**UNREASONABLE POST-PERFORMANCE ACTIONS BY THE GOVERNMENT**



In two recent Armed Services Board of Contract Appeals ("ASBCA") cases, the Board sustained the appeals and found the agency's post-performance actions to be unreasonable. In one case, *Avant Assessment, LLC,* ASBCA No. 58866, Sept. 28, 2016, the Army terminated a contract after performance for failing to deliver the "requisite number" of test items, even though the delivery of these items had been deleted by the language of the contract itself. In the second case, *HCS, Inc.,* ASBCA No. 60533, Sept. 20, 2016, the Navy unilaterally reduced the price of the contract by more than 50 percent by deleting work from the contract after that work had been performed.

In *Avant Assessment,* the contract was required to deliver foreign language test items. During performance, a bilateral modification was executed that provided that "any items that are still required by the contract but not accepted by the Government shall automatically be descoped from the contract." Nine months later the Army terminated Avant's contract for cause (default) for "failure to provide the contracted number [1300] of acceptable items." The Board found the Army's argument unsupportable. Delivery of the 1300 items was not a contractual requirement, given that the modification had explicitly descoped them from the contract. Consequently, the Army could not terminate the contract for failure to deliver, and the appeal was sustained.

In *HCS*, the Navy awarded a firm fixed price contract for excavation, removal and replacement of pipeline at Corpus Christi Naval Air Station. After completion of the work, the Navy Contracting Officer Representative ("COR") recommended and the Contracting Officer agreed that the contract price must be revised downward by more than 50% (from $40,975 to $21,082) because of lower costs incurred by HCS in performing the contract. The Navy maintained that the problems were in a 4" pipeline rather than an 8" pipeline stated in the statement of work, and the Navy unilaterally repriced the entire fixed price contract on a cost incurred based. However, the Navy offered no proof of any entitlement to a price reduction because of the different pipes. The Board noted that "a contractor is entitled to receive its contract price where the government fails to demonstrate entitlement to a contract price reduction for deleted work." Indeed, the Board found that HCS had performed extra work, and the Navy had so conceded.

The takeaway from these cases is simple: Agencies, just like contractors, are bound by the written words of the contract. If the agency is unhappy with the price, or the result, but that price or result complies with the contract, there will be no relief for the agency.