

Retain Evidence

Written by Nick Sanders
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A recent [ASBCA decision](#) contains a reminder that contractors should retain evidence and other documentation, even stuff that might not seem to matter now—but will matter in any dispute that goes to litigation.

Strategic Technology Institute, Inc. (STi) had received its first cost-type contract from the US Navy in 2008. As required by contract terms (i.e., clause 52.216-7), STi timely submitted its proposals to establish final billing rates (commonly called an Incurred Cost Proposal or ICP) for the two years of contract performance.

Allegedly.

STi asserted that it timely submitted its ICPs; however, the government—particularly DCAA—had no record of receipt. STi (allegedly) submitted its proposals but no auditors ever showed up to audit the submissions. The situation stayed that way until 2014.

In July, 2014, “DCAA was auditing STi’s 2010 ICP, which would have been submitted in June 2011 -- three years earlier. The auditor found reference to 2008 and 2009 costs, and requested from STi copies of its 2009 and earlier ICPs. STi promptly provided the 2008 and 2009 submissions to DCAA. At this point in July 2014, the 2008 ICP had been prepared five years earlier.”

DCAA audited 2008 and 2009 and, based on that audit report, three years later the DCMA contracting officer issued a Final Decision demanding \$1.1 million. The COFD was issued in November, 2018—“over nine years after the 2008 ICP was prepared, but less than four-and-a-half years after DCAA requested the ICPs from STi in July 2014.”

Before the Board, STi argued that the government’s claims were time-barred by the Contract Disputes Act’s six-year Statute of Limitations. The Board didn’t buy that argument—primarily because STi was unable to provide any evidence that it had actually submitted the proposals when the company said it had done so. Moreover, STi said that the passage of time prevented the company from actually disputing the government claim. Thus, if the Statute of Limitation argument failed, the company had nothing else to fall back on.

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The argument failed.

The Board's decision stated—

We hold that the contract required STi to submit its ICPs, and that STi has not established, by a preponderance of the evidence, that it submitted its ICP prior to July 2014. Additionally, we hold that the government did not know and had no reason to know of its claims against STi until it received the 2008 and 2009 ICPs in July 2014. Accordingly, we sustain the government's claim, reject STi's statute of limitation defense and deny the appeals.

The lesson here is simple: retain evidence that the proposals were submitted. Do not rely on the government agreeing with you as to when (and if) they were submitted. Obtain confirmation. Print out the confirmation and retain it in your ICP support files.

You have ICP support files, don't you?

You are going to experience turnover in personnel. You are going to have documents sent to storage or otherwise purged. Consequently, you are going to want to have robust files related to all significant decisions made during the account "scrub" and proposal preparation process.

If you don't have such files, you risk ending up as STi did, with no ability to dispute DCAA's audit findings, because you simply lack the documentary evidence to disagree with them. Not a great place to be in, is it?

I remember when we went to support the government audit of our 1986 proposal to establish final billing rates. This was back in the day when general ledgers were printed out, bound, and retained. We had taken all the old general ledgers and put them in an unused room, awaiting audit. When the audit finally came (in the late 1990's—please don't ask why it took so long), we went to pull the 1986 general ledger to show the auditors how our ICP reconciled ... only to find that somebody had "cleaned" the office by throwing out all the documents that we had carefully

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retained.

What did we expect was going to happen? The office was unused, and filled with papers more than a decade old. Of course somebody was going to clean up the mess! (Or so it was explained to us.)

Anyway, that made the audit support of the 1986 ICP rather challenging, to say the least.

Don't be like STi or like the company I worked for in the late 1990's. Retain your documents. Label them. Ensure they are not thrown away.

If you do all that, your audit will go better, I'm sure.