



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CBCA 5841, 6070, 6260 DENIED; CBCA 6952 DENIED IN PART:
July 25, 2023

FACILITY DEFENSE CONSULTANTS, INC.
dba HANKE CONSTRUCTORS,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Leonard R. Ruzicka of Ruzicka Law Firm, LLC, St. Louis MO, counsel for Appellant.

David G. Fagan, Office of General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

Before Board Judges **LESTER**, **VERGILIO**, and **GOODMAN**.

GOODMAN, Board Judge.

Appellant, Facility Defense Consultants, Inc. dba Hanke Constructors (Hanke), and respondent, Department of Veterans Affairs (VA), have filed cross-motions for summary judgment in CBCA 5841, 6070, and 6260 and cross-motions for partial summary judgment in CBCA 6952.¹ We grant respondent's motion for summary judgment and deny appellant's motion in CBCA 5841, 6070, and 6260, and we deny those appeals. We grant respondent's motion for partial summary judgment in CBCA 6952 and deny that portion of the appeal which is the subject of the motion.²

¹ These appeals are consolidated with CBCA 5967 and 6614, which are not the subject of the parties' motions.

² During briefing, appellant withdrew its cross-motion for summary judgment in CBCA 6952, but it continues to oppose respondent's motion.

Background

The Contract

On October 13, 2011, contract VA260-C-0909 (the contract) was awarded to appellant by the VA as a firm-fixed-price contract, in the amount of \$7,009,194, to provide all necessary equipment, labor, materials, and supervision to design and construct a new, 22,700-gross-square-foot Specialty Care Clinic for the VA Medical Center in Walla Walla, Washington. Appeal File, Exhibit 2.³

The VA issued six modifications to the contract. The parties' motions for summary judgment in CBCA 5841, 6070, and 6260 concern modifications P00003 (mod 3) and P00004 (mod 4) and appellant's claims for what appellant characterizes as "scope creep." A claim with regard to alleged increased costs for extra interior walls is the subject of the agency's motion for partial summary judgment in CBCA 6952.

Requests for Equitable Adjustments (REAs) 1 and 2

On April 15, 2016, appellant's president, Mr. Brett Hanke,⁴ submitted an REA (REA 1) to respondent's contracting officer,⁵ which was titled in the subject heading: "Request for Equitable Adjustment Due to Government Caused Delays in the Design Process ('Design Delay REA') and Change in Scope due to Government Design Directives ('Scope REA')" and sought compensation for alleged Government-caused delays, "scope creep," and construction cost increases between 2011 and 2016. Exhibit 6 at 01869-74. In the REA, appellant stated:

[A]ttached is Exhibit A which identifies the bid results in 2011 versus the current projected cost of the Project which demonstrates \$3.6 million increase in costs to perform the work which will be covered in more detail in section 2 below. . . . Hanke has or will incur \$3.6 million dollars more in cost to

³ All exhibits are found in the appeal file, unless otherwise noted.

⁴ Mr. Hanke submitted all REAs, requests for contracting officer final decisions, and appellant emails referenced in this decision. Appellant has also submitted several affidavits from Mr. Hanke in support of its motions for summary judgment and in opposition to respondent's motions.

⁵ The same individual is the contracting officer referred to throughout this decision. Respondent has submitted an affidavit from the contracting officer in support of its motions for summary judgment.

perform, unabsorbed overhead and additional design costs due to the VA caused design delays.

Id. at 01869, 01873.

Exhibit A to REA 1 is a schedule of values listing various categories that show the difference between appellant's 2011 contract bid pricing and the same pricing in 2016, including any alleged changes required by the VA. Exhibit 6 at 01875-76. The total claim in REA 1 is not specifically stated as a dollar amount but can be calculated from the schedule of values: Total 2016 costs (\$10,594,652.64 [soft costs: \$2,119,539.64 + subcontractor costs: \$8,058,747]) - Total original 2011 contract costs (\$7,009,193.48 [soft costs: \$1,661,150.48 + subcontractor costs: \$5,348,043]) = \$3,585,459.16. *Id.* The \$3.6 million referred to elsewhere in REA 1 appears to be an approximation of this total.

REA 1 reads with regard to the claim of "scope creep":

Scope REA

.....

The present design has included these scope changes as directed by the VA representatives and the increase[d] pricing in Exhibit A is *to some degree* a result of these scope changes. *Hanke will be submitting a follow up letter with more details on the changes in scope and the increase in pricing due to these changes when those increases can be identified from subcontractor bids.* There may be an opportunity to redesign to the original design intent to avoid some of these costs without further time delays and Hanke will work with the VA to identify any such opportunities.

Id. at 01873 (emphasis added).

On June 2, 2016, appellant submitted another REA (REA 2), titled in the subject heading "Request for Equitable Adjustment Due to Government Caused Delays in the Design Process ('Design Delay REA') and Change in Scope due to Government Design Directives ('Scope REA')." Exhibit 5 at 01598-600. REA 2 did not include a dollar amount in its narrative but included a schedule of values. *Id.* at 01602-03. The schedule of values, as to categories and the amounts claimed, is identical to the schedule of values in REA 1, with one

exception,⁶ and appellant again claimed a total of \$3,585,459.16. *Id.* REA 2 also includes a spreadsheet entitled “Subcontractor Quotes,” which was not included in REA 1, that identifies subcontractors by name and their 2016 pricing for the subcontractor costs listed in the schedule of values, showing identical values as in REA 1. *Id.* at 01604-07.

Mod 3

The VA issued mod 3 unilaterally on August 24, 2016, to fund a portion of REAs 1 and 2 in the amount of \$1,000,000. Exhibit 5 at 01431-32.

Mod 3 states in relevant part:

It has been determined necessary and in the best interest of the government to fund *a portion of the contractor’s request for equitable adjustment (REA) for government-caused delays and construction cost increases, pending completion of negotiations.* Accordingly, the contract is modified as follows.

1. GOVERNMENT-CAUSED DELAY AND CONSTRUCTION COST INCREASE

The contractor has submitted a REA for government-caused delays, *scope requirements creep* and construction cost increases. The government and the contractor are working diligently to negotiate a fair and reasonable settlement of the contractor’s request.

This unilateral modification is for construction cost increases and general conditions.

This unilateral modification will be definitized by a future bilateral modification. The amount of the definitizing modification will be the amount of the negotiated REA agreement less the amount of this unilateral modification.

Unilateral Price Adjustment: \$1,000,000.00

⁶ In the schedule of values in REA 2, total costs for heating, ventilation, and air conditioning (HVAC) were divided between two categories, HVAC Equipment and Ground Source System, Exhibit 5 at 1603, while in the schedule of values in REA 1, the total costs are listed as one amount in the category HVAC. Exhibit 6 at 01876.

2. DEFINITIZATION SCHEDULE

The contractor and the government are identifying cost saving initiatives in an effort to keep contract costs within program funding requirements. *A settlement agreement cannot be reached until the cost initiatives are fully identified and priced.*

Additionally, the contractor is asserting that there was scope requirements creep due to the design standard enforced by the government. Those impacts must be identified and priced prior to reaching a settlement agreement.

This modification will be definitized after agreement of cost saving initiatives and scope requirements creep is negotiated and prior to contract close out.

3. CONTRACT PERIOD OF PERFORMANCE

The contract period of performance of performance remains unchanged. The calculated completion date for final deliverables remains October 3, 2016.

4. CONTRACT AWARD AMOUNT

The contract award amount of \$7,064,134.00 is hereby increased by \$1,000,000.00 to \$8,064,134.00.

Exhibit 5 at 01432 (emphasis added).

REA 3

On October 24, 2016, two months after mod 3 was issued to fund a portion of REAs 1 and 2, appellant submitted another REA (REA 3) in which the total claim increased to \$3,733,078.23. Exhibit 7 at 02348-50. REA 3 stated in the subject heading: "Request for Equitable Adjustment Due to Government Caused Delays In the Design Process ('Design Delay REA')." Unlike REAs 1 and 2, it did not include in the subject heading the phrase "and Change in Scope due to Government Design Directives ('Scope REA')." The change in the total claim amount was the result of the following, as stated in REA 3:

Subcontractor/Supplier Pricing

Please see attached Exhibit B with subcontractor/supplier subcontract/purchase order values. *These values show the actual cost of construction in 2016.*

Id. at 02349 (emphasis added).

Exhibit B referred to in REA 3 is a schedule of values containing categories identical to those in Exhibit A in REA 1 and the same schedule in REA 2 with respect to subcontractor costs. The 2011 costs are identical to those in REAs 1 and 2. However, with regard to the 2016 costs referred to above, the amount of every subcontractor cost associated with these categories for 2016 differed from the amounts in REAs 1 and 2, with some increasing and some decreasing.

The total claim in REA 3 is calculated in this schedule of values as: Total 2016 costs (\$10,742,271.71 [soft costs: \$2,565,559.64 + subcontractor costs: \$8,176,712.07]) - Total original 2011 contract costs (\$7,009,193.48 [soft costs: \$1,661,150.48 + subcontractor costs: \$5,348,043]) = \$3,733,078.23. Exhibit 7 at 02352-53.

The 2016 soft costs increased by \$29,654 and subcontractor costs increased by \$117,965.07, for a total increase in REA 3 from REAs 1 and 2 of \$147,619.07. Exhibit 7 at 02352-53. As the increase in the total claim in REA 3 from the total of REAs 1 and 2 arises from changes in subcontractor costs, appellant's pricing of REA 3 appears to be the result of appellant's stated intent in REA 1 that "*Hanke will be submitting a follow up letter with more details on the changes in scope and the increase in pricing due to these changes when those increases can be identified from subcontractor bids.*" Exhibit 6 at 01873 (emphasis added).

Communication Before Mod 4

On November 7, 2016, the contracting officer sent appellant an email in response to REA 3. Exhibit 6 at 02318. The email stated in relevant part:

The amount of the REA is \$3,733,078.23. Please confirm, as I need a starting point. . . . Are the following changes in your cost data submitted? I know we were not going to include some of this, but the reality is that it will play into what I can offer as a settlement. . . . Are there additional changes that I am not aware of? . . . **Also**, because of the \$10.0 million limit on the minor funding program, I need hard numbers for the known changes before I can formulate the VA's offer.

Id. at 02318-19 (emphasis in original). Included in a list of changes, the contracting officer inquired:

HVAC Controls (Per April 14, 2016 letter, the increase for controls is \$56,124.28. Please confirm price and whether or not it is included in the REA number just submitted.)

Id. at 02319.

Mr. Hanke responded via email on November 17, 2016, inserting this response into the text of the contracting officer's email:

Yes, the \$56,124.28 is included in the REA as the Modification [mod 2] for the controls was issued as a \$0 Modification.⁷

Exhibit 6 at 02319. Mr. Hanke also stated that “[t]he \$3,733,078.23 for this REA is the starting point for the total additional costs from the original contract of \$7,009,193.48, thereby totaling a new contract amount of \$10,742,271.71.” *Id.* at 02318. In addition, Mr. Hanke responded to the contracting officer's question concerning any “additional changes that I am not aware of” by stating that appellant is “in the process of ensuring all costs related to VA comments have been resolved and plan to have these cost changes resolved no later than December 16.” *Id.* at 02319.

On December 15, 2016, having received no further “costs related to VA comments” from appellant, the contracting officer sent appellant another email with the final amount that the VA was able to offer to settle all costs associated with the REAs—\$2,659,003,⁸ which included the \$1,000,000 paid via mod 3. Exhibit 6 at 02316. The offer was therefore an additional \$1,659,003, and the contracting officer informed appellant that, because of the value of the modification, a certificate of current cost or pricing data for modifications in excess of \$750,000 was required. *Id.*

On January 27, 2017, appellant submitted a signed certificate of current cost or pricing data as required by FAR 15.403-4. Exhibit 6 at 02305. The certificate states that the cost or pricing data “in support of [mod 4] are accurate, complete, and current as of December 15, 2016,” and that the date of December 15, 2016, is “the day, month, and year when price negotiations were concluded and price agreement was reached, or if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price.”

⁷ The costs claimed for HVAC increased in REA 3 by \$146,994 from the amount claimed in the schedule of values of subcontractor costs in REAs 1 and 2—\$928,702 (Exhibit 6 at 01876 and Exhibit 5 at 01703, where the amount was split between HVAC and Ground Source System) to the amount claimed in the schedule of values of subcontractor costs in REA 3—\$1,075,696. Exhibit 7 at 02353.

⁸ This amount was noted as “Settlement Agreement” in the email.

Mod 4

On March 22, 2017, bilateral mod 4 in the amount of \$1,659,003 was executed by Mr. Hanke and the contracting officer. Exhibit 6 at 02312-13. Mod 4 read in relevant part:

It has been determined necessary and in the best interest of the government to incorporate *the settlement agreement* for the contractor's request for equitable adjustment (REA) and to *definitize contract modifications P00001, P00002 and P00003*. Accordingly, the contract is modified as follows.

1. REA – GOVERNMENT-CAUSED DELAYS, CONSTRUCTION COST INCREASES

The Government and the Contractor have reached an agreement regarding Government-caused delays and associated construction cost increases. The negotiated increase is \$2,659,003.00, of which \$1,000,000.00 was paid via Modification P00003, effective August 24, 2016. The remaining settlement amount to be paid via Modification P00004 is \$1,659,003.00.

Negotiated Cost Increase: \$1,659,003.00.

2. DEFINITIZE PREVIOUS CONTRACT MODIFICATIONS

The settlement agreement, above, definitizes the following:

CC02 BIM Modeling SOW Revisions, as issued in Modification P00001

Modification P00002 is revised as follows:

Elevator #2: The Contractor is to construct the elevator shaft and install all required electrical and plumbing to accommodate future installation of a second elevator. The Contractor is not to procure or install the car and ancillary equipment for the second elevator.

Direct Digital Control (DDC) System: No Change.

Modification P00003, as written

3. CONTRACT PERIOD OF PERFORMANCE

The contract period of performance remains unchanged. The contract completion date for final deliverables remains October 3, 2016.

4. CONTRACT AWARD AMOUNT

The contract award amount of \$8,064,134.00 is hereby increased by \$1,659,003.00 to \$9,723,137.00.

5. CONTRACTOR STATEMENT OF RELEASE

This modification represents full and complete compensation for all costs, direct and indirect, associated with the work agreed to herein, including but not limited to, all costs incurred for extended overhead, supervision, disruption or suspension of work, and labor inefficiencies, and this change's impact on unchanged work.

In consideration of this modification, agreed to herein as a complete equitable adjustment of the contractor's proposal arising under or related to the change(s) identified above, the contractor hereby releases the Government from any and all liability under this contract for further adjustment attributed to the contractor's proposal.

6. AWARD AND MODIFICATION AMOUNT SUMMARY

ACTION	CHANGE (+ / -)	BALANCE
Award		\$7,009,194.00
Modification P00001	\$54,940.00	\$7,064,134.00
Modification P00002	\$0.00	\$7,064,134.00
Modification P00003	\$1,000,000.00	\$8,064,134.00
Modification P00004	\$1,659,003.00	\$9,723,137.00

7. ATTACHMENTS

2016-12-16 Agreement

Id. at 02314-15 (emphasis added).

Impact of Mod 4

Mod 4 consists of four pages (despite the cover sheet indicating it is a three-page document). The pricing and release in the modification preclude the contractor from seeking additional relief for the items raised in its first three modifications. However, the modification expressly references the December 16, 2016, agreement, which therefore became part of the modification. As detailed below, the release precludes appellant from seeking compensation (money or costs) for the work addressed in the modification and any impact on unchanged work.

Claims that are the Subject of the Summary Judgment Motions

CBCA 5841

After Mod 4 was executed, on June 5, 2017, appellant submitted another REA (REA 4) in the amount of \$980,016, which stated that appellant was “only partially compensated” for REA 1 by Mod 4. Exhibit 7 at 02360. On August 28, 2017, the contracting officer issued a final decision which, except for two claims that were resolved by mod 5, denied the claims asserted in REA 4, stating that these claims were included in REAs 1, 2, and 3 and were settled in mods 3 and 4. *Id.* at 02325-29. Appellant filed its notice of appeal of this final decision on September 6, 2017, which was docketed as CBCA 5841.

CBCA 6070

On January 11, 2018, appellant submitted a request for a contracting officer’s final decision, without a previous REA, with regard to eight separate claims in the total amount of \$379,902.67. Exhibit 22 at 003083-86. On March 5, 2018, the contracting officer issued a final decision denying the claims, stating that the claims were for “scope creep” and settled by mod 4. Exhibit 26 at 003130-31. Appellant filed its notice of appeal of this final decision on March 8, 2018, which was docketed as CBCA 6070.

CBCA 6260

On July 30, 2018, appellant submitted a request for a contracting officer’s final decision, stating “the change is [sic] scope for the controls system per unilateral [mod 2] in the amount of \$56,124.28 for the Direct Digital Control (DDC) System.” Exhibit 33 at 003266-67. The contracting officer issued a final decision on September 24, 2018, denying the claim because the cost of the claim was included in and settled by mod 4. Appellant’s Appeal File Supplement Exhibit 5. Appellant filed its notice of appeal of this final decision on September 24, 2018, which was docketed as CBCA 6260.

CBCA 6952

On June 27, 2020, appellant submitted a request for a contracting officer's final decision concerning eleven different line items, one of which was a claim for "Added Walls" in the amount of \$105,897.27. Exhibit 42 at 003351-52. The contracting officer issued a final decision dated October 19, 2020, granting and denying the various claims, which included the denial of the claim for "Added Walls." CBCA 6952 Exhibit 8 at 002378-80. Appellant filed its notice of appeal of this final decision on October 20, 2020, which was docketed as CBCA 6952.

Discussion

Appellant's REAs 1, 2, and 3, which were submitted in 2016, requested compensation for alleged Government-caused delays, "scope creep," and construction cost increases incurred between 2011 and 2016. Mod 3, issued unilaterally in 2016 for \$1,000,000, was considered a partial payment for the claims asserted in REAs 1 and 2, which were to be "definitized" by a settlement of these claims in a future modification. After REA 3 was submitted, the parties executed the "definitized" bilateral mod 4 in 2017, which contained a provision entitled "Contractor Statement of Release" and stated that it incorporated and attached a "settlement agreement." The express statement of release, as fully supported by the settlement agreement (which exists on its own), resolves these disputes because appellant accepted compensation while agreeing to forego any additional relief for the items in question and their impact on performance.

In 2018, after mod 4 was executed by the parties, appellant submitted additional REAs and requests for contracting officer's final decisions that sought compensation for "scope creep." The contracting officer's final decisions denying these claims were appealed and docketed as CBCA 5841, 6070, and 6260. In its motion for summary judgment, to which appellant has filed a cross-motion, respondent asserts that the claims at issue in these three appeals were included and resolved either in mod 4 or in the contractor's statement of release. The agency's motion for partial summary judgment in 6952 raises a matter of contract interpretation with regard to part of a claim in that appeal.

Summary judgment is appropriate when there are no genuine disputes of material fact and the movant demonstrates it is entitled to judgment as a matter of law. *See Carmazzi Global Solutions, Inc. v. Social Security Administration*, CBCA 6264, 19-1 BCA ¶ 37,439, at 181,950. Genuine disputes of material fact exist when a rational finder of fact could resolve an issue in favor of either party and the resolution of that issue would impact the outcome of the case under governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. a 242, 248 (1986). We must view all inferences in a light most favorable to the nonmovant. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 599 (1986).

CBCA 5841, 6070, and 6260

The disputes in these appeals arise from appellant's claims for "scope creep." While mod 4 was the result of extensive negotiation between the parties, the parties do not agree on its interpretation. The basis of appellant's motion is that it was only partially compensated for "scope creep" in mod 4 and that the claims that are the subject of these three appeals were neither the subject of mod 4 nor released by the contractor's release language in mod 4. The basis of respondent's motion is that mod 4 "definitized," included, and resolved all claims involving "scope creep," as such intent was stated in mod 3. The parties in their motions request that this Board determine which party's interpretation of mod 4 is correct.

The parties have extensively briefed the motions, citing to an extensive documentary record, including affidavits by Mr. Hanke and the contracting officer. However, it is clear from the express release language in mod 4, when read in conjunction with the plain language of REAs 1, 2, and 3 and of mods 3 and 4, and as further confirmed by the series of emails attached to mod 4, that mod 4 was intended to resolve all of appellant's claims for scope creep. There being no issues of material fact in dispute, we grant respondent's motion for summary judgment as to CBCA 5841, 6070, and 6260, deny appellant's motion, and deny these appeals.

CBCA 6952

Although appellant's claim dated June 27, 2020, which is the subject of CBCA 6952, addresses eleven different line items, respondent's motion for partial summary judgment in CBCA 6952 relates solely to the line item identified as "Added Walls," for which appellant seeks \$105,897.27. Appellant stated in its claim that additional walls were necessary because of additional scope requirements, as the building was anticipated to be between 16,500 and 18,000 gross square feet but was constructed 2700 square feet above the contract requirement. In its motion for partial summary judgment, respondent asserts that the building was not built larger than anticipated but was ultimately constructed with less square footage. Respondent's Motion for Summary Judgment at 9. Appellant opposes respondent's motion, stating:

It is clear now that the VA accepted my Base Bid offer which was 20,700 gross square feet which was approximately what was constructed. Accordingly, I agree with the VA that any claim based on just the size of the building has no merit. . . . However, what was not addressed in the VA's Motion for Summary Judgment, and which is a significant part of this Claim, is that this Claim is not based on just the size of the building, but also based on

numerous adjustments to the floor plan, which added interior walls unrelated to the building size.

Supplemental Declaration of Brett Hanke (Feb. 22, 2023) at 2.

Respondent replied that, as no additional walls needed to be constructed, there was no basis for the claim. Additionally, respondent states:

Hanke's Claim . . . argues that "During the design phase, the VA's Architects demanded numerous adjustments to the floor plan, expanding the building and adding walls." . . . [T]he VA's architects did not expand the building and did not add additional walls. Regardless, Hanke suggests that these alleged changes occurred during the building design phase. As such, as with CBCA 5841, 6070 and 6260, the Contractor Statement of Release language in Bilateral [mod 4] excludes Hanke's claim for "Added Walls" as it will have been included in Hanke's 2016 REAs which were settled by [mod 3 and mod 4].

Respondent's Objection and Response to Appellant's Supplemental Statement with Respect to CBCA 6952 at 5.

As this claim is one arising from scope creep, as respondent notes, it was resolved by mod 4 if included in the previous REAs or released as a future claim if not so included. There being no issues of material fact in dispute, respondent's motion for partial summary judgment in CBCA 6952 is granted, and the portion of the appeal relating to the "Added Walls" line item in appellant's claim is denied.

Decision

Respondent's motion for summary judgment in CBCA 5841, 6070, and 6260 is granted, appellant's motion for summary judgement in these appeals is denied, and the appeals are **DENIED**. Respondent's motion for partial summary judgment in CBCA 6592 is granted, and the appeal is **DENIED IN PART** as to the portion that is the subject of the motion.

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

We concur:

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge