

CLIENT ALERT

Better to Ask Permission than Forgiveness: ASBCA Denies Subcontract Payments

Jan.18.2019

On November 19, 2018, the ASBCA denied KBR's claim for reimbursement of REA payments made to KBR's subcontractor supplying trailers to the Army in Iraq. The cost-reimbursement task order permitted payment of "reasonable" allowable costs. KBR alleged that the government failed to perform the prime contract or, alternatively, was obligated to change the period of performance, and, thus, was responsible for the subcontractor's delays and additional costs sought by the subcontractor's REA and paid by KBR. The Board held that KBR was not entitled to reimbursement because the terms of the fixed-price subcontract did not obligate it to reimburse the additional costs, the decision to pay the subcontractor was a business decision KBR made, and the government did not object to any performance period extensions KBR granted to the subcontractor. The Board also found that the subcontractor's REA costs were not substantiated, because they were not based on actual costs (although the subcontractor had this information), but on market estimates and delay models (which the Board found to be unreasonable). The Board rejected KBR's argument that actual costs were not required because the subcontract was for commercial items, finding that the subcontract did not state it was for commercial items or contain commercial item clauses.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Nicole Owren-Wiest

Partner – Washington, D.C.
Phone: +1 202.624.2863
Email: nowrenwiest@crowell.com

Stephen J. McBrady

Partner – Washington, D.C.
Phone: +1 202.624.2547
Email: smcbrady@crowell.com

Skye Mathieson

Counsel – Washington, D.C.
Phone: +1 202.624.2606
Email: smathieson@crowell.com

Catherine O. Shames

Associate – Washington, D.C.
Phone: +1 202.688.3446

Email: cshames@crowell.com