

## DON'T MAKE THE SAME MISTAKE 6 TIMES

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A recent case at the Armed Services Board of Contract Appeals appears to demonstrate that some contract administrators never seem to learn, and repeated the *same mistake* 6 times while administering a contract for construction of an unmanned aircraft facility at Creech Air Force Base, NV. See *Jaynes Corp.*, ASBCA No. 58385, May 7, 2013 (entitlement) and *Jaynes Corp.*, ASBCA No. 59234, May 19, 2015 (quantum, awarding the contractor 96% of his \$56,305 claim, plus interest).

These cases involve the pipes to be used in the building's sprinkler system. When Jaynes submitted its required shop drawings, equipment data, and material samples prior to starting, it proposed an Allied (subcontractor) sprinkler system, with piping identified as "Allied Sched 40 ASTM A135/A795." ASTM is an international standards organization frequently used for government specifications, and formerly was the American Society for Testing and Materials ("ASTM"). The Administrative Contracting Officer ("ACO") disapproved the Allied piping submission, asserting that the piping did not comply with Sched 40/A795, but only complied with ASTM Sched 10, and was "not real Sched 40 pipe," it is just an Allied "trade name." Jaynes made the submittal six times and was rejected each time, on

- December 2, 2011;
- February 2, 2012;
- April 10, 2012;
- May 3, 2012, ;
- May 4, 2012; and
- May 8, 2012

The May 4, 2012 submittal included an affidavit from the Metallurgy Manager of Allied, the subcontractor, explaining in detail why the pipe complied with the specification. The affidavit noted that the affiant was a committee member of ASTM 109.09 as well as the sponsor of the ASTM A135 Pipe Standard. It didn't matter, the ACO disapproved it anyway, and Jaynes was required to replace the rejected piping with acceptable pipe, thereby giving rise to Jaynes's \$56,305 claim.

In its entitlement decision, the Board concluded that the contract required Schedule 40, ASTM A135 or A795 pipe. The Board noted that the government (the ACO") had dismissed Jaynes' explanation of the proper interpretation "without any principled analysis of its own." The ACO had no factual basis for rejecting the Allied pipe, and never rebutted the Allied Manager's affidavit, or a second affidavit from Southland Industries' Chief Design Officer, which concurred

that the pipe complied. The Board concluded that the Government had changed the contract when it rejected the Allied pipe submittal, and sustained Jaynes's claim.

Two years later, in ASBCA No. 59234, the Government attempted to deny the claim again through the calculation of entitlement. It asserted that since the Government had rejected the Allied pipe before Jaynes purchased it, Jaynes "caused its own damage." The Board, however, rejected this argument as "absurd," noting that the Government never had the right to reject Allied pipe that was "fully in conformance with contract requirements...The government was consistently and persistently wrong and we will not shift the fault to appellant." The only adjustment the Board made to the claim was to give the Government credit for the salvage value of the Allied pipe that Jaynes retained, reducing the entitlement by \$1,295.

TIPS: Government personnel must apply reason, common sense and fairness in all aspects of government contracts. Indeed, the Federal Acquisition Regulation ("FAR") explicitly states that the acquisition system will "conduct business with integrity, fairness and openness." FAR 1.102(b)(3). Was this FAR requirement met by the ACO in this case? If a contractor's submittals do not appear to comply with the contract, and additional support is offered (especially expert support), the Contracting Officer must carefully consider that support. Only when the information supplied by the contractor is factually wrong—and the ACO can demonstrate it—can a submittal of the type in this case be rejected. And, after being confronted with the information *six times*, the Government should have regrouped and reconsidered, and only rejected the pipe if the evidence was clear—which it was *not*.