



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: April 22, 2016

CBCA 4452

RODRIGUEZ CONSTRUCTION LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Manuel Rodriguez, Principal of Rodriguez Construction LLC, Denver, CO, appearing for Appellant.

Leigh Ann Bunetta, Office of Regional Counsel, General Services Administration, Denver, CO, counsel for Respondent.

Before Board Judges **VERGILIO**, **KULLBERG**, and **WALTERS**.

VERGILIO, Board Judge.

On January 16, 2015, the Board received from Rodriguez Construction LLC (contractor) a notice of appeal arising under its contract with the General Services Administration (agency) under which the contractor performed work on a retention pond at the Denver Federal Center in Colorado. The contractor disputes a contracting officer's denial of its claim to recover \$42,859.31 (for what the contractor deems to be an increase due for work deleted from the contract, \$4179.80; additional work, \$10,510.95; and completed, but unpaid work, \$28,168.56), as well as the agency's reduction in the contract price for deleted work (\$13,445.51) and the agency's assessment of liquidated damages (\$18,740.86). In its complaint, the contractor contends it is owed \$47,704.51, which is the sum of \$37,193.56 (the unpaid contract balance) and \$10,510.95 (for alleged additional work).

The Board concludes that (1) for work deleted from the contract, the contractor is not entitled to a contract price increase; instead the contract price should be reduced by \$14,561.86; (2) the agency did not alter requirements for swale or security grates, such that the contractor is not entitled to additional payment; (3) the contractor is liable for \$3433.44 in liquidated damages under the contract for delayed substantial completion; and (4) the contractor is entitled to the unpaid balance on the contract price, \$37,193.56, reduced for the deleted work and liquidated damages.

Accordingly, the Board grants in part the appeal. The contractor is to recover \$19,198.26, with statutory interest to run from August 14, 2014, the date on which the contractor identified a sum certain for its claim to the contracting officer.

Findings of Fact

The Contract

1. Under the contract, GS-08P-13-JA-P-0043, the contractor was to renovate detention pond three at the Denver Federal Center, Lakewood, Colorado. Exhibit 4 at 1-3 (all exhibits are in the appeal file, with those submitted by the contractor having a prefix of "C-" before the number). The contractor was obligated to provide all services and materials necessary for the proper execution of the work under the contract for the fixed, lump sum price of \$87,100. Exhibit 4 at 3, 6.

2. The scope of work required the contractor to perform various tasks including demolition, improvements, construction, erosion control, grading, and providing drawings in AutoCAD format. The contractor was to construct a conventional drain swale as prescribed in contract drawings and contract documents. While the contract referenced drawing details for both a conventional swale and an infiltration swale, the agency did not opt for the infiltration swale; that is, the contract required the contractor to construct a conventional swale. Exhibits 4 at 57 & 336-39, 49. The original planned schedule of work identified the conventional (not infiltration) drain swale as a task to be performed. Exhibit C-1 at 2 (item 16).

3. The contract contained the Changes and Changed Conditions clause (APR 1984), 48 CFR 52.243-5 (2013):

(a) The Contracting Officer may, in writing, order changes in the drawings and specifications within the general scope of the contract.

(b) The Contractor shall promptly notify the Contracting Officer, in writing, of sub-surface or latent physical conditions differing materially from those indicated in this contract or unknown unusual physical conditions at the site before proceeding with the work.

(c) If changes under paragraph (a) or conditions under paragraph (b) increase or decrease the cost of, or time required for performing the work, the Contracting Officer shall make an equitable adjustment (see paragraph (d)) upon submittal of a *proposal for adjustment* (hereafter referred to as proposal) by the Contractor before final payment under the contract.

(d) The Contracting Officer shall not make an equitable adjustment under paragraph (b) unless—

(1) The Contractor has submitted and the Contracting Officer has received the required written notice; or

(2) The Contracting Officer waives the requirement for the written notice.

4. The contract also addresses equitable adjustments and the obligations of the parties, by supplementing the Changes and Changed Conditions clause:

At the written request of the Contracting Officer, the Contractor shall submit a proposal, in accordance with the requirements set forth herein, for an equitable adjustment to the contract for changes or other conditions that may entitle a Contractor to an equitable adjustment. If the Contractor deems an oral or written order to be a change to the contract, it shall promptly submit to the Contracting Officer a proposal for equitable adjustment attributable to such deemed change. The proposal shall also conform to the requirements set forth below.

(1) The proposal shall be submitted within 10 calendar days, or such other time as may reasonably be required by the Contracting Officer. In the case of a proposal submitted based on the “Differing Site Conditions” clause, the notice requirement of that clause shall be met.

(2) Proposals for equitable adjustments shall include a detailed breakdown of the following elements, as applicable:

- (a) Direct Costs.
- (b) Markups.
- (c) Change to the time for completion specified in the contract.

Exhibit 4 at 14 (¶ III.M). Regarding direct costs, the paragraph goes on to specify that the contractor shall separately identify each item of deleted and added work associated with the change, including increases or decreases to unchanged work impacted by the change. Exhibit 4 at 14-16 (¶ III.M).

5. The terms and conditions provisions in the contract expressly addressed contractor responsibilities. Two of these paragraphs read:

(4) Where installation of separate Work components as shown in the Contract Documents will result in conflict or interference between such components or with existing conditions, including allowable tolerances, it is the Contractor's responsibility to bring such conflict or interference to the attention of the Contracting Officer and seek direction before fabrication, construction, or installation of any affected work. If the Contractor fabricates, constructs, or installs any work prior to receiving such direction, the Contractor shall be responsible for all cost and time incurred to resolve or mitigate such conflict or interference.

(5) Where drawings show work without specific routing, dimensions, locations, or position relative to other work or existing conditions, and such information is not specifically defined by reference to specifications or other information supplied in the Contract Documents, the Contractor is responsible for routing, dimensioning, and locating such work in coordination with other work or existing conditions in a manner consistent with Contract requirements.

Exhibit 4 at 8-9 (¶ III.B).

6. As detailed in a special contract requirement, it was the contractor's responsibility to verify the accuracy of all measurements, blueprints, and other information provided to the contractor by the agency. Exhibit 4 at 57. Also, an Interpretation of Specifications and Drawings clause provides, in pertinent part, that if requirements set forth in one location are more restrictive than those set forth elsewhere in the contract documents, requirements set forth in specifications shall govern over requirements set forth in drawings; otherwise, the more restrictive shall govern. Further, if any inconsistency within the

drawings or specifications cannot be reconciled by reference to the clause, the contractor shall promptly request a determination from the contracting officer as to which requirement shall govern; the contractor assumes the risks if it follows either requirement without a determination from the contracting officer. Exhibit 4 at 11-12 (¶ III.G).

7. Contract drawing sheet 3 of 12 contains details for the work to be performed. The drawing, C 1.02 – construction plan exists in an 11"x17" contract version, with a stated scale of 1 inch = 30 feet. The drawing identifies the location of the conventional drain swale to be constructed, with attributes that include side slopes of 1:1 ratio and different channel slopes of 1% and 3%. The drawing contains a notation: “do not scale drawings[.]” Exhibits 4 at 336, 49, 56. When the contractor sought a larger version of the plans during the formation stage (i.e., pre-contract), the agency provided a larger and different version of drawing C 1.02, with a scale of 1:20; the document does not specify the slopes of the channels. The agency provided the document with the admonition that the contract documents would prevail should there be a conflict between the two drawings; the larger version drawing was not rescaled. Exhibits 50, 56.

8. The contractor was required to request of the contracting officer that an inspection occur to confirm the project was substantially complete. Following an inspection within five calendar days of the request, the contracting officer was to proceed with the inspection or advise the contractor of items that prevent the project from being designated as substantially complete. After the inspection, the contractor “shall correct all items noted on the List of Defects and Omissions within five days after substantial completion acceptance or will submit a written request to the Contracting Officer for approval to extend the correction period due to unusual conditions.” Exhibit 4 at 60.

9. The contract specified that the contractor was to begin performance within five calendar days and complete it within sixty calendar days after receiving the notice to proceed. Exhibit 4 at 1 (¶ 11). At variance with this sixty calendar day period of performance, the contract also specified that the contractor shall achieve substantial completion of the work no later than ninety calendar days from issuance of the notice to proceed, and contract completion within ten calendar days of substantial completion. Exhibit 4 at 6 (¶ 1.C). Substantial and contract completion are defined in a contract clause:

(1) The Work shall be deemed “Substantially Complete” if and only if the Contractor has completed the Work and related Contract obligations in accordance with the Contract Documents, such that the Government may enjoy the intended access, occupancy, possession, and use of the entire Work without impairment due to incomplete or deficient work, and without interference from the Contractor’s completion of remaining work or correction of deficiencies

in completed work. In no event shall the Work be deemed Substantially Complete if all fire and life safety systems are not tested and accepted by the Authority Having Jurisdiction, where such acceptance is required under the Contract.

(2) With reasonable advance notice, the Contractor shall submit to the Contracting Officer a written proposal recommending a Substantial Completion date (Notice of Substantial Completion). The Contracting Officer shall conduct inspections and make a determination of Substantial Completion within a reasonable time. If the Contracting Officer takes exception to the Notice of Substantial Completion, the Contractor shall be entitled to a written notice of conditions precluding determination of Substantial Completion.

(3) The Contractor shall only be entitled to an extension of time to address such conditions if, and to the extent that, the Contracting Officer provides notice of such conditions more than thirty (30) calendar days after receipt of the Notice of Substantial Completion.

(4) Substantial Completion shall be established by the Contracting Officer's issuance of a written determination specifying the date upon which the Work is Substantially Complete.

(5) The Contract is complete (Contract Completion) if and only if the Contractor has completed all Work and related Contract obligations, corrected all deficiencies and all punch list items, and complied with all conditions for final payment.

(6)

(7) The Contractor shall not be entitled to final payment or release of any retainage held by the Government until after Contract Completion. If the Contractor does not achieve Contract Completion within the time required by this Contract, the Government shall be entitled, after providing notice to the Contractor, to complete any work remaining unfinished. The Contractor shall be liable to the Government for all costs incurred by the Government to complete such work.

10. The contract specified that the contractor shall be liable to the agency for liquidated damages for each calendar day following the required completion date that the work is not substantially complete. The rate of liquidated damages is \$143.06 per calendar day. Exhibit 4 at 7 (¶ I.F), 17 (¶ III.O).

Performance and the disputes

11. A no-cost, bilateral contract modification effective on December 2, 2013, extended the contract completion date to January 31, 2014. This accounted for the issuance of the notice to proceed (after the receipt, review, and approval of bonds from the contractor) and specified that the period of performance remained sixty calendar days. Exhibit 5 at 3, 8. Subsequent no-cost, bilateral modifications (inexplicably referencing the Default (Fixed-Price Construction) clause (APR 1984), 48 CFR 52.249-10, as the authority for the issuance) extended the period of performance by twenty, thirty, and seven calendar days to March 29, 2014, due to severe weather. Exhibits 6 at 2-4, 7 at 2-4, 10 at 3-5. All performance dates referenced below are in 2014.

12. On March 14, the parties met to discuss performance and issues the contractor was encountering. Without the knowledge of the agency personnel at the meeting, the contractor recorded the meeting. Exhibits 57 (transcript of cd); C-0 (audio cd). The selective references by the contractor to portions of the meeting do not accurately reflect the substance of the conversations. Exhibits 57, C-0, C-7 to C-10. The contractor performed work on the swale and security grates, and grading, based upon input from its surveyor and others. That input relied upon other than the contract requirements and the contract drawings, as the contractor began installing an infiltration, not the conventional, drain swale. Use of a non-contract drawing led to difficulties surrounding the security grates. Also, the contractor was utilizing the incorrect slope standard such that the contracting officer's representative constructed a wooden form to assist in the performance of the project. Exhibits 57, C-0. The record as a whole, including the exhibits and annotations on documents provided by the contractor, Exhibits C-0, C-4 to C-10, do not demonstrate that the contract was defective, that differing site conditions existed, that the agency was a cause of the extra or unanticipated work the contractor performed, or that the contracting officer's representative acted inappropriately. Exhibits 8, 17, 56, 57, C-0.

13. On March 27, the contracting officer notified the contractor that if it failed to complete the work by the date specified in the contract, March 29, the agency would begin to assess liquidated damages under the contract and that the contractor was responsible for any costs it incurred if the project was not completed by April 1, the date on which water would be released to flow through a portion of the project. Exhibit 11. Although the communication referenced FAR 52.211-12, the agency has not demonstrated that this clause

was in the contract, which contains its own Liquidated Damages clause. Exhibit 4 at 17 (¶ III.O), Finding 10.

14. By a writing of March 31, the contracting officer informed the contractor that concrete work was removed from the project; this eliminated work associated with the trickle channel. Exhibit 11. As a follow-up, on April 9, the contracting officer provided the contractor with a change request form for the contractor to complete. The contractor was to provide a lump sum amount to deduct or add to the contract price, detailing any changes in the cost of performance and/or the time of performance that would result from deleting (1) concrete trickle drain extensions and ancillary activities and (2) a metal pipe support and ancillary activities. For each of overhead, profit, and bond there were lines for the contractor to specify a percentage and a dollar figure, as well as a grand total and the number of calendar days of contract time extension required due to the changes. Exhibit 18.

15. A document dated April 11 from the contractor's office administrator to the contracting officer and contracting officer's representative referenced substantial completion, noting items as 100% complete, with the exception of four items (fill concrete flow structure, concrete extension at trickle channel, blend existing contours at trickle channel, and seeding and mulching) as 0%. Exhibit C-11. The contractor maintains that the last day it was on-site doing work was April 10.

16. A contractor invoice dated April 16 identified costs said to be incurred for the week of March 16-22, to excavate for trickle channel extension and dam up water flow to permit the area to dry up. Hourly costs for four individuals and for two pieces of equipment total approximately \$2965. Exhibit 19. The agency questioned a number of the hours for individuals and equipment, and identified tasks that would not be performed given the deletion of work. Exhibit 26.

17. On April 22, the contractor provided the agency with an application and certification for payment for the period through April 5. This identified a total of \$55,451.60 completed out of the \$87,100 contract price, with a remaining balance to finish, including retainage (10% of completed work) of \$37,725.24. The agency signed a certification of progress payments reflecting these dollar amounts. Exhibit 23.

18. On April 22, the agency informed the contractor that the agency sought to schedule the substantial completion site walk for April 24. Exhibit 21. Based upon the April 24 inspection and later noted items, the agency created a list of defects and omissions. The form with the list includes a block 5, type of inspection, with four choices: progress, substantial, partial final, and final. The checked box is partial final. The list described fourteen items, with a description of each defect or omission and with the required action:

(1) specifies that the agency will monitor a crack in concrete for warranty concerns; (2) requires a repair to cracked grout; (3) requires cleaning, preparing, and recoating a pipe and beam; (4) identifies dirt and debris to be cleaned from beam flanges at abutments; (5) requires dirt and seeding; (6) specifies that the site and staging area needs to be cleaned; (7) requires even surface areas throughout the site and staging area; (8) notes that a dewatering pipe needs to be retrieved, and that the agency will contact the contractor when the water level has receded; (9) indicates that the contractor must provide record drawings identifying features; (10) recognizes that the water drainage system has not been thoroughly tested, but notes agreement that the full functionality will be tested at a later date; (11) states that additional meetings will be scheduled to discuss work activities to be removed from the scope of work; (12) notes that vegetated areas require further monitoring until the required 70% germination is achieved; (13) specifies that valve box extensions are not aligned, and some excavation and re-alignment is necessary; and (14) indicates that a concrete support block must be removed pursuant to the contract. Exhibit 24.

19. On May 1, the agency informed the contractor of problems with notes on drawings, documentation for buried features (which should be based on two existing objects), and the lack of documentation for a buried telephone cable. Exhibit 25. The agency contends that the contractor did not respond to requests to finish items on the defects and omissions list and did not ask for a reinspection to accomplish substantial completion, until early August 2014, when the contractor informed the agency that the project had been complete for a while. Exhibit 31.

20. The contractor submitted what it styled as a claim to the agency on July 9. The submission asserts that bid documents differed from construction documents, the site conditions had changed (regarding fence location, swale contours and location, and a two-foot realignment of the swale that threw off measurements for the survey and as-builts), and there were contract problems relating to submittal and engineering data for the drain pipe and design and with actions of the contracting officer's representative. The contractor stated that it had completed ninety percent of the work relating to the deleted work. The submission did not state a specific dollar amount sought, but asked the agency to honor its commitments, submit a full release of any monies due, and provide an equitable price adjustment for any work performed outside the scope of work identified in the original bid documents. Exhibit 29. A change order proposal, also dated July 9, sought \$10,510.95 for lump sum pricing of two items: (1) March 4 rework swales and slopes due to elevation change at intersecting swales, \$9435.50, and (2) reset security grate at fence due to elevation change at swale intersection dropping six inches, \$1075.45. The contractor asserted that it

acted in good faith and with due diligence in order to accommodate the differing site conditions, multiple verbal, written and unofficial requests made

by the COTR [contracting officer's technical representative] [sic, should be contracting officer's representative throughout]. [The contractor] was compelled to act outside of the original scope of work after the COTR discovered flaws in the Government design. On more than one occasion, the COTR harassed [the contractor], employees, management and suppliers to correct the Government[']s requirements out of pocket. Out of fear of retribution, [the contractor] complied with the request and accommodated the requests.

The COTR directed the use of a makeshift wooden template to demonstrate grade variation and used these methods as official rationale to compel [the contractor's] employees to rework simple earthwork. Grading non-aggregate surfaces is done by industry standard and as a general rule within a degrees of grade not to perfection and certainly not with homemade measuring devices. Site work is something [the contractor] performs with proven results and documented past performance, frequently, as this work is part of their core competencies.

[The contractor] voiced concern, submitted written dissent for design flaws and applied a large degree of industry knowledge within their core business function to ensure the requirements of this order were met.

[The contractor] has submitted multiple iterations of as-built drawings that have been rejected by the Government. [The contractor] has done multiple site and grade rework to accommodate the Government[']s requirements, most of which have an associated cost.

Exhibit 29 at 5. The particulars of the relief sought were set forth:

[The contractor] merely asks the Government to honor its commitments and submit full release of any monies due and asks for an equitable price adjustment for any work performed outside of the scope of work provided with the original bid documents. [The contractor] requests [that the contracting officer's representative] be removed from any future projects.

Exhibit 29 at 6. The support for the second item, \$10,510.95, consists of an invoice from the contractor to the agency for two items at lump sum prices. The first identified March 4 rework of swales and slopes due to elevation change at intersecting swales, priced at \$9435.50. The second was to reset security gates, due to elevation change at swale intersection, a drop of six inches, priced at \$1075.45. Exhibit 29 at 16. Credible support for

either figure is not included in the record; that is, the record demonstrates neither that extra work resulted from a change, differing site condition, or other basis which would make the agency liable for increased costs of the contractor nor that the contractor incurred the costs specified. Findings 4-5.

21. The contracting officer responded on July 31, 2014, raising questions and seeking information in order to fully evaluate the claim and issue a decision:

First, the claim does not discuss the items included on the Defects and Omissions (D&O) list, or when and if these items will be addressed (see attached D&O list). The most significant items on the list which have not been addressed are Item 9, Topographical Drawings and Item 13, Repair of 2 Valve Boxes. My records indicate that [contractor's project manager] understood that Item 13 was still pending completion by his email to me of May 29, 2014.

Second, the credit for the change request for removing work from the trickle channel was not discussed in the claim. The official change request was sent to [the contractor] on April 9, 2014. [The contractor] acknowledged the change request and submitted a proposal. The proposal shows a positive amount instead of a credit. As requested on June 23, 2014, please show the amount of the credit for the removal of the work. To date, all proposal revisions show additional cost to the Government.

Third, the claim does not explicitly state the sum certain that you seek filing the claim. Instead, the claim includes an invoice in the amount of \$10,510.95. If the Government pays the invoice of \$10,510.95 will this give the Contractor full satisfaction of the contract? If not, please submit what amount would give the Contractor full satisfaction of the contract.

Finally, please clarify the type of work performed by the [engineer]. This is introduced in Paragraph 3. Item a. on the Contractor's claim, but does not include sufficient detail to allow full evaluation by [the agency].

Exhibit 31.

22. On August 4, 2014, on behalf of the contractor, an individual responded to the contracting officer and stated that all items on the defects and omissions list had been addressed and corrected for quite some time, adding: "The project is 100% complete and is operational. We need to reach conclusion on this project asap." Exhibit 31 at 2. On the same day, the contracting officer responded:

The Government still has not received the information that it needs to render a decision on the claim. In light of that, the Government would like to negotiate a sum certain cost that would render full satisfaction of the contract.

The Government acknowledges that a sum is due to the Contractor for partial work received. However, liquidated damages have been accruing since April 1, 2014 and the Government is still owed a credit for the change request removing work from the trickle channel.

Please provide the Government with a proposal for the sum certain cost that would render full satisfaction of the contract.

Exhibit 31 at 3.

23. On August 7, the agency conducted what it characterized as a partial final inspection and concluded that the project was substantially complete. Exhibits 27, 28. However, the inspection noted mechanical and architectural concerns, and identified some items as not complete. Exhibit 31.

24. On August 14, the contractor provided the contracting officer with a written detail of the payment sought:

\$ 4179.80	work performed on the job before the trickle channel portion of work was removed
\$28,168.66	unpaid amount from pay application 3
\$10,510.95	amount owed for change order to rework swales and reset security grate
\$42,859.31	total sought

Exhibit 33.

25. On October 20, 2014, the contracting officer issued a decision denying the claim in its entirety. The decision further specified that \$37,193.56 is outstanding on the contract amount. The decision stated that a modification would be issued reducing that amount by both \$13,445.51, as credit for removing the trickle channel and related work, and \$18,740.86 as liquidated damages. Exhibit 34.

26. In its notice of appeal received at the Board on January 16, 2015, the contractor identified circumstances surrounding the claim as including: bid documents provided for

pricing differed from contract drawings; differing site conditions led to contradictory design information; difficulties working with the contracting officer's representative; after descoping of work, the agency has not paid for already completed work; and liquidated damages are not properly assessed because the contractor substantially completed performance in a timely fashion. The contractor stated that it is owed \$47,704.51.

27. The contractor asserts that there were conflicts in the design, differences between contract drawings and those provided to the contractor, and directives issued during performance that differed from contract requirements. The contractor has provided few details; the record does not factually substantiate its contentions. Beginning construction on an infiltration swale, not the conventional swale required by the contract, resulted from the contractor failing to follow contract requirements. The contractor's reliance on a large scale drawing not part of the contract, particularly without bringing any conflict to the attention of the contracting officer, is not the fault of the agency. Sloping difficulties and other problems arose from the contractor not following contract drawings and specifications. The contractor expended time and money building not according to the contract and then correcting the problem; those errors and expenditures are not attributable to the agency. Security grate difficulties are not the fault of the agency. Although the contractor faults the actions of the contracting officer's representative, the record reveals that the agency and that individual assisted the contractor in coming up with solutions to problems the contractor created. For example, the contractor was using the wrong detail for sloping, working to achieve a 3:1, not a 1:1, slope in a given area. The agency made a template with the proper slope to be used as a guide. The record does not demonstrate that the agency's actions created or caused any compensable costs or time incurred by the contractor in the performance of the contract; to the contrary, agency actions recognized problems and assisted in limiting wasteful expenditures because of contractor actions. Exhibits 8, 17, 34, 57, C-6 at 2 (##1-6).

28. Tasked with determining an independent estimate of the contractor's savings resulting from the deletion of the trickle channel and related work, the contracting officer's representative, who was familiar with the design, the work, and the pricing aspects of performance, utilized the contractor's cost details submitted as part of the justification for its lump sum pricing, and his knowledge regarding the work performed and deleted, and the direct and indirect cost items involved. The estimate indicates that, based upon the contractor's time and equipment records, the contractor expended \$484 on the work before further performance was deleted. In summary, from the \$87,100 contract fixed price, the agency found savings to the contractor in direct and indirect costs of \$12,335.33 (the contract price includes the \$484 expended, which is not a savings). To this were added percentages for bonding, overhead, and profit, for a total credit of \$14,931.92 calculated by the agency. Exhibits 2, 26, 53-54, 56. The specific direct and indirect cost savings, as well as profit and

overhead, are consistent with the record and credible. The record does not indicate that the contractor's bonding costs decreased as a result of the deleted work. Accordingly, making an adjustment for the bonding, the Board finds that the contract price should be reduced by \$14,561.86 for the deductive change.

Discussion

The contractor seeks compensation for (1) work performed on the trickle channel portion of the work before the work was deleted from the contract; (2) work the contractor deemed to be additional work related to reworking swales and resetting the security grate; and (3) unpaid, completed work. The contractor also takes issue with actions of the contracting officer's representative and opposes the agency's reduction in the contract price for the deleted work and the assessment of liquidated damages. The Board makes a de novo determination on the contractor's claims for compensation and on the agency's claims for a deductive change and for liquidated damages.

Change for deleted work

The agency deleted concrete work for the trickle channel and associated work on March 31. Finding 14. For the deleted work, the contractor sought a contract price increase of \$4179.80. Finding 24. The contractor bears the burden to establish entitlement to payment greater than the fixed contract price. The record fails to demonstrate that the fixed-price contract price should increase due to the deleted work. Findings 20-21, 24, 27.

The agency bears the burden of proof to substantiate the deductive change for deleted work. The Board finds that the calculations and analysis by the contracting officer's representative, who was aware of the associated efforts performed and not performed and the scope of the project, are credible and supported by the record, and without credible rebuttal from the contractor. The contractor expended \$484 on the work before being told to cease performance on the trickle channel and related work. Beyond that expenditure, the contractor saved direct and indirect costs of \$12,335.33. Overhead and profit for work not performed were then added to this figure. Although the agency seeks to decrease the contract price by bonding costs as well, the record does not establish that the contractor's bonding costs were reduced when the work was deleted near the end of the project. The contractor has not provided a substantive basis to discredit the analysis. Accordingly, based upon findings, the Board concludes that the supported amount of the deductive change order is to decrease the contract price by \$14,561.86. Finding 28. The contractor's claim for additional money on this item is denied, and the agency's claim for a contract price reduction is granted in the amount of \$14,561.86.

Conventional drain swale and resetting security grate

The contract, including drawings, identifies the particular aspects of the work to be performed. In particular, the contract required a conventional drain swale, and drawing sheet 3 of 12 specifies attributes for performance. Findings 2, 12, 27. When performing, the contractor used a non-contract drawing (the blown-up drawing which differed from the contract drawing) and relied upon non-contract requirements (the infiltration swale was not the requirement here) with the result that performance was not in accordance with the contract. These actions, not the fault of the agency, led to the contractor's additional efforts. The record does not establish the contractor's entitlement to extra costs for the work involved or the quantum of any related efforts. The contractor assumed risks of performing as it did, Findings 5-6, and has not established a change or changed condition that entitles it to additional money or time for its performance. Findings 3-4. The agency never required the contractor to perform other than the requirements of the contract. The actions of the agency and contracting officer's representative assisted the contractor in fulfilling its obligations and helped reduce the contractor's efforts when it strayed from actual requirements. The record contains lump sums the contractor seeks for its efforts, but the support of direct and other costs is lacking. Thus, the contractor has not prevailed on this item for relief.

Substantial completion and liquidated damages

The agency bears the burden of proof to recover liquidated damages. Under the contract, liquidated damages may be assessed if substantial completion occurs after the date determined by the contract. Here, substantial completion was to have occurred by March 29. Findings 10-11. On April 24, the agency performed an inspection. Thereafter, it issued a list of defects and omissions. The nature of the identified items, and the necessary correction or continued observation, indicate that the project was substantially complete as of April 22. While work remained to be accomplished, the agency has not identified how its use and enjoyment of the project was substantively diminished by the further work the contractor had to perform. This conclusion is supported further by the actual form which designated the inspection as a "partial final" inspection and not a substantial inspection. Findings 9, 18.

The contractor accomplished substantial completion on April 22, not March 29, therefore, twenty-four days late. The record does not demonstrate that any of that delay arose for reasons not attributable to the contractor. Multiplying the \$143.06 per day assessment times the twenty-four days results in liquidated damages of \$3433.44 to be assessed against the contractor.

Calculation based on entitlement

The contractor has not demonstrated that it is entitled to a price increase for deleted work or for any other basis raised. The unpaid contract amount is \$37,193.56. Findings 17, 25. The contract price needs to be reduced for the deleted work, \$14,561.86, and for liquidated damages, \$3433.44. Therefore, the contractor is to recover \$19,198.26. Interest under the Contract Disputes Act, as amended, 41 U.S.C. § 7109 (2012), is to run from the date the contracting officer received a proper claim with a sum certain, August 14, 2014. Finding 24.

Decision

The Board **GRANTS IN PART** the appeal.

JOSEPH A. VERGILIO
Board Judge

We concur:

H. CHUCK KULLBERG
Board Judge

RICHARD C. WALTERS
Board Judge