

## **HCR Contractors Can Recover Cost of Performing under a Defective Schedule PSBCA Ruling Provides New Grounds for HCR Contract Claims**

**By David Hendel**

HCR contractors now have a new way to recover the additional cost of performing under a defective contract schedule. The Postal Service often tries to foist the costs of a defective schedule on the contractor by not paying for the additional time it takes to complete the route. In some cases, Extra Trips may be authorized, but this can still short-change the contractor. Under a recently issued PSBCA decision, a contractor who shows that the schedule is defective now has grounds to recover the full cost of having to perform under it. The case is *Weber Trucking, LLC*, PSBCA Nos. 6784 and 6813, decided on November 19, 2021.

### **Background**

Weber Trucking was an experienced contractor who twice won the Postal Service's Eagle Spirit award and held 15 mail transportation contracts. Weber bid on a Contract Delivery Service contract to provide service on four routes servicing Westridge Station, outside of Las Vegas, NV. Weber lost to a lower priced bidder. But the day before the contract was to begin, the awardee told the supervisor he had looked at the routes and could not perform the contract. With less than 24 hours before the new contract was to begin, the contracting officer offered the contract to Weber. He accepted and began performing the next day despite not having a written contract.

Within the first week of performance, Weber found that the routes could not be completed within the schedule's required departure and return times. He requested a route survey. While that request was pending, the Postal Service threatened not to pay his invoices unless he signed the contract documents. Weber did so, signing the contract documents on the day it was presented to him.

### **Contract performance issues**

During performance, Weber incurred additional performance costs from multiple causes, including:

- Unexpectedly high mail and parcel volume
- Incorrect route lengths and mileage
- Held back from departing on time for late arriving mail
- Out-of-date delivery edit book (by more than 2 years)
- Entire housing subdivision left off of the schedule
- USPS failure to conduct a route survey
- AO did not know how to administer the contract

Weber advised the contracting officer and contract specialist of the difficulties he was encountering and that he had to split one of the routes into two routes – adding an additional driver and vehicle. The contract specialist responded that he should “do what [is] necessary to get the job done.”

Unfortunately, the Postal Service did nothing to fix the problems or increase the contract price, so Weber provided 60-days' notice that it was terminating the contract under the Termination with Notice clause. Internally, the contract specialist then contacted a local postal official who noted the route surveys “look like they were not done correctly.” Shortly before the end of the 60-day period, the contract specialist assured Weber that the line of travel and schedule would be corrected and asked him

to keep the contract. Relying on the understanding that these defects and other problems would be “straightened out,” Weber withdrew his notice and continued to perform the contract.

Four months later, the Postal Service still took no action to correct the contract. Finally, a senior contracting official instructed Weber to depart and return to the postal facility strictly by the scheduled time, even though his drivers would not be able to finish their routes within this time. When they returned to the postal facility, the drivers were then to go back out on their routes to complete their deliveries. He instructed Weber to submit a PS Form 5397, Contract Route Extra Trip Authorization, for these Extra Trips. The senior contracting official told Weber to submit the forms himself, because local postal officials were not doing their job and this would compel them to do so.

Weber followed this instruction, but the Postal Service never paid Weber for these Extra Trips. Eventually, the Postal Service issued a unilateral modification that retroactively increased the price for additional mileage, but this did not cover the increased labor and vehicle costs. Weber tried to contact postal officials to fix the contract, but the CDS office was transitioning to a new office and the former contracting officer had retired.

Weber filed a second notice of termination, which ended the contract in 60 days. During this time, the Postal Service finally conducted new route surveys, showing that 3 hours and 52 minutes should be added to the four routes. Weber conducted his own surveys, which showed 4 hours and 41 minutes should be added. The Postal Service, however, retroactively added only 1 hour and 23 minutes.

### **Weber Trucking’s claim**

After the contract was over, Weber Trucking submitted a request for equitable adjustment for the increased costs of performing the contract. He sought amounts for each of the following:

1. Additional hired labor
2. Additional supervisory labor (Weber’s own time)
3. Vehicle costs
4. Attorney fees to prepare the request
5. Cost of money
6. Profit

The Postal Service did not respond to the request, so he filed a claim on a similar basis. The Postal Service also failed to issue a final decision on the claim, so Weber brought an action before the Postal Service Board of Contract Appeals (PSBCA). Weber’s claim sought recovery under a variety of different legal grounds.

After five days of trial, and extensive briefing, the Board held that Weber was entitled to recover its increased cost of performance. The Board, however, was not of one mind as to the legal bases that established Weber’s right to recovery.

### **Defective specifications**

The presiding judge – who conducted the hearing and heard all of the testimony – sustained Weber’s claim on two separate grounds, the first being “defective specifications.” When an agency provides a contractor with defective specifications, the agency breaches an implied warranty that satisfactory performance will result from adhering to the specifications. When an agency has specified

the manner in which work is to be done, it warrants the outcome. A contractor is thus entitled to recover all the additional costs that proximately flow from performing in accordance with defective specifications.

The doctrine of defective specifications applies only when the agency prescribes the precise manner in which work is to be performed. In Weber's case, as with all HCR contracts, the presiding judge found that the contract prescribed the method of completing the contract. For example, the contract specified the number the vehicles and drivers per route, the line of travel, the method of delivering mail, departure time, return time, and sorting method.

The Postal Service did not dispute that the specifications were defective as to the number of boxes and mileage, and conceded that the mail volume and mail mix increased the estimated hours needed to complete each route. But it argued that under the contract's adjustment clause, Weber was only entitled to the additional compensation derived by a special formula USPS used. The Board rejected this contention because the Postal Service had complete control over the formula so Weber could not have meaningfully agreed to it. In addition, the formula could only have been effective for minor changes and could not apply where a route was so poorly crafted that it had to be split into two separate routes. The Board reached back to a nearly 100 year old legal decision holding that a mail contractor's acceptance of contract terms "did not bar recovery for what the services were reasonably worth."

The Postal Service next tried to hold Weber's dedication to the Postal Service against him. The Postal Service noted that Weber – at the contracting officer's request – began performance without a written contract. When presented with the written contract six weeks later, the Postal Service argued, he could have backed out and refused to sign. By that time he knew the specifications were defective. The Board rejected this argument because Weber *had* asked for a route survey by then, and this put USPS on notice that the schedule was defective. In addition, the Postal Service coerced Weber into signing the contract because it threatened to withhold his pay until he did.

The Postal Service next contended that Weber could recover no more than \$2,500, because the Changes clause requires a formal bilateral modification for any service changes over that amount. Since there was no mutual agreement, the Postal Service argued, Weber was limited to the "minor changes" portion of the clause that covers amounts up to \$2,500. The Board rejected the argument, finding it was fundamentally flawed because the Changes clause presumes the Postal Service will act in good faith and not demand excessive additional work.

### **Superior Knowledge**

The presiding judge also held that Weber was entitled to recover based on the Postal Service's withholding of superior knowledge. This grounds requires that a contractor show: (1) it did not know a vital fact impacting performance, (2) the agency knew the contractor did not know it and had no reason to obtain it, (3) the contract misled the contractor, and (4) the agency failed to disclose the vital fact.

Weber met this test. Weber attempted to perform without knowing that the estimated hours were woefully incorrect, and the Postal Service knew that Weber did not have this information. When it had issued the solicitation, the Postal Service knew that one of the routes had to be split due to the number of parcels, but USPS did not check the other routes. The Postal Service misled Weber by representing that the contract could be performed within the hours identified in the schedule. The Postal Service also failed to provide Weber with the correct number of hours needed to perform the contract.

The Postal Service argued that Weber had accepted the risk of performance and thus was not entitled to additional compensation when performance took longer than expected. But the Board held that Weber could not have knowingly accepted the risk. He had no way of knowing how much mail would be tendered or the defective nature of the schedule.

### **Oral agreement**

The other two judges hearing the case also found Weber was entitled to recover, but on different grounds. They found that there was a long and consistent agreement between the parties to amend the contract if it took longer to perform than set out in the contract. The Postal Service had acknowledged that an extra vehicle was needed and told Weber to do what was necessary to get the contract completed. And eventually, after Weber gave his second termination notice, the Postal Service agreed to perform a route survey and pay Weber for any errors in the schedule.

These actions and agreements, the two judges found, were sufficient basis to sustain Weber's claim. Since Weber could recover its increased cost on this grounds, the two panel judges did not believe it was necessary to further decide whether Weber could also recover under the theories of defective specifications and superior knowledge.

### **Damages**

Although the three judges reached their decision in different ways, they all agreed Weber was entitled to recover damages for the increased cost of performing the contract.

Weber sought damages under the total cost method (TCM), which is the total cost to perform minus the bid price. A TCM claim may be used when the costs arising from individual changes cannot be tracked to a reasonable degree of certainty. A TCM claim is appropriate when the contractor lacked responsibility for adding to performance cost. Here, the Board found Weber had problems with inefficient drivers at various times during performance, so TCM was not the best method for calculating damages. Instead, the Board examined each category of cost separately.

#### **1. Additional Hired Labor**

As to additional labor hours, the Board determined that performance took 4 hours and 7 minutes longer per day to complete than scheduled. The Board determined this based on the route surveys Weber had conducted, with some minor adjustments. Applied over the 455 days of performance, and applying a \$24 hour payroll cost, the Board allowed \$45,038 for additional labor.

#### **2. Supervisory Labor**

Weber also sought to recover the time spent on supervising the work under the contract, which had expanded due to dealing with the defective specifications. Weber estimated that he spent, on average, an additional one hour per day to manage the contract beyond what he had expected. The Board agreed. Weber sought a modest \$30 per hour for his time, which the Board applied to the additional 455 hours, resulting in \$13,659.

#### **3. Additional Vehicle Cost**

Weber split one of the routes, requiring an additional vehicle. He used Cost Statement values for the cost of the additional vehicle. The Postal Service objected because his figure was based on a fleet average, but the Board accepted it, finding that it would not make a material difference in the amount of damages. The Board awarded \$8,904 for the cost of the additional vehicle.

#### **4. Counsel cost**

Weber hired counsel (your humble author) to prepare and present his request for equitable adjustment to the Postal Service before bringing a claim. The Postal Service objected, contending these were litigation costs or not allowed under the Changes clause. The Board rejected these arguments, finding that consultant and attorney costs incurred in drafting and presenting a request for equitable adjustment are recoverable.

The Board noted that in his request for equitable adjustment, Weber proposed a lower amount for attorney costs than he incurred to encourage USPS to reach a settlement. But the Postal Service did not engage with Weber. In the end, Weber recovered the full amount of attorney costs incurred.

#### **5. Cost of money**

Weber sought to recover its cost of money in funding the additional performance cost. The Board agreed that Weber could in theory recover interest costs on borrowed money to fund these costs. But the Board held that Weber needed to show that its borrowing was attributable to the specific contract in question. Weber's accountant was not able to allocate the cost of borrowed money between this contract and his other contracts, and there was no evidence on this issue, so the Board did not award any amount on this item.

#### **6. Profit**

Weber sought profit on all of the above costs, except for vehicle costs which already included profit. Weber sought 15% profit due to the inordinate risk posed by the defective specifications. The Postal Service objected to any profit award, contending that the Cost Statement contains no separate listing of profit.

The Board rejected the Postal Service's contention and awarded 10% profit based on Weber's historic profit rate. Given that the Board had already provided an amount for supervisory costs, it believed the 10% rate was sufficient profit under the circumstances. Weber was also entitled to recover Contract Disputes Act interest on all of these amounts from the date his claim was certified.

#### **Take-aways for HCR contractors**

Here are four take-aways for HCR contractor stemming from this case:

- If the contract schedule is not accurate, immediately notify the AO and the contracting officer of the problems you are encountering and request a route survey. This will prevent USPS from later claiming that it was unaware of any defects in the schedule.
- If you regularly cannot complete performance within the schedule time, you may be entitled to a price adjustment due to a defective specification. Keep track of the costs you incur and submit a request for price adjustment to the contracting officer.

- Even if you are issued Extra Trips, you are not necessarily limited to Extra Trip rate compensation for performing under a defective schedule.
- If you need to add an additional vehicle or driver to meet the schedule, notify the contracting officer that is what you are doing. To prevent the Postal Service from claiming you were not authorized to do so, ask the contracting officer if you should stop splitting the route and instead return to the Post Office by the schedule time.

The main impact of this case for HCR contractors is the holding by the presiding judge that contractors may recover for the cost of performing under a defective specification and for USPS failure to disclose superior knowledge. These are new legal grounds for recovery, and they may apply to many contractors.

The decision also soundly rejects the old arguments that USPS regularly trots out to deny recovery. Let's hope we no longer have to hear the argument that the hours and miles in the contract are just estimates so the contractor accepts the risk of meeting the schedule if they are inaccurate. That argument did not work here and USPS should stop making it. In addition, let's hope this case ends the argument that the Changes clause does not allow contractors to recover more than \$2,500 from USPS changes. These arguments were put to rest by the Board and let's hope USPS puts them to bed as well.

Finally, on a larger scale, this case shows the problems that can arise from the disconnect between CDS purchasing officials and local officials administering the contract. Weber immediately notified the AO and the CDS Office of the problems he was having and the defective nature of the schedule, and even issued two separate termination notices to try to catch USPS's attention. But despite being an experienced, double Eagle Supplier Award winner, this was not enough to get the problems fixed. When he later submitted a request for a price adjustment, he was ignored. When he brought a claim, the Postal Service fought tooth and nail to deny him compensation. There has to be a better way to make these contracts work properly than what happened in this case.

### David Hendel

Partner



 [202-683-2022](tel:202-683-2022)

 [dhendel@cm.law](mailto:dhendel@cm.law)



1701 Pennsylvania Avenue NW, Suite 200  
Washington, DC 20006-5823