

**COMMONWEALTH OF MASSACHUSETTS**

Middlesex, ss.

**Division of Administrative Law Appeals**

**Constellation NewEnergy, Inc.,**  
Petitioner

v.

Docket No. CP-22-0136

**Division of Capital Asset Management  
and Maintenance,**  
Respondent

**Appearance for Petitioner:**

Erick M. Sandler, Esq.

**Appearance for Respondent:**

Christopher D. Guerin, Esq.

**Administrative Magistrate:**

James P. Rooney

**Summary of Decision**

When bidders for a public works contract were asked to bid separately on different project aspects, and one of those aspects was dropped from the project when the contract was signed, but that aspect was added back later, the terms of the contract required that it be treated as a project amendment. DCAMM's decision to treat this addition as a change order did not mean that the limits on compensation for change orders should apply. The contract and the practice that the parties had adhered to when agreeing to a different amendment show that the parties anticipated that, under an amendment, DCAMM should pay the contractor for project management and overhead and profit similarly to the way it was originally bid. Hence the general contractor is awarded the additional payment it seeks.

**DECISION**

Constellation NewEnergy contends the Division of Capital Asset Management and Maintenance (DCAMM) owes it money on a public works project in which Constellation was the

general contractor. DCAMM had included interior lighting improvements in its original project proposal for which it sought bids but then removed the upgrades, only to add them back in after the project was underway. Constellation asserts that this additional work should have been treated as a contract amendment and that it should be paid essentially in line with its original bid. DCAMM contends that this addition was properly treated as a change order and that the limits on change order compensation apply.

I held a hearing at the Division of Administrative Law Appeals (DALA) on November 13, 2023, which I recorded digitally. I accepted into evidence a joint stipulation of facts filed by the parties and the 13 exhibits attached to it (JSF A – M). I also accepted into evidence 73 exhibits offered by Constellation and 13 exhibits offered by DCAMM. I have added Constellation’s appeal as CNE Ex. 74. The parties called the following witnesses: Robert Belyea, Constellation’s technical sales manager; Elizabeth Isenstein, DCAMM’s director of energy and sustainability during the relevant period; Stephen O’Connor, a deputy director of DCAMM; Jessica Swenson, DCAMM’s project manager during the relevant period; and Sean Kidd, Constellation’s project manager. The parties filed closing briefs by December 15, 2023.

### **Findings of Fact**

Based on the testimony, exhibits, stipulations and reasonable inferences drawn from them, I make the following findings of fact:

1. In 2019, DCAMM sought bids on the design and installation of energy and water upgrades at the Massachusetts Information and Technology Center in Chelsea. The project, as initially conceived, included exterior and interior lighting elements. Bidders presented bids for each separate energy conservation measure. (Stipulation 1; CNE Ex. 1.)
2. Constellation NewEnergy presented a bid that broke the work down into 17 categories,

including cooling tower replacement, air dampers, exterior lighting (122 fixtures), interior lighting (4,737 fixtures), as well as alternative proposals for different approaches to exterior and interior lighting. Constellation itemized its costs in each category, including the expense of hiring subcontractors, the cost of material and labor, engineering costs, the cost of project management, and overhead and profit. For example, the total bid for the exterior lighting portion of the work was \$200,320, which included a 9.5% markup (\$14,022) for project management and a 22.3% markup (\$32,960) for overhead and profit.<sup>1</sup> (CNE Ex. 1; Stipulations 3 and 4; Belyea testimony.) Overall, Constellation's markups for project management in its bid ranged from 9.4% to 9.49% per energy conservation measure, while its markups for overhead and profit ranged from 18.02% to 22.32%. (CNE Ex. 73.) The other companies that bid for this project also provided the same level of detail regarding their costs. (CNE Exs. 15 – 19.)

3. Constellation presented two alternatives for interior lighting work. One involved the complete replacement of the existing lighting fixtures. The total cost of this alternative was approximately \$3 million. (CNE Ex. 66.) The other proposed alternative involved retrofitting the existing lighting fixtures and adding new lighting controls. The lighting fixtures and lighting controls were bid separately. The cost for retrofitting the lighting fixtures was \$1,365,639, which included \$94,601 for project management (a 9.42% markup) and \$166,703 for overhead and profit (a 16.61% markup). The new lighting controls for this alternative were bid at \$579,549, with \$40,147 for project management and \$78,827 for overhead and profit. Thus, the retrofit bid totaled \$1,945,188, with \$134,748 for project management and \$245,520 for overhead and profit. (CNE Ex. 1.)

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<sup>1</sup> The markups were all calculated as a percentage of the cost Constellation incurred for subcontracting the work. With exterior lighting, that cost was \$147,660. (CNE Ex. 1.)

4. On June 18, 2020, DCAMM awarded Constellation a contract to complete seven energy conservation measures and two alternatives. The total contract value was \$17,045,907. The award included exterior lighting, but not interior lighting. (Stipulation 4, CNE Ex. 3; DCAMM.) DCAMM had decided to forgo the interior lighting portion of the project because of uncertainty as to whether other changes would be made to the interior of the building. (Isenstein testimony; DCAMM Ex. 9.)

5. The contract provided two methods for addressing changes in the scope of services to be performed by Constellation: amendment and change order. Section 32.1 addressed contract amendment as follows:

DCAMM may, in its sole discretion, choose to treat any request for a change to the Services as a Change Order or amendment, depending on the nature of the requested change and its overall impact on the Total Contract Value or its scope of Services. Notwithstanding the foregoing, the parties agree that any change for a fundamentally different scope from the scope of Services set forth in Schedule B-4 Scope of Services (e.g. additional scope work above and beyond that which was selected; additional ECMs [energy conservation measures] not included in the scope) must be mutually agreed upon between the parties and issued as an amendment to the Contract.

(CNE Ex. 3.) Schedule B-4 included exterior lighting for the building, but not interior lighting.

*Id.*

6. The second sentence of Section 32.1 was added at Constellation's insistence to address any changes in scope beyond the energy control measures in the contract. (Belyea testimony.) A note on the draft that added this sentence stated that "[a]ny unilateral CO [change order] would relate to a change already included in the ECM scope and not adding a completely new scope. A fundamentally different scope, however, would need to be mutually agreed upon and incorporated via an Amendment." (DCAMM Ex. 13.)

7. The contract defined a change order at Section 32.2a as a "directive issued by DCAMM for a change in work as described in this Section." It added that:

CONTRACTOR shall perform any Change Order work that is ordered by DCAMM. Whenever a Change Order is issued and said Change Order will cause a change in the Total Contract Value . . . , CONTRACTOR or DCAMM may request an equitable adjustment in the Total Contract Value.

(CNE Ex. 3.) When a change order was issued, DCAMM’s change order form did not allow Constellation to charge more than 5% for overhead and profit. *Id.* at Section 32.5iii(h). The change order form did not include any additional compensation for project management.<sup>2</sup> *Id.*

8. The contract also contained a “no waiver” provision at Section 56. It provided that:

The failure of CONTRACTOR or DCAMM to insist upon the strict performance of this (sic) terms and conditions hereof shall not constitute or be construed as a waiver or relinquishment of either party’s right to thereafter enforce the same in accordance with the Contract in the event of continuing or subsequent default on the part of the CONTRACTOR or DCAMM.

(CNE Ex. 3.)

9. In 2021, DCAMM decided to expand the project to include a new roof for the building and other related work, such as larger chillers and “energy recovery ventilators.” After negotiating, the parties agreed to a contract amendment that added another \$8 million to the project. The approved price included figures for project management and profit that were respectively 9.46% and 21.40%, which were both in the range of markups included in the original contract. (Stipulation 8; Belyea testimony; CNE Exs. 4, 71, and 73.)

10. In July 2021, DCAMM decided to consider whether to add interior lighting back into the project because Eversource was proposing enhanced incentives for installing energy conserving lighting. The incentive was to be two times Eversource’s normal rate, but DCAMM would have to move forward with the interior lighting project before the end of 2021 in order to obtain this

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<sup>2</sup> The limits on compensation make sense if the change is small. For example, at one point, DCAMM added 22 additional light fixtures to the interior lighting project. (Kidd testimony.) Constellation would expect to make a small profit from this addition but would not anticipate any additional project management cost or overhead changes.

rate. (CNE Exs. 23, 24, and 27.)

11. In an August 5, 2021 email, Shawna Correll, DCAMM's project manager, informed Sean Kidd, Constellation's project manager, and Robert Belyea, Constellation's technical sales manager, about DCAMM's decision to proceed with interior lighting. The email told Constellation that Eversource wanted it to complete a workbook by October 31, 2021, describing the interior lighting project in order to determine how much incentive would be offered. (CNE Ex. 28; DACMM Ex. 10.) Mr. Belyea responded that it understood Eversource's timeline and agreed to it as Constellation had "worked successfully in the past with DCAMM on similar fast tracked efforts." (CNE Ex. 29.)

12. Constellation completed the workbook by September 24, 2021. Eversource approved an incentive of \$685,746, which is more than double the estimated \$320,00 interior lighting incentive contained in the original bid documents. (CNE Ex. 1 and 38, Belyea testimony.)

13. On October 5, 2021, Constellation submitted a proposal to retrofit existing interior light fixtures and install wireless controls. Constellation expected this revived project would be handled through the amendment process because this was a change in the project's scope. As described above, Constellation had originally bid retrofitting the interior lighting and installing the lighting controls separately. This time, Constellation put both aspects into one proposal. The total price it proposed was \$1,865,363, including \$129,218 in project management (a 9.43 % markup) and \$227,704 in overhead and profit (a 16.61% markup). While the price for materials had increased, the overall cost at \$1,865,363 was lower than the \$1,945,188 original bid. (CNE Exs. 1 and 39; Belyea testimony.)

14. In an email exchange on October 6, 2021, Constellation saw its proposal as one involving a change of scope. Ms. Correll of DCAMM responded that the proposal would have to be treated

by the change order process rather than an amendment because “[w]e cannot do another amendment in a timely manner.” She asked Constellation to start with a change order just for material costs. (JSF Ex. D.)

15. On October 13, 2021, DCAMM special counsel Christopher Guerin sent an email to Constellation senior contract analyst Marcie Larkin explaining that DCAMM thought the interior lighting project should be treated as a “CO [change order] structure because the lighting is not fundamentally different in scope in an energy project.” He added that if Constellation’s concern is “OH [overhead]/markup, we should have no issue with the percentage used in the original proposal, which would put CNE in substantially the same position had we accepted the lighting at the time.” (JSF Ex. F.)

16. Later that day, Constellation submitted a “materials-only” change order for \$987,993. This document is referred to as PCO-24, which shows it is the 24th change order connected with this project. In accordance with the limits on the form, it listed \$46,883 as overhead and profit, which was a 5% markup. (JSF Ex. E.)

17. A few days later, special counsel Mr. Guerin informed Ms. Larkin of Constellation that his misunderstanding led to his statement about how much overhead and profit could be charged on the interior lighting project. This time he stated that overhead and profit needed to be consistent with the change order process, and this could not exceed 5%. He reiterated his position that lighting was not a change in scope and thus the change order process was appropriate. Ms. Larkin pushed back, responding that the “small-ish \$100k amount of exterior lighting and what is being asked of us now is to add an almost \$2mm interior lighting project” was a fundamental change. (JSF Ex. G.)

18. On October 22, 2021, Constellation submitted a revised change order for interior lighting.

This change order, referred to as PCO-29, calculated the costs of materials for the interior lighting project at \$768,707. The portion of the figure representing overhead and profit was \$36,477.40, which was a 5% markup. It did not include a markup for project management because the change order form did not include a line for such costs. Project Manager Kidd informed DCAMM that work was being performed under protest. Constellation's summary sheet continued to show the total cost of the interior lighting project at \$1,865,363, including \$129,218 for project management and \$224,704 for overhead and profit. (JSF Ex. H.)

19. Robert Belyea sent a follow-up email on October 28, 2021 to Ms. Correll inquiring about PCO-29 and explaining Constellation's position that interior lighting was a separate energy conservation measure and thus this new work should properly be treated as an amendment. He stated:

This work (ECM1.01a Interior Lighting) is unquestionably a separate and additional ECM not selected or included in the B-4 current scope of services. ECM 1.01a Interior Lighting per DCAMM's own naming and numbering conventions was a requirement to be bid separately in the base proposal. Additionally, having installed roughly 122 Exterior fixture[s] and now being asked to retrofit on the order of 4500 interior fixtures is clearly "above and beyond."

(JSF Ex. I; DCAMM Ex. 5.)

20. Ms. Correll responded that PCO-029 had been approved for \$768,707 and that:

For the balance of the Interior Lighting, after further internal review we are in agreement with CNE's interpretation of the language of Section 32.1. But we would still like to process this as a Change Order, as the Amendment approach is not practical due to timing/urgency. We will look at this as a lump sum as proposed previously. However, we are not bound by the markups that were negotiated for the previous Amendment, nor those proposed in the original ESA. We will need to evaluate to determine what is fair and reasonable for this specific scope, as we would have even if this were done as an Amendment.

*Id.*

21. While this was going on, Constellation had sought a variance to allow DCAMM to remove the energy recovery ventilators from the project. The variance was granted on November



5, 2021, and hence Constellation then submitted change order PCO-30 to remove the energy recovery ventilators from the project. This amounted to a savings of \$1,539,075. Constellation had expected to receive \$103,806.85 in project management costs and \$234,859.44 in overhead and profit if this aspect had remained part of the project. (JSF Ex. J; CNE Ex. 71.)

22. On November 5<sup>th</sup> as well, Constellation submitted change order PCO-32 for \$1,096,656 for the remaining cost of the project beyond the \$768,707 requested in PCO-029. It continued to press DCAMM to pay \$129,218 for project management. It reduced the figure it sought for overhead and profit from \$227,704 to \$191,226.60, reflecting the \$36,477.40 included in PCO-029. (JCF Ex. J; CNE Ex. 39.) On November 10, 2012, Constellation agreed to reduce its engineering costs of \$119,424 by \$44,475 to \$74,949.<sup>3</sup> It now sought only \$110,145 for project management, which was an 8.04% markup, a reduction from the 9.43% markup originally sought.<sup>4</sup> (DCAMM Ex. 7.) Mr. Belyea described this price reduction as not reflecting any change in the engineering work required, but rather a goodwill gesture by Constellation. (Belyea testimony.)

23. DCAMM did not agree to PCO-32. Instead, on December 15, 2021, DCAMM issued Unilateral Change Order UCO-00001 approving \$300,00 in labor costs. (JCF Ex. K.)

24. On January 12, 2022, Constellation appealed the unilateral change order and reiterated its position that the interior lighting work should have been added through an amendment to the contract. Regarding contract Section 32.1, which addresses amendments and change orders, Constellation stressed that:

DCAMM and Constellation negotiated this provision so that Constellation was not subject

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<sup>3</sup> Constellation represented that it was reducing its engineering costs by \$66,710. (DCAMM Ex. 7.) This looks like a calculation error.

<sup>4</sup> There is no explanation in the record that I can find as to this reduction from \$129,218 to \$110,145.

to unilateral changes from DCAMM to add new scope of work into the existing project and requiring Constellation to be bound by lower change order percentages than those percentages bid by Constellation.

...

DCAMM's positioning for renegotiation of the pricing markup percentages on a fixed price contract for this alternate ECM at this point in the construction process runs afoul to the procurement process, Section 32.1 of the Contract, and the precedent established with the Amendment.

(Ex. L.) And in response to an objection from DCAMM that Constellation was not providing daily reports (Swenson testimony), Constellation further outlined its position that the interior lighting project qualified as an amendment:

Constellation disputes that it has not provided timely and sufficient proposal documentation to DCAMM regarding this matter. The documents sought by DCAMM is driven by DCAMM's Change Order process and PCO form in an attempt to justify Constellation's pricing markups, which is not required for purposes of the lump sum Amendment, as the cost structure and pricing markups for ECM 1.01a were firmly established during procurement. Notwithstanding, Constellation has been responsive and timely to DCAMM's requests to try to "fit" the pricing markups and documentation into DCAMM's Change Order process as a measure of good faith to keep the project on schedule, as demonstrated by the numerous email correspondences between September 21, 2021 and December 8, 2021, which includes the November 5, 2021 formal PCO submission "under protest" to DCAMM . . . as well as phone conversations a project meetings on this topic. Constellation requested many times for a meeting with the respective legal teams to resolve this issue, to which DCAMM did not respond in any instance.

*Id.*

25. DCAMM continued to disagree about the markups for profit and project management sought by Constellation. On March 11, 2022, it modified PCO-32 from \$1,096.65 to \$468,716.64 to cover the remainder of the labor and other costs associated with the indoor lighting project. DCAMM arrived at its figure by accepting the engineering cost price reduction proposed by Constellation, reducing the project management payment from \$110,145 to \$41,225 (3%) and the \$227,704 overhead and profit payment to \$32,232 because a \$36,477.40 profit payment had

already been included in PCO-029 and this remaining payment would bring the total profit payment to 5%. The changes meant that the total cost of the interior lighting project would be \$1,537,423.64. As DCAMM had already paid \$768,707 to acquire lighting material and \$300,000 for labor, the remainder due – according to DCAMM’s calculation – was \$468,716. (CNE Ex. 14; O’Connor testimony.)

26. DCAMM explained its rationale for reducing the markups proposed by Constellation as follows:

The scope of work included in the change order was not part of the previously negotiated multi ECM amendment, therefore does not warrant the same markup and overhead percentages as the previous amendment. The markups sought by Constellation are the same as those for the prior amendment and the markups in this approved change (as adjusted by DCAMM) are at an amount greater than a standard change order. No additional staffing has been provided by Constellation as part of this change and the approved change contains costs for engineering, the subcontractors GCS and project management, and some increased for Constellation’s GCs/project management as well as overhead, profit and bond costs.

(JCF Ex. M; CNE Ex. 14.)

27. Constellation disputed DCAMM’s claim that it did not add staff to perform the interior lighting project. Some of the staff that had been assigned to the ventilator project that was dropped were reassigned to the interior lighting project. (Belyea testimony.)

28. The work installing the interior lighting extended into March 2022. (Belyea testimony.)

29. Constellation filed a timely appeal on April 1, 2022. (CNE Ex. 74.) It seeks the difference between what DCAMM paid for project management and overhead and profit on the interior lighting project, which was \$73,457.64, and the amount it believes should have been paid if the change had been handled as an amendment (\$337,849). Thus, Constellation seeks an award

of \$264,391.36.<sup>5</sup> (CNE Ex. 72.)

### **Discussion**

The dispute here concerns how much Constellation should be paid under its contract with DCAMM for the interior lighting project. The parties agree on most of the breakdown in pay but for two aspects of this project. They disagree only about how much Constellation should be paid for project management expenses and for overhead and profit.

To resolve this dispute, I must address two questions. First, was the interior lighting project properly treated as a change order, or should it have been treated as an amendment? Second, if the project should have been treated as an amendment, how much does DCAMM owe Constellation?

This matter was heard at the DALA by statute. M.G.L. c. 30, § 39Q(1)(a) provides that “[d]isputes regarding changes in and interpretations of the terms or scope of the contract and denials of or failures to act upon claims for payment for extra work or materials” are to heard initially by the state agency that awarded the contract. Here, that was DCAMM. Appeal from an awarding agency’s decision is to DALA. M.G.L. c. 30, § 39Q(a)(c). As the party appealing DCAMM’s decision, Constellation has the burden to prove its case by a preponderance of the evidence. I find that the project should have been treated as an amendment and that Constellation is owed the extra compensation that it seeks.

#### *I. The Interior Lighting Project Qualified as an Amendment under the Contract*

DCAMM added the interior lighting project through a change order over Constellation’s objection that it should have been done by amendment. The portion of the overall contract that

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<sup>5</sup> Constellation sought \$110,145 for project management costs. DCAMM paid \$41,225.64, for a difference of \$68,919.36. Constellations sought \$227,704.00 for overhead and profit. DCAMM paid \$32,232.00, for a difference of \$195,472.00. (CNE Ex. 74.)

governs whether a change should be handled as a change order or an amendment is set forth in Section 32.1, which provides that:

DCAMM may, in its sole discretion, choose to treat any request for a change to the Services as a Change Order or amendment, depending on the nature of the requested change and its overall impact on the Total Contract Value or its scope of Services. Notwithstanding the foregoing, the parties agree that any change for a fundamentally different scope from the Scope of Services set forth in Schedule B-4 Scope of Services (e.g. additional scope work above and beyond that which was selected; additional ECMs [energy conservation measures] not included in the scope) must be mutually agreed upon between the parties and issued as an amendment to the Contract.

The first sentence of this provision gives DCAMM broad discretion to decide whether a change in the project should be made through a change order or an amendment. The second sentence, which was added at Constellation's request, limits that discretion when the proposed change involves additional scope of work or an additional energy conservation measure.

When the project was initially bid, the interior lighting project was treated as its own energy conservation measure separate from the exterior lighting energy conservation measure. The interior lighting aspect of the overall project was dropped by the time DCAMM entered into a contract with Constellation. When DCAMM later decided to add interior lighting back into the project, it was adding in a new energy conservation measure. As such, the contract called for it to be added as an amendment.

Although DCAMM conceded that Constellation was correct that the interior lighting project should be added as an amendment (Finding 20), it proceeded to use the change order process instead over Constellation's objection and continues, more or less, to contend that the change order provisions limit the pay Constellation should receive for project management and overhead and profit.. I say more or less, because, while DCAMM insists that Constellation should receive no more than the 5% markup on overhead and profit that applies to change orders, it is willing to pay a 3% markup for project management even though the change order form does

not allow for any such markup.

DCAMM maintains that its decision to proceed by change order was made in good faith and that Constellation waived any right to compel DCAMM to proceed by amendment when it agreed to proceed by change order under protest.

The good faith of DCAMM is not in question. There is no claim that DCAMM deliberately omitted the interior lighting portion of the project at the last minute so that it could later pay less than the bid price for this work. DCAMM was operating in an environment in which it had to act quickly on Eversource's offer of enhanced, but time-limited, incentives for an interior lighting project. There is no dispute that DCAMM chose the change order process because it thought it would be quicker. But the need for prompt action does not change the fact that the interior lighting was a new energy conservation measure and Section 32.1 required that such a change be done by amendment.

As for waiver, DCAMM does not explain how its claim that – Constellation waived its opportunity to insist that the interior lighting project when it agreed, under protest, to proceed via change order – can be reconciled with the “no waiver” provision in the contract, which precludes any finding that Constellation waived its position.

I therefore conclude that restoring interior lighting to the project constituted a new energy conservation measure and that the change was for a fundamentally different scope. Hence, the contract called for the change to be made through the amendment process.

## II. *DCAMM owes Constellation \$264,391.36*

While I conclude that the change order limits do not apply to the interior lighting project, that alone does not establish that Constellation is owed compensation for project management and overhead and profit on the same basis as in the original contract, as Constellation claims.

Section 32.1 does not explicitly address how to figure out what Constellation should be paid for a newly added energy conservation measure. Rather it declares that “any change for a fundamentally different scope from the scope of Services . . . must be mutually agreed upon between the parties and issued as an amendment to the Contract.” I have concluded that Constellation has demonstrated that the addition of interior lighting to the project was a fundamental change in scope and thus the parties needed to proceed by amendment. The details of what the amendment would contain, including payment terms, were left up to the parties by Section 32.1.

Although Section 32.1 is silent as to how to figure out how much Constellation should be paid for an agreed-to amendment, this silence is not incomprehensible. “There is no surer way to find out what parties meant, than to see what they have done.” *Browning-Ferris Industries, Inc. v. Casella Waste Management of Massachusetts, Inc.*, 79 Mass. App. Ct. 300, 309 (2011), quoting *Martino v. First Nat’l Bank*, 361 Mass. 325, 332 (1972). Similarly, “in an ordinary contract, where matters are left open, the court may imply terms either that are reasonable or that may be gathered from the subsequent course of performance.” *Vita v. Berman, DeValerio & Pease, LLP*, 81 Mass. App. Ct. 748, 755 (2012), quoting *Lawrence v. Cambridge*, 422 Mass. 406, 411 (1996).

The course of performance here can be seen from the way the parties treated the amendment to the project that called for a new roof on the building and the energy recovery ventilators. Although these were entirely new items, having not been proposed during the bid process, the amendment treated Constellation’s costs in the same way as it did in the initial contract. Constellation broke out its expenses as before, including figures for project management and overhead and profit, and DCAMM agreed to pay for those items, which were

within the range of percentages used in the original contract. (Findings 2 and 9.)

Constellation used the same approach when it priced the interior lighting project. Its proposal was similar to the proposal it made during the bidding process. One difference was that instead of treating the retrofitted fixtures and the lighting controls as separate items in its bid, Constellation combined these two when setting forth its cost figures in the proposed amendment. The other difference was that the total cost of the interior lighting project had come down from \$1,945,188 to \$1,801,815. Consequently, the cost for project management had been reduced from \$137,748 to \$110,145, and the cost for overhead and profit had been reduced from \$245,520 to \$227,704. The markup for overhead and profit was 16.61%, the same as it had been when Constellation's bid discussed retrofitting light fixtures. Its proposed overhead and profit markup (8.04%) was less than its initial proposal of 9.42%. (Findings 3 and 13.)

Thus, Constellation followed the course of practice the two parties had used in negotiating a prior amendment. DCAMM's acceptance, during the previous amendment process, of the proposed cost figures for project management and for overhead and profit—figures that matched the percentage range in Constellation's bid—shows that the parties agreed this was the appropriate approach for amendments. Not only were the markups proposed by Constellation when DCAMM sought to add interior lighting back into the project nearly identical to the markups proposed in Constellation's initial bid, the overall cost was lower.

I therefore conclude that the contract anticipated that when the parties agreed on an amendment, Constellation was to be paid for project management and overhead and profit in a manner essentially the same as the percentages used in its bid. Thus, I grant Constellation the additional \$264,391.36 it seeks.



### III. *Additional considerations*

I note that the parties presented evidence and argument on a few other topics. DCAMM contends that Constellation does not deserve more pay because it did not add more staff, while Constellation counters that some of its employees who would have been involved in the energy recovery ventilator project – which DCAMM dropped – went to work on the interior lighting project. Constellation speculates that DCAMM was trying to limit its cost on the interior lighting project to the amount it saved by dropping the energy recovery ventilator project. DCAMM asserts that Constellation did not file the daily reports it should have when protesting a change order, while Constellation asserts that is irrelevant because it consistently asserted that the interior lighting project should have been handled as an amendment. There is little evidence or argument on these issues. My conclusion that the interior lighting project should have been handled as an amendment and paid consistent with the original bid makes it unnecessary to decide them.

### **Conclusion**

For the reasons stated above, I conclude that the addition of interior lighting to the project should have been done by amendment and, consequently, DCAMM owes Constellation \$68,919.36 for project management and \$195,472.00 for overhead and profit, for a total of \$264,391.36.

DIVISION OF ADMINISTRATIVE LAW APPEALS

***James P. Rooney***

James P. Rooney  
First Administrative Magistrate

Dated: July 10, 2025