



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: September 15, 2017

CBCA 5618

INDUSTRIAL MAINTENANCE SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Brenda S. Soper, President of Industrial Maintenance Services, Inc., Escanaba, MI, appearing for Appellant.

David G. Fagan, Office of General Counsel, Department of Veterans Affairs, Portland, OR, counsel for Respondent.

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

VERGILIO, Board Judge.

Industrial Maintenance Services, Inc. (contractor) has appealed the denial of its claim to recover \$5633.01 under its contract with the Department of Veterans Affairs (agency). This amount is said to reflect direct costs (labor, labor burden, material, and equipment rental) plus mark-ups for overhead and profit, associated with a critical path adjustment connected to a contract extension arising from a modification that altered and added work. The agency maintains that these are overhead and other costs already paid under a contract modification and not separately reimbursable under its Changes clause supplement which is part of the contract (the provision caps allowances for overhead and profit, and specifies that percentages for overhead and the contractor's fee shall be considered to include field and office supervisors and assistants, incidental job burdens, and general home office expenses, with no separate allowance to be made therefore); the agency supports its position with

references to case law. The contractor contends that these costs are discrete from those paid under the contract modification and are recoverable. The parties have submitted the case on the record, without a hearing.

The Board concludes that the bilateral modification left open the resolution of additional time and money associated with the change. The agency has utilized an incorrect value for the cost of the modification focusing only on the added and altered work, and not including a value for the impacted work to be performed. The modification changed the critical path of performance (evidenced by the extended performance period not captured with the added and altered work). Impact was part of the change for which the contractor seeks additional compensation. The contractor is entitled to direct costs not precluded by the Changes clause supplement and overhead and fees based upon the value of the impacted work.

Findings of Fact

1. With an award date of April 26, 2016, the parties entered into a contract, VA69D-16-C-0116, under which the contractor was to furnish all labor, materials, equipment, and supervision to complete an upgrade to a specified medical center within 320 calendar days after receiving a notice to proceed. Exhibits 2 at 1-3, 3 (all exhibits are in the appeal file).

2. The contract contains a Changes clause (June 2007), 48 CFR 52.243-4 (2015), as well as a Changes clause supplement from agency regulations, VAAR 852.236-88 (JUL 2002), 48 CFR 852.236-88(b) (2016), which provides, in pertinent part:

(4) Allowances not to exceed 10 percent each for overhead and profit for the party performing the work will be based on the value of labor, material, and use of construction equipment required to accomplish the change. As the value of the change increases, a declining scale will be used in negotiating the percentage of overhead and profit. Allowable percentages on changes will not exceed the following: 10 percent overhead and 10 percent profit on the first \$20,000 Profit shall be computed by multiplying the profit percentage by the sum of the direct costs and computed overhead costs.

(5) The prime contractor's or upper-tier subcontractor's fee on work performed by lower-tier subcontractors will be based on the net increased cost to the prime contractor or upper-tier subcontractor, as applicable. Allowable fee on changes will not exceed the following:

(10) Overhead and contractor's fee percentages shall be considered to include insurance other than mentioned herein, field and office supervisors and assistants, security police, use of small tools, incidental job burdens, and general home office expenses and no separate allowance will be made therefore. Assistants to office supervisors include all clerical, stenographic and general office help. Incidental job burdens include, but are not necessarily limited to, office equipment and supplies, temporary toilets, telephone and conformance to OSHA requirements. Items such as, but not necessarily limited to, review and coordination, estimating and expediting relative to contract changes are associated with field and office supervision and are considered to be included in the contractor's overhead and/or fee percentage.

Exhibit 2 at 28-30.

3. The agency sought a proposal showing cost breakdowns, including any additional time requested, to provide additional and alternate work. Exhibits 6, 7.

4. The parties entered into a bilateral contract modification that added and altered contract work, and increased the contract price by \$34,158.41 to \$1,798,090.21. Exhibit 2 at 236-43. The figure is composed of subcontractor costs, contractor fees on that amount, and the contractor's direct labor to perform some of the work, a labor burden amount, and overhead and profit on the direct labor. Exhibit 24 at 8. The modification expressly left the completion date unchanged. A clause of the modification states:

This consideration represents a complete equitable adjustment for all costs direct and indirect, associated with the work and time agreed to herein, including, but not limited to, all costs incurred for the extended overhead, supervision, disruption or suspension of work, labor inefficiencies and the changes['] impact on unchanged work. Except as provided herein, all terms and conditions of the document referenced in item 9A or 10a, as heretofore changed, remains unchanged and in full force and effect.

Exhibit 2 at 237. Despite the stated zero day change to the completion date and statement that the price includes all costs direct and indirect, and the impact on unchanged work, a contract specialist provided the contractor with the to-be-signed agreement, noting: "As discussed prior, we can address your concerns regarding the impact on the schedule separately." Exhibit 15 at 9. The contractor returned the signed agreement with an email message that stated that it "reserves the right to be compensated for additional days if needed once the schedule is revised to incorporate this change." Exhibit 15 at 9.

5. Thereafter, the parties agreed that the change resulted in a five working or seven calendar day impact to the critical path and required an adjustment to the completion date. Exhibits 1 at 7 (¶ 4), 18 at 1-3. For this change to the critical path, the contractor sought \$5633.01 for its associated direct labor, direct material, equipment rental, and labor burden costs, as well as overhead and profit, each at 10%. The direct labor consists of a superintendent for 40 hours (8 hours per day for 5 days), a project manager for 10 hours (2 hours per day for 4 days), and daily clean up of 5 hours (at 1 hour per day for 5 days). The direct material is identified as vehicle mileage and equipment fuel. Equipment is a rough terrain forklift for 20 hours (5 hours per day). Exhibit 19 at 1, 3-4. The agency contends in its brief, without objection from the contractor, that the piece of equipment itemized as equipment rental was not used to perform the work specifically added or altered in the modification. However, the agency recognizes that the equipment was on site and states that it was used during demolition work; demolition work occurred after the modification and was impacted by the modification. Exhibit 19 at 11-17. The Board finds that the equipment was to be utilized to perform the work impacted by the modification; because of the modification, the contractor kept the equipment on site for a longer period than allocated under the initial contract.

6. By an email message sent and received on September 29, 2016, the contractor submitted its claim to recover \$5633.01, as it sought a contracting officer's decision. Exhibit 23. By decision dated December 8, 2016, the contracting officer denied the claim. Exhibit 1 at 7-13. The contractor filed an appeal with the Board on January 31, 2017.

Discussion

The contractor seeks \$5633.01, which it asserts are its direct costs, with mark-ups for overhead and profit under the contract, arising from the change to the critical path of performance. The agency maintains that the contractor seeks costs beyond what the contract permits, because full compensation already has occurred. The agency focuses upon language in its supplement to the Changes clause, and relies upon the decision in *Santa Fe Engineers, Inc. v. United States*, 801 F.2d 379 (Fed. Cir. 1986).

The bilateral modification states that the price adjustment includes all direct and indirect costs "associated with the work and time agreed to herein" including the impact on unchanged work. As evidenced by the communications by the agency in transmitting, and by the contractor in returning, the modification, the parties had not agreed to the time and cost impacts of the added and altered work. The ultimate change to the critical path arising from the modification demonstrates that the modification impacted the unchanged work. What is to be resolved is the contractor's entitlement to any additional payment and the amount of any such payment.

The agency contends that it has already paid the impact costs sought because the overhead and fee percentages calculated in the bilateral modification include payment for the labor and other costs sought. The language of the Changes clause supplement explicitly states that the overhead and fee percentages shall be considered to include field and office supervisors and assistants, and incidental job burdens, and that no separate allowance will be made for them. However, some of the costs sought are direct costs not precluded by the supplement. Further, the agency undervalues the modification which encompasses impacted work, as well as the added and altered work. The agency applies overhead and fee percentages to the value of the added and altered work, but not the impacted work. This methodology fails to compensate the contractor properly.

In *Santa Fe*, 801 F.2d at 381, there was no dispute over the allowability of the direct costs of a change, but a dispute arose as to delay overhead. The Court noted that the “literal words of [the clause] blanket [i.e., cover both] delay overhead as well as overhead on the direct costs incurred by the contractor. There is nothing in the language of [the clause] differentiating delay overhead in any way from direct costs overhead.” In *Reliance Insurance Co. v. United States*, 931 F.2d 863, 867 (Fed. Cir. 1991), the Court observed that the “clause does not deprive the changes clause of most of its ordinary coverage, rather the ordinary coverage of the changes clause in [the] contract includes limits on delay overhead.” In these cases, the Court limited relief calculated with the percentages applied to direct costs. The methodology under the clause has been followed in other cases, with *Sefco Constructors*, VABCA 3730, 93-1 BCA ¶ 25,458 (1992) (claimed supervision expenses associated with the changed work were not compensable as a direct cost, but treated as an overhead cost and compensated via the percentage overhead rate) as one example.

However, in seeking delay overhead, the contractors did not raise and opinions have not addressed or recognized that in terms of dollars, the actual scope of the underlying change extended beyond the dollar value of work added, altered, or deleted. As is apparent in this case, with the critical path of performance affected, the impact of the change reached beyond the immediate work modified, and the impacted work is just as much a part of the change as the actually added and altered work. The dollar value of the impacted work is an element of the costs of the modified work. It is from that total amount that the overhead and fee percentages must be calculated to properly compensate the contractor for its costs not recoverable as direct costs.

The contractor seeks direct labor costs for a superintendent, a project manager, and daily clean-up costs. The supplemental Changes clause precludes recovery for field and office supervisors as a direct cost; this means that those amounts the contractor seeks are not recoverable as direct costs, but are included in overhead and fees. Although the clause also precludes recovery of incidental job burdens as a direct cost, the daily clean-up costs, vehicle

mileage, and equipment fuel are not presented as burdened rates, but as direct costs. As such, they are recoverable as direct costs to the extent that the contractor proves its costs. The rough terrain forklift remained on the job site for the extended critical path time. That represents a direct cost, not excluded by the supplemental Changes clause. However, to receive payment the contractor must provide proof of its costs.

In summary, the Board grants in part the claim. The contracting officer did not compensate the contractor for all of its direct costs, and did not utilize the correct dollar figure when calculating overhead and fees. The contractor is to submit proof (affidavits and other information to verify and corroborate the costs sought) to the contracting officer of its actual costs for each aspect of the payment sought, and of the value of the impacted work. The contracting officer is to pay the supported direct costs, and apply percentages for overhead and fees to the value of the impacted work such that the contractor is compensated for costs not recoverable as direct costs. The contractor may recover the amount of its claim or a lesser amount, if borne out by the submissions and calculations.

Decision

The Board **GRANTS IN PART** the appeal. The contractor prevails on entitlement, but quantum remains to be determined by the contracting officer in accordance with the dictates above. The parties are to report to the Board on the outcome of that determination, and to state whether the quantum portion of the case may be dismissed from the docket.

JOSEPH A. VERGILIO
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

HAROLD D. LESTER, JR.
Board Judge