

## CLIENT ALERT

### “Show Us the Money (Trail)”: Estimated Subcontract Costs Disallowed for Lack of Proof

September 2, 2020

In *Kellogg Brown & Root Services v. Army* (Sept. 1, 2020), the U.S. Court of Appeals for the Federal Circuit denied KBR’s reimbursement request for payments made to a subcontractor due to a lack of proof that the costs were reasonable. KBR had argued at the Armed Services Board of Contract Appeals (“ASBCA”) that the government’s failure to provide force protection caused KBR’s convoys to back up at the Kuwait/Iraq border. KBR sought to recover amounts it paid its subcontractor for resultant delays and additional costs. The ASBCA denied KBR’s claim, finding that (1) the government had not breached the prime contract’s force protection clause, and (2) even if it had, KBR did not carry its burden of proof that the subcontract costs were “reasonable” under FAR 31.

The Federal Circuit declined to decide the breach question and affirmed the ASBCA’s second holding that KBR failed to show that its subcontract costs were reasonable. The Federal Circuit rejected KBR’s subcontractor cost calculation as unreasonable because “KBR supplied no meaningful evidence to the Board showing the reasonableness of its costs” and failed to explain “inconsistencies between its proposed cost model and the factual record.” Specifically, the Court found that KBR’s model was “inconsistent” with the [subcontractor’s] records”; KBR did not “disaggregate” the causes of delays and instead attributed all delays to the government, which was “not realistic”; “KBR offered no fact or expert witnesses to support the reasonableness” of its estimate of idle trucks; and KBR offered no data or evidence to support the reasonableness of a “composite rate” rather than the subcontractor’s actual costs. The decision is a good reminder of the need to develop sufficient evidence to show that claimed costs are reasonable under FAR 31.201-3.

In dissent, Judge Newman advocated remand to the Board for factual development, stating, “The court complains about the absence of evidence and expert testimony,” even though “there was no hearing, no testimony, no briefing, and no argument on the court’s new [reasonableness] standard.”

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

**Stephen J. McBrady**

Partner – Washington, D.C.  
Phone: +1.202.624.2547  
Email: [smcbrady@crowell.com](mailto:smcbrady@crowell.com)

**Nicole Owren-Wiest**

Partner – Washington, D.C.  
Phone: +1.202.624.2863  
Email: [nowrenwiest@crowell.com](mailto:nowrenwiest@crowell.com)

**Skye Mathieson**

Counsel – Washington, D.C.  
Phone: +1.202.624.2606

Email: [smathieson@crowell.com](mailto:smathieson@crowell.com)