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Quantum: A Formidable Barrier To Recovery Under A Claim

By Jerome S. Gabig[*]

Prevailing on a claim is a two-part exercise. First, the claimant must establish what is known as "entitlement." Entitlement means, under federal common law, that the claimant's legal theory for recovery and assertion of facts can withstand scrutiny by either the applicable court or administrative tribunal.[1] Entitlement is synonymous with the claimant having a cause of action. Quantum is the second part of what the claimant must establish to prevail on a claim. Albeit a simplification, as the name suggests, quantum means how much money the claimant is entitled to recover.[2]

Since quantum is closely tied to claims, it is useful take a close look at the term "claim" as it is commonly used in federal government contracts. According to the Federal Acquisition Regulation (FAR), a claim is "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract."[3] At the outset, it is worth noting the term "by one of the contracting parties." Although perhaps not as frequently made as claims by contractors, government claims commonly occur. After submitting a government claim, contracting officers are often surprised to experience that a government claim can face a formidable barrier before the government can recover.

Under case law, a claim "ripens" into a cause of action:

> Under the FAR's definition, a dispute must exist at the time of submission or the Government must unreasonably delay in paying the request and the contractor must notify the CO in writing that it is submitting a claim for the routine request to *ripen into a claim* under the [Contract Disputes Act].[4]

The ripening process usually begins with a request for equitable adjust-

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ment (REA). An REA is a term of art not defined in the FAR.[5] "Equitable adjustments are simply corrective measures utilized to keep a contractor whole when the Government modifies a contract."[6] An equitable adjustment reflects a particular contractor's costs; it is not a universal, objective determination of what the cost would have been to other contractors at large.[7]

An equitable adjustment is not based upon market prices, but reasonably incurred costs.[8] As explained by the U.S. Court of Appeals for the Federal Circuit, "the preferred way for a contractor to prove increased costs is to submit actual cost data because such data provides the court, or contracting officer, with documented underlying expenses, ensuring that the final amount of the equitable adjustment will be just that—equitable—and not a windfall for either the government or the contractor."[9]

The Federal Circuit has summarized the correct approach to ascertaining quantum as follows:

> The ascertainment of damages is not an exact science, and where responsibility for damage is clear, it is not essential that the amount thereof be ascertainable with absolute exactness or mathematical precision: It is enough if the evidence adduced is sufficient to enable a court . . . to make a fair and reasonable approximation.[10]

However, as a practical matter, judges are reluctant to conclude that they have sufficient evidence to make a fair and reasonable determination of quantum unless the evidence is based on actual data.

This Briefing Paper discusses the various methods claimants under government contracts use for proving quantum, the applicable burdens of proof, selected decisions illustrating the barriers to recovery under a government contract claim posed by the determination of quantum, and the role of change order accounting.

Methods Of Proving Quantum

Since proving quantum is not an exact science, claimants have used a variety of methods. There is clearly a preference for the actual cost method. Other methods of proving costs include total costs, modified total costs, the measured mile, and the jury verdict. Each method is discussed below.

Actual Costs

It is beyond contention that the actual cost method is the preferred method for proving costs.[11] A major reason why the actual cost method is preferred is because contractors are expected to prove their costs using the best evidence available under the circumstances.[12] Invariably, actual costs are the best evidence under the circumstances. "Logically, to prove damages through the actual cost method, the plaintiff must provide the court with specific documentation of the expenses caused by the government's change."[13] Hence, a failure to account for accumulated actual costs and to present that information to a court or board in a coherent manner can result in either a substantial reduction or total disallowance of the claimed costs.[14]

Total Costs

The total cost method is not preferred because it assumes the entire cost overrun is solely the government's fault. The total cost method calculates the difference between the bid price on the original contract and the actual total cost of performing the contract as changed.[15]

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A court or board of contract appeals is only likely to permit a total cost method of recovery if actual costs could not be established and the claimant can meet the following prerequisites: (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 was realistic; (3) the contractor's actual incurred costs were reasonable; and (4) the contractor was not responsible for any of the added costs.[16]

Modified Total Costs

As a practical matter, rarely is the government totally at fault concerning all the accumulated costs relating to a contractor's claim. The modified total costs method seeks to take into consideration that the contractor shares some responsibility to the additional costs. A modified total cost method might also apply where the original proposal lacks price realism or where a contractor might have been able to better mitigate costs.[17]

"Measured Mile"

Where the claim involves considerable disruption, a potential method of measuring damages is the "measured mile." The measured mile approach compares the productivity achieved during a period of delay and/or disruption caused by Government action with a period when the contractor was making normal progress in performing the work. To the extent that no contractor actions caused the loss or productivity, the measured mile method arguably is the most accurate way to measure a loss of productivity.[18] The measured mile method was thoroughly addressed in a recent Briefing Paper.[19]

Jury Verdict

As a practical matter, claimants seeking recovery using the jury verdict method do not have a high probability of success. In an article written in 2015, Professor Nash discussed his research findings concerning 16 jury verdict decisions during the period between 2006 to 2015 that granted some relief.[20] However, a statistic of less than two instances a year in which the jury verdict method of provided some recovery should make claimants cautious about relying on the jury verdict method.

The prerequisites before a court or a board will permit the use of the jury verdict method include (1) clear proof of injury; (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 damage.[21] There is authority that the jury verdict is a continuation into quantum as a means to resolve factual disputes.[22]

Applicable Burdens Of Proof

The general rule is that the burden of proof, by the preponderance of the evidence, is on the party advocating the claim.[23] As to quantum, the claiming party should seek to meet its burden of proof by submitting adequate supporting documentation.[24] Stated differently, the burden of proof gives the benefit of doubt to the party defending the claim.[25] For government claims, the agency typically bears the burden of proof.[26] However, where the government claim involves a disallowance of cost, the burden of proof can be more complicated. The FAR declares that the "burden of proof shall be upon the contractor to establish that such cost is reasonable."[27] The origin of this FAR provision is 10 U.S.C.A. § 3749 (formerly 10 U.S.C.A. § 2324(j)) for military agencies and 41 U.S.C.A. § 4309 for civilian agencies. The 10 U.S.C.A. § 3749 version states:

> In a proceeding before the Armed Services Board of Contract Appeals, the United States Court of Federal Claims, or any other Federal court in which the reasonableness of indirect costs for which a contractor seeks reimbursement from the Department of Defense is in issue, the burden of proof shall be upon the contractor to establish that those costs are reasonable.[28]

Contractors should not be intimidated by the statutory burden of proof that a cost is reasonable. "A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business."[29] The FAR acknowledges there are "a variety of considerations and circumstances" that could cause a cost to reasonable.[30] Four specifically identified considerations in the FAR for reasonableness are:

> (1) Whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or the contract performance;
>
> (2) Generally accepted sound business practices,

arm's-length bargaining, and Federal and State laws and regulations;

(3) The contractor's responsibilities to the Government, other customers, the owners of the business, employees, and the public at large; and

(4) Any significant deviations from the contractor's established practices.[31]

Just because a cost is challenged by the government as unreasonable does not mean there is merit to the challenge. In *Phoenix Data Solutions LLC, F/K/A Aetna Government Health Plans*,[32] the Defense Health Agency challenged the reasonableness of the contractor's 2008 general and administrative (G&A) expense rates with a mere empty assertion that the rates were "too high." The Armed Services Board of Contract Appeals (ASBCA) decided the issue in favor of the contractor, holding that the contractor "presented credible testimony regarding the calculation of its G&A rate, and explained that that G&A rate was high as a percentage because the pool of costs was applied to a small base." Thus, the board allowed the contractor its claimed G&A expenses of $4,542,366.[33]

The ASBCA's 2014 decision in *Kellogg Brown & Root Services, Inc*.[34] (KBRS) provides useful insight into how that board decides reasonableness. In this case, KBRS was awarded a cost-plus award fee contract in 2001 to "provide the Army with an additional means to adequately support the current and programmed force by performing selected services in wartime and other operations" in Iraq. Special Provision H-16 stated that the government would provide force protection to contractor employees commensurate with that given to Service/Agency civilian employees in the area of operations.

The Army breached the contract by not providing the requisite security:

> KBRS met with [Major General (MG)] Speakes and reported that the personnel and equipment casualties from attacks on its convoys and those of its subcontractors from mid-May to date were 7 killed, 7 wounded, 4 missing and 10 trucks missing. MG Speakes noted, among other things that: "Tomorrow the government will provide convoy protection for 46% of the convoys waiting to travel north. This level of support must increase, but presently the government is short convoy escort vehicles and shooters (shotgun riders)."[35]

Hence, KBRS subcontracted for security to private security companies (PSCs). The ASBCA concluded that, "in the security conditions prevailing in Iraq in 2003–2006, the use of PSCs by KBRS and its subcontractors was reasonable as that term is defined in FAR 31.201-3(a)."[36]

In its brief, the Army argued was that KBRS's remedy was to stop performance rather than hire PSCs. The ASBCA rebuked the Army's disingenuousness by stating:

> Fortunately for the troops that depended on KBRS and its subcontractors for their life-support and other logistical support services, KBRS and its subcontractors did not adopt the attitude now suggested by the government as their only remedy for the government's failures to provide force protection. As Mr. Murray, the [troop dining facilities] subcontractor manager expressed it: "if you don't have a delivery coming in every third day, you're in trouble. You can't feed soldiers. That was unacceptable to us, as a caterer, and to our client KBR. We could not fail."[37]

Put in perspective, there is no reason for contractors to be intimidated by their burden of proof for reasonableness. Straightforward testimony by an astute business owner often is sufficient to meet the burden.[38]

In 2017, the ASBCA issued a decision that provides a good lesson to contractors about not giving in too quickly when the Defense Contract Audit Agency (DCAA) recommends disallowing a cost. The underlying controversy in *A-T Solutions, Inc.*[39] (ATS) involved an Army contract to provide professional services and materials to train on improvised explosive devices. The training was to take place both within the United States and overseas. The cost-plus-fixed-fee contract was awarded to ATS for a base year and up to four option years. Under the contract, ATS provided the training materials and equipment as commercial items and was paid for them at its catalog prices. ATS's proposal stated that it was a provider of commercial training and that its training materials were priced using its product catalog.

In July 2011, the DCAA issued a report questioning ATS's charging for training material based on commercial prices rather than at actual costs as set forth in FAR 31.205-26, "Material costs." The contracting officer deferred to the DCAA. The Army suspended a per-

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centage of reimbursement of payment on the contract, and ATS appealed to the ASBCA. The board decided in favor of ATS, finding that the government had "not met its burden to show that the transfers of commercial ATS training materials between ATS divisions were not the sort of [interorganizational] transfers contemplated by FAR 31.205-26(e)."[40] Put in context, ATS prevailed by holding the DCAA to its burden of proof—something the DCAA could not meet.

Where there is no dispute over the reasonableness or the amount of costs incurred, nor over the allocability of amounts charged to a contract, and the Government seeks to disallow costs solely upon not being "unallowable," the Government bears the burden of proving that the costs are of the type made specifically unallowable by regulation or contract provision.[41] An example of the ASBCA holding that the Government did not meet its burden of proof occurred in *SRI International* (SRI).[42] In that decision, SRI was awarded a research and development contract by the Defense Advanced Research Project Agency. SRI had assumed a line of credit (LOC) with a bank to assure performance on the covenants and restrictions on the requisite bonds. In SRI's appeal of the administrative contracting officer's decision disallowing its claim for the LOC costs, the government contended the LOC costs were unallowable under FAR 31.205-20, "Interest and other financial costs," as costs of financing long-term capital. The ASBCA held that the government failed to carry its burden in proving that SRI's LOC costs were of the type made specifically unallowable by regulation or contract provision. Accordingly, SRI was able to recover its LOC costs. As shown in *SRI International*, the government's burden of showing that a cost is unallowable under a regulation can benefit contractors that choose to resist the disallowance of a cost.

In summary, burdens of proof are often barriers to both contractors and the government being able to prevail on quantum. Hence, a prudent claimant should pay close attention to burdens of proof.

Selected Decisions Providing Insight Into Quantum As A Formidable Barrier To Recovery

Discussed below are some selected decisions that exemplify why quantum can be a formidable (but not insurmountable) barrier to recovering on a FAR claim.

King Aerospace—ASBCA

In *King Aerospace, Inc.*,[43] King was awarded a contract to repair and maintain a fleet of aircraft. King knew at the outset of contract that the Government-furnished aircraft were in inferior condition. King was capable of tracking the above and beyond costs to repair and maintain the substandard fleet. However, King chose to present its case for quantum before the ASBCA using the measured mile method rather than actual costs. The ASBCA held: "This is the problem with King's quantum case: it paints with too broad a brush." The end result was that because King did not heed the strong preference that the ASBCA has for actual costs, King only recovered $3,640,794 of the $8,472,473 amount claimed.[44]

Kellogg Brown & Root Services, Inc.—ASBCA

Kellogg Brown & Root Services, Inc.[45] (KBR), decided in 2018, was one of numerous ASBCA decisions arising from the Army's LOGCAP III contracts to support the military during the Iraq war. In this task order, KBR was obligated to provide thousands of air-conditioned trailers to several sites in Iraq. KBR issued a $80,978,562 firm-fixed-price subcontract to a Kuwaiti company, FKTC, to perform this work. This subcontract contained a "Changes" clause modeled on the standard FAR "Changes" clauses.

The claim arose from the Army having a contractual duty to protect convoys from attacks. However, convoy protection was not a high priority for the Army. The subcontractors had to off-load their trucks at the border and then reloaded when a convoy was available. FKTC submitted REAs arising from the delays and disruptions for $33.8 million and $30.6 million. The negotiations between KBR and FKTC were hampered by FKTC not disclosing cost information that FKTC considered proprietary. Eventually, the parties agreed to settle the claims for $23,831,147.

Prior to the $23,831,147 settlement, FKTC presented another REA seeking $41,971,166 for idle truck time waiting for convoys. This negotiation was delayed as

KBR sought actual costs from FKTC but eventually settled on a model that an FKTC expert devised as to the costs of idle trucks and drivers. This $41,971,166 claim was settled for $24,923,400.

KBR sought to passed along its costs of the settled FKTC claims by submitting a claim to the Army for $51,273,482. The DCAA recommended disallowing most of the claim based on a lack of supporting documentation. The contracting officer disregarded the DCAA's recommendation because the contract supposedly was "commercial," thus not requiring actual cost data. The contracting officer deemed $25,564,516 to be fair and reasonable. Not satisfied with being paid less than 50% of the claim, KBR sought *de novo* review at the ASBCA.[46]

The ASBCA made the following finding:

> FKTC was a Kuwaiti contracting and construction firm with multi-million dollar projects. It had a number of contracts with the government, including embassy construction. FKTC had approximately 70 subcontracts with KBR in 2003-04. One of its founders was an expert in finance and it also maintained a finance department led by a manager with 19 years of experience. FKTC had continual growth, making it one of Kuwait's largest companies. All of these factors demonstrate that it functioned at a sophisticated level.[47]

The ASBCA's finding that FKTC was capable of accounting for its actual costs arising from the delay and disruption of convoys doomed KBR's claim. The ASBCA found:

> In sum, KBR has no shown that a prudent person conducting a competitive business would have resolved FKTC's delay REA based upon the model submitted by FKTC. That model was not realistic and did not approximate FKTC's actual costs arising from a delay. KBR has not shown that FKTC lacked such information, why it would lack such information, or why it would be reasonable not to have such information given the subcontract's record-keeping mandate and requirement to support REAs with actual costs.[48]

The ASBCA denied KBR any recovery.

One of the many lessons learned from this decision is that even highly sophisticated companies can fall victim to the formidable barrier that quantum can be to recovering under a claim.

Pacific Coast Community Services, Inc.—Court Of Federal Claims

In *Pacific Coast Community Services, Inc. v. United States*,[49] the Federal Protective Service (FPS) issued a solicitation for support services in Los Angeles and San Francisco consisting of five full-time equivalents (FTEs). This service contract was for a one-year base period followed by four one-year options. The contract was ambiguous as to whether Pacific Coast was required to provide 1,888 productive hours per FTE per year, as the contractor asserted, or 2,000 productive hours, as the Government contended. Pacific Coast prevailed on the merits. The lawsuit proceeded to the quantum phase. Pacific Coast argued that the FPS caused Pacific Coast to provide more employees than the contract required.

As explained by the court:

> Pacific Coast has shown the math to support what it alleges it is entitled to receive, but has not met its burden of showing that it *actually incurred* those costs, as required, to receive an equitable adjustment—or restitution—as a remedy for a constructive change to the Contract. Courts are not permitted to award equitable adjustment when the plaintiff cannot prove it was harmed by the government's actions. To that end, courts cannot award equitable adjustment when doing so would result in a windfall.[50]

Once again, the failure to prove actual costs proved fatal to a claimant being able to recover on its claim.

Bannum, Inc.—Court Of Federal Claims

In *Bannum, Inc. v. United States*,[51] the claimant filed suit against United States seeking $317,490.55 in bid preparation and other costs after the Bureau of Prisons (BOP) terminated for convenience a contract to provide residential reentry services. Bannum had initially been awarded the contract. However, following a Government Accountability Office protest, Bannum's proposal was eliminated from the competition.

Although Bannum sought recovery for many alleged incurred costs, this analysis is focused upon the alleged "initial and preparatory costs" to perform the contract. The BOP did not contest entitlement but instead challenged that Bannum had not proven quantum. As explained in the decision:

> The defendant acknowledges that these costs are re-

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coverable after a termination for convenience. See FAR 52.249-2(g); FAR 31.205-42. The defendant argues, however, that the plaintiff has failed to provide the documentation to justify and support its claims. All that Bannum has submitted in support of its claims for these costs is a spreadsheet it prepared based on its general ledger. Bannum's summary of costs from its general ledger, the defendant argues, is insufficient to support the amounts it claims for these preparatory costs. The spreadsheet is unverified; the plaintiff has not provided any explanation as to how it prepared the spreadsheet, who prepared it, or what source documents underlie the figures.[52]

The court agreed with the BOP:

Spreadsheets in the control of and prepared by the claimant are inadequate without supporting receipts of other evidence, or at least some explanation by the person who prepared them to explain how they were prepared and how the information in them was validated. Such documents are easy to manufacture and manipulate. There is no evidence that Bannum has manipulated the spreadsheets presented in support of its claimed costs, and the Court does not suggest that it has; yet, there is likewise no evidence contemporaneous with those costs to support them. Companies do not do business without receipts, contracts, documentation of costs, and the like. And companies do not remain in business by failing to maintain such records, at least for as long as the tax man may be able to come in and check the books.[53]

Bannum is yet another decision where recovery on a claim was within the grasp of the claimant but the claimant did not make a sufficient effort to prove quantum. If the Bannum employee who prepared the spreadsheet had testified as to why the data entries were reliable, it is probable that Bannum would have done better than zero recovery.

TRANLOGICTICS, LLC. —ASBCA

TRANLOGISTICS LLC[54] involved a relatively small amount of money but is a textbook decision for the general proposition that without proving actual incurred costs a monetary recovery is unlikely. The underlying contract was in the amount of $98,898.90. The contractor was obligated to transport military cargo by multiple truck trips between Soto Cano Air Base, Honduras and Port of Cortes, Honduras. TRANLOGISTICS presented the contracting officer with a claim for $170,932.05 for "additional work and delay costs." The government responded by asking for documentary support for the claim. TRANLOGISTICS provided three invoices from Aaron Casariego, who was identified as the subcontractor's project manager.

Here is an extract from the decision:

At the hearing of the appeals, appellant put forward Mr. Casariego to substantiate his and the vendor invoices. Mr. Casariego has a personal relationship with appellant's Chief Executive Officer, Lily Tran Ms. Tran and Mr. Casariego have lived together for the last ten years (including at appellant's business address), have been engaged to be married for eight years, and have two children together. Mr. Casariego was, at least during contract performance if not also at other times, one of appellant's corporate officers, at least its Chief Financial Officer. He is also responsible for the invoice redactions: his testimony is that he suggested that vendors redact their invoices so they could maintain their "confidentiality." And although Mr. Casariego says that he knows the identities of the vendors, he refused during the hearing to identify them, even after having been duly sworn to testify truthfully.[55]

The decision states nothing profound but it makes clear that TRANLOGISTICS had not meet its burden of proving quantum. As explained by the ASBCA:

In support of its quantum argument, the claimant seems to say that it can prove the amount it is due without having to rely upon invoices, merely by showing that the amount it requests is reasonable according to market prices in Honduras. However, we require evidence of actual incurred costs, if possible, not market prices."[56]

C.H. Hyperbarics, Inc.—ASBCA

C.H. Hyperbarics, Inc.[57] (CHHI) involved a Navy contract for design and installation of hyperbaric piping and instrumentation for the Army Special Forces Training Facility at Key West, Florida. CHHI submitted claims for defective specifications, differing site conditions, changes, and failure to deliver government-furnished equipment. According to the DCAA, CHHI failed to segregate its labor hours for added work. The government challenged CHHI's quantum claim on the grounds that it is not based on actual cost data, but on estimates that were not supported by detailed, substantiating, and corroborating data.

The ASBCA held that CHHI's estimates had a "reasonable basis in fact and constitute[d] sufficient evi-

dence" to allow the board "to make a fair and reasonable approximation of the damages." The board emphasized the testimony from CHHI's president who prepared the estimates and who provided supporting documentation:

> In this case we have Mr. Herblot's estimates of direct labor hours assigned to specific tasks within CHHI's REAs that were based on his experience and best judgment. Mr. Herblot's testimony as to the nature of the additional work required as a result of the government's defective specifications, defective [government-furnished property], and differing site conditions is evidence of resultant injury. He was familiar with all aspects of the job and had experience in estimating labor costs for tasks from submitting proposals to the government. His estimates were based on his own familiarity with the work performed. In addition, the REA estimates were supported by correspondence and documents evidencing work performed for resolution of the problems. The government's challenge to Mr. Herblot's estimates of direct labor hours was no more than vague, generalized assertions.[58]

The decision provides some favorable prose for claimants:

> A claimant need not prove his damages with absolute certainty or mathematical exactitude. . . . It is sufficient if he furnishes the Court with a reasonable basis for computation, even though the result is only approximate. . . . Yet this leniency as to the actual mechanics of computation does not relieve the contractor of his essential burden of establishing the fundamental facts of liability, causation and resultant injury. . . . It was plaintiff's obligation in the case at bar . . . to provide a basis for making a reasonably correct approximation of the damages which arose therefrom.[59]

The lesson learned from *C.H. Hyperbarics, Inc.* is that credible testimony from a knowledgeable corporate officer can be a valuable tool for contractors to overcome the formidable barrier to recovering quantum under a claim.

S.W. Electronics & Manufacturing Corp.—Court Of Claims

S.W. Electronics & Manufacturing Corp. v. United States[60] provides some useful insight into judicial scrutiny of quantum. The underlying Navy contract was to manufacture and deliver 527 radios for military aircraft at a contract price of $823,645. The specification contained a defective design for a rotary switch. The contracting officer determined that S.W. Electronics was entitled to recover $20,813. Unsatisfied with the amount offered by the contracting officer, the contractor appealed to the ASBCA. The ASBCA held that S.W. Electronics' attempts to prove quantum using both the total cost method and the jury method were unsuccessful and limited recovery to $2,601. The contractor sought review at the Court of Claims under the then Wunderlich Act. The Court of Claims held that the ASBCA's decision was "arbitrary, capricious, and not supported by substantial evidence."[61]

The board reinstated the $20,813 granted by the contracting officer:

> The court is thus confronted with the problem of correcting the board's error. Since it is clear that some radios were manufactured with the Ledex switch prior to the instructions correcting the problem, plaintiff is entitled to some damages. We conclude that the contracting officer's award of $20,813.63 was a reasonable approximation of the damages which plaintiff has proved.[62]

The lesson learned in *S.W. Electronics* is that once a court or board is convinced that the claimant has incurred damages, an award of damages may be made based on a "fair and reasonable approximation."[63] However, given the discretion that judges have to ascertain if there is a reasonable approximation of damages, the benevolence of the Court of Claims exhibited in 1981 is not something that claimants can be assured of receiving.[64]

Industrial Maintenance Services Inc. —CBCA

Industrial Maintenance Services, Inc. v. Department of Veterans Affairs[65] involved a change order for added work resulting in a five-day extension. The agency challenged the contractor's charges of $1000 for a forklift rental and fuel. The agency questioned whether the forklift and fuel were utilized during or after the change order. The CBCA found that the contractor had not explained or supported the claimed amounts or linked these charges to the change order. In denying the appeal, the CBCA stated: "The contractor's broad-brush approach, and failure to point to specific tasks or related dollars, results in an unsupported position."[66]

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Missouri Department Of Social Services—ASBCA

Missouri Department of Social Services[67] involved the Army's contract with the Missouri Department of Social Services to provide food service operations at 18 dining facilities at Fort Leonard Wood, Missouri. The Army issued a change order reducing the number of dining facilities from 18 to 12. The board found credible the calculations of the contractor's expert of unrecovered fixed costs due to the partial termination.

> Based on the calculations proffered by appellant's expert, we find that appellant's unrecovered fixed costs due to the partial termination (plus 3% profit) amount to $1,235,302. This calculation is based on a review of appellant's actual incurred costs, which were adjusted downward by the expert in specific instances where they exceeded proposed amounts, thus avoiding recovery of increased costs not resulting from the partial termination.[68]

The Army did not provide its own expert. Instead, the Army defended by arguing that the contractor had not sustained its burden of proof. The board rejected the Army's argument and found that the contractor had "proved the amount of its loss with sufficient certainty."[69]

Change Order Accounting

According to the Federal Circuit, "[t]he issuance of a change order request should signal to the prudent contractor that it must maintain records detailing any *additional* work, just as should the encountering of differing site conditions."[70] Hence, courts and boards are less likely to be sympathetic to contractor difficulties in proving quantum where the claim is based on change orders.

FAR 43.205 states: "The contracting officer may insert a clause, substantially the same as the clause at 52.243-6, Change Order Accounting, in solicitations and contracts for supply and research and development contracts of significant technical complexity, if numerous changes are anticipated."[71] The "Change Order Accounting" clause, as the name suggests, requires a contractor to segregate and account for change orders. It is important to note that FAR 52.243-6 is not a mandatory clause; the contracting officer has discretion whether to insert the clause into a contract. However, given the strong preference of courts and boards for actual costs, if the clause causes the contractor to separately account for change orders, the clause probably is a benefit to the contractor, if followed.

Contractors with DCAA-approved accounting systems typically implement change order accounting by opening a separate charge number. If a contracting officer does not direct the use of change order accounting, there is authority that a court or board will be more lenient in requiring a contractor with a fixed-price contract to prove its claim using actual costs.[72]

Guidelines

The *Guidelines* below are intended to assist contractors that face quantum as being a formidable barrier to recovering claims. They are not, however, a substitute for professional representation in any specific situations.

1. Act early. As soon as you are aware of a change order or a differing site condition, set up a separate charge account.

2. While it is only necessary to prove damages with reasonable certainty, err on the side of proving damages beyond the preponderance of evidence. Do not give the Government the opportunity to argue that you have not properly supported the claim as required by FAR 31.201-2(d).

3. Courts and boards have a strong preference for proof of damages by actual costs. The more detailed the information on incurred costs, the greater possibility of a recovery.

4. Use of a method other than actual damages is precarious. If you elect a method other than actual costs, justify the use of that method as required by the case law.

5. Present accounting and cost records in a clear and concise manner. Don't expect a judge to do your job of tracing a logical flow through documentation to ascertain damages.

ENDNOTES:

[1]Typically, the applicable court is the U.S. Court of

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Federal Claims. For a rare instance where a U.S. District Court decided quantum on a claim against the United States, see East Coast Repair & Fabrication, LLC v. United States, 199 F. Supp. 3d 1006 (E.D. Va. 2016), where the underlying contract was to repair a vessel, which constitutes a "maritime contract" governed by Suits in Admiralty Act, 46 U.S.C.A. § 30901 et seq. A typical administrative tribunal is the applicable board of contract appeals assigned to the agency that awarded the contract. The two most active boards of contact appeals are the Armed Services Board of Contracts Appeal (ASBCA) and the Civilian Board of Contract Appeals (CBCA).

[2]Confusion can occur if causation is not resolved in the entitlement stage but rolled into quantum.

[3]FAR 2.101.

[4]Scan-Tech Sec., L.P. v. United States, 46 Fed. Cl. 326, 331 (2000) (emphasis added); see Contract Disputes Act, 41 U.S.C.A. §§ 7101–7109.

[5]Nash, "Equitable Adjustment: A Term of Art?," 30 Nash & Cibinic Rep. NL ¶ 8 (Feb. 2016).

[6]Pacific Architects & Eng'rs, Inc. v. United States, 203 Ct. Cl. 499, 508 (1974).

[7]Kellogg Brown & Root Servs., Inc., ASBCA No. 57530, 19-1 BCA ¶ 37,205.

[8]See Software Design, Inc., ASBCA Nos. 23616 et al., 82-2 BCA ¶ 16,073, at 79,740; Nager Elec. Co. v. United States, 442 F.2d 936, 946 (Ct. Cl. 1971) ("This consideration of the particular contractor's actual and probable costs is tied to the overall function meant to be served by equitable adjustments. . . .").

[9]Propellex Corp. v. Brownlee, 342 F.3d 1335, 1338 (Fed. Cir. 2003), 45 GC ¶ 373 (internal quotation marks omitted). A corollary is that "[i]t is a 'well-established principle' that damages need not be proved to a mathematical certainty so long as we are provided a reasonable basis for their calculation." King Aerospace, Inc., ASBCA No. 60933, 19-1 BCA ¶ 37,316, at n.8.

[10]Bluebonnet Sav. Bank v. United States, 266 F.3d 1348, 1355 (Fed. Cir. 2001) (internal quotation marks omitted).

[11]Dawco Constr., Inc. v. United States, 930 F.2d 872 (Fed. Cir. 1991), 33 GC ¶ 136, overruled on other grounds by Reflectone, Inc. v. Dalton, 60 F.3d 1572 (Fed. Cir. 1995), 37 GC ¶ 411.

[12]Delco Elecs. Corp. v. United States, 17 Cl. Ct. 302, 321 (1989), aff'd, 909 F.2d 1495 (Fed. Cir. 1990).

[13]Doninger Metal Prods., Corp. v. United States, 50 Fed. Cl. 110, 125 (2001).

[14]Delco Elecs. Corp. v. United States, 17 Cl. Ct. 302, 331 (1989), aff'd, 909 F.2d 1495 (Fed. Cir. 1990) (recovery reduced for unexcused failure to segregate); Togaroli Corp., ASBCA No. 32995, 89-2 BCA ¶ 21,864 (costs not segregated despite the auditor's repeated recommendation to do so; no recovery beyond final decision); Assurance Co., ASBCA No. 30116, 86-1 BCA ¶ 18,737 (lack of cost data prevented reasonable approximation of damages for jury verdict; appellant's crawl space claim disallowed for lack of proof and plenum claim substantially reduced).

[15]Servidone v. United States, 931 F.2d 860 (Fed. Cir. 1991); Dawco Constr., Inc. v. United States, 930 F.2d 872 (Fed. Cir. 1991), 33 GC ¶ 136, overruled on other grounds by Reflectone, Inc. v. Dalton, 60 F.3d 1572 (Fed. Cir. 1995), 37 GC ¶ 411; Santa Fe Eng'rs, Inc., ASBCA No. 36682, 96-2 BCA ¶ 28,281; Concrete Placing Inc. v. United States, 25 Cl. Ct. 369 (1992).

[16]Servidone v. United States, 931 F.2d 860, 861 (Fed. Cir. 1991); WRB Corp. v. United States, 183 Ct. Cl. 409, 426 (1968).

[17]Servidone v. United States, 931 F.2d 860 (Fed. Cir. 1991); Stewart & Stevenson Servs., Inc., ASBCA No. 43631, 98-1 BCA ¶ 29,653, modifying 97-2 BCA ¶ 29,252, 39 GC ¶ 566; ECC Int'l Corp., ASBCA Nos. 45041 et al., 94-2 BCA ¶ 26,639; see also Propellex Corp. v. Brownlee, 342 F.3d 1335, 1340 (Fed. Cir. 2003), 45 GC ¶ 373 ("The Board added that it had attempted to reconstruct from the record a reasonable approximation of those costs, but had found that the evidence did not permit such an approximation. Accordingly, the Board concluded that Propellex's claim under a modified total cost method failed because Propellex had not established the impracticability of proving its actual losses directly and the lack of responsibility for the added costs.")

[18]Nash, "The Measured Mile: Its Limited Function," 36 Nash & Cibinic Rep. NL ¶ 57 (Oct. 2022).

[19]Dale & D'Onofrio, "The 'Measured Mile' Method for Proving Disruption," 21-12 Briefing Papers 1 (Nov. 2021).

[20]Nash, "Postscript VI: The Jury Verdict Approach," 29 Nash & Cibinic Rep. NL ¶ 16 (Mar. 2015).

[21]Navcom Def. Elecs., Inc., ASBCA No. 50767, 01-2 BCA ¶ 31,546.

[22]Delco Elecs. Corp. v. United States, 17 Cl. Ct. 302 (1989), aff'd, 909 F.2d 1495 (Fed. Cir. 1990); Joseph Pickard's Sons v. United States, 209 Ct. Cl. 643 (1976); River/Road Constr., Inc., ENGBCA No. 6256, 98-2 BCA ¶ 29,334.

[23]Wilner v. United States, 24 F.3d 1397 (Fed. Cir. 1994), 36 GC ¶ 361; Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 767 (Fed. Cir. 1987) ("claimant bears the burden of . . . proving the amount of loss with sufficient certainty so that the determination of the amount of damages will be more than mere speculation"); Deval Corp., ASBCA Nos. 47132 et al., 99-1 BCA ¶ 30,182 (holding that a contractor's clear entitlement to an equitable adjustment did not diminish the

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contractor's burden of proving the amount of such an adjustment).

[24]Libby Corp., ASBCA No. 40765, 96-1 BCA ¶ 28,255 (denying contractor's claim where claim was prepared by outside counsel who did not testify, and unsupported by contractor's witnesses with actual knowledge of how the claim was prepared).

[25]See Taylor, "Burden of Proof in Government Contracts," 82-3 Briefing Papers 1, at 3 (June 1982).

[26]Eyak Servs., LLC, ASBCA Nos. 58552 et al., 14-1 BCA ¶ 35,570 ("Because these appeals are from government claims, the government bears the burden of proof.").

[27]FAR 31.201-3(a).

[28]10 U.S.C.A. § 3749.

[29]FAR 31.201-3(a).

[30]FAR 31.201-3(b).

[31]FAR 31.201-3(b).

[32]Phoenix Data Sols. LLC, F/K/A Aetna Gov't Health Plans, ASBCA No. 60207, 18-1 BCA ¶ 37,164, 60 GC ¶ 360.

[33]Phoenix Data Sols. LLC, F/K/A Aetna Gov't Health Plans, ASBCA No. 60207, 18-1 BCA ¶ 37,164, 60 GC ¶ 360.

[34]Kellogg Brown & Root Servs., Inc., ASBCA No. 56358, 14-1 BCA ¶ 35,639, aff'd in part, vacated in part, rev'd in part in McHugh v. Kellogg Brown & Root Servs., Inc., 626 Fed. Appx. 974 (Fed. Cir. 2015).

[35]Kellogg Brown & Root Servs., Inc., ASBCA No. 56358, 14-1 BCA ¶ 35,639, aff'd in part, vacated in part, rev'd in part in McHugh v. Kellogg Brown & Root Servs., Inc., 626 Fed. Appx. 974 (Fed. Cir. 2015).

[36]Kellogg Brown & Root Servs., Inc., ASBCA No. 56358, 14-1 BCA ¶ 35,639, aff'd in part, vacated in part, rev'd in part in McHugh v. Kellogg Brown & Root Servs., Inc., 626 Fed. Appx. 974 (Fed. Cir. 2015).

[37]Kellogg Brown & Root Servs., Inc., ASBCA No. 56358, 14-1 BCA ¶ 35,639, aff'd in part, vacated in part, rev'd in part in McHugh v. Kellogg Brown & Root Servs., Inc., 626 Fed. Appx. 974 (Fed. Cir. 2015); see also Nash, "Helping the Government: It Can Be Troublesome," 33 Nash & Cibinic Rep. NL ¶ 43 (Aug. 2019).

[38]See generally BearingPoint, Inc., ASBCA No. 55354, 09-2 BCA ¶ 34,289 ("After considering the testimony and exhibits, as well as the briefs of the parties, we conclude that BearingPoint has met its burden of proof regarding labor allocability.")

[39]A-T Solutions, Inc., ASBCA No. 59338, 17-1 BCA ¶ 36,655, 59 GC ¶ 70.

[40]A-T Solutions, Inc., ASBCA No. 59338, 17-1 BCA ¶ 36,655, 59 GC ¶ 70.

[41]Johnson Controls World Servs., Inc., ASBCA No. 46674 et al., 96-2 BCA ¶ 28,464.

[42]SRI Int'l, ASBCA No. 56353, 11-1 BCA ¶ 34,694.

[43]King Aerospace, Inc., ASBCA No. 60933, 19-1 BCA ¶ 37,316.

[44]The lawsuit was eventually settled. See King Aerospace, Inc., ASBCA No. 60933, 2019 WL 5496020, (Oct. 9, 2019).

[45]Kellogg Brown & Root Servs., Inc., ASBCA 57530, 19-1 BCA ¶ 37,205.

[46]A de novo review means a fresh review with no deference given to the contracting officer's final decision. "Thus, once an action is brought following a contracting officer's decision, the parties start in court or before the board with a clean slate." Wilner v. United States, 24 F.3d 1397, 1402 (Fed. Cir. 1994), 36 GC ¶ 361.

[47]Kellogg Brown & Root Servs., Inc., ASBCA 57530, 19-1 BCA ¶ 37,205.

[48]Kellogg Brown & Root Servs., Inc., ASBCA 57530, 19-1 BCA ¶ 37,205.

[49]Pacific Coast Cmty. Servs., Inc. v. United States, 144 Fed. Cl. 687 (2019).

[50]144 Fed. Cl. at 696 (citations omitted).

[51]Bannum, Inc. v. United States, 151 Fed. Cl. 755 (2021).

[52]151 Fed. Cl. at 765.

[53]151 Fed. Cl. at 767–68.

[54]TRANLOGISTICS LLC, ASBCA No. 61366, 19-1 BCA ¶ 37,330.

[55]TRANLOGISTICS LLC, ASBCA No. 61366, 19-1 BCA ¶ 37,330 (citations to record omitted).

[56]TRANLOGISTICS LLC, ASBCA No. 61366, 19-1 BCA ¶ 37,330.

[57]C.H. Hyperbarics, Inc., ASBCA No. 53077 et al., 04-1 BCA ¶ 32,568.

[58]C.H. Hyperbarics, Inc., ASBCA No. 53077 et al., 04-1 BCA ¶ 32,568.

[59]C.H. Hyperbarics, Inc., ASBCA No. 53077 et al., 04-1 BCA ¶ 32,568 (quoting Wunderlich Contracting Co. v. United States, 173 Ct. Cl. 180, 199, 351 F.2d 956, 968-69 (1966)).

[60]S.W. Elecs. & Mfg. Corp. v. United States, 228 Ct. Cl. 333, 655 F.2d 1078 (1981).

[61]228 Ct. Cl. at 351, 655 F.2d at 1088.

[62]228 Ct. Cl. at 352, 655 F.2d at 1089.

[63]228 Ct. Cl. at 352, 655 F.2d at 1089.

[64]For a more garden-variety decision involved unsubstantiated invoices, see Mission Support Alliance, LLC v. Dep't of Energy, CBCA No. 6477, 22-1 BCA ¶ 38,210. In that decision Mission Support merely submitted evidence that it had paid three subcontractors.

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Mission Support offered no testimony that the amounts paid the three subcontractors was reasonable. When confronted with not having met its burden of proof, Mission Support sought to draw an inference that its employees would have confirmed that all necessary paperwork was in place when performing a contemporaneous invoice review. The CBCA did not consider such an inference as sufficient to meet the requirement that "[p]roof of reasonableness should entail 'some independent evidence of the reasonableness of the dollars spent'—not merely evidence of the contractor's own behavior."

[65]Indus. Maint. Servs., Inc. v. Dep't of Veterans Affairs, CBCA No. 5617, 18-1 BCA ¶ 37,088.

[66]Indus. Maint. Servs., Inc. v. Dep't of Veterans Affairs, CBCA No. 5617, 18-1 BCA ¶ 37,088.

[67]Mo. Dep't of Soc. Servs. ASBCA No. 61121, 19-1 BCA ¶ 37,240.

[68]Mo. Dep't of Soc. Servs. ASBCA No. 61121, 19-1 BCA ¶ 37,240 (citation to record omitted).

[69]Mo. Dep't of Soc. Servs. ASBCA No. 61121, 19-1 BCA ¶ 37,240.

[70]Dawco Constr., Inc. v. United States, 930 F.2d 872, 881 (Fed. Cir. 1991), 33 GC ¶ 136, overruled on other grounds by Reflectone, Inc. v. Dalton, 60 F.3d 1572 (Fed. Cir. 1995), 37 GC ¶ 411.

[71]FAR 43.205(f).

[72]Advanced Eng'g & Planning Corp., ASBCA No. 54044 et al., 05-1 BCA ¶ 32,806, at n.36 ("The Government's failure to prescribe a change order accounting clause may be used by the contractor to support a price adjustment in the absence of actual cost records.").

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BRIEFING PAPERS