UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: February 22, 2016

CBCA 4957

HAMILTON PACIFIC CHAMBERLAIN, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Sean Milani-nia and Ryan Stalnaker of Fox Rothschild LLP, Washington, DC, counsel for Appellant.

Neil S. Deol, Office of General Counsel, Department of Veterans Affairs, Decatur, GA, counsel for Respondent.

WALTERS, Board Judge.

Appellant, Hamilton Pacific Chamberlain, LLC (HPC), a small business entity, has elected to proceed under the small claims procedure of Board Rule 52, Small Claims Procedure, requiring a decision on the appeal within 120 calendar days from receipt of the election. Under the small claims procedure, "[t]he presiding judge may issue a decision, which may be in summary form, orally or in writing. . . . A decision shall be final and conclusive and shall not be set aside except in the case of fraud. A decision shall have no value as precedent." 48 CFR 6101.52 (2014). The parties, HPC and the Department of Veterans Affairs (VA), also both elected to have this appeal processed under Board Rule 19, Submission on the Record Without a Hearing, and have each submitted briefs and relevant documents which have been admitted into the record.

Background

The instant appeal arises from a three-phase contract awarded by VA to HPC, contract VA245-13-C-0069, for renovation of certain areas of buildings 217 and 500 at the VA Medical Center in Martinsburg, West Virginia. At issue is the pricing of two contract modifications – modifications P00002 and P00006. These modifications correspond to two requests for proposal (RFPs) – RFP 4 and RFP 7. Extensive negotiations between the parties failed to yield agreement as to the equitable adjustments for either modification. VA issued modification P00002, expressly characterizing it as "unilateral modification" in the February 28, 2014, email message to HPC that forwarded the modification document. Notwithstanding that characterization, the document contained a signature line on the first page for "Paul Hamilton, VP," HPC's Executive Vice President, Mr. Paul Hamilton, as well as the following release language on the document's second page:

> The consideration represents a complete equitable adjustment for all costs, direct and indirect, associated with the work and time agreed to herein, including but not limited to all costs incurred for extended overhead, supervision, disruption or suspension of work, labor inefficiencies, and this change's impact on unchanged work.

In his affidavit, Mr. Hamilton indicates he took the signature line with his name to be an "instruction that the Contractor was required to sign the modification." Mr. Hamilton did sign the modification document, but states that he did not notice the release language on the document's second page. HPC maintains that Mr. Hamilton had no intention to waive HPC's claim for the amounts in dispute when signing modification P00002.

Modification P00006, Mr. Hamilton asserts, was likewise provided to HPC for signature, despite the VA's awareness "that HPC disputed the costs included in that modification." He signed that modification on July 25, 2014, but, upon discovering release language on the second page (the same language that had appeared on the second page of modification P00002), crossed it out and signed where the language had been excised.

HPC submitted a request for equitable adjustment (REA) in January 2015, seeking additional reimbursement for the work under the two modifications. The parties were unable to come to agreement on the REA, and HPC submitted a "certified claim" to the VA contracting officer on May 20, 2015, in the total amount of $99,372.89, to recover the pricing differences between the amounts specified under the modifications and the amounts it had proposed for each modification, as well as additional amounts of alleged damages for delay to its contract performance purportedly caused by VA's delay in issuing the two modifications, plus $7426 allegedly incurred in preparation of the "certified claim." By

letter dated July 14, 2015, the contracting officer issued a final decision denying the claim in its entirety. HPC timely appealed the denial to the Board.

Discussion

The parties are in agreement that HPC was entitled to an equitable adjustment for the changes effected by modifications P00002 and P00006. They disagree as to the amounts due for each modification. As a preliminary matter, VA asserts that any entitlement to further compensation for modification P00002 was relinquished when Mr. Hamilton executed that modification, including its release language, without noting any exceptions. Under the circumstances presented, it is not at all clear that HPC had any intention of waiving further claim to adjustment under modification P00002, notwithstanding the release language. Mr. Hamilton disclaims any awareness of the inclusion of that language at the time he signed the modification document, and the contracting officer's having presented modification P00002 as a "unilateral modification" belies the notion that both parties intended it to represent a complete resolution of all claims regarding the additional work.

Having dispensed with the argument that further recovery here is barred by reason of accord and satisfaction, we turn to proof of quantum. In *Nu-Way Concrete Co. v. Department of Homeland Security*, CBCA 1411, 11-1 BCA ¶ 34,636 (2010), the Board provided the following guidance:

> An equitable adjustment encompasses the quantitative difference between the reasonable cost of performance without the added, deleted, or substituted work, and the reasonable costs of performance with the addition, deletion, or substitution. *J.L. Simmons Co. v. United States*, 412 F.2d 1360, 1370 (Ct. Cl. 1969) (citing *Bruce Construction Corp. v. United States*, 324 F.2d 516, 519 (Ct. Cl. 1963)). "When a party seeks recovery of costs incurred, it has 'the burden of proving the amount . . . with sufficient certainty so that the determination of the amount . . . will be more than mere speculation.'" *Benmol Corp. v. Department of the Treasury*, GSBCA 16374-TD, 05-1 BCA ¶ 32,897, at 162,979 (citing *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 767 (Fed. Cir. 1987) (quoting *Willems Industries, Inc. v. United States*, 295 F.2d 822, 831 (Ct. Cl. 1961)); *Advanced Materials, Inc. v. United States*, 54 Fed. Cl. 207, 209 (2002); *Twigg Corp. v. General Services Administration*, GSBCA 14386, et al., 00-1 BCA ¶ 30,772, at 151,975). "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.*, 00-1 BCA at 151,976.

Id. at 170,698.

In the present case, in terms of pricing the costs of the changed work, the work added under both modifications and the work deleted in conjunction with modification P00006, HPC posits that its pricing – which is based on actual costs incurred by HPC for its own work and paid to subcontractors and suppliers for the added work, as well as actual credits provided by its subcontractors for work deleted – should trump the cost estimates developed by VA and incorporated into its pricing of the two modifications, since the work has been completed. Case precedent clearly favors the use of actual costs for contract modifications when work has been completed. Indeed, we note that in another Board case, *Reliable Contracting Group, LLC v. Department of Veterans Affairs*, CBCA 1539, 11-2 BCA ¶ 34,882, VA itself put forth this very proposition: "The VA argues it should not have to pay the labor costs because the claimed amount should be based on actual costs as opposed to estimated costs, since the change has been performed." *Id.* at 171,563. *In Reliable*, VA sought to avoid having to pay for any labor costs, where the contractor had not kept track of actual labor costs as they were being incurred to perform changed work. The Board, in that instance, recognized that labor was part of the additional costs involved and found acceptable the use of cost estimates to price that one cost element. *Id.* (citing *Environmental Safety Consultants, Inc.*, ASBCA 53485, 05-1 BCA ¶ 32,903, at 163,019). Here, as evidenced in Mr. Hamilton's affidavit, HPC kept track of its actual labor hours and costs and was able to substantiate with actual cost records each of the other cost elements involved in the performance of both modifications. Under such circumstances, the Board finds HPC to have borne its burden of proving quantum, at least insofar as it pertains to pricing the cost of performing the new work.

By the same token, aside from questions the Board might have regarding the manner in which HPC quantified delay damages in conjunction with the two modifications, HPC has failed to provide proof of *entitlement* to such damages. HPC argues that it lacks funds to afford a scheduling expert to prove critical path delay, and that the Board should accordingly apply a "jury verdict" approach when addressing delay damages. Whether or not the modifications, as HPC asserts, were aimed at correcting government design deficiencies – and whether or not delays associated with obtaining direction to proceed with the new work would thus be rendered "unreasonable" per se for purposes of recovery of delay damages under the standard Suspension of Work clause, *see, e.g.*, *P.J. Dick Inc.*, VABCA 5597, et al., 01-2 BCA ¶ 31,647, at 156,345, and cases cited therein – HPC has not explained, let alone demonstrated, how any delay to the work under the two modifications caused its overall contract performance time to be extended such that delay damages would even be appropriate. Here, without proof of *some* delay to the project's critical path, with or without the use of a scheduling expert, the Board cannot entertain alternative methods for quantifying delay damages. Such damages simply are not recoverable.

Finally, in terms of the claim preparation costs HPC had sought, we note that HPC has properly withdrawn its claim to such costs, acknowledging that their recovery is not allowable under the provisions of the Federal Acquisition Regulation (FAR) Cost Principles, FAR 31.205-47. 48 CFR 31.205-47 (2014).

Applying the above analysis to the dollars HPC had claimed, the Board holds that HPC is entitled to a total of $59,013.96, which amount is derived as follows:

Modification P00002 (RFP 4) Cost Difference (Government Estimates versus Actual Costs)	$11,897.07
Modification P00006 (RFP 7) Cost Difference	47,116.89
Total Due	$59,013.96

Decision

In light of the foregoing, the appeal is **GRANTED IN PART**. HPC should be paid $59,013.96.

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RICHARD C. WALTERS
Board Judge