UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND IS BEING RELEASED TO THE PUBLIC IN ITS ENTIRETY ON JULY 20, 2020

DENIED: July 16, 2020

CBCA 6669

HAMSTRA CHICO LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Paul F. Khoury, Richard B. O'Keeffe, Jr., and Lindy C. Bathurst of Wiley Rein LLP, Washington, DC, counsel for Appellant.

Stephen J. Kelleher and Alicia M. Harrington, Office of General Counsel, Department of Veterans Affairs, Washington, DC, counsel Department of Veterans Affairs.

Before Board Judges **SOMERS** (Chair), **VERGILIO**, and **DRUMMOND**.

VERGILIO, Board Judge.

The Department of Veterans Affairs (agency) has a contract with Hamstra Chico LLC (contractor) (as the assignee after award of the contract, this opinion makes no distinction between the initial awardee and this contractor) that required the construction of a building and subsequent lease for a fifteen-year firm term with the annual rent to include all utilities and other operating costs. The contractor seeks contract reformation on the basis that the agency conducted improper negotiations by failing to notify it that its proposed electricity

costs were a deficiency or significant weakness; the agency did not so categorize that pricing. The contractor contends that it failed to price electricity as a contractor obligation, but faults the agency for not identifying this during negotiations. The reformation sought is to rewrite the contract to place the obligation on the agency to pay all electrical costs for the duration of the lease while reimbursing the contractor for electricity amounts it has paid. The agency moves for summary judgment, contending that the contractor is not entitled to the remedies sought, such that the claim must be denied. The contractor opposes the motion.

We do not read the regulations and case law as permitting reformation for the allegedly improper negotiations in this circumstance. The contractor does not allege a mistake on its part (regulation details how to resolve a "mistake in proposal" allegation). The contractor offered an overall contract price, with various components, that the agency accepted. As acknowledged by the contractor, an amendment explicitly shifted electricity costs to the contractor. The agency would not have awarded to the contractor the contract it now seeks, with terms and conditions contrary to those used in the competition and agreed upon by the parties. The reformation sought to correct improper negotiations is not substantiated or appropriate. The Board denies the appeal.

Background

This background is taken from the undisputed facts recognized by the parties, the solicitation, the contract, and other documents in the record. To resolve the motion, we utilize facts in the contractor's favor if the contractor alleges a dispute as to a material fact.

In 2015, the agency issued a solicitation to obtain proposals for the construction and subsequent lease of a building. Exhibit 1 (all exhibits are in the appeal file). As issued, the solicitation states in a section on operating costs: "The base for the operating cost adjustments will be established during negotiations based upon the Offeror's Final Cost Proposal, Line 27, of GSA Form 1217, Lessor's Annual Cost Statement. Note that the cost of electricity, gas, and water will be paid directly by the VA." Exhibit 1 at 43. On that form, electrical is one component of the services and utilities that are summed for the final cost in line 27. Current for light and power (including elevators) is one subcomponent–the electricity subcomponent. Exhibit 11 at 4. However, section 8.1 (utilities) of the solicitation states, in part: "The cost of all utilities shall be included as part of the rental consideration." Exhibit 1 at 207.

The contractor submitted an initial proposal with a price for the electricity subcomponent. The agency did not identify the electricity subcomponent or the total line 27 price as a deficiency or significant weakness. Thereafter, by solicitation amendment, the

agency eliminated the language that specified that the cost of electricity, gas, and water will be paid directly by the agency; the costs of electricity were to be borne directly by the contractor. The contractor expressly acknowledged receipt of the amendment, accepting all terms and conditions. Exhibit 6 at 249-50. In its claim, the contractor recognizes that the amendment made "clear that the [agency] would not directly pay for electrical power." Exhibit 10 at 9.

The agency considered subsequent revised proposals from the contractor. On the form, the contractor did not alter the electricity subcomponent cost. Its total operating costs increased from the first to the final submission. The agency did not identify either the electricity subcomponent or the total operating costs as a deficiency or a significant weakness. While the electricity subcomponent was out of line with other offers, the total offer was most favorable to the agency, such that it awarded the contract to the contractor.

After the building was constructed, the contractor attempted to have the agency to take over the utility costs. Thereafter, the contractor submitted a certified claim, alleging that the agency engaged in defective negotiations by failing to identify the electricity costs as a deficiency or significant weakness. The contractor's claim, at 1 and 9, specifies:

> [The contractor's] proposal was based on the understanding that the [agency] would pay for the overwhelming majority of the electrical utilities associated with the [building]. Despite engaging in four rounds of discussions with [the contractor, the agency] never brought up its contrary understanding of the terms of the lease as it was required to do. In these circumstances—where the Government has violated a contract formation rule intended to benefit a contractor—the Federal Circuit has held that the contractor may seek reformation of the contract.
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> Despite this flaw in [contractor's] initial proposal, the [agency] hosted [the contractor's] oral presentation three weeks after amending the [solicitation] to make clear that the [agency] would not directly pay for electrical power. But the [agency] did not mention this deficiency at the oral presentation or in any communications as the Agency requested four proposal revisions over the next six months, culminating in [the contractor's] final proposal revision on August 31, 2016. In not informing [contractor] that its proposal was understated by a factor of [x] times, the [agency] violated FAR [i.e., Federal Acquisition Regulation] 15.306(d)(1) (by not tailoring

> discussions to [the contractor's] proposal) and (3) (by not informing [contractor] that its proposal had a deficiency).

Exhibit 10 at 1, 9.

The contractor submitted a timely appeal based upon a deemed denial of the claim.

Discussion

The claim rests on the assertion that the agency conducted improper negotiations when it failed to identify the contractor's subcomponent price for electricity as a deficiency or a significant weakness over several rounds of negotiations. The contractor does not assert a mistake in proposal, which would require additional facts and a different analysis. 48 CFR 15.508, 14.407-4 (2019). The contractor seeks to reform the contract to make the agency responsible for electricity costs over the life of the lease. The agency moves for summary judgment and a denial of the claim. The contractor opposes the motion.

The standard of review, obligations of each party regarding a motion for summary judgment, and constraints upon the forum resolving such a motion are well established and here followed. *1000-1100 Wilson Owner, LLC v. General Services Administration*, CBCA 6506 (July 6, 2020); *Pernix Serka Joint Venture v. Department of State*, CBCA 5683, 20-1 BCA ¶ 37,589. The material facts are undisputed; it is not relevant that the parties dispute non-material facts. The issue presented is a legal issue; resolution through summary judgment is appropriate.

The contractor faults the agency which, according to the contractor, "never brought up its contrary understanding of the terms of the lease as it was required to do." With this basic premise, the contractor errs. The contractor never expressed its understanding until after award. The contractor recognizes that the amendment made it clear that the agency would not directly pay for electricity. The contractor priced the contract as it deemed appropriate under the solicitation language. Having received an award at a price it offered, the contractor now seeks to alter the price and terms of the contract. This assertion is not in keeping with regulation, as the parties had presumably reached agreement on a fair and reasonable price for the overall contract, not just a single line item or subcomponent. 48 CFR 15.405(a) ("The purpose of performing cost or price analysis is to develop a negotiation position that permits the contracting officer and the offeror an opportunity to reach agreement on a fair and reasonable price. A fair and reasonable price does not require that agreement be reached on every element of cost, nor is it mandatory that the agreed price be within the contracting officer's initial negotiation position.").

The requested reformation would be contrary to the express terms of the contract, which place the obligation on the contractor to bear such costs. The contractor won the competition under terms it seeks to remove as it would alter (to its benefit) the obligation to pay all electrical costs over the life of the contract. The requested reformation involves pure speculation that the agency would have awarded such a contract, or that the contractor would have won such a competition with the agency responsible directly for all electricity costs. Similarly it would be speculative to assume what total price the contractor may have proposed, given that the contractor recognizes that the amendment was clear and acknowledged receipt of the amendment.

The contractor is not assisted by cases it relies upon. *LaBarge Products, Inc. v. West*, 46 F.3d 1547 (Fed. Cir. 1995), does not dictate the result the contractor seeks. The court did not reform the contract to increase the contractor's price, because the contractor determined its pricing independent of the agency's actions, that is, the allegedly improper agency actions did not cause that contractor to reduce its pricing. Here, the contractor priced the contract, including its operating costs (of which electricity is an subcomponent), as it deemed appropriate, with or without regard to the terms and conditions of the contract. The contractor does not benefit from its stated failure to recognize what its obligations were.

Similarly, the contractor relies upon a decision not here binding, *Chugach Federal Solutions, Inc.*, ASBCA 61320, 19-1 BCA ¶ 37,380. That board addressed jurisdiction regarding a request for reformation based upon an allegation of negligent negotiations. The board concluded that it had jurisdiction over the dispute such that the contractor could pursue its claim. The source selection panel had found that the contractor's proposed staffing was significantly low, and a significant weakness, but did not so inform the contractor during negotiations. Alleging agency improprieties, the contractor contended that it won an award with staffing levels that the agency believed to be inadequate. The contractor asserted that it would have increased staffing had it been informed of the weakness.

Jurisdiction is not here at issue. This contractor had acknowledged receipt of an amendment that the contractor says makes clear that it was to bear the electricity costs under the agreed upon pricing. The agency had identified neither a deficiency nor a significant weakness. The contractor asserts neither a mistake on its part nor a problem with the overall price; the contractor priced the contract as it chose. The requested reformation is not appropriate here. We do not adopt or extend the analysis in *Chugach* to permit this contractor to pursue further the relief sought.

The contractor seeks to expand the application of reformation to the facts here. However, as stated in *Northrop Grumman Corp. v. United States*, 47 Fed. Cl. 20, 41 (2000):

> The remedy of reformation is a narrow one, bringing a contract into conformity with "the true agreement of the parties on which there was a meeting of the minds." *American President Lines, Ltd. v. United States*, 821 F.2d 1571, 1582 (Fed.Cir.1987). Reformation is not intended to be a means by which a court injects itself into the contracting process to create the contract that it determines is best for the situation. *See Atlas [Corp. v. United States]*, 895 F.2d [745,] 749 [(Fed. Cir. 1990)] (noting that courts have "no authority to write contracts, or contract clauses, for the United States by means of reformation where there has been no agreement") (citing *American President Lines*, 821 F.2d at 1582).

The contractor here seeks to reform the contract in contravention of its explicit terms. Under the fixed price contract (subject to price escalation) the contractor bears the risk of underestimating utility costs and attains the benefits of overestimating such costs. The contractor seeks to reform the contract to eliminate those risks and benefits. That is not the contract the agency sought to enter into, as made explicit by the solicitation modification and contract terms that placed the burden on the contractor to pay utility costs. Post award, a contractor does not dictate the terms and conditions of the contract. The contractor seeks relief that would be inconsistent with the contract and the amendment it acknowledged.

Decision

The Board grants the agency's motion for summary judgment and **DENIES** the appeal.

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

We concur:

Jeri Kaylene Somers
JERI KAYLENE SOMERS
Board Judge

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge