UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: February 23, 2018

CBCA 2326

ASW ASSOCIATES, INC.,

Appellant,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Robert B. Creager of Anderson, Creager & Wittstruck, P.C. LLO, Lincoln, NE, counsel for Appellant.

Sara E. McGraw and Kenneth R. Pakula, Office of General Counsel, Environmental Protection Agency, Washington, DC, counsel for Respondent.

Before Board Judges **VERGILIO**, **GOODMAN**, and **SULLIVAN**.

VERGILIO, Board Judge.

ASW Associates, Inc. (contractor or ASW) remediated lead-contaminated soil at a superfund site under a contract with the Environmental Protection Agency (agency or EPA). The contractor was paid for labor hours and equipment usage at the rates in the underlying contract, but the number of properties remediated, as well as labor hours and equipment usage were below the estimates in the contract. The agency did not exercise option year two. In its claim, and as pursued in its complaint, the contractor contends that the agency both improperly interfered with or hindered the contractor's ability to direct and manage the work, and misrepresented the scope and quantity of work to be performed. The contractor seeks to recover a total of $1,801,858.53, broken down as follows with the contractor's terminology (not Board calculations):

base year: personnel, equipment, delta for unilateral g&a of 15%	$ 755,153.80
option 1: personnel, equipment, delta for unilateral g&a of 15%	$ 604,420.73
option 2: equipment only	$ 442,284.00

The Board previously dismissed one aspect of the underlying appeal (the contractor alleged that the agency interfered with or hindered the contractor's performance, but failed to provide any evidence to support its allegation), and then determined that the agreement is not enforceable as either an indefinite delivery/indefinite quantity (ID/IQ) or a requirements-type contract. *ASW Associates v. Environmental Protection Agency*, CBCA 2326, 16-1 BCA ¶ 36,453, 17-1 BCA ¶ 36,699. In the latter decision, the Board directed the contractor to identify what, if any, additional payment it seeks, its bases for asserting entitlement, and its method of calculation. The Board also issued directives further specifying what the contractor had to do ("the contractor must flesh out any aspect of its claim that it asserts survives and that it seeks to pursue," Board Order (May 22, 2017); "the agency and Board have sought the information (legal theory and costs sought, with support) since well before counsel represented the contractor," Board Order (June 13, 2017)).

Despite the Board's direction, the contractor has not identified in the record or stated in its submissions in response how it arrived at its calculations or provided any support for the basic figures, and has failed to tie the amounts sought to each theory of relief it pursues. The contractor has stated that it has no additional claim for payment given the Board's determination that the contractor was limited to payment on a time and materials basis, while otherwise preserving its appeal rights. It amended that response to state that it has no additional claim for payment based upon the equitable principles in a case referenced by the Board, but that its claim is for work that it was not allowed to perform or work that was provided by other contractors. The contractor continues to seek relief under theories of negligence and cardinal change. The contractor has provided no details or explanation in support of the dollars sought. At this stage in the proceedings the contractor seeks a sum certain that is allocated between the base year, option year, and un-exercised option year.

The agency moved for summary relief on the aspects of the claim that remain in this appeal (assertions of agency negligence and cardinal change), accurately noting that the contractor failed to provide factual support for its monetary claim in response to previous Board orders and directives. The contractor provided no substantive response to the motion. It asserts that it contracted to remediate all of the work identified in the contract and priced the cost of providing the labor and equipment based upon the total amount of work identified. The contractor provides no proof of its pricing with its response. In particular, there is no explanation or reference to material that may be in the appeal file that provides support for the dollars claimed, or that supports a method of calculation based on the alleged breaches or change by the agency that remain a part of this appeal. Further, although the contractor

contends that it reasonably assumed that it would perform all of the work identified in the contract as available, this is not a firm, fixed-price contract and the contract specifies no minimum purchase amount. 17-1 BCA at 178,717. Moreover, the contractor offers no explanation as to why it should be paid for the un-exercised option year. Even should the contractor prevail on establishing that the agency misrepresented the scope and quantity of the work to be performed, there is no basis to calculate relief because the contractor has failed to put information into the record regarding its costs and pricing and methods of calculation.

The contractor is correct that the agency, as the moving party, bears the burden of proof on its motion for summary relief. The agency, however, has demonstrated that the contractor has failed to provide support for the damages it seeks. Given this failure of proof on the quantum aspect of the claim, the Board need not address the entitlement portion (whether the agency provided inaccurate estimates as a result of negligence or reflective of cardinal changes). The information missing from this record must be available to the contractor which formulated its claim, and should be available for submission to the Board (and should have been available to provide to the agency). As enunciated in the first opinion in this case, the missing information constitutes an essential element of the claim for which the contractor bears the burden of proof. Absent proof that could establish a factual basis for relief, the remainder of the claim does not survive the agency's motion for summary relief. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (summary judgment must be entered against a party who fails to sufficiently establish an essential element to that party's case where that party will bear the burden of proof at trial); *P&C Placement Services, Inc. v. Social Security Administration*, CBCA 391, 07-1 BCA ¶ 33,492, at 166,010 (after observing that the contractor's statement that it is prepared to meet the burden of proof is insufficient to overcome a motion for summary relief, the Board concluded that because the contractor "has failed to make the requisite showing that it can establish any of the three matters we identified as essential to proving this element of the claim, we grant [the agency's] motion for summary relief on this element").

Decision

Because the contractor has failed to provide any factual support for the dollar amount it seeks, the Board grants the agency's motion for summary relief. The Board **DENIES** the appeal.

JOSEPH A. VERGILIO
Board Judge

We concur:

ALLAN H. GOODMAN
Board Judge

MARIAN E. SULLIVAN
Board Judge