

FINDINGS AND RECOMMENDATIONS

Docket No.: 12-ODRA-00625

Glenn Brown, Esq.

As explained in the Findings of Fact (“FF”) and the Discussion below, the ODRA recommends that the Contract Dispute be granted in part and denied in part, and that the JV be awarded an equitable adjustment of \$60,782.09, inclusive of interest under the Contract Disputes clause.

II. Findings of Fact

A. The Contract

1. The JV received the award of Contract DTFANM-10-C-00131, a firm-fixed price contract that had an effective date of April 29, 2010. *Service Area's Substantive Response* ("SR") A-1C at 1. The original contract price was \$3,292,302. *Id.* The original total price included amounts for the following contract line item numbers ("CLINs"):

001	Base Building	\$1,063,979
002	Parking Area and Site Improvements	\$ 254,420
003	Antenna Tower	\$1,973,903
Total Offer Price		\$3,292,302

Id. at § B-1.

2. Generally speaking, the Contract required the JV to prepare a site in Yakutat, Alaska for erection of an Air Traffic Control Beacon Interrogator ("ATCBI") tower. *SR* A-2 at § 1.2.C. The JV was to erect the tower and provide equipment and personnel to support the installation of government furnished equipment ("GFE") that included a radar platform, pedestal, sail and other items. *Id.*
3. The original contractual period of performance was from the issuance of a Notice to Proceed to completion of a punch list items by December 17, 2010. *SR* A-1A (amendment 0001 at page 3). Section B001 identified certain moratorium periods for performance, stating, "No work shall be scheduled or take place during the week of and the weekend preceding and following the Thanksgiving, Christmas and New Years Holidays [sic]." *SR* A-1C, § B001.
4. Section F of the Contract incorporated by reference AMS Clause 3.10.1-24, "Notice of Delay (February 2009)." *SR* A-1C at § F. The Contract also incorporated many other Acquisition Management clauses, including:

3.2.2.3-56 Schedules for Construction Contracts (July 2004)

3.2.2.3-60	Specifications, Drawings, and Material Offers (February 2009)
3.2.2.3-66	Contractor's Daily Log (July 2004)
3.3.2-1	FAA Cost Principles (October 1996)
3.6.2-20	Payrolls and Basic Records (June 1999)
3.9.1-1	Contract Disputes (September 2009)
3.10.1-15	Changes-Construction, Dismantling, Demolition, or Removal of Improvements (July 1996)
3.10.1-16	Changes and Changed Conditions (April 1996)

SR A-1C at Section I.

5. Section I of the Contract also included the full text of AMS Clause 3.10.1-23, "Contracting Officer's Representative – Construction (July 2008)." SR A-1C at Section I. That clause, in particular, establishes that the Contracting Officer's representative is "authorized to act for the Contracting Officer in all specifically delegated matters pertaining to the contract, except: (1) contract modification that change the contract price or cost, technical requirements or time for performance, unless delegated field change order authority." *Id.* Nothing in the record shows that field change order authority was delegated to the Project Engineer or other individuals.
6. The specifications required the JV to submit shop drawings for "Tower Steel" and all other submittals prior to mobilization at the site. SR A-2, at Specification § 1.9.A.

B. Informal Change Order Administration

7. The administration of changes on this project – whether actual, proposed, or discussed – is best described as "informal." Aside from after-the-fact modifications (*see FFs 12 and 13, infra*), the record is barren of actual, written orders by the Contracting Officer directing the JV to perform work that constituted changes or alleged changes to the Contract. Nevertheless – and fortunately for the JV – the Service Area's filings demonstrate that the Service Area has accepted that changes occurred for the following items, identified as "Proposed Contract Changes" ("PCC") or "Contractor Change Order Requests" ("COR"):

- PCC 7, revised, for light fixtures, posts, etc. (*SA FS* at 4);
- PCC 16, for radome hatch work, etc. (*SA FS* at 4-5);
- COR 8 items, as follows:
 - Item 1, panel at 140-foot level (*SA FS* at 5);
 - Item 3, 4x4 wireway (*SA FS* at 6);
 - Item 4, OB light control box (*SA FS* at 6);
 - Item 6, Ground cover plates (*SA FS* at 6);
 - Item 8, “CTs” (*SA FS* at 7);
 - Item 9, building light fixtures (*SA FS* at 7);
 - Item 10, heater control credit (*JF FS* at C-11; *SA FS* at 7); and,
- Waiver of the Truss Engineering Inspection Requirement (*JV FS* at 4; *SA FS* at 19).

8. Precisely how the acknowledged changes were ordered is not in the record. For PCCs, the record demonstrates that the Service Area’s Resident Engineer (not the Contracting Officer) sent letters that described a proposed change and requested a price proposal. *See e.g., SR A-16 to A-21; Amended Contract Dispute*, Attachments 1, 2, and 3. Each letter contained identical language that stated:

Please provide a cost breakdown showing labor hours and rate, material, overhead & profit, and indicate any impact to the overall schedule.

This Request does not obligate the Government in any manner, nor does it constitute a contract change until the Contracting Officer accepts your offer in writing.

SR A-16 to A-21; Amended Contract Dispute, Attachments 1, 2, and 3.

9. Despite the quoted caveat in the second sentence of the above letters stating that each PCC was not a change order, the Resident Engineer explained that the JV sometimes began the work in advance of an actual change order:

Some of the additional work set forth in the PCCs required additional materials, and i[n] some cases, to ensure timely completion, those materials were ordered before the JV presented its initial cost proposal. We (the FAA) were well aware, of course, that the additional work was being done even though the CO [Contracting Officer] had not yet executed a contract amendment, and I did from time to time assure the JV that we wanted the work set forth in the PCCs done. At no time, however, did I assure the JV or any of its subcontractors that the FAA was accepting or willing to pay the amounts shown in the initial cost proposals. Rather, it was my understanding and belief

– and based on all of my interactions with the JV and its subcontractors it appears it was their belief and understanding as well – that we would settle on the prices after the work was done. Thus, I was rather surprised to read in the JV’s amended claim that we had accepted the “forward pricing,” a term I’ve never before heard used in the construction industry. At no time during any of our discussions regarding the price for any of the PCCs did the JV refer to its initial cost proposals as “forward pricing,” and at no time prior to the submission of the amended claim on November 28, 2012, did the JV allege that the FAA had accepted those initial costs proposals or was otherwise obligated to pay those amounts.

SA FS A-29, Project Engineer’s Decl., at ¶ 5.

10. The Contracting Officer provided a similar statement. After describing the post-performance negotiation history for modifications 001 and 002, he stated:

I am aware that beginning with its amended claim that it submitted on November 28, 2012, the JV is alleging that the FAA accepted its initial proposals for PCCs 7 (revised) and 16. During all of our negotiations regarding price and time extensions, the JV never make [sic] such an argument or gave any indication it though the FAA was bound to pay it those amounts. I never accepted any of the initial cost proposals submitted by the JV, and to my knowledge no one on behalf of me or the FAA did so either. Instead it seemed to me that everyone involved understood that with winter fast approaching and materials needing to be ordered and shipped, there simply wasn’t time to negotiate the price beforehand, and that we would do so later. We never told the JV that we intended to price PCC on a strict time and material basis because we did not intend to do so. Rather, we expected that the JV would make reasonable use of resources, and revise its cost proposals accordingly.

SA FS A-30, Contracting Officer’s Decl., at ¶ 5. Consistent with this statement, the record does not include written directions from the Contracting Officer accepting any of the JV’s proposals before change-related work began.

11. The contracting parties did not execute an advance agreement to address the various mark-ups for indirect costs and profit. Nevertheless, the topic was addressed at a construction conference on July 8, 2010, wherein the parties established that such items should use rates relied upon to develop the original bid. *SR* at 5 and A-6; *see also SA FS A-29, Project Engineer’s Decl.*, at ¶ 3 and 7.

12. Modification 0001, signed by both parties, increased the contract price by \$95,250.41, and added 1 “work day” to the “contract time.” *SR A-3*.
13. Modification 0002, also signed by both parties, established CLIN 0005 to increase the contract price by \$93,718.00, and added 10.5 “work days.” *SR A-4*. This modification also stated, “Contractor may submit a Request for Equitable Adjustment as he [sic] sees fit.” *Id.* at 1.

C. Duration of Performance

14. Despite the fact that the Contract required the JV to submit an initial construction schedule and progress schedules for payment purposes (*AMS Clause 3.2.2.56, at FF 4, supra*), neither party submitted into the record any construction schedules or delay analyses. Similarly, despite the fact that the Contract required the JV to maintain daily logs (*AMS Clause 3.2.2.3-66, at FF 4, supra*), neither party submitted construction logs into the record.
15. The Notice to Proceed is not in the record.
16. The Project Engineer states that after the Thanksgiving moratorium (*see FF 3, supra*), the JV and its subcontractor Badger Electric returned to the site in December 2010, in January 2011, and again in May 2011. *SA FS A-29, Project Engineer’s Decl.*, at ¶ 13. After the return in December, the “Contractor Acceptance Inspection” was held on December 15, 2010, which is when the punch list found at *SA FS A-22* was established. *Id.* The Project Engineer further indicates that during the three periods mentioned, the JV and Bader Electric performed “considerable work required under the original contract.” *Id.* Specifically, “[o]nly 5 of the 47 (6, 7, 44, 45, and 46) [items on the punch list] involved work not required under the original contract.” *Id.* The record is not precise as to when the Service Area accepted or when the JV completed demobilization.

D. Procedural History

17. The JV filed its Contract Dispute with the ODRA on October 18, 2012. At the time, the JV claimed \$98,556.00. *Original Contract Dispute* at 2.
18. After the initial status conference and a period for informal negotiation called for in the ODRA Procedural Regulation, 14 C.F.R. Part 17, the Product Team informed the ODRA on November 16, 2012 that attempts at alternative dispute resolution were not successful, and that the adjudication should commence. *Agency's Statement Regarding ADR*.
19. On November 28, 2012, the JV filed an Amended Contract Dispute that increased the claimed amount to \$137,116.12, inclusive of interest and attorney's fees. *Amended Contract Dispute* at 4 and Attachment 9.
20. In a conference call held on November 28, 2012, the ODRA established an adjudication schedule. *Scheduling Conference Memorandum* dated November 29, 2012.
21. Between January 7 and January 9, 2013, various portions of the Agency's Substantive Response and exhibits (called the "Dispute File") arrived at the ODRA. *See ODRA Letter* dated January 14, 2013, at 1. The ODRA revised the discovery period, and provided that the JV's supplement to the Dispute File would be due on May 9, 2013. *Id.* at 2.
22. Based in large measure on the Product Team's piecemeal filing of its Substantive Response and relevant documents, the JV filed a motion for summary judgment on January 15, 2013. After directing the parties to correct certain flaws in the exhibits (see ODRA Letter dated January 16, 2013), the ODRA denied the motion for summary judgment. *Contract Dispute of L&N/MKB Joint Venture* (Decision Denying Motion for Summary Judgment, dated January 25, 2013) ("Summary Judgment Decision").
23. During the course of discovery, the JV asserted that certain discovery objections from the Service Area were untimely, and not otherwise proper. *JV Letter* filed March 27, 2013.

The Product Team promptly responded on the same day and requested a conference call. *Product Team Letter* filed March 27, 2013. After scheduling difficulties, a conference was held on April 5, 2013 wherein the ODRA found that the objections were timely filed, but the ODRA nevertheless overruled the objections. The schedule was revised to permit the completion of discovery, and establish deadlines for subsequent filings. *Status Conference Memorandum* dated April 9, 2013.

24. The status conference of April 5, 2013 also addressed scheduling for the Joint Venture's Supplement to the documentary record and Final Submissions. During that discussion, the Administrative Judge explained to the JV's representative:

Administrative Judge Dietrich opened the discussion by explaining the need to build a complete record for decision, and noting that the Joint Venture has the burden of proof. He explained that reliable and probative evidence is needed to support the claimed amounts. He also indicated that the changes and costs in questions should be fully described and supported with citations in the record so that judgments can be made regarding whether claimed expenses are reasonable, allowable, and allocable. He stressed that the parties should not assume that he has the same degree of background knowledge about the project as the parties. Noting that the adjudication process may require a substantial amount of work to prepare adequate submissions, he strongly encouraged the parties to meaningfully engage in an alternative dispute resolution process[.]

Status Conference Memorandum dated April 9, 2013, at 2. Given these observations, a schedule for submissions was established that granted generous periods for the parties to develop and explain the record. *Id.* at 2-3. The scheduling order also directed the JV, if it elected to supplement the record, to continue the numbering system established in the Service Area's document collection. *Id.*

25. On May 28, 2013, the JV filed documents to supplement the Dispute File. *JV Supplement* of May 28, 2013 ("JV Supp."). The JV failed to continue the established numbering system. *JV Supp., passim.*

26. On July 15, 2013, the JV filed its Final Submission, which also included many tabbed additions to the record. *JV FS, passim*. Again, the JV failed to continue the established numbering system. *Id.*

27. On August 29, 2013, the Service Area filed its Final Submission, which also added several exhibits. *SA FS, passim*.

28. Neither party requested a hearing.

III. Burden of Proof

The party seeking an equitable adjustment has the burden to show that the preponderance of the evidence demonstrates liability, causation, and injury. *Contract Dispute of Carmon Construction, Inc./GAVTEC, Inc.*, 07-ODRA-00425 (citing *Contract Dispute of Strand Hunt*, 99-ODRA-00142). In the present matter, the JV has the burden of showing that the Government ordered changes to the Contract that caused the JV's costs or time of performance to increase. *Strand Hunt, supra*. Similarly, the FAA's Product Team has the burden to show its own entitlement to credits for changes that reduce the cost of the contractor's performance. *Id.*

IV. Discussion

This matter involves several claim elements, which the JV grouped in its Final Submission as:

Item	Item Costs	Mark-up and Totals
Proposed Contract Change ("PCC") 7 – Revised	\$83,301.81	
PCC 16	21,556.45	
Change Order Request ("COR") 8	3,154.40	
Truss Engineering Credit	(1,950.00)	
Additional Mobilization	6058.50	
Unilateral Deduction (from Modification 0002)	10,263.30	
Professional Services	1,199.88	
Sub-total		\$123,584.34
Home Office Overhead		7,785.23
Interest (from January 2011 to December 2013)		8,049.71
		\$139,419.86

JV FS at Attachment I. Each item listed in the table is addressed below, after preliminary discussions regarding the JV's use of "forward pricing," the applicable law, and a determination

of the appropriate indirect rates and profit to use in the equitable adjustments for some of these claimed items.

A. Forward Pricing is not Appropriate

For the first two claim items, revised PCC 7 and PCC 16, the JV's initial position is that it is entitled to the prices that it proposed in response to change proposal letters from the Service Area. *JV FS* at 2. Those letters requested the JV to "provide a cost breakdown showing labor hours and rate, material, overhead & profit, and indicate any impact to the overall schedule." *FF* 8. Each of the letters explained that "this request does not obligate the Government in any manner, nor does it constitute a contract change until the Contracting Officer accepts your offer in writing." *Id.* Despite this language, the JV argues in its Amended Contract Dispute that "the JV forward priced the change order work and was directed by the FAA to proceed." *Amended Contract Dispute* at 1.

The ODRA addressed this issue at length in the Summary Judgment Decision, and familiarity is presumed. The ODRA held that "absent a contractual agreement to a forward pricing proposal, retrospective examination of costs with reasonable profit is the correct approach to determining an equitable adjustment in a fixed price situation." *Summary Judgment Decision* at 5. At the time of the motion, the JV had failed to produce evidence demonstrating that the parties agreed to the forward pricing proposals. The record has not changed in this respect, and the ODRA finds that the parties did not agree in advance to accept the forward priced proposals.¹ *FF* 8 to 10. The ODRA, therefore, will determine the appropriate equitable adjustment in retrospect, using the appropriate standards found in the FAA Cost Principles and ODRA case precedent.

¹ The ODRA's findings characterize the administration of this contract as "informal," based on the statements from the Resident Engineer and the Contracting Officer, as well as the lack of documentary evidence clearly establishing the change order process. *FF* 8 to 10. Such informal administration rarely serves the parties well in the long run. Contractors who jump the gun on change orders without formal direction from an authorized government official run the risk that requests for equitable adjustments and claims will be denied. *See e.g., Winter v. Cath-DR/Balti Joint Venture*, 497 F.3d 1339, 1343-44 (Fed. Cir. 2007). Federal contract administrators, similarly, run the risk that unplanned changes may be found, or that an equitable adjustment for a change may exceed what a program office would otherwise accept. For these reasons – at the very least – the AMS Guidance advises:

b. Ceiling-Priced Modifications.

- (1) Contract modifications should be priced before execution, if this can be done without adversely affecting FAA's interests. If a ceiling-priced modification is entered into authorizing the

B. The AMS Cost Principles and ODRA Precedent

The Contract incorporates by reference AMS Clause 3.3.2-1, "FAA Cost Principles (October 1996)." *FF* 4. That clause states in relevant part:

(b) The Contracting Officer shall incorporate the FAA cost principles and procedures in contracts with commercial organizations as the basis for:

...

(6) Pricing changes and other contract modifications.

AMS Clause 3.3.2-1, "FAA Cost Principles (October 1996)" at (b)(6). The FAA Cost Principles require that construction contractors and administrators apply the cost principles and procedures contained in Section 2, "Contracts with Commercial Organizations." *AMS Guidance* T.3.3.2 A.1.e.(1). Section 2, in turn, places the burden to support claimed costs on the contractor:

(4) A contractor is responsible for accounting for costs appropriately and for maintaining records, including supporting documentation, adequate to demonstrate that costs claimed have been incurred, are allocable to the contract, and comply with applicable cost principles in this subpart and agency supplements. The CO may disallow all or part of a claimed cost which is inadequately supported.

AMS Guidance at T3.3.2 A.2.(b)(4). Notably, in a conference with the parties, the ODRA specifically advised the JV as to the importance of clearly describing and supporting its claims for equitable adjustments. *FF* 24.

contractor to start performance before final agreement on the modification's price, the CO must include in the modification:

- (a) All requirements for performance or delivery;
 - (b) The contract type, maximum price or cost to be negotiated, FAA's maximum liability pending definitization and a provision permitting the CO to determine a reasonable price or cost (subject to the disputes provisions); and
 - (c) A definitization schedule with dates for submission of the contractor's price proposal, required cost or pricing data, make-or-buy and subcontracting plans if required, a date for starting negotiations, and a target date for definitization. The definitization should be completed within 180 days after the date of the ceiling-priced modification or before completion of 40% of the work to be performed, whichever occurs first.
- (2) If agreement on the modification's price is not reached by the target date or within any extension of it granted by the CO, the CO may, with approval of the Chief of the Contracting Office, determine a reasonable price or fee, subject to contractor appeal as provided in the "Contract Disputes" clause. In any event, the contractor must proceed with completion of the contract, subject only to the "Limitation of FAA Liability" clause.

AMS Guidance T3.10.1 A.6.

In applying the cost principles, the ODRA recognizes that a contractor “is not required to prove its damages with absolute certainty or mathematical exactitude,” and that it “is sufficient if the [ODRA] is furnished with a reasonable basis for computation, even though the result is only approximate.” *Contract Dispute of Strand Hunt Construction*, 99-ODRA-00142. Such an approximation, called a “jury verdict,” is appropriate after entitlement has been established if three factors are present: “(1) that clear proof of injury exists, (2) that there is not a more reliable method for computing damages, and (3) that the evidence is sufficient for a court to make a fair and reasonable approximation.” *Id.*

C. Appropriate Indirect Rates

Several indirect costs rates are applied to the equitable adjustments proposed by the parties. The AMS Cost Principles encourage parties to a construction contract to proactively address overhead, equipment usage costs, and other possible costs in advance agreements to “avoid possible subsequent disputes or disallowances.” *AMS Guidance* at T3.3.2 A.1.(e)(3)(a) (AMS Cost Principles). In the present dispute, no formal advance agreement is in the record. *FF* 11. While the parties now use the same rates for several categories of indirect costs or mark-up, they differ on the application of three rates.

The parties mutually use the following rates, which are applied as multipliers to the sum of the direct costs for each claimed item:

General Liability Insurance:	1.22%
Excess Liability Insurance:	0.31%
Pollution Liability Insurance:	0.15%
Builders Risk Insurance:	0.37%
Bonds:	1.27%
Profit:	11.1%

Amended Contract Dispute, passim; SA FS at 23-24. The parties also agree that it is appropriate for the JV, as general contractor, to add 15% to its subcontractor’s charges for labor and materials expenses. *SA FS at 24.* All of these rates derive from identical percentages used in the original bid, according to the notes from a meeting held on July 8, 2010. *FF* 11. The ODRA

finds that use of such rates is reasonable and consistent with the *FAA Contract Pricing Handbook*, Ch. 16 (January 2012).

The ODRA must address with more detail the three rates at issue between the parties. The first such rate is for “General Conditions,” which neither party attempts to define. Their initial differences regarding this apparent indirect cost pool relates to supervision. As the Product Team explains:

Because the JV’s initial proposals included supervision at an hourly rate as a specific line item [in its estimates], the Agency took issue with the 6.75% markup for general conditions, which is supposed to include supervision. In essence, the JV’s initial proposals included double charges for supervision. In the end, the JV was given the choice of a 6.75% markup for general conditions or a 1.12% markup with a separate item for supervision at an hourly rate.

SR at 5-6. Subsequent submissions by the JV show that it elected to submit proposals that treated supervision as a direct charge, and adopted the rate of 1.12 for “general conditions.” See e.g., *JV Supp.* Attachment 2 (for PCC 7 revised). Similarly, the Product Team adopted this approach for its own estimates. See e.g., SR at A-14. This approach is permitted under the AMS Cost Principles, at T3.3.2 A.1(e)(3)(c), so long as it is consistently followed. Given that both parties ultimately adopted this approach, the ODRA likewise will use it below.

Another issue between the parties concerns the JV’s application of a mark-up for small tools on subcontractor labor and supervisor labor. The Product Team objects to applying the 10% mark-up to subcontractor labor, but it does not object to applying it to the JV’s own employees’ time. SA FS A-29, *Project Engineer’s Decl.*, at ¶ 7. Neither party explains its position in great detail; nor does the JV provide any supporting evidence as to how it treats small tool expenses in its accounting system. While there is nothing inherently inappropriate about applying a small tool mark-up to subcontractor labor,² the AMS Cost Principles place the burden to support claimed costs on the contractor. *AMS Guidance* at T3.3.2 A.2.(b)(4) (*quoted supra*, Part IV. B). The JV has provided no legal or factual basis to apply its this mark-up to a subcontractor’s labor, and the

² See e.g., *Dick/Morganti, a Joint Venture v. GSA*, CBCA 420, etc., 10-2 BCA ¶ 34,528 (mark-up rate for small tools applied to first tier subcontractor, as provided in an advance agreement).

ODRA, accordingly, will limit its application of the mark-up to the parties' mutual application to the JV's own labor force.

The final claimed mark-up at issue is 6.03% for "Home Office Overhead," which appears for the very first time in the Amended Contract Dispute filed with the ODRA. *Amended Contract Dispute* Attachment 9. This expense is not found in any of the prior spreadsheets used for claims or negotiations. The JV's only explanation is found in its Final Submission:

Home Office Overhead: This is a fraction of the actual costs the JV has incurred to administer and collect on FAA directed and agreed to change orders. Conservatively[,] the JV has spent in excess of \$75,000 in overhead attempting to collect remaining contract funds because the FAA project "defunded" and the FAA did not find it necessary to advise the JV of such until the JV was forced to bring the issue in front of the ODRA.

JV FS at Attachment I. On its face, this explanation addresses the specific costs of the adjudication process rather than conventional notions of home office overhead cost pools. Indeed, this statement does not describe what costs the JV – a joint venture – accumulated in this alleged overhead cost pool. It also does not identify the cost objectives that these alleged indirect expenses serve or justify why the JV applies the rate to the profit that is embedded in each separate equitable adjustment it seeks. See *AMS Guidance* at T3.3.2 A.2.(i). Without any support for the newly alleged Home Office Overhead mark-up, the ODRA finds that the JV has failed in its burden to demonstrate that such a mark-up is appropriate in its equitable adjustment.

D. Specific Claims

The several iterations of the specific claim items include differing estimates from the JV. As to supporting documents, the JV does not provide the ODRA with ledger pages reflecting amounts paid, signed certified payrolls, daily reports showing equipment on site, critical path analyses to justify delay-related expenses, or any of the many other items typically relied upon in a construction contract dispute or required by the Contract. As more fully discussed below, the ODRA therefore recommends denying a portion of the claimed amounts, and to the extent equitable adjustments are recommended, they are based in large measure on the jury verdict method of determining the appropriate equitable adjustment.

(1) PCC 7 – Revised (\$83,301.81)

PCC 7, as revised, proposed to add twenty light fixtures, at various locations, along with three mounting posts, and required a review of the electrical system to ensure it could handle the new lights. *Amended Contract Dispute* at Attachment 2 (Letter of October 26, 2010). The JV’s proposed price for this PCC was \$83,301.81. *Id.* at spreadsheet labeled, “PCC 7 Additional Type F Light Fixtures REVISION 1.” In its Final Submission, the JV provided a table to reflect the alleged costs actually incurred plus profit (labeled “fee”).³ *JV FS* at A-3. The parties’ positions regarding the appropriate adjustments, along with the ODRA’s findings, are summarized as follows:

PCC 7, REVISED	Alleged Actual - Tab JV FS. A-3		SR FS A-27	
Item	Contractor Citation	Contractor Figure	Agency Position	ODRA Finding
JV Supervision	JV FS A-4;	\$ 8,768.64	\$ 4,094.00	\$ 7,304.80
JV Welder	JV FS A-5;	622.40	846.00	622.40
JV materials - Seidehuber Iron & Bronze	JV FS A-6;	626.00		626.00
<u>Badger Electric</u>				
Freight - Alaska Air Cargo	JV FS A-7;	388.20		388.20
Badger Labor w/ 15% JV markup	JV FS A-8;	25,871.15	23,556.55	25,871.15
Badger materials w/ 15% JV markup	JV FS A-9;	24,163.66	20,111.00	19,898.93
Badger Air travel w/ 15% markup	JV FSp A-10	3,049.80		-
Truck - F-150	JV FS A-11;	1,857.60	500.00	1,548.00
Total Direct Costs		\$ 65,347.45	\$ 49,107.55	\$ 56,259.48
General Conditions (1.12%)		731.9	550.0	630.11
Small Tools (10% applied differently)		939.10	494.00	792.72
General Liability Insurance (1.22%)		797.24	599.11	686.37
Excess Liability Insurance (.31%)		202.58	152.23	174.40
Pollution Liability Insurance (.15%)		98.02	73.66	84.39
Builders Risk Insurance (.37%)		241.79	181.70	208.16
Bonds (1.27%)		829.91	623.67	714.50
Profit (11.1%)		7,253.57	5,450.94	6,244.80
GRAND TOTAL		\$ 76,441.55	\$ 57,232.87	\$ 65,794.92

³ Use of the term “fee” in these circumstances is not appropriate. The Contract in question is a firm-fixed price contract (*FF* 1), and the term “profit” is used for fixed price contracts. See *FAA Contract Pricing Handbook* (January 2012) at 12-2.

As shown in the table, the ODRA finds that the JV's citations sufficiently support its claims for welder labor, JV materials, freight, and subcontractor labor. The ODRA has not accepted either party's position regarding the JV Supervisor or the truck. Although the Government uses a higher labor rate for the supervisor, it reduces the hours charged to 40 hours. The contractor uses a lower labor rate, but claims 96 hours of supervision. The ODRA accepts the JV's labor rate, but applies it to 80 hours, based on the payroll dates when supervised workers (the welder and Badger Electric employees) were on site. *See JV FS A-5 and A-8.* Similarly, the variation from the amount claimed for the truck is based on the dates of the alleged work (*id.*) and the use of the cost estimating tables cited by the JV. Use of such tables is consistent with the FAA Cost Principles. *See AMS Guidance*, at T3.3.2 A.1.(e)(3)(b). As to Badger Electric's material costs, the ODRA accepts the Government's position that one invoice, valued at \$3,708.47, duplicates another invoice found in JV FS A-9. Inasmuch as the Government does not otherwise challenge these invoices, the ODRA calculates cost of the Badger materials, with JV's 15% markup, to be \$19,898.93, as shown in the table above.

The last item to address is airfare, which the ODRA denies on both entitlement and quantum grounds. As to entitlement, the ODRA finds that these alleged expenses concern project delay costs for bringing employees to the site for additional days of performance. The JV has not proven through any probative evidence that compensable delays occurred.⁴ As to quantum, the JV's claimed amount is not based on actual costs incurred and recorded. Specifically, while the labor exhibit shows work in December 2010 and January 2011, the cited exhibit is for summertime fares in 2013. *Compare JV FS A-8 with A-10.* The ODRA finds that the airfare

⁴ As the ODRA explained in *Strand Hunt*:

A contractor asserting a claim based upon alleged Government-caused delay has the burden of proving "the extent of the delay, that the delay was proximately caused by government action, and that the delay harmed the contractor." *[citations omitted]* Specifically, the contractor has the burden of proving: (1) that the claimed compensable delay was solely due to Government causes; (2) that it was not concurrent with contractor-caused or excusable delay not attributable to the Government; and (3) that the delay in question serves to delay the overall completion of the contract. *[citations omitted]* Where the Government caused delay is concurrent or intertwined with other non-chargeable causes of contract delay, there is no recovery. *[citations omitted]*.

exhibit is too removed from the period of performance to be sufficiently probative to form an estimate for airfare costs incurred even if entitlement were present.

Based on the foregoing, the ODRA recommends that the JV be awarded an equitable adjustment of \$65,749.92 for PCC 7, revised.

(2) PCC 16 (\$21,556.45)

PCC 16 proposed three items: (1) transporting of a government furnished Radome access hatch, and installing it in place of an existing hatch; (2) providing a desk chair; and, (3) replacing certain lightning conductor connections. *JV FS B-1*. The JV presents no evidence other than two spreadsheets, one from Badger Electric and one from the JV representing the forward pricing proposal of \$21,556.45. *See Amended Contract Dispute* at Attachment 3; *JV Supp. Amended Attachment 3*; and *JV FS* at B-2 and B-3. The Government, in contrast, provided an estimate of \$8,463 (*SA FS A-28*), supported by a reasonable explanation from the estimator. *See SA FS A-29, Project Engineer Decl.*, at ¶ 17. On such a record, the ODRA treats the Government's estimate as an admission, and the JV has failed to prove that it is entitled to anything beyond the Government's estimate of \$8,463. The ODRA, accordingly, recommends that the JV receive an equitable adjustment of \$8,463 for PCC 16.

(3) COR 8 (\$3,154.40)

COR 8 actually addresses ten separate items. The JV seeks additional sums for nine of these items, and recognizes a credit for the tenth. The Government agrees to four items requiring additional payment, challenges the amounts for five other items, and asserts that it is entitled to a credit that is far higher than conceded by the JV. The discussion below, in subparts a. to c., addresses direct expenses or credit for these items. Indirect charges are applied to the net amount in subpart d.

a. Agreed Equitable Adjustments

Without the need for further elaboration, the ODRA adopts the parties' agreement to the direct costs in equitable adjustments for the following four items:

<u>Item</u>	<u>Amount</u>	<u>Citations</u>
1. Panel at 140 foot level	\$4,457.89	JV FS at C-1a.and C-2; SA FS at 5.
3. 4 x 4 wireway	1,340.42	JV FS at C-1a and C-4; SA FS at 6.
4. OB Light Control Box	415.13	JV FS at C-1a and C-5; SA FS at 6.
8. CTs	513.12	JV FS at C-1a and C-9; SA FS at 7.

b. Disputed Amounts for Payment to the JV

The areas of disagreement include five alleged cost increases, summarized in the following table:

<u>Item</u>	<u>JV Claimed Amount</u>	<u>Government Position</u>	<u>ODRA Finding</u>	<u>Citations</u>
2. Clamps for Down Conductors	\$ 4,416.00	\$ -	\$ -	JV FS at C-1a. and C-3; AF-12; SR at 9
5. Cable Tray Fittings	1,434.12	-	-	JV FS at C-1a. and C-3; SA FS at 6.
6. Ground Cover Plates	2,494.30	2,424.10	2,494.30	JV FS at C-1a and C-7; SA FS at 6.
7. Fiberglass Poles	830.73	-	-	JV FS at C-1a and C-8; SA FS at 6-7.
9. Building Light Fixtures	781.70	390.85	55.34.	JV FS at C-1a and C-10; SA FS at 7 and A-29, para. 25.

For item 2, “Clamps for Down Conductors,” the Service Area denied entitlement in its Substantive Response. *SR* at 9. The ODRA agrees that the JV has not demonstrated entitlement for this item. The notes to drawing E008 place the burden of selecting and providing the clamps in question on the contractor. *SR* A-12, at notes 2 and 7. Even if the Service Area approved a shop drawing or other submittal – a fact not in the record and not found by the ODRA, but which could be inferred from the Badger Electric letter of February 1, 2011 (*Amended Contract Dispute* Attachment 4) – such approval would not shift the responsibility or cost of providing conforming goods to the Service Area. *See AMS Clause 3.2.2.3-60*, “Specifications, Drawings, and Material Offers (February 2009)” at ¶ (g) (incorporated into the Contract as shown in *FF* 4). The ODRA, accordingly, finds that the JV is not entitled to an equitable adjustment for the clamps in question.

The ODRA also does not recommend an equitable adjustment for item 5, “Cable Tray Fittings,” noting in particular that the JV has not explained why it is entitled to an equitable adjustment. The JV’s evidence on entitlement consists only of a letter from its subcontractor, Badger Electric to the JV, which in the entire body of the letter states only:

The following attachments are for the extra 30 degree fittings on the 140 foot level. The 45 degree fittings for the 20 foot level and the sheet metal for the 45 and 90 degree fitting[s] that were not covered. [sic] I provided the fittings that were called for. There were to be no substitutes for these fittings.

The 30 degree fittings were needed to align the cable tray to the opening in the dog house. The 45 degree fittings were for the 20 to 30 foot level.

JV FS C-6. Despite the ODRA's direction to fully describe the alleged changes (*see FF 24*), the JV's submission does not explain what Government specification or drawing called for fittings that required a substitute, or who ordered a substitution. To the contrary, the Project Engineer states that the JV selected the route of the cable tray in order to save labor and crane rental expenses. *SA FS at A-29, Project Engineer's Decl. ¶ 20.* Thus, while there may be a dispute between the prime contractor and its electrical subcontractor, the JV has not established a change to the prime contract that entitles it to an equitable adjustment.

As to item 6, "Ground Cover Plates," the parties' only belated difference concerns whether a credit for returned items should include the JV's 15% mark-up that it adds when charging the Government with subcontractor material expenses. In this particular item, the JV charges the Government a 15% mark-up for larger sized ground plates used in lieu of small plates that the subcontractor returned. The JV does not, however, credit the Government with the 15 % mark-up -- or \$70.22 -- on the returned plates priced at \$468.10. Although the Service Area stated in its Substantive Response that it accepted the JV's claimed amount of \$2,494.30 (*SR at 9*), it waited until its Final Submission to claim the \$70 credit. The Service Area cites no specific legal ground or recognized accounting practice to justify its retraction of its earlier concession. As a result, the JV was not on notice that the mark-up was at issue, and accordingly did not provide further elaboration of its position. The ODRA will not speculate as to the appropriate accounting practice. Accordingly, the ODRA recommends that the JV be awarded the full \$2,494.30, as the Service Area previously admitted, as its equitable adjustment.

The JV has not shown entitlement for item 7, relating to fiberglass poles. The JV provided a letter from its subcontractor, Badger Electric, stating in part:

The drawings (detail elevation view on the page TOWER LIGHTNING PROTECTION DETAIL) call to use a pipe clamp UB 2-1/2 PA for the vertical support for the 20 foot fiberglass mast. The clamp was too large and did not fit the mast proper [sic] and would not hold it in place.

I ordered the proper size a UB 2 PA and used it instead. The additional cost for replacement of material and labor is attached.

JV FS C-8. The JV does not explain Badger’s citation to a “TOWER LIGHTNING PROTECTION DETAIL,” and in particular, the JV does not cross-reference that citation to materials presented to the ODRA. The ODRA’s own review of the record shows a drawing entitled “ANTENNA DECK LIGHTNING PROTECTION DETAILS” that includes a “TOWER LIGHTNING PROTECTION MAST” detail, which in turn shows a UB 2-1/2 PA pipe clamp. This unsigned drawing, however, does not show any approval by the Government, and there is no evidence that it was incorporated into the Contract. Given that the JV does not cite to the document, by extension it also does not explain if the document is a shop drawing or who is the draftsman. As to the official drawings actually in the Contract, the “TOWER LIGHTNING PROTECTION AND GROUNDING DETAILS” drawing does not specifically call for a “UB 2-1/2 PA” pipe clamp. *SR A-12* (drawing E008). Thus, the JV has not shown that defective Government drawings caused a constructive change. The ODRA therefore recommends that this portion of the COR 8 be denied.

The last item in this group concerns light fixtures that were deleted after installation. The JV seeks \$726.36 for the original fixtures plus \$55.34 for freight, with both figures including the JVs’ 15% mark-up. *JV FS* at C-10. Whereas the Service Area’s Project Engineer concedes that the units were transported to the site, he also indicates that the fixtures were not delivered to the Service Area at the end of the project. *SA FS A-29, Project Engineer’s Decl.*, at ¶ 23. The JV may not charge the Service Area for items it never transferred to the Service Area. The ODRA recommends, therefore, that the JV be granted \$55.34 for the freight cost incurred prior to the change, but that the charge of \$726.36 be denied.

c. The Heater Control Credit

Both parties recognize that the Service Area is entitled to a credit for deleting a heat control system, and replacing it with simple timers, thermostats and miscellaneous materials. *See JV FS* at C-11; *SA FS* at 7; and A-29, *Project Engineer Decl.* ¶ 24. The JV asserts that the proper credit should be \$12,894.37, but this figure is limited only to materials. *See JV FS* at C-1a. and 11. The Service Area argues that labor must also be included, and provided the Project Engineer’s

estimate of 60 hours at the agreed composite rate for Badger Electric. This estimate is “based on the complexity of the deleted system and where it was to be located as well as [the Project Engineer’s] observation of how long it took BE’s crew to perform other tasks.” SA FS A-29, *Project Engineer Decl.* ¶ 24. The estimate also includes an hour of supervision, and operation costs for a pick-up truck for one hour. The Project Engineer’s estimate was provided with the Service Area’s Substantive Response (at A-14), but the JV presented neither arguments against it nor justification of why a labor credit is inappropriate. The ODRA finds that it is not reasonable to exclude labor for this item, and the preponderance of the evidence supports the Service Area’s position. Accordingly, the ODRA recommends that a deductive equitable adjustment is appropriate for this item in the amount of \$19,165 for direct costs not incurred.

d. Application of Indirect Loads and Profit

Totaling the foregoing direct costs for the items in COR 8, and applying the mark-ups previously discussed yields a total deductive equitable adjustment of \$11,434.65, as detailed in the following table:

SUMMARY OF ODRA RECOMMENDATION - CCR 8	
Item	ODRA Finding
1. Panel at 140 foot level	\$4,457.89
2. Clamps for Down Conductors	0.00
3. 4 x 4 wireway	1,340.42
4. OB Light Control Box	415.13
5. Cable Tray Fittings	0.00
6. Ground Cover Plates	2,494.30
7. Fiberglass Poles	0.00
8. CTs	513.12
9. Building Light Fixtures	55.34
10. Heater Control Credit	-19,165.00
Total Direct Costs	-\$9,888.80
General Conditions (6.75%)	-110.75
Small Tools for Item 10 (10% of JV supervisor time)	-9.13
General Liability Insurance (1.22%)	-120.64
Excess Liability Insurance (.31%)	-30.66
Pollution Liability Insurance (.15%)	-14.83
Builders Risk Insurance (.37%)	-36.59
Bonds (1.27%)	-125.59
Profit (11.1%)	-1,097.66
Total Equitable Adjustment	-\$11,434.65

The ODRA, therefore, recommends an equitable adjustment for COR 8 that reduces the overall price of the Contract by \$11,434.65.

(4) Truss Engineering Credit (-\$1,950.00)

Both parties recognize that the Service Area is entitled to a credit for waiving a requirement for an engineer to inspect the installation of roof trusses at the site. *JV FS* at 4; *SA FS* at 19. The waived requirement in question was stated as a General Structural Note in the drawings:

TRUSS ENGINEER SHALL VISIT SITE AFTER ERECTION OF TRUSSES AND TRUSS BRACING. TRUSS ENGINEER SHALL SUBMIT LETTER TO ARCHITECT FIELD VERIFYING THAT ALL TRUSS BRACING IS INSTALLED PER THE APPROVED TRUSS SHOP DRAWINGS.

SR A-2, Drawing YAK-D-ATCBI-S006, at grid A8. The JV asserts that the credit for direct costs associated with this requirement is the airfare of the engineer at \$750, plus 12 hours of time valued at \$100 per hour. *Amended Contract Dispute* at Attachment 5; *JV FS D*. The total direct costs credit, according to the JV, is therefore \$1,950.00. *Amended Contract Dispute* at Attachment 5; *JV FS D*. The JV does not provide a statement from its estimator to explain the full basis for its estimate. The Service Area provided notice in its Substantive Response that it did not concur with this estimate because it omits “per diem, travel time, mileage, parking, or the inspection report.” *SR* at 10. The Service Area’s estimate of direct costs is \$2,460. *SR A-15*. The JV did not respond or otherwise challenge the Service Area’s additional cost categories. *See JF FS, passim*. It also did not produce any agreement or subcontract with an engineering firm to show that the actual costs expected to be incurred were less than the Service Area’s estimate. *Id.*

The ODRA finds no justification for the JV’s omission of the several cost categories that the Service Area identified. The ODRA further finds that Service Area’s estimate of \$2,460 in direct costs – or \$2,990 with the markups – is a conservative estimate,⁵ supported by a sworn

⁵ The Service Area provided an explanation of the estimates from the Product Engineer, who believed that his original estimate of \$2,460 in direct costs – or \$2,990 with the markups -- represents a conservative estimate. *SA FS*

statement of the estimator, and is sufficient evidence for a jury verdict. *SA FS A-29, Project Engineer Decl.*, at ¶ 25. Accordingly, for waiver of the truss engineering inspection, the ODRA recommends an equitable adjustment that reduces the overall price of the Contract by \$2,990.

(5) Additional Mobilization Costs (\$6,058.50)

The JV asserts it is owed \$6,058.50 in “additional mobilization” costs. *JV FS* at Attachment I. Arguing that these costs were incurred because of Government delay to the project, the JV states, “Resulting from the change order work directed by the FAA[,] the project completion date was extended from December 2010 until March 2011 when considering punch list work activities and demobilization.” *JV FS* at 4. Further, without citation, the JV asserts that amount in question “was agreed to by the FAA.” *Amended Contract Dispute* at 3.

The JV has presented insufficient evidence to establish entitlement for additional mobilization costs based on Government delay. Although the Contract, at AMS Clause 3.2.2.3-56 (*FF* 4), required the JV to submit an initial schedule at the beginning of performance, and then to submit revised schedules showing actual progress, no such schedules are in the record. The JV only provides one email, dated November 29, 2010, from the Project Engineer relating to a transformer. *JV Supp.* Amended Attachment 6. The JV characterizes this letter as “solidifying the FAA was cause of the additional mobilizations.” *Id.* at 2.

Standing alone, the November 29, 2010 email demonstrates very little. Without construction schedules, the ODRA cannot determine that the transformer at issue was on the construction schedule’s critical path, much less was the cause of actual delay to the contract completion date. Further, the Service Area has produced several items calling into question the implicit allegation that the Government was the sole cause of delay on the project. In particular, the record includes:

A-29, *Project Engineer Decl.*, at ¶ 25. According to the Project Engineer, “a credit of \$3,266 seems appropriate for this item.”

- An October 5, 2010 letter from the JV to Badger Electric asserting that Badger has been “unable to meet a critical milestone” and pressing them to bring in “additional field support.”
- A December 16, 2010 letter from the JV to Badger Electric asserting in part, “BE’s reluctance to provide adequate manpower and inability to submit and procure materials has now pushed the project into further delays and missed deadlines.” The letter included an attachment to Badger Electric’s bonding company, asserting that Badger Electric “under manned project which caused delays.
- A January 11, 2011 letter charging Badger with the JV’s added cost of supervision, allegedly due “to B.E.’s inability to complete the project.”

SA FS A-22. While these letters do not prove that either the JV or Badger caused delays, they raise significant questions regarding the responsibility for any such delays. Absent a credible schedule or other relevant evidence, the ODRA finds that the JV has failed in its burden to show with “reliable, probative, and substantial evidence” that the Service Area was the sole cause of delay that necessitated a remobilization. 5 U.S.C. § 556 (d) (2012). The ODRA, accordingly, recommends that this claimed item be denied.

(6) Deduction from Modification 0002 (\$10,263.30)

Modification 0002, dated May 19, 2011, is signed by both parties, and increased the contract price by \$93,718.00. *FF* 13. It also does not have a release of claims, and instead states in block 14 of the standard form, “Contractor may submit a Request for Equitable Adjustment as he [sic] sees fit.” *Id.*

The JV now claims entitlement to an additional \$10,263.30, representing the difference between a prior offer and the amount actually stated in the Modification 0002. *Amended Contract Dispute* at 3. More specifically and referencing materials not in the record before the ODRA, a July 10, 2011 letter from the JV states, “Our records show the JV’s last offer for these items [in Modification 0002] to be \$103,954.30.” *Amended Contract Dispute* Attachment 7. The JV does not explain the basis for its offer of \$103,954.30. It also does not provide actual cost records demonstrating that it was underpaid. The ODRA finds, therefore, that this claim for additional payment is without evidentiary support and recommends that it be denied.

(7) Professional Services (\$1,199.88)

Finally, the JV seeks \$1,199.88, including markups, for legal services from a law firm. *Amended Contract Dispute* at 4 and Attachment 8. The JV describes these as “legal fees to adjudicate the subject matter.” *Id.* at 4. The ODRA has already explained that award of legal costs is premature. *Summary Judgment Decision*, at 7. Only after the JV has filed the appropriate application and satisfied the requirements of 14 C.F.R. pt. 14 (2013) will the ODRA consider the award of legal costs. The ODRA therefore recommends that this item be denied.

(8) Interest

The JV seeks interest from January 1, 2011 to December 31, 2013, in the amount of \$8,049.70. *JV FS* at I. Although the JV is entitled to interest, the JV uses a larger principal amount than the ODRA recommends, and also includes periods in its calculation that exceed the parameters established in the AMS Contract Disputes clause incorporated into the Contract.

The Contract Disputes clause in the Contract provides for interest as follows:

(i) The FAA will pay interest on the amount found due and unpaid from (1) the date the Contracting Officer receives the contract dispute, or (2) the date payment otherwise would be due, if that date is later, until the date of payment. Simple interest on contract disputes shall be paid at the rate fixed by the Secretary of the Treasury that is applicable on the date the Contracting Officer receives the contract dispute and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary until payment is made. **Interest will not accrue for more than one year.**

FF 4; AMS Clause 3.9.1-1 “Contract Disputes (September 2009),” at ¶ (i) (emphasis added). The JV filed its Contract Dispute with the ODRA on October 18, 2012 (*FF 17*), and under the emphasized terms of the clause above is entitled to interest for one year from that date. Applying Department of the Treasury interest rates to the appropriate periods, and using the total of the equitable adjustments recommended in these Findings and Recommendations (\$59,788.27), yields simple interest of \$948.10:

Simple Interest Calculation					
Dept. of the Treasury Period	Rate	Federal Register	Contract Dispute Start and Finish Dates within Period	Days in Period	Simple Interest
Jul 13 - Dec 13	1.750%	Vol. 78 #125, 06/28/13, p. 39063	July 1, 2013 to October 18, 2013	110	\$ 319.70
Jan 13 - Jun 13	1.375%	Vol. 77 #249, 12/28/12, p. 76624	January 1, 2013 to June 30, 2013	181	413.33
Jul 12 - Dec 12	1.750%	Vol. 77 #126, 06/29/12, p. 38888	October 19, 2012 to December 31, 2012	74	215.07
Total					\$ 948.10

V. Summary and Conclusion

The ODRA recommends that the Contract Dispute be GRANTED in part and DENIED in part to the extent explained in these Findings and Recommendations. The ODRA calculates the appropriate equitable adjustment as follows:

Item	ODRA Recommendation	Interest and Totals
Proposed Contract Change ("PCC") 7 – Revised	\$ 65,794.92	
PCC 16	8,463.00	
Change Order Request ("COR") 8	-11,434.65	
Truss Engineering Credit	-2,990	
Additional Mobilization	0	
Unilateral Deduction (from Mod. 0002)	0	
Professional Services	0	
Sub-total		\$59,833.27
Home Office Overhead		0
Interest from filing date		948.81
GRAND TOTAL		\$60,782.09

The ODRA, accordingly, recommends that the JV receive a total equitable adjustment of \$60,782.09.

-S-

John A. Dietrich
Dispute Resolution Officer and Administrative Judge
FAA Office of Dispute Resolution for Acquisition