

MEMORANDUM FOR

SUBJECT: ESTIMATES FOR REQUIREMENTS CONTRACTS

In light of the present emphasis on the use of requirements contracts, it is necessary to stress the importance of retaining the data and documentation used in developing the estimated quantities for these requirements contracts. This is essential in order to effectively oppose a contractor's allegation that the government negligently estimated the quantity. This information should be included as part of the contract file so that it is readily available in the event that a dispute/claim should arise in the future.

Despite the fact that requirements contracts typically contain clauses which warn that the estimated quantities are only estimates and are not a guaranteed quantity, a judicial exception has been created by the Court of Claims and the boards of contract appeals in order to provide the contractor with a remedy. Atlantic Garages, Inc., GSBICA No. 5891, 82-1 BCA ¶15,479 at 76,707 (Nov. 28, 1981). The Court of Claims held in Womack v. United States, 380 F.2d 793, 800-01, 182 Ct. Cl. 399, 413 (1968), that:

An estimate as to a material matter in a bidding invitation is an expedient. Ordinarily it is only used where there is a recognized need for guidance to bidders on a particular point but specific information is not reasonably available Intrinsicly, the estimate that is made in such a circumstance *must be the product of such relevant underlying information as is available to the author of the invitation.* If the bidder were not entitled to so regard it, its inclusion in the invitation would be surplusage at best or deception at worst. Assuming that the bidder acts reasonably, he is entitled to rely on Government estimates as representing honest and informed conclusions. . . . In short, in promulgating an estimate for bidding-invitation purposes, the Government is not required to be clairvoyant but it is obligated to base that estimate on all relevant information that is available to it.

(Emphasis supplied; citations omitted.)

The courts and boards have utilized two different standards in determining whether the Government was negligent. At times a standard of due care was used and at other times a good faith standard was used. Nevertheless, Atlantic Garages points out that "[r]egardless of which test is applied, the issue is whether defective or improper Government conduct has resulted in an estimate that misrepresents the work to be performed by the contractor; if it has, then the Government is liable for the consequences." Id. at 76,708. Furthermore, while requirement contracts typically place the risk that the quantities may vary on the contractor, this risk does not include the possibility that the Government negligently determined the estimated quantity. If the Government can establish that the estimate was formulated by the "best method reasonably available," then the fact that the actual quantities differed will not result in liability on the part of the Government. Id. at 76,710.

The burden of proof is on the contractor to prove that the estimate is in fact negligent. "The fact that the estimate may have proved to be wide of the mark does not mean that this error is per se, a misrepresentation." Marine Construction & Dredging, Inc., 95-1 BCA ¶27,286 at 136,008 (Oct. 31, 1994). The Marine Construction Board further stated that "the mere existence of a significant disparity between the estimates and the actual quantities does not of itself serve as the basis for sustaining a claim of lack of due care or lack of good faith in the preparation of the estimate." Id. at 136,009. However, once the contractor establishes prima facie evidence of negligence in developing the estimate, the burden will shift to the Government to show it acted with due care or good faith. The Government will be required to prove that their estimate was based on relevant and reliable information and that the Government

conducted an adequate inquiry into the requirements it would need under the contract. Without the back-up documentation for the estimate, the government will have an extremely difficult time proving this.

In the event that the contractor is able to meet its burden of proof and the government is unable to show the estimate was not negligent the contractor will be entitled to a remedy for breach of contract.¹ See Womack, supra. The purpose of damages for breach of contract is to compensate the injured party for the loss caused by the breach. The idea is that the damages are intended to give the injured party the benefit of the bargain by awarding the sum of money that will place that party in the same position it would have been in had the contract been performed fully. Cramer Alaska, Inc., ASBCA 47725, 1995 ASBCA LEXIS 283, at *11 (October 11, 1995). See also, Atlantic Garages, supra. (Government's negligent estimate in a requirement contract resulted in recovery of breach of contract damages.)

Most commonly, contractors have been entitled to lost profits minus any costs the contractor saved due to not selling the units (i.e. labor, storage, etc.). In addition to lost profits, it should also be noted that the Board has previously held that a contractor was entitled to recover costs associated with building a new factory when the Government breached a requirement contract. Inland Container v. United States, 512

¹It should be noted that prior to the passage of the Contract Dispute Act of 1978, 41 U.S.C. §§ 601-13 (Supp II. 1978), the boards of contract appeals lacked jurisdiction over claims that did not arise under the contract (i.e. breach of contract claims). Atlantic Garages, 82-1 BCA at 76,711. Thus, as an alternative, when faced with a breach of a requirements contract, the boards would often find relief for contractors under the Termination for Convenience Clause. Under the Contract Dispute Act, however, the boards are now entitled to grant any recovery that the Court of Claims is authorized to grant. 41 U.S.C. § 607(d) (Supp II 1978).

F.2d 1073, 206 Ct. Cl. 478 (1975).

It is imperative that the back-up data and documentation used to create the estimated quantity be retained in the contract file in order to effectively establish that the government had a sound rationale for reaching the amount used in the contract. Failure to retain this information may result in numerous judgments in favor of the contractor, not because the estimate was truly negligent but because the government is unable to show otherwise.

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