



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: December 15, 2021

CBCA 7165

NUES INC.,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Seun Oyewo, Chief Executive Officer of NUES Inc., Silver Spring, MD, appearing for Appellant.

Robert E. Nerthling, II and Elise Harris, Office of the General Counsel, Department of Health and Human Services, Atlanta, GA, counsel for Respondent.

BEARDSLEY, Board Judge (Chair).

Appellant, NUES Inc. (Nues), has elected expedited, nonprecedential disposition of this appeal by a single Board judge under the small claims procedure in Board Rule 52 (48 CFR 6101.52 (2020)). This decision is “final and conclusive, shall not be set aside except for fraud, and is not precedential.” *Id.*

Background

On September 19, 2019, Nues entered into a fixed-price purchase order for \$110,170, which included a cost reimbursable travel contract line item number (CLIN) in the amount of \$9740, with the Centers for Disease Control and Prevention (CDC) to conduct on-site monitoring of clinical research sites, pharmacies, and laboratories participating in the Tuberculosis Trial Consortium (TBTC) Study 35 in South Africa. Appeal File, Exhibit D.¹

¹ All exhibits are in the appeal file, unless otherwise indicated.

TBTC Study 35 was to be conducted at a minimum of three clinical research sites in Cape Town and Johannesburg, South Africa, and total enrollment was expected to be seventy-two children *Id.* Nues was required to furnish all necessary services, qualified personnel, material, equipment, and facilities to conduct on-site monitoring for the TBTC Study 35, to include on-site initiation visits, on-site periodic monitoring visits, on-site close-out visits, tracking of monitoring activities and deficiencies, and reports of monitoring findings. *Id.* at 5. The contract scope of work (SOW) described the monitoring plan, the three types of visits that would be made, the visit preparation, the visit activities, the pharmacy visit, and the documentation of findings, reports, and communication. *Id.*

The contract consisted of a base year (September 30, 2019–September 29, 2020) and one option year (September 30, 2020–September 29, 2021). Exhibit D. The contract contemplated eleven site visits. *Id.* There was no provision for remote visits. There were five contract-required deliverables associated with each site visit. *Id.* at 11. The milestone payment schedule (not including travel costs) for the base year stated:

Deliverable	Task	*Amount
Draft Monitoring Plan	C.4.a	\$18,361.67
**Monitoring visit notification	C.4.b	\$18,361.67
Preliminary structured summary of monitoring visit Findings Provide a separate report per site	C.4.f.2	\$18,361.67
Draft site monitoring report Provide a separate report per site	C.4.f.3	\$18,361.67
Final Site monitoring report Provide a separate report per site	C.4.f.4	\$18,361.67
Site monitoring follow-up report Provide a separate report per site	C.4.f.5	\$18,361.65

***Total		\$110,170.00
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* Amount is based on delivery of the tasks to be performed as outlined in Section C.4 in the solicitation.

** The billing Amount for this deliverable is divided by the number of visit types to each site as outlined in Section C.4 in the solicitation.

***Total Cost billed cannot exceed base year amount of \$110,170.00.

Id. at 3.

Bilateral contract modification 00002 provided “additional clarification to the places of performance by listing them with more detail” and “[r]evised the payment milestone schedule to provide a more detailed base year invoicing schedule.”

Invoice	Work Completed	Projected Invoicing Date	Amount
	Draft monitoring plan submitted to CRB	October 28, 2019	\$18,361.67
	PHRU Site initiation visit incl. Pharmacy	January 31, 2020	\$6,846.21
	Final PHRU site initiation visit report	February 28, 2020	\$1,500.00
	FAMCRU site initiation visit incl. Pharmacy	January 31, 2020	\$1,500.00
	DTTC routine monitoring visit with pharmacy	November 29, 2019	\$6,846.21
	Final DTTC routine monitoring visit with pharmacy report	December 29, 2019	\$1,500.00
	FAMCRU routine monitoring visit	May 27, 2020	\$6,846.21

	Final FAMCRU routine monitoring visit	June 26, 2020	\$1,500.00
	PHRU routine monitoring visit	May 15, 2020	\$6,846.21
	Final PHRU routine monitoring visit report	June 14, 2020	\$1,500.00
	DTTC routine monitoring visit	March 31, 2020	\$6,846.21
	Final DTTC routine monitoring visit report	April 30, 2020	\$1,500.00
	BARC safety laboratory routine monitoring visit	August 31, 2020	\$6,846.21
	BARC safety laboratory routine monitoring visit report	September 30, 2020	\$1,500.00
	PHRU routine monitoring visit	August 31, 2020	\$6,846.21
	Final PHRU routine monitoring visit report	September 30, 2020	\$1,500.00
	DTTC routine monitoring visit	August 31, 2020	\$6,846.21
	Final DTTC routine monitoring visit report	September 30, 2020	\$1,500.00
	FAMCRU routine monitoring visit	September 15, 2020	\$6,846.21
	Final FAMCRU routine monitoring visit report	October 15, 2020	\$1,500.00
	PK laboratory routine monitoring visit	September 1, 2020	\$6,846.21
	PK laboratory routine monitoring visit report	October 1, 2020	\$1,500.00
			\$110,170.00

Exhibit F.

Nues performed the contract for the first year; however, CDC stopped the Desmond Tutu TB Centre (DTTC) routine, on-site monitoring visit scheduled for March 2020 as a result of the COVID-19 pandemic. Transcript, Vol. 1 at 83. The contracting officer issued an email on March 19, 2020, stating, “I spoken [sic] with my team and confirmed that this visit will be postponed due to the Coronal [sic] Virus issue. This is not a stop work order for all other requirements.” Exhibit G. The other requirements included “on-site visits and reports that COVID would not have impacted.” *Id.*, Vol. 2 at 22. CDC was not preventing Nues from conducting site visits, but Nues could not conduct site visits because the sites were closed due to COVID. *Id.* at 31.

In June 2020, the parties executed contract modification 00004 to “[f]ully exercise Option Year 1; CLIN 1001 in the amount of **\$112,366.90** and CLIN 1002 in the amount of **\$9,740.00**; Period of Performance: September 30, 2020–September 29, 2021, for a total amount of for a total of [sic] **\$122,106.90**.” Exhibit J. Modification 00004 contained a milestone payment schedule similar to the one included in modification 00002. *Id.* at 3. The next on-site monitoring visit occurred in July 2020, and the last one occurred in September 2020.

On October 16, 2020, Nues submitted final base year invoice Q030 in the amount of \$41,731.07 for costs incurred due to “services paused, work stopped, undeliverable item(s), change in contract schedule, [and] contract modification.” Exhibit 14(m). CDC refused to pay the invoice amount because Nues had not performed the services or provided the deliverables. Transcript, Vol. 1 at 171-73. Instead, CDC paid revised invoice Q031 in the amount of \$2112.61 for General & Administrative (G&A) costs. *Id.* at 204; Exhibit 14(n).

CDC paid for all site visits conducted and reports submitted by Nues for a total of \$76,920.63. Exhibit 11. There was no discussion during the contract of “any remote work being done.” Transcript, Vol. 1 at 201. There were no remote visits performed for which there was an associated deliverable. *Id.* at 211; Exhibit 18Q. Nues, however, asserts that it incurred costs resulting from preparing for and the cancellation of the March scheduled visit, costs resulting from continuing to perform work that could be performed remotely, costs due to retaining employees in the event that the work continued, costs for monitoring services and visit preparation in anticipation of resuming site visits, costs as a result of the termination, and G&A.

On January 22, 2021, Nues submitted a request for equitable adjustment (REA), seeking \$31,030 for work performed and costs incurred as a result of the stop work order. Exhibit K. The breakdown of costs provided was \$20,000 for “staffing for on-site monitoring visits, including pre-payment of certain staff, staffing for responding to site staff compliance and queries, staffing to meet responsibilities as outlined in the contract and monitoring plan.” *Id.* Nues further defined the \$20,000 as \$15,000 for staffing, \$2000 for a medical monitor, and \$3000 for a clinical research associate. Exhibit L. Nues also claimed \$3500 for deliverables (such as monitoring visit notifications, preliminary structured

summary of monitoring visit findings reports, draft site monitoring reports, and site monitoring follow-up visit reports), \$2030 for prorated profit at a rate of ten percent, and \$5500 for G&A (\$500 for a software usage fee, \$3000 in attorney fees, and \$2000 for claim preparation). *Id.* According to the REA, “NUES completed monitoring reports, ensured staffing, training, facilities and support infrastructure for successful on-site visits, and provided an assurance to the CDC by providing effective management of the contract. NUES immediately stopped relevant work on the contract, as required, but nonetheless incurred contract work-related costs and expenses.” Exhibit K.

On February 18, 2021, by email, CDC agreed “to an equitable adjustment for \$17,030.00 (\$15,000 for Labor; \$2,030 for Pro-Rated Profit)” and indicated that it would “issue a separate forthcoming decision within 7 days regarding the stop-work.” Exhibit M. The contracting officer testified, however, that the use of the term “stop-work” was a mistake because there was no stop work issued. Transcript, Vol. 2 at 21.

On February 24, 2021, CDC notified Nues that it was terminating the contract for the convenience of the Government. Exhibit N. On April 14, 2021, Nues submitted a termination settlement proposal (TSP) on standard form (SF) 1436, requesting a contracting officer’s final decision in the amount of \$92,502. Exhibit 9(a). As part of its TSP, Nues claimed \$20,000 for an “[e]quitable adjustment of base year labor costs,” to include “labor hours for staffing for sites during Base Yr.-Stop Work Order.” *Id.* Nues also claimed \$10,245 for direct labor, \$2600 for training costs, \$25,200 for in-house and outside professional fees and expenses, \$11,174 for unabsorbed overhead for 148 days of delay, \$8306 for G&A, \$7500 in legal fees, \$2030 for “Equitable Adjustment - Base Year Pro-rated Profit,” and \$5447 for “Recovery of Profit, Excludes Settlement Expenses.” *Id.* After some settlement discussions, on April 30, 2021, Nues requested a final decision from CDC on the TSP. Exhibit 29Q. CDC did not issue a final decision.

On July 12, 2021, more than sixty days after it had converted its TSP into a claim, Nues filed a notice of appeal based on the “deemed denial” of its TSP. In its notice of appeal and complaint, Nues asserted claims for “breach of firm fixed price contract, equitable adjustment, and termination for convenience” in the amount of \$112,203.07. Nues filed a supplement in which it provided a breakdown of the \$112,203.07 claimed. Instead of the \$20,000 and \$2030 claimed for labor and profit in its TSP, Nues claimed \$41,731.07, described as “Past Due for Base Year,” and referenced the base year final invoice, Q030.

Discussion

Nues appealed the deemed denial of its TSP in the amount of \$92,502. “A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit.” *NUES, Inc. v. Department of Health & Human Services*, CBCA 7165 (Oct. 26, 2021) (quoting 48 CFR 49.201(a) (2020) (Federal Acquisition Regulation (FAR) 49.201(a)); *Russell Sand & Gravel Co. v. International Boundary & Water Commission*, CBCA 2235, 13 BCA ¶ 35,455); *see*

SWR, Inc., ASBCA 56708, 15-1 BCA ¶ 35,832 (2014) (“The overall purpose of a termination for convenience settlement is to fairly compensate the contractor and to make the contractor whole for the costs incurred in connection with the terminated work.” (citing *Nicon, Inc. v. United States*, 331 F.3d 878, 885 (Fed. Cir. 2003))).

The contract is based on conducting visits and providing deliverables. The contract specifically says that payment is based on the “delivery of the tasks to be performed as outlined in Section C.4 in the solicitation.” Exhibit D at 3. Nues requests costs for certain deliverables required by the contract because the modified payment schedule did not identify those deliverables specifically. Transcript, Vol. 2 at 56-58. Modification 00002, however, stated that “all other terms and conditions remain the same,” meaning that the contract price required Nues to provide the five deliverables identified in the contract.

Nues alleges that the Government breached the duty of good faith and fair dealing and the contract by failing to pay invoice Q030 and the REA, changing the payment milestone schedule, telling Nues that it did not need a subject matter expert for the termination proposal, delaying Nues’s ability to complete the work, and requesting documentation to support the REA. There is no evidence, however, that these actions interfered with Nues’s performance or destroyed Nues’s reasonable expectations regarding the contract. *BCPeabody Construction Services, Inc. v. Department of Veterans Affairs*, CBCA 5410, 18-1 BCA ¶ 37,013 (citing *Metcalf Construction Co. v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014)). CDC’s request for documentation was reasonable; a subject matter expert is not required for a termination proposal; and Nues invoiced for work that it had not performed. Nues agreed to the changed payment milestone schedule twice in bilateral modifications 00002 and 00004, and Nues was delayed as a result of the pandemic. CDC did not breach the duty of good faith and fair dealing or the contract.

CDC did, in effect, issue a stop work order as a result of the pandemic. An unforeseen pandemic does not shift the risk to the Government for any unexpected costs incurred under a firm, fixed-price contract. *Pernix Serka Joint Venture v. Department of State*, CBCA 5683, 20-1 BCA ¶ 37,589 (“It is well-established that ‘a contractor with a fixed price contract assumes the risk of unexpected costs not attributable to the Government.’” (quoting *Matrix Business Solutions, Inc. v. Department of Homeland Security*, CBCA 3438, 15-1 BCA ¶ 35,844 (2014))). However, “[i]f a stop-work order is not canceled and the work covered by the order is terminated for the convenience of the Government, the Contracting Officer shall allow reasonable costs resulting from the stop-work order in arriving at the termination settlement.” FAR 52.242-15(c) (incorporated by reference in the contract); Exhibit D at 32.

The difficulty is in determining what costs claimed by Nues are reasonable because the costs and the amounts claimed varied. In its TSP, Nues claims \$10,245 for direct labor, and \$20,000 for labor hours for staffing for sites during “Base Yr-Stop Work Order.” In its January REA, Nues claimed \$20,000 for labor (\$15,000 for staffing, \$2000 for a medical monitor, and \$3000 for a clinical research associate) but did not claim direct labor costs. Nues provided no support or explanation for the direct labor costs of \$10,245. The \$15,000

in costs claimed for work done to prepare for and stop the scheduled March visit, and staffing and work performed in anticipation of the site visits resuming after the work stoppages is reasonable.

Nues is not entitled to recover the costs claimed in invoice Q030 because the invoice claimed costs for site visits and reports that never happened. Nues is not entitled to costs incurred to prepare reports related to the July 2020 or the September 2020 visits as these reports were deliverables paid for under the contract. Nues provided no support for the unabsorbed overhead for 148 days of delay claimed in the amount of \$11,174 or the \$2600 for incurred costs of training staff. The contract required training of all contractor employees. Exhibit D at 21.

It is well established that settlement expenses, including legal expenses and costs to prepare and present settlement claims, are generally allowable. FAR 31.205-42(g). In the REA, Nues claimed \$3000 in attorney fees and \$2000 for preparing the REA. In the TSP, Nues claims \$7500 in legal fees, \$25,200 for in-house and outside professional fees/expense, and \$8306 for G&A. The work to prepare the REA, however, must have been utilized to prepare the TSP, and Nues changed attorneys between submission of the REA and the TSP, thus increasing the attorney fees incurred. Nues also provided no support for the legal fees claimed and no explanation of the reason for the more than doubling of the fees from the REA to the TSP. We award Nues \$3000 in legal fees. We only award Nues \$2000 for preparation costs and G&A. Nues did not provide support for the preparation costs claimed. It did not identify who the professionals were or what assistance they provided. Moreover, Nues stated that it did not get professional assistance in creating its TSP because CDC said that it did not need to get professional help. In addition, CDC paid Nues G&A as part of invoice Q031.

We find Nues' claim for ten percent for profit or \$1500 to be reasonable. CDC did not challenge this percentage. The total awarded to Nues is \$21,500.

Decision

For the foregoing reasons, we **GRANT IN PART** appellant's appeal in the amount of \$21,500, with Contract Disputes Act interest running from April 30, 2021. 41 U.S.C. § 7109 (2018).

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge