

so it could get its day in court.⁽¹⁾ When Congress passed the congressional reference resolution, Senator Simon stated that the Hardwicks deserve their day in court, and this act would ensure that they "get their long-awaited day in court and that justice is done." 139 Cong. Rec. S12296 (daily ed. Sept. 23, 1993).

When plaintiff filed its complaint in the congressional reference case, it requested that the case be assigned to this judge. *See Compl.* at 2. The parties stipulated that all documents, pleadings, evidence, prior findings, and testimony in the government contracts case (except anything contrary to the congressional reference or any motion or order to dismiss relating to 28 U.S.C. § 1500) be fully incorporated into the congressional reference case. *See Joint Preliminary Status Report* at 10 (filed Apr. 20, 1994). In February, March, and May 1995, this court received additional evidence at trial for the congressional reference case. On December 26, 1995, the U.S. Court of Appeals for the Federal Circuit reversed this court's ruling in the government contracts case and remanded that case for further proceedings. *Hardwick Bros. Co. II v. United States*, 72 F.3d 883, 886 (Fed. Cir. 1995).

On July 31, 1996, this court issued a lengthy Opinion in the government contracts case, holding that plaintiff was entitled to recover damages from defendant based upon plaintiff's breach of contract claim for over-inspection with regard to the Army Corps of Engineers' misinterpretation of the lift thickness requirement during a discrete period of contract performance. *Hardwick Bros. Co., II v. United States*, 36 Fed. Cl. 347, 402 (1996). The court found that such misinterpretation was plaintiff's only meritorious claim. This breach of contract claim was one small portion of plaintiff's case. This court denied the remainder of plaintiff's claims. *Id.* at 421-22. On March 26, 1997, this court awarded plaintiff \$28,145, plus CDA interest from April 4, 1986, in the government contracts case. That case is now on appeal to the Federal Circuit.

Notwithstanding the pendency of the Federal Circuit appeal, plaintiff now requests the court to issue a report in the congressional reference case. Defendant does not oppose the issuance of this report, but argues that the congressional reference no longer serves a purpose because plaintiff's case is receiving full consideration as a government contracts case. Defendant alternatively suggests that the court wait for the Federal Circuit's decision in the government contracts case before issuing its report. Plaintiff, however, argues that it is entitled to a resolution of its congressional reference case because of the equitable nature of its claims. Thus, plaintiff appears to be arguing that the same claims, although ultimately denied as legal claims in its contracts case, have merit independent of such denial, and that based upon the record before the court, it is entitled to a recommended recovery above the amount awarded as damages in its contracts case.

DISCUSSION

It is this court's understanding that the congressional reference was a way for this court to consider the claims raised in the government contracts case following the dismissal under 28 U.S.C. § 1500. *See S. Res. 91*, 103d Cong. (1993); *S. 745*, 103d Cong. (1993); 139 Cong. Rec. S12296. The congressional reference case and the government contracts case arise from the same underlying facts. Most of the claims in the congressional reference are similar to or overlap with plaintiff's claims in its government contracts action. When the Federal Circuit reversed and remanded the government contracts case, the foundational reason for the congressional reference no longer existed. Plaintiff has received and continues to receive its day in court because this court was allowed to issue its decision on the merits of the government contracts case. The Opinion in the government contracts case is attached as Appendix A to this Report. This Report shall be read in conjunction with the Opinion in the government contracts case. Essentially, the congressional reference case was overtaken by events in the government contracts

case.

Even if the court is wrong in its interpretation of the intent of Congress in the congressional reference, the court's lengthy and detailed 1996 Opinion effectively addresses and disposes of most of the claims raised in the congressional reference. A congressional reference case cannot reconsider legal claims made and rejected in a prior litigation. Sea-Gate, Inc. v. United States, 4 Cl. Ct. 25, 30 (1983).

In congressional reference cases, the court must decide whether plaintiff has a legal or equitable right to legislative relief in Congress or whether any relief would be a gratuity. Id.; see 28 U.S.C. § 2509(c) (1994). A legal claim is based on an invasion of a legal right, such as "one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." Spalding & Son, Inc. v. United States, 28 Fed. Cl. 242, 247 (1993) (quoting Tennessee Elec. Power Co. v. Tennessee Valley Auth., 306 U.S. 118, 137-38 (1939)). In this case, the legal claims are based on either contract or tort. To show an equitable right to monetary relief from Congress, plaintiff must show that the government committed a negligent or wrongful act, and that this act caused damage to plaintiff. Sea-Gate, 4 Cl. Ct. at 31. An equitable claim is considered when there is no existing remedy under existing law or the remedy has become barred by the statute of limitations. Spalding & Son, 28 Fed. Cl. at 250.

Many of the claims in the congressional reference are similar to the claims in the contracts action. Claims 1 through 15 in the congressional reference are the same as claims 1 through 15 in the government contracts suit. Therefore, the reasoning in the court's 1996 Opinion applies to claims 1 through 15 in the congressional reference case. Claims 16 through 23 in the congressional reference are additional claims. They are as follows:

16. Breach of contract by preventing Hardwick from filing its claim during contract performance;
17. Breach of covenant of good faith and fair dealing;
18. Tortious breach;
19. Spoliation of evidence;
20. Professional malpractice;
21. Interference with business relations;
22. Affirmative misrepresentation; and
23. Negligent misrepresentation.

Most, if not all, of the underlying issues raised in claims 16 through 23 of the congressional reference were addressed and rejected in the 1996 Opinion. Plaintiff may use different words to describe claims 16 through 23, but essentially they are the same claims the court considered in the government contracts case. The court specifically discussed plaintiff's bad faith and spoliation claims. Hardwick, 36 Fed. Cl. at 415-18. This discussion adequately addresses the allegations in claims 17 and 19 in the congressional reference. Claim 18 for tortious breach is a contract claim. See Travelers Indem. Co. v. United States, 16 Cl. Ct. 142, 150-51 (1988); H.H.O., Inc. v. United States, 7 Cl. Ct. 703, 706-07 (1985). The court has already decided plaintiff's contract claims and that same analysis applies to claim 18. The court addressed issues raised in claims 16 and 20 through 23 in its 1996 Opinion. 36 Fed. Cl. at 380-96, 405-

18 (discussing plaintiff's defective design claims, contour error claims, superior knowledge claims, differing site condition claims, defective specification claims, bad faith claims, and spoliation claims).

Plaintiff's tort claims in the congressional reference case were the same claims in its previous tort action against the Corps, which was voluntarily dismissed by plaintiff. The congressional reference resolution was passed so plaintiff could get its day in court because it was "thrown out of court." See 139 Cong. Rec. S12296. Plaintiff was not thrown out of district court. If the federal district court had ruled on plaintiff's tort claims, the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq.* (1994), would have applied. The court recommends that the FTCA apply to plaintiff's tort claims because Congress did not specifically waive the FTCA in the congressional reference resolution. See S. Res. 91.

Applying the FTCA, plaintiff's tort claims would be barred by two provisions. First, the FTCA precludes, "Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). The discretionary function exception protects government actions and decisions, which are based on considerations of public policy. United States v. Gaubert, 499 U.S. 315, 323-26 (1991) (holding federal regulators' supervision of savings and loan association's day-to-day operations was within discretionary function exception). The government conduct alleged in plaintiff's tort claims was discretionary. Administration of the levee construction contract involves the exercise of discretion on the part of government employees. See Boyle v. United Technologies Corp., 487 U.S. 500, 511 (1988) (holding that selection of appropriate design for military equipment was a discretionary function); Clark v United States, 805 F. Supp. 84, 88-90 (D.N.H. 1992) (holding negligence claim against Corps of Engineers for failure to enforce terms of contract was barred by discretionary function exception); Richardson v. United States, 776 F. Supp. 1373, 1377 (W.D. Ark. 1991) (holding assembly of contract specifications was a discretionary function).

Furthermore, the FTCA precludes, "Any claim arising out of . . . misrepresentation, deceit, or interference with contract rights . . ." 28 U.S.C. § 2680(h). Plaintiff's misrepresentation and deceit claims are barred explicitly by section 2680(h) of the FTCA. See Fridge Constr. Co., Inc. v. Federal Emergency Management Agency, 797 F. Supp. 1321, 1342 (S.D. Miss. 1991) (holding misrepresentation exception of the FTCA barred contractor's claim that agency negligently misrepresented estimates in contract specification). Section 2680(h) of the FTCA also bars plaintiff's claims for tortious interference with contract.

Even if plaintiff's tort claims are governed by equitable principles, the evidence does not support plaintiff's allegations. Plaintiff's tort claims can be summarized as allegations of bad faith on the part of government officials. There is a presumption that government officials perform their duties in a proper manner, and "well-nigh irrefragable proof" is required to rebut this presumption. See Sneed v. United States, 33 Fed. Cl. 303, 311 (1995) (congressional reference case); Essen Mall Properties v. United States, 21 Cl. Ct. 430, 443 (1990); Norwood Mfg., Inc. v. United States, 21 Cl. Ct. 300, 309 (1990); Embrey v. United States, 17 Cl. Ct. 617, 626 (1989); OAo Corp. v. United States, 17 Cl. Ct. 91, 106 (1989). As the following discussion demonstrates, plaintiff has not met its burden of proof.

Plaintiff's tort claims center primarily upon the alleged withholding of information, which prevented Hardwick from filing an earlier contract claim. Plaintiff maintains that the contract claim was extremely difficult and costly to prepare without the allegedly withheld information. One of the documents allegedly suppressed was the 1977 Morris memo, which was prepared by a Corps official and indicated that certain topographical deviations constituted a changed condition. Pl.'s Ex. 4. The Morris memo was written following a December 20, 1977 meeting between Corps and Hardwick representatives. Although Mr. Morris was a civil engineer, he was not experienced in topographical map making, topographical contours, or National Map Accuracy Standards. Corps officials undertook an investigation in response to

the Morris memo. The design engineers reviewed the memorandum and conducted a site visit in January 1978. The Corps's district office responded to the Morris memo. See Pl.'s Ex. 22. Plaintiff's Exhibit 22 stated that a topographical variance of 1 or 2 feet, which was mentioned in the Morris memo, would not be a sufficient basis for a contractor's claim of changed conditions. The Morris memo was not disclosed, in keeping with standard Corps practice. Hardwick, 36 Fed. Cl. at 371. Hardwick was not informed of the Corps's internal investigation in response to the memorandum prior to the government contracts litigation.

Plaintiff argues that the government's failure to disclose the Morris memo and Exhibit 22 prevented it from filing a formal differing site condition claim in 1977 or 1978. During the congressional reference trial, this court heard testimony that showed that the alleged withholding of the Morris memo did not impede Hardwick's ability to present a differing site condition claim for alleged topographical errors. Hardwick was not deprived of the opportunity to determine the actual elevation in the field. Congressional Reference Transcript ("Tr.") 515. Defendant's counsel read into the record, testimony from Deneen Hardwick, who admitted that as of December 20, 1977, the Hardwicks were aware that the plans showed the areas in question as being approximately an elevation of 621 when in reality those areas were elevation 619 to 620. Tr. 201. Hardwick's project manager, Alan Haberman, admitted that Hardwick had surveyed the areas listed in the Morris memo. Tr. 219. The Morris memo did not state the specific elevations in the field. Tr. 199. Mr. Haberman also admitted that Exhibit 22 did not contain any depictions of what the actual elevations were in the areas discussed in the Morris memo. Tr. 202. Mr. Haberman acknowledged that Hardwick told the government in 1977 that the actual conditions at the stations listed in the Morris memo differed materially from what was depicted in the plans to the point of constituting a differing site condition. Tr. 222.

Hardwick's consultants also possessed the necessary information to make a differing site condition claim for alleged topographical errors. Tr. 437, 441-42, 444. John Goodell, plaintiff's engineering consultant, wrote in his notebook on March 4, 1981, that Hardwick should have made some type of differing site condition claim before the dragline was moved to the project. Tr. 428-29. Mr. Goodell explained that when a contractor has to use different equipment than he anticipated when he bid the project, that circumstance is a major element of a changed condition. Tr. 428-29. There is insufficient evidence showing that defendant's failure to disclose the Morris memo and Exhibit 22 prevented Hardwick from filing a differing site condition claim or caused damage to plaintiff.

Plaintiff claims that defendant withheld information during its 1982 document review. Two of Hardwick's attorneys, Ronald Barker and Lawrence Lerner, reviewed documents relating to plaintiff's contract in the Corps's Glasgow office. The Corps interpreted plaintiff's counsel's request for document review as limited to the Glasgow project office and not the Kansas City district office. Tr. 1532. Plaintiff's counsel's request did not refer to the files in the district office. Tr. 1533. Based on the request being addressed to Mr. Palmateer, who was located at the project office, and listing certain files that were at the project office, the Corps reasonably interpreted that the request sought review of documents in the project office. See Tr. 1551. Certain documents, later produced to plaintiff, were not among those documents inspected by plaintiff's counsel in Glasgow. In the government contracts case, the court found that Mr. Palmateer, who supervised the Corps's inspectors on the project at issue, told Mr. Lerner that some documents were not produced. Hardwick, 36 Fed. Cl. at 377. Mr. Lerner did not request these unproduced documents at that time. Id. It is not defendant's fault that Mr. Lerner did not request the unproduced documents. Sufficient proof is lacking that the Corps acted wrongfully during the 1982 document review. See Hardwick, 36 Fed. Cl. at 417.

The court heard testimony that the original yellow copy of the Morris memo was located in the Kansas City district office's contracting file. Tr. 1545-46. At trial, defendant produced yellow copies of documents in numerical order, which were in this contracting file. Tr. 1544-46. Mr. Denker, who

worked at the Kansas City office in the Claim Section, testified that if a contractor came to the Kansas City office and asked to see the Corps's files, the contracting file would be available for review. Mr. Barker, who had not done a lot of Corps of Engineers work before the document review, testified that he reviewed files in the Kansas City office. Tr. 732, 757. Mr. Barker also testified that he did not recall that Mr. Lerner, who was a licensed engineer, accompanied him to the Kansas City office. Tr. 757. There is no direct evidence that Mr. Barker was denied access to the contracting file or to relevant documents. Based on the record, it is highly speculative that any so-called withholding of documents caused damage to Hardwick.

Plaintiff also maintains that the government committed wrongful acts during the claim review and the drafting of the contracting officer's decision. Plaintiff alleges that the Corps did not provide a fair claim review because the same engineering and construction personnel who were involved in the contract performance were also responsible for the technical review and recommendations on the claim. The Corps's actions complied with the Federal Acquisition Regulations ("FAR") because the FAR requires the contracting officer to secure assistance from legal and other advisors and to coordinate with the contract administration office or contracting office, as appropriate. 48 C.F.R. §§ 33.211(a)(2)-(3) (1986). Dale Holmes, the Corps's Chief Trial Attorney who prepared the final decision for the contracting officer, testified that the Corps followed its regulations during the claim review and the drafting of the final decision. Tr. 1097-99; see Def.'s Ex. 2407-10. The regulations permit an Office of Counsel attorney, with technical assistance from other appropriate staff members, to draft the contracting officer's decision. Def.'s Ex. 2407 at N-71-7. The contracting officer, Col. John Atkinson, testified that he read the entire claim and prepared questions for the staff. Tr. 1389-90. Col. Atkinson had several meetings with the staff regarding the claim. Tr. 1392. He testified that he independently evaluated plaintiff's claim. Tr. 1406, 1417, 1419. Col. Atkinson personally met with Deneen Hardwick and Alan Haberman before issuing his final decision. Tr. 272-73, 1393-94. At the meeting, Col. Atkinson mentioned that he did not find significant merit in Hardwick's claim and proposed alternative dispute resolution, which was rejected by Hardwick. Tr. 272-73, 1395-97. Col. Atkinson also stated that he considered plaintiff's two supplemental claims, and determined that they did not alter his final decision. Tr. 1399-1404, 1479-82. Based on the evidence, the court finds that the Corps followed standard procedure in reviewing the claim and drafting the contracting officer's decision and that there were no wrongful acts, which caused damage to plaintiff. (2)

CONCLUSION

Fairly considered, none of the evidence of record in this case including the additional evidence presented to the hearing officer at the separate hearings in Illinois, Missouri, and Washington, D.C. would support an additional monetary award to plaintiff on equitable grounds. Consequently, the hearing officer recommends that Congress award no amount to plaintiff in this proceeding because any such award would be a gratuity.

WILKES C. ROBINSON, Hearing Officer

1. When the court first learned that plaintiff had filed a tort action in federal district court, premised upon the same levee construction contract, this court was within approximately one week of issuance of the opinion in the government contracts case. The court's dismissal was premised upon application of binding legal precedent. See UNR Indus., Inc. v. United States, 962 F.2d 1013 (Fed. Cir. 1992).

2. Plaintiff also alleges that the government attorneys who handled the government contracts case engaged in unfair litigation practices. Plaintiff challenges defendant's interrogatory responses, its answer to plaintiff's complaint, its defenses, and its failure to settle the case. Based on the record, the court finds that these allegations lack merit. See Pl.'s Ex. 1334; Def.'s Ex. 2414, 2417. Considering that the court rejected all but one of plaintiff's claims in the government contracts case, the government attorneys were substantially justified in defending against plaintiff's complaint.