



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: July 9, 2018

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** (Chair), **VERGILIO**, and **LESTER**.

VERGILIO, Board Judge.

The contractor, Industrial Maintenance Services, Inc., seeks an additional \$5633.01 from the Department of Veterans Affairs (agency) for a change order under a contract. Particular direct costs, overhead and fees, and profit are at issue in the quantum phase of this dispute involving a Changes clause and the agency's supplement to the Changes clause, which specifies that a contractor's overhead and fee percentages shall be considered to include field and office supervisors and assistants (the contractor initially sought recovery for such individuals as direct costs), and that no separate allowance will be made for these costs. The contractor bears the burden of proof. The agency contends that the contractor has failed to meet its burden for some of the direct costs, and that the contractor uses the incorrect dollar value for the work impacted by the change, which is a factor when calculating overhead and profit.

A change order extended the time for performance by five calendar days because of altered and added work. Of the costs here at issue, the agency does not dispute payment of \$602.53 (for direct costs, plus markups), which the contractor is to receive. The contractor has not supported payment for a portable toilet (not payable as a direct cost under the contract), or forklift and fuel charges (both not shown to be directly related to or impacted by the change order). The contractor has not demonstrated either the dollar value of impacted work (beyond that of the work altered and added by the change order) or that additional payment for overhead or profit is warranted. The Board denies recovery on those items.

Discussion

Basic facts are detailed in the underlying opinion on entitlement, *Industrial Maintenance Services, Inc. v. Department of Veterans Affairs*, CBCA 5618, 17-1 BCA ¶ 36,850, and supplemented here as necessary. The contract contains a Changes clause (JUN 2017), 48 CFR 52.243-4 (2015), and the agency's supplement thereto, VAAR 852.236-88 (JUL 2002), 48 CFR 852.236-88(b) (2017), 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.

. . . .

(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.

Appeal File, Exhibit 2 at 28-30. The contractor separately has been compensated for subcontractor work; at issue is “the value of labor, material, and use of construction equipment required to accomplish the change”—direct and impact costs plus markups for overhead and profit. For this phase of the case, as specified in the entitlement opinion, “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.” 17-1 BCA at 179,575. The parties have submitted the case on the record, without a hearing. The contractor bears the burden of proof. The contractor seeks \$5633.01 for what it characterizes as its associated direct labor plus markup, direct material, equipment rental, and labor burden costs, as well as overhead and profit, each at ten percent.

The direct costs (to which it adds overhead and profit) the contractor attributes to the change order are for labor and labor burden for daily cleanup, vehicle mileage, and facilities charges, as well as forklift and fuel charges. What had been direct costs for a superintendent and a project manager are now treated as part of overhead, which the contractor seeks on what it contends is the post-change order value of remaining, non-change order work; it seeks profit on this same amount.

Direct costs

Of the direct costs, the agency accepts charges totaling \$454.40, for daily cleanup and vehicle mileage, to which it adds ten percent each for overhead and profit and an amount for labor burden on the cleanup. The total amount for these two items is \$602.53, which the agency does not dispute paying. This amount includes overhead and profit of \$45.44 each, and labor burden of \$57.25. The payment of overhead and profit is largely in keeping with paragraph (b)(4) of the supplemental clause: “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.” The clause specifies, “Profit shall be computed by multiplying the profit percentage by the sum of the direct costs and computed overhead costs.” The contractor has requested, and the agency does not oppose, profit based upon direct costs only (not summed with overhead costs). Because the clause does not dictate that the contractor automatically will receive overhead or profit of ten percent, the Board does not adjust upward the amount awarded.

The agency does not dispute the charge (\$23.80) and markup for a facilities charge. The charge is for a portable toilet, an item defined to be included in the incidental job burdens, for which a separate allowance is not payable. The contractor does not recover a direct cost (or markup) for the portable toilet.

The agency disputes charges of \$1000 for a forklift rental (twenty hours at \$50 per hour) and \$100 for fuel (\$20 per day for five days), contending that the record does not demonstrate that the forklift or fuel was utilized during or after the contract modification change order work. The Board determines that the record does not support payment of these rental and fuel charges—the contractor has not identified, and the Board has not found, material in the record and submittals that links these charges to the change order or its impact. While the contractor seeks payment for a forklift for an average of four hours per day for five days, there is neither explanation nor support of those figures. If the forklift was on site for the remainder of each of the days, then it seemingly would have been included as a cost for the day as part of the contract cost. Moreover, the hourly rate is not supported. A bid to the contractor from a rental company for a forklift for the period of August 8 to September 6, 2016, is for \$225 per day, as found in an attachment to the contractor's submission dated November 30, 2017. The hourly rate from that daily rate is \$28.25 based on an eight-hour day, not \$50. And, a bid is not a bill; the contractor has not demonstrated the amount it actually paid or linked any payment to the change order and request for payment. As to fuel, a record of sale of diesel fuel on October 10, 2016, is for \$232.61. This amount is not linked to the forklift (or other equipment) or the change order or its impact. The record does not indicate the derivation of the \$20 daily charge for fuel. Because the record lacks explanation and credible support, the Board denies payment of \$1100 of the direct costs sought (and overhead and profit thereon).

Impact costs and overhead and profit

The contract does not permit payment for supervisors and assistants as direct costs. Rather, a contractor's overhead and fees are to compensate for those costs. Specifically, "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."

Given the contract language, two points merit comment to address concerns raised and positions taken by the parties. First, a contractor is not guaranteed overhead or profit at ten percent each, or the maximum value under the declining scale as the value of a change increases. The "not to exceed" language provides flexibility to ensure appropriate compensation within the limits. Second, in determining the value required to "accomplish the change," a contractor may shift some or all work into a different time period and may be required to perform work in an order different from that anticipated before the change. This could alter the value of items, positively or negatively. An extension of time for performance suggests a change to the critical path, but does not by itself reveal the work or value thereof affected by the change. For example, it may be that a contractor could perform non-critical path work as originally anticipated, and critical path work as expected or without a change

in value. The contractor had the opportunity to demonstrate that the change entails impact costs, apart from the value to perform the specific work added or altered by a change order.

The contractor values the work impacted by the change order at \$593,103. Using that figure and maximum values under the declining scale, it calculates overhead and profit as \$31,584.06 each. The contractor suggests that it would be entitled to the total, \$63,168.12, but only seeks the remainder of the \$5633.01 in its underlying claim. It contends that onsite supervision and management were required for the added duration of the contract, which shows a compensable impact. The agency asserts that, although the critical path changed by adding five calendar days to the performance period, the contractor has failed to show that any or all of the other work was impacted or resulted in increased costs to the contractor.

The contractor's broad-brush approach, and failure to point to specific tasks or related dollars, results in an unsupported position. Impacted work may, not must, result in a change in value. Not all remaining work is necessarily impacted by a change order because non-change order work perhaps is performed as originally scheduled, or is performed earlier or later with no change in value or cost to the contractor. Specifics to support the contractor's position are lacking in the record, such as the derivation of the \$593,103 figure, and an explanation of the days supervision and management were on-site other than anticipated in the pre-change contract, and details of the value of the associated work performed. The contractor has not submitted proof—affidavits and other information—to verify and corroborate its basis for the costs sought. The contractor has not established a value to accomplish the change which would permit recovery of additional overhead or profit. The Board denies this aspect of the claim.

Decision

The Board **GRANTS IN PART** the appeal. The contractor is to recover \$602.53; the remainder of the claim is denied.

Joseph A. Vergilio

JOSEPH A. VERGILIO

Board Judge

We concur:

Jeri Kaylene Somers

JERI KAYLENE SOMERS

Board Judge

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.

Board Judge