

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
States Roofing Corporation) ASBCA No. 55507
)
Under Contract No. N62470-97-C-8319)

APPEARANCES FOR THE APPELLANT: Neil S. Lowenstein, Esq.
David W. Lannetti, Esq.
Vandeventer Black LLP
Norfolk, VA

APPEARANCES FOR THE GOVERNMENT: Thomas N. Ledvina, Esq.
Navy Chief Trial Attorney
Richard A. Gallivan, Esq.
Assistant Director
David L. Koman, Esq.
Senior Trial Attorney
Monique Myatt Galloway, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY

This is one of eleven appeals arising in conjunction with Contract No. N62470-97-C-8319 for repair and related work on the roof cells at Building W-143, Naval Operating Base (NOB), Norfolk, VA, awarded to appellant States Roofing Corporation (SRC) by the Navy. We previously issued decisions in ASBCA No. 54854, 08-2 BCA ¶ 33,912, ASBCA No. 55506, 08-2 BCA ¶ 33,970, and ASBCA Nos. 55500, 55503, 09-1 BCA ¶ 34,036, from which we incorporate relevant findings and conclusions. At issue in this appeal is the quantum of a government claim for a deductive change deleting wood blocking.

FINDINGS OF FACT

Detail 1 on Sheet A38 of the contract drawings depicted the installation of wood nailers, or wood blocking, as part of the contract work (ex. G-4 at 39 of 45). In an e-mail dated 27 October 2000, LT Darren R. Hale, USN, the Assistant Resident Officer in Charge of Construction (AROICC), notified SRC that the wood blocking should be deleted and that the Navy would seek a credit for this work (R4, tab 18). Modification No. P00001, issued unilaterally on 11 July 2001, deleted the requirement (R4, tab 2 at 631).

The record contains a number of estimates of the credit due the Navy for the deductive change deleting the wood blocking that were variously prepared by SRC, LT Hale, ENS Alex Palmer, who replaced LT Hale as the AROICC, and Mr. Mark Airaghi, the ROICC supervisory engineer (R4, tab 20 at 771, tabs 75, 387, subtabs 1 through 4; Navy's Amended Response to SRC's Amended Statement of Costs (ARSOC), tab 12; tr. 8/156-57).

On 7 April 2003, the contracting officer issued Modification No. P00007 as a bilateral modification and sent it to SRC for signature. Among other things, it included a contract price deduction of \$33,105 for deletion of the wood blocking. (R4, tab 133; Response to SRC's Statement of Costs (RSOC), tab 2 at 3373) SRC did not sign Modification No. P00007 and it was issued unilaterally on 23 April 2003 with an effective date of 7 April 2003 (R4, tab 2; tr. 6(2)*/136-38).

On 18 April 2003, SRC submitted a 67-item claim to the contracting officer which was received on 21 April 2003 (R4, tabs 133, 147). By a letter dated 30 April 2003, SRC reasserted its claims (RSOC, tab 3 at 1260-61). One of SRC's claim items was a \$17,966 credit to the Navy for deletion of the wood blocking (R4, tab 147 at 1361). This was a \$15,139 reduction of the \$33,105 credit taken in Modification No. P00007.

SRC's direct labor estimate for the credit was \$2,176 for 8,484 linear feet of wood blocking. The claim attachments referenced "RS Means 2001, page 233 Rough Carpentry wood faming, Section 600-0702" as the basis for its labor estimate. (R4, tab 147, subtab II.3 at 1625-27)

The contract price deduction taken by the Navy in Modification No. P00007 was based upon an estimate prepared by ENS Palmer that included \$8,993 in direct labor costs, the product of multiplying 8,484 linear feet of blocking at a unit labor cost of \$1.06 per linear foot. ENS Palmer took both the number of linear feet and the unit labor cost from a write-up prepared by his predecessor, LT Hale, of negotiations for the credit with Mr. Hugh DeLauney, SRC's president (R4, tab 387 at 4, and subtabs 3, 4; tr. 9/40, 90). ENS Palmer did not independently verify LT Hale's numbers and previously had never estimated a credit for wood blocking (tr. 9/90-91). The credit included profit at seven percent (R4, tab 387, subtab 4).

LT Hale's estimate reflects \$10,910 in direct labor costs. It is dated 4 May 2001, and uses 10,293 linear feet of blocking at \$1.06 per linear foot. The cost per linear foot was the sum of \$0.27 for carpenter-cut, \$0.67 for carpenter-install, and \$0.12 disposal-labor. LT Hale's estimate also included \$630 in other labor costs for cranes, hook-on and signal men, forklift operator and forklift rental. (R4, tab 387, subtab 2)

* 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.

This was LT Hale's first roofing project (tr. 8/61). He did not testify about his estimate, and in particular did not explain how he determined the three component labor costs which comprise his estimate of \$1.06 per linear foot.

On 1 September 2004, the contracting officer issued a final decision on SRC's claim. With respect to the wood blocking, the contracting officer noted that the "[a]ctual claim is the difference between the credit of \$33,105.00 issued in P00007 and [SRC's] proposed credit of \$17,966.00 - \$15,139.00." (R4, tab 143 at 1316) The contracting officer found that SRC had used an incorrect RS Means line item to estimate the labor and denied the claim (*id.* at 1317). This timely appeal followed.

SRC subsequently revised the amount of its wood blocking computation in conjunction with a review of its 18 April 2003 claim performed by its accountant, Ms. Susan Moser, who prepared a cost report dated 9 March 2006. Ms. Moser was qualified as an expert in government cost accounting. (Ex. A-2; tr. 8(2)/86-99) Her calculations for the credit were further refined at the hearing to correct typographical errors relating to the wood blocking at EJ Curb. The number of linear feet was corrected to 1,960 (rather than 960), changing the number of man hours to 78.40 (rather than 38.40). (Ex. A-2(C); tr. 8(2)/173-74)

SRC's final estimate for direct labor associated with blocking at the parapet wall was based upon RS Means, Section 06110, 535/5107 at .018 man hours per linear foot for 6,524 linear feet (a total of 117.432 man hours) at a \$14.57 per hour rate for carpenters, a total of \$1,711. Its final estimate for direct labor associated with blocking at the EJ Curb was based upon RS Means, Section 06110, 555/5980 at .040 man hours per linear foot for 1,960 linear feet (a total of 78.40 man hours) at a \$14.57 per hour rate for carpenters, a total of \$1,142. SRC provided Ms. Moser with the RS Means references (tr. 8(2)/198). The total revised number of man hours increased from 155.83 to 195.83. SRC's final computation for the wood blocking credit is \$19,302.66. It does not include profit. The total unburdened labor cost is \$2,853. (Ex. A-2(C))

Mr. DeLauney explained that the RS Means references used in Ms. Moser's report were different than that SRC had originally used in its claim because the Navy had questioned the first reference. Upon further review, he selected the RS Means references provided to Ms. Moser as more appropriate for the work. (Tr. 9(2)/8-9)

Ms. Cecilia Ambrose of the Defense Contract Audit Agency (DCAA) performed an audit of SRC's claims (ARSOC, tab 12). 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). Ms. Ambrose reviewed the RS Means references, determined that Section 06110 was the "appropriate section to use for the blocking effort" and verified the unit costs, including the \$14.57 per hour for carpenters (ARSOC, tab 12 at 49-50; tr. 10(2)/161-63).

Mr. Airaghi prepared yet another estimate for the hearing in the amount of \$32,976, including profit (ARSOC, tab 15(b); tr. 9(2)/211-12). He disagreed with SRC's labor estimate because he thought that the quantity of wood blocking would have required more than one person to perform the work and that additional labor would have been required to move the material to the roof and distribute it. He considered SRC's estimate of 155 or 156 hours for two men to install 8,484 linear feet of blocking to be unreasonable. (Tr. 9(2)/214-16) Mr. Airaghi used LT Hale's estimate of \$1.06 per linear foot for direct labor and 8,484 linear feet of wood blocking to arrive at a total of \$8,993 for direct labor (ARSOC, tab 15(b); tr. 10(2)/14). He looked at the RS Means references in SRC's revised computation and noticed that the crew for this work consisted of two carpenters, but he did not undertake an independent determination of what he thought the labor cost should be using RS Means (tr. 10(2)/15-16).

The parties stipulated at the hearing that the material costs were \$11,408 (tr. 8(2)/174). The parties also agreed that the correct number of linear feet of wood blocking was 8,484 and that the correct amount of the revised direct labor credit computed by SRC was \$2,853 (ARSOC, tab 12 at 47, 51; ex. A-2, tab 2(C); tr. 8(2)/175; 10(2)/91-96).

The cost of direct labor and whether profit should be applied to the deductive change remain in dispute. SRC computes the direct labor amount to be \$2,853 (ex. A-2, tab 2(C)). The Navy believes it should be \$8,993 (gov't br. at 343). The Navy asserts profit should be included in the credit (gov't br. at 25-26). SRC disagrees (app. br. at 29-31; app. reply at 9-10). The Board previously concluded that the profit rate on this contract should be seven percent. *States Roofing*, 08-2 BCA ¶ 33,912 at 167,809. All other cost items associated with the deduction to the contract price for the deletion of the wood blocking have been the subject of stipulations by the parties.

DISCUSSION

The Navy acknowledges that it has the burden of proof as to the amount of the credit to which it is entitled for the deductive change deleting the wood blocking. *See Nager Electric Co. v. United States*, 442 F.2d 936, 946 (Ct. Cl. 1971). The reduction to the contract price should reflect the costs SRC reasonably would have incurred to perform the deleted work. *Fru-Con Construction Corp.*, ASBCA Nos. 55197, 55248, 07-2 BCA ¶ 33,697 at 166,818.

Direct Labor

We conclude that the Navy has not met its burden of proving its direct labor estimate represents the reasonable cost of the work. The Navy relies upon the direct labor rate of \$1.06 per linear foot estimated by LT Hale. There are a number of problems

associated with using this rate. First, the labor rate is a composite estimate that includes rates for carpenter cutting and installation and labor removal. This was LT Hale's first roofing job. The source of his estimates for these rates is not documented and he did not explain how he determined the rates during his testimony at the hearing. Thus, we have no evidence supporting them. Second, the estimate is based upon 10,293 linear feet, not the stipulated 8,484 linear feet, of wood blocking. Finally, although LT Hale's direct labor estimate was used both by ENS Palmer for the credit taken in Modification No. P00007 and by Mr. Airaghi in the estimate he prepared for the hearing, neither made any attempt to independently verify LT Hale's estimate. In short, the Navy has not provided support for the \$1.06 per linear foot used for its direct labor estimate.

In contrast, SRC's revised estimate was based upon cited references to RS Means, an accepted construction estimating guide. Ms. Ambrose determined that the section cited was the appropriate RS Means section to use for estimating the cost of wood blocking and verified the unit costs. Mr. Airaghi looked at the RS Means provisions SRC referenced, but did not provide any estimate of what he thought the labor cost should have been using those line items. In this regard, we infer that the RS Means provisions he looked at are those attached to the Navy's post-hearing brief as Appendix 1, which we discuss below. In any event, Mr. Airaghi took issue with the number of man hours SRC estimated for the work, incorrectly referring to SRC's estimate of 155 man hours instead of the revised final number of man hours, 195.83, when trying to make his point. For the reasons stated, we consider his attempts to discredit SRC's labor estimate to be of virtually no value to our consideration of the issue.

In a further attempt to show that SRC's direct labor estimate was unreasonable, the Navy attached the section referenced by SRC from RS Means "Repair & Remodeling Cost Data, 23rd Annual Edition Commercial/Residential (2002)" as Appendix 1 to its post-hearing brief and argued that SRC should have, but had not, based its estimate on a two-man crew. SRC responded that the Navy's RS Means excerpt was not part of the hearing record and, further, that it was the wrong RS Means edition and publication. The Appendix 1 excerpt also was Section 06110, 545/5107 and not 535/5107 used by SRC. According to SRC the correct publication is "RS Means Building Construction Cost Data, 57th Annual Edition (1999)," explanatory excerpts from which it attached to its reply as Exhibit 1. SRC asserted that the Navy's incorrect interpretation of its excerpt produces an overstated value for labor. The Navy's sur-reply argued that SRC's Exhibit 1 supports the Navy's position, although the Navy again used the crew size taken from its Appendix 1.

At the completion of the hearing, the parties reached agreement as to the contents of the hearing record and an Order Settling the Hearing Record was entered by the Board on 7 January 2008. Neither Appendix 1 to the Navy's post-hearing brief nor Exhibit 1 to SRC's reply brief are part of the settled hearing record. There is no evidentiary testimony explaining either of these new documents.

Board Rule 13(b) provides: “Except as the Board may otherwise order in its discretion, no proof shall be received in evidence after completion of an oral hearing....” Receipt of additional evidence under Board Rule 13(b) is “exceptionally rare” and permitted only in “unusual circumstances.” See *D.E.W., Inc. and D.E. Wurzbach, A Joint Venture*, ASBCA No. 50796, 98-2 BCA ¶ 29,764 at 147,498, quoting *Dae Lim Industries Co., Ltd.*, ASBCA No. 28416, 87-3 BCA ¶ 20,110 at 101,833. The Navy has offered no reason for having failed to offer its Appendix 1 document as an exhibit at the hearing with supporting explanatory testimony. Accordingly, the Board declines to exercise its discretion to open the record and receive the Navy’s Appendix 1 as evidentiary proof in this appeal. SRC’s Exhibit 1 was offered in response to the Navy’s Appendix 1 and is likewise excluded from the hearing record.

Profit

The Navy contends that profit should be included in the calculation of the credit due for the deductive change eliminating the wood blocking. SRC contends that profit should not be included in the adjustment because the contract was in a loss position. We previously concluded that SRC was in a loss position on this contract. *States Roofing*, 08-2 BCA ¶ 33,912 at 167,799.

We stated the applicable rules in *Fru-Con Construction*, 07-2 BCA ¶ 33,697 at 166,818:

We are to leave appellant in the same financial position it would have been in had the deductive change not occurred. *Hensel Phelps Construction Co.*, ASBCA No. 15142, 71-1 BCA ¶ 8796 at 40,873. The contract price adjustment should not be used to reduce or increase profit or loss or convert a loss to a profit or vice versa, for reasons unrelated to the change. *Olympiareinigung, GmbH*, ASBCA No. 53643, 04-1 BCA ¶ 32,458 at 160,562.

Thus, we are obliged to leave SRC in an unchanged financial condition. Because SRC was in a loss position on this contract, a contract price deduction reflecting a loss of profit would increase SRC’s loss over what it would have been without the change. We conclude profit should not be included in the contract price adjustment for the deductive change due the Navy. See *CRF, A Joint Venture of Cemco, Inc., and R.F. Communications, Inc.*, ASBCA No. 17340, 76-1 BCA ¶ 11,857 at 56,805.

The correct contract price deduction for deletion of the wood blocking is computed as follows:

Stipulated Direct Materials	\$11,408.00
Undisputed 4.5% Sales Tax	513.36
Direct Labor	2,853.00
Stipulated 20.14% Labor Burden	<u>574.59</u>
	\$15,348.95
Stipulated 57.43% Field Overhead	<u>1,638.48</u>
	\$16,987.43
Stipulated 13.57% Home Overhead	<u>2,305.19</u>
	\$19,292.62
Stipulated 0.0166% Facilities Cost of Capital on Unburdened Direct Labor	0.47
Stipulated 0.045% Bond Premium	<u>8.68</u>
TOTAL:	\$19,301.77

The credit taken by the Navy in Modification No. P00007 for the deductive change deleting the wood blocking was \$33,105.00. The correct amount of the credit is \$19,301.77. SRC is due a refund of \$13,803.23, plus CDA interest from 21 April 2003. See *Technocratica*, ASBCA Nos. 47992 *et al.*, 06-2 BCA ¶ 33,316 at 165,190; *Plum Run, Inc.*, ASBCA Nos. 46091, 49203, 05-2 BCA ¶ 32,977 at 163,370, 163,374.

CONCLUSION

ASBCA No. 55507 is sustained in the amount of \$13,803.23, plus CDA interest from 21 April 2003.

Dated: 4 March 2009

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

(Signatures continued)

I concur

I concur

MARK N. STEMLER

EUNICE W. THOMAS

Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

Administrative Judge
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. 55507, Appeal of States Roofing Corporation, rendered in conformance with the Board's Charter.

Dated:

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