

overhead and 10% for profit on the total of these amounts. The Region has asserted a counterclaim for \$3,141.00, which represents credits taken for certain work deleted as a result of a design change, including excavation, backfill and formwork.

Avico filed the contract dispute on January 6, 2000. At the ODRA's request, Avico filed a claim supplement on February 15, 2000 (the "Amended Claim"), setting forth a chronological statement of its claim and attached exhibits, so as to comply with 14 C.F.R. 17.25(a)(3). The Region filed its Dispute File on March 14, 2000. The parties' attempts to settle the matter through alternative dispute resolution ("ADR") with the assistance of an ODRA neutral proved unsuccessful.

The Region filed a Motion for Summary Judgment, or alternatively, its Statement of Position on April 11, 2000, along with eight exhibits. In response to the Region's Motion, on April 14, 2000, Avico filed a letter and twelve exhibits. This filing also served as Avico's pre-hearing Statement of Position. Because material facts were at issue, the ODRA found that summary judgment was not appropriate and so advised the parties.

A one-day long hearing on the record was conducted by the ODRA under its default adjudicative process on April 25, 2000, and the parties subsequently filed their final submissions. For the reasons set forth below, the ODRA finds Avico entitled to \$1,395.24 on its claims; but the Region to be entitled to a credit of \$1,487.57, leaving a net credit due to the Region from Avico of \$92.33.

II. Findings of Fact

1. The Region issued a Request for Quotations ("RFQ") on September 25, 1998 for the installation of a Government furnished DF on leased FAA property known as "Saddle Peak" in the County of Los Angeles, California. The mountainous project site was surrounded by boulders and visible rock outcroppings. Region Hearing Exhibit 1. The project was to include, *inter alia*, excavation for and

- placement of a concrete foundation; installation of a foundation mat; erection of a new Government furnished 110' monopole; excavation of associated utility trenches; installation of a control cable and communication cables; and the relocation of an existing fence. Dispute File Exhibits 27 and 31.
2. The Contract included twenty pages of specifications for the DF-Antenna installation. The specifications address the areas of general requirements, site work, and structural metal work. Neither the contract nor the specifications mandate a particular method for monopole assembly and erection. Dispute File, Exhibits 27, 28 and 31.
 3. The Contract also included five drawings.¹ Contract Drawing No. WP-D-757-41783-X, which shows the pole footing and foundation details, indicates that the dimensions of the foundation area were to be 16' long x 16' wide x 6' deep. Note 3 of the "General Notes" on that drawing states: "The contractor shall check and verify all conditions, dimensions and elevations and conditions at the job site and shall cross-check and verify details and dimensions shown on the structural, electrical drawing and shall notify the engineer of any discrepancies or inconsistencies." Note 4 states: "The contractor shall resolve any conflicts with the engineer before proceeding with the construction." Note 18 states: "All footings shall be carried to depth indicated on foundation plan or a minimum of 36 inches below the finish grade on 24" compacted granular material." A detail on that drawing depicts a flat site with excavation around the 16' foundation square, and sidewalls roughly cut back at what appears to be a 1:1 slope, *i.e.*, at a 45 degree angle of repose. Exhibit 27; Transcript at pages 114-115, lines 12-2 (hereinafter "114-115/12-2"); 115/4-6. The drawing does not show "existing" conditions; rather it shows what the "final" condition was to be after project completion. Transcript at 115/15-17.

¹ These five drawings were included as part of the RFQ.

4. The 45 degree angle of repose is a California OSHA requirement (Transcript at 72/9-10; 116/18-20), which is incorporated by reference in General Note No. 16 on Drawing No. WP-D-757-41783-X: “Procedures for protection of excavations, existing construction and utilities shall be established prior to the start of foundation work, following all OSHA guidelines and safety procedures.” Exhibits 19 and 27.²

5. Contract Drawing No. WP-D-530-41783-2B reflects a topographical map and plot plan for Saddle Peak. A handwritten square enclosing capital letters of “DF” on the map identifies the location of the DF Antenna. The location is represented as being on the top ridge of the mountain, situated north and outside of a smaller fenced-in area. The map also shows large boulders to the North, Northwest and Southeast of the Antenna site. Dispute File, Exhibit 27. Photographs of the site taken in May of 1998 show a graded stake marking the location where the foundation actually was excavated by Avico. Although not evident from the topographical map, those photographs clearly show the site was to be located on sloped ground. Region Hearing Exhibit 1; Transcript at 87-88/6-18.

6. The Contract incorporates by reference Acquisition Management System (“AMS”) clause 3.10.1-8, entitled “Suspension of Work (August 1998), which provides, in part:

“[i]f the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted (1) by an act of the Contracting Officer in the administration of this contract ... an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption, and the contract modified in writing accordingly.”

Dispute File, Exhibit 31, page 6.

² Federal OSHA requirements for protective systems in excavations are found in 29 CFR 1926.652. This regulation requires excavation sites with a depth in excess of 5 feet to be protected from cave-ins by an adequate protective system. The protective system in this case under the Federal OSHA likewise was sloping the sides of the excavation at a 45 degree angle of repose.

7. Two weeks prior to the issuance of the RFQ, on September 11, 1998, Mr. Avi Arshadnia, the Vice-President of Avico, visited the site, with other FAA personnel, including the Region's Lead Project Engineer and Area Program Manager. Mr. Arshadnia claims that he was shown a fenced-in area that was within the FAA leased property. The leased property was also surrounded by an outside perimeter fence. Mr. Arshadnia's impression was that the antenna installation was to be done not outside, but *inside* the interior fence on the property. Amended Claim, page 1.

8. The Contract was awarded to Avico on September 29, 1998. Avico bid the job contemplating that the 110' monopole would be assembled in the air – *i.e.*, one piece at a time – with the use of a crane. Transcript at 41/15-18; 231/9-12. The breakdown of Avico's bid includes, among other items, the following \$4,480 line item: "Crane (8 hours x 2 days x \$280 per hour)". Dispute File, Exhibit 29.

9. Although the RFQ indicated an anticipated project start date of January 18, 1999, notification to proceed with the project was not issued until August 3, 1999. The Region conducted a pre-construction conference on August 17, 1999, prior to the start of any on-site work. Amended Claim, page 2. At that time, the Resident Engineer ("RE") showed Avico the location for the center of the antennae pole. Avico contends that, during the pre-construction conference, it had raised the issue of the antennae pole being located differently than it had been during the September 11, 1998 site visit, when Avico purportedly had been shown a site for the pole inside the interior fence. Amended Claim, page 2. According to the Region, the location of the monopole site was never changed. The location of the center of the foundation excavation, the Region contends, was marked by a grade stake located on sloped ground. The stake, the Region asserts, had not been moved since May 1998. Transcript at 88/4-14; 88/15-18. The Region further insists that at no time during the August 17, 1999 pre-construction conference did Avico raise the issue of the monopole site having been moved. Transcript at 95/21-25; 111/13-16. However, it appears that Avico did mention a relocation of

the monopole site two weeks later, in a letter to the Region dated September 2, 1999. Significantly, that letter seems to indicate that Avico would not be submitting a claim for additional costs associated with the alleged relocation: “The new location was approved by all parties concerned and E. Avico Inc. did not ask for any additional monetary compensation for these changes.” Dispute File, Exhibit 25.

10. It appears that Avico encountered rock like material (“hard layers of sand stone surfaces”) at approximately 4 feet below the surface. The parties, as a result, agreed to effect a design change to reduce the required excavation depth and also to eliminate the requirement for sloping of the excavation sidewalls. Dispute File, Exhibits 19, 25 and 26. The design change also increased the dimensions of the foundation slightly. The resulting dimensions of the foundation, instead of 16’ x 16’ x 6’, were to be 16’ 6” x 16’ 6” x 4’. In addition to reducing the excavation depth and eliminating the necessity for an angle of repose, the change also allowed Avico to pour in place the lower two feet of the concrete foundation using the surrounding native soil to contain the concrete in lieu of formwork along the sides of the excavation. Only the upper two feet of the concrete foundation would have to be formed with wooden formwork. Dispute File, Exhibit 26; Transcript at 130/13-21; 131/17-18; 133/7-10; 133/15-19.³

11. Avico claims that the sloped excavation area resulted in its excavation of a 7’ depth on one side and of only a depth of 4’ 6” down on the other side. Dispute File, Exhibit 25; Transcript at 235/18-21.⁴ However, the RE’s contemporaneous

³ The parties further discussed the addition of an asphalt apron around the sloped area of the site to prevent erosion of the soil. However, the installation of an asphalt apron was not part of the original contract requirements and there is no evidence that the parties reached any final agreement with respect to that work. Accordingly, Avico has no contractual obligation to provide an asphalt apron for the site.

⁴ The difference in the measurements of the RE and Avico is because Avico’s measurements were allegedly taken from the upper side of the foundation from a point approximately two feet away from the NW corner of the foundation. Transcript at 128/1-4. According to the RE, the measurement of the footing’s depth is taken from the lowest point of the area adjacent to the footing. Transcript at 115-116/24-1. The RE measured the foundation from the East side, the low point of the excavation. Transcript at 128/7-9. He contends that Avico originally was required to dig a minimum of six feet measured from the surface wherever the hole was dug. Transcript at 116/8-13.

measurements of the finished excavation (as recorded in his daily job report for August 24, 1999) indicate that the dimensions of the actual excavation from the surface were: 67” at the NW corner; 64” at the NE corner; 52” at the SW corner; and 52” at the SE corner. Region Hearing Exhibit No. 3; Transcript at 125-126/3-7.⁵ The NW and NE corners were on the high side of the slope and the SW and SE corners, in turn, were on the low side.⁶ All four sides of the finished excavation were vertical, *i.e.*, without any angle of repose. Transcript at 126/8-11.

12. As a result of the design change, Avico over-excavated the foundation width by approximately three inches on each side, resulting in finished dimensions of about 16’6” x 16’6”. The result of the change added 2.4 cubic yards (“CY”) of concrete to the original concrete foundation requirement. Exhibits 18 and 25; Transcript at 184/3-119; 133-134/20-4. The estimated cost of the additional concrete was \$451.00 (2.4 CY x \$188 per CY).⁷ Avico placed two feet of gravel on the bottom of the footing, which was underneath the four feet of concrete. Transcript at 163/13-18. This was to satisfy the requirement for “compacted granular material.” The concrete foundation was daylighted, that is, approximately one foot to 18 inches of concrete was exposed on the east side of the footing. Transcript at 129/20-25. Originally, with a lower excavation depth, none of the concrete monopole foundation would have been above ground.

13. An FAA engineering estimate shows a total of \$3,189 in savings to Avico resulting from the reduced scope of work, broken down as follows: (1) \$1,161 for less excavation (94 CY @ \$12.35); (2) \$1,260 for less backfill/gravel (42 CY @

⁵ Although Avico disagreed with these measurements, it did not contemporaneously record its own measurements of the excavation depths. Transcript at 213-214/3-11.

⁶ According to the RE, Avico was to excavate the East side to a depth of six feet. The depth of the west side would have been approximately two feet deeper to compensate for the sloped area. Transcript at 120/3-6.

⁷ The unit cost for concrete, as well as all unit costs used in the FAA’s cost estimates, were taken from the “Means Estimating Manual,” which is a reference commonly used in the construction industry for developing price estimates for materials, labor and equipment. Transcript at 176/12-22; 184/3-19.

\$30.00); and (3) \$744 for less formwork (124 Square Foot Covered Area x \$6.00). The sum of the savings is \$3,189. Exhibit 18; Transcript at 173-183.⁸

14. The credit amounts taken by the FAA for reduced excavation and backfill reflect an overestimation, in the ODRA's view, given that they are based on assumed dimensions that differ from those of the actual area excavated. Using the measurements recorded by the RE on August 24, 1999, the average depth of excavation would be approximately 58.75" (67" + 64" + 52" + 52" divided by 4). Using this average would result in estimated amounts of \$641.92 for reduced excavation and \$696.65 for reduced backfill.⁹

15. The Contract required the DF antenna to be mounted on a 110' monopole. The 110' monopole is a hollow, galvanized-coated steel pole, which is hexagonal in shape. Transcript at 140-141/24-2. The monopole was shipped to the site in three sections by the manufacturer, American High Mast Systems, Inc. ("High Mast Systems"). Region Hearing Exhibit 6.

16. On August 10, 1999, the RE provided Avico with the assembly and installation instructions for the monopole, which he obtained from High Mast Systems. The instructions contemplate assembly of the monopole on the ground. Section 1.4.3 of the pole assembly instructions also states that the pole sections may be drawn together using chokers and chain pullers/come-alongs.¹⁰ Region Hearing Exhibit 6; Transcript at 98-99/21-3. Although the Contract does not prescribe any

⁸ The amount of \$744 for formwork was subsequently reduced by the Government to \$720 for unexplained reasons. The sum of the estimated savings using the \$720 figure is \$3,141. Transcript at 183/8-20.

⁹ The planned depth of the excavation was 72". As noted above, the average depth (based on measurements taken by the RE and assuming a uniform slope) was actually 58.75". The difference between the 72" originally required and the 58.75" average of the actual excavated depths is 13.25", somewhat less than the 24" difference used in the Region's calculations. Thus, the Region is only entitled to 55.29% (13.25/24) of the amounts it is claiming for excavation and backfill credits. Multiplying each of those claimed credits by 55.29% would yield revised credits of \$641.92 for reduced excavation (\$1,161 x 55.29%) and \$696.65 for reduced backfill (\$1,260 x 55.29%).

¹⁰ Come-alongs are mechanical devices that pull things together similar to a ratchet. Transcript at 144/24-25. The come-along sits between two sections of pole, connected by chains or a choker. The come-along increases the amount of force, pulling the two sections of pole together, with great strength. Transcript at 145/1-5.

- particular method of pole assembly, the RE insisted that Avico comply with the manufacturer's assembly instructions, lifting and installing the pole after it was assembled. Transcript at 42/3-6.
17. The manufacturer's monopole drawings state: "Galvanized surfaces damaged during transportation or erection and assembly should be touched up using cold galvanizing paint." Region Hearing Exhibit 6, Drawing 4383-D1, Erection Note No. 4. Likewise, the Contract also states in specification section 5-2.5.4: "Apply a cold-galvanizing compound according to manufacturer's directions to ... surface damage as pertaining to galvanized work." Dispute File, Exhibit 26.
 18. On or about August 25, 1999, Avico contacted seven crane companies with regard to lifting the assembled pole, so that it could be erected and installed on the concrete pad. Transcript at 220/2-6. Three of those companies, including California Crane Rental, visited the project site. Dispute File Exhibit 23.
 19. On August 30, 1999, Avico was using steel chains and nylon straps to assemble the pole; however, the nylon straps ripped. Transcript at 42/15-25. Avico then wrapped the sections of the pole in automobile floor mats as it cinched the sections together. Transcript at 171/10-21. Avico was using the mats in an attempt to protect the surface of the pole. However, the chains slipped off the mats and scratched the surface of the pole.¹¹ Observing this, the RE -- not an FAA employee but rather a contract employee -- ordered Avico to halt the work. The Lead Project Engineer was unable to visit the site that day to inspect the scratches. Transcript at 96/14-16. It was not explained why another FAA representative could not have come to the project site on August 30th.
 20. On August 31, 1999, the FAA Regional Area Program Manager arrived on-site to inspect the scratches on the pole. He noted that the scratches appeared very minor

¹¹ These scratches were in addition to pre-existing scratches on the pole which occurred when the pole was transported to the site unprotected on a truck. Transcript at 47-48/8-13.

and could be repaired as specified in the drawings. Transcript at 76/4-7; 76/13-20.

21. By reason of the August 30, 1999 work stoppage, Avico incurred the following costs, based on an invoice Avico had received from its subcontractor, California Electrical Contractors:

Extra day for rental equipment	\$290.00
3 persons (\$35 x 3 hours)	\$315.00
2 electricians (\$60 x 3 hours)	\$360.00
2 rental trucks (\$15 x 3 hours)	\$90.00 ¹²
15% overhead and profit	<u>\$158.25</u>
Total	\$1213.25

Avico Hearing Exhibit 10; Dispute File Exhibit 13; Transcript at 43/8-18; 44/18-25; 45/19-22.

22. In addition, Avico claimed \$375.00 for the costs of 3 of its own employees allegedly impacted by the work stoppage. Dispute File, Exhibit 13. However, it appears that Avico was able to re-assign those employees to work on trenching and preparations for laying of cable. Transcript at 96/19-23; 98/1.

23. Avico contracted with California Crane Rental to provide a 35-ton crane to lift the monopole all in one piece on September 7, 1999. Transcript 48-49/24-1. Avico had told California Crane that the pole weighed 5600 pounds. Dispute File, Exhibit 23; Transcript at 220/21-25.¹³

24. Due to lack of space at the site, the crane was situated such that its boom had to be extended approximately 45 feet in order to lift the assembled pole. The lifting capacity for the 35-ton crane with its boom extended to that length was only 5500 pounds. Transcript at 149/2-6; 150-151/15-4. The 35-ton crane was unable to lift the assembled monopole, which consisted of line items 1 through 4 on the bill of

¹² The invoice erroneously contains the amount of \$180.00 for this item. Dispute File, Exhibit 13. The total is revised to reflect the correct amount.

material (shafts A – C, *i.e.*, the three monopole sections - plus the base plate). Transcript at 69/13-20; Avico Hearing Exhibit 8. The total weight of these pieces indicated on the bill of material (excluding nuts, bolts, etc.) was stipulated by the parties to be 6,192 pounds. Transcript at 69/24-25; 150/6-10. This weight total clearly exceeded the crane's lifting capacity. Transcript at 147/21-24.¹⁴

25. Due to the inability of the 35-ton crane to lift the assembled pole, Avico's work force was unable to complete the monopole erection on September 7, 1999. Avico was required to order a second, more powerful, crane to the jobsite to lift the monopole. On September 14, 1999, a 70-ton crane lifted the assembled pole without further incident. Avico subsequently filed a claim in the amount of \$4,844.50 for costs associated with having to obtain a second crane. Dispute File, Exhibit 13.

III. Discussion

It is well established that the burden of proof lies with the party who seeks an equitable adjustment. *See Contract Dispute of Martin Resnik Construction Co.*, 99-ODRA-00111 at 103.

A. The Foundation Design Change Results in a Net Contract Credit of \$1,487.57.

As a result of the change to the design of the foundation, Avico claims an equitable adjustment of (1) \$1,380.00 for deepening the footing excavation and (2) \$1,960.63 for expanding the width of the footing. In contrast, the Region claims that as a result of the design change, it is entitled to credits for reduced work of \$1,161 for excavation; \$1,260 for backfill/gravel; and \$720 for formwork.

¹³ In contrast, Avico's Daily Log for September 7, 1999, states that according to the manufacturer, the pole weighs 5800 pounds. Avico Hearing Exhibit 5.

¹⁴ Although the RE recorded in his construction diary on September 7, 1999, that the scale on the crane indicated that the monopole alone weighed somewhere around 6,700 pounds (Transcript at 148/5-20), that

The evidence shows that the parties agreed orally to a design change on-site, which increased the foundation dimensions slightly, and reduced the amount of formwork and excavation originally required by the Contract. Finding of Fact No. (“FF”) 10. However, design change scope and pricing were never finalized in the form of a written agreement.

At the hearing, Avico presented hand drawn diagrams and testimony at the hearing regarding the depth of the excavation. Avico Hearing Exhibit 3; Transcript at 235/18-21. However, the only credible evidence of the actual measurements of the finished excavation was the RE’s measurements taken at the completion of the excavation work and contemporaneously recorded in his job site diary.¹⁵ FF 11. As a result of these measurements, the Region adequately met its burden of proof by showing that as a result of the design change, Avico did less excavation, installed less formwork, and provided less backfill/gravel than specified under the original contract requirements. FF 10.

As we have found, the change did increase the amount of concrete required by 2.4 CY. A reasonable estimate of the additional costs of such concrete is \$571 (\$451 plus 15% overhead plus 10% profit). FF 12. As for the credits claimed by the Region, we have found that amounts taken for reduced excavation and backfill are overstated, as they are not based on the actual excavation dimensions. FF 14. The ODRA finds that reasonable credit amounts for reduced excavation and backfill are \$641.92 and \$696.65, respectively. FF 14. As to the claimed \$720 credit for reduced formwork, the Region’s

fact is irrelevant, since Avico erroneously represented to California Crane that the monopole weighed 5,600 pounds when it arranged for the services of the 35-ton crane.

¹⁵ When considering the events leading up to an alleged change, great weight is given to the contemporaneous actions of the parties, rather than their conduct after the “ramparts” of litigation have been erected; documents prepared at or about the time of an event normally are a much more reliable record of the event than personal testimony offered much later. *Washington Construction Company*, ENG BCA No. 5318, 89-3 BCA ¶22,077; *Granite Construction Company*, ENG BCA No. 4172, 89-2 BCA ¶21,683; *Sea-Land Services Inc. v. United States*, 213 Ct. Cl. 555,566, 553 F.2d 651, 658 (1977); *Liles Construction Co. v. United States*, 197 Ct.Cl. 164, 455 F.2d 527 (1972); *Max Drill Inc. v. United States*, 192 Ct.Cl. 608, 620, 427 F.2d 1233, 1240 (1970); *Dynamics Corporation of America v. United States*, 182 Ct. Cl. 62 389 F.2d 424 (1968); *Coastal Dry Dock & Repair Corp.*, ASBCA no. 31894, 87-1 BCA ¶19,618; *Honeywell, Inc.*, ASBCA No. 25556, 83-2 ¶16,551.

computations appear accurate and Avico took no issue with them. Accordingly, the Region is entitled to a net credit of \$1,487.57, derived as follows:

Additional Concrete	\$571.00
Credit for Reduced Forwork	(\$720.00)
Credit for Reduced Excavation	(\$641.92)
Credit for Reduced Backfill	<u>(\$696.65)</u>
Net Credit Due	(\$1,487.57)

B. The Region's Order to Stop Monopole Erection Work Was Unreasonable, Entitling Avico to an Equitable Adjustment in the Amount of \$1,395.24.

Avico claims the amount of \$1,710.75 for costs resulting from the RE's directive to stop monopole erection. The amount Avico claims consists of the costs of 3 Avico employees (\$375) and a bill from California Electrical Contractors ("CEC") in the amount of \$1,215.75. Exhibit 13. In addition to these amounts, Avico also requests mark-ups of 15% overhead and 10% profit.

Under AMS clause 3.10.1-8, which was incorporated into the Contract, if work is suspended for an unreasonable period of time, an adjustment must be made for any additional costs (excluding profit) arising from the suspension. FF 6. The preponderance of the evidence leads to the finding that the stop work order by the RE was not reasonably justified. On August 30, 1999, Avico was assembling the pole on the ground using chokers and chain pullers/come-alongs, *precisely as specified in the manufacturer's assembly instructions*. FF 16. During this effort, the pole suffered some minor scratches. Fearing that the poles would suffer greater damage, the RE -- a contract employee -- stopped the work so as to allow an FAA Official to inspect the damage and determine whether Avico could proceed using this method. However, for unexplained reasons, no FAA representative was able to make it to the site that day. FF 19. It was not until the following day that the FAA Regional Area Program Manager was able to come to the site and inspect the scratches. At that time, the Program Manager determined that the scratches were very minor and could be repaired as specified in the drawings. FF 20. Moreover, the contract contemplates the possibility that minor

scratches to the pole could occur and specifies a method of repair. FF 17. Also, there was evidence that some of the scratches on the pole might have occurred as a result of the pole being transported to the site unprotected on a truck. FF 19, Footnote 9. Based on these facts, the ODRA finds the RE's order to stop Avico's crane assembly on August 31, 1999 to have been unreasonable. Avico is therefore entitled to an equitable adjustment for costs associated with that work stoppage.

As for the costs Avico claims as a result of the unreasonable work stoppage, the record shows that Avico was able to re-assign its employees to work on trenching and make preparations for the cable. FF 22. This re-assignment is consistent with Avico's duty to mitigate damages. Accordingly, the hourly wages for these employees may not be recovered. During the course of these proceedings, the Region did not challenge the reasonableness of the costs allegedly incurred by CEC, which are reflected on an invoice dated September 26, 1999. FF 21. On its face, the invoice does not appear to be unreasonable, except for an arithmetic error.¹⁶ Although FAA Cost Principles do provide that actual costs are not to be presumed as reasonable, in this case, the FAA Cost Principles were not made part of the contract; thus, we will presume that the costs contained in the September 26, 1999 invoice are reasonable. *See Martin Resnick Construction Co., supra* at 99-100, *citing Bruce Construction Corporation v. United States*, 163 Ct. Cl. 97, 324 F.2d 516 (1963). Accordingly, Avico is entitled to 1,395.24 (\$1,213.25 plus 15% overhead and without any markup for profit, as prescribed by AMS clause 3.10-1.8).

C. Avico Erred When It Arranged To Use A 35-Ton Crane To Install The Monopole And Is Responsible For The Costs Associated With That Error.

Avico contends that the Region provided it with inaccurate information regarding the weight of the monopole, and caused it to incur the costs of a second crane of

\$4,844.50. This allegation is unsupported. There is no evidence that the FAA caused Avico to incur these additional crane costs. Rather, the evidence shows that Avico caused itself to incur these additional costs when it provided California Crane Rental with inaccurate information as to the weight of the monopole.

The evidence shows that, at a minimum, the assembled monopole weighed 6,192 pounds. FF 24. When Avico made arrangements for the crane, it provided to California Crane Rental (“crane company”) an erroneous weight of 5,600 pounds for the monopole. FF 23. Based on this information and its site visit, the crane company provided a 35-ton crane. FFs 18 and 23. The lifting capacity of the 35-ton crane, with the boom extended approximately 45 feet, was 5,500 pounds. FF 24. Avico never refuted the fact that the weight of items one through four in the monopole’s bill of materials totaled 6,192 pounds; nor that the crane’s boom was extended 45 feet; nor that the crane’s limit under those circumstances was only 5,500 pounds.¹⁷ Moreover, there is no question that the erroneous weight of 5,600 pounds provided by Avico to the crane company exceeded the crane’s lifting capacity when its boom was extended 45 feet.¹⁸ FF 24. In short, there was a failure of proof with respect to this claim item.

D. Requiring Avico To Assemble The Monopole On The Ground Was A Constructive Change; However, There Is No Proof That It Increased The Cost Of Contract Performance.

Avico originally planned to assemble the pole in the air in sections rather than on the ground. FF 8. It had this option under the Contract since the Contract is silent

¹⁶ The invoice reflects a quantity of 12 for 2 trucks for 3 hours at \$15.00 per hour. This amount was reduced to \$90.00.

¹⁷ Mr. Arshadnia argued that despite his error, the first crane should have been able to lift the monopole, given that “5,600 pounds plus 15 percent ... tabulates to be 6,440.” The 15% figure presumably comes from a letter from California Crane Rental dated September 9, 1999, which states: “Based on my measurement and the weight I was given, 5600 pounds, plus 15%, our 35-ton crane should have had no problem setting the pole, all according to load rating charts.” The basis for this 15% figure, however, is unexplained. Avico furnished no expert testimony or any other evidence to prove that the Government’s weight information was faulty. Transcript at 221/1-4.

as to any method for monopole assembly. FF2. After award, the RE made clear that it expected Avico to follow the monopole manufacturer's instructions and to assemble the pole on the ground before erecting it. FF 16. The facts show that when Avico bid the job, purportedly contemplating assembly of the monopole in the air, it included in its bid the following line item: "Crane (8 hours x 2 days x 280 per hour)" for the amount of \$4,480.00. FF 8; Dispute File, Exhibit 29. If that amount had been proven to reflect the reasonable cost of assembling the crane in the air and had Avico's actual crane costs been greater as a result of the change, Avico would have been entitled to an upward equitable adjustment for the increased costs. However, the evidence shows that the cost of the 70-ton crane was \$2,605.00, which is *less* than the crane costs originally contemplated in Avico's bid.¹⁹ FF 8; Dispute File, Exhibit 13. Furthermore, Avico presented no evidence as to how it would assemble and install the monopole in the air. The testimony was that great force was required in order to join monopole sections. Transcript at 66/3-9. Also, Avico has failed to produce any evidence as to what the costs actually would have been had the pole been assembled in the air. Therefore, there is no factual basis to conclude that this change actually increased the cost of contract performance.²⁰

D. Avico Failed to Prove That The Monopole Site Location Was Moved

Finally, Avico claims \$2,300.00 for additional electrical work and \$620.00 for additional 30 foot utility trenching by reason of an alleged relocation of the monopole site. Avico was clearly sincere in its apparently mistaken belief that the

¹⁸ If Avico relied on the expertise of the first Crane Company when it performed the site visit, any misjudgment made as to the placement of the crane and its impact on the strength of the crane is a matter between Avico and the crane company.

¹⁹ To the extent that Avico argues that, had it been allowed to assemble and install the monopole the air piece by piece, it could have successfully used the 35-ton crane, the fact of the matter is that Avico arranged for the 35-ton crane to come to the site knowing that the monopole was to be assembled on the ground and lifted in one piece. FFs 16 and 18.

²⁰ Compensation for a change is only to the extent that the change actually caused an increase in the cost or time of performance of the contract work. *Lectro Magnetics, Inc.*, ASBCA No. 15971, 73-2 BCA 10,112. The overriding basic principle applicable to price adjustments under the Changes clause is that they are

site location had been changed. The evidence shows, however, that the location of the site was clearly indicated on the topographical map and never was relocated. FF 5 and 9; Dispute File, Exhibit 27. The topographical map, which was part of the RFQ, shows the site to be *north and outside of* the smaller fenced-in area that Avico claims the site was originally located. FF 5 and 7; Transcript 35-36/3-6.

Moreover, the discrepancies in location that Avico claims that it perceived, if accurate, would have given rise to a pre-bid duty of inquiry. *Grinnell Fire Protection Systems Company*, VABCA-5672-5859, 199 VA BCA LEXIS 16; 00-1 BCA 30,662. For Avico to submit a bid without clarifying such an obvious discrepancy under the circumstances would have been both unreasonable and imprudent. This claim element is wholly without merit.

IV. Conclusion

For the foregoing reasons, the ODRA finds the Region entitled to a net credit in the amount of \$92.33, derived as follows:

A. Equitable Adjustment For Foundation Design Change	(\$1,487.57)	
B. Stop Work Order	\$1,395.24	
C. Constructive Change Regarding Monopole Assembly	- 0 -	- 0 -
D. Extra Crane Costs	- 0 -	
E. Monopole Site Relocation	- 0 -	
	Net Adjustment Due	
From Avico	(\$92.33)	

_____/s/_____
 Marie A. Collins
 Dispute Resolution Officer
 FAA Office of Dispute Resolution for Acquisition

APPROVED:

_____/s/_____
Anthony N. Palladino
Associate Chief Counsel and Director
FAA Office of Dispute Resolution for Acquisition