Wetland Mitigation Credits/Government Contract: Federal Appellate Court Addresses Contractor Request for Equitable Adjustment

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The United States Court of Appeals (Federal Circuit) ("Appellate Court") addressed in an August 26th Opinion a dispute regarding certain costs associated with a Federal Highway Administration ("FHA") road design and reconstruction project. See *Kiewit Infrastructure West Co. v. United States*, 2020 WL 5032464.

The issue involved a contractor's request for additional payment for the increased cost of purchasing wetland mitigation credits.

The FHA issued a solicitation for a road design and reconstruction project ("Project"). It consisted of realigning and reconstructing approximately 12 miles of road running through a National Forest in Alaska.

The solicitation provided offerors with a copy of a Waste Disposal Site Investigation Report ("Report"). This Report identified sites that a contractor could use to dispose of materials generated during road construction. The Report is stated to have indicated that many of the potential waste disposal sites:

- were located in existing rock quarries; and
- contained estimates of the volume of waste each location could accommodate.

The criteria for establishing the waste disposal sites included identifying locations that would minimize negative impacts to wetlands, wildlife, fisheries, streams, and karst formations.

Offerors were also provided access to a National Environmental Policy Act category exclusion that the agency had prepared in connection with its efforts to comply with the statute. The categorical exclusion indicated that the FHA had determined that the Project would not have a significant effect on the human environment:

. . . and that [t]he project was designed . . . to minimize the amount of fill placed into wetlands wherever possible.

A further assertion was that approximately 43 acres of wetlands would be permanently impacted by the proposed action. The categorical exclusion also referred to the Waste Site Report and indicated that it had been included in the analysis.

Responsibility for obtaining any necessary licenses or permits were placed on the offeror (contractor). This included responsibility for purchasing wetland mitigation credits.

Also referenced was a provision (Revised Standard Specification 105.06[RSS 105.06]) noting the Waste Site Report and stating that no further analysis of the environmental impacts of using government-designated waste sites would be needed unless an expansion was proposed. RSS 105.06 also stated that government-designated waste sites had "received NEPA clearance."

Kiewit Infrastructure West Co. ("Kiewit") visited the Project site. Its total bid incorporated $1,000,000 for wetland mitigation fees. The company was awarded the contract.

Kiewit subsequently wrote a letter to the FHA project manager asking for an equitable adjustment for the cost of purchasing mitigation credits for the wetlands it encountered at government-designated waste sites. It asserted that RSS 105.06 stated that no further analysis of the environmental impacts of using the sites would be required unless the contractor expanded the sites. The contractor asserted additional wetlands had been identified at the site. As a result, Kiewit argued that the increased cost of purchasing mitigation credits was compensable under the Contract Changes clause.

The FHA disagreed, arguing that the request was more appropriately evaluated as a "differing site condition claim." This was, regardless, deemed rejected based on the FHA's belief that nothing was represented about the presence or absence of wetlands at the disposal sites and a reasonable site investigation would have revealed the presence of wetlands.

The FHA contracting officer issued a final decision denying the claim for an equitable adjustment. The contractor officer concluded there had been no constructive change because there were no representations that the wetlands process (pursuant to Section 404 of the Clean Water Act), including mitigation, was complete for the waste sites.

Kiewit appealed to the Court of Federal Claims seeking an equitable adjustment in the amount of $490,387. It asserted that the presence of wetlands at the waste disposal sites was both a:

- constructive change to its contract
- a differing site condition

The Court of Federal Claims granted summary judgment in favor of the FHA on both requests. It determined that both RSS 105.06 and the categorical exclusion state that no further analysis of the environmental impacts of using government-designated waste sites would be required unless the contractor chose to expand those sites. The term "environmental impacts" referred only to NEPA environmental impacts as opposed to Clean Water Act environmental impacts. As a result, it determined that Kiewit was not justified in failing to further inquire regarding Clean Water impacts.

Kiewit appealed.

The Appellate Court first determined that Kiewit's claim could be adequately assessed under a constructive change theory. It then reviewed what constitutes a constructive change, noting it involves a scenario where:

- A contractor performs work beyond contract requirements without a formal order, either by an informal order or due to the fault of the Government

The Appellate Court agreed with Kiewit's argument that the FHA solicitation affirmatively represented that a contractor would not need to conduct any further environmental impacts analysis of the government-designated waste sites unless it decided to expand those sites. The contractor's conclusion that it would not need to perform any wetland analysis of such sites was deemed reasonable.

The Appellate Court stated that the FHA did not meaningfully dispute that the analysis required to obtain a permit until Section 404 of the Clean Water Act is an "environmental impact" analysis. It rejected the argument that wetland delineation and payment of wetland mitigation credits are excluded from the environmental impacts covered by RSS 105.06. It noted that if the FHA intended to exclude wetland

impacts from “environmental impacts” covered by RSS 105.06, it should have included such contract language.

The Appellate Court also rejected the FHA’s argument referencing the second sentence of RSS 105.06. The fact that the waste site had received NEPA clearance did not mean Kiewit should have understood that the term “environmental impacts” in the next sentence excluded wetland impacts. It stated:

. . . the fact that the FHA, as part of the NEPA process, had already undertaken an evaluation of “the effects of [Deweyville] project activities on wetlands . . . bolstered, rather than undercut, Kiewit’s reasonable conclusion that it would not need to conduct any further wetlands analysis . . .

Further cited by the Appellate Court was its conclusion that reading the categorical exclusion, a reasonably prudent contractor would conclude that no further analysis was necessary regarding any environmental issues (ones arising under the Clean Water Act).

The Appellate Court concluded that Kiewit reasonably interpreted RSS 105.06 to mean that no further environmental impacts analysis would be required if a contractor chose to dispose of waste and excess material at a government-designated waste site. Consequently, it concluded that a constructive contract change was effected when it required the contractor to perform wetland delineation at the waste site.

A copy of the Opinion can be downloaded[here](here).