

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

**ANCHORAGE, A MUNICIPAL  
CORPORATION,**

**Plaintiff,**

**v.**

**THE UNITED STATES OF AMERICA,**

**Defendant.**

**Case No. 14-166C**

**(Judge Damich)**

**PLAINTIFF’S RESPONSE TO THE COURT’S ORDER (ECF 254)**

**I. Introduction**

The Municipality of Anchorage (“Municipality” or “MOA”) seeks two categories of damages arising from the United States of America’s (“Government”) breach of contract: 1) \$180,839,807 for costs spent by the MOA for the Government to design and construct the defective OCSP system and related costs, which are referred to as “Impairment Damages; and 2) \$186,607,000 to remove and stabilize the OCSP system installed by the Government, which must be removed and stabilized because it is a safety hazard and will fail. The damages sought by the MOA for the Government’s breach of contract is \$367,446,807, which is a combination of those two categories of damages.

On December 9, 2021, the Court issued Order (ECF 254) requesting supporting evidence for the Impairment Damages – specifically the Court requested support for the \$188,980,786 on page 102 of ECF 241. As will be demonstrated below, this number is a combination of a part of the calculation performed by Mr. McGeehin to reach \$180,839,807, as summarized on PDX 3 page 3 (Attached as Ex. 1). (Tr 1168:3-1173:5) The \$188,980,786 represents the costs of design and construction of the OCSP up until the work was halted in 2010. It includes work performed by West Construction Company (“West”) to stabilize the OCSP just before the construction was stopped.

The differences between the \$188,980,786 and the \$180,839,807 claimed by MOA are other breach costs related to the defective design and construction of the OCSP that occurred after the construction was halted, along with a credits for the sale of sheet pile and gravel and for the settlement from the prior litigation in the Federal District Court Alaska. This includes items such as the suitability study – Corps of Engineers (COE), Task 8; ICRC Settlement Amounts with MarAd; credits for sales of sheet pile and gravel, and amounts received from the defendants in the Federal District Court in Alaska litigation. The \$180,839,807 is the final summary of all Impairment Damages caused by the defective OCSP. This summary will be demonstrated in more detail below.

The number of \$180,607,000 on page 49 of ECF 248 is simply a mistake. It should have been \$180,839,807.

Besides the areas of concern raised by the Court, Plaintiff has identified a third number in ECF 241 that requires explanation. On page 102 and 103 of ECF 241, MOA listed “Total Impairment Damages” as \$181,092,257. This number was the result of using a lower incorrect number for the credit for sales of sheet pile and gravel. When the correct credit is used, the correct total number for Impairment Damages, as explained below, is \$180,839,807. This error also resulted in an error of the total damages. The number of \$367,446,807 is the correct number.

The Court also requested a copy of PDX 3 which is attached as Exhibit A to this Response.

**II. The Number \$188,980,786 Is a Subset of PDX 3 Page 3 Which Summarizes Mr. McGeehin’s Testimony Relating to “Impairment Damages”**

To understand the \$188,980,786 number questioned by the Court, MOA refers the Court to the testimony of Mr. McGeehin, which is summarized on PDX 3, where he explains that the total of Impairment Damages is \$180,839,807. (Tr. 1168:3-1173:5) On page 3 of this demonstrative exhibit, Mr. McGeehin summarized his testimony concerning the “Impairment Damages” arising from defective design and construction of the OCSP. These categories are set forth below and the subsets that were used to calculate the \$188,980,786 are highlighted in yellow:

**SUMMARY OF DAMAGES<sup>1</sup>**

<i>Categories</i>	<i>Total Unusable</i>
<i>Percentages</i>	2,435 LF
	83.82%
OCSP-Construction Task Orders	\$126,264,016
OCSP Fill Materials Amounts	\$5,032,192
OCSP General Site Amounts	\$20,260,567
Subtotal	<u>\$151,556,774</u>
<i>Percentages</i>	100%
Corps of Engineers (COE), Task 8	3,397,900
ICRC Settlement Amounts with MarAd	11,279,059
OCSP Remediation Task Orders	\$32,421,056
OCSP Remediation General Site	\$5,002,955
Credit for Sales of Sheet Pile and Gravel	(3,467,936)
Subtotal	<u>48,633,033</u>
Subtotal	<u>200,189,807</u>
Less: Settlements from Prior Litigation	<u>(19,350,000)</u>
<b>Total</b>	<b><u>\$ 180,839,807</u></b>

When you add \$151,556,774 to the \$32,421,056 and the \$5,002,955, the total is \$188,980,785. The one dollar difference is a mistake in the \$151,556,774. If you total the numbers above the \$151,556,774 from PDX 3 they add up to \$151,556,775. The references to “OCSP Remediation Task Orders” and “OCSP Remediation General Site” are to work performed by West on the site before the work was shut down when West was directed to attempt to fix errors in prior

<sup>1</sup> Mr. McGeehin’s testimony supporting each of the numbers on PDX 3 p.3, can be found at TR 1168:3-1173:5. The left column of PDX 3 has been excluded here because it dealt with a 100% allocation of costs from the Task Orders rather than the 83.82% used for the damages sought. The column shown is Mr. McGeehin’s calculation for the damages sought for the cost of design and construction of the defective OCSP.

installation discovered by West and to stabilize the area before the work was shut down.<sup>2</sup> (Tr 1172:1-11)

To reach MOA's claim of \$180,839,807, you simply add the \$3,397,900 for Corps of Engineers (COE), Task 8, along with the ICRC settlement of \$11,279,059 to the \$188,980,785 and then deduct the \$3,467,936 for sales of sheet pile and gravel and the \$19,350,000 for the Settlements from Prior Litigation. These numbers are shaded in green for ease of identification.

**III. There Is An Error In Calculation On Page 102 Of ECF 241 Relating to Credits for Sales of Sheet Pile and Gravel, As Such The Number of \$181,092,257 Should Have Been \$180,839,807**

There is also error on page 102 of ECF 241 where the total amount of Impairment Damages is stated as \$181,092,257. This mistake relates to the sale of sheet pile and gravel. Added to the \$188,980,786 on page 102 of ECF 241 are the following:

ICRC Settlement with MARAD	\$11,279,059
Costs of Corp of Engineers Analysis	\$3,397,900
<b>Credit for Sale of Sheet Pile</b>	<b>(\$3,215,486)</b>
Subtotal of Damages	\$200,442,257
Less Settlement Proceeds Received by MOA	(\$19,350,000)
<b>Total Impairment Damages on page 102 of ECF 241</b>	<b>\$181,092,257</b>

These same categories of numbers appear on PDX 3 on page 3. However, the amount of the credit for sales of sheet pile and gravel in PDX 3 is (\$3,467,936), \$252,450 more than \$3,215,486 listed above from page 102 of ECF 241. Mr. McGeehin explained that this number is the result of added sale of sheet pile which occurred after his initial report. (Tr 1172:12-16) PDX 3, page 3 contains the correct amount (\$3,467,936). When you increase the credit to (\$3,467,936), the Total Impairment Damages drops to \$180,839,807. This is the same number listed above in the discussion relating to MOA's damages for the defective design and construction for the OCSP.

<sup>2</sup> The \$180,839,807 is for the impairment damages and is different than the cost of removing the defective structure discussed by Mr. Schoonmaker, which must be spent to stabilize the site and make it safe. That number is \$186,607,000. (Tr 1322:9-13)

The \$181,092,257 incorrect number also appears on pages 102, 103, 130 and 137 of ECF 241. In each instance, the number should be **\$180,839,807**.

The mistake on the credit for sale of sheet pile also impacts the total amount claimed. It is stated as \$367,699,257 on pages 2, 103, 129, 130, 137 and 138 of ECF 241. Additionally it is listed in Plaintiff's Reply to Defendant's Post Trial Brief,( ECF 248), on pages 39, 40, and 50. This number should be **\$367,446, 807** after the credit for the sale of sheet pile and gravel is corrected as described above.

**V. The Number \$180,607,000 On Page 49 of ECF 248 Is Simply An Error**

The number \$180,607,000 on page 49 of ECF 248 is simply an error. It should have been \$180,839,807.

**VI Damages Claimed by MOA**

MOA's total claimed damages are:

Total Impairment Damages	<b>\$180,839,807</b>
North Extension Stabilization and Repair	<b><u>\$186,607,000</u></b>
<b>Damages</b>	<b>\$367,446,807</b>

When compared to the number \$367,699,257 on page 103 of ECF 241, the difference is the \$252,450 correction of the credit for sold sheet pile and gravel referenced above.

DATED: December 17, 2021

Respectfully submitted,

MUNICIPALITY OF ANCHORAGE,

By counsel,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Response to the Court's Order (ECF 254) was served on this 17th day of December, 2021 via e-mail upon:

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*/s/ Jason N. Smith*

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