UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED: December 21, 2010

CBCA 1495

W. G. YATES AND SONS CONSTRUCTION COMPANY,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Stephen B. Hurlbut and Farah A. Khan of Akerman Senterfitt LLP, Vienna, VA, counsel for Appellant.

Lesley M. Busch, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **HYATT**, and **STEEL**.

HYATT, Board Judge.

Appellant, W.G. Yates and Sons Construction Company (Yates), has appealed a contracting officer's decision with respect to the calculation of an equitable adjustment for the impact of a revised Davis-Bacon Act wage rate adjustment that was incorporated after award into its contract to build the Federal Bureau of Investigation's (FBI's) field office in Houston, Texas. The revised wage rate determination had the greatest impact on the electrical work, and thus this appeal presents the claim of Yates' electrical subcontractor.

Findings of Fact

1. On October 26, 2004, the General Services Administration (GSA) issued a request for proposals (RFP) for the construction of a new field office building for the FBI

in Houston, Texas. Appeal File, Exhibits 3, 54; Transcript at 422-23. In January 2005, GSA determined that all the proposals submitted to it in response to the RFP were significantly over budget for the project, resulting in what GSA termed a "bid bust." *Id.* at 424.

2. In February 2005, GSA converted the RFP to a fee and general conditions approach with an initial value engineering phase followed by the award of a construction option. Appeal File, Exhibit 3. In the pre-construction value engineering services phase, for a stipend of $35,000, the contractor was to provide its ideas for reducing the cost of constructing the building. After completion of the value engineering phase, the Government had the option to award a contract for the construction phase. It was anticipated that the award would be for the firm fixed price of $54,045,000. This contract, number GS-07P-05-URC-5007, was awarded to Yates on March 31, 2005. Appeal File, Exhibit 3; Transcript at 425-28.

3. The value engineering phase was satisfactorily completed and on August 17, 2005, GSA issued modification PS03 to the contract and awarded the fixed price construction phase of the contract to Yates for the amount of $54,052,423. Respondent's Hearing Exhibit 3; Transcript at 454. Yates in turn awarded a fixed price subcontract for the electrical work to KenMor Electrical Company LP (KenMor). Respondent's Hearing Exhibit 4.

4. The contract contained clauses applicable to changes under fixed price contracts, including Federal Acquisition Regulation (FAR) 52.243-4, "Changes," and General Services Administration Acquisition Regulation (GSAR) 552-243-71, "Equitable Adjustments." The GSAR clause, which supplements the Changes clause, provided that an equitable adjustment would compensate the contractor for direct costs plus negotiated amounts for overhead, profit, and commission. Appeal File, Exhibit 2.

5. The Yates prime contract required that contractors pay applicable Davis-Bacon Act wages. In accordance with FAR 52.222-6(a),48 CFR 52.222-6(a) (2004), implementing the Davis-Bacon Act, ch. 411, 46 Stat.1494 (1931) current version at 40 U.S.C. §§ 3141-3144, 3146-3147 (2006)), the contract required that:

> All laborers and mechanics employed or working upon the site of the work will be paid unconditionally and not less often than once a week, and without subsequent deductions or rebates on any account . . . , the full amount of wages and bona fide fringe benefits (or cash equivalent thereof) due at the time of payment computed at rates not less than those contained in the wage

> determination of the Secretary of Labor which is attached hereto and made a part hereof . . . .

Appeal File, Exhibit 2. Pursuant to FAR 52.222-11, which was also incorporated in the contract, Yates was required to include the Davis-Bacon Act wage standards in its subcontracts.

6. With respect to electricians, a Department of Labor (DOL) wage determination dated August 20, 2004, was incorporated into the contract, requiring a minimum total wage rate of $18.51 per hour, composed of a direct labor rate of $14.68 and $3.83 for fringe benefits. Appeal File, Exhibits 1, 54; Transcript at 153.

7. On July 1, 2005, DOL issued a revised wage rate determination increasing the minimum wage for electricians to $29.98, consisting of $22.05 for direct labor and $7.93 for fringe benefits. The total difference between the wage rate decisions for electricians was $11.47 per hour ($29.98-$18.51). Appeal File, Exhibits 1, 4. The revised wage determination was not incorporated into the contract awarded on August 17, 2005. Respondent's Hearing Exhibit 3.

8. In February 2006, GSA's Procurement Management Review Board conducted a routine audit of the contract and determined that the revised wage determination should have been incorporated into modification PS03, which awarded the construction component of the contract. The contracting officer was told to modify the contract to incorporate the proper wage determination retroactively to the time of award in August 2005. Transcript at 430-31, 456-57; Supplemental Appeal File, Exhibit 64.

9. Bilateral modification PS06 to the contract, incorporating the revised wage determination into the contract, was executed on June 12, 2006. The modification directed that Yates and its subcontractors pay their workers in accordance with the revised wage determination retroactively and prospectively. A separate modification would be issued to address any cost changes resulting from the revised wage determination. The FAR Changes clause and the GSAR Equitable Adjustment clause were cited as authority for modifying the contract. Appeal File, Exhibit 4; Transcript at 154.

10. The contracting officer asked Yates to submit a proposal for both the past and future cost impact of the revised wage determination. Transcript at 433-34. Yates submitted a written proposal on November 8, 2006, estimating the total cost impact of the revised wage determination for the entire contract to be $1,420,596, including Yates' commission on subcontractor costs. Of this, the lion's share was attributable to KenMor, whose cost impact was projected to be approximately $1,323,959, including overhead and profit. Appeal File,

Exhibit 5. In December 2006, GSA obtained an estimate from its construction management contractor in the range of $1.88 million, excluding overhead and profit. This gave rise to concerns about the sufficiency of funds to complete the project. Transcript at 468-70, 474-75.

11. Subsequently, Yates and KenMor provided updated cost information associated with the new wage rates to GSA. In an e-mail message to a Yates employee dated September 13, 2007, the contracting officer stated: "Yates and GSA have agreed to use an actual method for the Davis-Bacon Act price adjustment." The contracting officer added that, pursuant to FAR clause 52.222-32, the contractor was not entitled to overhead and profit associated with the wage increase. This communication acknowledged that this clause was not actually incorporated in the contract, but stated that it should have been when the original solicitation was converted to the "fee and general conditions approach." Appeal File, Exhibit 9; Transcript at 278, 301.

12. FAR 52.222-32, Davis-Bacon Act - Price Adjustment (Actual Method) (Dec 2001), provides the following:

> (a) The wage determination issued under the Davis-Bacon Act by the [DOL] that is effective for an option to extend the term of the contract, will apply to that option period.
>
> . . . .
>
> (c) The Contracting Officer will adjust the contract price or contract unit price labor rates to reflect the Contractor's actual increase or decrease in wages and fringe benefits to the extent that the increase is made to comply with, or the decrease is voluntarily made by the Contractor as a result of –
>
> (1) Incorporation of the Department of Labor's Davis-Bacon Act wage determination applicable at the exercise of an option to extend the term of the contract; or
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> (2) Incorporation of a Davis-Bacon Act wage determination otherwise applied to the contract by operation of law.
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> (d) Any adjustment will be limited to increases or decreases in wages and fringe benefits as described in paragraph (c) of this clause, and the accompanying increases or decreases in social

> security and unemployment taxes and workers' compensation insurance, but will not otherwise include any amount for general and administrative costs, overhead, or profit.

48 CFR 52.222-32; Appeal File, Exhibit 9.

13. In September 2007, the contracting officer formally requested that the Regional Office of the Inspector General (OIG) audit the Davis-Bacon Act proposal. Appeal File, Exhibit 10; Transcript at 274, 440. The OIG reviewed its resources and determined that it could perform the audit. Transcript at 274. The following information was requested to be made available for that purpose:

> [W]e will need, at a minimum, (1) the basis of the original bid; (2) any change orders issued; (3) the payroll records; (4) the labor hours and dollars as recorded in the contractor's job cost system. The key information contained in the basis of the bid is the labor rate and the number of hours bid for each labor discipline for various components of the project. Also we are expecting to see a job cost system that will identify actual hours incurred by each labor category. We will not only identify all the actual labor hours bid at the Davis-Bacon wage rate that was in excess of the rate used in the bid, but whether or not all those hours were within their estimated and bid amounts - subject to increases or decreases resulting from change orders. Any incurred hours in excess of the bid hours that were not caused by Government change orders must be the result of the contractor's own inefficiencies and therefore not subject to reimbursement.

Appeal File, Exhibit 11.

14. By letter dated October 3, 2007, the contracting officer informed Yates that an audit would be performed on the cost proposals submitted with respect to the wage increases and identifying the back-up information that would be needed from Yates and its subcontractors. Appeal File, Exhibit 12.

15. In response to concerns expressed by Yates respecting delays in processing the increased wage rates being paid under the contract, on November 5, 2007, GSA issued unilateral modification PC54 to partially compensate Yates for the cost impact of the revised wage determination. The modification provided the following:

> Subject contract is modified to include Wage Rate revised 7/1/05 as per RFP 033. This modification is issued at a price not-to-exceed $75,000. The modification shall be definitized as to the price at a later date.

Appeal File, Exhibit 14. The Changes clause is identified as the authority for the modification.

16. In a letter dated November 21, 2007, the contracting officer requested that Yates provide additional information to permit the auditors to determine the price reasonableness of Yates' proposal. The information sought included original proposed hours of the affected trades and back-up documentation such as bid sheets and estimates to support the proposed hours. The letter also advised that, in accordance with FAR 22.404-12, overhead and profit on adjusted wage rates is not allowable. Finally, the contracting officer noted that it might be necessary for GSA auditors to visit the offices of affected subcontractors. Appeal File, Exhibit 16.

17. In a letter dated December 5, 2007, Yates objected to the request for bid information on the ground that it was entitled to, and the contracting officer had agreed to pay, actual costs incurred in complying with the change order implementing the revised Davis-Bacon wage determination. Nonetheless, Yates agreed that it would provide the requested documentation. Appeal File, Exhibit 17.

18. When the assigned auditor visited KenMor's offices, he told KenMor to provide a proposal based on the hours KenMor had estimated to complete the project. KenMor had not prepared such a proposal, but in response to pressure from the auditor that the audit could not proceed without one, KenMor hastily prepared a proposal in accordance with the auditor's directions, but made clear that it intended to submit a claim based on actual costs. Transcript at 181-82, 185-86, 490-91. The auditor told KenMor not to include any overhead or profit. The proposal, so prepared, came to the amount of $952,732.49. Transcript at 495; Appellant's Hearing Exhibit 5; Supplemental Appeal File, Exhibit 65.

19. GSA issued its final audit report on April 29, 2008, based on the proposal KenMor was required to provide using estimated labor hours. The audit disallowed $312,148 and concluded that KenMor was entitled to only $640,585 for the increased wages attributable to the revised wage determination. Appeal File, Exhibit 33. Although KenMor had offered to provide information showing its actual hours and costs, the OIG declined to audit this information, reasoning that, under its approach, the actual costs incurred by KenMor had no bearing on the proper price adjustment. Transcript at 180-81, 286-87, 491.

20. On May 22, 2008, the contracting officer informed Yates of the audit results and asked how Yates would like to proceed. Yates forwarded GSA's e-mail message to KenMor. KenMor informed Yates that it would not accept this amount as full compensation for the adjustment it was owed as a result of paying the increased wages to its workers. KenMor requested that GSA either allow it to reserve its rights to additional compensation or issue a unilateral modification for the undisputed amount. Appeal File, Exhibit 36.

21. On July 18, 2008, Yates submitted a certified pass-through claim on behalf of KenMor, seeking an adjustment of $1,064,891 attributable to the Davis-Bacon Act wage rate increase. This claim consisted of actual hours worked up to that time and projected hours to project completion. The claim included overhead and profit. KenMor's letter stated that:

> KenMor has and continues to incur additional costs complying with this change directive. We have been keeping Yates apprised of these costs by providing periodic requests for change orders detailing, on a month-by-month basis, the additional expenses. These change requests are based on actual hours worked and actual differences between each worker's regular hourly rate and the new project minimum wage scale.

Appeal File, Exhibit 40; Appellant's Hearing Exhibit 3.

22. On August 7, 2008, the contracting officer executed unilateral modification PC87, in the amount of $939,576, including the amount of $640,585, the costs allowed in the OIG's audit report, to compensate KenMor for the Davis-Bacon Act wage rate increase. Appeal File, Exhibit 43. On October 21, 2008, the contracting officer issued a decision on KenMor's pass-through claim acknowledging entitlement to an adjustment for the wage increase, determining that the proper amount of the adjustment was the amount allowed in the OIG audit report, and otherwise denying KenMor's claim for further compensation. Appeal File, Exhibit 54.

23. The contracting officer's decision explained the Government's rationale in pricing the adjustment as follows:

> The proposed hours were used in the OIG audit: since this is what the Government would have been responsible to pay had there been no increase in the wage rates. If Yates or its subcontractors actually perform the work in fewer hours than proposed, the appropriate contractor benefits from performing efficiently. Conversely, if Yates or its subcontractors actually

> perform the work using more hours [than] proposed, a liability may [be] incurred from performing less efficiently.

Appeal File, Exhibit 54.

24. Yates appealed the contracting officer's decision. The amount now claimed to compensate KenMor for the Davis-Bacon Act wage rate increase is $550,059.02. This represents KenMor's total claim offset by the partial payment made by GSA pursuant to modification PC87. Appeal File, Exhibit 57; Appellant's Hearing Exhibits 1, 3; Transcript at 200.

25. Yates presented considerable evidence at the hearing in support of its claimed costs. KenMor's bid was formulated using the wage rate included in the original RFP. Transcript at 60. The increase sought by Yates represents the baseline difference between the wages paid under the contract as it was awarded and the increased wage rate that KenMor was required to pay following the adoption of the revised wage determination. The claimed costs were based on the incremental increase in the wage rate plus labor burden incurred on these costs, project management cost, project accountant cost, overhead, profit, and bond costs. Appellant's Hearing Exhibit 1; Transcript at 192-94.

26. The contracting officer acknowledged in her testimony that she had no reason to challenge the accuracy of appellant's calculations of the costs it actually incurred in implementing the modified wage rates. She also agreed that she had no basis to assert that the number of hours KenMor worked on the project were excessive. The contracting officer also conceded that she had no reason to believe that appellant had included any contingency in its bid to cover the possibility that higher rates would be substituted. Transcript at 509-12.

27. Profit and overhead were generally authorized on other modifications issued pursuant to the Changes clause of the contract. KenMor used the same markups on the wage rates as it did for other changes that were routinely approved.

Discussion

The sole issue to be decided in this appeal concerns the method for calculating a price adjustment to the contract that appropriately accounts for the impact of the increased wage determination. Appellant argues the price adjustment should be calculated based on the increased costs incurred with respect to all affected, actual labor hours worked and should include profit and overhead in accordance with applicable contract clauses. The Government contends that it has already fully compensated appellant for the cost impact of

the modification of the wage rate because the price adjustment must be limited to costs attributable to the increased wage determination based on the labor hours estimated by KenMor in its bid. In addition, the Government asserts that standard markups such as overhead and profit are not permitted in calculating an adjustment for changes to the Davis-Bacon Act minimum wage.

Under the Davis-Bacon Act, contracts in excess of $2000 to which the United States is a party, for construction, alteration, or repair of public buildings or public works within the United States, must provide that any laborer or mechanic employed directly upon the site shall be paid no less than the prevailing wage rate as determined by the Secretary of the Department of Labor. *See also*, *United States v. Binghamton Construction Co.*, 347 U.S. 171, 172 (1954); *Twigg Corp. v. General Services Administration*, GSBCA 14639, 99-1 BCA ¶ 30,217, *modified on reconsideration on other grounds*, 99-1 BCA ¶ 30,310, 99-1 BCA ¶ 30,355, 48 CFR 22.403-1.

The Davis-Bacon Act is implemented in Part 22.4 of the FAR. The regulations contemplate that the prevailing wage rate in effect at the time of contract award will be included in the contract and will become the fixed minimum wage for laborers who perform under the contract for the duration of that contract. There is no requirement or expectation that subsequent revisions of wage determinations be made applicable to the contract. The Government is authorized and expected, however, to correct erroneous wage rates that are included in awarded contracts that are subject to the Davis-Bacon Act. FAR 22.404-6. When this is necessary, FAR 22.404-6(b)(5) provides that the "contracting officer shall modify the contract to incorporate the wage modification retroactive to the date of award and equitably adjust the contract price for any increased or decreased cost of performance resulting from any changed wage rates." *See also*, *Twigg Corp.*, 99-1 BCA at 149,496; Dahlstrom & Ferrell Construction Co., ASBCA 30741, 85-3 BCA ¶ 30,741; *Hendry Corp.*, B-179871, 75-1 CPD ¶ 189 (Apr. 1, 1975); 37 Comp Gen 326 (1957).[1]

Appellant maintains that the retroactive application of the current wage rate was accomplished by a modification under the contract's Changes clause and that under well-developed law, it is entitled to a price adjustment that reflects its increased cost of performance. In appellant's view, this requires an equitable adjustment that compensates it for the difference between the reasonable cost of the work required by the contract and the actual reasonable cost of performing the changed work, plus a reasonable amount of

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[1] DOL regulations similarly provide that contracts may be amended by change order to provide for retroactive application of Davis-Bacon wage rates in appropriate circumstances. 29 CFR 1.6(f) (2005); cf. *Reidell v. United States*, 43 Fed. Cl. 770 (1999).

overhead and profit. *6000 Metro LLC v. General Services Administration*, GSBCA 15731, et al., 04-1 BCA ¶ 32,510; *Stroh Corp. v. General Services Administration*. GSBCA 11029, 96-1 BCA ¶ 28,265, at 141,129.

GSA disagrees with appellant's analysis, and asserts that, in the context of a fixed price contract, the proper adjustment must be to the wage rates and must be limited to the number of hours the contractor estimated would be needed to perform the work. This, in GSA's view, puts KenMor in the same position it would have been in had it been aware of the revised wage rates in calculating its bid. GSA's contention that KenMor found itself in a loss position because it had bid insufficient resources to perform the work, however, is neither here nor there in terms of the proper approach for calculating the monetary adjustment to which appellant is entitled.

Although GSA is correct that this was a fixed price contract and that KenMor should not be permitted to use the Davis-Bacon Act adjustment to compensate it for a loss position in performing the contract, KenMor's approach does not, in fact, change KenMor's position with respect to its bid. GSA included a wage determination in the contract with which bidders were required to comply. It then modified the contract, retroactively, to require that wages be paid in accord with a substantially revised wage determination that was in effect at the time of award but had been overlooked. This caused KenMor to have to pay more than the base salary it offered in compliance with the initial wage determination. KenMor was obligated to pay the higher wages for all hours worked, whether included in the planned hours or not. Whether the planned hours were more or less than the actual hours is immaterial; both parties agree that the actual hours were reasonably devoted to the project. KenMor is not asking to be reimbursed anything other than the incremental increase above the rate for which it was responsible to pay its workers under the old determination. Payment of the incremental costs for all hours worked leaves KenMor's profit or loss position unchanged. With that payment, KenMor is in the same position it would have been but for the revised wage determination.[2]

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[2] This disposes of GSA's offhand assertion that KenMor's demand to be paid for the wage differential for hours that were not planned at the time of bid is a separate claim that is not before the Board. KenMor has consistently sought to be paid for the incremental impact of the increased wages it incurred as a direct consequence of the Government's modification of the contract to substitute the higher wage rates. KenMor's certified claim clearly sought the costs associated with all of the hours worked, Finding 21, and as such, the Board has jurisdiction over it.

This approach is consistent with settled law addressing the purpose of an equitable adjustment when some aspect of a contract has been modified by the Government. In general, when the contracting officer directs a specified change in contract terms and this change causes an increase or decrease in the cost of, or time required for, performance of contract work, the contracting officer shall make an equitable adjustment to the contract price. The Changes clause in the contract provides for an equitable adjustment if any change "causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed." *See* 48 CFR 52.243-4. Said another way, the formula for calculating an equitable adjustment is the difference between the reasonable cost of performing without the change and the reasonable cost of performing with the change. *Sauer Inc. v. Danzig*, 224 F.3d 1340, 1348 (Fed. Cir. 2000); *see also Electronic & Missile Facilities, Inc. v. United States*, 416 F.2d 1345, 1361 (Ct. Cl. 1969); *Paul Hardeman, Inc. v. United States*, 406 F.2d 1357, 1361-63 (Ct. Cl. 1969).

Because the purpose underlying an equitable adjustment is to safeguard both contractors and the Government against increased costs engendered by modifications, an equitable adjustment must be closely related to and contingent upon the altered position in which the contractor finds itself by reason of the modification. *Nager Electric Co. v. United States*, 442 F.2d 936, 946 (Ct. Cl. 1971); *Bruce Construction Corp. v. United States*, 324 F.2d 516, 518 (Ct. Cl. 1963). An adjustment should not increase or reduce a contractor's profit or loss, or convert any loss to a profit or vice versa, for reasons unrelated to a change. *Pacific Architects & Engineers Inc. v. United States*, 491 F.2d 734, 739 (Ct. Cl. 1974); *Keco Industries, Inc. v. United States*, 364 F.2d 838, 850 (Ct. Cl. 1966). Where a contractor has established its actual costs and correlated them to a particular modification of the contract, it is error to disallow, increase, or otherwise adjust those costs in the absence of specific evidence. *Teledyne McCormick–Selph v. United States*, 588 F.2d 808, 810 (Ct. Cl. 1978); *Dawson Construction Co.*, GSBCA 5364, 82-1 BCA ¶ 15,701. This established body of law fully supports recovery of the wage differential for all hours actually worked.

GSA also rejects appellant's position that its equitable adjustment calculations should be governed by the Changes clause. To the contrary, GSA maintains that FAR 22.404-12 sets forth a mandatory requirement obligating the contracting officer to have included one of four methods for compensating a contractor for changed labor costs attributable to the Davis- Bacon Act. This provision, entitled "[l]abor standards for contracts containing construction requirements and option provisions that extend the term of the contract," states:

> (a) Each time the contracting officer exercises an option to extend the term of a contract for construction, or a contract that includes substantial and segregable construction work, the

contracting officer must modify the contract to incorporate the most current wage determination.

. . . .

(c) The contracting officer must include in fixed-price contracts a clause that specifies one of the following methods, suitable to the interest of the Government, to provide an allowance for any increases or decreases in labor costs that result from the inclusion of the current wage determination at the exercise of an option to extend the term of the contract:

(1) The contracting officer may provide the offerors the opportunity to bid or propose separate prices for each option period. The contracting officer must not further adjust the contract price as a result of the incorporation of a new or revised wage determination at the exercise of each option to extend the term of the contract. Generally this method is used in construction-only contracts (with options to extend the term) that are not expected to exceed a total of 3 years.

(2) The contracting officer may include in the contract a separately specified pricing method that permits an adjustment to the contract price or contract labor unit price at the exercise of each option to extend the term of the contract. At the time of the option exercise, the contracting officer must incorporate a new wage determination into the contract, and must apply the specific pricing method to calculate the contract price adjustment. . . .

(3) The contracting officer may provide for a contract price adjustment based solely on a percentage rate determined by the contracting officer using a published economic indicator incorporated into the solicitation and resulting contract. At the exercise of each option to extend the term of the contract, the contracting officer will apply the percentage rate, based on the economic indicator, to the portion of the contract price or contract unit price designated in the contract clause as labor costs subject to the provisions of the Davis-Bacon Act. . . .

> (4) The contracting officer may provide a computation method to adjust the contract price to reflect the contractor's actual increase or decrease in wages and fringe benefits (combined) to the extent that the increase is made to comply with, or the decrease is voluntarily made by the contractor as a result of incorporation of, a new or revised wage determination at the exercise of the option to extend the term of the contract. Generally this method is appropriate for use only if contract requirements are predominately services subject to the Service Contract Act and the construction requirements are substantial and segregable. The methods used to adjust the contract price for the service requirements and the construction requirements would be similar.

GSA maintains that subparagraph (c)(4) is applicable here. The contract clause that implements the actual method approach is set forth in FAR 52.222-32. Finding 12. Since this clause was not inserted into this contract prior to award, GSA urges that it should be read into the contract by operation of law in accordance with the principle enunciated by the Court of Claims in *G. L. Christian & Associates v. United States*, 312 F.2d 418, 425 (Ct. Cl.), *rehearing denied*, 320 F.2d 345, *cert. denied*, 375 U.S. 954 (1963). Under the *Christian* doctrine, only a mandatory contract clause that expresses a significant or deeply ingrained strand of public procurement policy is considered to be included in a contract by operation of law. *S. J. Amoroso Construction Co. v. United States*, 12 F.3d 1072, 1075 (Fed. Cir. 1993); *General Engineering & Machine Works v. O'Keefe*, 991 F.2d 775, 779 (Fed. Cir. 1993);

GSA contends that this clause is mandatory and that the Davis-Bacon Act regulations reflect a significant public procurement policy. Appellant responds that the clause is not mandatory and that, even if it were, it does not apply to the situation at hand.

The main flaw in GSA's argument is that it focuses on a single clause, among many, in FAR Part 22. The particular FAR provision and the FAR clause on which it relies, when read as a whole, and in context, clearly apply to the exercise of an option to extend the term of a contract. GSA's attempt to invoke these provisions, and the accompanying clause, is strained at best. There is no price adjustment clause in the contract specific to the Davis-Bacon Act because the regulations contemplate that the prevailing wage rate will be incorporated into a construction contract at the time it is awarded and will establish the minimum wage for the duration of performance under that contract. FAR 22.404-6 provides guidance for the circumstances in which an outdated wage determination is mistakenly used. The clauses relied on by the Government apply when longer term arrangements, in which

the Government can extend the term of the contract, come into play. In those circumstances, the clauses added to the FAR in 2001 implement the Government's intent to ensure that extensions of such contracts use the current prevailing wage and provide for a mechanism to compensate the contractor. Despite GSA's valiant attempt to persuade the Board that they apply to this contract, we cannot find that they do, since the award of the construction phase of the contract was not an exercise of the type of option intended to be addressed by the subject clause.

Notably, the term "option" is defined under the FAR as "a unilateral right in a contract by which, for a specified time, the Government may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract." 48 CFR 2.101. The fee and general conditions approach adopted by GSA following the bid bust, Findings 1-2, contemplated a two-phase process -- a value engineering process, which, if successful, would lead to the separate award of the contract to construct the FBI building. As appellant points out, although GSA called the construction phase an option, the use of the term did not create the type of option contemplated in the FAR. The construction contract awarded is fundamentally the contract contemplated under the original solicitation, with value engineering changes that adjusted the original scope of work so that award could be made at or near GSA's target price. GSA had no unilateral right to order the construction phase of the contract at an established price. Rather, the parties had to work together to develop a mutually agreeable scope and price for the construction work. The "option" was not to extend the term of an existing contract, but to award or not award, depending on the circumstances.

Against this backdrop, the Actual Method clause identified by GSA is not relevant to this contract, even it if might be applicable to a contract containing option periods as that term is defined in the FAR. As such, even assuming that the clause meets the criteria for application of the *Christian* doctrine, there is no reason to consider reading it into the contract by operation of law.

The final point to address is the availability of profit and overhead on the equitable adjustment. Under the Changes clause, these cost elements are routinely added to the actual costs incurred to "make the contractor whole." Although the specific Davis-Bacon Act clause applicable to the exercise of option periods excludes these cost elements, absent the inclusion of a similar clause in the contract that directly applies on these facts, there is no basis to exclude these costs. It is not disputed that the modification increased the direct wage and fringe benefit costs of performing the contract. Under the FAR Part 31 cost principles, those direct costs must bear their pro rata share of indirect costs allocated under generally accepted accounting principles consistently applied. *See* FAR 31.203(c), (d). To the extent the claimed indirect costs are so allocated, they are properly a part of the equitable

adjustment. Similarly, consideration of profit is required in the determination of an equitable adjustment. This point was explained by the Armed Services Board in *Professional Services Unified, Inc.*, ASBCA 45799, 94-1 BCA ¶ 26,580, at 132,249 (1993). There, the board stated that an "equitable adjustment" for an increase in mandated minimum hourly wages and fringe benefits "necessarily makes provision for increased overhead and [general and administrative] costs and for a reasonable profit, unless these factors are expressly excluded by some pertinent contract provision." *BellSouth Communications Systems, Inc.*, ASBCA 45955, 94-3 BCA ¶ 27,231. There is no clause limiting appellant's recovery of these costs in this case.

Moreover, as the *BellSouth* decision noted, the argument for the categorical exclusion of indirect costs in this case assumes that such costs never increase with an increase in wage and fringe benefit rates; and that an increase in wage and fringe benefit rates has no effect on the contractor's risk, cost of financing, or other factors normally compensated by profit. 94-3 BCA 135,699. Here, GSA has not shown that this is the case and cannot do so because the auditors refused to audit on the basis of actual hours and indirect costs incurred by the contractor. Finding 18-19.

On the record before us, appellant has adduced credible evidence of the hours it incurred in performing the work and the actual cost of the wage differential it seeks under an equitable adjustment. The contracting officer testified that she has no basis on which to question appellant's calculations of hours and costs, and agreed that the auditors knowingly declined to audit actual costs. Finding 24. As such, we find that appellant has met its burden to prove the quantum it is owed.

Decision

The appeal is **GRANTED**. Appellant is entitled to the amount of $550,059.02, plus Contract Disputes Act interest from July 22, 2008, when its certified claim was received by respondent.

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CATHERINE B. HYATT
Board Judge

We concur:

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STEPHEN M. DANIELS	CANDIDA S. STEEL
Board Judge	Board Judge