UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: October 12, 2016

CBCA 5232

NATIVE AMERICAN CONSTRUCTION SERVICES, LLC,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

John M. Peebles and Ross D. Colburn of Fredericks Peebles & Morgan LLP, Sacramento, CA, counsel for Appellant.

Paul Sax, Office of the Regional Solicitor, Department of the Interior, Lakewood, CO, counsel for Respondent.

CHADWICK, Board Judge.

Native American Construction Services, LLC (NACS or appellant) timely appealed a contracting officer's decision denying its claim for $89,970.67 in damages for breach of a fixed-price contract by the Bureau of Land Management (BLM), a component of the Department of the Interior (respondent). NACS, a small business, elected the small claims procedure of Board Rule 52 (48 CFR 6101.52 (2015)), which provides for an accelerated, nonprecedential decision by a single board judge. A hearing was held on September 22, 2016. We deny the appeal for lack of evidence of damages.

Briefly stated, since October 2012, NACS has fed wild horses and burros that BLM captures and holds temporarily at a corral in Ridgecrest, California. NACS alleges that certain changes made by BLM to individual pens at the facility since contract award have obligated NACS employees to spend more time on site each day than NACS reasonably anticipated, and to transport hay to some of the pens using a small, "skid-steer" tractor, which

NACS owns but did not expect to use for the feeding work. (Under the contract, BLM supplies the contractor with a large tractor, a hay wagon, and hay.)

A party seeking damages for breach of contract bears the burden to prove legal liability, "the fact of loss with certainty," and "the amount of loss with sufficient certainty so that the determination of the amount of damages will be more than mere speculation." *Willems Industries, Inc. v. United States*, 295 F.2d 822, 830-31 (Ct. Cl. 1961); *see Nu-Way Concrete Co. v. Department of Homeland Security*, CBCA 1411, 11-1 BCA ¶ 34,636, at 170,698 (2010). "It is true, of course, that the proof of damages need not be exact. A reasonable basis is enough—but some convincing basis must be advanced." *Twigg Corp. v. General Services Administration*, GSBCA 14386, et al., 00-1 BCA ¶ 30,772, at 151,976.

Even if we found that BLM breached the contract in one or more of the ways that NACS alleges, we have no basis in this record to assign a dollar value to a breach. NACS offered no evidence that BLM's actions harmed NACS financially. The appellant's owner and one of the employees who feeds the animals testified in general terms that the use of new pens, changes in the configurations of some pens, and the introduction of hanging feeders in some pens have slowed the work. Yet NACS presented no evidence that we could use to compare the pace of feeding before and after these changes, and, more importantly, no payroll records or other evidence of what the extra time spent on site each day has cost NACS. Nor did NACS try to explain the absence of such hard evidence.

The evidence regarding the small tractor was similarly unhelpful. NACS says it began using this vehicle to move hay in October 2014. Through September 2015, however, NACS also used the small tractor to provide cleaning services at the corral, which were priced separately. NACS bore the burden to segregate the time it used the vehicle for feeding versus cleaning during the overlapping period. It offered no such breakout. And even if we looked only at the time period when NACS used the small tractor only to carry hay, the record contains no evidence of costs incurred by NACS for that use. Logically, it must cost NACS something to use its tractor, but we could only speculate as to what the costs might be.

In its post-hearing brief, NACS presents a damages calculation based on "current equipment and labor rates set by the U.S. General Services Administration ('GSA')." Appellant's Brief at 8. Citing rates published in GSA schedules for orders placed by federal agencies, NACS increases its claim from $89,970.67 to $146,452.93 "to reflect the current GSA rates." *Id*. at 33. The basic flaw in this approach is that there is no evidence that NACS paid "GSA rates" for its employees or its tractor, and expectancy damages for breach are based on the increase in the claimant's "actual costs" attributable to the breach, not on the supposed value to the breaching party of the extra work. *E.g.*, *Energy Northwest v. United States*, 641 F.3d 1300, 1305-06 (Fed. Cir. 2011); *see also Arcadis U.S., Inc. v. Department*

of the Interior, CBCA 918, 08-1 BCA ¶ 33,807, at 167,353-54 (quantum meruit may be awarded only absent a valid contract). The same principle would apply if we characterized the relief NACS seeks as an equitable adjustment of the contract price, rather than as breach damages. *See Nager Electric Co. v. United States*, 442 F.2d 936, 946 (Ct. C1. 1971).

NACS argues alternatively that we could award damages by the "jury verdict" method. We cannot do so, however, "when the party seeking relief, as is the case here, has failed to provide credible support for its alleged costs." *Donahue Electric, Inc.*, VABCA 6618, 03-1 BCA ¶ 32,129, at 158,827-28, *quoted in Douglas P. Fleming, LLC v. Department of Veterans Affairs*, CBCA 3655, et al., slip op. at 21 (Sept. 27, 2016). Even if we found the respondent liable, we simply have no evidence of the appellant's increased costs.

Decision

The appeal is **DENIED**.

KYLE CHADWICK
Board Judge