UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART; DISMISSED IN PART: May 14, 2019

CBCA 5387

VET4U, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Michael T. Stanczyk of Centolella Lynn D'Elia & Temes LLC, Syracuse, NY, counsel for Appellant.

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

Before Board Judges **DRUMMOND**, **LESTER**, and **O'ROURKE**.

O'ROURKE, Board Judge.

Appellant, Vet4U, LLC (Vet4U), seeks reimbursement of additional costs and losses resulting from an asbestos abatement contract with the Department of Veterans Affairs (VA). The VA denied all twenty-three claims in their entirety. Vet4U appealed to the Board and asked for a decision on the record. We grant the appeal in part and dismiss it in part.

Background Facts

In 2013, the VA solicited offers from qualified contractors to perform asbestos abatement services at a veterans hospital in Syracuse, New York. The project scope included "all demolition and construction services" necessary for the environmental remediation of the hospital's sub-basement or crawl space. These services included "excavation . . . into

unreachable areas of the sub-basement," "demolition and removal of all abandoned [] piping, equipment, and systems," and "abatement/encapsulation of soils, pipe insulation/gaskets, and other asbestos containing materials (ACM) and presumed asbestos containing materials (PACM)." It also required "selective demolition of existing electrical, communication, and lighting circuits," "repairs and structural modifications to caissons, grade beams, and electrical grounding systems," installation of an equipment lift system near a loading dock, and construction of access ways into the sub-basement.

The solicitation included a project cost range between $1,000,000 and $2,000,000, and required a phased approach to the work. To accommodate this approach, the sub-basement was divided into work zones, each of which corresponded to an option under the contract as follows:

Base Period: work zone A - phase 1 = dock/lift modifications
Option 1: work zone A - phase 2 = access way excavation/encapsulation
Option 2: work zone B = access way excavation/encapsulation
Option 3: work zone C = access way excavation/encapsulation
Option 4: work zone D/E = access way excavation/encapsulation

The solicitation specified time limits for performing each phase of the project as follows: 240 days for the base period and 300 days for each option period, resulting in a total performance period of 1440 days, or forty-eight months. Included in the contract were 589 pages of specifications and twenty-three drawings.

Multiple contractors attended the site visit in July 2013, including Vet4U. Interested contractors inquired about quantities of rock and asbestos in the crawl space to ensure accurate bidding. The VA responded by directing them to particular drawings and specifications, as well as to an asbestos survey conducted in 2012 and a sub-surface soil report dated September 15, 1949. According to the VA, this information was sufficient to estimate quantities of soil to be removed, but rock excavation was to be treated as a differing site condition.

The VA conducted an evaluation of proposals using the lowest-price technically acceptable approach. Vet4U, the only bidder on the project, proposed an eighteen-month period of performance at a total cost of $4,145,302, inclusive of all four option periods. On September 23, 2013, the VA awarded Vet4U a firm fixed-price contract in the amount of $3,581,957, which included the base period and the first three options. Five months later, the VA exercised the fourth option in the amount of $563,345.

During performance of the contract, a number of disputes arose between Vet4U and the VA's architect-engineering (AE) firm, Tolman Engineering, PLLC (Tolman). These included the method of excavation, the time-line for review of submittals, suspensions of work, and responsibility for certain additional engineering services. Contract modifications addressed many of these issues; others are the subject of this appeal.

Vet4U completed the project in thirty-six months—one year earlier than the required completion time, but twice as long as the time estimated in Vet4U's bid, which was priced according to an eighteen-month time-line. Vet4U maintains that it incurred significant additional costs in performing the contract and that the VA wrongly awarded certain project-related work to other contractors. As a result, Vet4U submitted twenty-three claims to the contracting officer (CO) seeking a combined total of $296,852.51, plus interest. The CO denied the claims in their entirety, and Vet4U appealed to the Board.

Discussion

I. Jurisdiction and Standard of Review

The Board has jurisdiction over Vet4U's timely appeal under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012). We review the appeal de novo, without any presumption of correctness or deference given to the CO's final decision (COFD). *Wilner v. United States*, 24 F.3d 1397, 1402 (Fed. Cir. 1994).

In deciding a case on the record, we look to Board Rule 19 for guidance on the scope of what we may consider as part of that record. At the time Vet4U requested a decision on the record, our Rule permitted including "(1) [a]ny relevant documents or other tangible things [they] wish[] the Board to admit into evidence; (2) [a]ffidavits, depositions, and other discovery materials that set forth relevant evidence; and (3) [b]riefs or memorand[a] of law" that explain each party's positions and defenses. 48 CFR 6101.19(a) (2017).

Regardless of whether a contractor elects a hearing or a decision on the record, the burden of proof is the same. *Sylvan B. Orr v. Department of Agriculture*, CBCA 5299, 17-1 BCA ¶ 36,863, at 179,613 (quoting *Raimonde Drilling Corp*., ENGBCA 5107, 86-3 BCA ¶ 19,282, at 97,488). "'While [the Board] can make inferences from th[e] evidence and either accept or deny the probative value of documents, statements or other extrinsic evidence, in order for us to find for a party, that party's evidence must establish,' by a preponderance of the evidence, 'that it is entitled to relief.'" *1-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913, at 175,551 (quoting *Schoenfeld Associates, Inc*., VABCA 2104, et al., 87-1 BCA ¶ 19,648, at 99,472). In addition to proving entitlement, a contractor must also prove its losses "with sufficient

certainty so that the determination of the amount of damages will be more than mere speculation." *Douglas P. Fleming v. Department of Veterans Affairs*, CBCA 3655, 16-1 BCA ¶ 36,509, at 177,876 (quoting *Willems Industries, Inc. v. United States*, 295 F.2d 822, 831 (Ct. C1. 1961)).

II. Findings of Fact and Conclusions of Law

Relocation of the Chemical Shed and Dumpster ($5330)

The VA contends that Vet4U is not entitled to any costs related to the permanent relocation of a chemical shed and dumpster because the work was done for the benefit of Vet4U's subcontractor, and because it was not "requested or authorized by the [CO], or by any other VA official." We disagree. The contract required the parties to agree on designated work space areas, material storage locations, and routes of access. A chemical shed and dumpster had to be relocated to make room for a HAZMAT trailer. The shed and dumpster were not shown on the drawings, were not relevant to the project, were too close to the road, and unnecessarily crowded an already small workspace.

The contracting officer's representative (COR) contacted the owner of the shed, and asked it to move the shed *before* the sub-basement project began. The owner emptied the contents of the shed but could not move it without a crane, but the crane rental was too expensive. The COR emailed Vet4U and asked Vet4U to move the shed: "I need to discuss a possible change order to relocate the [chemical] shed [from] the loading dock area to behind [building] 16." Vet4U replied by email and agreed to do it. The COR forwarded this email exchange to the owner and copied Vet4U, stating that, in addition to moving the chemical shed, Vet4U "will be moving the metal dumpster . . . further clearing out the area for truck traffic to back into our loading docks." The COR and owner then decided this would be a *permanent* move for the shed because its current location was too close to the road, as evidenced by the fact that the previous shed had been struck by a vehicle.

After receiving direction from the COR, Vet4U requested a cost estimate from one of its subcontractors, Paragon. Paragon submitted a proposed cost estimate of $4330 to relocate both items to another area of the hospital campus. The estimate included materials for constructing a foundation for the shed at its new location.[1] The COR coordinated the move with the owner, the VA police, and Vet4U. Sometime in January 2014, Paragon

[1] Moving the shed and dumpster were not in Paragon's original scope of work.

performed the move, which took place after regular business hours with multiple VA officials present. Paragon rented a large crane for the sole purpose of moving the shed.

By the time the move took place, no change order had yet been executed. Email messages and project meeting minutes showed the work as being included among a list of items in a pending change order dated November 21, 2013, then removed from the list in February and March 2014, only to be added back on June 19, 2014. After several months, the VA ultimately refused to pay for the work. The record is not clear as to why. It only references a statement by the COR that "the CO did not want to see any charge for this." Notably, the VA did not argue that the contract required this work as part of site preparation, mobilization, or any other term of the contract. Long after the VA solicited the work, coordinated it, watched it happen, and benefitted from it, the agency simply stated that the work was not authorized by the CO.

We are not persuaded by the VA's contention. The CO, COR, and project were all located at the same VA facility, and the CO and COR communicated daily about the project. The record contains email messages, project meeting minutes, a cost estimate, and references to verbal exchanges about this particular work, none of which indicates that the work was required by the contract. What the contract did call for, however, was a joint survey between Vet4U, the COR, and a representative of the VA supply service to review anticipated routes of access prior to the start of work and to note any discrepancies between the drawings and the conditions at the site. If the contract was changed as a result of the survey, the specification required a modification either under the Federal Acquisition Regulation (FAR) Differing Site Conditions clause, 48 CFR 52.236-2 (2013) (FAR 52.236-2), or under the Changes clause, FAR 52.243-4, and VA Acquisition Regulation (VAAR) 852.236-88.

The parties appeared to be following this procedure when the COR included the work on a change order request to the CO.[2] Although a formal change order never materialized, we are not precluded from finding that the contract was constructively changed. "A constructive change occurs when a contractor performs work beyond the contract requirements, without a formal [change] order under the Changes clause, either due to an informal order from, or through the fault of, the Government." *Nu-Way Concrete Co. v. Department of Homeland Security*, CBCA 1411, 11-1 BCA ¶ 34,636, at 170,696 (2010) (citing *Ets-Hokin Corp. v. United States*, 420 F.2d 716, 720 (Ct. Cl. 1970), and *Len Co. & Associates v. United States*, 385 F.2d 438, 443 (Ct. Cl. 1967)). The fact that the COR later

[2] The VA preferred batching additional tasks into a single change order rather than submitting piecemeal change requests to keep the work moving. For this reason, the completion of work occasionally preceded the written change order authorizing it.

relayed a message by the CO to the effect that "we do not want to see any charge for this," after directing Vet4U to perform work that was outside of the scope of the contract, does not relieve the VA of its obligation to pay for the benefit it received. Here, we find sufficient evidence of injury. The only issue is establishing the amount of Vet4U's damages. The record contains Paragon's cost estimate in the amount of $4330, as well as Vet4U's itemized accounting records for the entire project. It also contains an affidavit stating that Vet4U paid Paragon for this work, but that "some of the items contained in the Claim are combined in pay applications . . . with other items and they cannot be easily identified [on the accounting records]." Vet4U seeks a total of $5330 for this work. Because we have no evidence to substantiate the additional $1000 added to Paragon's cost of $4330, we find Paragon's estimate to be an accurate measure of Vet4U's damages. We grant $4330 for relocating the shed and dumpster.

Repair and Relocation of the Shaft 3 Unit Heater ($3770)

Vet4U seeks additional expenses related to repairing and relocating a unit heater in Shaft 3—work which it claims was out of scope. We address the repair claim first and the relocation claim second.

Two contract drawings showed a unit heater in the general vicinity of shaft 3 and room CL55. General note 1 on drawing number PD-100 stated that the "contractor shall remove all existing piping, conduit, raceway, valves, insulation, and equipment within required vertical lift limits. For lift limits, refer to detail [2 of drawing number CI-504]." Although section A-A of drawing CI-504 indicated a substantial clearance zone to accommodate loading dock modifications and the installation of a vertical lift, the clearance zone approached, but did not fully extend to, the location of the unit heater. The drawing, however, described the marked area as a "minimum" clearance zone and referred interested contractors to specification 14 55 00 (Vertical Reciprocating Conveyor) for additional requirements since the section drawings only provided general layout information. That specification, along with specification 13 50 00 (Loading Dock HVAC and Plumbing Modifications), required the contractor to field verify and review existing conditions, and to lay out "proposed HVAC, plumbing, fire [s]uppression, electrical, communication, and any other system modifications required to provide adequate space and clearance for new mechanical lift and loading dock access."

Vet4U's subcontractor, Eerie, verified that the unit heater was, in fact, in the way of the new dock system, including the vertical lift. Eerie did not state that the heater needed to be repaired, only relocated and re-piped. In a November 7, 2013, email, entitled "Change Order Scopes," Eerie stated only that "[t]he existing Unit Heater not shown to be removed under the demo scope or to be relocated will be in the way of the new dock system. The

heater may want to be relocated toward the rear wall and re-piped." Vet4U's claim described it as "disconnecting all electrical to the space heater and relocating the electrical to the rear wall." Allied Electric proposed a cost of $1270 for the work. It, too, only referenced relocating the heater, not repairing it. Further confusing the matter, Vet4U stated that the heater was "dead" and that "it was in the way, so it was taken out." Vet4U added that a VA employee bought a new heater, but it was too small and likely still "sitting there." In light of these inconsistencies, Vet4U has failed to substantiate, by a preponderance of the evidence, that the unit heater was repaired. Repair costs were correctly denied.

Costs incurred for relocating the heater were also correctly denied. Under the clear terms of the contract, Vet4U was responsible for removing existing piping, conduit, raceway, and equipment within the limits of the new vertical lift. It was also responsible for relocating—at no expense to the VA—all utilities that conflicted with the new work. Finally, "[u]nless otherwise indicated, the contractor [was] responsible for all demolition and removal work required to complete new work or modify existing [conditions] whether shown on [the] demolition plan or not." Vet4U chose to use that area as an access way to the basement for its equipment, so it demolished the heater wall.

We find that the contract unambiguously allocates the costs of removal work, demolition work, and utility relocation work to the contractor. We further find that corresponding specifications only contemplated an adjustment under the Changes clause for "utilities and systems *not* shown on [the] drawings or locations of which are unknown." (emphasis added). The heater was depicted on the drawings, and since Vet4U demolished the wall to make room for its equipment, it was required to relocate the heater and its electrical supply at no cost to the VA. Accordingly, we deny the claim.

Emergency Repairs of Sprinkler Lines ($6200)

Vet4U submitted two separate claims for repairing broken sprinkler lines in the sub-basement. The VA denied both claims, styled as additional work outside of the scope of the contract, since they were not authorized by the CO. Based on evidence in the record, we deny the first claim but find the second one compensable.

With regard to the first claim, Vet4U asserted that the sprinkler line froze and burst after a VA employee turned off the fan and closed the door to shaft 3 which, when propped open, allowed heat to access the area. Vet4U stated that while it did not cause the damage, had it not repaired the line immediately, the water spilling into the sub-basement would have delayed the project. Vet4U did not contact the VA prior to taking any action to repair the line and did not provide any additional information about the alleged VA employee whose

actions resulted in the damage. Vet4U asserted that the contract permitted emergency repairs but failed to identify the relevant provision of the contract on which it now relies.

Regardless of who closed the door, the contract required Vet4U to repair—at no cost to the VA—items that Vet4U damaged through its own actions or negligence. The contract required Vet4U to maintain a minimum temperature of forty degrees at all times in storage areas and in operational areas. We find that Vet4U failed to comply with this requirement, and, as a result, a sprinkler line froze, cracked, and began leaking water into the sub-basement. Vet4U's uncorroborated assertion that a VA employee was at fault is insufficient to absolve or waive its obligations under the contract. "A claim against the Government may not be allowed merely because it has been alleged." *Jen-Beck Associates*, VABCA 2107, et al., 87-2 BCA ¶ 19,831, at 100,322 (quoting *J.C. Edwards Contracting & Engineering, Inc.,* VABCA 1947, et al., 85-2 BCA ¶ 18,068, at 90,690). The "essential burden of establishing the fundamental facts of liability, causation and resultant injury" remains with the contractor. *Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 968 (Ct. Cl. 1965). Vet4U has failed to establish entitlement to the costs of repairing the broken sprinkler line. We deny the first sprinkler claim.

With regard to the second claim, Vet4U discovered "a six-inch sprinkler line that [was] just dumping water" into room CL55, exposing the work area and excavation equipment to the water. Vet4U claimed that it immediately notified either the COR or another VA representative. At some point, the representative told Vet4U that he had been waiting for Davis Ulmer (a commercial company) to return his call. There is no evidence that anyone contacted the CO. Due to the urgency of the situation, Vet4U contacted Davis Ulmer directly. An hour later, Davis Ulmer arrived and found that the sprinkler pipe had rotted. Davis Ulmer replaced it and invoiced Vet4U $2250 for the work, which Vet4U paid.

In her final decision, the CO disputed that the VA had received notice and found that "Vet4U undertook to repair the line without any authorization by the VA" and that "[t]he repair was not requested or authorized by the [CO]." Since the invoice referred to the condition of the pipe as "rotted," we find that Vet4U did not cause the damage. Therefore, Vet4U was not liable for the repair costs. The contract had no provisions for emergency repairs; nevertheless, an urgent repair was necessary to minimize the impact of the rotted sprinkler line.

In these emergency circumstances here, Vet4U's notice to the VA was adequate to meet any contract requirement regarding notice. "If a contract clause requires a contractor to notify the Government within a specified period of time of . . . a differing site condition, lack of . . . notice," or lack of notice to the individual named in the contract, "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 (2016) (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 72,156-57; and *DeMauro Construction Corp*., ASBCA 17029, 77-1 BCA ¶ 12,511, at 60,650)). "[N]otice may be waived in instances in which the Government suffers no prejudice, i.e., no other course could or would have been taken under the circumstances." *Fru-Con Construction Corp. v. United States*, 43 Fed. Cl. 306, 325 (1999), *aff'd,* 250 F.2d 762 (Fed. Cir. 2000) (per curiam).

Here, the VA has not identified what the CO would or could have done differently had he personally been notified of the broken pipe. Had Vet4U waited for full consent and guidance from the CO before repairing it, more damage to the sub-basement would have occurred. In fact, the VA's own representative, like Vet4U, contacted Davis Ulmer to address the emergency, indicating that the VA's recovery plan was exactly what Vet4U implemented. Davis Ulmer repaired the line, and Vet4U paid for it. The CO presented no evidence of prejudice, and we find none under the circumstances. We grant $2250 for the second sprinkler claim.

Demolition of the Condensate Electrical Box and Reinstallation of the Computer Room Junction Box ($2252)

Both the condensate electrical box and the computer room junction box were located on a wall that Vet4U demolished in order to access the sub-basement with its equipment. Vet4U argues that because this approach was approved by the VA as part of Vet4U's "means and methods" to perform the work, it should be reimbursed for removing, relocating, and rerouting the associated electrical equipment. We disagree. As with the unit heater, these items were not shown on the drawings as intended for demolition, and even if they were, the contract made Vet4U responsible for any necessary demolition whether shown on the drawings or not. Furthermore, the contract scope required Vet4U to construct an access way from room CL55 into "selected areas of the Sub-Basement from which mechanized equipment and personnel [could] enter the Sub-Basement Crawlspace to conduct the remediation project." The fact that Vet4U had to relocate the electrical equipment in order to perform according to its desired means and methods is unavailing. Under the contract, the removal and relocation of electrical items to accommodate new work was the responsibility of the contractor and therefore, not compensable. We deny both claims.

Temporary Electrical Connection ($7081.67)

Vet4U seeks reimbursement for all work associated with its installation of temporary electrical connections and associated equipment. Its argument is twofold. First, Vet4U

argues that, during a site visit, the VA identified certain electrical outlets that Vet4U could use to power the excavation equipment, which, as it turned out, were grossly insufficient. Vet4U had to hire an electrical subcontractor to install temporary electrical connections in room CL55, resulting in unanticipated additional costs. Second, Vet4U points to a "Site Visit Report," drafted by Tolman, that identified and commented on certain project-related topics. Item number twelve stated, "[The] VA will supply electric for the Contractor."

We disagree with Vet4U's interpretations of these statements because neither one fully represents the parties' obligations under the contract. The relevant specification and FAR Clause, both entitled "Availability and Use of Utility Services," stated:

> (A) The Government shall make all reasonably required amounts of utilities available to the Contractor from existing outlets and supplies, as specified in the contract. The amount to be paid by the Contractor for chargeable electrical services shall be the prevailing rates charged to the Government.
>
> (B) The Contractor, at [its own] expense . . . shall install and maintain all necessary temporary connections and distribution lines, and all meters required to measure the amount of [each utility] used for the purpose of determining charges. Before final acceptance of the work by the Government, the Contractor shall remove all the temporary connections, distribution lines, meters, and associated paraphernalia.

The specification contained additional relevant guidance in paragraph C: "Contractor shall install meters at contractor's expense and furnish the Medical Center a monthly record of the Contractor's usage of electricity as hereinafter specified." It also instructed bidders to "[o]btain electricity by connecting to the Medical Center electrical distribution system," and further that the "Contractor shall meter and pay for electricity required for electric cranes and hoisting devices, electrical welding devices and any electrical heating devices providing temporary heat. Electricity for all other uses is available at no cost to the Contractor."

According to these provisions, electricity required to power excavation equipment was covered by the VA if obtained from existing outlets and supplies. Costs associated with the installation of temporary connections and meters, however, were the responsibility of the contractor. During the solicitation process, and after the site visit, a bidder asked, "If the excavation contractor uses electric excavation equipment will the VA allow connection to their system? Will the VA pay for the electricity?" The VA referred bidders to specification for electricity and stated "[C]ontractors can connect to the VA system, but must meter and pay for the electricity." The VA referred to the correct specification but conflated its provisions, rendering any reliance on the statement to be misplaced.

Vet4U further asserted that "although the specifications indicated that the contractor was responsible for paying for temporary electric, this was removed from the specifications by Robert Lee, the Contract[ing] Officer." Vet4U provided no evidence that this specification was removed or modified in a way that shifted the burden of these costs to the VA. The only issue here is whether the VA's representations during a site visit—that the two panel boxes within CL55 could be used to connect the excavation equipment—justify payment of additional costs to Vet4U because it turned out that those outlets were not sufficient to power the equipment. We find it does not.

The referenced site visit occurred on October 28, 2014, after contract award. Discussions during that meeting cannot be used as a basis for payment, as there were no pre-bid representations regarding available power that would give rise to a differing site condition, and no contract terms warranting a subsequent change order. Neither the VA's response during the solicitation process, nor its statements during the site visit, supersede the clear terms of the contract, which did not cover the cost to install temporary connections or meters. *Future Forest, LLC v. Department of Agriculture*, CBCA 5764, 19-1 BCA ¶ 37,238, at 181,268 (2018) (citing *Jane Mobley Associates, Inc. v. General Services Administration*, CBCA 2978, 16-1 BCA ¶ 36,285, at 176,955). We deny Vet4U's claim for the costs to install temporary electrical connections.

Relocation of Plumbing Vent, Uninsulated Supply Line, Condensate Valve ($8200)

Vet4U asserted that these items were not shown on the drawings and, therefore, constituted additional work. Because Vet4U either misinterpreted the contract or failed to read it thoroughly, it misunderstood the scope of its obligations. Contract interpretation begins with a review of the contract's plain language. *LAI Services, Inc. v. Gates*, 573 F.3d 1306, 1314 (Fed. Cir. 2009). The purpose of contract interpretation is to determine the intent of the parties at the time the agreement was made. *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 16-1 BCA ¶ 36,333, at 177,129.

We have already addressed the parties' obligations related to the relocation of utilities and decided that the contract's unambiguous terms made the relocation of utilities the responsibility of the contractor. Vet4U presents no new arguments here. Merely stating that "the plumbing vent line required movement but was not identified on the drawings" ignores critical information in the drawing notes. The contract must be read as a whole in order to give reasonable meaning to all of its parts. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). The plan notes, general notes, and section drawings all reference steam vent lines and piping that required rerouting, such as "Provide rerouted steam vent and appurtenances." "Steam vent piping shall be relocated as shown." "Contractor shall relocate existing piping, conduit, raceway, valves, insulation, and equipment, and appurtenances, and

restore service, unless otherwise noted." "Piping work shall coordinate with loading dock modifications and installation of new vertical lift." We see no reason to deviate from the contract's clear terms, which made the relocation of these items the contractor's responsibility, without expense to the VA. Accordingly, we deny the claims.

Garbage Removal in CL55 and Sub-Basement; Cleaning of Room CL55 ($7753)

Vet4U requested reimbursement for expenses related to garbage removal and general cleaning within the project site, contending that such activities were the responsibility of the VA. Given the various contract terms that required the contractor to perform these tasks, Vet4U's position is untenable. General note 29 of drawing number GI-002 stated: "Various types of debris were observed throughout the crawl space, including metal parts, masonry, stone and miscellaneous construction materials. Unless otherwise directed, contractor shall remove and dispose of debris." Note 21 stated: "All requirements described within the general notes section and contract documents, unless otherwise indicated, shall be considered incidental to the project with no associated pay item and no additional compensation to be awarded to the contractor."

In addition to the drawing notes, the specification for earthwork instructed Vet4U to clear and remove, within the limits of earthwork operations, "incidental structures, debris, trash, and any other obstructions." It also cautioned: "Do not fill or backfill [excavated areas] until all debris, unsatisfactory soil materials, obstructions, and deleterious materials have been removed from the excavation." Two other sections of that specification left no doubt that trash removal and clean-up were included in the contractor's scope of work. "Remove surplus satisfactory soil and waste material, including unsatisfactory soil, trash and debris, and legally dispose of it off Medical Center property." And, "[u]pon completion of earthwork operations, clean areas within contract limits, remove tools and equipment. Provide site clear, clean, free of debris, and suitable for subsequent construction operations. Remove debris, rubbish, and excess material from the Medical Center." Based on the contract's clear terms, we deny these claims.

Temporary Enclosure—Morgue Entrance and Stairs ($5218)

Vet4U constructed a temporary enclosure around the morgue entrance and stairwell to accommodate excavation activities in the area. Shortly after building the enclosure, Vet4U was instructed to remove it and rebuild it because Vet4U had failed to use fire retardant wood as required. Vet4U removed the enclosure but did not rebuild it because it found a different solution for performing the relevant task. Vet4U now seeks costs related to the construction and removal of the enclosure, on the basis that "[it] was discussed with the project COR who approved the original enclosure," and because Vet4U was directed "to remove it and to use

fire retardant lumber in its place." Vet4U's reasoning is misguided. Neither the cost of constructing nor dismantling the partition was the responsibility of the VA. Under the contract, note 26 on drawing number GI-002 gave the contractor the discretion to determine its own construction means, methods, and techniques to accomplish the work. The temporary enclosure was a technical decision consistent with that discretion, and the COR's approval of that plan did not shift the cost risks to the VA. Vet4U understood these obligations as evidenced by Mr. DiMauro's deposition statement in which he recalled his conversation with the COR: "We'll build the enclosure. My dime."

Once Vet4U decided to build the partition, it was required to comply with the specified fire safety requirements in the contract, namely that temporary construction partitions had to be built "with gypsum board or treated plywood (flame spreading rate of 25 or less in accordance with ASTM E84) on both sides of fire retardant treated wood or metal steel studs." Vet4U used non-compliant wood, and as a consequence, was directed to remove and replace it. For these reasons, we deny the claim.

Unreimbursed Engineering Costs ($30,156.27)

The VA's AE contract with Tolman required that Tolman produce a 100% design for this project, which Tolman did, and which the VA used to solicit proposals from interested construction contractors. Notwithstanding that fact, Vet4U's contract contained multiple provisions requiring it to provide independent engineering services. Vet4U argues that the engineering requirements were removed from the contract, but in order to keep the project on track, it paid for design work that Tolman should have accomplished. Under two separate contract modifications, the VA reimbursed Vet4U for many of its engineering costs, but not for all of them. This claim represents Vet4U's unreimbursed engineering costs.

To interpret the contract, we start by examining its plain language. *Mare Solutions, Inc. v. Department of Veterans Affairs*, CBCA 5540, et al., 18-1 BCA ¶ 37,048, at 180,349 (citing *LAI Services, Inc.,* 573 F.3d at 1314). Under the heading "Professional Surveying Services," the contract stated:

> A registered professional land surveyor or registered civil engineer whose services are retained and paid for by the Contractor shall perform services specified herein and in other specification sections. The Contractor shall certify that the land surveyor or civil engineer is not one who is a regular employee of the Contractor and that the land surveyor or civil engineer has no financial interest in this contract.

More than a dozen specifications in the contract required Vet4U to provide these services, including performing concrete design work, providing structural calculations for steel framing, preparing detailed working drawings for fire suppression requirements, creating a rigging plan for plumbing and HVAC work, computing quantities of material for excavation, inspecting work, and certifying its compliance with specifications. No questions were asked about this during the solicitation process, and Vet4U—ultimately the only bidder on the project—did not include engineering services in its bid proposal. Mr. DiMauro explained in his declaration that it would be very unusual to require the construction contractor to provide such services:

> [I]n my many years of working in the construction industry, while a general contractor may from time to time use a professional surveyor, it would be very out of the ordinary for a general contractor, unless it was for a design-build agreement (which the Project was not), to have to provide structural engineering services to the owner (or to itself for the benefit of the owner), when the owner already had its own structural engineer. Also . . . there was absolutely no line item or even any reference to any professional surveying or professional engineering services in [our] technical proposal or cost proposal for the Project because, due to our approach we would not require [a surveyor or engineer].

Even if the requirements here are unusual, which we need not decide, Vet4U is bound by the language of its contract with the VA. That language required Vet4U to provide such services. Vet4U has not presented any evidence of industry trade usage or custom that would allow us to interpret the contract language in a way that would excuse Vet4U from that obligation. *See A-Son's Construction, Inc. v. Department of Housing & Urban Development*, CBCA 3491, 15-1 BCA ¶ 36,089, at 176,209 (discussing how trade usage may be applied in interpreting contract language).

Vet4U argued that the requirement was deleted from the contract and offered as proof a copy of the specification, which was crossed out and accompanied by the following hand-written statement: "VA chose not to require this." The statement was initialed. The first two letters of the initials are "R" and "E." The third initial is unclear, but looks like the letter "Q." The CO's initials are R.E.L. The COR's initials are R.E.D. The requirement was also crossed out and initialed on drawing number SI-100, "Access Way Structural Plan." Vet4U referred to these exhibits as "[o]utline of Project Number 528A7-12-736 with COR's handwritten notes," and "[a]bbreviations chart with COR's handwritten notes."

"To demonstrate entitlement to an equitable adjustment, [a contractor] must prove that the contract was modified by someone with actual authority" to have made binding

modifications. *Nu-way Concrete Co.,* 11-1 BCA at 170,697 (quoting *Winter v. Cath-dr/Balti Joint Venture*, 497 F.3d 1339, 1344 (Fed. Cir. 2007)). Vet4U has alleged that the COR, who passed away during the project, made the handwritten modifications. Even if true, the COR's delegation of authority letter from the CO, signed by the COR and Vet4U, proscribed any changes to the contract without written authorization by the CO. The record contains no evidence of either. To the contrary, in his deposition, the CO stated that engineering services were part of the contract and that he never authorized removal of this requirement. There is no basis for us to find that any of the handwritten changes were authorized by the CO.

We recognize that the CO issued several funded contract modifications for engineering services. He explained, "It was obvious to me that we weren't going to get anywhere unless I put some seed money on [the contract] to get them over the hump." "I told [Vet4U], I'm going to put some money on this contract, best interests of the government, to prime your engine and get you started so that you can get these things stamped." When asked whether it was odd that Vet4U did not include engineering services in its bid proposal, the CO responded: "I wouldn't have called for that. There was a specific format of line items I wanted to see for specific elements of cost . . . I don't think that was one of them. I'm almost positive I wouldn't have put that in." Nevertheless, the CO's actions do not establish that the CO agreed to pay for engineering services not covered by contract modifications.

Further, even if we were to find that the VA's conduct established a precedent for paying Vet4U's engineering costs, we agree with the CO that Vet4U failed to substantiate the additional engineering costs presented in its appeal. Bare statements of incurred costs, without detailed explanations as to how these costs related to the project, are insufficient to sustain these claims, and invoices marked "paid" do not remedy that deficiency, especially because funded modifications, issued close in time to the invoices, raise concerns about potential duplicate payments. To the extent that the structure of this contract may have been atypical in that it was a construction contract with engineering requirements, Vet4U nonetheless bid on it without inquiring about the requirements or factoring them into its fixed-price proposal. "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).

The CO's decision to fund some structural engineering costs was reasonable in light of Tolman's staffing limitations and a lack of progress on certain submittals. That decision does not automatically obligate the VA to fund other engineering costs. The contract required Vet4U to hire its own engineer, at its own expense, for various contract-related tasks. Reviewing its excavation plan was one of those tasks. We will not find the VA liable

for costs for which the contractor was responsible by contract when there is no evidence of waiver. Vet4U's claim for additional engineering costs is denied.

Stop Work Order ($15,824)

Vet4U seeks compensation for costs associated with a two-day suspension of excavation work issued by the CO on or about March 12, 2014. After Vet4U cut an entryway into a shaft wall to get excavation equipment into the sub-basement, Tolman raised concerns about safety because Vet4U did not yet have an approved "Access Way Installation Sequence." Tolman communicated its concern to the COR and CO by email on Tuesday, March 11, 2014, and copied Vet4U. The CO replied thirty minutes later to Tolman, with a copy to Vet4U and the COR, concurring with Tolman's request that work not proceed until Vet4U had an approved Access Way Installation Sequence.

We find that Vet4U cannot recover on this claim. The CO stopped the excavation work because Vet4U lacked an approved submittal, which was required before proceeding with excavation. Vet4U did not deny it lacked such approval, nor did it offer any explanation for proceeding without approval. Contractors cannot recover for delays caused by the contractor's lack of an approved submittal. *Tidewater Contractors, Inc. v. Department of Transportation*, CBCA 50, 07-1 BCA ¶ 33,525, at 166,103-04. We deny the claim.

Installation of Sprinkler Heads and Hose Bibs ($3957)

The contract required the VA to provide designated storage space to the contractor. "Working space and space available for storing materials shall be as shown on the drawings AND/OR as determined by the COR." The drawings showed that "[t]he construction staging area shall be located adjacent to Building #1" and instructed the contractor to "[p]rovide desired size to VAMC and coordinate with the COR to determine final location." In the event the contractor chose to store materials *inside* the medical center, the contract stated: "[S]torage of Contractor's materials and equipment [in vacated portions of medical center buildings] will be permitted subject to fire and safety requirements." Any construction required for storing materials was to be at the contractor's expense. This included temporary buildings and utilities.

To comply with fire safety requirements, Vet4U installed sprinkler heads over its lumber and requests reimbursement of those costs. These costs are not compensable. Vet4U made a strategic business decision to store the lumber in the sub-basement. It had other options for storage that would not have required the additional sprinkler heads. Miscalculated business decisions do not shield a contractor from liability or void a contract's clear terms. Vet4U was responsible for this work at no cost to the VA.

During performance, Vet4U "found that additional hose bibs were needed to be installed . . . to handle water required for various scopes of the project including but not limited to dust control, concrete placement and cleaning of tools." Vet4U essentially argues that because water was free under the contract, any additional hose bibs needed to distribute that water should have been free also. We disagree. The contract explicitly stated:

> The Government shall make all reasonably required amounts of utilities available to the Contractor from existing outlets and supplies, as specified in the contract . . . The Contractor, at Contractor's expense and in a workmanlike manner satisfactory to the Contracting Officer, shall install and maintain all necessary temporary connections and distribution lines.

With regard to water specifically, the VA had to make water available for use on the project "at no cost to the contractor." That did not mean that the VA had to provide or pay for equipment needed to access the water. In fact, the contract specifically instructed Vet4U to do the following: "Furnish temporary water service. Obtain water by connecting to the Medical Center water distribution system. Provide [a] reduced pressure backflow preventer at each connection," and "[M]aintain connections, pipe[s], fittings and fixtures." Water was free, but any connections or equipment necessary to access and use the water was at contractor expense, including the installation of hose bibs. We deny the claim.

Delay in Rock Removal ($68,927.60)

The contract solicitation identified a soil report from 1949 that indicated rock formations. When asked about the required quantity of rock removal, the VA informed potential offerors that rock removal "would be adjudicated" as a differing site condition. Initially, the CO instructed Vet4U to remove the rock and submit costs in $25,000 increments. This process became tedious due to the amount of rock, so in mid-September 2014, the CO asked Vet4U for a cost estimate for removing *all rock in all zones*, to be paid under one modification. Vet4U submitted the requested information on October 15, 2014, and informed the CO that its excavation subcontractor would seek work on other projects if the modification and funding were not received by the end of October.

The VA's funding for excavation ran out on October 31, 2014. The new modification had not yet been approved, so excavation stopped. Multiple email messages in the record show that work on the project came to a standstill due to a lack of progress on the modification. After several months passed without advancing the modification, the CO told the COR: "I think we need to consider going back to the 'as it occurs' differing site condition formula. It is very difficult to get such a large number ($200K) approved as a modification." When the CO retired in December, he had not executed a modification for the excavation,

nor had he returned to the "as it occurs" formula. As evidenced by project meeting minutes from December 17, 2014, the only work being addressed at that time was related to concrete testing, the electric lighting plan, a government estimate for rock and asbestos removal, strut encasement, and the repair of column N-15. All but the last two items required action by the VA to proceed, and the last two items were not part of Vet4U's scope of work.

A new CO was in place in January 2015. Although she was included in prior email messages and discussions, she decided to start the process over again by issuing a single RFP for additional rock and asbestos removal. Vet4U resubmitted its proposal shortly thereafter. Since the new CO followed a slightly different process than her predecessor, the parties conducted a number of back-and-forth discussions and negotiations to finalize the modification request. In an email dated February 3, 2015, the CO stated "we have the funds locally but because Congress put a cap on it, we have to wait for higher approval." Vet4U resumed excavation activities on February 9, 2015. The modification, in the amount of $179,314, was finalized on March 14, 2015. Vet4U did not agree to the release on the modification. Instead, it lined through it and handwrote that it reserved all rights.

Vet4U now seeks delay costs for general conditions at the weekly rate of $4923.40 for fourteen weeks. General conditions costs include expenses for project managers, supervisors, and clerical assistants; temporary offices and utilities and supplies for those offices; and other miscellaneous expenses necessary for on-site management of a construction project. *Turner Construction Co. v. Smithsonian Institution*, CBCA 2862, et al., 17-1 BCA ¶ 36,739, at 179,077. To recover these costs, Vet4U has to show that work was suspended waiting on direction from the CO. *U.A. Anderson Construction Co.*, ASBCA 48087, 99-1 BCA ¶ 30,347, at 150,083. It also has to show that the suspension period was unreasonable, that the Government directly caused the delay, and that the delay injured the contractor in the form of additional expense or loss. *Tidewater Contractors, Inc.*, 07-1 BCA, at 166,102-03.

We find that the record supports recovery of Vet4U's expenses arising from a Government-caused suspension. The contract contained the Suspension of Work clause, FAR 52.242-14, and although a formal suspension notice was never issued by the CO, all work activities were in a holding pattern awaiting VA action, including funding, government cost estimates, a revised electrical plan, and the award of a concrete contract. This caused performance to reach a standstill for nine weeks rather than the fourteen weeks that Vet4U claims. We find this suspension to be unreasonable, especially since Vet4U continued to incur costs during that time in the form of general conditions expenses. Vet4U's general conditions rate of $4923, however, is not supported by the record. In its original cost proposal, Vet4U indicated a general conditions rate of $3969, which we find reasonable. Accordingly, we grant $35,721 for this claim.

CHP Gas Line Project ($3751)

On March 23, 2015, Vet4U notified the COR that work on a gas line project was interfering with Vet4U's performance. Vet4U explained that another contractor built a scaffolding at the entryway to the sub-basement where Vet4U was working. The other contractor's welder was also working in that area, without a welding curtain, fire watch, or fire extinguisher. The COR for the other project was not on site because he was home sick but instructed the welding contractor to proceed despite the lack of on-site supervision.

Vet4U attempted to coordinate its own work with the other contractor, as well as with the COR for the other project, but the situation did not improve. The other contractor's work impeded access to the sub-basement entrance. As a result, Vet4U was forced to wait, with laborers and equipment sitting idle. In its claim, Vet4U described the impact as follows: "Four laborers at $50.01 an hour . . . [and] I had four operators standing around doing nothing . . . we couldn't take our stuff out [be]cause they were right in our aisle way . . . with their scaffold and their sparks flying all over the place." Vet4U calculated its damages by taking the hourly pay rates of four laborers and four operators, multiplying that times thirty-two (the number of hours worked by each over four days), and then reducing the productivity of these workers by twenty-five percent.

In her final decision, the CO did not contest the underlying facts of Vet4U's claim. Nevertheless, she found that the terms of the contract required Vet4U to cooperate with other contractors and adapt its scheduling and performance to accommodate them. She referenced FAR clause 52.236-8, entitled "Other Contracts," which prohibited interference with another contractor's performance. In addition to denying the claim, the CO stated that there was insufficient information to support it.

Based upon the information in the record, we find that Vet4U complied with its duty to accommodate the other contract and gave the VA timely notice of the interference. We also find that in fully cooperating and accommodating the other contractor, Vet4U was unable to fully prosecute its own work for several days. The other contractor was also under the control of the VA, yet the VA failed to secure its cooperation, which impeded Vet4U's performance. The Board has previously found that when a contractor's performance depends upon the agency's cooperation, the agency is necessarily required to provide the same or be found liable for the increased costs of performance. *CAE USA, Inc. v. Department of Homeland Security*, CBCA 4776, 16-1 BCA ¶ 36,377, at 177,350.

Having established entitlement to costs, we turn to Vet4U's evidence of its damages. The record contains a photocopy of a handwritten calculation for "CHP Interference Effect," which multiplied the number of laborers Vet4U had onsite by their respective labor rates for

four days at a twenty-five percent reduced rate of efficiency, arriving at a total cost of $3751. Although actual cost information is preferred, a contractor's burden of proof for its damages need not be perfect. All that is required is a reasonable showing of the extra costs. *BCPeabody Construction Services, Inc. v. Department of Veterans Affairs*, CBCA 5410, 18-1 BCA ¶ 37,013, at 180,258 (citing *Dawco Construction, Inc. v. United States*, 18 Cl. Ct. 682, 698 (1989), *aff'd in relevant part*, 930 F.2d 872 (Fed. Cir. 1991)). We find that the record sufficiently supports Vet4U's estimate. *See United Facilities Services Corporation dba Eastco Building Services v. General Services Administration*, CBCA 5272, 18-1 BCA ¶ 37,086, at 180,553 ("The Board has considerable discretion in determining the extent to which the a contractor has supported, or is justifiably unable to support, its cost claim with direct cost data"). Accordingly, we grant $3751 for this claim.

Lost Work—Strut Repairs and Electrical Differing Site Conditions ($65,871)

The contract directed Vet4U to "[i]nstall typical strut encasements, where applicable." After performing excavation work in the sub-basement, Vet4U observed that some of the struts were in poor condition and needed to be repaired before encasing them. Believing that the repair work was part of its contract, Vet4U submitted a request for information (RFI) on May 5, 2014, to the COR and Tolman, stating:

> Drawing S-501 [sic] detail 2 indicates a strut repair. Upon our structural engineer's visual inspection of struts . . . it was found no repairs were required on the bottom of these struts but each does require a repair on the top. Based on this inspection, I have requested that our engineer provide a repair detail that is being submitted to you under Submittal #0047 included with this RFI for your review and approval.

In its response to the RFI, dated June 19, 2014, Tolman stated, "The Typical Strut Encasement Detail 2 (drawing S-101) is *not* a repair detail. The strut encasement is required for structural purposes and should be installed per the design drawings (in addition to any strut repair requirements discovered during construction)." After reviewing the engineered proposal for the strut repair, Tolman stated:

> With respect to the condition of the top/bottom of the struts, we have reviewed your proposed Typical Beam Repair Detail . . . and find it acceptable with the following notes: The strut top is acceptable per the submittal and should be undertaken per [your engineer's] Detail/Specification. The strut bottom repair detail concept is also acceptable, however, the repair detail should be incorporated into the typical strut encasement detail 2 (S-101). . . . Provide a design sketch for each strut repair location, including dimensions of concrete

> removed, actual bars installed, etc. This can be provided at the completion of the repairs for the project as-built records.

The CO ultimately determined that the strut repair work was out of scope and could be performed at a later date. In its claim to the CO, Vet4U asked "why it was directed to have its engineer provide a repair detail if it was not part of our scope of work." We do not agree that Vet4U was directed by the VA to provide a repair detail. On the contrary, the record shows that Vet4U initiated this process based on its mistaken belief that the strut repairs were in scope. Under the contract's changes clause, the CO was authorized to make changes to the work as long as the changes were within the general scope of the contract. FAR 52.243-4. Here, the CO decided the strut repairs were out of scope. She explained:

> The repair of any struts would not be a within scope change as this would change the intent of the original contract and could cause an unfair advantage. This type of change could not be anticipated at the time of the original contract nor does it affect the existing contract. . . . Furthermore, when and if the work is required it will be posted on the electronic website required by the FAR and Vet4U would have an opportunity to submit [a] proposal or bid.

Although Vet4U complained that it necessarily incurred costs in preparing drawings and an action plan to deal with the degraded struts, the only monetary request that it makes is for "lost work" that the CO decided not to award to Vet4U. For the strut repairs, Vet4U presented its claim for damages as follows: "Potential lost business to Vet4U – $300,000 estimated if work is approved as it originally was by the VA. Effect on Vet4U is $60,000." To prove a claim for lost profits, which is what Vet4U is essentially seeking here, Vet4U must establish the following three elements:

> 1) the loss was the proximate result of the breach; 2) the loss of profits caused by the breach was within the contemplation of the parties because [it] was foreseeable or because the defaulting party had knowledge of special circumstances at the time of contracting; and 3) a sufficient basis exists for estimating the amount of lost profits with reasonable certainty.

Energy Capital Corp. v. United States, 302 F.3d 1314, 1325 (Fed. Cir. 2002).

With regard to the strut repairs, Vet4U has not shown that the CO breached any contract by not awarding the strut repair work to Vet4U. Contrary to Vet4U's suggestion, nothing in the contract required such work or required the CO to have Vet4U perform it. Furthermore, Tolman's approval of Vet4U's engineering proposal and its statement that the

repair work "should be undertaken" do not constitute CO approval of the work and could not reasonably be interpreted as direction from the CO to perform the strut repairs.

To the extent that Vet4U seeks to recover costs for its work on the strut repair plan, the general rule is that contractors may not recover the costs of preparing change proposals that are not later adopted. *Blake Construction Co.*, VABCA 1725, 83-1 BCA ¶ 16,431, at 81,739. The rationale for denying compensation is that activities related to preparing change proposals are not considered extra work under the contract. Rather, they are motivated by profit, and as such, are voluntarily undertaken. *Id.* (citing *Century Industries Corp.*, ASBCA 3774, et al., 58-2 BCA ¶ 1933). Boards have also denied their recovery under the cost principles since bid and proposal costs are considered indirect overhead costs. *Campos Construction Co.*, VABCA 3019, 90-3 BCA ¶ 23,108, at 116,012; *Acme Missiles & Construction Corp.*, ASBCA 11786, 69-2 BCA ¶ 8057, at 37,455.

One exception to this rule is when a contractor expends substantial resources in preparing a complex change proposal at the CO's direction. This is particularly true with engineering change proposals (ECPs). In this case, though, the CO did not request the change proposal from Vet4U, so Vet4U is not entitled to recoup its costs, despite the complexity. *Bechtel National, Inc.*, ASBCA 51589, 02-1 BCA ¶ 31,673, at 156,529, *aff'd*, 65 F. App'x. 277 (Fed. Cir. 2002). Another exception is where the CO did not order the proposal but paid the contractor's preparation costs because the VA retained and later used the information in the ECP. *Campos Construction Co.*, 90-3 BCA, at 116,014. Here, we have no evidence that the VA utilized Vet4U's strut repair plan in a subsequent solicitation. Also, Vet4U has provided no quantification of, or support for, costs incurred for that work, precluding any recovery for it. *See Bob L. Walker v. Department of Agriculture*, CBCA 2131, 18-1 BCA ¶ 36,921, at 179,878 (2017). Accordingly, we deny the strut repair claim.

With regard to the claim for lost electrical work, the contract required Vet4U to perform electrical work in accordance with the specifications and drawings. In August 2014, the VA determined that the electrical design plan, which included installing new lights, new grounding, and upgraded switching, would not meet the VA's needs. The CO requested a change proposal and cost estimate for the additional work, and Vet4U produced a revised plan to satisfy the VA's changed electrical requirements. Shortly thereafter, the COR emailed Vet4U, the CO and others, stating that the change proposal for the electrical work could not be adopted and executed in a change order because doing so would cause the VA to exceed its limit on project modifications and funding. "I will . . . identify what work has already been completed within the existing contract and submit the remaining items . . . in a construction IDIQ contract request." The COR also stated that he would produce a cost estimate and statement of work in order to de-scope what remains in the existing contract.

Vet4U's monetary claim was for lost electrical work. It valued that work at $29,357 with an "effect on Vet4U of $5871.40." As we discussed, to sustain a claim for lost profits, we must find that the VA breached the contract, which we do not. On the contrary, the CO was acting well within his authority when he de-scoped the unsuitable electrical work and compensated Vet4U for the portion of the electrical work that it had performed. Because there was no breach, we find that Vet4U is not entitled to lost profits. Although Vet4U demanded compensation for the extensive redesign work performed by its electrical subcontractor in response to the CO's request for a change proposal, Vet4U did not make a monetary claim to recover those costs, nor did it sponsor a claim from its subcontractor. Without a properly supported monetary claim, we have nothing additional to consider. We deny the claim for lost electrical work.

Legal Fees ($6300)

Vet4U's claim for reimbursement of legal fees was listed along with the other claimed amounts. We consider this claim to be a request for legal fees under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504. Since that statute requires the applicant to be a prevailing party to a judgment on the merits by the Board, Vet4U's claim for legal fees is premature. 48 CFR 6101.30(b) (2018); *Triad Mechanical, Inc. v. Department of the Interior,* CBCA 3946, 15-1 BCA ¶ 35,858, at 175,324; *Writing Co. v. Department of Treasury*, GSBCA 15097, 00-1 BCA 30,840, at 152,223. We dismiss this claim as premature.

Decision

As set forth above, the appeal is **GRANTED IN PART** and **DISMISSED IN PART**. The VA shall pay to Vet4U $46,052. Interest pursuant to the CDA, 41 U.S.C. § 7109, shall accrue from the date the contracting officer received the claim until the date of payment.

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge

We concur:

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge