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Contractors Take Care: Civilian Board of Contract Appeals Clarifies What (Independent) Evidence Suffices to Demonstrate Cost Reasonableness

By Amanda J. Sherwood*

In this article, the author analyzes a recent decision by the Civilian Board of Contract Appeals clarifying what evidence suffices to demonstrate that an incurred cost was reasonable and therefore subject to reimbursement under a cost-type contract.

The Civilian Board of Contract Appeals (CBCA or Board) recently issued a decision clarifying what evidence suffices to demonstrate that an incurred cost was reasonable and therefore subject to reimbursement under a cost-type contract. In presenting and defending claims related to cost-type contracts, contractors must remember they bear the burden of proving the reasonableness of incurred costs and that meeting that burden requires objective, factual evidence that is—importantly—separate and in addition to evidence that the contractor's own purchasing and accounting systems are government-approved.

In *Mission Support Alliance, LLC v. Department of Energy*,[1] the CBCA denied a contractor's request for reconsideration of the prior denial of its appeal of a government claim for $333,895 under a cost-type contract. There was no dispute that the contractor, MSA, actually paid this amount to three subcontractors, but the Board found that MSA did not meet its burden to prove that these costs were reasonable.

The Board's initial August 2022 decision[2] denying the appeal detailed the costs at issue:

- $169,405 paid to a subcontractor (FE&C) for "on-site technical and administrative support to MSA under a labor-hour subcontract."
- $61,160 paid to another subcontractor (EnergX) for a number of training courses at a fixed-price.

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1 Mission Support Alliance, LLC v. Department of Energy, CBCA 6477-R (Oct. 20, 2022), available at https://cbca.gov/files/decisions/2022/CHADWICK_10-20-22_6477-R__MISSION_SUPPORT_ALLIANCE_LLC%20(Decision).pdf.

2 https://www.cbca.gov/files/decisions/2022/CHADWICK_08-17-22_6477__MISSION_SUPPORT_ALLIANCE_LLC%20(Decision).pdf.

- $103,330 paid to yet another subcontractor (DGR Grant) for "miscellaneous construction services under fixed-price subcontracts."

In analyzing these costs, the CBCA made two clear legal holdings.

First, the contractor has the burden of proving the reasonableness of costs incurred, even for a government claim. The CBCA recognized the Armed Services Board of Contract Appeals (ASBCA) precedent holding that the government has the burden of proving that costs are expressly unallowable,[3] but the CBCA limited that rule to expressly unallowable costs, holding that reasonableness is a separate inquiry for which the contractor bears the burden. Therefore, here, even where it was the government disallowing MSA's costs as unreasonable, MSA retained the burden of proving the government was wrong.

Second, the CBCA made clear that the reasonableness inquiry "is inherently factual." That is, a contractor cannot argue costs were reasonable as a matter of law but rather must present factual evidence supporting the reasonableness of costs.

Applying these rules to the costs at issue, the Board rejected MSA's evidence as insufficient to demonstrate the reasonableness of each:

- Regarding the $169,405 paid to FE&C, the Board noted that MSA did not possess time cards supporting the labor hours FE&C charged under its subcontract, purportedly because FE&C refused to provide them. The Board explained that while time cards are not *necessary* to prove the reasonableness of these costs, the Board requires "*something* to satisfy MSA's burden of proof," and there was "no alternative evidence of the reasonableness of these costs cited in the 102 pages of post-hearing briefing filed by MSA."[4] While MSA cited testimony from an expert witness that "MSA satisfied all contract terms and conditions when supporting its costs," the Board explained that "[o]pinion testimony of this kind, however, does not constitute 'evidence or facts' " sufficient to meet MSA's burden.
- Regarding the $61,160 paid to EnergX, MSA only presented the five

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[3] Doubleshot, Inc., ASBCA 61691, slip op. at 5 (July 19, 2022) (citing Luna Innovations, Inc., ASBCA 60086, 18-1 BCA ¶ 36,919 at 179,869).

[4] Many have noted a portion of this holding appeared to contradict with the ASBCA's recent holding in Doubleshot, Inc., ASBCA No. 61691, that the government could not deny a contractor claim based on missing time cards when the government did not initiate an audit of those time cards under after the two year retention period specified in FAR 4.705. See, e.g., "Is There Split Between the CBCA and ASBCA on Retention of Employee Time Cards?" PubK, available at https://pubkgroup.com/law/is-there-split-between-the-cbca-and-asbca-on-retention-of-employee-time-cards/.

invoices containing these costs and a screenshot showing that MSA reviewed and approved the invoices. The CBCA found that the mere fact that a contractor "reviewed" an invoice constitutes no evidence as to the reasonableness of those costs.

- Regarding the $103,330 paid to DGR Grant, MSA presented its fixed price subcontract and various modifications thereto, as well as citation to the fact that "MSA's technical representatives, auditors, management, and expert witness at the hearing 'reviewed the costs' in dispute and, according to MSA, 'successfully corroborated' them." Again, the Board found "MSA neglects to cite hard, record evidence on the basis of which the Board could determine the reasonableness of the charges."

MSA moved for reconsideration of this decision, arguing the Board "overlooked record evidence that 'the disputed costs are reasonable because [MSA followed] its Purchasing System procedures . . . , which had been reviewed and approved by DOE [the respondent, Department of Energy,] and its auditor . . . , for reviewing and approving subcontractor work and costs.' "

The Board denied the motion, explaining that it "did not consider MSA's arguments that it followed its own procedures to be material." Rather, the Board cited Federal Circuit precedent for the rule 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."[5] The Board clarified, however, that MSA's citation to the fact that it "uses a Government-reviewed purchasing system" provides *some* evidence of the reasonableness of costs, because it "is marginally more likely, other things being equal, to have spent money reasonably than is a contractor without such a system."[6] But, the Board found this evidence to be "circumstantial" and insufficient to carry its burden to prove reasonableness. Thus, MSA's repeated assertions that its employees followed proper procedures to approve subcontractor invoices, using a government-approved purchasing system to do so, had some probative value, but was ultimately insufficient to demonstrate the costs were reasonable both in type and in amount.

These decisions contain several important takeaways for contractors.

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[5] Citing Kellogg Brown & Root Services, Inc. v. United States, 728 F.3d 1348, 1363 (Fed. Cir. 2013) and Kellogg, Brown & Root Services, Inc. v. Secretary of the Army, 973 F.3d 1366, 1373 (Fed. Cir. 2020).

[6] A finding that seems like an understatement, given FAR 44.301's description that "[t]he objective of a contractor purchasing system review (CPSR) is to evaluate the efficiency and effectiveness with which the contractor spends Government funds. . . ."

- First, contractors must remember they bear the burden of proof to demonstrate the reasonableness of costs incurred, even when it is the government challenging them. This underscores the necessity of proper record retention during contract performance and also presentation of evidence in any subsequent appeal.
- Second, because reasonableness is a factual inquiry, contractors must support reasonableness with factual evidence (not opinion) that speaks to both the substance and amount of costs at issue. What is the market price for the goods or services at issue? Did the contractor obtain several quotes before incurring the cost? Were the costs consistent with past experience? Were hourly workers paid according to a set, market-based price schedule? While the burden to prove cost reasonableness should not be unduly high, contractors must put forth some evidence that speaks to reasonableness beyond the fact that they incurred the costs in the normal course.
- Lastly, this case provides important clarification on the (limited) persuasiveness of contractors' reliance on past government audit or scrutiny of their purchasing or accounting systems. While the CBCA admitted that government approval of a contractor's purchasing system did provide some assurances that costs recorded in such a system were not egregious, it is clear that reliance on an approved system on its own will *not* carry the burden to prove cost reasonableness. The best practice would be to contemporaneously document the reasonableness of the charge; while this may be more time consuming than simply recording the charge in a purchasing system, such documentation would serve the contractor well in the event of a later dispute.

There was no dispute that MSA actually incurred the challenged costs in performance of its cost reimbursement government contract. Yet, merely incurring the costs (nearly half of which were under fixed price subcontracts) in the ordinary course of successful performance of that contract was not enough to ensure reimbursement. These decisions provide important reminders that contractors must not only do the work, but also be prepared to justify they did so at a reasonable cost.