UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: August 11, 2023

CBCA 6743

COMPENDIUM INTERNATIONAL, INC.,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Mark D. Johnson of Lanak & Hanna, P.C., Orange, CA, counsel for Appellant.

Ashley Akers, Jimmy S. McBirney, and Mark E. Mandel, Office of the General Counsel, Department of Justice, Washington, DC, counsel for Respondent.

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

VERGILIO, Board Judge.

Compendium International, Inc. (contractor) posits itself as a victim in performing a task order under a contract with the Department of Justice, Federal Bureau of Investigation (agency). It seeks costs it says it incurred that exceeded the firm, fixed-price task order. In its complaint, the contractor seeks $1,212,052.49, described as comprised of $1,072,750.37 in unresolved extra work, $128,802.12 for an extended duration of at least 144 calendar days, and $10,500 in legal and consulting fees. The contractor specifies that these amounts are due because of design errors, differing site conditions, mismanagement of the project by the agency, resequencing of the base contract work, work added to the scope of the contract, and resulting delays. The contractor maintains that, with the contracting officer's authorization,

it performed work in excess of that specified in the task order with the understanding that it would be paid for its expenses plus profit. The record reveals a different scenario.

The contractor performed beyond the requirements of the task order. The contractor intentionally demolished a building called the "restroom building," even though (1) the agency had not exercised an option for its demolition or the construction of a new building; (2) the contracting officer had not provided approval for the demolition; (3) the contractor was aware that the agency lacked funding for a replacement building. The contractor also performed other work that was outside of the scope of the task order, again while aware that there was no written approval from the contracting officer and that funding was lacking. For some actions, the contractor simply began performance without advance notice to the agency. For other items, agency personnel were aware of the excess actions and would agree to building plans. The contractor, however, never made a written request for a change order or sought, in writing, additional money for the extra work prior to seeking final payment and providing a release.

The Board discounts the testimony of the contractor's president, having found his testimony not to be credible. His testimony provides various, often contradictory or inconsistent, versions of events, at odds with the record as a whole. Further, views of the contractor's expert that go beyond the area of his designated expertise, or which address legal conclusions, are of no factual value.

The contractor seeks relief too late. It not only signed an enforceable release, but it also did not attempt to provide notice under the Differing Site Conditions and Changes clauses until after it had received final payment. Moreover, the contractor was aware throughout contract performance that the agency lacked funding to authorize the non-task order work the contractor began and completed and that the work was outside the scope of the task order. Payment on a quantum meruit basis, as urged in the alternative by the contractor here, is not appropriate. Such relief would circumvent the terms and conditions of the contract requiring a task order, and the terms of the task order establishing a fixed-price with express notice requirements for altering the terms. Also, such relief would be inconsistent with the terms of the release and the language that expressly makes the contractor liable for damaging government property. The Board denies the appeal.

Findings of Fact

The Contract and Task Order

The agency awarded the contractor a contract for general renovations at agency facilities. Styled a firm, fixed-price contract, the agency could issue specific, fixed-price task orders thereunder. The contract specifies: "Delivery or performance shall be made only as

authorized by orders issued in accordance with the Ordering Clause." This contract notes that final payment will normally be made on the sixtieth day after final acceptance or receipt of a proper invoice, whichever is later. The contract also includes an Indemnification clause, that states in part:

> (1) The Contractor assumes full responsibility for and shall indemnify the Government against any and all losses or damage of whatsoever kind and nature to any and all Government property, including any equipment, supplies, accessories, or parts furnished, while in his custody and care for storage, repairs, or services to be performed under the terms of this contract, resulting in whole or in part from the negligent acts or omissions of the Contractor, any subcontractor, or any employee, agent or representative of the Contractor or subcontractor.
>
> (2) If due to the fault, negligent acts (whether of commission or omission) and/or dishonesty of the Contractor or its employees, any Government-owned or controlled property is lost or damaged as a result of the Contractor's performance of this contract, the Contractor shall be responsible to the Government for such loss or damage, and the Government, at its option, may in lieu of payment thereof, require the Contractor to replace at his own expense, all property lost or damaged.

The Differing Site Conditions (48 CFR 52.236-2 (APR 1984) (2021)) and the Changes clauses (48 CFR 52.243-4 (JUN 2007) (2021)) each specify that no equitable adjustment shall be allowed under the clause if asserted after final payment under this contract. The Changes clause also provides:

> Any other written or oral order [i.e., other than a specific written change order] (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause; provided, that the Contractor gives the Contracting Officer written notice stating—(1) the date, circumstances, and source of the order and (2) that the Contractor regards the order as a change order.

The clause explains further that "[e]xcept as provided in this clause, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment."

On September 27, 2016, the agency placed a task order, as reflected in a bilaterally signed, firm, fixed-price negotiated agreement that incorporated the terms of the contract

between the parties. The agency ordered a twenty-five-yard-range shade canopy system (the base item) and two options—one involving asbestos abatement activities and the other involving a fifty-yard- range shade canopy system. Each was at a fixed price, requiring the contractor to design and build particular items and take other necessary actions. The agency did not accept two options offered by the contractor–one to replace and the other to remodel–the restroom building. There was, therefore, no task order to replace or remodel the restroom building. During performance, on February 2, 2017, a bilateral modification to the task order, under the Changes clause, added work involving the twenty-five-yard range target system infrastructure and its replacement. The modification increased the contract price but added zero days. Hereafter, "task order" refers to the modified order.

Performance

After award of the task order, the contractor sought multiple times to expand the scope of work to include the replacement of the restroom building. The contracting officer declined the requests, noting a lack of funding that was particularly acute during a continuing resolution period. In performing the canopy work under the task order, the contractor opted to attempt to tie in the new canopy to the restroom building. However, the contractor chose to remove the roof of the restroom building, reflecting more than just a tie in.

The contractor anticipated replacing the restroom building. On Sunday, February 12, 2017, the contractor's president emailed an employee seeking photographs or other support to include in a request for information (RFI) connected to replacing the building. At that time, such work remained outside of the task order. Email communications on February 13, 2017, indicate that the contracting officer and contractor spoke about a potential demolition of the restroom building, perhaps justified on a life safety issue basis, but the agency needed to know potential costs and to obtain funding. The contractor submitted an RFI to the agency, dated February 13, 2017, seeking an expansion of the task order to renovate or demolish and replace the restroom building. It provided price ranges. In an apparent attempt to justify the replacement of the restroom building, the contractor included in the RFI a list of alleged deficiencies in the building that the contractor viewed to be health and safety issues, which it used in support of its request. The request specified that a response was required by February14, 2017.

By the morning of February 14, 2017, the contractor had demolished and removed the remains of the restroom building. The task order was never modified to include the demolition or replacement of the building. Although the contracting officer stated that it was his understanding that the building collapsed while the contractor was performing work, that view is not supported in the record. That understanding was based on information the contracting officer principally learned from the contractor. Also lacking credible support are the various scenarios proffered by the contractor that the building required immediate

demolition. Photographs do not support the severity of the condition claimed by the contractor or that demolition had to occur prior to official approval. The record demonstrates that the contractor intentionally demolished the building when such action was not required or authorized. The contracting officer did not order the demolition. At best, any acquiescence by the contracting officer was based on misrepresentations by the contractor about the building's condition and the situation. The contracting officer consistently informed the contractor, before and after the demolition, that funding was lacking to obtain a replacement building. Some agency personnel were of the view, as documented in contemporaneous emails, that the contractor took responsibility for the demolition and had agreed to replace the building at no cost to the agency.

On February 27, 2017, the contractor submitted a revised RFI, again seeking to expand the scope of the task order. The revision provides an update with a version of what occurred:

> Post this RFI submission, the building was being prepared for new framing at the window openings. During this process, portions of the structural CMU [concrete masonry unit, i.e., cinder block] walls [lintels] collapsed at the east elevation causing potential safety incident for the contractor crew. The contractor removed portions of the dangerous areas of the wall but had to demolish all remaining exterior walls due to this issue.

The government form, on which the RFI was submitted, warns:

> The RFI system is intended to provide an efficient mechanism for responding to contractor's request for information ONLY. This system DOES NOT authorize the contractor to proceed with work—to do so, the contractor proceeds at his own risk. If the contractor considers the RFI response a changed condition, written notice to the Contracting Officer is required within 20 calendar days.

The record does not adequately confirm the collapse of the lintel or the contractor's various versions of what happened regarding the demolition. The contractor did not submit written notice to the contracting officer within the time frame or before obtaining final payment and providing a release. Because the Board deems the testimony of the contractor's president and his various accounts of what happened during and surrounding performance not to be credible, the Board discounts the testimony. At least one contemporaneous email from the contractor to a subcontractor indicates that the contractor would be liable for the costs of the new building. Various agency personnel voiced similar understandings based upon interactions with the contractor's president.

In summary, the contractor intentionally demolished the restroom building, designed a new, replacement building at a different location, obtained agency approval of the design, and constructed the replacement. The agency employees who were involved in approving the design for the replacement building did so with the understanding that the contractor was replacing the restroom building "at no cost to the government," which would be consistent with an attempt by the contractor to avoid or minimize its liability under the contract's Indemnification clause after improperly demolishing the restroom building. The contractor similarly performed concrete work, installed a new septic system in a different location from the existing, installed a retaining wall, and did work on a parking area with the knowledge of agency personnel, who again had the understanding that the contractor was providing the work in an effort to minimize its liability under the Indemnification clause. All work was performed, but without a change order or a written request for a change order to the contracting officer, and without pricing reviewed or approved by the agency. The contracting officer did not authorize the demolition of the building. The work for which the contractor seeks payment either was part of the task order (such that full payment has occurred) or was not part of the scope of work of the task order and not authorized by the contracting officer. In particular, the parties stipulate that "[n]one of the new building concrete flatwork, septic system, retaining wall, or concrete work performed . . . . was part of the specified scope of work under the [c]ontract." Of note, the contractor initiated actions, opting, for example, to remove the roof of the building and work on lintels, although not specifically part of the task order and to tear up more concrete and excavate areas beyond what was part of the task order's required work.

The task order required the contractor to replace the twenty-five-yard range target system and its infrastructure for a fixed price. The contractor provided a target system more costly than envisioned under the task order. The agency was aware of the proposed and actual upgrades the contractor installed; however, the contractor did not seek a revision to the task order or indicate that such would only be provided at an additional cost to the agency. The contractor did not seek a change order from the contractor prior to performance or at any time prior to seeking and obtaining final payment and signing a release.

Final Payment and the Release

After work was completed, the contractor submitted a request for payment dated June 2, 2017. This indicates an amount as current payment due, and a balance of zero dollars to finish. A final walk-through occurred on September 5, 2017. On September 6, 2017, the contractor sought confirmation that final payment could be submitted. By letter dated September 7, 2017, to the contracting officer—captioned by the contractor with a reference to the task order and the words "Final Release"—the contractor stated that all project installation and functions tested properly and to the satisfaction of the client and resulted in final construction completion approval of the project. At the time of the release, the

contractor had provided the contracting officer with no written change order or differing site condition request and no written claim. The release makes no reference to any matter remaining under the task order or any outstanding issues to be resolved. On September 17, 2017, the contractor emailed the contracting officer a final payment request. On September 19, 2017, the agency processed the payment.

The Certified Claim

On November 26, 2019, the contractor submitted a certified claim accompanying a request for equitable adjustment seeking $1,212,052.49 and a time extension of 144 calendar days. Thereafter, based upon a contracting officer's deemed denial of the claim, the contractor filed this appeal. The transcript of a hearing, with testimony by the contractor's president and its expert, supplements the appeal file. They form the basis for the Board's factual findings. Cross-motions for summary judgment were not resolved prior to this opinion, as material factual disputes existed.

Discussion

Final Payment and Release

The Board makes a de novo determination, considering the record as a whole. The agency placed a task order under a contract with the contractor. For a fixed price, the contractor agreed to perform specific work. The agency declined options offered by the contractor to replace or renovate the building. By a bilateral modification to the task order, work was added at a fixed price for the contractor to provide a target system in accordance with the contractor's proposal. The contracting officer issued no other written modifications to the contract prior to receipt of the contractor's request for final payment and release and final payment. Under the fixed-price task order, with the final payment and acknowledgment of release, the agency's obligations to pay the contractor additional money ceased. Requests for payment, based on alleged changes and differing site conditions, post-dating the final payment came too late.

Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1391-92 (Fed. Cir. 1987), prescribes the required analysis:

> In order for "final payment" to have occurred so as to bar subsequently submitted claims, it must be determined that no "claim" had been outstanding and excepted in the release accompanying the alleged final payment. The pertinent issue here is whether [the contractor] submitted and excepted from the . . . release any legally cognizable claims prior to the final payment . . . .

> Only when that question is answered can it be determined whether that payment was the final payment with respect to those claims.

The analysis under this standard is straightforward under the facts. The contractor submitted no claim to the contracting officer before seeking final payment or before submitting the release. The release bars the claims. Also, the contractor's failure to submit notice in accordance with the Differing Site Conditions and Changes clauses means that relief is not available under those clauses.

The above paragraphs summarize the legal rationale to deny the contractor payment here. Such is consistent with the agency's motion, which the contractor has not sufficiently rebutted, despite its assertions that it would demonstrate that it never sought final payment and did not submit a release. The contractor always believed that it was entitled to and would receive payment for the work it performed in excess of the specific requirements of the contract.

The record establishes that the contractor knowingly and without proper authorization destroyed the restroom building. The contractor was obligated to compensate the agency under the Indemnifications clause. In an effort to indemnify the agency, the contractor built a replacement building and performed work outside of the task order. The contractor's claim for additional payment and time, which it made after final payment and submission of a release (without any reservations), came too late for relief.

The contractor contends, via its expert, that the documents provided by the agency

> in its Request for Proposal were faulty, incomplete and inadequate. The bid documents did not adequately address the existing conditions at the 25 yard range jobsite or include the necessary components to meet the requirements of the [agency]'s range management. There was no HAZMAT report, no as-built drawings, no structural analysis of the existing restroom building and no identification of underground utilities. The [agency] solicitation was deficient, it did not provide the Design-Builder with sufficient information to complete its work.

The execution of the final payment release renders this assertion irrelevant. Had the contractor wanted to pursue a defective specifications claim, it should have noted so in a written request to the contracting officer before final payment and reserved that claim in its release. Moreover, even without regard to the release, this contention overlooks multiple facts. Assuming the assertions to be true, the contractor provided a design-build proposal and received a task order after a site visit, knowing that it lacked a HAZMAT report, as-built drawings, structural analysis, and identification of underground utilities. The contractor

chose its method of performance and acted contrary to limitations of the task order. Performing the task order did not require the referenced information; it was the contractor's intentional demolition of the restroom building, and other actions, that necessitated extra work. Moreover, the record does not demonstrate that the construction of the restroom building structure, the condition of the jobsite, or the location and condition of underground utilities and items were unexpected.

Quantum Meruit

Regarding the notion of payment for unjust enrichment, the Board does not reach beyond the valid task order, and its explicit terms and conditions for changes, to create a mechanism for payment; all of the work related to the work performed under the task order. Payment on the requested quantum meruit basis is not appropriate. *Seh Ahn Lee v. United States*, 895 F.3d 1363 (Fed. Cir. 2018); *John Douglas Burke v. Department of Health & Human Services*, CBCA 7492, 23-1 BCA ¶ 38,304.

This opinion should serve to disabuse the contractor and its expert, as well as the contracting officer during performance, that a contractor will be paid for any betterment, in excess of contract requirements, provided to the Government. The terms and conditions of the contract dictate the payment obligations and how changes are to occur. Here, the contractor was aware throughout performance that the agency lacked funding to procure items in excess of those described in the contract, as modified. Other clauses specified time frames within which relief was to be sought. The contractor failed to abide by the clauses.

Other arguments by the contractor in support of its position need not be addressed, as they are moot given the resolution.

Decision

The Board **DENIES** the appeal.

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

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