



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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CBCA 3246 DISMISSED FOR LACK OF JURISDICTION;  
CBCA 4356 GRANTED-IN-PART and  
DISMISSED-IN-PART FOR LACK OF JURISDICTION: August 17, 2016

CBCA 3246, 4356

REGENCY CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

S. Leo Arnold and Matthew W. Willis of Ashley, Ashley & Arnold, Dyersburg, TN,  
counsel for Appellant.

Danny L. Woodyard, Office of the General Counsel, Department of Agriculture, Little  
Rock, AR, counsel for Respondent.

Before Board Judges **SOMERS, VERGILIO**, and **SULLIVAN**.

**SULLIVAN**, Board Judge.

Appellant, Regency Construction, Inc. (Regency), appeals two decisions of the contracting officer for respondent, Department of Agriculture, Natural Resources Conservation Service (NRCS), denying its claim for additional costs of performance on the task order for canal excavation services in St. Bernard Parish, Louisiana. The appeal of the first decision, issued by the contracting officer on November 15, 2012, on Regency's uncertified claim, was docketed as CBCA 3246. The appeal of the second decision, issued

by the contracting officer on November 25, 2014, after Regency certified its claim, was docketed as CBCA 4356.

In its claim, Regency sought \$292,403, as the costs arising from four different issues that occurred during performance: (1) delays caused by the continued presence of another contractor at the site, despite the agency's representation that the other contractor would be finished prior to the start of task order performance; (2) delays in survey work caused by the NRCS; (3) costs incurred to remove additional material that entered the canal when the sides of the canal would not maintain the slope that NRCS mandated; and (4) delays Regency experienced looking for gas pipelines that did not exist. In its appeals, Regency also seeks the costs paid to a consultant who assisted with contract administration related to these problems, although these costs were not discussed in its claim to the contracting officer.

The Board convened a hearing in this matter in New Orleans, Louisiana, on December 9-12, 2014. Two fact witnesses testified in support of Regency's claims: Mr. John Smith, the president and owner of Down To Earth Contracting (DTEC), which was the subcontractor to Regency for the task order at issue in this appeal; and Mr. Paul Kosbab, the president and owner of Regency. Mr. Kosbab has been performing excavation and other storm-related clean-up projects for NRCS since 1989. Transcript at 493-94. Regency also presented the testimony of two experts: Dr. Berkeley Traughber, geotechnical expert; and Mr. William Connole, cost and pricing and delay analysis expert.

Three witnesses testified on behalf of the agency: Mr. Brad Sticker, Ms. Cherie LeFleur, and Mr. Dale Garber. Mr. Sticker is no longer employed by the agency but had held the title State Conservation Engineer and served as one of the managers of the NRCS emergency operations center (EOC) in Louisiana during the pendency of the task order. Transcript at 844-45. That office was responsible for the projects in Louisiana after Hurricane Katrina. *Id.* Ms. LeFleur is an environmental engineer with the agency and also served as a manager of the EOC. *Id.* at 765. Ms. LeFleur designed the project. *Id.* at 777. Mr. Garber is an engineer with NRCS, and served as the contracting officer's technical representative (COTR) on the task order for approximately two weeks at the beginning of January 2008. *Id.* at 946.

After review of the record, testimony, and pleadings of the parties, we reach the following conclusions: (1) Regency's first appeal must be dismissed for lack of jurisdiction because it was from a contracting officer's decision on an uncertified claim which was in an amount greater than \$100,000; (2) Regency is entitled to its direct costs of delays attributable to the continued presence of the sewer contractor and NRCS's failure to meet its obligations for the survey work to be performed; (3) Regency cannot establish that the additional material it removed from the canal was attributable to either a differing site condition or a

defective specification and, therefore, has no basis for recovery of the associated additional costs; (4) Regency also cannot establish that it incurred additional costs as a result of the drawings that depicted non-existent gas pipelines; and (5) the Board lacks jurisdiction to consider Regency's claim for contract administration costs because these costs were not in the claim presented to the contracting officer. As a result of these rulings, we grant Regency's second appeal in part and award Regency \$26,657.50, and interest as allowed by the Contract Disputes Act (CDA), 41 U.S.C. § 7109 (2012).

### Findings of Fact

#### I. The Contract and Task Order

##### A. Contract Terms

On May 14, 2007, NRCS awarded to Regency an indefinite delivery indefinite quantity contract to perform channel excavation and sediment removal work in Louisiana. Exhibit A at 1-2.<sup>1</sup> Pursuant to the statement of work, Regency was to "provide all materials, equipment, tools, supplies, labor, and required licenses necessary to excavate sediment and remove debris and ultimately dispose of said sediment and debris as described below at locations to be defined in individual task orders within the State of Louisiana." *Id.* at 36. NRCS let this contract and others like it to assist local entities in efforts to restore the watershed following Hurricane Katrina. *See* Transcript at 845-46.

The contract described the nature of the sediment removal activities that would be required on individual task orders:

1.1.1. SEDIMENT REMOVAL DESCRIPTION. It is anticipated that the type of material to be excavated will consist of mineral and organic soil, marsh root balls and decaying and herbaceous vegetation. The material may have settled to the bottom of the channel or it may be suspended within the water column of the channel. Excavation will be performed to the lines and grades indicated in the plans for the specific task order.

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<sup>1</sup> "Exhibit" refers to exhibits provided in respondent's appeal file. "Appellant's Exhibit" refers to exhibits provided in appellant's supplement to the appeal file. "Supplemental Exhibit" refers to exhibits provided in the respondent's supplemental appeal file.

*Id.* at 36. The contract also described the various locations for which task orders might be issued:

1.1.2. LOCATION DESCRIPTION. The sediment removal will be located in drainage channels. These channels may be natural, man made, or natural channels that have been previously manipulated. The channels will vary in size from small intermittent channels to large perennial bayous or pumped channels. Sediment removal may require specialized equipment such as excavation equipment capable of floating or mounted on portable barges.

Exhibit A at 36-37. The contract did not contain any further description of the composition of the banks of the channels that would require excavating.

The contract incorporated by reference four clauses that are relevant to resolving this appeal. The first clause is 48 CFR 52.236-3 (2007) (FAR 52.236-3), Site Investigation and Conditions Affecting Work. Exhibit A at 21. Pursuant to this clause, the Government disclaims any responsibility for any representation made unless that information is expressly made part of the contract:

Nor does the Government assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its officers or agents before the execution of this contract, unless that understanding or representation is expressly stated in this contract.

FAR 52.236-3.

The second clause is FAR 52.236-2, Differing Site Conditions, which provides that the contractor shall provide written notice of conditions that differ materially from those indicated in the contract, and the contracting officer shall investigate those conditions promptly. Exhibit A at 21. “If the conditions do materially so differ and cause an increase or decrease in the Contractor’s cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.” FAR 52.236-2(b).

The third clause is FAR 52.242-14, Suspension of Work, which provides for payment of “any increase in the cost of performance of [the] contract (excluding profit)” that results from a period of “unreasonable suspension, delay or interruption” caused by the act or omission of the contracting officer. Exhibit A at 9.

Finally, the fourth clause is FAR 52.243-4, Changes, which permits the contracting officer to make changes to the scope of work, including the specifications, but provides that the contracting officer shall make an equitable adjustment for any change that causes an increase or decrease in the contractor's cost. Exhibit A at 21. The clause further provides that, "[i]n the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications." FAR 52.243-4(d).

#### B. Task Order Request for Quotations

On October 17, 2007, NRCS issued an invitation for quotations to Regency and other contract holders for sediment removal on 40 Arpent Canal, Reaches 3 and 4.<sup>2</sup> The estimated price was \$1 to \$5 million and the performance time was eighty-one days. Exhibit B at 62. The channel to be excavated ran beside the Lake Borgne Levee and one of the sides of the channel was the constructed levee wall. *Id.* at 136. The other side of the channel bordered a residential neighborhood. Transcript at 796; Supplemental Exhibit 67 at 422-425.

The terms of the task order provided details as to the scope of the project and requirements for the contractor to follow.

Existing conditions. The task order described the existing conditions for the area to be excavated as:

#### 2.3 EXISTING CONDITIONS

The area in which construction will take place is an existing earthen channel that has been obstructed with hurricane deposited debris and sediment.

The receiving water for any runoff from this project site is the 40 Arpent Canal which is pumped into the Bayou Bienvenue and Bayou Dupree sump areas which drain by gravity into Lake Borgne.

The NRCS Runoff Curve Number [RCN] for the construction site prior to construction is estimated at 77 for brush, weed, and grass mix on a hydrologic group D soil in fair condition. After construction the RCN is estimated to be 73 for brush, weed, and grass mix on hydrologic group D soils.

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<sup>2</sup> A reach is a section of a canal. Transcript at 793.

Exhibit B at 90-91. The task order did not provide any further information regarding the composition of the banks of the channel to be excavated.

Access to levee. The contractor was directed to contact the parish engineer for the Borgne Levee District to obtain permission and approval to access the channel from public property. Exhibit B at 79.

Survey requirements. The contractor was required to perform all survey work on the project necessary for “performing quantity surveys, measurements and computations for progress payments,” and for “performing original (initial) and final surveys for determination of final quantities.” Exhibit B at 115. NRCS was responsible for setting the hubs or primary control marks from which the surveys would be taken:

The baselines and bench marks for primary control, necessary to establish lines and grades needed for construction, are shown on the drawings and have been located on the job site.

Exhibit B at 115, 117. NRCS reserved the right to observe the survey work if it chose to do so:

The Contractor shall notify the NRCS at least 48 hours in advance of any pending original, progress or final surveys to be performed by the Contractor. NRCS may, at its discretion, provide a survey observer to accompany the Contractor’s survey crew or conduct additional quality control surveys as necessary.

*Id.* at 119.

Excavation specification. The contract directed where the contractor was to excavate, but did not dictate the means of performance:

Channels shall be excavated as closely as practicable to the lines, grades, and cross-sections shown on the plans, considering the character of the material and the excavation methods employed. The excavated surfaces shall be reasonably smooth. In no case shall the excavated cross-sectional area of the channel be less than the specified area.

Exhibit B at 126.

Payment terms. The contract provided that the contractor would be paid on a unit price basis for the volume of material excavated within the limits of the neat lines and grades depicted on the drawings:

For items of channel excavation, for which specific unit prices are established in the contract, the volume of excavation will be measured within the specified limits and computed to the nearest cubic yard by the method of average cross-sectional end areas. Regardless of the quantities excavated, the measurement for payment will be made to the specified pay limits.

Exhibit B at 126, 129. The contract further provided that no payment would be made for excavation beyond the neat lines and grades shown on the drawings. Exhibit B at 127; Transcript at 914-15.

Drawings. The set of drawings provided with the solicitation and made part of the contract showed with two lines the “proposed channel bottom” and the “existing channel bottom.” At some points, the existing channel bottom was noted as above the proposed channel bottom, but at other points, it was denoted as below the proposed bottom. Exhibit B at 136. The drawings showed that most of the material to be excavated was on the non-levee side of the channel. *See, e.g., id.* at 139.

Ms. LeFleur, in designing the project, relied, in part, upon boring samples that were taken prior to the project to determine the depth of the sediment that needed to be removed. Transcript at 783. These samples were summarized on a spreadsheet, that shows that the samples were described as “clay” or “muck” and one entry noting “silt.” Supplemental Exhibit 9 at 136-37. However, the column to indicate the percentage of clay in the samples is left blank and Ms. LeFleur did not testify that there was any testing performed to determine the percentage of clay in the boring samples.<sup>3</sup> These logs were not part of the invitation for quotations or the resulting task order. *See* Exhibit B. NRCS also conducted design surveys to develop cross-sections of the channel to compute the amount of material that was to be removed. Transcript at 783-84. These amounts were described as “estimated” on the drawings that accompanied the task order solicitation. Exhibit B at 135.

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<sup>3</sup> Ms. LaFleur testified that the point of the soil borings was to determine the depth of the sediments that needed to be excavated. Transcript at 789. Ms. LaFleur explained, “[S]ince we were only going to be removing the sediment and debris that resulted from the storm, there is no need to perform any other soil borings on the project.” *Id.* at 792. Both parties hired firms during the pendency of the appeal to conduct laboratory tests on soil samples to determine the composition of the soils.

Ms. LeFleur determined that the sides of the channel should be excavated to a slope of 4:1, meaning 4 horizontal to 1 vertical. Transcript at 790. She made this determination based upon the slope of the channel walls above the water line and the reports that the channel walls had been very stable since the channel was constructed. *Id.* at 790, 823-24. NRCS did not perform any evaluation of the slope stability and the levee district never expressed concerns about slope stability or the need to repair the slopes. *Id.* at 791-92, 823.

Although the design required a 4:1 slope upon completion, the drawings described the lower part of the slope as constructed and warned that the actual bottom width may vary from what was estimated on the drawings depending upon these slopes:

The channel bottom widths shown on the x-sections are estimated. Actual bottom widths will vary based on site conditions. Top of bank and existing slopes above elevation -7.0 shall remain. Constructed slopes near the channel bottom shall be excavated at a 4 horizontal to 1 vertical (4H:1V) slope side until planned bottom grade is reached. The actual channel bottom width will be the distance remaining between the two sideslopes at the planned bottom elevation and may not be the original estimated bottom width shown on x-sections.

Exhibit B at 137. NRCS was not dictating the bottom width; instead, the agency wanted the contractor to obtain the requested depth of fourteen feet and a four-to-one slope on the channel sides. Transcript at 827-28. The planned bottom grade was fourteen feet, as requested by the project sponsor. *Id.* at 828.

Utilities. In numerous places, the contract warned the contractor of the need to take care around utilities that may be encountered while excavating. Exhibit B at 73, 79. The contract further required the contractor to protect any buried conduits. *Id.* at 127. The contract also directed the contractor to contact Louisiana One Call, the underground utilities marking service, prior to excavation and to provide a copy of the call ticket to NRCS. *Id.* at 79, 136. The drawings depicted gas pipelines on Reach 4. *Id.* at 136.

C. Site Visit and Invitation Amendment

On October 23, 2007, NRCS conducted a site visit for the project. Exhibit B at 63. Mr. Kosbab and Mr. Smith attended the site visit. *Id.* at 70; Transcript at 32-34.<sup>4</sup> During the site visit, they observed that a contractor was installing a new sewer line on the side of the channel from which a contractor would have to conduct excavation activities. Transcript at 34, 499. Neither Mr. Smith nor Mr. Kosbab testified as to what they learned about the expected composition of the channel banks during the site visit or subsequent visits to the site. *See id.* at 33-34, 497-500.

Following that site visit, NRCS issued an amendment to the invitation that answered questions from that visit. Exhibit B at 63-64. In this amendment, NRCS acknowledged the new sewer line that was being installed at the site and represented that the work on that pipe would be finished in time to start the project:

4. The attendees asked numerous questions about the projects. A list of questions, with the NRCS response, is listed below. All answers become part of the solicitation and any resultant contracts.

The following questions were asked at the site showing:

NRCS Comment. Made contractors aware of the newly installed sewer forced main pipeline along 40 Arpent, reaches 2, 3 & 4 and informed them that they must take the necessary precautions to prevent damage to pipeline.

Question. Will the pipeline job that is being installed on the work limits along 40 Arpent reaches 2, 3 and 4 be completed in time to start this job?

Answer. Yes! Pipeline contractor indicated to sponsor that their work should be completed within three (3) weeks from 10/22/2007. However, this could be impacted by the large amount of rainfall that fell 10/22/2007.

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<sup>4</sup> NRCS notes that Mr. Smith did not sign the sign-in sheet for the site visit and provided no other “documentation that would confirm his attendance.” Respondent’s Brief at 2. Mr. Smith testified as to sufficient details regarding the site visit, including where it started and who else was in attendance, that the Board finds he attended the site visit. *See* Transcript at 32-34. As Mr. Smith explained, he was not the prime contractor for the project, so he did not feel that it was necessary to sign the sign-in sheet for the site visit. *Id.* at 32.

Question. Has the pipeline been pressure tested.

Answer. No!

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NRCS Comment. Contractors must contact Lake Borgne Levee District before approaching access to the levee right-of-way.

Exhibit B at 64-65.<sup>5</sup> Mr. Kosbab relied upon this representation when he prepared Regency's quote of \$852,995. Transcript at 502; Exhibit B at 61.

D. Task Order Award

On October 31, 2007, NRCS awarded the task order for 40 Arpent, reaches 3 and 4, to Regency. Exhibit B at 58. On the same day, NRCS also issued task orders to Regency for sediment excavation on Back Levee, reaches 1 and 2. *See* Transcript at 497. Regency hired DTEC as its subcontractor for the 40 Arpent project. *See id.* at 507.

II. Incidents Arising During Task Order Performance

A. Delays Due to Continued Presence of the Sewer Contractor

By email message dated December 1, 2007, Regency received the notice to proceed on December 3, 2007. Exhibit D at 165. On December 3, Mr. Smith began mobilization at the end of Legend Street, a place where he could bring in his large heavy equipment without interference from power lines and other wires. Transcript at 45. When Mr. Smith arrived, he found that the sewer contractor was still on-site. *Id.* at 44-46. DTEC could not begin work because the sewer contractor was still working where DTEC needed to send its excavator down the non-levee side of the channel. *Id.* at 59; *see also* Supplemental Exhibit 67 at 430, 431 (pictures of exposed sewer pipes taken on December 7). When he submitted his bid to Mr. Kosbab, Mr. Smith had planned for three days of mobilization activities, including equipment unloading and training activities. Transcript at 350-51.

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<sup>5</sup> In its initial brief, NRCS asserts without citation that this answer was provided by the Levee District. Respondent's Brief at 41. There is no support for this contention in the record; however, what is relevant is that the amendment itself was issued by NRCS.

The testimony and documentary evidence establish that the sewer contractor continued to work on the site for several weeks after the mobilization date along the same side of the canal from which DTEC planned to operate. Beginning on December 5 through December 18, 2007, Mr. Smith noted every day in his job diary that the sewer pipeline contractor continued to work on-site. Appellant's Exhibit 1 at 51-63.<sup>6</sup> Mr. Smith also noted that the pipeline contractor had left the "ground rough and holding water. Need to [bulldoze area] to let dry or will have water backing into property." *Id.* at 51. DTEC had to wait until the sewer contractor was out of the way to mobilize fully because the channel was so wide it required two excavators to operate—one from a barge on the water and another on the shore. Transcript at 509-10.

On December 11, 2007, NRCS met with representatives of the levee district to discuss the situation. At this meeting, the levee district represented that the sewer contractor would be finished by December 14, 2007. Exhibit E at 167. According to the agency memorandum regarding this meeting, Mr. Smith was also informed that he could go in a different direction along the canal to begin work. *Id.* Mr. Smith testified that he informed everyone at the meeting that he could not move his equipment past the sewer contractor's equipment and, although the sewer contractor promised to move its equipment, it never did. Transcript at 210; *see also id.* at 51. According to Mr. Smith's job diary and the one entry from the COTR's job diary during the period, problems with the sewer contractor continued through December 21, 2007. Appellant's Exhibit 1 at 66; Exhibit J at 248. In addition to mobilizing, Mr. Smith and his crew spent time filling in the holes left by the sewer contractor on the top of the bank of the canal. Appellant's Exhibit 1 at 66; Supplemental Exhibit 67 at 438-39.

Mr. Smith did not mobilize his crew and many of his pieces of equipment until later in December. *See* Transcript at 57. Mr. Smith testified that he "wasn't going to bring people in there, pay them wages for sitting around and not doing anything." Transcript at 197-98; *see also id.* at 204. According to the records provided in support of the claim, Mr. Smith did not have any excavator operators on-site until December 17, 2007. Appellant's Exhibit 1 at 341. On December 19, 2007, Mr. Smith noted in his job diary that the pipeline contractor

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<sup>6</sup> Respondent elicited testimony from both Mr. Smith and Mr. Kosbab that raised concerns regarding the accuracy of the quality control reports submitted by Regency for the project. *See, e.g.*, Transcript at 261-62, 576-77. Based upon this testimony, the Board has not relied upon these records in its consideration of the record. In contrast, Mr. Smith testified as to how he prepared his job diary entries. *Id.* at 43. Respondent included a copy of Mr. Smith's job diary as an exhibit in the supplemental appeal file. Supplemental Exhibit 2. Therefore, the Board considers Mr. Smith's job diary as well as the job diaries prepared by the agency inspectors and the COTRs in its evaluation of the record.

was finished on reach 3 and that he was able to send his equipment to begin working. Appellant's Exhibit 1 at 64. However, at the end of the day, the equipment fell into a hole left by the pipeline contractor. *Id.*

B. Delays of Survey Work

1. December 3, 2007

Regency identifies two different days on which the work of its surveyors was delayed by NRCS. Appellant's Brief at 15. The first occurred on December 3, 2007, the day DTEC began mobilizing and the surveyors arrived to do the initial surveys. Dredging could not begin until the surveys had been completed. Transcript at 514-15. NRCS represented at the preconstruction meeting that the hubs from which to take the surveys would be set before DTEC mobilized. *Id.* at 512, 514. But, when the surveyors arrived, they discovered that the hubs were not set and they had to wait five hours until the NRCS surveyors began to set the hubs. *Id.* According to the invoice submitted by the survey firm, there were "no NRCS [survey hubs] in Reach 3 & 4; Was able to begin at 12 noon after NRCS survey crew stakeout began." Appellant's Exhibit 1 at 395; *see also id.* at 49 (Mr. Smith's job diary entry notes surveyors were delayed waiting for NRCS surveyors). In his entry for the same day, the inspector notes that the surveyors contacted him for the phone number for the levee district to open the gates and that Mr. Smith had reported that the surveyors had been delayed by the locked gates and were waiting for the NRCS inspectors. Exhibit K at 285. Mr. Kosbab testified that waiting for the levee representative to unlock the gate would only require five minutes. Transcript at 512.

2. January 11, 2008

The second day of surveyor delay occurred on January 11, 2008. According to the COTR diary entry for January 9, 2008, NRCS agreed to be present when the surveyors did their next survey. Exhibit J at 252. According to the invoices submitted by the survey firm, on January 10, 2008, the surveyors held a meeting with NRCS and DTEC to discuss the final cross-section method. Appellant's Exhibit 1 at 401. The next day, January 11, 2008, the surveyors waited three and one-half hours for the NRCS surveyors to arrive and set up. *Id.* at 402. Per Mr. Smith's job diary, the NRCS survey crew did not arrive at the site until 1 p.m. and was not set up until almost 3 p.m. *Id.* at 89; Exhibit J at 254.

C. Additional Quantities Excavated Due to Alleged Failure of Canal Slopes

1. Regency's Reports of Sloughing and Additional Quantities

The largest element of Regency's claim is for the costs of excavating additional quantities due to the alleged slope failure in the canal. Mr. Smith testified that, as the project got underway in earnest, his quality control measurements showed that the canal was filling in:

I'd go back into the same area that I had checked the previous day and I would then continue down through. And one of the problems I started seeing was that I was not getting the same reading as I got the previous day. So –

I wasn't getting the same depth-of-cut reading.

It showed that it became shallower. Our digging depth became shallower.

Transcript at 80. Mr. Smith testified that he called Mr. Kosbab to report the problems he was having with the channel filling in:

I informed him that we were excavating an area, we were checking it, it was correct. We'd come back a day or two later, and it was already filled back in with more material.

*Id.* at 108. Mr. Smith's testimony accords with his contemporaneous job diary. Appellant's Exhibit 1 at 72-74. On January 3, 2008, Mr. Smith noted that the slope of the non-levee side is "steep (1-2)." *Id.* at 79; Transcript at 115. On January 4, 2008, Mr. Smith noted that he spoke to the COTR about the problem with measuring and silting and asked him to see for himself. Appellant's Exhibit 1 at 80; Transcript at 109-10. The problem continued on January 8, when Mr. Smith noted that the inspector told him that the COTR would be at the site to join Mr. Smith in the boat to survey. Appellant's Exhibit 1 at 84; Transcript at 114. The NRCS inspector also recorded Mr. Smith's concerns in his job diary. Exhibit K at 313, 315.

Mr. Kosbab first reported these problems to Mr. Garber, who was serving as the COTR, on January 2, 2008. Exhibit J at 249; Transcript at 525. In response to Mr. Kosbab's report, Mr. Garber wrote in the COTR job diary, "[W]e were discussing our options and it was up to him if he wanted to bring extra equipment. I told him that we would like to meet with his surveyor and agree on how the sections would be taken through the slush until we would meet some resistance." Exhibit J at 249. Mr. Kosbab also asked that NRCS pay for

a surveyor to remain at the site throughout the project so that “the surveyor [could] take sections immediately after excavating.” *Id.* Mr. Garber answered that he did not know whether NRCS would pay for this effort. *Id.* Mr. Kosbab testified that he had pulled the original plans for the canal, which showed that the canal was originally dredged with a drag line, at a slope of one-to-one or one-to-one-and-a-half, steeper than the slope indicated in the drawings for the task order. Transcript at 530, 549.

Agency representatives met with Mr. Kosbab and Mr. Smith on January 10, 2008, to discuss a new survey method for both Back Levee 1 and 2 and 40 Arpent. Exhibit J at 253; Transcript at 911-12. Mr. Kosbab testified that the new survey method was necessary to be able to measure better the material that was sloughing from the sides of the canals on both projects. Transcript at 538. NRCS acknowledges that a meeting was held to discuss changes to survey methods for both projects, but disputes the change was needed because of a sloughing problem on 40 Arpent. *Id.* at 809. Ms. LeFleur did acknowledge, however, that the survey method was changed after Regency complained of sloughing on Back Levee 1 and 2. *Id.* at 810-11.

## 2. Experience on Back Levee 1 and 2

Witnesses for both parties testified as to sloughing or slope failure that occurred on the Back Levee 1 and 2 project that Regency performed contemporaneously with the 40 Arpent project. Transcript at 525-26. Regency requested a modification on Back Levee 1 and 2 because it was experiencing sloughing in areas that had been excavated. *Id.* at 806. Ms. LeFleur testified that NRCS took surveys to verify that this sloughing or additional material was being deposited, stating, “[W]e did confirm that in fact there was material that was settling into the bottom of the channel.” *Id.* at 807. Mr. Sticker testified as to the same problem. *Id.* at 892. And, Mr. Sticker confirmed, “[w]hen you had evidence of sloughing, you paid it? A: Yes.” *Id.* at 895. In contrast, on 40 Arpent, Mr. Sticker explained, “[W]ithout your field personnel telling you that material was moving, the NRCS didn’t do any other surveys? A: No, we did not.” *Id.* at 894-95.

According to a memorandum provided by the agency, in evaluating this problem, NRCS determined that the sloughing problem on Back Levee 1 and 2 was caused by the fact that the original sides of the channel were excavated to a steeper grade than 4:1, so that they would not hold this slope specified by NRCS. Supplemental Exhibits 39, 40. As a result, extra material was falling into the excavated area, which Regency then had to excavate. NRCS determined that the problem was not occurring because of Regency’s means and methods. NRCS agreed to modify the contract for Back Levee 1 and 2 to calculate payment to the actual excavation lines, rather than just to the neat lines, while maintaining the lower limits at the planned bottom elevation of the channel. *Id.*

### 3. Regency's Request for Modification of the 40 Arpent Task Order

On March 7, 2008, when Regency received the proposed modifications for the Back Levee 1 and 2 project, Mr. Kosbab inquired as to the status of the modification for 40 Arpent, believing that NRCS had also agreed to pay for sloughing on that project as well. Exhibit F at 183; Transcript at 545. The contracting specialist responded to Mr. Kosbab's inquiry that the 40 Arpent task order would not be modified in a similar manner "because there is no reason to believe the material is moving." Exhibit F at 183.

At the time of Mr. Kosbab's inquiry, Ms. LeFleur reported to the contracting officer that "[a]t no time during the construction did John Smith mention to the COTR that he thought the material from the side slopes was moving down the slope. The only time he mentioned anything was to [the inspector] regarding a 'trench' along the south slope. He didn't want to be accused of overexcavating in that area." Exhibit F at 186. Ms. LeFleur advised that "a modification for additional payment due to the contractor's method of performing the work is not warranted." *Id.*<sup>7</sup>

By letter dated April 2, 2008, Mr. Kosbab requested that the task order be modified to pay him for the "measured quantities above the bottom grade." Exhibit F at 188. Mr. Kosbab explained that he was experiencing the same sloughing of the side slopes as he experienced on Back Levee 1 and 2 because, as shown on prior drawings of the canal, the "existing side slopes on 40 Arpent [were] steeper (1.5 to 1) than the 4 to 1 slopes required in my contract." *Id.*

Mr. Sticker, the NRCS official who evaluated Regency's request for the same modification on 40 Arpent, testified about two complaints from Regency about 40 Arpent – extra material moving into the canal from side channels and sections of the canal that had not been excavated and slope failure. Transcript at 887. Mr. Sticker confirmed that, although Regency had noted the same problems with slope stability on the 40 Arpent project,

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<sup>7</sup> In her testimony at the hearing, Ms. LeFleur distinguished between sapping or slope failure and the sloughing that Regency experienced on Back Levee 1 and 2. Transcript at 841. Although Ms. LeFleur testified that NRCS would often verify claims of sloughing by performing its own surveys, *id.* at 832, she acknowledged that no surveys were performed on the 40 Arpent project in response to Regency's complaints of sloughing. *Id.* at 811. Ms. LeFleur also seemed confused as to the timing of Regency's complaints about sloughing on 40 Arpent, testifying that Regency had not complained of sloughing on 40 Arpent at the time the meeting was held on January 10, 2008, to discuss survey methods. *Id.* at 812.

NRCS had not conducted surveys. *Id.* at 894-95. Instead, NRCS relied upon the reports of field personnel that DTEC was overexcavating. *Id.* at 894.<sup>8</sup>

In his recommendation to deny the requested modification, Mr. Sticker acknowledged that the previous as-built drawings for the canal showed slopes that were steeper than 4:1. Exhibit F at 190-91. However, Mr. Sticker rejected this explanation because the surveys for the completed work on Reaches 1 and 2 of the same canal indicated that “4:1 slopes were obtained in most locations.” Exhibit F at 191.

On April 10, 2008, the parties executed modification 0002 to the contract to increase the quantity of excavation due to overruns caused by a variation in estimated quantities. Exhibit B at 148. This modification did not resolve the larger issue of additional quantities due to alleged slope failure.<sup>9</sup>

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<sup>8</sup> NRCS, in response to Regency’s claims, asserts that the problems Regency experienced were due to overexcavating by DTEC. Despite these concerns, Mr. Garber acknowledged that he did not find any instances of overexcavating when he took soundings himself in the channel. Transcript at 979, 981-82. Similarly, Mr. Sticker testified that he was told by agency personnel that DTEC was overexcavating but did not provide any details as to who told him that DTEC was overexcavating. *Id.* at 894; Exhibit F at 191. Mr. Smith marked the booms of his excavators in one-foot increments to ensure that the operators knew how far they could lower the booms and not excavate past the desired depth. Transcript at 82-85; Supplemental Exhibit 67 at 479-80 (picture showing markings on boom). Although it is not necessary to resolve the claims presented by Regency, the Board finds that the record does not support a finding that DTEC was overexcavating.

<sup>9</sup> The version of the modification in the record contained release language regarding the sloughing issue. Exhibit B at 149. Although NRCS raised the issue of the release language in cross-examination of Mr. Kosbab, NRCS does not argue in post-trial briefing that Regency has released its claim for additional quantities due to sloughing. Moreover, NRCS did not plead the affirmative defenses of release or waiver in its answer to Regency’s complaint. Answer; *see A-Son’s Construction, Inc. v. Department of Housing and Urban Development*, CBCA 3491, 15-1 BCA ¶ 36,089, at 176,207 (“Failure to plead an affirmative defense in a timely manner can result in the defense’s waiver.”). The Board finds that this language was not in the version signed by Mr. Kosbab. His testimony on this point was credible and is supported by the record. Transcript at 557; Exhibit H at 199-200.

D. Delays Due to Non-existent Gas Pipelines

Both prior to mobilization and during contract performance, Mr. Smith contacted Louisiana One Call and asked that the pipelines be marked. Transcript at 226; *see also* Exhibit K at 285. When no utilities were marked, Mr. Smith spent nine days trying to locate the utility lines by walking the site and asking utility and Lake Borgne Levee representatives where the lines might be located. Transcript at 126-27; Appellant's Exhibit 1 at 107-17. Mr. Smith found numerous flags on the site, but none of them marked by Louisiana One Call as the gas pipelines depicted on the drawings. Transcript at 149-50. Mr. Smith used every measure at his disposal to find the lines because it would be dangerous if his crew hit a pipeline and it exploded. Transcript at 128. The government inspector also documented Mr. Smith's efforts to locate the pipelines and took pictures showing numerous flags and other markings at the site. Exhibit K at 341, 343, 346, 351-52; Supplemental Exhibit 67 at 447-53.

DTEC did not stop working when Mr. Smith was unable to find the pipelines. Instead, Mr. Smith marked where the plans indicated that they would be and directed his crew to skip over that area and continue excavating Reach 4. Transcript at 128-29. His crew finished work on Reach 4 before the pipeline issue was resolved, so he directed his crew to use the excavator to straighten up the area where the excavated material was placed, referred to as the spoils area, work that Regency was obligated to perform on the contract. Transcript at 129; Appellant's Exhibit 1 at 116; Exhibit B at 128. When the excavator was off-loaded from the barge, it became stuck in one of the holes left by the sewer contractor. Transcript at 129-30; Appellant's Exhibit 1 at 117; Exhibit K at 347-49; Supplemental Exhibit 67 at 462. Mr. Smith's job diary indicates that the pipeline issue was resolved on February 9, 2008, when he was told for the first time that the pipelines were located on Reach 1, not Reach 4, as indicated on the drawings. Appellant's Exhibit 1 at 118.<sup>10</sup> DTEC did not free the excavator until February 11, 2008. *Id.* at 120. In the period between January 29 and February 12, 2008, the inspector did not note any idle time for contractor personnel due to the gas pipelines. Exhibit K at 341-52. With modification 0001 to the task order, NRCS issued a revised drawing that deleted the references to the utility lines. Exhibit B at 143-47.<sup>11</sup>

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<sup>10</sup> In his entry for February 9, 2008, Mr. Smith wrote: "now I'm being told that pipeline crossing is on map for Reach 1." Appellant's Exhibit 1 at 118. In his testimony, Mr. Smith attributed this statement to the inspector. Transcript at 136.

<sup>11</sup> The modification states that "[b]oth parties agree that there is no cost change in relation to this mod." Exhibit B at 144. Although counsel for NRCS questioned Mr. Kosbab about this language during the hearing, Transcript at 611-13, NRCS has not argued in post-hearing briefing that Regency waived or released its claims arising from this mistake in the contract drawings and, as noted above, the agency did not assert waiver or release as

### III. Regency's Claim

#### A. Procedural History

##### 1. Request for Equitable Adjustment

By letter dated February 26, 2008, Regency submitted a request for equitable adjustment (REA) in the amount of \$281,650, seeking the costs of the sewer contractor delays, the survey expenses, the costs of searching for non-existent pipelines, and the cost to excavate additional quantities. Exhibit F at 168. In its REA, Regency did not mention any contract administration costs that it was incurring for compiling these costs or preparing the submission to the agency for the purposes of negotiation. *Id.* at 168-81.

On March 13, 2008, Mr. Kosbab sent a letter to the contracting officer, asking again to be paid for the sloughing problem at 40 Arpent.<sup>12</sup> Exhibit F at 185. In his letter, he stated that it was his understanding that the channel had been cut with a drag line to a steeper slope than that sought by NRCS. For that reason, the sides would not hold when Regency excavated them. *Id.* Regency reiterated this request for payment in a letter dated April 2, 2008. *Id.* at 188.

The contracting officer responded to Regency's April 2, 2008, correspondence on May 6, 2008. Exhibit F at 193-94. In that letter, the contracting officer acknowledges that Regency had provided as-built drawings for the channel that showed some of the slopes on the south side of the channel were excavated to a slope steeper than 4:1 both in the areas that Regency was contracted to excavate and Reaches 1 and 2. *Id.* at 194. But, the contracting officer noted, the surveys for the completed work on reaches 1 and 2 indicate that 4:1 slopes were obtained in "most locations." *Id.* The contracting officer then noted that "[t]he allowance for this item on another contract (Reaches 1 and 2) is not applicable in this instance as the site conditions on Reaches 1 and 2 were significantly different than the conditions present at 40 Arpent Canal." *Id.* The contracting officer acknowledged Regency's further complaint that material from the side canals had seeped into its area of excavation and Regency had to remove this material as well. *Id.* The contracting officer noted, however, "[W]e have no means to quantify the extent of material that may have

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an affirmative defense in its answer. The Board considers any argument regarding release or waiver of this aspect of the claim to be abandoned by the agency.

<sup>12</sup> The COTR had issued a certificate of completion of the contract on March 12, 2008. Exhibit G at 196.

entered the work limits of this contract since no survey data exists of the lateral prior to the start of work.” *Id.*

## 2. Agency Response to Regency’s REA

Regency’s REA appears to have languished with the agency for a period of years. By letter dated June 18, 2010, Mr. Kosbab asked for a meeting to discuss his outstanding REA. Exhibit I at 216. On July 26, 2011, the agency asked Mr. Kosbab to submit a final invoice on the contract so that the contract could be closed out. *Id.* at 217. In response, Mr. Kosbab reminded the agency of his pending REA and his request for a meeting. *Id.* at 218.

Finally, on January 30, 2012, NRCS sent Regency a letter responding to the REA. Exhibit I at 223-24. In this response, NRCS rejected Regency’s request for costs caused by interference by the sewer contractor, additional survey expenses, and the costs attributable to the non-existent pipelines. *Id.* NRCS stood by its May 2008 determination that it would not pay for the claimed additional material, but the agency did adjust the amounts to be dredged based upon the before-dredging surveys performed by Regency’s surveyors. According to the NRCS response, those surveys showed the actual quantity of material to be removed was 66,468 cubic yards, rather than the originally estimated quantity of 63,612 cubic yards. The difference in these amounts, 2856 cubic yards, multiplied by \$11.50 per cubic yard, equals \$32,844, an amount that the contractor was “due and owing.” *Id.* at 224. Although NRCS, in later correspondence, described this response as a contracting officer’s final decision, the response did not set forth Regency’s appeal rights. *Id.*

## 3. Further Exchange on Regency’s REA

By letter dated November 7, 2012, Regency responded to NRCS’s January 2012 letter, seeking to provide additional information regarding the matters presented in the REA. Exhibit I at 225. Regarding the issue of sloughing, Regency provided a list of eight other contracts that Regency had performed for NRCS on which NRCS had paid Regency for additional slide material. *Id.* at 227. Regency noted that all of these contracts were in New Orleans East or St. Bernard Parish, the same area as the 40 Arpent project. Regency further noted that the Back Levee 1 and 2 projects were “immediately adjacent to 40 Arpent and New Orleans East Canals.” *Id.*

By letter dated November 15, 2012, NRCS advised that it had already responded to the issues raised by Regency’s letter in a contracting officer’s final decision, dated January 2012. Exhibit I at 237-38. NRCS stated that there would be no further negotiation on the issues presented. *Id.* NRCS then reiterated its position from the January 2012 letter and set forth Regency’s appeal rights. *Id.* at 238.

#### 4. Regency's Certification of its Claim

By letter dated January 16, 2013, to the contracting officer, Regency advised that the agency's issuance of a contracting officer's final decision had been premature because Regency had not certified its claim, which it did in the letter. Exhibit I at 239-41. On January 17, 2013, the contracting officer received the certification of the claim. Exhibit I at 242. With its certification, Regency reiterated the same issues that had been the subject of its REA and did not mention the contract administration costs. *Id.* On February 13, 2013, without waiting for the contracting officer to issue a new final decision, Regency filed its appeal with the Board. This appeal was docketed as CBCA 3246. On March 14, 2013, Regency filed its complaint with the Board, but did not mention its contract administration costs in its complaint.

#### 5. November 2014 Contracting Officer's Decision

On the eve of the hearing, the Board convened a conference call with the parties to advise them of a potential jurisdictional defect arising from Regency's certification in January 2013 and appeal immediately thereafter. To remedy this potential defect, the contracting officer issued another decision on November 25, 2014, regarding Regency's claim.

The substance of this decision was the same as the November 15, 2012, decision except for the determination of the additional quantities excavated. In the previous decision, the contracting officer had determined that Regency was owed \$32,844 for 2,856 additional cubic yards excavated (total of 66,468 cubic yards excavated). In the 2014 decision, the contracting officer determined that the total amount excavated was 63,612 cubic yards, based upon the as-built drawings for the project, and that Regency was not owed any money because it had been paid for this amount.

In supplemental briefing, the parties sought to explain the basis for the original and revised calculations. The data reviewed by the contracting officer was survey data prepared by Regency's surveyor. The basis for the November 2012 calculation was data generated in February 2008, during contract performance. Appellant's Exhibit 19 at 622, 629; Supplemental Exhibit 37. The basis for the November 2014 calculation was the survey data produced in March 2008, which was the basis for the final payment on the contract. Exhibit O at 592-93.

On December 3, 2014, Regency filed an appeal of this second decision (docketed as CBCA 4356) and moved to consolidate this second appeal with its existing appeal.<sup>13</sup> The Board granted this motion to consolidate on December 5, 2014.

B. Elements of Regency's Claim

1. Claimed Direct Costs

For each of the alleged delays or changes Regency experienced on the contract, Regency presents direct costs calculated by one of its experts, Mr. Connole. NRCS offered no expert testimony in response to Mr. Connole, and the agency's criticisms of Mr. Connole's analysis in briefing focus upon the calculation of the direct costs or the underlying issues of liability and causation. *See* Respondent's Brief at 29-36.

Sewer contractor delays. Regency seeks \$66,899 for the costs of the delay attributable to the continued presence of the sewer contractor, which includes \$29,022 in costs of standby time for DTEC equipment and \$1453 in direct labor costs. Mr. Connole lists seven pieces of equipment that were on standby while DTEC was waiting to begin work at the site, December 3-18, 2007. To calculate idle equipment costs, Mr. Connole relied upon a published rate schedule because Mr. Smith did not have actual cost data for his equipment. Transcript at 665. Mr. Connole chose to use the Rental Rate Blue Book Manual for Construction, because Mr. Smith had equipment of varying ages that he both owned and rented on the job. *Id.* at 666; Appellant's Exhibit 1 at 288-99. In this book, Mr. Connole identified the hourly rental rate for a particular piece of equipment and subtracted the estimated hourly operating costs, to derive the hourly standby rate for the equipment. Mr. Connole did not use the adjustments set forth in the book for age of equipment and locality, Transcript at 724-25, but testified that the rates he found on invoices for some equipment matched the rates in the book, *id.* at 725, and equipment rates in Louisiana were high after Hurricane Katrina, *id.* at 756. The portions of the book included in the record do not indicate whether the rates include overhead and profit for the equipment and there was no testimony on this point.

To identify the days the equipment was idle at the site, Mr. Connole used the quality control reports that are in the appeal file but that the Board has not considered. The Board finds that Mr. Smith's job diary entries provide the same information regarding the equipment on site and support the claim assembled by Mr. Connole. Appellant's Exhibit 1

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<sup>13</sup> The original appeal was transferred to the undersigned as presiding judge on November 26, 2014.

at 51-63.<sup>14</sup> Multiplying the number of days of delay that each piece of equipment was on-site by the rental rate for that equipment, the total costs of equipment standby time for Regency is \$21,214.00.<sup>15</sup> Mr. Connole also calculated the costs of operating hours for two pieces of equipment (a long-stick excavator and a bulldozer), but because these costs were incurred outside the period of delay attributable to the presence of the sewer contractor, Regency is not entitled to recover these costs.

For labor costs, Mr. Connole used DTEC's payroll records. Appellant's Exhibit 1 at 341-80. The direct labor costs incurred prior to December 19 that Regency has claimed total \$888.50. *Id.* at 388. Mr. Connole also calculated the cost of Mr. Smith's time attributable to each of the claimed delays by deriving an hourly rate from Mr. Smith's prior year income.

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<sup>14</sup> There is one discrepancy between Mr. Connole's spreadsheet and Mr. Smith's job diary entries. *Compare* Appellant's Exhibit 1 at 381-84 (spreadsheet prepared by Mr. Connole) *with id.* at 51-63. According to Mr. Smith's job diary, the second barge was not on-site until December 7, 2007, reducing the number of days that it was on standby to ten. *Id.* at 53. The Board has adjusted the calculation to account for this discrepancy.

<sup>15</sup> This table sets forth Mr. Connole's calculations with the discrepancies corrected.

Equipment	Rate	Hours (days)	Claimed Cost
CAT 325 DL Long Reach Excavator	72.98	96 (12)	7006.08
CAT 325 CL Long Reach Excavator	58.58	96 (12)	5623.68
JD 650G Bulldozer	28.30	88 (11)	2490.40
Barge	30.65	96 (12)	2942.40
Barge	30.65	72(9)	2206.80
Peterbuilt lowboy	7.70	96(12)	739.20
Crewboat	3.21	64(8)	205.44
Equipment Costs			\$21,214.00
Labor Costs			888.50
Total			\$22,102.50

Transcript at 670. The amount for this period of delay was \$3450. Appellant's Exhibit 1 at 385.

Survey delays. Regency seeks \$3401 as the costs of the additional survey expense. Appellant's Brief at 20. According to the invoices from the survey firm submitted with the claim, the surveyors waited a total of eight and a half hours for NRCS to either install the hubs or witness the survey. Appellant's Exhibit 1 at 394, 400; Exhibit 1 at 28. The survey crew of three was billed at an hourly rate of \$130 per hour, for a total cost of \$1105 for the eight-and-a-half hours of delay. Appellant's Exhibit 1 at 394, 400.

Regency also seeks to recover the per diem costs for the survey crew for these days, but has not established that it would not have been charged for these days without the NRCS delays. Regency also seeks the cost of Mr. Smith's time on these days, but did not provide any evidence that the delay for the surveyors also consumed Mr. Smith's time on the job. In fact, Mr. Smith testified that he spent December 3, 2007, mobilizing to the site and that he "was not really . . . involved in the survey stuff." Transcript at 44, 46. Mr. Smith's job diary entries for these days indicate he was busy working on other aspects of the project. Appellant's Exhibit 1 at 49, 89.

Costs of excavating additional material. Regency seeks to recover \$134,159 in additional costs that it incurred to excavate material as a result of the failure of the slopes of the channel. Appellant's Brief at 20. As a measure of the sloughing or slope failure, Regency seeks payment for all the material that it excavated from the channel above the bottom depth, including the material outside the specified neat lines of the channel. To determine the cost of excavating the additional material, Mr. Connole calculated an excavation cost per cubic yard. Appellant's Exhibit 1 at 392. He then multiplied the additional quantity excavated by this cost to derive the \$134,159 claimed by Regency. *Id.* at 27.

Costs attributable to non-existent pipelines. Regency seeks \$44,199 as the costs of delay attributable to the delays experienced while waiting for resolution of the issue of non-existent gas pipelines. Appellant's Exhibit 1 at 389-91. Mr. Connole calculated the labor and equipment costs of four days of delay while the issue was being resolved and the excavator was stuck in a hole on the bank. *Id.*

Contract administration costs. Regency seeks \$10,900.16 as contract administration costs, the costs of Mr. Connole's time assisting Regency in the preparation of communications with the agency regarding these issues. Appellant's Exhibit 1 at 35. These costs were incurred between April 2008 and December 2012 and are supported by invoices from Mr. Connole. *Id.* at 36-44.

## 2. Mark-ups to Direct Costs

To each of these direct cost amounts, Mr. Connole applied burdens for profit, overhead, and bonding percentages that he derived from DTEC's or Regency's books and records.

Overhead. DTEC's general and administrative (G&A) costs were DTEC's home office, and G&A expense from DTEC's tax returns. Transcript at 671. After deducting costs that were not allowable, Mr. Connole divided the total expenses by the cost of the contracts Mr. Smith performed in 2007 and 2008, which resulted in the figure of 31%. *Id.* at 671-73.

For Regency, Mr. Connole calculated both a field office overhead rate of 1.95% and a home office overhead rate of 10.34%. To calculate the field office overhead, Mr. Connole summed all of the field overhead costs for Regency for the 40 Arpent project, which totaled \$13,227. He then divided that total by the direct subcontract costs, which were \$676,579, and derived a percentage of 1.95%. Appellant's Exhibit 1 at 255. With regard to home office overhead, Mr. Connole calculated the G&A expenses incurred by Regency in 2007 and 2008 and divided the cost of revenues earned by that figure to derive the percentage of 10.34%. *Id.* at 259. Regency provided no testimony or other evidence regarding an inability to obtain other work while it was delayed on aspects of the project.

Profit. Mr. Connole derived the profit rates for DTEC and Regency from the previous years' tax returns. Mr. Connole calculated profit for DTEC to be nine percent, rounded up because ten percent is considered to be a "reasonable profit", and for Regency to be twenty percent, which was Regency's "experience rate for that time period." Transcript at 673, 678-79; Appellant's Exhibit 1 at 281.

Bonding cost. Mr. Connole calculated Regency's bonding cost percentage to be 1.375% based upon the bond costs paid on the original task order amount. Transcript at 679-80; Appellant's Exhibit 1 at 283. In support of Mr. Connole's calculations, Mr. Kosbab testified that he obtained bonding for the original task order amount of \$852,995. Transcript at 563. Mr. Kosbab did not testify that he obtained any additional bonding for the increased costs on the project, and the documents relied upon by Mr. Connole do not suggest that Regency incurred additional bonding costs.

C. Appellant's Geotechnical Expert, Dr. Traughber

Dr. Ewing Berkley Traughber, Regency's expert in geotechnical engineering, testified as to the reasons why additional material appeared in the canal after excavation.<sup>16</sup> Transcript at 371-72. Dr. Traughber opined that the additional material appeared in the canal because there was "progressive sapping of silty soils." *Id.* at 412. His opinion was based upon the results of testing of soil samples collected by another firm hired by Regency and his own experience. *Id.* at 412-13.

Discussion

I. Jurisdictional Issues Presented by Regency's Appeals

A. The Board Has Jurisdiction to Hear Only the Second Appeal

Regency's appeals present three jurisdictional issues. Pursuant to the CDA, 41 U.S.C. §§ 7107-7109 (2012), the Board hears appeals of contracting officers' final decisions. To obtain a final decision, the CDA requires a contractor to submit a written claim and for claims exceeding \$100,000, to certify the claim. 41 U.S.C. § 7103(a), (b). A contracting officer's decision rendered on an uncertified appeal is a "nullity" and the Board lacks jurisdiction to consider the appeal. *Paul E. Lehman, Inc. v. United States*, 673 F.2d 352, 355 (Ct. Cl. 1982); *EHR Doctors, Inc. v. Social Security Administration*, CBCA 3426, 13 BCA ¶ 35,371, at 173,572. The "contractor cannot retroactively meet this requirement—for the purpose of direct judicial review—by certifying the claim after the final decision of the contracting officer." *Skelly & Loy v. United States*, 685 F.2d 414, 416 (Ct. Cl. 1982) (citing *W.H. Moseley Co. v. United States*, 677 F.2d 850, 852 (Ct. Cl. 1982)). Despite the change in the CDA regarding an improperly certified claim, 41 U.S.C. § 7103(b)(3), these cases continue to apply to a claim which has not been certified.

As outlined above, Regency did not certify its claim until after it received the contracting officer's purported decision dated November 2012, and then proceeded to file

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<sup>16</sup> On the eve of trial, Regency filed a motion to exclude the report and testimony of a geotechnical expert proffered by NRCS because the agency was untimely in identifying the expert witness and providing the expert report. On December 3, 2014, the Board summarily granted Regency's motion in a pre-trial order and promised that a separate order explaining the basis for the decision would be issued in the future. That order is issued today under separate cover. NRCS was not permitted to present the expert or his opinions at the hearing in this matter, and the expert's report was stricken from the record.

its first appeal without waiting for a decision on that certified claim. Because the certification must precede the contracting officer's decision, Regency's first appeal did not comply with the statutory requirements and is dismissed for lack of jurisdiction. However, when the contracting officer issued a final decision in November 2014 and Regency appealed, all jurisdictional deficiencies were resolved. The Board possesses jurisdiction to resolve Regency's second appeal.

B. Regency's Claim for Additional Amounts Based upon the Contracting Officer's Earlier Decision Fails

NRCS took the opportunity, when it issued the contracting officer's second decision, to correct what it perceived to be an error in calculating the amount owed to Regency for amounts excavated. As discussed above, in the November 2012 decision, the contracting officer stated that, based upon the before-dredge surveys provided by Regency, there was an additional amount to be excavated (2856 cubic yards) and Regency was owed an additional \$32,844. In the November 2014 decision, the contracting officer revised these amounts based upon later survey data provided by Regency and found that Regency already had been paid for all amounts excavated pursuant to the task order (63,612 cubic yards). Regency, with its second appeal, seeks to recover the amount identified in the contracting officer's first decision.

Regency asks that the agency be bound by the contracting officer's prior determination, which was based upon an earlier set of survey data. As explained, the November 2012 decision cannot be considered a contracting officer's final decision because Regency had not certified its claim. Even if that decision were a final decision, that determination is not binding upon the agency because, once appealed, that decision is reviewed de novo by the Board. *Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994) ("contractor is not entitled to the benefit of any presumption arising from the contracting officer's decision"). The fact that NRCS changed its calculation of the quantity of material dredged between the two decisions issued by the contracting officer does not provide a separate basis for recovery of damages for Regency.

C. The Board Lacks Jurisdiction to Consider Regency's Claim for Contract Administration Costs

With the final element of its claim, Regency seeks \$10,900 in costs it incurred for Mr. Connole to prepare correspondence and other materials in support of the continuing negotiations with the agency related to its request for equitable adjustment. Appellant's Brief at 28. Regency contends that it may recover these costs incurred prior to the date it submitted its certified claim to the contracting officer on January 16, 2013. *Id.* at 29. NRCS counters

that Regency cannot recover these costs because they were unallowable claim preparation costs and Regency failed to include these costs in its claim to the contracting officer. Respondent's Brief at 59.

We need not decide whether these costs are properly considered contract administration costs because we find that we lack jurisdiction to decide that issue. As noted, the CDA requires that claims against the Government must first be presented to the contracting officer. 41 U.S.C. § 7103(a)(1). The Board's jurisdiction arises from the contracting officer's final decision on those claims. *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174,971. A purpose of these requirements is to ensure that a contractor provides "a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim." *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987). If a claim is not presented to the contracting officer, the Board lacks jurisdiction to consider it in an appeal. *McAllen Hospitals*, 14-1 BCA at 174,971 (citing *EHR Doctors, Inc. v. Social Security Administration*, CBCA 3522, 14-1 BCA ¶ 35,630, at 174,492).

NRCS is correct that Regency has failed to present its claim for contract administration costs to the contracting officer. Beginning with the submission of its REA in February 2008, Regency did not mention this additional category of costs. Regency, in its briefing, does not dispute this point. Instead, Regency asserts that its request for these costs "is part of the quantum associated with the changes experienced on the project." Appellant's Reply at 17. This assertion is not sufficient to provide the Board with jurisdiction.

A contractor may change the amount of its claim on appeal, but it must show that the "claims originally presented to the contracting officer can reasonably be viewed as encompassing the matters" raised before the Board. *EHR Doctors*, 14-1 BCA at 174,492. A contractor may recover professional and consultant service costs incurred by a contractor "when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Government." FAR 31.205-33(b). However, a contractor seeking recovery of such costs must provide "[i]nvoices or billings submitted by consultants, including sufficient detail as to the time expended and nature of the actual services provided." FAR 31.205-33(f)(2). Even in the cases cited by Regency regarding the recoverability of these costs, the contract administration costs were submitted as part of a claim to the contracting officer before being appealed. *Tip Top Construction, Inc. v. Donahoe*, 695 F.3d 1276, 1279-80 (Fed. Cir. 2012); *Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541, 1543 (Fed. Cir. 1995) (contracting officer denied recovery of consulting fees).

These provisions make it clear that a claim for consultant costs incurred as part of contract administration must still be presented to the contracting officer prior to appeal to the

Board. Because Regency failed to mention these costs in its communications with the contracting officer regarding its claims, the contracting officer had no basis on which to evaluate Regency's claim for these costs. The caselaw requires that the contracting officer be provided with this opportunity. Because Regency failed to provide this opportunity, the Board is without jurisdiction to consider Regency's claim for these costs.

II. Regency May Recover for the Delays Caused by the Continued Presence of the Sewer Contractor

A. The Language in the Amendment Constituted a Warranty

Regency alleges that DTEC's mobilization was delayed by the continued presence and work of the sewer contractor.<sup>17</sup> Appellant's Brief at 5-7. NRCS responds that Regency was not delayed by the sewer contractor; DTEC simply was not ready to mobilize. Respondent's Brief at 43-44. NRCS also contends that DTEC could have mobilized in a different location. *Id.* at 45-46.

We find that Regency and its subcontractor DTEC were delayed by the continued presence of the sewer contractor at the site after the date DTEC was to mobilize until December 19, 2007, when DTEC was able to begin moving its equipment into position. The Board credits Mr. Smith's testimony that he did not have operators on-site until December 17, 2007, in an effort to mitigate his damages. Moreover, NRCS's supposition that the excavation work could proceed while the sewer work continued ignores the amendment issued by NRCS that specified that the sewer contractor would finish work before this job began.

The issue to be resolved is whether NRCS is liable for that delay. Regency asserts that NRCS is liable because the agency warranted with the amendment that the sewer contractor would be finished before work began. Appellant's Brief at 23-24. NRCS responds that the agency was not responsible for the work of the sewer contractor and the

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<sup>17</sup> Prior to starting work, Regency continued its efforts to ascertain whether the sewer contractor would be finished prior to its project starting. These efforts included contacting the Parish inspector both before the pre-construction meeting, Transcript at 507, and at the pre-construction meeting. *Id.* at 504-05. Based upon these further representations, it was decided that Regency would begin work at 40 Arpent on December 3, 2007. *Id.* at 504; Exhibit D at 159. Prior to requesting the formal notice to proceed, Mr. Kosbab with one of the agency COTRs contacted the Parish again to confirm that the sewer contractor would be finished before December 3. Transcript at 506; Supplemental Exhibit 26.

statement in the amendment to the invitation for quotations did not constitute a guarantee. Respondent's Brief at 42, 45.

Generally, the Government is not responsible for delays caused by third parties, even other contractors on its own site, unless the Government affirmatively indicates that site will be ready and available. *Fort Sill Associates v. United States*, 183 Ct. Cl. 301, 309 (1968) (“[I]n the absence of an express warranty, or its own fault, the Government is not liable for failing to make the work site available to a contractor at a specified time due to delays experienced by another independent contractor.”). For the Government to be liable for the delays, the contract must contain specific language that constitutes a warranty by the Government that the site will be available. *Ben C. Gerwick, Inc. v. United States*, 285 F.2d 432, 436 (Ct. Cl. 1961) (“[u]nless the Government expressly covenants to make the site available at a particular time, plaintiff has the burden of proving that the United States was in some way at fault because the site did not become available to it at an earlier date.”).

The contract included the Site Investigation and Conditions Affecting Work clause, FAR 52.236-3, which specifically disclaimed any representations made unless those representations specifically were included in the contract. But then the amendment with the answers to the site visit questions specifically stated that the answers were made part of the contract. *Goss Fire Protection, Inc.*, DOT BCA 2782, 97-1 BCA ¶ 28,853, at 143,954 (language indicating that prebid conference minutes were part of the contract overcame contrary exculpatory language). The representation that the sewer contractor would be finished before work began was part of the contract.

To establish that the representation constitutes a warranty, Regency must show that “(1) the Government assured the [appellant] of the existence of a fact, (2) the Government intended that appellant be relieved of the duty to ascertain the existence of the fact for itself, and (3) the Government's assurance of that fact proved untrue.” *Oman-Fischbach International (JV) v. Pirie*, 276 F.3d 1380, 1384 (Fed. Cir. 2002) (quoting *Kolar, Inc. v. United States*, 650 F.2d 256, 258 (Ct. Cl. 1981)). “A warranty . . . is intended precisely to relieve the promisee of any duty to ascertain the facts for himself.” *Id.* at 1383 (quoting *Dale Construction Co. v. United States*, 168 Ct. Cl. 692, 699 (1964)). With its statement, the agency intended to assure Regency and other contractors that the sewer contractor would be finished before work on the task order began. That was not information that they could ascertain on their own at the time of bidding and the agency's statement proved to be untrue. The statement also constituted a warranty.

Regency's actions after it was awarded the task order do not eliminate the nature of the agency's representations as a warranty. Although Mr. Kosbab checked with the levee district to confirm the status of the sewer contractor's progress after task order award, he did

not learn anything different from what the agency had represented in the solicitation amendment—the sewer contractor would be finished. Based upon its warranty that the site would be available, the agency is responsible for the costs that Regency incurred due to the continued presence of the sewer contractor.

The Suspension of Work clause permits a contractor to recover costs incurred as the result of unreasonable delays in performance of the contract. *Triax-Pacific v. Stone*, 958 F.2d 351, 354 (Fed. Cir. 1992). Such delays can include actions or inactions by the contracting officer in administration of the contract. *Tidewater Contractors, Inc. v. Department of Transportation*, CBCA 50, 07-1 BCA ¶ 33,525, at 166,103 (failure to issue timely notice to proceed). However, for recovery to be possible, the delays caused by the contracting officer must be the “sole proximate cause” for the costs incurred. *Triax-Pacific*, 958 F.2d at 354 (citing *Merritt-Chapman & Scott Corp. v. United States*, 528 F.2d 1392, 1397 (Ct. Cl. 1976)). “What is a reasonable period of time for the Government to do a particular act under the contract is entirely dependent upon the circumstances of the particular case.” *Tidewater Contractors, Inc.*, 07-1 BCA at 166,103 (citing *Speciality Assembling & Packing Co. v. United States*, 355 F.2d 554, 565 (Ct. Cl. 1966)).

NRCS warranted that the site would be available before the task order began and directed Regency to proceed even though the sewer contractor had not cleared the site. Regency was required to complete the project in eighty-one days and Mr. Smith remained on site during the delay based upon repeated, inaccurate representations as to when the sewer contractor would be finished. The Board finds that the continued delay of sixteen days when Mr. Smith was ready to begin was unreasonable.

#### B. Regency May Recover Some of its Delay Costs

NRCS challenges various aspects of Mr. Connole’s opinions and calculation of damages. Three criticisms apply to the calculation of the period of delay attributable to the sewer contractor: (1) Mr. Connole used the error-filled quality control reports as the basis for his analysis (Respondent’s Brief at 31); (2) Mr. Connole did not adjust the rates for the equipment to factor in age and locality based upon the guidance in the Rental Rate Blue Book (*id.* at 29-30); and (3) Mr. Connole improperly charged the full ownership rate for the equipment, although “it is customary to only use one-half the ownership rate with no operating costs” when equipment is on standby (*id.* at 33).

NRCS’s challenges do not defeat Regency’s claim for the standby equipment costs, but do require adjustments to the calculations Regency provided. While Mr. Connole did use the error-filled quality control reports as the basis for his analysis, Mr. Smith’s job diaries provide support for the equipment being on standby during the period. While Mr. Connole

did not adjust the rates for the equipment based upon age and locality, NRCS has not explained how it believes this would have affected the claimed costs. As Mr. Smith and Mr. Connole testified, equipment was difficult to obtain in this period following Hurricane Katrina, and any adjustment made by Mr. Connole could have increased the rates. Finally, NRCS is incorrect that Mr. Connole did not adjust the rates to remove operating costs. Mr. Connole removed the estimated operating costs from the hourly rental rate and used the resulting figure to calculate the standby cost for each piece of equipment. Regency may recover \$25,552.50 as the increased cost resulting from the sewer contractor delay.

Regency may not recover any of the overhead or other costs that Mr. Connole calculated because Regency made no showing that these costs increased as a result of the delay. FAR 52.242-14 (contractor may recover “any increase in the cost of performance [] necessarily caused by the unreasonable suspension”). Instead, Mr. Connole simply derived a percentage for each of these costs and applied them to the direct costs, without establishing that the costs actually increased. Also, it is not clear from the record whether the equipment rates used to calculate the direct costs of delay already include these overhead costs. *See Tom Shaw, Inc.*, DOT BCA 2106, et al., 90-1 BCA ¶ 22,580, at 113,339 (contractor cannot recover overhead and profit if equipment rates used in claim include these amounts). Moreover, for its home office overhead costs, Regency provided no evidence that it was on standby during this period or any period during the contract. *P.J. Dick Inc. v. Principi*, 324 F.3d 1364, 1372-73 (Fed. Cir. 2003) (contractor must show work is delayed and required to be on standby to recover home office overhead). Similarly, Regency did not establish that it incurred additional bonding costs attributable to these costs. *Tromel Construction Corp.*, PSBCA 6303, et al., 13 BCA ¶ 35,346, at 173,493. Finally, neither firm may recover the calculated additional profit because the Suspension of Work clause precludes the recovery of profit. FAR 52.242-14.

### III. Regency May Recover its Additional Survey Expenses

The Board finds that NRCS delayed the work of Regency’s surveyors on December 3, 2007, and January 11, 2008. The contract required NRCS to set the hubs for the use by surveyors. Exhibit B at 115, 117. NRCS does not dispute that the hubs were not set prior to contract mobilization. Instead, NRCS suggests that the delay on December 3, 2007, was attributable solely to the fact that the levee gate was locked. Respondent’s Brief at 25. As support, NRCS cites the testimony of Mr. Smith, in which he was asked to agree with this report from the inspector’s job diary entry. *Id.* (citing Transcript at 294-96). The problem with the cited testimony is that Mr. Smith was asked solely about the statement about the locked gates and not about the remainder of the job diary entry in which he attributed the delay to waiting for the NRCS inspectors to set the hubs. *Compare* Transcript at 294-96 with Exhibit K at 285. Mr. Smith’s testimony is supported by the invoice from the surveyors,

noting that they were delayed while waiting for NRCS to set the hubs. Based upon this evidence, the Board finds that Regency's surveyors were delayed on December 3, 2007, waiting for NRCS to set the hubs and that this delay was unreasonable given the agency's clear contractual obligation to set the hubs prior to the start of performance.

The contract also permitted NRCS to witness any surveys and required the contractor to provide forty-eight hours' notice of surveys. Exhibit B at 119. NRCS does not dispute that its surveyors were late on January 11, 2008, but asserts that the agency should not be charged with the tardiness because Regency or DTEC failed to provide the required forty-eight hours' notice of the survey. Respondent's Brief at 26. As support, NRCS cites the entry in the inspector's job diary for January 11, 2008, which noted a conversation between DTEC and the inspector that NRCS should not be responsible for the delay because the contractor only provided twenty-four hours' notice. *Id.* (citing Exhibit K at 324). NRCS also suggests that NRCS was not obligated to be at the survey. Respondent's Brief at 26. But, as the COTR diary indicates, NRCS agreed to be at the January 11 survey and made that agreement on January 9, more than forty-eight hours before the survey. Given NRCS's commitment to be present, the delay of three-and-one-half hours was unreasonable.

Regency may recover the direct cost of the survey crew's time of \$1105. Regency may not recover the surveyors' per diem costs because it has not established that these costs increased as a result of the hours of delay. In addition, Regency has not established that the delay for the surveyors also delayed Mr. Smith. Finally, Regency has not established that the increased surveyor costs also caused an increase in any of the overhead costs that it applies as a percentage of the direct costs.

#### IV. Regency May Not Recover the Costs of the "Additional" Quantities that It Excavated

##### A. Regency Has Failed to Establish a Differing Site Condition

Regency offers two theories as to what caused the slope failure and two theories of recovery. The first, based upon Dr. Traugher's testimony regarding the composition of the soil in the canal slopes, is that the slope failure constitutes a Type I differing site condition. Appellant's Brief at 12. To prove a type I differing site condition, Regency must establish the following elements:

[1] "that the conditions 'indicated' in the contract differ materially from those it encounters during performance" [ 2] [t]he conditions encountered must have been reasonably unforeseeable based on all the information available to the contractor at the time of bidding[, and 3] that it reasonably relied upon its interpretation of the contract and contract-related documents and that it was

damaged as a result of the material variation between the expected and the encountered conditions.

*Stuyvesant Dredging Co. v. United States*, 834 F.2d 1576, 1581 (Fed. Cir. 1987) (citations omitted).

Regency's claim fails on the first element. Neither the contract nor the task order contained any representations regarding the type of soil in the slopes of the canal banks. The contract stated that task orders could be issued for work on a variety of different types of slopes and the task order was silent as to the composition of the canal slopes. Neither Mr. Kosbab nor Mr. Smith testified as to what soil composition they expected to encounter based upon the contract documents or their site visits. It does not appear that the boring logs that Ms. LeFleur used to determine the depth of the excavation were provided as part of the task order solicitation. "A contractor cannot be eligible for an equitable adjustment for a Type I differing site condition unless the contract indicated what that condition would be." *H.B. Mac, Inc. v. United States*, 153 F.3d 1338, 1345 (Fed. Cir. 1998) (citing *P.J. Maffei Building Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984)). Without any representation as to what the slopes were comprised of, Regency cannot recover additional funds based upon a claim of differing site conditions.

#### B. The Slope Specification Was Not a Design Specification

Regency also asserts that the requirement to excavate to a slope of 4:1 constituted a defective specification because the slopes failed and would not maintain the required slope during excavation. Appellant's Brief at 25. As a result of this slope failure, Regency was required to excavate quantities that it did not anticipate. *Id.* Regency offered testimony regarding its experience with Back Levee 1 and 2 as support for its claim. *Id.* at 12, 25. NRCS attributes Regency's difficulties to overexcavating and asserts that there is no survey data to support Regency's claim of sloughing, unlike on Back Levee 1 and 2. Respondent's Brief at 19.

In examining Regency's defective specification claim, the Board must first decide whether the requirement to excavate the slopes to 4:1 was a design specification or a performance specification. A design specification "detail[s] the actual method of performance," whereas a performance specification "merely set[s] forth an objective without specifying the method of obtaining the objective." *White v. Edsall Construction Co.*, 296 F.3d 1081, 1084 (Fed. Cir. 2002). "When the Government provides a contractor with design specifications, such that the contractor is bound by contract to build according to the specifications, the contract carries an implied warranty that the specifications are free from design defects." *Id.* (citing *United States v. Spearin*, 248 U.S. 132, 136 (1918)). However,

the warranty against defects in the design only attaches to design specifications. *Broce Construction Co. v. Department of Transportation*, DOT BCA 4464, 07-1 BCA ¶ 33,457, at 165,867 (2006) (“No warranty applies to performance specifications.”).

The requirement to excavate the slopes to 4:1 was a performance specification, part of the final requirements for the shape of the canal after excavation. NRCS wanted a canal that was fourteen feet deep with a slope of 4:1, and that is what the task order required Regency to deliver. NRCS did not dictate how Regency was to obtain this dimension, just that the canal have this dimension when Regency finished its work. *Stuyvesant Dredging*, 834 F.2d at 1582 (contract terms that dictated the dimensions of the dredged channel were performance, not design, specifications).

Moreover, Regency has not alleged that it could not or did not obtain the required slope for the channel. Instead, Regency alleges that it was more difficult because the slope of the channel when it was originally cut was steeper. The difficulty Regency encountered does not mandate additional compensation. “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.” *Spearin*, 248 U.S. at 136. Regency cannot recover its additional costs based upon the difficulty of meeting the performance specification in the task order.

C. The Experience on Back Levee 1 and 2 Does Not Provide a Basis for Recovery

Finally, although not explicitly stated, it appears that Regency seeks recovery based upon a course of dealing theory rooted in the parties’ resolution of similar problems on Back Levee 1 and 2. “A course of dealing is defined as ‘a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.’” *Underground Construction Co. v. United States*, 16 Cl. Ct. 60, 66 (1988) (quoting Restatement (Second) of Contracts § 223 (1981)). Parties’ prior course of dealing may be examined by the Board to determine whether past conduct can inform the interpretation or understanding of a contract term or provision in dispute. *Tibshraeny Brothers Construction, Inc. v. United States*, 6 Cl. Ct. 463, 470 (1984) (citing *L.W. Foster Sportswear Co. v. United States*, 405 F.2d 1285, 1290 (Ct. Cl. 1969)). “The emphasis is on a sequence of events; a single transaction cannot constitute a course of dealing.” *DeLeon Industries, LLC v. Department of Veterans Affairs*, CBCA 986, 12-1 BCA ¶ 34,904, at 171,630 (2011) (quoting *Underground Construction*, 16 Cl. Ct. at 67). Moreover, the course of dealing must pre-date the agreement in question. *Tibshraeny Brothers*, 6 Cl. Ct. at 470 (“look to the past conduct of the parties”).

The agency's willingness to modify the method of payment when Regency experienced the same difficulties on a different task order does not provide a basis for recovery in this case. Here, there is no contract provision that is ambiguous or subject to interpretation. Both parties clearly understood that the channel slopes were to be excavated to a 4:1 slope. Moreover, there is no course of dealing; Regency points to a single event, namely the agency's response to the same difficulties on another task order, at the same time as Regency was experiencing problems at 40 Arpent. The conduct on Back Levee 1 and 2 was contemporaneous with the conduct on 40 Arpent and cannot provide the basis for relief as a course of dealing.

V. Regency Has Not Established Costs Attributable to the Non-Existent Gas Lines

Regency asserts that its work was disrupted while Mr. Smith looked for the gas pipelines that were indicated on the contract drawings for Reach 4 and claims four days of delay attributable to this issue. Appellant's Brief at 24; Exhibit 1 at 389. NRCS does not dispute that the drawings contained an error, but asserts that the error did not increase the cost of Regency's performance. Respondent's Brief at 47, 49. According to NRCS, Regency was able to skip over where the pipelines were depicted on the drawings and continue work the entire time. *Id.* at 49.

Regency's claim for the costs attributable to the erroneous depiction of gas lines on the drawings is analyzed pursuant to the Changes clause, which provides that the contracting officer is permitted at any time to make changes in the specifications or drawings for the contract. FAR 52.243-4(a)(1). "If any change under this clause cause an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing." FAR 52.243-4(d). "An equitable adjustment encompasses the quantitative difference between the reasonable cost of performance without the added, deleted, or substituted work, and the reasonable costs of performance with the addition, deletion, or substitution." *Nu-Way Concrete Co. v. Department of Homeland Security*, CBCA 1411, 11-1 BCA ¶ 34,636, at 170,698 (2010) (citing *J.L. Simmons Co. v. United States*, 412 F.2d 1360, 1370 (Ct. Cl. 1969)). A contractor's failure to demonstrate any increase in cost will defeat a claim for an equitable adjustment. See *HomeSource Real Estate Asset Services, Inc. v. Department of Housing & Urban Development*, CBCA 859, 10-2 BCA ¶ 34,553, at 170,406; *Trojan Building Maintenance, Inc.*, VABCA 968, 71-1 BCA ¶ 8792, at 40,851.

Regency has failed to demonstrate that its costs of performance increased as a result of this change. DTEC did not stop work while Mr. Smith was looking for the non-existent pipelines. Mr. Smith spent a significant amount of time looking for the pipelines, but Mr.

Smith's time is not a direct cost to DTEC or Regency. DTEC and Regency have not alleged that Mr. Smith should or could have been performing some other task while he was looking for the pipelines. Similarly, the fact that the excavator became stuck when Mr. Smith decided to pull the excavator off the barge to assist with smoothing the spoil on the bank was not a cost attributable to this issue because DTEC and Regency were obligated to smooth the spoil as part of the contract. The fact that DTEC decided to perform that work while waiting for an answer on the pipelines does not make the resulting costs attributable to the non-existent pipelines. Although the change in sequencing work (with equipment and men skipping over an area only to return later for performance) could engender compensable additional costs, Regency has not established that the cost of DTEC's work was increased by change in the drawings to remove the non-existent pipelines.

Decision

CBCA 3246 is **DISMISSED FOR LACK OF JURISDICTION**. CBCA 4356 is **GRANTED IN PART** and **DISMISSED IN PART FOR LACK OF JURISDICTION**. Regency may recover \$25,552.50 for the delays attributable to the continued presence of the sewer contractor and \$1105 for the survey costs attributable to NRCS delays, for a total of \$26,657.50, with interest to run from January 17, 2013, pursuant to 41 U.S.C. § 7109.

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MARIAN E. SULLIVAN  
Board Judge

We concur:

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JERI KAYLENE SOMERS  
Board Judge

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JOSEPH A. VERGILIO  
Board Judge