indicates a Government perception that the security situation is or readily can become more dangerous, perhaps without further warning. With an ordered departure in place, the Government benefits by having fewer American citizens in the country should conditions deteriorate or deteriorate further, particularly if an evacuation must occur.

It was not within the contractor's control to put the embassy on ordered departure and to urge the departure of American citizens at that time. This Government action did not occur in connection with the contract; it was an action outside of the control of the contracting officer. The contract does not explicitly require the contractor to continue

performance under such circumstances; the Excusable Delays clause explicitly recognizes that circumstances may constitute an excusable delay. The contractor acted reasonably under the heightened security conditions in following the urging to depart while the embassy was on ordered departure. The test of legal impossibility to support an excusable delay does not require a showing of actual or literal impossibility. Because neither this contractor nor the contracting officer would be aware of all of the bases underlying the change in status at the embassy and the scope and duration of any particular perceived threats, it was commercially impracticable to perform critical path work. *International Electronics Corp. v. United States*, 646 F.2d 496, 510 (Ct. Cl. 1981). The Board concludes that the ordered departure and related urging of American citizens to depart constituted a basis for excusable delay under the contract.

With a basis for excusable delay established, relief (time, not money) under the clause requires that in each instance, the failure to perform must be beyond the control and without the fault or negligence of the contractor, and the failure to perform furthermore (1) must be one that the contractor could not have reasonably anticipated and taken adequate measures to protect against, (2) cannot be overcome by reasonable efforts to reschedule the work, and (3) directly and materially affects the date of final completion of the project. Exhibit 1 at 31 (¶ F.9); *Fraser Construction Co. v. United States*, 384 F.3d 1354, 1361 (Fed. Cir. 2004).

Regarding the first element, particularly after the ordered departure in 2004, even if the contractor reasonably could have anticipated another ordered departure at the embassy, the contractor could not have taken measures to protect against the Government's actions coupled with the urged departure of American citizens. Future conditions could change rapidly; the Government would benefit by a reduced presence of American citizens. As found above, the contractor acted reasonably in departing while the embassy was on ordered departure. With the departure of various personnel, the contractor could not continue with performance as reasonably planned, with its personnel overseeing performance. The contract does not require the contractor to have delegated performance to subcontractors or other non-American citizens.

While some performance continued, work on the critical path ceased. Reasonable efforts to shorten a knowingly tight schedule on the critical path were not available. Because of this, the date of final completion was directly and materially affected. The final two elements of an excusable delay were satisfied.

The Board rejects the agency-suggested application of the War Risks clause, Finding 4, to limit its liability here at issue. The clause, which applies to property loss, damage, or destruction, does not come into play here, because such did not occur. The express shift of

risks to the agency under the one clause, does not mean that the agency does not accept risks for excusable delays and actual or constructive acceleration arising under other contract provisions. The contract places those risks on the agency.

The agency suggests that the contractor was compelled to complete performance by the contractual completion date, during the period that the contracting officer had not approved an excusable delay. The agency relies upon the Disputes, Alternate I, clause, which dictates that the contractor shall proceed diligently with performance pending final resolution of any request for relief, claim, or appeal, and comply with any decision of the contracting officer. Finding 4. The inclusion of the Disputes clause in the contract does not eliminate the Excusable Delay clause from the contract; the agency included both clauses in the contract. Reading the contract as a whole, the clauses compel the contractor to proceed diligently, but permit a later resolution regarding the existence, or not, of an excusable delay and its length. When an excusable delay is found under such circumstances, and one ascertains the length of the delay, the next potential question to address is whether a constructive acceleration arose from the compelled completion within the unlengthened performance period. This contractor has specifically raised the question of relief for an excusable delay and constructive acceleration.

To resolve this matter, we must consider the length of the excusable delay. The contractor departed the site and ceased critical path work on June 1, 2005. Finding 53. At the agency's urging (by its discussion of default and liquidated damages, viewed by the contractor as threats), the contractor returned to the site in phases. By September 12, it was at its pre-departure staffing level, with the addition of an individual to oversee security. On September 21, 2005, excavation on the critical path resumed. Finding 68. The contractor claimed excusable delay of 111 days relating to the security situation (this roughly coincides with the June 1 to September 21 period) and 26 days relating to its alleged differing site condition. Finding 68. A contracting officer granted 143 days of excusable delay on June 29, 2007, shortly before the initial contract completion date. Finding 75.

The contractor has demonstrated that it is entitled to the 111 days of excusable delay for the period it was not performing critical path work. The contractor has not demonstrated that it was entitled to 26 days of excusable delay relating to what the Board has found not to have been a differing site condition. Other delays arose during the performance period. The contractor has not demonstrated that it is entitled to more than the 143 days of excusable delay granted by the contracting officer, or that its acceleration efforts arose from other than those excusable delays arising from suspending operations for several months in 2005. The agency has not demonstrated that the contractor was not entitled to the days in the modifications. *Norair Engineering Corp. v. United States*, 666 F.2d 546, 548 (Ct. Cl. 1981)

(“We may not assume that the post hoc extension was some sort of gratuity; [the contractor] presumably was granted it because it deserved it[.]”).

Excusable delay entitles the contractor to additional time, not money. The contractor received additional time for performance. The contractor seeks additional money under the theory of accelerated performance, said to have been required by the agency’s granting additional time long after requested and long after various denials, and only a few days before the unmodified contract completion date would arrive.

Acceleration Because of Excusable Delay

The belated recognition of the contractor’s entitlement to excusable delay raises the possibility of the contractor’s recovery for costs incurred in accelerating performance. To recover the contractor must demonstrate that performance was accelerated. The contractor’s efforts, particularly with additional laborers (and more significantly, better-skilled laborers) and supervisors, and the needed tools and equipment, accelerated performance.

The benefits of those efforts are not quantifiable exactly and the actual costs of only the acceleration cannot be determined with precision. It is true, as the agency points out, that the contractor did not complete performance by the original completion date (unmodified by the excusable delays) or by the modified completion date (as extended by excusable and other delays and causes). The contractor underestimated the availability and productivity of the local work force, the length of time to complete performance under the given conditions, and, more importantly, the security situation in Haiti, and the need for security and project management. However, with appropriate management and supervision and an expenditure of dollars for additional personnel, tools, and equipment, the contractor performed more readily.

The agency fails to acknowledge any liability for acceleration costs. That position is not supported by the record. By denying the contractor’s excusable delay claim for months, and granting it only a few days before the completion date, while liquidated damages loomed, the agency impressed upon the contractor the need for completion with no extension due to excusable delay. The contractor acted accordingly in planning the remainder of performance. Ultimately, the contractor achieved substantial completion after the modified date. However, the contractor experienced much delay due to the security situation and, to a lesser extent, the subsoils (a non-differing site condition), which impacted the benefits of acceleration efforts. As explained in the findings, the Board attributes 5% of the contractor’s acceleration costs to having arisen from the excusable delays.

With this conclusion that the contractor is entitled to recover acceleration costs incurred because of the delayed granting of time for excusable delays, each of the particular costs elements can be examined. The contractor seeks \$34,848,562, to which it adds profit of \$3,177,848, for a total of \$38,026,410, plus interest from July 28, 2008. Exhibit 18980 at 51. The specific elements of the claim are set out in Finding 79.

Item one: alleged differing site condition

The first item (\$532,125) of the claim relates to what the contractor describes as its differing site condition claim. The Board has concluded that the record does not establish the existence of a differing site condition. Accordingly, these costs are not recoverable.

Item two: evacuation, remobilization, and security related costs

Under the second item (\$967,408) of the claim the contractor seeks payment for costs of evacuation, remobilization, and various security-related costs. The Board has determined that the evacuation and remobilization occurred because of an excusable delay. Under the clause, the contractor is entitled to a time extension (already granted by the agency) but not compensation for its associated costs. The record does not demonstrate that the contractor incurred any particular security or other costs when it arrived back in Haiti, while an ordered departure of personnel remained in place at the embassy, which would not have been incurred with a later return. Accordingly, despite the accelerated return of some individuals, no costs are compensable.

Item three: time sensitive costs

In an expert report, the contractor describes the time sensitive costs as cost arising as a result of security-related and differing site conditions. These costs are detailed in the third item (\$2,159,807) of the claim:

JAJI is entitled to reimbursement for the time-related (i.e., fixed) costs which were caused by delay on the Haitian Embassy Contract. Because of the delay experienced on the project, JAJI was forced to devote a portion of its productive capacity (as measured by fixed costs) to the Haitian Embassy Contract for a longer period of time than anticipated in the original contract or than would otherwise have been necessary.

Exhibit 15201 at 234.

As defined by the contractor, these costs were not costs of acceleration. Any acceleration would reduce the period over which the contractor incurred the time-related costs. To the extent that costs were incurred because of an excusable delay (either during the period of delay or the resulting extension), the costs cannot be reimbursed under the Excusable Delay clause, which provides for time, not money, compensation. No other specific delays have been established for which the contractor remains to be compensated.

Item four: man camp costs

The contractor seeks to recover \$12,091,187 of its man camp costs that it attributes to the acceleration. The Board concludes that the man camp was created because of the security situation in Haiti. Even if the agency had granted an excusable delay earlier, the contractor still would have constructed the man camp and incurred many of the charges, and received many of the credits. Therefore, the contractor's claimed costs of the man camp, \$17.3 million, less its installation and demobilization costs, \$12.6 million, results in \$4.7 million which can be apportioned based upon acceleration efforts. The Board has deemed 5% of the expended acceleration costs to be the appropriate share to be paid to the contractor; therefore, the contractor is entitled to \$235,000. In reaching this amount, the Board utilizes the figures proposed by the contractor, aware that the agency disputes allocations for the number of workers and meals used in the calculations. The data provided and necessary speculation makes such a refinement neither practical nor of significance.

Item five: craft labor and small tool costs

The contractor seeks to recover \$7,579,332 for craft labor and small tools costs. The record does not explain the difference between this figure and the calculations in the supporting documentation; some of the difference relates to a difference in the percentage of acceleration costs, reduced to 72% in the final request for recovery. The contractor seeks relief for four categories of costs it attributes to acceleration: small tools, a wage uplift for cleared United States workers, craft labor, and loss of productivity.

The contractor has not demonstrated entitlement to loss of productivity costs or the wage uplift; neither cost has been shown to relate to constructive acceleration for a given period of time. Therefore, the contractor not entitled to recover on the second or fourth categories of these costs. Of the other costs for craft labor and estimated tool costs, the record reflects an expenditure of \$7,075,252, to which the Board applies the 5% factor for recovery. The contractor is entitled to recover \$353,763.

Item six: additional equipment and fuel, oil, and grease costs

Of the costs related to additional equipment (purchased and rented) and FOG costs, the parties disagree on costs incurred by the contractor in renting equipment from a wholly-owned subsidiary. Regulation allows the rental costs of personal property leased from any subsidiary of the contractor under common control, that has an established practice of leasing the same or similar property to unaffiliated lessees. 48 CFR 31.205-36 (2004). The contractor sufficiently has established the practices of its subsidiary. The regulation does not require the leasing of identical equipment; the reasonableness of rates is to be considered under the circumstances.

The contractor's additional costs for rented and purchased (less salvage value) equipment and FOG is \$2.441 million. Applying the 5% factor for costs attributable to the acceleration caused by the agency's untimely granting of an excusable delay results in the contractor's entitlement to \$122,051.

Item seven: staff labor

The contractor seeks to recover \$7,367,957 in staff labor costs. The staff labor costs of \$5.9 million were affected by the delays during performance. The contractor is entitled to recover \$293,068 (5% of the staff labor costs). The record does not demonstrate that a loss of productivity was attributable to the delayed granting of the excusable delay; therefore, the contractor is not entitled to the \$2.3 million it seeks under that category. As with time sensitive costs, the security/differing site condition labor costs are not recoverable, as these have not been tied to the acceleration. The additional compensation to hire and/or retain staff became a cost of doing business. The contractor is entitled to be reimbursed \$15,888 for the 5% share of those costs of \$317,757 incurred because of the agency-caused acceleration. These two figures sum to \$308,956. On that amount, the contractor is entitled to recover its incurred travel and subsistence costs at the undisputed rate of 6.19%, or \$19,124. In total, on this item, the contractor recovers \$328,080.

Item eight: local labor lunches due to acceleration

The contractor incurred \$1,003,483 in costs of providing lunches to local labor. The contractor seeks \$722,508, which it attributes to its agency-caused acceleration efforts. The provision of lunches limited down time for workers and eased security concerns. The Board finds entitlement of \$50,174, calculated using the 5% factor for agency responsibility arising from the untimely granting of the excusable delay.

Item nine: OBO/CST/CAG overtime due to acceleration

The contractor incurred \$163,860 in overtime costs for agency and other personnel because of various delays. Instead of the 72% factor used by the contractor in seeking \$117,979, the Board uses the 5% factor to find entitlement to \$8,193.

Item ten: general and administrative costs

The parties have stipulated to a percentage rate to be applied to recovered costs that represents recoverable general and administrative costs. Exhibit 25920 at 4. Applying that percentage (4.68%), the contractor is entitled to recover \$51,352 for these costs.

Item eleven: profit

The parties have stipulated to a percentage rate to be applied to recovered costs (including general and administrative costs) that represents recoverable profit. Exhibit 25920 at 4. Applying that percentage (9.15%), the contractor is entitled to recover \$105,098 as profit.

In summary, the Board determines that the contractor is entitled to recover the following costs:

\$	0	additional earthworks subcontractor/geotechnical engineering
	0	evacuation, remobilization, and security change costs
	0	time-sensitive costs
	235,000	man camp costs
	353,762	craft labor and small tools costs
	122,051	additional equipment and fuel, oil and grease costs
	328,080	staff labor costs
	50,174	local labor lunches due to acceleration
	8,193	OBO/CST/CAG overtime due to acceleration
	1,097,260	SUBTOTAL
	51,352	general and administrative costs
	105,098	profit
	\$1,253,710	TOTAL

Decision

The Board **GRANTS IN PART** this appeal, concluding that the contractor is entitled to recover \$1,253,710, plus interest pursuant to statute, calculated from July 28, 2008.

JOSEPH A. VERGILIO
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

JEROME M. DRUMMOND
Board Judge