BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF TRANSPORTATION & PUBLIC FACILITIES

QAP	)	
	)	
v.	)	
	)	
DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES, CENTRAL REGION	)	OAH No. 19-0961-CON
	)	

DECISION AFTER REMAND

I. INTRODUCTION

A. Case Overview

QAP is an asphalt paving business headquartered in Anchorage.[1] The letters apparently stand for "Quality Asphalt Paving," but the entity ordinarily does business only as "QAP." In 2017-18 QAP re-paved the Dillingham Airport runway under a contract let by the Department of Transportation & Public Facilities' (DOT&PF's) Central Region. Disputes developed over the amount owed for the work, and QAP lodged claims totaling $1.3 million, exclusive of interest.

Contracting Officer Joel St. Aubin denied the claims on July 31, 2019. QAP appealed the decision to Commissioner MacKinnon as permitted by AS 36.30.625. The commissioner's office executed a voluntary referral agreement with the Office of Administrative Hearings to conduct an evidentiary hearing or any other proceedings necessary to prepare the matter for final resolution.[2]

QAP raised three claims. Two of them grew out of the fact that the base course and pavement of the runway both required more oil than had been foreseen. This decision finds that those claims cannot be sustained, primarily because the forecasting errors were not unreasonable and the solicitation gave QAP a means to protect itself fully from such errors, which it chose not to use. The third claim relates to a scrivener's error in a penalty provision in the specifications. Central Region concedes that the provision cannot be enforced as written and that QAP could not be required to pay the penalty it imposes. However, QAP seeks fundamental reformation of the provision to turn it into a large bonus. This decision finds no basis to grant such relief.

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1 QAP is a registered business name of Colaska Inc.

2 Memorandum of Agreement for Adjudication Services, Oct. 15, 2019. *See also* AS 44.64.060(b).

B. Proceedings and Evidence Admitted

Discovery was available in this case, and a significant amount of it was conducted. The tribunal had subpoena power under AS 36.30.629 to compel production of evidence. Accordingly, QAP had the opportunity to obtain evidence needed to support any legal theory of recovery. After a period of discovery and an agreed delay related to Covid-19, evidence was taken over the course of a three-day hearing in late August of 2020. QAP had the burden of proof at the hearing.[3]

Testimony was taken over the course of two hearing days from James Mulhaney (QAP's Western Alaska Manager), R. Michael Jens (QAP's retained expert),[4] Christopher Humphrey (an engineering manager and estimator with QAP), Mike Yerkes (Central Region's Materials Group Chief), Laura Paul (Central Region's Quality Assurance Engineer), and Ronald Searcy (a project manager with Central Region who oversaw the last stages of the runway project). In addition, Cari Tavernier testified by deposition; she had functioned as an office engineer for Weed Engineering, the firm that supplied the project engineer overseeing the project on behalf of Central Region.

Exhibits G-R, U-W, 1-12, 14-22, 24, 25, 27-30, and 32-38 were admitted at the hearing (with the final version of 22 being substituted in on August 25, 2020). Exhibit 39 was admitted by stipulation on January 14, 2021. A set of three documents (Bates numbered QAP 000222-224) were admitted in an agreed "Supplement to the Record" on August 28, 2020, with no exhibit letter or number.

A proposed decision was issued January 25, 2021. The following month, QAP submitted a Proposal for Action as permitted by AS 44.64.060(e), and on March 10, 2021 Commissioner MacKinnon remanded the case to address and potentially correct a factual finding to which QAP had objected. On remand, the record was supplemented with a Stipulation to Correct Record accompanied by pages from James Mulhaney's discovery deposition. Pages 10-12 of the present decision have been modified in a limited way based on that material. No other changes have been made.

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[3] *See* 2 AAC 64.290(e).

[4] A short passage of testimony from Mr. Jens was taken subject to a relevance objection, with argument deferred to counsel's closings. First day hearing recording at 2:29:10 – 2:32:40. This was testimony about what the net price would have been, at the end of the project, if one of the other bids had been selected and DOT&PF had paid the unit prices for variable quantity items as presented in those bids. Although the objection is probably well-taken on the merits, it is now overruled because it was not pursued at closing.

II. BACKGROUND FACTS

A. Contract Award and Content

The Dillingham Runway Rehabilitation Project (CFAPT00104) involved the removal of four inches of the existing runway surface and the application of a new asphalt runway surface. R&M Consultants, acting as contractor and agent for DOT&PF's Central Region, drew up the specifications for the project.[5] Final review and changes by Central Region managers was complete on March 24, 2017.[6]

A major component of the invitation to bid—and of the final contract—was a set of "Standard Specifications for Airport Construction," with modifications. Modifications were shown by using strikeout typeface to show deletions from the standard language, and by underlining new language. These changes are called "special provisions."[7] Some are project-specific, and others are simply language updates that the department has, for one reason or another, decided to substitute into all contracts going forward. In either case, the special provisions take precedence over any unchanged provisions that might conflict with them in some way.[8]

The project went to bid in May 2017, with three bids opened on June 21. QAP's Total Basic Bid of just under $8 million was almost $1 million lower than the next lowest competitor, and more than $2.5 million lower than the engineer's estimate for the project.[9] Central Region issued a notice of intent to award to QAP on June 27, 2017, with the contract fully executed by mid-July.[10] We will return to this timeline in Part IV, because the above time span overlaps with a period when DOT&PF was working to redesign a price adjustment specification for paving projects, one that has become a centerpiece of this case.

B. Unbalanced Bidding

A notable background component of some of the later disputes on this contract was the use of bidding strategy in the context of a highly competitive solicitation. Because an understanding of the bidding strategy of "unbalanced bidding" is necessary to evaluate two of

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5 Paul testimony (cross).

6 *Id.*; Ex. 33.

7 Ex. 22 at 28.

8 Counsel for both parties agree on this, and there was even some testimony to this effect (*e.g.*, Humphrey testimony (direct)). There is probably a contract provision that makes this rule explicit, but I do not believe either party cited it to me and I have not been able to find it in the partial set of contract documents in the record.

9 Ex. 21 at 5. DOT&PF engineer's estimates, for the overall project or for individual line items in the bid, are internal, not available to bidders. Mulhaney testimony (redirect).

10 Ex. J at 3.

QAP's claims, we will take a moment to explore the nature of that strategy and its application to this solicitation.

When contractors bid on a paving project of this nature, they do not simply bid a bottom-line price. They submit a bid schedule that breaks the bid into components. Some components, such as "Mobilization and Demobilization," are entered as a lump sum. For other components, a per-unit price is solicited, so that, for example, Portland cement is priced at a certain figure *per ton.* A few items on the bid schedule are pre-filled by Central Region. These are "contingent sums" that each bidder must add to its total, such as a number for certain after-the-fact price adjustments based on quality.

To arrive at the "Total Basic Bid," the unit prices are multiplied by the estimated quantities supplied by the bid solicitation, and then added to the lump sum and contingent sum items to arrive at a total. Central Region's Bid Schedule for this project, as filled out by QAP, can be seen at Exhibit 20.

The component bidding serves two purposes. One is to help allocate costs to stages of a project so that progress payments can be made as the project moves toward completion. The other is to provide a per-unit basis to compensate the contractor when the actual quantity of an item ends up being different from the estimated quantity listed in the solicitation. In a paving project, for example, the exact quantity of the oils needed to create the base course and pavement cannot be known precisely at the time of bidding. This is because DOT&PF prescribes the optimum mix of aggregate and oil at a later stage—after the project is already launched—based on lab results from aggregate and base material samples collected by the selected contractor. Actual payment to the contractor for these materials is ordinarily based on the actual quantity used, multiplied by the unit price.

Apparently, all competing bids that reach the selection stage are compared head-to-head solely on the bottom-line "Total Basic Bid."[11] Before that occurs, however, in a project of this type DOT&PF must evaluate the component prices to see if they are in "reasonable conformance" with the engineer's estimate, and must completely reject "materially unbalanced" bids.[12] "Materially unbalanced" is a defined term that covers only certain kinds of imbalance.[13]

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[11] There was no direct testimony about this, but it may be inferred from, among other places, Ex. J at 3-4.

[12] Ex. J at 16.

[13] It includes circumstances where manipulation of unit prices creates "reasonable doubt" whether the bidder with the lowest bottom line will in fact deliver the lowest cost to the department. *Id.* The contours of this standard are explored in *Granite Construction Co. v. DOT&PF Central Region,* OAH Case No. 17-0742-PRO (Comm'r of Trans. & Pub. Fac. 2017) (aws.state.ak.us/OAH/Decision/Display?rec=4782), a case analyzing another QAP bid.

QAP's bid was not rejected on this basis, and no party has contended that it should have been. However, QAP's bid did exhibit an unbalance between line items, an unbalance that later played a role in a portion of its claim.

Unlike material unbalance, mere mathematical unbalance in a bid can be permissible. It occurs when an individual item fails to carry its share of the bidder's overhead and profit, or where a nominal price is given for one item with the cost recovered through an enhanced price for other items.[14] The evidence in this case showed that deliberately unbalanced bidding is both common and tolerated (up to a point) in public procurement for construction.[15] In the present case, to give just one example, bidders were required to provide an hourly cost for an extra three-person survey party in Dillingham, which was anticipated to be used for 50 hours. Central Region's engineer's estimate for this item was $360.00 per hour. QAP bid $300.00 per hour, and competitor JJC Enterprises bid $375 per hour. But the third competitor, Knik Construction, bid just one dollar per hour, or 33 cents per hour per person, to furnish this crew.[16] One can infer that this was below Knik's actual cost, and that it intended to recover the actual cost elsewhere in its bid.

Unbalanced bidding can be used in a variety of ways to a contractor's benefit. One facet that is particularly attractive is to move funds from pay items that will be paid late in the project to pay items that will be performed and paid earlier. For instance, if the cost of an asphalt component that will be used in the second season of a project can be incorporated into site preparation that will occur in the first season, the contractor will receive the money a year earlier and the cash flow of the project will improve. In theory, unbalanced bidding can also benefit the state, in that it can help a contractor to pare its bottom-line bid to a minimum.[17]

QAP's bid on this project included at least one highly unbalanced line item: Item P-401c, for type PG 52-40 asphalt cement. Asphalt cement is also known as asphalt oil, and to avoid confusion it will be referred to as such in this decision. It is an expensive oil, incorporating a polymer and other additives, that is used to bind the asphalt. The project engineer projected the

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14 *See* Ex. J at 16.

15 *E.g.*, Jens testimony (direct).

16 Ex. 21 at 2.

17 Mulhaney testimony (direct and cross); Jens testimony (direct, cross, and redirect) [whole paragraph]. The ALJ makes no finding on whether such benefits are real or illusory.

cost at $950 per ton, and the other two competitors bid the item at more than $1000 per ton.[18] QAP bid the item at ten cents per ton.[19]

A second component of QAP's bid that showed an element of imbalance was P-310b, for PG 52-28 foaming oil.[20] Foaming oil is used in creating the stabilized base course that will underlie the pavement. The project engineer estimated the cost of foaming oil at $900 per ton, and the other two competitors bid the item at $900 and $870, respectively.[21] QAP bid this component at $437 per ton.[22]

C. Administration of the Project

Central Region used a different contractor, Weed Engineering, as contract administrator for the runway project. Weed's Larry Geise was designated as Project Engineer.[23] Mr. Geise was overseen by Central Region's Project Manager for the project, M.M. Toward the end of the project, and particularly by the fall of 2018, M.M. was quite ill and was not always attentive.

QAP began work on the project in the summer of 2017, completing some mobilization and constructing an important cross-runway culvert that season.[24] Sampling for mix designs also took place in the fall of 2017.[25] Central Region provided the mix design for asphalt in October of 2017, and the design for the foamed base course in early April of 2018.[26] The mix designs resulted in a need for substantially more asphalt oil and foaming oil than had been anticipated, and claims were later pursued relating to the cost of these materials. Those claims are addressed in Part III below.

The process of replacing and finishing the runway surface was carried out later in 2018, with additional mobilization taking place at the beginning of that season.[27] Pavement operations ended in October of 2018, and the project was largely complete by the end of that month.[28] DOT&PF had already paid $7.4 million to QAP.[29]

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18 Ex. 21 at 4.
19 Ex. 20 at 5.
20 Mulhaney testimony (cross) (foaming oil bid "not reflective of QAP's actual cost"); Ex. 38 at 2 (QAP expert: foaming oil bid "may have been unbalanced").
21 Ex. 21 at 4.
22 Ex. 20 at 5.
23 Ex. 1.
24 Mulhaney testimony (direct and cross).
25 Ex. 16 at 3, 5.
26 *Id*.
27 Mulhaney testimony (direct and cross).
28 Humphrey testimony (direct).
29 Ex. 3 at 2.

The contract called for certain price adjustments based on measurements of the quality of the asphalt laid. Weed personnel signed another pay estimate, Number 10, on November 13, 2018, calling for payment of an additional $1 million to QAP.[30] The primary component of this proposed additional payment was a calculation of a P-401b "Hot Mix Asphalt Price Adjustment" consisting of two components totaling $863,500.[31] The estimate was issued to QAP, but only two days after it was issued (and before QAP had signed off on it) QAP was notified the estimate was wrong and was being recalculated.[32] The full $863,500 was deleted from the next estimate (although a different, smaller component of the Hot Mix Asphalt Price Adjustment was recommended for payment).[33] The deleted $863,500 is the focus of the price adjustment claim addressed in Part IV.

III. EXCESS QUANTITIES CLAIMS

A. Asphalt Oil

1. Claim Background

The parties' dispute over asphalt oil came about because much more asphalt oil was needed for this project than had been foreseen. Since QAP had bid just 10 cents a ton for this expensive oil—which seems to have cost QAP 460 *dollars* a ton just to purchase at the source[34] —every extra ton of the oil beyond the projected quantity substantially reduced the company's profit (or increased its loss). The problem came about as follows.

In paving projects, it is important to get the right mix design for the asphalt, which consists primarily of aggregate and oil. The mix design is developed after the project is already underway. The contractor must obtain source material from its chosen source and generate a large quantity of aggregate (filling many five-gallon buckets, with an overall quantity that may approach a quarter of a ton), which is shipped to a state lab for testing to design the mix. The contractor is then required to follow the mix design. Because aggregates vary from one source pit to another and DOT&PF ordinarily does not know in advance the pit a winning bidder will use, the design cannot be generated until aggregate has been created and submitted for testing, after the contract award.[35]

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30 *Id.*
31 *Id.* at 4.
32 Ex. 8 at 1.
33 Ex. 6 at 4.
34 Ex. U at 25.
35 *E.g.,* Mulhaney testimony (cross).

At the time of bidding, contractors are given an estimate of the mix design, the primary component of which is a percentage of estimated oil content, and are given a calculation of the projected quantity of asphalt oil needed based on that percentage. It is possible for this (and other) quantity estimates to overshoot or undershoot by a wide margin. DOT&PF Standard Specification 90-04, which became part of the contract for this project, contains stop-loss mechanism to limit the effect of per-unit component bids if the quantity of units of a "Major Contract Item" varies widely from the estimate. If the quantity needed is more than 25 percent above the estimate, an "equitable adjustment" can be made to the unit price for the units beyond that threshold.[36] Otherwise, "the Contractor shall accept payment at the original Contract unit prices for the . . . materials furnished . . . as payment in full . . . . [encompassing] all costs, expenses, and profit that the Contractor is entitled to receive for the altered quantities . . . ."[37]

The plan set advertised by Central Region for this project estimated that the project would require 27,300 tons of hot mix asphalt. It estimated that the mix would consist of 5.3 percent asphalt oil, yielding a need for 1447 tons of asphalt oil.[38] As it turned out, the aggregate used in the Dillingham Runway project required 6.2 percent oil in the mix to achieve the optimum mix design.[39] This meant that QAP had to supply an additional 246 tons of asphalt oil, which required it to ship an additional 13 specialized tanks containing the oil to Dillingham.[40] In percentage terms, this was 17 percent more than anticipated, falling short of the 25 percent trigger for the contract's stop-loss provision. Moreover, to qualify for the stop-loss provision, the asphalt oil would have to be a "Major Contract Item," a term defined in the contract as an item comprising 5 percent or more of the overall price. Obviously, at $144.70 for 1447 tons of oil, the price QAP chose to bid for asphalt oil did not amount to 5 percent of this $8 million contract. Thus, QAP had to sell the additional oil to the state for 10¢ per ton.

There are three fundamental premises to QAP's claim arising out of this overrun. First, QAP contends that it was entitled to rely, to some degree, on the estimated mix percentage, because it ought to be a rationally-generated, educated projection. We will return to this premise in some detail in Part III-A-2-a below. Second, QAP contends that the 6.2 percent figure was not such a projection. This will be examined in Part III-A-2-b. Third, QAP takes the position that

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36 Ex. 22 at 11-12.
37 *Id.* at 11.
38 Ex. 16 at 2; Mulhaney testimony (direct).
39 Ex. 16 at 3; Mulhaney testimony (direct).
40 Mulhaney testimony (direct).

its 10¢ bid should be read as a price for the oil itself, and that the cost of delivering the oil to Dillingham fell under a different bid item (mobilization). Again, we will revisit this premise in a later discussion, Part III-A-2-c. If these three premises are accepted, QAP's claim for asphalt oil in this case is not extravagant: QAP seeks no additional compensation for the oil itself, but asks to be reimbursed for the cost of mobilizing the extra oil to the project site.

This cost is not trivial. The asphalt oil used in this project requires a special formulation, and QAP had to purchase it in Seattle and ship it from there. The shipping occurred in special tanks, and these tanks had to be rented, trucked, and shipped, and substantial extra handling had to occur.[41] For the extra cost plus a 20 percent markup, QAP claims $145,091.95.[42]

2. Evaluation of Claim Premises

a. First Premise: Reasonable Reliance on 5.3 Percent Estimate

So that bids can be compared, contractors must *bid* using the estimated quantities in the solicitation. However, contractors do not have to plan internally using those quantities. Indeed, QAP's Western Alaska Manager acknowledged that it is "not uncommon" for contractors, including QAP, to believe they have superior knowledge of the actual quantity of a particular item that will be needed, and to tailor their bid accordingly so as to realize a greater profit or windfall thereby.[43] To use the runway project as an example, if QAP had known that the actual quantity of asphalt oil would likely exceed the estimated quantity, QAP could obtain a bidding advantage by placing a particularly high unit value on that line item, and reaping the benefit of selling the unprojected, additional quantity at a highly profitable price. (Of course, to make the overall price competitive, QAP might need to unbalance its bid in other ways, recovering costs for other project components in the asphalt oil line.)[44] With its 10¢ bid, QAP did just the opposite.

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41 Mulhaney testimony (direct).

42 Ex. H at 2 & 44; colloquy on record at beginning of day 2 of hearing. Because this decision rejects QAP's claim on its merits, it makes no finding on whether the amount of the compensation claim is fully supportable. If this decision were to be overturned on the merits, a very short proceeding on remand would be necessary to ascertain damages and interest.

43 Mulhaney testimony (cross)

44 QAP suggested during the redirect of Mr. Mulhaney, as well as during direct testimony of its expert, Mr. Jens, that it would have been at a competitive disadvantage had it bid using its own superior knowledge, rather than the estimating factor, to make a decision about pricing the asphalt oil line item. This is frankly nonsensical, and is contradicted by the testimony cited in footnote 43. I note that Mr. Jens appeared to believe that if a contractor prepared its bid using its own, superior knowledge that probable quantities would exceed the department's estimate, its bid would be higher. This does not follow at all. All the contractor needs to do is bid the true cost of a given item on the line for that item, rather than underbid the item and then shift those costs to other line items. The net result can be the same bottom line total bid

In QAP's own experience, the estimating factors in DOT&PF plan sets were usually quite accurate.[45] Moreover, after the problem arose in the Dillingham Runway project, QAP has surveyed about a dozen projects and found that the estimate has typically deviated from the final mix percentage by about 0.2 percent, far less than the 0.9 percent deviation in Dillingham.[46] Hence, QAP contents it was reasonable to assume that the ultimate mix design for the Dillingham Runway would be close to the 5.3 percent factor provided.

There are two central flaws to this premise. The first is that § 20-03 of the Standard Specifications applicable to this project provided that

> [q]uantities of . . . materials to be furnished are approximate and are prepared only for the comparison of bids. These quantities may increase, decrease, or be eliminated. Payment for unit price items will be made for the actual accepted quantities of . . . materials furnished . . . .[47]

QAP seeks to evade the implications of this contract provision by pointing out that it refers to "quantities", and QAP's quarrel is with an "estimating factor." But the quantities flow from the estimating factors by simple operation of mathematics; they are one and the same. Moreover, QAP's claim is ultimately not for an abstract factor, but for a *quantity* overrun. By any conventional reading of this language, Specification 20-03 rules out the first premise underlying QAP's asphalt oil claim.

Perhaps one can imagine circumstances in which an absurdly erroneous quantity estimate, offered with reckless disregard for accuracy, would give rise to a supportable claim. The contractual theory under which this might occur might be that the implied covenant of good faith and fair dealing could trump § 20-03. However, this certainly is not such a case, because of the second flaw in QAP's first premise.

The second reason it was unreasonable for QAP to put much reliance on the 5.3 percent estimating factor is that QAP itself had superior knowledge, if it chose to use it. QAP had previously used a pit in Dillingham known as the Choggulung or "Chogg" Pit.[48] It used that pit again for the 2017-2018 runway project. Its prior use of that pit was for a state project in 2010, the Wood River Road Reconstruction. And on that occasion, when aggregate from the pit was tested it yielded a mix design calling for 5.9 percent asphalt oil.[49] As one might expect from

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45 Mulhaney testimony (direct).
46 Ex. 30 at 6; Mulhaney testimony (direct).
47 Ex. 22 (as revised) at 20.
48 Mulhaney testimony (cross); Exhibit A to Stipulation to Correct Record (March 19, 2021).
49 Mulhaney testimony (cross); Ex. 14 at 3.

samples taken from a single pit, the 2010 and 2017 test results were fairly close, both falling at the high end of the spectrum.[50]

As a brief aside, we should note that the 2010 mix design was for type II-B asphalt, an asphalt type that may require more oil than the type II-A used on the Dillingham runway.[51] However, QAP has taken the position that the difference in oil content is not very significant, and the best evidence supports this view.[52]

From the earlier test from the pit it intended to use for this project, QAP could have known that this project would be likely to have a higher optimum asphalt oil percentage than 5.3 percent, and therefore would require substantially more than the projected 1447 tons of asphalt oil. This made it unreasonable for QAP to rely on Central Region's estimating factor, which was necessarily not specific to a particular pit. QAP knew which pit it was going to use and had specific information about the kind of aggregate that pit would yield, and yet it chose to rely on inferior, generalized information rather than on specific information from its own experience with the Choggulung pit.

b. Second Premise: Unreasonableness of 5.3 Percent Estimate

Central Region generated the 5.3 percent estimate by averaging the final asphalt mix design percentages from 2009-2014 for all Central Region projects.[53] QAP contends that Dillingham-area pits are likely to generate a significantly higher mix design percentage, and that Central Region should have known this and used an estimating factor tailored to Dillingham.

In evaluating this premise, we should begin by noting that there are half a dozen pits around Dillingham. QAP had access to at least two of them, separated by a distance of 5-10 miles, and other competitors had access to other pits.[54] There is no competent testimony in this case to establish that the geology of the Dillingham area is so homogenous that one could expect these disparate pits to produce similar aggregate, so that the area could be said to have a special,

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[50] Central Region witness Mike Yerkes noted that there is some variability of material within a single pit, but did not opine that results from a single pit have no correlation with one another. Thus, it would be reasonable for QAP to expect, or at least anticipate, another high-end result when it chose to source this project from the Chogg Pit.

Obviously, if there is no correlation from one sample to the next, QAP's entire theory underlying premises one and two would be nonsense. However, I accept QAP's view that some correlation can be expected.

[51] Yerkes testimony (direct).

[52] Mulhaney testimony (cross). The Yerkes testimony indicated that type II-B requires "more" oil, but did not directly contradict Mulhaney's judgment that the difference is not significant and that type II-B mix design data is relevant. Moreover, Yerkes admitted on cross that the state has been using the same estimating factor for both types of oil.

[53] Yerkes testimony (direct). Past values are collected at Ex. 10. They range from 4.8 to 7.4 percent, with most clustered around the average.

[54] Mulhaney testimony (cross).

local character. That said, Central Region does seem to have concluded as much after the experience of this project and one other that occurred after it[55]—that is, after it had the benefit of four data points, all of them elevated. In 2018 it advertised a second Dillingham Airport project using a locally-generated 6.5% estimating factor for asphalt oil.[56] QAP faults Central Region for not coming to this conclusion sooner.

Prior to putting the Dillingham Runway project out to bid, Central Region had two projects in Dillingham that might have alerted it to a local condition that would lead to oil-rich mix designs. One was the 2010 Wood River Road project (5.9 percent), which we have discussed above because it was a QAP project using the Choggulung Pit. The other was a Dillingham Airport project with a mix design developed in 2014 from a pit about a mile from the Choggulung Pit, which yielded an optimum oil percentage of 6.2 percent.[57]

I am asked to accept that premise the on the basis of just two data points—taken from two pits only a mile apart, in a community that has half a dozen pits spread across a much greater span of territory—Central Region should have known that using the 5.3 percent southcentral Alaska average to estimate Dillingham projects was unreasonable. This is marginally plausible, but is not supported by any credible and competent evidence. Testimony from someone with demonstrated expertise in geology or gravel pits would needed for a trier of fact to make this leap.[58] QAP has not met its burden of proof to establish this premise.

c. Third Premise: Exclusion of Shipping Costs from Unit Price

QAP takes the position that the bid line item setting a unit price for asphalt oil does not encompass the cost of moving the oil to the project site. Instead, it views that cost as an element of mobilization. It argues that by providing a deficient quantity estimate, on which QAP reasonably relied, Central Region escalated QAP's mobilization costs, and must now compensate the contractor for that escalation.

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[55] The other project was a pair of contracts for the Aleknagik Road and Aleknagik Wood River Bridge, for which a single sample set was taken on September 4, 2017. *See* Ex. 17, 18. This sample provided a second example of aggregate from the pit a mile away from the Chogg Pit.

[56] *See* Ex. 19; Ex. 12 at 3 comment 22.

[57] Ex. 15 at 3; Mulhaney testimony (direct). Other projects listed by Mr. Mulhaney in his affidavit to support the claim (Ex. 30) are not relevant because the testing post-dated the Dillingham Runway Rehabilitation ITB.

[58] Insofar as QAP expert Michael Jens, P.E., had a background that might make him qualified to opine on this issue—and this was not established—his testimony and report were rendered non-credible by his reliance on the irrelevant later data points. Moreover, he did not explain a basis for reaching a conclusion about regional characteristics. The other witness with some potential expertise in this area was Central Region witness Mike Yerkes (a specialist in material testing), but his testimony was wholly unsupportive of QAP's theory that one or two prior tests in an area would be predictive of material from the area as a whole.

The actual cost of moving the originally estimated quantity of oil of all types (asphalt oil and foaming oil) to Dillingham was about $600,000.[59] QAP contends that the excess above the erroneous estimate added about $120,000 (before markup) to this expense.

We should start by noting that QAP did not actually bid the shipping component of the asphalt oil cost in mobilization. Because of a second-order use of strategic, unbalanced bidding, it greatly underbid mobilization. QAP's internally-calculated cost for all mobilization was $1.6 million, but QAP bid only $500,000 for this item, for the simple reason that a significant portion of payment for mobilization is delayed under the payment methodology in the contract.[60] Instead, costs that were associated with "mobilization" were further moved to a variety of other, very early pay items, such as:

D-701A (pipe for culverts) – bid at about 140 percent, or $368,000, above cost;

D-760C (thaw wire) – bid at about 340 percent, or $86,000, above cost;

G-135A (survey) – bid at nearly 400 percent, or $156,000, above cost.[61]

QAP's point, however, is not so much that items it characterizes as "mobilization" need to be bid on the mobilization line, but the broader point that because the shipping costs for the oil are "mobilization," they are *not* part of the unit price bid for the oil itself, and therefore not subject to the hard cap in Standard Specification 90-04 providing that the unit price will be "payment in full" for "all costs, expenses, and profit" associated with the item. In support of this contention, QAP points to the contract's description of bid item G-100, "Mobilization and Demobilization."[62] This item is defined to include "operations necessary to move personnel, equipment, supplies, and incidentals to the project site." QAP contends that asphalt oil and the tanks it comes in are "supplies," and therefore the cost of moving them is mobilization.[63] The reasoning is flawed, for three reasons.

The first problem with this theory is that asphalt oil is not an item of "supplies." Because it is an item being sold to the state for incorporation in the runway, it is instead what the contract defines explicitly as an item of "materials"—"[s]ubstances specified for use in the construction of the project."[64] The definition for bid item G-100 (mobilization) does not encompass "materials."

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59 It is difficult to allocate this between the two types, because of their different points of origin.
60 Mulhaney testimony (cross). Payment for 20 percent of mobilization can be delayed several years.
61 Mulhaney testimony (cross); Ex. U at 1.
62 Ex. 22 at 18.
63 Mulhaney testimony (cross); Jens testimony (cross and redirect).
64 Ex. 22 at 12.

Second, the plain language of the contract provides that unit prices are all-inclusive. Specification 90-04 says that when quantities are altered, the unit price "shall compensate the Contractor for all costs, expenses, and profit that the Contractor is entitled to receive for the altered quantities," except as provided in the stop-loss provision. Indeed, it goes on to reiterate that except as provided in that provision or the one relating to change orders, "no allowance shall be made for any increased expenses", explicitly noting that this exclusion applies to "unbalanced allocations among the contract items on the part of the bidder."[65]

Third, the very purpose of unit pricing would be defeated if costs tied to the volume of materials purchased were not compensated through the unit price. Indeed, every time a quantity exceeded the estimate in the bid documents, a contractor would not only pocket the augmented unit price payment but would immediately accrue a claim for the cost of getting the additional materials to the site. Claims are expensive to adjudicate, and this would be nothing short of an absurd way to administer variable-quantity purchases. As such, it is also an impermissibly absurd construction of the contract.[66]

The conclusion is inescapable that the unit price bid for asphalt oil is the price at the destination, inclusive of all tanking, shipping, and handling to get it there. If more asphalt oil is used, the contractor's sole compensation is set by the unit price it quoted. This has already been paid.

3. Disposition of Claim

All three premises behind QAP's asphalt oil claim fail. The first is untenable as a matter of fact; the second is unproven; and the third is untenable as a matter of law. QAP is entitled to no additional compensation related to asphalt oil.

By adopting a highly aggressive bidding strategy, QAP was the author of its own misfortune. Indeed, aggressiveness of the bidding approach was such that QAP's own expert, Mr. Jens, indicated that he would not "recommend this as a bidding strategy."[67]

There was potential for the strategy to produce substantial benefits to QAP. Had asphalt oil quantities been lower than projected, QAP would still have been compensated for the very substantial cost of moving the full projected quantity to Dillingham—which were bid by inflating other line items—even though those costs would not have been incurred.

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[65] Ex. 22 at 14.

[66] Ambiguities in contracts are to be construed to avoid an absurd or unreasonable result. *E.g., Hussein-Scott v. Scott,* 298 P.3d 179, 182 (Alaska 2013); *Dugan v. Atlanta Cas. Co.,* 113 P.3d 652, 656 (Alaska 2005).

[67] Jens testimony (cross).

QAP's bidding strategy was a calculated gamble, with an upside and a downside. The fact that the downside has come to pass does not entitle QAP to compensation.

B. Foaming Oil

1. Claim Background

Foaming oil is used to create a firm base course for the runway pavement. The contract required the contractor to mill four inches of existing surface, mix it with foaming oil, and lay it down again as a substrate. As with the mix design for the asphalt, the mix design for the substrate is created after the project is already underway, using samples the contractor collects, processes, and sends to the state lab.

The plan estimated that the project would require 116,900 square yards of foamed base course. It estimated that the mix would need to incorporate 2.0 percent foaming oil by weight, yielding a need for 680 tons of foaming oil.[68] As it turned out, the material generated from grinding up the top four inches of the existing Dillingham Runway required 3.5 percent foaming oil in the mix to achieve the required mix design.[69] This figure was a "real outlier" on the spectrum of foaming oil percentages, and Central Region found it surprising.[70] For the contractor, this meant that QAP had to supply an additional 510 tons of foaming oil, which required it to ship an additional 27 specialized tanks filled with the oil to Dillingham.[71] In percentage terms, this was 75 percent more than anticipated, which exceeds the 25 percent trigger for the contract's stop-loss provision. However, the stop-loss provision still did not apply, because the provision only operates for "Major Contract Items," that is, line items exceeding 5 percent of the total bid price. As QAP had bid it, the foaming oil comprised only $297,160—or 3.7 percent—of a total price of $7,996,317.70.[72] QAP therefore had to sell all of the 75 percent overrun of foaming oil for the bid price of $437 per ton.

2. Foaming Oil Claim as Compensation for Deficient Quantity Estimate

QAP has not rigorously defined its contractual theory on the foaming oil claim, but at the end of the case it seemed to present two different routes to potential recovery. One is for the claim to be addressed like the one for asphalt oil, premised on reasonable reliance on a quantity estimate that was negligently or recklessly supplied by the owner. The second is to evaluate the

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68 Ex. 16 at 2; Mulhaney testimony (direct).
69 Ex. 16 at 5; Mulhaney testimony (direct).
70 Yerkes testimony (cross).
71 Mulhaney testimony (direct).
72 *See* Ex. 20 at 5. For this to have been a "Major Contract Item", QAP would have had to bid it at $588 per ton or more. This would still have been a low price, far less than the $870 and $900 bid by the other competitors.

requested adjustment as a differing site condition claim—a theory that was wholly unavailable for asphalt oil, but that makes some sense for the foaming oil issue. This section addresses the first potential theory, the one that does parallel the asphalt oil claim.

Viewed this way, as with the asphalt oil claim, there are three fundamental premises to QAP's claim arising out of the foaming oil overrun. First, QAP contends that it was entitled to rely, to some degree, on the estimated mix percentage as a rationally-generated, educated projection. We will return to this premise in Part III-B-3-a below; it involves different considerations from the evaluation of the asphalt oil estimate. Second, QAP contends that the 2.0 percent figure was not a reasonable projection. This will be examined in Part III-B-3-b. Third, parallel to the asphalt oil claim, QAP takes the position that its $437 bid for foaming oil should be read as a price for the oil itself, and that the cost of delivering the oil to Dillingham fell under a different bid item (again, mobilization). Again, we will revisit this premise briefly in Part III-B-3-c.

Building on these three premises, QAP again makes a limited claim, seeking no additional compensation for the oil itself, but asking to be reimbursed for the cost of mobilizing the extra oil to the project site. As with the asphalt oil, this cost is not trivial. The foaming oil used in this project was purchased in Seward; QAP had to ship it from there in special tanks designed to be heated on site with the oil in them; there was associated tank rental, trucking, shipping, and handling.[73] The claimed expense plus a 20 percent markup, covering all of the 510 tons of extra oil, totals $276,895.33.[74]

3. Evaluation of Claim Premises Under Deficient Estimate Theory

a. <u>First Premise: Reasonable Reliance on 2.0 Percent Estimate</u>

As already discussed in connection with asphalt oil, although contractors must fill out their bidding forms using the engineer's estimate of quantities, they are by no means required to use those estimates in projecting their own costs and coming up with an appropriate bottom-line bid. If the contractor has its own, superior knowledge or test data, it can make use of it. But this is where the path for resolution of the foaming oil claim deviates significantly from the asphalt oil claim. With regard to the aggregate to be mixed with the asphalt oil, QAP had specific data in hand on the source pit it had decided to use, and yet it elected not to pay attention to that data. With regard to the material to be mixed with the foaming oil, however, QAP had no access to

[73] Mulhaney testimony (direct).
[74] Ex. H at 2 & 45; colloquy on record at beginning of day 2 of hearing.

data, because it was inside and underneath the runway. At early stages of the claim review process Central Region suggested that QAP could nonetheless have come to Dillingham and done sampling prior to bidding, but that position proved unreasonable at the hearing, and Central Region has abandoned it. It was not practical for any prospective bidder to take a meaningful set of samples from the runway.

As we have already noted, in QAP's own experience, the estimating factors in DOT&PF plan sets were usually quite accurate.[75] Moreover, after the problem arose in the Dillingham Runway project, QAP surveyed about half a dozen projects using foaming oil, and it appears that the estimate has typically deviated from the final mix percentage by about 0.4 percent, far less than the 1.5 percent deviation in Dillingham.[76] The amount of deviation on this project was surprising.

QAP's premise is still hampered by Specification 20-03, providing that the estimates are "are prepared only for the comparison of bids." But as discussed previously, that caveat may not wholly preclude a claim if the estimate was offered with such disregard for reasonable expectations that it was unconscionably misleading to bidders—the kind of circumstances that would bring the implied covenant of good faith and fair dealing into play. Hence, we must evaluate the second premise: that the 2.0 percent estimate was unreasonable.

b. Second Premise: Unreasonableness of 2.0 Percent Estimate

Central Region seems to have generated the 2.0 percent estimate by averaging the final asphalt mix design percentages over a period of years for all Central Region projects.[77] The estimate could not readily have been generated by direct sampling from the runway, because of the difficulty of generating the large volume of material needed for the state's testing procedure without unacceptable damage to the runway surface while it was still in use.[78] The estimate had nothing to do with a prediction of the nature of the material to be milled at this site, whether it be old asphalt or something else.

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[75] Mulhaney testimony (direct).

[76] Ex. 30 at 7; Mulhaney testimony (direct). Because it included negative and positive numbers in its average, QAP came up with a typical deviation of 0.26 percent, but the better approach for statistical comparison is to use the absolute value of each variance to compute an average variance of 0.4 percent (0+0+0.3+0.5+0.5+1.0+0.5) ÷ 7 = 0.4.

[77] Yerkes testimony (direct). The testimony regarding the origin of the foaming oil estimating factor is a little more equivocal than the testimony about asphalt oil. Moreover, insofar as Mr. Yerkes intended to say that 2.0 percent is used as an estimating factor on all Central Region projects, his testimony is hard to square with Ex. 30, p. 7. Uncertainties about the genesis of the 2.0 percent estimate were not pursued by either party.

[78] Yerkes testimony; Mulhaney testimony.

No evidence was offered to indicate that Central Region had any data on the characteristics of the material in and below the runway surface in connection with formulating a foamed base course.[79] The use of a foamed base course is a relatively new innovation,[80] and seems not to have been done in the past on the Dillingham runway.[81] Thus, Central Region would not have had an occasion to evaluate how milled material under the runway would behave in formulating a mix design for a foamed base course.

The only evidence of any other application of a foamed base course in the Dillingham area was a single project on the terminal apron in 2011.[82] It showed an approved mix design of 2.5 percent foaming oil—a wholly unremarkable figure, since chosen mix percentages seem to have mostly been in increments of half a percent and 80 percent of Central Region's final approved foamed base course mixes between 2009 and 2018 were at 1.5, 2.0, or 2.5 percent.[83] Thus, not even the two data points for asphalt mix designs around Dillingham—with all their shortcomings—were available to forecast this base course mix. There was just one data point, and it was close to the Central Region mean. There is no basis to support a finding that the 2.0 percent estimating factor was chosen with even slight negligence, much less unconscionable disregard for accuracy.

Instead of trying to show that Central Region was, or should have been, on notice that the foamed base course mix design in this location would require a high oil component, QAP has focused on a different forecasting error: that Central Region mistakenly reported the thickness of the existing asphalt, and should have known better. QAP's contention arises as follows.

The bidding documents contained two test hole logs from the existing runway, one showing an asphalt layer 4.5 to 5 inches thick and another showing asphalt 5 inches thick.[84] They also indicated that the contractor was to "cold plane 4" of AC pavement," which may imply that the material to be removed and milled into the foam base course was pavement, not pavement combined with something else.

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79 As noted previously, discovery was made available in this case, and the tribunal had subpoena power under AS 36.30.629 to compel production of evidence. Accordingly, QAP had the opportunity to develop an evidentiary record on this issue. Jens admitted (direct) that it was "hard to tell" quality of the material under the runway.

80 Jens testimony (cross).

81 It was not used in the 2012 Dillingham Airport project. *See* Ex. 15. Dillingham Airport does not appear on the list of prior uses of foaming oil collected by QAP at page 7 of Ex. 30.

82 Ex. 11; *see also* Ex. 30 at 7.

83 Ex. 11.

84 August 28, 2020 "Supplement to the Record" at QAP 223 and 224.

When it laid the base course, QAP apparently discovered that the existing pavement was, over the majority of the surface area, less than four inches thick.[85] This meant that the milling process to create the new base course brought up not only old asphalt, but also gravel from underneath the asphalt. QAP theorizes that this is why so much more foaming oil was needed than projected: the old asphalt already contained some oil, but the material below the asphalt did not, and therefore more oil had to be added.[86] In other words, QAP's theory is that if all of the milled material for the base course had consisted of existing asphalt, that oil would have contributed to the new mix and lessened its need for oil.[87]

This theory did not fully prove out exactly as offered. Although there were different schools of thought, the slightly more convincing testimony was that the oil in the old asphalt is bound to the rock, does not get heated and released in the laying of the base course, and does not contribute usable foaming oil to the new mix.[88] However, although QAP may be wrong about the mechanism, QAP is probably right that reducing the amount of old asphalt in the base course mix may well have contributed to an increased need for foaming oil. Central Region's Materials Group Chief explained that the old asphalt may have less void space than the material underneath it, and so if underlying material becomes part of the mix it could create a mix with more voids, needing more foaming oil for optimum performance.[89] He did not testify that this would always be so, nor that it was predictable, but he did indicate that, in retrospect, it probably had something to do with the high oil percentage needed for this base course. And—although the evidence is extraordinarily weak and speculative on this point—Central Region may have had access to information about the thickness variations in the asphalt from records of previous paving projects, and thus could perhaps have augmented the information obtained from its borings.[90]

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85 Humphrey testimony (ALJ). The evidence on this issue is very vague, a problem that will be revisited below in connection with the differing site condition theory.

86 Mulhaney testimony (direct).

87 *E.g.,* Jens testimony (direct).

88 Humphrey testimony (cross). Mr. Yerkes appeared to find the QAP theory plausible, but did not explain how the cold, bound asphalt oil in the old asphalt would supplant new foaming oil. Mr. Jens adopted the QAP theory, but admitted (direct) to having "struggled" to come up with an explanation at first; it seems to have been far from obvious to him.

89 Yerkes testimony (ALJ).

90 Mulhaney testimony (cross) (speculating as to possible old project records). Central Region does seem to have taken additional test borings—a total of four or five—with results similar to the two furnished to bidders. Yerkes testimony (direct).

Nonetheless, it is important to remember what clearly was *not* established. QAP offered no evidence at all that anyone—DOT&PF or QAP—relied on the old asphalt thickness in estimating or projecting the need for foaming oil. There was no evidence that if QAP had known the asphalt would be only three inches thick in places, it would have bid the project any differently.

And thus, QAP's showing on this premise is merely the illusion of a case. QAP has shown that there was an erroneous figure on asphalt thickness in the plans. And it has shown that, in hindsight, the fact that QAP ended up milling material below the asphalt probably affected the mix design—because of what the character of that material turned out to be. But it has not shown a causal connection to its claim for compensation. So far as we can tell from the evidence, if Central Region had accurately reported the asphalt thickness on the plans, there still would have been no clear reason, known in advance, for Central Region to adjust the quantity estimate, and QAP would have bid the project exactly the same and would have planned to purchase and ship the same amount of foaming oil to the site.

What QAP needed to prove was that there was something seriously negligent, or worse, *about the 2.0 percent estimating factor* and the resulting quantity estimate for foaming oil. This it did not do. All it proved was that the 2.0 percent estimate was inaccurate and that, in hindsight, we can identify a reason why more oil was needed.

c. Third Premise: Exclusion of Shipping Costs from Price

As with asphalt oil, QAP takes the position that the bid line item setting a unit price for foaming oil does not encompass the cost of moving the oil to the project site. Instead, it views that cost as an element of mobilization. And thus it contends that by providing a deficient quantity estimate, on which QAP reasonably relied, Central Region escalated QAP's mobilization costs, and must now compensate the contractor for that escalation.

The actual cost of moving the originally estimated quantity of oil of all types (asphalt oil and foaming oil) to Dillingham was about $600,000.[91] Just as we saw with asphalt oil in section III-A-2-c above, QAP did not actually bid these shipping costs in mobilization, either, instead sprinkling them among a variety of unrelated line items such as surveying and thaw wire.[92]

[91] It is difficult to allocate this between the two types, because of their different points of origin.
[92] Mulhaney testimony (cross).

Moreover, the foaming oil was not moved to Dillingham in the initial mobilization; the tanks were loaded and shipped in 2018.[93]

The error in QAP's contract interpretation with regard to costs of moving the oil was fully explained in Part III-A-2-c above.

4. Foaming Oil Claim as Compensation for a Differing Site Condition

There is another way to approach QAP's foaming oil claim, one that would not focus on the quantity estimates, but rather on the premise that the work site proved to be materially different from what was represented in the plans.[94] Thus, the issue discussed under premise 2 above—the thickness of the asphalt—would become a freestanding basis for the claim, not merely a purported explanation for a negligent pre-construction quantity estimate. Viewed in this alternative way, the claim would be a differing site condition claim under General Contract Provision 40-03.[95]

Central Region contends that QAP's claim cannot be pursued on a differing site condition theory because no such theory was raised in the contract claim, and as a result "we're all dealing with this . . . without the benefit of the procurement officer having done any analysis of the issue"[96] Central Region points out that any "theories of recovery" pursued on appeal must have been raised before the contracting officer.[97] I must reject this argument, however, because QAP did, in fact, briefly identify this as a differing site condition issue in its claim to the contracting officer, citing § 40.03 by number.[98] The issue is framed in just two or three vague sentences, but it is present in the formal claim. The fact that the contracting officer did not address it seems to be an oversight, presumably an outgrowth of the cursory mention it received in the claim.

Although it is not foreclosed from consideration on appeal, this theory of recovery quickly stumbles on the very next set of hurdles. Differing site condition claims are tightly limited, and the predicates for pursuing them are strictly enforced.[99] A contractor identifying a

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93 Mulhaney testimony (cross)

94 Here I assume, without deciding, that the plans (that is, QAP 000222-224) can be construed as a representation that the existing asphalt on the runway would nowhere be less than four inches. This alone is a considerable stretch.

95 The provision is at Ex. 39. It defines "differing site condition" to encompass any "[s]ubsurface or latent physical conditions at the site, differing materially from those shown in the Contract documents, that could not have been discovered by a careful examination of the site." The parties agree that, as a practical matter, no bidder could have independently tested beneath the runway before bidding.

96 Garner Closing.

97 AS 36.30.625.

98 Ex. I at 48. There may be other flaws in the way QAP sought to present this claim, but Central Region has confined its objection to the purported failure to raise the claim at all.

99 *See North Pacific Erectors, Inc. v. State, Dep't of Admin.,* 337 P.3d 495 (Alaska 2013).

differing site condition waives any future claim regarding that claim if it does not immediately give written notice to the project engineer and, unless otherwise ordered, leave the area undisturbed to allow the engineer to investigate the condition.[100] There is no evidence that this was done, and the implication of all testimony received about the course of the project is that it was not done; the differing condition apparently was not documented contemporaneously by anyone. Indeed, QAP's only record of the extent of the purported differing condition seems to be the memory of its personnel, of whom just one testified with any specificity at the hearing and who prefaced his testimony about the extent to which runway asphalt thickness was mischaracterized with "Oh, I don't want you to hold me to it, but if I had to guess, I'd say . . . ."[101]

This is not the kind of record on which a differing site condition claim can be pursued. QAP needed to show that it specifically identified the differing site condition, in writing, when it was exposed, identifying it as such and giving the project engineer an opportunity to investigate.[102]

5. Disposition of Claim

Viewed as a claim based on a misleading quantity estimate, QAP's foaming oil claim fails because the first premise behind it would be viable only if the second is proven, the second is unproven, and the third is legally untenable. Viewed as a differing site condition claim, the claim fails because QAP did not follow the steps necessary to perfect such a claim. QAP is entitled to no additional compensation related to foaming oil.

QAP's expert opined that the underestimate of need was "potentially foreseeable" because the owner "could have done additional homework," and lays the blame for QAP's misfortune at Central Region's feet.[103] However, it has not been shown that any practical variety of "homework" would have made this estimating error foreseeable.

The solicitation provided a completely adequate mechanism for contractors to protect themselves from errors or uncertainties in estimating factors and quantities, however: it put these variable items into separate, unit price lines. It did this precisely because the owner could

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100 Ex. 39.

101 Humphrey testimony (ALJ).

102 QAP proffered no exhibits to show that it perfected a differing site condition claim. Central Region had some exhibits on its exhibit list (B-E) that encompassed email correspondence around the time the condition may have been discovered, but neither side referred to or offered those exhibits at the hearing, and they did not become part of the record.

103 Jens testimony (direct).

not be certain of the quantities. A contractor who bid these items "straight," at or above their true cost, would be fully protected. QAP chose to bid foaming oil at a price substantially below the true cost to deliver this material to the site.

IV. ASPHALT PRICE ADJUSTMENT CLAIM

We now turn to the largest component of QAP's set of claims on this contract. This claim relates to price adjustments—made to the overall project price after the pavement is laid—based on tests of samples taken during or just after paving. The tests address the density of the pavement, the quality of the asphalt oil for purposes of achieving the desired stiffness/creep recovery, and the quality of the joints between paving courses. The tests, rewards, and penalties are part of the P-401 specification.

The P-401 specification relates only to the pavement—the asphalt—and not to the base course. In many paving contracts in recent years, there have been three price adjustments for the asphalt. One is the Hot Mix Asphalt (HMA) adjustment. It can be either a deduction or a bonus.[104] The second is the Asphalt Cement Property (ACP) adjustment, which applies to the properties of the asphalt oil[105] and will be discussed at length below. The last is the Longitudinal Joint adjustment, which relates to joint density where courses come together. It can be either a deduction or a bonus.[106] The price adjustments are not applied to the unit prices bid by the contractor for asphalt and its components. Instead, they are added to, or subtracted from, the overall sum due the contractor in a single, separate line item in pay estimates, P-401b.[107]

A. Scope of QAP's Price Adjustment Claim

In this appeal to the commissioner, QAP has sought "863,500, plus interest, for the wrongfully denied bonus."[108] The $863,500 was a specific component of Pay Estimate #10, and to avoid confusion it will be important to keep track of that particular figure, as opposed to other, similar figures surrounding this claim.

At the end of Part II, the background facts section of this decision, we saw that paving work was completed in October of 2018. It was time for the Project Engineer to begin addressing the P-401 price adjustments based on the quality of the pavement.

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104 Paul testimony (direct). This can also be seen from Ex. 2 at 1-2.

105 Recall that asphalt oil is also known as asphalt cement.

106 Paul testimony (direct); Ex. 2 at 5.

107 Paul testimony (direct). P-401b is titled, a little confusingly, "Hot Mix Asphalt Price Adjustment" (Ex. 20 at 5; Ex. 21 at 4), even though one of its three components (401-8.1) has almost the same title. In this decision we are calling the component generated by section 401-8.1 the "HMA adjustment."

108 Ex. I at 7. In its claim to the contracting officer, QAP did not explicitly claim the full $863,500.

In November of 2018, Pay Estimate #10 was prepared by Cari Tavernier and Amy Price, two mid-level employees at Weed who functioned as office engineers.[109] Ms. Price, from whom we have no testimony, seems to have done the actual calculation.[110] It is here that Weed first tackled the P-401 adjustments.

A concern arose regarding one of the three components of the adjustment, because it seemed to Price and Tavernier that it was producing an anomalously large positive number. Price reportedly had "never seen a spec written like this" and found it "very confusing."[111] She thought the result "should not be a positive number."[112] Ms. Tavernier, who had no experience at all with bonus/penalty provisions like this, was "uneasy."[113] Mr. Geise seems to have given it a cursory glance and "said it's fine."[114] Ms. Tavernier then signed Estimate #10 on Mr. Geise's behalf, acting with express authority.[115]

In an email drafted by Ms. Price, Ms. Tavernier subsequently reported three amounts owing under P-401b.[116] One was a Longitudinal Joint adjustment of $40,600. This item is not in controversy and was later recommended for payment under Pay Estimate #11—although it may not have been payment in full on that bonus.[117] The second was an AC Properties [ACP] Price Adjustment of $93,500, and the third was a hot mix asphalt [HMA] price adjustment of $770,000.[118] The second and third items together total $863,500.

This email has been, and remains, a potential source of enormous confusion, and so it would be well to address it head on. There are four areas of confusion.

First of all, Ms. Tavernier has reversed the ACP and HMA adjustments. It was the ACP adjustment that contained an equation whose solution, if used as the Weed staffers thought it should be used, would produce a number in the neighborhood of $800,000.

Second, Ms. Tavernier's figure for the ACP adjustment is odd, at first glance. Using the projected oil quantity for the project, 1,447 tons, the product of the equation would be $795,850.

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109 Tavernier depo., *passim*. This role does not seem to require a P.E. license. Ms. Tavernier holds an associate degree in business. *Id.* at 5. Ms. Price is a "nonengineer." *Id.* at 96.
110 *Id*. at 95-96.
111 *Id.* at 29.
112 *Id.*
113 *Id.* at 31-32, 67.
114 *Id.* at 30 ("he didn't look"), 67 ("he wasn't paying attention").
115 *Id*. at 46, 98.
116 Ex. 4 at 1; Tavernier depo. at 34-35.
117 Ex. 6 at 4. The indication that more money may be owed is at Ex. 8, p.3.
118 Ex. 4 at 1.

This is what M.M. calculated the following month when he worked the same equation.[119] We do not have direct evidence of how Ms. Price came up with the slightly lower figure of $770,000, but it is easy to deduce what must have happened. Asphalt oil is tested in lots of 200 tons, with each lot run separately through the adjustment calculation. If Ms. Price had test results in hand from the first seven full lots, but not the final lot, she would reach a result of exactly $770,000.[120]

The third source of confusion is that the final oil tonnage was higher than the tonnage either Ms. Price or M.M. used in their calculations. The final tonnage was 1571.4.[121] Using that tonnage in the calculation, the equation yields a figure of $864,270.[122] This just happens to be extremely close to the Pay Estimate #10 bonus line item of $863,500, but one should not be deceived by the near-match of these figures. $863,500 was a total of the lower ACP figure of $770,000 plus another number—$93,500—that apparently corresponds to a *completely different adjustment*, the HMA adjustment.

And now the fourth area of confusion. When Pay Estimate #10 was later reversed, the entire $863,500 was withdrawn. Thus, the putative ACP adjustment, then thought to be $770,000 (but now known to be $864,270) was undone, ***and*** the putative HMA adjustment of $93,500 was undone. This means that the present contract claim regarding the reversal of the $863,500 payment line technically encompasses both the ACP adjustment and the HMA adjustment.

Central Region ultimately declined to pay both the ACP and HMA price adjustments calculated by Price.[123] The ACP adjustment will occupy the next few subparts of this Part IV. The HMA adjustment will be taken up briefly in Part IV-H.

B. Specification 401-8.2: Genesis of the Erroneous ACP Equation

The central component of QAP's price adjustment claim grows out of the fact that the ACP adjustment equation in the contract contains a critical error. It will be helpful to start by exploring how that came about.

About ten years ago, when polymers started to be added to asphalt oil, airport specifications began to include a table for price adjustments for a T&T, or "toughness and

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119 Ex. 37.

120 To shorthand the calculation, it is 1400 x 110 x 5. Another way to see it is to look at lots 1-7 on Ex. W at 1. The testimony of Ms. Paul, late in her direct examination, is helpful in understanding these figures.

121 Ex. W at 1; Paul testimony (direct).

122 The calculation is made, albeit for a different purpose, on Ex. W at 2. Ms. Tavernier seems to have come up with the $864,270 number herself, just three days after she signed the lower estimate. Ex. 8 at 2.

123 Tavernier depo. at 68.

tenacity" test. This set up a way to accept asphalt binder material, at a reduced price, even if it was not perfectly in spec, rather than reject it entirely (since the test results would come back after the asphalt was down, outright rejection would be a draconian result). The T&T table can be seen in the Dillingham Runway specifications: it is the table that is stricken out on page 3 of Exhibit 2.[124]

The T&T table set up a straightforward progression of reductions in payment for asphalt oil, ranging from no deduction up to a 25% reduction. This may be a good juncture to point out that the percentage reduction was not a percentage of the *bid* price for asphalt oil, about which we learned so much at an earlier stage of this decision. No doubt partly because of the phenomenon of unbalanced bidding, the deduction was calculated against a stand-in for the value of the oil, calculated as a price adjustment base (PAB) times a certain multiplier.[125] Thus the percentage reduction was used with this stand-in value per ton (amounting to a few hundred dollars, depending on asphalt type) to produce a penalty that could be as much as $75 per ton of asphalt oil used.[126]

In 2016, in connection with a project at Anchorage Ted Stevens International Airport, it became apparent that the T&T test was flawed, and the department set out to replace it with the MSCR (Mass Stress Creep Recovery) test, apparently referred to informally as the massacre test. This resulted in a new table to govern price reductions for off-spec but acceptable binder. Table 10, substituted into the Dillingham Runway specifications, is a MSCR table. The department also started using a MSCR table in some highway projects late in 2016.[127]

When this table was developed, the department wanted to have a formula that lent itself readily to both a variable penalty for off-spec oil *and* a small bonus, if desired (subsequently—though not in time for the Dillingham Runway project—the department has incorporated a one percent bonus for perfect binder). The idea was to have 1.00 correspond to payment at par

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124 Paul testimony (direct) [whole paragraph].

125 I am mindful that in the colloquy immediately after lunch on day 2 of the hearing, both counsel seemed to reject my suggestion that the term (PAB x 5) is a stand-in for actual value of the asphalt oil. However, in my opinion that is exactly what Ms. Paul testified when asked about the function of (PAB x 5) immediately thereafter. This finding is based on her testimony, not on the colloquy.

126 $60 x 5 x 0.25. This paragraph is taken from Paul testimony together with the lined-out material on pp. 2-4 of Ex. 2. One can calculate that, had it been applicable on the current project, the T&T table could have produced a penalty range from zero to $117,855, a range similar to the range Central Region calculates under the MSCR table provision when used with the correct equation, as can be seen in the second table on Ex. W at 2. Thus, in Central Region's view, the switch in tables reflected a different testing regime but was not designed to fundamentally change the disincentive system.

127 Paul testimony (direct) [whole paragraph].

(instead of 0, as in the T&T table), 1.01 to correspond to a one percent bonus, 0.95 to correspond to a 5 percent penalty, and so forth. (Again, these percentages are applied to a stand-in value for the oil, not to the bid price).[128]

Thus, the new table, in essence, flipped the adjustment factors upside down so that, for example, a 5 percent penalty would now be represented by 0.95 instead of 0.05. Obviously, this necessitated a change in the formula in which the factor was used. For the Dillingham Runway project and for several highway projects around the same time, however, that adjustment did not occur. The old formula was:

Asphalt Cement Property Price Adjustment … = 5 x PAB x Qty x PRF

where "5 x PAB" was the stand-in value, "Qty" was the tons of oil, and "PRF" was the applicable factor from the table. The new formula written into the specs was essentially identical to the old formula, except that it listed the factors in different order. It read:

Asphalt Cement Property Price Adjustment = Lowest Pay Factor x Quantity x PAB x 5

where "PAB x 5" was the stand-in value, "Quantity" was the tons of oil, and "Lowest Pay Factor" was the applicable factor from the table. But because the starting point of the penalty factors had been flipped, in order to work properly the term of the equation relating to pay factor should have been changed from "Lowest Pay Factor" to "(Lowest Pay Factor -1)" if the equation's product was to be added to final payment, or "(1-Lowest Pay Factor)" if the product was to be subtracted from final payment.[129]

The error was identified in March of 2017, when a prospective bidder on a project asked how it should be interpreted. By this time, several projects had already gone to bid with the erroneous equation in them. These were highway projects, and the equation appears in them with significantly different surrounding text from the Dillingham contract we are discussing. To skip ahead, DOT&PF ultimately paid large bonuses on all of these highway projects.[130] As for the Dillingham Runway project, the specifications had apparently last been reviewed about the time of the discovery of the error.[131] The focus of those who spotted the problem was road projects, and the information did not get relayed to the aviation side.[132] The Dillingham Runway project went to bid with the erroneous equation in the specifications.

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128 Paul testimony (direct) [whole paragraph].
129 Paul testimony (direct).
130 Paul testimony (direct) [whole paragraph]; Ex. K, L, M. For a project that was pending bids, an addendum was issued to the specifications. Ex. N at 13.
131 Paul testimony (direct).
132 *Id.*

Central Region does not seem to have become aware of the error in the Dillingham contract until the following year. In July of 2018, just before paving on the runway began, Laura Paul noticed the problem as she was preparing the price adjustment spreadsheet to use during the paving stage.[133] Ms. Paul is Central Region's Quality Assurance Engineer, she was intimately familiar with the workings of provisions of this kind, and she had helped to correct the problematic specifications in highway projects in 2017, so she could readily grasp the error in the equation.

C. Specification 401-8.2: What the Weed Personnel Did

QAP achieved optimal asphalt oil (binder) for this project.[134] Ms. Price and Ms. Tavernier ran the equation, apparently using seven 200-ton lots (or a total of 1400 tons of asphalt oil) for the quantity. The product of the calculation was $770,000, as follows:

Lowest Pay Factor x Quantity x PAB x 5 = [ACP Price Adjustment]

1.0 x 200 x 110 x 5 = 110,000 [per lot]

7 x 110,000 = 770,000

With approval of Project Engineer Geise after a momentary glance, they plugged this positive number into the amount to be added on line P-401b of Pay Estimate #10.[135]

Remarkable as it may seem, there is no evidence that the Weed personnel gave any consideration at all to the context of the ACP formula in the text that surrounds it.[136] In other words, they correctly generated a positive number from the equation for each 200-ton lot, and they correctly added the seven positive numbers together for a positive total, but they did not look to see whether they were supposed to add or subtract that total from the contract price.

D. Specification 401-8.2: Literal Meaning

A literal reading of Specification 401-8.2 yields a meaning that is crystal clear. It requires the Project Engineer to do exactly the opposite of what Weed Engineering did.

The preamble of Specification 401-8.2 says: "The Engineer will adjust Contract Item P-401b for asphalt cement[137] property according to Subsection 401-8.2a."[138] Below, Subsection 401-8.2a is quoted in full, with struck out text excluded and new text included. Certain key words are highlighted in underline/bold for later discussion:

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133 Paul testimony (cross).
134 Humphrey testimony (direct).
135 The other component of that number was discussed in section IV-A above.
136 Tavernier depo., *passim*.
137 Recall that asphalt cement is asphalt oil.
138 Ex. 2 at 2.

a. Basis of Adjusted Payment for Asphalt Cement Property. Asphalt cement property pay **reduction** factors for each lot will be determined from Table 10. The total asphalt cement price adjustment is the sum of the individual lot price adjustments, and **will be deducted under Item P-401b,** Hot Mix Asphalt Price Adjustment.

TABLE 10. ASPHALT CEMENT PROPERTY PAY REDUCTION FACTORS
(Use the single, highest pay **reduction** factor)

Pay Factor			1.00	0.95	0.90	0.85	Reject [c]
RTFO (Rolling Thin Film Oven)							
DS[a.1]	All Grades	G*/Sinδ, kPa^{-1}	≥ 2.20	2.19 – 1.96	1.95 – 1.43	1.42 – 1.10	≤ 1.10
MSCR[a.2]	PG 52-40 "V"	$J_{NR3.2}$	≤ 0.50	0.51–0.59	0.60 – 0.69	.70 – 1.00	> 1.00
		% $Rec_{3.2}$	≥ 75	74 – 68	67 – 60	59 – 55	< 55
	PG 58-34 "E"	$J_{NR3.2}$	≤ 0.25	0.26 – 0.29	0.30 – 0.39	0.40 – 0.50	> 0.50
		% $Rec_{3.2}$	≥ 85	80 – 84	–	75 – 79	< 75
	PG 64-40 "E"	$J_{NR3.2}$	≤ 0.10	0.11 – 0.15	0.16 – 0.20	0.21 – 0.25	> 0.25
		% $Rec_{3.2}$	≥ 95	90 – 94	–	80 – 89	< 80
PAV (Pressurized Aging Vessel)							
DS[a.3]	PG 52-28, PG 64-40 "E"	G*Sinδ, kPa	< 5000	5001 – 5300	5301 – 5600	5601 – 6000	> 6000
	PG 52-40 "V", PG 58-34 "E"	G*Sinδ, kPa	< 6000	6001 – 6300	6301 – 6600	6601 – 7000	> 7000
CS[a.4&5]	All Grades[a.4]	BBR, s, MPa	< 300	301 – 340	340 - 400	401 – 460	> 460
	All Grades[a.5]	BBR, m	> 0.300	0.299 – 0.294	0.293 – 0.278	0.277 – 0.261	< 0.261
Creep Stiffness (CS)		Dynamic Shear (DS)			Multiple Stress Creep Recovery (MSCR)		

a. Asphalt Cement Property Price Adjustment = Lowest Pay Factor x Quantity x PAB x 5

Select the lowest pay **reduction** factor from:

RTFO (test the binder residue at the performance grade temperature)

(1) DS, All Grades, G*Sinδ, kPa^{-1}
(2) MSCR; PG, Select from the highest pay factor corresponding to either $J_{NR3.2}$ or $\%_{Rec3.2}$ values

PAV

(3) DS, PG, G*Sinδ, *k*Pa
(4) CS, All Grades, BPR, s MP a
(5) CS, All Grades, BPR, m

The language is plain that (1) a pay reduction factor will be determined for each lot; (2) that pay reduction factor will be run through the equation to yield an individual lot price adjustment for each lot; (3) the sum of those "adjustments" "will be deducted under Item P-410b."

At the risk of stating the obvious, when a positive number is subtracted from another number, the total is a lower number. Under a literal reading of the specification, QAP would receive a price reduction of $770,000 (based on the 1400 tons Weed was using as a quantity) or $864,270 (based on true final quantities for the project).

A final note is needed before moving on. The above quotation included the title of the embedded table. Throughout the case, counsel for QAP suggested this title is meaningless, an orphan title with no table to go with it. To quote one of his leading questions, "Are all the pay reduction factors listed under that header stricken out?" (his client dutifully answered in the affirmative).[139] In my view, this wholly misreads the strikeout/replacement visible in the contract pages reproduced in Exhibit 2. The old text referenced "Table 9" in the preamble, had a title for "Table 9," and printed the T&T table below it. The new text references "Table 10" in the preamble, has a title for "Table 10," and has a full table of pay factors below it—the MSCR table. The title for "Table 10" is the same as the old title for "Table 9." It is unquestionably part of the new text of Subsection 401-8.2a.

It is also an operative part of the specification. QAP has often pointed out that Standard Specification 10-01, applicable to this contract, provides that "[t]itles and headings of sections, subsections, and subparts are intended for convenience of reference and will not govern their interpretation."[140] The table is not a section, subsection, or subpart, however, and its name is not a title or heading of a section, subsection, or subpart. Nor does the title function like a section heading. Where a section heading merely summarizes or characterizes text that is generally self-explanatory if read in full, a table name is—in many cases, including this one—the only way for a reader know what the numbers in the table are about. It is more in the nature of a caption of a drawing or picture than a section heading.

The plain meaning of Specification 401-8.2a is reinforced by Specification 401-8.2b. That provision sets up an appeal procedure for the results of 401-8.2a, and again refers, twice, to "a price reduction."[141]

E. Specification 401-8.2: QAP's Expectations

Although the literal meaning of the specification is clear, the inclusion of an erroneous equation will make it relevant to look at the parties' expectations.

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139 Humphrey testimony (direct).

140 Ex. 22 at 5.

141 Ex. 2 at 4. This is underlined, added text, which makes it a special provision that takes precedence over other provisions. Ex. 22 at 7.

Counsel for QAP appeared to contend through questioning that this appeal procedure only applies to rejected asphalt oil, but this is not so. Rejected asphalt oil—oil in the fifth column of the table on Ex. 2, p. 3—does not incur a pay reduction factor, perhaps because it is not paid for at all. The "reduction" referenced twice in the provision plainly applies to numbers, produced under the formula, for partially failing oil, falling in columns 2-4 of the table—oil that QAP thinks is always entitled to a bonus.

I find that QAP probably did not have any expectation regarding the bonus provision (that is, that it had not noticed how it was written), and if it did, it did not rely on that expectation. As its Western Alaska Manager testified, "QAP does not bid the bonus money into any of our jobs," and does not build its pricing based on bonus expectations.[142] Conversely, if the company had read the provision carefully and recognized that the contract provided for a three-quarter million dollar penalty for furnishing perfect asphalt oil, it is inconceivable that QAP would have let the matter rest without at least a request for clarification to the procurement officer at the time of bidding, or to the contracting officer at the time of contracting.

When bidders prepare their bid forms, Item P-401b is pre-filled with a "contingent sum." The number inserted is the maximum net bonus that the contractor could earn from the three components added together, assuming (i) that project quantities equal the engineer's estimate and (2) that the test results were all perfect.[143] For the Dillingham Runway project, the contingent sum on line P-401b of the bid form was $230,000.[144] From this, QAP could have developed an expectation that, if all three sets of test results (HMA, ACP, and Longitudinal Joints) were perfect for all lots, it could receive a *net* bonus in the neighborhood of $230,000. The $230,000 is not a ceiling, but an experienced bidder such as QAP would know that it would ordinarily represent the maximum net P-401b bonus assuming quantities were as projected. However, QAP offered no testimony or documentation that it formed any expectation based on the contingent sum on the bid form. The $230,000 sum is consistent with payment of small bonuses under Specifications 401-8.1 (HMA) and 401-8.3 (Longitudinal Joint).

QAP could not have formed any expectation based on the handling of any other project. After the Dillingham Runway project had been bid and let, QAP received a bonus of about $860,000 on the Dimond to Dowling Seward Highway Reconstruction project[145] and about $650,000 on the O'Malley Road Reconstruction Phase I Project,[146] both based on a specification

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142 Mulhaney testimony (cross). I was not convinced by formulaic testimony of Chris Humphrey, Mulhaney's subordinate—in response to highly leading questions—that he had noted the possibility of a positive ACP adjustment prior to bidding. He went on to testify that he "didn't dwell on" the specification. This would be odd if he had truly taken in its potential to change QAP's revenue on the entire project by more than 10 percent. And then he admitted on cross examination that he did not actually *do* the formula prior to bidding. His testimony seemed dispirited at this point, as though he felt trapped by having followed leading questions into a claim that, for him, wasn't quite true.

143 Paul testimony (direct).

144 Ex. 20 at 5.

145 Humphrey testimony (direct); Ex. 27. The date was supplied in closing argument.

146 Humphrey testimony (direct); Ex. 28. Official notice is taken that the paving work for this project (located on the ALJ's commute route) occurred in the summer of 2017, and that payment of any bonus must have postdated the work. Any party objecting to noticing this fact may object in its Proposal for Action.

containing the same erroneously written equation. But the surrounding text for the equation seems to have been utterly different, with not even a hint that the product of the equation should be deducted, much less the express directive that the result "will be deducted under Item P-401b." Moreover, the decision to pay bonuses based on these contracts occurred too late to affect expectations under which any party entered into the Dillingham Runway contract.

F. Specification 401-8.2: Is the Project Engineer's Initial Signoff Binding on DOT&PF?

QAP's leadoff argument in its prehearing brief is that the Project Engineer's "interpretation is dispositive of this claim."[147] Although the company did not press so radical a position in its original claim, it now takes the view that analysis can end here, because "the Engineer will decide *all* questions about contract interpretation."[148] Thus, even though Pay Estimate #10 was never shared with M.M. in advance,[149] never signed off on by any department official,[150] and was quickly questioned, then rescinded as soon as Central Region became aware of it,[151] QAP views the estimate hastily approved by Larry Geise of Weed Engineering as a final determination by the ultimate authority.

Let us pause for a moment to contemplate the breadth of QAP's theory. It contends that even if a project engineer takes an action directly contrary to what the contract directs him to do (as happened here), his interpretation is final, superseding the very language of the contract and every other standard of contractual interpretation. If the engineer decided the contract entitled QAP to be paid double for every pay item, that would be the end of the matter, with no state official having the authority to overrule him.

This cannot be true, and it is not. The single contract provision QAP relies on is Standard Specification 50-01, part of a section on "Control of Work," setting out a number of ways in which the Project Engineer has expansive authority over what is and is not to be done at the worksite.[152] And indeed, while it gives the engineer authority to issue directives, work orders,

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Another contractor seems to have been paid a similar bonus in 2018. Ex. 29. Although contract terms were not supplied, one can see how the equation was used at the bottom of p. 1.

147 QAP's Pre-Hearing Brief at 4.

148 *Id.* (quoting General Provision 50-01, adding italics).

149 Searcy testimony (direct).

150 *Id*.

151 Ex. 5, Ex. 8.

152 Ex. 22 at 8. Standard Specification 10-01 stipulates that the section titles do not "govern their interpretation," but does not say they are of no value in discerning their context.

and change orders, and to declare work complete and acceptable, Specification 50-01 expressly only gives him "authority . . . to *recommend* Contract payments."[153]

Moreover, all payments made under interim estimates, such as Pay Estimate #10, are expressly made subject to audit, "correction," and true-up in the final estimate and payment at project closeout.[154] Thus, the correction of Pay Estimate #10 in Pay Estimate #11, issued December 28, 2018, was timely.[155]

G. Specification 401-8.2: Interpretation/Reformation of the Contract Language

1. Plain Meaning

After arguing that the project engineer is the final arbiter, QAP's second argument is a plain language argument. It contends that the plain language of Specification 401-8.2 "clearly require[s] an adjustment in favor of QAP."[156] QAP's notion of the "adjustment in favor of QAP," moreover, is a bonus of spectacular proportions, exceeding 100% of the value of the oil at its source.[157] As explained in Part IV-D, this is not what the specification says.

2. Ambiguity

QAP's third argument is that the provision is ambiguous, and that the ambiguity should be addressed according to QAP's purported expectations. There are many problems with this approach—including the paucity of persuasive evidence that QAP had any expectations—but the approach fails on the threshold. Contract doctrines for the resolution of ambiguities only come into play for terms that are "reasonably subject to differing interpretation[s]."[158] The language of Specification 401-8.2 is breathtakingly clear.

Despite the clarity of the language, QAP has sometimes suggested a course of dealing argument to resolve purported ambiguity. We noted previously, in connection with reliance, that after the Dillingham Runway project had been bid and let, QAP received two large bonuses based on what have been suggested to be similar, erroneously drafted specification. If they were really applications of the same language in a parallel context, these might give rise to a course of dealing argument. But they are not similar. They use the same pay adjustment formula, to be sure, but in contrast to the runway contract's Specification 401-8.2a and b, with their five express

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153 Ex. 22 at 8, fourth line of provision (italics added).
154 Ex. 22 at 16 (Standard Specification 90-08).
155 *See* Ex. 6.
156 QAP's Pre-Hearing Brief at 5.
157 QAP would be paid a $550 per ton bonus, which is more than the price to purchase the oil from QAP's third-party supplier. *See* Ex. U at 25.
158 *Tesoro Alaska v. Union Oil Co. of Cal.,* 305 P.3d 329, 333 (Alaska 2013) (quoting prior authority).

references to "reduction" and the key "will be deducted" language, the other contracts contain no language identifying the *result of the formula* as a deduction.[159]

3. Mistake

And thus, we are left with a clear provision, and no basis to pretend it is ambiguous. However, the literal reading of the language of 401-8.2—as clear and unequivocal as it is—produces an absurd result. The literal reading would present a contractor who had supplied perfect asphalt oil with a penalty equal to something close to the full market value of the oil.[160] Even more troubling, the penalty would be higher if the oil was perfect, but lower for substandard binder.[161]

What we have here is a scrivener's error, in which a penalty provision was inserted in a contract omitting two characters ("1-"), thereby creating a mathematical distortion. The error produces a result that would be favorable to the drafting party, but was not the intent of the drafting party. As for the other party, there is no believable evidence of it having paid attention to the provision or formed any intent at all. We may surmise, however, that if it had considered the matter, it would likewise never have intended the provision as written.

A scrivener's error must be addressed under the doctrine of mistake.[162] There are two kinds of mistake in contract law, unilateral (by just one party) and mutual (by both). We will address this claim under both.

QAP argues that if the provision is analyzed as a mistake, it was a unilateral mistake—a mistake by Central Region alone, which erred when it wrote down the formula.[163] QAP points out that the hurdles are very high for a party seeking a remedy for a unilateral mistake, citing authority such as *Handle Construction Co. v. Norcon, Inc.*[164] But Central Region is not seeking a remedy. It does not ask the tribunal to reform Specification 401-8.2; nor does it seek to void

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159 Ex. 27, 28; Humphrey testimony (cross). On redirect of Mr. Humphrey, counsel for QAP (shortly after accusing opposing counsel of "Orwellian" questioning) suggested through questioning that the word "deduction" appears on Ex. 27 at 2 in the same way it does on Ex. 2 at 3-4. However, on Ex. 27 the word plainly refers to four precisely defined things that are *not* products of the formula.

160 Recall that the (PAB x 5) term in the formula was intended to be a stand-in for actual value, and the penalty, under a literal interpretation of the provision, would be 100% of that amount. As noted in footnote 157, a PAB x 5 value of $550 per ton would be higher than the price of the oil at source. Ex. U at 25.

161 Ex. 2 at 3 (MSCR table).

162 Rest. (2d) Contracts § 151 comment a ("An erroneous belief as to the contents or effect of a writing that expresses the agreement is . . . a mistake.").

163 QAP's Prehearing Brief at 10.

164 264 P.3d 367 (Alaska 2011). *See also, e.g., Boston v. Security Fed. Sav. & Loan Ass'n,* 877 F.2d 696, 697 (8th Cir. 1989) (typographical error overstating bank balance tenfold could be corrected if non-mistaken party had knowledge or constructive knowledge of the mistake).

the contract; nor does it seek to enforce the penalty as written. And there is no principle of law or equity that allows a *non*-mistaken party (QAP, in this conception of the case) to seek a remedy for mistake.[165] The outcome of this case, if it is a unilateral mistake case, is very simple. The specification is not reformed because the mistaken party has not even sought reformation. And it is not enforced because neither party seeks to enforce it. The net pay adjustment is zero.

The situation can also be viewed as a mutual mistake. In this conception, Central Region was mistaken in transcribing the formula, and QAP was mistaken because, even though it had no crystalized expectation about the ACP adjustment, a massive penalty from that adjustment—for conforming oil—was outside the *range* of its reasonable expectations.

In the event of a mutual mistake, QAP, as one of the mistaken parties, could seek to reform the contract to conform to the parties' expectations.[166] And QAP does seek to reform this contract, by disregarding the "will be deducted" language and turning the $800,000+ penalty into an $800,000+ bonus.

But to obtain this result under the doctrine of mutual mistake, QAP would have to show by clear and convincing evidence that, at the time of contracting, Central Region thought the specification called for a bonus, or knew that QAP believed it did.[167] This QAP has not even attempted to do, and the evidence in this case makes it clear the task would be impossible.

As Professor Corbin wrote in a leading American treatise on contracts:

> Reformation is not a proper remedy for the enforcement of terms to which the defendant never assented; it is a remedy the purpose of which is to make a mistaken writing conform to antecedent expressions on which the parties agreed.[168]

Central Region never assented to a bonus for good ACP test results. The contract cannot be reformed as QAP desires.

If QAP were seeking to reform the provision less radically—to impose a penalty only for off-spec oil, for example—there might be some basis to do so. Such a remedy could line up with

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165 *Cf.* Rest. (2d) Contracts § 153 (in very limited circumstances, "[w]here [there is] a mistake of one party . . . the contract is voidable *by him*" [italics added]).

166 Rest. (2d) Contracts § 155.

167 *See, e.g., Voss v. Brooks,* 907 P.2d 465, 469 (Alaska 1995) ("For the deed to be reformed in this way there must be clear and convincing proof that Brooks thought the deed conveyed an entire present possessory to her and that Voss either shared in this belief or knew of Brooks' mistake"); *Groff v. Kohler,* 922 P.2d 870, 874 (Alaska 1996) (the clear and convincing showing "must relate to the time of . . . execution . . . and show that at that particular time the parties intended to say a certain thing and by mistake expressed another") (quoting Oregon cases); *Kish v. Kustura*, 79 P.3d 337 (Or. App. 2003).

168 3 Arthur Corbin, *Corbin on Contracts* § 614 (1960).

the parties' mutual expectations at the time of contracting. But QAP does not seek this remedy, because it does not need to. Central Region does not seek to enforce any penalty against QAP.

Accordingly, the provision remains as it is, unchanged and unenforced. Neither party owes the other any money under Specification 401-8.2.

H. Specification 401-8.1: HMA Adjustment

The two other element of P-401b are the HMA adjustment (defined in 401-8.1) and the Longitudinal Joint adjustment (defined in 401-8.3). Both of these can be either positive or negative, and both are fairly easy to earn as positive bonuses.[169] The Longitudinal Joint adjustment was not included in Pay Estimate #10, but at least a portion of it was subsequently approved as a positive bonus in Pay Estimate #11.[170] The HMA adjustment was part of the $863,500 line item at issue in Pay Estimate #10. It was to be a positive bonus of $93,500. When the whole line item for P-401b was overruled, this item was pulled back, and it did not reappear in Pay Estimate #11. However, none of the reasoning for overruling the P-401b line on Pay Estimate #10 had any application to the 401-8.1 HMA adjustment. At the time, Central Region had no explanation for pulling back the 401-8.1 HMA adjustment.[171]

There is a hint in the evidence that one of the Weed personnel later decided the $93,500 should not have been projected.[172] However, Project Manager Searcy believes that, as of the time of Pay Estimate #10 and the time of the hearing, QAP is probably owed a bonus under 401-8.1.[173] The project has not been closed out, and several items (including a balance for mobilization/demobilization) were still outstanding and owed as of the time of the hearing.[174] Thus, payment of $93,500, or some other sum, for this item is probably still pending.

This leads to an important limitation on this decision. Although QAP's claim is rejected in its entirety, and although that claim was framed as a claim for an $863,500 line item in an estimate that encompassed a $93,500 HMA (401-8.1) bonus, the rejection of the claim will be without prejudice to QAP's entitlement to a 401-8.1 bonus, if earned. If earned and not yet paid, Central Region should pay that item at closeout notwithstanding this decision.[175]

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169 Searcy testimony (direct).
170 Ex. 6 at 4.
171 Tavernier depo. at 68-69.
172 Ex. 8 at 3. The author of this cryptic text does not remember what the problem was. Tavernier depo. at 87.
173 Searcy testimony (direct and cross).
174 *Id.*
175 In the unlikely event that payment of the 401-8.1 bonus is due but is refused, nothing herein shall be construed to foreclose a new, separate contract claim on that issue.

V. GLOBAL FAIRNESS ARGUMENT

In closing argument, QAP's counsel has put forward an argument that links both strands of QAP's overall claim. On the one hand, he observes, state agencies feel that if they make an error, it should have no consequence. They claim the freedom to correct their own errors. Contractors, on the other hand, are held mercilessly to the consequences of any mistakes they make. He proposes that this case illustrates the double standard, with QAP given no quarter from its bidding mistake, while Central Region is gently excused from its botched price adjustment specification.

This is not the place to speculate on whether there is any general truth to counsel's proposition of a double standard. It suffices to point out that the facts of this case have given no occasion to apply such a standard.

With regard to bidding, QAP did not make a mistake. It made a gamble. It asks to be given a reprieve, not from the results of a mistake, but from the outcome of a lost wager.

With regard to the ACP adjustment formula, Central Region made a mistake, to be sure. But the mistake was in writing a provision *unfavorable* to the contractor. Relief from strict enforcement of the provision is desired by both sides, and Central Region has already agreed not to enforce it. All that has been denied QAP is to wholly rewrite the provision to turn it into the polar opposite of what it says.

VI. CONCLUSION

The appeal to the commissioner dated August 14, 2019, regarding the Contracting Officers Decision dated July 31, 2019 as to the Dillingham Runway Rehabilitation Project, is not sustained. The effect of this decision is limited as set out in Part IV-H above.

DATED this 29th day of March, 2021.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

Adoption

The undersigned adopts this Decision and Order as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this Decision.

DATED this 25th day of June, 2021.

By: *Signed*
John S. MacKinnon
Commissioner of Transportation &
Public Facilities