



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: March 26, 2018

CBCA 5410

BCPEABODY CONSTRUCTION SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Robert M. Carpenter, President/Chief Executive Officer of BCPeabody Construction Services, Inc., Lutz, FL, appearing for Appellant.

Harold W. Askins III, Office of Regional Counsel, Department of Veterans Affairs, Charleston, SC, counsel for Respondent.

Before Board Judges **BEARDSLEY**, **GOODMAN**, and **RUSSELL**.

BEARDSLEY, Board Judge.

BCPeabody Construction Services, Inc. (BCPeabody) timely appealed from the denial of its certified claim. It asserts entitlement to suspension of work damages in the amount of \$175,778, costs incurred for additional architectural and engineering (A/E) design services in the amount of \$68,904, and extra and changed work totaling \$73,864.26 under a firm-fixed-price design build task order issued by the Department of Veterans Affairs (VA). BCPeabody also appealed the VA's claims for \$115,294.93 for unused equipment costs and \$17,501.13 for procurement costs. Additionally, BCPeabody alleged that the VA breached its implied duty to act in good faith and deal fairly with BCPeabody under the task order.

The parties submitted the appeal for a decision on the record pursuant to Rule 19 of the Board's rules. 48 CFR 6101.19 (2016).

We find that BCPeabody is entitled to \$13,700.54 for personnel costs and \$13,282 for general conditions costs as a result of the unreasonable suspension of the work, but not unabsorbed home office overhead costs. We find that BCPeabody is also entitled to damages in the amount of \$34,900 for additional A/E design services and \$63,644.16 for extra and changed work. The VA did not breach the duty of good faith and fair dealing. The VA is not entitled to costs for unused equipment or procurement costs. The total awarded to BCPeabody is \$125,526.70.

Findings of Fact

The VA awarded firm-fixed-price task order VA248-12-J-4502 (task order) under contract VA248-C-1851 to BCPeabody on June 29, 2012, to renovate nutrition and food service (N&FS) areas in buildings 101 and 102 of the Bay Pines Veterans Affairs Medical Center in Bay Pines, Florida. The task order required BCPeabody to provide "full design, all labor, tools, materials, equipment and supervision to renovate the kitchen areas in buildings 101 and 102." The work included all "structural, architectural, utilities, and equipment as needed to meet the design." The task order directed BCPeabody to renovate one building at a time to allow the VA to continue its mission.

Additional Architectural and Engineering Design Services

BCPeabody received the notice to proceed on or about July 9, 2012. BCPeabody was supposed to complete the design of both kitchen areas within sixty days from the notice to proceed, or by September 7, 2012. Instead, the VA approved the design on or about May 10, 2013, or 245 days later. The task order called for "all new equipment" except for the "dish machines currently in place." The new equipment supplied by BCPeabody was to be "driven by the design, however, for bidding purposes" the equipment specified in the task order was "probable at a minimum for each building." Instead and as a result of late coordination with the N&FS staff in November and December of 2012, the equipment list was revised to require BCPeabody to reuse thirty to forty percent of the existing equipment. While the task order documents were "intended to define existing conditions," it was discovered late in the design process that the VA's plans did not represent the actual operating heating, ventilation, and air conditioning (HVAC) system. The equipment changes and HVAC discovery required a major rework of the electrical and mechanical design.

At a meeting on February 26, 2013, the design team realized that the kitchens would be used to grill food using grease, requiring a different hood and configuration. Although

BCPeabody asserts that it was told that there would be no grease cooking, the drawings, early equipment list, and early design indicated that griddles would be used, and the specifications specifically called for a “griddle with hood” and “a dedicated grease hood exhaust system.”

BCPeabody claims \$68,904 in costs for additional A/E design services required as a result of the VA’s design changes. Specifically, BCPeabody claims:

\$32,000 for the rework of kitchen equipment new/used, rework of all electrical systems, rework airflow systems (record plans incorrect), rework plumbing plans, two additional site visits for programming and as-builts.

\$28,000 for modifications to kitchen operations and electrical load, design of new hood, ansul system, cleaning system, rework of airflow system in kitchen, design to bring 45 KVA system to 75 KVA, additional site visit to evaluate existing electrical system.

\$2,000 for Erik Stor’s^[1] additional time needed for added requirements of design. (\$50/hr. @ 40 hrs.)

\$640 for Adam Goetz’s^[2] additional time needed for added requirements of design. (\$16/hr. @ 40 hrs.)

BCPeabody claimed ten percent profit and overhead for the additional design services.

Suspension of Work

Per the Suspension of Work clause in the task order, the VA notified BCPeabody at a November 4, 2013, meeting that the work would be suspended in building 101 for as long as four months. The reason for the suspension was that patients using the dining room could not be relocated to allow for the renovation to begin. The VA issued several suspension of work letters to BCPeabody starting on November 6, 2013. The first letter read:

BCPeabody Construction Services, Inc. is hereby directed to Suspend Work for thirty days ending on Friday 6 December. The suspension of work is

¹ Erik Stor was a senior vice president for BCPeabody until June 2013. During his tenure as senior vice president, he was the “focal point” for the project. From June 2013 to November 2013, Mr. Stor worked as an independent contractor on the project.

² Adam Goetz was a project manager for the project.

effective immediately. A decision will be made on or before Friday 6 December on whether to extend or lift the suspension of work.

Each of the five letters issued read substantially the same way, except that the suspension periods identified in each letter varied from twenty-three days to sixty days. A meeting was held on April 14, 2014, to discuss the contractor's remobilization and request for equitable adjustment related to the suspension. At the meeting, the parties agreed that the work would restart on May 5, 2014. The suspension of work lasted for 179 days.

During the suspension, BCPeabody shifted its tradesmen and foremen to other jobs, but it alleges that it did not shift its project leadership due to the potentially short duration of the suspension. BCPeabody claims \$9367.21, Adam Goetz's full salary for his work as project manager during the suspension. Mr. Goetz stopped working on the project on January 31, 2014. The contracting officer agreed that the costs claimed for Mr. Goetz "have merit" and were supported by the record. Kevin Osborne served as project manager on the project starting on February 1, 2014. BCPeabody claims compensation for one hundred percent of Mr. Osborne's time during the suspension period, or \$21,529.98, even though he was identified as the project manager on several other BCPeabody projects for the same time period. In support of BCPeabody's claim, Mr. Osborne testified by affidavit that he spent forty hours per week on this project and another forty hours per week on other BCPeabody projects. The contracting officer determined that Mr. Osborne only spent eight hours per week on this project during the suspension, for a total cost of \$4333.33. The superintendent, Mr. Dalton, also worked on other projects during the suspension, but because he was ready to return to this project at a moment's notice, BCPeabody claimed entitlement to his entire salary in the amount of \$22,741.16 during the suspension period.

Punchlists

On May 20, 2015, the VA provided a final punch list to BCPeabody with approximately 100 items identified. BCPeabody noted that many items on the punchlist were not valid, were completed prior to receipt of the list, or were not included in the scope of work. BCPeabody worked to complete the items on the punch list. In August 2015, BCPeabody identified six items on the list that were not complete but noted plans to complete those punchlist items. In response to the VA's assertions that the punch list was not completed, BCPeabody stated that it "never considered not doing the list and in fact our crew was turned away in our attempt to complete it." At the same time, BCPeabody indicated its availability to perform warranty work.

By letter dated February 1, 2016, the VA notified BCPeabody that it claimed a credit of \$17,501.13 for unfinished or deficient work. The VA identified the unfinished or

deficient work and provided copies of proposals from other contractors quoting the cost to complete the work. The VA claimed that it had notified BCPeabody of the unfinished or deficient work in its May 20, 2015, punchlist, but it did not specifically identify for the Board the items that were on both the May 20 punchlist and in the February 1 letter. BCPeabody noted that there were only three items that could be found on both lists, but it did not identify which items and questioned the validity of all of the items listed.

Change Requests and BCPeabody's Claim

The project was completed on May 4, 2015. BCPeabody submitted proposals for thirteen changes with signed subcontractor quotes on or about October 19, 2015. On January 21, 2016, the VA asserted its claim for \$115,294.93 for undelivered equipment. The parties attempted to resolve all of the claims at a meeting on February 4, 2016. The VA approved eight of the thirteen change requests in the amount of \$50,625.16 the next day. On April 15, 2016, BCPeabody submitted its certified claim. The contracting officer determined in his July 20, 2016, final decision that BCPeabody owed the VA \$27,950.70. BCPeabody timely appealed the final decision to the Board on July 26, 2016.

Discussion

I. The Suspension Period

BCPeabody claims \$13,282 in general conditions costs, \$53,638.35 in personnel costs, and \$49,516.20 in unabsorbed overhead costs, for a total of \$116,436.55 resulting from the 179-day suspension period.³ In order to recover under the Suspension of Work clause, a contractor must show that (1) contract performance was delayed; (2) the Government directly caused the delay; (3) the delay was for an unreasonable period of time; and (4) the delay

³ In its amended complaint, BCPeabody suggests an alternative way to calculate damages resulting from the suspension period using a daily rate of \$982 that it asserts the VA accepted in modification P00006. Using this alternative calculation, the total suspension damages claimed equal \$175,778. BCPeabody provides no support for this daily rate, except to calculate it by dividing the total amount awarded by the days of delay awarded ($\$40,262.02 \div 41$ days) in modification P00006 and to say that the claimed amount of \$116,436.55 (daily rate of \$650.48) was a compromise due to the fact that BCPeabody could not document its costs. Without evidence regarding how the \$982 daily rate was derived or documentation to support this rate, and given that BCPeabody has provided documentation to support its claim of \$116,436.55, the Board will not use this \$982 daily rate in calculating damages.

injured the contractor in the form of additional expense or loss. *Triax-Pacific v. Stone*, 958 F.2d 351, 353 (Fed. Cir. 1992); 48 CFR 52.242-14 (2012) (FAR 52.242-14). The 179-day suspension was solely caused by the VA. The issue is whether the suspension was for an unreasonable period of time. “[T]he word ‘unreasonable’ which appears twice in the ‘Suspension of Work’ clause refers to the duration of the suspension and the delay in the work caused thereby and does not refer to the Government’s motivation or purpose in ordering the suspension.” *T.C. Bateson Construction Co.*, ASBCA 5492, 60-2 BCA ¶ 2815, at 14,545. We find that the VA had more than sufficient time to arrange for the December 2013 renovation of the kitchen area, since the task order was awarded in June 2012. A 179-day delay due to the unavailability of the kitchen area for renovation was a protracted and unreasonable period of time for which the contractor should not be required to shoulder the added expense.

a. General Conditions and Personnel Costs

We find that the general conditions costs in the amount of \$13,282 are substantiated. Most of the claimed personnel costs, in the amount of \$53,638.35, however, are not. The personnel costs include the entire salary for the suspension period of both project managers and the superintendent. We deny any entitlement to costs for the superintendent since he was working elsewhere during the suspension. Mr. Osborne’s claim to have been working on this project forty hours a week during the suspension period while at the same time working forty hours a week on other BCPeabody projects lacks credibility. Instead, we accept the contracting officer’s determination that Mr. Osborne was working on the project eight hours a week for thirteen weeks of the suspension period, and that Mr. Goetz’s costs as project manager were supported by the record. BCPeabody is, therefore, awarded \$13,282 in general conditions, and \$13,700.54 in personnel costs (\$9367.21 for Mr. Goetz’s work and \$4333.33 for Mr. Osborne’s work during the suspension period).

b. Unabsorbed Home Office Overhead Costs

BCPeabody requests unabsorbed home office overhead costs in the amount of \$49,516.20 for the 179-day suspension. Suspension or delay of contract performance results in an interruption in payment for direct costs, which in turn causes an interruption in payment for overhead; however, overhead costs continue to accrue regardless of direct contract activity. This interruption in the stream of payments causes a portion of home office overhead costs to be unabsorbed. *Nicon, Inc. v. United States*, 331 F.3d 878, 882 (Fed. Cir. 2003); *Wickham Contracting Co. v. Fischer*, 12 F.3d 1574, 1577 (Fed. Cir. 1994). *Eichleay* refers to the formula used to calculate the amount of unabsorbed home office overhead when the Government indefinitely suspends or delays work. See *P.J. Dick, Inc. v. Principi*, 324 F.3d 1364, 1370 (Fed. Cir. 2003) (citing *Melka Marine v. United States*, 187 F.3d 1370, 1375

(Fed. Cir. 1999)); *Eichleay Corp.*, ASBCA 5183, 60-2 BCA ¶ 2688. To receive *Eichleay* damages, appellant must first establish its prima facie case that (1) there was a VA-caused delay that did not run concurrently with any other delay, (2) the delay extended the time of performance of the contract, and (3) appellant was required to remain on standby during the delay. *P.J. Dick*, 324 F.3d at 1370.

The parties do not dispute that there was a VA-caused delay or that the VA-caused delay extended the original time for performance by at least six months. “[S]tandby’ requires an uncertain delay period where the VA can require the contractor to resume full-scale work at any time.” *Melka Marine*, 187 F.3d at 1376 (emphasis omitted). When a contracting officer issues a written order that suspends work for an uncertain duration and requires the contractor to remain ready to work immediately or with short notice, the contractor proves its prima facie case. *P.J. Dick*, 324 F.3d at 1370.

Here, the VA suspension was not for an uncertain duration. From the VA’s suspension letters, BCPeabody knew that the earliest it would be asked to resume work would be the date identified in each of the suspension letters as the end of the suspension. When a contractor knows with certainty that it cannot be called on to perform work before a certain date, there is no uncertain delay period and the contractor is not on standby. *P.J. Dick*, 324 F.3d at 1371 (citing *Melka Marine*, 187 F.3d at 1376). Thus, BCPeabody did not establish that it was on standby.

BCPeabody also fails to prove that it was required to be ready to resume work immediately. See *P.J. Dick*, 324 F.3d at 1371. “The contractor must be required to keep at least some of its workers and necessary equipment at the site” to establish this part of the standby requirement. *Id.* BCPeabody provided no evidence that it was required to be ready to work immediately after the suspension lifted without reasonable time to remobilize, *id.* (citing *Mech-Con Corp. v. West*, 61 F.3d 883, 887 (Fed. Cir. 1995)), or without gradually increasing the workforce. See *id.* (citing *Melka Marine*, 187 F.3d at 1375). In fact, BCPeabody ultimately had one month to remobilize. Since BCPeabody did not prove that it was required to be ready to resume work immediately, it did not prove that it was on standby. BCPeabody failed to establish a prima facie case for *Eichleay* damages, and, therefore, we need not address whether it was impractical for BCPeabody to obtain sufficient replacement work. See *id.* (citing *Melka Marine*, 187 F.3d at 1376).

II. Approved Change Orders

The VA does not dispute that it owes BCPeabody \$50,625.16 of the \$54,016.46 BCPeabody claims for approved change orders. The only item in dispute before the Board is BCPeabody’s claim for the cost of an additional floor drain in the amount of \$3391.30.

BCPeabody asserts that the superintendent and the contracting officer agreed that the VA would pay for two additional floor drains. No such agreement, however, was memorialized in any document found in the record. Instead, BCPeabody's subcontractor revised its quote at the VA's request to include only one additional floor drain. Thus, we find that BCPeabody is not entitled to the cost of the additional floor drain but is entitled to \$50,625.16 for approved change orders.

III. Disapproved Change Orders

BCPeabody asserts entitlement to \$19,847.80⁴ for five change orders denied by the VA.

a. Run Temporary Tube System

BCPeabody discovered that the pneumatic tube system for the dispensary connected to an existing electrical circuit in the kitchen. BCPeabody characterized the fact that an outside system (the dispensary tube system) was running off of the kitchen electrical panel as an unforeseen and unusual differing site condition. To avoid delaying electrical work in the kitchen area and avoid disrupting electrical service to the tube system, BCPeabody created a temporary electrical connection for the tube system at a cost of \$1650. The VA argues that this work was within the scope of the task order and/or incidental to the project, and in a firm-fixed-price task order, such changes should be borne by the contractor. In addition, the VA argued that the contractor failed to give timely, written notice of a differing site condition.

The task order required that BCPeabody maintain the existing electrical connections for the medical center at all times to ensure uninterrupted service.

Utilities Services: Maintain existing utility services for Medical Center at all times. Provide temporary facilities, labor, materials, equipment, connections, and utilities to assure [sic] uninterrupted services.

....

No utility service such as water, gas, steam, sewers or electricity, or fire protection systems and communications systems may be interrupted without prior approval of Contracting Officers [sic] Representative (COR).

⁴ This number changed from the \$17,357.45 originally claimed because BCPeabody increased by \$2490.35 the amount claimed for the flooring upgrade.

“The essence of a firm fixed-price contract is that the contractor, not the government, assumes the risk of unexpected costs.” *Lakeshore Engineering Services, Inc. v. United States*, 748 F.3d 1341, 1347 (Fed. Cir. 2014); *Southwestern Security Services, Inc. v. Department of Homeland Security*, CBCA 1264, 09-2 BCA ¶ 34,139, at 168,777 (citing *Gulf Shores, LLC v. Department of Homeland Security*, CBCA 802, 09-1 BCA ¶ 34,024 (2008)). The fact that maintaining the existing utility service was more costly than expected because BCPeabody had to reroute the electrical for the tube system to prevent any interruption in patient services does not entitle the contractor to compensation beyond that provided for in the task order. *Lakeshore Engineering Services*, 748 F.3d at 1347; *Southwestern Security Services*, 09-2 BCA at 168,777 (citing *Gulf Shores*).

For a Type II differing site condition, it is necessary to prove that the condition was unknown and of “an unusual nature, which differed materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.” FAR 52.236-2. In order to qualify as a Type II differing site condition, “the unknown physical condition must be one that could not be reasonably anticipated by the contractor from his study of the contract documents, his inspection of the site, and his general experience[,] if any, as a contractor in the area.” *Randa/Madison Joint Venture III v. Dahlberg*, 239 F.3d 1264, 1276 (Fed. Cir. 2001) (quoting *Perini Corp. v. United States*, 381 F.2d 403, 410 (Ct. Cl. 1967)); *Project Solutions Group v. Department of Transportation*, CBCA 3411, 13 BCA ¶ 35,437, at 173,813. Thus, BCPeabody bears the burden of establishing that it encountered an unknown and unusual physical condition when it discovered the electrical connection.

There is no evidence, other than a conclusory statement by BCPeabody, that the electrical connection was unusual, or could not have been reasonably anticipated by the contractor from its study of the task order documents, inspection of the site, or general experience. Moreover, under FAR 52.236-2(a), the contractor “shall promptly, and before the conditions are disturbed, give a written notice to the Contacting Officer” if there are differing site conditions. There is no dispute that BCPeabody did not give timely written notice. It is not clear, however, that BCPeabody gave notice of any kind to the contracting officer of this alleged differing site condition until 283 days after it created the temporary electrical connection for the tube system. “If a contract clause requires a contractor to notify the Government within a specified period of time of a differing site condition, lack of such notice does not automatically bar the contractor’s recovery unless the Government can establish that it was prejudiced by the lack of notice.” *Ahtna Environmental, Inc. v. Department of Transportation*, CBCA 5456, 17-1 BCA ¶ 36,600, at 178,304 (citing *Singleton Contracting Corp.*, IBCA 1413-12-80, 81-2 BCA ¶ 16,269, at 75,607; *Mutual Construction Co.*, DOT CAB 1075, 80-2 BCA ¶ 14,630, at 72,156-157; and *DeMauro Construction Corp.*, ASBCA 17029, 77-1 BCA ¶ 12,511, at 60,650). Failure to give notice

of a differing site condition before the condition is disturbed or additional costs are incurred can prejudice the Government. *Grunley Construction Co. v. General Services Administration*, CBCA 4539, 16-1 BCA ¶ 36,536, at 177,992 (quoting *David Boland, Inc.*, ASBCA 48715, et al., 97-2 BCA ¶ 29,166, at 145,025) (“When a contractor fails to furnish information to the Government that will allow the Government an opportunity to relax the contract requirements before proceeding to incur extra costs, the contractor’s claim will fail.”). We find that BCPeabody failed to give notice, oral or written, to the contracting officer before the condition was disturbed and additional costs were incurred, thus prejudicing the VA. BCPeabody did not meet its burden to prove that there was a differing site condition, and the claim for \$1650 is denied.

b. New Steam Piping and Return for Dishwasher

BCPeabody claims \$3080 for replacing steam lines to make the dishwasher function. The task order stated:

All utilities including but not limited to fire suppression and fire alarm systems, plumbing, electrical, air conditioning and exhaust will be brought up to current code requirements and VA specifications under this project. Any item found to be deficient, such as less than required floor slope to drains, wall framing being rusted, etc. will be corrected under this project.

By the plain language of the task order, a corroded steam pipe that had to be replaced for the dishwasher to properly function was in the scope of work of the task order and did not constitute a change. *1201 Eye Street, N.W. Associates, LLC v. General Services Administration*, CBCA 5150, 17-1 BCA ¶ 36,592, at 178,223 (“Contract interpretation begins with the plain language of the agreement” (citing *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991))). Thus, BCPeabody is not entitled to an equitable adjustment in the amount of \$3080.

c. Frame Above Roll-Up Door

BCPeabody claims the cost of \$550 to replace a stud frame that had rotted above a door. The scope of work, however, identified rusted wall framing and similar items as deficient and requiring correction under the task order. Thus, we find that a rotting stud frame was not a differing site condition, but a cost to be incurred by the contractor under the task order.

d. Flooring Upgrade

BCPeabody claims \$13,019⁵ for upgraded vinyl flooring selected by the VA. The contracting officer agreed that this was a change in the flooring required by the task order. The contracting officer, however, denied BCPeabody's claim on the grounds that it did not meet its burden to prove the cost of the change. BCPeabody admits that it does not have the documentation to support the cost originally quoted for the tile.

With regard to BCPeabody's burden of proof, this Board has stated:

The ascertainment of damages, or of an equitable adjustment, is not an exact science, and where responsibility for damages *is* clear, it is not essential that the amount thereof be ascertainable with absolute exactness or mathematical precision: "It is enough if the evidence adduced is sufficient to enable a court or jury to make a fair and reasonable approximation." *Specialty Assembling & Packing Co. v. United States*, 355 F.2d 554, 572, 174 Ct. Cl. 153, 184 (1966); *WRB Corp. v. United States*, 183 Ct. Cl. 409, 425 (1968). . . .

As the court stated in *Dawco Construction Inc. v. United States*, 18 Ct. Cl. 682, 698 (1989), *aff'd in part*, 930 F.2d 872 (Fed. Cir. 1991), "All that is necessary is a reasonable showing of the extra costs. Defendant cannot be permitted to benefit from its wrong to escape liability under the guise of a lack of a perfect measure. See generally *Dale Construction Co. v. United States*, 161 Ct. Cl. 825 (1963)." In *Dawco*, the court had decided quantum on the basis of a jury verdict, a less-favored approach than total cost. The court stated that it was appropriate to apply a jury verdict approach where it was not possible for the plaintiff to prove its actual damages, but sufficient information existed for the court to arrive at a fair approximation. Similar cases are *Propellex Corp. v. Brownlee*, 342 F.3d 1335 (Fed. Cir. 2003), and *Boyajian v. United States*, 423 F.2d 1231 (Ct. Cl. 1970).

Choctaw Transportation Co. v. Department of Agriculture, CBCA 2482, et al., 16-1 BCA ¶ 36,579, at 178,168 (quoting *Moshe Safdie & Associates, Inc. v. General Services Administration*, CBCA 1849, et al., 14-1 BCA ¶ 35,564, at 174,300). We will use the jury verdict approach to arrive at a fair approximation of the damages.

⁵ BCPeabody increased its claim for a flooring upgrade from \$10,528.65, after obtaining documentary support.

BCPeabody provided a more current quote for the high-end cost of hospital grade tile (\$3.50 per square foot) from a different supplier and used that number to calculate the difference in the original cost of the tile and the actual cost of the vinyl flooring (\$7.90 per square foot). The difference in cost for an area of 2690 square feet equaled \$11,836, plus ten percent overhead and profit, for a total amount of \$13,019. This amount is a fair approximation of the damages.

e. Moved Chilled Water Lines

Retherm units added in the second kitchen required BCPeabody to move chilled water lines. The cost for the additional plumbing was \$1548.80. The task order required the “[r]emoval and relocation of utilities to meet work flow corrections and equipment needs.” We agree that the relocation of the chilled water lines to meet equipment needs was included in the task order scope and not a change.

IV. Architectural and Engineering Design Services

BCPeabody claims \$68,904 in increased A/E costs incurred as a result of the VA’s design changes. The VA asserts that the design changes were reasonable and within the scope of the task order. The VA argues that “design pricing is expected to take into account reasonable alterations and adjustments, all of which are inherent to the” design process, quoting *Planned Environmental Design Corp.*, ASBCA 47599, et al., 96-1 BCA ¶ 28,001 (1995).

“[I]t is in the nature of an A-E design contract that the Government will decide what desired aspects of the project will change or be deleted due to budget constraints when appellant’s design and cost estimates are received. Mere changes in the original parameters for the design of a project do not necessarily constitute compensable changes. A certain amount of ‘give and take between the parties’ is expected in A-E design contracts.” “[A] design contract, like any contract, has limits and includes provisions which define scope and set out requirements which are not expected to change. Although aspects of scope are subject to being adjusted without triggering added compensation, neither the Government nor the A/E is entitled to make unlimited adjustments without expecting that some of them could result in a change in design costs.” *Moshe Safdie*, 14-1 BCA at 174,296; *Planned Environmental Design Corp.*, 96-1 BCA at 139,848 (citing *Bryant & Bryant*, ASBCA 27910, 88-3 BCA ¶ 20,923, at 105,746 (citing *McLean & Schultz*, ASBCA 30552, 85-3 BCA ¶ 18,265, at 91,693)). We must consider “the timing of such a [design] change and the level of effort required of the designer [in order to] determine the extent, if any, to which the A/E may be entitled to an equitable adjustment.” *Taylor & Partners, Inc.*, VABCA 4898, 97-1 BCA ¶ 28,970, at 144,267 (quoting *Fanning, Phillips & Molnar*, VABCA 3856, 96-1 BCA

¶ 28,214, at 140,833-834, *modified on reconsideration*, VABCA 3856R, 96-2 BCA ¶ 28,427).

Significant changes to the equipment BCPeabody expected to use on the project and inaccuracies in the VA's as-built HVAC plans, both identified late in the design process, caused BCPeabody to rework the design in a significant way. The timing and extent of these design changes entitle BCPeabody to an equitable adjustment in the amount of \$32,000 for additional A/E services. BCPeabody is also entitled to ten percent for overhead and profit for the first \$20,000 awarded and seven-and-one-half percent for overhead and profit for the next \$30,000 awarded, for a total of \$2900 for overhead and profit. 48 CFR 852.236-88(b)(5) (2008) (VAAR 852.236-88(b)(5)). The total amount awarded is \$34,900.

The incorporation of a hood for cooking with grease, however, was not a change. The task order required a hood for cooking with grease. Even if BCPeabody was told otherwise during the design process, the cost of designing the hood for cooking with grease should have been included in BCPeabody's bid. BCPeabody is not entitled to the cost of this additional A/E work in the amount of \$28,000.

There has been no evidence presented to support BCPeabody's claim that Erik Stor and Adam Goetz each worked forty additional hours as a result of the design changes. We find that BCPeabody is not entitled to the \$2640 claimed for their time.

V. Undelivered Equipment Credit

The VA claims entitlement to \$115,294.93 – the difference in cost between the equipment listed in the task order as “probable at a minimum” and the actual equipment provided for the project by BCPeabody. This, however, was a firm-fixed-price design-build task order.

Firm-fixed-price contracts “assign the risk to the contractor that the actual cost of performance will be higher than the price of the contract.” *Dalton v. Cessna Aircraft Co.*, 98 F.3d 1298, 1305 (Fed. Cir. 1996). The VA took the risk that the actual cost of the equipment purchased was less. If BCPeabody completed the work using different equipment than anticipated in its bid, it is entitled to the benefit of its bargain. The price of a firm-fixed-price contract does not vary with the cost experience of the contractor. FAR 16.202-1 (“A firm-fixed-price contract provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract. This contract type places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss.”). Thus, the contractor is entitled to keep the cost savings if it performed for less than the bid price; conversely, it must absorb the loss if it exceeded the

bid price. *Dalton*, 98 F.3d at 1303-04. The VA is not entitled to a credit for unused equipment.

VI. Deficient Work Credit

The VA claimed reimbursement of costs incurred to complete unfinished or deficient work. The VA bears the burden of proof for its claim for costs incurred to complete unfinished or deficient work, and must show that “the work [initially] performed by the [contractor] failed to meet the contract specifications.” *Mitchell Enterprises, Inc.*, ASBCA 53202, et al., 06-1 BCA ¶ 33,277, at 164,962 (citing *Cochran Construction Co.*, ASBCA 40,294, 90-3 BCA ¶ 23,239, at 116,609). “The fact that the Government included items on a punch list does not *a fortiori* establish the existence or extent of the alleged defects.” *Id.* (citing *Techno Engineering & Construction, Ltd.*, ASBCA 32938, 88-1 BCA ¶ 20,351, at 102,921). “Moreover, appellant cannot be held responsible for punch list items first noted after the government takes possession, unless it is shown that the damage was in fact caused by appellant.” *Id.* (citing *Cocoa Electric Co.*, ASBCA 33921, 91-1 BCA ¶ 23,442, at 177,591). The VA has failed to meet its burden. The VA has not proven that the work identified as unfinished or deficient failed to meet the task order specifications, was deficient prior to occupancy of the building by the VA, or was even in the scope of work.

Even if such unfinished or deficient work were the fault of BCPeabody, BCPeabody was not given the opportunity to correct the work. The VA must establish that it “offered the contractor the opportunity to correct the defect and that the contractor failed or refused to correct the defect.” *Mitchell Enterprises*, 06-1 BCA at 164,962. “Absent proof that the appellant would have refused to make corrections, or been unable to do so within a reasonable time, the Government is not entitled to charge appellant with its own costs for correcting deficiencies.” *Id.* (quoting *Techni Data Laboratories*, ASBCA 21054, 77-2 BCA ¶ 12,667, at 61,411). The record indicates that BCPeabody did not refuse to make corrections. Some of the items claimed had not been previously identified, and those that were, BCPeabody intended to complete, but its crew was turned away. Thus, this claim is denied.

VII. Breach of Good Faith and Fair Dealing

“The covenant of good faith and fair dealing . . . imposes obligations on both contracting parties that include the duty not to interfere with the other party’s performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.” *Metcalf Construction Co. v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014 (quoting *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005))). BCPeabody asserts that the VA’s administration of the task order adversely affected

BCPeabody's financial situation, ability to negotiate with the VA, and relationship with its suppliers and subcontractors. Specifically, BCPeabody points to six actions by the VA that it argues "made manifest" the VA's breach of the duty of good faith and fair dealing and had the adverse effects alleged: (1) the VA's refusal to pay for additional costs of the design, (2) the VA's refusal to acknowledge that it placed appellant on standby for the entirety of the suspension period, (3) the VA's failure to give appellant adequate notice and a fair opportunity to correct defective and incomplete work before reprocurring, (4) the VA's decision to bill appellant for equipment not received, (5) the VA's refusal to pay for approved change orders, and (6) the VA's refusal to waive the written notification requirement for a differing site condition. Maintaining BCPeabody's financial situation, negotiation position with the VA, or relationship with its subcontractors were not "reasonable expectations created by the autonomous expressions of the contracting parties." *Tranben, Ltd. v. Department of Transportation*, CBCA 5448, 17-1 BCA ¶ 36,635, at 178,430 (quoting *Metcalf*, 742 F.3d at 991). "A party to a contract cannot use an implied duty of good faith and fair dealing to expand another party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions." *Agility Public Warehousing Co. KSCP v. Mattis*, 852 F.3d 1370, 1384 (Fed. Cir. 2017) (quoting *Metcalf*, 742 F.3d at 991). Moreover, beyond a mere assertion in its complaint, BCPeabody failed to prove that the VA's actions had the adverse effects alleged.

Even assuming that such adverse effects resulted from the VA's actions, the effects were not the result of the VA's task order administration during performance. The VA actions identified, instead, occurred after substantial completion and involved the assertion and litigation of claims by both parties. Nonetheless, "[t]he obligation of good faith and fair dealing extends to the assertion, settlement and litigation of contract claims and defenses." Restatement (Second) of Contracts § 205 cmt. e (1981). The VA, however, did not breach this obligation. The VA acted timely to resolve BCPeabody's change orders by meeting to negotiate and issuing its decisions on each claim shortly thereafter. The VA also had a reasonable basis to assert its claims and to offset the amounts owed for approved change orders by the amounts the VA claimed it was owed. When we consider the totality of the actions of the parties, we do not find the overall conduct of the VA rose to the level of clear and convincing evidence of the breach of the duty of good faith and fair dealing.

Decision

For the foregoing reasons, the Board **GRANTS IN PART** the appeal. BCPeabody is awarded \$125,526.70, which includes \$13,700.54 for personnel costs, \$13,282 for general conditions costs, \$34,900 for additional A/E design services, and \$63,644.16 for extra and changed work. The VA did not breach the duty of good faith and fair dealing and is not

entitled to costs for its claims for an unused equipment credit or procurement costs.

ERICA S. BEARDSLEY
Board Judge

We concur:

ALLAN H. GOODMAN
Board Judge

BEVERLY M. RUSSELL
Board Judge