BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

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| Appeal of<br>CHERRY HILL CONSTRUCTION, INC. | ) | |
| | ) | Docket No. MSBCA 1352 |
| Under Maryland Transportation Authority/Maryland Port Administration Contract No. 287904 | ) | |

November 14, 1988

Change - During the course of performance of a contract involving excavation of soils a dispute arose between the parties as to the proper classification of soil for purposes of measurement for payment. Appellant asserted that the fact that laboratory analysis, performed at the contractor's expense, showed the State inspectors to be incorrect ten to fourteen percent of the time in their visual classification of the suitability of soil demonstrated that the contract had been breached or changed. The Board disagreed that this ten to fourteen percent error rate demonstrated that a change (or breach) had occurred. The Board found that the contract contemplated visual classification of soils by the State inspectors, that the State did not agree to the laboratory testing of soil where the contractor disagreed with the State Inspectors' classification, and that the ten to fourteen percent range of disagreement was reflective of normal disagreement between persons properly trained to make judgments as to soil classification.

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OPINION BY CHAIRMAN HARRISON

Appellant entered into a contract dated June 4, 1986 with the Maryland Port Administration (MPA) for certain work in connection with the construction of the Seagirt Marine Terminal. The work to be performed by Appellant consisted of transferring a surcharge embankment from the area of Berth

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I of the Terminal to the area of Berth II of the Terminal, plus some storm drainage work.

During the course of performing the work, a dispute arose between the parties as to the proper classification of material for purposes of measurement for payment. From denial of its claim by the MPA procurement officer, Appellant takes this timely appeal.

Findings of Fact

1. The work, apart from the construction of storm drains (not here relevant), generally consisted of excavating a previously placed surcharge on Berth I and moving it to Berth II. Incidental excavation was also to be performed near Berth I to bring the entire area to elevation.

This work was governed by Sections 2 and 3 of the Technical Specifications. Section 2 addressed the excavation and Section 3 addressed the surcharge embankment. Both sections contemplated that only "suitable material" would be used in the embankment construction with the suitable material obtained from the excavation.

The relevant portions of the Technical Specifications provide:

SECTION 2

EXCAVATION

(a) The work under this section shall include all unclassified excavation for grading to the elevations shown on the plans and all excavation required for the removal of unsuitable material below the limits of excavation where directed by the Engineer ....

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(c) The work further includes the hauling of unsuitable materials encountered within the limits of excavation to the Muck Area and disposal of same within the Muck Area.

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2. MATERIALS:

(a) Excavated material which contains wood, concrete, organics, debris or which does not meet the following requirements shall be classified as unsuitable material.

(1) Moisture Content < 30

(2) Liquid Limit < 40

(3) Plastic Index < 15

(b) Excavated material meeting the requirements listed in (a) above shall be used to construct the Berth II surcharge embankment.

(c) Classification of material as to suitable or unsuitable material shall be in minimum 2 cubic yard size loads.

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4. MEASUREMENT:

(a) Unclassified Excavation shall be measured on the cubic yard basis using cross-sections obtained at the Contractor's cost before and after grading operations.

(b) Unsuitable material hauled to the Muck Area and disposed of shall be measured in the vehicle on a cubic yard basis. The Engineer shall direct the

Contractor as to the procedure by which the volume of material within the haul vehicle is to be determined.

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5. PAYMENT:

(a) Payment for "Unclassified Excavation," complete in place, shall be made at the Unit Price Bid per cubic yard under Item No. 2001 on the Proposal Sheet. The price shall include all work described in this section and shown on the Contract drawings, including all labor, materials, and equipment necessary to complete the work in every respect to the satisfaction of the Engineer. The price shall also include furnishing the Engineer with a new nuclear density gauge.

(b) Payment for "Hauling and Disposal of Unsuitable Material," complete, shall be made at the Unit Price Bid per cubic yard under Item 2002 on the Proposal sheet. The price shall include all labor, materials, services, and equipment required to haul and then dispose of this material in the Muck Area.

## SECTION 3

## SURCHARGE EMBANKMENT

1. SCOPE:

(a) The work under this section shall include, but is not limited to, the placing as embankment of all suitable material from "Unclassified Excavation" required to provide the required surcharge depths as shown on the drawings. All hauling, dumping, spreading, etc., and all other work required to complete the project as indicated on the drawings and/or as called for in these Specifications shall be included.

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2. MATERIALS:

(a) Suitable material obtained from "Unclassified Excavation" shall be used to construct the Berth II surcharge embankment. This material

shall not contain concrete, wood, organics, debris, and shall meet the following requirements:

(1) Moisture Content < 30

(2) Liquid Limit < 40

(3) Plastic Index < 15

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4. MEASUREMENT:

Placing surcharge embankment material obtained from on-site Unclassified Excavation will not be measured for payment.

5. PAYMENT:

(a) Payment for surcharge embankment, complete in place, shall be included in the Unit Price Bid for Item 2001, "Unclassified Excavation." This price shall constitute full compensation for the furnishing, hauling, placing and spreading and all equipment, labor, and incidentals necessary to complete

the work in every respect to the satisfaction of the Engineer.

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2. In the schedule of bid prices, the total amount of unclassified excavation was estimated to be approximately 529,000 cubic yards of which 31,000 cubic yards was estimated to be unsuitable material to be hauled to the Muck Area for disposal. The remaining approximately 498,000 cubic yards, was to be used primarily to construct the surcharge embankment at Berth II.

3. Notice to proceed was issued on June 10, 1986 and the excavation work commenced June 23, 1986. The State had appointed two inspectors, Steven G. Mavronis and Diane Eckard, to observe the ongoing excavation and to judge the suitability of the excavated material. A truck was loaded with approximately four buckets of material by a backhoe in assembly line fashion every two minutes and directed by the inspectors to either the surcharge embankment or the Muck Area. A dispute arose over the classification of the material when James A. Openshaw, Jr., Appellant's president visited the site during the first week of excavation and observed what he believed to be unsuitable material being sent to the embankment area rather than the Muck Area. (May 2 Tr. p. 221).

4. Appellant had bid $1.15 per cubic yard for Bid Item 2001 (unclassified excavation-suitable) and $6.00 per cubic yard for Bid Item

2002 (unsuitable). Mr. Openshaw complained to MPA that by classifying what he considered to be unsuitable material as suitable, MPA was reducing the amount due Appellant under Bid Item 2002 of the contract. To address this concern, Appellant employed Kidde Consultants, Inc. (Kidde), and engineering and soil testing firm, to give an opinion as to the proper classification of the material being excavated.[1] The employment of Kidde was not authorized by the contract or otherwise approved by MPA.

5. Mr. Thomas J. Schafer, the design engineer for the project, testified that, given the great variability of material expected to be encountered, he would periodically check the work of the MPA inspectors to ensure that their visual classification of material as suitable or unsuitable was reasonably close to the tolerances set forth in the specifications. (May 3 Tr. pp.56-59, 79-80). While admitting that he viewed the tolerances set forth in the specifications as setting a benchmark rather than an absolute criteria for classification there is no evidence that Mr. Schafer attempted to have the MPA inspectors relax the application of the specifications in visually classifying material.

Mr. Ronald Lange, the MPA project manager, testified that he instructed the MPA inspectors to adhere to the specifications in classifying material as suitable or unsuitable. Despite his acknowledgement that Appellant's $6.00 unit price for unsuitable material

[1]When it bid for the contract, Appellant saw no requirement in the specifications for any sort of testing and no thought was given to testing at that time because it was expected that because of the nature of the work to be accomplished in assembly line fashion over a large area containing a great variability of material, classification of material as suitable or unsuitable would be accomplished by visual inspection. (May 2 Tr. pp.252-270).

was high in comparison to other bids he testified that he did not try to influence the inspector's opinions concerning proper classification. (May 3 Tr. pp. 122-124, 197-199).

6. Kidde arrived on the job site Monday, June 30, 1985. Despite discussions during the period of June 30, 1986 to July 15, 1986 disagreements continued between Appellant and MPA as to what constituted unsuitable material. Appellant then employed Kidde full time to determine the accuracy of the classification by MPA inspectors.

7. On July 2, 1986, Mr. Timothy Gary a second year civil engineering student at the University of Maryland employed as a soils technician by Kidde was sent to the site to observe the backhoe excavation and loading of material into the trucks[2] and to confirm the judgment of the State inspectors. When Mr. Gary went back to school in August, he was replaced by Mr. Dan Rybak. Mr. Rybak remained on the site until September 12, 1986, when the backhoe excavation was substantially completed.

8. Mr. Gary testified as to the procedures that he followed which included an initial visual classification. (May 2, Tr. p. 39). If he agreed with the State inspectors on the classification of material, then nothing further was done. Where he disagreed with the State

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[2]Mr. Gary testified that each of the truck loads was made up usually of all of the same material. (May 2 Tr. p. 95). He did acknowledge that on "a few occasions" the truck contained both suitable and unsuitable material, but then the decision was made as to what made up the majority of the truck load. (May 2 Tr. pp. 96, 167-168)). Mavronis agreed there was "no mixture," except for a few times. (May 3 Tr. p. 87). The Board finds that the particular content of any given truckload is not a part of the dispute herein.

inspectors, a sample was taken by Mr. Gary and sent to the Kidde lab for analysis. The report was returned to Mr. Gary who used it to confirm or correct his visual classification. (May 2 Tr. pp. 40-43). During the period of July 15, 1986 to September 12, 1986, 195 samples were taken by the Kidde inspectors. (May 2 Tr. p. 143).

9. As noted above, the specification for distinguishing suitable and unsuitable material provides:

2. MATERIALS:

SECTION 2

EXCAVATION

* * * *

(a) Excavated material which contains wood, concrete, organics, debris or which does not meet the following requirements shall be classified as unsuitable material.

(1) Moisture Content < 30

(2) Liquid Limit < 40

(3) Plastic Index < 15

There is no objective physical test that can be used to make a determination of organic content and thus such determination is based on visual inspection. (May 2 Tr. p. 143). It is not practical to field test for liquid limit and plastic index. (May 2 Tr. pp. 79-80, 266).

Moisture content is the only variable for which it was possible to test in the field to any extent. (May 2 Tr. p. 53). However, Kidde abandoned field testing because the Kidde on site inspector could not conduct moisture tests and at the same time keep track of the rapid excavation and loading operation. (May 2 Tr. pp. 53, 125-129).

10. MPA also conducted laboratory tests. MPA contracted with EBA Engineering, Inc. (EBA) to perform 32 laboratory tests on soil samples collected by MPA inspectors. EBA conducted the following tests: moisture content, liquid limit, plastic index and the percentage passing #200 sieve. MPA soil samples provided EBA for testing represented soil which MPA's inspectors, Mavronis and Eckard, classified as suitable but Appellant challenged. Of the 32 samples tested in the EBA laboratory, 27 samples met the specification limits for suitability, thus confirming the judgment of the MPA inspectors 85 percent of the time respecting these challenges. (Respondent's Ex. 14; Appeal File, Tab 5, June 8, 1987 letter from T. Schafer to E. Jones). However, like Kidde's tests, the EBA tests were done substantially after the fact.

11. An analysis of the Kidde inspector's daily reports (Appellant's Ex. 5) reflects the following range of disagreement between the respective judgments of the MPA inspectors and the Kidde inspectors. On the basis of the Kidde inspectors' judgments, uncorrected for the results of the 195 Kidde laboratory tests, there was disagreement as to suitability 14 percent of the time with Mr. Gary and 15 percent of the time with Mr. Rybak. When the Kidde inspectors' judgments are corrected by the test results, the disagreement is 10 percent of the time for Mr. Gary and 14 percent of the time for Mr. Rybak. (Respondent's Ex. 15).[3]

[3]An analysis of Respondent's Ex. 15 and the percentages of before and after testing disagreements also reflects that the Kidde field personnel, Mr. Gary and Mr. Rybak, were incorrect in their visual judgments on a number of occasions.

12. The disagreement after test results of 10 to 14 percentage points reflected in Finding of Fact No. 11 above during the period in question, July 15, 1986 - September 12, 1986, is spread over 22,503 buckets of material in 6,842 truck loads.[4] (Respondent's Ex. 15). In normal operating conditions a backhoe (with trucks lined up side by side) would fill a truck approximately every two minutes and the truck driver would then drive the truck to the destination directed by the inspectors to dump its content. (Appellant's Ex. 5; May 2 Tr. 219, 220). Thus on site determinations, i.e. judgments, concerning the suitability of material, were of necessity required to be made quickly by the MPA and Kidde inspectors based on visual observation.

13. The Board finds based on the record as a whole that (1) both the MPA inspectors and the Kidde inspectors made bonafide efforts on the site to visually properly classify the material based on the specifications and (2) that at all relevant times the MPA inspectors exercised an independent, unbiased, and uncoerced judgment concerning the classification of the material observed.

14. Based on the 195 soil tests conducted by Kidde, a calculation was made by Appellant as to the quantity of material that was allegedly improperly classified as suitable by the MPA inspectors. This

[4]The total quantity of suitable and unsuitable material actually excavated and paid for under Bid Item 2001 (at $1.15 per cubic yard) is 489,964 cubic yards. The 9,885 cubic yards in dispute represents 2 percent of this total quantity.

quantity was asserted to be 9885 cubic yards.[5] Appellant was paid at the $1.15 per cubic yard it bid for suitable material for this quantity. Appellant, however, submitted a claim to MPA arguing that it was entitled to be paid at its $6.00 per cubic yard bid price for this material and that MPA thus owed it $59,310.00 (9885x6.00= $59,310.00). Appellant also asserted that it was is entitled to be reimbursed the $9,771.00 that it paid Kidde to monitor the classification of material.

15. The contract contained a standard changes clause (GP-4.05) and an estimated quantities clause which in relevant part provides:

GP-4.03 Variations In Estimated Quantities

> Where the quantity of a pay item in this contract is an estimated quantity and where the actual quantity of such pay item varies more than twenty-five percent (25) above or below the estimated quantity stated in this contract, an equitable adjustment in the contract price shall be made upon demand of either party. The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above one hundred twenty-five percent (125%) or below seventy-five percent (75) of the estimated quantity.

[5]The record reflects that a few of the 195 soil tests were from areas not representative of the area actually being excavated. However, the Board will accept Appellant's assertion that 9885 cubic yards were improperly classified for purposes of its decision.

The contract sets forth an estimated quantity of unsuitable material of 31,000 cubic yards. (Contract Proposal Form at p. 3, Appeal File, Tab 2.) Appellant actually excavated and hauled to the Muck Area 44,248 cubic yards of material and was paid therefore at the bid price of $6.00 per cubic yard. However, to date, neither party has demanded an equitable adjustment under the variation in estimated quantities clause.

16. By letter dated August 20, 1987, the procurement officer denied Appellant's claim for $59,310.00 relating to the alleged improper classification of material and $9,771.00 in fees paid to Kidde. The grounds for denial of the claim were (1) that the material was properly classified and (2) that the work performed by Kidde was unauthorized work under Contract General Provision 4.07.[6]

17. Appellant noted an appeal on September 18, 1987 and elected to proceed in the appeal both as to entitlement and quantum.

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[6] GP-4.07 Unauthorized Work

Any work which may be done by the Contractor prior to receipt of the notice to proceed, work done contrary to or regardless of the instructions of the procurement officer, work done beyond the lines and grades shown on the contract drawings, or as given, or any extra work done without written authority will be considered as unauthorized and at the expense of the contractor and will not be measured or paid for. Work so done may be ordered removed and/or replaced at the Contractor's expense.

## Decision

Appellant claims that the MPA failed to properly classify 9885 cubic yards of excavated material as unsuitable. Proper classification, Appellant asserts, would have required MPA to pay Appellant an additional $59,310.00 under bid item 2002 where it bid $6.00 per cubic yard for hauling and disposing of unsuitable material. Appellant also claims that it is entitled to be reimbursed $9,771 in fees paid to Kidde to protest it against an alleged MPA bias in classifying material as unsuitable.

MPA asserts that Appellant is not entitled to recover because MPA acted reasonably and in accordance with the contract specifications in classifying the soil. MPA also argues that Appellant's claim must fail because it seeks compensation for work not actually performed, i.e. the hauling to and disposal of 9885 cubic yards of material at the Muck Area.[7] Additionally, respecting the claim of Appellant for $9,771 in fees paid to Kidde, MPA asserts that such work was (1) not authorized by the contract, and (2) not allowable since payments to Kidde represented claim preparation costs which are not recoverable as part of an equitable adjustment. For the reasons that follow we find that MPA acted reasonably and in accordance with the contract

[7]In view of the decision we reach herein we will not consider MPA's other arguments based on the variation in estimated quantities and changes clauses of the contract.

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specifications in classifying the excavated material as suitable or unsuitable, and, accordingly, we deny the appeal.

Appellant asserts that MPA breached the contract by deliberately misclassifying material as suitable when it was in fact unsuitable thus necessitating the hiring of Kidde to determine proper classification.[8] Appellant, however, bears the burden to demonstrate that MPA misclassified material; i.e. it bears the burden to show that MPA breached or changed the contract. This it has not done. Appellant asserts that Mr. Ronald Lange, the MPA project manager, and Mr. Thomas J. Schafer, the design engineer for the project, were instructing the MPA inspectors (Mavronis and Eckard) to only classify very bad soils as unsuitable and to classify as suitable material that should have been classified as unsuitable under reasonable application of the tolerances set forth in the specification respecting soils classification. The

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[8]Whether MPA's alleged misclassification of material is labeled a change (as argued by MPA on appeal) or a breach is immaterial in the context of the "all disputes" clause (GP-5.15) of the contract. In view of our determination that the classification of material was reasonable under the terms of the contract we need not address MPA's contention that Appellant's claim must fail for failure to demonstrate that it suffered any damages and, in fact, could not have sustained any monetary loss because it did not have to perform the allegedly more expensive work involved in hauling and disposal of the 9885 cubic yards of disputed material at the Muck Area. Nevertheless, a comment is warranted. Appellant takes the position that it is entitled to an award of $59,310.00 even though (having hauled such material to the surcharge embankment) it did not perform the work involved in hauling to and disposing of the disputed 9885 cubic yards at the Muck Area. It asserts that as a matter of law improper classification entitles it to the compensation sought whether or not it suffered any actual monetary loss. While quantum is not before us in view of our determination on entitlement we caution that this Board only awards an equitable adjustment to make a contractor whole as a result of actual costs incurred by a contractor as a result of a change or breach that exceed the amount paid by the State under the contract. See generally C. J. Langenfelder & Son, Inc., MDOT Nos. 1000, 1003 & 1006, 1 MSBCA ¶2 (1980).

evidence of record, however, fails to support this assertion. Mr. Mavronis testified that he was attempting to classify the material as suitable or unsuitable in accordance with the tolerances and description as set forth in the specification.' Mr. Schafer and Mr. Lange denied that they directed or otherwise attempted to influence the MPA inspectors to misclassify the material or ignore the specification tolerances and we find their testimony to be credible. We believe that the contract specifications contemplate that the material to be excavated was to be classified through visual observation. The parties also contemplated that the material was to be visually classified. Laboratory testing by Kidde of disputed samples reflected that MPA and Appellant were in agreement 90% of the time when Mr. Gary was the Appellant's representative on site and 86% of the time when Mr. Rybak was the Appellant's representative on site. We believe this ten to fourteen percent range of disagreement between the MPA and Kidde inspectors is merely reflective of normal disagreement between people properly trained to visually make judgments as to soil classification. In this regard we also note that the record reflects that Mr. Gary was mistaken in his own personal classification of material on numerous occasions. In any event, upon the Board's finding that the visual method of classification of materials was as contemplated by the provisions of the contract and reasonably conducted by the MPA inspectors, we deny the appeal.

Opinion by Mr. Ketchen

Dissenting in Part and Concurring in Part

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'Ms. Eckard did not testify.

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I respectfully dissent in part and concur in part with the Appeal Board's decision in MSBCA No. 1352. Appellant believed very early on in this project that MPA, using a visual means of classifying excavation material, was improperly classifying material as suitable instead of unsuitable to Appellant's detriment under the contract's pay terms. Appellant gave notice of this dispute immediately to MPA and took steps to quantify its conclusions based on its observations of what MPA's inspectors were doing. In this regard, the contract changes clause does not require a contractor to immediately quantify the extent of a change when it believes a change is occurring in the work over a period of time. Nor do the specifications here clearly contemplate visual classification of material where the contract specified very precise criteria, at least as to moisture content (less than 30) liquid limit (less than 40) and plastic index (less than 15). The subject specifications reasonably infers that fairly precise tests of these criteria would be undertaken to classify material as suitable or unsuitable.[1] (May 3, 1988 Tr. 57-62, 76-80). However, the visual

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[1] "'moisture content'....the weight of water in a soil mass divided by the weight of the solids and multiplied by 100."

"'liquid limit' Water content, expressed as a percentage of the dry weight of the soil at which the soil passes from the plastic to the liquid state under standard test conditions; the minimum moisture content which will cause soil to flow if jarred slightly. (see Atterberg limits)"

"plastic index The numerical difference between the soil's liquid limit and its plastic limit. Also called plasticity index."

"plasticity index The range in water control through which a soil remains plastic; numerical difference between the liquid limit and the plastic limit. (see Atterberg limits)"

inspection method used with laboratory testing to follow if there was disagreement between Appellant and the MPA inspectors, although not specified by the contract, was developed on-the-job and thereby informally added to the scope of work early in the performance of the contract work.

The Appeal Board's findings of fact indicate that soil samples taken during the period of the excavation work show that indeed MPA's inspectors were misclassifying material, to some extent, possibly as much as 10-14 percent of the time when Appellant's inspectors and MPA's inspectors disagreed as to a visual classification of material. However, this necessarily became known sometime after the material was analyzed at the laboratory following excavation and placement of the material from which the sample was taken. (Findings of Fact Nos. 11 and 12). Similarly, MPA's laboratory tests indicate that the MPA inspectors generally were misclassifying material 15 percent of the time when Appellant and MPA disagreed as to the visual classification. (Finding of Fact No. 10). In this regard, however, due to discrepancies in Appellant's sampling methods, it is not clear that the full amount of 9885 cubic yards of material was misclassified as Appellant contends, although the record indicates that a good deal of this amount was in fact misclassified as suitable material.

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"plastic limit The water content at which a soil will just begin to crumble when rolled into a thread approximately 1/8 inch (3 mm) in diameter. (see Atterberg limits)"

"Atterberg limits Arbitrary water contents (shrinkage limit, plastic limit, liquid limit) determined by standard tests, which define the boundaries between the different states of consistency of plastic soils." Construction Dictionary, Greater Phoenix, Arizona, Chapter #98 of The National Association of Women in Construction (June 1979). Certain soil classification tests (liquid limit test, plastic limit test, and field moisture content) are described in the Construction Dictionary. Id. at 607.

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I agree that the MPA acted reasonably and did the best it could under the circumstances existing at the job site in its efforts to visually classify the material being excavated, given the difficulty of conducting standard soil classification tests in the field. However, I disagree that MPA's actions compiled with the specifications or were contemplated by the specifications which spelled out certain criteria to be met in classifying the soils and which necessarily called into play certain standard testing requirements. I conclude, therefore, that MPA's action in developing the method of classifying the material dictated by the practicality of the field situation nevertheless constituted a change in the agreement that MPA wrote and Appellant bid on. See Martin G. Imbach, MSBCA 1020, 1 MSBCA ¶52 (1983).

The changes clause applies since there was a change to the method and manner of performance; there was no breach of contract here. Lehigh Chemical Co., ASBCA No. 8427, 1963 BCA ¶3749 at 18707. Appellant thus would be entitled to an equitable adjustment under the contract's changes clause provided it could show that the change increased its costs in this unit price contract. See N. Fiorito Company, Inc. v. United States, 189 Ct. Cl. 215, 416 F.2d 1284 (1969); C.H. Leavell and Company, ENG BCA No. 3492, 75-2 BCA ¶11,596 (1975); Tompkins & Co., ENG BCA No. 4484, 85-1 BCA ¶17,853 (1985). See generally Modern Foods, Inc., ASBCA No. 2090, 57-1 BCA ¶1229 ("...a proper equitable adjustment is the difference between what it would have reasonably cost to perform the work as changed.").

However, Appellant has not shown, and did not attempt to show, that the misclassification of quantities between unsuitable and suitable material under the terms of this unit price contract correspondingly increased its costs of performance so as to entitle it to an equitable adjustment. In this regard, Appellant was paid at the contract unit price of $1.15 per cubic yard for excavating the material Appellant maintains was misclassified as suitable material. The unit price of $1.15 per cubic yard was the contract unit price for excavating all material whether suitable or unsuitable, including all the material Appellant asserts was improperly classified as suitable material instead of unsuitable material. However, Appellant seeks payment for the quantity of material misclassified as suitable material at the contract unit price for hauling unsuitable material at $6.00 per cubic yard. As pointed out by MPA, Appellant thus requests payment at the contract unit price for work it did not do; i.e., for the material misclassified as suitable material. I have seen no legal basis put forth on the record of this appeal that would support this theory of recovery under the equitable adjustment provisions of the changes clause.

However, in my view, Appellant would be entitled to some part of its testing costs as part of an equitable adjustment for the change I would find occurred. See Tempo Inc., ASBCA No. 9588, 65-1 BCA ¶4822; Szemo, Inc., ASBCA No. 9892, 1964 BCA ¶4503, 65-1 BCA 4505. Compare N. Fiorito Co. v. United State, supra. See generally General Motors Corp., ASBCA No. 10418, 65-2 BCA ¶4885; Electro Plastic Fabrics, Inc., ASBCA No. 14762, 71-2 BCA ¶8996; Lehigh Chemical Co., No. ASBCA 8427, 1963 BCA ¶3749.

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For these reasons, I would deny the appeal because Appellant did not prove the extent of the changed work, except for the testing expense, and how the work as changed correspondingly increased its costs so as to entitle it to an equitable adjustment under the contract changes clause.

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