CONSTRUCTIVE CHANGE ORDERED, BUT THERE WERE NO DAMAGES

In a recent case at the Court Appeals for the Federal Circuit ("CAFC"), the Court concluded that the government ordered a constructive change, but the contractor received no compensation because it failed to prove that it suffered any damages. *Pacific Coast Community Servs. Inc. v. United States,* No. 2020-1219 (Fed Cir. April 30, 2021).

The Federal Protective Service ("FPS") awarded a contract to Pacific Coast for administrative support services. The solicitation for that contract required offerors to provide five full time equivalent employees for four Contract Line Item Numbers ("CLINs"). The solicitation incorporated a pricing worksheet, which required 2,000 productive hours, and an unspecified number of vacation hours. Pacific Coast's proposal listed 1,888 productive hours per employee per year, or 2,000 hours less annual vacation. When A new FPS contracting officer arrived, he required Pacific Coast to perform 2,000 hours of productive hours with full replacement of any absent employee regardless of the duration of their absence. The dispute was whether Pacific Coast needed to provide 2,000 hours or 1,888 productive hours per year, with the contractor seeking the difference between the price of 2,000 hours and 1,888 hours.

The Court of Federal Claims held that the contract only required 1,888 productive hours per employee per year and that the government had constructive changed the contract when it demanded 2,000 productive hours. However, the court held that Pacific Coast had failed to provide any harm resulting from the constructive change, and awarded no damages. The CAFC agreed.

At the CAFC, the court agreed with the Federal Claims court, but noted that any compensation for a claim cannot be based on a speculative theory of damages—and cannot award an equitable adjustment when this would result in a windfall. In the case, Pacific Coast admitted that it did not provide "a level of performance exceeding 1,888 productive hours per year, per CLIN." Pacific Coast provided no evidence to show costs incurred as a result of the government's constructive change—and this was fatal. Pacific Coast's argument that it should be entitled to some kind of speculative increase in the "value" of the contract was rejected by both Courts.

Takeaway. A contractor seeking damages bears the burden of proving them—regardless of any constructive change that the government has made to the contract. Pacific Coast attempted to argue that this contract was like a fixed price contract for each CLIN, but the courts rejected this because the contractor produced no evidence to show that it actually furnished work in excess of the 1,888 productive hours (in its proposal). Also, Pacific Coast admitted that it did not perform beyond the 1,888 hours in the contract.

Be sure that you can prove your damages as part of your claim. The government will not grant you a "windfall" based on some speculative theory of damages.

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