

R.N.G. CONTRACTING, INC.,)	AGBCA No. 1999-170-1
)	
Appellant)	
)	
Appearing for the Appellant:)	
)	
Daniel M. Gross)	
Oviatt, Clark & Gross, L.L.P.)	
4251 Kipling Street, #500)	
Wheat Ridge, Colorado 80033)	
)	
Appearing for the Government:)	
)	
Daniel B. Rosenbluth)	
Office of the General Counsel)	
U. S. Department of Agriculture)	
P. O. Box 25005)	
Denver, Colorado 80215-0005)	

DECISION OF THE BOARD OF CONTRACT APPEALS

August 29, 2001

Before HOURY, POLLACK, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge POLLACK, Separate Dissenting Opinion by Administrative Judge HOURY.

This appeal arises out of Contract No. 50-82X9-7-150-SM, Galloping Goose Trail Highway Crossing, between R.N.G. Contracting, Inc. (Appellant), of Norwood, Colorado and the U. S. Department of Agriculture, Forest Service (FS), Grand Mesa, Uncompahgre, and Gunnison National Forests, Colorado. The contract was primarily for an 80-foot-long, precast concrete pedestrian tunnel under Colorado State Highway 145. The dispute centers on the Appellant's claim for costs of encountering rock in the tunnel and approaches. The contract was awarded on the basis of acceptance of Appellant's offer to a Request for Proposal (RFP). The Appellant initially put forth three primary theories of recovery: (1) that the Government RFP and Appellant's response to it, resulted in a contract that excluded excavation in solid rock; (2) that the parties understood that Appellant was not bidding on rock and such understanding constituted an indication which supports a Type I differing site condition; and finally, (3) that alternatively, R.N.G. and the FS were mutually mistaken, as each believed that rock would not be encountered in the excavation for the tunnel. In

addition, Appellant pled theories of a Type II differing site condition, defective specifications and constructive change. The FS contested entitlement under all of Appellant's theories. Initially, the appeal also involved a separate dispute over the footings. That issue, however, was dropped by Appellant.

The Board has jurisdiction over this appeal pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613. A hearing was held in the matter in Denver, Colorado.

FINDINGS OF FACT

THE REQUEST FOR PROPOSALS

1. The project was located in the southwest corner of Colorado and called for construction of an 80-foot precast concrete pedestrian tunnel (approximately 12 feet high and 14 feet wide) under existing Colorado State Highway 145, along with the installation of trail approaches at both ends of the tunnel, photovoltaic lighting, gabion retaining walls and hand rails (Appeal File (AF) 260-64). Excavation for the tunnel ranged from a minimum depth of 15 feet to a maximum depth of approximately 18 feet (AF 263, 289; Transcript (Tr.) 102, 403). Existing Highway 145 was a two-lane road with a 24-foot wide asphalt surface, edge to edge (Tr. 96). Under the proposal, the contractor had 14 days to excavate and install the tunnel and conduct other field work installation (AF 7). Although the contract was awarded in September 1997, Notice to Proceed for work in the field was not issued until June 1998. In the interim period, various matters relating to the precast tunnel (to be installed under the highway) were dealt with by the parties. (Appellant's AF Supplement (App. AF Supp.) 19-24.)

2. The FS issued the RFP on August 13, 1997. It called for proposers to submit a cost and technical proposal (AF 110.) Part I, the Schedule, Section A - Solicitation, Offer and Award (Standard Form 1442) consisted of four pages (pp). Page 3 of the form contained a signature line and a price line to be filled out by the offeror. Page 4, at paragraph 30B., had a line for the signature of the Contracting Officer (CO) and for insertion of the award date. On the CO signature page, the form included both Paragraph 28, Negotiated Agreement; and Paragraph 29, Award. The form stated that the CO would complete item 28 or 29, as applicable. In this instance, the CO checked Paragraph 29, which stated, "Your offer on this solicitation is hereby accepted as to the items listed. This award consummates the contract, which consists of (a) the Government solicitation and your offer, and (b) this contract award." Paragraph 28 (the unchecked alternative) contained no similar language incorporating Appellant's offer. (AF 110-113.)

3. The RFP required proposals to be submitted by no later than September 12, 1997, with the FS opening the proposals on September 15, 1997. Various provisions in the RFP set out the evaluation and award procedures to be used by the FS in evaluating proposals. Section M.1 addressed evaluation criteria and directed at paragraph A.2 that "Proposals shall be prepared in accordance with the technical proposal preparation instructions. To be considered for award, a proposal must conform to all requirements of the solicitation. The following factors will be used in the evaluation process and are equal in importance." The factors were as follows. The first,

designated as “a”, was titled experience. The second, “b”, was past performance. The final factor, “c”, was proposed project planning. Under this last item, the contractor was directed to “provide sufficient information to evaluate the following.” Six items were then listed.

- (1) Proposed schedule of completion that ensures start of performance and delivery no later than those required under Section F.1.
- (2) Installation method(s).
- (3) Traffic control plan.
- (4) Limits on area disturbance and proposed use of temporary erosion control measures.
- (5) Number and experience of employees and subcontractors committed to the project.
- (6) Equipment committed to the project.

(AF 257-58.)

4. In addition, the RFP provided the following at Section L.16 (b) (AF 255-56):

(b) Technical Proposal Instructions. The technical proposal will be used to make an evaluation and arrive at a determination as to whether the proposal will meet the requirements of the Government. Therefore, the technical proposal must present sufficient information to reflect a thorough understanding of the requirements and a detailed description of the techniques, procedures and programs for achieving the objectives of the specifications/statement of work. Proposals which merely paraphrase the requirements of the Government’s specifications/statement of work, or use such phrases as “will comply” or “standard techniques will be employed” will be considered unacceptable and will not be considered further. At a minimum the proposal must clearly provide the following:

- (a) Provide adequate information in the form of a brief narrative on each of the valuation criteria described in detail in Section M which clearly demonstrates ability to perform the required work satisfactorily.

5. The RFP section on evaluation criteria, at M.1A3, closed by advising offerors that price proposals would be evaluated after evaluation of the technical proposals. It provided, “Each price proposal shall be evaluated to determine its reasonableness for the effort proposed and to determine the demonstrated understanding of the level of effort needed to successfully perform the services.” Section M also specified under Paragraph B, Award Determination, that award would be made on

the basis of the combination of those criteria offering the best overall value to the Government and would be determined by comparing the differences in value of technical and management features with differences in cost to the Government. The section went on to specify that award might be made without further discussions and offers should be submitted initially on the most favorable terms from a price and technical standpoint. The RFP left open to the Government the option, after evaluating the proposals, to conduct further oral or written discussions with offerors. (AF 69-70.)

6. Many of the technical specifications used in the RFP were borrowed from the Colorado Department of Transportation (CDOT) standard technical specifications (AF 120-41; App. AF Supp. 40-51). At Part A., the RFP identified the CDOT specifications and CDOT standard plans which were applicable to the contract. The RFP specifically incorporated Specifications (Spec.) Nos. 200-717 of the Colorado State Highway Specifications for 1991 and made it part of the contract. (AF 120-21.) The FS then added several modifications to various CDOT provisions. None of the modifications are material to the issues in this appeal. (AF 121-45.) Particularly pertinent to this appeal are sections 203 and 206 of the Colorado Specifications, the former addressing the excavation outside of the structure and the latter, the structural excavation (essentially the excavation under the road so as to place the tunnel) (App. AF Supp. 41, 49). The FS saw the two sections, in conjunction with the contract drawings and schedule of work items (the pay or proposal schedule), as describing what work was called for regarding excavation (Tr. 517). Eighty to ninety percent of the rock Appellant encountered was in the structural excavation portion of the project (Tr. 157-58).

7. Set out below are the pertinent portions of Sections 203 and 206:

**SECTION 203
EXCAVATION AND EMBANKMENT**

DESCRIPTION

203.01 General. This work consists of excavation, hauling, disposal, placement, and compaction of all material encountered within the limits of the work, including excavation for ditches and channels, necessary for the construction of the roadway in accordance with the Contract. All excavation will be classified, "rock excavation," "unclassified excavation," "stripping," "muck excavation," or "borrow" as hereinafter described. All embankment will be classified "embankment material" or "rock fill" as hereinafter described.

203.02 Excavation.

- (a) *Unclassified Excavation.* Unclassified excavation shall consist of the excavation of all materials of whatever character required for the work, obtained within the right of way, including surface boulders and excavation for ditches and channels that is not removed under some other item. Overhanging rock or other rock considered dangerous shall be removed when ordered, and will be classified "Unclassified Excavation."

* * * *

(d) *Rock Excavation.* Rock excavation shall consist of igneous, metamorphic, and sedimentary rock which cannot be excavated without blasting or the use of rippers, including all boulders or other detached stones having a volume of ½ cubic yard or more, as determined by physical or visual measurement.

* * * *

203.13 The accepted quantities will be paid for at the contract unit price for each of the pay items listed below that appear on the proposal schedule.

Pay Item	Pay Unit
Rock Excavation	Cubic Yard
Rock Fill	Cubic Yard
Unclassified Excavation	Cubic Yard
Unclassified Excavation (complete in place)	Cubic Yard

**SECTION 206
EXCAVATION AND BACKFILL
FOR STRUCTURES**

DESCRIPTION

206.01 This work consists of the excavation, and backfill or disposal of all material required for the construction of structures. The excavation and disposal of excavated material for ditches and channels shall be accomplished in accordance with Section 203.

All excavation and backfill for structures below the designed slope or subgrade line provided in the Contract shall be included under this item.

Unless otherwise specified, structure excavation shall include all pumping, bailing, draining, sheeting, bracing, and incidentals required for proper execution of the work.

MATERIALS

206.02 General. All structure backfill, bed course material, and filter material will be accepted in place.

- (a) *Structure Backfill.* Class 1 and Class 2 structure backfill shall be composed of materials from excavation, borrow pits, or other sources. Material shall conform to the requirements of subsection 703.08. Class of material shall be as specified or as designated.
- (b) *Bed Course Material.* Material shall conform to the requirements of subsection 703.07. Upon approval, aggregate base course conforming to the requirements of subsection 703.03 may be used in lieu of bed course material.
- (c) *Filter Material.* Class A, Class B, and Class C filter material shall conform to the requirements of subsection 703.09. Class of material shall be as specified or designated.

CONSTRUCTION REQUIREMENTS

206.03 Structure Excavation and Structure Backfill. Unsuitable foundation material shall be removed and wasted in a manner acceptable to the Engineer, and the excavated material will be paid for as structure excavation. Excavation and backfill for areas in excess of three feet below designed elevation will be paid for as provided in subsections 104.03 and 109.04. Unsuitable foundation material which is suitable for embankments, and suitable surplus excavated material shall be used in the construction of embankments. Unsuitable material removed below designed elevation shall be replaced with approved material.

Rock, hardpan, or other unyielding material encountered in trenches for culvert pipe or conduit shall be removed below the designed grade for a minimum depth of 12 inches. This extra depth excavation shall be backfilled with loose structure backfill (Class 1) or other approved material. The base of structure backfill shall be scarified to a depth of six inches and compacted with moisture and density control prior to placement of any structural element or structure backfill. The type of compaction shall be the same as that required for structure backfill (Class 2), as specified below.

Backfill shall consist of approved materials uniformly distributed in layers brought up equally on all sides of the structure. Each layer of backfill shall not exceed six inches before compacting to the required density and before successive layers are placed. Structure backfill (Class 1) shall be compacted to a density of not less than 95 percent of maximum density determined in accordance with AASHTO T 180.

Required density for structure backfill (Class 2) shall conform to subsection

* * * *

METHOD OF MEASUREMENT

206.06 Structure excavation, structure backfill, and bed course material will not be measured but will be the quantities designated in the Contract. When field changes are ordered or when there are errors on the plans, quantities will be measured as follows:

- (a) For bridges and irregular shaped structures, quantities will be computed to neat lines 18 inches outside and parallel to the outline of the revised foundation plan or as shown on the plans.
- (b) For conduits, a profile will be made along the bottom centerline extending 18 inches beyond each end of the structure, including aprons, wing walls, etc.. The area defined between this profile and the limits way excavation or natural ground line in embankment sections shall be multiplied by the width shown on the plans to obtain the volume of structure excavation
- (c) Backfill and filter material will be the calculated volume of material lying within the prism shown on the plans, from which shall be deducted the volume occupied by the structure.
- (d) Bed course material will be the calculated volume of material lying within the prism shown on the plans.

BASIS OF PAYMENT

206.07 The accepted quantities will be paid for at the contract unit price for each of the pay items listed below that appear in the proposal schedule.

Payment will be made under:

Pay Item	Pay Unit
Structure Excavation	Cubic Yard
Structure Backfill (Class _____)	Cubic Yard
Bed Course Material	Cubic Yard
Filter Material (Class _____)	Cubic Yard

Compaction, water, and all other work necessary to complete the above items will not be measured and paid for separately but shall be included in the work.

(AF Supp. 40-51.)

8. Addendum 3 to the RFP at page 2 of 3, item 3 (AF 105-06), established that excess material from excavation should be spread over the existing site or removed from Government land. Both parties expected this to be a balanced project, with any material left over from excavation to be scattered on the site. (Tr. 149, 151, 622, 687, 706-10). As discussed in more detail later, as a consequence of Appellant encountering extensive rock, a significant amount of additional material from the excavation had to be hauled and wasted off site, due to the excavated material (rock)

swelling. The FS paid the Appellant under Modifications 4 and 5, for hauling an additional 490 cubic yards of material, which had to be wasted off site. (AF 86-89; Appellant's Exhibit (A-3), Photo 1; Tr. 151-53.)

9. Appellant contended in its brief that in several respects, CDOT, the primary user of CDOT specifications, employed the clauses used in this contract differently than did the FS on this project. However, Appellant did not show that it relied on any such knowledge in pricing its proposal. Moreover, prior to this project, the Appellant had not been either a general or subcontractor on a CDOT job. (Tr. 115.) Further, the testimony relied on by Appellant, that of its expert, Mr. Chris Krueger, a contractor with approximately 25 years experience in Colorado (some of it on CDOT projects), at best established that CDOT normally provides geotechnical information when structural excavation is to be performed and that CDOT normally includes a pay item for rock, when rock is expected. Mr. Krueger also asserted that where rock had not been spelled out or set out as a pay item, CDOT would issue a change order if rock were encountered. Mr. Krueger, however, acknowledged that he did not have prior experience in a situation such as this, where the contract package had no borings and where the parties did not specifically know the conditions under the ground. (Tr. 186-92, 195-96, 205.) The FS countered with the testimony of Mr. Gary Self, a resident engineer with CDOT (who often acted as a CDOT presenter in claims). Mr. Self did not dispute that generally CDOT provided geotechnical information. However, he was also clear in stating that CDOT does not automatically or as a practice issue a modification when rock is encountered in structural excavation. Rather, that decision would be subject to a number of factors, including whether rock was identified in the contract and whether it could have been reasonably anticipated. He described CDOT's procedures for paying for rock to be on a case-by-case basis. He pointed out that it is a designer's decision as to whether to include rock excavation as a separate pay item or to include rock as part of the general excavation. (Tr. 245, 252, 256-58, 267, 279-80.)

10. The RFP contained a number of contract drawings. Drawings 1-9 were prepared by the FS. The drawings contained the warning that they were not to scale. (AF 259-67.) Of particular application to this dispute are Drawing 4, Trail Site Plan, which shows a "plan view" of the trail, including the tunnel area; and Drawing 5, Trail Profile, which showed a profile of the trail and the tunnel in relation to the trail and existing surface. (AF 262-63.) In addition to Drawings 1-9, the solicitation contained four drawings prepared by Conspan Bridge Systems (C/drawings), which included a depiction of the precast tunnel to be constructed (AF 287-90).

11. To understand and properly utilize FS Drawing 5, it must be pointed out that the drawing contained a labeling error. Mr. Self pointed out that the arrow identifying existing ground and the arrow identifying finished grade on the profile drawing were reversed. Thus the upper elevation shown on the profile was existing ground and not the anticipated finished grade. (AF 262-63; Tr. 261-65.) The profile drawing also provided a number of elevations not only for the existing ground but also for the bottom (surface or tread) of the tunnel. At the south end of the tunnel, the existing elevation is 9,001.1 feet and the tread of the tunnel is 8,988.7 feet (a depth of 12.4 feet). On the north end, the existing elevation is shown as 9,001.8 feet and the tread at 8,987.2 feet (a depth of 14.6 feet). The approximate 18 feet of excavation cited by the dissent at its (Finding of Fact (FF) 2), is clearly not the norm but represents the deepest excavation at the north end of the tunnel. In contrast, the deepest point reflected for the south end would be 15.4 feet. (AF 262-63.) In

addition, the largest and deepest section of fill would be expected below ground on the north end (FF 43-44). In order to determine the depth of excavation, one must add an additional 2 feet below the tunnel tread for the footer of the tunnel and an additional 1 foot of excavation below that (Tr. 692). While the testimony tended to support the general accuracy of the elevations depicted on the drawings, testimony indicated some variations in depth. Mr. Ronald Gabbett, President of R.N.G., stated that the excavation was 12 feet plus 3 feet under the asphalt (approximately 15 feet) (Tr.102).

According to the CO's Representative (COR), Mr. P. Douglas Marah, the profile (AF 263) showed excavation going down 18 feet below the shoulder (Tr. 403). In its brief at page 15, the FS states that the excavation was approximately 17 feet. That consisted of the height of the precast tunnel structure, the required excavation of a minimum of 2 feet deeper than the tunnel bottom for footers, and 2 feet of fill over the top of the structure. (Brief of FS at p.15.)

12. Although the tunnel appeared on the profile to follow a straight line, the parties made clear during the hearing that part way through the tunnel (going south to north), the tunnel turned at an angle, with more tunnel and thus more of the excavation on the north end than on the south. This configuration was illustrated on the plan view drawing. (AF 262-63; Tr. 103.)

13. The drawing notes addressed a number of items, including the road shutdown during construction. The notes provided that the road could be shut down for no more than 15 minutes at a time. It could be narrowed to one lane with flagging. (AF 261, 265.) Testimony showed that as part of the closure process, each night the Appellant refilled any opening in the road that it had excavated that day so that full traffic could pass through the area. Consequently, Appellant had to re-excavate that material the next day before proceeding with further excavation. At the hearing the FS challenged the procedure followed by the Appellant and suggested that there were other possible alternatives, such as conducting nighttime traffic control operations or using a trench cover. The FS, however, failed to show that any method other than that used by Appellant was more practical or efficient, and further the FS conceded that the method of refilling the excavation as conducted by Appellant was a method used in the industry. (AF 265; Tr. 130, 548-49.)

14. The RFP price schedule listed 26 individual pay items. Specific to this dispute are line item 203, Unclassified Excavation (complete in place) of 536 cubic yards (cy) and line item 206, Structural Excavation of 563 cy. (AF 74, 118-19; AF Supp. 40-51; Tr. 517.) The definitions for unclassified and structural excavation from the CDOT specifications were incorporated into the RFP and the line item numbers used by the FS for these items were the same numbers as CDOT used for these items. Sections 203 and 206 were the only two excavation items in the contract and on the pay schedule. (Tr. 517.)

15. The RFP contained a number of standard FAR clauses, among which were Differing Site Conditions (FAR 52.236-2)(April 1984), and Site Investigation and Conditions (FAR 52.236-3)(April 1984) (AF 153-54).

16. Finally, Section L of the RFP set out the instructions for preparing the technical proposal. Among the provisions in that section was (a)(2) which provided that offerors could provide alternate proposals that deviate from the requirements, provided the offeror presented a proposal for

performance of the work as set forth in the statement of work. There is no evidence that Appellant availed itself of that provision. (AF 255.)

17. One other matter involving preparation of the RFP is central to this appeal. That relates to the FS actions regarding how the FS treated and understood potential site conditions and more specifically, the possibility of the successful offeror encountering rock during the tunnel or structural excavation. In putting together the technical specifications for this project, the FS decided not to take any borings nor to conduct any other form of subsurface investigation. The FS made the decision for budgetary reasons and because it wanted to avoid impacting traffic. (Tr. 323, 456-58.) At the hearing, Appellant elicited the following testimony from the COR:

Q. Now, before we move off of estimates, why couldn't the Forest Service be a better public steward and find out or determine exactly what's under the surface?

A. We, I guess, could have, had we been able to shut down Highway 145 for an extended period of time, excavated the site, saw what was under it, put it back in. But that's really becoming ludicrous.

Q. What would be the cost impacts, in terms of cost benefit considerations, for the Forest Service to have excavated the whole area and determined precisely what was there?

A. We wouldn't have gone out for contract then. We would have done it ourselves. The cost would have been prohibitive.

(Tr. 323, 456-58.)

18. The COR's view as to both the usefulness and potential cost of taking borings was confirmed by Ms. Anna Jones-Crabtree, the FS engineer in charge of the design. She stated that she did not put great worth in conducting borings and said that a boring program of six to eight borings, if included in the RFP package, could have been misleading. In her view, bidders would still have had to make their own site investigations and assumptions. She stated that to deal with the level of precision that would be necessary, the FS would have needed to do an extensive, if not complete excavation, of the project itself. (Tr. 620-21, 655.) FS personnel spent time at the project site prior to issuing the RFP. However, there was no evidence at the time the FS issued the RFP nor when the FS awarded the contract, that FS personnel had developed any specific knowledge as to the subsurface conditions at the tunnel site beyond what could be gleaned from general observation and general practice. Essentially the FS personnel involved with this contract were "hoping" that the Appellant did not hit rock during the excavation. The purpose of the FS using the designations of "unclassified" and "structural" as the excavation line items on the proposal schedule was to indicate that the FS did not know what Appellant might ultimately hit below the surface and to put proposers on notice that the FS was not representing material other than for volume. (AF 74; Tr. 516-17, 614-15, 618-19, 754-56.)

19. As best could be determined, Colorado State Highway 145 was built around 1905. The FS had no as-built drawings of the roadway that might have shed light on either the material below the

roadway or on the depths of construction fill, which would have been placed during original construction. (Tr. 95-96.) The roadway was along the side of a mountain valley and due to the steepness in the area, the road was built using a series of cuts and fills. As part of that process, materials were taken from cut areas and placed in nearby depressions. (Tr. 34-36.) In deciding where to place the tunnel on this project, FS designers, who set the location and alignment, expected that much of the trail tunnel would be constructed through construction highway fill under the existing road, with some of the excavation to be conducted below the fill and into undisturbed material. Fill material under a road such as here, consists of unconsolidated material, which is then compacted. (Tr. 434-36, 576-77, 676, 681-83.) As Mr. M. Colin Watts, the FS inspector and a design engineer on the project acknowledged, when one is digging in fill or digging exclusively in fill, there should be no extreme problems as to excavation (Tr. 676). Presenting disturbed material (fill) to put the material through would have the effect of lowering the amount bid because of easier digging (Tr. 681-83).

20. Although the FS did not have precise knowledge of subsurface conditions (the exact point at which fill would stop and natural ground would begin) and hoped Appellant would not hit rock, the FS design officials each thought that it was likely that a contractor performing the project would at some point encounter some hard rock in placing the concrete tunnel, once the contractor exhausted the fill area and reached natural ground. (Tr. 386, 436, 557, 689-90). Their expectation of rock in the natural ground was in large measure based upon observations of the general geographical setting of the project in the Rocky Mountains and the presence of some visible rock (shown on Drawing 4 as rock outcrop but somewhat closer to the tunnel than shown) (Tr. 568-70). Also, among the rock visible in the area was a large granite structure called the Ophir Wall, which was approximately half a mile away. As described by the FS engineer, the highway runs along the side of canyon walls and is not in the bottom of a valley. (AF 262; Tr. 570, 577, 593.) A number of FS photographs, Exhibit G-5, depicted the overall setting of the project.

21. As part of the preparation of the technical specifications, the FS technical personnel prepared a projected estimate of the cost of the work. Appellant pointed out that FAR 36.203, Government estimate of construction costs (A-8) provided in part, "The estimate shall be prepared in as much detail as though the Government were competing for award." The technical team members testifying stated they understood that they were to prepare the Government estimate as though they were competing for the work or actually planning to perform the work themselves. The FS engineer in commenting upon this matter noted that the FS needs to prepare estimates as if it were producing the project itself, given its best knowledge of efficiencies and methods. (Tr. 437, 446-47, 524-25.)

22. The technical team's estimate, which it submitted to the CO, included \$12 a cubic yard for unclassified excavation (Item 203) and \$24 a cubic yard for the structural excavation (Item 206) (AF 51, 74). There is no dispute that the FS estimate was an earthwork estimate and did not include costs for rock removal nor any allowance for rock removal equipment to conduct drilling or blasting in either the unclassified or structural excavation (Tr. 442-44).

23. As described by the COR, the estimate prepared by the FS for the project was for the benefit of the Government and the FS chose to make no call as to how much hard rock might be below the surface (Tr. 447, 462-63). Although FS designers at all times recognized the possibility, if not probability of hitting some rock, the FS believed it had protected itself from having to pay for rock by placing the risk of rock on the contractor, through the use of the line items which gave no designation of material for the structural and unclassified excavation and through the lack of any specific representation as to conditions. From the FS perspective, a prudent contractor should have been aware of the possible risk in submitting pricing on this project and submitted its proposal accordingly. (Tr. 448.) The FS position at the time of the design and award is best illustrated by the testimony of the COR who, when asked how a contractor would know that he would encounter rock, stated:

By the general site location, by the layout of the rock, by the dipping beds. Sir, I hoped we wouldn't hit rock. I guess maybe, if I can continue, in my estimate, I gambled the same way that Mr. Gabbett did. The difference is I didn't have to get paid to do it.

(Tr. 448.)

24. Finally, as to what the FS expected as to conditions, the FS did not calculate nor estimate a rock related swell factor (material from blasting swelled from 100 to 150 percent) in its estimating for the project. The FS estimated this as a balanced job. (Tr. 466, 709.) Because of the presence of rock, the material swelled to the extent that there was too much material to use or waste on site as planned. The FS recognized this added material as a change and paid R.N.G. under Modifications 4 and 5 for having to haul 490 cubic yards of rock to a remote location. (AF 80-89; Tr. 151-53, 465-66.) Notwithstanding the fact that the FS estimate did not include any rock removal costs, the COR defended the FS estimate, noting that based on the FS estimating assumptions, which prepared the estimate on the basis of excavating in earth and not in rock, the FS estimate for the project was realistic (Tr. 447, 462-63).

OFFER AND ACCEPTANCE

25. The FS held a pre-proposal site meeting and site visit for the project on August 27, 1997. Mr. Gabbett and Mr. Richard Benintendi, R.N.G.'s estimator attended. (AF 58-59, 105-07; Tr. 34.) Mr. Benintendi described the location for the tunnel as on a hillside. It was in the middle of an arroyo (a valley) bend where there was a low side and a high side. The Appellant was going to put the box culvert (tunnel) through fill. (Tr. 34- 35.) Mr. Benintendi had extensive experience in southwest Colorado (A-13). R.N.G. had performed approximately \$1.5 million a year in work and its customary work involved underground construction in southwest Colorado. Its base of operations was approximately 30 miles from the site of the project. (Exhibit A-12, Tr. 86-89.) Mr. Gabbett had worked in construction since the early 1980's and had rarely ever encountered solid ledge rock in his work in this area of Colorado, which consisted of 200-300 hundred projects. In fact, he had only one experience where he had to use a blaster. (Tr. 88-90, 303-04.) Mr. Benintendi confirmed that he too had experienced very little hard rock (Tr. 32-33). Mr. Gabbett specifically did not contend that R.N.G. never hits rock. Rather, he stated that in virtually all cases, the rock that R.N.G. encountered was not solid but was in the form of rubble rock or boulders which could be handled with conventional earth moving equipment. Most of R.N.G.'s underground excavation has been in clay soils that contained rocks and it was not uncommon to encounter boulders and pieces of broken rock that were up to 6 feet on a side. R.N.G. could handle that type of rock with its equipment, using excavators (44,000 CAT) and dozers with rippers. That equipment was not effective with solid rock, which would be rock in excess of one cubic yard that could not be removed by use of conventional equipment. (Tr. 89, 168-69, 284-86.)

26. At the pre-proposal meeting, the FS represented that the project would be going through highway fill (Tr. 35, 80-81, 477-78). As stated by the COR, "We showed the location. It was a highway fill from the toe of the fill on the south side to the toe of the fill on the north side. The location ran through it." The COR pointed out that although the FS knew that there was fill beneath the road, the FS did not know how deep the highway fill would go at this particular location. (Tr. 435-36, 476-78.) Mr. Benintendi recollected that the COR had stated at the pre-proposal meeting that there was fill. Mr. Gabbett had a similar recollection as to such a statement being made. Neither contended that the FS identified a specific depth for the fill. (Tr. 35-36, 95.)

27. The FS prepared a memorandum of the pre-proposal tour and meeting. It identified a number of questions raised by those in attendance. None dealt with the nature of the underground material. One question asked whether the 14 days in the RFP was mandatory. The FS answered that the time for the project was 14 days and that if a contractor "feels" he cannot make that limit, he should include that in his proposal. (AF 58.) After the pre-proposal meeting the FS issued Amendment 3 to the RFP, which set out in writing, various questions and answers addressed at the pre-proposal conference (AF 105-07).

28. At and after the pre-proposal site visit, Mr. Benintendi and Mr. Gabbett conferred as to what to expect as to subsurface conditions. They correlated the indicated alignment of the tunnel with the fill and reviewed the angle of repose of the shoulders of the road. They also observed the rest of the work area, *e.g.*, where the gabion walls were to be built. (Tr. 91-92.) According to Mr. Benintendi,

the site investigation at the pre-construction meeting, as directed by the COR was a reasonable site visit. He and Mr. Gabbett concluded that the work would be performed in a highway fill, that they would not have to excavate beneath the disturbed material that had been placed for that highway fill, and therefore, they would not encounter solid rock. They based this conclusion on the field conditions they observed, including the height of the fill and their review of the drawings that disclosed how deep the excavation would go. They also observed a wet area on the south end of the tunnel which they associated with soft ground. Appellant acknowledged that there were visible rock outcroppings as well as the large granite (Ophir) wall. However, the granite wall was ½ mile away and in Mr. Benintendi's view, not close at all. Moreover, there was a river between the excavation and the wall. Appellant believed it might encounter rocks on the project but expected the rock to be 2-3 feet in diameter and therefore rock that could be handled with their excavator. (Tr. 57, 80, 98, 109.) As Mr. Gabbett stated, "We felt we probably would not hit rock, but in the event that [we did], because of the comparisons of people that sit down and have to use the same information to bid something, we made the assumption that we couldn't include a rock contingency or risk or a rock dollar amount in our bid and still be competitive." (Tr. 1, 71, 111, 169-70.)

29. On September 12, 1997, the Appellant submitted its proposal to the FS in the sum of \$229,748.88. The only other offeror proposed \$397,711. (AF 77.) The FS estimate was \$269,921 (AF 51-52).¹

30. Appellant's estimate which it used for costing (A-15) priced unclassified excavation at \$26.33 and structural excavation at \$23.05 per cubic yard, based on overhead and profit of 15 percent and 10 percent respectively. The unclassified and the structural excavation were premised on using a 320 L excavator and a 938 loader, as well as dump truck time. In pricing the work, Appellant considered the area where work was to be done as tight, the quantities to be removed were relatively small, and it would be necessary to double handle the material. Mr. Gabbett stated that those factors made the unit price fairly expensive. (App. AF Supp. 15; Tr. 41-45.) Appellant had no contingency for rock excavation in its price (Tr. 111). There is no data on the breakdown for the other offeror (AF 51, 74).

¹ As part of its initial claim, the contractor claimed the cost of foundation footings for the tunnel. That claim was for \$24,308. As Appellant's counsel noted in his brief, that accounts for the majority of the difference between Appellant's proposed price and the FS estimate.

31. At the time it provided its proposal, neither Appellant nor the other proposer included a technical proposal submission, as specified in the RFP. After receiving only price proposals, the CO contacted both offerors and asked for a technical proposal. (Tr. 48-49, 740-41.) During discovery, the Appellant attempted to secure information from the FS as to details involving the proposal of the other offeror. The FS advised the Appellant that the records were no longer in the FS files. According to Government counsel, because there was nothing that required the Government to keep such records, the FS at the conclusion of an award phase, routinely destroys the unsuccessful offeror's price and technical proposals and that is what occurred here. (Stipulation (Stip.) at Tr. 241-42.) FS personnel were unable to shed any light on whether the other offeror had information in its proposal about equipment that was capable of handling solid rock (Tr. 632). The name of the other proposer was redacted from the copy of the September 23, 1997 letter to file summarizing pre-award actions in the AF 77).

32. On September 15, 1997, R.N.G. submitted a three-page technical proposal to the CO (AF 61-63). The proposal contained no summary or opening paragraph but rather set forth four categories: (1) prior experience, (2) proposed project planning, (3) employees, and (4) equipment. Under equipment, Appellant showed 11 pieces of equipment to be available for use on the project. The equipment on the proposal tracks the equipment shown on Appellant's estimate. None of the equipment nor anything as to the experience of the intended employees on the project indicated any intention on Appellant's part to work with hard rock or to conduct any blasting. The proposal listed a certified crane operator but contained nothing as to a certified blaster. Finally, Appellant also provided proposed project planning and sequence of performance. It set durations of about 3 days for the excavation and installation of north sections of Conspan culvert to the centerline of existing pavement and set another 3 days for the same work on the south side of the tunnel. (AF 61-63, A-15.)

33. The CO turned the proposal (but not any of the pricing information) over to a technical evaluation panel, which consisted of the COR, the job inspector, the FS engineer (Ms. Jones-Crabtree) and another FS engineer. Each member of the technical team who testified at the hearing had been involved in some manner in putting together the specifications for this project. (Tr. 512.) The COR, an engineering technician with over 20 years experience in the general vicinity of the project, was chairman of the technical evaluation panel (AF 65-72; Tr. 306-08, 431). By letter of September 16, 1997, the CO provided the following directions to the panel, "Evaluation factors shown in Section M of the RFP must serve as the sole measurement standard for evaluating proposals and must be applied consistently, objectively and uniformly. No unstated factors may be used to evaluate." The FS engineer, understood the directions to allow the panel to look at what was listed in black and white. She said, "You can't infer or assume what contractor's state of mind may have been when they proposed – when they put the proposal together." (AF 65-73; Tr. 532-33.) She further stated, that given knowledge of the ground conditions, the FS did not feel it was in a position to assume whether contractor was right or wrong regarding rock (Tr. 537). The panel was specifically charged with considering: (a) offeror's schedule to insure the timely start and completion of the work; (b) the offeror's installation methods; (c) the number and experience of employees and subcontractors committed to the project; and (d) the equipment committed to the project (AF 65-73). According to the FS engineer, the criteria was submitted in order for the FS to

review the contractor's experience, and traffic control. The purpose of proposal was simply to allow the FS to evaluate the ability of the contractor to be successful. According to her, the evaluation process and proposal were never in any manner incorporated into the contract document. (Tr. 533.) The technical panel did not speak to the Appellant during the evaluation process, nor did the team engage in any conversations with the CO, other than passing forth the recommendation (Tr. 555). Although the technical team had before it a list of contractor planned equipment and an anticipated schedule and other information, it was given no information as to how many dollars Appellant or the other offeror placed on the excavation. The technical team evaluation was based only on three sheets of paper. Pricing was strictly withheld from the team and they made no analysis of the reasonableness of the proposers' cost. Only the CO had the proposed price. (Tr. 455-56.)

34. The FS witnesses conceded that the proposal, on its face, does not show any rock excavation and that the team had concerns as to the absence of any rock related equipment. The various team members each testified that they considered it likely or at least probable, that the Appellant would encounter some rock and recognized that Appellant's proposal had no equipment capable of dealing with rock. (Tr. 536-37, 557, 630-32, 644, 719-20.) The FS engineer stated that in her opinion it was highly likely that rock would be encountered during excavation, noting, "Given that the excavation was below what could have even been reasonably assumed for the bottom of fill." (Tr. 644). When the FS engineer was asked if she was expecting to see information about someone with experience and licencing for blasting, she replied, "I think more than anything we were surprised that the contingency wasn't directly addressed." (Tr. 633). There was similar testimony from the project inspector and the COR, who acknowledged that Appellant showed no blasting, but also asserted that it was not the FS responsibility to question that, given Appellant's experience (Tr. 448, 717-20). Appellant argued in its brief, that given the alleged FS expectation of rock, the technical team had to have known that R.N.G.'s proposal was predicated on encountering no hard rock in its excavation.

35. In reaching the conclusion that there would likely be some rock, the FS officials relied on what they said were evident indications from the surrounding terrain in the local area and the perception that outside of Tulluride (the general vicinity of the project), rock is pretty much a fact of life. The COR stated that he was pretty sure that a contractor would know that he was likely to hit rock in the alignment for this underpass. (Tr. 436.) The design engineer and later the inspector, Mr. Watts, took the position that the FS did everything it could in the placement of the project on site to make construction easier, but an expectation that there would be no rock is just an assumption (Tr. 666). The COR said that the FS made no assumption either way as to what would or would not be encountered and where undisturbed material would start (Tr. 436). What is not disputed is that the FS was aware at the time of the review of the proposal that rock was a major consideration in how the work would be performed and affected whether the work could be completed in a timely fashion. Nevertheless, even though the FS personnel discussed during their review the possibility of rock, the team chose to make no conclusion as to how the Appellant had handled that possibility in its proposal. (Tr. 628-32.) As described by the FS engineer, the design team found it interesting that the contractor chose not to address the rock, "given the surrounding

ground conditions and the unclassified and structural excavation pay item definitions, that the contractor would choose to proceed and assume the risk that there might be rock. . . ." (Tr. 660.)

36. In addition to the testimony of its technical personnel, the FS also provided testimony from Mr. Self of CDOT regarding site conditions. He stated that he would have expected rock because of the surrounding terrain. "If there was a lot of rock near the surface exposed, you would have to assume that the rock is pretty shallow and that if you were going to any depth into natural ground, you would probably be going into rock." (Tr. 256, 277.) When asked if that was an assumption that the FS engineers should have made, he responded, "Perhaps." (Tr. 277.)

37. After review, the technical team rated both proposals as acceptable, but felt that Appellant was slightly more acceptable than its competitor. The panel felt more information would have been helpful but decided that sufficient data was provided to make a reasonable interpretation as to capability. (AF 77-78, G-4.)

38. Although the Appellant's proposal was below the FS estimate, the CO did not believe that the price was seriously out of line with that of the FS. R.N.G. was asked to verify its price prior to award by the CO, which R.N.G. did by telephone. Mr. Benintendi described the call as follows. The CO called and asked if R.N.G. was comfortable with the numbers on this project. That is all that was asked. The CO never focused on any particular item. (Tr. 46-47.) A message from the CO to the FS engineer, dated September 22, 1997, indicates that the contractor got the numbers straightened out. The message then goes on to address pricing for the cast-in-place footers. That appears to be the subject of the verification, with rock never being an issue. (AF 7, 73.) By letter to the file of September 23, 1997, the CO prepared a review of the award process. She referred to several errors in math which were corrected, with each error apparent from the face of the offer. She then determined to award to R.N.G. In the copy of the letter contained in the AF, the name of the other proposer has been redacted. (AF 77-78.)

39. The FS conducted a pre-work conference on June 1, 1998. Present were the CO, Anna Jones-Crabtree, there identified as inspector; the COR, Bill Dunkelberger (no further identification); Mr. Gabbett and Ernest Moroft, both identified as representing R.N.G. Contracting, Inc. (AF 291-92). Both Mr. Gabbett and the COR in testimony recounted a statement made by Ms. Jones-Crabtree to the effect that the contractor had better not hit rock (Tr. 119) or we hope we don't hit rock (Tr. 386). When questioned by Government counsel whether she recalled making such a comment, Ms. Jones-Crabtree avoided answering "yes" or "no." She couched her response in terms of the first person plural: "we all knew there was structural excavation and unclassified excavation"; "we were all aware of the surrounding conditions;" "we were all aware it was a 14-day contract;" and "I think we all had a joke [about being lucky] if we don't hit rock." (Tr. 575.)

40. According to the CO, "A review of the proposed pricing with the technical panel did not suggest unbalanced bidding or questioned prices. While some line items were substantially different from the government estimate, each fell within the range of evaluated proposals received. It was determined that variations could result in how certain costs were allocated within the project." (AF 77-78.) Additionally the CO concluded that (a) the technical review panel had sufficient information to make a reasonable determination of acceptability and (b) a review of

R.N.G.'s pricing with the technical review panel did not cause her to question R.N.G.'s prices (AF 77-78). The Board notes an obvious inconsistency between the statement in the above referenced letter that indicates a review of pricing with the review panel, and testimony from the review panel that they were never provided the price nor did they discuss price with the CO (Tr. 455-56, 555). During her testimony, the CO clarified this matter and stated that she reviewed general pricing information with a single person who may have been Tom Condos, an FS engineer on the technical team (Tr. 788). Mr. Condos did not testify. The FS awarded the contract on September 24, 1997, in the amount of \$229,748.88. (AF 113.) In making the award, the CO did not see the FS having the responsibility to look behind Appellant's proposal. In her view, the contractor should have listed its assumptions, rather than having the FS infer or not infer what the contractor intended to do. (Tr. 809.)

41. The FS issued a Notice to Proceed (NTP) on June 15, 1998, and Appellant was to complete by June 28, 1998 (AF 106; Tr. 101-03). During the project, the performance period was extended an additional 3 days through modifications. Further, as described by the FS, Appellant was allowed to buy an additional 9 contract days beyond the original performance period. The contract work was completed with a total of five modifications. (AF 80-95, 321.)

FILL UNDER THE ROAD

42. Both FS and Appellant witnesses conclusively established that the contractor should have expected construction fill to be under the road. The Appellant expected the fill to go the full depth of the excavation. The FS expected the excavation to initially be in fill; however, expected that some of the excavation would go into natural ground. (Tr. 98, 109, 465.) Testimony of the FS engineer, Ms. Jones-Crabtree and testimony of Mr. Watts revealed that the contractor would be reasonable in expecting the composition of the fill to be unconsolidated material (material that is either brought onto the site or taken from somewhere else on the site and compacted) and therefore, not solid rock (Tr. 576-77; 675-76). As stated by the COR, Mr. Marah, "The upper part of the project is through a fill. That's clearly shown on the profile. It's clearly shown on the ground." (Tr. 465). He agreed that the contractor would be digging in disturbed material to the depth of the fill (Tr. 434-36). In regard to what the contractor should have anticipated, we have no disagreement with the COR's conclusion that to excavate down 18 feet in geological conditions at the site, it's a good bet that someone would hit rock at some point (Tr. 392). Our decision reflects that. However, Mr. Marah's statement about expecting rock at 18 feet, does not establish at what depth fill is ordinarily present on this type of highway and his statement does not address to what extent fill would generally be recognized as the material in place on a road such as this. Finally, his statement about hitting rock in 18 feet of earth does not help us establish whether rock was hit within the fill area (which at virtually all locations has been defined by witnesses as being much higher than 18 feet below the surface). The issue here is defining the ordinarily expected extent or depth of fill for this location. It is agreed by the parties that the contract documents did not include any specific depiction of where fill stopped and natural ground began.

43. There is no absolute standard which establishes that every roadway will have the exact same configuration of fill. However, there are conditions that are well established and ordinarily used for

this type of road. In this case, Government witnesses provided consistent testimony that for a road constructed such as this, on a slope, they would expect fill to run in roughly a straight line from the high toe to the low toe of the highway. When asked whether he had told bidders that they would be digging through highway fill, Mr. Marah, the COR, testified: “We showed the location. It was a highway fill from the toe of the fill on the south side to the toe of the fill on the north side.” (Tr. 476-77.) Government witness Self testified: “Typically, you would just extend a line from the upper toe of the fill to the lower toe of the fill, and assume that as your natural ground line” (Tr. 261-62). Mr. Watts also joined in supporting the toe-to-toe profile. On his Government Exhibit (G-6), a series of graphics which he prepared (and which the dissent relies upon), Mr. Watts uses a toe-to-toe line to show where fill would end and natural ground begin. (G-6, Tr. 674-77, 699-700.)

While initially the FS engineer, Ms. Jones-Crabtree, resisted providing her expectation of the depth of fill, she later conceded that if there is a rule of thumb, the anticipated bottom of fill would go from one edge of the toe of the fill to the other (Tr. 578, 586). She emphasized that surrounding ground conditions will account for variations in the general assumption that fill goes from “here” to “here” (presumably upper toe to lower toe) (Tr. 590). Finally, there was no evidence that anyone would expect the bottom of the fill to run in a perfectly straight line from toe-to-toe. Rather, as Mr. Watts stated, the bottom of fill would be expected to undulate to some degree. (Tr. 702-03).

44. Mr. Self described what he understood to be the “reasonable assumption” of the start of natural ground and end of fill. He was asked to show, using the trail profile (Drawing 5), where he would have expected fill on this project to begin and end. (AF 262-63; Tr. 261-65.) He identified the upper end of the fill (where fill and earth came together) to be to the right of Station 1+00, halfway into the second square. The point he identified is on the south end of the tunnel. One can see an angle point where the ground starts to tip up. Mr. Self then drew a line from that point to the bottom of the toe, located as the dip in the fourth square heading north from Station 2+00. He stated that it could not be determined if the ground would go up or down, so one pretty much assumes a straight line beneath the fill and that indicates the profile line. In point of fact, when one looks at Mr. Self’s profile line, it shows that fill will be well below the tunnel entrance and tread on the north side of the tunnel and fill will continue to run well outside the tunnel, running to the lower toe. (Tr. 261, 264-65.) According to Mr. Self, he would think that any engineer looking at Drawing 5 would understand where existing ground and bottom of fill would be located. In his view, location of existing ground would be equally apparent to the engineers or owners, who prepared this drawing. (Tr. 268.)

45. Mr. Self’s depiction on the profile was theoretical. He acknowledged that he did not know the specific year the highway was built, although he stated that he did not think that there has been any significant change in how highways were built on slopes over the last 100 years or so, and thus would not expect anything unusual as to this fill. He said basically normal practice is to create a series of benches in the slope to lock in the fill to the slope. (Tr. 266-67.) He also did not dispute that it was equally plausible that instead of his hypothetical straight line, there could be a depression in that area and that the existing line would actually be at a lower elevation than he pointed out. (Tr. 269.) It is also important to recognize that Drawing 5 is not to scale. The tunnel is longer north of the center line, than it is south of the center line. Further, the tunnel actually turns or curves and does not cross the road in a straight line. (AF 263-64.) Finally, in attempting to

explain that the toe-to-toe line does not always run in a straight manner, Ms. Jones-Crabtree did note that the graphic which Mr. Watts drew as Alternative 2 (G-6) showed what the FS considered as the middle ground representation for illustrating the bottom of fill. It is of note that Alternative 2 depicts at best a very minor undulation. (G-6, Tr. 590.) It is also important to recognize that in the other graphic depictions used in G-6, and particularly the graphics where the FS identified the depth of fill by including a rock or top of natural ground line (in red), the FS used the middle ground alternative of fill shown in Alternate 2 (Tr. 590-91). Thus, where the dissent references a graphic which it claims shows little rock in fill, the dissent is using as its base, what the FS saw as the middle ground. As indicated later in this decision, rock was considerably higher than shown in the graphics relied on by the dissent and thus the actual fill encountered by Appellant was considerably less than what would ordinarily be encountered.

46. In addition to Mr. Self's drawing of the fill line profile, the FS, as noted above in FF 43 and 45, independently had Mr. Watts, the job inspector, prepare a series of graphics (seven separate panels) to illustrate and address the relationship of fill and natural ground in this type of road construction. (G-6). Particularly pertinent to our discussion were three panels designated Alternative 1, 2 and 3, which showed varied levels of fill. Also pertinent was a panel which showed a hypothetical rock/fill line (the rock in red) and also showed an automobile and hiker. The fill line on this panel was based on Alternative 2. (G-6, Tr. 590-591.) This panel was not specifically titled, but was later introduced as B-2.² (G-6, B-2). Conceptually, Mr. Watts' exhibit was consistent with Mr. Self's analysis. (FF 44, 45.) In each of the graphics, Mr. Watts established the limits of fill by connecting a line from the upper to the lower toe. Within those parameters, he varied the amount of fill. He attempted to illustrate various possibilities as to the extent of fill (shown in gray) versus the start of natural ground (shown in red). He stated that when he prepared the graphics, he was preparing them as a projection. The graphics were not created from information deduced from the contract. (Tr. 694.) He described his Alternate 2 as a "rough extrapolation" and pointed out that what he was trying to do was "to connect toe to toe." (Tr. 699.) He said, "So what we're trying to illustrate is that it's not so much a matter of what is the material; where is material. What's fill and what's not fill is really what we're trying to do." (Tr. 675-76, 694.) He said that the best one can do for deduction or assumption is to connect the various lines between the toes of the fill (Tr. 673). As to the location of the rock on the graphic, he at first testified that he thought his placement of red (natural ground) on Alternate 2 (G-6) was within 18 inches to a foot of the actual conditions encountered by the Appellant (Tr. 674). However, he abandoned that position at the hearing, after examining several photographs which showed rock as considerably higher than where he showed it in Alternate 2. He pointed out that when he prepared G-6 he based it on diaries but did not have the photographs at that time. He stated that based on photographs, things can be adjusted up and down. (Tr. 723-25.) After testifying as to Photograph 9 B (addressed in more detail below), he re-emphasized that his Alternate 2 was an approximation, and then continued, that maybe the location of rock was more clearly represented on that end of the trail in Alternate 1 rather than Alternate 2 (Tr. 695, 700-08). Alternate 1 had rock at a much higher level and showed considerably less fill in place than in his Alternate 2, what the FS considered to

² Alternative 2 of G-6 and B-2 are for all intents and purposes the same.

be the middle ground (G-6, Tr. 590-91, 700). Finally, Mr. Watts agreed that the Board should not rest its determination as to where rock was encountered on his depiction in the graphics. He was trying to connect toe to toe and that became difficult to do, particularly on the north end, because of the curve in the tunnel. (Tr. 699, 702.) Although B-2 was conceptually accurate in showing the relationship between fill and natural ground and in illustrating the narrowing of fill, as fill approached the upper toe; the photographs and testimony make it clear that the actual height of the natural ground and where Appellant encountered rock was much higher and different than what one sees on Mr. Watts' graphic (FF 58-59, 60-63). This is addressed in more detail below in the discussion of the photographs.

47. Despite the fact that Mr. Watts' graphic does not accurately depict where fill stopped and rock began on this project, the graphic depicting rock in red and containing other features is still useful (B-2). It provides a depiction (albeit graphic) which contains the tunnel, the ordinarily expected (middle ground) placement of fill as it relates to natural ground (red is supposed to indicate where the fill stopped), an automobile and a man walking in the tunnel (the man is nominally 6 feet tall and the automobile roughly 5 to 6 feet tall). The graphic was referred to and used at the hearing to assist in giving a location context to some of the photographs. The graphic also proved useful for comparing the actual depth of the fill and presence of rock, with what Mr. Watts used for his illustration. Because the tunnel was actually curved, Mr. Watts places the centerline of the road to be just to the left of the driver of the car, near the driver's side wheel. (G-6; Tr. 672, 674-75, 691-94.) Mr. Watts also addressed the heavy blue line on the graphic. It is the surface of the trail and not the bottom of the tunnel. He intended the bottom of the tunnel to be approximately 3 feet below the tread. There is a 2-foot footer or foundation and 1-foot of structural material below the trail level, with the blue line being slightly above the top of the foundation, about 6 inches to a foot, to allow for trail material. (Tr. 691-92, 698, 705.) Finally, Mr. Watts addressed the variations he placed in the line he showed between fill and rock on B-2 (and Alternate 2). He stated that he added some variation in the line to make it look natural, as opposed to drawing a perfectly straight line. (B-2, G-6, Tr. 673.)

48. Mr. Self made several observations relating to the Watts' graphic illustration of fill and natural ground in B-2. First, using the graphic, Mr. Self concluded that part of the excavation would be in fill and part would be in natural ground. More specifically, he was asked whether it would be reasonable for a contractor to expect that the area from where the man was shown walking to the road surface would be solely in fill. He stated, "Yes. Since it's below ground and you can't see what's there, you have to make some type of an assumption, and basically, roughly a straight line interpolation is — would be considered a reasonable assumption." He continued by confirming that from his experience, that is generally how most roads wind up being constructed, recognizing that there are going to be exceptions. (Tr. 274.)

49. The following exchange with the COR, Mr. Marah, is also pertinent, for it too helps establish the FS's expectation as to the extent of fill anticipated by the FS at the time the FS received Appellant's proposal.

Judge Pollack: ...My question to you therefore is that connecting these dots, would you agree that, given this was a known fill road, that it would have been reasonable for a contractor to expect that at least up to that profile, there would be fill material.

Witness: Yes, sir.

Judge Pollack: and if there's rock in here that's something different than fill. Correct?

Witness: That's correct.

(Tr. 496-97.)

PERFORMANCE AND LOCATION OF ROCK

50. During construction, Mr. Gabbett, was not the full time superintendent, however, he was present approximately 19 or 20 days (Tr. 120-21). The COR and FS inspector were at the site on most days. Construction began on June 15, 1998. Appellant began work on the south side of the highway. Appellant initially performed clearing and grubbing for the bypass and for the trail up to the south portal of the undercrossing. The contractor potholed an exploratory hole at the south side of the pavement to determine the location of an existing fiber optic phone line. The line was exposed at approximately 30 inches below road grade. (AF 381-84.) On June 15, 1998, the Appellant did a sample retrieval from the up-hill side on the center line of the pike underpass, to a depth of 8 feet, as measured from the pavement surface. A sample was retrieved and included numerous 6-inch + rocks. All were fractured with multiple facets. According to the daily field report prepared by Lambert and Associates, a geotechnical subcontractor, the COR stated in a June 15 conversation that he thought they were still in manmade fill material (at approximately 8 feet of excavation) and that the excavation for the underpass would not reach the underlying native material. (Tr. 26; App. Supp. 26.)

51. On June 16, 1998, clearing and grubbing continued on the south trail approach to the tunnel. The inspector identified that solid rock was hit at approximately Stations 0+60 to 1+00 (outside the structural excavation) and as a result, the FS moved the trail approximately 8 feet east in this area to avoid the rock. (AF 263, 387-88.) Appellant also proceeded to bring on an excavator with a hydraulic rock breaker. That arrived on June 17, 1998. (Tr. 124-25.)

52. On June 17 large rocks were encountered on the south side of the road excavation. The diary did not indicate exactly where or at what depth. (Tr. 124-25.) Because of difficulty with rock, Appellant then moved to the north side of the tunnel (AF 390).

53. The diaries contain various references to rock. On June 18, the diary reflects that the Appellant hit rock at a depth of approximately 12 feet from the surface between the centerline and the north portal. Rock appeared to run the width of the excavation and Appellant was encountering rock at the footer edges. (AF 391-92, 394-96.) In general, Mr. Gabbett said that the rock Appellant encountered from the north end of the tunnel to the center line of the roadway was not a thick layer of rock. The rock got thicker as it got closer to the bottom, where Appellant had to penetrate rock to get the footers in. The hammer worked relatively well in that section. As the Appellant got

closer to the center line, the rock layer thickened. It was from 4 to 5 feet thick and was moving upward toward the south entrance of the tunnel. (Tr. 104-06.) During this time frame, Appellant was attempting to find a blaster; however, that effort was complicated because of concerns about potential damage to underground fiber optic cable (at the south end) which was in the rock area (AF 397-400, 403-04).

54. After it began to hit rock, Appellant concluded that it could not remove the dense granite it was encountering by using conventional earthmoving equipment. The initial approach, using the hammer, which had generally worked on the north end, was not successful and much less effective in the denser rock. As excavation proceeded to the south side of the roadway and toward the south portal of the tunnel, the amount of rock became greater. Near the center line, there was as much as 7 feet of solid rock that had to be excavated to set the footer. (Tr. 125-26, 703-04.)

55. In regard to the location of rock, on the south portion of the project, the COR in a message to the CO on June 28, 1998, pointed out that rock continues past the fiber optic line and Appellant drilled and placed S-mites in the hopes of breaking up the rock. The S-mites were marginally effective. (AF 428; Tr. 126-28.)

56. Appellant had difficulty securing a blaster. Two of the blasters it contacted expressed reluctance to work near the fiber optic cable. A number of blasters were booked. (Tr. 128.) Ultimately, on June 28, 1998, the Appellant was able to secure a blaster to mobilize. The Appellant provided a traffic control plan for the blasting on June 29 and blasting operations began on June 30, 1998. (AF 316, 433.)

57. The rock caused disruption to R.N.G.'s performance. The time for structural excavation doubled, precast deliveries were disrupted, and R.N.G. was forced to stockpile tunnel pieces (Tr. 122-23.) It was also necessary for R.N.G. to cover the excavation each night in order to leave the road open. At the end of the day Appellant had to backfill what had been cut and build a temporary road so that 2-way traffic could go through. The next day it had to dig the material up and stockpile it and then proceed with hammering rock. If Appellant did not get another section installed, it had to backfill again. (Tr. 293-94.) Once blasting began, Appellant took two to three shots a day for 3 days (Tr. 132-33).

58. Testimony regarding photographs of the excavation area proved to be the most helpful evidence for establishing the actual location of rock and to what extent rock was encountered in the area above the fill profile line drawn by Mr. Self. Both the COR and Mr. Watts testified as to Photo 9B. (A-3, G-6.) The COR placed 9B approximately 18 feet into the tunnel from the north side entrance. He agreed that photo shows rock going at least 3 feet above ground (trail) level at that location and agreed that the rock would have tended to move upward, not necessarily in a straight line but eventually it would have undulated upward. He also agreed that if the Board drew a line from the top of rock at 9B to the portal on the south side that line would roughly parallel where the rock line went. (Tr. 492-94.) The presence of rock rising upward from north to the south was also confirmed by Mr. Watts, who recollected from his observations during work performance, that the slope of rock moved upward, with more rock on the south end than on the north end (Tr. 702-03).

Mr. Watts stated that Photo 9B shows a wing wall at the north end of the tunnel, as well as a two-or-three foot foundation. The footing is sitting a foot higher than the bottom of the excavation. The top of the foundation would essentially be the surface of the trail, less trail material. In the photo, rock is clearly shown behind the foundation. When asked how high he estimated the rock to be above the tunnel trail, he estimated it to be 2 feet above the top of the footer. (Tr. 694-702.) An estimate of 2 feet, however, is not consistent with the photograph. The photograph shows a man sitting on his haunches. His sitting height is at least 2 feet. (Tr. 695-99.) The rock behind the man continues well above his head and thus 4 feet from the top of the foundation seems a more reasonable conclusion from the photograph. (G-6.) Although one could logically anticipate that the rock was uniformly high at this location on both sides of the tunnel, Mr. Gabbett candidly stated that this particular photograph was showing only one side of the tunnel. He thought that the rock might have been a bit shallower on the other side of the tunnel from the side depicted in 9B. (Tr. 815, 821.) When the actual location of rock at 9B is compared to the same location on Watts' rock/fill depiction (G-6, B-2, used by the dissent), we see that Mr. Watts did not show rock anywhere near the height shown in Photograph 9B and in fact showed rock as starting well below the tread. The depiction of the rock fill line on B-2 (or G-6) is thus inaccurate. If we plot 9B against Mr. Self's toe-to-toe line using Drawing 5, we see that the rock is well into what ordinarily should be fill. (AF 283; FF 44.)

59. Mr. Watts and Mr. Marah addressed the height of rock as shown on Photograph 11B. Both placed this photograph in the area of the center line. (Tr. 370-71, 703-06.) Mr. Watts stated that there is at least 3 feet of rock above the trail. He agreed that photograph 11B shows that the Appellant had to excavate through 6 to 7 feet of rock in order to lay the foundation or footer piece shown in the photograph. (G-5; Tr. 703-06.) Mr. Marah estimated that there was 5 feet of rock from the bottom of the footer at 11B (Tr. 476). In addition, both Mr. Marah and Watts again confirmed that the rock tended to move in an upward slope from the north side to the south entrance and in fact, rock was encountered very close to the surface on the south end, once Appellant was in the non structural excavation. Mr. Watts, in fact, stated that the upward trend he showed on Alternate 2, was representative of how the rock sloped upward toward the south portal. (Tr. 377-78, 494, 702-703.) Using Photograph 11B, there is at least 3 feet of rock above the blue line on Watts' graphic. Put another way, if one uses the Watts' Alternate 2 graphic, it shows fill stopping at least 3 feet or more below where Photograph 11B shows that the fill really stopped. Further, looking at the Watts' (B-2) it shows fill going below the tread from the centerline north. Photographs 9B and 11B and the testimony of Mr. Watts and Mr. Marah show rock above the tread. Again, the Watts' depiction of rock (red) is not representative of what was encountered nor was it intended to be and the actual fill ended considerably higher than what he depicted on his graphic. (FF 46.)

60. Mr. Gabbett and Mr. Marah addressed Photograph 12B, located on the south end. It looked into the tunnel area toward the north. It shows a significant amount of rock behind Mr. Gabbett, who is depicted wearing a hard hat. Mr. Marah used B-2 to locate where the man in the hard hat was standing. For purposes of comparison with G-6 (B-2), he said it would be at about the left side of the automobile or the edge of the trench wall looking north. (Tr. 375-77.) There is a painted line on the rocks showing where the foundation was to be placed (G-5; Tr. 162, 371). According to Mr.

Marah, there is a change from soil to rock depicted in the photograph and the change can be seen at the shoulder level of the gentlemen in the cowboy hard hat. The photograph also shows a temporary bulkhead to keep tunnel from filling up. The bulkhead is about 12 feet in height. (G-5; Tr. 371-75.) Once again, the height of rock and actual depth of fill, as demonstrated in the photograph is not accurately reflected in the Watts' graphic.

61. The dissent in its discussion of Mr. Watts' testimony concludes that essentially no rock was encountered above the theoretical fill line and explains this conclusion in part by placing a straight edge across G-6 (B-2), which the dissent treats as an accurate depiction of where rock was found. To support its reliance on this graphic as an accurate depiction of where rock was found, the dissent cites a statement made by Mr. Watts in his testimony where he said that he thought that Alternate 2 (the basis of the graphic showing rock and fill) was within a foot to 18 inches of where rock was actually encountered or one foot in one location. The dissent position cannot be reconciled with Mr. Watts' testimony at the hearing. There he stated that the illustration was not intended to be a depiction of actual conditions. He also testified that one should not rely on the graphics in G-6 to determine where rock was encountered. The dissent position also cannot be reconciled with clear photographic evidence and testimony of Mr. Marah and Watts which places the rock at a considerably higher level than what G-6 shows. (Tr. 675-76, 694, 699, 702; FF 58-60.)

62. If we plot the points from the north toward the south, connecting points 9B, 11B and 12B (using either Drawing 5 or the Watts' graphic), we see a flat to an upward trend of rock moving toward the south and that rock line is well above both Mr. Self's and Mr. Watts' (toe-to-toe) profile lines for establishing fill. If we compare the amount of rock above the profile line and take that as a percentage of the total amount of rock excavated (assuming all material below the initial rock, continues to be rock to the bottom of the excavation), we see that 40 percent to 50 percent of the rock excavation took place in what ordinarily would have been expected to be fill. (AF 283; G-6; FF 44, 58-60.) The discussion here is not intended to, nor should it, cast a negative reflection on Mr. Watts' preparation of G-6. He candidly acknowledged that with that exhibit, he was simply trying to illustrate how fill and rock would be expected to interact. Mr. Watts never intended nor claimed that his illustration should be used in the manner used by the dissent. (Tr. 694-95, 699, 700-02, 708.)

63. The Appellant completed work on July 10, 1998, 8 days past the original contract deadline (Tr. 544). Under Modification 5 (AF 82, 84), R.N.G. agreed to a modification under which it was back-charged \$2,113.44 by the FS for what was described as the Government's actual (estimated) costs for inspectors for the 8 days after the approved contract time. Appellant signed the modification in consideration of the FS not placing a default on its record. The FS correspondence indicated that although the FS was not intending to remove the contractor from the project and the FS intended to allow the Appellant to complete, the FS, absent the Appellant paying consideration, did intend to declare the contractor in default. The contractor chose to pay and avoid being identified in a default status. (AF 14-15, 39; Tr. 799.)

64. By letter of January 22, 1999, the Appellant presented its certified claim to the FS in the amount of \$87,494.84. The rock removal portion of the claim totaled \$63,186.43 and the remainder

dealt with footers. (AF 37-48.) The breakdown for the rock portion of the claim, as set forth in the letter, was as follows with the claim summary on AF 45 and a further breakdown on AF 46-47. Backup data, such as time sheets, were not put in evidence but were in the hearing room and available for use. (Tr. 140-41):

Labor costs including fringe benefits	7,218.03
Labor overburden @ 25.92%	1,870.91
Equipment costs	16,241.40
Blasting Costs	9,060.32
Additional Traffic Control Costs	13,081.53
Total Unrecovered Expense	47,472.20 (sic)
Overhead (15%) and Profit (13.65%)	13,600.79
U.S. Forest Service costs to RNG	2,113.44
Total Due RNG Contracting for this item	\$ 63,186.43

65. The CO denied the Appellant's certified claim by decision dated March 25, 1999 (AF 21-29). The Appellant filed a timely appeal. During the processing of the appeal and prior to the hearing, the Appellant reduced its claim and dropped the portion of the claim dealing with footers for the tunnel. The rock claim was not submitted on a unit cost basis. Rather, the Appellant had gathered all the costs it incurred as a result of rock and claimed those total costs. (AF 37-48, A-11.)

66. Mr. Gabbett explained that the claim includes only rock related work costs and does not include work that had been specified in the contract. Mr. Gabbett said that the Appellant set up codes (512 and 513) for all additional rock work, and the costs claimed in this appeal were costs coded to those rock code numbers. He testified that work Appellant performed on line items in the bid, such as removal of the material set out in his bid (the 563 cubic yards included in his bid under 206) was coded under 203 or 206 and thus was not included in this claim. (Tr. 133-34, 137, 300-301.)

67. The basic method used by the Appellant to assemble quantum was to segregate costs associated with rock excavation from all of the other costs on the project. Appellant made these designations (assigned costs to specific codes) while work was being performed. Costs attributable to rock excavation as opposed to anticipated earth excavation – were coded as either cost codes 512 or 513. Mr. Gabbett testified that care was taken to insure that costs coded to rock excavation were not items of work for which the contractor was otherwise responsible. (AF 37-48; Tr. 133-34, 175-77, 299-301.) To assure that the items coded for rock were truly rock and not spilling over into other activities, the coding was done on daily time cards and Mr. Gabbett and his supervisor would discuss daily the appropriate equipment hours for the different phases. Mr. Gabbett stated he was comfortable with the accuracy of the coding and noted that Appellant kept the time cards as they do, to analyze projects and then put that information into R.N.G.'s data base to go forward and bid the next job. (Tr. 133-34.) More specifically, the Board directly questioned the Appellant as to whether

some of the dollars being claimed here for rock were dollars that had already been included in Appellant's bid for excavation. Mr. Gabbett explained that the dollars he had on 206 he coded to 206 and were not part of this claim. He further stated he could provide a breakdown just like he had for 512 and 513 of the equipment and the time he allocated for excavation of the structure. (Tr. 299-300.) Mr. Gabbett provided examples. He pointed out that if the excavator was working with the hammer and hammering away for three hours it was coded to 512. (Tr. 133.) In regard to the blaster, Franklin, that too was coded 512 or 513. However, once the rock was shot, if the material had to be put someplace and it was in the Appellant's contract, then he coded it to 206 or to 203. (Tr. 300.) When he was asked if there were any duplication or cost savings because of the blasting, he stated "I believe not. I tried very carefully to just code things that I felt were directly related to hitting the rock to this page 46." (Tr. 301.) Mr. Gabbett's testimony was confirmed by Mr. Al Jongeneel, a claims consultant, who Mr. Gabbett contacted some time in the middle of June 1998 and who assisted him in putting together the claim. Mr. Jongeneel testified that during the work on the project, the Appellant set up a separate account for additional costs of rock excavation and coded to that account costs that were over and above what would have been required under the contract. At the same time the Appellant was coding rock costs, the Appellant was also coding other labor and equipment hours to the unclassified excavation and the structural excavation bid items. In his opinion, R.N.G. made a concerted effort to segregate the additional costs of rock from the contract items 206 and 203. (Tr. 221.)

68. In more detail, the Appellant claimed costs of \$7,218.03 as labor for operators, laborers and supervisors. The operator hours differed from the equipment hours, as Appellant included labor time for activities such as warm-up of equipment and direction time but did not charge those hours to the equipment itself. (Tr. 137-38.) Operators were needed to run equipment such as the air hammer. Other operator costs were due to having to cover and uncover the excavation each night. This was necessary due to the additional days of work involved with removing the rock. Part of the labor and equipment which was coded was for inefficiencies that were attendant to rock the operation. For example, during blasting it was necessary for all operations to stop so that the area could be evacuated. In addition, the efficiencies of earth excavation were not realized when handling large quantities of rock. (Tr. 130-33.) Traffic control costs for 8 days were priced on a per-day basis at the rate that was agreed upon in the proposal form and accepted with other modifications (AF 83). Blasting costs were \$7,500 for the blaster and \$1,560.32 for the chemical expander (Tr. 142-43). Overhead at the rate of 15% was not contested by the CO. Appellant sought 13.65 percent profit; that percentage included bond markup. (Tr. 146-47.) In coding the labor and equipment, Appellant made no charges for equipment breakdowns not attributable to rock (Tr. 175-76). Appellant coded repair items to different codes (Tr. 175-78). Mr. Marah did challenge some of Appellant's costs pointing out that some of the equipment claimed for rock was also used for non rock work. Mr. Marah however, took it no further (Tr. 425), and Appellant explained in his testimony that where equipment was used for work already covered in the contract, it was coded to 206 and 207 and not to this claim. (Tr. 300-01.) This was the extent of the FS challenge to coding.

69. In addition to the above, the FS presented testimony which challenged Appellant's costs on the basis that Appellant's claimed costs did not take into account inefficiencies and equipment problems experienced by Appellant on the project. The FS referred the Board to various references

in the documents and particularly the diaries. The diaries contained various references to inefficiencies and equipment breakdowns. The inefficiencies and breakdowns did not seem excessive for this type of project. As to the reasonableness of Appellant's costs, the FS engineer, in testimony, challenged costs on the basis that the contractor should not be compensated for hammer work as this was the result of Appellant not blasting right away. She asserted that had Appellant immediately blasted, Appellant would not have had to use the rock hammer, and therefore, could have saved that cost. (Tr. 551-53, 601-04.) The FS engineer conceded that she did not know what efforts Appellant made to attempt to secure blasting once Appellant discovered the presence of rock (Tr. 552-53). The FS engineer also challenged the necessity of the Appellant having to backfill the road each night and thus re-dig in the morning. She contended, without providing details, that contractor might have gone to a 24-hour flagging operation or used a trench box; however, she also acknowledged that the method used by the Appellant of refilling the excavation was a method that was used in the industry. (Tr. 548-49.) The FS engineer also asserted that the contractor could have blasted all in 1 day and thus there should have been no need for all supervision time used in other rock removal methods. The FS also contended that some pieces of equipment were needed anyway to move material, that there were some equipment breakdowns for which the FS should not be charged, and that the contractor did not adjust for non-productive time. Finally, the FS engineer challenged the claim on the basis of insufficient backup, saying it was hard to believe that the contractor had sufficient documentation to backup the costs claimed. She then conceded that she did not know one way or the other, and did not know how the Appellant coded the work. (Tr. 598, 600-03.)

70. The dissent challenges the Board's use of the extrapolation as a vehicle for comparing the amount of rock in the fill with the rock included under the contract. The dissent suggests that the parties may not have been aware of the significance or weight given the profile and fill by the Board. That is not the case. The record, as reflected in the FF set out above, is replete with discussions regarding the presence of fill and its relationship to the profile line. Further, counsel for Appellant, said in relation to an unsustainable objection that digging in fill was the basis for Appellant's Type II claim. (Tr. 394.)

71. Several findings need to be stated to clarify portions of the dissent. The term solid rock as used in the claim meant to Mr. Gabbett, rock which was at least one cubic yard in size or rock which demonstrated refusal of a 320 excavator. To him, if it could not be dug with the 320 excavator or ripped or dozed with a D7, then it became solid rock. That is what he referred to in his differing site condition claim. (Tr. 285.) It was not limited to only rock that must be blasted. Rather, the differing site condition claimed and found in this appeal involves more than blasted rock. The rock Appellant called solid rock and the rock for which we have granted compensation includes rock that required use of a chipping hammer, rock that required use of a chemical agent, and rock that required blasting. (Tr. 288.) The rock requiring blasting was more solid than the rock subject to chipping, where there would have been fractures (Tr. 289). Appellant accumulated the costs for the above work on the documents AF 45-46 (Tr. 292-93.) During the job that compilation accumulated anything related to rock under either code 512 or 513 (Tr.133).

72. Eighty to ninety percent of the rock encountered by the Appellant was encountered within the structural excavation and the remainder within the unclassified excavation (Tr. 157-58). Using Mr. Self's profile line, segments of the unclassified excavation, particularly rock in the area south of the fiber optic cable, were encountered in what normally would be fill on this type of construction. Fill is normally placed from toe to toe. As shown, when one runs the toe to toe line on the contract profile drawing, the structural excavation (while the majority of the excavation) is not the only excavation taking place in what is normally fill. Thus, rock was encountered not only within what normally was fill within the structural excavation, but also within what normally was fill outside of the structural excavation on the south side. Since most of the excavation in issue occurred in the structural portion; however, references in the findings do not always refer to both structural and unclassified, although both are included. (FF 44, 48, 54-55.)

73. The indication in the dissent that the rock being viewed in 9B behind the crouching man was backfill put in by Appellant and not rock, is in conflict with the record and logic. All Mr. Watts said was that the foundation shown in the drawing was sitting on backfill. Since the contract required excavation to one foot below the bottom of the foundation, Appellant would have had to backfill putting the foundation in place. That is not inconsistent with the presence of rock behind and above that foundation. In point of fact, Mr. Watts did not question the presence of in situ rock behind the crouching man. The only issue raised was that he said the photograph showed 2 feet of rock above the foundation, and as the Board pointed out, given the height of someone crouching and the placement of the rock, the two-foot estimate by Mr. Watts appeared not to be accurate. Mr. Gabbett also confirmed rock. (Tr. 697- 99, 821.)

DISCUSSION

TYPE I DIFFERING SITE CONDITION

To establish a Type I differing site condition, the Appellant must show that the conditions indicated in the contract differed materially from those which Appellant encountered during performance, the conditions were reasonably unforeseeable based on all information available at the time of proposal, the contractor relied on that interpretation and it was damaged as a result. H.B. Mack, Inc. v. United States, 153 F.3d 1338, 1345-1346 (Fed. Cir. 1998).

In the classic Type I differing site condition involving excavation, the scenario is generally the following. The Government, in the contract documents or drawings identifies the presence or lack thereof of a particular material, either by name or through borings and the contractor in performing the work encounters different and more costly conditions. The facts in this case do not present that classic condition. The evidence is clear that here the FS provided no borings nor did it define or set out a description of the particular material anticipated in the structural excavation. Rather, the FS specifically classified the material to be removed under the tunnel as "structural excavation," and the remaining material (all other material outside the structural excavation) as "unclassified." The FS specifically did not identify the presence of a particular material and in using the descriptions it did, selected that wording in order to avoid making any representation as to conditions. (FF 6, 7, 14, 17-18.) Since the FS did not represent the presence of any particular type material, either

through borings or other direct description, the Appellant cannot sustain a classic Type I differing site condition on the basis that what it encountered differed from the subsurface material described by the FS in the contract.

There is, however, another way to establish a Type I differing site condition. That occurs when the contractor can establish that the Government, through other indications in the solicitation (other than a description of the material), reasonably conveyed to the contractor that a particular condition would be encountered. Those indications need not be as explicit as a geological finding or description, but rather can be conveyed by specifying certain type of equipment or setting out other conditions which would lead a contractor to reasonably believe that it would encounter certain conditions in its performance which differ from what it encountered at the site. The leading case on this matter is Foster Construction C. A. and Williams Bros. Co. v. United States, 435 F.2d 873 (Ct. Cl. 1970), where the court stated:

For this part of the Changed Conditions Clause to apply, it is not necessary that the “indications” in the contract be explicit or specific; all that is required is that there be enough of an indication on the face of the contract documents for a bidder reasonably not to expect “subsurface or latent physical conditions at the site differing materially from those indicated in the contract.”

In Foster, the court determined that design features in the contract specifications and drawings provided enough of an indication so that a reasonable bidder was led to conclude that he would not meet the type of subsurface conditions which the contractor encountered on that project. In Foster, the issue centered on whether the contractor should have expected to work in a wet or dry condition. The court relied upon and identified various specific design features which were inconsistent with the wet conditions encountered.

Here Appellant has argued that the Foster rationale applies to this RFP. Appellant points to the fact that the RFP was silent as to any specifications or requirements directly related to blasting or rock removal; points to the tight time frame set for the project, which it asserts also indicated an absence of having to dig in rock; and points to the equipment it listed in its offer, which the evidence has shown was understood by all to be non-rock work equipment. (FF 1-8, 14, 23, 24, 27, 32-34.) But for the argument relating to the equipment in its offer, which is discussed later in this decision (in regard to the effect of its offer), Appellant essentially is putting forth the proposition that the FS made a representation by silence. Here Appellant says it was reasonable for it not to expect rock, because the FS set out no rock removal specifications and gave no indications of expected rock. While Appellant is correct that the contract did not include rock removal specifications (FF 7, 14) that is not sufficient here to make this consistent with Foster. In Foster, the specifications reasonably and affirmatively led the contractor to expect certain conditions. That has not been shown here and we will not find such representation by silence. Accordingly, we find Appellant has not established a Type I differing site condition.

Appellant also argues that since the FS, under the CDOT provisions (which were incorporated in the contract), could have used a rock line item, the FS failure to specify any rock category should be

taken as an indication that rock would not be encountered. Again, we find this to be too tenuous a negative inference to be drawn. The use of the descriptions of “unclassified” and particularly the neutral term “structural excavation,” are sufficiently broad to cover a myriad of materials. (FF 7.) Further, Appellant has not shown any reliance on a specific course of dealing or trade interpretation of the CDOT provisions (FF 9). The testimony shows that Appellant’s proposal was submitted as it was because Appellant was confident that the tunnel was going through fill and Appellant had not in its prior work in this geographical area experienced this type of rock. Belief that the tunnel was to be constructed in fill and Appellant’s experience based on prior work in the area formed the basis of its proposal. The line item descriptions chosen by the FS to secure pricing did not form that basis. (FF 25, 28.) Further, Appellant testified that it had not previously performed a CDOT project. That lack of prior experience with CDOT and its clauses, negates any finding that Appellant relied on custom and usage or past practice in interpreting these clauses, in preparing its proposal. (FF 9.)

In assessing Appellant’s argument, we find that the Government did not convey to the Appellant either directly or implicitly what specific material the FS thought would be encountered below the road. Here, unlike in Foster, the Government did not set out specifications that were inconsistent or nullified the possibility of rock. Here the methodology as to removal was left up to the contractor. Most important, here the FS was attempting to place the risk of uncertainty of conditions on the contractor. (FF 14, 17, 23.) In this case, we believe the contractor should have understood that. Applying Foster in this case would be based, not on positive indications but rather on silence. We believe such an application here would extend the Foster reasoning too far.

TYPE II DIFFERING SITE CONDITION

A claim of a Type II differing site condition raises entirely different legal and factual questions from a Type I claim. A Type II differing site condition is a condition “of an unusual nature, which differs materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.” A Type II differing site condition can exist independent of whether the Government does or does not represent a particular condition in the contract. The clause is included in a contract to take out of the bidding process a contingency for conditions that would not normally be found. It is premised on the concept that certain conditions are so ordinarily encountered and so much an aspect of how work is done, that a contractor is entitled to expect (absent specific warning) that those conditions will be present. While operation of the clause requires an unusual condition, that is defined by the operative phrases in the clause, “differs materially from what is ordinarily encountered” and “generally inhering in work of the character.” Neither requires an absolute. There is nothing inconsistent with having undefined or unclassified excavation and also, under certain fact situations, finding a Type II differing site condition.

The burden of proving a Type II differing site condition is heavier than that of proving a Type I, as there is no clear written point of reference. See Charles T. Parker Constr. Co. v. United States, 193 Ct. Cl. 320, 333, 433 F.2d 771, 778 (1970). Notwithstanding that difficulty and notwithstanding the fact that Appellant relied more heavily on other theories of recovery (Type I differing site condition and mutual mistake), we have concluded that the facts as revealed in the record accord with a partial recovery pursuant to that portion of the differing site conditions clause which describes a Type II

differing site condition. To determine whether a Type II differing site condition exists, all evidence bearing on the issue must be evaluated. Chance Constr. Co., AGBCA No. 81-226-1, 84-3 BCA ¶ 17,603.

The dissent asserts that there is no substantial evidence to support a finding of a Type II differing site condition. It asserts that the conditions here do not meet the test of the condition being “of an unusual nature, which differs materially from those ordinarily encountered and generally recognized as inhering in work of the character provided in the contract.” The dissent says that there was no practice established. The dissents position cannot be reconciled with the overwhelming evidence. This is not a case where only one individual described what would be normally encountered and what was recognized as inhering in this type of work. Instead, this is a case where every Government witness acknowledged that fill should have been expected above a profile line connecting the top toe to the lower toe. Mr. Marah said, that the upper part of the project is through fill, that it was clearly shown on the profile and on the ground. He said, “We showed the location. It was highway fill from the toe of the fill on the south side to the toe of the fill on the north side”. When asked by the Board if a contractor would have been reasonable to expect that at least up to the upper to lower toe profile it would encounter fill material, Mr. Marah answered “Yes.”(FF 42-43, 49.) Mr. Watts, when he prepared his graphics for G-6, independently used a toe to toe profile to establish where the fill would ordinarily end. He said that the best one can do for deduction or assumption is to connect various lines between toes of the fill. He was trying to connect toe to toe. (FF 43, 46-47.) Ms. Jones-Crabtree, while reluctant, conceded that if there is a rule of thumb the anticipated bottom of fill would go from one toe to the other. She described Mr. Watts graphic in Alternate 2 as a middle ground for illustrating the bottom of fill. (FF 43, 45.) The cited testimony is from FS officials and a fair reading of that testimony surely establishes that what is ordinarily encountered and inhering in construction of a road of this nature is fill running from toe-to-toe. Finding rock instead of fill in the upper portion of a constructed highway of this nature is unusual. Finally, the outside expert provided by the FS, Mr. Self was quite clear that fill from toe-to-toe is how road construction of this type highway is ordinarily done and what one would expect. He said that you connect the toes and further said that he would think that any engineer looking at Drawing 5, would understand where existing ground and the bottom of fill would be located. When asked in relation to Watts’ graphic whether it would be reasonable for a contractor to expect the area showing the man walking to the road surface to be in fill, Mr. Self replied, “Yes. Since its below the ground you can’t see what’s there, you have to make some type of assumption, and basically, roughly a straight line interpolation is -- would be considered a reasonable assumption.” As he concluded, from his experience that is how most roads wind up being constructed, recognizing that there are going to be exceptions. (FF 44-45, 48.)

We find that the above evidence establishes that finding rock instead of fill at the heights encountered on this project was of an unusual nature and differed materially from the fill condition that is ordinarily encountered. Based on the testimony, the placement of fill from toe to toe certainly qualifies as being generally recognized and inhering in work of the character provided on the contract. Certainly, we acknowledge that the individuals on whom we rely did state that the profile line would not necessarily be absolutely straight and pointed out that there could be some variation. (FF 43.) However, the witnesses did not establish that variations would normally be significant or common place and the fact that there could be some variations in instances does not change the fact

that universally, everyone here had essentially the same expectation. One can pick out testimony to try to negate the above; however, the sense of the evidence is that the witnesses expected that in this below road excavation, at least through the normal range of fill, the contractor would not hit rock. What the contractor encountered below the normal range of fill was indeed a different story and thus the contractor's risk.

The conclusion of the dissent conflicts with the testimony and demonstrative evidence in this case. At best what the dissent shows is that there could be certain circumstances, which would vary to some small degree the extent of fill, as measured using a toe to toe connection. As we note in our quantum analysis, we have recognized that there can be some variations in the extent of fill and have taken that into account, along with other factors, in arriving at the percentage of costs we allow.

EXTENT OF TYPE II DIFFERING SITE CONDITION

Appellant has established a Type II differing site condition as to the rock within the ordinarily expected fill. We have used the toe-to-toe profile line to set the expected end of fill and mark the expected start of natural conditions, which could include rock. It is clear from the profile and testimony that while substantial portions of the excavation were expected to be in fill, a substantial part of the excavation was also to take place below the fill. (FF 44-45.) Since the Appellant has presented its claim and accumulated its costs on the basis of all rock, and there was no separate tracking of costs for rock in fill, as contrasted with costs of removing rock below and outside the fill (FF 67-68), the first step we must take in determining an adjustment is to decide how much of the total rock excavation was performed in the fill area.

Notwithstanding the criticism from the dissent, the most logical and accurate method to establish how much extra rock was encountered in the fill area is to first set out the toe to toe line (using Mr. Self's identification of the upper and lower toe on Drawing 5) and then plot where rock was encountered in the excavation above that line. We then take the rock encountered in the fill area as a percentage of the total rock encountered on the project excavation. It is reasonable and the photographs and testimony supported, that once rock was encountered, rock continued to the bottom of the excavation. (FF 43-44, 58-60.) We then can visually arrive at a reasonable percentage relationship between rock in fill and the overall rock. Once we do that, we then take that percentage, adjusted by any other material factors, and apply it to the total cost of rock removal, to arrive at a fair estimated compensation number for the rock in the fill.

Through photographs and the testimony of various witnesses, including Mr. Marah and Mr. Watts, we can place rock at locations set out in Photographs 9B, 11B and 12B. No one disputes these locations. These points are distributed (1) 18 feet from the north entrance, (2) roughly at the center line, and (3) on the south probably 10 feet from the center line. No one has questioned the reliability of the evidence. We also know that the rock at this site followed a pattern. It tended to rise starting lower on the north and getting higher on the south. If we plot the three identified points, we see that rock is well into the expected fill area (well above the profile line) and to some degree is moving upward, as described by the witnesses. If we then compare the area (in fill) where we have plotted rock (using the profile line as the bottom) against the total rock excavated (top of rock encountered

by Appellant, bottom of excavation), it appears that approximately 40 to 50 percent of the rock excavation performed by Appellant was in areas where the toe to toe profile called for fill. (FF 11, 43-44, 58-60.)

We recognize that this is an extrapolation and as such not precise. In assessing our use of a percentage, we take into account that the drawing profile we are using to establish the theoretical fill line and elevation of rock is not to scale and rock was not necessarily uniform and would have undulated to some degree rather than run in a totally straight line. Rock could have been higher or lower in places. (FF 43-47.) We take into account that the profile on Drawing 5 does not reflect the bend in the tunnel, which also affects how one measures the amount of rock encountered. (FF 10-12.) We take into account that at some locations, such as at Photograph 9B, the rock did not go across the full width of the tunnel at a uniform height (FF 58). We also take into account that the tunnel was longer on the north side of the center line than on the south side and that the plottings show a significant amount of rock (in what should have been expected as fill) was on that north side, including rock below the tunnel running to the lower toe (FF 12, 43-44). In determining what percentage of costs of the total rock removal we will allow for the Type II rock, we have taken all of those factors into consideration.

The dissent has chosen to reject all of the above and instead decides that Appellant encountered virtually no rock in the fill area. It relies on defining the location of rock based on B-2 and a general statement of Mr. Watts, which Mr. Watts showed (through his later testimony) did not take into account the photographic evidence and was an inaccurate generalization. (FF 46, 58-59, 61.) In fact, after viewing the photographs, Mr. Watts indicated that at some points his Alternative 1, which showed fill at a much shallower level than even Alternate 2 might be the better mirror of what was encountered, at least at that segment of the excavation (FF 46). The dissent's conclusion about the location of rock, based on B-2, and the rock's relationship to the profile line simply has no foundation. There is no way to reconcile with Mr. Watts' depiction the location of rock at 3 to 4 feet above the footer in 11B, and rock at least 3 feet above the footer in 9B and rock (of almost 6 feet) slightly to the left of the car at approximately 10 feet into south part of the tunnel (as shown on 12B).

The evidence we rely on for the location of rock was not created by Appellant. Rather, the evidence is from testimony of the FS witnesses including Mr. Watts, the author of B-2. (FF 58-60.) We find no reason or basis to reject the photographic evidence.

The dissent has challenged our extrapolation on the basis that it was not provided by either of the parties but was the result of an off the record extrapolation. Simply put, neither party made or offered the Board an extrapolation. However, the evidence used in the Board's extrapolation was provided at the hearing and since the Board has concluded that not all the rock encountered on the project was compensable, it was logical for us to find a method to separate out what was compensable from what was not. We do not apologize for our effort to use extrapolation. That methodology has been used by tribunals for this type purpose over many years.

One comment of the dissent calls for a response. The dissent asserts that the extrapolation will not be able to be certified to the Court of Appeals. We disagree. In making the extrapolation we are not relying on rejected or speculative benchmarks. Rather, we are making our extrapolation based on

hard evidence from photographs and testimony. We have described the plotting points we have used, what we have compared those points to, and have set out the parameters of the areas being compared. The method the Board used in coming up with the extrapolation has been clearly laid out in this decision. (FF 44-46, 58-60.) A court can clearly determine what the Board used and decide if it agrees. The Board has also made it clear that it has taken other factors into account in addition to simply comparing the areas. If a court does not agree, then it can draw its own percentage and conclusion from the data.

The dissent seems concerned that extrapolation was not briefed. While that may have been useful, it surely does not negate our result. There was extensive questioning at the hearing by the Board as to the profile line and height of rock. We do not expect that the matter was missed by the parties. Those participating in the hearing clearly understood or should have understood that the issue of the profile line and how that related to expected fill was of concern to the presiding judge. Further, during the hearing, on a unsustained objection, Appellant's counsel specifically stated that the Type II differing site condition claimed by Appellant involved digging in fill. (FF 70.)

ROCK IN NATURAL GROUND

In defending against Appellant's Type II claim, the FS relies on the presence of rock in the area and asserts that one cannot conclude that hitting rock here could be an unusual condition. In setting out its argument, the FS states that the alleged differing site condition that "R.N.G. hawks is the extremely hard rock (Complaint) encountered beneath the fill." In making its argument, the FS fails to distinguish between removing rock in ordinarily encountered fill versus removing rock from natural ground below and beyond that fill. In point of fact, we agree with the FS that on this contract, Appellant ran the risk of encountering rock, once it reached what one would expect to be natural ground.

Given the locale of the project, in the Rockies and the presence of visible rock in the area, we cannot and do not find that rock in the natural earth encountered on this project rises to a Type II differing site condition. The Board recognizes and has considered the testimony from Mr. Gabbett that he had not previously encountered this type of solid rock in the 200 to 300 prior projects he had performed. The Board also considered the testimony of Mr. Benintendi, who also indicated that he too had not, but for very limited circumstances, encountered this type of rock. (FF 25.) That said, however, we cannot ignore the physical setting of the project and evidence of rock in the area of the project. Further, various FS officials, who were also familiar with the area, testified that solid rock certainly was a condition that might very well be encountered once the Appellant reached natural ground. (FF 20, 35, 36.) The Appellant carries the burden of establishing a Type II differing site condition. Here we have not been presented any independent data or published geological data from which we can conclude that solid rock is an anomaly in southwest Colorado. Absent such evidence, Appellant has not met the burden of establishing that solid rock in this area in natural ground was so unusual so as to constitute a condition not normally inhering. Rather, here the driving force in Appellant's decision to bid as it did, was the expectation of fill going the full depth of the excavation and not the belief that once it hit natural ground, it was assured of an absence of solid rock. (FF 28.)

The Type II differing site condition, therefore, only exists in that segment where Appellant should have expected to encounter fill it does not exist where excavation indicated natural ground.

APPELLANT'S CLAIM THAT FS IS BOUND BY ITS PROPOSAL

Appellant has contended that the FS, by accepting Appellant's proposal, which on its face did not include any equipment dealing with rock excavation or blasting, contracted for the performance method specified in Appellant's proposal, *i.e.*, using equipment set forth in the proposal. To the extent that the Appellant was required to conduct contract work using equipment of a different nature than that proposed because it encountered unexpected rock, the Appellant urges that we find that to be a change. The facts show that the technical team that reviewed Appellant's technical proposal recognized that Appellant had no rock removal equipment in its proposal and further recognized, at least on the face of the proposal, that Appellant showed no contingency dealing with rock conditions. (FF 32, 34-35.)

The award provision specifies that the award consummates the contract, which "consists of (a) the Government solicitation and your offer, and (b) the contract award." This language is clear and not confusing. (FF 2.) The Appellant is correct in stating that its proposal is part of the contract between the parties. To find otherwise would require ignoring the award statement. That, however, does not entirely dispose of the matter. The proposal does not stand alone, nor does it substitute for the RFP. Rather, it must be read in conjunction with the RFP with every attempt to harmonize the two.

The testimony shows that the technical team, although it recognized that Appellant's proposal contemplated no rock, did not conclude that Appellant's proposal was so qualified or conditioned that it was Appellant's intent to negate the risk of encountering rock and shift the risk of rock on to the FS. Rather, as the COR testified, the technical team believed that the Appellant hoped, as did the technical team, that no rock would be encountered. The technical team, however, also believed that Appellant was assuming the risk of encountering rock. In coming to that conclusion, the technical team took into account the geographic setting of the project and the fact that the FS clearly made no specific representation as to conditions. As pointed out by the FS engineer, COR and the CO, they did not see the Government being responsible to delve into the mind of contractors to understand their assumptions or mind set. We are convinced, based on the testimony of the various FS personnel, that the FS officials did not specifically know what was under the ground. Their view was that it was up to the proposer to decide what risk the proposer was willing to take. They did not know whether and to what degree the proposer consciously assumed that risk. (FF 23, 32-35, 39.) In arriving at our conclusion on this matter, we have considered the testimony of all of the FS witnesses and find the evidence sufficient to establish the FS position.

Appellant cites among its authorities, the decision of ENG BCA in GAI Consultants, Inc., ENG BCA No. 6030, 95-2 BCA ¶ 27,620, to support the proposition that the FS, once it accepted Appellant's offer was bound by the methodology indicated in Appellant's proposal. In GAI, the Board addressed the effect of Appellant's proposal as it related to when work would be performed. The Appellant's proposal clearly indicated that it would be working in the spring, summer and fall and not in the winter. The Corps of Engineers required work to continue into the winter and the

costs incurred by the contractor in having to perform winter work were found to be an extra, since work in the winter was at odds with Appellant's proposal and the proposal had been incorporated into the contract. The GAI proposal, however, unlike that here was a detailed statement of work which covered multiple pages. Moreover, that contract contained a clause at Section 10.10, which stated that "Offerors are invited in their proposals to suggest improvements on the Scope of Work so long as the minimum requirements are met. Any substantive changes will be dealt with during the negotiation (best and final) process for those within the competitive range." Other clauses gave the offerors broad range to vary and alter items set forth by the Corps in its planned specifications. The situation in GAI, was quite different from what was being asked for here, for here as discussed below, the information asked for was much less expansive and did not necessarily supercede or alter the FS specifications so as to shift the risk as Appellant claims.

Appellant says that once the FS accepted the proposal on this project, it accepted the Appellant's methodology and thus must pay for costs beyond that scope. The Government counters, contending that the proposal did not "trump" the solicitation. The FS states that the solicitation clearly conveyed that the FS was not guaranteeing or even representing the type of conditions below the road and that excavation and its pricing was a risk taken on by the contractor. The FS says the proposal should have no bearing in our analysis, for otherwise the contractor can pick and choose what it wants. The FS also contends that because the contract said that the award could be made without negotiation, the proposal is not part of the contract.

As a threshold matter, we repeat that the contract includes what the RFP said would be included. That includes the Appellant's proposal. The fact that the solicitation stated that award could be made without discussion is not significant, and we reject the FS argument which relies on that point. By inviting a proposal, the FS invites the possibility of change. Once the FS received Appellant's proposal and made award based upon the proposal, the proposal became part of the contract and the language of the proposal is not to be ignored. (FF 2.)

That said, however, the FS is correct that the proposal, once submitted, does not necessarily override or change the RFP. Instead, the two documents need to be looked at together. One must look at the respective documents and what was contained within them. M.A. Mortenson Co. v. United States, 29 Fed. Cl. 82, 96 (1993), Fortec Constructors v. United States, 760 F. 2d 1288, 1291-1292 (Fed. Cir. 1985). Among other things, one must look at what the offeror was being asked to provide. As noted above, the operation of the proposal and solicitation in this case was very different from the situation in GAI. There, the contractor's proposal, in large measure, was intended to serve as a specification. The contractor was invited to provide its own methodology as to various aspects of the work. Here, the role of the proposal was much more limited. The excavation of the tunnel here was defined in the solicitation. What was left to the contractor was to tell the FS how it was planning to proceed so that the FS could use that to establish the contractor's capability to perform the work. Looking at the surrounding circumstances, the proposal, asked for by the RFP, was not asking for the offeror to set the specifications in or through its proposal. That is particularly the case here, where the RFP provided at Section L, (a)(2) that contractors could provide alternate proposals that deviated from the requirements, provided the offeror present a proposal for performance of the work as set forth in the statement of work. Under that clause the Appellant could have made it clear

that it expected to get paid an extra, if it encountered rock or specified that its proposal was only at the price if the precise equipment was used. The simple fact is the Appellant could have disclaimed the risk by using the clause. Appellant did not do that. (FF 2-7, 10-14.)

To define the obligations of the parties in this contract, we need to apply contract interpretation principles to both the RFP and proposal. First, there was nothing in the RFP (but for the differing site condition clause, if the facts warranted its operation) which indicated that the contractor would be paid extra excavation costs, if it encountered rock. Second, on their face, the two items, “unclassified excavation” and “structural excavation” appeared to be inclusive of all material. (FF 6-7, 14.) Given that, the Appellant in order to establish that the pay items were conditioned, must show that its proposal, which was its offer, either reasonably did, or should have put the FS on notice that Appellant was not bidding the pay items as all inclusive, but was excluding from them the coverage of rock. As the drafter of its proposal, Appellant carried the obligation of making its position clear if it wished to vary the terms of the RFP. As long as the FS (following the doctrine of *contra proferentum*) could reasonably have read the Appellant’s proposal in the manner that the FS did, which in this case was the belief that Appellant was buying the risk of rock (FF 18, 23, 33-35), then the FS did not bind itself to a change in the RFP. The FS interpretation need not be the only possible interpretation but just one that falls within the zone of reasonableness.

In some respects Appellant’s position has appeal from an equity standpoint. It appears that the FS took a deal that on its face looked almost too good to be true or at least a proposal that was not well thought out by the Appellant. The FS knew that Appellant appeared to be bidding without a contingency. The FS’s estimate, which was reasonably close to that of the Appellant, was based on no rock. Further, while there is a lack of information as to the specifics of how the other offeror structured its price, that offer was considerably higher than either the Appellant or FS estimate. That said, however, there is no question that the FS intended to place the risk of subsurface rock on the Appellant. There is also no question that the FS did not hide that intention and a reasonable proposer should have recognized the FS placing that potential risk on the contractor. (FF 23, 29.) Simply put, the Appellant should have walked away or otherwise clearly conditioned its proposal. To proceed on the basis that the FS would pay if it hit rock was not prudent.

The FS team did not wish to put itself inside the Appellant’s head, nor did it want to make assumptions as to what risk the Appellant was willing to accept. While it recognized that there was no contingency for rock and had that as a concern, the FS did not know for a certainty what conditions would be encountered, nor did it know to what extent Appellant (particularly given the rock outcroppings and locale of this project) was willingly accepting the risk; or as the COR described, the gamble. The FS hoped that no rock would be hit, but took care not to make that representation in the solicitation. It included a clause that allowed the contractor to take exceptions to the solicitation and that could have included an exclusion of rock. The contractor did not avail itself of the clause. (FF 16, 19, 20, 23, 35.) Further, as noted above, we do not find that the Appellant’s proposal language was adequate to put the FS on notice that the Appellant’s price excluded the risk of rock. For those reasons, we do not find the FS actions to be unreasonable or wrong in awarding to the Appellant. (FF 16-18, 23, 34-39.) While contingency bidding is disfavored, it is not unknown, nor is it legally impermissible, for the Government to go out with an RFP surrounded by contingency. Where the Government clearly places a risk and puts the

contractor in a position to have to bid a contingency, the contractor proceeds at its own peril, absent relief under a particular clause. See PCL Constr. Servs., Inc. v. United States, 2000 WL 1474486 (Fed. Cl. (Sept. 20, 2000)). Accordingly, the Appellant's proposal, as submitted, did not negate the risk it assumed. Appellant had to do more if it wanted its proposal to negate the otherwise clear risk. Appellant had to be more explicit than it was here.

MUTUAL MISTAKE

In order to establish a mutual mistake of fact, one must show that the parties to the contract were mistaken in their belief regarding a material fact, that the mistaken belief constituted a basic assumption of the contract, that the mistake had a material effect on the bargain and the contract did not put the risk of the mistake on the party seeking reformation. National Presto Indus. v. United States, 167 Ct. Cl. 749, 338 F.2d 99 (1964), Dairyland Power Co-Op v. United States, 16 F.3d 1197 (Fed. Cir. 1994).

The first element for establishing mutual mistake is that each of the parties to the contract had to be mistaken as to the same material fact. For that to be the case here, both Appellant and the FS would have had to believe that in its performance of the excavation, the Appellant would hit no solid rock, that the pay items were not inclusive, and that if Appellant encountered rock, it would be paid for it separately. The evidence makes clear that for most of the rock encountered, that encountered outside the fill area, such mutual mistake did not exist here. For here, although the Appellant did not expect rock, other than rock with which it could use standard excavation equipment and the Appellant expected to excavate only in fill (for the full depth of the excavation), the same cannot be said of the FS's view of the contract. Although the FS entered the contract expecting much of the excavation to be in fill, it also expected significant excavation to occur in natural ground, which it believed may or may not have been rock. The FS simply did not know. Even more important as to the issue of mutual mistake is that the FS, notwithstanding its belief about expecting fill to at least some level, believed that the contract entered into by the Appellant put the entire risk of encountering rock upon the Appellant. (FF 23, 34, 39.) When the FS accepted Appellant's offer, it did not think that it was accepting a bid that disclaimed what the FS saw was a stated and identified risk placed on the offerors as to the unidentified underground conditions. The FS did not think it was entering into a contract, where it would pay for rock, if rock was encountered. Therefore the requisite facts to establish mutual mistake do not exist.

CUSTOM AND USAGE OF CDOT CLAUSES

Appellant in presenting this appeal has placed several other issues before the Board which we will address briefly. Appellant put forth evidence to attempt to establish that the FS deviated from standard CDOT practice in interpreting CDOT specifications and that had the pay items been administered by CDOT, the Appellant would have been paid for all rock.

Appellant's evidence, which was the testimony of its expert, Mr. Krueger, does not convince us that there was an established procedure under which CDOT always paid for rock by modification. At best, his testimony indicated that CDOT's determination of payment was done on a case-by-case

basis. The Board notes that despite FS concerns, the Board took no negative inference from the fact that Mr. Krueger was employed in a family business, nor does it even peripherally find that Mr. Krueger was attempting to hide this matter. The FS challenge to Mr. Krueger on the basis of who he worked for and the fact he did not state that it was a family business in his resume is simply not well placed. One can gain expertise as easily in a family business as in working for a non-family employer. That said, on the matter of CDOT practice, we found the testimony of Mr. Self of CDOT to be more convincing. He has worked with CDOT clauses throughout his career. He pointed out that a modification depended on the circumstances, a point not in real conflict with Mr. Krieger. One cannot define a custom and usage or trade practice on a matter, which sometimes is handled one way and at other times in a different manner. Finally at all times the Appellant knew this contract would be administered by the FS and not by CDOT, and even if Appellant had established that CDOT had a particular practice, the Appellant still would have failed in its claim because Appellant did not establish reliance. The evidence showed that Appellant had no previous experience or special familiarity with these clauses. (FF 9.)

DUTY TO VERIFY

Appellant did not directly argue before us whether it is entitled to relief because of a unilateral mistake that the FS should have been aware of. There was evidence about the offer, about concerns of the technical team as to an absence of a contingency for rock and finally evidence of inquiry and verification. Notwithstanding the parties' lack of argument on this issue, because of the evidence presented in this case, we provide our comments.

Among the elements needed for a contractor to recover on a unilateral mistake, the contractor must show that the mistake was (1) due to a clear cut clerical, arithmetic or misreading of the specifications, (2) prior to award, the Government knew or should have known that a mistake had been made, (3) that the Government's request for verification was inaccurate and (4) if reformation is sought, clear and convincing evidence be presented of the intended bid without the mistake. Worldwide Parts, Inc., ASBCA No. 38896, 91-2 BCA ¶ 23,717; Triax Pacific, Inc., ASBCA No. 41891, 94-1 BCA ¶ 26,380, *recon. denied*, 94-1 BCA ¶ 26,529. The case law specifically holds that where the mistake is a mistake in judgment, a contractor who seeks relief after award is not entitled to compensation. Regur v. United States, 420 F.2d 709, 190 Ct. Cl. 327 (1970). Business judgments involve matters such as assessing the complexity of a task and determining the amount of time and effort that will be required. Liebherr Crane Corp. v. United States, 810 F.2d 1153 (Fed. Cir. 1987), Aydin Corp. v. United States, 229 Ct. Cl. 309, 669 F.2d 681 (1982). Here the Appellant made a judgment call as to the extent of fill under the surface. That judgment, at least in part, was incorrect.

While we find no relief available for unilateral mistake in this case, there are concerns as to some of the procedures used by the FS, and in particular the lack of communication between the technical team and the CO, as to the knowledge of the technical team that the Appellant did not include any apparent costs for rock. It appears that the CO proceeded with verification without getting relevant input from the technical team either as to the procedures planned by Appellant or the reasonableness of Appellant's costs for segments of the work. The evidence shows that the technical team had serious concerns as to Appellant's failure to address rock. While the COR may have believed that

the contractor was buying into a gamble, neither the COR or other members of the technical team were provided or sought out information on whether the gamble was reflected in Appellant's pricing. (FF 33-39.) Much of this could have been resolved if the technical team and the CO communicated before final award. They did not. We understand the FS rational for reviewing the proposal initially without pricing; however, at some point, price should be taken into account or otherwise award is made in a vacuum. Here the CO did talk to one engineer, however, that individual did not testify and thus, we do not know the extent of his role as to the technical team or the extent of his dealings with the CO. (FF 39.) We point out that we see no improper motivation on the part of the FS in awarding this solicitation. The FS was attempting to secure contingency offers and the law does not prohibit the Government from soliciting contingency bids. That said, what the procurement system calls for is a system where the Government pays a fair, but not excessive price for work and not a system where the Government seeks to secure a windfall. Here, the FS appears to have secured a windfall in the award. There is, however, no basis for legal relief under the bidding error provisions. A mistake in judgment falls on the contractor. That is what happened here. Appellant assumed that the fill would continue to the bottom of the excavation and that proved not to be the case. Moreover, Appellant has to accept some responsibility by failing to read the contract carefully and to understand the risk it was taking.

We are also troubled by the fact that the only other proposal was destroyed. The record is unclear as to when this took place. The record indicates only that Appellant asked for the other proposal in discovery and that Government counsel stated that it was no longer in the Government files because other (unawarded proposals) are routinely destroyed at the end of the design phase, there being no requirement for retention. We note that even the name of the other proposer was redacted from the letter to file memorializing the solicitation and award process. (FF 38.) Research has not revealed such a requirement.³ Withholding the name of the other proposer makes more difficult the possibility of a contractor's independently developing such evidence were it to choose to attempt to do so. We disagree with the dissent that 48 CFR 3.104-5 and 4.802(e) are relevant to the expressed concerns. While there are prohibitions on unauthorized disclosures, maintaining such proposals would not necessarily lead to unauthorized disclosures. FAR 3.104-5(f)(1) anticipates circumstances under which such documents remain in existence and available to Congress, its committees and subcommittees, a Federal agency, the Comptroller General, or an Inspector General of a Federal agency.

FS FAILURE TO PREPARE ITS ESTIMATE ON THE BASIS OF ROCK

One final matter bears comment. Appellant argued that the FS failed to follow the regulations in that it did not prepare its estimate to reflect how the work would be completed. There is no question that the FS chose to estimate on the basis of no rock, even though the FS says that Appellant should have expected some rock. (FF 21-23.) The FS had to use some basis for preparing its estimate.

³ This was a negotiated procurement governed by FAR Part 15. FAR Part 14 sealed bid procurements provides for public bid openings, except in the case of classified bids. FAR 14-402-1 and 2. While Part 15 does not provide for a public opening of proposals, neither does it state that the mere identity of unsuccessful offerors should be withheld from the successful offeror or from the public.

Here it chose to estimate on an optimistic scenario, rather than to use a more conservative approach. (FF 23.) There is no legal prohibition to the FS making that choice. Finally, and even more important here, the Appellant never saw nor relied on the FS estimate. Thus, we do not find that the manner used by the FS to estimate, justifies or establishes any basis for compensation.

QUANTUM

The evidence in this appeal does not allow us to arrive at a precise damage figure, because one cannot segregate to a certainty all rock which was Appellant's responsibility (that in what should have been expected to be in natural ground) from the costs of removing rock in the fill area. It is, however, well settled law that absolute certainty is not necessary where it is clear that damages occurred. Petrovich v. United States, 421 F.2d 1364, 1367-1369, 190 Ct. Cl. 760, 766-769 (1970); Foster. Here the Appellant set up an accounting method to segregate its rock costs and has not commingled the claim with outside costs. (FF 66-68.) Here, we have been able to plot with reasonable accuracy what proportion of the rock work was in fill and what was in natural ground. Taking that together, we can reach a reasonably accurate determination as to damages. (FF 62.)

By plotting out the location of identified rock and drawing lines connecting areas as discussed above to arrive at a percentage for rock encountered in fill areas, taking into account that there was rock encountered in the unclassified excavation (shallow) on the south approaches to the tunnel, taking into account that rock was not entirely uniform at some portions of the north end of the tunnel, taking into account that the amount of rock was considerable from the center line to the south end, we have concluded as discussed earlier in the section of the findings headed "Performance and Location of Rock", that 40 to 50 percent of the rock excavation took place in what would normally be expected to be fill. (FF 62.) That said, however, we recognize that we are using an approximation and recognize that the profile line would likely be subject to some undulation. We also recognize that there cannot be any exact certainty as to the precise amount of rock in the fill, even as compared to total rock. Accordingly, we have decided to take a conservation approach to the quantum and conclude that the best measure of damages is to apply to the total dollars expended for rock, a somewhat lower percentage than the 40 to 50 percent of volume earlier identified. We conclude that the best measure of the Appellant's costs due to rock in fill is 35 percent of the total rock cost identified in its claim. (FF 51, 58-62.)

We also have considered the fact that the FS has challenged the overall costs claimed by Appellant for rock removal. However, that challenge primarily centered on claims of contractor inefficiency and equipment breakdown. (FF 69.) We do not find the FS challenges as to efficiency and equipment to be persuasive. While in hindsight one can assert that blasting may have been more efficient than rock hammering, we do not find it unreasonable that the Appellant started with rock hammering and only turned to blasting when the former would not work. We also do not find it unreasonable that it took some time for Appellant to secure a blaster. (FF 52-56.) We therefore do not reduce costs for that reason. Also, the FS has attempted to isolate certain breakdowns of equipment and inefficiencies. We recognize that there are some breakdown and inefficiencies which are not related to rock and which appear in the diaries. However, the Appellant stated that it did not include those costs in its quantum. (FF 67-69.) Moreover, some inefficiency and equipment

problems can be expected and when they occur during changed work, absent negligence or fault by the contractor, they are generally compensable. Further to the extent there were inefficiencies in rock work, the costs are distributed over both the rock in fill and the rock in natural ground.

To the extent that Mr. Marah suggested double counting, Mr. Gabbett's explanation as to how he coded the work convinces us that Appellant avoided to the extent possible any double counting. The fact is that at no time did the FS challenge the contractor's coding system or the contractor's statements nor that of its consultant, Mr. Jongeneel, that the only items in the claim were additional costs associated with rock and that costs, such as the basic removal of the soil, was not attributed to the codes used in the claim. Appellant provided a summary of its costs and advised that the backup data was in the hearing room. The backup data was never put in issue. (FF 66-68.)

This is not a total cost claim. Appellant claimed costs only associated with rock work. We have proportionally reduced the costs claimed, paying Appellant only for the work that was in unexpected rock and not paying for rock excavation that predictably could have been encountered in natural ground. (FF 62.) We use as our baseline for applying the percentage, \$61,074.99 - the sum Appellant has claimed as costs for rock excavation. We do not include in those costs the back-charges made by the FS. The Appellant agreed to those reductions in a modification. (FF 63.) That modification is an accord and satisfaction. When we apply 35 percent to the dollars noted above, we conclude that Appellant is entitled to \$21,383.24, plus CDA interest from the date of the claim on the basis of a Type II differing site condition.

The dissent has challenged the calculation of costs and essentially has asserted that even if there is entitlement, Appellant is being paid twice for the removal of 563 cubic yards of material, first, at the contract rate for item 206 and then again as part of rock removal. The evidence as shown above is otherwise. Mr. Gabbett explained in detail that costs dealing with rock were coded as 512 or 513. To assure that the items coded for rock were truly rock and not spilling over into other activities, the coding was done on daily time cards and Mr. Gabbett and his supervisor would discuss daily the appropriate equipment hours for the different phases. Mr. Gabbett stated he was comfortable with the accuracy of the coding and noted that they keep the time cards as they do to analyze the projects and put that into their data base. Appellant uses the data on bidding the next job. More specifically, the Board directly questioned the Appellant as to whether the dollars being claimed here were dollars that had already been included in Appellant's bid for excavation and Mr. Gabbett explained that the dollars he had in his bid to spend on 206, he coded to 206. He further stated he could provide a breakdown just like he had for 512 and 513 of the equipment and the time he allocated for excavation of the structure under 206. Mr. Gabbett's testimony was also supported by Mr. Jongeneel, a claims consultant who Appellant brought in to help it put together the claim. Mr. Jongeneel confirmed that during the work on the project, the Appellant set up a separate account for additional costs of rock excavation and Appellant coded to that account costs that were over and above what would have been required under the contract. At the same time they were coding rock costs they were also coding other labor and equipment hours to the unclassified excavation and the structural excavation bid items. In his opinion, to his knowledge, R.N.G. made a concerted effort to segregate the additional costs of rock from the contract items 206 and 203. (FF 66-68.) The FS has

provided us no evidence to support rejecting Mr. Gabbett's testimony. Absent simply disbelieving Mr. Gabbett's testimony, there is no evidence of double counting.

Finally, the dissent challenges costs of mobilization, indicating that it might be costed twice. None of Appellant's claimed costs are broken down to mobilization and demobilization. To the extent there are costs associated with that the costs are spread throughout various items. Further, there was no evidence to indicate that mobilization would have been a significant cost factor as Appellant was located in the general vicinity of the project. (FF 25.) Finally, we have used essentially a jury verdict method here and in applying 35 percent rather than a higher overall figure to the rock costs we believe we have accounted for elements of uncertainty.

DECISION

Appellant's appeal is granted in the sum of \$21,383.24, plus CDA interest as compensation for having to remove rock in the fill area. The remainder of Appellant's appeal is denied.

HOWARD A. POLLACK

Administrative Judge

Concurring:

ANNE W. WESTBROOK

Administrative Judge

Separate Dissenting Opinion by Administrative Judge HOURY.

I would deny the appeal. Any reader who has persevered through the previous 45 pages of slip opinion is unlikely to endure many more. Thus, the first four pages of this slip opinion are limited to a capsule presentation of the differences between the majority decision and this dissent. If the reader remains interested, the next six pages present a decision in the appeal that is consistent with Appellant's claim, the Contracting Officer's (CO's) decision, the evidence presented by the parties at the hearing, and the issues briefed by the parties, rather than as the evidence and issues have been recast by the interjection of the majority. The last 11 pages represent a critique of some of the objectionable portions of the majority decision.

This appeal arose under Contract No. 50-82X9-7-150-SM, between the Forest Service, U. S. Department of Agriculture, and R.N.G. Contracting, Inc., of Norwood, Colorado (Appellant). The contract was awarded based upon a competitive solicitation and a determination by the Forest Service that Appellant's proposal represented the best value (Findings of Fact (FF) 4).⁴ The contract required the construction of a pedestrian tunnel at a 9,000 foot elevation in the Rocky Mountains

⁴ References to Findings are to dissent Findings unless specifically indicated otherwise.

under a section of Colorado Highway 145 in southwestern Colorado (FF 1). The tunnel was located under a section of highway constructed in 1905 over a fill slope, as opposed to a cut slope (FF 8). The excavation, 18 feet at its deepest point, was required for the tunnel (563 cubic yards for bid item 206). Excavation was also required for the north and south approaches to the tunnel (536 cubic yards for bid item 203). The excavation was unclassified (unknown, and not precluding rock). The plans showed a large rock outcropping less than 50 feet from the tunnel and 2 feet from the highway. Photographs of the vicinity indicated a rugged, mountainous terrain (FF 1, 3). During the excavation Appellant encountered rock requiring blasting to remove that it claims it had not priced into its contract. I find no differing site condition, and thus would deny the appeal.

The majority decision holds that Appellant encountered a differing site condition,⁵ concluding that Appellant should not have anticipated rock above a majority created, subjectively established, theoretical-hypothetical fill line⁶ said to connect the upper toe of the fill with the lower toe. Based on an attempted “jury verdict” approach, the majority conclude that 40 to 50% of the rock excavated was above the majority’s line. The majority then award Appellant 35% of its claim to account for elements of uncertainty. The precedent established by the majority and the attendant injustice warrant this dissent, even if the amount at issue might not.

First, I dissent because the majority decision does not meet the legal requirements for recovery as set forth in the Differing Site Conditions clause (FAR 48 CFR 52.236-2), that the condition be “an unknown physical condition at the site, of an unusual nature, which differs materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.” The natural rock in an 18 feet deep excavation under highway fill in a 9,000 foot high mountainous area, that might protrude through a subjectively established, theoretical-hypothetical straight fill line, because the underlying rock is jagged, uneven, undulating, and convex, does not meet this test. Natural ground that is rock in mountainous areas is by its very nature jagged, uneven, undulating, and is just as likely to have a general convex shape below highway fill as it is to have a concave shape. Thus, the majority have established a general legal precedent for a differing site condition associated with highway fill that ignores the language of 48 CFR 52.236-2, and should not be followed.

⁵ See Federal Acquisition Regulation (FAR) clause at 48 CFR 52.236-2, Differing Site Condition.

⁶ Since the issue relates to the volume of rock above a surface, the discussion should relate to a theoretical-hypothetical “fill surface,” or fill plane, rather than fill line. Further, the “fill surface” will follow the road grade and/or banking. Thus, the slope of the fill surface that has been made an issue by the majority could be other than flat over the width of the tunnel. For ease of comparison with the majority decision and the record, use of “line” will be continued.

All the witnesses and in particular, Mr. Watts,⁷ described the subjective nature and uncertainties of even establishing a theoretical-hypothetical fill line, and thus cast serious doubt on the purported definitive standard the majority seek to impose as a differing site condition for highway fill. Further, Appellant did not utilize or rely upon a theoretical-hypothetical fill line in pricing its offer, as it expressly chose to include no contingency for rock to gain a competitive advantage (FF 5). Given its business decision, the contract should not now be reformed.

Second, I dissent because even if the majority decision met the legal requirements for a differing site condition, the majority decision is not based on substantial evidence, contrary to section 10(b) of the Contract Disputes Act (41 U.S.C. § 609(b)). Contrary to the majority's conclusion, there simply is no probative evidence that undisturbed, dense rock, requiring blasting to remove, existed at a point 2-to-3 feet above the trail, 18 feet inside the tunnel (majority FF 58).⁸ The majority then use Government Exhibit 6, B-2, which the majority discredits the accuracy of, to determine where this point 2-to-3 feet above the trail is, in comparison to the majority's subjectively established, theoretical-hypothetical fill line, which is not shown on B-2, and which has no relationship to the trail. The majority then uses this point, and two other similarly established points, to reach the conclusion that 40-to-50% of the volume excavated above the majority's line was rock requiring blasting that Appellant should not have expected, even though it is clear Appellant specifically disregarded the possibility of encountering rock to gain a competitive bidding advantage (FF 5).

The approximations and extrapolations made by the majority, even if based on substantial evidence, even for a jury verdict, are not susceptible of reasonably accurate verification, or of being forwarded

⁷ See heading below entitled, **Majority Decision/Differing Site Condition/No Substantial Evidence**.

⁸ The presiding judge/majority fail to distinguish "rock" that is structural backfill or scalable "rock," from undisturbed, dense "rock" requiring blasting to excavate. Only the latter formed the basis of Appellant's claim. The former two do not. See headings entitled **Majority Decision/Differing Site Condition/No Substantial Evidence** and **Majority Decision/40 to 50% Rock/No Substantial Evidence**.

as a certifiable record to the U. S. Court of Appeals for the Federal Circuit. Thus, the majority's conclusion is based on extra-record material that is neither judicially noticeable nor a part of the evidence, and cannot stand. Johnson & Case v. United States, 223 Ct. Cl. 210, 618 F.2d 751, 757 and fn. 4 (1980). In any event, the only probative evidence shows that no dense rock, requiring blasting to remove, protruded above the majority's imposed line. See the heading below, **Majority Decision/40 to 50% Rock/No Substantial Evidence**.

Third, even if the majority decision met the legal standard for a differing site condition, and even if it were based upon substantial evidence, the calculation of the 35% amount is patently incorrect. The majority calculated the 35% as a proportion of the rock above the majority's line to the overall quantity of rock only in the tunnel excavation. However, even under the majority decision, Appellant should have expected to encounter rock in the excavation for the north and south approaches to the tunnel, and in the location of the tunnel, below the majority's subjectively established, theoretical- hypothetical fill line. Thus, the calculation of the percentage of rock above the majority's line, is much less than 35% when calculated as a percentage of the total rock encountered. Further, an amount for the cost of the delay in securing a blasting subcontractor, and for the cost of the subcontractor's mobilization and demobilization should be subtracted from any recovery. Finally, since the majority decision pays for the cost incurred of "rock" excavation, Appellant's claim must be reduced by the "normal" excavation Appellant anticipated but did not perform. For example, since Appellant bid \$23.05 per yard for excavating item 206 under the tunnel, and there were an estimated 563 cubic yards of structural excavation there, \$23.05 times 35% of 563 cubic yards is \$4,542.

There are many other troubling aspects of the majority decision. For example, the majority decision concludes that:

What the procurement system calls for is a system where the Government pays a fair but not excessive price for work and not a system where the Government seeks to secure a windfall. Here, the FS appears to have secured a windfall in the award.⁹

Consistent with this conclusion, the majority decision pays little regard to the terms of the contract or to the probative evidence, and strains to rewrite the law of differing site conditions, by providing what it deems to be an equitable remedy where a legal one does not exist. The effect of the majority decision, besides not enforcing the terms of the contract, is to undermine the integrity of the procurement system by providing a remedy and a reward for a contractor whose proposal was properly, but imprudently based on not encountering rock to secure a competitive advantage (FF 5). The detriment here goes beyond disregarding the contract terms, to the actual and potential contractors who realistically assessed the probability of encountering rock, but did not receive the award, or did not bid.

⁹ Majority slip opinion, page 40.

Another expressed source of concern in the majority decision is the Government's \$269,921 estimate for the work, which included no contingency for blasting rock. However, this estimate was prepared for internal Governmental purposes, was not disclosed to Appellant or any other potential offeror, and therefore, could not have been relied upon in any way for purposes of formulating offers. Unfortunately, of little or no concern in the majority decision is the fact that the solicitation of offers indicated on its face: "Price Range: Between \$250,000 and \$500,000." Nevertheless, Appellant submitted a \$229,748.88 offer, testifying that it could not remain competitive if it included a contingency for rock, and that it could point to no contract document that guaranteed the depth of fill, or the absence of blasting rock, under the highway that would be encountered during excavation (FF 5).

Another expressed source of concern in the majority decision is that the Government secured its "windfall" because it failed to open discussions about the absence of a contingency for blasting rock in Appellant's proposal. In this regard, the technical evaluators could only infer that Appellant did not anticipate dense rock requiring blasting (as opposed to scalable rock), because the equipment listed by Appellant in its proposal was incapable of excavating dense rock. They had no access to Appellant's pricing (FF 4). Further, the material to be excavated was unclassified, and the evaluators properly assumed that Appellant had accepted the risk of encountering dense rock. Moreover, Appellant's offer for items 203 and 206, for the excavation, and the subject of Appellant's claim, was \$27,090 versus \$19,944 for the Government's estimate. Thus, while one could infer from Appellant's equipment listing that Appellant did not anticipate blasting rock, Appellant's price offer, which was not tied to the equipment listing, could have included such a contingency. (FF 5.)

Given the unclassified nature of the excavation, Appellant properly, but (as it turns out) imprudently, failed to include a contingency for the risk of encountering rock requiring blasting in order to excavate. However, this was not a proposal deficiency, and did not mandate that the Government open discussions. No duty to clarify arose.¹⁰ Thus, the contract awarded to Appellant was consistent with applicable law, and should be enforced as written. There is no evidence suggesting that Appellant utilized or relied upon the majority's subjectively established, theoretical-hypothetical fill line, as Appellant expressly chose to include no contingency for encountering rock (FF 5). The majority's position was never proffered or litigated by Appellant, and Appellant's presented no evidence on this issue (FF 9). Indeed, the record shows that Appellant's counsel attempted to discredit the testimony now relied upon by the majority to support recovery for Appellant. The majority's use of this evidence for a different purpose, without notice to the parties, is prejudicial. I also dissent from the majority's decision determined attempts to address procurement policy matters, and to decide matters that were unnecessary and judicially imprudent to address because they were matters that were not presented or litigated, and therefore matters with respect to which the record was not fully or adequately developed. These gratuitous forays include: (1) the majority decision discussion of the Government's duty to verify offers, (2) the majority decision discussion of

¹⁰ See for example, SOS Interpreting, Ltd., Comp. Gen. Dec. B-28747.2, 2001 CPD para. 84, where the agency was not required to discuss the bidder's high price as a weakness, even though the high price eventually precluded award.

the Government's duties in preparing estimates, and (3) the majority decision comments regarding the Government's obligations to retain the proposals submitted by unsuccessful offerors.

FINDINGS OF FACT

1. Highway 145 was a two lane highway, approximately 28 feet wide. It ran in a northwest-southeast direction at an elevation of approximately 9,000 feet at the tunnel location. The contract drawings and testimony indicated a "Large Rock Outcrop" less than 50 feet from the tunnel and only 2 feet from the highway. In the vicinity of the tunnel, the highway ran along a canyon wall, as opposed to being in a valley. The county is in the middle of the Rocky Mountains and it is "granitic foundation by nature." (Drawings 4, 5,¹¹ and 8; Appeal File (AF) 282-83, 86; Tr. 350, 354, 570, 593.) The photographs of the area indicated rugged, mountainous terrain (Government Ex. 5). The outside dimensions of the tunnel were 13 feet, 8 inches wide, 14 feet high (including footers), and 80 feet long.

2. The first 30 feet of the southern end of the tunnel ran north-south, and thus, the tunnel crossed the road at a slant, rather than being perpendicular to the road. Under the highway centerline, the tunnel turned about 15 degrees to the left from the north-south direction and continued in that direction for the remaining 50 feet, ending north of the highway. (Drawings 4 and CS1; AF 282, 287.) The tunnel was set at a 3% grade, descending to the north. The 14 foot tunnel height (including footings), plus approximately 2 feet of fill between the tunnel and the road, and the fact that the tunnel is approximately 2.4 feet deeper at its northern end because of the 3% grade, would require excavation of more than 18 feet below the surface.

3. The contract included detailed drawings and specifications, and required construction to those specifications. The contract schedule contained 26 separate items for bidding. Of particular relevance are items 203 and 206. Item 203 was for 536 cubic yards of "unclassified" excavation, 67 cubic yards for the approach to the southern end of the tunnel, and 469 cubic yards for the approach at the northern end. Unclassified excavation consists of materials of whatever character and includes boulders and rock. Item 206 was for 563 cubic yards of "structure excavation," necessary for the placement of the tunnel itself. Structural excavation required the removal of all material without regard to the type of material encountered. (Drawings 3, 5; AF 51-52, 74, 281, 283; AF Supplement (Supp.). 41-51.) With the highway having been constructed in 1905, the Forest Service designers of

¹¹ Drawing 5 contained an obvious error in that the arrows for the "Finished Grade" and "Existing Grade" were reversed (Transcript (Tr.) 262-63).

the project had no specific knowledge of the subsurface material, and accordingly, designated it as unclassified. (Tr. 498, 666-67.)

4. The contract was to be awarded under competitively negotiated proposals with the award based upon the best value to the Government. The best value would be based upon separate cost, and technical proposals, with technical proposals being comprised of descriptions of experience, past performance, and project planning. Project planning was comprised of a proposed schedule, installation methods, traffic control plan, proposed erosion control, and committed employees, subcontractors, and equipment. Clause M.1.A.2 cautioned offerors that “To be considered for award, a proposal must conform to all requirements of the solicitation.” (AF 69-70.) The CO established a technical evaluation panel that would have access only to the technical proposals (not the cost proposals) and rank the technical proposals as exceptional, acceptable, marginal, or unacceptable. All work was to be completed in 14 days to minimize interference and traffic control problems. Contractors were told to advise in their proposals if they could not meet the 14 days. (AF 58; Tr. 395, 433-34.)

5. There were 66 bidders on the bidders list. Two proposals were received. Appellant’s offer was for \$229,748.88, approximately \$40,000 less than the Government’s estimate of \$269,921. The second offer was \$397,711 with further details not available, because the Forest Service apparently destroyed the proposal after award. Appellant’s offer for items 203 and 206, the excavation, the subject of Appellant’s claim, was \$27,090 versus \$19,944 for the Government’s estimate.¹² The solicitation itself indicated on its face: “Price Range: Between \$250,000 and \$500,000.” While the proposal evaluators were generally aware that Appellant’s proposal did not include explicit provisions for rock removal because of the equipment listed, the material to be excavated was unclassified, and the evaluators assumed that Appellant had accepted the risk of encountering rock. Indeed, Appellant testified that it could not remain competitive if it included a contingency for rock. Appellant’s also testified that it could point to no contract document that guaranteed a depth of fill that would be encountered. (AF 73, 77-78, 110-113; Tr. 111, 167, 660.)

6. Neither proposal provided complete information regarding the evaluation criteria. Phone calls were made to both companies to provide an opportunity to fax the required information, and both companies did so. Appellant’s price proposal contained minor calculation errors that Appellant was advised of and allowed to correct. Although both technical proposals were rated “acceptable,” Appellant’s proposal was rated slightly higher by the technical evaluation panel, who forwarded their ratings to the CO. Appellant had provided services to the Forest Service under a previous contract. The CO awarded the contract to Appellant on September 24, 1997. (AF 77-78, 110-13, 153.) Notice to proceed was issued June 15, 1998 (AF 291).

¹² Given the fact that Appellant’s bid for excavation exceeded the Government’s estimate for excavation, Appellant could have included a contingency for encountering rock, since there was no direct tie between Appellant’s equipment listing and Appellant’s pricing of excavation.

7. The Solicitation, Offer, and Award form in paragraph 13.B provided that all offers were subject to the work requirements, other provisions, and clauses of the solicitation. Paragraph 17 provided that “The offeror agrees to perform the work required at the prices below in strict accordance with the terms of this solicitation.” (AF 111.) In Paragraphs 21 and 29, all 26 items for which Appellant filled in prices were accepted by the Government (AF 112). Items 203 and 206, at issue in this appeal, referred to sections of the specifications with the same item numbers. The solicitation in paragraph 29 recited that the contract consisted of the solicitation, the offer, and the award. The contract included the Differing Site Conditions clause (FAR 52.236-2) (Apr. 1984) and the Site Investigations and Conditions Affecting the Work clause (FAR 52.236-3) (Apr. 1984) (AF 77-78, 110-13, 153-54.)

8. There is no dispute that Appellant encountered rock during the excavation required by items 203 and 206, that some of the rock required blasting to remove, and that Appellant had bid on the basis of finding no rock, even though the contract did not preclude rock. By letter dated January 22, 1999, Appellant filed a claim with the CO seeking \$63,186.43 for increased costs incurred for the rock removal.¹³ Appellant’s claim, portions of which are quoted below, states:

The Contract Documents did not include any information with respect to the type of materials to be excavated. There was no geotechnical investigation, borings or report of subsurface conditions From the site visit R.N.G. ascertained that it would not encounter rock during excavation . . . because the location of the undercrossing was at a fill section of the highway. . . . It is also important to note that this solicitation was a Request For Proposals, not a competitively bid project. . . . Nowhere in its proposal did R.N.G. indicate rock excavation was included in its scope of work. . . . The contract negotiated by R.N.G. and the Forest Service, therefore, clearly did not include any rock excavation.

Appellant’s position was that its technical proposal was incorporated into the construction contract and displaced the specifications regarding the classification of excavation (AF 38; Tr. 259, 269-70). Further, regarding Appellant’s reliance on the tunnel being constructed in a fill area of the road, this was done primarily to facilitate ingress and egress to the trail. If the tunnel had been located in a cut area, it would have been necessary to bore and build vertical shafts through the cut sections for ingress and egress to the trail and tunnel. It was only a secondary benefit that rock excavation would be minimized. (Tr. 681.)

¹³ Appellant’s original claim was in the amount of \$84,494.84 and included \$20,662.22 for a separate tunnel footings claim. Appellant withdrew the latter claim (Tr. 3).

9. Regarding the amount, depth and location of rock encountered, using the sum total of the evidence most favorable to Appellant, as found in Appellant's Post-Hearing Brief at pages 24-28, granite type rock was first encountered in the northern portion of the roadway (Appellant's FF 88). As excavation proceeded to the south portal of the tunnel the amount of rock increased. In some locations there was as much as 7 feet of rock (Appellant's FF 92). The total quantity of rock was over 500 cubic yards (Appellant's FF 98). Appellant's FF 89-91, 93-97, 99-104 relate to how Appellant dealt with encountering the rock and the impact on its operations. In Appellant's Reply Brief at page 10, Appellant asserts as a fact that the excavated rock swelled 150-200%. As is readily apparent from considering all the evidence presented by Appellant, and the fact that excavation to a depth of more than 18 feet was required, none of the evidence establishes that the rock encountered was above a theoretical-hypothetical fill line connecting the upper toe of the highway fill to the lower toe.¹⁴

10. Appellant testified that it had performed "200 to 300" projects in southwestern Colorado and had only encountered rock one time, at the corner of a high school building. Appellant normally worked in clay soils that could include large rocks. (Tr. 88-90, 284, 303-04.) There was no cross-examination on this issue. However, regarding the direct examination of the Contracting Officer Representative (COR) on the same issue, Appellant's objection prevented an answer regarding the likelihood of encountering rock in the areas where Appellant had worked. Counsel for Appellant stated that where the projects were located, how they are designed, how deep the cuts are, what the engineer has done regarding subsurface investigation, needed to be known, and that there are a myriad of reasons why rock may or may not be encountered, and to generalize about 100 projects without background is meaningless. However, similar background was not provided by Appellant (Tr. 392-93). In addition to the one contract in which Appellant conceded encountering rock, rock was also encountered in Appellant's only previous contract with the Forest Service. However, any potential problem was avoided by a mutually beneficial realignment of the trail bridge 10 miles north of the present work site (Tr. 321-22).

DISCUSSION

In a well written Post-Hearing Brief, Appellant succinctly presents an Overview Of Argument at pages 30-31 as follows:

¹⁴ As is indicated in the section of this opinion dealing with the majority opinion, the majority's reliance on this theoretical/hypothetical fill line as an "industry practice" is without evidentiary support.

The Government's choice of a negotiated procurement created the situation where RNG's technical proposal became a part of the contract RNG has presented reliable evidence that the technical review panel understood that RNG did not anticipate any rock excavation. Such an indication was for purposes of a [Type I] differing site condition, a contract indication. It is equally plausible that the parties were simply mutually mistaken as to the non-existence of rock in the excavation. . . . RNG has also pled this matter under theories of type II differing site condition, defective specifications, and constructive change. These will be addressed, but are not RNG's primary entitlement theories.

Did The Proposal Supersede The Specifications/Was There A Type I Differing Site Condition Contract Indication/Was There A Mutual Mistake?

I concur with the majority decision that these issues do not provide any bases for relief, but limit my concurrence, particularly on the role of Appellant's offer in the contract, to the analysis below. Moreover, I disagree that Foster Constr. C.A. v. United States, 435 F.2d 873 (Ct. Cl. 1970), provides a basis to look beyond the contract itself for indications of a Type I differing site condition.

Relying on the language in section 29 of the Award form that the contract includes Appellant's offer (FF 7), Appellant insists that it is entitled to payment for excavating the rock encountered because Appellant's technical proposal included a listing of equipment that allegedly could not excavate rock. The cases relied upon by Appellant all involve disputes related to a provision of a proposal that was made a part of the contract. The question here is what parts of Appellant's proposal, if any, not only became a part of the contract, but changed or superseded the excavation specifications. Certainly, the pricing proposal portion of the offer became a part of the contract. However, the technical proposal was largely informational in nature (FF 4), and must be construed in harmony with the specifications.

Appellant is asserting that the equipment listed in the technical proposal resulted in changing the solicitation's excavation specifications from unclassified excavation for item 203, and structural excavation for item 206, both of which could include rock, to guaranteeing Appellant excavation without rock, and requiring the Government to pay additionally if rock were encountered. First, Appellant's equipment listing did not necessarily preclude a contingency for rock (See footnote 4, FF 5). Second, the purpose of the listing was to assist the Government in performing a best value award determination (FF 4). There was no evidence that the equipment listing was intended to amend sections 203 and 206 of the specifications. Appellant's position would result in a different basis for award to each offeror, depending on the inferences that could be drawn from each offeror's technical proposal equipment listing. This would not be the case here where the pedestrian tunnel was to be constructed to a detail design specification, as here. There was nothing in the solicitation to suggest a performance specification, or that the Government was looking to award based upon alternate approaches, without amending the solicitation (FF 3-5).

Further, the solicitation cautioned that to be considered for award the offerors' proposals must fully comply with all requirements of the solicitation (FF 4). These requirements included an unclassified

excavation description for item 203, and structural excavation for item 206, both of which included rock excavation (FF 3). Thus, while Appellant might have been able to submit an alternative proposal limiting its liability for encountering rock, Appellant's present proposal could not shift this risk to the Government. For example, if in addition to the mere listing of equipment, Appellant had included a condition that its performance would be limited to the listed equipment, and that Appellant must be paid separately if rock were encountered, Appellant's proposal could have been properly disqualified from consideration.

In conclusion, the solicitation specifications regarding the classification of excavation were not superseded by the inferences that might have been drawn from Appellant's listing of equipment. Thus, there are no Type I differing site condition indications created by Appellant's proposal. Further, Appellant concedes in its claim and in its testimony that the contract did not otherwise provide indications that Appellant would not encounter rock (FF 5, 8).

Regarding the question of mistake, there was no mistake evident by the Government regarding the classifications for the excavation as set forth in the solicitation. Further, while there were minor clarifications, there were no discussions, and certainly no discussions regarding the classification of excavation (FF 6). If Appellant intended to receive extra payment if it encountered rock, it did not communicate this fact to the Government. The Government was not obligated to determine Appellant's subjective intent, whatever that intent might have been at the time. Thus, there was no mutual mistake.

Type II Differing Site Condition And Defective Specifications

Appellant's basis for type II differing site condition recovery is set forth at page 39 of its Post-Hearing Brief as follows:

If the contract indications were that work would be performed in a highway fill without rock being present, encountering a hard ledge of rock would constitute unknown physical conditions at the site of an unusual nature which differ materially from those ordinarily encountered and generally recognized as inhering in the work of the character provided for in the contract. . . . The basis of the differing site condition is that hard rock ledges are not inhering in highway fills. In other words, the nature of the differing site condition is that excavation extended below the fill into undisturbed rock material.

In order to qualify as a type II differing site condition, the Federal Circuit recently stated in Randa/Madison Joint Venture III v. Dahlberg, 239 F.3d 1264, 1276 (Fed. Cir. 2001) that "the unknown physical condition must be one that could not be reasonably anticipated by the contractor from its study of the contract documents, inspection of the site, and its general experience[,] if any, as a contractor in the area," citing Perini Corp. v. United States, 180 Ct. Cl. 768, 381 F.2d 403, 410 (1967). The language of the differing site conditions clause itself requires more than the mere encountering of unexpected conditions. It requires that the condition be "an unknown physical condition at the site, of an unusual nature, which differs materially from those ordinarily

encountered and generally recognized as inhering in work of the character provided for in the contract.”

Appellant essentially alleges that because the road was constructed over an area with fill, that the fill must have extended for the entire depth of the 18 foot excavation necessary to construct the tunnel. Why Appellant could assume that the fill would extend for the entire depth of excavation is not clear, particularly when Appellant testified that there was no contract document that it could point to that guaranteed the depth of fill that would be encountered (FF 5). The evidence is overwhelming that based upon the work site and a site investigation, Appellant should have anticipated encountering rock during the excavation for the tunnel, notwithstanding the fill. The excavation was 18 feet deep at a 9,000 foot elevation in the Rocky Mountains. The site was not in a valley, but along a mountainous canyon, and there was a large rock outcropping just 50 feet from the tunnel and 2 feet from the road. Moreover, the general terrain was rocky (FF 1-2.)

Further, the testimony based upon the surrounding area was that the fill area was not particularly wide when viewed along the length of the road, and therefore, probably not very deep. Also there was excavation into natural ground outside the fill, strongly indicating that rock should have been anticipated. Appellant itself provided testimony that it could not remain competitive if it included a contingency for rock, bidding \$229,748.88, when the solicitation itself indicated that the price range was between \$250,000 and \$500,000. Appellant assumed the risk of encountering rock. (FF 5.)

Finally, Appellant’s past experience as proof of a differing site condition is not specific enough to be helpful. In the only other contract with the Forest Service, Appellant appears to have encountered rock. (FF 10.) Based upon all these facts, a differing site condition does not exist.

Therefore, the appeal should be denied.

MAJORITY DECISION/DIFFERING SITE CONDITION/ NO SUBSTANTIAL EVIDENCE

Generally, the Board will decide the facts before it based upon the preponderance of the evidence. Indeed, it is well settled that the factual findings of a board of contract appeal will be sustained, unless not supported by substantial evidence, and great deference is generally accorded to the findings of boards of contract appeals. Roseburg Lumber Co. v. Madigan, 978 F.2d 660 (Fed. Cir. 1992); William F. Klingensmith v. United States, 731 F.2d 805 (Fed. Cir. 1984). However, the court’s deference is not limitless. For example, even where the board found “the evidence was un rebutted that tan and brown aggregate that would meet all the contract needs was available in [the contractor’s] home town,” the court nevertheless concluded that “the testimony relied upon was so general, incomplete, and vague . . . [that] the testimony clearly does not constitute substantial evidence.” Blount Bros. Corp. v. United States, 872 F. 2d 1003, 1007-08 (Fed. Cir. 1989).

“Substantial evidence is evidence which could convince an unprejudiced mind of the truth of the facts to which the evidence is directed.” Moreover, “the substantial evidence rule requires consideration of the evidence on both sides in order to determine whether it appears that the evidence in support of the administrative decision can fairly be said to be substantial in the face of

opposing evidence.” The court will find an absence of substantial evidence where there is evidence overwhelmingly contrary to the findings made by the board. Koppers Co. v. United States, 405 F.2d 554, 186 Ct. Cl. 142 (1968).

The problem with the majority decision in terms of the substantial evidence issue, among other things, is that the majority have failed to differentiate between: (1) undisturbed “rock” that requires blasting to remove as in Appellant’s claim, (2) scalable “rock” that can be removed without blasting and therefore not apart of Appellant’s claim, and/or (3) “rock” that is structural excavation used as backfill. If (2) or (3), then the “rock” relied upon by the majority is not “rock” that required blasting, and therefore was not the subject of Appellant’s claim. As shown below, the answer is that the “rock” referred to is (3) structural backfill. At Tr. 697, on the last day of the 3-day hearing, and long after much of the testimony relied upon by the majority was given, it is obvious that the precise nature of the rock relied upon by the majority has been misunderstood. The presiding judge, referring to photograph 9B (Tr. 695), questions Mr. Watts, a civil engineer, as follows:

Judge Pollack: Now, we’re looking toward the north. Okay. Now, if you look at the photographs and we’re talking about two- or three-foot foundation - - Correct?

The Witness: Correct.

Judge Pollack: And that’s sitting on - - I assume it’s sitting on **rock**. Is that correct?

The Witness: Actually at this point, **no**, it should not [be **rock**]. It should have been backfilled, and you can see the structural excavation in front of the bobcat loader.

The rock seen in photograph 9B behind the foundation, and piled 3 feet above the foundation is structural excavation used as backfill and/or scalable rock, not undisturbed dense rock requiring blasting to excavate, as the majority concludes. As with photograph 11B and other photographs discussed, there simply is no evidence that undisturbed, dense rock, requiring blasting to remove, existed at a point 2 to 3 feet above the trail, 18 feet inside the tunnel, as the majority concludes. Even if there were such evidence, the majority then uses Government Exhibit 6, B-2, which the majority discredits for accuracy, to determine where this point 2 to 3 feet above the trail is, in comparison to where the subjectively established, theoretical-hypothetical fill line is, which is not shown on B-2, and which has no relation to the trail line.

The record relied upon in the majority decision fails to support with substantial evidence, the conclusion that Appellant was entitled to rely upon on a subjectively established, theoretical-hypothetical fill line. This position was never proffered by Appellant, and even the sum of all of Appellant’s evidence as set forth in Appellant’s brief does not support this conclusion (FF 9). Moreover, there is no evidence of actual reliance by Appellant, as Appellant expressly chose to include no contingency for rock. (FF 5). Further, the majority relies on testimony offered by the Government to show the virtual certainty with which rock would be encountered (and which Appellant attempted to discredit), to prove Appellant’s case. Such use of the evidence by the majority, without notice, is prejudicial.

Appellant's lack of reliance on a theoretical-hypothetical fill line should be dispositive of the differing site condition issue. To the extent it is not, the majority Findings 42-49, dealing with the issue of the theoretical-hypothetical fill line, need to be evaluated. As stated above, Appellant presented no evidence on this issue. Nevertheless, for four pages, the majority takes excerpts of the testimony of four Government witnesses, then mixes and intersperses the excerpts and presents them out of sequence throughout eight Findings, to purportedly establish what Appellant should have expected during excavation, even though Appellant had no such expectation. Over the next six pages, I am constrained to present the testimony of these four Government witnesses in the order they were called to testify, not mixed and interspersed as in the majority decision, and to present their testimony in the sequence and order the testimony itself was presented. This testimony fails to support the majority position with any semblance of substantial evidence.

Mr. Self's Testimony.¹⁵ Mr. Self, the first Government witness relied upon by the majority (majority FFs 43-46, 48; Tr. 261-74), was an engineer for the Colorado Department of Transportation. On cross examination, he testified that while it was possible to construct a tunnel through fill without encountering rock, the plans for the present work indicated substantial excavation below the natural ground (rock) line (Tr. 260-61). In response to a question as to how he could tell the tunnel would run below the fill (Tr. 261), he referred to the trail profile (AF 263; Tr. 261) and stated, "Typically, you would just extend a line from the upper toe of the fill to the lower toe of the fill, and assume that as your natural ground line. But even to the left of the toe of the fill, it shows an excavation" (Tr. 261-62). The question was again asked and answered (Tr. 263-64). He testified further that, "If you were to draw a line between those two [a point at the upper toe and another at the lower toe of the fill], that would be a reasonable assumption of natural ground line . . . (Tr. 264)." "Since you don't know if the ground is going up or down, you would assume a straight line beneath the fill . . . the bottom of the excavation for the box culvert is below that ground [rock] line. In addition, there's considerable excavation below natural ground [rock] to the left of the fill area (Tr. 265)." Appellant's counsel then attempts to discredit the witness (Tr. 266-68).

Appellant's counsel continued and then asked Mr. Self, "And isn't it also equally true that you came up with a hypothetical undisturbed earth line, as opposed to one that you can definitely say would be found in the area?" The response was "Yes." And it's equally plausible, is it not, that there would

¹⁵ Use of the witnesses names, rather than their positions descriptions are being used here, because the majority decision relies on this practice, and consequently, it is easier to track the comparisons in how the testimony was understood.

be a depression in that area and that the existing [ground] line would actually be at a lower elevation than you've pointed out?" Again, the response was "Yes." (Tr. 269). Appellant's counsel continues his attempts to discredit the witness (Tr. 269-71). Had Government counsel been able to conceive how the evidence would be misused by the majority, on redirect, he could have elicited testimony that it would also be equally plausible that the existing ground line could actually be at a higher elevation, and that this certainly was not such an unusual condition supporting a legal conclusion that a differing site condition existed.

On redirect, reference was made to Government Exhibit 6 (Tr. 272), a series of artist sketches of a cross-section of the tunnel/trail profile with the southern end of the tunnel on the left and the northern end on the right, showing the road cross-section with one car on it, fill under the road, and rock under the fill. The center line of the road is just to the left of the driver of the car (Tr. 691). Exhibit 6, Alternatives 1-3, showed three possible fill and rock configurations with Alternative 1 showing the least fill between the rock and road, Alternative 2 showing more fill between the rock and road (more than 1, less than 3), and Alternative 3 showing the most fill between rock and road. Exhibit 6, B-1 and B-2 utilized the Alternative 2 trail profile showing the average conditions, and superimposed a schematic depiction of the cross-section of the tunnel with the southern end of the tunnel to the left and the northern end to the right, a car, the trail as a straight line, and a hiker on the trail within the tunnel.

The rock area under the fill was shown as red. After objections from Appellant's counsel, Mr. Self was asked, "[D]oes this exhibit (B-1) demonstrate whether a reasonable contractor should have expected structural excavation [rock] to be beneath the fill area? He responded, "Yes, it does." The presiding judge then asked, "Am I, therefore to understand that the area from where we have the depiction of the man walking up to where it indicates, where we see the road surface, that it would be reasonable for a contractor to expect that to be solely fill?" Mr. Self responded, "Yes. Since it's below ground and you can't see what's there, you have to make some type of an assumption, and basically roughly a straight line interpolation is - - would be considered a reasonable assumption. (Tr. 272-74.)¹⁶"

¹⁶ Mr. Self testified that the CDOT applies the "reasonable-man approach" to determine if rock was unanticipated (Tr. 253, 260). Based on the wording in the Differing Site Condition clause (FAR 52.236-2), that requires conditions to be "of an unusual nature, which differ materially from those ordinarily encountered," CDOT may be applying a different standard.

Again, it is important to remember that the testimony was being presented to prove that Appellant would encounter rock, not that Appellant would not encounter rock above the theoretical-hypothetical fill line. It is also important to note that Appellant has not claimed that it relied on any such line in preparing its bid. Further, “the area from where we have the depiction of the man walking,” as quoted from the question asked by the presiding judge, has nothing to do with a theoretical-hypothetical line connecting the upper toe of the fill with the lower toe of the fill. Such line is no where shown on the Exhibit B-1. The hiker is shown standing on the trail (a straight line). If a straight edge is placed on Alternative 2 to connect the upper toe of the fill with the lower toe, the line so created barely grazes the rock in one area, indicating that no rock existed above the theoretical-hypothetical fill line.

In conclusion, Mr. Self’s testimony does not provide substantial evidence that Appellant should not have encountered rock above a theoretical- hypothetical fill line.

Mr. Marah’s Testimony. The next Government witness relied upon by the majority was Mr. Marah (majority FFs 42, 43, 49; Tr. 434-36, 465, 476-77, 496-97), a supervisory civil engineering technician, and the COR on the project. At Tr. 434-36, he testified that while the tunnel ran through highway fill, he didn’t know at what depth the highway fill would end and undisturbed material would begin, that the contractor was likely to hit rock, because if the contractor had looked just 50 feet up the road, there was 100% rock. At Tr. 465 he simply testified that the “The upper part of the project is through fill. That’s clearly shown on the profile. It’s clearly shown on the ground.” Next, at Tr. 476-77, he testified as to what might have been said at the bidders conference. He stated that he showed the location and that the alignment ran through highway fill. Nowhere in this testimony does the witness testify or refer to a theoretical-hypothetical line.

Next, it is important to review majority Finding 49, where the presiding judge asks, “[W]ould you agree that, given this was a known fill road, that it would be reasonable for a contractor to expect that at least up to that profile, there would be fill material.” Mr. Marah responded, “Yes.” (Tr. 496-97.) First, it is not apparent what “that profile” referred to, because there had been no preceding mention of the theoretical-hypothetical fill line (Tr. 495). Second, the question asked was “[Would] it would be reasonable for a contractor to expect that at least up to that profile, there would be fill material.” Even if the question specifically related to the theoretical-hypothetical fill line, the question does not relate to what is reasonable above the fill line. Thus, there is no substantial evidence that rock should not reasonably have been encountered above the theoretical-hypothetical fill line.

Ms. Crabtree-Jones’ Testimony. The next Government witness relied upon by the majority was Ms. Jones-Crabtree (majority FFs 42, 43, 45, 46; Tr. 576-78, 586, 590-91), a registered professional engineer, and a Ph. D. candidate in civil and environmental engineering (Tr. 505-07). The only salient testimony at Tr. 576-78 was that there was no engineering standard or principle that defines the depth in which fill may be located (Tr. 577). There is no linkage in the engineering profession between fill and an expected fill depth (Tr. 578).

At Tr. 585-86, the record indicates:

Judge Pollack: Okay. Let me ask you this. In the industry, is there a, let's say, rule of thumb or -yes. Is there a rule of thumb used in the industry for - - given a drawing of this nature [referring to Drawing 5, Trail Profile, (AF 263)], for determining, without a site investigation, without borings- -

The Witness: Well, the bottom - -

Judge Pollack: - - the approximate bottom of the fill?

The Witness: Well, the logical thing to do would be to go from the bottom of what you can decipher to be the bottom of the fill on one side of the highway to the bottom of the fill on the other side of the highway. And when you do that, you need also look at how wide is that fill. Is the fill 500 yards wide? Is the fill 12 feet wide? And you need to look at that, in accordance with your surrounding ground conditions.

And if there are surrounding ground conditions that have rock ledges all over the place, it might be safe to assume that there may be a rock ledge somewhere in the bottom of the fill.

Judge Pollack: Okay. And the question again is: In normal design, in the industry, in normal design of fill and in normal determining where fill is, is there- -do you know?- - any rules of thumb that are typically used to go ahead and determine- - and I'm going to use the word- -I don't want to use the word "hypothetical." I'm looking for another term. "Anticipated," let's use that- -anticipated bottom of fill?

The Witness: I believe- -I guess if you were to state that there was a rule of thumb, it would be to go from one edge of the toe of the fill to the other. However, you can't just do that independently, without assessing the location, the width of the fill, and the surrounding ground conditions.

At Tr. 589-90, there is a discussion about the three alternative sketches which are a part of Government Exhibit 6. Ms. Crabtree-Jones describes the lines separating fill from natural ground as having "lots of undulations." Referring to the three alternatives, she states in all three the fill starts and ends at approximately the same location, but that it was not reasonable to assume this configuration for volumetric calculations without considering surrounding ground conditions. At Tr. 593, Ms. Crabtree-Jones explained that there was no differing site condition because of the surrounding ground conditions, in the Rocky Mountains, extreme canyons near by, with a rock outcropping 50 feet away and 2 feet from the highway. She also stated that it was not reasonable to assume a straight line from one edge of the fill to the other.

Mr. Watts' Testimony. The next witness relied upon by the majority is Mr. Watts (majority FF 42, 43, 46, 47; Tr. 672-77, 691-94, 698-708, 723-25), a civil engineer and the inspector on the project. At Tr. 671-77, the witness is referring to the various artist depictions represented in Government

Exhibit 6. He testifies that these are based on the trail profile in the contract drawings (AF 263), and that while they are not to scale, the trail, tunnel, trees, car, hiker are proportional to one another. (Tr. 671-72). The center line of the road was just under the left side of the driver (Tr. 691). At Tr. 673-77, he testified:

So, anyway, based on that information about when and where rock was encountered under the approximate center line of the road, from the daily diaries we are able to determine that, in fact, of these three alternatives, alternative 2 is actually the closest to representing. We're within a foot to 18 inches off this deduction where rock was actually encountered. So rock was not three feet higher or three feet lower, as would have been the case in alternative [1] or 3, so we used that . . . the significance is heavily leaning towards their allegation, which is because the construction was in a fill area, we didn't hit a big rock. And sure enough, contained within the fill area, we didn't hit a big rock. Everything was easily removed. As soon as you went below the fill area into the natural ground, lo and behold, we hit big rock. So as soon as you excavated through the fill into the natural ground, now you're in rock, so when they make the statement that the construction was in a fill area, that's a half-truth. The construction was in a fill area. I don't have any problem with that statement, but it's- -you need a qualifier on the end that says that, however, construction was not exclusively limited to the fill area. . . . [It] all comes down to your deduction about one of the three alternatives. Had this been a case where it could be seen from surface conditions that the toe of the fill was 200 feet down each side of the road and that it- -you know, again inferring visually in your mind the connection between one side of the toe and the other, that the depth of fill must have been at least 100 feet tall and our trail, in fact, had to go up the fill placed there in the early 1900s through a tunnel and down the other side of the fill, then I would have thought that would have been a reasonable deduction. However, we were- -we actually started excavating into natural ground well up outside the toe of the fill, so clear sailing is not a term I would have used for this specific project.

When Mr. Watts was asked, "As a matter of engineering concepts and standard practice, in dealing with fill, what is your understanding about whether there's a minimum depth guaranteed?" Appellant's counsel objected (Tr. 677-78). "Ultimately, he testified that depth can vary "greatly" (Tr. 678).

At Tr. 691-94, relied upon by the majority, the witness, referring to the graphic with the car and hiker, testified that the center line of the highway is located just to the left of the driver of the car, that the trail sits 3 feet above the bottom of the tunnel, and that the hiker is about 6 feet tall (Tr. 691-92). Again, if a straight edge were placed on this graphic to connect the upper toe of the fill with the lower toe, all the rock would be below the line. At Tr. 693-94, Mr. Watts testifies that:

What we actually determined is that looking at the three alternatives and then comparing- -because we came up with the alternatives first and then compared them with the factual evidence of the daily diaries. Using the center line of the road as Mr.

Gross pointed out, and scaling down, rock was- -based on this approximation, rock would be encountered at about 14 feet. . . . It was not created directly from information deduced off the contract. But what was discovered, it was very close.

We're within a foot of this approximation, from what was really encountered on site.

The witness testified that the red area on Government Exhibit 6 indicated where the fill stopped. Immediately beneath the fill was natural soils that included small scalable rock "that was easier to bust up" (Tr. 694). While not cited in these findings by the majority, it is instructive to review Tr. 695-98. At Tr. 695, the following testimony took place:

Judge Pollack: In actuality, the rock could have been encountered at higher levels than what is being shown in that particular depiction [Government Ex. 6 with car and hiker]. Is that correct?

The Witness: Had the fill stopped sooner, had there been- -

Judge Pollack: No, no, no, no. In actuality on this job.

The Witness: Rock could not have been encountered more than about maybe within a foot higher than the red shows here [referring to Government Ex. 6 with car and hiker], because based on our daily diaries, it says that at a depth of 12 feet, at center line rock was encountered. This red line is actually at about 13 feet.

The presiding judge then refers to photograph 9B (part of App.'s Exhibit 1) which the witness instructs shows the wing wall beyond the north end of the tunnel (Tr. 696). The photo shows the site conditions after having been disturbed by the excavation. The photo shows the 2-foot foundation sitting above the 1-foot excavation which the presiding judge incorrectly assumed was "rock." It was not structural backfill, not "rock." (Tr. 697.) The witness then testifies that the blue line on Government Exhibit 6, depicting the trail, would sit slightly above the foundation shown on photograph 9B (Tr. 697-98). The presiding judge again refers to photograph 9B and states that "rock" like material in the photo appears to go up at least 4-to-5 feet high, apparently, but it is not clear, from the top of the foundation (Tr. 698), inferring that Government Exhibit 6 is not accurate because it shows the "rock" like material at a lower elevation than photograph 9B. However, the "rock" in photograph 9B is backfill as the witness testified, or scalable rock that could have been excavated without blasting. There is no evidence that it is undisturbed dense rock requiring blasting to remove.¹⁷

There is then considerable confusion in the questions and answers between the witness and the presiding judge (Tr. 699-700). There were then objections from Government counsel that the prior testimony was that Alternative 2 had been "close to truth" (Tr. 700-01), after which the witness, in deference to the presiding judge, concedes that the presiding judge need not rest on the

¹⁷ See the heading below entitled **Majority Decision/40 to 50% Rock/No Substantial Evidence** for the actual transcript testimony indicating that what the presiding judge referred to as "rock" was actually structural backfill.

determination of where rock was encountered within the tunnel on the witnesses depiction (Tr. 701-02). Mr. Watts then describes the subjective nature and uncertainties of even establishing a theoretical-hypothetical fill line, and thus casts serious doubt on the purported definitive standard the majority seek to impose as a differing site condition. At Tr. 700, Mr Watts testifies:

Determining where exactly the toe of the slope is very difficult, and it's even more difficult when you look in plan view, because the natural grade of the ground in the meadow below the toe of the slope is very steep. So you know, had we connected and considered the toe even ten feet closer, it would have shifted the whole line up. But, again, it's an approximation that maybe was more closely represented on that end of the trail in alternative 1 [the depiction with the least fill] than alternative 2 [the depiction considered most representative of actual conditions.

The presiding judge then refers to photograph 11B (part of App.'s Exhibit 1) showing excavation at about the center line of the road (Tr. 703). Mr Watts agreed that photograph 11B showed 6 to 7 feet of "rock" excavation necessary to place the footer in place (Tr. 703), and that the Government Exhibit 6, B-2 understated the amount of "rock," and that the actual amount of "rock" was 3-to- 4 feet above the footer, with the surface of the trail being about 1 foot higher than the footer (Tr. 703-05). There was no testimony regarding the nature of the "rock," and whether it was backfill, undisturbed scalable, or undisturbed requiring blasting, or some combination.

Since Government Exhibit 6, B-2 shows the trail and not the footer, the rock would have been understated by only 2-to-3 feet, because the trail lies approximately 1 foot above the footer. Government counsel's attempt to elicit from Mr. Watts whether there was better data than just the photograph supporting the accuracy of Government Exhibit 6, B-2 was objected to and interfered with (Tr. 723-26). In fact the exhibit and where rock were encountered was based on information in the daily diaries (Tr. 673-77, 693-95).

Even if one were to accept the majority's view that Government Exhibit 6, B-2 understates the elevation of rock by 2-to-3 feet at the center line of the road, none of the testimony above relates to a subjectively established, theoretical-hypothetical fill line connecting the upper toe of the fill with the lower toe. In any event, if a straight edge is placed to connect the upper toe with the lower toe, the line created would lie above the rock at a point 2-to-3 feet higher the trail, at the center line of the road (to the left of the driver of the car), in Government Exhibit 6, B-2.

All the witnesses, and in particular Mr. Watts, describes the subjective nature and uncertainties of even establishing a theoretical-hypothetical fill line, and the unpredictable nature of the natural ground under fill. They all cast serious doubt on the purported definitive standard the majority seek to impose as a differing site condition. Again, there is no substantial evidence that undisturbed rock, requiring blasting to remove, was encountered above the theoretical-hypothetical fill line.

In conclusion, the record relied upon in the majority decision fails to support by substantial evidence, the conclusion that Appellant should not have expected to blast rock above a subjectively established, theoretical-hypothetical fill line. Nor is there support that a contractor can reasonably assume that the natural ground under highway fill will all lie below a theoretical- hypothetical fill

line. This position was never proffered by Appellant, and even the sum of all of Appellant's evidence as set forth in Appellant's brief does not support this conclusion (FF 9). Moreover, there is no evidence that Appellant utilized or relied on such industry practice or rule of thumb, as Appellant expressly chose to include no contingency for rock (FF 5).

MAJORITY DECISION/40 TO 50% ROCK/NO SUBSTANTIAL EVIDENCE

The majority decision conclusion that 40 to 50% of the area above the subjectively established, theoretical-hypothetical fill line was rock requiring blasting to remove is not supported by substantial evidence (See also discussion under previous heading). Further, this conclusion, while allegedly premised on majority Findings 51, 58-62 (page 42 majority slip opinion), is based on approximations and extrapolations made by the majority, which even for a jury verdict, are not susceptible of verification, or of being forwarded as a certifiable record to the U. S. Court of Appeals for the Federal Circuit. The majority's conclusion is based on extra-record material that is neither judicially noticeable nor a part of the evidence, and cannot stand. Johnson & Case v. United States, 223 Ct. Cl. 210, 618 F.2d 751, 757 and fn. 4 (1980).

Finding 51 on its face does not address the majority's 40 to 50% rock conclusion. Next cited by the majority is Finding 58. Relying on testimony about photograph 9B, the majority concludes, among other things, that 18 feet inside the tunnel "rock" rises 3 feet above the trail. The majority then notes that Government Exhibit 6, B-2 shows the trail above the "rock," rather than the "rock" above the trail as the testimony about photograph 9B indicates. The majority then conclude that B-2 is therefore incorrect, and that this dissenting opinion's reliance on B-2 is also incorrect.¹⁸ In the subsequent Findings, the majority then extrapolate the "rock" that is allegedly 3 feet higher than the trail into 40 to 50% "rock."

The problem here is not with the accuracy of B-2, but with what the presiding judge has elected to call "rock." Is it (1) undisturbed "rock" that requires blasting to remove as in Appellant's claim, (2) scalable "rock" that can be removed without blasting, and/or (3) "rock" that is structural excavation used as backfill? If (2) or (3), then the testimony is not inconsistent with B-2. As shown below, the answer is that the "rock" referred to is (3) structural backfill. At Tr. 697, the presiding judge, referring to photograph 9B (Tr. 695), questions Mr. Watts as follows:

Judge Pollack: Now, we're looking toward the north. Okay. Now, if you look at the photographs and we're talking about two- or three-foot foundation - - Correct?

The Witness: Correct.

¹⁸ The dissenting decision (slip opinion pages 5-11) does not rely on B-2. B-2 has become an issue because of the majority's reliance on B-2.

Judge Pollack: And that's sitting on - - I assume it's sitting on **rock**. Is that correct?

The Witness: Actually at this point, **no**, it should not [be **rock**]. It should have been backfilled, and you can see the structural excavation in front of the bobcat loader.

The rock seen in photograph 9B behind the foundation, and piled 3 feet above the foundation is structural excavation used as backfill and/or scalable rock. As with photograph 11B discussed in the previous section, there simply is no evidence that undisturbed, dense rock, requiring blasting to remove, existed at a point 2-to-3 feet above the trail, 18 feet inside the tunnel. Even if there were such evidence, the majority then uses B-2, which it discredits for accuracy, to determine where this point 2-to-3 feet above the trail is, in comparison to where the subjectively established, theoretical-hypothetical fill line is, which is not shown on B-2, and which has no relation to the trail line. Therefore, the testimony regarding photograph 9B is not inconsistent with Government Exhibit 6, B-2, as the majority decision asserts.

In conclusion, the majority seek to plot incorrect points from photographs, unto Government Exhibit 6, B-2, which the majority discredits, and then determine where these points lie in comparison to a subjectively established, theoretical-hypothetical fill line, which is non-existent on either the photographs or B-2. Besides being incorrect, and an improper basis even for a jury verdict, the gross approximations and extrapolations relied upon in the majority decision are not susceptible of reasonably accurate verification, or of being forwarded as a certifiable record to the U.S. Court of Appeals for the Federal Circuit in the event either party appeals the majority decision. The majority decision conclusion is based on extra-record material that is neither judicially noticeable nor a part of the evidence, and cannot stand. Johnson and Case, dba J.C. Company v. United States, 223 Ct. Cl. 210, 618 F.2d 751, 757 and fn. 4 (1980).

MAJORITY DECISION/AMOUNT OF RECOVERY

This issue was discussed in the introduction and will not be repeated here.

MAJORITY DECISION/DIFFERING SITE CONDITION/LEGALLY INCORRECT CONCLUSION WHEN CONSIDERED AGAINST REQUIREMENTS OF 48 CFR 52.236-2

This issue was discussed in the introduction and will not be repeated here.

MAJORITY DECISION/DUTY TO VERIFY

The majority decision correctly notes that:

Appellant did not directly argue before us whether it is entitled to relief because of a unilateral mistake that the FS should have been aware of.

The fact that the issue was not presented, or litigated, the record not fully developed, and there was no need to consider the issue, has not prevented the majority decision from assuming a pedantic role. The analysis demonstrates a selective view of the record.

Notwithstanding the clear testimony that Appellant did not include a contingency for encountering rock because it felt it could not remain competitive if it did so. Notwithstanding the fact Appellant bid \$229,748.88 in the face of a solicitation that advised it that the price range for the work was "Between \$250,000 and \$500,000" (FF 5). Notwithstanding that Appellant's price for excavation exceeded the Government's estimate, the majority decision criticizes the Forest Service technical evaluation panel for not communicating with the CO the fact that Appellant had no contingency in its bid to deal with rock. The majority decision also instructs that negative inferences can be drawn because of the Forest Service failure to retain copies of unsuccessful offer(s).

Given the unclassified excavation for item 203, and structural excavation for item 206, neither of which precluded encountering rock, Appellant had every right to exercise its business judgment and assume it would not encounter rock for purposes of pricing its competitive offer. Conversely, the Government technical proposal evaluators could not properly substitute their judgment for Appellant's, and this record simply indicates no reason to do anything other than follow the instructions of the CO, who advised them to rate the proposals exceptional, acceptable, marginal, or unacceptable (FF 5). After providing an opportunity to clarify the proposals, the technical evaluation panel rated both proposals as acceptable (FF 6).

Since this was a negotiated procurement, the real issue is whether the Forest Service had a legal obligation to enter into discussions. It did not.¹⁹ If for example, the specifications had indicated the presence of rock for excavation, and Appellant's proposal had indicated that no provisions had been made for encountering rock, there might have been an obligation on the part of the Forest Service to enter into discussions and clarify this area. However, here, the Forest Service reserved the right to award without discussions, and Appellant's proposal was not inconsistent with the excavation specifications. Further, the fact that Appellant's equipment listing did not list equipment capable of dealing with serious rock excavation, when the specifications showed the excavation as unclassified, was not a weakness that would obligate the Forest Service to conduct discussions. The Forest Service was not required to be clairvoyant.

Regarding the retention of proposals, the CO cautioned in writing "that all information contained in the proposals is confidential and not available for disclosure except through the CO. You must not discuss the number or quality of the proposals with [anyone] unless authorized by the CO." (AF 65-68.) The FAR prohibits the disclosure of confidential proposals before and after award. See 48 CFR 3.104-5 and 4.802(e). Further, 10 U.S.C. § 2305(g) and 41 U.S.C. § 253(b) prohibit the disclosure of unsuccessful proposals for Freedom of Information Act purposes. Therefore, there is little to be gained by retaining proposals after the period for protests has passed, and the destruction of unsuccessful proposals is certainly consistent with safeguarding the information contained therein

¹⁹ See footnote 10.

and in minimizing storage expenses. In any event, this competitor's proposal was not relevant in the circumstances of this appeal. Based on the record before the Board, there should be no negative inferences drawn because the Forest Service destroyed the proposal of an unsuccessful offeror.

MAJORITY DECISION/FOREST SERVICE FAILURE TO PREPARE ESTIMATE ON BASIS OF ROCK

The majority decision focuses on FAR 36.203 (majority decision FF 21) and the Government's estimating assumption that no rock would be encountered. The Government's estimate, as the majority decision correctly points out, is not made available to offerors. Therefore, there can be no reliance by Appellant. What the majority opinion fails to point out is that the Government's estimate is prepared for internal Government purposes and confers no rights on Appellant. Moreover, FAR 36.203(a) is not applicable because it addresses the degree of detail in the estimate, not the assumptions upon which the estimate is based. Specifically, FAR 36.203(a) provides that "The [government estimate of construction costs] shall be prepared in as much detail as though the Government were competing for award."

Finally, the trade-offs considered by the Forest Service in expending time and funds needed for a site survey to properly classify the rock for purpose of bidding, versus the possible increased contract costs and risks inherent in issuing a solicitation without such information, are issues that are not before the Board, and need not have been addressed by the Board.

EDWARD HOURY
Administrative Judge

Issued at Washington, D.C.
August 29, 2001