UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: December 22, 2022

CBCA 6760

WU & ASSOCIATES, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Sean T. O'Meara of Archer & Greiner, P.C., Voorhees, NJ, counsel for Appellant.

Jay Bernstein, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **RUSSELL**, **SULLIVAN**, and **CHADWICK**.

RUSSELL, Board Judge.

In a previous decision, the Board granted Wu & Associates, Inc.'s (Wu) motion for partial summary judgment on entitlement upon finding that the specification at issue was defective because using skids to strengthen flooring at a federal building to support the weight of heavy elevator equipment was infeasible and that Wu relied on this defective specification. *Wu & Associates, Inc. v. General Services Administration*, CBCA 6760, 21-1 BCA ¶ 37,965. Following the Board's decision, Wu and the General Services Administration (GSA) agreed to brief the issue of quantum on the written record under Board Rule 19, 48 CFR 6101.19 (2021), and the Board issued scheduling orders consistent with the

parties' agreement.[1] After reviewing the record, we find that Wu has established entitlement to some of its costs.

Background

In December 2018, during a site visit shortly after contract award, Wu determined that the existing raised floor on the seventeenth floor of the Ted Weiss Federal Building in New York City could not support the weight of heavy elevator equipment. Wu submitted a change order request proposing to correct, protect, and strengthen the floor. The proposal involved Hi Tech Data Floors, Inc. (Hi Tech), the original floor installer, removing the existing flooring, which the change order request alleged was damaged, installing support pedals, and adding an underlayment and new flooring. In March 2019, Wu notified GSA that it would submit further information in support of the change order request. In April 2019, Wu provided GSA a report prepared by William J. Madden (Mr. Madden), a professional engineer, in which he concluded that the existing floor could not support the load of the elevator equipment by only distributing the load.

GSA, GSA's project manager, Wu, and KONE Elevators (KONE), the elevator installer, continued to discuss the engineering needed to address the limited load capacity of the floor. Wu submitted a formal proposal in early May 2019 with options to safely move the elevator equipment, including the use of an elevator shaft to hoist the equipment up to the machine room which Wu determined would be the most effective option. Relying upon Mr. Madden's opinion, Wu noted that using skids over the floor to distribute the equipment load, as required by GSA in the contract, would not work. GSA informed Wu that the agency had no objection to Wu's proposal, but it asked for additional technical details.

In response, Wu provided a detailed analysis prepared by Innova Technologies, Inc. (Innova). Innova proposed the use of an "Air Sled" system to move the elevator equipment over the raised floor with a customized skid. Innova rejected the proposal to add more stanchions because that solution might not be feasible since the space under the floor was already being used for wiring. Innova also noted the possibility that the stanchions might fail without a full understanding of the internal forces of the proprietary floor panel system, and the process involving the installation of stanchions was labor-intensive. At a meeting in June 2019, GSA raised questions about the "Air Sled" system proposal and instructed Wu to, again, look into the possibility to reinforce the raised flooring panels with more stanchions.

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[1] *See American Agri-Business Insurance Co.*, CBCA 4708-FCIC, 16-1 BCA ¶ 36,303, at 177,028 n.1 (treating the parties' motions for summary relief as submissions of the case on the record consistent with the prior expressed intent of the parties and the Board's order.).

GSA also asked Wu to provide a more scientific and engineering analysis on the raised flooring and a scientific and detailed analysis on the "Air Sled" system solution.

In September 2019, KONE, with PSP Enterprises, Inc. (PSP), an engineering company, revisited the solution of reinforcing the raised floor. PSP performed the calculations necessary to address the steps that were required to move the elevators across the floor and proposed adding additional stanchions to reinforce the floor. KONE obtained a quote from Hi Tech to install the stanchions. GSA selected this solution to reinforce the flooring.

On December 3, 2019, pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018), Wu submitted its certified claim to GSA for the following costs: $28,334.29 for the installation of the additional floor stanchions; $576 for per diem; $3200 for the engineering analysis completed by Mr. Madden; $6050 for engineering analyses prepared by Innova; $3816.03 for overhead (ten percent of costs); $2098.82 for profit (five percent of costs); $2880 for work performed by Wu's weekend site supervisor (sixteen hours at $180 per hour); $2880 for time spent by Wu's president for meetings and review (twelve hours at $240 per hour); $4230 incurred by Wu's senior project manager for meetings, investigation and review (twenty-four hours at $180 per hour); and $1083.10 for bond and insurance. Wu did not seek return of its retainer ($10,000) in its claim.

In March 2022, the parties filed their briefing on costs and, subsequently, replies in support of their briefing. In its briefing (but not as part of the Rule 4 file or its discovery responses to GSA), Wu produced a time sheet showing that the site supervisor, an hourly employee, worked 23.5 hours during weekends. Wu also estimated that its president and senior project manager, respectively, spent twelve hours and twenty-four hours on the project. Wu states that it does not keep time records for these individuals so, by necessity, the time had to be estimated. Wu also produced no salary records for the two individuals in either its discovery responses or its Rule 19 supplement.

Pursuant to the Board's Order on Further Proceedings dated September 15, 2020, discovery in the appeal closed on November 2, 2020, and pursuant to the Board's order of December 1, 2020, all supplementation to the Rule 4 file was to be submitted by December 18, 2020.

Discussion

I. The Board Lacks Jurisdiction over Wu's Claim for Release of the Retainer Fee

The CDA provides the Board with jurisdiction to resolve claims disputes between contractors and executive agencies. 41 U.S.C. §§ 7101-7109. Before the Board can exercise its jurisdiction under the CDA, "there must be both a valid claim . . . and a contracting officer's final decision on that claim." *Stobil Enterprise v. Department of Veterans Affairs*, CBCA 5246, 16-1 BCA ¶ 36,478, at 177,741 (quoting *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1541-42 (Fed. Cir. 1996)). "While a contractor may increase the amount of its claim [in an appeal to the Board], it may not 'raise any new claims not presented and certified to the contracting officer.'" *Anglin Consulting Group, Inc. v. Department of Homeland Security*, CBCA 6926, 21-1 BCA ¶ 37,918, at 184,157 (quoting *Santa Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987)).

For the first time in its briefing on quantum, Wu requested the release of its $10,000 retainer fee. The Board lacks jurisdiction over this claim because Wu failed to present the issue of the retainer fee, which involves a different set of operative facts from those related to the dispute over the flooring costs, to GSA's contracting officer. *See Integhearty Wheelchair Van Services, LLC v. Department of Veterans Affairs*, CBCA 7318, 22-1 BCA ¶ 38,156, at 185,314 ("If the operative facts of an issue are not encompassed within the certified CDA claim underlying an appeal, we lack jurisdiction to consider the issue."). Accordingly, Wu's claim asking the Board to compel GSA to release the retainer fee is dismissed for lack of jurisdiction.

II. Wu May Recover Some of Its Costs to Address the Defective Specification

A. Engineering Reports from Mr. Madden and Innova

GSA only disputes reimbursing Wu for the costs that the company incurred for Mr. Madden's services ($3200), Innova's services ($6050), and the additional time spent on the flooring issue by Wu's president ($2880), senior project manager ($4230), and weekend site supervisor ($2880).

"A constructive change occurs when a contractor performs work beyond the contract requirements, without a formal 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), *aff'd*, 449 Fed. App'x 945 (Fed. Cir. 2011). "[I]f the government was at fault in causing work to be done outside the scope of the contract," as was previously found by the Board in this case, the

appellant "is entitled to an equitable adjustment of price" for the constructive change. *LB&B Associates Inc. v. United States*, 91 Fed. Cl. 142, 153 (2010).

Under the Changes clause for defective specifications, Wu is entitled to an equitable adjustment for the "increased costs [that were] reasonably incurred by [it] . . . in attempting to comply with" GSA's defective specifications. 48 CFR 52.243-4(d). A cost is considered reasonable "if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business." *Id.* 31.201-3(a). The contractor bears the burden of proof to establish that the cost is reasonable. *Id.*

Wu argues that it incurred the expenses for Mr. Madden's and Innova's services only after communications from GSA asking Wu for additional information to address the limited load capacity of the raised floor. Wu adds that the Madden report was necessary to convince GSA that the raised floor could not support heavy elevator equipment by distribution only and that Wu incurred the costs of the Madden and Innova reports in a good faith attempt to address a problem that, in its view, GSA caused by failing to perform the necessary engineering during the design phase of the project. Wu asserts that, because the procurement was not a design-build contract, Wu, as a general contractor, should not have been responsible for hiring a structural engineering company to perform any structural analysis. Instead, Wu argues that GSA's designer of record should have performed the structural analysis.

GSA asserts that because Wu's initial change order submitted in March 2019 included a similar proposal for strengthening the floor to the one ultimately adopted in September 2019, Wu's costs for the Madden and Innova reports, completed between March 2019 and September 2019, were unnecessarily incurred and not reasonable. GSA also argues that the costs for these reports were unreasonable because the engineers reached the wrong conclusion about the feasability of adding stanchions to strengthen the existing floor. Yet GSA has produced no evidence showing that Wu continued to pursue options to address the flooring issue knowing the engineering analyses might have been incorrect or that, for some reason, it was imprudent for Wu to reach out to Mr. Madden and Innova for engineering services.

Also, the record reflects an iterative approach in which GSA was actively engaged in addressing the issues with the flooring. GSA repeatedly sought information from Wu at the time the company was attempting to resolve the flooring issue – approximately from March 2019, when Wu submitted its initial change order, to September 2019, when the flooring was reinforced. For example, in June 2019, GSA, in addition to asking Wu to re-evaluate the feasibility of using stanchions, also asked Wu to provide scientific and detailed analysis of Innova's "Air Sled" proposal. At this point, Wu and GSA were still discussing various options to the flooring issue.

Under the circumstances, the Board finds that it was reasonable for Wu to incur the costs of the various engineering analyses, including the analysis done by KONE and PSP, which supported the use of stanchions to address the flooring issue (and for which GSA is willing to pay), as well as the analyses done by Mr. Madden and Innova during the period when Wu and GSA were still examining options to address the issue. Accordingly, the Board grants Wu's appeal for reimbursement of the costs for the Madden analysis ($3200) and the Innova analysis ($6050). Both amounts are supported by documentation in the record.

B. Supervisory and Executive Costs

1. Site Supervisor Costs

GSA contends that the costs Wu incurred for the time of its president, senior project manager, and weekend site supervisor are not legally recoverable and not supported and, instead, should be considered as part of Wu's ten percent overhead allowance. GSA states that, notwithstanding its pre-briefing discovery requests to Wu for all documents and information that supports its claim, Wu did not produce any information supporting the claimed time for its president and supervisory staff.

The Board cannot ignore that Wu first produced the time sheet (purportedly showing hours worked) for its site supervisor with its opening brief on quantum, which was filed about sixteen months after discovery closed and fifteen months after any supplementation of the Rule 4 file was due. Under Board Rule 1(c), the Board may "apply principles of the Federal Rules of Civil Procedure to resolve issues not covered by [Board] rules."

When a party fails to obey an order regarding discovery, Rule 37 of the Federal Rules of Civil Procedure provides tribunals with discretion to redress the party's failure, including "prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence." Fed. R. Civ. P. 37(b)(2)(A)(ii). This Rule also states, "If a party fails to provide information . . . as required by Rule 26(a) or (e) [regarding initial disclosures and supplementing disclosures and discovery responses], the party is not allowed to use that information . . . to supply evidence on a motion, at a hearing, or a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c). Wu has provided no argument that its failure to produce the time sheet for its site supervisor in a timely manner – i.e., during discovery in response to GSA's discovery requests or as a document in the Rule 4 file – is substantially justified or harmless. The Board will not consider the late-produced time sheet as evidence in this appeal, and, without this evidence, Wu has provided no evidence to support its claim.

2. President and Project Manager's Costs

Costs for salaried employees are typically included in overhead. *RLS Construction Group LLC v. Department of Veterans Affairs*, CBCA 6349, et al., 20-1 BCA ¶ 37,566, at 182,404 (citing *Interstate General Government Contractors, Inc. v. West*, 12 F.3d 1053, 1058 (Fed. Cir. 1993); *see also J.C. Equipment Co.*, ASBCA 51321, 02-1 BCA ¶ 31,810. Wu explains that the ten percent overhead allowance might be sufficient if it were just responsible for the build part of the elevator modernization project, but the amount does not cover Wu's additional costs here involving a design solution. Wu has failed to provide support for the costs that it seeks.

It is true that, in certain circumstances "[w]here a contractor does not accumulate cost data and cannot identify its actual costs attributable to changes, estimates may be used to quantify the increased costs a contractor incurred." *Reliable Contracting Group, LLC v. Department of Veterans Affairs*, CBCA 1539, 11-2 BCA ¶ 34,882, at 171,563 (quoting *Environmental Safety Consultants, Inc.*, ASBCA 53485, 05-1 BCA ¶ 32,903, at 163,019, *modified on reconsideration*, 05-2 BCA ¶ 33,073). Yet the United States Court of Appeals for the Federal Circuit has recognized that an award of damages based on cost estimates – or, as the Court described it, the "guesstimate" of how much the contractor actually spent in response to a change – is permissible only "where the [contractor] can demonstrate a justifiable inability to substantiate the amount of his resultant injury by direct and specific proof." *Dawco Construction, Inc. v. United States*, 930 F.2d 872, 881 (Fed. Cir. 1991), *overruled on other grounds by Reflectone, Inc. v. Dalton*, 60 Fed. 3d 1572 (Fed. Cir. 1995) (quoting *Joseph Pickard's Sons Co. v. United States*, 532 F.2d 739, 742 (Ct. Cl. 1976)).

Additionally, "once a contractor is aware that it has a potential claim against the Government or that it is having to perform extra or changed work, it has an obligation to create and maintain contemporaneous records tracking and showing its increased costs and/or segregating increased costs from costs for unchanged work." *United Facility Services Corp. v. General Services Administration*, CBCA 5272, 18-1 BCA ¶ 37,086, at 180,553. "Inability to justify the absence of contemporaneous records can preclude or diminish a contractor's recovery." *Id*. (citing *Dawco Construction, Inc.*, 930 F.2d at 881-82). Wu, as part of its normal business practice, states that it does not keep time records for its president and senior project manager. Yet Wu knew that it had a potential claim when it submitted its first change order request and should have started tracking the time spent by its salaried employees to resolve the raised floor issue.

Wu also failed to produce any other business records or documentation that could have supported its claim and provided no reason justifying any inability to do so. For example, Wu could have produced declarations or affidavits attesting to the estimated hours worked by these two individuals. Wu could have also produced contemporaneous business

records showing the salaries of its president and senior project manager, possibly extrapolating their hourly pay from these salaries. The Board declines to award damages absent proof of incurred costs.

III. Wu's Claim for Attorney Fees and Costs Is Premature

Wu claims $49,763.49 under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, in legal fees and costs incurred to prosecute this claim. It is well established that an application for recovery of attorney fees under EAJA that is submitted to the Board before final adjudication of an appeal will be considered premature. *See* Rule 30(b) ("A party may file an application for fees and other expenses only after the time to seek appellate review of a Board decision has expired. A party may file an application within 30 calendar days after that date."). There has been no final adjudication in this appeal, and, accordingly, Wu's request for legal expenses under EAJA is premature.

Decision

The appeal is **GRANTED IN PART**. In addition to the costs that GSA concedes are owed to Wu ($28,334.29 for the installation of the additional stanchions, $576 for per diem and the markups (i.e., ten percent for overhead, five percent for profit, and two percent for bond/insurance)), the Board finds that Wu is also entitled to the engineering costs for fees paid to Mr. Madden ($3200) and Innova Technologies ($6050) and interest on these amounts calculated from December 11, 2019, the date on which Wu's certified claim was received by GSA, *see* 41 U.S.C. § 7101(a)(1).

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge

We concur:

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge

Kyle Chadwick
KYLE CHADWICK
Board Judge