

Avoid the Uncertainty of a Jury Verdict: Prove Your Quantum Using Actual Costs

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In a recent case before the Armed Services Board of Contract Appeals, *RLB Contracting, Inc.*, ASBCA No. 57638, Jan. 3, 2014, 2014 WL 123639, the Board awarded the contractor \$914,970.84 for performing additional work under a contract change even though the contractor could not prove with certainty how much it spent performing this work. But before starting to celebrate, contractors should recognize that this case is the exception to the rule. Usually contractors relying solely on the “jury verdict” or “total cost” methods of calculating damages walk away empty-handed. Prudent contractors should therefore strive to avoid the need for a “jury verdict” or “total cost” approach on quantum by tracking actual costs incurred as a result of Government change orders or constructive changes.

The Jury Verdict Approach. In determining the appropriate amount to award the contractor, the Court of Federal Claims and the boards may rely on a technique known as the jury verdict approach. Under this technique, the court or board simply does the best it can to approximate how much the contractor spent to perform the additional work. Before a court or board will apply the jury verdict approach, the contractor must prove that (1) there is clear proof that the contractor was injured, (2) there is no more reliable method for computing damages, and (3) the evidence is sufficient for a court to make a fair and reasonable approximation of the damages. This standard is often prohibitively high because the courts and boards strongly disfavor the jury verdict approach. And if a contractor has relied solely on the jury verdict but then fails to satisfy one of these three prerequisites, that contractor may be out of luck.

Authors

Gary S. Ward
Partner
202.719.7571
gsward@wiley.law

In *RLB Contracting*, the Board's approximation came in the form of a percentage (65%), which the Board multiplied by the contractor's total incurred costs (the cost of performing all work regardless of whether the work was required by the original contract). The Board then subtracted the amount the Government had already paid to the contractor for performing the original work to arrive at \$914,970.84, the amount it awarded to the contractor.

How did the Board reach 65% as a reasonable estimate? The contractor and the Government provided the Board with competing estimates, but the Board's actual reasoning remains a black box. In reaching 65%, the Board simply channeled, "the nature of the jury verdict."

Contractors are better served by avoiding a jury verdict on their claims. First, as is evident from the discussion above, the jury verdict approach leaves a court or board with nearly unlimited discretion to calculate its award, which in turn leads to unpredictable results. Second, the legal standard set forth above makes it difficult for a contractor to persuade the court or board to apply the jury verdict approach, so those relying on the jury verdict risk that they might recover nothing.

The Total Cost Method. Another similarly disfavored, though more predictable, approach is the total cost method. To apply the total cost method, the court or board takes all of the contractor's incurred costs and subtracts the initial contract value (generally the contractor's proposed price). This approach naturally favors contractors because it assumes that all additional costs were caused by the government or otherwise attributable to the changed work. As a result, courts and boards are hesitant to apply this technique and will do so only if the contractor can prove that (1) the nature of the particular cost is impossible or highly impracticable to determine with a reasonable degree of certainty; (2) the contractor's bid or estimate was realistic; (3) the contractor's actual incurred costs were reasonable; and (4) the contractor was not responsible for any of the added costs. In some situations, a board or court will apply a modified version of this total cost method and adjust either the total cost or the original contract price to compensate for amounts for which the Government should not be responsible.

The More Reliable Approach: Actual Cost Data. Fortunately, at least in most cases, contractors can take steps to better prepare to file requests for equitable adjustments, starting from the moment the contractor first becomes aware of a potential change. The most important steps any contractor can take are to begin segregating costs for the additional work from costs for the work required by the original contract and to substantiate those costs with supporting detail.

The following are items that contractors should consider, depending on the nature of the work and the contractor's accounting system:

- Set up new charge codes in your accounting system for time keeping, materials and supplies, and other vendor costs. These new codes should map to the new requirements, and contractors should provide supporting detail beyond just the account titles to substantiate which requirement each cost aligns with. Coordinate with your subcontractors/vendors to ensure they are segregating their costs as well.

- Keep the Government informed of your progress and the increased scope of work using contract deliverables such as status reports. Not only will notifying the Government force you to track your costs, but it will also put the Government on notice, which in turn will strengthen your position in future negotiations or litigation.

If the changes are so numerous or complicated that you cannot segregate your costs, you should document your explanation and prepare detailed estimates with substantiating data including thorough daily reports and schedules. Although it may be possible to prevail without segregating your costs, every step in this direction reduces the chance that down the road a board or court will simply guess how much your company deserves or, worse, find you have not proven any damages.