

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
States Roofing Corporation) ASBCA No. 55506
)
Under Contract No. N62470-97-C-8319)

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OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY

ASBCA No. 55506 is a quantum only appeal. At issue is the amount that States Roofing Corporation (SRC) is entitled to recover for use of SRC-owned and rental cranes in performing its roofing contract. This appeal is one of 11 appeals that were consolidated for hearing and the second we have decided. We incorporate findings of relevance from our earlier decision in *States Roofing Corp.*, ASBCA No. 54854, 2008 LEXIS 41, relating to the parapet walls. We sustain the appeal and return it to the parties as indicated.

FINDINGS OF FACT

Contract section 01140, WORK RESTRICTIONS, in paragraph 1.5, SPECIAL SCHEDULING FOR OCCUPIED BUILDINGS, advised bidders that: "Elevator #6 will be available for material handling subject to base regulations. Use of the building elevator shall require maintenance and repair of damage due to contractors [sic] use." (R4, tab 1 at 92) Elevator #6 was a large, centrally-located freight elevator with a 16,000 pound load capacity and SRC planned to use it to move men, equipment and material up to and down from the roof. It intended to use one of its small forklifts to load the elevator and

then put the forklift in the elevator, go up to the roof and use the forklift to unload the elevator. (R4, tab 389, subtab 2(4); ex. A-7; tr. 1/34-35, 39-40, 2/215, 8(2)/247-48)¹

During the pre-construction meeting on 12 September 2000, however, the Navy advised SRC that the elevator could not be used to move materials to the roof, although SRC could request prior approval to move unusual items as an exception (R4, tab 4 at 708; tr. 1/68). SRC submitted a Request for Information to clarify the change and by a letter dated 19 October 2000 requested permission for full use of elevator #6 beginning 23 October 2000 (R4, tabs 12, 17). The Navy did not allow SRC to use the elevator, even on a limited basis (tr. 1/68). SRC changed its work plan and used a crane to move materials from the ground up to the roof (tr. 1/47, 68). Using a special sling, the crane also transported asphalt debris from the roof down to dumpsters when the debris was too large to be disposed of using the trash chute as had been planned (tr. 1/71-72). Forklifts were used on both the roof and at the base of Building 143 (tr. 9(2)/132-33).

On 9 November 2000, SRC submitted a cost proposal in the amount of \$219,950 for using a crane instead of elevator #6 to lift material to the roof and the Navy acknowledged entitlement, eventually issuing unilateral Modification No. P00003 on 30 July 2001, which increased the contract price by \$113,000 to “[u]se crane to move material to roof instead of using the elevator as called for in the specifications” (R4, tab 2 at 636-37, tab 389, subtab 2(1)). SRC revised its cost proposal several times (R4, tab 389, subtabs 2(2), (3)). On 15 November 2001, in preparation for negotiations to settle the cost of the change, LT Darren R. Hale, the Assistant Resident Officer in Charge of Construction (AROICC), asked SRC to provide a final revised cost proposal for the use of cranes, forklift invoices and justification for any additional time (R4, tab 351). SRC submitted another revised proposal on 28 November 2001. Included with it was a letter dated 27 November 2001 in which SRC explained that it used forklifts on the roof to transport material to designated work areas and to and from storage and that a ground forklift was also required to load and unload material from trucks. The letter also explained that a hook-on man was required to secure the loading area, hook the material onto the crane and direct the lift and placement of the material and that a signal man was required on the roof to direct the landing of the material and disconnect it from the crane because the parapet walls blocked the view of the crane load and its travel path. (R4, tab 389, subtab 2(4); tr. 8(2)/246-47)

SRC revised its proposal upward on 30 November 2001 to request \$427,465 and a contract time extension of 45 days for having to use a crane (R4, tab 389, subtab 1; tr. 8(2)/243). This is referred to as the “Crane vs. Elevator” proposal and subsequently became Claim Item 1 (Claim 1). As is relevant to this appeal, the 30 November 2001

¹ We continue designation of the transcripts from the third week of trial as volumes 6(2) through 10(2) to differentiate them from the transcripts from the second week of trial, both of which were numbered 6 through 10.

proposal sought payment for: 1,761 hours each for hook-on and signal men, a total of 3,522 hours, at an hourly rate of \$10.52; 13 months of forklift rental and 1,761 hours of forklift operator time at an hourly rate of \$19.46; and 630 hours of SRC-owned crane equipment time at an hourly rate of \$46.85 and 630 hours of operator time for this 25-ton SRC crane at an hourly rate of \$23.11. It also sought 967 hours of a total of 1,131 hours of crane rental at an average hourly rate of \$127.84, for a total of \$123,621. (R4, tab 389, subtab 1) It is industry practice to include a crane operator with the rental of a crane so that only SRC-owned crane operator hours were claimed (ex. A-2, tab 1 at 28 of 47). Negotiations held on 6 and 14 February 2002 on this proposal were unsuccessful (R4, tab 389 at 2).

On 24 February 2002, SRC submitted a new proposal for "Equipment Lifts & Stand-By Crane Time" in the amount of \$56,391 that subsequently became Claim Item 61 (Claim 61) (R4, tab 389, subtab 3). This claim was based upon using a crane instead of the trash chute to remove the large chunks of asphalt debris from the roof (tr. 8(2)/243). As is relevant here, it sought payment for: 160 hours each for the hook-on and signal men at the \$10.52 hourly rate; 160 hours of forklift operator time at the \$19.46 hourly rate; 123 hours of SRC-owned crane equipment time at \$45.00 per hour and 123 hours of SRC crane operator time at the \$23.11 hourly rate; 248 hours of SRC stand-by crane equipment time at \$14.67 per hour; and 201 hours of crane rental at varied hourly rates for a total of \$17,469 (R4, tab 389, subtab 3).

Also of relevance to Claims 1 and 61 is SRC's Claim Item 22, "Removal of Additional Asphalt," which was based upon a differing site condition relating to the thickness of the existing roof asphalt. When bidding on the contract, SRC planned to use another of its own forklifts and one of its front-end loaders to perform the roof asphalt demolition work. It estimated a total of 2,329 man-hours to perform this work, 1,165 hours for each piece of equipment. It also estimated 660 forklift operator hours for new roof installation, bringing the total number of forklift operator hours to 1,825. (App. supp. R4, tab 152 at 1; ex. A-2, tab 1 at 23 of 47) The bid did not include any charges for use of SRC's equipment and did not include any forklift rental costs (tr. 9(2)/76-77).

SRC planned to use its forklift to "pop the three inches of asphalt up," *i.e.*, to dislodge it. When SRC began work, however, it discovered that the asphalt was thicker than had been indicated in the contract drawings and some debris flew up and over the top of the parapet wall. SRC changed its work plan and used a jack hammer near the edge of the roof to keep the asphalt debris from going over the wall and rented a larger forklift to get underneath the asphalt and break it up. (Tr. 1/68, 70-71) The front-end loader was used to scrape up debris and deposit the smaller pieces down the trash chute (tr. 8(2)/258).

On 20 February 2002, SRC submitted a cost proposal for a differing site condition in the amount of \$129,524 that included forklift rental at a cost of \$28,000 and 1,135 forklift operator hours at an hourly wage rate of \$19.46. This subsequently became Claim 22. The full amount of SRC's cost proposal was paid by unilateral Modification Nos. P00004 and P00007. (R4, tabs 2, 147 at 2198-99)

ENS Alex Palmer replaced LT Hale as the AROICC and was responsible for definitizing Modification No. P00003 (tr. 8/156-57, 255). He used the Claim 1 proposal revised on 30 November 2001 and the Claim 61 proposal dated 24 February 2002 as the basis for his evaluation of the amount due SRC for both claims. He subtracted all of the claimed costs relating to the forklift operator time and forklift rental because he thought SRC would have needed a forklift to move material whether it used the elevator or a crane and that use of a crane would not have impacted the number of hours of forklift usage for that purpose. This was LT Hale's view as well. (R4, tab 389 at 3-4, subtab 2 at 3; tr. 8/255-62, 9/93)

Mr. Mark Airaghi, the ROICC Supervisory Engineer, speculated that use of the crane actually reduced the amount of forklift effort that would have been involved with moving the gravel in carts up to the roof using the elevator (gov't Response to SRC's Statement of Costs (RSOC), Claim 1 at 3428; tr. 9(2)/200-01). Mr. Hugh DeLauney, SRC's president, disagreed and persuasively explained that the gravel had to be poured into the carts and that as many as eight carts could be loaded into the elevator, making it more efficient to use the elevator than to lift one crate at a time with the crane (tr. 10(2)/215-16).

ENS Palmer's contract modification estimate for Claims 1 and 61, dated 10 December 2002, reflects that he multiplied 3,522 hours for the hook-on/signal men by the proposed \$10.52 hourly rate, a total of \$37,052 [sic], and 878 hours (630 active and 248 stand-by) of SRC crane operator time at the proposed \$23.11 hourly rate, a total of \$20,291. As to equipment, he multiplied 967 hours of crane rental by the proposed \$127.84 hourly rate, a total of \$123,621, 630 hours for use of SRC's crane by the proposed \$46.85 per hour, a total of \$29,516, and 248 hours of stand-by for SRC's crane by the proposed \$14.67 per hour, a total of \$3,638. (R4, tab 389 subtabs 1, 2, 4; tr. 9/8-9)

ENS Palmer's "CHANGE ORDER RECOMMENDATION" for Claims 1 and 61, dated 11 December 2002, states that Navy accepted the 248 hours of SRC stand-by crane equipment time "[a]s a business decision." His recommendation makes the same statement about the 878 crane operator hours (630 active and 248 stand-by), the 1,761 hook-on and 1,761 signal man-hours, and 1,131 crane rental hours. (R4, tab 389 at 4)

On 14 April 2003, SRC revised the amount sought for Claim 61 to \$100,290 (R4, tab 147 at 3322-27). On 18 April 2003, with a deemed receipt date by the

contracting officer of 21 April 2003, SRC submitted a certified claim under the Contract Disputes Act (CDA) for some 67 outstanding items, including \$427,465 for Claim 1 and \$100,290 for Claim 61 a total of \$527,755. Neither claim requests a contract time extension. (R4, tab 147 at 1359, 1378)

On 23 April 2003, the Navy unilaterally issued Modification No. P00007, which, among other things, definitized Modification No. P00003 at a price of \$326,949 and no time, with the following explanation:

- a. Provide crane and associated labor and equipment for movement of material to the roof. Delete labor and associated equipment for movement of material to the roof via elevator 6.

(R4, tab 2 at 652) The total amount paid for use of the crane, \$326,949, actually included both Claims 1 and 61 as reflected in ENS Palmer's "CHANGE ORDER RECOMMENDATION" and his 10 December 2002 contract modification estimate (R4, tab 389 at 1-4, subtabs 1, 2, 4).

On 25 August 2004, SRC combined Claims 1 and 61 and increased the amount sought for both to \$624,788 (R4, tab 142 at 1). The claims were denied by the contracting officer in final decisions issued on 1 and 16 September 2004 on grounds the costs to which SRC was entitled had been paid by Modification Nos. P00003 and P00007 (R4, tabs 143, 145). A timely appeal was docketed as ASBCA No. 55506.

Four cost items associated with use of the crane reflected in Claims 1 and 61 are at issue in ASBCA No. 55506: (1) direct labor; (2) rental equipment; (3) sales tax on rental equipment; and (4) equipment ownership costs. As revised at the hearing the total claimed is now \$471,598, of which \$326,949 has been paid, leaving \$144,649 at issue (ex. A-2, tab 2(A)).

Ms. Susan Moser, who is SRC's accountant, was qualified as an expert in government cost accounting and prepared a report that was received in evidence as appellant's trial exhibit 2 (ex. A-2; tr. 8(2)/86-99). She performed a review and audit of Claims 1 and 61 (tr. 8(2)/124).

Ms. Cecelia R. Ambrose of the Defense Contract Audit Agency (DCAA) performed an audit of SRC's claims. Her DCAA audit report is found at tab 12 of the Navy's Amended Response to SRC's Amended Statement of Costs (ARSOC). SRC stipulated that she was an expert in the field of auditing government contractors, including analyzing claims and pricing proposals (tr. 10(2)/43-45).

1. Direct Labor

There are three categories of direct labor: crane operators, forklift operators, and hook-on/signal men. SRC endeavored to keep track of these direct labor hours. Mr. DeLauney reviewed SRC's employee time cards on a daily, or sometimes weekly basis with Mr. Aubrey Etheridge, SRC's vice president and quality control manager for the project, and annotated and initialed the cards to reflect the time and work function associated with use of a crane. (App. supp. R4, tab 148; tr. 1/20, 24, 8(2)/250-51, 9(2)/134-35)

Ms. Moser used these annotated time cards to prepare an excel spreadsheet that summarized the hours worked by each employee in each of the three labor categories (app. supp. R4, tab 148; ex. A-2, tab 1 at 25 of 47, tab 2(A) at 6061-79; tr. 8(2)/125-26, 128, 201-02). There had been a number of different computations undertaken manually by SRC and DCAA using the raw data before she prepared the spreadsheet (tr. 9(2)/71). Ms. Moser removed all overtime and accumulated it in the acceleration claim, ASBCA No. 55501 (tr. 8(2)/126-27).

In its post-hearing brief, the Navy selected one day from Ms. Moser's spreadsheet and compared it to the Contractor Production/Quality Control Report (daily report) and the time card of one employee for that day to show that there were discrepancies (app. supp. R4, tab 148 at 446, tab 380 (No. 252); ex. A-2, tab 2(A) at 6070; gov't br. at 332-33). Ms. Moser explained that she did some comparison with the daily reports for verification purposes, but did not compare every line item on her spreadsheet to every daily report (tr. 8(2)/202).

Ms. Moser's spreadsheet reflects instances in which it appears that some crane and forklift operators were paid either more or less than the prevailing Davis-Bacon Act wage determination rates (Davis-Bacon rates) (ex. A-2, tab 2(A) at 6061-79; ARSOC, tab 12 at 25). Additionally, the DCAA audit report describes a sample verification process that reflects some inconsistencies between the direct labor classifications and SRC's Certified Payroll and Payroll by Date Report, with pay rates that sometimes were higher than the applicable Davis-Bacon rate (ARSOC, tab 12 at 25-26).

SRC Crane Operator

Ms. Moser determined there were 733 man-hours of SRC crane operator time (ex. A-2, tab 1 at 25 of 47, tab 2(A) at 2). She used the applicable Davis-Bacon rate of \$23.11 per hour (ex. A-2, tab 1 at 27 of 47; ARSOC, tab 12 at 27; tr. 8(2)/128). Ms. Ambrose eliminated one hour because it was not recorded at the Davis-Bacon rate, a matter we resolve in favor of the Navy, and otherwise we accept 732 man-hours. She also used the \$23.11 Davis-Bacon rate. (ARSOC, tab 12 at 27) Thus, the revised amount

to which SRC is entitled for crane operator direct labor is \$16,917 (732 x \$23.11) (ex. A-2, tab 1 at 25 of 47).

Forklift Operator

Ms. Moser determined there were 2,219.5 hours of forklift operator time at an average hourly rate of \$19.88, but used the applicable Davis-Bacon rate, \$19.46 per hour, for purposes of the claim for a total of \$43,191 (ex. A-2, tab 1 at 25 of 47, tab 2(A); ARSOC, tab 12 at 28; tr. 8(2)/126-27). She applied a credit for the 660 hours of forklift operator time that had been included in SRC's bid for new roof installation work in the amount of \$12,844 (ex. A-2, tab 2(A); tr. 8(2)/129-30). Thus, the total direct labor claimed for 1,559.5 hours of forklift operator time is \$30,347 (ex. A-2, tab 2(A)).

Ms. Ambrose used the electronic version of SRC's Payroll by Date Report and sorted it by the forklift operator Davis-Bacon straight-time \$19.46 hourly pay rate, rather than by work category, to arrive at 2,846.5 hours and Davis-Bacon overtime \$29.19 hourly pay rate to arrive at 23 hours, a total of 2,869.5 hours (ARSOC, tab 12 at 27-28; tr. 10(2)/68, 156-57).

Ms. Ambrose deducted from the 2,869.5 hours the 1,165 hours of forklift operator hours in SRC's bid for demolition of the asphalt roof and the 660 forklift operator hours SRC bid for new roof installation, a total of 1,825 hours as a credit. She then determined that SRC had 1,196 forklift hours in other claims, most notably the 1,135 forklift operator hours that had been paid for Claim 22 under Modification No. P00007. (ARSOC, tab 12 at 28; tr. 10(2)/68-69, 157) This is a total deduction or credit of 3,021 hours of forklift operator time.

We find Ms. Ambrose's deduction of these 3,021 forklift operator hours is correct. SRC acknowledges the credit of 660 forklift operator man-hours for the new roof installation work (ex. A-2 at 25, tab A; tr. 8/257-58). The Navy is also due a credit for 1,135 of the 1,165 forklift operator hours SRC bid for asphalt demolition work. The Navy did not consider the forklift operator hours SRC included in its bid when it paid the full amount of SRC's cost proposal for Claim 22 (R4, tab 389, subtabs 2, 4). This was an error that Ms. Ambrose corrected in her audit when she determined a credit was due for the 1,135 hours of forklift operator time paid for by the Navy in Modification No. P00007. She also determined without contradiction that SRC had another 61 hours of forklift operator time in other claims (1,196 - 1,135 = 61).

Irrespective of whether we use the 1,559.5 hours computed by Ms. Moser (after the 660 hour credit and without overtime), the 2,846.5 hours of straight time or 2,869.5 hours with overtime computed by Ms. Ambrose, application of the 3,021 hours of credit due the Navy results in no entitlement to payment for forklift operators.

Hook-On/Signal Men

Ms. Moser found that the combined hook-on/signal man labor classification was not always annotated on the time cards she used to create her spreadsheet and was not a separate category within SRC's accounting system (tr. 8(2)/126). She excluded hours claimed elsewhere and computed a revised total of 4,359.5 hours for hook-on/signal men at an average hourly labor rate of \$12.17 based upon actual hourly rates, a total of \$53,055 in direct labor costs, with the explanation that "[p]revious schedules were missing hours that were not correctly quantified and calculated" (ex. A-2 at 25-26 of 47, tab 2(A)).

Ms. Ambrose agreed that SRC did not have a hook-on/signal man labor classification and determined that most of the hook-on/signal men were paid the \$10.52 Davis-Bacon hourly wage rate for roofers (ARSOC, tab 12 at 29; tr. 10(2)/61). Based upon Ms. Moser's testimony that she excluded all overtime labor, we find Ms. Ambrose's assumption that the average rate used by Ms. Moser included overtime is incorrect, particularly since there was evidence that SRC sometimes paid its employees more than the prevailing Davis-Bacon rates (tr. 8(2)/125-26, 10(2)/70). Her DCAA audit report indicates that the earlier version of SRC's claim she audited sought 3,365 hook-on/signal man-hours. Ms. Ambrose deducted 97 hours that she determined had been included in other claims, leaving 3,268 hours. (ARSOC, tab 12 at 28-29; 10(2)/70)

Mr. Airaghi expressed the view that since the hook-on and signal men were required when the crane was being used, the direct labor hours for them should match the crane operating time (tr. 9(2)/200, 10(2)/7-9). This view is consistent with SRC's 30 November 2001 Claim 1 proposal which sought 1,761 hours each for hook-on and signal men. It also sought 630 hours of SRC crane operator time and identified 1,131 hours of crane rental time (with operator), a total of 1,761 hours. (R4, tab 389, subtab 2) Mr. DeLauney testified that the hook-on and signal men "were captive with the crane" and did not perform other functions (tr. 10(2)/216-17).

Computing the hook-on/signal men hours in this manner approximates the hours claimed in SRC's 30 November 2001 proposal. It also resolves the issues of overtime and whether any of the hours were included in other claims. We accepted 732 hours of SRC-owned crane operator hours from Ms. Moser's computation and we find below that there were 1,002 hours of crane rental time, a total of 1,734 hours. Thus, we find SRC is entitled to recover payment for 1,734 hours each for hook-on and signal men, a total of 3,468 hours. Since both Ms. Moser and Ms. Ambrose used the Davis-Bacon wage rates for the crane and forklift operators, and because Ms. Ambrose determined that most of the hook-on and signal men were paid at the \$10.52 Davis-Bacon hourly roofer rate, we find that it is appropriate to use this rate. We find SRC is entitled to recover \$36,483 for hook-on and signal men (3,468 x \$10.52).

Supervisor/Foreman

The parties stipulated that a rate of 7% of direct labor man-hours should be used to compute the number of supervisor/foreman hours charged (tr. 8(2)/149). We previously concluded in *States Roofing Corp.*, ASBCA No. 54854, 2008 LEXIS 41, that the hourly rate should be \$16.62. We have found SRC is entitled to recover 732 hours of crane operator time and 3,468 hours of hook-on and signal men time, a total of 4,200 hours. Using the stipulated rates, this is 294 hours at \$16.62, a total of \$4,886.

2. Rental Equipment

Crane Rental

The parties stipulated that SRC incurred \$141,090 in crane rental costs for Claims 1 and 61 and that the Navy should receive credits for the \$4,600 for crane rental costs SRC included in its bid and the \$7,388 prompt payment credit SRC received (ARSOC, tab 12 at 31; tr. 8(2)/136-38). Ms. Ambrose determined an additional \$975 had been included in other claims and deducted it along with the stipulated credits, a total of \$12,963, from the claimed amount leaving \$128,127 in crane rental costs (ARSOC, tab 12 at 31). Ms. Moser did not evaluate this additional \$975 deduction (tr. 8(2)/134-35). We find SRC incurred \$128,127 in crane rental costs associated with Claims 1 and 61. At the average hourly rate used by ENS Palmer in definitizing Modification No. P00003, \$127.84, this is 1,002 hours of crane rental time.

Forklift Rental

The parties stipulated that SRC incurred \$10,988 in forklift rental costs (ex. A-2, tab 2(A); ARSOC, tab 12 at 31; tr. 8(2)/135-36). This is the remainder of forklift invoices totaling \$38,988 after the Navy paid \$28,000 for forklift rentals for Claim 22 resulting from the differing site condition in Modification Nos. P00004 and P00007 (R4, tabs 2, 147 at 2199).

3. Sales Tax on Rental Equipment

Ms. Moser revised her report to reflect her agreement with DCAA that the crane rental costs were not subject to sales tax. In its claim as revised SRC seeks only \$494.46 in sales tax at 4.5% on \$10,988 forklift rentals. (Ex. A-2, tab 2(A); ARSOC, tab 12 at 22, 31-32; tr. 10(2)/73-74)

4. Equipment Ownership

SRC maintained a daily chart for the cranes that indicated when SRC's 25-ton crane was being used (R4, tab 147 at 1525-37; tr. 8(2)/252-53). Ms. Moser revised the number of hours sought for SRC's crane to 723 based upon the information provided to her from Mr. DeLauney (ex. A-2, tab 2(A); tr. 8(2)/133-39). (We recognize that she determined there were 733 man-hours of SRC crane operator time, a difference of 10 hours, which we found should be reduced by one hour.) She used the \$46.85 hourly rate proposed by SRC and agreed to by LT Hale that was based upon the Army Corps of Engineers' Construction Equipment and Ownership and Operating Expense Schedule equipment rates. SRC had agreed to use its crane at \$46.85 per hour until it was needed elsewhere because crane rental was expensive and LT Hale wanted to find a cheaper way of obtaining a crane. (R4, tab 389, tab 2 at 2; ex. A-2, tab 2(A); tr. 8(2)/243-45, 260)

Ms. Ambrose did not question the 723 hours claimed in the audit report. She did, however, question the crane ownership costs claimed because she determined, and Ms. Moser agreed, that SRC includes these costs in its field overhead (ARSOC, tab 12 at 32; tr. 8(2)/217-18, 10(2)/72-73). Ms. Ambrose was not aware that LT Hale and Mr. DeLauney had reached an agreement that the applicable hourly rate for the SRC crane would be \$46.85, and conceded that she would have tried to verify consistency (tr. 10(2)/154-55). She also considered the hourly rates to be overstated because of the age of the crane, but did not provide the alternate rates she thought should have been used (ARSOC, tab 12 at 33).

DISCUSSION

The Navy conceded liability for additional costs associated with its decision that SRC would not be permitted to use elevator #6 in the performance of this contract and has paid SRC a total of \$326,949 for the increased cost of using cranes on both Claims 1 and 61. SRC seeks an additional \$144,649. The formula for measuring the quantum of an equitable adjustment is the difference between the reasonable cost of performing without the change and the reasonable cost of performing with the change. *See Sauer, Inc. v. Danzig*, 224 F.3d 1340, 1348 (Fed. Cir. 2000). The purpose of an equitable adjustment is to make the contractor whole when the government modifies the contract. *See Precision Dynamics, Inc.*, ASBCA No. 50519, 05-2 BCA ¶ 33,071 at 163,926. SRC nevertheless must prove its additional costs with sufficient certainty so that determination of the amount is more than mere speculation. *See Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 767 (Fed. Cir. 1987).

In our findings above, we evaluated the disputes relating to the costs SRC asserts it incurred associated with use of the crane. We compute the quantum to which SRC is entitled based upon our findings, the following conclusions, and the stipulations reached

at the hearing and our prior cost determinations as reflected in our earlier decision in ASBCA No. 54854.

As to direct labor, SRC is entitled to recover: 732 SRC crane operator hours at the Davis-Bacon hourly rate of \$23.11, a total of \$16,917; 3,468 hook-on/signal man hours at \$10.52 per hour, a total of \$36,483; and 294 foreman/supervisor hours at \$16.62 per hour, a total of \$4,886. Direct labor is thus \$58,286. The Navy did not challenge the \$1,812 direct labor credit Ms. Moser applied for crane equipment lifts SRC had included in its bid (127.5 man-hours at an average of \$14.21 per hour) (ex. A-2, tab 2(A); tr. 8(2)/130-32). Thus, we reduce the \$58,286 direct labor costs by \$1,812 and conclude that SRC is entitled to recover \$56,474 in direct labor costs.

SRC incurred \$128,127 in crane rental costs associated with Claims 1 and 61. The parties stipulated that \$10,988 in forklift rental costs had not been reimbursed. SRC did not include equipment charges for its forklifts or for forklift rental in its bid. It planned to use its own forklifts to load and unload the elevator and for 600 hours of installation, including moving material into place, and for 1,165 hours of asphalt demolition work. The Navy paid SRC for 1,135 hours of forklift rental for a larger forklift for asphalt demolition because of the differing site condition. This closely approximates the 1,165 hours for this work SRC initially bid using a smaller forklift. We are not persuaded that SRC has established a causal connection between the remaining forklift rental costs and the use of a crane instead of an elevator. Apart from asphalt demolition work, the evidence was insufficient for us to conclude that the forklifts were used to perform work that was otherwise not required if the elevator had been available. We conclude SRC is entitled to \$128,127 in crane rental costs, but no forklift rental costs. Absent recovery of forklift costs, there is no sales tax due SRC.

Remaining is the equipment ownership cost claimed for SRC's 25-ton crane, 723 hours at \$46.85 per hour. The number of SRC crane hours was not challenged and it is undisputed that SRC previously was paid \$46.85 per hour for this same crane for 630 hours as part of Modification Nos. P00003 and P00007. It is also undisputed, however, that SRC includes equipment ownership costs in its field overhead. As a result, there is a duplication in the costs claimed for the crane. Given the circumstances at the time, we are persuaded that we should honor the agreement reached between LT Hale and Mr. DeLauney that the Navy would pay SRC an hourly rate of \$46.85 for use of SRC's crane. Moreover, this is the rate used by ENS Palmer when he prepared the recommendation that was adopted by the contracting officer when issuing unilateral Modification No. P00007, definitizing Modification No. P00003. We conclude SRC is entitled to recover \$33,873 for use of its crane (723 x \$46.85).

Having concluded the hourly rate should be applied, the ownership expense attributable to the crane must be removed from SRC's field overhead. We return this accounting exercise to the parties with direction to compute the amount of the revised

field overhead for purposes of this appeal and to determine the amount of SRC's recovery for Claims 1 and 61, less amounts previously paid.

SRC's direct costs, with the stipulated labor burden, total \$229,848. The parties are directed to apply the revised field overhead, the stipulated home office overhead, facilities capital cost of money and bond premium, together with profit at seven percent in accordance with our decision in ASBCA No. 54854 to determine the total amount of SRC's recovery for Claims 1 and 61. The total recovery shall be reduced by the \$326,949 previously paid to SRC in Modification Nos. P00003 and P00007. If SRC is entitled to an additional payment, interest under the CDA shall run from 21 April 2003, until paid.

CONCLUSION

The appeal is sustained as indicated and returned to the parties for a final computation of quantum in accordance with our opinion.

Dated: 16 September 2008

CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

JACK DELMAN
Administrative Judge
Acting Vice Chairman
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. 55506, Appeal of States Roofing Corporation, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals