



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: December 16, 2010

CBCA 1411

NU-WAY CONCRETE COMPANY, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

J. Marshall Gilmore of Law Office of J. Marshall Gilmore, Winter Park, FL, counsel for Appellant.

Jean Hardin, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **GILMORE**, and **HYATT**.

SOMERS, Board Judge.

Nu-Way Concrete Company, Inc. (Nu-Way or appellant) seeks reimbursement for additional expenses incurred during the deactivation of travel trailers and mobile homes used in support of disaster operations of the Department of Homeland Security, Federal Emergency Management Agency (FEMA or the Government) in Florida. For the reasons set forth below, we deny the appeal.

Background

On August 24, 2004, FEMA issued a request for quotations (RFQ) for the maintenance and deactivation of travel trailers and mobile homes to support FEMA's disaster operations in Florida.

The statement of work provided detailed specifications regarding the procedures to be followed by the contractor when deactivating a travel trailer or mobile home, referred to as a "unit." It required, among other things, that the commode and sanitary line be free of sewage and that the unit be "winterized" (defined as removing all water from the system and using air pressure to clean out the water lines). In addition, the statement of work required that the unit be thoroughly cleaned, including the removal of trash and foodstuffs, and fumigated.

The contractor would receive compensation for deactivations on a per-unit basis. The per-unit deactivation charge included all labor, service call charges, and towing to staging area or designated areas within 150 miles. For a distance beyond 150 miles, the contractor would be paid for each mile beyond 150 miles.

Attachment B to the contract included the Quality Assurance Surveillance Plan. The plan stated that FEMA would inspect all deactivated units to ensure contractor compliance with deactivation requirements.

The contract included contract clauses FAR 52.243-1, "Changes-Fixed-Price," and FAR 52.212-4, "Contract Terms and Conditions - Commercial Items." The second clause included a section entitled "Changes," which stated that "changes in the terms and conditions of this contract may be made only by written agreement of the parties."

Nu-Way submitted a bid in response to the RFQ. The RFQ required bidders to submit a schedule of prices for various categories, including basic deactivation. Nu-Way submitted a bid of \$750 per unit for basic deactivation. FEMA entered into a firm-fixed price contract with Nu-Way on January 7, 2005, in the amount of \$1,200,000, ultimately increased to \$9,800,000.¹

On April 14, 2005, Kenneth Miller, Nu-Way's chief executive officer, contacted Jim Sadler, FEMA's contracting officer's technical representative (COTR) at the time, and asked

¹ The first contract modification indicates that Nu-Way would be paid \$300 per unit to activate units and to perform monthly maintenance.

him to explain what the contract required Nu-Way to do in terms of cleaning a unit. Mr. Miller indicated that the FEMA logistics staff conducting the inspections for deactivated units at the FEMA staging areas (known as “the inspectors”) required Nu-Way to meet more stringent standards than had been required in previous contracts. Mr. Sadler notified Theresa Coker, the contracting officer at the time, of Mr. Miller’s concerns. Ms. Coker responded to Mr. Miller by letter dated April 21, 2005, stating that the contract required Nu-Way to return the units in a reasonably clean condition, to “remove debris and food stuff and perform reasonable wipe down, sweep non carpet floors, vacuum carpets, clean out holding tanks, etc.” Appeal File, Exhibit 24.

The next day, Mr. Miller contacted the contracting officer, the COTR, and Jeff Harrison, the FEMA employee responsible for the contract’s Quality Assurance Surveillance Plan, and advised them that the staging area manager at one of the staging sites had continued to reject, improperly, some of the units presented by Nu-Way. The contracting officer met with FEMA personnel, including the logistics chief and the staging area manager, to discuss Nu-Way’s complaint about allegedly overzealous inspectors.

Over the next month, FEMA inspectors rejected a few units based upon failure to meet cleanliness standards, and Nu-Way continued to complain that FEMA had forced it to perform extra work in order to ensure that the units would be accepted by the FEMA inspectors. FEMA issued more instructions to the inspectors concerning the standards to be applied. In May 2005, FEMA deployed new inspectors to the staging locations in an attempt to ensure consistent evaluations.

FEMA’s actions did not resolve the problem to Nu-Way’s satisfaction. Nu-Way continued to complain that it was being required to perform extra work in order to ensure that the units would be accepted by the FEMA inspectors. Various e-mail messages to and from FEMA employees reflect that FEMA may have had a problem with some inspectors evaluating the units inconsistently, even after it deployed new inspectors.

On June 2, 2005, Mr. Miller sent a letter to the contracting officer on behalf of Nu-Way, “asking for a ratification of the contract for extra cost of \$800 per unit for a total cost of \$435,200.” Appeal File, Exhibit 43. Mr. Miller submitted a second claim letter seeking \$384,000 on June 25, 2005. Nu-Way submitted two more invoices to cover the extra costs allegedly incurred during the remainder of calendar year 2005.

After much internal discussion on the merits of Nu-Way’s claims seeking ratification, on November 2, 2006, Linda Whitmer, the new contracting officer, denied Nu-Way’s first two claims. She stated, as follows:

The two ratification requests that Nu-Way submitted cited that because of repeated rejections, it has more than doubled the cost to perform the work and hence caused you to submit the ratification requests of \$800.00 per unit for 980 units.

To the best of FEMA's records and deactivation logs, from the period of 1/3/05 to 2/10/06 at the Challenger Staging Area, 102 units were deactivated by Nu-Way and only 7 units were rejected. Further, at the Jacaranda Staging Area from the period of 4/11/05 through 6/30/05, 203 units were deactivated by Nu-Way and only 2 units were rejected. This represents a 3% rejection rate.

Because of these reviews conducted and agreed upon by our Logistics, Contracting, and Legal departments, we have determined that the two requests for ratification submitted by Nu-Way are unsubstantiated, and are denied at this time. The cited reasons for denial include: 1) Conflicting information regarding the actual number of units deactivated by Nu-Way during the stated time period, 2) Lack of documentation on the part of Nu-Way regarding the actual number of units that were rejected and the reasons why, and 3) The Fixed Price Contract type which places the burden of risk for success on the vendor. FEMA strongly feels that it is unrealistic and unsubstantiated to agree with Nu-Way's claim that 980 individual units have been or would be rejected by FEMA officials at time of inspection. Further, as this is a Fixed Price contract, not a Cost Reimbursement type contract, it is not the Government's responsibility to compensate the vendor for changes in cost as there was no change in scope.

Appeal File, Exhibit 57.

On January 29, 2007, Nu-Way filed an appeal with this Board, in the amount of \$824,000. Because Nu-Way had failed to certify the claim, as required by the Contract Disputes Act, 41 U.S.C. § 605(c)(1) (2006), the Board dismissed the appeal by decision dated March 5, 2008.

By letter dated October 11, 2007, Nu-Way submitted an amended claim to the contracting officer. The document stated that "on or before October, 2006" Nu-Way had submitted four invoices to the contracting officer for "a ratification of modification of the Contract and/or equitable adjustment to the contract amount due Claimant," and listed the claims as follows:

Claim period One:	Jan. 11, 2005 to May 16, 2005	\$ 436,800
Claim period Two:	May 17, 2005 to July 26, 2005	387,200
Claim period Three:	July 27, 2005 to Oct. 17, 2005	1,248,800
Claim period Four:	Oct. 20, 2005 to Dec. 19, 2005	<u>68,000</u>
TOTAL:		\$2,140,800

Nu-Way noted that it had submitted executed certifications of the four claims on or about January 29, 2007, the date that it had filed its original appeal with the Board. Alternatively, Nu-Way contended that in the event that the contracting officer denied Nu-Way's claim based upon its ratification theory, Nu-Way sought payment of \$2,353,443.58 based upon an equitable adjustment to cover the "excess services and costs Claimant supplied to FEMA pursuant to changes in scope of work demanded and accepted by FEMA, and performed and delivered by Claimant." Nu-Way certified both the original claim and the equitable adjustment claim on October 13, 2007.

In support of the equitable adjustment claim, Nu-Way submitted summary invoices listing contractors paid and the number of units attributed to those contractors, with a charge of \$400 per unit per contractor, for a total of 2675 units at \$1,070,000. In addition to those costs, Nu-Way listed additional expenses incurred, as follows:

Lot rent on 3 lots to clean units	\$ 344,374.00
Extra equipment pressure wash, etc.	71,875.30
Extra miles to lot/vehicle expense	468,125.50
Extra housing for crews	35,874.75
Cleaning materials	58,500.45
Install 3 septic systems for sewer dumps	51,812.25
Insurance on lots	<u>65,518.75</u>
Total Additional Expenses:	\$1,096,081.00
Additional labor for staff/in house employees	187,362.58
Total:	\$2,353,443.58

Appeal File, Exhibit 60.

The contracting officer assigned to this contract during this time period, Bryan S. McCreary, issued a final decision on the amended claim by letter dated September 26, 2008. In his decision, the contracting officer responded to both renditions of Nu-Way's claim, *i.e.*, the ratification claim and the equitable adjustment claim.

As to the claim for ratification, the contracting officer denied that claim, asserting that although Nu-Way raised the idea of modifying the contract so that Nu-Way could receive an additional \$800 per unit, none of the contracting officers involved either expressly ratified or otherwise accepted Nu-Way's offer to modify the contract.

The contracting officer also rejected Nu-Way's claim for an equitable adjustment. He stated as follows:

Your equitable adjustment claim for \$2,353,443.58 for work performed under the Contract is also hereby denied. Despite repeated requests, including a letter from the Contracting Officer dated November 13, 2007, describing the specific areas to be addressed, you have failed to provide evidence to support your claim. Our request for supporting documentation was met with a package of cancelled checks without any explanation as to how they related to this contract or to Nu-Way's claim. As such, it is impossible to determine what additional work, if any, was done and what the cost of performing that additional work or the value of that work may have been. Assistance was requested from the Defense Contract Audit Agency (DCAA) to review your claim. DCAA was unable to audit your claim since your cost data was essentially non-existent and completely inadequate.

Appeal File, Exhibit 60. The contracting officer noted that Nu-Way provided no evidence verifying the number of units rejected, nor did it provide any documentation or evidence to show that the rejections were improper. The Government's records indicated that it had rejected only twenty units out of the 2676 units presented by Nu-Way at the three staging areas, and that those rejections were based upon noncompliance with the contract requirement that all water be removed from the sewage system.

The contracting officer noted that he had reviewed the letters from Nu-Way employees concerning these rejections, in which the employees state that the water coming from the tanks was clean water. The contracting officer determined that, in light of the contract requirement that all water shall be removed from the system, the fact that these employees stated that the water coming from the system was clean merely provided additional evidence that Nu-Way had not complied with the contract specifications. Finally, the contracting officer stated that Nu-Way had failed to provide any evidence that FEMA directed any additional work, or that the alleged work resulted in any additional costs. None of the cost data submitted logically supported the claim, he asserted.

Nu-Way timely appealed the contracting officer's September 26, 2008, decision. In its complaint, Nu-Way seeks an award of "all damages and claims certified to Respondent

for ratification amounts and equitable adjustment amounts alleged above, its costs, attorney fees and pre-judgment and post-judgment interest on the claims filed and such other relief to which it may show itself entitled to at hearing hereon.” Complaint at 3.

After attempts at alternative dispute resolution proved unsuccessful, the parties completed discovery and the Board held a hearing on May 4 and 5, 2010.

At the hearing, the testimony presented by both parties supported Nu-Way’s claim that the inspectors at the various staging areas may not have consistently enforced the contract requirements. However, what became increasingly clear during the course of the hearing was that Nu-Way could not provide evidence sufficient to establish that inconsistent enforcement of standards impacted its ability to do the work, that Nu-Way was required to perform additional work by the contracting officer, or, assuming for the sake of argument that Nu-Way did indeed perform extra work, that Nu-Way could not provide the evidence necessary to establish its claim of additional costs.

Mr. Miller testified that inspectors required extra work to be performed on a trailer before FEMA would accept the trailer. Theresa Coker, the contracting officer at the time Mr. Miller first made his complaint, testified that Mr. Miller told her that he believed he had to perform extra work in order to ensure that the trailers would be accepted. Ms. Coker confirmed that she told Mr. Miller that he should not perform any work beyond that required by the contract. Transcript at 508. In addition, Ms. Coker stated that she advised him if he intended to file a claim for extra work, he needed to keep documentation, specifically including “trailer numbers, dates, names of people, what they specifically told him to do that was beyond the scope of the contract, and that he would need to submit his costs broken down, his support [for] whatever charges he felt were applicable.” Transcript at 507-08.

Unfortunately, Nu-Way’s records, to the extent that it kept them, did nothing to advance its cause. Mr. Miller testified that he used subcontractors on the contract but had no written agreements with the subcontractors. Transcript at 113-14. Mr. Miller confirmed that he did not provide any receipts to support Nu-Way’s costs to the contracting officer until the first day of trial. Transcript at 183. The receipts raised questions about the accuracy of Nu-Way’s certified claim. Mr. Miller testified that although he certified the claim alleging that the costs had been incurred in 2005, the receipts span the entire contract, from 2005 to 2007. Transcript at 197. Nu-Way made no attempt to reconcile the discrepancy between the dates identified in its certified claims and the testimony that the costs had been incurred over the entire contract.

On the specific costs claimed in support of its equitable adjustment claim, Nu-Way presented three binders of evidence. These binders could be best described as organized chaos. Nu-Way tracked its expenses using the following procedure:

The men would come in and we'd pay them and we'd take [the receipt and] put it in a file folder, or fuel folder for parts or a folder for whatever it was at the time.

Transcript at 117. The receipts would be used to tabulate the actual costs to be submitted. Nu-Way did not submit the receipts; rather, it submitted summaries of the costs claimed. For example, one category is identified as "extra auto expense." When asked why no bills or other documents had been submitted to support a tabulation of costs, Mr. Miller testified:

The only thing I can say maybe it was lost if it's not in there Those would have had a check form, it would have been a cash ticket so the receipt would have not have been taken care of so to speak like one that a man needs the cash back for. We would have definitely got those. If we gave him a check and said get this then we had to copy the check so we wouldn't have been after the receipt so much. That's the only thing I know that could explain that not being there.

Transcript at 144.

Nu-Way's attorney attempted to obtain clarification from Mr. Miller.

Q: So is it your testimony that the things that appear as a bunch of receipts we can't see the actual receipt, that they're tabulated on an adding slip, that that's additional expenses of Nu-Way?

A: Yes.

Transcript at 146. During his testimony, Mr. Miller mentioned various types of records that Nu-Way allegedly possessed in support of its summary tabulations, such as pay sheets, tax forms for various contractors, and other documents. However, when asked, Mr. Miller verified that many of those documents had not been presented as evidence to the contracting officer in support of Nu-Way's claim, nor did Nu-Way have them available for trial. *See, e.g.,* Transcript at 142-43, 144. Mr. Miller testified that Nu-Way did not pay for its subcontractors' meals, lodging, gas, etc., because the subcontractors were paid on a per unit basis. In response to questions from the Board about some of the receipts that had been submitted in support of its claim for restaurant expenses, Mr. Miller acknowledged that Nu-Way had submitted some receipts for costs that should not have been included:

I am sure some of them did get mixed over and there is another million or so cash expense that we have that's not in here, that was not incurred on this. And I'm sure some of them did get mixed in. The Outback Steak House is probably something where the men we took them to eat . . . [w]e probably took them in, they'd done something right and we'd done this often. If they done a good week and they'd had a good week we'd kind of took them for supper and took care of them, and they probably should not have been there as extra.

Transcript at 152-53.

Testimony concerning how subcontractors were paid was inconsistent. Mr. Miller testified that he paid \$350 per unit plus \$50 for insurance. Later, Mr. Miller testified that he paid subcontractors per unit on a "sliding scale." Transcript at 200-01. A subcontractor explained that he had been promised an additional \$350 per unit, plus \$50 for moving the unit. Transcript at 383.

One witness, Raymond Forbes, testified that he had been hired by Nu-Way as an independent contractor. Mr. Forbes received a salary from Nu-Way and would also be reimbursed for various expenses. Transcript at 309. These amounts would be paid to him in one check. The check did not distinguish between the salary paid and the amounts for reimbursement. In addition, Mr. Forbes worked on both the maintenance and deactivation portions of the contract, as well as providing services on other contracts during this time period. The receipts provided by Nu-Way show that Mr. Forbes was paid on November 23, 2005, for labor performed from September 4 through November 26, in the amount of \$18,000. Nu-Way made no distinction between his salary or the reimbursement of expenses, nor did Nu-Way account separately for the time Mr. Forbes spent working on this deactivation portion of the contract at issue here or Nu-Way's other contracts. Transcript at 309-10.

In sum, the evidence and testimony at the hearing confirmed that Nu-Way could not support its claim or clarify any discrepancies in its cost data in any meaningful way.

Discussion²

I. Equitable Adjustment

Nu-Way asserts that when the inspectors required it to perform additional work in order to accept the units at staging areas, the inspectors constructively changed the contract requirements. A constructive change occurs when a contractor performs work beyond the contract requirements, without a formal order under the Changes clause, either due to an informal order from, or through the fault of, the Government. *See Ets-Hokin Corp. v. United States*, 420 F.2d 716, 720 (Ct. Cl. 1970); *Len Co. & Associates v. United States*, 385 F.2d 438, 443 (Ct. Cl. 1967). As the Court of Claims explained:

[W]here a contract contains the standard “changes” provision and the contracting officer, without issuing a formal change order, requires the contractor to perform work or utilize materials which the contractor regards as being beyond the requirements of the pertinent specifications or drawings, the contractor may elect to treat the contracting officer’s directive as a constructive change order and prosecute a claim for an equitable adjustment under the “changes” provision of the contract.

Ets-Hokin, 420 F.2d at 720.

Before it can recover, however, the contractor must show that the Government ordered it to perform the additional work. *Len Co.*, 385 F.2d at 443. The contractor cannot merely show that the Government disapproved a mode of performance. *Singer Co., Librascope Division v. United States*, 568 F.2d 695, 701 (Ct. Cl. 1977). Indeed, the Government generally has the right to insist on performance in strict compliance with the contract specifications and may require a contractor to correct nonconforming work. *S.S. Silberblatt, Inc. v. United States*, 433 F.2d 1314, 1323 (Ct. Cl. 1970). The work must be “beyond the requirements of the pertinent specifications or drawings” for it to be considered additional work. *Ets-Hokin*, 420 F.2d at 720.

² Because Nu-Way initially presented its claim under a “ratification” theory, following with an equitable adjustment theory, the parties presented their arguments using that order. However, we find that their arguments and our findings are more logically presented by addressing the equitable adjustment theory first, followed by ratification, and finally, quantum. Although this opinion may not address each and every point presented by the parties, we have considered all of the arguments in reaching this decision.

Here, the contract detailed what the contractor must do in order to properly deactivate a unit. The evidence presented through documents and at trial is that when the inspectors rejected a unit, which verifiably occurred only twenty times out of 2675 units deactivated, inspectors generally rejected units based upon failure to properly clear sewage and excess water from the commode, the sanitary line, or the holding tank. These requirements fall within the scope of the contract and do not constitute additional work.

Nu-Way contends that the Government rejected units many more times than claimed by the Government. If Nu-Way believed that the inspectors were improperly rejecting units, Nu-Way needed to keep documentation to prove this allegation, including trailer numbers, dates, names, what additional work was required that was beyond the scope of the contract, and the additional costs, with supporting documents for the costs. Unfortunately, Nu-Way did not do so. The only evidence consists of generic anecdotal testimony from Nu-Way and subcontractors that they had to do additional work on the units. Nu-Way failed to present any persuasive or sufficient evidence to show that the Government actually compelled it to perform additional work beyond what the contract required.

Even if Nu-Way had demonstrated that FEMA inspectors had ordered it to perform extra work, it failed to show that these inspectors had authority to modify the contract to require such work. As the United States Court of Appeals for the Federal Circuit has noted,

To demonstrate entitlement to an equitable adjustment, [a contractor] must prove that the contract was modified by someone with actual authority. Where a party contracts with the government, apparent authority of the government's agent to modify the contract is not sufficient; an agent must have actual authority to bind the government.

Winter v. Cath-dr/Balti Joint Venture, 497 F.3d 1339, 1344 (Fed. Cir. 2007). The evidence shows that Nu-Way complained to the contracting officer about the inspectors' requirements. In response, the contracting officer instructed Nu-Way to perform in accordance with the contract, not to do extra work, and advised that if Nu-Way felt that it was being required to perform extra work, it needed to provide evidence to support that contention. At no point did the contracting officer order Nu-Way to do any more than the contract required or delegate her authority to the inspectors to make contract modifications.

We conclude that Nu-Way failed to show by a preponderance of the evidence that the Government ordered it to perform work beyond that required by the contract. As noted previously, the contract required, among other things, that Nu-Way remove all sewage and water from the sewage system. The fact that inspectors discovered water in the system indicated Nu-Way had not complied with the contract, providing adequate justification for

the inspectors to reject the units. Nu-Way's claim for equitable adjustment based upon constructive change is therefore denied.

II. Implied Ratification

Appellant's alternative theory for recovery is that an implied ratification occurred. Appellant summarizes its theory as follows:

Appellant is not claiming that an *express* ratification took place or that the ratification process contemplated by FAR 1.602-3 took place or that the contracting officers -- Gail Coker and/or Brian McCreary - expressly modified, ratified, or approved of the claim for \$800 per unit additional to do the additional work. Rather, Appellant has proven his case and claims that the evidence set forth below show conclusively that an implied ratification occurred.

Appellant's Post Trial Brief at 3. To prevail under this theory, one must find that Nu-Way performed extra work. As noted above, Nu-Way failed to show that it performed work beyond that required by the contract. Likewise, the evidence does not support Nu-Way's contention that a ratification occurred.

The law applying to this area is well developed. Generally, only officially designated contracting officers may bind the Government. Those who deal with government agents are obliged to investigate and determine for themselves the level of actual contracting authority of the agent with whom they are dealing. *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1575 (Fed. Cir. 1984). The Government is not bound by the acts of its agents that exceed the agent's authority, even though the agent believes himself to have such authority. *See Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 383 (1947); *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990).

However, an unauthorized act can be adopted through ratification. In government contracting, representatives' unauthorized actions may be subsequently ratified by those with authority to bind the Government. If the ratifying government official has actual or constructive knowledge of a representative's unauthorized act and expressly or impliedly adopts the act, ratification will be found. *Parking Co. of America*, GSBCA 7654, 87-2 BCA ¶ 19,823.

In this case, the persons Nu-Way asserts directed it to perform additional duties were the FEMA inspectors. Nu-Way contends that because "the two pertinent contracting officers for FEMA had a full understanding of the facts that make up Appellant's claim that it was

doing additional ‘out of scope’ work,” and that these contracting officers did not send “written or oral notice to Appellant denying or declining or repudiating or giving Appellant notice that it declined to pay the \$800 per unit ratification claim” until the contracting officer officially denied Nu-Way’s claim, Nu-Way should prevail on an implied ratification theory. Appellant’s Post Trial Brief at 6-7.

In order for Nu-Way to prevail under an implied ratification theory, Nu-Way must show that the contracting officer had actual or constructive knowledge of all of the facts upon which the unauthorized actions were taken and failed to take action to investigate or stop such actions. This Nu-Way cannot do.

In *Parking Co. of America*, the board held that the General Services Administration ratified the Border Patrol’s unauthorized use of excessive parking spaces based on the fact the contracting officer received verbal confirmation of the excessive use but failed to take action “to investigate or stop such use.” 87-2 BCA at 100,297. Here, upon receiving notice that the inspectors were allegedly requiring Nu-Way to do extra work on the units, the contracting officer told Nu-Way what the contract required, not to do any extra work, and, in addition, met with the inspectors to ensure uniform enforcement of the contract requirements. Contrary to taking no action, the contracting officer worked hard to resolve any questions about contract requirements. None of her actions suggest that she agreed that Nu-Way should do anything more than the contract required.

Nu-Way elected to continue to perform what it considered to be extra work despite the contracting officer’s instructions to the contrary. Therefore, we find from the record and the testimony at trial that the contracting officer, through her letters and actions, did not ratify any alleged agreement between Nu-Way and the inspectors concerning what constituted the amount of work required under the contract to properly deactivate a unit. The contracting officer’s advice to Nu-Way to keep track of its expenses should it find it necessary to file a claim for extra work does not mean that she condoned or agreed that extra work had been performed.

III. Quantum

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. “Exaggeration, inherent improbability, self-contradiction, omissions in a purportedly complete account, imprecision and errors may all breed disbelief and therefore the disregard of even uncontradicted non-opinion testimony. Such testimony . . . ‘carries its own death wound.’” *Sternberger v. United States*, 401 F.2d 1012, 1016 (Ct. Cl. 1968) (citations omitted).

Here, appellant presents two legal theories for recovery. One assumes that the parties had reached an agreement that FEMA would pay Nu-Way an additional \$800 per unit, based upon Nu-Way’s “ratification” theory. The second arises from Nu-Way’s second theory, that a constructive change to the contract requirements occurred, which would allow it to receive an equitable adjustment in the contract price for the increased work. Both of these theories must fail for lack of evidence.

Nu-Way did not present any documentation or testimony whatsoever that substantiates or supports its cost claims. Nu-Way argues that it submitted its costs at trial through its binders of receipts and summary tabulations. These binders constituted summaries of costs incurred without the supporting receipts, checks paid with no supporting documents, and receipts for costs that, as Nu-Way acknowledged at trial, should not have been included in its claim.

Indeed, Nu-Way failed to explain a glaring error in its certification of costs. While Nu-Way certified that it incurred all of its costs in calendar year 2005, the records submitted at trial included costs from calendar years 2006 and 2007. Nu-Way’s failure to address the erroneous certification raises questions about the validity of its calculations. Ultimately, Nu-Way’s calculation of costs is inconsistent, incredible, and incomprehensible.

Decision

The appeal is hereby **DENIED**.

JERI KAYLENE SOMERS
Board Judge

We concur:

BERYL S. GILMORE
Board Judge

CATHERINE B. HYATT
Board Judge