READ YOUR CONTRACT AND REMEMBER THE RULES

In two recent cases, one before the Civilian Board of Contract Appeals ("CBCA") and the other at the Federal Circuit, the contractors either failed to read their contract, or they ignored some basic contracting rules, like the plain meaning rule in contract interpretation or the rule that government oral statements, aspirations and a contractor's reasonable expectations are not contractual commitments—only the words in the contract are binding.

Future Forest

In *Future Forest, LLC v. Dept of Agriculture,* CBCA 5863, March 9, 2020, the contractor received an indefinite delivery, indefinite quantity ("IDIQ") contract from the Forest Service for treatment and removal of trees in a the Apache-Sitgreaves National Forest in Arizona. The contract included the normal indefinite quantity Clause, FAR 52.216-22, which stated that the quantities in the schedule were only estimates and delivery would be made only as ordered. The contract further stated that the minimum guarantee, for each program year was 5,000 acres, to a total of 50,000 acres over the ten year life of the contract.

The contractor's complaint alleged that the Contracting Officer, and the Forest supervisor and her contracting staff "made statement at meetings with the offerors and elsewhere that notwithstanding [the guaranteed minimum of 5,000 acres] the Forest Service would, nevertheless, still treat 150,000 acres over the term of the contract. The contractor stated that as a result of these representations, the Forest Service created a "reasonable expectation" that it would order 150,000 acres to be treated. Future Forest alleged that the government's failure to fulfill these "reasonable expectations" was a breach of the duty of good faith and fair dealing.

The appeal went nowhere at the Board. The CBCA stated clearly "Simply put, intentions, plans or anticipations on the part of agency officials, even a contracting officer, to order more than the stated minimums set forth in an IDIQ contract do not equal to contractual commitments." Furthermore, even acknowledging the government's covenant of good faith and fair dealing, this cannot expand a party's contractual duty beyond those in the express contract or create duties inconsistent with the contract's provisions. Contractors with the government cannot rely on the good faith covenant "to change the text of their contractual obligations." Furthermore, expectations "do not change the express nature of the minimum guarantee."

Takeaway: Future Forest was completely out of luck, and its entire appeal was denied. It either had failed to read its contract, or it didn't believe the words in the contract, which were clear. Furthermore, Future Forest attempted to argue that the words had been changed by oral statements (but not written commitments) of the Contracting Officer and other government officials. That is surely an argument that will lose at the Boards.

Team Hall Venture

In *Team Hall Venture, LLC, DBA Limeberry Frozen Yogurt v. Army and Air Force Exchange Service,* No. 2018-2283 (Fed. Circuit, March 12, 2020), the Court affirmed the decision of the Armed Services Board of Appeals which denied Team Hall's assertion that a release it had signed was ambiguous. The Board and the Court both found no ambiguity.

Team Hall submitted a claim on its military base concession contract. After the parties agreed to terminate the ten year contract early, they executed a Contract Amendment which further shortened the contract period by moving the termination date from July 17, 2016 to June 30, 2016 at Team Hall's request.

> The release stated:
>
> The contractor hereby releases the Army and air Force Exchange Service (the Exchange) from any and all obligations related to this contract, and waives any claim against the Exchange for monetary or other relief to this contract, including any that may arise in the future, to include the time period of 1-17 July 2016.

Team Hall argued that this release was (1) ambiguous as to whether it bars all claims under the contract, or only claims arising between July 1-17, 2016, and (2) that ambiguity should be resolved against the Exchange as the drafter of the contract (contra proferentem).

The Board found no ambiguity in this clause, and the Federal Circuit found none either. The Court made a clear statement that the plain language (the "plain meaning") of the words was not ambiguous. The plain language released the Exchange from "any and all obligations" and Team Hall had signed, thereby waiving any claim against the Exchange for monetary or other relief. The additional specification of the date July 1-17, 2016 did not create any ambiguity, it merely added a period that was also being waived. Team Hall's claim appeal was denied.

Takeaway: The first rule in contract (or statutory interpretation) is the "plain meaning" or "plain language" rule. In statutory or contract interpretation, "when the language is unambiguous and clear on its face the meaning of the statute or contract must be determined from the language of the statute or contract and not from extrinsic evidence." *Merriam-Webster.com Legal Dictionary.* When language is clear and unambiguous, Courts and Board are not to search outside the contract (or statute) for reasons to undo that language. In a recent Supreme Court case involving Exemption 4 of the Freedom of Information Act ("FOIA"), the rule was restated. *Food Marketing Institute v. Argus Leader Media,* 139 S.Ct. 2356 (June 24, 2019). In that case, the Court overturned a 45 year old D.C. Court of Appeals precedent that required companies demonstrate that disclosure of mandatorily submitted materials would "likely cause substantial competitive harm" in order to prevent disclosure. In *Food Marketing*, the Court (Justice Gorsuch) analyzed the plain language of Exemption 4 and found it contained no "substantial competitive harm" requirement. Instead of examining the "ordinary meaning and structure of the law itself," the D.C. Circuit examined legislative history and witness statements in the hearings. Justice Gorsuch called this 45 year old action a "casual disregard of the rules of statutory interpretation" which require, as a starting point, a "careful examination of the ordinary meaning and structure of the law itself.

Did Town Hall ever seriously read the release? We do not know. All we know is that two judicial bodies found the plain meaning of that release to be unambiguous. All contractors must start with the actual text of the contract.

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