

## **CONSTRUCTION CONTRACT DUE DATE IS NOT A WARRANTY BY GOVERNMENT THAT WORK CAN BE COMPLETED BY DUE DATE**

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In a recent case, a construction contractor sought summary judgment on whether the contract's 365 day performance period was a warranty by the government that the work could have been completed within that time period. *ECC Int'l LLC*, ASBCA Nos. 60165 and 60282, June 2, 2020. ECC had a contract to construct a facility in Afghanistan.

The Armed Services Board of Contract Appeals considered the question and answered with a very clear "no." The Board stated that "a due date in a contract is not a warranty by the government that the contract can be performed within the prescribed due date; to the contrary, it is the contractor [that must] presumably [be] aware of the performance requirements and its own capabilities that assumes the risk of performance by the specified due date."

The Board stated that this was a "long-standing rule," and entered summary judgment that the contract's 365-day performance period was not a warranty that the contract work could be completed within that period. In so doing, the Board rejected the idea that the 365-day performance period was somehow a defective specification or a guarantee that would require granting the contractor more time if the work was not finished by the due date.

Takeaway. In preparing its bid or proposal, a contractor must carefully examine if it is capable of meeting the delivery date in a contract. A contractor must assess whether it can meet whatever performance period is stated in the solicitation. Furthermore, it is the contractor that assumes the risk of meeting that performance date. This requires careful preparation of bids or proposals. If the contractor cannot meet the performance date, it should request a change in the solicitation, and if no change is made, not submit a bid or proposal at all.

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