



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: March 10, 2022

CBCA 7233

CI-POND SOLUTIONS JV, LLC,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Kevin H. Hudson and Alexander J. Bell of Hudson Lambert Parrott Walker, LLC, Atlanta, GA, counsel for Appellant.

Marc E. Mandel, Office of General Counsel, Federal Bureau of Investigation, Department of Justice, Washington, DC; and Kelli Beene, Office of General Counsel, Federal Bureau of Investigation, Department of Justice, Redstone Arsenal, AL, counsel for Respondent.

SHERIDAN, Board Judge.

Appellant, CI-Pond Solutions JV, LLC (CPS), was awarded task order 15F067-20-F-0000515 for the construction of the Federal Bureau of Investigation (FBI) Hazardous Devices School Fuselage Training Facility (FTF), located in Huntsville, Alabama. The contract was a firm-fixed-price, design-build type with a value of \$1,251,599.

CPS is a small business concern, and the amount in controversy is \$149,551.33. It elected to pursue the appeal under the Board's small claims procedure, as permitted by section 7106(b) of the Contract Disputes Act (CDA) (41 U.S.C. § 7106(b) (2018)) and implemented through Board Rule 52 (48 CFR 6101.52 (2020)). A decision issued under that procedure is final and unappealable except for fraud.

Background

The contract's scope of work included all management, labor, equipment, and material necessary for design and construction of a fully operational FTF. Appeal File, Exhibit 5 at 391.¹ The contractor was also responsible for site preparation, excavation, and soil investigation. *Id.* Due to the restrictive nature of the facility, offerors were only permitted a visual inspection of the site and were not allowed to take additional photographs or soil samples. Appellant's Reply at 4. Offerors did not receive a geotechnical report or topographical survey. *Id.* The statement of work (SOW) provided a brief description of the existing conditions at the site, including the following description of the soil: "The local overburden is predominantly residual red clays, with some shallow loam or gravel lenses and deeper cherty rubble occurring above the bedrock surface." Exhibit 5 at 395.

CPS requested, but was denied, a follow-up site visit. Complaint at 2. Offerors, including CPS, submitted hundreds of requests for information (RFIs). *See generally* Exhibit 9 at 475-515. The Government, through responses to the RFIs, informed offerors that the soil bearing conditions, electrical requirements, and other information would be determined during design. *Id.* To assist offerors in developing their proposals for building the FTF, the Government provided reference drawings of what it considered to be a comparable building at the site. On January 18, 2020, CPS submitted a proposal based on these conditions.

On May 20, 2020, the parties executed the contract for design and construction of the FTF in the amount of \$1,251,599. The contract incorporated CPS's proposal, which indicated that it planned to use a pre-engineered building for the FTF.

The contract incorporated Federal Acquisition Regulation (FAR) clauses 52.236-2, Differing Site Conditions, and 52.243-4, Changes (48 CFR 52.236-2, .243-4). Exhibit 2 at 36, 37. The contract also included clauses appropriate for design-build contracts:

2.1 Project Description: The intent of this project is to provide all management, labor, equipment and material necessary for design and construction for a new Fuselage Training Facility. The government will entertain pre-fabricated buildings. This project includes all related site preparation and grading, utility relocation, placement, and connections, installation of government-furnished fuselage, architectural, telecommunications, electrical, mechanical, plumbing and fire protection building components and system installations.

¹ All exhibits are found in the appeal file, unless otherwise noted.

Exhibit 5 at 392.

H.14 Design Errors or Deficiencies, Inspection of Existing Work

The Contractor shall be responsible for the professional quality, technical accuracy, and coordination of all services required under this contract. As such, it shall be the responsibility of the Contractor to inspect the existing facility identified in any Task Order and inspect and investigate the “as built condition” for the preparation of construction documents.

Exhibit 2 at 13.

H.23.2 Schematic Design and Construction Documents

The Contractor shall submit schematic design and construction documents to the FBI for review and comment at the following levels: 35%, 50%, 90% and final for comment. The FBI shall have a minimum (14) fourteen calendar-day period in which to provide comments to the Contractor during each of the review periods, however, each review period shall not exceed (30) thirty calendar-days.

Exhibit 2 at 17.

H.31 Responsibility of the Contractor For Design:

(a) The contractor shall be responsible for the professional quality, technical accuracy, and the coordination of all designs, drawings, specifications, and other on-construction [sic] services furnished by the Contractor under this contract. The Contractor shall, without additional compensation, correct or revise any errors or deficiency in its designs, drawings, specifications, and other non-construction services and perform any necessary rework or modifications, including any damage to real or personal property, resulting from the design error or omission.

Exhibit 2 at 18.

On June 2, 2020, a kick-off meeting was held between the parties. CPS received the geotechnical study from Building and Earth (its geotechnical subcontractor) on June 25, 2020. Exhibit 9 at 538. CPS tracked what it considered to be design changes and only noted “TBD” (to be determined) for proposed design or construction changes. Exhibit 41 at 150. By the fifty-percent design review meeting, the Government had directed several changes,

including changing the plane fuselage to be housed to the larger Boeing 757. *Id.* at 123; Appellant’s Reply at 15. On July 17, 2020, CPS submitted its final design analysis, which included the proposed work for constructing the FTF, completing all related site preparation and grading, building the asphalt access road with parking lot, and installing the utility connections for the building. Exhibit 41 at 76. The Government issued the notice to proceed with construction on August 31, 2020. Exhibit 30 at 107. On September 3, 2020, CPS submitted a document seeking an additional \$499,545.13 and an extension of forty-five days for changes in scope and pricing that differed from its proposal. Exhibits 31, 32.

The civil work required by the contract included, but was not limited to, asphalt paving of the existing gravel road, an asphalt parking lot, a storm drainage system with a bio-retention pond, landscaping, and utilities, including power. Exhibit 41 at 76-78. Civil engineering work began on September 21, 2020. On October 26, 2020 (over a month after it began work and over three months after it received the geotechnical study), CPS informed the Government that unsuitable soil conditions were found under the asphalt road that would result in a change to the contract. Exhibit 8. CPS requested \$49,894.79 to complete the road compaction work recommended by its geotechnical subcontractor. *Id.* at 450.

On December 3, 2020, CPS presented change order six “in response to changes in design requirements, scope changes from bid, and overall reconciliation from bid to project execution,” in the amount of \$363,425.54. Exhibit 9 at 461. On December 22, 2020, under pressure to pay its subcontractors, CPS split change order six into two requests for equitable adjustment (REAs)—one addressing the civil portion of the proposed extra work (civil work REA) and the other addressing the heating, ventilating, and air conditioning (HVAC) and the electrical portion (HVAC/Electrical REA). Exhibits 10, 36. CPS asked the Government to address the civil work REA first. Exhibit 10.

The civil work REA amounted to \$216,953.68. Under the civil work REA, CPS sought compensation for additional costs for sitework, existing conditions, and changes to the concrete footings and slab for the foundations as well as costs for overhead, insurance, and related fees. Exhibit 10 at 689.

On January 26, 2021, the Government presented a proposed modification for the civil work, offering \$151,511 in additional cost and stating that the offer “represents an equitable amount of risk allocation.” Exhibit 37. On January 29, 2021, CPS responded, elaborating on the basis for the civil work REA and requesting the full amount of \$216,953.68. Exhibit 35 at 515-16. The Government unilaterally executed modification eight in the amount of \$151,511 on February 10, 2021, stating that this was an “equitable transfer of cost risk to assist with price increases due to COVID.” Exhibits 11 at 742, 12 at 743.

Paragraph 4.1.6.2 of the SOW required CPS to “design, provide, and commission a complete and operable heating, ventilating, and air conditioning (HVAC) system.” Exhibit 5 at 407. The SOW required that the electrical system comply with applicable regulations cited in the contract and that the system achieve the maximum level of energy efficiency that was life-cycle cost effective. *Id.* at 411, 420-21. CPS submitted several RFIs to the Government to determine the electrical and mechanical requirements of the project but did not receive responses sufficient to determine what those requirements were. Exhibit 9.

For the HVAC system, CPS proposed the use of one ten-ton unit system. Exhibit 9 at 529. After conducting the life-cycle cost analysis and learning the actual power supply requirement, CPS realized that its proposed HVAC design was impracticable and altered the design to include two five-ton HVAC systems. Exhibit 41 at 87. After award, CPS was informed by the utility company that CPS’s proposed pad-mounted electrical system would be unacceptable and a pole-mounted transformer was necessary because the power line at the site was single phase rather than the anticipated three phase. Exhibits 9 at 533, 39.

As previously mentioned, the original REA was split into two REAs. For the HVAC/Electrical REA, CPS requested \$185,643.37 for additional costs resulting from purported HVAC and electrical changes, additional metals associated with the fuselage cradle, and changes to the general conditions. Exhibit 36. Additional metals were part of this REA because changes to the fuselage size mandated a larger sized cradle. Exhibit 9 at 467. On February 11, 2021, the Government partially approved the HVAC/Electrical REA and offered an equitable transfer of cost risk in the amount of \$50,342.20 “to assist with price increases due to COVID” but also noted that this would be offset by the removal of certain items within CPS’s scope of work and would result in a “zero-sum change.” Exhibit 13. In the HVAC/Electrical proposed modification, the Government agreed to pay CPS the requested \$13,610.84 for additional metals, \$10,957.12 of the requested \$33,484 for the HVAC work, and \$25,774.34 of the requested \$103,726 for the electrical work. *Id.*

On February 16, 2021, CPS responded by modifying its HVAC/Electrical REA to \$143,372.73 through reduction of its prices and markups. Exhibit 14 at 759. The Government denied CPS’s modified REA and then unilaterally issued a modification for the changes to the HVAC/Electrical work in the amount of \$50,342.20 on February 25, 2021.² Exhibit 15.

CPS submitted a certified claim to the contracting officer on May 12, 2021, seeking \$200,743.85, which is the difference between the amount requested by CPS in the civil work

² The record does not include the actual modification issued for the HVAC/Electrical work.

REA and the HVAC/Electrical REA (\$402,597.05) and the amount paid by the Government through the two unilateral modifications (\$201,853.30). Exhibit 38. The contracting officer responded with a final decision on September 23, 2021, denying CPS's claim for additional compensation. Exhibit 1. CPS timely appealed the contracting officer's final decision on October 21, 2021.

CPS claims entitlement to compensation for site work completed pursuant to differing site conditions under FAR 52.236-2 and compensation for constructive changes under FAR 52.243-4. Complaint at 5-6. CPS's claim is for \$149,551.33 and consists of the following: (1) \$65,442.68 for unapproved costs of soil removal and changed conditions; (2) \$73,227.38 (voluntarily reduced from the initial amount sought) for electrical and HVAC changes; (3) \$2371.64 for unapproved markups on additional metals; and (4) \$8509.63 for unapproved general conditions changes connected to electrical and HVAC changes. *Id.* at 4-5.

The Government filed an answer requesting the Board deny CPS's claim and asserting that it overpaid CPS. Answer at 8. The Government asked the Board to determine the amount of the overpayment, making clear it contested both entitlement and quantum, even though it made partial payment on the REAs that serve as the bases of CPS's claim. In response to a Board order, CPS filed its schedule of costs, providing a breakdown of the costs it sought totaling \$149,551.33. The Government filed its response to appellant's schedule of costs and brief, again requesting that the Board deny CPS's claim and order CPS to repay \$173,542.98. Respondent's Rule 19 Brief at 23. CPS filed its prehearing brief and a reply to the Government's brief. The Board held a hearing and ordered post-hearing briefs.

Regarding the Government's allegations of overpayment, the contracting officer, until just a few days before the hearing, had not issued a final decision in accordance with section 7103 of the CDA, 41 U.S.C. § 7103 (2018), asserting an affirmative Government claim demanding the return of money. Prior to the hearing, though, the contracting officer issued an "addendum" to his earlier September 23, 2021, decision and attempted to assert an affirmative claim taking back the \$201,853.30 previously granted in two unilateral modifications. Although the "addendum" notified CI Pond of its appeal rights, CI Pond has not yet appealed that decision to the Board, and it is therefore not properly before the Board. *See id.* § 7104 (entitling the contractor, not the Government, to decide whether and where to appeal a contracting officer's decision). In fact, appellant affirmatively objected to the addendum being a part of this appeal, and the Board refused to rule on the allowability of an addendum at that late stage in these proceedings. As a result, we do not have an affirmative Government claim before us in this appeal. We leave it to the parties to determine how to pursue any claim contained in the "addendum," if appropriate, outside the context of this appeal.

Discussion

A. The De Novo Standard

As we stated in *BES Design/Build, LLC v. Department of Veterans Affairs*, CBCA 5640, 17-1 BCA ¶ 36,840:

The CDA provides that “(e)ach claim by a contractor against the [Government] relating to a contract shall be submitted to the contracting officer for a decision.” 41 U.S.C. § 7103(a)(1) (2012); *CompuCraft, Inc. v. General Services Administration*, CBCA 5516, 17- 1 BCA ¶ 36,662, at 178,538. The contracting officer’s final decision need not include specific findings of fact, but “[i]f made, specific findings are not binding in any subsequent proceeding.” 41 U.S.C. § 7103(e). On appeal, the Board proceeds to conduct a de novo review. *Id.* § 7104(b)(4). “[O]nce an action is brought following a contracting officer’s final decision, the parties start in court or before the board with a clean slate.” *Wilner v. United States*, 24 F.3d 1397, 1402 (Fed. Cir. 1994) (en banc); *Regency Construction, Inc. v. Department of Agriculture*, CBCA 3246, et al., 16-1 BCA ¶ 36,468, at 177,706.

Because of the de novo nature of proceedings under the CDA, “the contracting officer’s [decision] is not to be treated [as] the unappealed determination of a lower tribunal which is owed special deference or acceptance on appeal.” *Assurance Co. v. United States*, 813 F.2d 1202, 1206 (Fed. Cir. 1987). Accordingly, the fact that the contracting officer made specific findings, including quantifying costs owed to [contractor], does not bind the agency once appellant has appealed the final decision.

B. Design-Build Contracts

We note that this is a design-build contract, which impacts somewhat the risks held by the design-build contractor, CPS, and the owner, FBI. In a traditional design-bid-build project, the owner hires the design team, and the contractor builds the design provided to it by the owner. Under longstanding case law, design-bid-build construction contracts include an implied warranty by the owner that the plans are accurate and suitable for the owner’s intended purposes. *Spearin v. United States*, 248 U.S. 132, 136-37 (1918). Thus, if the plans and specifications are not accurate or suitable, the owner cannot recover from the general contractor for damages related to building performance deficiencies. *Id.* Moreover, an owner who breaches the *Spearin* warranty may be liable to the contractor for damages, including actual costs and delays incurred in rectifying deficiencies so that the building may be built. *Id.*

Under design-build contracts, the design-builder assumes the responsibility of design, thereby relieving the owner of liability that it would normally have under *Spearin*. A properly written and administered design-build contract transfers the risk of design insufficiency from the owner to the design-builder. The owner is shielded when the design results in cost overruns or does not work. *M.A. Mortenson Co.*, ASBCA 39978, 93-3 BCA ¶ 26,189. However, if the owner supplies design-related information that is to be incorporated into the design or used in the bidding process, the owner may be held to have established an implied warranty regarding that information. *Donahue Electric, Inc.*, VABCA 6618, 03-1 BCA ¶ 32,129 (2002). Here, the Government provided only minimal information pre-proposal, leaving it up to CPS to design the project within the cost it proposed. While, as noted in the RFIs, a lack of information may drive the price of a proposal up, it may later save costs on differing site condition and changes claims.

That this contract was a design-build type adds a twist that places greater liability on CPS for its proposal. The fact that there were many RFIs in the contract, which the Government answered with “TBD during design” or simply “TBD,” does not shift the design responsibility and liability onto the Government. Of course, CPS is entitled to recover increased costs due to differing site conditions and Government changes but to do that it bears the burden of proof. *See BCPeabody Construction Services, Inc. v. Department of Veterans Affairs*, CBCA 5410, 18-1 BCA ¶ 37,013 (finding that the contractor bears the burden of proving a differing site condition in a firm-fixed price design-build task order). CPS costed its proposal fully understanding that it had to design this project within the price it proposed. If the proposal was faulty, or only provided for ideal conditions, the responsibility for extra costs does not fall on the Government.

In the contract, the Government was responsible for providing the airplane fuselage to be housed within the FTF. Exhibit 5 at 391. Under the scope of work defined in the SOW, CPS was responsible for the design and construction of a fully operational FTF. *Id.* Section 3.1 of the SOW, titled “existing conditions,” required the contractor to “verify all existing conditions prior to any design or construction activities commencing.” *Id.* at 393. The SOW placed the responsibility on CPS to provide, among other tasks, all geotechnical services, including developing and providing an initial boring plan and an initial geophysical investigation plan, to design and construct all water and sewer improvements, and to “develop a structural design on accurate, site specific geotechnical information, and anticipated loads for the building type and geographic location.” *Id.* at 396, 398, 401.

C. Differing Site Conditions Claim

It is well known that the purpose of the Differing Site Conditions clause is to encourage contractors not to inflate their bids to account for issues that may or may not arise. *Tucci & Sons, Inc. v. Department of Transportation*, CBCA 4779, 17-1 BCA ¶ 36,599

(2016). Differing site conditions can arise either as a type I condition, in which the contractor encounters physical conditions that differ materially from those indicated in the contract, or as a type II condition, in which the physical condition is unknown, unusual, and differs materially from those ordinarily encountered. *Id.*; FAR 52.236-2.

CPS alleges that the geotechnical report and topographical survey results revealed lower soil bearing capacities than expected and other unanticipated subbase conditions which added more work to balance the site, resize the storm drain, compact the subbase of the road, and increase the foundation size for the FTF. CPS argues that it is entitled to recover costs for a type I differing site condition because (1) the contract implied that contractors would be entitled to a price adjustment if the information obtained during the surveys conflicted with their proposal, and (2) the reference building provided by the Government indicated that the bearing capacity would be sufficient for the use of the same size footing in the new FTF. Appellant's Prehearing Brief at 6-8. Alternatively, CPS argues that it is entitled to recover under a type II differing site condition because the conditions were (1) unknown, as the Government neither provided any geotechnical or survey information nor allowed contractors to investigate the site beforehand, and (2) unusual, as the soil conditions differed from the known conditions at other projects at the site. *Id.* at 9-10.

The Government argues that CPS is not entitled to compensation under the Differing Site Conditions clause because (1) CPS cannot meet the burden to show that clay was an unknown, unanticipated, or unusual condition, and (2) CPS did not properly notify the Government of the differing site condition before proceeding with the work. Respondent's Rule 19 Brief at 25.

The contractor bears the burden to prove a differing site condition by a preponderance of the evidence. *Stuyvesant Dredging Co. v. United States*, 834 F.2d 1576, 1581 (Fed. Cir. 1987). To prove a type I differing site condition, the contractor must show that:

(1) "the conditions 'indicated' in the contract differ materially from those it encounter[ed] during performance," (2) "[t]he conditions encountered must have been reasonably unforeseeable based on all the information available to the contractor at the time of bidding," (3) "it reasonably relied upon its interpretation of the contract and contract-related documents," and (4) "it was damaged as a result of the material variation between the expected and the encountered conditions." *Regency Construction, Inc. v. Department of Agriculture*, CBCA 3246, et al., 16-1 BCA ¶ 36,468 (quoting *Stuyvesant Dredging Co. v. United States*, 834 F.2d 1576, 1581 (Fed. Cir. 1987) (citations omitted)).

Ahtna Construction & Primary Products Co. v. Department of Agriculture, CBCA 6892, 21-1 BCA ¶ 37,777 (finding that the contractor did not meet the burden of proving a type I differing site condition claim when the contract made no representations as to the subsurface conditions of the site).

To prove a type II differing site condition, the contractor must show that the unknown physical condition was “one that could not be reasonably anticipated by the contractor from his study of the contract documents, his inspection of the site, and his general experience[,] if any, as a contractor in the area.” *Randa/Madison Joint Venture III v. Dahlberg*, 239 F.3d 1264, 1276 (Fed. Cir. 2001) (quoting *Perini Corp. v. United States*, 381 F.2d 403, 410 (Ct. Cl. 1967)).

Item one: Site earthwork and grading access road to create a balanced site

CPS seeks \$20,737.50 for additional work to balance and haul off soil and \$2489.50 to strip and stockpile soil. Appellant’s Schedule of Costs at 3; Appellant’s Reply at 2. CPS fails to establish a type I or type II differing site condition with respect to the soil grading and haul-off work. CPS argues that, at the time of its proposal, there was no topographical survey or information to know the exact grades of the site and no opportunity to perform a takeoff analysis to determine if the site was balanced. Appellant’s Post-Hearing Brief at 12; Appellant’s Reply at 11. After receiving the results from the topographic survey, CPS had to move more soil than it expected and haul it off to balance the site. Appellant’s Schedule of Costs at 3. The contract does not provide any indicators as to the topography of the site. Instead, as part of the design-build nature of the agreement, the contract directed the contractor to perform a topographic study to determine the conditions of the site. Furthermore, CPS has not shown how the different topography is an unusual or unknown condition. CPS’s claim for additional costs to balance the site and haul off soil is denied.

Item two: Storm drain system

CPS seeks \$13,248.10 for additional work for the storm drain system when the size of the bio-retention pond increased and the topographic survey revealed a steeper site than CPS anticipated. Appellant’s Schedule of Costs at 2. CPS asserts that a survey and measurements were unavailable to predict the quantities of soil at the site or account for the quantities of storm water flowing onto the site. Appellant’s Reply at 11. Similar to the reasoning for the site earthwork claim, the Board finds that CPS has not shown how there were changes in what CPS anticipated for the topography that amounted to a type I or type II differing site condition, and this portion of the claim is denied.

Item three: Asphalt paving for the road

CPS seeks \$62,530.20 for additional costs to compact and pave the asphalt road. CPS fails to prove that the road's subbase either differed from what the contract indicated or was an unknown physical condition. Appellant's Schedule of Costs at 1. CPS argues that the Government's acceptance of its proposal to add a 1.5-inch asphalt topper to the existing gravel road was a representation that the road was properly compacted. Appellant's Closing Brief at 8. CPS failed to show, by a preponderance of the evidence, that the condition could not be reasonably anticipated by CPS from its study of the contract documents, inspection of the site, and its general experience as a contractor. At the hearing, CPS's witness unconvincingly testified that CPS assumed the road's subbase was properly compacted because it was within a Government facility and appeared to be built to some standard. CPS's claim for asphalt paving is denied.

Item four: Footing and slabs, including anchor bolts

CPS relied upon the information provided by the Government about a comparable structure at the site to determine the design for the FTF footings. Appellant's Closing Brief at 9-10. The geotechnical report revealed that the lower soil bearing capacity and changes to the size of the building necessitated wider footings. *Id.* at 10. The Board is not convinced that the soil bearing capacities encountered at the site were unusual or differed from the contractor's general experience. Instead, the Board finds that the need for wider footings was largely a result of the constructive change to the size and weight of the building rather than a differing site condition represented by the drawings. Therefore, the Board will analyze the claim for footings, slab, and anchor bolts as a claim for a constructive change.

Item five: Bollards

The Government conceded that CPS is entitled to \$1545 for the cost for bollards, as those were additional items requested by the Government. Respondent's Response to Schedule of Costs at 3.

Item six: Silt fence, site fencing, stripping, and the use of an out-of-town crew

CPS requests entitlement for additional costs incurred in the amount of \$57,446.59 for a silt fence, site fencing, stripping, and use of an out-of-town crew. Appellant's Schedule of Costs at 3. CPS has not proven entitlement for the additional costs incurred for the silt fence, site fencing, stripping of topsoil, or out-of-town crew. The Board denies these costs and finds that they were to be borne by the contractor as part of the fixed-price contract.

D. Constructive Change Claim

CPS claims entitlement to additional costs incurred when the FBI changed the parameters of the project by increasing the size of the fuselage to be placed in the building. Appellant's Prehearing Brief at 13. CPS argues that its proposal met the contract requirements, the changes were for items in excess of the minimum contract requirements, and added additional requirements than what was anticipated by CPS in its proposal. *Id.* The Government asserts that, under the contract, CPS is responsible for designing and constructing a complete HVAC and electrical system for the fuselage facility. Respondent's Rule 19 Brief at 20-21. The Government alleges that any changes to the design were within the scope of the contract and CPS's purview. *Id.* at 22.

“A constructive change occurs where a contractor performs work beyond the contract requirements without a formal order, either by an informal order or due to the fault of the Government.” *International Data Products Corp. v. United States*, 492 F.3d 1317, 1325 (Fed. Cir. 2007). To recover on a constructive change claim, a contractor must show that (1) it performed work beyond the contract requirements and (2) the Government ordered—expressly or implicitly—the contractor to perform the additional work. *Bell/Heery v. United States*, 106 Fed. Cl. 300, 313 (2012), *aff'd*, 739 F.3d 1324 (Fed. Cir. 2014); *IAP World Services, Inc. [v. Department of the Treasury]*, CBCA 2633, 12-2 BCA ¶ 35,119]. A contractor cannot invoke a claim for constructive change against the Government unless the Government “effect[s] an alteration in the work to be performed.” *Bell/Heery*, 739 F.3d at 1335.

Pernix Serka Joint Venture v. Department of State, CBCA 5683, 20-1 BCA ¶ 37,589.

Item one: Additional metals

CPS based its design for the fuselage cradle and the overall size and weight of the building on the Government's direction that the FTF would house a fuselage the size of a Boeing 737. Exhibit 9 at 475; Appellant's Prehearing Brief at 16. During design, the Government changed the size of the fuselage to be housed to the larger Boeing 757. Exhibit 41 at 123; Appellant's Prehearing Brief at 16. CPS used more metal than anticipated to build an adequate cradle for the larger fuselage. Appellant's Prehearing Brief at 16. The Government agreed that this was a constructive change and conceded the metal costs for the fuselage cradle in the amount of \$13,610.84. Respondent's Response to Appellant's Schedule of Costs at 4.

Item two: Footing and slabs, including anchor bolts

While CPS alleges that the changes to the footing and slab were due to a differing site condition, the Board instead finds that the changes were largely a result of the increase in building height and weight caused by the change in fuselage size. The Board is convinced by CPS's testimony that the increased height and weight of the building had an effect on the bearing capacity of the soil. While it is unclear if the soil bearing capacity was a differing site condition, it is reasonable to find that the heavier building would affect the foundation and stability of the building. Therefore, the Board finds that CPS is entitled to the incurred costs of increasing the size of the building's footings, including the costs for the anchor bolts. CPS's claim for \$23,720.50 for the footings and slab and \$880.50 for the anchor bolts is granted.

Item three: HVAC system

CPS asserts that its proposal to use a ten-ton unit HVAC system for the fuselage was within the contract requirements. Government-ordered changes to the size of the fuselage increased the height of the building, which changed multiple engineering calculations including the volume of air to be handled by the HVAC system. In addition, after conducting a life cycle cost analysis and learning of the correct incoming power supply, CPS had to change from the ten-ton unit to two five-ton units. Appellant's Schedule of Costs at 6; Appellant's Prehearing Brief at 16-18. CPS, in its closing brief, adjusted the total HVAC claim to \$13,885. Appellant's Closing Brief at 16. The Board finds that CPS is entitled to the total HVAC claim as a result of constructive changes caused by changes to the building height and the power supply. CPS's claim for \$13,885 is granted.

Item four: Electrical, including transformer in lieu of service panel

At the time of the contract, CPS did not know what power was available at the site and assumed, based on CPS's general knowledge of commercial buildings, that the building had a three-phase power supply. Appellant's Reply at 17. Based on that assumption, CPS determined that a pad-mounted transformer would be sufficient to power the building and comply with the electrical design standards. *Id.*; see Appellant's Prehearing Brief at 18; Appellant's Post-Hearing Brief at 17. CPS alleges that, after award, the utility company provided the power requirements for the building, which was a single-phase power supply and required a pole-mounted transformer. Appellant's Prehearing Brief at 18; Appellant's Reply at 17. CPS also argues that the Government requested additional outlets for the fuselage building, which, combined with the changes in the HVAC system, necessitated additional power distribution. Appellant's Schedule of Costs at 7. The Board agrees with CPS that these changes were a result of the Government ordering CPS to house a larger

fuselage as well as its request for additional power outlets. CPS is entitled to its full electrical claim of \$70,420.

Item five: Security lighting

The Government agreed with CPS's claim for \$9342 for security lighting requested by the Government after award. Respondent's Response to Appellant's Schedule of Costs at 6.

E. Claim for General Conditions, Overhead, Fee, Insurance, and Bond Premium

The Government agreed to pay CPS \$115.88 for overhead and \$124.57 for insurance and bond premiums for the civil claim. Respondent's Response to Appellant's Schedule of Costs at 4. For overhead, fee, insurance, and bond claims for the fuselage support, the Government agreed to pay a total of \$2118.18. *Id.* at 4-5. As a result of increased work under the electrical and security lighting claim, the Government agreed to pay \$700.65 for incurred overhead and fee and \$753.20 for increased insurance and bond premium. *Id.* at 7. The remaining portion of CPS's claim for general conditions, additional overhead, fee, insurance, and bond premium is denied.

Decision

The appeal is **GRANTED IN PART**. The Board finds that CPS is entitled to \$108,906 for the additional costs associated with the transformer, HVAC, footings, slab, and anchor bolts. In addition, the Government conceded \$28,310.32 which includes \$1545 for the bollards, \$13,610.84 for the fuselage support, \$9342 for the security lighting, and \$3812.48 for related overhead, fees, insurance, and bond premiums. In total, CPS is entitled to \$137,216.32.

Patricia J. Sheridan

PATRICIA J. SHERIDAN
Board Judge