

ASBCA Rescues Small Business from Navy Contracting Officer

Written by Nick Sanders

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In September, 2015, the US Navy awarded a \$41,000 firm, fixed-price contract to HCS, Inc. (a small business) for pipeline repair work at NAS Corpus Christi. During contract performance, issues arose. HCS properly sought direction from the Navy contracting officer and executed the direction it received. The changed work led to a deductive change proposal in the amount of \$1,435. In addition, the Contracting Officer's Representative (COR) directed HCS to perform additional work not originally bid. HCS estimated the cost of the additional work to be \$1,500, which just about offset the deductive change it had just calculated.

The contracting officer and the COR didn't like those numbers. The COR, who was an ensign, a graduate from the Naval Academy with a degree in mechanical engineering but no experience in construction, attempted to make their own calculations. Their approach resulted in the original FFP value being reduced from \$41,000 to \$21,082. HCS filed a claim with the contracting officer, and the contracting officer kicked it to the NAVFACENGCOM Chief of Contracting, who found "partial entitlement" and directed the contracting officer to "negotiate a final price adjustment."

The contracting officer offered HCS an additional \$5,164 but HCS refused it and filed an appeal with the ASBCA. Interestingly, the Navy contracting officer offered the following piece of "advice" to HCS—

I am prepared to offer \$5,164.00 to cover the portion of the claim that we have determined to have merit. That amount probably will not satisfy you though, as I understand that you feel you are due the full \$22k. I have also heard that it can cost more than \$100K to go through the ASBCA appeal process. If that is true, the economics of it don't make much sense to me, but of course you have the right to do so.

Fortunately HCS disregarded that advice and proceeded to an accelerated appeal pursuant to ASBCA Rule 12.3. And fortunately the Board found the appeal had merit. In the [decision](#), Judge Hartman noted that the Navy had based its legal position on the lack of documentation ("receipts, costs, accounting records, or other documentation") from HCS substantiating why it was entitled to the full firm, fixed-price it and negotiated and agreed-to. HCS argued that the Navy was attempting to convert the FFP contract into a cost-reimbursement contract after completion of all contract work. Judge Hartman found for HCS, writing—

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The government has the burden of proving the amount of cost savings due to deletion of work. ... A contractor, therefore, is entitled to receive its contract price, unless the government demonstrates the government is entitled to a price reduction for deleted work. ... We are aware of no authority allowing the Navy to delete work from a contract after work performance and then refuse to pay for the work initially specified and performed, and the Navy cites us no legal authority for such action. ... A contractor is entitled to receive its contract price where the government fails to demonstrate entitlement to a contract price reduction for deleted work. (*Internal citations omitted.*)

HCS was awarded its full contract price (plus a small bump for the additional work) plus interest.

So what does this mean?

Many of our clients are small businesses. They are sometimes left with a difficult choice regarding accepting contractual outcomes that are wrong, or lawyering-up and litigating. As you can see, in this case the Navy contracting officer was explicitly using that difficult choice as leverage, trying to force HCS to accept an unjust decision because the amount in question was cheaper than paying for a lawyer. Indeed, many larger businesses—including the very largest defense contractors—often make a decision to forego litigation because it will cost more to litigate than the case is worth.

It is morally wrong to put another party in a contract to that choice. It is morally wrong to force a small business to choose between taking a loss on a contract it had successfully performed and hiring an attorney. And it is *reprehensible* for a government contracting officer to put a small business into the position of having to choose, and to do so intentionally.

This, right here, is why so many companies are wary of doing business with the U.S. Government.

For those small businesses that may be reading this article, you do not have to let yourself be bullied by a prime contractor or by a government contracting officer. You can, *and you should*, choose to litigate when you believe you are correct. You can win and you may be able to get

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your attorney's fees paid for by the opposition. (

See

: Equal Access to Justice Act.)

And to any government contracting officers who may be reading this article, you do not have to balance the Federal deficit via unethical means. You do not have to claw money back from small businesses who did their jobs and who rightfully should be paid. When you issue a COFD, make sure it's a good one.