UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: September 24, 2024

CBCA 6032

UNITED FACILITY SERVICES CORPORATION
dba EASTCO BUILDING SERVICES,

Appellant,

v.

DEPARTMENT OF THE TREASURY,

Respondent.

William Weisberg of Law Offices of William Weisberg PLLC, McLean, VA, counsel for Appellant.

Jonathan D. Tepper, Holly H. Styles, Justin M. Wakefield, and Richard L. Hatfield, Office of Chief Counsel, Internal Revenue Service, Department of the Treasury, Washington, DC, counsel for Respondent.

Before Board Judges **SHERIDAN**, **SULLIVAN**, and **O'ROURKE**.

O'ROURKE, Board Judge.

This case involves allegations that the equipment inventory list contained in a facilities maintenance contract changed significantly during the nearly six-year period of performance. Appellant, United Facility Services Corporation doing business as EastCo Building Services (EastCo), contends that the agency, the Internal Revenue Service (IRS), replaced multiple legacy systems with modern systems and installed new equipment throughout the facilities yet refused to approve any updates to the equipment inventory list. This refusal, appellant argues, forced it to perform additional work without compensation.

Appellant submitted a claim to the contracting officer for the extra work in the amount of $4.6 million, which was deemed denied, and then appealed to the Board. During a hearing on the merits, the agency argued that appellant was not entitled to additional compensation because the equipment inventory and maintenance hours actually decreased over the life of the contract. After a detailed review of the appeal file, the hearing transcript, and arguments by counsel, we deny the appeal based on insufficient evidence to support the claim.

Findings of Fact

Contract Solicitation and Award

On August 9, 2010, the IRS solicited offers from small businesses to perform facilities operations, maintenance, repairs, and construction services at the IRS Service Center campus in Fresno, California. Appeal File, Exhibit 1 at 1.[1] The period of performance consisted of a two-month phase-in term followed by a one-year base period and four option years. *Id.* at 20. The agency structured the contract as a firm-fixed-price (FFP) service contract with an indefinite delivery, indefinite quantity (IDIQ) component, against which the Government could issue task orders for work that met specified requirements under paragraph 2.3 of the performance work statement (PWS). *Id.* at 62–64.

The PWS divided the work into two categories: basic services and additional services. Exhibit 1 at 61–64. The basic services category included all services necessary to operate the facility, respond to service calls and repair requests, perform preventive maintenance (PM), conduct testing, and certify the equipment. Basic services also included project planning, proposal development activities, and cost estimating for all IDIQ work requested by the agency. Additional services included service call repairs, new project work exceeding $3000,[2] and any work over $500 that was required to correct deficiencies discovered during the phase-in period.

Paragraph 3.17 of the PWS identified and explained the function of the Computerized Maintenance Management Systems (CMMS) as systems for tracking and documenting all contract activities and deliverables related to the operation and maintenance of the facilities. Exhibit 1 at 108. The contractor was responsible for updating the CMMS and ensuring its accuracy. *Id.* at 78. Relevant to this dispute was the requirement to update the system when new equipment was installed or when equipment was upgraded or removed from a facility. Technical exhibit 5 (TE-5), also referred to as the equipment inventory, was generated within

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

[2] Work that exceeded that threshold cost was authorized by the contracting officer in the form of an FFP or time and materials (T&M) task order. Exhibit 1 at 62.

the CMMS and represented the site-specific list of equipment requiring preventive maintenance. *Id.* at 79–80. The TE-5 contained 1559 line items of equipment. Exhibit 21. While most of those line items described an individual piece of equipment, others described dozens or even hundreds of pieces of equipment on a single line. Each line item on the TE-5 corresponded to an asset number and letter that identified the type of equipment as well as the required preventive maintenance cycle. Because the TE-5 was a printout report from the CMMS, changes in the CMMS affected the content of the TE-5. *See* Transcript, Vol. 1 at 291.

Several provisions of the PWS indicated that the IRS might upgrade equipment during performance of the contract. For example, paragraph 3.4.9 discussed potential upgrades to the building automation system (BAS) control system software. Exhibit 1 at 85. Paragraph 4.1.1(b) indicated that the government might decide to upgrade or replace an entire system even when "the contractor proposes to make a repair" to that system. *Id.* at 109. The contractor was also required to provide technical assistance in the form of advice or consultation for "building or system upgrades." *Id.* at 77–78. Most notably, paragraph 3.4.3 of the PWS directed the contractor to "maintain and update the building equipment data in the CMMS" within seven calendar days after the installation or removal of any equipment. *Id.* at 82. Before making those changes, the contractor had to notify the Government and obtain the Government's concurrence. *Id.* This provision also stated:

> At the beginning of each new option period, the official TE-5 shall be adjusted as required to ensure accuracy and to affect the basis for an equitable adjustment based on a revised and up-to[-]date TE-5 equipment inventory. Any year during the contract that the PM equipment inventory increases or decreases with more than a 5% deviation from the original TE-5 inventory (based on GSA man-hour standards or RS Mean's man-hours), an equitable adjustment shall be effected during the beginning of the next option period. If inventory additions do not result in the 5% threshold being surpassed, then the Contractor shall maintain the new equipment at no additional cost to the government. Likewise, if deletions in the equipment inventory do not result in the 5% threshold being surpassed, the Government will not receive a reduction in contract cost.

Id. at 82–83.

Paragraph 3.4.2(A) of the PWS stated, "During the Phase-in period, the Contractor shall review the existing schedule and equipment inventory loaded in the CMMS. The Contractor shall ensure that the CMMS . . . equipment inventory . . . accurately reflects all equipment identified in the contract technical exhibits and shall make changes in the CMMS . . . as necessary." *Id.* at 80. This represented the first opportunity that the new contractor

would have to ensure it was working with an accurate TE-5. Once a baseline was established for the equipment inventory, the contractor was required to maintain the equipment in accordance with the terms of the contract. *Id.* at 80.

Technical exhibit 4 (TE-4) of the solicitation, entitled "General Services Administration (GSA) [Preventive Maintenance] Guide Cards,"[3] was a 363-page document that described the maintenance steps for every piece of equipment listed on the TE-5.[4] Exhibit 20. In addition to relying on the preventive maintenance tasks provided by the guide cards, the contractor used the GSA Maintenance Time Standards (also referred to as "GSA man-hour standards") to allocate the number of hours required to perform those tasks. The IRS used these time standards to determine whether changes in the equipment inventory warranted an equitable adjustment. Exhibit 1 at 82–83. The solicitation did not include the GSA Maintenance Time Standards, which lists the budgetary hours associated with all preventive maintenance tasks.[5] Even if the IRS had included it, a banner on almost every page of the document cautions that the hours listed "are not the actual PM times and should not be used as such." Exhibit 98 at 3; *see also* Transcript, Vol. 1 at 68–69 (EastCo's chief executive officer (CEO), Mr. Brown, testifying that private contractors can do maintenance in less time than the budgetary hours suggest).

The agency scheduled a site visit for interested offerors. Exhibit 1 at 20, 126. After the site visit, the IRS issued an amendment to the solicitation identifying the attendees. EastCo did not have any employees listed on the attendance sheet. Exhibit 9. However, several companies which EastCo planned to use as subcontractors attended. *Id.* at 2–3 (identifying attendees from Servi-Tech Controls and Trane); *see also* Exhibit 14 at 3

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[3] Although the solicitation referred to TE-4 as a GSA document, the TE-4 attached to the solicitation (Exhibit 20) was entitled "Internal Revenue Service Public Buildings Preventative Maintenance Guides." It appears that both IRS and GSA had their own guide cards. A former IRS program analyst clarified during the hearing that GSA has guide cards, but for "[c]ertain things that IRS wanted to do that were above-standard for GSA, IRS would produce its own guide cards. That is why IRS had to create the TE-4—so it could capture the agency requirements for maintenance in its own guide cards. Transcript, Vol. 1 at 326.

[4] The TE-5 identified which guide card to use for a particular item. The contractor would then refer to the TE-4 to identify the required preventive maintenance steps for that item. Transcript, Vol. 1 at 119-20.

[5] The copy of the GSA Maintenance Time Standards that was submitted as part of the appeal file is marked in red capital letters on the first page: "internal document" that "shall not be in the possession of any . . . contractor." Exhibit 98 at 1.

(identifying Servi-Tech Controls, Inc. and Trane Company as "principal subcontractors"). EastCo occasionally used subcontractors to attend site visits, "especially on the West Coast." Transcript, Vol. 1 at 178–79.

EastCo, a small business based in New York, submitted an offer in response to the solicitation. The offer included a detailed staffing plan discussing which items of work would be performed by EastCo personnel and which items would be subcontracted. *See* Exhibit 14 at 1–12. According to the staffing plan, EastCo intended to subcontract every subcategory of the contract's preventive maintenance tasks—either completely or as needed. *Id.* at 11. For example, EastCo identified Trane Company as the subcontractor that would perform all preventive maintenance, repairs, and overhaul of the chillers when required by the contract. *Id.* at 2–3. The only exception to this plan was that EastCo would maintain the CMMS equipment inventory.

On December 7, 2010, the IRS awarded EastCo the contract. EastCo's phase-in period ran from March 9 to May 8, 2011. The base year of the contract began on May 9, 2011, and each option year thereafter began on the same date of the subsequent year, with the total period of performance ending on May 8, 2016. Exhibit 13 at 1, 39.

<u>Contract Performance: System Upgrades, New Equipment, and the TE-5</u>

The contracting officer (CO) modified the contract at various points during performance in order to add funding, implement prevailing wage rates, exercise options, extend the contract, and complete various administrative actions.[6] *See generally* Exhibits 30–35, 38, 40–42, 44–51, 53–59, 62, 67, 69–70, 72–76, 80–81. During the phase-in period, EastCo provided the IRS with an updated TE-5 that included some additions and deletions based on EastCo's observation of the facility. Exhibit 95; *see also* Transcript, Vol. 1 at 126-30. The IRS accepted the updated TE-5 and incorporated it into the contract through modification 0002, which stated that it was "issued to increase funding for Fixed Price Services for the Base Year." Exhibit 30 at 2. The total amount of the increase for *all* fixed price services was $305,040. *Id.* For preventive maintenance specifically, this modification contained two contract line item numbers (CLIN) for increasing funding: CLIN 1001H, "Preventive Maintenance (PWS 3.4) Fixed," totaling $75,339 for three months of service, and CLIN 6001, totaling $7032 for two months to account for an increase in the prevailing wage rates. CLIN 6001 also stated, "The TE-5 Equipment inventory has been updated." Exhibit 30 at 2–3. EastCo disagreed that it was compensated for changes to the TE-5

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[6] Thirty-one of the thirty-seven modifications in the appeal file were not signed by the CO or by EastCo. Despite the lack of signatures, neither party has disputed the validity of these modifications.

identified during the phase-in period but offered no evidence other than a verbal assertion to that effect. Transcript, Vol. 1 at 128–30.

During performance of the second option year, the parties signed a bilateral modification (modification 0014)[7] that transferred responsibility for all new equipment installed under a utility energy services contract (UESC) to EastCo. Exhibit 53 at 2 ¶ A. Modification 0014 expressly stated:

> In accordance with contract clause 3.4.3 Changes in Equipment Inventory and 3.4.4 Preventive Maintenance, [EastCo] is responsible for maintaining and operating equipment at the Fresno Service Center. Effective immediately, [EastCo] is responsible for the UESC project associated equipment.
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> *At the beginning of Option Year 3, a comprehensive review will be done on the TE-5 and adjustments will be made as needed.*

Id. ¶ B (emphasis added).

The UESC was a multi-million dollar project which involved a different contracting officer and a different contractor. Through the UESC project, the IRS Fresno office replaced older, less efficient equipment, such as chillers, cooling towers, pumps, air handlers, bathroom equipment, and lighting. Transcript, Vol. 2 at 9–13. The BAS was also replaced. Transcript, Vol. 1 at 328–29; Exhibit 68-A at 12–13. The UESC replacement took approximately one year to complete. Transcript, Vol. 2 at 10–11.

Four binders containing the "ECM As Built information associated with the UESC project" were turned over to EastCo's project manager on December 4, 2013. Exhibit 53 at 2 ¶ A. The UESC contractor was to provide training to personnel who would be conducting maintenance on the equipment. Transcript, Vol. 2 at 14. The record shows that EastCo's training was scheduled for October 2013, but there is no information about whether the training actually took place. Exhibit 114. Paragraph 3.4.9 of the PWS precluded EastCo from claiming additional payment for maintaining the new BAS control system as long as the IRS provided EastCo with training on the new system. Exhibit 1 at 85. At the hearing, Mr. Brown, EastCo's CEO, testified that the cost to maintain the new BAS was $585 per week, as opposed to $58 a month under the old system, but did not elaborate:

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[7] Modification 0014 was unsigned, but the effective date of the modification was December 19, 2013. Exhibit 53 at 1.

> [W]e ran it for almost three years that way without getting paid. . . . When we put in the request to be compensated for this, they told us it was a software update. . . . But then going back to the contract . . . that absolutely didn't apply. [The IRS] didn't change the software, [it] removed the whole unit. You can't go back, it had nothing to do with the old unit. It was gone, it was taken out and there was nothing left.

Transcript, Vol. 1 at 81–82.

It is unclear from the record whether the UESC equipment resulted in an increase that warranted additional compensation. Modification 0001 of option year three, dated July 1, 2014, adds funding for five months of preventive maintenance in the amount of $3516 per month, or $17,580 total, but no reference was made to the UESC equipment. The description of supplies and services stated, "Adjustment to Preventive Maintenance per Delivery Order 0001, Modification 0002. This funding was accidentally left out." Exhibit 56 at 2. However, the referenced delivery order and modification were related to the base year of the contract, which was *prior* to the transfer of responsibility of the UESC equipment from the IRS to EastCo. Modification 0002 of option year three, dated October 9, 2014, added funding in the amount of $72,313.32, for three months of preventive maintenance, as well as funding to the other categories of service. Although it did not specifically reference the UESC equipment, the modification provided increased funding for all categories of basic services in option year three. Exhibit 59 at 1-4.

By the fourth option year, the IRS upgraded the graphic database interface (GDI) used to input information into the CMMS. The upgraded system allowed repair and preventive maintenance tickets to be rejected by the Government if an inspection determined that they were not adequately performed. *See* Transcript, Vol. 1 at 284–86; *see also* Exhibit 66 (discussing the GDI upgrade). Because service and preventive maintenance tickets were assigned to, and based on, the asset number in the CMMS, a single ticket might include dozens or hundreds of pieces of equipment if those pieces of equipment were "bundled" in the CMMS or TE-5. Under this configuration, if the IRS inspection required rework on one unit in a bundled ticket, the entire ticket would have to be rejected. Transcript, Vol. 1 at 286. As a result, the IRS directed EastCo to "unbundle" all of the inventory—to change the data in the CMMS so that each row referred only to a single piece of equipment. *Id.*; *see* Exhibits 65–66.

After this administrative task was accomplished, it appeared as if hundreds of new equipment items had been added to the TE-5. The IRS stated that only the format had changed. EastCo disagreed and accused the IRS of using the new format as a way to force EastCo to absorb more of the repair costs. EastCo explained that for years it had applied the $3000 repair threshold to an entire system. By breaking it down in this manner, EastCo

complained that the IRS shifted responsibility for many repairs to EastCo in violation of the contract's terms. "When you unbundled your TE-5 . . . you exposed my company to every single individual piece of equipment." Transcript, Vol. 1 at 148. EastCo accused the IRS of "chang[ing] the contract mid-contract" without a change order, essentially giving the Government a "free insurance policy" on every piece of equipment, which was not what EastCo agreed to when the contract was executed. *Id.* at 46, 66, 148–49. Whether bundled or unbundled on the TE-5, the IRS's view was "a chiller is a chiller." *Id.* at 80–81. This particular issue, however, was not part of EastCo's claim to the contracting officer. Exhibit 83.

<u>EastCo's Increased Costs of Performance</u>

As existing equipment was upgraded or new equipment was installed in an IRS building, EastCo claimed that its performance costs increased. Using the example of the chillers, the IRS viewed the installation of the new chillers as merely swapping out old equipment with new equipment and expected EastCo to carry on with inspections, preventive maintenance, and repairs as it had prior to their installation. EastCo's annual preventive maintenance cost on the old chillers was about $2600. The annual cost on the new chillers was $3050. Exhibit 115. EastCo understood it was required to perform annual preventive maintenance on the new chillers and made no issue of the $450 annual increase. However, EastCo did not include in its original proposal any costs related to first-year maintenance on brand-new chillers, since EastCo bid on a contract with thirty-year-old chillers. Exhibits 115, 116 at 1.

An email from the contracting officer's representative (COR) to EastCo stated: "Per the direction of my CO . . . I am giving EastCo written notification for service to have the [preventive maintenance] (R-13) base line test [for the chillers] performed as soon as possible by no later than March 21, 2014. With the expectancy that EastCo will be paying the entire bill for services rendered." Exhibit 116 at 9. EastCo pushed back, responding that R-13 (also referred to as "Eddy current testing") was performed every three years on the chillers. EastCo performed the R-13 testing on the old chillers in 2012, making the next one due in 2015. *Id.* at 7. The IRS expected EastCo to perform the Eddy current test on the new chillers in 2014, one year early. EastCo agreed to make that adjustment—not because the contract required it but because it was willing to work with the agency. But EastCo stated that it could not perform the first year maintenance without additional funding. Exhibit 115. EastCo did not include those costs in its preventive maintenance budget when it bid on the contract. The additional maintenance was costly and usually involved proprietary systems ("Th[e] quote [from Carrier] came in at $19,450."). *Id.* Making the wrong decision on who provided maintenance risked voiding the manufacturer's warranty. Transcript, Vol. 1 at 186.

Other smaller items also became more costly when they were replaced or upgraded. For example, the old bathroom sinks in the facilities consisted of traditional metal faucets that were turned on and off manually. The new bathroom sinks, however, contained automation technology. Mr. Brown, EastCo's CEO, explained the issue at the hearing:

> [S]o if you could imagine a regular faucet that costs $19, they [then] put [in] electronic faucets . . . battery-operated soap dispensers [and] battery-operated paper-towel dispensers. Everything was automated. They didn't want to give me a change on that. Everyday the[re] would be a solenoid breaking, the cleaning company would knock something off, people would go in and break the faucets these [new] faucets were $300 to $500, not $19. Not their problem [the IRS] said . . . .

Transcript, Vol. 1 at 64–65. Mr. Brown added that by unbundling these sinks, ten broken faucets at $300 a piece would no longer exceed the $3000 threshold since the IRS would apply that threshold to each faucet. *Id*. Although this issue was addressed several times during the hearing, it was not included in EastCo's claim to the contracting officer.

The record contains multiple examples of the parties' attempts to keep up with the equipment changes and their impact on increased costs. Sometimes, the IRS reached out to EastCo to request an updated copy of the TE-5. Exhibits 66, 117 at 1, 119 at 2. Other times, EastCo initiated a request for approving an updated TE-5. Exhibit 65. In some instances, EastCo's updates were accepted. For example, in 2012, the IRS accepted many requested additions that EastCo had placed on the TE-5. *See generally* Exhibit 43-A at 54–69 (accepting additions with "ok"). On other occasions, the IRS rejected them. *E.g.*, Exhibits 43-A at 54–69 (rejecting many additions, mostly because they were added on previous updates); 65 (updated TE-5 denied because of "bundled" items); 120 at 1 (rejecting TE-5 because EastCo did not unbundle items). Despite these efforts, EastCo insisted that the IRS failed to approve continued updates to the TE-5, depriving EastCo of fair compensation for increased performance requirements. Mr. Brown testified that the IRS "was well aware of all the equipment coming into the facility . . . [and] of the changes being made to the TE-5 . . . but [the IRS] wouldn't supply the TE-5."[8] Transcript, Vol. 1 at 85.

In April 2016, one month before the expiration of EastCo's contract, the IRS produced an updated version of the TE-5 to solicit offers for the follow-on contract. EastCo argued that the TE-5 attached to the new solicitation was the same as the version that EastCo had been urging the IRS to approve because it represented the most accurate picture of the equipment in the facilities at that time. EastCo considered this an acknowledgment of the

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[8] We interpret the phrase "supply the TE-5" to mean "approve the TE-5."

changes and expressed frustration that the IRS did not give EastCo the financial benefit of the changes—only the responsibility of the additional work.:

> [The IRS] wouldn't let me prosper from the new inventory and they told me to maintain it at no charge but the new contractor had the ability to bid on the new inventory . . . . [The IRS] felt I was being paid enough money. [They said that] I didn't need more money, [and] that I could maintain the building with what they were paying. I said that is absolutely ridiculous.

Id. at 86–87.

At the conclusion of the fourth option year, the IRS extended EastCo's contract twice for a total of six months. Exhibits 70, 73. The IRS paid EastCo significantly higher prices during the extension periods. EastCo explained that costs which were previously amortized over a twelve-month performance period had to be compressed into six months. Exhibit 112 at 1–2. After the final contract extension expired, EastCo continued performing under a three-month bridge contract, which covered the period from November 9, 2016, through February 8, 2017.[9] Under the bridge contract, the IRS paid EastCo approximately $73,000 more per month for services than during prior years of performance. EastCo contends that the increase was due to "verifiable and justifiable differences in the inventories and upgrades that had taken place" over the previous five years. Exhibit 83 at 4. The IRS claimed it had no other choice but to pay the higher prices since it still had not awarded a follow-on contract. The contracting officer testified, "We had no choice. Our back was against the wall. We needed the services." Transcript, Vol. 1 at 232.

EastCo's Claim to the Contracting Officer and Subsequent Appeal to the Board

On October 13, 2017, EastCo submitted a certified claim to the contracting officer in the amount of $4,615,362.83, alleging that: (1) the IRS understated the initial TE-5 by 1736 equipment assets, causing EastCo to miscalculate the true costs of the required work; (2) the IRS breached the duty of good faith by failing to approve updated TE-5s despite repeated requests to do so; and (3) the upgrades to the facility's equipment resulted in EastCo incurring significant additional costs without compensation. Exhibit 83. According to EastCo's claim, the IRS *underpaid* EastCo each year of the contract as follows:

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[9] The appeal file does not contain a copy of the bridge contract. Although Exhibit 77 is listed in the appeal file index as "Bridge Contract (PWS) Performance Work Statement," the actual exhibit contains no references to a bridge contract. It is dated June 30, 2010, and appears to be the same PWS that EastCo originally bid on, though a detailed comparison was not conducted.

Contract Year	Effective Date	Annual Increase
Base Year	May 9, 2011 - May 8, 2012	$1,175,449.35
Option Year - 1	May 9, 2012 - May 8, 2013	$980,337.65
Option Year - 2	May 9, 2013 - May 8, 2014	$895,285.53
Option Year - 3	May 9, 2014 - May 8, 2015	$817,612.35
Option Year - 4	May 9, 2015 - May 8, 2016	$746,677.95
Total: Five Years	**May 9, 2011 - May 8, 2016**	**$4,615,362.83**

Id. at 4.

In support of its claim, EastCo provided a twenty-five-column, 3900-row Microsoft Excel spreadsheet purporting to analyze the differences between the TE-5 that EastCo bid on in 2011 and the TE-5 that was attached to the 2016 solicitation of the follow-on contract. Exhibit 94; Transcript, Vol. 1 at 141. EastCo alleged that each asset identified as "new" on the spreadsheet was an item added by the IRS that was not on the original TE-5. EastCo contends that it maintained these new assets without compensation because the IRS refused to approve subsequent versions of the TE-5s that incorporated the new equipment. The spreadsheet identified 1736 assets excluded from the original TE-5, then separated those assets into two groups – assets for which EastCo subcontracted out the maintenance and assets that EastCo maintained itself. EastCo quantified the total additional hours for each category and multiplied them by the "hourly loaded rate for subcontractor" work and "hourly loaded rate for in-house" work. EastCo added profit and overhead to those amounts to determine the amounts listed in the above table, totaling $4,615,362.83. Notice of Appeal, Exhibit 2.

The contracting officer did not issue a final decision on EastCo's claim, and on February 12, 2018, EastCo timely appealed the deemed denial of its claim to the Board.

Discussion

Burden of Proof

EastCo advances three arguments in support of its claim: (1) the original equipment list was understated, (2) the IRS breached the duty of good faith and fair dealing when it failed to approve changes to that list, and (3) the IRS undertook equipment upgrades and replacements but failed properly to pay EastCo for their maintenance. As the proponent of its claim, EastCo bears the burden of proving both entitlement and the amount of its

damages. *Choctaw Transportation Co. v. Department of Agriculture*, CBCA 2482, et al., 16-1 BCA ¶ 36,579, at 178,160. First, EastCo must show, by a preponderance of the evidence, that it is entitled to relief. *Vet4U, LLC v. Department of Veterans Affairs*, CBCA 5387, 19-1 BCA ¶ 37,336, at 181,572; *see also*, *1-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913. "Preponderance of the evidence means proof by information that, [when] compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not." 48 CFR 2.101 (2023). "We have held that 'a party asserting a claim has met its burden of proof by presenting corroborating evidence in support of that claim.'" *Systems Integration & Management, Inc. v. General Services Administration*, CBCA 1512, et al., 13 BCA ¶ 35,417, at 173,765 (quoting *Navigant SatoTravel v. General Services Administration*, CBCA 449, 11-1 BCA ¶ 34,765, at 171,103).

After a party establishes entitlement to relief, it has to prove its damages "with sufficient certainty so that 'the determination of the amount . . . will be more than mere speculation.'" *Sylvan B. Orr v. Department of Agriculture*, CBCA 5299, 17-1 BCA ¶ 36,863, at 179,616 (quoting *Willems Industries, Inc. v. United States*, 295 F.2d 822, 831 (Ct. Cl. 1961)). "[C]ontract law precludes recovery for speculative damages." *San Carlos Irrigation & Drainage District v. United States*, 111 F.3d 1557, 1563 (Fed. Cir. 1997).

<u>The Initial TE-5 – Superior Knowledge and Negligent Estimate</u>

EastCo alleges that the IRS significantly understated the initial TE-5. We analyze this allegation under two theories of liability – first, that the agency had superior knowledge of the facility and failed to share it and, second, that the agency provided prospective offerors with a negligent estimate. The superior knowledge doctrine permits a contractor to recover its damages "where the government fails to provide a contractor with vital knowledge in the government's possession which bears upon the costs of the contractor's performance." *Hercules Inc. v. United States*, 24 F.3d 188, 196 (Fed. Cir. 1994). To establish superior knowledge, a contractor must show four elements:

> (1) a contractor undertakes to perform without vital knowledge of a fact that affects performance costs or duration, (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specification supplied misled the contractor or did not put it on notice to inquire, and (4) the government failed to provide the relevant information.

Id. We apply the superior knowledge doctrine when "the Government fails 'to disclose to [the] contractor otherwise unavailable information regarding some novel matter affecting the contract that is vital to its performance.'" *Yates-Desbuild Joint Venture v. Department of*

State, CBCA 3350, et al., 17-1 BCA ¶ 36,870, at 179,688 (quoting *Scott Timber Co. v. United States*, 692 F.3d 1365, 1373 (Fed. Cir. 2012)).

EastCo cannot establish the first prong of the test for superior knowledge – that it undertook the contract without vital knowledge. First, EastCo had an opportunity to visit the facility prior to submission of its bid. The agency made much of EastCo's failure to attend the site visit, but during the hearing, EastCo clarified that when it bid on projects on the West Coast, it typically had its subcontractors attend the event. The record substantiates that two of EastCo's subcontractors attended the site visit. Thus, both EastCo's opportunity to participate in a site visit and its confirmation that its subcontractors did so undermine any contention that information pertaining to the contents of the facilities and the condition of their equipment was unavailable to EastCo. Second, the terms of the contract not only contemplated but *required* EastCo to verify the initial TE-5 during the phase-in period. Contemporaneous documentation shows that EastCo submitted an updated TE-5 that the IRS accepted and funded in 2011 and made effective on May 9, 2011 (the first day of the contract's base year). Thus, because the contract required EastCo to update the TE-5 at the outset of performance, the update actually occurred, and EastCo received a substantial increase in funding, EastCo's claim cannot be supported under a theory that the agency withheld superior knowledge.

EastCo's claim for liability based on a negligent estimate fails for similar reasons. EastCo argues that the Government's deficient equipment estimate caused EastCo to underbid the contract and lose money. Here, the volume of equipment was at the heart of EastCo's claim, yet there is no evidence to support EastCo's contention that the IRS solicited proposals based on a negligent estimate of the work.[10] "[T]he government must act in good

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[10] It is immaterial that EastCo's contract was *partially* an IDIQ. Even though "no Government liability can exist for negligent estimates in [an IDIQ] contract" because "the Government's sole requirement for [such a] contract is to purchase the non-nominal minimum obligation," 1 Ralph C. Nash, Jr. & Steven W. Feldman, *Government Contract Changes* § 11.35 (3d ed. 2007) (citing *Travel Centre v. Barram*, 236 F.3d 1316 (Fed. Cir. 2001)), the work that EastCo alleges the negligent estimates affected fell under the FFP part of the contract. Although negligent estimates claims typically arise under requirements contracts, they can, in appropriate circumstances, affect other forms of FFP contracts. *American General Trading & Contracting, WLL*, ASBCA 56758, 14-1 BCA ¶ 35,587, at 174,378–79; *see Engineered Demolition, Inc. v. United States*, 70 Fed. Cl. 580, 591–93 (2006) (holding that the Government can be liable for breach for providing negligent estimates on non-requirements FFP contracts). "What matter[s is] not the type of contract but whether 'estimates of volume are material to the contract.'" *American General Trading*, 14-1 BCA at 174,378 (quoting *Rumsfeld v. Applied Cos.*, 325 F.3d 1328,1340 (Fed. Cir.

faith and use reasonable care in computing its estimated needs." *Medart, Inc. v. Austin*, 967 F.2d 579, 581 (Fed. Cir. 1992). The burden of proving that the estimate was unreasonable is on the contractor, even for significant deviations. *Id.* The contractor must prove, by a preponderance of the evidence, "that the government's estimates were 'inadequately or negligently prepared, not in good faith, or grossly or unreasonably inadequate at the time the estimate was made.'" *Agility Defense & Government Services, Inc. v. United States*, 847 F.3d 1345, 1350 (Fed. Cir. 2017) (quoting *Medart*, 967 F.2d at 581).

EastCo failed to respond to the agency's comments that items on EastCo's spreadsheet were double-counted or credited in previous modifications. However, even if the IRS failed to account for various equipment items in the initial TE-5, the terms of the contract instructed EastCo to review the equipment list for accuracy during the phase-in period and make any necessary updates. Any variation between what was advertised in the solicitation and what was actually in the building became irrelevant to the extent that EastCo performed the required update and was paid for the difference. Evidence in the record shows that an updated TE-5, accompanied by an increase in funding, occurred just after the phase-in period. Although EastCo disputes this fact, the uncorroborated testimonial evidence proffered by EastCo's witness does not overcome the contemporaneous documentation substantiating the transaction. "'While [the Board] can make inferences from th[e] evidence and either accept or deny the probative value of documents, statements or other extrinsic evidence, in order for us to find for a party, that party's evidence must establish,' by a preponderance of the evidence, 'that it is entitled to relief.'" *1-A Construction*, 15-1 BCA at 175,551 (quoting *Schoenfeld Associates, Inc.*, VABCA 2104, et al., 87-1 BCA ¶ 19,648, at 99,472). EastCo has not met that burden here.

The Duty of Good Faith and Fair Dealing

"Implied in every contract is a duty of good faith and fair dealing that requires a party to refrain from interfering with another party's performance or from acting to destroy another party's reasonable expectations regarding the fruits of the contract." *CAE USA, Inc. v. Department of Homeland Security*, CBCA 4776, 16-1 BCA ¶ 36,377, at 177,347 (quoting *Bell/Heery v. United States*, 739 F.3d 1324, 1334–35 (Fed. Cir. 2014)). Conduct that may breach this duty includes "interference with or failure to cooperate in the other party's performance," as well as "acts or omissions that . . . deprive the other party of the contemplated value" of the contract. *Metcalf Construction Co. v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014).

2003)).

EastCo's second argument in support of its claim is that the IRS breached the duty of good faith and fair dealing by ignoring repeated requests to approve updates to the TE-5 as required by the contract. This failure prevented EastCo from pursuing full compensation for its work. The IRS argues that EastCo was in charge of the CMMS, and since the CMMS populated the TE-5, EastCo was responsible for finalizing the TE-5. We disagree. Under the terms of the contract, the IRS had final approval authority for the TE-5. Failing to act on those requests, or delaying such action, would hinder EastCo's ability to seek compensation that it felt it was owed. The record shows a pattern of EastCo reaching out to the contracting officer and to her representative seeking approval for TE-5 updates and related matters but rarely receiving a meaningful response. While it is unacceptable for agency officials to neglect the legitimate inquiries of their contracting partners, the issue that we must decide is whether the agency's delays and incomplete responses constituted a breach of the duty of good faith and fair dealing that would entitle EastCo to compensation.

After examining the record, we find that the agency's conduct, while regrettable, did not breach this duty. Despite the agency's sparse communication with EastCo, the record shows that the contracting officer communicated with the project manager and other IRS technical personnel on the status of TE-5 reviews to ensure progress was being made, even if it was slow. At other times, the contracting officer initiated the communication and asked EastCo to provide an updated TE-5. Furthermore, IRS technical personnel performed several reviews of TE-5 updates and provided EastCo with feedback on those reviews, including agreeing to add multiple equipment items to the inventory list. Any rejection or denial of equipment items being added to the inventory list were found to be redundant or obsolete. The agency should not have to pay twice for servicing the same equipment. If that was *not* the case, we would have expected to see more information from EastCo explaining why the IRS was wrong to reject the items from being added to the inventory list. As we previously noted, EastCo bears the burden of proving entitlement to compensation under the theories set forth in its claim. Based on what EastCo presented, as well as the agency's actions, we do not find that the IRS's overall conduct manifested evidence of breach, which is required to sustain a violation of this duty. *BCPeabody Construction Services, Inc. v. Department of Veterans Affairs*, CBCA 5410, 18-1 BCA ¶ 37,013, at 180,261.

Equipment Upgrades Were Not Changes to the Terms of the Contract

EastCo's third and final argument in support of its claim was that the extensive equipment and systems upgrades in the facilities resulted in EastCo incurring significant additional costs without compensation. EastCo elaborated that the new equipment and systems were complex and, consequently, required costly specialized and proprietary subcontractor involvement, which EastCo's original bid did not include. EastCo argues that many of these additions and upgrades should have been accompanied by a change order but

were not. EastCo's argument is essentially a claim for liability under a constructive change theory.

Although this final argument employs a different theory, our response is the same. The contract's terms contemplated systems and equipment upgrades throughout the period of performance and provided a mechanism for compensating the contractor when appropriate. According to the contract's terms, whenever new equipment was installed or old equipment was removed or upgraded, EastCo was required to analyze the cost impacts of those changes and request an equitable adjustment if certain criteria were met. Since this entire process was built into the contract, EastCo's constructive change theory is unfounded.

In *Crane & Co. v. Department of the Treasury*, CBCA 4965, 16-1 BCA ¶ 36,539, the Board stated that for a constructive change claim, "we look to see whether, during contract performance, the contracting officer 'unilaterally . . . alter[ed] the contractor's duties under the agreement; the contractor's performance requirements [were] enlarged; and the additional work [was] not volunteered but result[ed] from a direction of the Government's officer.'" *Id.* at 178,005 (quoting *Len Co. & Associates v. United States*, 385 F.2d 438, 443 (Ct. Cl. 1967)). Here, no duties or terms were altered. And to the extent that performance requirements were expanded as a result of system upgrades or new equipment, it was EastCo's responsibility to demonstrate the magnitude of that expansion so it could be compensated accordingly.

The new BAS installed as part of the UESC contract, which EastCo alleged was forty times more expensive to maintain than the old BAS, seems to be the most expensive system upgrade that the IRS installed during the contract. However, the contract specifically discussed upgrades to the BAS and other control systems and stated that, as long as the Government provided training to EastCo, EastCo could not claim additional payment for changing to the new or upgraded software or control programs. EastCo has not alleged that the training did not occur, and there is evidence in the record that it was scheduled. Moreover, EastCo's witnesses testified about the significant increased costs associated with maintaining the new BAS system but provided no details about the nature of those costs. Nor did EastCo explain why it should not be bound by the terms of the contract precluding additional compensation for maintaining the new BAS system if EastCo received the training.

Overall, EastCo's claim fails to provide the necessary evidence and analysis that paragraph 3.4.3 requires in order to establish a compensable adjustment. Neither the testimony of EastCo's witnesses nor its spreadsheet provides the required support. The spreadsheet simply identifies equipment that was added to the inventory after award yet, according to EastCo, was never formally acknowledged or paid for by the IRS. The spreadsheet also lists the total additional hours that EastCo asserts it worked and multiplied

those hours by a fixed dollar amount for in-house work and subcontractor work. Evidence we would typically look for to support such claims includes repair tickets, subcontractor invoices, payment receipts, employee time cards, the CMMS printouts, or other contemporaneous documentation that may substantiate an increase of five percent or more for preventive maintenance work on new equipment. A spreadsheet can be built at any point, and while that may be an acceptable method for capturing or summarizing all of the relevant supporting data, it should be accompanied by the underlying data that populated the spreadsheet in the first place. *See Michael Johnson Logging v. Department of Agriculture*, CBCA 5089, et al., 21-1 BCA ¶ 37,904, at 184,087, *aff'd*, No. 2022-1210, 2022 WL 17494846 (Fed. Cir. 2022).

Without evidence that EastCo's duties were altered or its performance requirements were expanded—when, how, and by how much—we find no entitlement to additional costs on a theory that the contract was constructively changed. Furthermore, to the extent that EastCo alleges that the IRS's unilateral decision to unbundle the equipment inventory list exposed EastCo to significant additional costs by materially changing the threshold for outsourcing work, we make no determination on that allegation here since EastCo failed to present that claim to the contracting officer. *See Bob L. Walker v. Department of Agriculture*, CBCA 2131, et al., 18-1 BCA ¶ 36,921, at 179,879 (2017) (citing *Lee's Ford Dock, Inc. v. Secretary of the Army*, 865 F.3d 1361, 1369 (Fed. Cir. 2017)).

<u>EastCo Provided Insufficient Proof of Damages</u>

Even if we could find that EastCo established liability pursuant to its legal theories, EastCo provided insufficient proof of causation and its claimed damages. The only support that EastCo provided was its TE-5 comparison spreadsheet. Despite the voluminous data in that spreadsheet, we cannot discern how this document proves its claim. EastCo did not explain at the hearing or in its post-hearing brief how the figures in the spreadsheet apply to the provision in the contract for substantiating an upward equitable adjustment. And yet, on the "summary sheet" that EastCo provided in support of its claim, EastCo adds up some number of hours and arrives at a total of 47,346.43 additional maintenance hours; it then allocates them according to two hourly rates – one for subcontractors and one for in-house. We are perplexed by having just two flat rates. Costs vary depending on many factors, and we are not persuaded that all subcontractors charged the same rate, for all categories of work, over five years.[11]

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[11] Exhibit 1 to EastCo's claim is the TE-5 Equipment Inventories Analysis, which EastCo asserts "presents [] in-depth analysis information that supports its claim, along with Exhibits, Attachments and Subcontractors Proposals." Exhibit 83 at 4. However, the panel could not locate any of the referenced documents.

As we already noted, the Board looks for contemporaneous evidence of *actual* costs to substantiate EastCo's *claimed* costs. The Court of Appeals for the Federal Circuit has held that "the 'actual cost method' is preferred because it provides the court, or contracting officer, with documented underlying expenses, ensuring that the final amount of the equitable adjustment will be just that—equitable—and not a windfall for either the government or the contractor." *Dawco Construction, Inc. v. United States*, 930 F.2d 872, 882 (Fed. Cir. 1991), *overruled on other grounds by Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995). Because the spreadsheet was built off of budgetary hours, not actual hours, it is an estimate rather than a reflection of the expenses that EastCo actually incurred. Indeed, EastCo's CEO testified that private contractors can do maintenance in less time than the budgetary hours suggest. EastCo must show how the estimates relate to records of the costs that EastCo actually incurred in performing the work. EastCo did not supply that documentation. Therefore, the information presented in EastCo's spreadsheet is speculative or, at best, consists of estimates.

Lastly, we reject EastCo's argument that the higher rate it received during the contract extensions is an implicit admission by the Government that its damage calculations were correct. The emails between EastCo and the IRS show that EastCo itself proposed a higher price because of a shorter amortization period for fixed costs and not because of any changes to the equipment inventory.

Decision

The appeal is **DENIED**.

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge

We concur:

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge