

## Are You Smarter Than the Government?

Written by Nick Sanders  
Thursday, 23 March 2017 09:29

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No. No you're not.

And yet we keep hearing it. We keep hearing from clients—particularly from clients that are new to government contracting—how they have figured out things better than the Government has. If only the Government will listen to them...

We touched on this phenomenon in [this article](#). We noted that several small business clients had become accustomed to doing business their way. Those clients tended to be a bit surprised when they failed their DCAA pre-award accounting system review because “their way” didn't map well to “the Government's way.”

As our old friend Brent Calhoon likes to say, “You can't do business with the Government. The Government doesn't do business. The Government does government. So when you do business with the Government, you have to do government.” Too many government contractors haven't figured out that their cherished, innovative, approaches to government contracting just will not work. They haven't figured out that the Government wants them to do government.

We worked for several years at a very successful multi-national engineering services corporation. Multiple billions of dollars of annual revenue—about five percent of which was from the Government. Being a 95 percent commercial contractor—and a much respected industry leader in its niche—the company tended to do things its own way. And it hired a bunch of people to come in after the fact and “scrub the books” to make them compliant with government requirements.

It worked, to an extent. Zero CAS noncompliances; zero questioned costs. But the fact of the matter is that you simply cannot audit every single transaction. Eventually one transaction slipped through and \$35 million later the company's False Claim Act suit was settled.<sup>1</sup>

Now that company generates about half its revenue from Government sources and all accounting is done in accordance with Federal cost accounting rules. Adjustments are made (where necessary) to meet commercial needs. The company has learned which of its

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customers had the bigger stick.

With all that in mind, let's discuss the recent ASBCA [decision](#) in the appeal of Industrial Consultants, Inc. (DBA W. Fortune & Company). ICI was awarded a contract for HVAC work (that's heating, ventilation, and air conditioning) at a government facility. ICI was the low bidder (by more than 35 percent) and was awarded the contract. ICI had not attended the pre-bid site visit; however, upon the first post-award visit, ICI "concluded ... that the design provided by the government had significant problems [and] then began a campaign to redesign the work, which [it] refused to drop no matter how many times the Corps told [it] to build as designed."

Discussions, as they say, ensued. ICI refused to submit required documents and insisted that the design was flawed. As the decision noted, "Reacting to this in an internal email, one Corps employee observed 'He cannot seem to get over the idea that he cannot propose a system rather than simply execute the contract as agreed'."

The contract was terminated for default.

Continuing its contentious approach to contracting, ICI requested that the T4D be converted into a Termination for Convenience. Among other things, "ICI contended that the government provided defective specifications, failed to cooperate in approving submittals in a timely manner, breached the government's implied warranty of design and violated international building codes."

The Board was not impressed. The Termination for Default was upheld. We want to quote some more of Judge O'Connell's decision because it speaks to those contractors who believe they are smarter than the government customer who hired them. He wrote—

We have already rejected ICI's contentions that the government delayed the project. Rather, the record makes it clear that ICI delayed the project because it disagreed with the government's design choices and failed to provide timely or complete submittals. The record strongly suggests that ICI has a basic misunderstanding as to its role as a contractor on a government project. Despite ICI's views to the contrary, and as we now discuss, *government contractors must perform the contracts they execute and cannot require the government to rewrite the contract so that they can build some other project they like better.*

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It is well settled that the government is entitled to enforce its contracts so that it receives the work product provided for in the contract. The government enjoys considerable leeway in determining what to specify. The Federal Circuit has held in the context of selecting the performance of air conditioning equipment that the ‘government may require performance both in excess of, or below, the standard normally accepted in a trade.’

A number of cases from the Federal Circuit and the Court of Claims demonstrate that *the contractor's role is to build the project for which it made a binding promise, not some contract that, in hindsight, it believes is more appropriate or makes more sense.*

(Emphasis added. Internal citations omitted.)

There is a common misperception that government employees are lazy or unintelligent, and that if they were smarter they'd be working for a contractor. In our experience that's simply not true. However, that belief is often used as a subtle (or unsubtle) foundation for an arrogance that “we know better than the customer what the customer really needs.” That's just not the smart way to do government with the Government.

As this decision shows, a much smarter approach to government contracting is to give the customer exactly what you have promised to deliver. Deliver it on time and on budget. Arguing with the customer almost certainly isn't going to change the bargain you made, and it might just result in a very upset customer.

<sup>1</sup> Don't be a fact witness if you can avoid it. Being deposed by an Assistant U.S. Attorney is *not* fun.