UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY JUDGMENT DENIED:
March 27, 2020

CBCA 6349, 6463

RLS CONSTRUCTION GROUP, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Joseph A. Camardo, Jr. of Camardo Law Firm, P.C., Auburn, NY, 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 **DRUMMOND**, **SHERIDAN**, and **SULLIVAN**.

SULLIVAN, Board Judge.

These appeals arise from two claims for costs incurred as the result of alleged delays and problems on a construction contract between the Department of Veterans Affairs (VA) and RLS Construction Group, LLC (RLS). VA moved for summary judgment, contending for various reasons that RLS cannot recover the five types of costs that it seeks. Because there are disputed material facts, we cannot conclude as a matter of law that VA should prevail. Therefore, we deny the motion.

Background

I. Relevant Contract Terms

A. Original Contract Terms and Performance

In May 2014, VA awarded to RLS a contract for the construction of a new entrance at the medical center in Lebanon, Pennsylvania. The award amount was $2.15 million and the contract required completion within 535 days. Exhibit 16 at 1. The notice to proceed was issued on June 4, 2014, Exhibit 19, and VA took beneficial occupancy on May 3, 2017. Exhibit 57. There are 1064 days between these two dates.

The contract contained several clauses relevant to the matters in dispute: Changes clause, Federal Acquisition Regulation (FAR) 52.243-4 (48 CFR 52.243-4) (2014); Suspension of Work clause, FAR 52.242-14; and, VA Contract Changes - Supplement clause, Veterans Affairs Acquisition Regulation (VAAR), 852.236-88 (2014). Exhibit 16 at 20, 29–30.[1] This last clause places limits on percentages of profit to be recovered on changes, the same percentages set forth on VA change order costs summary forms used on the contract. *See, e.g.*, Exhibit 44 at 66. The contract also contained a Schedule of Work Progress clause, VAAR 852.236-84, that required RLS to submit a schedule of work progress when it submitted schedules of costs. Exhibit 16 at 27–28. The Board did not find any of these schedules in the current record.

B. Modifications

Modifications 2–7. The contract was modified eight times; seven modifications are relevant to this appeal. In modifications 2–7, VA sought to compensate RLS for work added to the contract. Exhibits 28, 30, 34, 36, 37, 39. Each of these modifications contained language releasing any additional claims for costs or time for this additional work. For example, modification 2 stated:

> The purpose of this modification is to increase this contract by $45,776.27. The increase is needed to fund additional in scope work as described in the statements of work contained herein. The current contract amount is $2,150,000. The new contract amount will be $2,195,776.27. This supplemental agreement represents full and complete compensation for all

[1] Although some modifications were issued pursuant to the Changes and Changed Conditions clause, FAR 52.243-5, this clause does not appear in the contract.

> costs, direct and indirect, and all time associated with the agreement performed herein, including but not limited to all costs incurred for extended overhead, suspension of work, labor inefficiencies and impact costs.

See Exhibit 28 at 1. Each modification included a statement of work that described the additional work covered by the modification. *See, e.g.*, *id*. at 2. Modifications 3, 4, 5, and 6 also added days to extend the contract performance date, with the final extension to August 4, 2016. Exhibits 30, 34, 36, 37. The total time included in these modifications is 256 days. Exhibit 44 at 16. Modifications 2 and 3 were issued under the Changes clause. Modifications 4–7 were issued under the Changes and Changed Conditions clause.

In modification 4, RLS reserved its right to claim the increased costs associated with the changes on unchanged work. Exhibit 34 at 1. The releases in modifications 5, 6, and 7 included a release of costs and time associated with "this change's impact on unchanged work." Exhibits 36, 37, 39.

Modification 8. In August 2018, VA issued the final modification to the contract to increase the contract amount by $107,938.96, to pay costs presented by RLS in a request for equitable adjustment (REA). Exhibit 44 at 1. The modification was unilateral and issued pursuant to the Changes clause. *Id*. The contracting officer determined that RLS was owed money for five different types of costs, including $71,345.38 for supervisory and direct expenses. *Id*. at 3, 16. In the modification, the contracting officer assumed responsibility for 490 days of "previously uncompensated schedule slippage." *Id*. at 56.

II. RLS's Claims

A. Periods of Delay Alleged

The parties dispute how long actual contract performance should have taken absent the changes that are the subject of the modifications. RLS alleges that, based upon a schedule provided to VA at the beginning of contract performance, Exhibit 48 at 18, and its bid documents, Exhibit 49 at 15, it planned to perform the contract in 180 days. VA, in its response to the REA, determined that performance should have required 318 days. Exhibit 44 at 16. The difference is 138 days.

This difference creates a dispute between the parties as to the number of days of delay for which VA is responsible. As noted above, the period of performance was 1064 days. Modifications 2–7 added 256 days of performance time to the contract. VA took responsibility for another 490 days of delay in modification 8. RLS alleges, based upon

VA's acceptance of 490 days of delay plus the difference of 138 days noted above, that VA is responsible for 628 days of delay.

B. Types of Costs Claimed

Additional supervisory costs. RLS claims that it is owed direct supervisory costs and fixed expenses of $71,062.41, for 138 days of delay. Exhibit 53 at 7. VA reimbursed RLS these supervisory costs in modification 8, but disagreed that VA was responsible for the additional 138 days because these days fell within RLS's expected period of performance. Exhibit 48 at 12. In response to this claim, the contracting officer observed that RLS exceeded the activity durations for each step of its proposed schedule. Exhibit 44 at 1.

Additional administrative costs. RLS claims that it is owed $179,863.78 for additional administrative costs it incurred due to VA-caused changes, delays, and disruptions. Exhibit 53 at 7–8. It appears that RLS estimated the costs of the time three senior RLS personnel spent attending project meetings and providing additional oversight for the project over 628 days of delay. The estimates were developed by deriving the salary costs of these personnel and then estimating a percentage of their time spent working on the contract. *Id*. at 63–67; Exhibit 58 at 68–73.

In briefing, RLS cites to funding documents prepared by VA to obtain additional funds for modifications to the contract in support of its claim. Exhibit 64. These funding requests describe design deficiencies and unforeseen site conditions on the project. *Id*. at 171, 173. RLS also cites to deposition testimony of two of its employees describing RLS's efforts to address these design deficiencies. Exhibits 59, 66. RLS highlights that these design deficiencies required RLS to prepare numerous requests for information (RFIs) and perform other work to address issues that were not within the scope of the original contract. Exhibits 28, 30, 34, 36, 37, 39. As an example, RLS describes delays in deciding issues related to the replacement of a sanitary sewer pipe that was within the scope of the original contract. Exhibit 66 at 199–206.

Home Office Overhead. RLS seeks $226,975.69 in home office overhead for 628 days of delay. Exhibit 53 at 6. RLS contends that its work on the contract was delayed and disrupted due to VA-caused delays and that its bonding was "impacted." *Id*. In briefing, RLS explains how the project was held up for a year because it could not begin demolishing the canopy at the front entrance to the hospital. Exhibit 65 at 180–81. It is unclear whether RLS adjusted its allocable overhead figures to remove any costs attributable to the senior administrative personnel costs which it seeks to recover as a direct cost. *See* Exhibit 58 at 73.

VA concedes for the purposes of the motion that RLS can meet the first two legal requirements for the recovery of home office overhead, but asserts that RLS cannot show that it was on standby. As support, VA cites the testimony of an RLS manager that RLS continued working on the project, albeit at a "snail's pace." Exhibit 59 at 122. VA also proffers a table that shows the payments to RLS over the contract period. Exhibit 60. The table shows twenty-eight payments issued between June 2014 and December 2017, ranging in amount from $25,000 to $250,000. Exhibit 60. As support for the contention that RLS could obtain other work, VA cites to RLS's financial statement for 2018, which shows that RLS completed eleven other projects and had six other ongoing projects in that year. Exhibit 56 at 17.

Profit. RLS seeks $71,679.29, in profit. Exhibit 53 at 6. RLS calculated this amount by applying a fifteen percent mark-up to its claims for direct and overhead costs. *Id*. RLS alleges that it seeks this amount because of "the risk, financing, lost bonding, [and] lost opportunities that RLS has been forced to incur as the result of the VA-caused changes, disruptions and delays." *Id*. at 10.

Proposal Preparation Fees. RLS claims $27,501.11, in proposal preparation fees. Exhibit 53 at 6. The Board is unable to determine when these costs were incurred and for what purpose. According to RLS's claim, RLS "incurred contract administration proposal preparation fees and costs associated with the various VA-caused problems and delays," but then suggests that the costs were incurred in the preparation and review of the second claim. *Id*. at 10. RLS submitted a spreadsheet that tallies the hours for RLS personnel, but it does not appear that the record includes the legal bills for the proposal preparation fees that RLS seeks to recover. *Id*. at 63–67.

Discussion

I. Additional Supervisory Costs

RLS seeks supervision costs for an additional 138 days of performance, based upon its contention that it would have performed the contract in 180 days rather than the 318 days that VA determined in modification 8. VA disputes that RLS is entitled to additional amounts for the 138 days that were within RLS's period of performance. VA moved for summary judgment, arguing that the contract term was 535 days and RLS cannot recover costs based upon purported performance in less time.

VA's motion, predicated solely upon the original contract performance period, misses the mark. RLS's claim is one for "early completion," i.e. but for the alleged delays and problems caused by VA, it would have finished the contract within 180 days. To prevail,

RLS must demonstrate that "it intended to complete the work before the contract completion date." *Skyline Painting, Inc.*, ENG BCA 5810, 93-3 BCA ¶ 26,041, at 129,459. RLS's intent "must be supported by the course of [RLS's] actions during contract performance that would have led to such early completion absent unreasonable Government-caused delays." *Elrich Contracting, Inc. v. General Services Administration*, GSBCA 10936, 93-1 BCA ¶ 25,316, at 126,142 (1992).

In response to VA's motion, RLS cites to a submitted schedule and its bid documents, both of which project finishing in 180 days. These documents are evidence of intent sufficient to overcome VA's motion. However, to recover on its claim, RLS will have to establish that it "(1) intended to complete the contract early; (2) had the capability to do so; and (3) actually would have completed early but for the [VA's] actions." *Interstate General Government Contractors, Inc. v. West*, 12 F.3d 1053, 1059 (Fed. Cir. 1993). If any of these delays were RLS's responsibility, its claim for early completion will fail. *See, e.g.*, *Swanson Products, Inc.*, ASBCA 48002, 96-2 BCA ¶ 28,289. We will await the presentation of evidence at hearing before deciding whether RLS can recover on this aspect of its claim.

II. Additional Administrative Costs

VA challenges, for three reasons, RLS's ability to recover the costs of the time that three senior RLS officials spent coordinating the work over the term of the contract. One, RLS signed releases for these costs. Two, since the contract is a fixed-price contract, RLS cannot recover costs that were simply greater than it anticipated for work in the original scope of work. And, three, RLS's damages, based upon estimates developed after performance, are too speculative.

Before addressing the specifics of VA's motion, the Board makes the following observation about the current record in this case. It is sparse and lacks details about what problems RLS experienced and how these problems relate to the additional work covered by the modifications. While RLS contends that VA is responsible for the problems and delays that it experienced on the contract, there is little support for those claims in the current record. In its response to VA's motion, RLS describes a few discrete problems, such as the direction to wait before moving ahead with the demolition of the canopy and discovery of piping at the front entrance, and cites to supporting documentation and deposition testimony. The record, however, does not contain an explanation as to whether those problems were addressed by modifications to the contract or, if not, how those problems tie to the costs claimed. At hearing, RLS has the burden to explain these problems and differentiate them from work covered by the modifications.

Releases. VA argues that the release language in modifications 2–7 bars RLS's claims for these costs. VA is correct that release language that is clear on its face will preclude the recovery of costs within its scope. *Stobil Enterprise v. Department of Veterans Affairs*, CBCA 5698, 19-1 BCA ¶ 37,428. "[W]hen a bilateral contract modification does not contain any reservation of claims, the modification constitutes an accord and satisfaction as to the subject matter of the modification and the contractor cannot later narrow the scope of the modification." *Trataros Construction, Inc. v. General Services Administration*, GSBCA 15344, 03-1 BCA ¶ 32,251, at 159,459.

Here, the broad language of the releases bars RLS from recovering any additional costs incurred as a result of the additional work covered by the releases. RLS also may not recover for additional costs of unchanged work affected by the additional work covered by modifications 5–7. The problem is that the Board cannot discern whether the administrative costs RLS seeks were incurred as a result of this additional work or are tied to other problems and issues encountered during performance of the contract. For example, RLS highlights VA's delay in releasing the work to demolish the front entrance canopy, but the Board cannot discern whether this delay was encompassed within one of the modifications. While failure to make this showing at hearing will preclude recovery by RLS, the Board cannot find on VA's motion that the release language bars the claims for these costs.

Fixed-price nature of the contract. VA also challenges RLS's ability to recover these costs because the costs were incurred to address work that was within the original scope of work. VA is correct. If these costs were incurred in connection with work within the original scope of the contract, the fixed-price nature of the contract would provide a basis for denying these costs. *BCPeabody Construction Services, Inc. v. Department of Veterans Affairs*, CBCA 5410, 18-1 BCA ¶ 37,013. RLS assumed the risk of unexpected costs on the original scope of work. *Lakeshore Engineering Services, Inc. v. United States*, 748 F.3d 1341, 1347 (Fed. Cir. 2014). If, however, VA caused problems that were outside the scope of the original contract and not covered by the modifications, the fixed-price nature of the contract is not a bar to recovery. Because we cannot discern the origin of these costs, we cannot grant VA's motion on this basis.

Too speculative. VA challenges RLS's ability to recover these costs because RLS cannot prove its loss with any degree of certainty. VA notes, in particular, that RLS has provided no contemporaneous records, choosing instead to estimate its costs after contract completion.

RLS is seeking what it says were increased costs of its performance. It may recover these costs based upon estimates only if it had "no more reliable method for computing damages" and the evidence that it presents "is sufficient for [the Board] to make a fair and

reasonable approximation of the damages." *Dawco Construction Inc. v. United States*, 930 F.2d 872, 880 (Fed. Cir. 1991). RLS bears the burden "to justify its failure or inability to substantiate its damages by direct proof." *United Facility Services Corp. v. General Services Administration*, CBCA 5272, slip op. at 7 (Jan. 30, 2020).

To recover these costs, after specifically identifying the additional problems or delays that led to the incurrence of these costs, RLS will have to justify its use of estimates and explain why it could not track these costs contemporaneously. In addition, the salaries of these individuals, based upon their positions, typically are included in home office overhead. *Interstate General*, 12 F.3d at 1058. If RLS seeks to recover both these direct costs and home office overhead based upon the *Eichleay* formula, *Melka Marine, Inc. v. United States*, 187 F.3d 1370, 1375 (Fed. Cir. 1999) (*Eichleay* formula to be used to calculate amount of unabsorbed home office overhead during period of indefinite delay), RLS will have to establish that it has eliminated the costs of these individuals from its *Eichleay* calculation to ensure that it is not seeking a double recovery. While RLS bears a heavy burden to prove entitlement, VA has not provided a basis for summary judgment on these costs.

III. Home Office Overhead Costs

VA moves to preclude RLS's claim for home office overhead, asserting that RLS cannot establish that it was on standby, the third prong of the entitlement test. VA stipulates that RLS can meet the first two prongs because the "VA assumed responsibility for all delays associated with the contract performance with the issuance of modification 8." Respondent's Motion at 27.

To recover home office overhead, a contractor must prove that (1) "there was a government-caused delay to contract performance (as originally planned) that was not concurrent with a delay caused by the contractor or some other reason," (2) "the original time for performance of the contract was thereby extended," and (3) "it was required to remain on standby during that delay." *P.J. Dick Inc. v. Principi*, 324 F.3d 1364, 1370 (Fed. Cir. 2003). "[T]he 'standby' test focuses not on the idleness of the contractor's work force (either assigned to the contract or total work force), but on suspension of work on the contract." *Interstate General*, 12 F.3d at 1057. During a period of uncertain delay, the contractor cannot mitigate its home overhead costs because it is required to remain ready to perform. *Id*. at 1057–58. The "[s]uspension or delay of contract performance results in interruption or reduction of the contractor's stream of income from direct costs incurred." *Id*. at 1057.

VA asserts that, because RLS kept its workforce working on the project, albeit at a lower level of effort, RLS cannot show that it was on standby. As noted above, the

entitlement to home office overhead does not depend upon whether RLS's workforce was idled. Instead, it depends upon whether there was a suspension or delay of indefinite duration. Similarly, the testimony VA cites regarding the constant presence of employees and subcontractors on the site does not defeat RLS's ability to show that VA required RLS to be ready to "resume full-scale work at any time." *Melka Marine,* 187 F.3d at 1376.

VA also contends that the stream of payments was not interrupted, relying upon the list of contract payments RLS received. Contrary to VA's contention, this chart does not establish that RLS "received [twenty-eight] payments on average approximately every 38 days in the amount $95,478.43." Respondent's Motion at 31. Instead, it shows that VA paid RLS varying amounts over varying periods of time during the three years of contract performance. This evidence does not provide a basis for summary judgment.

Finally, VA relies upon RLS's financial statements as evidence that RLS could and did take on additional work during the period of alleged delay. In response, RLS cites to deposition testimony that RLS could not obtain additional bonding during this period. RLS's ability to take on additional work during this period remains an issue of fact that will be decided after the hearing in this matter.

IV. Profit

VA challenges RLS's claim for profit, asserting that recovery of profit is not allowed under the Suspension of Work clause. If it is allowed in this case, however, VA also asserts that fifteen percent is unreasonable and that RLS should be limited to the recovery permitted by the VA Contract Changes - Supplement clause.

A contractor may not recover profit under the Suspension of Work clause. FAR 52.242-14. However, a contractor may recover profit under the Changes clause. FAR 52.243-4. While some of RLS's claimed costs may arise pursuant to the Suspension of Work clause, others may arise under the Changes clause. In addition, modification 8, a unilateral modification, was executed under the Changes clause. Until the Board understands the basis for the claims presented, we cannot determine that RLS is not entitled to any profit on its claim.

VA also asks the Board to find that, because RLS's financial records show a profit in 2018, any recovery of profit on its claims would be unreasonable. VA cites no case law support for its position and the Board is unwilling to make such a finding on the current record. However, the Board and its predecessors have applied the limits to the profits contained in the Contract Changes - Supplement clause, VAAR 852.236-88(b)(5). *See, e.g.*, *BC Peabody Construction Services, Inc*. Thus far, RLS has not provided a basis upon which

the Board could deviate from those limits, but we will await the presentation of evidence before deciding this issue.

V. Proposal Preparation Fees

VA seeks summary judgment on RLS's claim for proposal preparation fees, asserting that the costs were incurred after RLS decreed in its first claim that a dispute existed between the parties. RLS asserts that these costs were incurred in pursuit of negotiation of an equitable adjustment that VA promised it would grant at the end of contract performance. RLS does not cite to any documentation in support other than the material in its second claim.

A contractor may recover legal fees that it incurred in connection with preparing proposals and for negotiations relating to additional compensation. *Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541, 1550 (Fed. Cir. 1995), *overruled in part on other grounds by Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1579 & n.10 (Fed. Cir. 1995) (en banc). However, these costs must be incurred in pursuit of negotiations, not the prosecution of a claim against the Government, *Bill Strong*, 49 F.3d at 1550, or in other matters of contract administration. *Yates-Desbuild Joint Venture v. Department of State*, CBCA 3350, *et al.*, 17-1 BCA ¶ 36,870. RLS bears the burden to prove that these costs are recoverable. *Id*.

VA seeks summary judgment because the costs were purportedly incurred in the presentation of a claim to the contracting officer after the declaration of a dispute. Based upon the description of the costs in the second claim, VA's challenge has merit. However, neither party has presented sufficient evidence as to what these costs were or when and why they were incurred. Instead, they have provided merely competing assertions as to when or why the costs were incurred. The Board cannot grant summary judgment on this basis.

At hearing, RLS will have to establish why the costs it seeks were incurred and when they were incurred. Further, it will have to show that the costs it seeks were not incurred in preparation of cost proposals or negotiation of additional work covered by the contract modifications or claims for unchanged work related to modifications 5, 6, and 7.

Decision

VA's motion is **DENIED**. The hearing in this appeal will begin on June 24, 2020.

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge

We concur:

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge