

GOVERNMENT CAN'T RELY ON NON-CREDIBLE HERESAY TO SHOW FAILURE TO MEET CONTRACT SPECIFICATIONS

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In a recent construction contract, the Government sought to rely on testimony from a contract manager who “heard [] from another government employee [that the contractor failed to meet the contract specification].” *GSC Construction, Inc.*, ASBCA Nos 59046, 59957, July 11, 2019. The Armed Services Board rejected this type of hearsay (which could have been permitted by Board Rules) on the grounds that it was of insufficient credibility to prove the underlying conclusion.

Before discussing this matter, it would be useful to discuss the differences in the Federal Rules of Evidence (which bind the Court of Federal Claims), the Armed Services Board of Contract Appeals rules, and the Civilian Board of Contract Appeals rules.

In the Federal Rules of Evidence, Rules 801, 802 and 803 are particularly important to hearsay. Rule 801 provides definitions, including those matters that are excluded from hearsay. Rule 802 is “the Rule Against Hearsay” and states “[h]earsay is not admissible unless any of the following provides otherwise: a federal statute; these rules [of evidence]; or other rules prescribed by the Supreme Court.”

The Civilian Board rules state that in “rules on evidentiary objections, the Board is guided but not bound by the Federal Rules of Evidence, except that the Board generally admits hearsay evidence unless the Board finds it unreliable.” CBCA Rule 10.

The Armed Services Board rules state that the parties “may offer such evidence as they deem appropriate and as would be admissible under the Federal Rules of evidence or in the sound discretion of the presiding Administrative Judge or examiner. The Federal Rules of Evidence are not binding on the Board but may guide the Board’s rulings.” ASBCA Rule 10(c).

The bottom line is that the Boards are more liberal in permitting hearsay, but any hearsay must be reliable.

Now to the *GSC* case. *GSC* was awarded an Army construction contract for design and construction of warehouses in Mississippi. *GSC* made numerous claims for constructive change, which are not discussed here. However, there was one claim which dealt with hearsay. The government ordered *GSC* to redesign and reconstruct a truck turnaround area that *GSC* had previously built. The Government alleged that in November 2013, a tractor-trailer hauling a 53 foot shipping container was unable to maneuver the provided space and back up to the loading dock in order to unload the equipment. However, the government provided no evidence that was “first hand or of sufficient weight to show that a tractor-trailer hauling a 53 foot shipping container” could not unload at the loading dock. The Government merely offered the evidence of its contract manager, but the manager stated that he “heard it from another government employee.” The Board concluded that this evidence failed to credibly demonstrate that the truck turnaround did not meet contract specifications, and that *GSC* was entitled to its claim for the cost of redesign and reconstruction of that area. (The Board cited *Ensign-Bickford Aero. & Def. Co.*, ASBCA No. 57929, 16-1 BCA ¶ 36533 for the proposition that a contractor is entitled to an

equitable adjustment if the government fails to meet its burden of proving that the rejected work did not comply with the contract.)

How could the Government have provided reliable and credible evidence? The contracting officer could have observed the unloading of a tractor-trailer hauling a 53 foot shipping container, or could have sent a COR (contracting officer's representative) or another contracting official to observe the unloading. In either case, the evidence would have been first-hand, non-hearsay and likely admissible. But "hearing it from another government employee," where no specific person was called before the Board as a witness, and the case never even gave a specific name of a person who allegedly witnessed the problem, just did not satisfy the Board's desire for credible evidence.

Takeaway. Even though hearsay is admissible at the Boards, it will not be permitted as part of the record unless it is found to be reliable. Where the Government has the ability to provide reliable, non-hearsay evidence, the Boards will most likely admit it.

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