Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DENIED: July 21, 2003

GSBCA 15421

HERMAN B. TAYLOR CONSTRUCTION CO.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Christina Stone of Gaughan & Stone, Houston, TX, counsel for Appellant.

Sharon J. Chen, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **NEILL**, and **HYATT**.

BORWICK, Board Judge.

This is an appeal from the decision of a General Services Administration (GSA) contracting officer concerning appellant's termination for convenience settlement proposal for a renovation contract. Appellant submitted a proposal in the amount of $1,179,028.80, but later revised the amount to $865,062.91. We held a hearing on an earlier-filed appeal from a contracting officer's decision on appellant's equitable adjustment claim, but the parties requested that the termination for convenience matter be decided on the record.[1]

---

[1] variety of reasons, including alleged Davis-Bacon Act violations. Herman B. Taylor Construction Co. v. General Services

The contracting officer determined that the total cost, including overhead and profit, for the contract was $4,196,937.01, the amount paid by GSA was $4,322,532.69, and the Government thus overpaid appellant by $125,595.68. GSA seeks return of that amount.[2]

We sustain the decision of the contracting officer. We conclude that the reasonable and allowable total cost, overhead, and profit for the contract was $4,196,937.01. GSA paid appellant $4,322,532.69 for contract work appellant had performed. We conclude that the total payment--the ceiling price--should be increased by $9779.82, for proven costs of appellant's equitable adjustment claim. Nevertheless, because the allowable total cost of the contract work was $4,196,937.01 and the Government has paid appellant $4,322,532.69, appellant owes the Government the difference of $125,595.68.

Findings of Fact

The contract

The contract was for renovation of the United States Courthouse and Post Office Building in Galveston, Texas, which the Government built in 1935 and contains more than 110,200 square feet of gross area. Appeal File, Exhibit 1 at 01010-2 (¶ 1.2D). The seven-story building houses courtrooms, lobbies, workrooms, offices, and other related spaces for the United States Courts, the Department of Justice, the Postal Service, and other agencies. Id. The building occupies an entire city block of the west end of the "Strand" historic district

---

Administration, GSBCA 12961, 98-2 BCA ¶ 29,836. The Board sustained the Government's termination for default based on the Davis-Bacon Act violations. Id. On October 27, 1998, appellant appealed the Board's decision on the termination for default to the United States Court of Appeals for the Federal Circuit. We held a hearing on the equitable adjustment claim--GSBCA 13884-- in the fall of 1998, and in the fall of 1999, we suspended proceedings pending the decision of the Court of Appeals on the termination for default appeal. Herman B. Taylor Construction Co. v. General Services Administration, GSBCA 13884 (Sept. 13, 1999). On February 15, 2000, the Court of Appeals reversed and remanded GSBCA 12961 to the Board. Herman B. Taylor Construction Co. v. Barram, 203 F.3d 808 (Fed. Cir. 2000). Appellant then submitted a termination for convenience proposal to the contracting officer. Upon receiving her decision, appellant timely appealed to the Board. That appeal was docketed as GSBCA 15421. By the agreement of the parties, the record compiled in GSBCA 13884 was made part of the record in GSBCA 15421.

but later granted an upward

adjustment of $4724 for appellant's insurance reimbursement. The $125,595.68 figure reflects that adjustment.

of Galveston. Id.; Herman B. Taylor Construction Co., 98-2 BCA at 147,408 (Finding 1).

The contract required that work be performed in four stages. Appeal File, Exhibit 1 at 01010-2 (¶ 1.2D). The first stage involved the replacement and enhancement of the major building support systems, including heating, ventilating and air conditioning (HVAC), electrical, lighting, and water distribution systems. The second stage involved identification and partial abatement of asbestos-containing materials in the mechanical and electrical rooms and plumbing pipes, ceiling plenums, and exposed locations throughout the building. The third stage involved upgrade and enhancement of the existing fire safety systems. This work included the addition of fire sprinklers throughout the building, installation of smoke detectors in the elevator lobbies, replacement of the standpipe systems, construction of a dedicated fire control center, and replacement of the stair railings system. The fourth stage involved miscellaneous architectural improvements and alterations, including landscaping and site improvements. Appellant was to perform the work in specified phases, with all inside work being performed outside normal working hours. Id. at 01010-3 (¶ 1.2E); Herman B. Taylor Construction Co., 98-2 BCA at 147,408 (Finding 2).

The equitable adjustment claim

Appellant's equitable adjustment claim, which was the subject of GSBCA 13884, as amended, sought: (1) $65,971.87 for disputes concerning change estimates (CEs) 3, 4, 8, 11, 12, 15, 20, and 46; (2) $83,628.39 for "cost of lost efficiency and momentum as a direct result of flawed drawings and specifications and significant delays in response to requests for information (RFI) which in turn necessitated numerous unscheduled crew moves"; (3) $79,989.90 for "cost of lost efficiency and momentum as a result of a continuous need to reschedule, re-assign manpower, work operations concurrently, and dilute supervision to deal with changes in scope and sequence"; (4) $65,257.57 for "non payment for contract work performed from May 1, 1994 to June 10, 1994"; (5) $34,884.58 for "lost profits on balance of work to be performed which [appellant] was prevented from performing as a result of the [alleged] improper and unjustified early termination of [appellant]"; (6) $71,580.72 for "cost of extended supervision resulting from the GSA's refusal to accept the [appellant's] schedule, not withstanding the fact that the bid documents specifically stated that durations stated were maximums"; (7) $75,445.71 for "internal administrative costs and consulting costs associated with this request for equitable adjustment"; and (8) an unspecified amount for "attorney's fees and pre-judgment interest." Appeal File, GSBCA 13884, Exhibit 4, Tab A at 1-2. [3]

554,202.51, $143,415.64 of which was for "extra work performed by [appellant] for which full compensation was not paid." Appeal File, GSBCA 13884, Exhibit 4, Tab A. In its post-hearing brief in GSBCA

Our findings below serve as the basis for our analysis as to how much, if at all, the contract ceiling price should be increased and whether appellant incurred costs reimbursable under the termination for convenience clause.

Pricing of changes

CE 3 (Modification PC06)--pricing of added asbestos work

On or about December 9, 1992, through CE 3, GSA requested appellant to provide change order pricing for additional asbestos work in the basement of the courthouse, to include the removal of approximately 15,520 square feet of contaminated soil in the basement crawlspace and removal of 8120 linear feet of pipe insulation, as well as the re-insulation of 6500 linear feet of pipe. Respondent's Hearing Exhibit 58. Appellant provided preliminary pricing of $210,617.45. This estimate included asbestos removal of $175,706.45 (labor, materials, supervision, and overhead); alleged "damages" to appellant of $13,600; alleged delay impact to the electrical subcontractor, Longhorn Electric Company, of $10,428; and alleged delay impact to the mechanical subcontractor, Sentry Mechanical, Inc., of $10,883. Id. at 69.

The delay damages reported by Sentry Mechanical included costs for all alleged, but unspecified, delays to the project to date. Sentry Mechanical reported that the removal of asbestos from the crawlspace as contemplated by CE 3 would create further delays. Longhorn Electric reported that it had been ready to work since October 1992 but that it had been "held-up" by the asbestos in the crawl space. Respondent's Hearing Exhibit 58 at 70-71. Longhorn Electric sought the costs of its job superintendent from October 5, 1992, through December 21, 1992; labor burden; job trailer rental of $500 for two month's rental; and office management cost of $6000. Id. On or about January 20, 1993, appellant increased its proposal to $210,611.45, and on February 22, 1993, it increased its proposal again to $267,705.66. Id. Alleged delay costs to Longhorn Electric increased, without explanation, to $14,356. Id. at 185.

The Government determined a unilateral price of $188,164.54 as the fair and reasonable price for the changed work. Respondent's Hearing Exhibit 58 at 27. The Government did not compensate appellant for Sentry Mechanical's or Longhorn Electric's alleged delays because appellant had not provided the contracting officer with data or schedules to show that the project would not be completed within the scheduled contract

---

13884, appellant reduced its claim by $77,443.77. In a brief contracting officer's decision, the contracting officer denied the claim for lack of substantiation. Id., Exhibit 16.

completion time. Id. The Government also noted that payrolls for the delay period December 1992 through February 1993 showed the appellant and its electrical and mechanical subcontractors working on the project and that, according to the contract schedule and phasing, the subcontractors would be on-site anyway. Id. at 31.

At the hearing on the merits of GSBCA 13884, appellant's principal admitted that appellant had not paid Longhorn Electric $10,428 for the alleged delay. Instead, according to the testimony, appellant "bartered," or "swapped work with [Longhorn]." Transcript at 41-42. As explained by appellant's principal:

> Well, subs normally clean up their own mess when they make a---mess up an area and it had to be cleaned up every night before the people could go back to work the next morning, the tenants. So we told him that we would make up the $10,000 by cleaning up the floors, sweeping, dusting, helping him carry electrical conduit up through the building. We would do our best to make up his losses.

Id. at 42.

Appellant engaged in the same practice with Sentry Mechanical, according to appellant's principal. Appellant's principal engaged in the following colloquy with appellant's counsel:

> Q. And this $10,883. Did [appellant] pay . . . Sentry Mechanical that money?
>
> A. To keep them on the job, I claimed--told them I would clean up after them when they got to working, help them any way I could, let them use my telephone for long distance calls, helped them move their office trailer, set it up for them.
>
> Q. And did you perform that work?
>
> A. Oh yes, Oh, yeah.
>
> Q. The dollar value of the work you performed, was it . . . as much as $10,883?
>
> A. It was a lot more than that ma'am.

Transcript at 79. In answer to the presiding judge's question whether appellant was making a claim on behalf of subcontractors, appellant's principal answered:

No. just me.

. . . .

This is what I lost, but they're entwined with it, though.

Id. at 76. Appellant has not established that it incurred either increased expense or delay costs due to the issuance of the change order.

CE 4 (Modification PC 13)--extended overhead claim

On November 2, 1992, appellant advised the contracting officer that it had encountered hidden fire walls while demolishing the ceiling in rooms 332 and 328 of the courthouse. Appellant requested an equitable adjustment for the alleged differing site condition. Respondent's Hearing Exhibit 59 at 55. The Government issued a change order request incorporating demolition of the hidden fire walls and redirecting telephone and electrical conduits in corridor 330 of the courthouse, apparently to accommodate the demolition of the firewall. The change order also ordered the rearrangement of bus ducts, conduits, a telephone board, the fire alarm control panel, feeder and conduit risers, and chilled and hot water risers from the second through sixth floors, as to be shown on approved shop drawings. Id. at 46. Appellant requested ten days of extended overhead at $680 per day. The Government rejected that portion of the request. The Government concluded that appellant had not developed a schedule sufficient to identify which portions of the job were on the critical path. Id. at 53. The Government also questioned whether appellant could have incurred extended overhead. Appellant premised its claim of extended overhead on early completion of the project. The Government concluded that appellant had not provided sufficient substantiation for its position. Id. at 14. Appellant has not established delay and increased costs resulting from this change order.

CE 8 (Modification PC05)--pricing of additional asbestos work

On or about the night of February 4, 1993, while demolishing the ceiling, appellant discovered unknown ducts and piping covered with asbestos insulation. Respondent's Hearing Exhibit 59 at 15. The Government issued CE 8 for abatement of the asbestos, and appellant submitted a price proposal of $9594.45, including overhead and profit of fifteen percent. The proposal included subcontractor cost of $8100, fifteen percent for overhead and profit, and three percent for the bond. Appeal File, GSBCA 13884, Exhibit 4, Tab B(5).

The equitable adjustment clause of this contract provided that on work performed by other than the contractor's own forces the most contractor would be entitled to, unless it

demonstrated entitlement to a greater percentage, was ten percent commission and no overhead and profit. Appeal File, GSBCA 13884, Exhibit 1, Specification and Bid Forms, Vol. I, GSA Form 3506 at 31 (¶ 81, GSAR 552.243-71 Equitable Adjustments (Apr. 1984)). Applying the ten percent commission and three percent bond to the subcontractor price of $8100 results in $9177.30, or $1679 more than the unilateral price of $7498.30 established by the Government. Id., Exhibit 4, Tab B(5). Appellant has established an additional increased cost of $1679.

CE 11 (Modification PC 11)

This change order specified eleven items of changed work: (1) providing temporary power to "J" boxes in storage room 221A; (2) re-circuiting of the coffee bar to a new service panel in coffee room 607A; (3) demolition of the existing partition between the mechanical room 628 and office 604A and replacement with a new sound partition; (4) deletion of the requirement to provide a partition between the holding cell and office 601A; (5) substitution of drywall ceiling for the drop ceiling in the coffee room; (6) removal of the steel channel above the clerk's office in room 505; (7) provision of a new chase partition to enclose pipes between room 142 and the postal office workroom; (8) provision of a new chase partition east of the existing mechanical chase between the mechanical room and room 149 of the mezzanine; (9) identification and re-circuiting of the existing lighting to a new service panel in rooms 420A, 401D, and 401C; (10) rerouting and re-circuiting the existing water heater controls to the service panel in boiler room 005; and (11) demolition of the existing finishes and provision of new finishes in room 319. This last item required the work of the asbestos subcontractor to remove asbestos floor tile. Respondent's Hearing Exhibit 62 at 50. The change request also deleted partition work in a holding cell in the courthouse. Appeal File, GSBCA 13884, Exhibit 4, Tab B(7); Respondent's Hearing Exhibit 62. An item for adding a pair of hollow metal doors to the entrance of the electrical room was also deleted. Id.

Appellant says it is owed $976.14 more than the Government's pricing. Appellant's Brief app. A. Appellant and the Government agree on the amount of direct costs incurred, i.e., $12,010.95. Compare Respondent's Hearing Exhibit 62 at 17 with Appellant's Brief app. A. The parties disagree on whether appellant or his subcontractor performed most of the work. Respondent's pricing of the modification assumed that 85.75% of the cost of the work was borne by subcontractors while appellant's pricing assumed that appellant incurred 85.98% of the cost of the work with appellant's own forces. Compare Respondent's Hearing Exhibit 62 at 17 with Appellant's Brief app. A. Application of percentage markups to the differing categories of costs account for the $976.14 difference. The backup to the pricing shows substantial involvement in the performance of this work by six sub-contractors--Sentry Mechanical, Inc.; BMC; Door-Pro Systems, Inc.; Longhorn Electric Co.; Stoma Floor Covering; and Williams Interior Construction. Respondent's Hearing Exhibit 62 at 50-53,

55. Appellant has not established that its allocation of work between its own forces and subcontractor forces was accurate or that it incurred increased costs based upon its assumed allocation of work.

CE 12 (Modification PC 12)

CE 12 required appellant to (1) remove plaster ceilings in elevator lobby 200 and corridors 230 and 237, (2) remove asbestos contaminated duct work in room 403, and (3) remove a plaster ceiling in room 728. Respondent's Hearing Exhibit 63.

For the work in item (1), correcting for appellant's calculation and mathematical errors, appellant's labor total is $968.90, which comprises direct labor of $646.24 (sixteen hours of supervision at $17.59 per hour and forty-eight hours of laborers' hours at $7.60 per hour), forty-nine percent labor burden, and transportation mileage of $6. Appellant's Brief app. A. Appellant states that it used three rolls of plastic at a cost of $150, a dumpster for $100, and small tools and blades for $100, for a direct cost subtotal of $1318.90. Applying overhead and profit rates of ten percent and a bond rate of three percent results in a total for this item of $1643.75.[4] The Government unilaterally priced the change for this work based on its estimate of $600 of labor, $294 labor burden, an assumption that appellant would need to use one plastic roll at a cost of $50, two rolls of tape at a cost of $8, dumpster costs of $50, and small tool cost of $37, for a direct cost subtotal of $1039. Respondent applied a ten percent rate for overhead, a ten percent rate for profit, and a three percent rate for the bond, to derive $1294.90. Respondent's Hearing Exhibit 63.

For item (2), appellant accepts the Government's pricing of $929. For item (3), appellant says it incurred $1600 in direct labor costs, forty-nine percent labor burden, five rolls of plastic, eight rolls of tape, $200 for the dumpster, and $150 for small tools and blades. Appellant's Brief app. A. Again, correcting for a mathematical error in appellant's calculation of labor burden, the total direct cost is $3024. Adding overhead and profit rates of ten percent, and a bond rate of three percent, results in $3768.81 for that item. The

---

nd ten percent profit,[4] unless

the contractor demonstrated entitlement to a higher percentage of profit, on additional work. Appeal File, GSBCA 13884, Exhibit 1, Specification and Bid Forms, Vol. I, GSA Form 3506 at 31 (¶ 81 GSAR 552.243-71 Equitable Adjustments (Apr. 1984)). The Government used markup percentages for commission and overhead of ten percent in its pricing of changes, as did appellant. Appellant's Brief, GSBCA 13884, app. A; Respondent's Hearing Exhibit 63. We use the ten percent markup for profit and ten percent markup for overhead that the parties used.

Government priced labor at $1153, and pricing the other material costs, refused to reimburse appellant for all the plastic and tape appellant claimed was necessary to perform the work. Using the markups of ten percent overhead, ten percent profit, and three percent bond, the Government priced this item at $2501.27. Respondent's Hearing Exhibit 63. The difference between appellant's total pricing for this change (including markups) and respondent's pricing is $1267.54. Appellant's material costs were based on actual use, the Government's material costing was based on estimates Appellant has established it incurred additional increased costs of $1267.54 for this change request.

CE 15 (Modification PC 17)

CE 15 involved thirteen miscellaneous changes to the contract, including one deductive change. Respondent's Hearing Exhibit 64 at 3-4. The deductive change involved a credit for not demolishing 7'-6" of existing clay/tile partition. The added changes were to re-circuit appliance receptacles in the galley; extend a partition from the existing ceiling line to the structure in room 139; relocate the return air openings in room 148 and in mechanical room 149; re-circuit a closet light fixture and a wall clock in rooms 103 and 108; provide furr-down at the existing supply duct in room 144; provide a revised sprinkler layout in workroom 43; relocate an existing chain metal fence and mezzanine slab and add a partition with return air boot in room 147; relocate the sprinkler heads in room 108; re-circuit the existing vault for light fixtures in electrical vault 6; provide flush access panels in the plaster ceiling of lobby 100; repair a dirt berm at the exterior of the building where the berm washed out; and revise the partition layout for service counter 141. Id.

The Government accepted appellant's proposal for its direct cost and its subcontractors' cost, but adjusted percentage markups. The Government believed appellant was pricing its proposal for subcontractor work on the basis of ten percent commission and ten percent profit when contractor was only allowed ten percent commission on subcontractor work. Respondent's Hearing Exhibit 64 at 16. The equitable adjustment clause of this contract provided that, on work performed by other than the contractor's own forces, the contractor would be entitled to a maximum ten percent commission and no overhead and profit. Appeal File, Exhibit 1, Specification and Bid Forms, Vol. I, GSA Form 3506 at 31 (¶ 81, GSAR 552.243-71 Equitable Adjustments (Apr. 1984)). Appellant argues that, "[a]ssuming that all of the GSA figures for costs are correct, the total for item No.1 through 13 is $15,202.68." Appellant's Post-Hearing Brief, Exhibit A. In fact, the total is less--$14,762.01--if one subtracts the cost of the deductive change and adds appellant's cost to subcontractors' cost without markups. Respondent's Hearing Exhibit 64 at 29. Adding the correct markups on subcontractors' work (ten percent commission and three percent bond) yields the change order price of $16,402.68. Id. Appellant has not established that it incurred increased costs for this change request.

CE 20 (Modification PC 26)

This change involved eleven items: (1) providing extra work to reroute piping on the fifth, sixth, and seventh floors; (2) deleting and adding miscellaneous electrical work on the fifth and sixth floors, including the deletion and addition of walls outlets, telephone outlets, and baseboard systems; (3) providing institutional sprinkler heads on the fifth floor in place of regular heads and redesigning the sprinkler system and removing the sprinkler heads from the Judges' suites on the fifth floor; (4) adding work for acoustical ceiling removal and deleting work for dry wall and work for acoustical ceiling removal on the fifth and sixth floors; (5) printing[5]; (6) adding plaster ceiling removal and deleting plaster ceiling removal on the fifth and sixth floors; (7) deleting painting of walls and ceilings and finishes in several rooms on the fifth and sixth floors; (8) deleting installation of an oak door frame; (10) job engineering; and (11) adding penetrations on the fifth and sixth floors. Respondent's Hearing Exhibit 66 at 7-8.

Appellant, discerning potential conflicts, had many questions about the change order. For example, appellant noted that for room 509, the reflective ceiling plan showed the existing ceiling plan to remain, while the ceiling demolition plan showed the ceiling to be removed. Respondent's Hearing Exhibit 66 at 26. Appellant stated that the asbestos abatement plan showed the piping above the ceiling to be abated, requiring a complete removal of the ceiling and its replacement with gypsum board. Id. In room 502, appellant stated, the beam between columns K-14 and -14 would block the risers and sprinkler piping from the north side of room 502B. Id. at 29. Appellant also stated that in rooms 508A and 508B, the existing ceilings were different heights, and that the ceiling heights had to be made the same to allow the sprinkler piping to clear the beam. Id. at 30. Appellant maintained that the sprinkler piping in rooms 503 and 517 would not reach the southeast corner of the courtrooms because of a potential conflict between beams and existing ductwork in the ceiling and the run of the sprinkler pipe. Id. at 27. Appellant noted that the existing beams and ductwork in room 502B would not allow installation of sprinkler pipe with the existing ceiling height. Id. at 28. Appellant maintained the solution to such conflicts was to reroute the pipe, id. at 46, or to lower the ceilings to allow the sprinkler pipes or electrical ducts to clear existing obstructions. Id. at 47.

Respondent's architect and mechanical engineer consultant provided extensive clarifications and comments to the Government to aid appellant in the performance of the change. Respondent's Hearing Exhibit 66 at 22-53. For room 509, the architect and mechanical engineer advised that a new acoustical ceiling would be shown to match that of

---

[5] not explained in the exhibit.

the existing ceiling in room 509A with new light fixtures and that the old ceiling would be removed and replaced with a lay-in ceiling, with installation of recessed light fixtures. Id. at 40, 46. For Rooms 502 and 502B, the mechanical consultant advised appellant that the ceiling would be lowered to nine feet and that the lowering of the ceiling would provide enough clearance to run the sprinkler pipe. Id. at 47-48. For rooms 508A and 508B, the Government's mechanical consultant explained how appellant could avoid the stated conflict by using available space to route pipe and provided appellant with a procedure to make space available to install sprinkler heads. Id. at 48.

The Government determined that the change order additions were valued at $26,404.51, while the deletions were estimated to be $24,080.90, leaving a total of $2322.61, which the contracting officer rounded off to $2324, the amount of the unilateral change order. Respondent's Hearing Exhibit 66 at 3.

In pricing the unilateral change order, the Government agreed to appellant's pricing proposal for sub-items one through four. Respondent's Hearing Exhibit 66 at 6-7. For sub-item six, deletion and addition of removal of plaster ceilings, the Government and the contractor agreed during the negotiations on this change order that the net effect of this change would be a deletion to the work. Appellant wanted to be reimbursed $11 per square foot for the addition of the removal of plaster ceilings, but only agreed to a credit of $3 per square foot for the deletion of the removal of the plaster ceilings. The Government estimated the unit price at $3.08 per square foot for both the deletion and addition of removal of plaster ceilings, for a total credit to the Government of $4219. Id.

Sub-item seven was the deletion of painting work. During negotiations on this change, GSA's contracting officer's technical representative (COTR) and appellant agreed on the total square feet to be deleted, but the appellant's price per square foot to be deleted was lower because the Government's estimate used a more-expensive natural finish than the appellant's estimate. Respondent's Hearing Exhibit 66 at 7. The square footage price and the contractor's unit price were used to develop the "agreed to" price of a credit to the Government of $2585. Id. The Government agreed with the contractor's pricing for sub-item eight. Id.

Appellant, without explanation, in its brief in GSBCA 13884 maintained that the value of the paint deletion should have been $1906.20 and not the $2585 that the Government had used in its pricing of the unilateral change order. Appellant's Brief, Exhibit A.

For sub-item ten, job engineering, appellant claimed incurred costs of $7290.40. Affidavit of Herman B. Taylor (Taylor Affidavit) (Feb. 22, 2002); Appeal File, GSBCA 13884, Exhibit 4, Tab H. The Government priced that item at $4642.47 (including mark-ups)

and allowed that amount. Respondent's Hearing Exhibit 66 at 3, 9. Appellant also anticipated extra penetrations (for sub item eleven) at a cost of $6618. Respondent's Hearing Exhibit 66 at 8, 127. The Government concluded that appellant had added extra costs for three of the penetrations that did not need to be made to perform the work. Id. at 8. However, appellant explained that the penetrations were necessary to explore the condition of the site in preparation for performing the work. Taylor Affidavit at 4. Appellant incurred labor costs of $6618 for performing the work. Respondent's Hearing Exhibit 66 at 8. The Government allowed $2432.65 (including mark-ups) for the penetrations. Id. For sub-items ten and eleven, appellant incurred costs of $6833.28 greater than those costs the Government allowed in its unilateral pricing (($7290.40-$4642.47) + ($6618-$2432.25) =$6833.28).

In summary, the dispute over appellant's termination for convenience proposal for CE 20 centers on the amount due the Government as a credit for deletion of painting and the amount of job engineering and penetration work necessary to perform the change order. As for the painting, appellant has not shown that the Government should receive a smaller credit than it took in unilaterally pricing the change. Appellant has not demonstrated that the square footage or unit pricing for the deleted work, which appellant had apparently agreed to during the negotiation of this change, was erroneous. As for the job survey and cost of penetrations, in pricing the unilateral change, the Government had already granted appellant $7075.32 for those costs. Appellant has not established that it needed to expend significant funds for job survey costs in light of the extensive assistance the Government, through its architect and mechanical consultant, provided appellant in resolving potential conflicts and obstructions in the performance of the change order. Appellant has demonstrated it incurred additional costs of $6833.28 for sub-items ten and eleven, however.

CE 46 (Modification PC 44)

This change called for: (1) re-circuiting lighting in vault 401C; (2) relocating a light switch in room 607B; (3) adding a smoke detector in elevator lobby 200; and (4) re-circuiting telephone switch boxes in janitor closets B2, A3, A4, A5, and A6. Respondent's Hearing Exhibit 69. Appellant agrees with the Government's pricing of items one through three, but states that Longhorn Electric's bill for the fourth item was $2207 rather than the $1477 allowed by respondent, after deducting work on closets A4 and A6. Appellant's Brief app. A; Respondent's Hearing Exhibit 69 at 8. The temporary circuiting already performed for the boxes in those closets was satisfactory as a permanent solution. The Government allowed $1307 for the permanent re-circuiting of the boxes in closets B2, A3, and A5. Appellant did not present Longhorn Electric's bill for this work or otherwise show that Longhorn Electric had permanently re-circuited the boxes in closets A4 and A6, which would have rendered the Government's elimination of that work and subsequent pricing erroneous. See Respondent's Hearing Exhibit 69. The difference between appellant's estimate and the Government's

estimate was $900. Given appellant's lack of proof, we cannot find appellant's estimate to be the more reliable one.

Work allegedly performed from May 1 through June 10 and not paid for

This claim is based on a spreadsheet in the equitable adjustment claim that does not explain what work was performed for which appellant was not paid. See Appeal File, GSBCA 13884, Exhibit 4, Tab E. The contracting officer determined that $35,687.77 of the amount claimed was paid to the surety--Ohio Casualty-- under the takeover agreement, and that paying appellant would be equivalent to paying for the same services twice.[6] The GSA auditors concluded that Ohio Casualty paid $48,992 to appellant's subcontractors. Respondent's Hearing Exhibit 45 at A-3. The evidence suggests that Ohio Casualty paid appellant's subcontractors for work that was performed by subcontractors but not paid for by appellant. Appeal File, Exhibit 12, Item 1; Respondent's Hearing Exhibit 45. This suggestion is not refuted by appellant. Appellant has not shown it would have been entitled to recovery on this portion of the claim.

Alleged labor inefficiency

Appellant sought $83,628.39 for the "cost of lost efficiency and momentum as a direct result of flawed drawings and specifications and significant delays in response to requests for information (RFI) which in turn necessitated numerous unscheduled crew moves." Appeal File, GSBCA 13884, Exhibit 4, Tab A. As to that claim, the following information was developed at the hearing on the merits of GSBCA 13884.

Appellant's base bid for labor versus actual labor costs

Appellant's bid price for labor with its own forces was $62,000 with a $26,000 contingency. Respondent's Hearing Exhibit 4; Transcript at 224. At the hearing on the merits, appellant's principal could not break down that number to labor hours or contract tasks, and he could not state the number of crew moves appellant anticipated on the job. Transcript at 227-28.

[6] to procure the performance of all of the work partially performed by appellant in accordance with the contract documents. Respondent's Hearing Exhibit 45 at 2 (¶ 1).

Crew moves

Appellant's claim for labor inefficiency is based on the assumption that, in its original bid, appellant anticipated 140 crew moves had the contract been implemented on time and on schedule. Appeal File, GSBCA 13884, Exhibit 4, Tab C. The number of 140 crew moves was developed by appellant's claims consultant from the contract's phasing plan. Transcript at 454-55, 461.

The phasing plan is GSA's description of the phases of work to be accomplished. Appeal File, GSBCA 13884, Exhibit 4, Tab G-1. Phase 1, for example, contemplated materials procurement, shop drawing, mobilization, staging, and basement asbestos abatement. Phase 2 contemplated partition construction, door installation, and rough-in for electrical rooms on levels 2 through 4; installation of main feeder components in vertical utility chases; spot asbestos abatement of mechanical and electrical rooms on levels 2 through 4; installation of chilled and hot water piping risers; installation of heating, ventilation and air conditioning (HVAC) and compressors; rerouting of ductwork; and installation of a fire alarm panel. Phase 3 involved removal of the old air handling units and installation of new ones; demolition of an old, and installation of a new, generator building; demolition of an old, and installation of a new, cooling tower; installation of old mechanical pumps in the basement and switch gear and equipment; renovations and alterations in basement; and installation of fire risers, fire service, and basement piping. Phase 4 involved installation of flooring on the seventh floor and mezzanine, elevator machine room work, elevator recall work, and installation of new equipment in generator building. Phase 5 involved asbestos abatement; typical alteration and repair work; demolition of existing stair handrails and installation of new handrails; installation of sprinkler piping; installation of air conditioning ductwork; building and installation of new partitions; and installation of a ceiling grid, electrical wiring; ceiling, flooring, and irrigation; and painting. Id.

While the phasing plan might have served as a foundation for a contractor workforce mobilization plan, it was not itself a workforce mobilization plan. The phasing plan was merely GSA's concept of the phasing of the work. The phasing plan did not purport to specify how any of the contractor's workers or subcontractors were to be deployed between phases or, for that matter, within phases to accomplish the work. Appeal File, GSBCA 13884, Exhibit 4 at G-1. The phasing plan was too general to identify the number of crew moves appellant had contemplated at the beginning of the job. Transcript at 790-91.

Appellant claimed that it spent 101 extra crew moves taking 1084 labor hours due to the Government's delayed response to requests for information (RFIs). Appeal File, Exhibit 4 at G-1. Appellant also claims that it took an extra 284 other crew moves involving an extra 3924 labor hours due to alleged Government hindrances to efficient contract administration,

such as failing to move furniture, federal employees working in assigned areas during contract work hours, elevator breakdowns, work damaged by tenants after completion, and general lack of coordination. Id. Appellant's claims consultant estimated that it would take ten labor hours to execute each crew move. Transcript at 469. This estimate was based on an assumption that it would take a two-person crew two and one-half hours to pick up their tools, take the tools back to the construction trailer, find out where they were going to be reassigned, get reassigned, get the material that they needed for that new area, and pick up the materials needed for the new assignment, with two moves required for each occasion. Id. The claims consultant arrived at this estimate from his general experience as a contractor and claims consultant. Id. at 470. Appellant has not shown labor inefficiency because it had not established that the number of crew moves needed to perform the work exceeded the number of crew moves appellant had planned to perform the work.

Lost efficiency and momentum

Appellant also sought $79,989.90 for the "cost of lost efficiency and momentum as a result of a continuous need to reschedule, re-assign manpower, work operations concurrently, and dilute supervision to deal with changes in scope and sequence." Appeal File, GSBCA 13884, Exhibit 4, Tab A. This claim was based on lost productivity of 38.44%. Id., Exhibit 4, Tab D at 2. Appellant assumed a 20% loss of productivity for "morale and attitude," a 10% loss of productivity for "reassignment of manpower," a 5% loss of productivity for "concurrent operations," and a 10% loss of productivity for "dilution of supervision." Id., Exhibit 4, Tab D. Appellant's claims consultant did not explain how the loss of productivity percentages totaled to lost productivity of 38.44%.

The claimed amount is as follows:

Direct Non-Supervisory Labor Hours Worked	13,688.00
Less Direct Labor Hours for Extra Crew Moves	(3,924.00)
Subtotal Labor Hours	9,764.00
Loss of Productivity	38.44%
Lost Labor Hours	3,753.28
Average Labor Hour Rate	$17.76
Total Extra Cost	66,658.25
Appellant's Mark-Up (20%)	13,331.65
Total	$79,989.90

Appeal File, Exhibit 4, Tab D.

The claim for loss of labor productivity was based on the Mechanical Contractors Association of America (MCAA) Bulletin PD 2 (1994), entitled "Factors Affecting Labor Productivity." Appeal File, Exhibit 4, Tab D-2. The Bulletin takes general factors and assigns a percentage of loss if the condition is "minor," "average," or "severe." Id. For "Morale and Attitude,"[7] as an example, the Bulletin assigns productivity loss of ten percent, twenty percent, and thirty percent for minor, average, and severe loss, respectively. Id. The Bulletin warns that:

> these factors are intended to serve as reference only. Individual cases could prove to be too high or too low. The factors should be tested by your own experience and modified accordingly in your use of them, since percentages of increased costs due to the factors listed may vary from contractor to contractor, crew to crew and job to job.

Id.

Respondent's expert claims analyst explained that the MCAA Bulletin was not intended to prove loss of productivity, but to illustrate what types of productivity loss might occur on a mechanical project. Transcript at 801. Appellant's claims consultant admitted that the productivity study applied only to mechanical trades. Id. at 511-12. Appellant's claims consultant recognized that appellant's own forces were primarily "helpers for clean-up, set-up, that sort of thing." Id. at 499. Appellant did not tie-in loss of productivity to the actual performance of appellant's workforce on the job as against their planned performance at the beginning of the contract.

Respondent's expert claims analyst considered whether appellant's forces were inefficient during the performance of the contract. Respondent's Hearing Exhibit 46. Lacking any baseline data from appellant, the analyst had an experienced bid estimator in his firm perform a labor take-off of the contract's general scope of work, as if the estimator were bidding the job. Transcript at 834.

To perform the estimate, the estimator used the contract specifications and drawings and was aware that the contract work was to be performed at night in an occupied building. Transcript at 835. Respondent's claims analyst gave the estimator no further information and the estimator had no knowledge of appellant's claim. Id. The estimate was based on Means'

---

petition for overtime[7], over-

inspection, multiple contract changes and rework, disruption of labor rhythm and scheduling, poor site conditions, etc." Appeal File, Exhibit 4 at Tab D-1.

Facilities Construction Cost Data, which is a database that identifies costs associated with given elements of work or tasks performed in the construction industry. The estimate was adjusted for different areas of the country; the estimator adjusted his estimate for Galveston, Texas. Id. at 835-36. The analyst analyzed the labor hours for each construction task (demolition, concrete, masonry, miscellaneous metals, wood and plastic, roofing, doors and windows, finishes, and general conditions). That bid estimate for the general scope of work amounted to 16,308 labor hours necessary to perform the general scope of the contract work, including an estimated 8464 hours for the general conditions. Respondent's Hearing Exhibit 46, Tab 8.

Respondent's claims analyst removed from that analysis estimated hours for categories of work performed by subcontractors on this job. Respondent's Hearing Exhibit 46, Tab 9; Transcript at 845. He estimated that appellant spent 3937 labor hours on performing modifications. Respondent's Hearing Exhibit 46, Tab 4; Transcript at 823.[8] The resulting analysis showed an estimate of 16,820 expected labor hours for the work appellant actually performed on this contract: 4209 for base contract items (demolition, concrete, masonry, miscellaneous metals, wood and plastic, roofing, doors and windows, and finishes), 8464 for general conditions, 3937 for modifications (based on the estimate of the work appellant performed), and 210 for the adjustments for night and overtime work.

Respondent's claims analyst then used May 31, 1994--the date of appellant's last pay requisition--to compare the number of expected labor hours with the number of actual labor hours expended by appellant in the performance of the contract. The claims analyst determined from appellant's pay applications that $14,022.76 of work remained for finished carpentry, resilient flooring, and painting. Using the analysis similar to the analysis of labor hours necessary to perform the modifications, the claims analyst determined that 606 hours of work remained between May 31, 1994, and completion of the contract work. Respondent's Hearing Exhibit 46, Tab 10. Subtracting 606 from 16,820 results in 16,214 expected labor hours for the work appellant had performed. Id., Tab 11. The claims analyst then took the number of hours worked from appellant's certified payroll and determined that

---

[8] the labor hours proposed by the contractor to perform the contractor's share of the work. Transcript at 822. Where labor hours were not indicated, the claims analyst took the dollar value of the work, divided by 1.2 to adjust for overhead and profit for the work, reduced the amount by what the claims analyst felt was the appropriate material cost, and then divided that value by $12.57, which was the estimated average labor cost to appellant with a 30% markup for labor burden. Id.

appellant worked 16,217 labor hours from contract start to May 31, 1994. Id.; Transcript at 853.

Respondent's claims analyst determined from appellant's bid sheet how many labor hours appellant had bid. He took $88,000 and divided that figure by a 49% burdened labor rate of $14.41, which equals 6108 labor hours or 37% of the labor estimate. Transcript at 913. Using a 30% burden rate of $12.57 yields 7000 labor hours or about 43% of the estimate. The claims analyst concluded that appellant had underbid his labor. Id. at 913-94. Appellant has not established lost productivity. Since appellant's workers were laborers and not mechanical workers, appellant's use of the MCAA factors was not appropriate and appellant underbid its labor.

Extended supervision

Appellant sought $71,580.72 for the "cost of extended supervision resulting from the GSA's refusal to accept the [appellant's] schedule, not withstanding the fact that the bid documents specifically stated that durations stated were maximums." The claim includes $41,890.06 for the cost of "[appellant's] owned major equipment" (backhoe and trucks) and unexplained "HBTC supervision" of $17,760 for total alleged delay costs of $59,650.60.[9] Appellant does not explain whether the extended supervision was at the job site--usually a direct cost--or home office overhead. Appellant added a 20% markup ($11,930.12) to equal $71,580.72. Appeal File, GSBCA 13884, Exhibit 4, Tabs G-3 and I-3.

Appellant claims alleged delay of 172 calendar days from a planned completion date of December 20, 1993, based on a sixty-eight-week completion schedule. Appeal File, Exhibit 4, Tab G-3. It appears that appellant never submitted a sixty-eight-week completion schedule to the Government. Appellant could not produce at the hearing on the merits a version of the sixty-eight-week schedule it says it had submitted to GSA at the beginning of the contract. Transcript at 188. The only version of the alleged sixty-eight-week schedule appellant maintains as the basis for the delay claim was created by appellant's claims consultant. Id. at 247-48. In any event, GSA never approved a sixty-eight-week completion schedule. Appellant's Exhibit 40 at 37-38 (Deposition of Alton LeMay (June 30, 1998)).

At the beginning of contract performance, September 11, 1992, GSA received from

---

m and totaled the number as

[9] $59,650.60, instead of $59,650.06. It then carried that mistake through in figuring the percentage markup. It claimed a markup of $11,930.12 instead of $11,930.01, and a total of $71,580.72 instead of $71,580.07.

appellant a 108-week contract completion schedule. Respondent's Hearing Exhibit 14. Appellant performed the contract on a 108-week schedule and was paid for work based on a 108-week schedule. Respondent's Hearing Exhibit 52 (Payment Voucher 5 at 3). Indeed, appellant told its bonding company the contract term was twenty-three months--or ninety-eight weeks--which is closer to a 108-week completion schedule than a sixty-eight-week completion schedule. Appellant forwarded to the bonding company a payment voucher stating that the bond premium had been corrected to reflect the twenty-three-month term of the contract. Id. (Payment Voucher 1 at 6).

A sixty-eight-week completion schedule would not have been in accordance with the contract's phasing plan because in the alleged sixty-eight-week schedule, demolition work for the generator building, HVAC work in the basement, and asbestos abatement begins earlier than the phasing plan would allow. Transcript at 855. In contrast, the 108-week completion schedule complied with the phasing plan with the exception of the generator building work, for which the Government allowed an early start date. Id. at 857-58. The contracting officer's technical representative testified that the 108-week schedule was "close" to the phasing plan. Id. at 626. Appellant was in a position to complete the project by June 24, 1994, well in advance of the October 1, 1994, contract completion date. Herman B. Taylor Construction Co., 98-2 BCA at 147,710 (Findings 10, 12, and 13). Appellant showed no delay to the completion of the work.

Internal administrative and consulting costs associated with preparation of the equitable adjustment claim & unspecified attorney fees

Appellant sought $75,445.71 in administrative and claims consultant costs associated with preparing the request for equitable adjustment. The claim included alleged costs for appellant's principal and appellant's office staff, as well as the claims consultant's charges to appellant. Appeal File, GSBCA 13884, Exhibit 4, Tab H. Appellant also sought an unspecified amount of attorney fees. Id. at Exhibit 4, Tab A.

The termination for convenience settlement proposal

On June 9, 2000, appellant submitted to the contracting officer a termination for convenience settlement proposal. Appeal File, GSBCA 15421, Exhibit 6. On June 20, 2000,

the Board converted the default termination to a termination for the convenience of the Government. Herman B. Taylor Construction Co. v. General Services Administration, GSBCA 12961-REM, 00-2 BCA ¶ 30,989.[10]

On July 3, 2000, appellant submitted an amended termination for convenience settlement proposal requesting $1,070,630.63. Appeal File, GSBCA 15421, Exhibit 8. This proposal tracked elements of appellant's equitable adjustment claim, but did not include an itemization of all of appellant's costs incurred under the contract up to the effective date of termination. Id.

On September 6, 2000, the contracting officer rendered her decision and granted appellant $39,759.14 as the fair and reasonable settlement amount based upon appellant's post-hearing brief in GSBCA 13884 and the amended settlement proposal submitted by appellant. Appeal File, GSBCA 15421, Exhibit 12.

On March 19, 2001, pursuant to an agreement of the parties, the Board issued a decision partially granting the appeal and awarded appellant $357,252.74, which represented the settlement for payment of the judgment entered in Ohio Casualty Insurance Co. v. Herman B. Taylor, No. H-97-3990 (S.D. Tex. Jan. 11, 1999). Herman B. Taylor Construction Co. v. General Services Administration, GSBCA 15421 (Mar. 19, 2001).

By order dated April 9, 2002, the Board requested that appellant submit an itemization of all direct costs incurred under the contract up to the effective date of termination in accordance with the Federal Acquisition Regulation (FAR), 48 CFR 49.206-2(b)(2) (2001). On June 11, 2002, appellant submitted to the Board and respondent the following amended termination for convenience settlement proposal, which superceded the earlier ones:

Subtotal Payroll and Payroll Tax	261,795.68
Insurance	219,517.82
Subcontractors	3,343,274.56
Professional Fees	14,931.21
Rentals	20,452.03

---

[10] the appeal of the equitable adjustment claim docketed as GSBCA 13884. The Board granted the parties' request that the evidence and filings in the record of GSBCA 13884 would be included in the record of an appeal arising from the contracting officer's decision on appellant's termination for convenience settlement proposal.

Material, Field Office, STC[11]	189,370.80
Total Job Cost from Check Register	4,049,342.10
Contractor-Owned Equipment	
Small Electric Tools	158,220.29
Total Job Cost	4,207,562.39
Total Pro-rata Overhead	115,434.10
Subtotal	4,322,996.49
20% Profit	864,599.30
Total Costs, Overhead & Profit	5,187,595.79
Sums Paid by GSA	4,322,532.69
Total Termination for Convenience Claim	$865,063.10[12]

Amended Claim, Exhibit 1 at 1, 2.

Government's determination on settlement proposal

Respondent audited appellant's submission and issued its results in an audit dated October 2, 2002. Letter from Contracting Officer to Appellant (Oct. 15, 2002) (hereinafter Contracting Officer's First Letter); (Respondent's Audit). On October 15, 2002, the contracting officer, after reductions in accordance with "adjustments" in respondent's audit, allowed the following amounts of appellant's claim:

Subtotal payroll and payroll tax	219,431.68[13]
Insurance	49,924.00
Subcontractors	3,328,782.56

---

[11] all tools and consumables."

[12] nt added $4,207,562.39 and $115,434.10 and derived $4,322,996.40; the correct sum is $4,322,996.49. Due to appellant's error carried through in its calculation, its total was $865,062.91. Amended Claim, Exhibit 1 at 1.

[13] er figures. For example, she allowed $219,432 instead of $219,431.68 for payroll and taxes. Where possible, we use unrounded numbers. These figures also reflect the contracting officer's $4742 upward adjustment of appellant's insurance costs. Letter from contracting officer to Appellant (Apr. 1, 2003) (hereinafter Contracting Officer's Second Letter).

Professional Fees	10,839.21
Rentals	20,452.03
Material, Field Office, STC	152,503.80
Total Job Cost from Check Register	-[14]
Contractor-Owned Equipment	
Small Electric Tools	0.00
Total Job Cost	3,781,933.28
Overhead	33,464.00
Subtotal	3,815,397.28
10% Profit	381,539.73
Total Cost, Overhead & Profit	4,196,937.01
Amount Paid by GSA	4,322,532.69
Government Overpayment	$125,595.68

Contracting Officer's First Letter; Contracting Officer's Second Letter. The reasons for the reductions follow immediately below.

Reductions

Payroll and payroll taxes

The contracting officer reduced the item payroll and payroll taxes by $42,364. She determined that appellant had overstated the amount of payroll taxes it had paid on the project, calculating that appellant should have paid payroll taxes at an effective rate of 8.8% on appellant's project payroll of $233,636, i.e., $20,560 (rounded). Contracting Officer's First Letter at 1; Respondent's Audit at 5.

Insurance

The contracting officer reduced the insurance item by $174,318. Respondent found support for $45,200 for bond insurance based on an invoice from the bonding company that appellant had submitted. She denied the remainder for lack of supporting documentation. Contracting Officer's First Letter at 1-2; Respondent's Audit at 6. According to respondent's audit, the only support for the $174,318 insurance cost was a spreadsheet prepared by appellant's claims consultant. Respondent's Audit at 6.

---

[14] ...late a subtotal for this item.

In support of additional insurance costs, appellant has submitted three checks from Lumberman's Mutual Casualty Insurance Company totaling $4724. Appellant's Supplemental Reply to Respondent's Submission (hereinafter Appellant's Supplemental Reply), Exhibit 1. After review of these invoices, the Government increased the allowable insurance cost to $49,924. Contracting Officer's Second Letter.

Subcontractors

The contracting officer reduced appellant's subcontractor costs by $14,492 for a payment to appellant's mechanical subcontractor, Sentry Mechanical, because the Government could not find supporting documentation for that payment. Contracting Officer's First Letter at 3; Respondent's Audit at 6. Appellant has submitted a check for $14,492 it made out to Sentry Mechanical; however, the check was returned not paid. Appellant's Supplemental Reply, Exhibit 2. Appellant states that the check was not paid "due to a faulty endorsement," but that the amount was paid later and the check returned to appellant. Id. at 3. Appellant, however, has not submitted proof that the second payment was actually made.

Professional fees

The contracting officer reduced the amount of professional fees by $4092. Relying on 48 CFR 31.205-47(f), she determined that amount was for unallowable claim (litigation) preparation fees by appellant's claims consultant. Contracting Officer's First Letter at 3; Respondent's Audit at 6.

Material, field office, STC

The contracting officer reduced this amount by $36,867 because that amount was unsupported. The contracting officer determined that the unsupported amount consisted of checks that did not have invoices or explanations of what was purchased. Contracting Officer's First Letter at 3. The audit questioned $17,928 of material costs and $18,939 of STC costs. Respondent's Audit at 6. Of the $17,928 of material costs, the audit found that $2190 of those costs, as stated on a spreadsheet prepared by appellant, exceeded the amounts shown on supporting invoices. Id. at 7. The remainder of the material costs showed payees Jeb's Ace Hardware, Chalmer's Hardware, and Morgan Building Supply, as well as one check made out to Efim Gilin for $3000, but with no explanation of what was purchased. Id.

For the $18,939 STC costs, there were seven checks for $8100 payable to Herman B. Taylor for "expense-miscellaneous." The remainder were for other unexplained expenses without supporting invoices. Respondent's Audit at 7.

Contractor-owned equipment, small electric tools

The contracting officer denied this item as unallowable under 48 CFR 31.205-11(l). Contracting Officer's First Letter at 3. The audit stated that contractor-owned depreciated equipment was not allowable under 48 CFR 31.205-11(l). In addition, the auditors were not presented with documentation and proof of ownership of the claimed equipment or with how appellant calculated rental rates. Respondent's Audit at 8. However, appellant identifies the contractor-owned equipment in its claim, the supposed amount of time the equipment was used on the project, and the rental rate applicable to each item of equipment. Appeal File, GSBCA 13884, Exhibit I-3. The rental rate is based on the Rental Rate Blue Book for Construction Equipment. Appellant's Supplemental Reply, Attachment. Appellant does not dispute respondent's position that the contractor-owned equipment was fully depreciated. Id. Appellant states that all the back-up was in documents seized by the Internal Revenue Service (IRS) pursuant to a criminal investigation and not returned. Appellant's Reply to Respondent's Response (hereinafter Appellant's Reply) at 4.

Overhead

Appellant's overhead claim is as follows:

1992-Total Overhead	118,562.67
Courthouse Project	9.8%
GSA Prorated Overhead	11,619.14
1993-Total Overhead	90,090.00
Courthouse Project	53.0%
GSA Prorated Overhead	47,747.70
1994-Total Overhead	164,903.72
Courthouse Project	34.0%
GSA Prorated Overhead	56,067.26
Total	$115,434.10

Amended Claim, Exhibit 3 at 1.[15]

---

[15] ved a total of $115,434.40.

For calendar year 1992, appellant included the following charges in the overhead expense pool:

Car and Truck Expenses	8,917.09
Insurance	39,463.89
Legal & Professional	6,404.00
Equipment Repairs	8,241.87
Telephone & Utilities	10,098.48
Waste Removal	2,027.00
Equipment Rental	5,601.65
Hardware & Parts	15,901.18
Taxes (Property & Other)	44.38
Printing/Duplication	145.24
Training	396.07
Security	39.78
Other	21,282.04
Total	$118,562.67

Amended Claim, Exhibit 3-A.

For calendar year 1993, appellant included the following charges in the overhead expense pool:

Insurance	21,199.00
Legal & Professional	32,621.00
Repairs & Maintenance	6,705.00
Supplies	3,577.00
Utilities	9,405.00
Bad Debt Expense	10,222.00
Other	6,361.00
Total	$90,090.00

Amended Claim, Exhibit 3-B.

For calendar year 1994, appellant included the following charges in the overhead expense pool:

Car and Truck Expenses	541.50
Insurance	35,250.00
Legal & Professional	18,488.03

Suppliers	1,036.59
Utilities	562.70
Bank Service Fees	2,106.98
Travel Expenses	166.80
Waste Disposal	1,385.00
Equipment Rental	451.38
Parts	4,414.55
Tools	742.33
Texas Employment Commission Taxes	420.26
Other	99,337.60
Total	$164,903.72

Amended Claim, Exhibit 3-C.

Appellant did not explain why any of these costs belonged in the indirect expense pool, or for what purpose appellant expended these costs. The contracting officer accepted appellant's overhead percentages for 1992 through 1994. For those years, she also accepted appellant's claim for insurance, although the audit did not. She granted appellant $3867 (pro-rated) for 1992, $11,235 for 1993, and $5993 for 1994. Contracting Officer's First Letter at 2-3. For all years, the contracting officer eliminated the expense pools for telephone and utilities, legal and professional fees, equipment rental, and tools, after determining that those pools were duplicated as direct costs in appellant's job cost section of the termination for convenience claim. Id. She denied the category "other" as unexplained. Id.

In response to the contracting officer's letter, appellant states that "the amount of pro-rata overhead was calculated by the Eichleay method. Back up showing the value of all of [appellant's] jobs in each year was included in the claim." Appellant's Reply at 4.

Profit

The contracting officer established a profit rate of ten percent, which was the profit rate applied to change orders. Appellant does not explain how it arrived at a profit rate of twenty percent.

Discussion

Conversion of a termination for default to a termination for convenience converts a fixed price contract to a cost reimbursement contract, entitling the contractor to recover allowable costs incurred in the performance of the terminated work, a reasonable profit on the work performed, and certain additional costs associated with the termination. Richerson

Construction, Inc. v. General Services Administration, GSBCA 11161, et al., 93-1 BCA ¶ 25,239, at 125,704; D.E.W., Inc., ASBCA 50796, 00-2 BCA ¶ 31,104. Thus, in termination for convenience quantum appeals, the parties present an itemization of complete contract costs (including labor, material, and subcontractor costs) from the start of contract performance until termination. D.E.W., Inc.; Maitland Brothers Co., ASBCA 43088, 93-3 BCA ¶ 26,007, reconsideration denied, 94-1 BCA ¶ 26,285; Paul E. McCollum, Sr., ASBCA 23269, 81-2 BCA ¶ 15,311, aff'd in part sub. nom. McCollum v. United States, 7 Cl. Ct. 709 (1984). However, save for reasonable costs incurred in preparing the termination for convenience settlement proposal, compensation may not exceed the contract price, including any payments due for contract modifications. White Buffalo Construction Inc. v. United States, 52 Fed. Cl. 1, 4 (2002); see 48 CFR 49.207. The parties agree that monies paid under the contract amounted to $4,322,533.69. Appellant's Claim at 1; Contracting Officer's First Letter at 4; Respondent's Hearing Exhibit 52 (Construction Contract Payment Voucher Attached to Pay Application 17). We consider whether that payment should be increased by any amounts due on appellant's claim for equitable adjustment.

The equitable adjustment claim

Change orders

We deal with the change order pricing in our findings of fact. Appellant has not established that it was entitled to increased compensation for the direct costs in implementing CE 3. Appellant was not entitled to recover on any alleged delay costs allegedly associated with this change. Sentry and Longhorn were working on-site during the alleged delay period; appellant did not establish delay to Sentry and Longhorn. Additionally, it appears that the alleged "delay" was not to Sentry and Longhorn, but to appellant itself, since appellant "swapped-out" work. Appellant, however, has not established that it was delayed by the change order. For the reasons mentioned in the findings of fact for CE 4, appellant has not established any delay caused by the change in CE 4.

As indicated in our findings of fact, for CE 8 appellant has proven its subcontractor costs of $8100 for implementing the change order. Applying the correct percentages results in an additional compensation $1679 due appellant.

Appellant is owed nothing for the change in CE 11 but is owed an additional $1267.54 for the change in CE 12, since the Government did not give appellant full credit for the cost of materials necessary to perform the change. As indicated in our findings of fact, the Government correctly calculated the amount it owned appellant for the change in CE 15.

For CE 20, sub-items 10 and 11, appellant has established that it incurred costs of

$6833.28 greater than the Government granted in its unilateral change order. Appellant has not shown it is entitled to more compensation than the Government granted for the change associated with CE 46. For the direct costs of the change orders, appellant is entitled to $9779.82 more than the Government's pricing in the unilateral change orders.

Labor inefficiency

Appellant did not prove its equitable adjustment for alleged labor inefficiency. A labor inefficiency claim is proven by expert witnesses, Luria Brothers & Co. v. United States, 369 F.2d 701, 713 (Ct. Cl. 1966), and the starting point for identifying and measuring inefficiency is a comparison to some accepted standard. Danac Inc., ASBCA 33394, 97-2 BCA ¶ 29,184, at 145,152, reconsideration denied, 98-1 BCA ¶ 29,454. Where expert testimony of labor inefficiency is based on assumptions which are not supported by reliable empirical data, the claim of labor inefficiency will be denied for insufficient proof. For example, in Transtechnology Corp. v. United States, 22 Cl. Ct. 349, 398 (1990), a contractor sought to prove that the use of Government-specified, but unusable, ignition material for flares caused labor inefficiency. The court rejected the contractor's expert's analysis of labor inefficiency in part because the expert relied on the contractor's bid to estimate the baseline for productivity, when the labor steps in the bid were not the same as the labor steps during actual contract performance as reflected in production records. Additionally, the expert's study assumed, without empirical proof, that the lack of suitable material paced the production line.

In this matter, appellant did not submit adequate proof of labor inefficiency. First, we agree with respondent's expert that appellant underbid its labor costs and consequently was unable to demonstrate that its original labor staffing was reasonable. Second, appellant's proof of labor inefficiency was based on a number of "crew moves" that lacked substantiation, both as to the number of crew moves that were originally planned for the project and the actual number of crew moves that were made. Third, the lost productivity analysis was deficient because the analysis was based upon the MCAA Bulletin PD2. While we have accepted the Bulletin as evidence in analyzing claims for labor inefficiency, see, e.g., Hensel Phelps Construction Co. v. General Services Administration, GSBCA 14744, et al., 01-1 BCA ¶ 31,249, use of the MCAA Bulletin was inappropriate here because the labor force allegedly made inefficient by the Government consisted of laborers, not mechanical workers.

Work allegedly performed but not paid for

Appellant never explained what work it had performed for which the Government did not pay and has not shown that it would have been entitled to recover under the equitable

adjustment claim. The contracting officer refused to pay appellant amounts for retainage GSA paid to Ohio Casualty Insurance. We think the contracting officer acted properly in denying appellant reimbursement. Although in overturned default terminations payments under the performance bond for excess costs of completion are payable as settlement costs in the subsequent termination for convenience, Foremost Mechanical Systems Inc. v. General Services Administration , GSBCA 13250-C(12335), 98-1 BCA ¶ 29,652, at 146,921, the payment to Ohio Casualty was not for excess reprocurement costs.[16] Rather, the payment was for pre-termination subcontractor work for which Ohio Casualty had paid. The contracting officer acted correctly in protecting the public fisc when she determined that reimbursement of appellant would be tantamount to paying twice for contract work.

Extended supervision

The contracting officer correctly denied appellant's proposal of $71,580.72 for the cost of extended supervision. The contracting officer correctly determined that appellant had not proven delay. Indeed, appellant was in a position to complete the project by June 24, well in advance of the October 1, 1994, contract completion date. Herman B. Taylor Construction Co., 98-2 BCA at 147,710 (Findings 10, 12, and 13). Appellant's approved project schedule was based on a 108-week schedule with a completion date of October 1, 1994, and not on a sixty-eight-week schedule for completion.

Lost profits

Appellant seeks lost profits on the balance of work to be performed which "[appellant] was prevented from performing as a result of the [alleged] improper and unjustified early termination of appellant." Appeal File, GSBCA 13884, Exhibit 4; Appeal File, GSBCA 15421, Exhibit 8 at 2. The equitable adjustment clause only allows profit on work "performed" by a contractor's own forces. 48 CFR 552.243-71(a)(2). Appellant is not entitled to lost profit on terminated work. Spinazzolo Systems Inc., ASBCA 44536, 96-2 BCA ¶ 28,388.

Internal administrative and consulting costs associated with preparation of the equitable adjustment claim & unspecified attorneys fees

---

ward of $357,252.74 for the surety's increased costs of performance for which appellant was found liable under the terms of its performance bond. Herman B. Taylor Construction Co. v. General Services Administration, GSBCA 15421 (Aug. 7, 2001).

Appellant seeks $75,445.71 for internal administrative costs and consulting costs associated with the request for equitable adjustment in GSBCA 13884, as well as unspecified attorney fees and expenses. The FAR makes unallowable legal, accounting, and consulting costs incurred in connection with the prosecution of a CDA claim or an appeal against the Federal Government. Bill Strong Enterprises Inc. v. Shannon, 49 F.3d 1541, 1548-49 (Fed. Cir. 1995); Colorado Piping & Mechanical Inc., GSBCA 8254, 91-2 BCA ¶ 23,684; 48 CFR 31-205.47(f)(1).

The termination for convenience settlement proposal

The FAR prescribes the data required in a termination for convenience settlement proposal:

> When the total-cost basis is used under a complete termination, the contractor must itemize costs incurred under the contract up to the effective date of termination. The costs of settlements with subcontractors and applicable settlement expenses must also be added. An allowance for profit . . . or adjustment for loss . . . must be made. The contract price for all end items delivered or to be delivered and accepted must be deducted. All unliquidated advance and progress payments and disposal and other credits known when the proposal is submitted must also be deducted.

48 CFR 49.206-2(b)(2) (emphasis supplied). This contract incorporated the standard form Termination for Convenience Clause, Alternate I (Apr. 1984), which provided in pertinent part:

> e. Subject to paragraph (d) above, the Contractor and the Contracting Officer may agree upon the whole or any part of the amount to be paid because of the termination. The amount may include a reasonable amount for profit on work done. However, the agreed amount, whether under this paragraph (e) or paragraph (f) below, exclusive of costs shown in subparagraph (f)(3) below, may not exceed the total contract price as reduced by (1) the amount of payments previously made and (2) the contract price of the work not terminated. . . .
>
> f. If the Contractor and Contracting Officer fail to agree on the whole amount to be paid the Contractor because of the termination of work, the Contracting Officer shall pay the Contractor the amounts determined as follows, but without duplication of any payments agreed upon under paragraph (e) above:

(1) For contract work performed before the effective date of termination, the total (without duplication of any items) of-

i. The cost of this work;

ii. The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in subdivision (i) above; and

iii. A sum, as profit on (i) above, determined by the Contracting Officer under 49.202 of the Federal Acquisition Regulation in effect on the date of the contract, to be fair and reasonable; however, if it appears that the Contractor would have sustained a loss on the entire contract had it been completed the Contracting Officer shall allow no profit under this subdivision (iii) and shall reduce the settlement to reflect the indicated rate of loss.

(2) The reasonable costs of settlement of the work terminated including-

(i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(ii) The termination and settlement of subcontracts (excluding the amounts of such settlements); and

(iii) Storage, transportation and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.

Appeal File, GSBCA 13884, Exhibit 1, Specification and Bid Forms, Vol. I, GSA Form 3506 at iii (¶ 98 FAR 52-249-2).

The guiding principles to be applied in determining costs to be allowed a contractor whose contract has been terminated for convenience are set forth in 48 CFR 49.201. A settlement should compensate the contractor fairly for work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit. Fair compensation is a matter of judgment and cannot be measured exactly. In a given case, various methods may be equally appropriate in arriving at fair compensation. The use of business judgment, as distinguished from strict accounting principles, is the heart of a settlement. 48 CFR 49.201(a). Cost and accounting data may provide guides but are not rigid measures for ascertaining fair compensation. In appropriate cases, costs may be

estimated, differences compromised, and doubtful questions settled by agreement. Other types of data, criteria, or standards may furnish equally reliable guides to fair compensation. The amount of record keeping, reporting, and accounting related to the settlement of terminated contracts should be kept to a minimum compatible with the reasonable protection of the public interest. 48 CFR 49.201(c).

The cost principles and procedures in the applicable subpart of part 31 of the FAR shall, subject to the general principles in subpart 49.201, be used in determining costs relevant to the termination settlement of this contract. 48 CFR 49.113(a).

In construing these guidelines, we have observed that it is axiomatic that one must strike a balance between the need for technical compliance with regulatory requirements and the need for basic fairness. Foremost Mechanical Systems, 98-1 BCA at 146,917-18 (citing Spectrum Leasing Corp. v. General Services Administration, GSBCA 12189, 95-1 BCA ¶ 23,317, at 136,185-86 (1994)); see also Nicon, Inc. v. United States, 331 F.3d 878, 886 (Fed. Cir. 2003). Nonetheless, the burden remains on the contractor to demonstrate that its entitlement to convenience termination payments is appropriate under the termination for convenience clause, and claimed costs must be reasonable, allocable, and in accordance with prescribed standards. Nicon, 331 F.3d at 885; Lisbon Contractors Inc. v. United States, 828 F.2d 759, 767 (Fed. Cir. 1987); Airo Services, Inc. v. General Services Administration, GSBCA 14301, 98-2 BCA ¶ 29,909, at 148,071-72.

A cost is reasonable if, in its nature and amount, it does not exceed what a prudent person would incur in the conduct of a competitive business. 48 CFR 31.201-3(a). What is reasonable depends on a variety of considerations and circumstances, including (1) whether it is a type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or the contract performance; (2) generally accepted sound business practices, arm's-length bargaining, and federal and state laws and regulations; (3) the contractor's responsibilities to the Government, other customers, the owners of the business, employees, and the public at large; and (4) any significant deviations from the contractor's established practices. 48 CFR 31.203-3(b); Airo Services, 98-2 BCA at 148,072.

We agree in large part with the contracting officer's treatment of appellant's termination for convenience proposal. The contracting officer acted correctly in concluding that reimbursement of $158,220.29 for contractor-owned equipment was unallowable under 48 CFR 31.205-11(l). That section of the FAR provides in pertinent part:

> No depreciation or rental shall be allowed on property fully depreciated by the contractor. . . . However a reasonable rental charge for using fully depreciated property may be agreed upon and allowed (but see 31.109(h)(2)).

The case of Union Boiler Works Inc. v. Caldera, 156 F. 3d 1374 (Fed. Cir. 1998) dictates the result as to this aspect of the termination for convenience settlement proposal. There, the Court held that an equitable adjustment claim for the contractor's use (resulting from insulation work directed by the Government) of a fully depreciated temporary boiler was barred by 48 CFR 31.205-11(l) because the contractor and contracting officer had not entered into an agreement providing for compensation for the boiler's use. Union Boiler Works, 156 F.3d at 1376. Admittedly, Union Boiler Works concerned compensation under an equitable adjustment claim, not a termination for convenience settlement proposal. Nevertheless, the FAR requires use of the cost principles in part 31 in determining contract settlement proposals, 48 CFR 49.113(a), and we are thus not free to ignore either the content of 48 CFR 31.205-11(l) or our appellate authority's construction of that provision. Here the contracting officer, for sufficient reason, refused to enter into an agreement with appellant as to a reasonable rental charge and to allow such a charge. We will not disturb that determination.

One board has held that 48 CFR 31.205-11(l) does not necessarily prevent recovery of the reasonable ownership reimbursement based on rental rates for fully depreciated contractor-owned equipment. Marshall Associated Contractors and Columbia Excavating, IBCA 1901, et. al., 02-1 BCA ¶ 31,797, at 157,058 (citing Tom Shaw, Inc., DOT BCA 2106, et al., 90-1 BCA ¶ 22,580, at 113,338). In light of Union Boiler Works, we decline to follow Marshall on that issue.

The contracting officer determined that the appropriate profit rate was ten percent. Profit is determined by applying the factors in 48 CFR 49.202, including: (1) the extent and difficulty of the work done by the contractor as compared with the total work required by the contract; (2) engineering work, production scheduling, planning, technical study and supervision, and other necessary services; (3) efficiency of the contractor; (4) amount and source of capital and risk assumed; (5) inventive and developmental contributions, and cooperation with the Government and other contractors in supplying technical assistance; (6) character of the business, including the source and nature of the material and complexity of manufacturing techniques; (7) the rate of profit the contractor would have earned had the contract been completed; (8) the rate of profit both parties contemplated at the time the contract was negotiated; and (9) the character and difficulty of subcontracting, including selection, placement, and management of subcontracts, and effort in negotiating settlements of terminated subcontracts.

Appellant has not met its burden of showing that the factors set forth above entitled appellant to a profit rate of twenty percent. Richerson Construction, 93-1 BCA at 125,712. We sustain the contracting officer's use of a ten percent rate, which, based on the record before us, is reasonable. Swanson Group, ASBCA 52109, 02-1 BCA ¶ 31,836, at 157,296.

Here, the contract work was challenging in that it involved night renovation work in an occupied and relatively old space. The type of work justifies the ten percent rate used by the contracting officer. D.E.W., Inc., 00-2 BCA at 153,633; see I. Alper Co. v. General Services Administration, GSBCA 11335, 92-3 BCA ¶ 25,038 (award of seven percent profit on an equitable adjustment). Additionally it is some comfort that the Government had agreed to that rate in pricing change orders.

Appellant has not demonstrated it is entitled to reimbursement for any delay or extended overhead based upon the Eichleay formula. Appellant has not shown Government-caused delay of uncertain duration to the project, the first pre-requisite of Eichleay recovery. Nicon, 331 F.3d at 883. Indeed, appellant was in a position to complete the project by June 24, well in advance of the October 1, 1994, contract completion date. Herman B. Taylor Construction Co., 98-2 BCA at 147,710 (Findings 10, 12, and 13). Appellant's approved project schedule was based on a 108-week schedule with a completion date of October 1, 1994, and not on a sixty-eight week schedule for completion.

The fair and reasonable termination settlement is as follows:

Subtotal Payroll and Payroll Tax	$219,431.68
Insurance	49,924.00
Subcontractors	3,328,782.56
Professional Fees	10,839.21
Rentals	20,452.03
Material, Field Office, STC	152,503.80
Contractor Owned Equipment	
Small Electric Tools	.00
Total Job Cost	3,781,933.28
Overhead	33,464.00
Subtotal	3,815,397.28
10% Profit	381,539.73
Total Cost, Overhead & Profit	4,196,937.01
Amount Paid by GSA/	
Ceiling Price Before Additions	4,322,532.69
Additions to Ceiling Price	9,779.82
Total Ceiling Price	4,332,312.51
Difference Between Total Cost	
and Amount Paid	$125,595.68

Decision

The appeal is **DENIED.** Appellant owes the Government $125,595.68.

_____
ANTHONY S. BORWICK
Board Judge

We concur:

_____
EDWIN B. NEILL
Board Judge

_____
CATHERINE B. HYATT
Board Judge