



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: March 11, 2021

CBCA 5194, 5938

SRM GROUP, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

G. Scott Walters of Smith, Currie & Hancock LLP, Atlanta, GA, counsel for Appellant.

James C. Caine and Stephanie Kearney-Quilling, Office of Chief Counsel, Federal Law Enforcement Training Centers, Department of Homeland Security, Glynco, GA, counsel for Respondent.

Before Board Judges **SOMERS** (Chair), **HYATT**, and **LESTER**.

SOMERS, Board Judge.

SRM Group, Inc (SRM) seeks an equitable adjustment for costs incurred due to modification of a contract awarded by the Department of Homeland Security (DHS or the Government). SRM provided housing management and other services for eight buildings at a law enforcement training center. DHS removed two buildings from the scope of the contract, resulting in a downward adjustment of the contract price. A few months later, due to an unanticipated increased need for these services, the contracting officer sought to add those buildings back into the scope of the contract. When the parties could not agree, the contracting officer, using a bilateral modification, added the buildings back into the contract. SRM submitted a claim for an equitable adjustment in the amount of \$2,644,968. Following

further negotiations, SRM submitted a subsequent claim. We find that the contractor has been paid all it is entitled to receive and therefore deny the claims.

Background

On June 28, 2012, DHS awarded a firm-fixed price, multi-year contract to SRM, an 8(a) certified small disadvantaged business. Under this contract, DHS agreed to pay SRM \$1,710,486.50 for the base year, with increasing amounts per option year, resulting in a total contract award of \$36,649,908.50. The contract required SRM to provide housing management services at the DHS Federal Law Enforcement Training Center (FLETC) in Glynco, Georgia. These services, identified in the contract by contract line item numbers (CLINs), included custodial services, basic maintenance, and desk clerk services, managed by SRM personnel. SRM would provide these services in dormitories located in eight buildings on the FLETC campus, in addition to public areas in other buildings. The contract identified Buildings 185, 186, and 187 as leased dorms, with a total of 900 suite-type rooms (300 per building). Buildings 71, 95, 96, 210, 275, and 277, located on the main campus, included a total of 1199 dormitory-type rooms. SRM would also replace equipment, such as microwaves or coffee pots, or seek material reimbursement for service work requests, on a fixed-price basis, not to exceed a specified amount.

The contract incorporated Federal Acquisition Regulation (FAR) contract clauses FAR 52.243-1, "Changes-Fixed-Price" Alt. II, and FAR 52.212-4, "Contract Terms and Conditions – Commercial Items." Pursuant to the contract clauses, "changes in the terms and conditions of this contract may be made only by written agreement of the parties."

On July 15, 2013, the parties modified the contract through modification P00009 (mod. 9). The modification "removed main campus dorms 275 & 277 from this contract beginning FY14 and continuing through FY17 due to a significant decrease in occupancy rates." Mod. 9 removed dorms 275 and 277 from the scope of the contract, decreasing the contract by \$1,173,062.25, for a new total amount for the contract of \$36,627,997.87. Mod. 9 also increased the per-room unit price for room cleaning in the remaining dorms from \$5 to \$6.

In early December 2013, the contracting officer informed SRM that DHS wished to modify the contract by adding dorms 275 and 277 back into the contract. SRM submitted its price and the parties negotiated. Although SRM believes that the parties reached a tentative verbal agreement on the price, the parties never formalized that agreement in writing. Rather, a new contracting officer presented SRM a proposed bilateral modification, which increased the contract value by \$744,615.40, and added an additional CLIN to cover the one-time cost of bringing the buildings back in scope. SRM did not agree, so the contracting officer modified the contract through unilateral modification (mod. 16).

On September 4, 2014, SRM submitted a certified request for an equitable adjustment (REA) for \$2,644,968. The cover letter accompanying the REA stated that:

It is SRM Group's and our intention to resolve all the issues as quickly as possible with open discussions and the exchange of any additional supporting documentation if needed. We will submit additional supporting cost data upon request. Once you receive this package (sic) please email me at . . . and I will email you a spreadsheet that supports the REA cost summary.

In response, by letter dated September 11, 2014, the contracting officer stated:

In accordance with Federal Acquisition Regulation (FAR) 32.211(c)(2), the Contracting Officer will attempt to render a Contracting Officer's Final Decision not later than November 5, 2014. The submitted package received did not contain any attachments or backup documentation to fully support SRM Group's REA to include complete breakout of all costs, materials, supplies, [and] labor. Please provide all necessary documents so that the review process can be initiated. Once this data is received, a new final decision date will be established to finish this action.

After receiving supporting data from SRM, the contracting officer responded to the REA by letter dated July 6, 2015. The contracting officer determined that SRM should receive a total of \$1,128,687,38, and denied the rest of the REA. On July 15, 2015, SRM countered, offering hundreds of pages of payroll data to support a revised proposal of \$1,967,968.87. On February 4, 2016 (docketed February 5 as CBCA 5194), SRM timely appealed, seeking \$2,644,968 for contract modification.

After docketing this claim, we suspended proceedings at the parties' request to allow time to negotiate the claim. On June 17, 2016, the parties apparently reached a tentative settlement of \$2,359,011.64. The contracting officer presented a bilateral modification (mod. 43) to SRM for that amount, reduced by CLIN adjustments of \$627,165.35, previously provided for in mod. 16. SRM declined to sign the modification.

On September 29, 2016, the contracting officer issued a final decision. The contracting officer noted that:

Subsequent to submission of [mod. 43] to SRM Group and their rejection of the modification terms and conditions, the Government discovered that the application of a 3% allowance for inflation was erroneously applied twice, yielding an inflation percentage of 6%. In addition, it was discovered that the previously negotiated amount for Option Year V included twelve months of

increased service in lieu of the nine months identified in the contract terms. The Contracting Officer's Final Decision provides for adjustment for these two errors—an overall reduction of \$57,517.26 attributed to inflation percentage reduction and a reduction of \$164,515.37 for the removal of three months of service from Option Year V.

Through unilateral modifications 16 and 43:

The Government agrees to pay SRM Group the total of this modification in the amount of \$1,509,836.15 over the remaining life of this contract. The amount for prior years FY14 and FY15 (\$153,675.71 and \$472,669.47 respectively) will be paid upon receipt of proper invoice once the modification has been fully executed. The funding due for FY16 and FY17 (\$480,122.63 and \$403,368.34 respectively) will be paid as a monthly increase to the affected CLINS throughout the remainder of this contract.

The Contracting Officer's Final Decision is in the amount of \$2,137,001.50 . . . to resolve this issue. This is the final decision of the Contracting Officer.

The parties do not appear to dispute that SRM received payment as described in the contracting officer's final decision, totaling \$2,137,001.50, of which \$1,509,836.15 covered the increased costs of adding the two buildings back into the scope of the contract. The contract expired on September 30, 2018.

Meanwhile, on September 21, 2017, new counsel representing SRM presented an amended request for equitable adjustment and amended claim in the total amount of \$6,119,319.45 “in additional amounts owed due to the Department's change to the contract as well as unpaid amounts for these changes to which the Department had already agreed.” Upon receiving no response for the contracting officer, SRM filed a second appeal on November 20, 2017, which we docketed as CBCA 5938. We consolidated CBCA 5194 with CBCA 5938 at the request of the parties.

After multiple extensive delay requests by the parties, we scheduled a hearing for August 13, 2020, on the limited issue of “whether SRM has sufficiently established the costs claimed and their causal connection to DHS's changes to the contract under the applicable legal standard.”

The parties retained experts to calculate the actual cost of adding the two buildings back into the contract. SRM submitted into the record four expert reports by Aaron Raddock, identified as the “managing director of BDO USA, LLP's Industry Speciality Services practice based in the Washington D.C. Metropolitan area . . . with more than 12

years of experience providing consulting services to government contractors regarding compliance with a variety of federal contracting requirements.” In the first report, dated January 15, 2019, Mr. Raddock explained that he had been “asked to analyze SRM’s accounting records to identify allowable costs owed to SRM as a result of this contract change and for which SRM has not been made whole by DHS.” Mr. Raddock analyzed records from the time period of February 2, 2014 through June 30, 2018, using one of two methodologies “(with a preference towards method 1 where possible)”:

- 1) Analyzed the underlying accounting data to extract discrete costs attributable to the add-back, or
- 2) Calculated total costs for the period covered by the change (i.e. February 2, 2014 through June 30, 2018) and reasonably allocated a portion of those costs attributable to the two buildings.

Mr. Raddock opined that SRM was due an additional \$5,682,501 as of the date of his report.

In a second report dated April 18, 2019, entitled “Rebuttal Expert Report,” Mr. Raddock explains that he prepared this rebuttal report “in conjunction with Smith, Currie & Hancock, LLP [SRM’s third counsel of record] . . . to address the report and accompanying analyses of” DHS’s expert witness, Mark Hudak. Identifying areas of agreement with some of the positions contained in the Government’s report, Mr. Raddock updated his analysis. Using this revised analysis, Mr. Raddock opined that DHS owed SRM \$4,007,650. In August 2019, SRM submitted a third “report” from Mr. Raddock, comprised of 571 pages of data and calculations with absolutely no written analysis. Page one of that report, however, does conclude at the end of a chart that SRM is owed a total of \$3,915,825.

SRM submitted its pre-hearing brief on October 25, 2019. This brief included what is identified as appendix B to Mr. Raddock’s expert report. The appendix, containing seventy-four pages of charts, but, again, with no written analysis, amended the claimed amount to \$2,261,676.

At some point, SRM retained a new expert, Greg Fordham, founder of Celestial Defense, Inc., and a “certified public accountant, certified internal auditor, certified computer examiner, a microsoft certified professional, a certified live investigator and a certified steganography¹ investigator.” In his April 2020 report, Mr. Fordham states that he was “retained by Smith Currie & Hancock, LLP to provide forensic accounting services for the

¹ Steganography is “the art or practice of concealing a message, image, or file within another message, image or file.” *Steganography*, Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/steganography> (last visited Mar. 10, 2021).

quantification of increased costs [resulting from] changed conditions incurred by SRM Group.” Mr. Fordham concludes in this written report that SRM is entitled to \$3,359,075.87 for changed conditions to the contract.

At the hearing, Mr. Fordham testified about his calculations. Using the total number of rooms that SRM had cleaned, Mr. Fordham determined that the modification caused SRM to clean an additional 357 rooms per weekday for the remaining four-and-a-half years of the contract, resulting in an increase of twenty-two percent of the overall cleaning per year. To reach this percentage, Mr. Fordham broke the costs down by CLIN, combining some CLIN costs with others, while keeping some CLINs separate. Mr. Fordham testified about his technique:

All right. Now, what does it take to clean an additional 357 rooms a day. Because this isn't like it's just one room or two rooms or twenty rooms or thirty rooms. It's not like, it's not like you can tell your staff oh, there's a couple extra rooms I need you to go and clean down here, you know, before you go home today go and take care of it. What does it really take to do 357 a day.

Mr. Fordham detailed the need for an additional cleaning crew of twenty people, plus someone to schedule the crews, do quality control, and prepare paperwork (“with all Government contracts I'm sure it's paperwork intensive. There's a lot of paper has to be done.”). The increase in rooms resulted in an escalation of maintenance costs and required more desk clerks, Mr. Fordham pointed to specific parts of his report to explain how he added the labor costs, general and administrative (G&A) rate, and profit rate for each CLIN, plus the project management numbers incorporated from CLIN 1, to arrive at the total cost figure. Using this calculation, Mr. Fordham initially arrived at a total cost of around \$9.5 million. However, he deleted \$6 million from his total calculation, because either SRM had already been paid for that work or the costs were unallowable. Mr. Fordham calculated that SRM is owed about \$3.3 million.

Mr Fordham testified that he disagreed with DHS's starting point for calculating the effects of mod. 16. Mr. Fordham testified that DHS started from a point that was unaffected by mod. 9 and mod. 16 so it was not representative of the actual costs incurred due to mod. 16. Further, while Mr. Fordham did rely on management representations for some of his calculations, he claimed to have also relied upon various third-party financial statements. Mr. Fordham provided extensive details about his methodology for calculating the direct costs associated with CLINs 1–5. Specifically, Mr Fordham described his methodology as an “actual cost” analysis in which he calculated the cost of the unchanged work and then used the figure to calculate the average cost resulting from mod. 16.

When asked to explain the costs presented in SRM's REAs and claims, Mr. Fordham explained that he was not involved nor did he know how SRM calculated their costs previously. As to the other previous expert witness reports contained in the record, Mr. Fordham could not testify, explain, or account for the analyses they presented. The failure to address the inconsistencies with the previous expert witness reports, which remained part of the record, is problematic. SRM presented no witness to explain the inconsistencies between the amounts presented in the initial claims (\$2,644,968 for CBCA 5194 and \$6,119,316.45 for CBCA 5938).

Mark Hudak, the Government's pricing expert and a credible witness, pointed out various perceived discrepancies with SRM's conduct over the past six years. He focused on inconsistencies in SRM's expert reports, testifying that the reports failed to provide adequate support and did not comply with applicable FAR requirements. He noted that none of the experts had conducted any audits, relying simply upon management's representations. SRM provided no support for some major cost categories, such as laundry. Overall, Mr. Hudak disagreed with Mr. Fordham's methodology, noting that Mr. Fordham did not examine actual costs or look at the impact of the cost, but instead applied twenty-two percent of the direct costs to the claim based on the number of rooms. Mr. Hudak testified:

The Government has on multiple times requested SRM to provide invoices for the transaction to make sure that the work performed related to the contract, and they continue to provide incorrect information, statements, and such for it.

Mr. Hudak opined that SRM's calculation "takes 22 percent of all its direct costs and applies it to the claim" without any analysis of the impact of the change on costs. Mr. Hudak noted that he actually agreed with the methodology used by the previous expert. He focused on individual costs to determine the impact of the change, looking at:

What happened to the program management directly, what happened with maintenance directly, focus on the individual cost elements to determine the impact of the change. This is exactly what the Government has done as well as SRM's previous expert. This is what SRM should be doing now.

Mr. Hudak provided specific examples of why SRM's position does not make sense. He explained that DHS pooled all CLINS that did not change before and after the removal of the buildings into a program management category. He examined general ledger information and determined no increase in costs.

Mr. Hudak continued:

One of the unique things about this contract is the other direct costs were mostly added to the fixed cost claims rather than part of the housekeeping CLIN rate.

Mr. Hudak concluded that the projected staffing levels and scopes did not change in these categories because they were already negotiated based on actual payroll information that is supported by bilateral modifications.

In sum, after comparing the actual costs before the change and the actual costs after the change, based upon the terms of the contract and SRM's original price proposal, Mr. Hudak concluded that the addition of the two buildings increased the costs by approximately \$800,000, an amount far less than the \$1,509,836.15 paid by DHS to SRM through contract modifications 16 and 43.

Discussion

The sole issue in these appeals is “whether SRM has sufficiently established the costs claimed and their casual connection to DHS’s changes to the contract under the applicable legal standard.” DHS contends that SRM’s calculations are not reasonable and it has not met its burden of proving its *actual* costs of performing the changed work. SRM disagreed, contending that it has sufficiently demonstrated that its costs were incurred by the additional work and that they are reasonable and allowable.

The party seeking the recovery of incurred costs has “the burden of proving the amount . . . with sufficient certainty so that the determination of the amount . . . will be more than mere speculation.” *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 767 (Fed. Cir. 1987) (quoting *Willems Industries, Inc. v. United States*, 295 F.2d 822, 831 (Ct. Cl. 1961)). We discussed proving quantum in *Nu-Way Concrete Co. v. Department of Homeland Security*, CBCA 1411, 11-1 BCA ¶ 34,636 (2010):

An equitable adjustment encompasses the quantitative difference between the reasonable cost of performance without the added, deleted, or substituted work, and the reasonable costs of performance with the addition, deletion, or substitution. *J.L. Simmons Co. v. United States*, 412 F.2d 1360, 1370 (Ct. Cl. 1969) (citing *Bruce Construction Corp. v. United States*, 324 F.2d 516, 519 (Ct. Cl. 1963)). “When a party seeks recovery of costs incurred, it has ‘the burden of proving the amount. . . with sufficient certainty so that the determination of the amount. . . will be more than mere speculation.’” *Benmol Corp. v. Department of the Treasury*, GSBCA 16374-TD, 05-1 BCA ¶ 32,897, at 162,979 (citing *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 767 (Fed. Cir. 1987) (quoting *Willems Industries, Inc. v. United States*, 295 F.2d

822, 831 (Ct. Cl. 1961)); *Advanced Materials, Inc. v. United States*, 54 Fed. Cl. 207, 209 (2002); *Twiggs Corp. v. General Services Administration*, GSBCA 14386, et al., 00-1 BCA ¶ 30,772, at 151,975). “It is true, of course, that the proof of damages need not be exact. A reasonable basis is enough – but some convincing basis must be advanced.” *Twiggs Corp.*, 00-1 BCA at 151,976. “Exaggeration, inherent improbability, self-contradiction, omissions in a purportedly complete account, imprecision and errors may all breed disbelief and therefore the disregard of even uncontradicted non-opinion testimony. Such testimony . . . ‘carries its own death wound.’” *Sternberger v. United States*, 401 F.2d 1012, 1016 (Ct. Cl. 1968) (citations omitted).

See also Reliable Contracting Group, LLC v. Department of Veterans Affairs, CBCA 1539, 11-2 BCA ¶ 34,882. Thus, SRM has the burden of proving its costs “with sufficient certainty so that the determination of the amount . . . will be more than mere speculation.” *Nu-Way*. The fact that SRM provided five different expert reports, each containing different methods and figures, and provided no explanation for the differences, does not meet the burden of proof.

SRM’s expert witness did not elucidate the matter. Although Mr. Fordham adequately explains his own methodology, he did not account for the different methodologies, the diverse conclusions, nor could he justify (or distinguish) the varying amounts claimed by SRM in its two claims. The differing amounts and methodologies are contradictory and imprecise. The mere fact that SRM submitted five expert reports, but failed to present testimony to disclaim the previous reports, or at least explain why these reports came to different conclusions, is problematic.

On balance, we find that DHS’s expert raised valid objections to SRM’s figures while presenting a persuasive analysis to support its calculation of the costs incurred by the modification. By contrast, we conclude that SRM has not met its burden to prove quantum because its expert reports supported differing amounts, used different methodologies, and ultimately did not support SRM’s claims.

Decision

Through mods. 16 and 43, DHS has already compensated SRM for the costs of adding dorms 275 and 277 back into the contract. SRM has not established that it is entitled to anything beyond what DHS has already paid. Accordingly, SRM's appeals are **DENIED**.

Jeri Kaylene Somers
JERI KAYLENE SOMERS
Board Judge

We concur:

Catherine B. Hyatt
CATHERINE B. HYATT
Board Judge

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