

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Charles G. Williams Construction, Inc.) ASBCA No. 49775
)
Under Contract No. DADA03-92-C-0043)

APPEARANCE FOR THE APPELLANT: Judith Ward Maddox, Esq.
Colorado Springs, CO

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
CPT Bryant S. Banes, JA
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OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Charles G. Williams Construction, Inc. (CGW) appeals the deemed denial of its claims for price adjustment and termination settlement under a construction contract. We sustain the appeal for a net amount of \$47,119 plus interest.

FINDINGS OF FACT

1. On 18 August 1992, the Government solicited bids for improvements and repairs to Building 628, Fitzsimons Army Medical Center (FAMC), Aurora, Colorado. On 18 September 1992, CGW submitted a bid of \$1,301,000 for the specified work. (R4, tab 1) CGW's bid was reasonable. The Government estimate was 3.1 percent lower. The next low bid was 4.3 percent higher. (Gov't supp. R4, Book 10, tab 8 at 003129-30) On 28 September 1992, CGW was awarded Contract DADA03-92-C-0043 for the work specified in the solicitation. The contract included, among other provisions, the FAR 52.243-4 CHANGES (AUG 1987) clause, the FAR 52.236-2 DIFFERING SITE CONDITIONS (APR 1984) clause, and the FAR 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED PRICE) (APR 1984) ALTERNATE I (APR 1984) clause. (R4, tab 1)

2. The total contract performance time was specified as 360 calendar days from notice to proceed. The work was to be performed in two phases. Phase 1 was all work in the south half of the building and was to be completed in 190 days from notice to proceed. Phase 2 was all work in the north half of the building, and was to be completed in the remaining 170 days after the completion of Phase 1. Between the completion of Phase 1 and the start of Phase 2 the Government was allowed 10 working days "to move equipment out of Phase 2 zone into completed Phase 1." This ten working day

allowance was part of, and not an addition to, the overall 360 days allowed the contractor for completion of the contract. (R4, tab 1 at F-1; ex. G-9, dwg. A-1) CGW reasonably understood, and the Government ultimately agreed, that the contract required the Government to vacate each phase while that phase was under construction (R4, tab 20; Gov't supp. R4, Book 7, tabs 5, 22).

3. CGW received notice to proceed with Phase 1 on 16 October 1992, establishing contract completion dates of 24 April 1993 for Phase 1 and 11 October 1993 for Phase 2 (Gov't supp. R4, Book 6, tab 17). CGW started work on Phase 1 on 2 November 1992 (Gov't supp. R4, Book 2 at 000488). When it arrived on site, CGW found the Phase 1 area still occupied. Notwithstanding CGW's protests, the Government continued to occupy the Phase 1 area and use that area as a school throughout CGW's performance of the work. (R4, tab 20) This caused substantial labor inefficiency and overall delay in completing the contract (Gov't supp. R4, Books 2, 3).

4. Asbestos removal was scheduled initially to begin on 2 November and to be completed on 11 November 1992 (ex. G-12). Because of its own neglect and that of its asbestos removal subcontractor, CGW did not have an approved abatement plan until 23 November 1992, and removal work did not start until 2 December 1992 (Gov't supp. R4, Book 2 at 000488-557). Removal of additional asbestos, discovered on 5 November 1992 and not shown on the drawings, was not completed until 27 January 1993 due to Government delay in granting permission for removal (Gov't supp. R4, Book 2 at 000501-02, 000653, 000721). Still more asbestos, not shown on the drawings, was discovered on 11 February 1993, and was not removed until 15 February 1993 (Gov't supp. R4, Book 2 at 000766, 000780, 000785). The asbestos removal work that was originally specified affected approximately 5 percent of the Phase 1 area (tr. 1/126). With the added asbestos work, approximately 30 percent of the Phase 1 area was affected. Other work could not be performed in the affected area until the asbestos was removed. (Tr. 1/127-30)

5. In bilateral Modification Nos. P00002 and P00003, CGW received price adjustments for the direct cost, overhead, profit and bond for the additional asbestos removal work. Both modifications included CGW's standard reservation for impact costs which stated: "It is expressly understood that the amounts of money and time added by this modification are for direct costs only and do not include any money or time for impacts which may be attributable to this change; we reserve the right to submit such costs when impacts become quantifiable." (R4, tabs 3, 4)

6. At the end of April 1993, CGW learned from its mechanical subcontractor and informed the Government that the structural steel support for the roof was inadequate for the specified roof-mounted equipment (tr. 1/70-72). This drawing deficiency stopped work on the roof for several months while the support was redesigned (tr. 1/72). CGW

was not authorized to proceed with the redesigned roof support until Modification No. P00007 was signed by the contracting officer on 7 September 1993 (R4, tab 8; tr. 1/76).

7. An internal memorandum of the contracting officer dated 23 June 1993 admitted that the contract “has serious errors and deficiencies in the project drawings and specifications” and recommended that the Government pursue a claim against the architect/engineer (A&E) firm that prepared the specifications and drawings. This memorandum also noted that “[t]here are other problems such as government caused delays, [and] differing site conditions” (App. supp. R4, tab 19)

8. Between 2 November 1992 and 3 November 1993, CGW submitted to the Government 156 notices of “delay/disruption/differing site condition” (NOD’s) detailing the differing site conditions and deficiencies in the contract specifications and drawings which were delaying and disrupting the work (Gov’t supp. R4, Book 1 at 000001-116, 000353-57). By unilateral Modification Nos. P00004 and P00014, and by bilateral Modification Nos. P00005 through P00010, and P00012, CGW received price adjustments for 58 differing site conditions, design deficiencies, and changes directed by the Government. Modification No. P00007 extended the contract completion date 20 days from 11 October to 31 October 1993. The bilateral modifications included CGW’s standard reservation for impact costs. (R4, tabs 5-11, 13, 15)

9. On 20 October 1993, CGW and the contracting officer met to discuss “tentative time extensions” to the project schedule. By letter to the contracting officer dated 21 October 1993, CGW stated that the parties had agreed, among other things, that: “to date of the meeting, October 20, 1993, an additional 177 calendar [days] has been required to work in Phase 1 due to changes and government occupancy of Phase 1” and that “it will require approximately 60 more calendar days to complete Phase 1 to December 20, 1993.” (Gov’t supp. R4, Book 6, tab 54) By letter dated 29 October 1993, the contracting officer replied that “[t]he Government concurs with all items listed” (Gov’t supp. R4, Book 7, tab 87).

10. On 7 December 1993, the Government terminated for convenience the Phase 2 work with the exception of parts of that work which it had previously directed CGW to complete as part of Phase 1 (Gov’t supp. R4, Book 7, tab 93). The termination of the as yet unperformed Phase 2 work was ordered by the Government because it considered CGW’s proposed price for a substantial modification of that work to be excessive (app. supp. R4, tab 20; ex. G-18 at 65). The general need for the modification was known to the Government before award of CGW’s contract. The details of the modification were not known until after award. (App. supp. R4, tabs 14, 18; tr. 2/44) The Government did not have its architect’s cost estimate of the modification until February-March 1993 (Gov’t supp. R4, Book 12, tab 22). CGW’s proposed price was not submitted until 13 October 1993, more than one year after award (Gov’t supp. R4, Book 12, tab 41).

11. CGW did not complete the Phase 1 work on 20 December 1993 as estimated at the 20 October 1993 meeting. The Phase 1 work was not completed until 26 April 1994. There were concurrent contractor and Government responsible causes of this delay. (Gov't supp. R4, Books 4, 5) An error in the contract drawing for a louvered wall delayed completion of the penthouse by 15 days (Gov't supp. R4, Book 1 at 000138, Book 3 at 001231, Book 7, tab 91). However, pipe insulation was not completed until 15 March 1994 due to poor productivity of the insulation subcontractor (Gov't supp. R4, Book 4 entries for 7, 14, 26 January 1994, Book 5 entry for 3 February 1994). In addition to the pipe insulation delay, there was a long delay in balancing the HVAC system from 22 February to 14 April 1994 (Gov't supp. R4, Book 5). There is no showing of Government responsibility for either the pipe insulation or the HVAC balancing delays.

12. On 5 May 1994, CGW submitted an initial termination settlement proposal which commingled costs for the termination with costs for a price adjustment and costs previously compensated in 12 contract modifications (Gov't supp. R4, Vol. A, tab "May"). On 28 July 1994, the Defense Contract Audit Agency (DCAA) reported that it was unable to audit CGW's claim as submitted, and requested that CGW segregate its termination settlement proposal costs from the costs included in the price adjustment proposal and in previous contract modifications (app. supp. R4, tab 25).

13. On 30 August 1994, CGW submitted a total cost basis termination settlement proposal in the net amount of \$113,862.90 (Gov't supp. R4, Vol. A). On 5 October 1994, CGW submitted a price adjustment proposal in the amount of \$504,149 (R4, tab 55 at 2). After audit and negotiations, the parties on 7 August 1995 entered into Modification No. P00015 which provided an "interim payment" to CGW of \$322,193 for the "unquestioned costs" in its price adjustment proposal. Modification No. P00015 expressly stated that "[t]he balance of the requested costs are questioned cost [sic] and will be addressed at a later time." (R4, tab 16)

14. Modification No. P00015 also stated that the total adjusted contract price was \$2,082,945.16. This was an error arising from the failure to delete Modification No. P00013 which had granted a \$206,000 price increase to commit money to the contract at the end of the Government fiscal year "pending settlement claim." (R4, tab 14; tr. 4/13) The documentation of the negotiations leading up to Modification No. P00015 show that the intent was to state the total amount of the "interim payment" for unquestioned costs on the price adjustment proposal, and not an amount in addition to the amount in Modification No. P00013 (app. supp. R4, tab 26; ex. A-6). The correct total adjusted contract price with the amount allowed by Modification No. P00015 was \$1,876,945.

15. On 17 October 1995, CGW submitted a revised termination settlement proposal in the amount of \$138,701 (Gov't supp. R4, Vol. B at 10). This proposal expressly recognized that the total adjusted contract price to and including Modification No. P00015 was \$1,876,945 (Gov't supp. R4, Vol. B at 16). On 24 October 1995, CGW submitted a price adjustment proposal in the amount of \$175,574. This proposal consisted of \$76,932 for "inefficiencies and additional costs associated with Government occupancy of building 628 and changes orders [sic] issued by the Army," and \$98,642 for "Extended Overhead/Unabsorbed Overhead." (Gov't supp. R4, Vol. B at 9)

16. On 15 December 1995, the DCAA issued an audit report on the price adjustment proposal questioning \$153,173 of the proposed \$175,574 (R4, tab 63). On 21 December 1995, DCAA issued an audit report on the termination settlement proposal questioning \$4,970 of the proposed \$138,701 (R4, tab 65). After the audit reports were issued, neither party requested the other party to negotiate a settlement. On 29 January 1996, CGW certified both proposals as claims under the Contract Disputes Act of 1978 (CDA), and demanded a contracting officer's final decision within 60 days. The certification and request were received by the contracting officer on 31 January 1996. (R4, tab 67) On 24 April 1996, CGW appealed the deemed denial of its claims. At that time it had received neither a final decision nor notice of when a final decision on its claims would be issued. (R4, tab 68)

17. CGW's price adjustment claim includes \$32,769 for direct labor (including "labor burden") incurred in connection with differing site conditions, defective drawings, and Government occupancy of the work area. The claimed costs are based on manhours contemporaneously recorded on time cards to cost codes specifically established to record those costs. With the exceptions noted in the findings on specific items of labor below, the claimed costs are reasonable, properly allocable as recorded, and not reimbursed or released in Modification No. P00015 or any other contract modification. (Gov't supp. R4, Vol. B at 42-50)

(i) CGW claims \$1,122 for inefficient labor in demolition work in Rooms 147, 148 and 151 caused by the Government's continued occupancy of those rooms with Government furniture and equipment. These costs were contemporaneously recorded on time cards to CGW's cost code 75W which was specifically set up to record the impact of the Government's occupancy of those three rooms. (Gov't supp. R4, Vol B at 47; tr. 2/174) The Government auditor questioned this item solely on the ground that CGW had an underrun on its original estimate for demolition work charged to a different cost code. The auditor did not find that the claimed costs had been reimbursed or released in Modification No. P00015 or in any other contract modification. (Gov't supp. R4, Book 10, tab 9 at 003260, Book 11, tab 2 at 003789-90) CGW's daily reports for 2, 3, 4, 5, 8, 9, and 10 February 1993 show work in Rooms 147, 148 and 151 affected by the Government's occupancy of those rooms with estimated labor inefficiency percentages

of 60, 60, 75, 70, 70, 75, 70, respectively, on each of those days due to the Government's occupancy (Gov't supp. R4, - 2 at 000732-759). The total CGW direct labor hours worked on each of those days per the certified payrolls, and where the certified payroll is missing, the daily report, were respectively: 31.5, 23.5, 16.0, 16.0, 24.0, 24.0, and 24.0 (Gov't supp. R4, Book 2 at 000737, 000742, 000746, 000753, 000759, Book 8 at 002213-14). Applying CGW's estimated inefficiency percentages on its daily reports to its direct labor hours for each of those days at issue, we find a total of 107.8 inefficient direct labor hours. Applying the average direct labor rate for the contract (\$129,830/6,662.5 hrs.) to those hours, the indicated direct labor cost of the inefficiency is \$2,100. (R4, tab 65 at 6; Gov't supp. R4, Book 11 at 003397-3472) Since this amount substantially exceeds the amount claimed by CGW under its cost code 75W, we find the claimed amount proven as claimed.

(ii) CGW claims \$5,246 for labor incurred in extra clean-up due to the Government's continued occupancy of the work area. These costs were contemporaneously recorded on time cards to CGW's cost code 1048 which was specifically set up to record "extra clean-up" costs. (Gov't supp. R4, Vol. B at 47, Book 8, tab 2 at 002416; tr. 2/174-75) The Government auditor questioned this item solely on the ground that CGW had an underrun on its original estimate for clean-up costs which were charged to a different cost code. The auditor did not find that the claimed costs were reimbursed or released in Modification No. P00015 or any other contract modification. (Gov't supp. R4, Book 10, tab 9 at 003260, Book 11, tab 2 at 003789-90) Since the claimed costs were contemporaneously recorded by time cards to a cost code specifically set up for that work, and since the daily reports specifically refer to extra cleaning as a continuing problem caused by the Government's occupancy on at least 12 occasions from 29 June through 6 October 1993, we find the claim credible and proven in the claimed amount. (Gov't supp. R4, Book 3 at 001037, 001039, 001060, 001068, 001081, 001083, 001086, 001091, 001099, 001122, 001131, 001182)

(iii) CGW claims \$2,128 for work required to remove a differing site condition (concrete slab) in the excavation for a dock extension (Gov't supp. R4, Vol. B at 46; tr. 2/173). This item was not questioned by the Government auditor, nor by the Government at hearing (Gov't supp. R4, Book 11, tab 2 at 003790). However, the direct cost of correcting this differing site condition was reimbursed in Modification No. P00009, and the claimed costs, as described, are clearly direct costs and not within the "impact" reservation in that modification (R4, tab 10).

(iv) CGW claims \$275 for labor incurred in identifying a drawing defect in the location of a window, notifying the Government of the defect, and sending a follow-up notice when the Government failed to respond to the first notice. These costs were contemporaneously recorded on cost codes 70W and 92W which were specifically set up to record those costs. (Gov't supp. R4, Vol. B at 42-43) The Government auditor

questioned this item on the ground that resolving the window location was not affected by the Government's occupancy of the work area. (Gov't supp. R4, Book 10, tab 9 at 003256-57, 003297, Book 11, tab 2 at 003789) This basis for questioning the claimed cost is not relevant to the claim. The claim is not for costs of Government occupancy of the work area, but for the costs of obtaining a change to correct a defect in a contract drawing. (Tr. 2/166) Modification No. P00005 reimbursed CGW in the amount of \$74.05 for the cost of relocating the window. (R4, tab 1 at 6; Gov't supp. R4, Book 1, tab 1 at 000063) It did not reimburse CGW, or release the Government from liability, for the costs incurred in obtaining the change. Those are the costs at issue in this claim item, and we find them proven as claimed.

(v) CGW claims \$4,361 for costs incurred in attempting to resolve differing site conditions and drawing deficiencies that ultimately resulted in Item 14A.1 in Modification No. P00009. These costs were contemporaneously recorded on time cards to cost codes 94W, 101W, 102W, 107-W, 107G, 107W, 426 and 2900. (Gov't supp. R4, Vol. B at 45-46) The Government auditor questioned these costs on the ground that Item 14A.1 in Modification P00009 involved outside work that was not affected by the Government's occupancy of the Phase 1 area. The auditor did not find that the claimed costs had been reimbursed or released by Modification No. P00009 or any other contract modification. (Gov't supp. R4, Book 10, tab 9 at 003789 and Appendix 2, Book 11, tab 2 at 003258) We find the costs proven as claimed.

(vi) CGW claims \$19,637 for its foreman's time dealing with the drawing deficiencies and differing site conditions which ultimately resulted in the changes incorporated into the contract by Modification Nos. P00002 through P00010, P00012 and P00014. The claimed costs were contemporaneously recorded on daily time cards and charged to cost codes 01001 and 01010. (Gov't supp. R4, Vol. B at 48-49; tr. 2/175-76) The auditor questioned \$10,544 of the claimed costs on the ground that they were allocated by CGW to modifications which were not affected by Government occupancy of the work site. (Gov't supp. R4, Book 11, tab 2 at 003791) This basis for questioning the costs is irrelevant to the claim. The claimed costs are not alleged to be costs of the Government's continuing occupancy of the work area, but are costs of the foreman attempting to resolve various drawing defects and differing site conditions with the Government. The auditor did not find, nor does the evidence otherwise show, that any of the claimed costs were reimbursed or released in any of the contract modifications. (Gov't supp. R4, Book 11, tab 2 at 003791) However, although the cost codes are different, there does appear to be the possibility of duplication between the costs allowed for items (i), (iv) and (v) above and the costs claimed under this item (vi). Accordingly,

we find this item (vi) proven only in the amount of \$13,879 (\$19,637 - \$1,122 - \$275 - \$4,361).

(vii) The audit-confirmed total burdened direct labor incurred by CGW in performance of the contract was \$129,830 (R4, tab 65 at 6). The parties have stipulated that CGW's direct labor budget at the start of the job, before it knew of the drawing defects, differing site conditions and Government occupancy of the work area, was \$43,903. The DCAA auditor reviewed the historical accuracy of CGW's budgets and concluded: "[m]ost [budgets] were underrun so the risk to the government of some of the amount over budget on this contract being due to poor estimate is minimal." (Gov't supp. R4, Book 10 at 003123) The parties have further stipulated that the burdened direct labor cost included in the executed modifications to date was \$52,888 (ex. G-31). The total amount of direct labor in the present claim which we have found incurred on account of the differing site conditions, defective drawings, and Government occupancy of the work area (\$24,883) is less than the total amount (\$33,039) of otherwise unrecovered direct labor incurred in performance of the contract. There is also no duplication of costs between the amounts allowed herein and the costs included in the "base contract inefficiency" item in Modification No. P00015. That item was based on cost codes other than those in the present claim. (R4, tab 16 at 2; Gov't supp. R4, Book 10, tab 9 at 003261, Book 11, tab 2 at 003816)

18. CGW's price adjustment claim includes \$94 for direct material and \$80 for "subcontractor" charged to the "extra clean-up" code 1048 (Gov't supp. R4, Vol. B at 50; tr. 2/174). We have allowed the claimed labor charged to this code (*see* Finding 17(ii) above), but the material and subcontractor charges are unsupported by any documentation in evidence or credible testimony at hearing. Asked what subcontractor was involved in the clean-up, appellant's consultant who prepared the claim testified: "I'm not sure exactly . . . It may have been a trash removal service, something like that." (Tr. 2/175) The claimed material and subcontractor costs for extra clean-up are not proven.

19. CGW's price adjustment claim includes \$2,757 for consulting and legal fees allegedly incurred for advice on the occupancy issue. (Gov't supp. R4, Vol. B at 49-50) The DCAA questioned \$2,215 of the claimed costs on the ground that the invoices had not been recorded on the job cost ledger. (Gov't supp. R4, Book 11, tab 2 at 003791-92) Moreover, one of the questioned invoices is for charges preparing a schedule before CGW arrived on site, and is clearly related to the original contract work (Gov't supp. R4, Book 10, tab 9 at 003234). The balance of the claimed consulting and legal costs plus an additional amount found by the auditor total \$542. That amount was not included in or released by any of the contract modifications, nor was it otherwise questioned by the

auditor. (Gov't supp. R4, Book 11, tab 2 at 003791) We find that amount proven as claimed.

20. CGW's price adjustment claim includes \$1,591 for the cost of asbestos abatement permits procured by a subcontractor for Phase 2, and for preparing a request for information and cost proposal for that work. (Gov't supp. R4, Vol. A, tab 4, Vol. B at 49) This was added work since there was no Phase 2 asbestos abatement indicated on the contract drawings. The claimed additional asbestos subcontract costs were not included in, or released by, any of the contract modifications, nor were they otherwise questioned by the auditor. (Gov't supp. R4, Book 11, tab 2 at 003792; ex. G-9, dwgs. M-8, A-5) We find the claimed amount proven as claimed.

21. CGW's price adjustment claim includes \$22,864 for costs allegedly incurred by a subcontractor, Generic Electrical and Mechanical, Inc. (Generic), as a result of "occupancy and inefficiency issues caused by the Army" (Gov't supp. R4, Vol. B at 49). The claimed amount is the difference between the \$64,638 proposed by Generic and CGW for inclusion in Modification No. P00015 for Generic's costs, and the \$41,774 determined by the auditor and ultimately included in the modification for that purpose. (Gov't supp. R4, Book 10, tab 9 at 003250-52; app. supp. R4, tab 26) CGW has presented no evidence showing the components of the present claimed amount, or how that amount is related to the drawing defects, differing site conditions or Government occupancy of the work area. (Tr. 2/183-84) This claim item is not proven.

22. CGW's price adjustment claim includes 15 percent home office overhead on claimed direct labor, material, subcontract, and contract administration costs (Gov't supp. R4, Vol. B at 50) The DCAA determined an actual home office overhead rate of 14.12 percent after adjusting for (i) operating and depreciation expense on company automobiles provided to employees for both business and personal uses; (ii) reorganization costs; (iii) failure to credit a gain on sale of a depreciated capital asset; (iv) unallowable contribution and entertainment expenses; (v) failure to capitalize a new furnace; and (vi) unsupported petty cash disbursements (R4, tab 55 at Schedule 5, tab 63 at 8-9). CGW has presented no credible evidence challenging the audit-determined rate.

23. CGW's price adjustment claim includes profit at 10 percent of the direct costs and allocable home office (G&A) expense. It also includes bond expense at 1.1 percent of total cost and profit. (Gov't supp. R4, Vol. B at 50) A 10 percent profit was agreed to by the parties as reasonable in the adjustment under Modification No. P00015. (App. supp. R4, tab 26) We find that rate reasonable for the adjustment proposed here. The claimed bond rate was verified by the auditor. (R4, tab 63 at 11)

24. CGW claims \$98,642 for 330 days of "extended overhead/unabsorbed overhead" allegedly incurred as a result of the drawing defects, differing site conditions

and Government occupancy of the work area. The claimed amount is an “Eichleay” calculation. (Gov’t supp. R4, Vol. B at 9; R4, tab 62 at 5-6) The DCAA auditor found that the overhead for the entire period of extended contract performance was “fully absorbed by the basic contract, contract modifications, and other projects.” He further found that CGW used both variable and fixed overhead expenses in computing the average daily overhead rate. (Gov’t supp. R4, Book 11, tab 2 at 003795-96; tr. 2/270-73) On this evidence, CGW’s Eichleay claim is not proven.

25. On the basis of Findings 17-24 above, we find that the proven incurred costs and reasonable profit for the additional work caused by the Government, which were not reimbursed in the contract modifications, were as follows:

a. Direct Labor (Finding 17)	\$24,883
b. Consultants (Finding 19)	542
c. Asbestos Subcontract (Finding 20)	1,591
d. G&A @ 14.12% (Finding 22)	3,815
f. Profit @ 10% (Finding 23)	3,083
g. Bond @ 1.1% (Finding 23)	373
h. Total	\$34,287

26. CGW’s termination settlement claim is in the net amount of \$138,701 (Gov’t supp. R4, Vol. B at 10). Subject to the usual audit report disclaimers, the DCAA auditor determined a net settlement amount of \$133,731 (R4, tab 65 at 4). Both CGW and the auditor excluded from the termination settlement amount the direct labor costs included in the price adjustment claim (R4, tab 65 at 5). Those costs, however, should be included since they were in fact incurred costs of performance.

27. The auditor verified the incurred total direct labor cost of \$129,830 as shown on the job cost ledger (R4, tab 65 at 5). The auditor adjusted CGW’s proposed direct material and “other [direct] costs” to conform to CGW’s job cost ledger, and to include the amounts allowed in Modification No. P00015 for subcontractors which had not been included in the job cost ledger. (R4, tab 65 at 4-5, 7-8) We agree with these adjustments, and with the auditor’s home office overhead (G&A) rate (*see* Finding 22 above). We find that the total incurred costs of performing the contract were:

a. Direct Material	\$ 89,539
b. Direct Labor	129,830
c. Other Costs	1,265,272
d. G&A @ 14.12%	209,631
e. Total Incurred Cost	\$1,694,272

28. For purposes of determining whether a loss adjustment is applicable pursuant to the Termination clause, CGW estimates that it completed 95.64 percent of the total job (Gov't supp. R4, Vol. B at 15). The Government estimates that CGW completed only 91.85 percent of the total job (Gov't supp. R4, Book 6, tab 67). CGW's estimate is based on the percentage of progress payments made by the Government on the original contract price. The Government's estimate is based on a detailed "contract progress report" prepared by a Government inspector based on "actual job progression" plus material payments, bond and modifications. (Gov't supp. R4, Book 6, tab 67) We find the inspector's estimate to be more credible than that of CGW. Applying this percentage to the total incurred cost (*see* Finding 27 above), we find that, if the Phase 2 work had not been terminated, the total cost at termination would have been \$1,844,608.

29. CGW's termination settlement claim proposed \$42,761 for settlement expenses (R4, tab 65 at 4). The auditor questioned \$1,940 as unsupported (R4, tab 56 at 11-12). No documentation such as invoices or accounting records kept in the regular course of business were offered in evidence to support the questioned costs (tr. 2/276-77). We find them unsupported. The auditor also questioned, as unreasonable in amount, \$3,125 incurred for updating the price adjustment and termination proposals. The auditor states that CGW should have used its own personnel rather than an "expensive" consultant since the update "was just a reiteration of the data provided on its previous proposal." (R4, tab 65 at 11) We disagree. The auditor's opinion ignores the fact that analytical effort was needed to determine whether the "reiteration" of previous data was appropriate for the update.

30. At hearing and in its post hearing brief, CGW claimed an additional \$51,086 for termination settlement expenses that were not included in its settlement proposal, or in its certified claim (ex. A-5; tr. 2/199-201; app. br. at 108). Of the claimed amount, \$20,282 was incurred for proposal preparation and assistance at the audit. Of that amount, however, all but \$1,125 was invoiced on or before 12 January 1996, and was known to CGW before it certified its proposal as a claim on 29 January 1996. (Ex. A-5) The balance of the claimed \$51,086 is for consultant and legal costs incurred after 29 January 1996. Those costs are costs of prosecuting the claim.

31. The Government has paid CGW \$1,750,262 on the contract to date (R4, tab 65 at 4).

DECISION

CGW is entitled under the Changes and Differing Site Conditions clauses of the contract to a price increase of \$34,287 for the costs caused by the defective drawings, differing site conditions, and Government occupancy of the work area. Those costs were neither included in, nor released by, the contract modifications. *See* Findings 17-24

above. With this adjustment, the total contract price is \$1,911,232, and CGW would have earned a profit of \$66,624 (3.61 percent) on total costs of \$1,844,608 if the Phase 2 work had not been terminated. See Findings 14 and 28 above.

Pursuant to the Termination clause of the contract, CGW is entitled to recover all costs incurred in performance, plus a fair and reasonable profit on those costs, plus reasonable settlement expenses, less payments to date. The 3.61 percent profit that would have been earned if the Phase 2 work had not been terminated, is a fair and reasonable profit on the work actually performed. Settlement expenses incurred up to the time the settlement proposal was converted to a claim are also properly included in the settlement amount. But they are allowable only to the extent they were included in the certified claim, or are based on information that was not available to CGW at the time the claim was submitted. See *Toombs and Company, Inc.*, ASBCA No. 35085, 35086, 89-3 BCA ¶ 21,997 at 110,607. Accordingly, we find CGW entitled to a net termination settlement as follows:

a. Total Incurred Cost (Finding 27)	\$1,694,272
b. Profit at 3.61%	61,163
c. Settlement Expenses (Findings 29-30)	41,946
d. Payments to Date (Finding 31)	(1,750,262)
e. Net Settlement	\$ 47,119

CGW argues that it is entitled to anticipatory profits and “all costs incurred in processing this appeal” because the Government acted in bad faith. In CGW’s view, the termination was in bad faith because the Government knew before award that the Phase 2 work had to be modified. The Phase 2 work was terminated, however, not because it had to be modified, but because CGW’s proposed price for the modification, submitted more than one year after award, was too high. See Finding 10 above. *Torncello v. United States*, 681 F.2d 756 (Ct. Cl. 1982) is inapposite. There is no evidence of any intent on the part of the Government at the time of the award to CGW to terminate the Phase 2 work, and award that work to another contractor. See *Krygoski Construction Company, Inc. v. United States*, 94 F.3d 1537, 1545 (Fed. Cir. 1996), cert. denied, 520 U.S. 1210 (1997). CGW alleges that the Government’s evaluation of its proposed price for the modification was “improper.” (App. br. at 34-41) The evidence at most shows only errors in the Government’s cost estimate for the modification. Estimating errors do not constitute “bad faith.” *Marine Construction & Dredging, Inc.*, ASBCA Nos. 38412 et al., 95-1 BCA ¶ 27,286 at 136,027. Moreover, there is no evidence that the Government knew at the time of award that the modification of the Phase 2 work would cost the amount indicated by CGW’s proposal.

CGW also argues that its termination settlement proposal was “grossly mishandled by the Government in violation of FAR regulations.” (App. br. at 86, 101) We find no

gross mishandling of the proposal or violation of FAR regulations sufficient to constitute a compensable breach of the Termination clause. The Government's request for segregation of the costs commingled in CGW's initial proposal was reasonable for purposes of determining the ceiling on the termination settlement and applicability of the loss adjustment provisions of the Termination clause. While the contracting officer did not offer to negotiate a settlement immediately after the 21 December 1995 audit report was issued, CGW did not request negotiation before converting its settlement proposal to a claim on 29 January 1996.

The appeal is sustained in the total amount of \$47,119 with interest pursuant to 41 U.S.C. § 611 from 31 January 1996. *See* Finding 16 above.

Dated: 27 July 2000

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I concur

I concur

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

MICHAEL T. PAUL
Administrative Judge
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 49775, Appeal of Charles G. Williams Construction, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals