



GOVERNMENT CONTRACTS

update

Contract Performance Pitfalls Lessons Learned from 2012

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Common Law Duties

- In addition to the myriad of clauses that appear in every Government contract, the principles of common law also apply and are useful to understand.
- In *Teresa A. McVicker, P. C.*, ASBCA No. 57487, 2012 WL 3645366 (August 16, 2012), the board found that the Government had breached the covenant of good faith and fair dealing when it contracted with a company for the services of two physician assistants and then proceeded to hire them directly as Government employees.
- The board found that the Army's subsequent termination for convenience was improper—a rare decision.
- In *D'Andrea Brothers LLC v. U.S.*, 109 Fed.Cl. 243 (2013), the Court of Federal Claims also applied this common law principle in holding that the Government breached its agreement with the plaintiff.
- **Moral:** There are limitations on the discretion of Government officials.

Mistakes

- Mistakes are a common part of Government contracting and are classified either as mistakes in bid or mistakes in contract.
- The remedy is “reformation,” a feature of common law.
- The Government rarely admits it made a mistake, so most mistake claims are “unilateral” rather than “mutual.”
- In *Red Gold, Inc. v. Dept. of Agriculture*, CBCA No. 2639, 2012 WL 2869697, the board upheld the contractor’s appeal from the DA’s denial of a reformation claim.
- The contractor met the five elements for relief for a unilateral mistake claim.

Elements of Proof for a Unilateral Mistake Claim

- A mistake in fact occurred prior to contract award;
- The mistake was a clear-cut mathematical or clerical error or a misreading of the specs;
- Prior to award, the Government knew or should have known that a mistake had been made;
- The Government failed to request bid verification; and
- The contractor can prove its intended bid.

Releases

- Releases are commonly used in connection with settlement of claims.
- In prime contracts, FAR 43.204 contains the prescribed language for C.O.s to use.
- In *Walsh/Davis J.V. v. GSA*, CBCA No. 1460, 12-1 BCA 34,968, the board held that the prime's sponsored claim to recover cumulative labor inefficiency for its sub was barred by the release language in contract modifications.

Releases

- In *Hedgecock Elec., Inc.*, ASBCA No. 56307, 12-2 BCA ¶ 35086, the ASBCA reversed in part the Government's assessment of liquidated damages against a contractor that was 77 days late in finishing the construction and repair of an airfield taxiway.
- The Government tried to argue that the broad release language in bilateral modifications served as an "accord and satisfaction" (another common law concept) and barred any more claims, but the board rejected that contention because the record showed that the C.O. continued to discuss and negotiate with the contractor on its delay claim after the modifications were executed.
- **Moral:** Releases are binding and can only be ignored under limited circumstances.

Anticipatory Repudiation

- One of the most dangerous things a contractor can do.
- Will usually result in a termination for default.
- In *Brock v. U.S.*, 2012 WL 2057036 (Fed.Cl. 2012), the contractor claimed that the Army had abandoned the contract even though the contractor had refused to continue performance under a newly-reestablished delivery schedule.
- Court held that the contractor's promise of litigation and "no surrender" amounted to anticipatory repudiation.
- **Moral:** Stifle your "John Wayne" opportunities—never threaten a C.O.

Thank You

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