



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: February 10, 2016

CBCA 4614

MAGWOOD SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Heyward Manigault, President of Magwood Services, Inc., Campbell Hall, NY, appearing for Appellant.

Lucy G. Mac Gabhann, Office of the General Counsel, Department of Health and Human Services, Baltimore, MD, counsel for Respondent.

Before Board Judges **DRUMMOND**, **SHERIDAN**, and **SULLIVAN**.

SULLIVAN, Board Judge.

Appellant, Magwood Services, Inc. (Magwood), appeals two decisions of the contracting officer for respondent, Department of Health and Human Services (HHS), denying claims for delay and contract funds improperly withheld. Magwood alleges that the contracting officer's determination regarding the sprinkler testing requirements unreasonably delayed its performance of the contract and that the contracting officer improperly withheld re-inspection costs from its final payment of the contract. The parties submitted the case for decision on the record, pursuant to Rule 19. 48 CFR 6101.19 (2014). For the reasons that follow, the Board denies the appeal.

Statement of Facts

The Contract and its Relevant Terms

On December 31, 2013, HHS awarded a contract to Magwood for the renovation of an existing warehouse at the Hopi Health Care Center on the Hopi Reservation. Exhibit 1 at 1-2.¹ Magwood was to perform the construction activities set forth in the design drawings that accompanied the contract. *Id.* at 13. The amount of the contract was \$129,000 and the term of performance was ninety days from the date the notice to proceed was issued. *Id.* at 2.

The construction drawings contained general notes regarding the fire protection system. Exhibit 2 at 14.² Pursuant to these notes, the contractor was required to “modify the existing wet-pipe fire sprinkler system in all areas of remodeling as indicated in the drawings, provide and install all items, including those of a minor nature, necessary to complete the installation and to provide approved fire protection throughout the remodeled area.” *Id.* The notes also required that “all work shall be installed in accordance with all codes, laws, rules and regulations of all national, state, county and local authorities having jurisdiction over the premises. This shall include but not be limited to the fire department having jurisdiction, and the carrier of the building insurance.” *Id.* The contractor was required to “secure and pay for all permits, inspections and certificates required by the foregoing authorities.” *Id.*

The drawings also set forth the specifications for the air conditioning system. According to the scope of work for the contract, Magwood was required to install “a split air conditioning system in one of the areas of the building with an interior ceiling mounted fan coil unit and an exterior condensing unit on a concrete pad and to reconfigure the existing fan unit and louvers to provide ventilation to the other portion of the building.” Exhibit 1 at 13. The project data contained on the drawings advised that the drawings had to be coordinated with the mechanical and electrical requirements:

5. [Heating, ventilation, and air conditioning (HVAC)] and electrical equipment shown on architectural drawings is for general reference only.

¹ All exhibits are found in the appeal file, unless otherwise noted.

² The construction drawings are part of the contract and were provided by the agency as part of exhibit 1 in the appeal file. The agency also provided a larger, legible version of the drawings as exhibit 2.

Coordinate equipment and location with mechanical and electrical drawings.

Exhibit 2 at 2. The drawings for the HVAC system similarly advised that the locations on the drawings were only approximate and required that any changes were to be noted on the final as-built drawings submitted at the end of the project:

1.02 HVAC drawings are diagrammatic and intended to show the approximate location of ductwork, outlets, equipment and piping. Dimensions given in figures on the plans shall take precedence over scaled dimensions and all dimensions, whether given in figures or scaled, shall be field verified. No ductwork shall be fabricated until duct clearances are field verified.

.....

3.09 Make note of any changes made in layout and incorporate in “record” drawings submitted to the architect at completion of the project.

Id. at 15.

With regard to inspections, Magwood was required to “make arrangements for inspections and perform tests required for HVAC work.” Exhibit 2 at 15. The notes contained the requirements for “testing, adjusting and balancing” the HVAC system and required that the system be “balanced to approximate [cubic feet per minute (CFM)] . . . and to satisfaction of the owner.” *Id.* The performance specification for the HVAC unit was 1600 CFM. *Id.* The list of submittals for the contract included “[r]esults of required tests per the sheet specifications.” *Id.* at 14.

The contract incorporated by reference a Suspension of Work clause, which provides the remedy should the Government unreasonably delay the performance of the work:

If performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted (1) by an act of the Contracting Officer in the administration of this contract, or (2) by the Contracting Officer’s failure to act within the time specified in this contract (or within a reasonable time if not specified), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption,

and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor

Exhibit 1 at 9 (48 CFR 52.242-14(b) (FAR 52.242-14(b))). The contract also incorporated by reference an Inspection of Construction clause, which provides in relevant part that the contractor was to provide inspections as required by the contracting officer:

The Contractor shall promptly furnish, at no increase in contract price, all facilities, labor, and material reasonably needed for performing such safe and convenient inspections and tests as may be required by the Contracting Officer. The Government may charge to the Contractor any additional cost of inspection or test when work is not ready at the time specified by the Contractor for inspection or test, or when prior rejection makes reinspection or retest necessary. The Government shall perform all inspections and tests in a manner that will not unnecessarily delay the work. Special, full size, and performance tests shall be performed as described in the contract.

Id. (FAR 52.246-12(e)).

Although not referenced in the contract³, Magwood also relies upon the Changes clause, which provides the remedies should the Government change any of the requirements of the work in a manner that causes an increase or decrease in the contractor's costs:

If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part

³ The contract does not appear to contain a changes clause, although FAR 43.205(d) requires the insertion of such a clause for fixed-price construction contracts. The Board reads into the contract the standard Changes clause found at FAR 52.243-4. *Rockies Express Pipeline LLC v. Salazar*, 730 F.3d 1330, 1338 (Fed. Cir. 2013) (citing *G.L. Christian & Associates v. United States*, 312 F.2d 418, 426-27 (Ct. Cl. 1963)) (“if the parties to a government contract neglect to include a clause in the contract *that is otherwise required by regulation* . . . , courts will read the clause into the contract as a matter of law”).

of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. However, except for an adjustment based on defective specifications, no adjustment for any change under paragraph (b) of this clause shall be made for any costs incurred more than 20 days before the Contractor gives written notice as required.

FAR 52.243-4(d).

Contract Performance

The contracting officer issued the notice to proceed on February 10, 2014. Exhibit 4. Magwood submitted a project schedule in which it forecast that the project duration would be sixty-four days. Exhibit 7. In this schedule, Magwood indicated that it would begin demolition on March 3, 2014, and projected final clean-up would conclude on April 21, 2014, and the “closeout document” would be completed on April 29, 2014. There were no separate dates for testing listed on the initial schedule. *Id.* Magwood notified the contracting officer’s technical representative (COTR) on March 3, 2014, that its start date had to be postponed by a week because it had not received the materials from its suppliers. Exhibit 9.

The parties executed four modifications to the contract, the last of which extended the completion date for the contract to August 12, 2014. Exhibits 17, 19, 32, 38. Prior to signing modification 004, the contracting staff asked Magwood to submit a revised project schedule. Exhibit 37. After Magwood missed the completion date of August 12, 2014, Magwood submitted a schedule that showed the items left to be completed in five workdays and projected that performance would be complete on September 8, 2014. Exhibit 48. The remaining activities included “HVAC certification” and “sprinkler certification,” which were to be completed on the same day, September 4, 2014. *Id.* at 3.

The appeal file contains a series of contractor’s daily reports for the period August 30 through September 8, 2014. Exhibits 51-59. According to these reports, on September 3, 2014, Magwood “got HVAC certification (will send as soon as we get hard copy).” Exhibit 55. On September 8, 2014, Magwood was still “waiting on sprinkler certification to come.” Exhibit 59.

By email message dated September 9, 2014, Magwood forwarded the HVAC certification to the COTR and noted that it was “still waiting for the sprinkler certification to come in.” Exhibit 60. The COTR responded that the HVAC report

looked “satisfactory from an installation standpoint” but that Magwood needed to submit a test and balance report as required by sheet M2.1, item 3.01 of the construction drawings. *Id.*

By email message dated September 25, 2014, Magwood informed the COTR that the tests for the HVAC and sprinkler systems were scheduled for Tuesday, October 7, 2014. Exhibit 66. By email message dated October 6, 2014, Magwood requested a copy of the sprinkler drawings for the existing system from the COTR. Exhibit 67 at 2. The COTR responded the same day that he could not find the drawings and would ask the facility for them. There is no further mention of the need for the sprinkler drawings until Magwood sent another email message on October 31, 2014, in which Magwood states that its sprinkler inspection company would provide a proposal the following week. Exhibit 68 at 1. This email message follows several exchanges in which Magwood simply reports that it is awaiting the report from the sprinkler company. *Id.* at 2-4.

By letter dated November 5, 2014, in response to the contracting officer’s statement that he planned to assess liquidated damages, Magwood reported that it was still awaiting a proposal to accomplish the testing:

[W]e are waiting to receive the sprinkler proposal from CINTAS for the total cost of re-engineering the sprinkler system. This is the only way that the system can be properly tested and certified. As stated above, the government will need to issue a formal modification including the added cost for Magwood Services to have this work completed.

Exhibit 69 at 2. This letter prompted several written and telephonic exchanges between the parties regarding what would be necessary to test the sprinkler system. Exhibits 75, 78, 81, 83. By letter dated November 21, 2014, the contracting officer declined the work Magwood proposed to perform to provide the testing of the system and stated that “[n]o further work on the sprinkler system will be required.” Exhibit 86.

By email message dated December 9, 2014, the contracting officer advised that “with the exception of the [test and balance (TAB)] reports, the punch list items are completed. As soon as these [TAB] reports are provided and a release of claims is signed, I will approve the remaining payment amount.” Exhibit 95.

Magwood did not provide the HVAC certification for the project until January 14, 2015. Exhibit 98. The certification consisted of a TAB report prepared by Omega Test & Balance LLC, for a test performed on October 7, 2014. *Id.* at 7. In the narrative summary, Omega reported that the HVAC unit, when “set on the highest speed setting,”

was “providing 55% of the specified design CFM.” *Id.* at 4. The test report listed the total CFM to be 880. *Id.* at 7-8. Magwood also submitted a receipt for work performed on January 8, 2015 by Boyer Heating & Cooling. *Id.* at 9. According to the receipt, the technician, after finding that the ducts were not installed properly, spent four hours on-site to connect the leads to the ductwork. *Id.*

The contracting officer acknowledged receipt of the TAB report by email message, dated January 23, 2015, but noted that Magwood’s submission was missing “some important information.” Exhibit 102. In particular, the contracting officer found that the report indicated that the system was receiving only half the flow listed and wanted to know whether that problem was corrected. *Id.* On January 26, 2015, Magwood responded that the “test and balance was completed as requested. The system flow was corrected.” Exhibit 103.

By email message dated February 2, 2015, Magwood inquired as to the status of final payment on the contract. Exhibit 104. The contracting officer responded that the agency was awaiting the submission of an acceptable TAB report “that clearly demonstrates that the corrective measures . . . were successful.” *Id.* The contracting officer asked that Magwood submit this report by February 13, 2015. *Id.* On February 4, 2015, Magwood stated that it was “beyond our scope to provide yet another TAB report to address specific questions you have. The TAB report provided showed the system is operational with no deficiencies reported.” Exhibit 105.

The parties continued to exchange correspondence as to whether another TAB report was required by the contract or as a result of the first report. On February 11, 2015, the contracting officer informed Magwood that he had arranged for another TAB test to be performed and that the agency would deduct the cost of that report, estimated to be \$2000, from the final balance on the contract. Exhibit 109. In response to this notice, Magwood stated that it had complied with the requirements of the Inspection clause and that the only problem at the time of the original test was that the ducts were not permanently secured, a problem that Magwood subsequently had fixed. Exhibit 110. In response, the contracting officer stated that Magwood had not provided a new TAB report after the noted problems were corrected. Exhibit 111.

Magwood’s Claims

By letter dated January 15, 2015, Magwood filed its first claim with the contracting officer, seeking an equitable adjustment for seventy-seven days of delay arising from the agency’s failure to provide the drawings for the existing sprinkler fire

protection system. Exhibit 100 at 4-5. Magwood sought approximately \$28,000 in delay costs. *Id.* at 5.⁴

On February 17, 2015, Magwood submitted its second claim seeking payment of the final contract balance. Exhibit 112. By letter dated March 6, 2015, the contracting officer denied Magwood's claim for the remaining contract balance. Exhibit 113. The contracting officer withheld \$2000 from the final payment as the cost that the agency incurred for a second report. *Id.* at 3. The contracting officer also provided a copy of the second TAB report from Omega, from testing performed on February 19, 2015. Exhibit 114. In the narrative summary, Omega reported on the work that its technician had performed on the system:

All cooling/heating coils are clean and free of leaks at this time. We have installed new 10" collars, new flex and dampers to increase airflow to AC-1. Previously this system had 6" duct runs connected to 12" registers; we capped all existing 6" collars on main duct and installed 10" collars in more efficient locations. Supply ductwork is not insulated. We did seal many existing locations where duct joints were not sealed with [d]uct [m]astic.

Id. at 3. Omega included a drawing that showed the new duct collars and their placement. *Id.* at 7. As a result of these changes, Omega reported that the unit was providing eighty percent of the design airflow. *Id.* The test report listed the total CFM to be 1280. *Id.* at 5-6. Omega invoiced the agency \$2000 for this work, consisting of \$1600 for the second TAB report and \$400 to "repair and seal the existing ductwork." Exhibit 129.

On March 19, 2015, Magwood filed its appeal. Exhibit 117.⁵

⁴ In its claim, Magwood asserted that the delay began on September 3, 2015, when its sprinkler test subcontractor notified the COTR that it needed the sprinkler drawings to be able to perform the tests. The record on appeal does not contain correspondence about this issue bearing this date.

⁵ Magwood appealed the contracting officer's decision on its second claim (seeking final contract payment) and asserted that its first claim (seeking delay costs) was deemed denied. *Id.* The agency filed a motion to dismiss, alleging that Magwood had not submitted a claim for delay. After Magwood provided copies of both claims in response to a Board order, the agency withdrew its motion to dismiss. The contracting officer subsequently denied Magwood's claim for delay, finding that Magwood had other outstanding work during the period of alleged delay. Exhibit 123 at 6.

Discussion

I. Failure to provide prompt determination on sprinkler testing requirements was not sole cause of performance delay

In its submission to the Board, Magwood seeks costs for forty-seven days of delay. Appellant's Brief at 11. The alleged delay began on October 6, 2014, when Magwood requested the drawings for the existing sprinkler system prior to testing, and ended on November 21, 2014, when the contracting officer stated that the Government would not require the proposed testing and that it considered work on the sprinkler system complete. *Id.* Magwood seeks the costs of travel, project administration, office administration, labor and the inspection and service fees of two subcontractors regarding the fire protection system. Magwood also seeks overhead on all of these costs and the costs of insurance for eighty-five days. These costs total \$36,499. *Id.* at 16; Exhibit 121.

Magwood invokes the Suspension of Work clause and the Changes clause as the basis for its claim. Because Magwood's claim arises from the contracting officer's enforcement of the original testing requirement, rather than the imposition of a new requirement, the Suspension of Work clause rather than the Changes clause provides the framework for the resolution of Magwood's claim. *Triax-Pacific v. Stone*, 958 F.2d 351, 354 (Fed. Cir. 1992).

The Suspension of Work clause permits a contractor to recover costs incurred as the result of unreasonable delays in performance of the contract. *Triax-Pacific*, 958 F.2d at 354. Such delays can include actions or inactions by the contracting officer in administration of the contract. *Tidewater Contractors, Inc. v. Department of Transportation*, CBCA 50, 07-1 BCA ¶ 33,525, at 166,103 (failure to issue timely notice to proceed). However, for recovery to be possible, the delays caused by the contracting officer must be the "sole proximate cause" for the costs incurred. *Triax-Pacific*, 958 F.2d at 354 (citing *Merritt-Chapman & Scott Corp. v. United States*, 528 F.2d 1392, 1397 (Ct. Cl. 1976)). If there are other reasons that performance of the contract was delayed or the costs were incurred, the contractor cannot recover the costs. FAR 52.212-12 ("no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor"). The contractor bears the burden to establish that the Government was solely responsible for the alleged delays. *Tidewater Contractors*, 07-1 BCA at 166,103.

Magwood cannot establish that the inability to test the sprinkler system was the sole cause of its delays in finishing the work on the contract. Even after the contracting

officer, on November 21, 2014, released Magwood from the obligation to test the sprinkler system, Magwood still could not finish contract performance until it submitted the TAB report for the HVAC system. In fact, in the revised schedule Magwood submitted in September 2014, both of these tests were listed as items necessary to complete contract performance and both were to occur on the same day. These were the only two remaining items, other than contract close-out activities. Magwood has not alleged that the two testing requirements were linked or in any way dependent upon each other. The Board finds no reference in the exchanges between the parties suggesting that the HVAC system was being held up by the inability to test the sprinkler system. Moreover, according to the TAB report Magwood submitted, testing of the HVAC system did occur as scheduled on October 7, 2015. Why Magwood failed to obtain the further work on the HVAC system until January 2015 and then submit the TAB report remains unexplained.

Magwood disputes the contracting officer's finding that it had other outstanding work, asserting that the "remaining work on the punch list could not be completed until the sprinkler system testing issue was resolved." Appellant's Brief at 16. Magwood's assertion is not supported by the record. Even after Magwood completed the rest of the punch list items on December 9, 2014, the contracting officer was still awaiting the TAB report for the HVAC system. If, as Magwood alleges, the Government's delay in deciding this issue was the only cause of delay and it delayed the remaining clean-up work, the record would show that Magwood completed the contract shortly after receiving the contracting officer's direction that no further testing would be required on November 21, 2014. Instead, contract performance continued into January 2015, when Magwood finally submitted the TAB report for the HVAC system. Putting aside for the moment Magwood's dispute with the further testing requirements, according to Magwood, the contract was at an end when it submitted the TAB report and the invoice from its subcontractor showing that the additional work on the system had been completed. The Board finds that the failure to submit the results of the HVAC TAB test is a concurrent delay and defeats Magwood's contention that the Government's inaction on its request for the sprinkler drawings was the sole source of its delay in finishing work on the contract.

II. The contracting officer properly withheld additional inspection costs

Magwood also appeals the contracting officer's decision to withhold \$2000 from the final payment on the contract as costs incurred by the Government to obtain a new TAB report. Magwood asserts that it fulfilled its contractual obligations by obtaining the first TAB report and providing documentation that the deficiencies identified in the first report were corrected. Appellant's Brief at 17-19. Magwood also asserts that the contractor redesigned the HVAC system, which was not work that Magwood would have

been permitted to do by the contract. *Id.* at 20-21. As evidence of this improper redesign, Magwood points to the statements from Omega that it had replaced the six-inch ducts installed by Magwood with ten-inch collars. *Id.* at 21.

Magwood correctly notes that the disposition of its claim is governed by the Inspection of Construction clause in the contract. Pursuant to that clause, the contractor is required to perform inspections “as may be required by the Contracting Officer.” FAR 52.246-12(e). Moreover, the contractor may be charged the costs of a re-test if “prior rejection makes reinspection or retest necessary.” *Id.*; *GEM Engineering Co. v. Department of Commerce*, GSBICA 12826-COM, 94-3 BCA ¶ 27,152, at 135,320 (contractor required to pay costs of travel for second inspection). The clause further requires that the contractor bear the costs to correct work that does not meet contract requirements. FAR 52.246-12(f). The Government bears the burden to establish that the retest was necessary and its costs. *See GEM Engineering Co.*, 94-3 BCA at 135,320 (after Government makes out a prima facie case, burden switches to contractor).

The agency has met its burden to show that the contracting officer’s insistence on a new test was reasonable and permitted by the clause. The original test showed that the system was only providing fifty-five percent of the designed airflow. Magwood, itself, expended additional dollars to have a contractor attach the ducts to address this issue. The contracting officer properly required a second test to determine whether these subsequent repairs had improved the airflow, because the contract required Magwood to perform the tests to show that the system met the airflow requirements to the satisfaction of the contracting officer.

Magwood is incorrect in its assertion that only one TAB report was contractually required. As noted, the contract required Magwood to provide a TAB report that showed that the system met the airflow requirements and satisfied the contracting officer. The initial report showed that the system was delivering only fifty-five percent of the required airflow and Magwood had taken steps to address this issue. Although Magwood asserted that it addressed the deficiencies identified in the first TAB report, the contracting officer was permitted to require a second TAB report to assess whether this work was sufficient.

Magwood is also incorrect in its assertion that Omega performed work to redesign the system that was not permitted by the contract. Magwood asserts that the contract documents identified where the HVAC ducts were to be placed and the size of the ducts.

Appellant's Brief at 21; Appellant's Supplemental Brief at 1.⁶ The work that Omega did to revise the layout and install larger ducts, Magwood insists, was not permitted by the contract and Magwood should not be required to pay for those efforts. As support, Magwood cites to the electrical drawing in the contract which indicated ducts of 24"x6". Exhibit 2 at 14. The contracting officer states that the contract did not require specific placement or types of ducts and left it to the contractor to decide the best method to fulfill the requirements of the contract. Declaration of Contracting Officer (Nov. 23, 2015) ¶¶ 7-9.

To resolve this issue, the Board examines the terms of the contract to determine what the contract required for the installation of ducts. Magwood asks the Board to find that the requirements for the size and placement of ducts were design specifications, from which Magwood had "no discretion to deviate." *Blake Construction Co. v. United States*, 987 F.2d 743, 745 (Fed. Cir. 1993) (citing *J.L. Simmons Co. v. United States*, 412 F.2d 1360, 1362 (Ct.Cl. 1969)). The agency asserts that the requirements for the HVAC system and its parts were performance specifications, wherein the contract sets forth a "standard to be achieved, and the successful bidder is expected to exercise his ingenuity in achieving that objective or standard of performance, selecting the means and assuming a corresponding responsibility for that selection." *Id.*

The Board finds that the requirements for the HVAC system were performance requirements and the indications on the drawings for duct location and size were not design requirements. The HVAC system to be installed had to meet the requirement of 1600 CFM.⁷ The notes on the drawings indicated that the locations for the HVAC equipment was approximate and could be changed. Magwood does not assert that the changes Omega made were unnecessary or did not bring the system closer to performing the system requirements. Pursuant to the Inspection of Construction clause, Magwood is responsible for any costs that are necessary to correct work found not to meet requirements. Therefore, the contracting officer properly withheld the additional \$2000 from Magwood's final payment on the contract to pay for this work.

⁶ Magwood asserted, in its initial brief, that it was required to use six-inch ducts, but did not identify where in the contract that requirement was stated. The Board asked the parties for supplemental briefing to address this issue and provide support.

⁷ The HVAC system as completed and tested only delivers the total of 1280 CFM, which still is deficient contractually.

Decision

The appeal is **DENIED**.

MARIAN E. SULLIVAN
Board Judge

We concur:

JEROME M. DRUMMOND
Board Judge

PATRICIA J. SHERIDAN
Board Judge