



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

---

MODIFIED ON RECONSIDERATION: April 13, 2020

CBCA 2953-R, 2954-R, 2955-R, 3596-R, 4175-R, 4377-R, 5006-R

SUFFOLK CONSTRUCTION COMPANY, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

James R. Newland, Jr., of Seyfarth Shaw LLP, Washington, DC, counsel for Appellant.

James F. H. Scott and Justin S. Hawkins, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS** (Chair), **DRUMMOND**, and **ZISCHKAU**.

**ZISCHKAU**, Board Judge.

Appellant, Suffolk Construction Company, Inc. (Suffolk), and respondent, General Services Administration (GSA), have moved to amend our decision in *Suffolk Construction Co. v. General Services Administration*, CBCA 2953, et al., 20-1 BCA ¶ 37,488 (2019). We treat their motions as motions for reconsideration. The parties do not contest any of the entitlement determinations of our decision, but seek adjustments to the quantum award. We grant reconsideration and amend in part our quantum award.

### Background

Familiarity with the underlying decision is presumed. This appeal arose from a contract GSA awarded to Suffolk for the renovation of the McCormack Building, an historic building located in Boston, Massachusetts. Suffolk filed appeals seeking \$22,766,290, plus interest, while GSA sought \$3,196,437 in claims of its own. We found Suffolk entitled to a net recovery of \$12,583,546, plus interest. Suffolk seeks reconsideration (1) of the Board's award of \$1,135,000 for Suffolk's general conditions claim, and (2) on the failure of the Board to award commission and insurance/bonding on portions of two subcontractor claims. GSA seeks reconsideration of the Board's jurisdiction to award Suffolk's contract balance, and of the award of \$314,302 on proposed change order (PCO) 1048 under Suffolk's PCO claims.

### Discussion

Board Rules 26 and 27 authorize the Board to grant reconsideration or relief for any reason recognized in Rules 59 and 60 of the Federal Rules of Civil Procedure. *See* 48 CFR 6101.26(a), 27(a) (2019). These reasons include: justifiable or excusable mistake, inadvertence, surprise, or excusable neglect; the decision is void, whether for lack of jurisdiction or otherwise; and any other ground justifying relief from the operation of the decision or order. *See Watermark Environmental, Inc. v. Department of Agriculture*, CBCA 2866-R, 15-1 BCA ¶ 36,113. Additionally, Board Rule 29 authorizes the Board to "correct clerical mistakes while a case is pending, or within 60 days thereafter if a decision has not been appealed."

#### Suffolk's General Conditions Claim

We found Suffolk entitled to \$1,135,000 in general conditions costs related to the period of government delay from May 29, 2009, through March 31, 2010. We calculated the amount by dividing the period of delay into four phases and multiplying the duration of each phase by a daily rate that represented Suffolk's costs during that period. Prior to arriving at a final number for each period, we accounted for the costs that GSA had already credited to Suffolk for the government delay, which we noted Suffolk had excluded from its claim. In this motion, Suffolk requests that we increase the general conditions award from \$1,135,000 to \$2,265,986. *See* Appellant's Motion at 1. Suffolk suggests that "the Board may have overlooked the fact that Suffolk had already reduced its claim" by the amount that GSA had credited to Suffolk. *Id.* at 2. The Board did not come to its lower award by double-counting the amount that GSA had already credited to Suffolk for the delay period. Rather, the Board found Suffolk entitled to general conditions costs at a lower daily rate particularly for the later delay periods. We determined that the awarded amount of \$1,135,000 reasonably

reflected Suffolk's additional general conditions costs on its contract work. Accordingly, we deny Suffolk's motion to amend the general conditions award.

#### Commission and Bonding Costs for Suffolk's Subcontractors

In our decision, we found Suffolk entitled to \$4,520,133 for costs associated with the claims of its subcontractors NB Kenney and City Lights. In calculating quantum for these subcontractors, the Board mistakenly omitted awarding Suffolk's 10 % commission and 1.362 % insurance and bond mark-up. By subtracting the \$772,323 value of PCO 212R and 212Q from the combined subcontractor award of \$4,520,133, we now determine that Suffolk is entitled to \$374,781 for its commission on the net award of the subcontractor claims and \$56,150 for its insurance and bonding costs. Suffolk properly excluded the value of PCO 212R and PCO 212Q from this calculation since commission and insurance and bonding costs were already incorporated into the Board's award for those change orders. We grant Suffolk's motion to increase its subcontractor cost award by \$430,931.

#### GSA's Motion Regarding Board Jurisdiction

We found Suffolk entitled to \$1,264,102 for the balance of the contract and monies retained by GSA. In its motion, GSA alleges that none of Suffolk's certified claims "contain a request that GSA pay the contract balance." Since the Board's jurisdiction over contractor claims for more than \$100,000 is limited to claims that were certified and submitted to a contracting officer, *see* 41 U.S.C. § 7103 (2018), GSA concludes that the Board lacked jurisdiction over Suffolk's claim for the balance of this contract and the contractor's retained contract earnings.

GSA misconstrues the contract balance issue as a contractor claim, when in fact it is a government claim. An agency's decision to retain money under a contract is a government claim. *See Placeway Construction Corp. v. United States*, 920 F.2d 903, 906 (Fed. Cir. 1990) (finding retention of a contract balance to offset costs alleged to relate to late performance constituted a government claim). A contractor "may appeal a government claim to the appropriate [board of contract appeals] without having to submit a monetary claim of its own to the [contracting officer]." *Malone v. United States*, 849 F.2d 1441, 1443 (Fed. Cir.), *modified*, 857 F.2d 787 (Fed. Cir. 1988).

In this case, GSA informed Suffolk that it would withhold \$988,482 in addition to the remaining contract balance in order to offset the Government's \$4,196,437 claim against the contractor. *See* General Conditions Contracting Officer Final Decision at GSA00000018. Suffolk appealed GSA's decision to the Board on September 5, 2012. Thus, we properly exercised jurisdiction over GSA's contract balance claim.

GSA also argues that the Board lacked jurisdiction over PCO 1048 because Suffolk failed to file a certified claim for that change order. *See* Respondent's Motion at 3. PCO 1048 concerned a government claim for the recovery of \$314,302 that GSA paid to Suffolk in contract modification PC-63 before GSA determined that Suffolk ought to have borne the costs of the modification itself. GSA folded the \$314,302 of PCO 1048 into its larger \$3,196,437 counterclaim against Suffolk, and explicitly asserted its right to the \$314,302 in the same contracting officer final decision that denied Suffolk's right to the contract balance. *See* General Conditions Contracting Officer Final Decision at Attachment 3, COFD00000026. When Suffolk appealed GSA's decision on September 5, 2012, the Board acquired jurisdiction over GSA's claim regarding PCO 1048 in the same manner as it acquired jurisdiction over GSA's claim to the retained contract balance.

#### Double-Counting of PCO 1048

In our decision, we found Suffolk entitled to the \$314,302 for PCO 1048. However, we mistakenly included that sum in the PCO claims when this amount was already included in Suffolk's \$1,264,102 contract balance amount. Suffolk agrees that the \$314,302 amount should be deducted from the PCO claims total. We grant GSA's request to decrease the total by \$314,302.

#### CDA Interest

Suffolk is entitled to recover CDA interest for the additional \$430,931 it is owed on its subcontractor claims. Similarly, the amount of CDA interest on Suffolk's PCO claims must be reduced to account for the removal of the \$314,302 amount.

#### Decision

The parties' motions for reconsideration are granted in part and the award is **MODIFIED** as stated above.

Jonathan D. Zischkau  
JONATHAN D. ZISCHKAU  
Board Judge

We concur:

Jeri Kaylene Somers  
JERI KAYLENE SOMERS  
Board Judge

Jerome M. Drummond  
JEROME M. DRUMMOND  
Board Judge