

## **A COST PLUS FIXED FEE CONTRACT DOES NOT GUARANTEE THE PROFIT ON FULL ESTIMATE OF WORK, IF NOT FULLY PERFORMED**

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In a cost-plus fixed fee contract, where the Agency's actual requirements are substantially lower than the Agency's initial estimated hours, is the contractor entitled to its full fee? This issue was recently explored in an Armed Services Board of Contract Appeals ("Board") case, *Vectrus Sys. Corp.*, ASBCA Nos. 62685, 62949. Vectrus contended that its fixed fee represents the agreed-upon profit, but the Agency alleged that it was only obligated to pay for actual contractor costs plus a fee that was proportionate to the work actually performed.

The Navy awarded an indefinite-delivery, indefinite quantity ("IDIQ") contract that contemplated the issuance of task orders for personnel, materials, test instrumentation and other services to support the Navy's missions. The contract included estimated labor hours per year but stated that the actual hours may differ from the estimated labor hours. The contract also included a "fee per direct labor hour" amount.

When labor hours amounted to only about two-thirds of the estimated hours under Vectrus's task order, the contractor requested to renegotiate the fixed fee and the Navy refused. The Board began by noting that the contract stated that there must be a modification when the number of hours *increases*, but says nothing about what happens if the actual hours worked are less than the estimated hours. However, clause SEA 5252.216-9122(g) incorporated in the contract required that when Navy's actual needs are less than initially estimated, the contracting officer must either reduce the fixed fee proportionately to the unused level or extend the contract term until the total labor hours are used. The task order issued to Vectrus stated that Navy would pay a proportional fee for each direct labor hour that was invoiced when actual hours were less than estimated.

The Board noted that the Navy's interpretation was consistent with a cost-plus contract's overall structure and intent, and held that the government normally only paid for actual contractor labor costs. Further, the Navy's estimated level of effort was not a guaranteed minimum, and the contract explicitly stated that actual hours may vary from the estimates given. The Board noted that "estimates are not guarantees," and the fixed fee amount represented the "maximum fee that Vectrus could earn if it used all of its estimated hours." The contract expressly stated that the fee would be paid on a "per hour basis" and Vectrus would only receive a profit on each hour worked.

The Board also noted that FAR 16.306(d)(2) explains that in a cost-plus fixed-fee contract the fixed fee is "only fully recoverable if the contractor states that the level of effort specified in the contract has been expended in performing the contract work."

The Board also address the "negligent estimate breach" theory advanced by Vectrus and noted that it is only applied in fixed-price requirements contracts. (A 20 year old Interior Board Decision that stated otherwise did not apply to the Armed Services Board), and there was no binding precedent for that.

Finally the Board held that the plain language of the contract was clear and the contract was not ambiguous when the language in it was considered in its entirety.

Takeaway. In a cost-plus fixed fee IDIQ contract, where the Agency's actual requirements turn out to be substantially lower than the Agency's estimated hours in the solicitation and the contract, the contractor is only entitled to a fee proportionate to hours performed and not to its full fee specified for the full performance of the contract.

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