

GOVERNMENT BEARS BURDEN OF PROVING EXCESS COST OF REPROCUREMENT

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When the government defaults a contract and seeks excess costs of reprocurement, this is a government claim against the contractor, and it is the government's burden to prove the elements of the reprocurement costs as well as the actual amount of the excess costs. A recent case at the Postal Service Board of Contract Appeals demonstrates that the government's failure to prove these costs will result in no recovery. *Angela Pugliese v. United States Postal Service* ("USPS"), PSBCA No. 6856, March 21, 2023.

Angela Pugliese had a contract with the USPS to deliver and collect mail along a route in Alaska. The contract was fixed price with economic price adjustment and other price adjustments made in accordance with USPS Instructions, including extra trips. The contract could be terminated for default by USPS. In March 2020, Ms. Pugliese had an off-duty motor vehicle accident after completing her delivery route. The accident occurred in the vehicle she used to perform the contractor. Some undelivered mail dating back a year was recovered from her vehicle. The USPS denied Ms. Pugliese access to the mail and USPS premises. USPS instructed her to provide service with a hired driver, but Ms. Pugliese did not do so. Less than a month later, the USPS terminated her contract. In a separate decision, the Postal Board found the termination to be proper.

USPS awarded a temporary service replacement contract to Ms. Brittnae Tolliver, after soliciting for the replacement.

The USPS issued a final decision claiming \$50,875 in excess reprocurement cost, but reduced its damages to \$34,071 by recalculations.

The Board noted that USPS may recover "additional costs associated with its reprocurement efforts to replace the terminated service" but has the burden of demonstrating three things:

- 1) Reprocured services are the same or similar to those involved in the terminated contract (the Board found that the services differed slightly, but not meaningfully, and the USPS had met its burden).
- 2) USPS acted reasonably to mitigate the excess costs incurred (The Board found that USPS had met its burden and acted within a reasonable time of default, used the most efficient method of reprocurement and mitigated its losses).
- 3) USPS must show it actually incurred the excess reprocurement costs it demanded (See below).

The Board found that USPS had not met its burden for item (3) above. First, its claim included costs that it had not yet occurred. USPS caselaw states that reprocurement costs must be contingent upon a showing that performance was completed and payment was made. Second, the USPS failed to demonstrate entitlement for its payments made to Ms. Tolliver. The Board found that the evidence produced by the USPS was inadequate and USPS used an estimating methodology that was insufficient. The Board concluded as follows

In sum, the Postal Service did not provide sufficient evidence of its damages. To award any amount here would require us to speculate about evidence that was not produced, and we will not do that. [The USPS] failed to present evidence of payments made to the replacement contractor. [] it failed to explain why the payments different each month and why none of those payments corresponded with either of the two annual rates provided for the replacement contracts. This explanation was critical [because of the price adjustment clauses in these contracts].

Takeaway. The burden of proving correct methodology as well as actual costs incurred for excess procurement costs is on the government. Any failure may result in a court or board finding that the government is not entitled to these costs.

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