SQUARE CORNERS

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Nearly 100 years ago, U.S. Supreme Court Justice Holmes wrote "Men must turn square corners when they deal with the Government." *Rock Island, Ark. & LA RR Co. v. United States,* 254 U.S. 141, 143 (1920). About ten years later, 10th Circuit Judge McDermott added the statement that "The Government ought to turn square corners when dealing with its citizens." *Howbert v. Penrose,* 38 F. 2d 577, 581 (10th Cir. 1930). The "square corners" doctrine stands for fairness and full compliance with required procedures and due process. We recently got a whiff of this requirement in Judge Timothy J. Kelly's (D.C. District Court) ruling on a temporary restraining order that required the White House to restore CNN reporter Jim Acosta's "hard pass" allowing him entry into the White House. The White House had summarily removed the pass because of a verbal tiff between the President and Acosta at a press conference on November 7, 2018. Judge Kelly ordered the pass to be temporarily restored because the White House did not provide Acosta with the due process required by the 5th Amendment to legally revoke his press pass. "Adequate due process "must include notice, an opportunity to rebut the government's reasons and a written decision." *CNN v. Trump et al,* DDC No. 1:18-cv-02610-TJK (Motion Hearing, at 9), citing *Sherrill v. Knight,* 569 F.2d 124 (DC Cir. 1977). But we find these types of problems in much more mundane government contract issues, such as the government's withholding of money owed to a contractor. *CB&I Areva Mox Services, LLC v. United States*, Fed. Cl. No. 16-950C et al, Nov. 9, 2018 (hereafter "Mox Services").

Mox Services had a cost reimbursement subcontract involving construction and operations at the Department of Energy's ("DOE") Savannah River Nuclear Site. Mox and other subcontractors had overhauled its employees' titles, duties and, in the case of 55 employees, their compensation rates billed to DOE. The prime contractor did not notify DOE of the increased salaries, which occurred in 2015. In 2016, DOE conducted a labor verification for Mox, discovered that certain employee billing rates had changed and demanded certain supporting materials to permit DOE to make a cost-allowability decision, granting Mox only 6 days to provide the data. DOE alerted Mox that if the additional documentation was not provided in that time frame, the "Agency would take appropriate action…to protect the Government's interest." Four days after the due date, because it did not receive the data, DOE began to withhold 2 percent of the total direct labor expenses, totaling $1.1 million.

Mox submitted a certified claim for the $1.1 million, asserting that DOE did not follow the formal "disallowance procedure" set forth in FAR 42.801 and the DOE Acquisition Regulation, 48 CFR § 942.803. In order to disallow costs, the contracting officer must provide official notice of the intent to disallow the disputed amount. 48 CFR § 942.803(a)(2). DOE never issued proper notice of its intent to disallow. (Agencies are required to follow such regulations in administering contracts. *See Spherix, Inc. v. United States,* 58 Fed. Cl 351, 355-56 (2003)). The Court rejected as notice the "imprecise phase" that DOE used—"take appropriate action," because it did not convey to Mox that DOE intended to disallow costs.

The Takeaway. Both contractors and the Government must "turn square corners" in the execution of contracts. Of course, contractors must follow the FAR and agency regulations

precisely. But the Government must also faithfully follow its own applicable rules and regulations. The failure to grant a contractor all of the due process that exists in the FAR and DOE Acquisition regulation will not be overlooked by the courts.

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