



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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GRANTED IN PART: July 29, 2022

CBCA 6490

FRENCH CONSTRUCTION LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Mark E. Landers, Dayton OH, counsel for Appellant.

Harold W. Askins, III, Office of General Counsel, Department of Veterans Affairs, Charleston, SC; and Donald C. Mobly, Office of General Counsel, Department of Veterans Affairs, Denver, CO, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **VERGILIO**, and **SULLIVAN**.

**SULLIVAN**, Board Judge.

French Construction LLC contracted with the Department of Veterans Affairs (VA) for construction on a VA medical campus. As the result of delays allegedly caused by VA, French Construction seeks \$383,390. French Construction also seeks to recover \$23,282 on six direct-cost claims. After a hearing in this matter, we find that French Construction failed to prove its delay claims but award a portion of the direct-cost claims in the amount of \$11,483.

## Findings of Fact

### I. Delay Claims

#### A. Contract Terms

In August 2014, VA awarded French Construction a fixed-price contract for the construction of a two-story corridor to connect two buildings at the Veterans Hospital in Chillicothe, Ohio. Complaint ¶ 5. The contract required the completion of performance within 365 days after receiving the notice to proceed. Appeal File, Exhibit 16 at 1.<sup>1</sup> French Construction received the notice to proceed on September 15, 2014, but did not complete performance until January 13, 2017. Complaint ¶¶ 6, 11. The contract incorporated by reference the Federal Acquisition Regulation (FAR) Brand Name or Equal clause, 48 CFR 52.211-6 (2013) (FAR 52.211-6), and Changes clause, FAR 52.243-4. Exhibit 16 at 33, 35.

#### B. Alleged Periods of Delay

French Construction claims a total of 419 days of Government-caused delay, which its expert, Mr. Allan Ballew, allocated across five different time periods between activities on the critical path. Complaint ¶ 11; Exhibit 44 at 14-15. Mr. Ballew determined the number of days of delay by comparing the as-planned schedule approved by VA to the as-built schedule that he prepared for the claim. *See* Exhibit 771 at 21, 29.<sup>2</sup> Mr. Ballew only provided two “rough” updates to the planned schedule during contract performance. Transcript, Vol. I at 243.<sup>3</sup> It is not clear whether Mr. Ballew used either of these updates in performing his analysis or preparing his expert report.

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<sup>1</sup> All exhibits are in the appeal file, unless otherwise noted.

<sup>2</sup> Mr. Ballew served as French Construction’s project manager. He prepared both the as-planned and as-built schedules that he used in his expert analysis. Transcript, Vol. I at 27, 164.

<sup>3</sup> Both sides elicited extensive testimony regarding whether French Construction was required to prepare schedule updates during performance. *See, e.g.*, Transcript, Vol. I at 166-67. Because we find that French Construction did not prepare updates, we need not decide whether it was required to do so.

1. Notice to Proceed to Demolition of Existing Structure

Mr. Ballew identified the first period of delay as between the issuance of the notice to proceed and the completion of the demolition of the existing structure. Exhibit 771 at 33-34. French Construction's as-planned schedule forecasted the demolition of the existing corridor to be complete by October 10, 2014. Exhibit 69. According to the as-built schedule, French Construction began demolition on February 23, 2015, and completed it on February 27, 2015, 149 days later than it had planned. Exhibit 689.

Mr. Ballew testified that, before French Construction could demolish the existing corridor, it was required temporarily to relocate cables and wiring related to elevator function, generator function, and communication. Transcript, Vol. I at 49-50; *see also* Exhibit 771 at 32.<sup>4</sup> French Construction was unable to proceed when it discovered cables that were not indicated on the drawings prepared by the project architect. Transcript, Vol. I at 50:6 to :13. It waited until after it received updated drawings and a notice to proceed with the changed work on February 6, 2015, Exhibit 260, and VA's approval of a necessary power outage, which was provided on February 10, 2015. Exhibit 256. French Construction relocated the cables by February 16, 2015, Exhibit 270, and completed testing of the cables on February 20, 2015. Exhibit 282; Transcript, Vol. I at 128.

On the as-planned schedule, Mr. Ballew showed demolition of the existing corridor as an activity on the critical path with two preceding activities – the creation of a duct bank and the relocation of oxygen lines. Exhibit 69.<sup>5</sup> These preceding activities were planned to require eight and four days, respectively, and both were to be completed on October 6, 2014. *Id.* Mr. Ballew testified that the corridor could be demolished once these activities were completed. Transcript, Vol. I at 25. The as-planned schedule also lists an activity, "elec-removals/relocations," which was projected to require two days and be finished by either September 26, 2014, or May 18, 2015, depending upon whether French Construction had an early or late start on it. Exhibit 69 (activity 7020). This activity is not on the critical path. *Id.*

Mr. Ballew's as-built schedule depicted the same preceding activities for the demolition of the building. Exhibit 689. The actual time required to install the temporary ductbank was twenty days, and the work was complete on October 30, 2014. *Id.* The actual

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<sup>4</sup> Mr. Ballew testified both as a fact witness and expert witness. He did not testify on direct about his expert opinions; instead, French Construction's counsel elected to rely solely upon Mr. Ballew's expert report, which is Exhibit 771. Transcript, Vol. I at 324.

<sup>5</sup> Exhibit 69 is the as planned critical path schedule that VA approved. Transcript, Vol. I at 23.

time to relocate the oxygen lines was six days and was complete on November 13, 2014. *Id.* The activity “elec-removals/relocations” is not listed on the as-built schedule. *Id.* If the electrical wiring issue about which Mr. Ballew testified was part of the temporary duct bank, the work was completed almost four months in advance of the beginning of the demolition of the existing corridor. If the electrical work was a different activity, Mr. Ballew did not indicate on the as-built schedule when the delay on this work started and ended and at what point the work became part of the critical path. Mr. Ballew also did not indicate how these preceding activities—the temporary ductbank and relocation of oxygen lines—overlapped with the resolution of the electrical wiring issues. Mr. Ballew testified that the order of activities on the “as-built” schedule did not change from the “as-planned schedule.” Transcript, Vol. I at 28.

Mr. Ballew testified extensively about other issues that allegedly delayed French Construction’s progress at the beginning of the project, such as the delayed work of another contractor blocking French Construction’s access to the site. *See, e.g.*, Transcript, Vol. I at 112. But Mr. Ballew did not explain, either in his report or his testimony, the duration of these other issues or how they affected the critical path activities on the as-planned schedule. *See Exhibit 771 at 26.*

## 2. Demolition to Completion of Structural Steel

Mr. Ballew identified the second period of delay as from the demolition of the existing structure to the completion of the structural steel. The planned duration from completion of demolition to completion of structural steel was eighty-four days. Exhibit 689 (October 1 to December 24, 2014). The actual duration was 131 days, forty-seven days longer than planned. Appeal File, Exhibit 689 (February 27 to July 8, 2015). From this difference of forty-seven days, French Construction subtracted fourteen days for subcontractor-caused delay, leaving a claimed delay of thirty-three days during this period. Exhibit 44 at 14.

In his expert report, Mr. Ballew attributes the delays during this period to the need to resolve “many issues with regard to the foundation design, elevator infrastructure, tunnel access, steam line differing site condition, etc.” Exhibit 771 at 34. Mr. Ballew also testified that French Construction was delayed because it could not start work on the structural steel until the concrete foundation was completed. Transcript, Vol. I at 55, 62. Mr. Ballew provided no specifics on the causes of these delays or how long the structural steel work was delayed as a result of these issues.

### 3. Structural Steel to Completion of Slabs on Grade

Mr. Ballew identified the third period of delay as from completion of structural steel to completion of slabs on grade placement, a planned duration of twenty-one days. Exhibit 689 (December 24, 2014, to January 14, 2015). The actual duration between these two activities was forty-four days (July 8 to August 21, 2015), twenty-three days longer than planned. Exhibits 44 at 14, 689. The only information regarding what caused a delay during this period is found in French Construction's claim, which states that placing slab on grade could not be completed until the underground utility work was completed. Exhibit 44 at 13. Mr. Ballew provides no explanation as to when the underground utility work was completed or what caused the delay in its completion.

### 4. Structural Steel to Completion of Drywall

Mr. Ballew identified the fourth period of delay as from completion of the structural steel to the completion of drywall, a period of unknown duration. *See* Exhibit 771 at 35.<sup>6</sup> French Construction claims 187 days of delay during this period. Exhibits 44 at 15, 771 at 35-36. In his report, Mr. Ballew attributed the delay during this period, at least in part, to change orders D, E and G,<sup>7</sup> all of which were changes directing additional work by French Construction. Exhibits 25, 26, 28, 771 at 35. Mr. Ballew provided no further information regarding the effect of these modifications upon French Construction's schedule or how the work was delayed. Mr. Ballew did not testify about the causes of this period of alleged delay at the hearing.

### 5. Mod H to Project Finish

Mr. Ballew identified the final period of delay as "mod H to end." Mr. Ballew calculates a sixty-three-day delay, attributable to the "impact of modification H." Exhibit 771 at 38.<sup>8</sup> Modification H was a change order, issued in August 2016, directing French Construction to provide "additional site work and handicapped door operators." Exhibit 29. Mr. Ballew opined that "the modification had impact . . . from March 8, 2016 until November 7, 2016, a period of 244 days." Exhibit 771 at 38. The schedule that Mr. Ballew created to show the effects of this modification upon the critical path schedule does not

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<sup>6</sup> VA's expert identifies a planned duration of sixty-five days. Exhibit 772 at 11.

<sup>7</sup> VA used letters rather than numbers to denote the modifications to the contract. *See, e.g.*, Exhibit 25.

<sup>8</sup> French Construction's claim to the contracting officer describes a twenty-seven-day delay during the final period. Exhibit 44 at 15.

identify the period of Government-caused delay or the concurrent delay caused by French Construction. *See* Exhibits 688, 771 at 38.

C. Alleged Costs of Delay

1. Field Office Overhead

French Construction claims field office overhead in the amounts of \$97,192 for 153 days during the period September 15, 2014, to February 15, 2015, and \$147,284 for 266 days during the period February 16, 2015, to January 13, 2017. Exhibit 771, Attachment P.

2. Home Office Overhead

French Construction seeks \$35,296 for home office overhead for 161 days of contract performance from September 15, 2014 (date notice to proceed issued), to February 23, 2015 (date that demolition started). Exhibit 771, Attachment P.

3. Subcontractor Claim

In addition to its own delay claims, French Construction also seeks to recover \$42,247 for its subcontractor, Kerlyn Construction Company. Exhibit 771, Attachment P. French Construction did not explain what work Kerlyn performed on the project or how its work was delayed. Mr. Ballew did not provide any explanation as to how Kerlyn's claimed costs were calculated. The record contains a single exhibit titled "Kerlyn Construction Co., Inc. Eichleay," which purports to show Kerlyn's contract revenue and overhead for the period of contract performance. Exhibit 692.

4. Labor Impact Claims

French Construction claims \$22,079 associated with elevator shaft work, and \$35,496 in other impact costs. Exhibit 771, Attachment P. French Construction alleges that these claims arose because delays caused by VA pushed scheduled work into the winter months of 2015 and 2016. *Id.* at 39. Mr. Ballew explained in his report that "[t]he weather delay and impact was cumulative and extended the durations of many activities. There was some added cost as a result of performing the work in adverse conditions." *Id.* In attachment N to his report, Mr. Ballew provides an excerpt from the contract schedule that shows the concrete work performed out of sequence and at colder temperatures but does not explain how actions by VA caused this schedule change. *Id.* Mr. Ballew also does not provide an explanation as to how he calculated the labor impact costs.

## II. Direct-Cost Claims

### A. Facts Establishing Jurisdiction

French Construction also seeks to recover on six direct-cost claims that arose during contract performance. Complaint, Attachment B.<sup>9</sup> These claims originated as cost proposals that were submitted to the contracting officer and sought payment of money for work completed on the contract. Exhibits 255, 258, 364, 447, 532, 673. In the request for equitable adjustment (REA) that French Construction later certified as a claim on which it sought a decision, French Construction described these outstanding cost proposals:

There were numerous contract changes on the project. Primarily, these were either for correction of defective specifications or differing site conditions. Twenty-six cost proposals were submitted to the VA. The VA issued 9 contract modifications covering seventeen (17) of the cost proposals. Nine *other* cost proposals remain pending as of this writing.

Exhibit 44 at 11.<sup>10</sup> The total amount sought in the delay REA did not include these claimed amounts, but the original cost proposals match the amount sought before the Board.

The contracting officer addressed these claims in the decision on the claim, stating:

In reviewing the claim, VA became aware that there were a few requests for equitable adjustments (REAs) made by French during the term of the contract which should have been accepted and addressed by VA. While not related to the claim for field overhead, the Contracting Officer has determined the following items do impact the time for performance and that the REAs are legitimate changes.

Exhibit 46 at 3. The contracting officer granted entitlement on four of the outstanding requests and concluded, “The contracting officer is denying all other allegations related to a delay or the demand for additional field overhead and is denying all other requests for

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<sup>9</sup> Attachment B to the complaint lists ten pending cost proposals but the contracting officer granted entitlement to four in his decision, leaving six for adjudication in this appeal. Exhibit 46 at 3.

<sup>10</sup> French Construction submitted an REA seeking its delay costs. Exhibit 44. The contracting officer asked whether French Construction wanted to certify its REA so that it could be decided as a claim. Exhibit 45. By email dated March 27, 2019, French Construction certified its claim and requested a decision. *Id.*; Transcript, Vol. II at 181.

compensation French Construction is seeking.” *Id.* at 4. The contracting officer testified that he reviewed all of the outstanding cost requests prior to issuing his decision. Transcript, Vol. II at 191.

B. Facts Relating to Entitlement on Direct Cost Claims

1. Additional Work to Change Elevator Forms

French Construction seeks \$483 for work that it undertook when the contracting officer’s technical representative (COTR) directed it to change forms that had been built for a concrete pour. Exhibit 255. French Construction alleges that the direction from the COTR delayed the pour by three days. *Id.* Although French Construction’s cost proposal details the elements of the costs claimed, it does not explain what costs were incurred as the result of this direction. *Id.*

2. Change to Masonry Anchors Used on Project

French Construction seeks \$3385 for the costs of different masonry anchors that were required for the project. Exhibit 258. The change arose when French Construction’s subcontractor determined that the masonry anchor specified by VA in the contract did not accommodate the insulation that had been installed. Exhibit 267; *see also* Transcript, Vol. I at 208-09. French Construction’s subcontractor noted that “it would have been convenient to have caught this error in the allotted bidding time.” Exhibit 267.

3. Work to Revise the Foundation for the Steam Line

French Construction seeks \$5283 for the costs incurred as the result of a design change to address the location of a steam line. Exhibit 364. The material costs are for new rebar to replace the rebar that had been delivered to the site but would not work with the new design. *Id.* at 3. The labor costs are the costs to rework the forms and insulation resulting from the design change. *Id.* at 5.

4. Work to Revise the Drywall and Rough-in Following Bulletin 10

French Construction seeks \$1741 for the costs to re-do drywall work following a change to the location of the automatic door openers as the result of VA’s decision to install an air curtain. Exhibits 387, 673; Transcript, Vol. I at 217-18. The labor and material costs sought are those of its drywall subcontractor following this change. Exhibit 673 at 4-5.



5. Work to Revise Wall and Door Ratings Following Bulletin 13

French Construction seeks \$4459 for a portion of the costs incurred to address the changes issued by the architect in Bulletin 13. VA issued unilaterally modification D with a not-to-exceed amount of \$14,000. Exhibit 25. The amount that French Construction seeks is the amount that it maintains it incurred over the not-to-exceed amount. Transcript, Vol. I at 191. According to Mr. Ballew, the COTR thought that French Construction's quotes for the materials were too high, but French Construction needed to procure the doors from the original subcontractor with the hardware templates. *Id.* at 191-92. The labor and material costs are those of its door subcontractor following this change. Exhibit 766.

6. Handrails and Wall Protection Materials

French Construction seeks \$7930 for the difference in the costs that it originally bid to provide wall protection materials and railings and the costs that it paid to supply the materials from a particular vendor, Acrovyn. Exhibit 570; Transcript, Vol. I at 229-30. VA rejected French Construction's original choices for wall protection and handrails because the profiles and colors did not match those found in the buildings adjoining the corridor that French Construction built. Exhibit 537 at 2; Transcript, Vol. I at 226 (Mr. Ballew: "[VA] insisted on the exact profile, which is the shape of the handrail."). Drawing AF601 specified the dimensions and required finishes for these components and listed Acrovyn products for the handrails and wall protection "for aesthetic reference only." Exhibit 48 at 26. The notes explained that "[m]anufacturer information provided for material type/finish/color is for reference only. Other equal product shall be considered by the VA if the product meets specification and general intent of color compatibility." *Id.*

Discussion

I. French Construction Has Not Established a Compensable, Measurable Delay

The long-standing, oft-quoted burden for contractors to prove delay claims:

A claimant need not prove his damages with absolute certainty or mathematical exactitude. It is sufficient if he furnishes the court with a reasonable basis for computation, even though the result is only approximate. Yet this leniency as to the actual mechanics of computation does not relieve the contractor of his essential burden of establishing the fundamental facts of liability, causation, and resultant injury. It was plaintiffs' obligation . . . to prove with reasonable certainty the extent of unreasonable delay which resulted from defendant's actions and to provide a basis for making a reasonably correct approximation of the damages which arose therefrom.

Broad generalities and inferences to the effect that defendant must have caused some delay and damage because the contract took . . . longer to complete than anticipated are not sufficient.

*Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 968-69 (Ct. Cl. 1965) (citations omitted).

Mr. Ballew attempted to show the delays on the contract by comparing the “as-planned” and “as-built” critical path schedules. Critical path analysis is widely used to establish delay. *See, e.g., George Sollitt Construction Co. v. United States*, 64 Fed. Cl. 229, 240 (2005); *I-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913, at 175,554 (finding contractor required to identify how excusable delays affected activities on the contract’s critical path). “A ‘critical path’ is a way of grouping interrelated activities in a construction project, and a delay to an activity that is on the ‘critical path’ usually results in a corresponding delay to the completion of the project.” *I-A Construction & Fire, LLP*, 15-1 BCA at 175,557 (citing *Wilner v. United States*, 24 F.3d 1397, 1399 n.5 (Fed. Cir. 1994) (en banc)). “A government delay which affects only those activities not on the critical path does not . . . delay the completion of the project.” *George Sollitt Construction Co.*, 64 Fed. Cl. at 240. “To show how the critical path of contract performance evolved over the life of the contract and how excusable delays impacted that path, a contractor, at a minimum, needs a reasonable ‘as planned’ schedule and an ‘as built’ schedule, which it can incorporate into an analysis to show ‘the interdependence of any one or more of the work items with any other work items’ as the project progressed.” *I-A Construction & Fire, LLP*, 15-1 BCA at 175,557 (citing *Mega Construction Co. v. United States*, 29 Fed. Cl. 396, 428 (1993)).

Mr. Ballew testified extensively about the need to await new drawings before the wiring and cables could be relocated and the existing corridor demolished. This problem likely caused delay during this time period. However, Mr. Ballew was required to “show the nature and extent” of this delay, which he failed to do. *See Wunderlich*, 351 F.2d at 969. The electrical wiring was never identified on the critical path in the “as-planned” schedule and was not represented at all on the “as-built” schedule. At a minimum, it would appear that the delay caused by the electrical wiring did not become critical until after November 13, when the oxygen lines were relocated. Moreover, it appears that the predecessor activities on the critical path simply took longer than planned, with no allegation that VA caused delays on these activities. Without this information, we have no way to quantify the delay attributable to the electrical wiring relocation and ensure that there were no concurrent delays caused by French Construction during this period.

Rather than isolate the days of delay attributable to the electrical wiring and the other issues, it appears that French Construction, through Mr. Ballew, has simply submitted a total

time claim. Mr. Ballew subtracted the number of days planned between the notice to proceed and the demolition of the building from the actual duration between those activities and sought the entire period as delay by the Government. “Under the ‘total time theory,’ the contractor ‘simply takes the original and extended completion dates, computes therefrom the intervening time or overrun, points to a host of individual delay incidents for which defendant was allegedly responsible and which “contributed” to the overall extended time, and then leaps to the conclusion that the entire overrun time was attributable to defendant.” *1-A Construction & Fire, LLP*, 15-1 BCA at 175,556 (citing *Law v. United States*, 195 Ct. Cl. 370, 382 (1971)). The “[total time] theory of proving delay is insufficient to meet the contractor’s burden to prove that government-caused delay actually delayed the overall completion of the project.” *Morganti National, Inc. v. United States*, 49 Fed. Cl. 110, 134 (2001), *aff’d*, 36 F. App’x 452 (Fed. Cir. 2002) (quoting *Mel Williamson, Inc. v. United States*, 229 Ct. Cl. 846, 852 (1982)). Mr. Ballew testified about the drawing delays and other problems that delayed demolition of the building without providing a sufficient showing that all the days of delay were attributable to this cause. French Construction has failed to establish compensable delay during the first period of delay identified by Mr. Ballew.

The remainder of French Construction’s delay claim suffers from the same problem. Mr. Ballew simply subtracted the planned duration from the actual duration and identified that as the period of delay. Mr. Ballew, in his report, then generally describes challenges or issues that French Construction faced during periods two through five and attributes all of the delay, without any specifics, to those issues. Mr. Ballew’s opinions regarding the causes of delay amount to “broad generalities and inferences” that are insufficient to carry French Construction’s burden to prove compensable delay. *Wunderlich*, 351 F.2d at 969.

French Construction’s labor impact claims suffer the same fate. While working out of sequence or during bad weather can often provide the basis for a loss of efficiency claim, a contractor must still show that those adverse conditions caused the work to take longer or cost more than planned or than would have occurred without them. *Youngdale & Sons Construction Co v United States*, 27 Fed. Cl. 516 (1993); *Metro Engineering*, AGBCA 77-121, 83-1 BCA ¶ 16,143, at 80,188 (1982). French Construction has not provided any such evidence.

## II. French Construction Proved Some of Its Direct Cost Claims

### A. The Board Possesses Jurisdiction to Consider the Direct Cost Claims

During the hearing, the Board sua sponte questioned whether the Board possessed jurisdiction over the direct cost claims because the claims were only mentioned in the document that became the claim upon which the contracting officer issued a decision. Having looked at the correspondence between the parties and considered the hearing

testimony, we are satisfied that the requests for payment ripened into claims that were presented to the contracting officer for decision. Accordingly, the Board has jurisdiction to decide the claims.

A proper claim must contain “a clear and unequivocal statement that gives the contracting officer adequate notice of the basis for and amount of the claim.” *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987). A request for payment “may be converted to a claim under the [Contract Disputes Act, 41 U.S.C. §§ 7101–7109 (2018),] by complying with the submission and certification requirements, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.” FAR 33.201. All of the correspondence between the parties should be reviewed to determine if sufficient information has been supplied to the contracting officer, and the Board should apply common sense in the evaluation. *Kevin J. LeMay v. General Services Administration*, GSBCA 16093, 03-2 BCA ¶ 32,345, at 160,041; *Valco Construction Co.*, ASBCA 47909, et al., 96-2 BCA ¶ 28,344, at 141,552.

The contracting officer knew the amounts sought and the bases for each of the claims. The contracting officer reviewed each of these claims in rendering his decision. The total amount of the claims is below the certification threshold. 41 U.S.C. § 7103(b)(1). Based upon the totality of the circumstances, we find that French Construction’s REAs ripened into claims and are properly before the Board for decision. *See Zafer Construction Co. v. United States*, No. 2021-1547, 2022 WL 2793596, at \*3-\*4 (Fed. Cir. July 18, 2022); *ePlus Technology, Inc. v. Federal Communications Commission*, CBCA 2573, 12-2 BCA ¶ 35,114, at 172,434.

#### B. French Construction Has Proven Entitlement to Claims 3, 4, and 5

Claim 1. French Construction did not prove entitlement to its costs resulting from the direction from the COTR to change the form for the elevator because it did not provide any explanation as to why the costs sought were incurred. “Ultimately, as the party seeking additional monies above the amount of the contract, the contractor bears the burden of proving that it was required to perform work outside the scope of the contract, as well as the costs associated with that work.” *Douglas P. Fleming v. Department of Veterans Affairs*, CBCA 3655, 16-1 BCA ¶ 36,509, at 177,876 (citing *Willems Industries, Inc. v. United States*, 295 F.2d 822, 831 (Ct. Cl. 1961)).

Claim 2. French Construction did not prove entitlement to its costs concerning the changed masonry anchors because the statement of the subcontractor in support of the claim indicates that the problem with the specification could have been identified prior to bidding. French Construction bears the risk of a patent specification error. *White v. Edsall*

*Construction Co.*, 296 F.3d 1081, 1084-85 (citing *Blount Brothers Construction Co. v. United States*, 346 F.2d 962, 972-73 (Ct. Cl. 1965)).

Claim 3. French Construction proved entitlement to its costs of rework following the design change to address the steam line. The material and labor costs that it incurred resulted from this change.

Claim 4. French Construction proved entitlement to its costs following the change to the location of the automatic door openers. The material and labor costs that it incurred resulted from this change.

Claim 5. French Construction may recover the additional costs that it incurred when it acted reasonably to comply with the changes directed in Bulletin 13. While VA can set not-to-exceed caps, particularly as it seeks to contain costs, the extra costs here could not have been avoided, and the record reveals no valid reason for denying payment.

Claim 6. French Construction is not entitled to recover its costs to supply the Acrovyn products. VA wanted the handrails and the wall protection materials in the corridor to match those in the connected buildings. VA properly rejected the handrails and other wall protection materials that did not meet the specifications set forth in the drawings. “The Government may reject an item where salient characteristics are not met, even if only one source meets all the characteristics.” *J.K. Richardson Co.*, ASBCA 46309, 94-2 BCA ¶ 26,900, at 133,951.

### Decision

French Construction’s appeal is **GRANTED IN PART**. French Construction is entitled to receive \$11,483, plus interest on that amount calculated from March 27, 2019, pursuant to 41 U.S.C. § 7109(a)(1).

*Marian E. Sullivan*

MARIAN E. SULLIVAN

Board Judge

We concur:

*Erica S. Beardsley*

ERICA S. BEARDSLEY

Board Judge

*Joseph A. Vergilio*

JOSEPH A. VERGILIO

Board Judge