BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of MINOS CONTRACTORS, INC.	)	
	)	Docket No. MSBCA 1242
Under DGS Project No. SFC 6/26-151	)	

August 7, 1986

Differing Site Condition - The contractor's uncorroborated testimony that a "type 2" differing site condition was encountered failed to overcome expert testimony (including the testimony of Appellant's own expert) that the condition complained of could not theoretically exist and other testimony of record from which it could be inferred that the condition did not, in fact, exist.

Equitable Adjustment - Burden of Proof - The project involved sandblasting and painting a water tower. The contractor intended to commence work in the interior of the tower so it could re-use a certain amount of spent sand from interior sandblasting operations on the exterior work. As a result of a mechanical problem, the water tank was not completely drained of water by the scheduled project commencement date and the contractor was required to commence work on the exterior of the tank. The contractor alleged that this change caused it to use more sand on the project. However, the contractor failed to show that this change in its construction sequence, in fact, required it to use more sand than originally intended, and its claim was denied.

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APPEARANCE FOR RESPONDENT: Jeffrey H. Myers
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OPINION BY CHAIRMAN HARRISON

This is an appeal from a Department of General Services (DGS) procurement officer's decision (1) denying Appellant's[1] claim for additional compensation based on delays resulting from an alleged differing site condition, a resequencing of work and inadequate inspection services, and (2) affirming the termination of Appellant's contract.

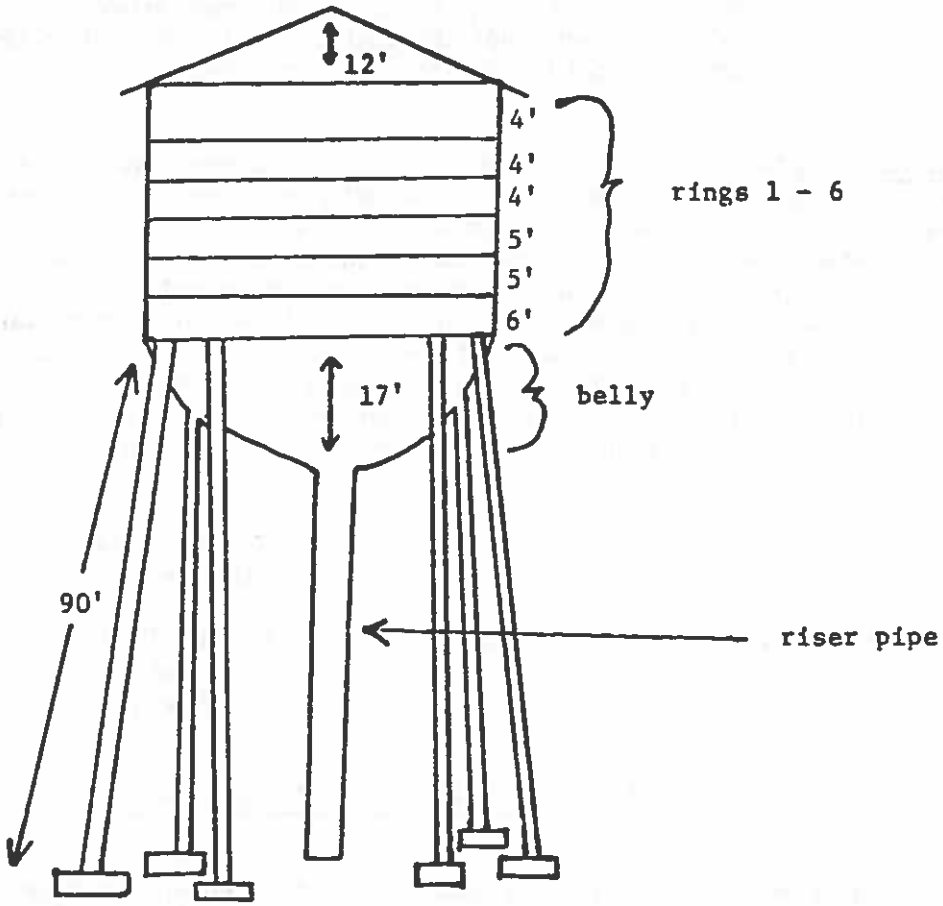
[1]Unless the context indicates otherwise, reference to Appellant is to Mr. Panagiotis Athanassiou, Appellant's President, who personally performed or supervised much of the work described herein.

Findings of Fact

1. Appellant's claim arises out of a maintenance contract for surface preparation, repair and coating of all surfaces and appurtenances, both interior and exterior, of a steel water tower at Springfield Hospital Center, Sykesville, Maryland.

2. The water tower consists of a large conical shaped steel tank supported by six steel legs. The height of the entire structure from the concrete base that supports the legs to the roof of the tank is approximately 147'. The interior diameter of the tank at its widest part is approximately 34' and the height of the tank as measured from the bottom floor of the interior to the interior roof top is approximately 57'. The legs which support the tank rise approximately 90' from ground level.

The following schematic, based on a sketch prepared by Appellant (Rule 4, Tab 30), shows the rough dimensions of the structure.



3. The contract was let by DGS on behalf of the Maryland Environmental Service (MES). DGS and MES had shared responsibility for the project. Compliance with specifications was the responsibility of MES which contracted with Tank Coatings Inspection Company to perform this function. DGS remained responsible for contract administration.

4. Attendance at a prebid site visit was encouraged by the Invitation for Bids (IFB) but was not mandatory. Despite efforts by MES to cause the tank to be drained for the purpose of site investigation (April 7 Tr. 173-174),

the interior of the tank contained water up to the second ring at the time of the site visit so that the condition of the lower 40% of the surface area of the interior of the tank could not be determined. (April 7 Tr. 43, 173-174; Rule 4, Tab 26). Appellant did not attend the prebid site meeting. However, he did visit the site and observe the exterior of the tower prior to submitting his bid. (April 7 Tr. 43-44).

5. Bid opening occurred on May 2, 1984. Five bids were received. Appellant submitted the low bid of $17,800.00. The other bids were $23,950.00, $39,240.00, $50,980.00 and $69,830.00. The estimated cost to do the work as prepared by MES was $35,000.00.

6. Appellant was contacted by Mr. Dennis Brobst of MES, the project supervisor, who had prepared the project cost estimate, and asked if Appellant wished to withdraw its bid. (April 7 Tr. 165-177). Mr. Brobst made this inquiry because he was aware of problems Appellant had encountered on a previous job for MES involving similar work and he did not think Appellant could do the work for the amount bid. (April 7 Tr. 172-173, 179-181). Appellant insisted that it was willing and able to perform for the amount of its bid. (April 7 Tr. 173). Appellant accepted award of the contract which obligated it to substantially complete the project within 60 calendar days of the commencement date. (Rule 4, Tab III, Tab 9). At the commencement of the job, Appellant also told Mr. Lothar Hapke, President of Tank Coatings Inspection Company, that he could do the work at the price bid. (April 9 Tr. 127-130).

7. The scheduled commencement date for the project was Monday, September 17, 1984. (Rule 4, Tab 11). Appellant had intended to sandblast the interior of the tank first so that the spent sand from the blasting operations which would collect at the bottom of the tank interior could be partially re-used on the exterior. (April 7, Tr. 50-53). Appellant had advised DGS and MES of this planned sequence at the preconstruction meeting. (April 7 Tr. 52; April 9 Tr. 68). The tank was not completely drained by September 17, 1984 due to mechanical problems. Therefore, Appellant was required to start on the exterior of the tank which he did on September 19, 1984 at the urging of DGS. (Rule 4, Tab 12). The tank was completely drained by Saturday, September 22, 1984, and work on the interior could have commenced on Monday, September 24, 1984. (April 9 Tr. 68, 86-87).

8. Appellant commenced sandblasting the interior on October 5, 1984. (April 7, Tr 54-57). Inspection reports (Rule 4, Tabs 14, 15) indicate that Appellant had completed less than half of the exterior work required when he commenced interior work.

9. The surface area of the interior of the tank was approximately 25% sandblasted by October 11, 1984. By this date Appellant had sandblasted the interior from the bottom up to a height of approximately 3' from the first ring. Of this approximately 14', 8' was accepted and the Appellant was required to further sandblast the next 6' to be in conformity with Specification 5A1 of the contract specifications.[2] (Rule 4, Tab 16, report for

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[2]Specification 5A1 required in pertinent part that: "The interior surfaces shall be thoroughly cleaned of all rust, scale and previous coatings by means of abrasive blasting to a near white grade in accordance with Steel Structures Painting Council Specification SSPC-10. All abrasive and other deleterious

10/11/84). Appellant was orally notified by DGS on November 27, 1984, as confirmed in writing by letter dated November 29, 1984 from the DGS Chief Construction Engineer, Mr. John Hartlove, that if the interior of the tank was not completed within five working days of November 27, 1984, i.e. by December 3, 1984, the contract would be terminated for default.[3] The work required in the interior was substantially completed subject to punch list items at the time of final inspection of the interior on December 3, 1984. (Rule 4, Tab 30).

10. Appellant had bid the job on the assumption that the existing paint to be removed (interior and exterior) would not be more than 20-25 mils thick. This assumption concerning paint thickness proved to be generally correct. However, Appellant alleges it encountered an unusual condition in the interior from the base of the belly of the tank up to the third ring. This condition allegedly covering approximately 50% of the surface area of the interior was described by Appellant as paint of 1/2 inch thickness up to the first ring and paint of 280 mils thickness from the first ring up to the third ring.[4] (Rule 4, Tab 26; April 7 Tr. 71-80; App. Exs. 2-6). Thus Appellant was complaining of encountering unusually thick material required to be removed from the bottom of the tank interior up to a height of 28' along the sides of the interior. (April 7 Tr. 71-80, 158-159).

11. The only access to the tank interior was a ladder that had five rungs missing approximately half way down the side of the tank. Tank Coatings Inspection Company refused to permit its inspectors to enter the tank on safety grounds until October 11, 1984 when a safe temporary ladder was installed pursuant to a change order. (April 7 Tr. 176-177; April 9 Tr. 130-135; Rule 4, Tab 16). Thus, formal inspection of the work[5] in the interior did not occur until October 11, 1984.

12. Appellant alleges that several pieces of thick epoxy paint varying in thickness from approximately 1/2 inch to 1/8 inch that were introduced as exhibits during the hearing were taken from the interior of the tank. (App.

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material shall be completely removed from the tank by acceptable means and disposed of by the Contractor."

[3]Appellant testified that he had completed the interior subject to punch-list by November 13, 1984. (April 7 Tr. 111). In a letter to Mr. Hartlove dated November 19, 1984, Appellant claimed to have finished the interior on November 15, 1984. (Rule 4, Tab 27).

[4]The paint is referred to by the parties herein as an epoxy paint. The condition Appellant complains of does not include any thick epoxy paint that may have existed at the juncture of the riser pipe and the bottom of the tank interior. Such material is occasionally found in small quantity in a steel tank at the juncture of the riser pipe and the bottom of the tank and is utilized for purposes of structural integrity where a riser pipe has rotted out and has been replaced. (April 7 Tr. 57-59; April 9 Tr. 311). Since Appellant does not contend that the few inches of such material that may have existed at the juncture of the riser pipe and the bottom of the tank constitutes a part of the complained of differing site condition (April 7 Tr. 57-59), the Board makes no finding as to the actual existence of such material.

[5]When the interior of the tank was first informally inspected prior to commencement of work (See Finding of Fact No. 15 below), there was no evidence of the unusual condition that Appellant complained was impeding his progress in sandblasting the interior. (April 9 Tr. 323-328, 332).

Exs. 2-6). However, the only pieces of material that came from the interior that were actually ever seen by the inspectors were a small piece approximately 2 3/8 inches long and 1/16 inch thick (Resp. Ex. 2) and a large piece approximately 1/4 inch thick and 4 inches square. The larger piece was scraped off the underside of an "I"-beam over the riser pipe (photograph 20, Resp. Ex. 3) with a knife by Mr. Hapke, President of Tank Coatings Inspection Company, when he noticed what he thought was a piece of rust under the "I"-beam (which had not been sandblasted) when inspecting the interior on October 11, 1984. (See Finding of Fact No. 15 below). This piece was similar to a piece of material (Resp. Ex. 1) which Mr. Donald Hobbs of DGS had picked up off the used sand pile outside of the tank and other pieces shown to Mr. Hapke by Appellant and alleged to be material encountered in the interior of the tank.[6] (April 9 Tr. 73-75, 146-153, 310-312).

The smaller 1/16 inch thick piece was all that could be found on October 19, 1984 when Appellant went into the tank with an inspector from Tank Coatings Inspection Company to find a piece of the material at the request of Mr. Brobst and Mr. Hobbs to document his claim concerning thick epoxy paint. (April 7 Tr. 194, 197; April 9 Tr. 72-76, 89-93; Resp. Ex. 2; Rule 4, Tab 20).

13. Mr. Thomas Edward Krehnbrink testified as an expert[7] for the Appellant. He was shown a piece of material by Appellant early in the progress of the job which Appellant claimed came from the interior of the tank. (App. Ex. 18). This material (App. Ex. 18) was described by Mr. Krehnbrink as an epoxy surfacing compound. (April 8 Tr. 214-218). It is slightly curved and varies in thickness from approximatley 1/4 to 3/8 to 1/2 inch over its approximatly 6 inch square surface. Mr. Krehnbrink testified that in his experience he had never seen this type of material in a steel tank and that such material would ordinarily be used in a concrete tank in connection with structural integrity. (April 8 Tr. 238). He also testified that such material was not approved for use in potable water systems.[8] (April 8 Tr. 239). He further testified that if such material had been in the interior

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[6] Donald Hobbs was the DGS construction inspector assigned to the project. He was not responsible for inspection of the interior of the tank and never entered the interior. He testified that he did not know where the pieces he was shown by Appellant came from and that they could have come from another project or the concrete columns at the base of the tower which were covered with similar material. (April 9 Tr. 74-75, 89-92).

[7] Mr. Krehnbrink has been a member of the National Association of Corrosion Engineers for 30 years and is a member of the Steel Structure Painting Council. He is presently a Vice President of Budeke's Paints Incorporated (from whom Appellant purchased its paint for the job) in charge of the sales department and responsible for all technical aspects of the national paint brands or coatings sold by Budeke's. Mr. Krehnbrink had previously worked for the "Glidden Company" (SCM Corporation, Inc.) for a period of fifteen years where he was a corrosion engineer and in charge of sales for their maintenance coatings department. Mr. Krehnbrink has many years of experience in the painting and inspection of water towers. (April 8 Tr. 211-214).

[8] The tank was utilized to supply potable water and could also be used to supply fire hydrants for fire protection. (April 8 Tr. 234-236). The specifications required the project to meet standards for potable water.

of the tank it would only be in the thicknesses described by Appellant (1/2 inch to 280 mils) at the bottom of the tank and gradually decreasing in thickness up to a height of 6 to 8 feet along the curved side of the belly of the tank. (April 8 Tr. 236-242). Mr. Krehnbrink testified that this was because the forces of gravity require material of the thickness and extent described by Appellant to be either on a horizontal surface or secured or fastened to some device (not present in the interior of the tank) if on a vertical surface. (April 8 Tr. 219-223, 228-229, 238-240).

14. Appellant's present business partner, Mr. Prodomos Tezaris, testified for Appellant as an expert in the sandblasting and painting of water towers, both steel and concrete. Mr. Tezaris testified that he had observed material similar to what Appellant allegedly encountered in only one water tank (steel) out of approximately 50 water tanks (steel and concrete) that he had worked in. (April 8 Tr. 372-384).

15. Mr. Hapke was one of the site inspectors supplied by his company. He was personally present at the job site during the times Appellant was working, excepting approximately two one week periods when another inspector generally was present. (April 9 Tr. 314-323; Rule 4 Tabs 12-19, 21, 23, 36-38). Mr. Hapke has a very diverse background in projects like the present one.[9] He was offered without objection as an expert in the construction, fabrication, painting and inspection of steel tanks. (April 9 Tr. 122).

Mr. Hapke testified that he first entered the interior of the tank alone during the week of September 24, 1984 after the tank had been drained and cleaned and before Appellant had started any paint removal work. Despite the unsafe ladder, he was able to climb to the bottom of the tank with the assistance of a tag line and safety belt. He noticed that the tank interior was pitted and rusted. However, he did not see any thick epoxy paint or other thick material as alleged by Appellant. (April 9 Tr. 130-135, 255, 262, 309-314, 323-328, 332).

He speculated that the thick piece of material that he pried off the underside of the riser pipe "I"-beam[10] in a subsequent inspection on October 11, 1984[11] (see Finding of Fact No. 12) could have resulted from a

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[9]His experience includes five years as President of Tank Coatings Inspection Company which is in the business of inspecting water towers and other large steel tank structures, consulting work and preparation of specifications in connection with the cleaning and painting of such structures. Mr. Hapke also has 16 years overall general experience in painting and sandblasting including responsibility for estimating the cost of painting hundreds of steel tanks. (April 9 Tr. 114-122).

[10]The "I"-beam is welded to the curve of the tank belly and there are a few inches between the top of the riser pipe and the bottom of the beam. (April 9 Tr. 153).

[11]Mr. Hapke did not keep the piece of material he had removed from under the "I"-beam. At the hearing he testified that it resembled Resp. Ex. 1 which was the piece of material Mr. Hobbs had picked up off the used sand pile and App. Exs. 5 and 18 which Appellant claimed came from the interior of the tank.

heavy paint run which spilled down into the bottom of the tank. (April 9 Tr. 169-172, 310-311). This theory seemed to Mr. Hapke to provide a more plausible explanation for the presence of this material than that the material was an epoxy seam sealer or surfacing compound (epoxy paint) used for purposes of structural integrity. (April 9 Tr. 310-312).

Like Mr. Krehnbrink, Mr. Hapke testifed that the material described by Appellant as being in the interior of the tank could not have extended vertically (in ever decreasing thickness) more than a few feet up the sides of the belly of the tank due to gravity. (April 9 Tr. 312-313).

Mr. Hapke further testified based on his personal observation that the conditions that existed in the interior of this particular tank which was pitted and rusted were not unusual as compared to other tank interiors he had observed over the years. (April 9 Tr. 114-122, 216, 332).

Mr. Hapke also testified that there was an indentation on Appellant's Exhibit 5 (a piece of thick epoxy paint allegedly from the tank interior) that looked like a weld seam indentation. A weld seam would only have been located at the junction of the riser pipe and the bottom of the tank where epoxy type material may have been used for purposes of structural integrity if the original riser pipe had rotted out and a new one had been welded in at the bottom of the tank interior. (April 9 Tr. 311, 341-342).

16. In Mr. Hapke's opinion, the delay Appellant experienced in progress of work in the interior resulted from the combination of (1) high turnover in and inexperience of personnel Appellant had working on the job, (2) insufficient numbers of personnel with Appellant's President, Mr. Athanassiou, doing much of the work himself, (3) equipment failures, and (4) inefficiency resulting from insufficient air pressure at the sandblaster nozzle due to operating two sandblasters off of one compressor.[12] (April 9 Tr. 210-216).

17. Appellant was paid $8,915.75 as a progress payment on or about December 3, 1984 representing 45% of the contract amount of $17,800.00 ($8,010.00) and 100% of Change Order No. 1[13] ($1,375.00) less 5% retainage ($469.25). (Rule 4, Tab 29; April 9 Tr. 98-105). This payment was based on the estimates of Tank Coatings Inspection Company and Mr. Hobbs that Appellant had completed approximately one half of the entire project including the interior work (subject to punch list) by December 3, 1984. (April 9 Tr. 99-103; Rule 4, Tab 25).

18. In a letter addressed to Mr. Hartlove, presented to Mr. Hobbs on November 9, 1984, Appellant advised he would complete all of the work except the six legs and part of the exterior belly of the tower. He would then stop working and abandon the project unless paid an unspecified but substantial amount ($15,000 - $25,000) in additional monies above what the

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[12]Appellant's own testimony supports Mr. Hapke's observation concerning inexperience and insufficient numbers of personnel. (April 7 Tr. 85-86).
[13]Change Order No. 1 involved the removal of the existing ladder and replacing it with a temporary ladder, as discussed above, and associated miscellaneous work.

contract provided.[14] (Rule 4, Tabs 22 and 26). This advice was apparently repeated orally at a meeting to discuss the situation with DGS personnel on November 15, 1984 and was repeated in writing by letter to Mr. Hartlove dated November 19, 1984. (Rule 4, Tab 27). As noted above, Appellant was told to finish the interior by December 3, 1984 or the contract would be terminated for default. (See Finding of Fact No. 9). Appellant finished the interior by December 3, 1984 subject to completing the punch list items. Because of the onset of winter weather, however, it was mutually agreed by the parties that the interior punch list items would be completed in the spring when the weather would permit the exterior work to also be completed. (Rule 4, Tab 30).

19. By letter to Mr. Hartlove of March 15, 1985, Appellant presented a claim in the amount of $15,758.70 relating to additional costs purportedly resulting from the alleged differing site condition and resequencing of the work. (Rule 4, Tab 31). While it is not possible, based on the record, to allocate these alleged additional costs between the differing site condition and the resequencing of work, it appears that most of the claimed amount relates to the alleged differing site condition.

20. By certified letter dated March 19, 1985, Mr. Hartlove denied Appellant's claim and advised Appellant that its contract would be terminated unless it resumed work on the project within 10 days. (Rule 4, Tab 32). By certified letter from Mr. Hartlove dated April 2, 1985, Appellant was notified that its contract was terminated since it neither responded to Mr. Hartlove's letter of March 19, 1985 nor commenced work on the project. (Rule 4, Tab 33, April 9 Tr. 40-42).

21. By letter dated April 11, 1985, Appellant protested the termination of its contract and requested a procurement officer's final decision. The procurement officer issued a final decision on May 13, 1985 affirming the termination of Appellant's contract for default and denying its claim for compensation. Appellant took a timely appeal to this Board on May 23, 1985.

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[14]Appellant estimated that the work it would complete before walking off the job constituted all but 30% of the work required by the contract. (Rule 4, Tab 22).

Decision

Appellant asserts that it encountered a so called "type 2" differing site condition[15] in the interior of the water tower which pursuant to Section 3.03 of the General Conditions of the Contract entitled it to additional time and compensation to complete the work. Section 3.03 of the General Conditions of the contract provides in relevant part:

> 3.03 DIFFERING SITE CONDITIONS:
>
> A. The Contractor shall promptly, and before such conditions are disturbed, notify the procurement officer in writing of: (1) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this contract. The procurement officer shall promptly investigate the conditions, and if he finds that such conditions do materially so differ and cause an increase or decrease in the contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed as a result of such conditions, an equitable adjustment shall be made and the contract modified in writing accordingly.

In order to be entitled to an equitable adjustment under this clause, Appellant must demonstrate that it encountered a condition in the interior of the tank which was unknown, unusual and differed materially from that ordinarily encountered in steel water tower maintenance work. See generally Northwest Painting Service, Inc., ASBCA No. 27854, 84-2 BCA ¶17,474 (June 8, 1984).[16] The condition Appellant contends it encountered was an epoxy paint gradually decreasing in thickness from 1/2 inch to 280 mils commencing at the bottom of the tank[17] and extending to a height of 28' up the sides of the tank to the third ring. (Finding of Fact No. 10). DGS contends that any such condition would have been revealed by a reasonable prebid site investigation and, therefore, the condition may not be considered to be unknown. Appellant contends that a prebid site investigation was (1) not mandatory by

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[15] A "type 2" differing site condition requires the encountering of a condition which is unknown, unusual and differs materially from that ordinarily encountered in the performance of the type of work contemplated by the parties. This is to be distinguished from a "type 1" differing site condition wherein the contract makes some representation as to the conditions to be encountered. Here the contract contains no representation or indication as to the presence or absence of the complained of condition (heavy epoxy paint), thus requiring Appellant to demonstrate the existence of a "type 2" condition. See C.J. Langenfelder & Son, Inc., MDOT 1000, 1006 at pp. 44-58, 1 MSBCA (MICPEL) ¶2 at pp. 34-44 (August 15, 1980).

[16] For a concise discussion of the differing site condition see Resolution of Contract Disputes under the New Maryland Procurement Code, MICPEL at pp. 141-157 (1980).

[17] We note again that Appellant's complaint about a differing site condition is exclusive of any material that may have existed at the juncture of the riser pipe and the bottom of the tank interior.

the terms of the IFB, and (2) would not have revealed the alleged thick paint condition because there was water in the tank at the time scheduled for the prebid site visit.

We need not decide these respective contentions regarding a site visit, however, since our review of the entire record fails to persuade us that Appellant has demonstrated that the complained of differing site condition actually existed in the interior of the tower. Mr. Krehnbrink, Appellant's own expert, testified that, due to the force of gravity, epoxy paint in the thicknesses described by Appellant could only exist at the bottom of the tank and gradually decreasing in thickness up to a height of 6 to 8 feet along the curved side of the belly of the tank. (Finding of Fact No. 13). Mr. Hapke, likewise an expert in the painting and inspection of tanks similar to the instant one (Finding of Fact No. 15), also testified that the material described by Appellant could theoretically only be found a few feet up the side of the belly due to gravity, if it was in fact on the side of the tank at all. We find the testimony of these two experts to be credible and reject Appellant's assertion that thick epoxy paint (1/2 inch decreasing to 280 mils) existed up to a height of 28' from the bottom of the tank. We further conclude that the record does not support a finding of the complained of condition up to a height of 6 to 8 feet from the bottom of the tank, the maximum height that expert testimony suggests such a condition could theoretically exist.

Mr. Hapke who had entered the tank alone during the week of September 24, 1986 after it had been drained and cleaned and before Appellant had started any paint removal work did not observe any thick epoxy paint as allegedly observed by Appellant. (Finding of Fact No. 15).[18] We believe that Mr. Hapke, particularly given his expertise, would have observed the complained of condition had it in fact existed to any degree. Mr. Hapke further testified that it was his opinion that conditions in the interior of the tank were not unusual as compared to other steel tank interiors he had observed over the years. (Finding of Fact No. 15). Thus we find that the record fails to demonstrate that Appellant encountered the condition specifically complained of[19] or that it encountered any other condition unusual for a project of this nature. Since Appellant has failed to establish the existence of a differing site condition, its claim for additional compensation on such grounds must be denied.[20]

Appellant next argues that it is entitled to additional compensation as a result of a change in its planned construction sequence necessitated by the failure to drain the water tank by the scheduled work commencement date of September 17, 1984. This change in construction sequence is alleged to have

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[18] Appellant, his present business partner Mr. Tezaris, Mr. Krehnbrink and Mr. Hapke were all unanimous in their testimony that one would seldom encounter a material such as described by Appellant in a steel water tank.

[19] Although several persons who were employed by Appellant worked in the interior of the tank, none were called to corroborate Appellant's testimony concerning the thick epoxy material allegedly encountered. (Rule 4, Tabs 15-19).

[20] Our finding in this regard also renders moot discussion of Appellant's alternate requests for compensation flowing from a finding of a differing site condition under Section 8.02 (Force Account Work) or Section 7.12D (Termination for Default—Damages for Delay—Time Extensions) of the contract General Conditions.

delayed the progress of the job and resulted in additional cost. Appellant had intended to commence work on the interior of the tank. However, the tank was not completely drained until September 22, 1984, requiring Appellant to commence work on the exterior of the tank. (Finding of Fact No. 7).

Appellant's stated reason for starting on the interior of the tank was that he intended to partially re-use the spent sand from interior sandblasting for exterior blasting. At the urging of DGS, Appellant commenced working on the exterior on September 19, 1984. While sandblasting operations did not commence in the interior until October 5, 1984, interior work could have commenced by Monday, September 24, 1984 (Finding of Fact No. 7) and neither the two day delay in commencement of the work from September 17 to September 19 when Appellant commenced work on the exterior nor any delay in access to the interior has been shown to have materially affected overall job progress nor to have involved any ascertainable additional costs.

While it is conceivable that Appellant could have expended extra money for additional sand as a result of not being able to partially re-use a certain amount of sand due to resequencing of work, the amount of additional sand actually required is not ascertainable from Appellant's records. Appellant testified that in preparing its bid it planned to use two 50 ton loads of sand for the entire project but ultimately was required to use three loads for the work; one load for the exterior and two loads for the interior. (April 7 Tr. 83-84). Appellant alleges that it expended a total of $3,560.42 on the job for sand. (App. Ex. 17). Thus, Appellant apparently claims 1/3 of this amount, $1,186.80, as the cost of the additional load of sand it alleges it was required to use as a result of the resequencing of the work. However, it is not possible from the state of the record to determine how much sand, if any, could have been re-used on the exterior if interior work had commenced first; how much sand was used in the course of the work actually completed; and how much sand would have been necessary if the job had been totally completed. It is also not possible to determine how much of the $3,560.42 claimed was actually expended for sand used and/or intended to be used on this project.[21] Accordingly, it is not possible to determine if the resequencing of the work caused Appellant to expend additional money for sand and its claim must be denied.

Appellant next contends that the DGS/MES inspection contractor, Tank Coatings Inspection Company, failed to provide an inspector on certain dates. This failure is said to have delayed the progress of Appellant's work since approval of certain work for compliance with specifications was necessary before other work could commence (i.e., inspection of sandblasted areas for compliance with specification 5A1[22] prior to painting of such area).

If in fact the DGS/MES inspection contractor failed to perform under the terms of its contract which required it to provide daily inspection services when Appellant was working, such failure would be attributable to DGS/MES and would lead us into an inquiry as to the extent and nature of

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[21]It is also possible that Appellant may have incurred extra costs associated with the rigging of the exterior of the tank an extra time (see e.g. the note at the bottom of the daily inspection report for 10/27/84, Rule 4, Tab 19). However, what these costs may have consisted of is not discernible from the record.

[22]See footnote 2.

any delay caused thereby. See Russell R. Gannon Co. v. U.S., 189 Ct.Cl. 328, 417 F.2d 1356 (1969). However, based on the record we find that Tank Coatings Inspection Company did provide inspectors on a daily basis, at least when Appellant was working, and that contrary to Appellant's assertion no delay was occasioned by the absence of an inspector. Contrasting sharply in specificity with Appellant's vague testimony and written complaint on the matter, the daily logs maintained by Tank Coatings Inspection Company and the testimony of Mr. Hapke reflect that an inspector was present at the job site and available to inspect work as needed every day that Appellant worked during the critical period October 11, 1984 to November 15, 1984, excepting October 12, 24 and 26 when no work requiring inspection was performed. (April 9 Tr. 314-323; Rule 4, Tabs 12-19, 21, 23, 36-38; April 7 Tr. 102-111; Rule 4, Tab 27; Findings of Fact Nos. 8, 15, 16). Accordingly, we deny Appellant's claim for additional compensation based on the alleged absenteeism of inspectors.

Finally, Appellant urges that DGS/MES materially breached the contract (thus excusing Appellant's refusal to complete the work) by, singly or in combination, failing to compensate Appellant for delay and additional costs resulting from the alleged differing site condition, resequencing of work and inspector absenteeism discussed above. Since we have found that Appellant was not entitled to such compensation, we need not discuss Appellant's argument in this regard any further except to note that the record simply does not support Appellant's assertion of a material breach of contract by DGS/MES.

Further, our review of the record satisfies us that the termination for default was proper. The termination for default provision of the contract provides in relevant part that:

> "If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as shall insure its completion within the time specified in this contract, or any extension thereof, or fails to complete said work within this time, the State may, by written notice to the contractor, terminate his right to proceed with the work or the part of the work as to which there has been delay."

General Conditions, Section 7.12. (Rule 4, Tab III). The record supports the assumption that the DGS/MES determination to defer work on the project until the spring of 1985 represents a formal extension of time to finish the project beyond the 60 days originally alloted under the contract. Appellant acquiesed in this extension. Despite Appellant's acquiesence in the extension, it, nevertheless, failed to even undertake to attempt to complete the project within the time specified in the contract as extended thus justifying the termination of the contract for default. (See Findings of Fact Nos. 18-20).

Accordingly, the appeal on the grounds of alleged improper termination of Appellant's contract is denied as well.