

PROVING (AND NOT PROVING) YOUR CLAIM WITH CERTAINTY

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It is well-recognized that a party (either government or contractor) that seeks recovery of its incurred costs has “the burden of proving the amount...with sufficient certainty so that the determination of the amount...will be more than mere speculation.” *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759 (Fed. Cir. 1987). What happens when you engage experts to price your claim and they submit 5 different amounts and conflicting methodologies? You guessed it—the Board denies your claim. See *SRM Group, Inc. v. Dept of Homeland Security*, CBCA 5194, 5938, March 11, 2021.

SRM filed a claim when the Department of Homeland Security first deleted two buildings from a housing management contract it was performing, and later added the two buildings back into the scope of work. SRM, of course, was entitled to an equitable adjustment for the reinstatement of the buildings.

SRM initially requested \$2,644,968 first in an equitable adjustment request, and then in a claim. Only \$1,128,687 was allowed by the contracting officer. SRM then appealed to the Board. Ultimately, the contracting officer adjusted this to \$1,509,836. However, SRM pursued its claim at the Board for higher amounts.

Then followed negotiations, and the presentation by SRM of five reports by two different experts, as follows, identifying the “correct amount”

Report 1: \$5,682,501
Report 2: \$4,007,650
Report 3: \$3,915,825
Report 4: \$2,261,676
Report 5: \$3,359,075

The government’s expert examined the five reports, and testified to inconsistencies, lack of adequate support, and failure to comply with the FAR requirements.

The Board identified the sole issue as whether SRM had sufficiently established the costs claimed and their connection with the changes ordered. The Board noted that the burden of proof was on SRM. The Board held that “the fact that SRM provided five different expert reports, each containing different methods and figures, and provided no explanation for the differences, does not meet the burden of proof.” The Board found that the methodologies in the reports were contradictory and imprecise. The Board concurred in the government expert’s evaluation, and concluded that SRM had not met its burden to prove quantum. The Board refused to provide anything beyond what the agency had already paid (\$1,509,836).

Takeaway. The contractor has the burden to prove quantum for its claim. Similarly, when the government makes a claim (such as defective pricing or excess cost of procurement), the government has the burden to prove its quantum. While using experts is commendable, if

multiple experts are used it is essential to explain why the reports reach different conclusions or use different methodologies.

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