

## **BURDEN OF PROOF CHANGES**

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When a contractor seeks an equitable adjustment for increased cost or time, the contractor bears the burden of proof. It is a “well-established rule that a contractor seeking an equitable adjustment for increased costs has the burden of proving entitlement and quantum to its claim.” *Raytheon Co. v. United States*, 747 F.3d 1341, 1352 (Fed. Cir. 2014), citing *Servidone Constr. Corp. v. United States*, 931 F.2d 860, 861 (Fed.Cir.1991). When the government submits a claim, however, the burden of proof shifts, and the government bears the burden of proof. For example, the Government has the burden of proof for all elements of defective pricing cases. *Singer Co., Librascope Div. v. United States*, 576 F.2d 905, 919 (Ct. Cl. 1978). A termination for default is also a government claim, *Securiforce Int'l Am., LLC v. United States*, 879 F.3d 1354, 1363 (Fed. Cir. 2018), and the government bears the burden of showing that the default was proper. Similarly, a government claim for liquidated damages is also a government claim, and the government bears the burden of proving the claim and damages.

This shift in the burden of proof was also found in *Maxway, Inc. v. U.S. Postal Services*, PSBCA no. 6906, March 31, 2023. Maxwell appealed a U.S. Postal Service (“USPS”) decision upholding a prior offset of \$100,975 from contract payments for 21 mail transportation contracts involving 709 trips. Each of the contracts required Maxway to transport mail in accordance with the operating schedule for outbound and inbound trips. Before Maxway’s trucks left the USPS loading dock and when they returned, a USPS expediter was supposed to scan the truck’s barcode, and the scan would be recorded in the USPS Surface Visibility system.

For the 709 alleged omitted trips, there were no departure or arrival scans, each of which resulted in issuance of an electronic USPS Form 5500 alleging omitted service.

In analyzing this claim, the Postal Service Board of Contract appeals began by saying that “this is a Postal Service monetary claim and the Postal Service has the burden of proof of whether Maxway failed to provide the required service.” To attempt to meet its burden, the USPS investigated Maxway’s response to the USPS Forms 5500, and checked with personnel for the missing scans—but these actions were not tied to any particular missing trip. There was no testimony, logs, checklists or line-item summaries showing what was specifically checked by USPS administrative officials to validate the missed scan for each trip. (The USPS officials testified that they had files, but the USPS did not introduce these files or a summary of these files into evidence). Rather, USPS testimony consisted of sweeping, general assertions. The PSBA noted that “a missed scan without the evidence of what was specifically checked to validate the trip was not performed fails to meet the burden of proof.”

The Board held in favor of Maxway, and directed the USPS to repay the \$100,975 that had been offset from payments under the 21 contracts, plus Contract Disputes Act Interest.

**Takeway.** Neither government nor contractor should ignore the burden of proof in prosecuting a claim. In order to win, the evidence must be detailed and specific.

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