UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND IS BEING PUBLICLY RELEASED IN ITS ENTIRETY ON SEPTEMBER 22, 2025

DISMISSED FOR FAILURE TO STATE A CLAIM: September 4, 2025

CBCA 8151, 8162, 8163

GDM A-E, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Italia A. Carson, Polaris Law Group, P.C., North Pole, AK, counsel for Appellant.

Neil S. Deol, Office of General Counsel, Department of Veterans Affairs, Decatur, GA; and Kathleen Ramos, Office of General Counsel, Department of Veterans Affairs, Arlington, TX, counsel for Respondent.

Before Judges **GOODMAN**, **KULLBERG**, and **KANG**.

GOODMAN, Board Judge.

GDM A-E, Inc. (GDM or appellant) filed three appeals from the Department of Veterans Affairs (VA or respondent) contracting officer's (CO) final decisions (COFDs) denying GDM's certified claims concerning three contracts.[1] These appeals were docketed

[1] Appellant designated its notices of appeal, which were not paginated, as complaints in the three appeals. References to page numbers in the complaints are to the

as CBCA 8151, CBCA 8162, and CBCA 8163. Respondent filed a motion to dismiss in each of these appeals for failure to state a claim upon which relief may be granted, presenting substantially similar legal issues across the motions.[2] The Board consolidated the appeals on August 27, 2025, pursuant to Board Rule 2(f) (48 CFR 6101.2(f) (2024)) and resolves the three motions to dismiss in this decision.[3] We grant respondent's motions and dismiss these consolidated appeals for failure to state a claim.

Background

The Solicitations and Contracts

The VA issued Requests for A/E [Architect-Engineer] Fee Proposals (solicitations) pursuant to Federal Acquisition Regulation (FAR), part 36, Construction and Architect-Engineering Contracts. The solicitations sought proposals to award contracts to A/E contractors who would, in turn, design construction projects to attain goals associated with Electronic Health Record Modernization (EHRM) projects. Respondent's Motions to Dismiss at 1.

For each solicitation, the VA prepared an independent government cost estimate (IGCE), which was used to determine the VA's estimated construction contract price (ECC price) for the project that would be designed by the A/E contractor. *Id*.

PDF document filed, beginning with the transmittal cover. References to exhibits are to appeal file exhibits.

[2] The motions are substantially identical. References to page numbers in the motions are to all three motions without identification of docket number, unless otherwise indicated.

[3] Appellant retained counsel after appellant's chief executive officer filed the notices of appeal and oppositions to respondent's motions. "We construe a pro se litigant's pleadings liberally," but such lenience does not affect "a pro se litigant's burden of proof or our [assessment] of the factual record." *House of Joy Transitional Programs v. Social Security Administration*, CBCA 2535, 12-1 BCA ¶ 34,991, at 171,975 (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Greenlee Construction, Inc. v. General Services Administration,* CBCA 416, 07-1 BCA ¶ 33,514, at 166,062).

Each solicitation and awarded contract contained the Design Within Funding Limitations clause (APR 1984), FAR 48 CFR 52.236-22 (2021) (FAR 52.236-22), which included the ECC price for the project to be designed and reads as follows:

> (a) The Contractor shall accomplish the design services required under this contract so as to permit the award of a contract, using standard Federal Acquisition Regulation procedures for the construction of the facilities designed at a price that does not exceed the estimated construction contract price as set forth in paragraph (c) of this clause. When bids or proposals for the construction contract are received that exceed the estimated price, the contractor shall perform such redesign and other services as are necessary to permit contract award within the funding limitation. These additional services shall be performed at no increase in the price of this contract. However, the Contractor shall not be required to perform such additional services at no cost to the Government if the unfavorable bids or proposals are the result of conditions beyond its reasonable control.
>
> (b) The Contractor will promptly advise the Contracting Officer if it finds that the project being designed will exceed or is likely to exceed the funding limitations and it is unable to design a usable facility within these limitations. Upon receipt of such information, the Contracting Officer will review the Contractor's revised estimate of construction cost. The Government may, if it determines that the estimated construction contract price set forth in this contract is so low that award of a construction contract not in excess of such estimate is improbable, authorize a change in scope or materials as required to reduce the estimated construction cost to an amount within the estimated construction contract price set forth in paragraph (c) below, or the Government may adjust such estimated construction contract price. When bids or proposals are not solicited or are unreasonably delayed, the Government shall prepare an estimate of constructing the design submitted and such estimate shall be used in lieu of bids or proposals to determine compliance with the funding limitation.
>
> (c) The estimated construction contract price for the project described in this contract is $ [amount of the contract].

CBCA 8151, Exhibit 15 at 15-16; CBCA 8162, Exhibit 9 at 13; CBCA 8163, Exhibit 20 at 18.

Veterans Affairs Acquisition Regulation (VAAR) 836.606-71, 48 CFR 836.606-71, limited the A/E contractor's fee to six percent of the ECC price specified in the contract. If the Government changed the scope of work of the project to be designed by the A/E contractor, the A/E contractor could request an equitable adjustment in its fee pursuant to the Changes clause, FAR 52.243-1. CBCA 8151, Exhibit 15 at 18; CBCA 8162, Exhibit 9 at 15; CBCA 8163, Exhibit 20 at 30.

The solicitation for the contract for the Togus, Maine, EHRM Infrastructure Upgrades was issued on May 6, 2022. CBCA 8151. Appellant submitted a fee proposal, CBCA 8151, Exhibit 14, and was awarded a firm-fixed price (FFP) A/E design services contract on December 1, 2022, in the amount of $3,836,578.86 if all options were exercised (Togus contract). CBCA 8151, Exhibit 15 at 7; Exhibit 7; Exhibit 30 at 1 (COFD). The contract established an ECC price of $29,984,000. *Id*. at 16.

The solicitation for the contract for the Birmingham, Alabama, EHRM Infrastructure Upgrades was issued on August 19, 2021. CBCA 8162, Exhibit 5. Appellant submitted a fee proposal, CBCA 8162, Exhibit 7, and was awarded a FFP A/E design services contract on September 27, 2021, in the amount of $1,350,185 (Birmingham contract), with an ECC price of $16,503,365. CBCA 8162, Exhibit 9 at 5, 13. The total estimated award if all options were exercised was $1,889,773. *Id*. at 5. Five modifications were issued, increasing the contract price to $2,524,569.36. CBCA 8162, Exhibit 62 at 2 (COFD).

The solicitation for the contract for the Murfreesboro, Tennessee, EHRM Infrastructure Upgrades was issued on August 30, 2022. CBCA 8163, Exhibit 14. Appellant submitted a fee proposal, CBCA 8163, Exhibits 16, 19, and was awarded a FFP A/E design services contract on January 31, 2023, in the amount of $2,858,918 (Murfreesboro contract). CBCA 8163, Exhibit 20 at 7. The contract established an ECC price of $30,945,000. *Id*. at 18.

Each solicitation and contract contained a list of attachments and/or attachments comprised of several hundred pages, which included the statements of work, specifications, site maps, and other contract requirements. Solicitation (CBCA 8151), Exhibit 7 (sixty-eight pages with attachments listed but not included); Contract (CBCA 8151), Exhibit 15 (556 pages including attachments); Solicitation (CBCA 8162), Exhibit 5 (362 pages including attachments); Contract (CBCA 8162), Exhibit 9 (344 pages including attachments);

Solicitation (CBCA 8163), Exhibit 14 (644 pages including attachments); Contract (CBCA 8163), Exhibit 20 (627 pages including attachments).

Claims and Appeals

For each of the three contracts, appellant submitted a certified claim pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018). On February 5, 2024, appellant submitted a certified claim with regard to the Togus contract in the amount of $2,513,128.14. On May 28, 2024, the CO issued a COFD denying the claim. On July 18, 2024, appellant filed a notice of appeal, docketed as CBCA 8151.

On January 22, 2024, appellant submitted a certified claim with regard to the Birmingham contract in the amount of $456,455.58. On May 21, 2024, the CO issued a COFD denying the claim. On July 29, 2024, appellant filed a notice of appeal, docketed as CBCA 8162.

On June 24, 2024, appellant submitted a certified claim with regard to the Murfreesboro contract in the amount of $1,052,936. On July 9, 2024, the CO issued a COFD denying the claim. On July 29, 2024, appellant filed a notice of appeal, docketed as CBCA 8163.

Appellant attached to its notices of appeal its certified claims and requests for equitable adjustments previously submitted to the COs.[4] After appellant designated its notices of appeal as complaints in the three appeals, respondent designated the COFD in CBCA 8151 as its answer and, thereafter, filed a motion to dismiss the appeal. In CBCA 8162 and CBCA 8163, respondent filed motions to dismiss in lieu of responsive pleadings.

The complaints are substantially similar, including identical introductions:

> The following documented cardinal change required GDM to perform duties above and beyond those required by the solicitation and awarded contract for which GDM is seeking—and rightfully owed—equitable compensation.

[4] The same CO administered the Togus and Birmingham contracts, and a second CO administered the Murfreesboro contract.

Complaint (CBCA 8151) at 3; Complaint (CBCA 8162) at 3; Complaint (CBCA 8163) at 3.

Appellant's factual allegations and legal arguments in the complaints are included as they relate to the issues in the discussion below.

Discussion

Appellant, an A/E contractor, after reviewing solicitations and submitting proposals, was awarded three FFP contracts to design VA projects based upon the scope of work, specifications, and the ECC prices in the contracts. The Design Within Funding Limitations clause of the contracts required appellant to design the projects pursuant to the statements of work, specifications, and other requirements that would then allow the VA to award construction contracts that did not exceed the ECC prices. The ECC prices in the contracts were the VA's estimates of the prices for the construction contracts that would be eventually awarded based on appellant's designs. Appellant's fee, under these FFP contracts, was limited to six percent of the ECC price specified in the contract. The fee could be increased if the scope of work of the project appellant designed was increased under circumstances described in the Design Within Funding Limitations clause.

Appellant submitted certified claims for the contracts, alleging that the IGCEs upon which the ECC prices were based were defective and did not reflect the complexities of the projects to be designed. During performance of the contracts, appellant's ECC prices for the projects it designed exceeded the ECC prices specified in the contracts. Appellant advised the COs as to the increase in the ECC prices and also that, as a result of its design efforts, the number of design drawings it produced exceeded the number estimated in its proposals. However, the COs did not revise the scopes of work of the projects being designed by appellant or increase the contract ECC prices but directed appellant to continue to design the projects within the scopes of work of its contracts. Appellant, therefore, asserts that the continued directions to design under these circumstances were cardinal and constructive changes, entitling it to compensation for the increased costs that it incurred in excess of the FFPs for its contracts.

Standard of Review

Respondent has moved to dismiss the appeals for failure to state a claim upon which relief may be granted, pursuant to Rule 8(e). The standard to resolve a motion to dismiss for failure to state a claim is well established. The contractor must point to factual allegations that, if true, would state a claim for relief that is plausible on its face when the Board draws

all reasonable inferences in favor of the contractor. *B.L. Harbert International, LLC v. General Services Administration*, CBCA 6300, et al., 19-1 BCA ¶ 37,335, at 181,569. In resolving respondent's motions to dismiss, "[t]he Board decides legal issues, and may treat any document that is incorporated in or attached to the complaint as part of the pleadings." *Id*. (citing *Amec Foster Wheeler Environment & Infrastructure, Inc. v. Department of the Interior*, CBCA 5168, et al., 19-1 BCA ¶ 37,272, *aff'd mem.*, 835 F. App'x 603 (Fed. Cir. 2021)).

Appellant's Complaints

Respondent states that, "[i]n this matter, Appellant's Complaint references the Solicitation as well as the certified claim, which claim references the awarded Contract. As such, both the Solicitation and Contract are appropriate to review in the context of a Motion to Dismiss." Motion to Dismiss (CBCA 8151) at 4; Motion to Dismiss (CBCA 8162) at 3-4; Motion to Dismiss (CBCA 8163) at 4. We consider appellant's notices of appeal designated as complaints and all attachments to determine whether the complaint can survive the motion to dismiss for failure to state a claim. *Strawberry Hill, LLC v. General Services Administration*, CBCA 5149, 16-1 BCA ¶ 36,561, at 178,063-64 (citing *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 15-1 BCA ¶ 35,976, at 175,789).

Failure to State a Claim

Despite the allegations in the claims and complaints, appellant has not asserted factual allegations that, if true, would state a claim for relief. Even when the Board draws all reasonable inferences in favor of the contractor, appellant has failed to state a claim in the three, now consolidated, appeals, as described herein.

Allegations of Defective IGCEs and Contract ECC Prices

Appellant alleges that the VA utilized inappropriate parametric estimating, rather than typical standards of preliminary cost estimating, to calculate the IGCEs that were used as the basis for the ECC prices included in the solicitations and contracts upon which, in turn, its FFP fees were based. Appellant asserts that the resulting ECC prices violated an implied warranty of the Government to supply accurate information, with appellant emphasizing that "A/E firms rightfully assume that the VA has reviewed and understand[s] the complexities of the scope of work, schedule, and site-specific features and has provided a reasonably

accurate estimated construction contract price and design funding limitation." Complaint (CBCA 8153) at 4; Complaint (CBCA 8162) at 4; Complaint (CBCA 8163) at 5.

Appellant also alleges:

> The design limitation provides the A/E with an understanding of how the VA has interpreted the risks, magnitude, and complexities of the design along with underlying assurances that the VA has accurately reflected the costs of the future construction project.
>
> . . . .
>
> The accepted Fee Proposal was based on a defective estimate in the form of the stated design limit, and the VA benefitted from all the additional design work.

Complaint (CBCA 8153) at 8; Complaint (CBCA 8162) at 7; Complaint (CBCA 8163) at 6-7 (with editorial variations).

Case law does not support appellant's assertions that an ECC price in a solicitation or contract is a warranty of accurate information such that it represents the VA's determination of the ECC price of the project that will be designed by the A/E contractor. In *Acres American, Inc.*, ASBCA 27743, 85-1 BCA ¶ 17,865, an A/E contractor under a similar contract, which also contained the Design Within Funding Limitations clause, alleged that the ECC price had been negligently prepared and sought an increase in the contract price for designing a project in excess of the ECC price. In that case, the Armed Services Board of Contract Appeals (ASBCA) acknowledged that, in some circumstances, government estimates have been held to have been negligently prepared when the Government's estimator fails to consider reasonably available information. *Id.* at 89,437. However, in the case of an ECC price in an A/E contract, the ASBCA concluded that:

> [T]he Government construction limitation [ECC price] is not a normal construction estimate because it depends on the design to be developed by the [A/E firm] under the contract for which the fee negotiations were being conducted.
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> . . . .

> We need not decide whether the Government's construction limitation was negligently prepared because we find that it is not the type of estimate or opinion upon which a contractor could reasonably rely. Statements of opinion are those where different points of view are to be expected. Restatement of Contracts, Second, § 168, comment a. at 456. *Predictions of the cost to construct a project not yet designed clearly fit this definition*.

Id. at 89,437 (emphasis added).

In the *Acres American* decision, the ASBCA explained that when a contract's ECC price reflects a design that is to be developed by the A/E firm, "the subject matter of the transaction is one on which the two parties have roughly equal skill and judgment, each must generally form his own opinions and neither is justified in relying on the other's." *Acres American*, 85-1 BCA at 89,437-38 (quoting Restatement (Second) of Contracts § 169 cmt. b (1981)). The exceptions to this general rule are: (1) the Government has superior knowledge of facts not reasonably available to the recipient; (2) the Government is especially skilled compared to contractor; and (3) the contractor does not know the underlying facts on which the ECC is based and reasonably infers that the Government's opinion is based on sufficient facts to form such an opinion. *Id*.; *see also O'Neal Engineering, Inc.*, ASBCA 32013, 86-3 BCA ¶ 19,114, at 96,619 (denying, based on *Acres American*, A/E contractor's increased design costs claim that alleged reliance on Government's "inaccurate" construction estimates).

The exceptions to the general rule that a statement of opinion may not be relied upon are not applicable here. Appellant challenges the VA's method for computing the IGCEs upon which the contract ECC prices were based, not whether the VA had superior knowledge of the project requirements. The projects' requirements upon which appellant based its proposals were set forth in the solicitations and the awarded contracts, as the Government was seeking an A/E contractor to evaluate the requirements and create designs to construct the projects within the contract ECC prices.

There is no evidence that the government personnel who compiled the solicitations and contracts were more skilled than the bidding A/E contractors, as the Government's effort was to set forth the parameters of the project that would be designed by the awardees of the contracts. The attachments to the solicitations contained the projects' scopes of work, specifications, and other requirements for potential A/E contractor bidders to review when deciding whether to submit a proposal seeking a design contract award. If the contractor, after reviewing the solicitation and scope of work and specifications (amounting to several

hundred pages), did not believe it could accomplish the design, it could decide not to submit a proposal.

There was no assurance, or warranty, as suggested by appellant, that the ECC prices accurately reflected the costs of the future construction contracts. While appellant contends that its proposals relied upon the ECC prices, it also acknowledges that its decision to submit proposals was also based on its review of each contract's requirements as stated in the solicitation. In fact, appellant alleges:

> *There are three essential pieces of information in a solicitation that are relied on to formulate the A/E fee proposal—the scope of work, the as-built drawings and other attached pertinent materials, and the stated Design Limitation [ECC price]*; it is imperative that these pieces of information are complete and accurate when formulating the fee proposal. The design limitation provides the A/E with an understanding of how the VA has interpreted the risks, magnitude, and complexities of the design along with underlying assurances that the VA has accurately reflected the costs of the future construction project. With those essential pieces of information, the A/E formulates their fee proposal along with providing the VA with the number of contract drawings needed to complete the design deliverable.[5] The design deliverable includes not only the contract drawings and details, but the calculations and a design narrative write-up that support the basis of design.

Complaint (CBCA 8153) at 8 (emphasis added); Complaint (CBCA 8162) at 7 (emphasis added); Complaint (CBCA 8163) at 6 (emphasis added) (with editorial variations).

In *O'Neal Engineering*, the ASBCA held that an ECC price was not to be relied upon under circumstances similar to those in this appeal. While the A/E contractor in *O'Neal Engineering* alleged a "grossly inaccurate" ECC price in the solicitation and contract, the ASBCA noted that the contractor had an opportunity to study the Government's detailed statement of work and to visit the construction site. 86-3 BCA at 96,619. The *O'Neal Engineering* decision summarizes the appellant's responsibilities here:

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[5] As noted elsewhere in this decision, the number of contract drawings in the proposals were estimates.

> It was [A/E firm's] job, not the Government's, to provide the direct design services based upon the contractually defined work scope. *[The A/E firm's] efforts, in this regard, were expected to lead to the more detailed plans, and the more precise construction cost estimate.* These were [the A/E firm's] contractual obligations. Moreover, [the A/E firm was well aware [this was the case] when it was asked to submit a detailed fee proposal based on its anticipated design effort. . . . It was during this period that [the A/E firm] had the opportunity to more precisely define its direct design costs.
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> . . . .
>
> [The A/E firm] was awarded this contract based upon its architectural ability in designing electrical and mechanical projects. The Government was not the expert. It was [the A/E firm] upon whom the Government relied and to whom it gave the basic information to submit a proposal to design [the project].

Id. (emphasis added).

Here, it is clear that the VA was relying upon the expertise of the A/E contractors to evaluate the information in the solicitation, and not to simply rely upon the ECC price, when submitting their proposals.

Allegations of Increased ECC Prices

Respondent does not dispute that the ECC prices of the designed projects increased as appellant performed its contracts. An increase in the ECC price of the project as designed does not entitle an A/E contractor to additional compensation. *Schoenfeld Associates, Inc.*, VABCA 2104, et al., 87-1 BCA ¶ 19,648, at 99,478. As explained in *Schoenfeld Associates*,

> The mere fact that [the A/E firm] had provided the VA with a project with a higher budget than that anticipated does not establish a right to compensation. The [A/E firm] came in with a contract price. The VA evidently did not require the [A/E firm] to redesign back to the original price. Thus, there was no extra work directed by the VA from that done under the original contract. The [A/E firm] has presented absolutely no evidence that the scope of the work, which it designed for, was any different when it bid, then when it completed its design. Only the price for construction was higher than either

> party anticipated. That alone is not grounds for an increase in design fee. The [A/E firm] has failed to meet its burden of proof on this issue.

Id.; *see also R.M Otto Co. & Associates*, VABCA 1526, 82-2 BCA ¶ 15,889, at 78,795 ("An increase in the cost of construction does not, standing alone, entitle the A/E to additional compensation."); *Shaw Metz & Associates*, VACAB 774, 71-1 BCA ¶ 8679, at 40,310; *Praeger-Kavanagh-Waterbur*y, DOT CAB 67-13, 69-1 BCA ¶ 7482, at 34,716.

Even if, as appellant has alleged, the ECC prices of the contracts did not reflect the complexities of the projects to be designed, as discussed previously, appellant was required to design the projects based upon all the information in the contracts, within the scopes of the work upon which it based its proposals. It was foreseeable that appellant would conclude during contract performance that the designs would be more complex than it anticipated when it prepared its proposals and therefore result in increased ECC prices for the designed projects. The Design Within Funding Limitations clause alerts those submitting proposals of this possibility, and the Government was not obligated to change the scope of the project the awarded A/E contractor was designing. As stated previously, GDM's efforts, as the A/E contractor, were expected to lead to more detailed plans and more precise construction cost estimates, which could exceed the ECC prices in the contracts. *See, e.g., O'Neal Engineering,* 86-3 BCA at 96,619.

Pursuant to the Design Within Funding Limitations clause, the A/E contractor is only entitled to increased compensation if the Government increases the scope of the project to be designed. As noted by appellant in its complaints, the VA did not increase the scopes of work but directed appellant to design within the scopes upon which appellant based its proposals:

> For nearly a year, the VA was told over and over again that the project scope of work was exceeding the design funding limitation. The project scope of work was not revised in any way to stay within the design funding limitation at any of the four design submittal stages (35%, 65%, 95%, and 100%) that took place over the year[-]long design process. *The Contracting Officer did not provide any direction on the matter whatsoever. No request to redesign. No revised scope of work. No changed specifications.* No other direction that might have lowered the estimated cost of construction was ever received.

Complaint (CBCA 8153) at 6 (emphasis added); Complaint (CBCA 8162) at 6 (emphasis added). In its CBCA 8163 complaint, appellant similarly acknowledges that:

> In accordance with FAR 52.236-22 Design Within Funding Limitations, GDM alerted the VA with each design submittal (35%, 65%, 95%, and 100%) that the design limitation was being exceeded. *At no time did the VA authorize a change in scope or materials as required to reduce the estimated construction cost (ECC) to an amount within the funding limitation.*

Complaint (8163) at 5 (emphasis added).

Allegations of Cardinal and Constructive Change

Under a FFP contract, a contractor can demonstrate entitlement to additional compensation pursuant to the Changes clause, FAR 52.243-1, if the Government changes the scope of work. *See Hengel Associates, P.C.*, VABCA 3921, 94-3 BCA ¶ 27,080, at 134,965 (explaining that, absent evidence that a design firm "performed any [d]esign work in addition to that for which it originally contracted" an increased construction budget, alone, does not establish a right to compensation); *Schoenfeld Associates*, 87-1 BCA at 99,478. Since the appellant admits that the Government did not explicitly order a change, appellant would need to prove constructive change. *Nova Group/Tutor-Saliba v. United States*, 159 Fed. Cl. 1, 49 (2022), *aff'd*, 87 F.4th 1375 (Fed. Cir. 2023). Prevailing on a constructive change claim requires allegations of fact showing: "(1) that appellant performed work beyond the contract requirements, and (2) that the additional work was ordered, expressly or impliedly, by the government." *Id.* (quoting *Bell/Heery v. United States*, 739 F.3d 1324, 1335 (Fed. Cir. 2014)); *see also Praeger-Kavanagh-Waterbury*, 69-1 BCA at 34,717 (holding that additional compensation is warranted when the Government "alters the basic project requirements so as to importantly affect the prior design work, thus imposing a significant additional workload on the architect.").

In its complaints, appellant alleges that, as it performed the design contracts, the total numbers of design drawings appellant produced exceeded the estimated number included in appellant's proposals.[6] For the Togus contract, the number of drawings increased from an estimated 305 to 573. Complaint (CBCA 8151) at 8. For the Birmingham contract, the number increased from an estimated 305 to 467. Complaint (CBCA 8162) at 7. And, for the Murfreesboro contract, the number increased from an estimated 295 to 477. Complaint (CBCA 8163) at 7.

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[6] Appellant's proposals contained estimated numbers of contract drawings. CBCA 8151, Exhibit 14 at 9; CBCA 8162, Exhibit 7 at 14; CBCA 8163, Exhibit 19 at 17.

While appellant emphasizes that it produced more drawings than specified in its accepted fee proposals, the number of drawings appellant specified in its proposals were clearly designated as estimates. An increase in the actual number of drawings from an estimated number does not prove a change in scope, entitle a contractor to additional compensation, or lead to the conclusion that a change in the scope of work has been authorized. *See Elcon Associates*, ASBCA 44189, 95-2 BCA ¶ 27,859, at 138,915 (requiring an A/E firm to allege more than just that it produced more drawings than anticipated). Appellant acknowledges that the Government did not increase the scopes of the work. Accordingly, there was no change, actual, constructive, or cardinal.

Again, appellant's primary basis for relief is the less tangible assertion that the projects' designs became more complicated than anticipated. A more complicated design is not, in and of itself, the basis for a compensable change. *Schoenfeld Associates, Inc.*, 87-1 BCA at 99,478. "It [is] the [A/E firm's] expertise that the Government [seeks and] . . . the A/E's job to flesh out and focus the design so that an end product [can] be constructed." *Id*. As stated previously, appellant had the opportunity to review the detailed requirements in the solicitations before submitting its proposals. If an A/E firm views an estimate as woefully inadequate, it should not bid or accept the contract. *Id*; *see also Hengel Associates, P.C.*, 94-3 BCA at 13,965 ("If [the A/E firm] felt that the Government's estimate was unrealistic and thus if it could not do the design for the price offered, it should not have put in a final offer.").

Respondent's Direction Pursuant to the Design Within Funding Limitations Clause

Appellant advised the COs that the ECC price of the projects that were being designed to meet the contracts' requirements continued to increase and exceeded the ECC prices in paragraph c of the Design Within Funding Limitations clauses in the contracts. While the COs did not increase the scopes of work of the contracts or of the projects to be designed, appellant asserts that it is entitled to an increase in its design fees for the quantum of the certified claims. Complaint (CBCA 8153) at 3; Complaint (CBCA 8162) at 3; Complaint (CBCA 8163) at 3.

As noted previously, appellant states that the COs did not revise the scopes of the projects when appellant advised that the construction projects could not be designed within the stated funding limitations of the contracts (i.e., the ECC prices in the contracts). Appellant asserts that this lack of revision of the scopes of the projects denied appellant an increase in its fee:

> GDM used the [Design Within Funding Limitations clause] . . . and the other solicitation documents to develop a proposal for a project of the magnitude and with the complexities presented. In accordance [with the Design Within Funding Limitations clause,] GDM advised the Contracting Officer that the design limitation was being exceeded. At no time did the Contracting Officer revise the scope or required materials nor did the Government revise the [ECC price] published in paragraph (c) of the clause. Rather, the Contracting Officer[s] took no action other than to advise GDM to continue with the design. By advising GDM to continue with the design *without any revision to the scope of work, materials, or the design limitation implies acceptance of GDM's 100% construction documents and estimated construction cost, constituting a cardinal change to the contract*.

Complaint (CBCA 8153) at 6 (emphasis added) ; Compliant (CBCA) 8162 at 6 (emphasis added); Complaint (CBCA 8163 at 5) (emphasis added).

As mentioned previously, appellant alleges:

> For nearly a year, the VA was told over and over again that the project scope of work was exceeding the design funding limitation. The project scope of work was not revised in any way to stay within the design funding limitation at any of the four design submittal stages (35%, 65%, 95%, and 100%) that took place over the year long design process. *The Contracting Officer did not provide any direction on the matter whatsoever. No request to redesign. No revised scope of work. No changed specifications. No other direction that might have lowered the estimated cost of construction was ever received*.
>
> The problem with this assertion is that the VA could write in any unreasonable "low-ball" estimated construction contract price knowing that an A/E firm is restricted by the Brooks Act to 6% of construction for design and construction documents, abusing the right to direct additional design effort without consequence.[7]

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[7] Appellant's speculation that the VA might intentionally have included unreasonable ECC prices to reduce the A/E's fee is not supported by appellant's complaints, which challenge the VA's methodology of calculating the IGCEs but do not allege any intention to include reduced ECC prices to disadvantage those who submit proposals.

Complaint (CBCA 8153) at 6 (emphasis added); Complaint (CBCA 8162) at 6 (emphasis added).

The Government's actions described by appellant above do not entitle appellant to additional compensation. As explained in *Michael Roth & Associates, Architects & Planners Inc.*, 133 Fed. Cl. 279 (2017), which is factually similar to the case here, "[t]he design within funding limitations clause imposes only one duty on the VA." *Id.* at 290. That duty is to review the contractor's revised ECC after the contractor informs the Government that the project, as designed, is likely to exceed the initial ECC. *Id.* And, then after review, the Government "*may* . . . authorize a change in scope or materials as required to reduce the estimated construction cost to an amount within the estimated construction contract price . . . or the Government *may* adjust such estimated construction contract price." *Id.* (quoting FAR 52.236-22) (emphasis added). The use of "may" is permissive, and the Government here was not obligated to change appellant's scope when appellant informed it of the increased ECC. *See id.* (stating that "the VA was not obligated to choose one of the options set forth in the [funding limitations] clause; the options were discretionary."). Here, the Government did not authorize a change in scope or an increase in the contract ECC price. Appellant acknowledges this discretion when it alleges:

> *GDM understands that had the Contracting Officer issued direction to revise the scope of work, services necessary for the redesign would have been at GDM's expense (FAR 52.236-22)*; however, that is not what took place. Rather, the VA remained silent and maintains that "the decision to increase the ECC . . . was at the discretion of VA."

Complaint (CBCA 8153) at 6 (emphasis added); Complaint (CBCA 8162) at 6 (emphasis added) (editorial variations).

Thus, appellant acknowledges that even if the CO had increased the scopes of the contracts by directing redesign to comport with increased ECC prices, there would be no entitlement to additional compensation.

Conclusion

Appellant concludes:

> On numerous occasions through the year-long design process, GDM fulfilled its responsibility to inform the VA that the estimated cost of construction was exceeding the design limitation. By advising GDM to continue designing the

> awarded scope of work, the VA approved a change to the estimated cost of construction contract. As this is a material matter to the solicitation and award, it is GDM's position that this is a cardinal change to the contract for which GDM is owed equitable compensation.

Complaint (CBCA 8153) at 8-9; Complaint (CBCA 8162) at 8; Complaint (CBCA 8163) at 7.

Appellant agreed to perform each contract for a firm, fixed price. The fact that appellant realized during performance of the design contracts that the contract requirements were more complex than it had anticipated when preparing its proposals—requiring more design effort than appellant estimated, resulting in increased ECC prices for the projects designed—did not change the scopes of the projects being designed or require the Government to increase the scopes or require redesign of the projects. There were no changes to the design contracts—actual, constructive, or cardinal, as alleged by appellant—for which appellant is owed additional compensation. In these appeals, appellant has failed to state claims upon which relief can be granted.

Decision

Respondent's motions to dismiss for failure to state a claim, filed in CBCA 8151, CBCA 8162, and CBCA 8163, are granted, and these consolidated appeals are **DISMISSED**.

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

We concur:

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

Jonathan L. Kang
JONATHAN L. KANG
Board Judge