

Claiming the Government Acted in “Bad Faith”

Written by Administrator
Monday, 01 February 2010 00:00

Recently somebody posted this cry for help on the LinkedIn Question & Answer Board—

We have a COTR that is causing problems with our contract and need a recommendation for an attorney

...

Can anyone help us?

We have a service contract

...

and the COTR has lied, is now causing our Supervisor to quit because he feels he is being harassed by him

...

and more. Does this constitute a delay and/or Government Interference? Any help is appreciated.

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Let’s look at this from two perspectives. First, let’s talk about delay and disruption. This is really two issues. In a delay claim, the contractor is claiming compensation for not being able to work. In some situations, that claim can include the costs of “unabsorbed overhead”—i.e., indirect costs that would have been absorbed on the instant contract, had the labor hours or dollars been incurred as scheduled, but which now will be absorbed by other contracts, causing them to incur more costs than they had planned. In a disruption claim, the contractor is asking for additional compensation because the work is more complex, and more expensive, than the parties originally agreed.

As [this article](#) makes clear—

The contractor must prove for either claim the elements of liability, causation, and resultant injury. When the contractor is asserting a delay claim, the contractor

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has the burden of showing the extent of the delay, that the delay was proximately caused by government action, and that the delay caused damage to the contractor. While the law requires ‘reasonable certainty’ to support a damages award, damages do not need to be proven with mathematical exactness. Rather,

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] It is sufficient if a claimant furnishes the court with a reasonable basis for computation, even though the result is only approximate.

The preferred method for proving costs is through the submission of actual cost data.

However, where actual cost data is not available, estimates of the costs may be used.

Estimates of costs

should be prepared by competent individuals with adequate knowledge of the facts and circumstances,

and should be “supported with detailed substantiating data.” [All legal citations omitted.]

What the LinkedIn interlocutor is also hinting about is whether, by engaging in lying and harassment and unreasonable delays, the Government has breached its implied duty of “good faith and fair dealing”. As an aspect of these duties, “[e]very contract . . . imposes an implied obligation ‘that neither party will do anything that will hinder or delay the other party in performance of the contract.’”

Such covenants require each party “not to interfere with the other party's

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performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.”

This “duty not to hinder is breached when the Government commits ‘actions that unreasonably cause delay or hindrance to contract performance.’”

[Legal citations omitted.]

The case law is well-settled that the Government enjoys a presumption that it acts in good faith. To overcome that presumption, “the proof must be almost irrefragable” – which has also been described as “clear and convincing evidence” of “some specific intent to injure” the contractor. “Courts have found bad faith when confronted by a course of government conduct that was ‘designedly oppressive,’ or that ‘initiated a conspiracy’ to ‘get rid’ of a contractor. As these cases illustrate, the ‘irrefragable proof’ standard, though daunting, is not intended to be impenetrable, that is, it does not ‘insulate government action from

any review by courts.”

*[Emphasis in original;
legal citations omitted.]*

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Recently the U.S. Court of Appeals, Federal Circuit, affirmed a decision by the U.S. Court of Federal Claims in which the contractor successfully proved bad faith on the part of its Government customer, the U.S. Army Corp. of Engineers. The tale is a sad one, where certain government individuals exercised their authority (and more!) to the detriment of the contractor, North Star Housing.

As the C

ourt found, “the record provides a virtual rancid cornucopia of electronic messages and other communications evidencing a specific intent by key government officials to injure North Star.”

See the entire

CoFC

decision

[here](#)

As the Court observed, “Among the most troubling aspects of the case ... is clear proof that Mr. Peterson, Ms. Kiser and others eventually co-opted the contracting officer who was responsible for ruling on North Star’s claims.”

Although the FAR requires the contracting officers to ensure that contractors “receive impartial, fair, and equitable treatment,” the Court found the contracting officer did not do so in this case.

The Court declared—

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Abdication of those responsibilities in the face of pressure from government officials who plainly are driven by animus against a given contractor constitutes perhaps the most pernicious form of bad faith on the part of the government, as it threatens the integrity of a dispute resolution process that is central to the government contracting system itself.

Despite the Court being “thoroughly convinced” of the Government’s breach of its duty of good faith and fair dealing, the plaintiff (North Star) was not awarded as much money as it had hoped for. First, some of its claims were dismissed for lack of jurisdiction, because they had not been first presented to the contracting officer with a “sum certain” as the FAR and Contract Disputes Act (CDA) require. Second, North Star’s analysis of its damages was found to be lacking by the Court. As the Court stated, “such [Government] liability, no matter how egregious, does not obviate the necessity for plaintiff to prove its damages.”

To wrap up, many contractors are afraid to submit claims because they are worried about angering their customer(s) and losing future work. (We note that contractor evaluations and past performance ratings cannot be affected by assertion of contractual rights.) Contractors seeking to assert claims

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against their Government customers need to understand what their cause of action is. Are they asserting Government-caused delay or disruption? And are the Government’s actions tied to any provable breaches of its duty to act in good faith? Finally, what damages can be proven, and have all the steps of the FAR and CDA strictly been followed when asserting the claim?