

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

NORTHEAST DRILLING, INC.,)
)
 PLAINTIFF)
)
 v.)
)
 INNER SPACE SERVICES, INC. AND)
 NATIONAL GRANGE MUTUAL)
 INSURANCE COMPANY,)
)
 DEFENDANTS)
)
 AND)
)
 INNER SPACE SERVICES, INC.,)
)
 COUNTERCLAIMANT)
)
 v.)
)
 NORTHEAST DRILLING, INC. AND)
 RANGER INSURANCE COMPANY,)
)
 COUNTERCLAIM DEFENDANTS)

CIVIL No. 99-173-P-H

FINDINGS OF FACT AND CONCLUSIONS OF LAW

From February 8 through February 14, 2000, I presided at a bench trial in this drilling and blasting contract dispute. I heard closing arguments on February 22, 2000. These are my findings of fact and conclusions of law.

I. FINDINGS OF FACT

A. *Background*

1. Northeast Drilling, Inc. ("NDI"), the plaintiff, engages in drilling and blasting, both on land and under water.

2. Inner Space Services, Inc. (“ISSI”), the defendant, engages in a variety of land-based and water-based construction activities, including dredging.

3. NDI and ISSI entered into a subcontract executed on November 2, 1998, and amended on January 30, 1999, for NDI to perform drilling and blasting services in connection with construction of a land level transfer facility at Bath Irons Works (“BIW”) in Bath, Maine. See Joint (“Jt.”) Exs. 1, 2, 3.

4. ISSI had a contract for drilling, blasting and dredging services with Atkinson Construction (“Atkinson”). See Jt. Ex. 10.

5. Atkinson had a construction services contract with The Clark Construction Group, Inc. (“Clark Construction”). See id.

6. Clark Construction had a broader construction services contract with Clark Builders of Maine, L.L.C. (“Clark Builders”). See id.

7. Clark Builders had the contract with BIW, the owner, for engineering, design, permitting, construction and project management services. See id.

8. National Grange Mutual Insurance Company (“National Grange”) issued a labor and material payment bond (Bond No. S-220880) guaranteeing ISSI’s payment of labor and materials. See Pls.’ Ex. 5 (second page).

9. Ranger Insurance Company (“Ranger”) issued payment and performance bonds guaranteeing NDI’s undertakings. See Defs.’ Exs. 5, 5-A.

10. The subcontract between ISSI and NDI called for a total payment to NDI of \$1,182,561.16 after taking into account approved change orders. (The original contract was \$1,140,000. See Jt. Ex. 1.) Because of bonding complications,

ISSI was to pay this amount partly through payments to NDI's employees and materials providers, and partly by direct payments to NDI.

11. Of the total contract amount, ISSI has withheld \$403,431 from NDI. See Stipulations (Docket Item 39) ¶ 12.

B. Scope of the Contract

12. The contract between NDI and ISSI contained an exhibit, a map of the site, which delineated the location where NDI was to perform drilling and blasting work. This delineation was broader than the area specified for drilling and blasting in the contract between ISSI and Atkinson, where a cross-hatched area showed the location of drilling and blasting work. Compare Jt. Ex. 1, Ex. B with Jt. Ex. 14. I will call the broadened area the "expanded area."

13. Under the ISSI/Atkinson contract, if ISSI had to perform drilling and blasting in order to accomplish its dredging work in the area outside the cross-hatch, it would be an extra or change order, entitling ISSI to additional payments. Under the drilling and blasting contract between ISSI and NDI, on the other hand, NDI would obtain additional payments from ISSI for NDI's work in the expanded area, but not as a change order or extra. Instead, payment for that work was specified by the NDI/ISSI contract; the payment was to be a "proportional amount" of what ISSI obtained from Atkinson for the same work, and was to be paid "if and only if ISSI receives compensation" from Atkinson under a change order. See Jt. Ex. 1, Ex A ¶ 10. This provision was typed into the contract and controls any potential conflicting language in the printed ¶¶ c-e of the standard form contract.

14. In fact, NDI did perform drilling and blasting work in the expanded area.

15. NDI and ISSI made no agreement or oral or written modification to the contract to change the basis the contract provided for paying NDI for work in the expanded area.

16. ISSI submitted a change order request to Atkinson for the drilling, blasting and dredging work in the expanded area, but did not do so on a timely basis. Even though all drilling and blasting work was completed by March 31, 1999, when the environmental window closed,¹ ISSI did not submit a change order for the extra work until September 1999, when it requested \$272,027 for the expanded drilling and blasting. ISSI says that it was delayed by NDI's failure to provide backup information, but ISSI had all the available NDI and GZA² reports that would provide the data for square footage or cubic footage calculations, the basis for the amount of any change order.

17. Atkinson and ISSI are currently negotiating a resolution of disputes between them, one of which involves the extra drilling and blasting in the expanded area. An agreement in principle has been reached by which ISSI will receive \$140,000 (\$10,000 per day for 14 days) for the drilling and blasting portion of the work. (That is also approximately the amount yielded by applying the cubic yardage unit price (\$72.26) under the contract to the disputed amount (2000 cubic

¹ The drilling and blasting dates were circumscribed by environmental windows for sturgeon in the Kennebec River. See ¶ 23, infra.

² GZA GeoEnvironmental, Inc. ("GZA") was hired by Clark Builders to perform observation and record keeping services on the BIW contract.

yards) (\$145,120)). In addition, there will be a credit of \$81,560 back to ISSI, for the so-called Hughes barge, for which NDI was billed and should receive credit.

18. Although the Atkinson/ISSI agreement in principle is not yet an enforceable agreement and potentially may never come to fruition, I find that it is a reasonable measure of what ISSI is entitled to receive from Atkinson for the drilling and blasting work in the expanded area and that NDI is entitled to its proportional share.

19. Because ISSI is the only party that knows what NDI's proportional share is and because ISSI has provided no evidence on this topic, there is no basis upon which to reduce the \$140,000, and I find that NDI is entitled to the full \$140,000.

20. NDI claims reimbursement based on its expert's calculation derived from a hypothetical price per hole "shot"—*i.e.*, blasted. The contract was not bid on that basis; Forest Bradbury (NDI's principal) testified that he had not used such a method in determining his costs and profits; and I find it to be an unreasonable measure, not provided for under the contract or anywhere else.

21. Although the contract provides for payment to NDI "if and only if ISSI receives compensation" from Atkinson, ISSI had the obligation to make a reasonably timely request upon Atkinson and failed to do so.

C. Performance of the Contract

22. The contract between NDI and ISSI called for NDI to perform blasting on a "6 x 6 grid, with the intent of supplying 'diggable' rock for dredging." Jt. Ex. 1, Ex. A, ¶ 6(I). The parties have agreed that the contract means that NDI must

supply diggable rock down to the specified elevation.³ ISSI contends that in addition to being contractually obligated to provide diggable rock, NDI was obligated to follow the 6 x 6 pattern and maintain the powder charge contained in the blast plan, whereas NDI maintains that those were only starting points and that all that matters is that diggable rock result.

Most importantly, NDI and ISSI disagree over what is diggable rock. The term is ambiguous. ISSI maintains that it means gravel of football size or less. NDI says that it means rock that is one cubic yard or less. Other testimony from the parties' experts suggested that it means anything diggable with the appropriately sized equipment (E. Douglas Ryan) or that it means diggable with the equipment the dredger plans to dig with (Andrew McKown). ISSI says that NDI knew it was going to dredge with 1-½ yard clamshell buckets. NDI says that it never knew what ISSI planned to dig with. I find that in using the term "diggable" rock, NDI and ISSI meant rock of one cubic yard or less. I also find that under that standard, up to ten per cent of the rock could be oversized, a common occurrence in the industry.

23. NDI never employed a 6 x 6 pattern underwater. It shot only one row at a time and ultimately enlarged the burden (the space between rows) to eight feet or greater. This row by row blasting was contrary to the blast plan, which had called for production blasting of 40 to 60 holes (on the 6 x 6 grid). See Jt. Ex. 5. A major reason for the inability to blast more than one row at a time was the delay

³ The contract also called for NDI, "so far as the SUBCONTRACT work is concerned," to assume toward ISSI "all the obligations and responsibilities which [ISSI] assumed toward the OWNER by the MAIN CONTRACT which includes the general and special conditions thereof, and the plans and specifications and addenda. . . ." Jt. Ex. 1, ¶ a.

in the starting date of the drilling and blasting. Specifically, because of environmental restrictions related to the presence of sturgeon in the Kennebec River, the original starting date of November 15, 1998, was delayed until January of 1999, when the sturgeon finally left the river for the season. By then, ice floes were present on the river and interfered with the lines from the drilling barge to the drilled holes waiting to be shot. The resulting risk was that if the lines were pulled out by floating ice, the blasting charge would be left in place without the means to shoot it. Consequently, NDI shot only one row at a time. But after a row of holes was shot, when NDI returned to attempt to drill the next row six feet away, it could not find “drillable” rock. In other words, it found that the rock to be drilled was already broken up. NDI therefore had to move farther away to drill the next row. ISSI’s trial expert testified that a possible reason for this rock being broken up was that NDI had improperly angled its drills. No such suggestion was made at the time of drilling and blasting, and I find the explanation doubtful, given the testimony of how the drilling barge was positioned. At the time, it was accepted by both NDI and ISSI that the rock condition itself produced this consequence of being undrillable on the 6 x 6 pattern.

24. The drilling plan called for a test blast to assess rock fragmentation, but ISSI never dug the first blast, or any other before the environmental window closed (March 31, 1999), to check the size of the fragmentation. ISSI never required NDI to prepare a new drilling plan to account for the larger grid pattern. The amended contract provided that if NDI was “not performing properly,” ISSI could demand an offsite meeting. Jt. Ex. 3, ¶ 5. But there was no such meeting and

no consultation with powder suppliers or others to make any necessary changes in the plan to compensate for the enlarging pattern.

25. ISSI knew that NDI was enlarging the burden. ISSI was concerned; the reason for its concern was its fear that the resulting pieces of blasted rock would be too large for the type of dredging it contemplated. Nevertheless ISSI acquiesced in NDI's going forward in the enlarged pattern.

26. I find that NDI did drill and blast in the areas where the contract called upon it to drill and blast, as indeed the Atkinson representative (Timothy Daniels) testified. Thus, aside from the question about the quality of NDI's work (rock fragmentation), NDI completed the job.

27. NDI did breach the contract in other ways—recordkeeping and reports, safety lapses, and failure to amend the blast plan or follow it precisely—but none of these breaches was material or caused ISSI any quantifiable damage.

D. Results of the Drilling and Blasting

28. I find that approximately thirty percent of the fragmented rock was oversized as I have defined it. (The testimony was in conflict on this. Forest Bradbury and William Friend who did the blasting but did not see the dredging estimated it was ten percent or less; none of the experts saw the entire amount; Robert Mason who was present for most of the dredging estimated it was 50 or 60 per cent; Scott Gibson⁴ estimated 50 percent, but did not see all of it.)

⁴ Gibson was hired to be NDI's on-site observer during dredging, the parties having already reached an impasse expected to end in litigation. ISSI subsequently hired Gibson to do work for it. Not surprisingly, ISSI, not NDI, called Gibson as a witness.

29. I find from the testimony that although the rock was oversized, the drilling and blasting were generally successful in generating loose rock down to the elevation requirements.⁵

E. Completion of the Dredging

30. ISSI originally estimated that it could do its dredging in two months and expected to use 1¼- or 1½-yard clam shell buckets. That was an unreasonable projection in terms of both equipment and time. Among other things, ISSI had made no provision for dealing with the up to ten per cent of the rock that might be oversize.

31. The actual dredging occupied the time period from April 14 through early November.

32. The equipment ISSI ended up using was a hydraulic impact hammer, and a backhoe with a 4½-yard bucket.

33. The longer dredging time and the change in equipment cost ISSI a substantial amount of extra time and money. Moreover, because ISSI had to remain on the site longer than it had expected, it was unable to perform a job in Boston and had to subcontract it out. ISSI calculated its damages largely by taking

⁵ I note that a recent survey reveals that in the original cross-hatched area, there are fewer than ten sites where the rock exceeds the contract elevation. See Defs.' Ex. 125 (hydrographic survey prepared December 1999 by Atkinson). They are within a tolerance limit that Timothy Daniels of Atkinson has testified the owner might approve if a specific request was made, but ISSI never made such a request. In the expanded area, the same survey reveals that there is a more extensive area where, after dredging, the elevations are not down to the proper limit. It is impossible, however, to tell whether this is because of unblasted rock or whether it is a result of sand filling in the area that has migrated from a sand dump in the river.

its total dredging costs and subtracting what it had originally projected, as well as adding a component for the lost Boston job.

34. The reason for the extended dredging time was not only the necessity of breaking up some of the oversized rocks and the greater difficulty in lifting large rocks, but also ISSI's initial unreasonable projections, as well as the presence of overburden that, under the contract, should have been removed earlier by others, and the silting of sand into the area from a sand pile that was dumped up river by one of the other contractors. (I recognize that some of this dredging remains to be done, but some of it has already occurred and contributed to ISSI's costs.)

35. ISSI's calculation of the increased dredging costs caused by NDI's deficient performance is therefore unreasonable.

F. Value of NDI's Performance

36. I find the reasonable value of NDI's work (other than the expanded area) to be \$1,007,561.16, *i.e.*, \$175,000 less than the contract price.

G. Prompt Payment Dispute

37. Atkinson paid ISSI \$1,192.11 by check dated March 8, 1999, \$408,695.93 by check dated March 22, 1999, \$597,403.86 by check dated April 26, 1999, and \$2,167.78 by check dated May 13, 1999, for the drilling and blasting work done by NDI.

38. ISSI has withheld \$403,431 of the contract price from NDI, maintaining that NDI failed to perform under the drilling and blasting subcontract. Atkinson

paid ISSI all but \$145,000 for NDI's work (not including the expanded area) by May 13, 1999.

39. ISSI's claim that NDI had failed to meet its contractual obligations was made in good faith.

II. CONCLUSIONS OF LAW

A. Jurisdiction

1. I have jurisdiction based upon diversity of citizenship and an amount in controversy that exceeds \$75,000. See 28 U.S.C.A. § 1332 (West 1993 & West Supp. 1999).

B. Interpretation and Performance of the Contract

(i) Expanded Area

2. NDI contends that the drilling and blasting in the expanded area is not covered at all under its contract with ISSI, and amounts to an oral change order for which it should be compensated on a different basis. NDI also makes arguments based on *quantum meruit* and unjust enrichment. Its expert has calculated damages based upon the number of holes drilled. I find that the written contract between NDI and ISSI is clear and unambiguous on these matters, that the work in the expanded area is covered by the contract, that the basis for the payment is set forth therein and that no oral or written amendment was made. As a result, NDI is entitled only to that compensation (its "proportional" share of what Atkinson pays ISSI), not compensation for a change order or based upon *quantum meruit*, unjust enrichment or equitable accounting. It was ISSI's burden to demonstrate any appropriate reduction to the Atkinson payment to reach the "proportional"

share. Its failure to do so results in a complete pass-through of the Atkinson payment to NDI.

3. Because ISSI was delinquent in making a change order claim to Atkinson on this expanded area, I conclude that ISSI is estopped from using the defense that Atkinson has not yet paid ISSI so as to avoid paying NDI.

(ii) Rest of the Contract

4. The NDI/ISSI contract called for NDI to drill and blast on a “6 x 6 grid, with the intent of supplying ‘diggable’ rock for dredging.” Jt. Ex. 1, Ex. A, ¶ 6(I). The language of the contract seems unambiguous to me: the contractual obligation was to blast on the six by six grid; diggable rock was a hoped-for, not guaranteed outcome. However, the parties at trial agreed by their testimony and through their lawyers that the contract required NDI to produce “diggable” rock. I therefore accept their consented-to interpretation.⁶ They disagreed only on what the term “diggable” means. The term is ambiguous. I have found from the parol evidence that it means rock of one cubic yard or less, and that a deviation of up to a ten per cent overage was to be expected. NDI performed its obligation under the contract to the extent of drilling and blasting everywhere it was supposed to and breaking up rock down to the required elevation. It did not, however, achieve diggable rock as required.

⁶ To the extent that ISSI argues that the contract called for a 6 x 6 grid independently of the diggable rock requirement, I find that compliance with the 6 x 6 grid was made impracticable without NDI’s fault and was caused by an event (the sturgeon’s late presence) whose nonoccurrence was a basic assumption on which the contract was made. Restatement (Second) of Contracts § 261 (1981). See Findings of Fact ¶ 23 for a more complete factual elaboration.

C. Damages

5. The most recent pertinent decision by the Maine Law Court on how to measure damages in a case like this is F.A. Gray, Inc. v. Weiss, 519 A.2d 716 (Me. 1986). There, the Court held that if a contractor (here NDI) provides “substantial performance of the . . . contract,” it “may recover the contract price, less the damages on account of the omissions.” Id. at 717 (quoting S. Williston on Contracts § 805, p. 843 (3d. ed. 1961)). The implication is that the burden to prove the reduction lies with the other party (here ISSI). Where the contractor (NDI) fails to meet the substantial performance standard, on the other hand, and provides only partial performance, it can no longer recover under the contract, but “must resort for remedial relief to the equitable doctrine of a *quantum meruit* recovery.” See Loyal Erectors, Inc. v. Hamilton & Son, Inc., 312 A.2d 748, 756 (Me. 1973). Then its burden is to show that its “misdirected or deficient work has resulted in a benefit to the other party” and, presumably, the value of that benefit. Id. Although earlier cases show some confusion on this subject,⁷ Gray and Loyal Erectors, read in this way, place Maine in accord with respected commentators.⁸

⁷ For example, Skowhegan Water Co. v. Skowhegan Village Corp., 66 A. 714 (Me. 1906), seems to say that the burden of proving damages lies with the contractor even in a substantial performance case and that he cannot simply seek the contract price, expecting the defendant to prove any reduction.

⁸ See, e.g., 3A Arthur L. Corbin, Corbin on Contracts § 709 at 334-35 (1960) (discussing substantial performance and noting that “it is generally stated as the rule of recovery that the contractor has a right to the contract price, less compensatory damages for the injury caused by his breach.”); id. § 709 at 337 (discussing substantial performance and noting that it “would seem that each [party] must state [its] own claim, and must allege and prove the facts that constitute the other’s breach and that create [its] own right. There is no very strong reason for requiring the plaintiff to prove that the defendant has any counterclaim or its amount.”); id. § 710 at 342 (discussing (continued..))

6. Gray stated that substantial performance is a question of fact and listed some factors that can be considered: “the work called for by the contract; the extent to which there has been compliance; the ratio of the cost of curing defects and omissions to the total contract price; and the importance of any defects or omissions to the purpose of the contract.” 519 A.2d at 717 (citing 3A Corbin on Contracts §§ 705, 706. Additionally, the breach must not be willful; the contractor must have performed in good faith. See id.; 3A Corbin on Contracts § 707 at 327-28. Here, NDI operated in good faith. It was doing its best to fulfill the contract under difficult weather and time constraints. It performed the “work” called for by the contract, *i.e.*, it drilled and blasted the holes. However, it failed to provide diggable rock as called for—too much of which it blasted was too large. Was that important? Yes and no. Yes, in the sense that it cost ISSI more to dredge and thereby lowered its expected profit. No, in the sense that NDI did break up rock down to the required elevations during the environmental window, so that it could be dredged with the proper equipment.

⁸ (...continued)

performance that is less than substantial and noting that the “contractor’s right is a right to reasonable compensation for value received by the defendant over and above the injury suffered by the contractor’s breach. . . . If the contractor’s right to compensation is of this nature, the burden of proving its amount rests on him. To have any claim at all, he must show that he has done more good than harm and how much. It will not be permitted to be in excess of the contract price.” (footnote omitted); Restatement (Second) Contracts § 237 cmt. d (1981) (“If there has been substantial although not full performance, the building contractor has a claim for the unpaid balance and the owner has a claim only for damages. If there has not been substantial performance, the building contractor has no claim for the unpaid balance, although he may have a claim in restitution. . . .”).

7. The significance of the issue here is burden of proof. Given the deficiency in full performance, will I allow NDI to recover the contract price with the burden on ISSI to prove how much it should be reduced for the cost of cure? Or will I put the entire burden on NDI to prove the value of its deficient performance? Calculation of damages and proof of causation here are complex. What happened here was largely underwater. Even now it is difficult to know the characteristics of what remains underwater and why it is there. There were a number of factors at work that made the dredging far more expensive for ISSI than it had expected. The parties have tailored their testimony and their experts to polar extremes: ISSI claims that NDI's deficiencies have cost it \$538,624,⁹ see Defs.' Pretrial Mem. at 4, while NDI says its deficiencies were negligible. Not surprisingly, I find that the truth lies somewhere in between, and the polar adversarial positions, therefore, give me little aid in charting the course on precise damages.

8. Ultimately, I conclude that on these facts it does not matter whether I characterize NDI's performance as substantial or partial. I conclude that its recovery for partial performance, the reduction from the contract price for substantial performance and any damages under the ISSI counterclaim all yield the same outcome regardless of burden of proof for the contract (Count I), *quantum meruit* (Count III), unjust enrichment (Count IV) or equitable accounting (Count V), or ISSI's counterclaim under the contract (Count I) or negligence (Count II). I

⁹ ISSI's damage claim rests on an unrealistic and unjustified premise as to what equipment ISSI needed for dredging, and it fails to account for other factors—for which NDI was not responsible—that contributed to the damage. See Findings of Fact ¶¶ 30-35, supra.

conclude that the consequence of NDI's failure to generate diggable rock within a ten per cent tolerance lowered the value of its contract performance by \$175,000 to \$1,032,561.16. That sum, \$175,000, is also the amount as to which ISSI can prove damages and causation on its counterclaim for breach of contract (Count I) or negligence (Count II). The number \$1,032,561.16 is the value of NDI's performance on a partial performance/*quantum meruit*, unjust enrichment or equitable accounting basis. The \$175,000 reduction is not a precise number that can be calculated arithmetically from specific exhibits. Neither is it an average nor an attempt to "split the difference." Instead, it is a factfinder's conclusion of what the approximately correct number is when the parties have presented damage numbers at the polar extremes in a factual setting of great uncertainty and difficulties of proof (*i.e.*, what happened underwater and why).¹⁰ The alternative is illusory certainty—either to conclude that performance was substantial, and that ISSI cannot prove the amount of its damages, with the result that NDI (unfairly)

¹⁰ The Maine Law Court has "made clear . . . that reasonableness, not mathematical certainty, is the criteri[on] for determining whether damages were awarded appropriately." Down East Energy Corp. v. RMR, Inc., 697 A.2d 417, 420 (Me. 1997). The Law Court then reiterated its statement in Merrill Trust Co. v. State, 417 A.2d 435, 440-41 (Me. 1980):

Damages are not fatally uncertain for the reason that the amount of the loss sustained is incapable of exact proof by mathematical demonstration. The triers of fact are allowed to act upon probable and inferential as well as direct and positive proof. They are permitted to make the most intelligible and probable estimate which the nature of the case will permit, given all the facts and circumstances having relevancy to show the probable amount of damages suffered. A monetary award based on a judgmental approximation is proper, provided the evidence establishes facts from which the amount of damages may be determined to a probability.

recovers everything; or to conclude that performance was not substantial, and that NDI cannot prove the value of its performance with the result that NDI (unfairly) recovers nothing.

D. Prompt Payment Statute

9. NDI has not made a prompt payment claim for amounts due on the expanded area.

10. It appears that sometime in the spring of 1999, ISSI began withholding amounts from NDI that ISSI had been paid by Atkinson. However, I cannot determine amounts that ISSI improperly withheld at that stage because at some point Atkinson itself withheld from ISSI \$145,000 of amounts attributable to NDI and, in addition, ISSI made certain payments to suppliers and other creditors on NDI's behalf. The parties have stipulated that \$403,431 of the contract price remains unpaid. After subtracting the \$145,000 withheld by Atkinson and the \$175,000 I have attributed to NDI's failure to perform fully, I conclude that \$83,431 was due as of May 20, 1999, under Maine's prompt payment statute, seven days after the final payment from Atkinson to ISSI with respect to NDI work. Therefore, interest on that amount began to run as of that date under 14 M.R.S.A. § 1602-A(2). See 10 M.R.S.A. § 1114(4) (West 1997).

11. NDI is also entitled to attorney fees under 10 M.R.S.A. § 1118(4) (West 1997), but it is not entitled to a penalty because ISSI acted in good faith, see 10 M.R.S.A. § 1118(1)-(3) (West 1997). Its attorney fees will have to be apportioned according to the degree of its success. See id. § 1118(4).

E. Bond Obligation

12. Because ISSI is not entitled to recover from NDI, ISSI has no right to recover on the Ranger performance and payment bond.

13. NDI is entitled to recover under the National Grange labor and material payment bond. See Pls.' Ex. 5 (second page). Although ISSI's liability was contested, no evidence was presented that any pre-condition of the National Grange bond has not been met. This obligation is joint and several with that of ISSI. See id. ¶ 2.

F. Other

14. Although ISSI would be entitled to recover \$175,000 on its counterclaim for breach of contract or negligence if NDI recovered the full contract price, this recovery disappears because I have reduced NDI's recovery by that amount.

15. I reaffirm the pre-trial and trial rulings that NDI's lawsuit is not to be dismissed for insufficient joinder in failing to make Atkinson a party. (ISSI was free to make Atkinson a party if it chose to do so.)

III. CONCLUSION

Underwater drilling and blasting is not a science and requires adjustment to conditions as they occur, with understanding and good working relations among the subcontractors on the site. Unfortunately, this subcontract was not a marriage made in heaven. Forest Bradbury, NDI's male principal, freely admits that he pays little attention to the wording of written contracts and that he unilaterally adjusts the job as he sees fit. He clearly had little regard for Robert Mason, the male

principal of ISSI. Mason was volatile on site by the testimony of more than one observer and had to be contractually restrained from interfering in NDI's work. He neglected to exercise ISSI's contractual right to dig the first blast to see what it would reveal. Communications between these two broke down quickly and irretrievably.¹¹

Both men also turned a convenient blind eye to what should have raised questions. NDI's Bradbury should have been bothered by the fact that two small crane baskets with teeth for stone were lying on the dredging barges, a suggestion as to what ISSI expected by way of dredging. ISSI's Mason did see the enlarging grid size being blasted, but never bothered to dig the product as a test dig to see the consequences.

I found the testimony of both Forest Bradbury and Robert Mason to lose credibility at critical points. Their inability to hear or understand or give straight answers to questions in the witness box came at convenient times. (The drilling, blasting and dredging business might create occupational hearing loss, but the lapses I observed at trial were broader than occupational injury.)

My findings, therefore, depend heavily on credibility judgments. The outcome will satisfy neither party.

¹¹ In fairness, I observe that the parties were working under very difficult winter conditions, with the time for this work drastically foreshortened by the sturgeon's lassitude in moving out of the area. Indeed, the early concerns were whether the drilling and blasting could be completed by March 31 given the late start in January.

IV. JUDGMENT

NDI shall recover jointly and severally against ISSI and National Grange \$228,431 of the amount withheld by ISSI (\$403,431 less \$175,000); \$140,000 for the expanded area; \$81,560 for the dredging barge; interest on \$83,431 to be calculated under the statute beginning May 20, 1999, for its prompt payment claim; and reasonable attorney fees, which will have to be apportioned.

ISSI shall recover nothing on its counterclaim against NDI or Ranger.

SO ORDERED.

DATED THIS 31ST DAY OF MARCH, 2000.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE

