ANALYSIS OF CLAIMS IN U.S. CONSTRUCTION PROJECTS

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ABSTRACT

This thesis analyzes causes of construction claims based on 34 litigated cases in the U.S. construction industry. One such case, Anderson v. Golden, is analyzed in detail, and provides several good lessons about construction disputes. Secondly, causes and Court decisions of the typical disputes in construction projects are analyzed. Finally, on the basis of these above analyses, the following four recommendations are made in order to reduce construction disputes.

1. About Court decisions
Courts should judge disputes based on what construction services the Owner received, rather than what the contract says, since the contract is often biased in favor of one of the parties. If Courts do not do so, each party tries to take advantage of uncertainties of construction circumstances.

2. About the way of choosing a Contractor
Owners should take into consideration the Contractors' past record in terms of construction claims in order to avoid Contractors who repeatedly make clearly unreasonable claims.

3. About who has to take what kinds of risks
Owners should take all risks of unforeseen circumstances and acts of God since only Owners can control the location and timing of construction.

4. About defective contract documents
If a defect in the contract documents prepared for the Owner by the Architect/Engineer is found, the correction should be made as quickly as possible and confirmed in writing. Otherwise, defects provide a good excuse for the other party and waste time and money.

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While many people contributed, this final product is mine, and for it I take full responsibility.

Toshiharu Tanaka
Cambridge, Massachusetts
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1. Introduction

There are many construction claims in the U.S.A. which are very expensive and time consuming for both sides. I think that this is one of the main factors which makes the productivity of the U.S. construction industry relatively low. Everyone who enters into a construction contract wants to avoid claims. Many people have tried to reduce the number of claims through revisions to contract forms or references to arbitration. However, such efforts seem to be ineffective, because the number of claims does not seem to be decreasing.

I studied 34 of the many cases relating to construction that were decided by the federal courts in the United States to find the causes of these claims, to find why efforts to avoid claims were in vain, and to find a way to decrease claims. In this thesis, I would like to describe my views of how conflicts between parties develop and how they are settled, citing some of the cases and making several suggestions to eliminate these causes.
2. Case study: Anderson v. Golden

The case of M.C. Anderson v. Donald Golden\(^1\) is an example of the kinds of claims that develop, and provides several good lessons. The actual court decision is presented in Appendix 2.

"This case involves a classic confrontation between the developer [Golden] of a project, McAlpin Square Shopping Center, and his Contractor [Anderson], the rough-grading and storm drainage system Contractor. The conflict which arose during the course of the work was exacerbated by the weather and other adverse conditions at the site of the development. Each party accused the other of various breaches of the contract. Anderson filed a materialmen's lien against the McAlpin Square property. Anderson sued Donald Golden, the developer of McAlpin Square, seeking monies allegedly due under the contract, or alternatively, in quantum meruit, reimbursement of certain funds expended during the course of the job, and attorney's fees. Golden, in turn, asserted a counterclaim for delay damages, for the cost of correcting or completing work under Anderson's contract, for expenses incurred, and for interfering with Golden's title to the property." Please see Appendix 2 for the actual court decision, which contains a full statement of facts.

The following issues were presented:

(1) Should Anderson be allowed additional time or not?

(2) Should the Contractor have complied with the three-day notice requirement for weather-related delays or not?

\(^1\)569 F. Supp. 122 (1982).
(3) Should the Owner have named a project representative with full authority to act for the Owner or not?

(4) Where the locations of easements had been inadvertently omitted from the original drawings, would inset drawings on other plans, which showed the easements, have given Anderson ample notice of the existence of easements or not?

(5) Should the contract be construed to make the provision of "offsite fill" by Anderson extra work or not?

(6) Should Anderson be allowed additional compensation for unforeseen difficulties in excavation or not?

(7) Where the contract contains no changed-condition clause, but does contain clauses disclaiming responsibility for accuracy of data and requiring the Contractor to verify design specifications by inspecting the site, should there still be an implied warranty by the Owner that conditions are as described in plans and specifications or not?

(8) Did the Owner misrepresent material facts as to site conditions where actual ground elevations at the site were different from those shown on drawings made by architect?

(9) Where time was "of the essence" under the contract, should the Contractor be entitled to recover extra costs for his labor and services even though the work was not finished on time?

2.1 Problems originating with contract

2.1.1 Ambiguous contract documents

In the Anderson case, the work was delayed due to various disputed reasons. One reason was the high moisture content of the soil which made it
necessary for Anderson to dry it through stockpiling and aeration, the cost of
which was further increased due to unusually frequent rains.

The Contractor, Anderson, assumed in his scheduling that the
condition of the soil was basically "ideal" in spite of more unfavorable reports
in the documents, his own observation that the site was wet, and his general
awareness of the likely weather conditions during the winter months. He
tried to justify the delay in completing the work by relying on an ambiguous
clause which stated the work was to be done as "as rapidly as field conditions
permitted". The Contractor claimed that this contract clause [that "Contractor
agreed to complete work as rapidly as field conditions permitted"] amended
the timetable for the work and allowed additional time to Anderson in the
event of adverse conditions. Anderson submitted requests for extensions of
time.

On the other hand, the Owner, Golden, disagreed with Anderson's
interpretation of the contract and asserted that the Contractor was not only
late, but did not comply with the contract's three-day notice provision, which
states:

8.2.2. Three-day notice of delay from act, neglect or default of
architect, Owner, contractors, fire, stopping of work. If no claim for
extension is made within three days of occurrence, no claim for
extension may be made.

The other clauses as to schedule in the contract are as follows:

Building pads for Units A&C to be completed by November 1,
1979. The remainder of the building pad areas by December 1, 1979. All
remaining work by February 1, 1980.

Time is of the essence of this Agreement.

Without limiting the provisions of the preceding sentence,
Contractor also agrees to complete the work as rapidly as field
conditions permit... so as to enable the Contractor to complete the
work within the time limits specified above.
I think that this dispute originates with the ambiguous contract wording "as rapidly as", which gave the Contractor a good excuse for completing the project behind schedule, even though there are specific due-date clauses and "Time-of-essence clauses" in the contract. The latter was caused by omission of the words, "weather-related delays", from the language of the provision, which make it ambiguous.

In deciding this dispute, the Court relied on the following four general rules of interpretation of contracts:

(1) When a conflict exists between general and specific provisions, the specific clauses control.
(2) Written clauses govern printed clauses, since it is presumed that written provisions received stricter attention from the parties.
(3) Ambiguous terms are to be construed most strongly against the party who drafts the ambiguous language.
(4) Contracts will be interpreted, insofar as possible, to give reasonable interpretation to all parts of the contract, and interpretations which create conflicts will be avoided unless it is unreasonable to do so.

On the issue of delays from schedule, the Court applied rule (4) against Anderson and held that both the context and the wording of the clauses unambiguously demonstrate that the timetables in the contract were outside dates for completion and that the clause was intended only to underline the essential nature of timely completion. On the issue of notice, the Court applied rule (4) and held in Anderson's favor that Anderson's failure to comply with the three-day notice requirement for time extensions could not constitute a bar to the granting of such extensions since, for whatever reason, the parties did not include weather-related delays in the notice provision.

I think that both decisions were proper. Neither party could object to them. On the issue of delay, since Anderson had known of the wet condition of the soil and took a chance to estimate the schedule assuming an ideal one of offsite fill, he had to take the responsibility for the delay. However, on the
latter issue, as the weather was unusual, nobody could anticipate it. Therefore, I believe that the Owner should take this risk since only the Owner could have controlled it by setting another season for this job. I think the three-day notice provision is not so important because everyone encountered the unfavorable weather and could expect to be delayed by it.

If I had been the Contractor, I would have submitted two proposals as to schedule. One would have been based on the ideal condition using the offsite fill and the other on the wet condition. Then I believe that the Contractor could have avoided the risk. The Owner, by selecting one of the proposals, would have taken it. If I had been the Owner, I would have realized that the schedule was unfavorable since it had been raining unusually. I, then, would have consulted the Contractor about the future schedule to determine the best procedure at that time because the project was mine and I would have been in difficult position if it had been delayed unreasonably. I believe that there should not have been litigation concerning this issue if the parties had so acted.

Similar claims to those in Anderson were made in the case of Western Contracting Co. v. Dow Chemical Co., due to the ambiguous contract words "Best Efforts". The decisions in McKinney Drilling Co. v. The Collins Co., Inc. and W.J. Sanford v. G & R Construction contain good examples of applying these rules of interpretation.

2.1.2 Defective contract documents

The original drawing lacked the information about the dimensions of easements which was very important to calculate the amount of onsite fill. However, it was revised prior to the execution of the contract and the Owner called the Contractor to bring the easements to their attention. In addition to
this, the discrepancy between the estimated amount of fill and the actual amount required made this dispute much more complicated.

The Contractor alleged that offsite fill should be extra because the contract required the use of onsite fill. Anderson claimed that the need for offsite fill was an extra task and made the plans and specifications defective. Therefore the job could not be performed as contemplated, requiring Anderson to expend more money and effort than he had planned. Actually, when Anderson discovered that he had made a miscalculation of the amount of fill and knew that he could not get adequate onsite fill, he thought that he could get extra reimbursement for offsite fill no matter how much would be required believing that offsite fill was not included in the original contract price.

The Owner alleged that the drawing was not deficient because it had been revised and the revision had been called to the Contractor's attention before contract. The Owner denied the Contractor's claim for an increase in the contract sum based on the proposed use of offsite fill because the Owner claimed he did not intend to make it extra.

As to the Contractor's responsibility for scrutinizing the contract document, the contract says;

4.2.1. The Contractor shall carefully study and compare the contract Documents and shall at once report in writing to the architect any error, inconsistency or omission he may discover.

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2 Drawings were claimed to be deficient in failing to give notice of easements in spite of the facts that the topographic maps showed the easements and utility line. Anderson claimed this deficiency caused him to miscalculate the quantity of onsite fill he could excavate from the pond and to fail to choose a proper excavation technique to yield an adequate supply of borrowed material. Through these allegations, he tried to make the offsite fill be extra, so that he could recover for his miscalculation.
The contract was for a lump-sum and the following provision was included for an increase in the contract sum;

2.3.1. If the Contractor wishes to make a claim for an increase in the Contract sum, he shall give the architect written notice thereof within 20 days after the occurrence of the event giving rise to such claim. . . before proceeding to execute work.

I think that this dispute was mostly attributable to the fact that this lump-sum contract did not clearly state whether or not the offsite fill was extra work. This ambiguity affected the contract price seriously. In fact, the misunderstanding between the Owner and the Contractor as to offsite fill originated with this dispute.

As to whether the use of offsite fill was an extra for unforeseen circumstances, the Court held that in a fixed-sum contract, the Contractor was not entitled to additional compensation simply because unforeseen difficulties were encountered as long as the Owner did not breach the implied warranty that conditions were as described in the plans and specifications. The Court held that the Owner did not warrant the conditions because the contract contained no changed conditions clause. Also, the Court held that there were no misrepresentations by the Owner of material facts about the site conditions, because the inset drawing showed the easements and gave ample notice of the easements. The Court held that had the Contractor made a more careful inspection of the site, the ditches would have been discovered. Therefore, the Court decided that supplying offsite fill was not an extra. As to the quantity of fill, the Court held that the Contractor may recover the extra cost due to the differences between the actual ground elevations and those shown in the drawings. However, the Court held that the Owner was not liable for expenses incurred by the Contractor due to the Contractor's own miscalculations with regard to the amount of fill necessary to do job.
I disagree with this Court decision. Even if the Contractor had utilized the proper construction method to yield an adequate supply of borrowed material, the Contractor might have needed to use only offsite fill in order to complete the job on time, because of the wet condition of onsite fill. Actually, the Contractor based the dates for completion on offsite material quality and ideal conditions. Even if the Contractor had accurately estimated the amount of fill required to fill the site to the final grade, the amount of fill would have never changed. I believe that the cost of this earth work would have been much higher than the contract price, even if everything had been the best that could be expected. Therefore, unless offsite fill was an extra, the Owner could just take advantage of the Contractor's mistakes, because he could get service for a much lower price than he should have. I believe that the Court should have approved the extra cost which would have been required if the Contractor had performed his work ideally.

If I had been the Contractor, I would have disclosed my mistake to the Owner as soon as I noticed my miscalculation. Then, the Owner would have been aware that the amount of fill would have been the same no matter how I had done the estimation. I could, thereby, have avoided a claim if the Owner acted reasonably. I believe that it is extremely important to keep a good relationship between the Owner and the Contractor in order to avoid claims. The role of Court is quite important in this process: it should make a fair decision so that nobody can take advantage of the other's mistake. Otherwise, neither party can trust the other. In this respect, I think that this case shows many characteristics of construction claims in the U.S. I feel that each party in the U.S. tries to take advantage of the other through some loophole in the contract. For example, in this case, even if the contract had included the provision that offsite fill would not be extra and the drawings
had been perfect, this claim would have occurred because the Contractor would have felt that the Owner would have gotten an unfair benefit. As long as this attitude persists, the number of claims will not decrease no matter how the contract is revised.

2.2 No onsite project representative

In Anderson, some additional delay was experienced because there was no project representative of the Owner empowered to resolve disputes and to render interpretive decisions contemporaneously with the emergence of problems on the site.

The Contractor alleged that the failure to name a project representative was a breach of the Owner-Contractor Agreement.

The Owner made the excuse that there was a project coordinator until early 1980 when the Contractor had been expected to complete his portion of the work.

As to this matter, the contract included the following provisions;

2.2.2. Architect shall have no authority to execute Change Orders.

2.2.3. The architect will visit the site at intervals appropriate to the stage of construction to familiarize himself generally with the progress and quality of the work...

2.2.17. If the Owner and architect agree, the architect will provide one or more Project Representatives.

I think that if there had been no problem during the course of the earth work, there would have been no dispute about this. However, when the Contractor encountered difficulties to complete the work timely, the problem was the Owner's uncooperative attitude to expedite the work. While his failure to name a representative hindered the Contractor from expediting the work, he blamed the Contractor's failure of timely completion. I think that
nobody could dispute the Owner's responsibility for the delay in this situation.

The Court held for the Owner that the failure to name a project representative during the course of the Contractor's earth work did not constitute a material breach of the Owner-Architectural agreement and did not breach the Owner-Contractor agreement at all, where a project representative could only have referred to the architect's limited authority to order minor changes in work which could not involve adjustment in contract sum or extension of time for completion.

I disagree with this decision. The Court thought that since a project representative has no authority, the failure to name him is not breach of contract. However, in this case, this decision means that before the bid, the Contractor should have assumed the risk that he might be required to engage in time-consuming, long distance correspondence in order to obtain approval for proposed changes because no onsite authorized project representative would be present at the development site. I do not believe that any Contractor would assume such a ridiculous risk as this. I think that even though the Owner was not in breach of contract, he should have been penalized for the delay due to the failure to name a representative.

If I had been the Owner, I would have named an authorized representative as soon as I had known of the emergency situation in terms of timely completion. Then I would have cooperated with the Contractor to expedite the work. I think that these attitudes would have prevented misunderstanding and inspired the Contractor to work harder.
3. Impossibility of performance

As to examples of claims by Contractors for impossibility of performance, the decision in the case of H.B.Zachary v. Miles-Sierra is worthy of discussion.

In Zarchary, the problem was whether oral assurances by government representatives that marginal material not meeting the specifications could be used by the Subcontractor made it impossible for the Subcontractor to perform the work, where the prime contract required that any change of specifications be made by written change order.

The Contractor asserted that it was not impossible because he satisfactorily completed the work which the Subcontractor alleged was impossible after taking it over. The Contractor claimed breach of the sub-contract.

The Subcontractor alleged that the use of marginal material which might bring about rejection of the work was too risky and that it was impossible to perform the job because he was not furnished an adequate supply of material meeting the specification.

As to this material, the contract says;

Contractor guarantees that material in either Sites 1 or 2 will meet specifications and in sufficient quantity to complete required yardage in the pit selected by the Subcontractor.

I think that the Subcontractor's failure to furnish the appropriate equipment and personnel to do this job was the main reason for this dispute. The Subcontractor, who was struggling to do the work satisfactorily without the proper equipment and personnel, sought to get an excuse, "impossibility of performance", for its failure to perform based on oral notice. From the Contractor's point of view, the claimed "impossible performance" was due to...
the Subcontractor's failure to furnish the proper equipment, because the Contractor completed the job satisfactorily after taking over the Subcontractor's work.

The Court held for the Contractor in view of two facts: that material made available by the prime Contractor met the specific gravity requirement and that the Subcontractor continued performance until the takeover in spite of its alleged excuse for nonperformance.

I think that there was no absolute "impossibility of performance" here. The Supreme Court of Oklahoma's opinion was that the rule of supervening impossibility means not only actual strict impossibility, but impracticability arising from extreme and unreasonable difficulty, loss, injury or expense which may be involved. Therefore a decision about whether work is "impossible" should be based on whether proper preparation is reasonably done or not. In this case, the Subcontractor failed to furnish the proper equipment so that he was unable to perform his obligation. The Court made a decision based on the fact that the Contractor accomplished it satisfactorily after taking over the Subcontractor's job. However, I think that it might be impossible for even the Contractor to perform it with the equipment which the Subcontractor had furnished. Accordingly, if it had been reasonable to choose the equipment based on the contract document before bid, this decision should be reversed. As a matter of fact, in the case of James W. Miller v. The City of Broken Arrow, the Contractor was relieved from its contractual liability because of impossibility of performance, applying the Supreme Court of Oklahoma's opinion. In this case, the Contractor's preparation was reasonably based on the contract documents and he was complying with the contract requirement perfectly and in good faith.
In the case of Zachary, if the Contractor was at fault, it was in choosing this Subcontractor. Therefore, if I had been the Contractor, I would have checked the ability of the Subcontractor more carefully. For example, I would have checked its past results in performing the similar work and the way in which it intended to perform it. I might be advised that I would have to take a risk of failure of performance if I did so. However, I believe that it is best to cooperate and find out the best way of performing in terms of quality and price.
4. Extra work

It is extremely important for Contractors and Owners to know about the obligations created by the contract since different interpretations about the obligations of each party under the contract often raise the problem of "Extra Work." "Extra Work" is one of the major issues in construction projects. This is usually caused by a "Change Order" or a "Changed Condition".

4.1 Change Order

There are many cases disputing "extra work" such as Service Steel Erectors Co. v. SCE, Inc., McKinney Drilling Co. v. The Collins Co., Inc., Linneman Construction, Inc. v. Montana-Dakota Utilities Co., Inc., Environmental Utilities Co. v. Lancaster Area Sewer Authority, E&R Construction Co., Inc. v. Guy H. James Construction Co., and Falcon Jet Co. v. King Enterprises, Inc. Most of them were caused by failure to comply with the change clause which requires that each "Change Order" should be written by an authorized person and that claims must be submitted within a limited time in order to get additional compensation for the extra work. In most cases, some implied waiver of the contractual right is at the center of the dispute, because a contractor would be unable to recover the extra cost without it.

Usually, Contractors assert that an Owner implicitly waives its contract rights both to the written authorization requirement and timely claims by its conduct, such as that the Owner is aware of numerous changes being made on oral directives, or that the Owner implicitly promises to pay for the extra work, without any written authorization, or based on the Owner's conduct. For example, a contractor may claim that the Owner is aware that extra work
is being done without proper authorization but stands by without protest while extra work is being incorporated into the project.

The Owner, in order to prevent any implied waiver like this, often includes a "merger clause" in the contract such as this:

"No oral order, objection, claim or notice given by any party to the others shall affect or modify any of the terms or obligations contained in any of the Contract documents, and none of the Contract documents shall be held to be waived or modified by reason of any act whatsoever, other than by a definitely agreed upon waiver or modification thereof in writing, and no evidence of any other waiver or modification shall be introduced in any proceeding."

Failure to comply with the notice requirements is the main reason for these disputes. Some of the reasons contractors claim for their failure are the following:

1) Too busy to get an authorization
2) Too busy to make a claim
3) Oblivious of this requirement
4) Misunderstanding of this requirement
5) Unaware of this requirement

These reasons are basically the Contractor's own fault and he does not have any basis for the dispute. Nevertheless, why do Contractors make such claims for extra work? I think that Contractors cannot help doing so because of the money involved. On the other hand, the Owner can not concede either for just the same reason.

An important factual issue to be decided by the Court is whether or not there was a implied waiver of the Owner's contractual right to both the written authorization requirement and the notice requirement. For example, in the case of Service Steel Erectors Co. v. SCE, Inc., the Court found no liability for the claimed extra work, holding that there was no implied waiver
of these contractual provisions because the general contractor did not enter into a definite agreement to pay for any extra work, nor was there any other action demonstrating an intention to abandon the Owner's contractual rights.

I do not think that the basis for this decision is convincing. I think that these requirements are provisions to prevent the Contractor from doing extra work arbitrarily so that an Owner can decide what to do by himself. Therefore, the decision should be based on whether the extra work was what the Owner intended to do or not. For example, if the claimed extra work is reasonably necessary, it should be rewarded, regardless of failing to comply with the requirements, as long as there is no special reason why the Owner would not do so. Otherwise, the Owner could get a service free.

If I were the Owner, I might pay for the extra work as long as it is reasonable, because if it is reasonable, the work to be done would be the same without regard to how he complied with the requirements. I believe that this is the best way to keep good relations with one another.

4.2 Changed Conditions

There are two types of changed conditions. The first, known as "Type I" changed conditions, is defined as conditions which vary from the conditions indicated in the contract documents. The second, a "Type II" changed condition, is defined as a site condition of a previously unknown and unusual nature which differs materially from those ordinarily encountered in the work provided for in the contract.

To establish a "Type I" change, there must be some representation that reasonably induces a Contractor to believe that the site conditions will be more favorable than actually encountered.
"Type II" change conditions, on the other hand, require that the Contractor show that the conditions encountered were unusual and differed materially from those he had a reason to expect, considering the nature of the work in the locale. The conditions encountered by the Contractor do not have to be natural conditions, but may include any unknown physical condition that was reasonably unanticipated based upon an examination of the contract documents and the site. Contractors will be held to the common knowledge of other Contractors familiar with the area.

Clauses in contracts on these subjects also require that the Owner be notified in a timely fashion of changed conditions to provide him with the opportunity to evaluate and implement changes in design or alterations in method of performance which may become necessary due to the changed condition. Failure to comply with the notice requirements may present the Owner with a defense against the Contractor's claim for additional cost for extra work and cause a dispute.

In most disputes concerning changed conditions, the question is who has to take the liability for a bad expectation. This is the main point regardless of the type, since while a Contractor has expectations, it is the Owner who provides the documentary basis for those expectations.

A Contractor usually asserts that he did not reasonably expect the unforeseen conditions based on the contract documents. He asserts a change was caused by defective contract documents in that actual conditions were not what he expected them to be.

On the contrary, most Owners, in order to shift the risk of unforeseen circumstances, prefer a contract which contains standard clauses disclaiming responsibility for accuracy of the information furnished to bidders concerning
surface and subsurface conditions or requiring a Contractor to verify specifications by inspecting the site.

Actually, most contracts contain a clause requiring bidders' site inspection such as the following:

Each bidder shall thoroughly examine and be familiar with the site of the proposed project and submission of a Proposal shall constitute an acknowledgement upon which the Owner may rely that the bidder has thoroughly examined and is familiar with the site. The failure or neglect of the bidder to fully familiarize himself with the conditions at the project site shall in no way relieve him from or to the Contract. No claim for additional compensation will be allowed which based upon lack of knowledge of the site (from UMPOUA River Navigation Co. v. Crescent City Harbor District.)

Moreover, some contracts contain clauses disclaiming the accuracy of information of unforeseen conditions such as following:

All existing ground elevations, utilities, soil conditions, etc., as shown on the drawings are as reported to the architect by others and are therefore not guaranteed correct (from M.C.Anderson v. Donald Golden)

An aim of providing bidders with the site conditions information despite these clauses is to lower the bid price which bidders submit relying on the information. Therefore, the logic of the Owner seems to be inconsistent.

The rationale on which Courts make a decision concerning this inconsistency is summarized in Foster Construction C.A. & Williams Bros. Co. v. United States:

Normally, bidders will engage in extensive pre-bid inspections of project sites to avoid losses from unknown subsurface conditions. For the same reasons, Contractors will build a risk contingency element into bids, inflating contract prices. If, however, the government conducts a pre-bid inspection, assuming the burden of investigation, and, through a changed conditions clause, guarantees that the Contractor will be compensated for overruns resulting from conditions not detected by the government's logs, then the inflationary cushion in bidding should be reduced. (Id. at page 887.)
For example, in the case of UMPQUA River Navigation Co. v. Crescent City Harbor District, the Court held:

Provisions in contract including changed conditions clauses which shift some of the burden of investigation to bidder are narrowly construed and government disclaimers of responsibility for contractual indications are disregarded.

As a result, in most disputes about changed conditions, the key point is whether a Contractor reasonably expected the unforeseen conditions through the contract documents, regardless of disclaimer clauses.

In the case of UMPQUA v. Crescent, the Contractor, UMPQUA, claimed extra cost due to different site conditions, alleging that specifications provided by the harbor district and prepared by Swinc Engineering, Inc. inaccurately represented soil conditions in the dredging area, that UMPQUA and a Subcontractor relied on these specifications in submitting contract bids, and that, during the dredging, the Subcontractor encountered conditions materially differing from those shown in the specifications, resulting in unforeseen costs. See Appendix 2 for details.

Three contract clauses, "Examination of Site", "Soil information and Pile Tests" and "Subsurface Conditions Found Different", were related to this case.3

3. EXAMINATION OF SITE
Each bidder shall thoroughly examine and be familiar with the site of the proposed project and submission of a Proposal shall constitute an acknowledgement upon which the Owner may rely that the bidder has thoroughly examined and is familiar with the site. The failure or neglect of the bidder to fully familiarize himself with the conditions at the project site shall in no way relieve him from or to the Contract. No claim for additional compensation will be allowed which is based upon lack of knowledge of the site.

4. SOIL INFORMATION AND PILE TESTS
The drawing show soil test logs and pile test logs reproduced from reports by the district's soil Consultant. Copies of these reports are on file at the offices of the Engineers and at the District office and may be examined by prospective bidders. Each bidder shall make his own evaluation of the information contained in the reports. Neither the Owner or the Engineers guarantee that the soils borings, pile test logs or other information shown are typical for the entire site of the work.
Against the Contractor's allegations, the Court held that the Subcontractor's reliance on contractual data for dredging information was unreasonable where the special conditions informed bidders that backup reports for soil data were available at the harbor district's office but the Subcontractor made no effort to obtain this information, where the Subcontractor's dredge captain had encountered rocks on previous occasions while dredging areas of the harbor near the project site, and where the Subcontractor's own test results were inconsistent with those shown in contract plans.

I disagree with this decision. I do not believe it is reasonable for the engineer to provide bidders with unreliable information. I think that if the Contractor's reliance on the specifications is unreasonable, the engineer's provision of unreliable information to bidders should be also unreasonable since the engineer could have evaluated it based on backup reports and could have known about boulders from an engineer who was in charge of the similar project adjacent to this project area. Accordingly, I believe that the engineer is primarily responsible for not detecting these conditions.

In the case of Al Johnson Const. Co. v. Missouri Pac. R. Co., the Contractor claimed extra cost due to different site conditions from those shown in the plans and specifications. The contract clauses relevant to the

21. SUBSURFACE CONDITIONS FOUND DIFFERENT
Should the Contractor encounter subsurface and/or latent conditions at the site materially differing from those shown on the Plans or indicated in the Specifications, he shall immediately give notice to the Architect/Engineer of such conditions before they are disturbed. The Architect/Engineer will thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the Plans or indicated in the Specifications, he will at once make such changes in the Plan and/or Specifications as he may find necessary, and any increase or decrease of costs resulting from such changes to be adjusted in the manner provided in Paragraph 17 of the General Conditions.
issues in this case are found in the specifications such as examination clause\textsuperscript{4},
disclaimer clause\textsuperscript{5} and the changed condition clause.\textsuperscript{6}

The Court held for the Contractor that the changed condition clause had to be given effect since the condition was materially and substantially different from the conditions disclosed by the contract documents and it was not possible for bidders to make their own subsurface exploration of site conditions prior to bidding due to the short time interval between the invitation to bid and the bid opening and the high water level at that time of year.

I agree with this decision, since I think that the Owner is basically liable for the extra cost due to unforeseen circumstances.

\textsuperscript{4} GENERAL PROVISIONS
Article 7. EXAMINATION OF PLANS, SPECIFICATIONS AND SITE OR WORK.
It shall be understood that the Contractor has, by careful examination, satisfied himself as to the nature and location of the work, the conformation of the ground, the character, quality and quantity of the materials to be encountered, the character of equipment and facilities needed preliminary to and during the prosecution of the work, the general and local conditions, and all other matters which can in any way effect the work under this Contract....

\textsuperscript{5} SPECIAL CONDITIONS.
Article 6. SUBSURFACE CONDITIONS.
.....Certain boring information has been obtained for design purposes and the logs of borings are shown on the plans for the convenience of the Contractor and for such use, if any, as he may at his own risk desire to make of it. No representations or guarantees are made concerning the completeness of the boring data. Such data indicates an opinion as to materials encountered at the specification location of the respective borings and may not represent materials which will actually be encountered in performing the work....

\textsuperscript{6} Article 8. CHANGED CONDITIONS.
As the various portions of the subsurface are penetrated during the work, the Contractor shall, promptly and before such conditions are disturbed, notify the Engineer at the project site and company in writing if the actual conditions differ substantially from those which were indicated or normally inherent in the nature of the work or if obstructions obviously foreign to the natural character of the substratum or previously unknown obstructions are encountered. If in concurrence therewith the Engineer at the site will promptly submit to the Contractor a plan or description of the modifications which he proposes should be made in the contract documents. The resulting increase or decrease in the contract price or time allowed for the completion of the contract shall be estimated by the Contractor and submitted to the Engineer at the site in the form of a proposal.....
5. Suggestions to Avoid Claims

There are many kinds of claims in U.S. construction projects, but all of the claims ask for additional compensation from the Owner because of "extra work cost". I reviewed 34 court decisions of construction claims to see how they are tried in the court and resolved. Figure 1 summarizes the results of my review. Among the reasons for dispute, "Conflict about interpretation of the contract documents concerning extra work or changed conditions" is a major one. Figure 1 shows that this tendency has not changed in the last 30 years. I think this means that revisions to standard form contracts to avoid claims has not been effective. These revisions have been made by the representative of one party [engineers or Contractors] and neither side has cooperated with this work. I think this is the main reason why these form revisions are biased toward one party or the other and in vain. For instance, in many cases there were clauses in the contract which try to avoid the Owner's risk of unknown conditions and impute it to the Contractor. On the other hand, they put the "changed conditions" clause in the contract to prevent the bidders from raising the bid price to presume the high risk of uncertain conditions. Who takes this risk is still ambiguous in the contract. Who should take what risk? I think that if this question was answered properly and unambiguously in the contract, construction claims would be reduced drastically.
<table>
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<tr>
<th>NO.</th>
<th>PLAINTIFF &amp; DEFENDANT</th>
<th>CAUSE</th>
<th>Year of contract</th>
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**TOTAL** 12 8 20 3

A; Insufficient or defective contract provisions or instructions
B; Conflict about interpretation of contract concerning about change condition
C; Conflict about interpretation of contract concerning about obligation, extra work and cost
D; Conflict about interpretation of contract concerning about time extension

**Figure 1 Causes of claims**
5.1 Court decisions

Through this research, I felt that the Court decisions were not always consistent with what I feel is fair. I think that there is a price for each construction project, were it built ideally, and an Owner should pay at least this amount of money for such service, no matter what the contract says. I do not think that it is fair that either side makes a profit by taking advantage of the other's mistakes only because of what the contract says. I think that a Contractor is basically in a weaker position than an Owner before entering into a contract. Consequently, the contract is often favorable to the Owner. Disclaimer clauses and merger clauses are good examples of this. I think that Courts should make decisions based on what services an Owner actually got rather than what a contract says.

For example, in the case of Anderson v. Golden the Owner received the benefit of offsite fill rather than onsite. Though one of the reasons why the Contractor used offsite fill was that the Contractor failed to obtain enough amount of offsite fill due to his own mistake, the other reason was that the onsite fill was so wet that he could not complete the work on schedule. As a result, no matter who would have done this job, it would have been necessary to use offsite fill. However, the Court made a decision against the Contractor because it construed the contract to be so.

In case of UMPQUA v. Crescent, the Court held that the Contractor could not recover the extra cost due to unexpected unfavorable conditions even though no matter who had done the work, such conditions would not have changed.

I think that such Court decisions lead people to be sly in their dealings with one another, because one can be rewarded for taking advantage of the other's mistake. I believe that Courts should make decisions such that the
Contractor would at least recover the cost which it would have taken if the work had been done ideally.

5.2 The way to choose a Contractor

There are some cases in which either party may try to find a loophole in the contract to get extra compensation even though knowing that the fault was his own. For example, in the case of Linneman v. Montana, I think that the act of the Contractor, who failed to get the written authorization for extra work and submit a claim until 10 months after completion of the job, while the contract required notice within 30 days of completion of the extra work, was very unreasonable. I cannot understand why he sued the Owner. The following cases are also good examples of this situation: Goodwin, Inc. v. City of Lafayette, Environmental Utilities Co. v. Lancaster Area Sewer Authority and Service Steel Erectors Co. v. SEC, Inc. in which cases the allegations were clearly untimely and unreasonable. If this were in Japan, these Contractors would never get future jobs, since every Owner would be aware of their unreasonable behavior. There are few construction claims in Japan because every party behaves very reasonably. I believe that if the Owner takes into account the bidders' past behavior at his award, as it is in Japan, such unreasonable and time-and-money-wasting litigation as this would be eliminated.

5.3 Who should take what kind of risk

5.3.1 Unforeseen circumstances

In order to reduce the risk of unforeseen circumstances, we have to investigate the site of the project. It takes money and time. The more money and time that is spent on the investigation, the more accurate it usually is. On the other hand, the increased accuracy makes the cost of the project lower.
Both time and money are controlled by the Owner. That is, it is the Owner who makes a decision about how much money and time should be spent for the investigation. Therefore, I believe that it is most natural and reasonable that the Owner take the risk of the unknown circumstances. In order to do so, I would like to recommend a bidding system in which bidders submit all assumptions about uncertain conditions on the basis of which they estimate the cost so that an Owner can choose the best Contractor based on their assumptions and prices, and the Owner takes responsibility for the assumption. If the Owner does not want to do so, I recommend he enter a turn-key contract in which the Contractor takes all kind of risks.

I know some cases in which Contractors dare to assume the ideal conditions to lower the bid price in spite of expecting that actual conditions will be worse. In other words, they gamble on the actual conditions and if they lose, they try to get additional costs for the changed conditions like Affholder, Inc. v. Southern Rock, Inc. I think that my suggested system can eliminate such ridiculous litigations as this.

5.3.2 Act of God

In the case of Barnard-Curtiss v. the U.S., a Contractor claimed additional costs incurred as a result of flood damage. The Court held against the Contractor's claim that an unprecedented amount of rainfall in a watershed covered by a dam project was an act of God, but did not excuse the construction Contractor from timely performance where the Contractor was still able to perform the work, albeit with more difficulty and expense. I think that this Court decision was obviously erroneous because there is nothing impossible in construction projects if there is no limit on expenses.

I think that nobody could reasonably anticipate such an act of God as occurred in Barnard-Curtiss v. U.S. during performance of work. If anyone
should take this risk, it would be the Owner, since he took a chance to build a structure and to avoid damage due to it before the work. A Contractor also should take some risk because it is common sense that he should expect that minor damage or disruption might occur during his performance.

Therefore, I strongly recommend that a contract contain a provision which provides a ratio on which the expense of damage due to an act of God is borne by both parties.

5.4 Defective contract documents

As to defective contract documents, the party who drafts them is responsible. I suggest that the drafter of the contract should be responsible for the ambiguous words, which should not be used in the contract. For example, "as rapidly as..." (Anderson v. Golden) or "use its best efforts" (Westin v. Dow Chemical) do not accomplish anything but provide a reason for claims, because these words only give excuses for problems and a loophole in the contract. The one who has to take each risk of uncertain conditions should be specified clearly.

If a defect in the contract documents is found, the correction should be made as quickly as possible and confirmed in writing immediately. Otherwise, this defect could give a good excuse to the other party and wastes time and money.
Appendix 1

1. Eastern Iowa Light and Power Co-op. v. McKenzie, 296 F.2d 295 (8th Circuit Court of Appeals, 1961)
   Cause: C
   Parties disputed over whether the construction of a barge channel was required by the contract. Furthermore, even if it was required, the Contractor alleged that he did not have to do so since he had no place to deposit "unstable" dredging material on the site development.

2. P.L. Saddler v. the U.S., 287 F.2d 411 (U.S. Court of Claims, 1961)
   Cause: C
   This is a claim for contract damages based on a change order issued by the Owner. The Contractor maintained that required work by the change order, which increased earthwork, on which the unit price was based, from 7,950 yards to 13,000 yards and necessitated the bringing of equipment 100 miles back to the job site, was outside the scope of the contract.

3. George Bennett Construction Co. v. the U.S., 371 F.2d 859 (U.S. Court of Claims, 1967)
   Cause: C
   This is a suit by the Contractor against the government for additional compensation allegedly due for extra work in excavating for the construction of a river levee.

4. Barnard-Curtiss Co. v. the U.S., 301 F.2d 909 (U.S. Court of Claims, 1962)
Cause: B

This is a suit by the Contractor to recover additional costs incurred as the result of flood damage accruing during the course of its performance of the construction contract.

5. Morrison-Knudsen Co. v. the U.S., 397 F.2d 826 (U.S. Court of Claims 1968)

Cause: B

This is an action by the Contractor, a road builder, to recover additional compensation due to the Owner's action of designating substitute borrow pits to replace pits originally designated in drawings, ordering certain of the original borrow pits enlarged, and ordering the Contractor to perform borrow excavation and overhaul far in excess of quantities shown on contract drawings because of materially different subsurface and/or latent conditions from those shown on the drawings.


Cause: A, C

This is an action which arose out of a dispute between the Contractor and the Subcontractor as to whether the work done by the Subcontractor was "extra" or not and whether damage was due to the Subcontractor's improper performance and delay, or due to deficiencies in plans.

7. Macri v. the U.S., 353 F.2d 804 (9th Circuit Court of Appeals, 1965)

Cause: C
This is an action which arose out of a dispute between the Contractor and the Subcontractor as to whether the extra work done by the Subcontractor and the subsequent delay were due to foundations for which the Contractor was responsible or not and whether damages were due to the Subcontractor's improper performance and delay or not.

8. **Fanning & Doorley Const. Co. v. Geigy Chemical Corp.,** 305 F.Supp. 650 (District Court Rhode Island, 1969)
   Cause: A, C
   This is a dispute as to who was responsible for the failure of a product to effectuate its purpose and whether the work by the Contractor was extra or not in case of failing to get a written authorization.

9. **H.B.Zachery Co. v. Travelers Indemnity Co.,** 391 F.2d 43 (5th Circuit Court of Appeals, 1968)
   Cause: A
   This is a dispute between Contractor and Subcontractor as to impossibility of performance where government specifications for riprap work on a dam required rock with greater than 2.45 specific gravity and the prime contract required that any change of specifications be made by written change order, oral assurances by government representatives that riprap material not meeting specifications could be used.

10. **Practical Construction Co. v. Granite city Housing,** 416 F.2d 540 (7th Circuit Court of Appeals, 1969)
    Cause: C
This is a dispute as to extra work where the Contractor failed to comply with the contract provisions which required the Contractor to submit protests to instructions on extra work within ten days after their receipt.

11. Goodwin, Inc. v. City of Lafayette, 418 F.2d 698 (5th Circuit Court of Appeals, 1969)

Cause: C

This is a dispute as to extra work where the Contractor failed to comply with the contract provisions that no claims for extra work or extra cost would be allowed unless a claim was presented with the first estimates filed after changed or extra work was performed.


Cause: C

This is a dispute between the Contractor and Subcontractor for extra cost by the Contractor's failure to remove promptly the large quantities of shot rock which it had wrongfully deposited on the cofferdam system.


Cause: A

This is a dispute as to the sum of money which G&R contracted to pay the Subcontractor, Sanford, for the work due to the ambiguous wording of contract documents.
14. *E.C. Ernst, Inc. v. General Motors Corp.*, 482 F.2d 1047 (5th Circuit Court of Appeals, 1973)

Cause: B

This is an action by a Subcontractor against a general Contractor and Owner for claims for additional costs and increased expenses which resulted from delay caused by other Subcontractors.

15. *Elte, Inc., v. S.S. Mullen, Inc.*, 469 F.2d 1127 (9th Circuit Court of Appeals, 1972)

Cause: A

This is an action by a Subcontractor against the Contractor for claims for additional costs in trying to exploit the unproductive quarry first selected by the Contractor where the contract required the Contractor to provide the quarry site.


Cause: A, C

This is a dispute as to extra work concerning rock excavation between the Contractor and Subcontractor where there was a ambiguity between the general contract and the subcontract in terms of responsibility for measurement and certification of quantities of rock excavation.


Cause: B
This is an action for additional compensation under changed condition clauses where actual conditions were substantially different from those indicated by borings as to which the contract contained disclaiming clauses.


Cause: A, C

This is a dispute between the Contractor and the Subcontractor as to who was responsible for the unwatering work as described in their subcontract agreement.


Cause: A

This is a dispute between the Owner and the Contractor as to whether plans were defective where there was a two-foot discrepancy between ground water elevation shown on two pages of the engineer's plans.

20. Linneman Const. v. Montana-Dakota Utilities Co., 504 F.2d 1365 (8th Circuit Court of Appeals, 1974)

Cause: C

This is a dispute between the Owner and the Contractor as to whether the Contractor was entitled to extra compensation where the Contractor failed to comply with the "extra" clause providing for a written order for any extra work and for submission of claims within 30 days of completion of the extra work.

Cause: D

This is a dispute between the Contractor and Subcontractor as to whether the Contractor could terminate the Subcontractor when the Subcontractor failed to complete its performance on time but the Contractor also delayed the Subcontractor's access to the work site.


Cause: B, C

This is a dispute between the Owner and the Contractor as to whether "spread moves" of the Contractor's crews were extra or not, whether the Contractor was entitled to rely on the unscaled, undimensioned "typical drawing" and whether the contract provisions were unfair to the Owner or not.

23. **Nebraska Public Power Dist. v. Austin Power**, 773 F.2d 960 (8th Circuit Court of Appeals, 1985)

Cause: A, C

This is a dispute between the Owner and the Contractor as to who was responsible for substantial delays and massive cost overruns. The Owner mainly alleged that the Contractor failed to provide sufficient organization, planning, management and direction of its work force on the project. The Contractor mainly alleged that the problem was due to (1) late and inaccurate construction and installation drawings; (2) untimely delivery of material and
equipment furnished by the Owner; (3) requiring to provide labor not required in the contract without issuing change work orders.


Cause: C

This is a dispute between the Owner and the Contractor mainly as to whether the Contractor was entitled to additional compensation for extra work without extra work orders as required by the contract.

25. UMPQUA River Nav. Co. v. Crescent City Harbor, 618 F.2d 588 (9th Circuit Court of Appeals, 1980)

Cause: B

See Appendix 2


Cause: D

This is a dispute between the Contractor and the Subcontractor as to whether the Contractor was liable for damages for the delay caused by change orders, extra work and drawing revisions in case the contract contains a "no damage delay" clause.

27. Western Contracting v. Dow Chemical, 664 F.2d 1097 (8th Circuit Court of Appeals, 1981)

Cause: A
This is a dispute between the Contractor and the Subcontractor as to the construction of "best effort" in the contract provisions.


Cause: B

This is a dispute between the Contractor and the Subcontractor as to whether the cost overrun was due to the fact that the location of the tunnel was changed from the place shown in the bid documents, as well as different subsoil and water invasion problems encountered at the new location.


Cause: C

This is a dispute between the Owner and the Contractor as to who is responsible for defective products shortly after the acceptance of the jobs.

30. Service Steel Erectors v. SCE, Inc., 573 F.Supp. 177 (District Court Virginia, 1983)

Cause: C

This is a dispute between the Contractor and the Subcontractor as to whether the Subcontractor was entitled to additional compensation for extra work when he failed to comply with contractual provisions requiring written approval and timely claims for extra work.

Cause: A, C

This is a dispute between the Contractor and the Subcontractor as to the wording of the subcontract which seems to be ambiguous and inconsistent regarding extra work.

32. In Re King Enterprises, 678 F.2d 73 (8th Circuit Court of Appeals, 1982)

Cause: C

This is a dispute between the Owner and the Contractor as to whether the oral change order was valid where the contract provision required that changes be in writing and signed by an authorized agent.

33. M.C. Anderson v. Donald Golden, 569 F.Supp. 122 (District Court Georgia, 1982)

Cause: A, B, C, D

See Appendix 2


Cause: C

This is a dispute between the Contractor and the Subcontractor as to whether the Subcontractor was entitled to additional compensation for acceleration and extra work where he failed to give written application for an extension as required by the subcontract.
Appendix 2


Attachment of photocopy of *UMPQA River Navigation Co. v. Crescent City Harbor District*, 618 F.2d 588.
M.C. ANDERSON, d/b/a M.C. Anderson
Construction Company, Plaintiff,
v.
Donald GOLDEN, Defendant.
CV481-237.
United States District Court,
S.D. Georgia,
Savannah Division.

Contractor, after filing materialman's lien against owner, brought action against owner seeking money allegedly due under contract, remuneration in quantum meruit, reimbursement of certain funds expended during course of job, and attorney fees. Owner asserted counterclaim for delay damages, cost of correcting or completing work, expenses incurred, and slander of title. The District Court, Edenfield, J., held that: (1) owner's failure to name project representative during course of earthmoving contractor's work did not constitute breach of owner-architectural agreement and did not breach owner-contractor agreement at all, where project representative could only have referred to architect's somewhat limited authority to order minor changes in work which could not involve adjustment in contract sum or extension of days for completion.

2. Contracts =242

Contractor's failure to comply with three-day notice requirement for time extensions could not constitute bar to granting of such extension where, for whatever reason, parties did not include weather-related delays in notice provision.

3. Contracts =312(1)

Failure to name project representative during course of earthwork contractor's work did not constitute breach of owner-architectural agreement and did not breach owner-contractor agreement at all, where project representative could only have referred to architect's somewhat limited authority to order minor changes in work which could not involve adjustment in contract sum or extension of days for completion.

4. Contracts =199(1)

Though easements were not otherwise pointed out to earthwork contractor's employee, where inset drawings on additional plans delineating easements, along with admonition that those areas are not to be disturbed by contractor, would have given ample notice of existence of easements which are not to be excavated had contractor's employee studied drawings, contractor was not precluded from accurately estimating amount of available offsite fill on ground that drawings were deficient in failing to give notice of easements.

5. Contracts =232(1)

Developer did not misrepresent amount of fill available in retention ponds; thus developer was not liable for expenses incurred by earthwork contractor due to con-
tractor's own miscalculations with regard to amount of fill necessary to do job.

6. Contracts $\equiv$ 287(2)

Architect's certificate to construction lender for purposes of loan disbursement was not equivalent to certificate of final payment contemplated by owner-contractor agreement which was required prior to proceeding with suit on contract.

7. Contracts $\equiv$ 287(1), 300(3)

Where owner terminated contractor's contract by ordering him off job, and subsequently reinstated contractor only to allow him to mitigate damages, with express understanding that notice of termination would remain effective, and owner substantially contributed to lengthy delays and failure of contractor to complete work according to timetable, which was reason given for termination of contract, owner by his own act prevented completion in accordance with terms of contract thereby making it impossible for contractor to secure architect's certificate; thus, contractor could sue on contract despite architect's failure to issue certificate of completion.

8. Contracts $\equiv$ 278(1)

Owner was entitled to rely on and enforce terms of owner-contractor contract despite failure to agree with architect as to appointment of project representative, where provision of owner-contractor agreement referring to nomination of onsite project representative was not mandatory.

9. Contracts $\equiv$ 198(1)

Contractor who held himself out as experienced in earthwork and storm-drainage system work was bound to exercise reasonable professional skill in estimating cost of work and in performing job.

10. Contracts $\equiv$ 143.5

Contract will be interpreted, insofar as possible, to give reasonable construction to all parts of contract, and construction of contract provisions as conflicting will be avoided unless it is unreasonable to do so.

11. Contracts $\equiv$ 232(1)

Where contract provided that contractor furnish all materials and supplies necessary to perform work, specifications provided that contractor could acquire additional fill from offsite locations if he chose to do so, postbid addendum contained “revision” or “clarification” which required excavation of borrowed material from adjacent retention pond areas, and contract finally executed by parties indisputably required contractor to excavate retention areas, contract did not limit contractor to use of onsite fill, thereby making offsite fill extra.

12. Contracts $\equiv$ 241

Where owner authorized purchase of offsite fill when, because of moisture content of onsite fill, site could not be proof-rolled without bridge layer of offsite fill, condition surely not foreseen by either contractor or owner, and contractor only requested such authorization when onsite material was saturated to point that it could not be proofrolled or would entail delays if used, parties did not modify contracts to make offsite fill extra on all occasions.

13. Estoppel $\equiv$ 78(1)

Owner's authorization of increase in contract sum for offsite fill used as bridging lift to alleviate unforeseen proofrolling problems estopped owner from arguing that offsite fill was never extra under contract.

14. Contracts $\equiv$ 232(1)

Extra or additional work is work not contemplated in original specification.

15. Contracts $\equiv$ 232(1)

If work performed is covered under lump-sum contract, contractor cannot consider cost of performing as extra.

16. Contracts $\equiv$ 232(1)

In fixed-sum contract, contractor is not entitled to additional compensation simply because unforeseen difficulties are encountered.

17. Contracts $\equiv$ 232

If services are not contemplated by original agreement and are necessary to perform work, law will apply promise to
pay for extra services even though contract is fixed-sum contract.

18. Contracts ⇐ 232(1)

Where contractor was clearly required under terms of contractor-owner agreement to bring site to final grade levels, contractor was required to fill site no matter how much fill was required, contract did not specify amount of fill to be placed on site, there was no supplemental agreement to pay, and owner repeatedly informed contractor that he would not pay for offsite fill that he chose to use because of poor quality of onsite fill, contractor could not recover costs of offsite fill, even though quality of material was unforeseen circumstance to all parties.

19. Implied and Constructive Contracts ⇐ 64

Where filling of site was clearly contemplated by contract, contractor could not recover in quantum meruit cost of onsite fill merely because quality of material was unforeseen circumstance to all parties.

20. Contracts ⇐ 303(1)

Where cost of compliance exceeds contemplated cost, contractor who submits bid has little choice but to bear burden of additional expenses.

21. Contracts ⇐ 205

Implied warranty by owner that conditions are described in plans and specifications is not vitiated by standard clauses disclaiming responsibility for accuracy of data or requiring contractor to verify specifications by inspecting site.

22. Contracts ⇐ 93(1)

In order to calculate bid, bidders must be able to rely on representations by owner as to subsoil conditions and other nonobvious conditions.

23. Contracts ⇐ 205

Where contract specifically provided that contractor was responsible for investigating soil and subsoil conditions, for visiting site and familiarizing himself with local conditions, for correlating drawings and specifications with existing conditions, ground elevations, utilities, and soil conditions as shown on drawings were expressly not guaranteed to be correct, and contract contained no changed-condition clause, contract squarely placed risk of uncertainty as to site conditions on contractor and owner did not impliedly warrant the accuracy of his agents' investigation.

24. Contracts ⇐ 232

Purpose of changed-condition clause of contract is to relieve bidder of risk of encountering adverse subsurface conditions.

25. Fraud ⇐ 11(1)

Even where no implied warranty by owner that conditions are as described in plans and specification exists, owner may be liable to contractor due to misrepresentations of material facts of onsite conditions.

26. Fraud ⇐ 18, 23

In order to prevail on claim of misrepresentation, contractor asserting misrepresentations by owner must satisfy two requirements: first, that he was not reasonably able to discover true facts for himself and second, that misrepresentation was material.

27. Contracts ⇐ 94(1)

What constitutes reasonable ability to discover true facts about contract site depends upon time constraints involved, nature of alleged misrepresentation, and whether owner expected that bidders would rely on specification and plans provided.

28. Fraud ⇐ 21

Where drainage ditches were alluded to in specifications, and had contractor's employee done more careful inspection of site, ditches would have been revealed, and contractor was put on notice of easements and utility lines which they contained, plans and specifications were not defective in regard to ditches and easements so as to make owner liable for misrepresentations of material facts of offsite conditions.

29. Contracts ⇐ 199(1)

Where contractor would have had to incur expense in surveying site himself, with no assurance that his bid would be
accepted, and more careful inspection of site would not have revealed discrepancy in amount of fill actually needed to raise site to finished grade levels and amount called for on owner's drawings, contractor justifiably relied on architect's plans in constructing bid and estimating quantity of fill needed.

30. Contracts $\Rightarrow 232$

Where contractor discovered variance between amount of fill actually needed and that called for on drawings made by owner's architect, contractor could recover costs of additional cubic yards of fill required as well as cost of survey requested by owner's architect.

31. Contracts $\Rightarrow 232(1)$

Where existing ground elevations of site were different than those shown on drawings made by owner's architect, contractor could recover costs of additional cubic yards of fill required as well as cost of survey required by owner's architect.

32. Mechanics' Liens $\Rightarrow 208$

Lien waivers are valid and enforceable under Georgia law even against contractor's contention that his intention was only to subordinate his lien claims to that of lender.

33. Mechanics' Liens $\Rightarrow 208$

Waivers of lien rights must be distinguished from contractor's affidavits which in usual course of business are sworn statements by contractor that he has paid subcontractors reasonable value or agreed price of work done or material furnished.

34. Mechanics' Liens $\Rightarrow 236$

Only sworn statement by contractor that he has paid subcontractors reasonable value or agreed price of work done or material furnished upon completion of work is binding release of materialman's lien rights.

35. Mechanics' Liens $\Rightarrow 115(1)$

Contractor's sworn statement that he has paid subcontractors reasonable value or agreed price of work done or material furnished does not refer to contract price between owner and contractor.

36. Mechanics' Liens $\Rightarrow 208$

Contractual language whereby contractor stated he waived, released, and relinquished any and all claims for rights of lien which he may have had, and that he waived and released his rights to file mechanics' or materialman's lien against property constituted waiver of lien rights and was not only an intent by contractor to subordinate his lien claims of that of lender.

37. Contracts $\Rightarrow 232$

Where contractor waived any lien rights with regard to amount of contract sum already paid, no sum could be asserted for any amount which exceeded agreed-upon contract price, even though costs of completion may have exceeded contract sum; furthermore, owner was entitled to deduct cost of completion from balance due.

38. Libel and Slander $\Rightarrow 130$

Under Georgia law wrongful filing of mechanic's lien may give rise to action for slander of title.

39. Libel and Slander $\Rightarrow 139$

Where owner not only failed to prove malice on part of contractor who filed wrongful mechanic's lien but also failed to demonstrate that he sustained any special damages, owner failed to establish elements necessary to state cause of action for slander of title. Ga.Code, § 105-1411; O.C.G.A. § 51-9-11.

40. Contracts $\Rightarrow 211$

Implied and Constructive Contracts $\Rightarrow 65$

Time-of-the-essence clauses are enforceable in Georgia, however, Georgia follows rule which allows recovery in quantum meruit by plaintiff who was in substantial breach of contract, as long as breach is not willful or deliberate.

41. Contracts $\Rightarrow 301$

Although that time was of essence was made abundantly clear in earth-movin contract, where except for some minc items of contract, earthwork contract completed rough grading of storm sew system work, and owner accepted benefit c performance, even though contractor faile
to timely complete contract and failed to complete some portions of work at all, contractor was entitled to recover value of his labor and services at amount equivalent to unpaid contract price minus setoff for expenses incurred by owner to complete or correct contractor’s work.

42. Contracts § 232(1)
Contractor is not entitled to additional compensation for work necessitated by his own inadequate performance.

43. Costs § 173(1)
Under statute which allows recovery of attorney fees if defendant has acted in bad faith, or has been stubbornly litigious, or has caused plaintiff unnecessary trouble and expense, award of attorney fees is precluded where there is bona fide controversy or genuine dispute. Ga.Code, § 20–1404; O.C.G.A. § 13–6–11.

44. Costs § 173(1)
Under Georgia law attorney fees are not allowed where amount recoverable is considerably less than amount sought. Ga. Code, § 20–1404; O.C.G.A. § 13–6–11.

45. Federal Civil Procedure § 2737.5
Where bona fide controversy existed as to amount due contractor for work performed in earthmoving aspect of development project, contractor was not entitled to award of attorney fees. Ga.Code, § 20–1404; O.C.G.A. § 13–6–11.

Stanley E. Harris, Jr., Savannah, Ga., for plaintiff.
Robert J. Campbell, Kansas City, Mo., and Aaron L. Buchsbaum, Savannah, Ga., for defendant.

ORDER

EDENFIELD, District Judge.

The above-captioned case came on for bench trial before this Court on August 24, 1982. After hearing three days of testimony and reviewing numerous exhibits and depositions, the Court now makes the following Findings of Fact and Conclusions of Law.

Introduction

This suit involves a classic confrontation between the developer of a project, McAlpin Square Shopping Center, and his contractor, in this case, the rough-grading and storm drainage system contractor. The conflict which arose during the course of the work was exacerbated by the weather and other adverse conditions at the site of the development. Each party accused the other of various breaches of the contract. The contractor, M.C. Anderson, doing business as M.C. Anderson Construction Company, filed a materialmen’s lien against the McAlpin Square property. He subsequently brought this action, which was removed to this Court on the basis of diversity jurisdiction, against Donald Golden, the developer of McAlpin Square. He seeks monies allegedly due under the contract, remuneration in quantum meruit, reimbursement of certain funds expended during the course of the job, and attorney’s fees. Golden, in turn, asserted a counterclaim for delay damages, for the cost of correcting or completing work under Anderson’s contract, for expenses incurred, and for slander of title.

FINDINGS OF FACT

I. The Parties and the Contract

1. Plaintiff, an earthwork contractor, entered a lump sum contract to perform site work at the proposed McAlpin Square Shopping Center, with Donald Golden, a real estate developer with a leasehold in the property. The site is located in Chatham County, Georgia, northwest of the intersection of Victory Drive and Wallin Street.

2. Anderson received an invitation to bid on the development in late May, 1979. In order to prepare bids on the site grading and storm sewer construction work, prospective bidders were provided with a package of information prepared by Golden’s architect, John Carey. The package included a bound book entitled “Specifications for Site Grading and Storm Sewer Work for the McAlpin Square Shopping Center” which contained detailed bidding and soil
boring information and a site grading plan dated May 23, 1979. The scope of the site work initially included clearing the site, raising it to the required elevation, rough-grading, and general preparation of building pad and parking area sites. Bidders were instructed to carefully examine the site, the drawings, and other bid documents and to verify conditions and locations in the field.

3. Anderson, the only earthwork contractor to bid the job, submitted a bid of $575,695.00 on June 12, 1979. In order to achieve a reduction in this price, John Carey engaged in discussions with Steve Chavis, Anderson's employee in charge of the McAlpin Square bid. After the elimination of a soil stabilization mat and the addition of a provision requiring the excavation of fill from retention areas adjacent to the site, Anderson submitted a revised bid of $425,000.00 on June 21, 1979. After further discussions and negotiation, Anderson submitted a final proposal on August 15, 1979, for $425,000.00, which was substantially similar to the June 21, 1979 bid. Golden accepted this bid and after adding $4,250.00 for the bond premium, the contract price was $429,500.00.

4. Prior to the execution of the contract, Carey issued a revised grading plan dated August 23, 1979, which superceded the May 23rd plan. In addition to other minor configuration changes, the dimensions of easements in the retention pond area, which had been inadvertently omitted on the May 23rd drawings, were shown.

5. Anderson and Golden executed the standard AIA contract on September 12, 1979. The contract documents included the Owner-Contractor Agreement, the August 23rd drawings, the Specifications, the Instructions to Bidders, the Uniform Proposals, Addendum No. 1 (Post-Bid), and the General and Supplemental General Conditions. The contract contained a merger clause. Pertinent portions or paraphrases of portions of the contract documents are set out below.

a) The Agreement

Art. 2. The Contractor shall furnish all supervision, labor, materials, equipment, transportation and supplies necessary to perform the site grading work and storm sewer work for the Project.

Notwithstanding anything set forth in the contract documents to the contrary, Contractor acknowledges and agrees that Contractor has investigated soil and subsoil conditions of the site to its full and complete satisfaction.

Art. 3. Work to be commenced as soon as possible and substantial completion to be achieved according to terms of Schedule A.

Art. 6. Final payment when work completed, contract performed and final Certification for Payment issued by architect.

b) Schedule A

(1) Building pads for Units A & C to be completed by November 1, 1979. The remainder of the building pad areas by December 1, 1979. All remaining work by February 1, 1980.

Time is of the essence of this Agreement.

Without limiting the provisions of the preceding sentence, Contractor also agrees to complete the work as rapidly as field conditions permit ... so as to enable the Contractor to complete the work within the time limits specified above.

c) General Conditions

Art. 1.2.2. By executing the Contract, the Contractor represents that he has visited the site, familiarized himself with the local conditions under which the work is to be performed, and correlated his observations with the requirements of the Contract documents.

1.2.3. The Contract documents are complementary, and what is required by anyone shall be as binding as if required by all.

2.2.2. Architect shall have no authority to execute Change Orders.

2.2.3. The architect will visit the site at intervals appropriate to the stage of construction to familiarize himself generally
with the progress and quality of the work....

2.2.17. If the owner and architect agree, the architect will provide one or more Project Representatives.

4.2.1. The Contractor shall carefully study and compare the Contract Documents and shall at once report in writing to the architect any error, inconsistency or omission he may discover.

4.3.1. Contractor... shall be solely responsible for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the work under the Contract. If Contractor shall have knowledge of same, he shall notify owner and architect of any actual impending or probable shortages of labor or material or of other factors which may affect adherence to the progress schedule.

6.1.8. The owner will provide for the coordination of the work of his own force and of each contractor with the work of the Contractor, who shall cooperate therewith as provided in Paragraph 6.2.

8.1.3. The date of substantial completion of the work or designated portion thereof is the date certified by the architect when construction is sufficiently complete, in accordance with the contract documents, so the owner can occupy or utilize the work or designated portion thereof for the use for which it is intended.

8.2.2. Three-day notice of delay from act, neglect or default of architect, owner, contractors, fire, stopping of work. If no claim for extension made within three days of occurrence, no claim for extension may be made.

12.8.1. If the Contractor wishes to make a claim for an increase in the Contract sum, he shall give the architect written notice thereof within 20 days after the occurrence of the event giving rise to such claim... before proceeding to execute work.

d) Uniform Proposal

Scope of work. “Bidder”... has become familiar with the general requirements and local conditions affecting the costs relating to this proposed project.

UP-4. No change in the work which affects the Contract price shall be implemented by the Contractor.

e) Specifications

Art. 10.9. Bidders are advised that the time element for the completion of the job will be one of the major considerations in awarding the contract. The Contractor, however, should estimate his time accurately as he will be required to meet his time schedule.

f) Supplementary General Conditions

0201b. Before submitting a proposal, bidders, general contractor and all subcontractors shall carefully examine the drawings and specifications, and fully inform themselves as to all existing conditions.

0202. Contractor’s Responsibility

a. Site Inspection: The site where the work is to be constructed shall be carefully examined, the drawings and specifications read, and the Contractor shall thoroughly understand all requirements before work is begun. All existing ground elevations, utilities, soil conditions, etc., as shown on the drawings are as reported to the architect by others and are therefore not guaranteed correct. The Contractor shall verify all conditions and locations in the field and accept same unless he shall report any discrepancy to the architect prior to submitting his bid.

0217. Pay Requests

After the first monthly pay request each subsequent request shall be accompanied by a waiver of lien, signed by the General Contractor, covering the full amount of all payments received as of that date.

0304d. The fill shall consist of sandy clay, or other granular nonexpandable material of low plasticity, hauled in if necessary.

0305. Retention and Borrow Pit Areas

As long as Contractor excavates the retention areas to the elevations noted on the
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plan, he may acquire additional fill from offsite if he so chooses.

0310. Sub-surface Investigation Report

A complete copy of the sub-surface investigation report is included for the Contractor's use and guidance. Any unusual condition found shall be brought to the attention of the architect before proceeding with the work.

g) Addendum No. 1 (Post Bid)

The following revisions and clarifications shall be made to the drawings and specifications, dated May 23, 1979.

8.e. Excavate borrow material from adjacent retention pond areas.

8.g. The maximum elevation in the retention basin shall be left at El. 1'.

6. The job which Anderson finally contracted to perform was essentially two-faceted:

(1) Clear, fill, and rough-grade the site

(2) Excavate retention ponds to a maximum of one foot above sea level elevation.

At the time of his final proposal, Anderson apparently contemplated a balance job. Chavis had estimated that to reach the finished grade levels, 114,000 cubic yards of fill would have to be placed on the site. Excavation of the fill from the borrow pits would, in turn, leave the retention ponds at a maximum elevation of plus one, after the unsuitable soil (overburden) was replaced in the bottom of the pits. The reduced figure of the final proposed price was based in part on the availability of on-site fill. Both Anderson and Chavis understood, however, that the contract required M.C. Anderson Construction Company to meet the final contours whether the amount of fill exceeded or fell short of the quantity Chavis had estimated would be needed.

7. The soils engineer's report contained in the specifications stated that the larger borrow area (Pit A) contained 18 feet of good usable fill overlain by an average of 7 feet of overburden. This amounted to 29,000 cubic yards of fill per acre. There were 6.67 acres, exclusive of the easements; thus, approximately 190,000 cubic yards of fill would be available for use from Pit A. Hussey and Gay, a civil engineering firm, later estimated the quantity of usable fill as approximately 112,000 cubic yards. Both Whitaker Laboratory, Inc. and D.E. Hill Engineers, who investigated the subsurface conditions, noted that the soil was slow-draining and that the site was normally wet.

Chavis noted that the area "was sort of a wet site" (Chavis Deposition at 43) when he walked the perimeter of the site. He did not further inspect the interior of the site because, according to Chavis, he was hindered by the dense undergrowth which covered it.

[1] 8. After discussing with Golden and Carey the timetable for completion, Chavis arrived at a schedule which was incorporated into the contract. (Schedule A). Despite the report on the condition of the soil, his own observation that the site was wet and his general awareness of the weather during the winter months, Chavis based the dates for completion on off-site material quality and ideal conditions. At trial, Anderson argued that the proviso attached to Schedule A that the "Contractor ... agrees to complete the work as rapidly as field conditions permit" amended the timetable to allow additional time in the event of adverse conditions. Both the context and the wording of the proviso unambiguously demonstrate, however, that the preceding paragraphs setting forth the timetables contained outside dates for completion and that the proviso was intended only to underline the essential nature of timely completion.

Anderson did not meet any of the Schedule A deadlines for completion.

II. The Work, The Delays, and The Disputes

9. Anderson and Golden executed the contract on September 12, 1979. Anderson's crew, with Chavis in charge, began work during the week of September 15th. Shortly after the work had begun, Carey, at Golden's request, wrote a letter to Chavis
concerning Item 8(e) of Addendum No. 1, which specified that borrow material was to
be excavated from the adjacent retention pond areas. That item, Carey explained,
was "more restrictive than intended." (D-15):

You may ... secure fill material from
offsite sources if you wish as long as it is
acceptable material, the retention area is
lowered to at least elevation 1' and the
finished site is left at the new grades
shown on the plans.

[2] 10. From the outset, Anderson's
crew encountered difficulties on the site.
The primary problem was the high moisture
content of the soil. Before borrow material
could be placed on the site, the soil had to
be dried through stockpiling and aeration,
processes which slowed the progress of the
work. Beginning in November and con-
tinuing through Spring, 1980, unusually fre-
quently rains occurred, aggravating the mois-
ture problem. Because the rain saturated
the site, work was hindered on clear days.
Anderson submitted two requests for exten-
sions of time, the first on December 14,
1979, detailing 37 days lost to rain, and the
second on February 8, 1980, (36 days lost).
Anderson claimed a total loss of 52 working
days to rain, 10 days for drying and stock-
piling material, and 11 days for mucking
and backfilling. The contract contained a
three-day notice requirement for extensions
but weather-related delays were inadvert-
ently omitted from the language of the provi-
sion. It is undisputed that Anderson
did not comply with the three-day notice
provision.¹

11. Some additional delay was experi-
cenced due to the absence of a local project
representative empowered to resolve dis-
putes and render interpretive decisions con-
temporaneously with the emergence of
problems on the site. The general condi-
tions provided that "[i]f the Owner and
Architect agree, the Architect will provide
one or more Project Representatives to as-
sist the Architect in carrying out his respon-
sibilities at the site." The Agreement en-
tered by Golden and Carey provided that
the owner and architect would nominate a
project representative for the project. Car-
ey testified that a project representative
was appointed for the general contractor's
portion of the work but that none was
named for Anderson's contract.

The Owner-Contractor Agreement de-
nominated the architect the owner's repre-
sentative and required him to make periodic
visits to the site. He was not required to be
continuously present on the site. The archi-
tect was authorized to render necessary in-
terpretations for the progress of the work
upon written request by either the owner or
the contractor and to order minor changes
in the work which would not involve an
adjustment in the contract sum or an exten-
sion of the dates for completion. Only the
owner, however, could institute change or-
ders.

Because no onsite project representative
was present at the development site, Chavis
was required to engage in time-consuming,
long distance correspondence in order to
obtain approval for proposed procedures.
Delays resulted because of the circuitous
route such communications had to follow.

However, a soil technician, either an em-
ployee of Whitaker Laboratory, Inc. or Joe
Whitaker himself, was present on the site
to advise Chavis on soil-related problems.
Roy Hussey supervised the storm drainag-
complete his portion of the work by Febru-
ary, and thereafter Golden continued to expec-
ter the development site had to be
obtained. But Anderson and McDevitt & Street
guaranteed Carey that they would coordinate
their work and that it would be unnec-
assumptions since, for whatever reason, the parties did
not include weather-related delays in the notic-
provision.
Thus, the failure to name a project representative during the course of Anderson’s work, particularly in view of the fact that a project representative could only have referred to the architect’s somewhat limited authority, does not constitute a material breach of the Owner-Architect Agreement and does not breach the Owner-Contractor Agreement at all. The omission did contribute to Anderson’s failure to timely complete the work.

12. In December, 1979, while excavating fill from Pit A, Anderson’s crew encountered a utility line and damaged a sewerage pipe. Work was delayed while the sanitary sewerage was cleaned up and a rerouting structure erected. Because of the presence of the sewerage and utility lines, fill could not be excavated from that area and the quantity of fill available from the retention basin was reduced. Chavis claimed that he was unaware of the easements and utility lines therein because Carey’s plans did not disclose their existence. The easements did not appear on the May 23rd plans because the easement information was not significant in May of 1979 since the specifications contemplated using offsite fill and there was no clear requirement for a retention area. The dimensions of the easements were added to the August 23rd drawings and the contractor was warned that the easements were to remain “undisturbed.” The presence of utility lines within the easements was not disclosed though Carey and his assistant had in their possession topographic maps showing the easements and utility lines. After sending the August 23rd drawings to Chavis, Carey attempted to bring the easements to Chavis’ attention by phone conversation and correspondence but Chavis misconstrued his reference to “easements” and interpreted Carey’s remarks as references to the storm drainage system to be constructed.

[4] Though the easements were not otherwise pointed out to Chavis, the inset drawing on the August 23rd plan delineating the easements, along with the admonition that these areas were not to be disturbed by the contractor, would have given ample notice of the existence of the easements which were not to be excavated had Chavis or another Anderson employee studied the August 23rd drawings. Chavis testified that he did not learn of the presence of the easements and utility lines until the lines were exposed during excavation. Only at that point did he look at the August 23rd drawings and notice the easements and the qualifying remark. Hence, any allegations that the drawings were deficient in failing to give notice of the easements and that the plaintiff was therefore unable to accurately estimate the amount of available onsite fill is clearly meritless.

13. During the course of the work, there were five written change orders instituted as provided in the contract which increased the contract sum from $429,500.00 to $464,953.50.

a) Change Order No. 1, dated September 27, 1979, for $16,562.00 was for additional fill material to raise the finished grade level six inches.

b) Change Order No. 2, dated October 30, 1979, was for $9,525. Replacement of unsuitable material excavated from the retention basin comprised $7,525. Because of the high moisture content of the natural soil, the building pad for Unit C could not be proofrolled in order to ascertain whether soil needed to be replaced. The soil technician on the site recommended using an initial layer of offsite fill as a bridging lift to alleviate this problem. Chavis followed his advice and requested an add in the contract sum for the purchase of 2,000 cubic yards of offsite fill. Golden approved the request and instituted an add of $2,000.00 for the purchase of the offsite fill. Chavis had offered to supply the fill for $2,000.00, rather than at the unit price of $3.00 per cubic yard.

c) Change Order No. 3 which engendered turmoil both during the course of the work and during the trial requires some discussion of events that ensued prior to its issuance. During December of 1979, afterAnderson had failed to meet the deadlines for completion of the building pads for Units A and C, methods of expediting the
work were discussed. The quality of the onsite fill, aggravated by the heavy rainfall, was such that substantial amounts of time passed between laying each lift of fill. Chavis recommended the use of drier offsite fill on Units A and C at a cost of $1.50 per cubic yard. Golden declined to treat this item as an extra. Subsequently, in early January, Chavis reported to Golden that Unit C could be completed in a timely manner if offsite fill was utilized. Golden then agreed to split the cost of the offsite fill with Anderson, each to pay $8,625. Chavis promised that the work on Unit C would be completed within 8 or 4 days. Although the fill was purchased and the work performed, it was several weeks before the Unit C building pad was eventually completed because of heavy rainfall during January. Anderson and Chavis orally notified Golden of the rain delay during the last week of January and documented the days lost to rain in a letter to Carey dated February 8, 1980.

Change Order No. 3, including $2,665.00 for the removal of unsuitable material in Unit B and $8,625.00 for one-half of the cost of offsite fill for Unit C was prepared by Carey and signed by him on January 28th. On or around the same day, Golden discovered that due to the rain delay, Anderson had just begun to bring in the offsite fill. By letter dated January 30, 1980, Golden informed Anderson that although it was Anderson's responsibility to provide the material to fill the site, Golden had gratuitously offered to pay part of the cost of offsite fill in order to expedite the work. Chavis received the change order and signed it on March 7, 1980. On March 24th, Golden struck through the second item, for the offsite fill, and executed the change order, leaving the $2,665.00 item. He then sent the revised change order to Anderson, pointing out the stricken item and explaining that he had reversed the amount for the offsite fill because of his discovery that Anderson had raised a number of matters which would require an adjustment of the contract price, over which Golden did not intend to negotiate. At trial, Golden explained that his decision not to pay was based on Chavis' failure to complete the work within the time specified in their verbal agreement.

d) Change Order No. 4, dated March 19, 1980, was for $4,484.00 for storm drainage revisions due to interference with a previously undiscovered city force main and for an additional manhole. Chavis did not execute this change order because he disagreed with the amount. Carey had reduced the amount due submitted by Anderson.

e) Change Order No. 5, dated June 19, 1980, for $1,466.00 authorized payment of the amounts claimed by Anderson which had been removed by Carey in preparing Change Order No. 4. Chavis also refused to execute this change order.

14. In addition to these authorized change orders, by letters dated February 20, 1980, Anderson submitted requests for adds of $10,350.00 for 6,900 cubic yards of fill to be used as a bridging lift for Unit D and $46,847.50 for 18,739 cubic yards of fill which represented the quantity of fill required to bring the site to the final grades above and beyond the quantity indicated by Carey's drawings. Both requests were denied. In February, 1980, at a meeting held at Sambo's Restaurant attended by Carey, Chavis and others, Chavis notified Carey that the settlement plates had indicated a variance in the elevations noted on the Carey drawing and the actual existing ground elevations. Carey requested an independent survey. Joseph Helmly of Helmly, Purcell & Associates, an engineering and surveying firm, performed a survey of the site in March of 1980.

Helmly compared the quantity of fill required to bring the site to final design using the elevations of contours on Carey's drawing with the amount of fill needed based on his survey of the existing ground level and found that 7,895 cubic yards of fill above and beyond that indicated by Carey's August 23rd drawing would be required to reach the finished grades.

Helmly also calculated the amount of material needed to fill ditches on the site, some of which did not appear on Carey's drawing.
Carey and his assistant, Ron Juhnke, conceded that not all of the ditches shown on the topographic map on which they relied were reflected on their sitework drawings. Anderson was put on actual notice of the existence of the drainage ditches, however, by the soils report contained in the Specifications. Moreover, he had a duty to inspect the site himself in order to verify site conditions and to note any discrepancies with the drawings. Helmly calculated that to fill the ditches not shown would require 3,853 cubic yards of fill. And if one and one-half feet of top soil were stripped from the sides and bottom of the ditches, an additional 2,541 cubic yards would be needed. The total amount of fill required over and above that indicated by the Carey drawings, according to Helmly’s calculations, was 13,789 cubic yards in compacted state. Allowing for a 30% increase in volume in fluffed condition, this translates into 17,926 cubic yards. Helmly’s calculations were not preferred and the difference in his final figure and Chavis’ estimate of 18,739 cubic yards was not explained.

At the time that Helmly surveyed the site, fifty to seventy-five per cent of it had been cleared and the ditches had been filled. Helmly testified that he did not take into account the six-plus inches of soil stripped away in the clearing process. He also testified that the omission of some of the ditches from Carey’s drawing was immaterial because, viewing the job overall, the sitework “balanced out.”

Helmly also compared the contours on Carey’s drawing with the spot elevations shown on a topographic map prepared by Leigh Gignilliat in 1970 which had been verified as accurate by Golden’s civil engineer, Roy Hussey, and on which Carey had relied in preparing his site plans. He found them remarkably similar. Carey utilized contours spaced at two-foot intervals rather than at one-foot intervals. Although there was a great deal of testimony that one-foot contour intervals were customarily used in the Chatham County area, Chavis testified

2. Concededly, this figure is somewhat arbitrary. However, without more data than was that the two-foot contour intervals did not cause him problems. The Gignilliat drawing showed spot elevations between eight and six feet whereas the contour lines on the Carey drawing, by their very nature, showed no elevation below eight feet. Apparently, Chavis did not utilize the process of interpolating between two contour lines in order to determine elevations lower than eight feet. Though spot elevations may have been more useful to Chavis, the Carey drawing was not defective because of the use of two-foot contour intervals, particularly in view of the fact that the specifications disclosed numerous elevations below eight feet. At any rate, Helmly concluded that the elevation differences on the two drawings were minimal.

Helmly’s comparison of the Gignilliat and Carey drawings demonstrated that the omission of the ditches and the minimal elevation discrepancies ultimately made no difference in the work on the McAlpin Square site. The yardage reflecting the amount of material necessary to fill the ditches will therefore be disregarded. The Court also finds that the testimony regarding the amount of fill needed to reach final contours based on existing ground elevations as compared with the quantity needed according to the contours on Carey’s drawing is unreliable to the extent that Helmly did not take into account the amount of soil stripped away in clearing the site.

The difference in cubic yardage actually required and that required according to the Carey drawing, as calculated by Helmly, was 7,885 cubic yards. This figure translates into 10,263 cubic yards in fluffed condition. If one-half of the site had been cleared with a maximum loss of .5 foot of top soil, approximately 7,698 cubic yards (in fluffed condition) more than required by the Carey drawing would have to be placed on the site to reach final elevation. There are several ways to account for this apparent discrepancy between the existing ground elevations and those indicated on the Carey drawing. Chavis could simply presented, a more accurate amount cannot be calculated.
have failed to accurately interpolate between the contours to reach the actual ground elevations. However, his discovery of a discrepancy is supported by Helmly's survey. The defendant suggests that the variance can be explained by Helmly's failure to take into account the stripping of up to six inches of soil during the clearing process. Because Carey relied on the Gignilliat topo to prepare his drawing, it seems logical to infer from the evidence of minimal differences in the Carey and Gignilliat elevations that only minimal disparities existed with regard to the existing ground elevations.

The Court finds that the evidence preponderates in favor of the plaintiff and credits Helmly's testimony insofar as it establishes that some amount of fill was required above and beyond that indicated by the Carey drawing. The Court finds this amount to be $7,698 cubic yards. Because, as will be discussed, onsite fill was or should have been available to correct this deficiency, the unit price for onsite fill, $2.50 per cubic yard, will be employed to determine the cost of the additional fill.

15. On November 14, 1980, nearly two months after removing his crew from the site, Anderson submitted a pay request in which he included a claim of $219,729.00 for 73,243 cubic yards of offsite fill at $3.00 per cubic yard. This figure reflects a truck count kept by Chavis during the course of the project. At trial, Chavis testified that 85,013 cubic yards of offsite fill were hauled onto the site, the cost of 73,243 cubic yards of which has not been paid by Golden.

Chavis itemized the total amount, as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Quantity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Difference in Carey and Gignilliat plans</td>
<td>18,739 cu. yds.</td>
</tr>
<tr>
<td>1) 2.88 acres lost from retention areas because of easements</td>
<td>41,000 cu. yds.</td>
</tr>
<tr>
<td>depth of 10 ft.</td>
<td></td>
</tr>
<tr>
<td>2) Change Order No. 1:</td>
<td>6,625 cu. yds.</td>
</tr>
<tr>
<td>Raising paved area one inch</td>
<td>6,900 cu. yds.</td>
</tr>
<tr>
<td>Replacement of unsuitable material</td>
<td>2,088 cu. yds.</td>
</tr>
<tr>
<td>Initial lift on Unit C</td>
<td>5,750 cu. yds.</td>
</tr>
<tr>
<td>Lift prior to surcharge on Unit C</td>
<td></td>
</tr>
<tr>
<td>TOTAL:</td>
<td>85,018 cu. yds.</td>
</tr>
</tbody>
</table>

3. The evidence with regard to the 73,243 cubic yards of offsite fill was extraordinarily confusing. At his deposition, Chavis could not account for the use of this quantity of offsite fill.
change orders and the denied requests for change orders, the record does not contain any indication that Chavis submitted claims for an increase in the contract sum based on the proposed use of offsite fill, until the final pay request in November, 1980. The contract required the contractor to give notice of a claim for an increase in the contract sum "within twenty days after the occurrence of the event giving rise to such claim." (General Condition 12.8.1). Failure to comply with the stipulated procedure would render the claim invalid.

Aside from this technical defense to the claims for items 2, 4, and 5, another question arises with regard to the 41,000 cubic yards of offsite fill allegedly required because of the depletion, in mid-May, of the retention ponds. Chavis calculated that 2.83 acres of fill were lost due to the existence of the easements. That Chavis had notice of the easements which were to remain undisturbed has already been discussed. Moreover, he based his assessment of the defect on excavation of the pits to a depth of ten feet. There is no doubt that more fill was available in the retention ponds, but because of the construction technique implemented, that is, the replacement of the overburden into the ponds after removal of the good fill, the contractor could not retrace his steps and reach the concededly available fill after he realized his miscalculation of the quantity of fill he could excavate from the ponds. The owner and contractor had agreed upon utilization of this method of disposal of the overburden but the contract did not control the depth to which the ponds could be excavated as long as the ponds were left at a maximum plus-one elevation after replacement of the overburden. Chavis did not know the depth to which the ponds had been excavated. Had Chavis been aware of the easements from the beginning of the work, as he should have been, he could have changed his excavation technique in order to obtain more onsite fill. Anderson conceded that the retention ponds would have yielded sufficient fill if not for the placement of the overburden into the bottom of the ponds after excavation of the usable fill.

Chavis testified that 111,896 cubic yards of fill was excavated from the retention ponds. Other testimony and documentary evidence, based on cross-sectioning of the retention ponds after excavation of the fill, demonstrated that the figure is closer to 90,000 cubic yards. According to Chavis, 85,013 cubic yards of offsite fill was hauled onto the site. Thus, the amount of fill actually used exceeded by approximately 60,000 cubic yards Chavis' estimate that the job would require 114,000 cubic yards of fill.

The natural inference to be drawn from the foregoing facts is that Chavis incorrectly estimated the amount of fill needed in preparing the plaintiff's bid. When it became apparent to him and to Anderson that the job would cost more than they had calculated, they decided to seek an increase in the contract sum. Their failure to request increases in the contract sum in accordance with their truck counts each month supports the conclusion that they fully expected to bear the expense of the offsite fill in acknowledgment of their obligation to fill the site to the final grades, no matter how much fill was required or where the fill was obtained. The plaintiff now seeks to recoup the costs of the offsite fill incurred because the construction method they utilized failed to yield an adequate supply of borrow material.

For instance, his truck count for October showed that 9,000 cubic yards had been hauled onto the site. However, he submitted a claim for only 2,000 cubic yards. He also testified that one-half of the 73,243 cubic yards of offsite fill was used before he depleted the retention ponds, as a mixture with the onsite fill. There was some evidence of the use of offsite fill to construct haul roads and plaintiff's counsel suggested that offsite fill was used for filling ditches. Indisputably, no claims for change orders were submitted with regard to the use of offsite fill for haul roads or filling ditches. Based on the similarity of the figures, the Court can only conclude that by the time of trial, Chavis had found a way to account for the 73,243 cubic yards, in the manner set out above. Because of the inclusion of some items which were never explained, the inconsistencies in his deposition and trial testimony, and his continued confusion at trial, the Court cannot find Chavis' calculations credible.
569 FEDERAL SUPPLEMENT

[5] The record is devoid of evidence that Carey misrepresented the amount of fill available in the retention ponds and the defendant should not be saddled with expenses incurred by the plaintiff due to his own miscalculations with regard to the job. The defendant should not be required to increase the contract sum by the price of the offsite fill which the plaintiff had no evidenced intention of claiming as an extra at the time he planned to purchase it. Moreover, a claim for an add two months after Anderson's crew left the job fails to satisfy the contractual provision governing the procedure for asserting claims for increases in the contract price.

16. In March, 1980, after a meeting on the site of the project, Golden set up a new timetable for completion, as follows:

1) C Unit [Kroger]—overburden must be completely off site by March 19 . . .
2) B Unit—overburden is to be completed and on site by March 14 with consolidation completed and overburden removed no later than April 26 . . .
3) D Unit—Overburden is to be completed and on site by April 2nd with consolidation completed and overburden removed no later than May 17 . . .
4) Remainder of work—all of the remaining work is to be 100 percent completed and all of your men and equipment off the site on or before June 1st.

This would include the consolidation.

Unit A had been completed in early February. The surcharge (overburden) was removed from Unit C on March 19, 1980. Final density tests on Unit B were performed on April 25, 1980, and Whitaker issued his certification of completion on April 28, 1980. On Unit D, the surcharge was removed on May 30, 1980. Whitaker's letter certifying completion was dated June 30, 1980. Whitaker issued a qualified certification of completion of the parking area on August 15, though he testified that he could have done so as early as June 30th. His certification was conditioned on removal of unsuitable material, regrading and recompaction.

Delays in completion of the work in accordance with the new schedule resulted in part from continued rainfall and the presence of the general contractor's crew whose materials and supplies interfered with the progress of the sitework. The parking lot area was found to contain unsuitable material which also delayed the filling of the site. Golden contributed substantially to this delay by neglecting to deliver written authorization of the removal and replacement of the unsuitable material. Anderson stood ready with his equipment to perform the work for three weeks awaiting Golden's go-ahead. When no authorization was forthcoming, Anderson withdrew his equipment. A picket of the site in May halted work for two or three days. During July, Anderson's crew was hampered by the presence of raw sanitary sewerage flowing into the storm line. Together with McDevitt & Street's people and city personnel, Anderson undertook a clean-up operation. This further delayed completion.

During a substantial part of the summer months, Anderson's crew was rough-grading the parking lot area. After they had completed the grading, McDevitt & Street's base subcontractor noted disparities in the grades. Chavis testified in his deposition that McDevitt & Street "was having a problem with the grades that we had set," (Chavis Deposition at 100), and that Anderson therefore undertook to correct the inaccuracies by preparing a grid system and by regrading, in doing so, raising the area to be paved one inch. Though Carey stated at trial that he thought the grid system was unnecessary, he did check and approve the grid system and raising of the site. Anderson does not seek to recover the cost of preparing the grid system. He does, however, seek recovery of $7,000.00 which he paid to Shuman, McDevitt & Street's paving subcontractor, for fill brought in by Shuman to correct the disparity. Apparently, the correction of the grades by raising the area one inch also accounts for the 2,000 cubic yards of offsite fill included in Chavis' itemization of the offsite fill used on the site.

17. Pursuant to Golden's inquiry, Carey submitted his opinion on July 24, 1980, that
just cause existed for termination of Anderson's contract. That same day, Golden memorialized by letter a conversation with Joe Whitaker in which Whitaker opined that more than $15,000.00 worth of work remained to be done under the Anderson contract. Golden had previously given Anderson and his bonding company, Sentry Insurance Company, notice that the contract would be terminated if the work was not completed in a timely manner. Accordingly, by letter dated July 24, 1980, Golden terminated the contract because of the "lengthy delays and failure to complete the job within the times provided." (Defendant's Exhibit 6-49).

Anderson, by counsel, objected to the termination and offered to undertake to complete portions of the work. After a telephone conversation with Golden on August 4th, Anderson, again by counsel, reiterated his offer to perform mutually agreed-upon items of work—filling an overexcavated area of retention pond B and rough-grading behind Unit B. Anderson's bonding company reconfirmed this offer and set a ten-day period for completion. Golden's attorney contacted Anderson's attorney on August 11th and set forth the terms and conditions for Anderson's return to the job. It was understood that Anderson would be permitted to do the work in order to mitigate losses and that the notice of termination would not be withdrawn. On August 12th, Golden withdrew permission to proceed pending resolution of certain matters at an onsite meeting with Anderson, McDevitt & Street personnel, Carey and others. On August 20th, Golden reinstituted the letter agreement. In the meantime, Golden hired other contractors to perform certain items under the Anderson contract.

18. During the August onsite meeting, Anderson discovered that McDevitt & Street was using plans dated December, 1979, which showed several different and additional grades than those shown on Anderson's plans, the August 23rd drawings as revised in October. Some of the finished floor level elevations for sidewalk and curb areas were different on the two sets of plans and some of the final elevations did not appear on Anderson's plans. Anderson was required to leave the site at eight inches below finished floor level, thus he had to know the correct finished floor levels in order to properly grade the site.

18A. Except for certain items which will be discussed hereinafter, Anderson completed the sitework and pulled his crew from the development site on or around September 17, 1980. He has not received payment on pay request No. 9 for $7,776.00; although Golden drew the check for payment, Golden's bank refused to honor it. Pay request No. 10 was itemized as follows:

<table>
<thead>
<tr>
<th>Item Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Contract retention (includes total amount of Change Order No. 3, before reversed)</td>
<td>$65,000.00</td>
</tr>
<tr>
<td>Offsite fill (73, 243 cu. yds. at $8.00/cu. yd. and 350 cu. yds. at $2.50/cu. yd. used as pipe backfill by utility contractor)</td>
<td>219,875.00</td>
</tr>
<tr>
<td>Regrading parking area after utility contractor disturbed it</td>
<td>5,250.00</td>
</tr>
<tr>
<td>Storm drain revisions</td>
<td>6,600.00</td>
</tr>
<tr>
<td>Interference manhole</td>
<td>950.00</td>
</tr>
<tr>
<td>Payment bond premium on additional work</td>
<td>2,720.00</td>
</tr>
</tbody>
</table>
Item 2 has previously been discussed and revised, except as to the 350 cubic yards allegedly used as pipe backfill. No evidence was offered as to this item. Nor was any evidence offered with regard to Item 3. Change Order No. 4 included $5,485.00 for the storm drainage revision. Chavis refused to execute it because he disagreed with the price; however, he did not explain why the assigned cost was inaccurate. Item 5 was included in Change Order No. 5, which Chavis also refused to sign. Again, he did not explain why he refused to do so. After revising the figures in accordance with the foregoing discussion, the plaintiff's tenth pay request includes the following:

<table>
<thead>
<tr>
<th>Unpaid Contract Sum</th>
<th>$63,000.00</th>
</tr>
</thead>
<tbody>
<tr>
<td>Additional fill required because of discrepancy in plans</td>
<td>$19,245.00</td>
</tr>
<tr>
<td>$2.50/cu. yd.</td>
<td></td>
</tr>
<tr>
<td>Payment bond premium</td>
<td>$2,720.00</td>
</tr>
<tr>
<td>TOTAL</td>
<td>$84,965.00</td>
</tr>
</tbody>
</table>

The plaintiff also seeks recovery of additional costs incurred in completing the work and of fees paid to third parties, as follows:

<table>
<thead>
<tr>
<th>Additional Costs Paid to Shuman Construction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Company</td>
</tr>
<tr>
<td>Grade crews (13 days at $1,050.00 per day)</td>
</tr>
</tbody>
</table>

The reason for the second item was not clear but it possibly represents the regrading performed after implementation of the grid system.

<table>
<thead>
<tr>
<th>Paid to Third Parties</th>
</tr>
</thead>
<tbody>
<tr>
<td>Helmly, Purcell field topo</td>
</tr>
<tr>
<td>Helmly, Purcell calculations</td>
</tr>
<tr>
<td>Helmly, Purcell calculations</td>
</tr>
<tr>
<td>Bonding company attorney's expenses</td>
</tr>
</tbody>
</table>

Anderson gave notice of bad faith to the defendant and therefore seeks attorney's fees totalling $26,803.

19. At approximately monthly intervals throughout the job, Anderson submitted applications for periodic payments accompanied by signed lien waivers and contractor's affidavits. Anderson routinely signed these lien waivers until May 16, 1980, when his attorney objected to signing the lien waiver accompanying pay request No. 7. There was a conflict in the testimony as to whether an understanding existed between the parties' attorneys to limit the effect of the May 16, 1980 affidavit. Anderson testified that he understood that the May 16th affidavit as well as the other affidavits were lien subordination documents only, as opposed to waivers of lien rights. According to Anderson's attorney, this was indeed the agreed-upon position as to the affidavit accompanying pay request No. 7. Golden's attorney did not recall reaching such an agreement.

The illogic of Anderson's stance with regard to the partial lien waivers and contractor's affidavits is apparent upon reviewing the letter attached to and incorporated into the contract signed on September 12, 1979. In that letter, which Anderson read and signed, Golden informed the contractor that at such time as the prospective lender filed its mortgage of record on the property, the contractor would be required to subordinate any lien rights to the lender's first mortgage. Golden obtained a lender in March, 1980, and requested the execution of a lien subordination agreement. Thus, the lien waivers and contractor's affidavits signed during the interim period before acquisition of the mortgage could not logically have been construed as mere lien subordination documents. And since Anderson was notified in March of 1980 of the necessity of executing a lien subordination agreement, it is difficult to believe that two months later he or his attorney could have interpreted the lien waiver documents attached to pay request No. 7 as a lien subordination agreement.
ANDERSON v. GOLDEN
Cite as 569 F.Supp. 122 (1983)

CONCLUSIONS OF LAW

Introduction

[6] Before embarking on an application of the legal theories to the facts of this case, it is necessary to determine whether the plaintiff may sue on the contract and whether the defendant may rely on the terms of the contract. It has been consistently held in Georgia that where the contract stipulates that final payment to the contractor shall be due and payable upon the issuance of an architect's certificate of completion, it is essential to allege compliance with this condition in order to maintain an action to recover the balance due under the contract or to enforce the collection thereof by foreclosure of a materialman's lien. Southern Manufacturing Co. v. R.L. Moss Manufacturing Co., 13 Ga.App. 847, 856, 81 S.E. 263 (1918). The Owner-Contractor Agreement provides that final payment shall be due to the contractor when the work has been completed, the contract fully performed, and a final certificate for payment has been issued by the architect. The only certificate, other than those for progress payments, which appears in the record is one given by the architect to the construction lender for the purpose of loan disbursements. Though the plaintiff argued that this certificate is equivalent to the certificate of final payment contemplated by the contract, the Court cannot so conclude. It does not resemble the certificate, which must be acquired prior to proceeding with a suit on the contract.

The condition will be excused where the owner "by his own act rendered it impossible for the contractor to secure the approval and certificate of the architect...." 17A C.J.S. § 499(7), at 758. The Georgia courts follow this reasoning: "if the completion of contract: the placement of foreign borrow over a drain pipe along Victory Drive and grading for curbs and gutters. Backfilling under the curb line behind Sambo's and around the catch-basin in the front parking lot would have been an extra under the Anderson contract.

5. This figure represents the cost of mucking the top foot of an area in the northwest corner of the rear parking area and placing the material on the bank of retention pond B to correct the angle of the slope left by Anderson.

6. According to Whitaker, only two items in Shuman's bill are attributable to Anderson's
the contract was prevented by the party otherwise having the right to insist on the architect's certificate, this is equivalent to completion of the contract...." Gellis v. B.L.I. Construction Co., 148 Ga.App. 527, 535, 251 S.E.2d 800 (1978). See also Allen v. Moore, 77 Ga.App. 426(1), 49 S.E.2d 121 (1948).

[7] Golden terminated Anderson's contract and ordered him off the job. He subsequently reinstated Anderson only to allow him to mitigate losses, with the express understanding that the notice of termination would remain effective. Thus, the owner by his own act prevented completion in accordance with the terms of the contract thereby making it impossible for Anderson to secure the architect's certificate. Moreover, the owner substantially contributed to the lengthy delays and failure of Anderson to complete his work according to the timetable, which were the reasons given for termination of the contract.

[8] The plaintiff vigorously asserts that the defendant cannot rely on the terms of the contract because he committed a breach by failing to agree with the architect as to the appointment of a project representative. Although this omission undoubtedly caused delays in completion of the work, the Court cannot find that Golden breached the Owner-Contractor Agreement since the provision therein for the nomination of an onsite representative was not mandatory. The plaintiff seeks to take advantage of the concededly mandatory term of the Owner-Architect Agreement with regard to the appointment of a project representative by arguing that as a beneficiary of the obligations created by the Owner-Architect Agreement, damage to him was a foreseeable consequence of the omission. See Rhodes-Haverty Partnership v. Robert & Co. Associates, 163 Ga.App. 310, 312, 293 S.E.2d 876 (1982). With this much I agree, but I cannot follow such reasoning any further (particularly where there was little if any evidence upon which to base a finding of a breach of the Owner-Architect Contract as opposed to a mutual modification) to hold that the defendant cannot therefore rely on the terms of the Owner-Contractor Agreement.

Therefore, I find that Anderson may sue on the contract despite the architect's failure to issue a certificate of final payment and that Golden is entitled to rely on and enforce the terms of the contract.

[9] 1. In entering the lump sum contract for the site and storm drainage work, Anderson held himself out as experienced in earthwork and storm drainage system work. He was thus bound to exercise reasonable professional skill in estimating the cost of the work and in performing the job. See Day & Zimmerman, Inc. v. Blocked Iron Corporation of America, 200 F.Supp. 117 (E.D.Pa.1960). During the course of the project, Anderson found that he had to perform additional work and incur additional expenses in order to complete the job according to the specifications. He now seeks to recover some of these costs as an "extra," based on the unit prices set out in the contract. He premises this right to recovery on two theories: (a) the contract required the use of onsite fill and made offsite fill an extra; (b) the plans and specifications were defective, therefore the job could not be performed as contemplated, requiring Anderson to expend more money and effort than he had planned.

a) The Court must construe the contract to determine whether it called for the exclusive use of onsite fill from the borrow pits. If it did not, a second question arises as to whether the parties, by their conduct, modified the contract to make offsite fill an extra.

[10] Some elementary rules of construction guide the Court in making its determination. A contract will be interpreted, insofar as possible, to give a reasonable construction to all parts of the contract, Morrison-Knudson Co. v. United States, 184 Ct.Cl. 661, 397 F.2d 826, 842 (Ct.Cl.1968), and constructions of contract provisions as conflicting will be avoided unless it is unreasonable to do so. Id. "Where the plans and specifications are by express terms

[11] The pertinent portions of the contract were set out above. The contract provided that the contractor shall furnish all materials and supplies necessary to perform the work. The specifications provided that the contractor could acquire additional fill from offsite locations if he chose to do so. The post-bid addendum contained a "revision" or "clarification" which required the excavation of borrow material from adjacent retention pond areas.

The contract as finally executed by the parties indisputably required Anderson to excavate the retention areas. When Anderson originally bid the job, the excavation of the retention ponds was not an integral part of the project. After discussions with Carey however, the excavation of the retention ponds, making available onsite fill, became an important facet of the work. The "revision" in the post-bid addendum obviously pertains to the added requirement of excavating the retention basins.

Nowhere, however, does the contract require that only the material obtained from the retention ponds should be placed on the site. This point is emphasized by Carey's letter of September 8, 1979, which he termed a modification but which is more appropriately characterized as an architect's interpretation under Article 2.2.8 of the General Conditions. In the letter, he carefully explained that the post-bid addendum was not intended to preclude the use of other fill.

The Court finds that the contract did not limit the contractor to the use of onsite fill, thereby making offsite fill an extra. The provision for a unit price for offsite fill does not change this conclusion. The contract contains a stipulated price for offsite fill to be used in the event that the owner, at his own or another's recommendation, concluded that offsite fill was needed for some purpose not contemplated in the original specifications.

[12] Because on several occasions Chavis requested and Golden on two occasions (Change Order Nos. 2 and 3, though the latter was reversed) authorized the purchase of offsite fill, the question arises whether by their course of conduct, the parties modified the contract to make offsite fill an extra on all occasions. In the Court's opinion, the parties did not modify the contract by their conduct. Golden authorized the purchase of offsite fill when, because of the moisture content of the onsite fill, the site could not be proofrolled without a bridge layer of offsite fill, a condition surely not foreseen by either party. Chavis only requested such authorization when the onsite material was saturated to the point that it could not be proofrolled or would entail delays if used. As discussed above, he did not request change orders with regard to much of the offsite fill allegedly utilized on the site.

[13] Thus, the Court cannot conclude that the parties treated offsite fill as an extra to the contract entitling the plaintiff to recover extra compensation. The Court does find, however, that Golden's authorization of an increase in the contract sum for offsite fill used as a bridging lift to alleviate unforeseen proofrolling problems estops him from arguing that offsite fill was never an extra. Therefore, when Whitaker Laboratory personnel and Chavis recommended in February of 1980, that a bridging lift of offsite fill be placed on Unit D, at a cost of $10,350.00, Golden should have authorized the purchase of the fill. Golden might have done so had he been presented with such a request, but it appears that Carey did not transmit the request to Golden. (See printed message on P-42).

7. The failure to comply with the provision for notice of claims for an increase in the contract sum bars recovery of the extra compensation. See Goodwin, Inc. v. City of Lafayette, 418 F.2d 696 (5th Cir.1969); see also E.C. Ernst, Inc. v. General Motors Corp., 537 F.2d 105 (5th Cir. 1976).
[14-17] As to whether the use of offsite fill was an extra in unforeseen circumstances other than the inability to proofroll situations, "it is an elementary principle of contract law that in order to recover for 'extras,' the contractor must show that they are in fact extras." E.C. Ernest, Inc. v. Koppers Co., Inc., 476 F.Supp. 729, 754 (W.D.Pa.1979). Extra or additional work is work not contemplated in the original specifications. When the work performed is covered under the lump sum contract, the contractor cannot consider the cost of performance as an extra. Baton Rouge Contracting Co. v. West Hatchie Drainage Dist., 304 F.Supp. 580, 585 (N.D.Miss.1969); Continental Casualty Co. v. Wilson-Avery, Inc., 115 Ga.App. 795, 156 S.E.2d 152 (1967). In a fixed sum contract, a contractor is not entitled to additional compensation simply because unforeseen difficulties are encountered. United States v. Spearin, 248 U.S. 132, 39 S.Ct. 59, 63 L.Ed. 166 (1918); Jefferson Construction Co. v. United States, 183 Ct.Cl. 720, 392 F.2d 1006, 1007 (Ct.Cl.1968); Baton Rouge, 304 F.Supp. at 585. However, if the services are not contemplated by the original agreement and are necessary to perform the work, the law will imply a promise to pay for the extra services. Puritan Mills, Inc. v. Pickering Constr. Co., Inc., 152 Ga.App. 309, 292 S.E.2d 586 (1979).

[18,19] Under the agreement between Anderson and Golden, Anderson was clearly required to bring the site to the final grade levels. Anderson testified that he understood that he had to fill the site no matter how much fill was required. The contract did not specify the amount of fill to be placed on the site. The quality of the material, though known to be wet and slow to drain, was an unforeseen circumstance to all the parties. This case falls within the rule of Spearin. Puritan Mills is not controlling here because the service—filling the site—was clearly contemplated by the contract. Anderson cannot recover the cost of the offsite fill as an extra merely because unforeseen difficulties arose. There was no supplemental agreement to pay. Indeed, Golden repeatedly informed Anderson and Chavis that he would not pay for the offsite fill they chose to use because of the poor quality of the onsite fill. Nor is recovery in quantum meruit warranted because "the required performance [does not] fall(s) outside the terms of the original obligation." Brookhaven Landscape and Grading Co. v. J.F. Barton Contracting Co., 676 F.2d 516, 521 (11th Cir.1982).

[20] As with any other contract, Anderson assumed a risk when he bid that he would not be able to perform the contract for the amount of his bid. Where the cost of compliance exceeds the contemplated cost, the contractor has little choice but to bear the burden of additional expenses. See Pitman v. Dixie Ornamental Iron Co., 122 Ga.App. 404, 177 S.E.2d 167 (1970); Talierca v. Grove Park Plumbing Service, Inc., 103 Ga.App. 591, 120 S.E.2d 36 (1961).

[21,22] b) To overcome the rule that extra compensation is not recoverable when unforeseen difficulties are encountered during the course of performing a fixed-sum contract which is capable of performance, courts have found that an implied warranty by the owner that conditions are as described in plans and specifications may be breached by defective plans. Jefferson Construction Co. v. United States, 183 Ct.Cl. 720, 392 F.2d 1006, 1014 (Ct.Cl.1968). The warranty is not vitiated by standard clauses disclaiming responsibility for the accuracy of data or requiring the contractor to verify the specifications by inspecting the site. Hollerbach v. United States, 233 U.S. 165, 34 S.Ct. 553, 58 L.Ed. 898 (1914). This is so because contractors cannot be expected to perform certain investigations such as soil borings. In order to calculate a bid, bidders must be able to rely on representations by the owner as to subsoil conditions and other nonobvious conditions. Robert S. McKee, Inc. v. City of Atlanta, 414 F.Supp. 957, 959 (N.D.Ga.1976).

[23,24] The contract involved here specifically provided in several of the documents that the contractor was responsible for investigating soil and subsoil conditions, for visiting the site and familiarizing him-
self with local conditions, and for correlating the drawings and specifications with existing conditions. Ground elevations, utilities, and soil conditions as shown on the drawings were expressly not guaranteed to be correct. The contract contained no changed conditions clause, the purpose of which is to relieve the bidder of the risk of encountering adverse subsurface conditions. *Al Johnson Constr. Co. v. Missouri Pac. R. Co.*, 426 F.Supp. 639, 646–7 (E.D.Ark.1976). The contract thus squarely placed the risk of uncertainty as to site conditions on the contractor. The owner did not impliedly warrant the accuracy of his agents' investigations. *See Eastern Tunneling Corp. v. Southgate Sanitation Dist.*, 487 F.Supp. 109, 112 (D.Colo.1979).

[25–27] Even where no implied warranty exists, the owner may be liable because of misrepresentations of material facts about the site conditions. Thus, placing the risk of uncertainty on the contractor does not absolve the owner of the duty not to materially misrepresent conditions. In order to prevail on a claim of misrepresentation, the plaintiff must satisfy two requirements: that he was not reasonably able to discover the true facts for himself and that the misrepresentation was material. *McKee*, 414 F.Supp. at 959–60. What constitutes a reasonable ability to discover the true facts depends on the time constraints involved, the nature of the alleged misrepresentation, and whether the defendant expected that bidders would rely on the specifications and plans provided. *Al Johnson*, 426 F.Supp. at 647; *McKee*, 414 F.Supp. at 960.

[28] I have already found that the omission of the ditches and the elevation differences on the Carey plan as compared with the Gignilliat topo were, as a factual matter, immaterial, based on Helmly's testimony. At any rate, the drainage ditches were alluded to in the specifications, and it is apparent to the Court that had Chavis done a more careful inspection of the site, the ditches would have been revealed. Likewise, the plaintiff was put on inquiry notice of the easements and utility lines they contained. Thus, the plans and specifications were not defective in this regard.

[29, 30] As to the quantity of fill which the Court has found that Chavis could not have included in his estimate of the amount of fill needed to raise the site to finished grade levels because of a variance in the existing ground elevations and those shown on the Carey drawing, the question is whether Anderson should have discovered the discrepancy himself, taking into account the time constraints, the nature of the defect, and the owner's expectations. The invitation to bid was issued on May 23, 1979. The bid opening was held on June 12, 1979. Anderson would have had to incur expenses to survey the site himself, with no assurance that his bid would be accepted. A more careful inspection of the site would not have revealed the discrepancy. *Cf. In re D. Federico Co., Inc.*, 16 B.R. 282, 287–8 (Bkrtcy.D.Mass.1981). The Court finds that Anderson and Chavis justifiably relied on the architect's plans in constructing the bid and in estimating the quantity of fill needed. As to Anderson's post-bid responsibility, the evidence demonstrated that he did discover, perhaps serendipitously, the variance and that he then made a formal request for an increase in the contract sum, based on the results of the independent survey requested by the architect. In the Court's opinion, Anderson acted as expeditiously as could be expected under the circumstances.

[31] The second prong of the test requires the plaintiff to establish the materiality of the misrepresentations. "[I]t will not be sufficient for the plaintiff to show that it was misled by the general conclusions made by the [owner's] agents . . .; the plaintiff must show that the underlying factual data . . . was inaccurate." *McKee*, 414 F.Supp. at 961. The plaintiff established through Helmly's testimony that the existing ground elevations differed from those shown on the Carey drawing, therefore the Court finds that the plaintiff carried its burden of showing that the underlying factual data was inaccurate. Thus, the plaintiff may recover the cost of
7,698 cubic yards of fill at $2.50 per cubic yard. The Court also concludes that the initial Helmly survey and calculations in March, 1980, were required by the owner's agent, the architect, and therefore this cost should be borne by the owner.

[32-35] 2. The Court has previously found that Anderson executed partial lien waivers with each pay request. Lien waivers are valid and enforceable under Georgia law. Ga.Code Ann. § 67-2001(2); O.C.G.A. § 44-14-361(b); R.S. Helms, Inc. v. GST Development Co., 135 Ga.App. 845, 219 S.E.2d 458 (1975). Such waivers are enforceable even against the contractor's contention that his intention was only to subordinate his lien claim to that of the lender. Id. Waivers of lien rights must be distinguished from contractor's affidavits which in the usual course of business are sworn statements by the contractor that he has paid the subcontractors the reasonable value or agreed price of work done or material furnished. Jackson's Atlanta Ready Mix Concrete Co., Inc. v. Industrial Tractor Parts Co., Inc., 139 Ga.App. 422, 228 S.E.2d 324 (1976). Only a sworn statement to such effect taken upon final completion of the work is a binding release of materialman's lien rights. Bankston v. Smith, 134 Ga.App. 882, 216 S.E.2d 634 (1975); Massachusetts Bonding & Ins. Co. v. Realty Trust Co., 142 Ga. 499 (1914). The sworn statement with regard to the payment of the agreed price or reasonable value thereof does not refer to the contract price between the owner and the contractor. Short & Paulk Supply Co. v. Dykes, 120 Ga.App. 638, 171 S.E.2d 782 (1969). Hence, plaintiff's assertion that only a sworn statement taken at the completion of the work is binding, is inapposite in the case of lien waivers.

[36] The language of the lien waivers and of the contractor's affidavit forms is clear and unambiguous:

Acknowledgment of Payment and Waiver of Right of Lien:

For valuable consideration in hand paid to the undersigned, in the amount of __________, receipt of which is hereby acknowledged to his (its) complete satisfaction, the undersigned does hereby waive, release and relinquish any and all claims or rights of lien which he (it) may have upon the premises owned or leased by Golden & Company in the City of Savannah, State of Georgia for labor and material furnished to date on said premises.

Contractor's Affidavit:

[Affiant] ... on oath, deposes and says as follows ...

4. That the undersigned hereby waives and releases his right and the right of the above-referenced contractor to file a mechanic's or materialman's lien against said property.

[37] The Court finds that the above-quoted language constitutes a partial waiver of lien rights. Therefore, Anderson, by executing the waivers, waived any lien rights with regard to the amount of the contract sum already paid. No lien may be asserted for an amount which would exceed the agreed-upon contract price, even though the cost of completion may exceed the contract sum. Thompson v. Brannen Bldg. Supply, 153 Ga.App. 4, 264 S.E.2d 498 (1980). In addition, the owner is entitled to deduct the cost of completion from the balance due. Hausen v. James Development, Inc, 143 Ga.App. 265, 238 S.E.2d 265 (1977).

[38,39] 3. The defendant asserts that the filing of the mechanic's lien was wrongful and that it is therefore entitled to recover for slander of title in the amount of his compensable damages and for punitive damages. Georgia recognizes that the wrongful filing of a mechanic's lien may give rise to an action for slander of title. Here, however, the defendant has not established the elements necessary to state such a cause of action. Section 105-1411 of the Georgia Code Annotated, O.C.G.A. § 51-9-11 provides that an "owner of an estate in lands may maintain an action for libelous or slanderous words falsely and maliciously impugning his title, if any damage shall have accrued to him therefrom." The owner must allege and prove the publication of slanderous words (here, the wrongful filing of the lien), their falsity and mali-
ANDERSON v. GOLDEN

Cite as 369 F.Supp. 122 (1962)

4. There is no doubt that Anderson failed to timely complete the contract and failed to complete some portions of the work at all. That time was of the essence of the contract was made abundantly clear. "Time is of the essence" clauses are enforceable in Georgia. Ga.Code Ann. § 20-704, O.C.G.A. § 13-2-2. However, Georgia follows the English rule which allows recovery in quantum meruit by a plaintiff who is in substantial breach of the contract, as long as the breach is not willful or deliberate. Martin v. Rollins, 238 Ga. 119, 121, 231 S.E.2d 751 (1977). Except for some minor items of the contract, Anderson completed the rough-grading and storm sewer system work. The defendant accepted the benefit of this performance. Therefore, the Court finds that the plaintiff is entitled to recover the value of his labor and services which the Court finds to be equivalent to the unpaid contract sum, with set-offs which will be discussed hereinafter. The payment due shall include the full amount of Change Order No. 3. In the Court's opinion, it would be inequitable to allow the defendant to reap the benefits of Anderson's work without reimbursing him for the cost of the performance where the defendant authorized the work and then withdrew permission despite notice of the rain which made prompt performance impossible.

5. Ledbetter Construction Company and Shuman Construction Company completed certain items of the Anderson contract upon Anderson's failure to do so because of the termination of his contract. The defendant is entitled to offset $7,680.58 for the sums paid to these contractors against the plaintiff's recovery. Ayers v. Baker, 216 Ga. 132, 114 S.E.2d 847 (1960).

Hussey, Gay & Bell, Inc. submitted a bill in the amount of $2,038.00 for services performed in connection with the discovery, during the summer of 1980, of inaccuracies in the grade stakes in the parking lot area. A survey was conducted pursuant to the request by the general contractor or its project representative, after discrepancies were noted in the grade stakes set by Anderson's rough-graders. Anderson subsequently undertook to correct the grades. The owner is entitled to a set-off for the expenses incurred in discovering the discrepancies. Id.

Anderson also seeks to recover additional costs incurred in correcting the inaccurate grades. It is well-settled that a contractor is not entitled to additional compensation for work necessitated by his own inadequate performance. 17A C.J.S. § 371(1). The plaintiff will not, therefore, be allowed to recoup the costs of correcting the grades. The claims of $7,254.26 which Anderson paid to Shuman for fill and of $13,650.00 for regrading are denied.

6. The remainder of both parties' alleged damages flow from the long delay in completion, primarily in the form of additional expenditures. The defendant also claims that he lost rental payments because of the delay, though the proof on this point was unconvincing since the outside dates contained in the leases for the tenants' entry into the premises were all met. Where each party proximately contributes to the delay, "the law does not provide for the recovery or apportionment of damages occasioned thereby to either party." J.A. Jones Construction Co. v. Greenbriar Shopping Center, 332 F.Supp. 1336 (N.D.Ga. 1971), aff'd 461 F.2d 1269 (5th Cir.1972).

Anderson badly misjudged the job to the extent that he based his deadlines for completion on ideal conditions and offsite fill quality. Some delays resulted from Chavis' failure to carefully examine the plans and specifications. Golden aggravated the delays caused by the poor weather and quality of onsite material by failing to establish an expeditious method for approving procedures, settling disputes, and authorizing changes in the work. "It is well established that an owner has an obligation to facilitate
the work of a contractor and to not do anything that would obstruct or impede the contractor's work." *Niagara Mohawk Power v. Graver Tank & Mfg. Co.*, 470 F.Supp. 1308, 1322 (N.D.N.Y.1979). For these reasons and others discussed fully elsewhere, both party's claims for delay damages are denied.

[43-45] 7. There is no basis for an award of attorney's fees to Anderson. Ga. Code Ann. § 20–1404; O.C.G.A. § 18–11l provides that "[t]he expenses of litigation are not generally allowed as a part of the damages; but if the defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them." Where there is a bona fide controversy or genuine dispute, an award of attorney's fees is precluded. *Eldon Industries, Inc. v. Paradis and Co.*, 897 F.Supp. 535, 543 (N.D.Ga.1975). Moreover, Georgia law does not allow attorney's fees under section 20–1404 where "the amount recoverable is considerably less than the amount sought," *Broyles v. Johnson*, 103 Ga.App. 102, 118 S.E.2d 734 (1961), because this indicates the existence of a genuine dispute. Based upon the foregoing findings and conclusions, it should be apparent that the Court was presented with a bona fide controversy. Attorney's fees are therefore denied.

SPECIAL VERDICT AND ENTRY

OF JUDGMENT

The Court having heard the evidence in the above-captioned case, now returns the following special verdict on the claims and counterclaims of the parties:

A. Amounts Due Plaintiff Anderson

1. Value of Performance $ 61,974.45

2. Change Order Requests for off-site fill, including Change Order No. 8 $19,975.00

3. Reimbursement for extra fill required by elevation disparities on plans at $2.50 per cubic yard 19,245.00

4. Paid to Third Parties [Heinly, Purcell survey and calculations in Spring, 1980] ... To be submitted by counsel

5. Interest [Legal rate of interest, 7% per annum, to run from date of demand, November 30, 1980]

TOTAL DUE PLAINTIFF

B. Amount Due Defendant Golden

1. Shuman Construction Co. $ 6,448.25

2. Ledbetter Construction Co. 1,277.83

3. Hussey, Gay & Bell fee 2,085.00

4. Drainage pipes under Anal $800.00

5. Interest [Legal rate of interest, 7% per annum, to run from date of trial]

TOTAL DUE DEFENDANT TO BE OFFSET AGAINST TOTAL DUE PLAINTIFF

JUDGMENT

The foregoing special verdict having been found, the Court will enter judgment thereon fifteen (15) days from the date of the filing of this Order. Counsel for the parties shall submit those items indicated. Counsel are directed to review the figures set forth herein for correctness, to calculate interest in accordance with the foregoing instructions, and to furnish the Court with appropriate sums for final judgment.

It appearing that a lien was timely filed the final judgment may include the same

Eugene HOLLINES, Petitioner, v.

W.J. ESTELLE, et al., Respondents.


United States District Court,

W.D. Texas,

Waco Division.

Feb. 4, 1983.

On a petition for a writ of habeas corpus, the District Court, Nowlin, J., held
When, however, an accomplice of the defendant is cross-examined about crimes which he has admitted in proceedings conducted after the offense for which the defendant is being tried, and when the use of such past offenses to show the potential bias of the witness is apparent, then the failure of the defense to identify the precise theory of bias at the outset of cross-examination does not block it from bringing the admission of the crimes before the trier of fact. This is especially the case where, as here, the defense counsel expressly noted that he was attempting to test the witness's credibility.

[7] There is a further, alternative ground to support our ruling. The state trial court sua sponte declared that it would not, as the trier of fact, give any consideration to the point that the second witness, in cross-examination, testified that he had admitted commission of 48 burglaries in the juvenile proceeding conducted after the arson. The court based its ruling on the Oregon statute which forbids the use of juvenile records in any proceeding other than juvenile court. Or.Rev.Stat. § 419-567(3). This sua sponte striking of the cross-examination of a key prosecution witness constituted prejudicial error. The need of the defendant to cross-examine a principal government witness to show possible bias outweighed the need of the state to maintain the confidentiality of its juvenile records. Davis v. Alaska, supra, 415 U.S. at 820, 94 S.Ct. at 1112. The testimony was relevant to show possible bias or self-interest of the witness who testified against Burr. The state did not object to the introduction of the testimony. The state trial court's sua sponte striking of testimony elicited during cross-examination which tended to show the bias or self-interest of the witness denied the defendant his right to confront that witness. We conclude that petitioner was thus denied the right of effective cross-examination which "would be constitutional error of the first magnitude and no amount of show-

WALLACE, Circuit Judge, concurring:

I concur in the result reached by the majority. The cross-examination of the second juvenile accomplice elicited the admitted commission of 48 burglaries without objection. The relevance and materiality of the evidence was obvious. I agree with the majority that the sua sponte striking of this evidence requires reversal. I therefore would not reach the question whether Burr's counsel preserved the error when he failed to specify with clarity the basis of his cross-examination of the first juvenile accomplice on similar facts. As the question will not arise during retrial, there is no reason for us to reach the issue.
cost overruns incurred by dredging subcontractor, and harbor district sought indemnification from engineering firm. The United States District Court for the Northern District of California, Charles B. Renfrew, C., entered judgment for harbor district and engineering firm against general contractor and for engineering firm on harbor district's indemnity action, and appeals were taken. The Court of Appeals, Goodwin, Circuit Judge, held that: (1) general contractor did not have standing to assert breach of warranty claim on subcontractor's behalf; (2) general contractor had standing to assert subcontractor's derivative claims under general contract's changed conditions clause; (3) district court did not clearly err in concluding that subcontractor's reliance, if any, on contractual data for dredging information was unreasonable; (4) district court did not err in concluding that engineering firm was negligent neither in its preparation and presentation of plans nor in its investigation and determination of subcontractor's changed conditions claims; and (5) engineering firm was not entitled to recover its costs and fees from harbor district under contract with harbor district.

Affirmed.

1. Contracts 1185

General contractor did not have standing to assert breach of warranty claims against harbor district on behalf of subcontractor, where exculpatory language of subcontract thoroughly insulated general contractor from any liability to subcontractor for breach of warranty.

2. Contracts 1185

General contractor had standing to assert subcontractor's derivative claims against harbor district under general contract's changed conditions clause; subcontract incorporated general contract's changed conditions provision, and subcontract's exculpatory provisions did not limit resort to that equitable remedy, and thus, because general contractor was potentially liable under equitable mechanism, it could raise parallel equitable claim against harbor district.

3. Contracts 1185

Agreement between general contractor and subcontractor pursuant to which general contractor agreed to bring action against harbor district in return for exoneration of any liability for cost overruns did not deprive general contractor of standing to raise changed conditions claim on behalf of subcontractor, as agreement between general contractor and subcontractor was contingent rather than fixed in that general contractor was exonerated only if it filed action.

4. Contracts 1232(1)

To prevail on changed conditions claim for cost overruns incurred by subcontractor, general contractor had to demonstrate that contract plans indicated presence of certain conditions, that this representation differed materially from conditions actually encountered, and that subcontractor reasonably relied on these indications to its detriment.

5. Contracts 1232(1)

Even if information in plans indicated soil conditions in boat basin's access channel and turning area which differed materially from those actually encountered, district court did not clearly err in concluding that subcontractor's reliance, if any, on contractual data for dredging information was unreasonable, where special condition informed bidders that backup reports for soil data were available at harbor district's office but subcontractor made no effort to obtain this information, where subcontractor's dredge captain had encountered rocks on previous occasions while dredging areas of the harbor near the project site, and where subcontractor's own test results were inconsistent with those shown in contract plans.

6. Public Contracts 116

Provisions in contract including changed conditions clauses which shift some of the burden of investigation to bidder are narrowly construed and government disclaimers of responsibility for contractual indications are disregarded.
Contracts ✽ 93(1)

Bidders are required to inspect documents brought to their attention in the bidding materials and to make general inspection of project site.

Federal Courts ✽ 859

District court did not clearly err in concluding that engineering firm was negligent neither in its preparation and presentation of plans nor in its investigation and determination of dredging subcontractor's changed conditions claim.

Contracts ✽ 187(1)

District court did not err in concluding that engineering firm did not misrepresent subsurface conditions at project site, that firm was negligent neither in its preparation of plans and specifications nor in its investigation of dredging subcontractor's changed conditions claim, that firm did not breach its contract with harbor district, and that subcontractor therefore could not recover, as a third-party beneficiary of engineering firm's design contract with harbor district, for engineering firm's preparation of allegedly inaccurate plans and specifications.

Federal Civil Procedure ✽ 2731, 2737.6

Where general contractor brought suit against harbor district and engineering firm, harbor district filed third-party complaint against engineering firm, seeking indemnification, and district court properly entered judgment against general contractor and for engineering firm on indemnity action, but where some, if not all, of engineering firm's litigation costs were attributable to its defense against general contractor's claims, it was virtually impossible to apportion expenses between the two actions, and engineering firm was incidental beneficiary of harbor district's expenditures, engineering firm was not entitled to recover its costs and attorney fees from harbor district under contract with harbor district.

UMPQUA RIVER NAV. CO. v. CRESCENT CITY HARBOR DIST. - 591

Cite as 618 F.2d 588 (1980)

The series of events underlying this litigation began in the early 1970's, when the harbor district decided to investigate the possibility of expanding its boat facilities. In June 1971, as part of its preliminary research, the harbor district commissioned an independent firm, AAA Drilling, to drill eight test holes on the beach near the site of the proposed new boat basin to find bedrock levels. AAA subsequently prepared drawings, showing the location of its borings, the depth of bedrock, and the materials found between the surface and bedrock. AAA made no underwater borings in the proposed dredging channel.

Shortly after these drillings, still in June 1971, the harbor district informed Swine that it had been chosen to design the new boat basin. The harbor district turned the AAA results over to Swine, and, after prolonged negotiations, the harbor district and Swine signed a formal agreement in May 1972.

In August 1972, Swine arranged for Harding, Miller, a soils engineering firm, to make two more test borings. These holes were drilled in the area where the breakwater surrounding the boat basin was to be constructed, not in the dredging channel.

The results of the AAA and Harding, Miller borings were included in sheet 002 of the boat basin plans. Sheet 002 showed the presence of sandy clay, sand, clay, and gravel at the test hole sites. The term "gravel" was not defined in the plans, and nothing in the contract materials furnished to bidders interpreted or elaborated on this soil information.

In March 1973, the harbor district invited sealed bids on the boat basin construction. The bidding materials included plans, specifications, and special and general conditions. Particularly relevant to this case are special conditions 3 ("Examination of Site") and 4 ("Soil Information and Pile Tests"), and general condition 21 ("Subsurface Conditions Found Different"). Contractors were given thirty days to submit their bids.

Before bidding, Umpqua examined the results of the AAA borings reported on sheet 002 and concluded that they were unreliable except as showing the depth of bedrock. Umpqua's project engineer found the test results defective because the soil logs were inconsistent and because the logs did not include a legend defining various soil terms. Umpqua did, in compliance with special condition 4, request the reports underlying the Harding, Miller soil logs. Those borings, however, were taken at the location of the proposed breakwater, and not in the dredging channel.

1. Special Conditions 3 and 4, and general condition 21 read as follows:

"3. EXAMINATION OF SITE
"Each bidder shall thoroughly examine and be familiar with the site of the proposed project and submission of a Proposal shall constitute an acknowledgment upon which the Owner may rely that the bidder has thoroughly examined and is familiar with the site. The failure or neglect of the bidder to fully familiarize himself with the conditions at the project site shall in no way relieve him from or to the Contract. No claim for additional compensation will be allowed which is based upon lack of knowledge of the site.

"4. SOIL INFORMATION AND PILE TESTS
"The drawings show soil test logs and pile test logs reproduced from reports by the District's Soil Consultant. Copies of these reports are on file at the offices of the Engineers and at the District Office and may be examined by prospective bidders. Each bidder shall make his own evaluation of the information contained in the reports. Neither the Owner or the Engineers guarantee that the soils borings, pile test logs or other information shown are typical for the entire site of the work."

"21. SUBSURFACE CONDITIONS FOUND DIFFERENT
"Should the Contractor encounter subsurface and/or latent conditions at the site materially differing from those shown on the Plans or indicated in the Specifications, he shall immediately give notice to the Architect/Engineer of such conditions before they are disturbed. The Architect/Engineer will thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the Plans or indicated in the Specifications, he will at once make such changes in the Plan and/or Specifications as he may find necessary, and any increase or decrease of costs resulting from such changes to be adjusted in the manner provided in Paragraph 17 of the General Conditions."
Western Pacific also conducted a pre-bid investigation. Robert Kaltsukis, a Western Pacific dredge captain, visited the project site. Kaltsukis, who had encountered rocks while dredging a nearby portion of Crescent City harbor in the mid 1960's saw submerged rocks in an area adjacent to the dredging site. As part of his on-site inspection, Kaltsukis used a backhoe to dig test holes near two of the AAA boring locations. The results of these tests, which did not get down to project level, were inconsistent with the information shown on sheet 002, yielding sand and pea gravel, rather than only gravel, as indicated in the AAA results. Despite these discrepancies, Western Pacific did not comply with special condition 4 and attempt to obtain the source data for sheet 002.

Umpqua was awarded the boat basin construction contract in May 1973, and shortly thereafter selected Western Pacific as its dredging subcontractor. Western's subcontract bid, which Umpqua accepted, was based on an estimated dredging output of 10,000 cubic yards per day, using hydraulic dredging methods.

Western began dredging on May 29, 1973. Almost immediately, the dredge "Polhemus" encountered cobbles, boulders, and cemented sand. The dredge sustained damage requiring extensive repairs. These difficulties arose during the dredging of the boat basin's access channel and turning area, areas in which no soil borings were taken. On July 26, Western notified Umpqua that it had encountered conditions materially different from those indicated in the plans and that it was withdrawing the "Polhemus" from the project. Umpqua forwarded this notice to Swine which, in turn, informed the harbor district.

Western brought in a second, larger dredge, the "Herb Anderson", which encountered difficulties similar to those encountered by "Polhemus." The parties offered conflicting explanations of these problems. Umpqua contends that the damage to the dredges was unprecedented, resulting from extreme and unforeseeable concentrations of cobbles and boulders. The harbor district and Swine assert that Western's dredging troubles were due to inefficient crews and improper maintenance of the dredges.

Whatever the source of its dredging problems, Western Pacific, on August 25, again notified Swine that it had encountered conditions different from those shown in the plans. Swine and the harbor district did not formally investigate Western's claims until November 28. On that day, with representatives of Western, Umpqua, Swine, and the harbor district present, Umpqua's floating crane, "Mink", dug test holes at three locations designated by Western. On the basis of these borings, which yielded a large quantity of sand and silt, some cobbles, and one boulder, Umpqua and Swine engineers decided the basin was dredgable and directed Western Pacific to continue.

Western Pacific completed dredging on December 21. Over six months of intermittent dredging, Western rarely met its projected output of 10,000 cubic yards per day. The material dredged during the entire project was 80 percent sand, 15 percent gravel less than three inches in diameter, and 5 percent material exceeding three inches in diameter. Neither Umpqua nor Western Pacific obtained a change order, as required by general condition 21, or submitted a bill for extra costs at any time before June 6, 1974, when Umpqua reported that the boat basin project was completed.

On June 11, 1974, Western informed Umpqua that it had incurred additional dredging expenses of $523,402. This claim was ultimately forwarded to the harbor district, which formally denied the claim on July 30, 1974. The harbor district then paid Umpqua 75 cents per cubic yard dredged, and Umpqua paid Western 65 cents per cubic yard.

Umpqua and Western agreed, on January 28, 1975, that an action to recover the additional dredging expenses would be brought in Umpqua's name, that Western would select counsel and bear all costs incurred in prosecuting the action, that Western would receive any recovery, and that Western exonerated Umpqua of all liability for the
dredging overruns. Umpqua filed this action the following day.

Umpqua argues in this appeal that it is entitled to recover the dredging cost overruns on Western's behalf under any of four theories. First, the harbor district is required to compensate for the overruns under the contractual "changed conditions" clause. Second, the harbor district is similarly liable for breach of an implied warranty of accuracy of the project's plans and specifications. Third, even if Western's reliance on the project plans for dredging information was unreasonable, Umpqua may, under a comparative negligence formulation, recover some portion of the resultant overruns from the harbor district and Swine because those parties were negligent in their preparation and presentation of the plans. Finally, Western, as a third-party beneficiary of the harbor district-Swine contract may recover for damages resulting from Swine's preparation of inaccurate plans and specifications, breaching that contract.

Before considering these contentions, we must first address appellees' claim that under the Severin doctrine Umpqua lacks standing to raise the claims on Western's behalf. Severin v. United States, 99 Ct.Cl. 455 (1949), cert. denied, 322 U.S. 783, 64 S.Ct. 1045, 88 L.Ed. 1567 (1974). The Court of Claims has summarized the Severin doctrine in the following manner:

"[A] prime contractor may sue the Government for damages incurred by one of its subcontractors through the fault of the Government... only when the

2. Article 19 of the Umpqua-Western subcontract, titled "Final Payment", reads in relevant part as follows:

"In consideration of the promises, covenants and agreements of the Subcontractor herein contained and the full, faithful and prompt performance of this agreement and the plans and specifications constituting a part thereof, the Contractor agrees to pay to Subcontractor and Subcontractor agrees to receive and accept as full compensation for doing all work and furnishing all materials, supplies, etc., contemplated and embraced in this agreement, also for all loss or damage arising out of the nature of the work aforesaid, or prime contractor has reimbursed its subcontractor for the latter's damages or remains liable for such reimbursement in the future. . . ."

J. L. Simmons Co. v. United States, 304 F.2d 886, 888, 158 Ct.Cl. 893 (1962).

The harbor district and Swine argue that Umpqua does not have standing because it is insulated from liability to Western for the overruns in two ways. First, Article 19 of the Umpqua-Western subcontract purports to limit Umpqua's liability, even if unexpected conditions were encountered, to the first subcontract price. Second, even if Article 19 did not limit Umpqua's liability to the subcontract price, the January 28, 1975, agreement between Umpqua and Western, in which Umpqua agreed to bring this action in return for exoneration of any liability for the overruns, absolved Umpqua from liability to its subcontractor before the action was filed.

We note initially that the Severin doctrine is based on concepts of sovereign immunity and privity and concerns only standing to raise contractual claims against governmental entities. Nothing in Severin or its progeny limits Umpqua's ability to assert noncontractual claims against the harbor district or claims of any sort against Swine, a private concern. Our inquiry, then, is limited by determining Umpqua's standing to raise claims against the harbor district for breach of warranty or for adjustment under the changed conditions clause.

[1] Under the Severin doctrine, Umpqua does not have standing to assert a breach of

from the action of the elements, or from any unforeseen difficulties or obstructions which may arise or be encountered in the prosecution of the work until its acceptance by the Principal, and for all risks of every description connected with the work; also for all expenses incurred by or in consequence of the suspension or discontinuance of the work, and for well and faithfully completing the work and the whole thereof, in the manner and according to the terms of this agreement and the requirements of the Contractor and the instructions of the engineers in charge of said work, payment at the unit prices contained in Article XX hereof."
warranty claim on Western's behalf. The exculpatory language of subcontract Article 19 thoroughly insulates Umpqua from any liability to Western for breach of warranty. Consequently, Umpqua may not raise a parallel claim against the District.

[2] Umpqua may, however, assert Western's derivative claims under the general contract's changed conditions clause. Exculpatory language like that in Article 19 does not trigger the Severin bar when "subcontractor claims are asserted as an equitable adjustment under the provisions of a prime contract with the Government" and when the prime contract's equitable adjustment mechanism is incorporated by reference in the subcontract. Seger v. United States, 469 F.2d 292, 300, 199 Ct.Cl. 766 (1972). Here, the subcontract incorporated the general contract's changed conditions provision, and the subcontract's exculpatory provisions did not limit resort to that equitable remedy. Because Umpqua is potentially liable under the equitable mechanism, it may, consistent with Severin, raise a parallel equitable claim against the harbor district.

[3] Appellees' contention that the January 1975 agreement between Umpqua and Western deprives Umpqua of standing to raise the changed conditions claim lacks merit. The agreement was contingent, not fixed. Umpqua was exonerated only if it filed the action. This is not the sort of explicit and unequivocal exculpatory provision sufficient to invoke Severin. See J. L. Simmons Co. v. United States, supra, 304 F.2d at 892.

[4] Umpqua's principal contention is that the harbor district is liable for the dredging overruns under the prime contract's changed conditions provision, general condition 21, because the materials encountered during dredging differed significantly from those shown on sheet 002 of the plans. To prevail on this claim, Umpqua must demonstrate that: (1) the contract plans indicated the presence of certain conditions; (2) this representation differed materially from conditions actually encountered; and (3) Western reasonably relied on these indications to its detriment. See Foster Construction C. A. & Williams Bros. Co. v. United States, 435 F.2d 873, 198 Ct.Cl. 587 (1970).

[5] We need not determine whether the first two changed conditions criteria were met because the third was not satisfied. Even if the information on sheet 002 indicated soil conditions in the boat basin's access channel and turning area, where dredging was most difficult, which differed materially from those actually encountered, any reliance on the contractual data for dredging information was unreasonable. The district court entered a factual finding that Western's reliance, if any, on sheet 002 was unreasonable, and we are unpersuaded that that finding was "clearly erroneous." Fed. R.Civ.P. 52(a).

The rationale for the changed conditions clause was summarized in Foster Construction C. A. & Williams Bros. Co. v. United States, supra. Normally, bidders will engage in extensive pre-bid inspections of project sites to avoid losses from unknown subsurface conditions. For the same reasons, contractors will build a risk contingency element into bids, inflating contract prices. If, however, the government conducts a pre-bid inspection, assuming the burden of investigation, and, through a changed conditions clause, guarantees that the contractor will be compensated for overruns resulting from conditions not detected by the government's logs, then the inflationary cushion in bidding should be reduced. Id. at 887.

[6] Consistent with these purposes, provisions in contracts including changed conditions clauses which shift some of the burden of investigation to the bidder are narrowly construed and government disclaimers of responsibility for contractual indications are disregarded. See Foster Construction, 435 F.2d at 887-888; United Contractors v. United States, 368 F.2d 585, 177 Ct.Cl. 151 (1966). Accordingly, we give the

3. See note 1 supra.
exculpatory language in the harbor district-Umpqua contract, special conditions 3 and 4, no effect.

[7] Still, bidders are required to inspect documents brought to their attention in the bidding materials and to make a general inspection of the project site:

"[A] contractor cannot call himself misled unless he has consulted the relevant Government information to which he is directed by the contract, specifications, and invitations to bid. As we read them, the decisions of the Supreme Court and of this court do not permit the contractor to rest content with the materials physically furnished to him; he must also refer to other materials which are available and about which he is told by the contract documents." Flippin Materials Co. v. United States, 312 F.2d 408, 414, 160 Ct.Cl. 357 (1963) [footnote omitted].

Flippin was a misrepresentation case, but the same duty to consult cross-referenced material is implicit in the "reasonable reliance" language of cases involving changed conditions claims. See, e.g., Foster Construction, 435 F.2d at 888 ("The contractor is unable to rely on contract indications of the subsurface only where relatively simple inquiries might have revealed contrary conditions"); United Contractors, 368 F.2d at 596 ("Business sense and human nature would tell contractors not to shut their eyes to relevant data of this type.").

Here, special condition 4 informed bidders that the backup reports for the soil data shown on sheet 002 were available at the harbor district's office. Western Pacific made no effort to obtain this information. Robert Lofgren, Western's president, testified that if he had seen the backup data, Western would have pursued a different sort of on-site inspection than it did. Western's failure to seek the backup information undercuts its claim of reasonable reliance.

Several other factors further counter Western's position. Western's dredge captain, Robert Kaltsukis, had encountered rocks on previous occasions while dredging areas of the harbor near the project site. Cf. Morrison-Knudson Co. v. United States, 345 F.2d 535, 540, 170 Ct.Cl. 757 (1965) (emphasizing contractor's prior experience with similar conditions in the same locale). Other Western personnel noticed partially submerged boulders in an area adjacent to the dredging channel during their on-site inspection. The presence of boulders adjacent to the project area reasonably should have alerted Western to the possibility of boulders in the dredging channel.

Finally, although the changed conditions clause rationale may have released Western from any obligation to do investigatory digging at the project site, Western did in fact dig some test holes. The fact that Western made its own borings indicates that it was not completely relying on the harbor district's boring results. See Arundel Corp. v. United States, 515 F.2d 1116, 1127 n.21, 207 Ct.Cl. 84 (1965). The results of Western's backhoe investigation were inconsistent with those shown on sheet 002. This again should have put Western on notice that contractual indications were suspect. Umpqua's changed conditions claim founders on the rock of reasonable reliance.

Umpqua next contends that even if Western Pacific was somehow negligent in relying on the information in sheet 002, the harbor district and Swine were also negligent in the manner in which they developed and presented the results of the test hole borings. Because California law applies in this diversity context, the loss resulting from the unforeseen conditions should be apportioned among or between the parties through the comparative negligence mechanism.

[8] The district court entered factual findings that Swine was negligent neither in its preparation and presentation of the plans nor in its investigation and determination of Western's changed conditions claims. The trial judge made no findings regarding the harbor district's possible negligence. However, because the only tort liability Umpqua assigns to the harbor dis-
trict flows from the harbor district's endorsement of Swine's actions, the trial court's finding concerning Swine implicitly deny negligence by the harbor district. These findings must be sustained unless clearly erroneous.

Umpqua argues that the district court's findings concerning negligence are not entitled to deference under Fed.R.Civ.P. 52(a) because they conflict with other factual findings by the court. Specifically, Umpqua contrasts the trial court's finding that "Western Pacific's reliance, if any, on the information contained on sheet 002 was unreasonable . . . in light of the manner in which the information was presented" with the court's finding that "Swine was not negligent in the preparation and furnishing of the Plans and Specifications." If Swine was not negligent in presenting the data on sheet 002, Umpqua reasons, then reliance on that information should have been reasonable.

We do not agree that these findings are contradictory. The district court's finding regarding unreasonable reliance reflects testimony at trial that even a cursory reading of the test hole data reproduced on sheet 002 would reveal that those results were reliable only as describing bedrock depth and were not intended to show dredging conditions. While Swine's presentation of the test hole data for the limited purpose of indicating bedrock elevation was not negligent, Umpqua's reliance on sheet 002 for dredging information was unreasonable.

We affirm the district court's findings concerning Swine's negligence as not clearly erroneous. Because neither Swine nor, by implication, the harbor district, was negligent, neither can be liable as comparatively negligent.

[9] Umpqua contends, finally, that Western, as a third-party beneficiary of Swine's design contract with the harbor district, may recover for Swine's preparation of inaccurate plans and specifications, in breach of that contract. Again, the district court found that Swine did not misrepresent subsurface conditions at the project site and that it was negligent neither in its preparation of the plans and specifications nor in its investigation of Western's changed conditions claim. We are not persuaded that these findings were in error. Swine did not breach its contract with the harbor district.

Because neither the harbor district nor Swine is liable to Umpqua under any theory, we need not determine whether Swine would have been obliged to indemnify the harbor district had such liability existed. Accordingly, the trial court's judgment for Swine on the harbor district's indemnity action was proper.

[10] Swine, as the "prevailing party" in the indemnity action, claims that it is entitled to recover its costs and attorney's fees from the harbor district under Clause VI-7 of the District-Swine contract. We agree that had Swine been named only in the harbor district's indemnity action, it would have been entitled to costs and fees. Here, however, Swine was simultaneously defending two actions on identical grounds. Some, if not all, of Swine's litigation costs were attributable to its defense against Umpqua's claims, and it is virtually impossible to apportion those expenses between the two actions. Swine was also an incidental beneficiary of the harbor district's expenditures in defending against Umpqua's claims. In these circumstances, we believe that Swine and the harbor district should bear their respective costs and fees.

The district court's judgments are affirmed.

5. Article VI-7 of the "Agreement for Engineering Services" between the District and Swine reads as follows:

"In any litigation or arbitration proceedings between the parties concerning this Agreement, the party, DISTRICT or ENGINEERS,