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A Tale of Two Contract Releases: One for the Government, One for the Contractor

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On the heels of our recent post offering key takeaways from recent release of claims decisions, the ASBCA and the CBCA have published another round of notable opinions regarding contract releases: *Supply & Service Team GmbH*, ASBCA No. 59630 and *ServiTodo, LLC*, CBCA 5524. Both decisions are important, albeit for different reasons. The ASBCA decision demonstrates how a release provision in a contract modification providing an equitable adjustment can bar the government from processing an administrative offset against a contractor. The CBCA decision illustrates the difficulties contractors face when attempting to minimize the impact of a broadly worded release of claims provision.

What's Good for the Goose is Good for the Gander (*Supply & Service Team GmbH*, ASBCA No. 59630)

In June 2006, Supply & Service Team GmbH ("SST") entered into a contract with the U.S. Army to provide personnel, known as Civilians on the Battlefield ("COBs"), for role playing battlefield exercises designed to train soldiers. In response to an SST Request for Equitable Adjustment ("REA"), the Army agreed to provide additional compensation under Task Order 02 ("TO 2") for labor during the lengthy clearance process and to permit SST to provide fewer Arabic speaking actors during the exercise. The Army then issued Modification 4 to TO 2, which stated in pertinent part:

> This modification finalizes all actions under this contract.
>
> Contractor, by signing this modification you confirm that the contract is complete and the change to the contract amount as seen above constitutes the entire contract price for this order. Additionally, there are no further requests for equitable adjustments or claims to be submitted under this contract.

After reviewing the contract, the Army Audit Agency ("AAA") concluded, among other things, that SST overbilled the Army by approximately 689,000 Euros and charged the Army an improper rate for certain personnel. The Army then collected this sum through administrative offsets under other SST task orders. *Five years later*, SST submitted a claim to the contracting officer to recoup most of this money, and ultimately appealed to the ASBCA.

In addition to finding that Modification 4 had "enough clarity to constitute a binding agreement" and was supported by adequate consideration, the ASBCA held that the Army – through the release provision – waived its right to assert future challenges to the amounts paid to SST and rejected the Army's argument that the aforementioned release language was ambiguous. The Board found that "the only plausible reading of the release language is that it applies to potential claims on TO 2," and determined that the Army intended for the release to act not just as a settlement on the REA, but as "a guarantee from SST that there were no further REAs to come on TO 2." Then, the Board explained how the release applied *equally* to each party:

> Had SST come to the Army . . . seeking to file a new claim for work performed on TO 2, the Army would have been well within its rights to assert that SST has waived the ability to bring future claims. ***The obverse is true as well.*** The Army had agreed that all actions under TO 2 were final and, under the terms of Mod 4, ***waived its rights to make future challenges upon the money paid to SST***.

(Emphasis added.)

Finally, the Board also rejected the government's affirmative defense of fraud because the Army conceded that there had not been a third-party finding of fraud. Consistent with its recent holding in *Laguna Construction Co.*, ASBCA No. 58324, 14-1 BCA ¶ 35,748 (Nov. 22, 2013) (affirmed by the Federal Circuit), the Board explained that it "only maintains jurisdiction over a separate affirmative defense involving . . . fraud as long as [it does] not have to make factual determinations of the underlying fraud."

Think Carefully About What You Bargain For (*ServiTodo, LLC*, CBCA 5524)

After completion of four contracts with the Department of Health and Human Services ("HHS"), ServiTodo filed several claims with contracting officer, which were ultimately the subject of appeals to the CBCA. The parties entered into a settlement agreement to resolve a certain number of the appeals. The settlement agreement provided, in part, that it was a "complete and final settlement of all present and pending requests for equitable adjustment, claims, CBCA appeals, actions in the Court of Federal Claims, and any other forum" related to the contracts at issue. ServiTodo also agreed that the settlement would "operate[] as a complete Contractor Release of any and all claims against HHS, CDC, and its Agents, Officers, and Employees" relating to the same contracts.

Seven months later, ServiTodo submitted a new certified claim to reopen the claims previously resolved by the settlement. ServiTodo alleged that the settlement agreement was ambiguous, unconscionable, and executed under duress. ServiTodo also alleged that the release language was "null and void."

The CBCA rejected each of ServiTodo's arguments. First, the CBCA found that the settlement agreement was not ambiguous, noting that ServiTodo was obligated to clarify any ambiguities under the agreement and that the plain language of the settlement "clearly acts as a release . . . . of the instant appeal." The CBCA also rejected the duress argument because ServiTodo could have rejected HHS's settlement offer, and there was no evidence that it was coerced. As to unconscionability, the CBCA noted that the "settlement amount [] was not insignificant compared to the values of the four contract[s]." Finally, the CBCA concluded the release in the settlement agreement was valid because "a party cannot accept and retain such substantial monetary and other benefits of an agreement and at the same time maintain that the agreement has no force and effect. Having accepted the benefits of the settlement agreement, [ServiTodo] is equitably estopped from challenging it."

Key Insights

- As demonstrated by *SST*, contractors may have just as much to gain from a particular release provision as they have to lose. For that reason, when negotiating a release provision, a contractor should think not only about the claims or defenses it may be releasing, but also about the claims and defenses the government may be giving up.

- In the wake of *SST*, the government may start to craft release language that is intended to foreclose the contractor's right to submit future REAs, while leaving the door open to future claims and/or offsets by the government. As such, contractors should pay close attention to the release language proposed by the government to ensure that it is fair to both parties.

- As reflected in *ServiTodo*, contractors should carefully scrutinize any agreement that contains broad release language. Unless a viable defense exists — defenses which are very difficult to establish — such a release provision may very well cut-off a contractor's ability to obtain additional compensation from the government.

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