



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CBCA 8202 DENIED; CBCA 8203 RESPONDENT'S MOTION
FOR SUMMARY JUDGMENT GRANTED IN PART: April 24, 2026

CBCA 8202, 8203

F.O.G. LLC,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Anthony Massey, President of F.O.G. LLC, Mint Hill, NC, appearing for Appellant.

Kathryn K. Brinton and Megan C. Isom, Office of the Regional Solicitor, Department of the Interior, Sacramento, CA, counsel for Respondent.

Before Judges **BEARDSLEY** (Chair), **VERGILIO**, and **SULLIVAN**.

BEARDSLEY, Board Judge.

F.O.G. LLC (F.O.G.) appealed the decisions of the contracting officer (CO) for the United States Department of the Interior, Bureau of Land Management (BLM) on two claims. In its first claim, F.O.G. sought damages that it attributed to delays in payment by BLM (CBCA 8202). In the second claim, F.O.G. sought compensation for the increased price of lumber and additional costs caused by differing site conditions and the use of bagged concrete (CBCA 8203). We grant BLM's motion for summary judgment in CBCA 8202 and deny that appeal. We also grant BLM's motion for summary judgment in CBCA 8203 on F.O.G.'s claim for increased lumber costs, but we deny BLM's motion for summary judgment in CBCA 8203 on the claims for damages for differing site conditions and the use of bagged concrete.

Background

BLM awarded the contract to F.O.G. for the Indian Creek Vehicle Barrier project on July 25, 2023. Respondent's Statement of Material Facts (SMF) ¶ 2. The project consisted of the construction of steel posts and wood rails for a vehicle barrier fence at the Indian Creek Recreation Area. DOI-000138.¹

I. Claim for Payment Delays (CBCA 8202)

In CBCA 8202, F.O.G. claims damages in the amount of \$381,000 that “reflect[] the financial hardship and operational disruptions imposed on F.O.G. LLC by the delays in payment from BLM staff.” DOI-001261. F.O.G. contends that BLM's alleged delay in paying its second payment request caused F.O.G. to stop work and suffer damages as a result. DOI-001262. F.O.G. also asserts that BLM delayed making payment for two-and-a-half months after F.O.G.'s fourth payment request and that, as a result of these delays, F.O.G. incurred costs for loan repayment delays, vendor account closures, and employee and subcontractor payment delays. DOI-001260. In addition, F.O.G. asserts that the payment delays also caused personal financial hardship to the company's president and his wife because they had issues paying their mortgage and their credit scores deteriorated. *Id.*

A. Second Payment Request

On October 11, 2023, F.O.G. requested its second payment, and BLM asked that F.O.G. adjust its requested amount to reflect the work completed. SMF ¶ 30. On October 13, 2023, F.O.G. resubmitted its second payment request for \$266,745, which had been adjusted to reflect fifty-five percent of the work completed. SMF ¶ 31. On October 17, 2023, F.O.G. told BLM that “[d]ue to undue hardship brought on by the government not paying F.O.G. LLC[,] [a]ll work will stop until ten days after payment has been received.” DOI-000168. BLM paid the resubmitted second payment request on October 18, 2023. SMF ¶ 31.

B. Fourth Payment Request

On November 15, 2023, F.O.G. submitted its third payment request for \$92,546, with the project seventy-two percent complete. SMF ¶ 33. BLM paid the third payment request on November 22, 2023. *Id.* Even though F.O.G. believed that the contract allowed F.O.G.

¹ We cite to the pages of the documents in the Rule 4 appeal file by referencing the Bates number (DOI-XXXXXX) found on each page.

to apply for payments every twenty-eight days, F.O.G. asserted that it waited three months after being paid for the third payment request “to ensure significant progress had been made before requesting” the fourth payment. DOI-001260. However, work on the project was sporadic from approximately November 21, 2023, to February 1, 2024. SMF ¶ 34. BLM conducted an inspection on December 18, 2023, and found items that needed to be fixed to bring them into compliance with the contract. SMF ¶ 35. BLM requested an update on the requested fixes on January 17, 2024, and F.O.G. responded that it would make the fixes once it had access to the site. SMF ¶ 36.

On February 5, 2024, F.O.G. submitted its fourth payment request in which it indicated that it had completed ninety percent of the work on the project and asked to be paid \$97,988 (the remaining contract balance less ten percent retainage). DOI-001748. According to BLM, however, before it could approve F.O.G.’s fourth payment request, “BLM and [F.O.G.] had to work out their differences on how much work was left on the contract, how much payment was owed, and what the modification was for the reduction in work (due to bedrock) and changed requirements on concrete (allowing bagged instead of trucked[-]in as required by the contract).” SMF ¶ 37.

On February 20, 2024, F.O.G. wrote that “we are on week 3 of requesting . . . payment. Last payment was Nov. 7, 2023.” DOI-000545. The agency responded the next day:

Per [F.O.G.’s] past emails, [F.O.G.] stated that everything is complete, but it does not appear to be complete (per your pics).

With that said, we cannot issue any further payments as of now. I can make time to go out there within the next couple weeks or so to determine IF any partial payment can be issued as of yet. Again, as stated prior, we cannot do a final until the snow is completely gone from each post and we can do an inspection and determine if the site has been cleaned up properly.

As of now you have been paid 72% of the original contract amount.
Original contract amount: \$544,377
Amount paid to date: \$391,951

DOI-000545.

That same day, F.O.G. responded:

All of the posts that are not in the ground are part of the ones that can not [sic] go in the ground or the ones that Arthur/Brian said that BLM would put in. The gaps that you see are those ones. There is no other post that can go in the ground in the agreed upon parameters. There is one steel post that needs to be fixed and we adjust all of the flagged posts. The last thing that we are waiting to finish this project is installing the bolts when they come in. . . . We are at most a week away from finishing this job when the bolts[] come in.

DOI-000544. Later that same day, the BLM contracting specialist responded:

[BLM] will be going out to the site to review the progress within the week, thanks for your patience as we are dealing with road and weather conditions. . . . [B]efore we can discuss further payment, we need to determine the final contract amount. You have requested several modifications . . . and I have requested documentation to review these modifications. Please send me the requested documentation in the attached email as soon as possible.

DOI-000544. On March 8, 2024, the agency indicated that F.O.G. was substantially complete with the project. DOI-000754. “On March 12, 2024, F.O.G. once again asked BLM whether they could file for pay.” SMF ¶ 39. As of March 14, 2024, F.O.G. had not been paid even though the project was substantially complete. DOI-001753. On April 6, 2024, F.O.G. asked, in response to BLM’s proposed modification instituting a nine-percent labor reduction for the posts that had not been installed:

What was the delay? Why did it take so long? Two months.

Why was I not given the opportunity to file for a partial payment while I was still under the contract performance date? I’m willing to accept the 9% labor reduction. This could have been proposed to me a long time ago and it leads me to believe this was all done on purpose to take advantage of a small business. . . . I believe the BLM, [the] Department of Interior, has acted in bad faith towards our company.

DOI-001038. The agency responded:

We appreciate your patience as we continue to work on this matter; it has taken time to gather and sort out information including some that we needed from you. While not perfect, the BLM has at all times worked in good faith with

you on the various questions and concerns that have arisen during this contract and will continue to do so.

DOI-001085. On April 8, 2024, F.O.G. and BLM executed modification P00001, which reduced the contract price by \$6450.20, DOI-001083-84, and allowed F.O.G. to submit its next payment request. F.O.G. submitted pay application number 4 on April 8, 2024, for the period from November 7, 2023, to April 8, 2024, for the total amount of \$64,325, with eighty-four percent completion. DOI-001059. BLM paid this amount on April 9, 2024. SMF ¶ 42.

C. Contracting Officer's Final Decision

The CO denied F.O.G.'s claim for \$381,000 for payment delays on the basis that BLM had timely paid F.O.G. for the work that met the requirements of the contract. DOI-001410. According to the contracting officer,

[t]he parties disagreed on the amount of progress to be requested under the final progress payment, #04. The contractor indicated that they planned to request 90% of the original contract award amount, which was not an accurate representation of progress completed to specifications at that time. The government had to determine what contract adjustments were pending and what percent of work had been completed to specifications to accurately determine an allowable amount that could be approved as a progress payment.

DOI-001409. The CO stated further that "there is nothing that mandates the government pay a contractor every 28 days and the government only approves payments for work that meets the requirements per the contract." DOI-001410. The CO also dismissed F.O.G.'s claim that delays in payment caused the work to stop. DOI-001412.

D. Complaint²

In its complaint in CBCA 8202, F.O.G. requests \$381,000 "for financial harm and operational disruptions caused by the BLM's payment delays" and the relief requested as

² In the record, the complaint discussing the payment delay claims in CBCA 8202 has been misidentified by F.O.G. as the CBCA 8203 complaint. Similarly, the complaint discussing the issues in CBCA 8203 has been misidentified by F.O.G. as the CBCA 8202 complaint. When citing to either complaint, we indicate the correct appeal number associated with that complaint.

“[p]enalties for missed loan repayments,” “[c]redit score damage to Mr. Massey and his wife,” and “[v]endor account closures and subcontractor payment delays.” Complaint (CBCA 8202) at 3.³ F.O.G. argues that it is entitled to Prompt Payment Act interest and breach of contract damages for the delayed payments. *Id.* at 2. It also argues that it is entitled to an equitable adjustment for the disruption caused by the work stoppage. *Id.*

II. Claim for the Increased Cost of Lumber, Differing Site Conditions (Discovery of Bedrock) and the Use of Bagged Concrete (CBCA 8203)

In its claim, F.O.G. requested \$194,000 for changes, unforeseen circumstances, delays, and challenges that “significantly impacted . . . the project’s costs and timeline.” DOI-001262. The claim consisted of \$66,000 for the increase in the cost of lumber and \$128,000 for delays caused by several factors, including the discovery of bedrock on the site and the delay in acceptance of the use of bagged concrete. *Id.*

A. F.O.G.’s Claim for the Increased Cost of Lumber

The contract specified that the contractor was to use “Douglas Fir or Lodgepole Pine or Ponderosa Pine” for the wooden fence rails. DOI-000063. When F.O.G. placed its bid on the contract, the estimate for lodgepole pine ranged from \$22,000 to \$31,200. SMF ¶ 5. According to F.O.G., during contract performance, the market price for lodgepole pine increased from \$30,000 to \$96,000. Complaint (CBCA 8203) at 1; DOI-001262. F.O.G. asserts that it “did not under bid the wood, it was a post bid cost increase that was [due to an] unforeseen/unpredictable market increase in lodgepole lumber. One reason we [were] given for the increase in cost was fires up in Oregon and Montana, but not sure if that was the only reason that we were given.” DOI-000597.

B. F.O.G.’s Claim for Differing Site Conditions (Discovery of Bedrock)

During construction, F.O.G. encountered bedrock at the project site. Complaint (8203) at 2. F.O.G. notified BLM that it had encountered bedrock in late October and early November 2023. SMF ¶ 10-11. On November 13, 2023, F.O.G. requested an on-site meeting to discuss the issue of the bedrock. DOI-000212. Discussions between F.O.G. and BLM related to how to address the bedrock continued from October 30 through, at least, December 7, 2023. SMF ¶ 10. It is unclear from the existing record, however, as to when

³ As there are no page numbers in appellant’s two complaints and its response to respondent’s motion for summary judgment, we cite to what the actual page numbers should be for these pleadings.

and how the parties resolved the issue of the bedrock. Ultimately, BLM agreed that F.O.G. did not have to install 123 posts (eighty-one posts because of the bedrock and forty-two posts BLM decided to install later), DOI-000930, and the 123 posts and associated rails became the property of BLM. DOI-00989.

C. Modification P0001

On April 5, 2024, BLM proposed to modify the contract to reduce F.O.G.'s labor costs by nine percent "to reflect the total amount of work not completed." *Id.* BLM also indicated that it had "previously approved [a] delay at the start of the project, for a total adjustment of \$8,399.14 as requested by F.O.G., LLC. No other delays were, or are, approved." *Id.* On April 8, 2024, F.O.G. and BLM signed bilateral modification P00001 to reduce the labor by nine percent (-\$14,809.34) and to compensate F.O.G. for the initial delay (+\$8399.14) for a net change of -\$6410.20.⁴ DOI-001083; SMF ¶ 15.

D. F.O.G.'s Claim for the Use of Bagged Concrete

The contract required "Ready-Mixed Concrete Producer Qualifications: ASTM C 94/C 94M" (trucked-in concrete). SMF ¶ 16. F.O.G. had arranged for the delivery of trucked-in concrete in October and November 2023. SMF ¶ 17. On October 24, 2023, F.O.G. notified BLM that it could not procure trucked-in concrete and suggested the use of bagged concrete. SMF ¶ 20. BLM approved the change to bagged concrete on November 2, 2023, so long as it was "mixed in a stationary mixer on site." SMF ¶ 22. BLM stated, "More inspection and oversight will be needed with this method." *Id.* On November 9, 2023, F.O.G. indicated that it was planning to use the concrete attachment on Saturday. SMF ¶ 23. On November 10, 2023, F.O.G. notified BLM, "We finish[ed] the holes with the concrete truck today and will not need an inspector tomorrow for the bag of concrete." SMF ¶ 24. On December 5, 2023, the agency asked that F.O.G. "please let us know when you are doing concrete using the attached mixer as we need to coordinate an inspector." DOI-000269. It is unclear from the record if or when F.O.G. used bagged concrete and/or the mixer since F.O.G. did not notify BLM so that it could inspect the concrete process. *See* DOI-000751.

E. Contracting Officer's Final Decision

The CO denied F.O.G.'s claim in its entirety. DOI-001411-12. The CO determined that F.O.G. was not entitled to \$66,000 for the increased cost of lumber because the contract was a firm-fixed-price contract that did not allow for an adjustment to the contract price due

⁴ The modification wrongly calculates the total adjustment as -\$6450.20.

to a change in the cost of materials. DOI-001411. Although the CO noted that certain contract clauses would defeat F.O.G.'s claim for a differing site condition and determined that the Government "did not delay, prevent, or stop F.O.G. LLC from work as a result of the discovery of bedrock at the site," the CO recognized that BLM allowed F.O.G. to forego installing posts in the area where the bedrock was located. DOI-001412. The CO further noted that BLM deducted, through bilateral modification P00001, the costs of labor that F.O.G. avoided because it did not have to install these posts. *Id.* The CO disregarded F.O.G.'s claim for delay in acceptance of the use of bagged concrete because BLM approved the use of bagged concrete as long as F.O.G. used a "stationary mixer or skid steer attachment mixer" and allowed BLM to inspect F.O.G.'s concrete preparation. *Id.* However, F.O.G. proceeded without allowing for this inspection, and the CO did not know if F.O.G. had used a mixer or mixed the concrete by hand. *Id.*

F. Complaint

In its complaint in CBCA 8203, F.O.G. described the grounds for its appeal as follows:

1. **Unforeseen Increases in Material Costs:**

The **2023 Montana wildfires** caused an unprecedented increase in the cost of lodgepole pine. This market disruption was beyond F.O.G. LLC's control and entitles the company to an equitable adjustment of **\$66,000** under **Federal Acquisition Regulation (FAR) 52.243-1** for changes that increase the cost of performance.

2. **Differing Site Conditions:**

The **undisclosed bedrock** encountered at the project site qualifies as a **differing site condition** under **FAR 52.236-2**. F.O.G. LLC is entitled to an equitable adjustment for the additional costs associated with the labor, equipment, and time required to overcome this unforeseen condition, totaling **\$21,555 per week**.

3. **Constructive Change due to Reversal of Concrete Approval**

The BLM's reversal of its prior approval for the use of bagged concrete constitutes a **constructive change** to the contract under **FAR 52.243-4**. The additional [labor and material] costs incurred by F.O.G. LLC due to the requirement to use trucked-in concrete amount to **\$21,555 per week**.

Complaint (8203) at 2. F.O.G. requested the following relief:

1. **Grant an equitable adjustment of \$66,000** for the unforeseen increase in material costs due to the Montana wildfires.
2. **Award \$21,555 per week** for the additional costs incurred due to the **differing site** conditions (bedrock) and the resulting delays and need for specialized equipment.
3. **Award \$21,555 per week** for the additional costs caused by the **constructive change** in material requirements (from bagged to trucked-in concrete).

Id. at 6.

Discussion

I. Motion for Summary Judgment Standard of Review

The Board recently described the standard that the Board must apply in reviewing a motion for summary judgment as follows:

“[A] party may move for summary judgment on all or part of a claim or defense which we will only grant if the party ‘is entitled to judgment as a matter of law based on undisputed material facts.’” *Mission Support Alliance, LLC v. Department of Energy*, CBCA 6477, 20-1 BCA ¶ 37,657, at 182,834 (quoting Rule 8(f)). In addressing each motion, we draw all factual inferences in favor of the non-movant. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-92 (Fed. Cir. 1987). “[S]ummary judgment is inappropriate if the factual record is insufficient to allow [us] to determine the salient legal issues.” *Mansfield v. United States*, 71 Fed. Cl. 687, 693 (2006), *cited in CSI Aviation, Inc. v. General Services Administration*, CBCA 6543, 20-1 BCA ¶ 37,580, at 182,479.

JITA Contracting, Inc. v. Department of Transportation, CBCA 7269, et al., 25-1 BCA ¶ 38,778, at 188,501.

II. F.O.G. Cannot Recover Its Claims for Payment Delays (CBCA 8202)

A. F.O.G. Has Not Established Entitlement to Prompt Payment Act Interest

F.O.G. claims that it is entitled to interest under the Prompt Payment Act (PPA), 31 U.S.C. § 3901–3907 (2018), caused by BLM’s alleged delay in timely paying its second and fourth payment requests. BLM moved for summary judgment arguing that it made timely payments under the terms of the contract and the PPA.

F.O.G. bears the burden to establish that the progress payments were erroneously withheld. *TGC Contracting Corp. v. United States*, 736 F.2d 1512, 1515 (Fed. Cir. 1984). Under FAR 52.232-27(a)(3) (48 CFR 52.232-27(a)(3) (2022)),⁵ PPA interest will be paid if the Government receives a proper payment request and “there is no disagreement over quantity, quality, or Contractor compliance with any contract term or condition, or requested progress payment amount.”

The prompt payment regulations at 5 CFR 1315.10(c) do not require the Government to pay interest penalties if payment delays are due to disagreement between the Government and the Contractor over the payment amount or other issues involving contract compliance, or on amounts temporarily withheld or retained in accordance with the terms of the contract.

FAR 52.232-27 (a)(4)(ii). However, to avoid PPA interest:

“[T]here must be, at the time payment of an invoice is delayed, a ‘present basis for delaying payment which is related to an objective discernible dispute.’” *Ross & McDonald Contracting, GmbH*, ASBCA Nos. 38154[,] et al., 94-1 BCA ¶ 26,316[,] at 130,894 (citation omitted). All that is required to raise a *bona fide* dispute concerning contract compliance is that the government’s questions be raised in good faith. That a contractor may ultimately prevail on

⁵ Despite the contract’s inclusion of several payment clauses—FAR 52.232-5, Payments under Fixed-Price Construction Contracts (MAY 2014); FAR 52.232-16, Progress Payments [(APR 2012)] Alternate I [(MAR 2000)]; and FAR 52.232-27, Prompt Payment for Construction Contracts (JAN 2017)—the terms and conditions in the Prompt Payment for Construction Contracts clause governs the payments at issue in this appeal. “Notwithstanding any other payment clause in this contract, the Government will make invoice payments under the terms and conditions specified in this clause.” FAR 52.232-27.

the merits does not defeat an otherwise proper payment withholding if there is such a good faith dispute. *Id.*

Dick Pacific//GHEMM, JV, ASBCA 55829, 08-2 BCA ¶ 33,937, at 167,942. Considering all the facts and circumstances in the light most favorable to F.O.G., we conclude that there was a *bona fide* dispute concerning contract compliance and work completed and that BLM raised these questions in good faith. BLM's payment withholding was proper. Moreover, F.O.G. is not entitled to PPA interest for BLM's alleged delay in acting on and resolving F.O.G.'s modification requests. *See id.* (citing *Onan Corp.*, ASBCA 41925, 93-1 BCA ¶ 25,261, at 125,830; *Ricway, Inc.*, ASBCA 30205, 86-1 BCA ¶ 18,539, at 93,137). As explained in *Ricway*, the PPA "is not the vehicle for compensating a contractor for Government delays in acting on contractor's proposals for contract price increases or adjudicating change orders." 86-1 BCA at 93,137.

B. F.O.G. Cannot Recover the Company President's or His Wife's Personal Financial Losses or Other Claimed Financial Impacts

BLM moved to dismiss F.O.G.'s claim for damages that were incurred personally by F.O.G.'s president and his wife. F.O.G. claims that, due to the Government's alleged delayed payments, the company president and his wife were unable to pay their personal mortgage on time and their credit scores deteriorated. However, neither F.O.G.'s president nor his wife are a party to this contract, are in privity of contract with BLM, or are the beneficiaries⁶ under this contract. F.O.G., therefore, cannot recover for any losses either one has suffered individually and that F.O.G. has claimed in this appeal.

F.O.G. also cannot recover for the other financial impacts it claims. Interest on borrowings, such as the penalties on missed loan repayments that F.O.G. seeks, are unallowable. FAR 31.205-20; *see J.D. Hedin Construction Co. v. United States*, 456 F.2d 1315, 1330-31 (Ct. Cl. 1972) ("Interest paid on bank loans made because of financial stringency resulting from a breach by the Government of a contract between it and the borrower is not recoverable as an item of damage."). F.O.G. also cannot recover damages claimed for its difficulty securing future financing or future contracts as a result of vendor disputes and account closures because these damages are "too remote and speculative."

⁶ F.O.G.'s president and his wife were not third-party beneficiaries of F.O.G.'s contract because the contract did not expressly or impliedly reflect an intention to directly benefit either person. *Glass v. United States*, 258 F.3d 1349, 1354, *amended on other grounds on reh'g*, 273 F.3d 1072 (Fed. Cir. 2001).

Nexagen Networks, Inc., ASBCA 60641, 19-1 BCA ¶ 37,258, at 181,328. As explained in *Nexagen*:

[I]f [the damages] are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in suit.

Id. (quoting *Ramsey v. United States*, 121 Ct. Cl. 426, 435 (1951)).

F.O.G. also alleges that BLM's delay in paying the second payment request "caused a constructive change by forcing F.O.G. LLC to stop work." Complaint (8202) at 2. However, BLM paid the second payment request within five days of submission of that request. There was no delay in paying the payment request that could be considered a constructive change or reason to stop work. BLM's motion for summary judgment related to payment delays is granted, and CBCA 8202 is denied.

III. BLM's Motion for Summary Judgment on F.O.G.'s Claim for Increased Lumber Costs Is Granted, and BLM's Motion on F.O.G.'s Claims for Differing Site Conditions and the Use of Bagged Concrete Is Denied (CBCA 8203)

A. Specialized Equipment, Labor, and Project Costs Related to the Discovery of Bedrock Remain Part of F.O.G.'s Claim

As part of its motion for summary judgment, BLM sought dismissal of F.O.G.'s claim for "increased costs from additional labor, specialized equipment or project costs" resulting from the alleged differing site condition (bedrock), arguing that F.O.G.'s claim before the Board is different from the one presented to the CO.

The first claim presented to the CO included 1) an increase in cost of lumber and 2) compensation for delays due to changes in site conditions, rejection of onsite material, acceptance of substitute material, and stop work orders. DOI-001262. The complaint before the Board lists differing site conditions as a separate claim, instead of one of the reasons for delay, and includes additional factors for increased costs from finding bedrock including additional labor, specialized equipment, and increase in project costs.

Respondent's Motion for Summary Judgment (Respondent's MSJ) at 2. Although "[t]he Board may not consider new claims a contractor failed to present to the contracting officer,"

Walker Development & Trading Group Inc. v. Department of Veterans Affairs, CBCA 5907, 18-1 BCA ¶ 37,065, at 180,422 (citing *Lee's Ford Dock, Inc. v. Secretary of the Army*, 865 F.3d 1361, 1369 (Fed. Cir. 2017)), the claim to the contracting officer and the claim before the Board must “arise from the same operative facts, claim essentially the same relief, and merely assert differing legal theories for that recovery.” *Id.* (quoting *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003)); *see also Anglin Consulting Group, Inc. v. Department of Homeland Security*, CBCA 6926, 21-1 BCA ¶ 37,918, at 184,157 (“In determining whether a contractor is presenting a new claim, tribunals consider ‘whether the new issue is based on the same set of operative facts’ as the claim submitted to the contracting officer.” (quoting *Foley Co. v. United States*, 26 Cl. Ct. 936, 940 (1992), *aff'd*, 11 F.3d 1032 (Fed. Cir. 1993))).

While F.O.G. describes, in its complaint, the damages sought for the discovery of bedrock in several different ways, F.O.G.’s claim before us arises from the same operative facts and claims essentially the same relief as the claim before the CO. Although in the claim before the CO, F.O.G. did not mention additional costs for specialized equipment specifically, F.O.G. did assert entitlement to project costs resulting from the discovery of bedrock. Such costs could include equipment and labor. F.O.G.’s claims for specialized equipment, labor, and project costs related to the discovery of bedrock remain part of its claim.

B. F.O.G. Cannot Recover the Increased Cost of Lumber

F.O.G. seeks to recover the increased cost of \$66,000 that it incurred in purchasing the lodgepole pine for the project. Because this was a firm-fixed-price contract, F.O.G. cannot recover the increased costs for materials.

FAR 16.202-1 explains that “[a] firm-fixed-price contract provides for a price that is not subject to any adjustment on the basis of the contractor’s cost experience in performing the contract.” As a result, “a contractor with a fixed price contract assumes the risk of unexpected costs not attributable to the Government.” *Matrix Business Solutions, Inc. v. Department of Homeland Security*, CBCA 3438, 15-1 BCA ¶ 35,844, at 175,283 (2014) (quoting *IAP World Services, Inc. v. Department of the Treasury*, CBCA 2633, 12-2 BCA ¶ 35,119, at 172,444[]).

Tri Vet Contracting Co., Inc. v. Department of Veterans Affairs, CBCA 8030, 24-1 BCA ¶ 38,606, at 187,667. “Under a firm-fixed price arrangement, [F.O.G.] assumed ‘maximum risk and full responsibility for all costs and resulting profit or loss.’” *Ace Electronics Defense Systems*, ASBCA 63224, 22-1 BCA ¶ 38,213, at 185,568 (quoting

Parsons Government Services., Inc., ASBCA 61630, 20-1 BCA ¶ 37,655, at 182,815 (quoting FAR 16.202-1)). “Thus, “[t]he price was ‘not subject to any adjustment on the basis of [F.O.G.’s] cost experience in performing the contract.’” *Id.*; see also *Zafer Taahhut Insaat ve Ticaret A.S. v. United States*, 833 F.3d 1356, 1361 (Fed. Cir. 2016). F.O.G., therefore, must bear the increased costs incurred to purchase lodgepole pine. Moreover, had F.O.G. purchased the lumber earlier than it did, it could have avoided the increased costs.

The contract does not contain a clause that shifts the risk for increases in material costs to the Government. F.O.G. points to FAR 52.243-1, Changes-Fixed-Price, in support of its claim, but this clause was not incorporated into the contract and does not apply. FAR 52.243-5, Changes and Changed Conditions (APR 1984), was incorporated into the contract by reference, but this clause requires that the Government order a change to the contract before F.O.G. may recover its increased costs. Since F.O.G. does not allege that BLM’s actions or BLM’s change to the contract caused the increase in the costs for lodgepole pine, F.O.G. cannot recover those costs under the changes clause. With no facts in dispute and drawing all factual inferences in favor of F.O.G., BLM’s motion for summary judgment regarding the increased costs for lodgepole pine is granted.

C. F.O.G.’s Differing Site Condition Claim Remains to Be Decided

F.O.G. asserts entitlement to increased costs for delay, labor, and equipment for a differing site condition, namely bedrock. BLM argues that we should grant summary judgment because

[a]ppellant does not explain how its costs increased or how it calculated its estimated damages. Appellant has not alleged when the delays occurred and has only provided a cursory guess at how long the delays lasted. Respondent has calculated one delay which was addressed in the modification, but it is unclear whether Appellant is referring to this delay in its claims. MSJ Facts at ¶ 18. As stated above, Appellant bears the burden of proving that its claim is correct, but has not provided the evidence required to support its claim.

Respondent’s MSJ at 7-8. We note that, in its summary judgment briefing, BLM does not make any attempt to identify whether, based on the contract language at issue here, the alleged differing site condition would constitute a category I or category II condition. See John Cibinic, Jr., James F. Nagle, & Ralph C. Nash, Jr., *Administration of Government Contracts* 445-75 (5th ed. 2016) (discussing the differences between category I and category II). The degree to which BLM made any kind of warranty of what subsoil conditions at the project site were and the type of evidence that F.O.G. would need to establish an actionable differing site condition are highly dependent on this distinction. See

id. BLM’s motion is not directed to whether it made a category I warranty but instead focuses exclusively on whether F.O.G. has proven any delay or damage.

F.O.G. need not prove delay or its damages at this stage of the proceedings. To survive summary judgment, F.O.G. must present evidence on which a reasonable factfinder could find that there was a differing site condition that may have caused compensable delay or damages as a result. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56 (1986). Moreover, “[t]he appropriate measure of damages for a differing site condition is the additional cost incurred by the contractor as a result of the differing site condition.” *Tucci & Sons, Inc. v. Department of Transportation*, CBCA 4779, 16-1 BCA ¶ 36,258, at 176,886. F.O.G. “bears the burden of proving that it encountered a differing site condition, that the differing site condition caused an increase in the cost of performance of its work, and the amount of that increase.” *Id.* at 176,887 (citing *Quality Forests, Inc. v. Department of Agriculture*, CBCA 123, 07-1 BCA ¶ 33,490). To meet its burden, F.O.G. ultimately will have to prove the following:

To qualify for an equitable adjustment based on the Differing Site Conditions clause, the contractor must prove the existence of one of two categories of compensable conditions: category I (site conditions which differ materially from those indicated in the contract) or category II (conditions which are unknown and unusual and differ materially from those generally encountered in the type of work being procured). *E.g., Imbus Roofing Co.*, GSBCA 10430, 91-2 BCA ¶ 23,820, at 119,348.

Tucci & Sons, 16-1 BCA at 176,887 n.1.

In response to BLM’s motion, F.O.G. argues that, while section 3.2A of the statement of work (SOW) anticipated that rock may be excavated, DOI-000069, “[d]emolition of bedrock is not the same thing as excavation, earth moving and rock.” DOI-000212. F.O.G. also asserts that it reasonably assumed that there was no bedrock because 1) the contract did not mention bedrock; 2) none of the other contractors asked questions about bedrock; and 3) to “get through bedrock” successfully requires dynamite which was not allowed under the contract. DOI-000237 (“Because if we weren’t allowed to use dynamite on this project, then the expectation set by the government was that we would not be running into bedrock.”); SOW 1.5 A. at DOI-000032 (stating that the use of explosives is not permitted). Moreover, the questions of whether F.O.G. participated in a site visit or inspected the site prior to executing the contract and whether F.O.G. should have known by inspecting the site or other means that there was bedrock remain unanswered.

Although BLM questions F.O.G.'s ability to meet its burden to prove its differing site condition claim, the only basis that BLM has raised for denying F.O.G.'s differing site condition claim is its failure to prove delay or damage. Absent the parties' development of a record regarding whether a category I or a category II differing site condition is at issue here and whether F.O.G. has sufficient evidence to support a claim for whichever category is established, we have no basis to grant summary judgment in BLM's favor. Compensable costs, if any, must await further record development, and F.O.G. must prove its delay claims (entitlement and costs).

A claimant need not prove his damages with absolute certainty or mathematical exactitude. It is sufficient if he furnishes the court with a reasonable basis for computation, even though the result is only approximate. Yet this leniency as to the actual mechanics of computation does not relieve the contractor of his essential burden of establishing the fundamental facts of liability, causation, and resultant injury. It [is] [F.O.G.'s] obligation . . . to prove with reasonable certainty the extent of unreasonable delay which resulted from [BLM's] actions and to provide a basis for making a reasonably correct approximation of the damages which arose therefrom. Broad generalities and inferences to the effect that [BLM] must have caused some delay and damage because the contract took . . . longer to complete than anticipated are not sufficient. *Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 968-69 (Ct. Cl. 1965) (citations omitted).

French Construction LLC v. Department of Veterans Affairs, CBCA 6490, 22-1 BCA ¶ 38,164, at 185,339.

Viewing the facts favorably for F.O.G., and based on BLM's position that F.O.G. has not proven delay or damage, we cannot find that F.O.G. is precluded from seeking payment for any delays or equipment costs associated with the bedrock on the current record. While the bilateral modification P00001 did address labor costs associated with the bedrock, it did not contain a release of any other claims. F.O.G. has set forth facts which permit the further development of the record to establish if the bedrock was a differing site condition for which it can prove entitlement to compensable delay, labor, or equipment costs. Accordingly, BLM's motion for summary judgment regarding the differing site condition is denied.

D. F.O.G.'s Claim Arising from the Use of Bagged Concrete Remains to be Decided

F.O.G. claims damages due to the change from trucked-in concrete to bagged concrete. However, the factual predicate for F.O.G.'s claim is unclear. In its complaint,

F.O.G. alleges that “[a]fter initially approving the use of **bagged concrete**, the BLM later reversed its decision and mandated the use of **trucked-in concrete**.” Complaint (8203) at 2. “This reversal caused project delays, as F.O.G. LLC was forced to adjust its material procurement and construction plans.” *Id.* F.O.G. claims entitlement to \$21,555 per week “for the additional costs caused by the **constructive change** in material requirements (from bagged to trucked-in concrete).” *Id.* at 3. However, in its response to the motion for summary judgment, appellant contends that its “shift to bagged concrete was authorized by BLM and necessitated by constructability challenges beyond [a]ppellant’s control. There remains a genuine issue as to whether appellant’s response to delivery failures was reasonable and within the scope of the contract.” Appellant’s Response at 1. In its claim, F.O.G. asserted that it was entitled to costs for “[t]he delay in acceptance of suitable substitute material (concrete) that met the project requirements” that contributed to the project timeline extension. DOI-001262.

BLM suggests that the April 8, 2024, bilateral modification P00001, which compensated appellant in the amount of \$8399.14 for initial delay, was compensation for the delay caused by the concrete change. SMF ¶ 26; Respondent’s MSJ at 8-9. Neither the modification nor other documents discussing the modification, however, indicate that this compensable initial delay was related to the substitution of concrete types.

BLM moves for summary judgment, arguing that “[a]ppellant has not proven that Respondent is responsible for unreasonable delays and has not provided evidence to support its claims,” and both parties agreed to “a bilateral modification for government delay, differing site conditions, and changes in concrete.” Respondent’s MSJ at 9. However, material facts remain in dispute regarding whether BLM reversed its decision to allow F.O.G. to use bagged concrete, when and how much bagged concrete F.O.G. used, whether F.O.G. was delayed as a result of BLM’s consideration of the substitution or the substitution itself, and whether the bilateral modification compensated F.O.G. for such delay. Again, at this stage of the proceedings, F.O.G. does not have to prove that BLM was responsible for unreasonable delays to survive the Government’s motion. Viewing the facts in the light most favorable to F.O.G., BLM’s motion for summary judgment regarding the use of bagged concrete is denied.

Decision

BLM’s motion for summary judgment is **GRANTED** on the issue of payment delays, and CBCA 8202 is **DENIED**. BLM’s motion for summary judgment on F.O.G.’s claim for the increased costs for lumber is **GRANTED**, but BLM’s motion for summary judgment on F.O.G.’s claims for a differing site condition and the use of bagged concrete is **DENIED**. CBCA 8203 remains pending before the Board in accordance with this decision.

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

We concur:

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge