Dragon Poker

A firm-fixed-price contractor uses an unwritten clause (Christian doctrine) and an unwritten warranty (Spearin doctrine) to recover legal fees to defend an unwritten bounty lawsuit (*qui tam* action under false claims act).

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In *Little Myth Marker,* by Robert Asprin, the main character plays "Dragon Poker." It's described as "The most complicated game on this, or any other, world."

For the most part, Dragon Poker resembles five-card stud poker. The main difference is the use of conditional modifiers that change the value of the hands based on outside factors like the day of the week, the time of day, or the number of players.

It's impossible to determine the value of your own hand without knowing approximately dozens of conditional modifiers. "Unicorns (Kings) are wild on Tuesdays. In months with the letter 'M,' Ogres (Queens) are at half value. Red Dragons (Aces) are wild on even-numbered hands..."

In general, business owners can rely on the "four corners" rule when reviewing contracts. Under that general rule, the contract terms are limited to the four corners of the document unless there is a hidden ambiguity. So, a careful business owner can know all the terms by reading the contract carefully.

In contrast, federal contracts have many clauses, doctrines, and programs that modify the contract despite not appearing in the four corners. In other words, a government contractor *cannot know the meaning of a written federal contract* without knowing the laws, regulations, doctrines, and caselaw that modify the contract's written terms.

In this article, we will discuss the Christian Doctrine, where a court will add a missing clause to a contract if it was required and important to the procurement system. We will also discuss the Spearin Doctrine, where a court will add an implied warranty to a government contract if the government provided design specifications.

Lastly, we will also discuss *qui tam* actions by an individual bringing an action on behalf of the United States for a False Claims Act violation. Contractors should be aware of the backdrop of government contract laws and regulations, since they can add terms that change the meaning of a federal contract.

In *The Tolliver Group, Inc, v. United States*, 20 F.4th 771 (Fed. Cir. 2021) the United States Court of Federal Claims (COFC) addressed whether a government contractor may recover legal fees incurred in defending its contract performance in a *qui tam* suit brought under the False Claims Act.

The case focuses on two main issues: (i) whether the cost principles

and procedures of FAR Part 31 would have applied to the Task Order pre-modification; (ii) whether FAR § 31.205-47 would be incorporated into the Task Order in the absence of an express contract provision, and (iii) whether the attorneys' fees satisfy the allowability standards in that subpart.

The court found there was no genuine dispute that Tolliver incurred its legal fees "specifically for the contract" and to preserve "the overall operation of [its] business."

Case History

On August 26, 2011, the United States Army ("Army" or "Government") awarded Task Order 10 to DRS Technical Services, Inc. The Task Order was subsequently novated to the Tolliver Group, Inc. on September 25, 2012.

The Task Order was to create and deliver technical manuals for a mine clearing system. The order's performance work statement (PWS) required the Army to provide a technical data package to Tolliver from the original equipment manufacturer, although Tolliver was not required to rely on that information.

The Army's contracting officer representative responsible for the Task Order neither obtained nor provided the technical data package to Tolliver. Notwithstanding this fact, the Army directed Tolliver to proceed without the technical data package, which Tolliver did. On April 23, 2013, the Task Order was modified, and converted from a fixed-price, level-of-effort developmental contract to a pure firm-fixed-price contract and the technical data package requirement was removed from the performance work statement.

On April 15, 2014, Robert Searle filed a "*qui tam* suit" against Tolliver under the False Claims Act in the United States District Court for the Eastern District of Virginia. Searle's action claimed that Tolliver violated the False Claims Act by performing without the technical data package and by deviating from certain military standards and Army regulations in the final version of the technical manuals that it created.

On November 2, 2015, the District Court entered summary judgment in Tolliver's favor. Searle appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed the ruling.

On June 15, 2017, because of the legal fees it incurred in successfully defending the *qui tam* suit, Tolliver submitted a certified claim to the Army contracting officer for $195,899. This amount represented 80% of its attorneys' fees and was supported by FAR § 31.205-47.

On September 8, 2017, the contracting officer denied Tolliver's claim on the basis that Tolliver's litigation costs were not allocable to the Task Order because "they were not incurred specifically for the contract and did not provide the government with a benefit," and "the fixed-price nature of the contract" proscribed such reimbursement "in the absence of a contract clause providing otherwise."

On November 9, 2017, Tolliver then commenced this civil litigation in the COFC against the government. "An action brought before the Court of Federal Claims under the Contract Disputes Act must be based on the same claim previously presented to and denied by the contracting officer." *Raytheon Co. v. United States*, 747 F.3d 1341, 1354 (Fed. Cir. 2014) (brackets omitted) (quoting *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003)).

Tolliver alleged that under 41 U.S.C. § 7104(b)(1), the government had made a constructive change to the Task Order by requiring Tolliver to proceed without the technical data package (as required by the Spearin Doctrine), and it was entitled to recover its legal fees, related to the *qui tam* action, under FAR § 31.205-47.

The COFC concurred with Tolliver and held that (i) FAR § 31.205-47 applied to the Task Order, a fixed-price contract when cost analysis is performed, before its modification, (ii) the modification used forward-looking language and

lacked retroactive effect over the pre-modification period of contract performance, and (iii) under the Christian doctrine, FAR § 31.205-47 was incorporated into the Task Order.

The end result was that "the contract could not be performed as specified in the original performance work statement . . . , engendering changed conditions of performance," which resulted in the *qui tam* suit.

The court held, relying on *United States v. Spearin*, 248 U.S. 132 (1918), that "the contract could not be performed as specified in the original performance work statement . . . , engendering changed conditions of performance" that "directly constituted the basis of the *qui tam* suit" and entitled Tolliver to recover part of its attorneys' fees.

The government appealed the ruling, arguing that Tolliver had not explicitly raised the implied warranty of performance and the Spearin doctrine in its claim. Ultimately, on jurisdictional grounds, the lower court ruling was vacated by the United States Court of Appeals for the Federal Circuit and remanded back to the COFC.

Main Case Issues

After remand, the COFC focused on two main issues: (i) whether the cost principles and procedures of FAR Part 31 would have applied to the Task Order pre-modification; and (ii) whether FAR § 31.205-47 would be incorporated into the Task Order in the absence of an express contract provision.

Tolliver Argument

Tolliver's argument was predicated upon the following arguments: (i) Tolliver proceeded, under the government's direction, without the government-furnished information required under the PWS; and (ii) FAR § 31.205-47 applies to the Task Order because (1) the risk of incomplete performance was allocated to the government pre-modification, rendering the pre-modification Task Order a cost-type contract, (2) the modification's language solely dealt with post-modification contract performance, and (3) the Christian doctrine incorporated FAR Part 31 cost principles into the Task Order.

Government Argument

In contrast, the government argued that (i) Tolliver fails to demonstrate how it satisfies any of the requirements of FAR § 31.201-4, and (ii) cost principles and procedures are inconsistent with the terms of the Task Order as it was a firm-fixed-price contract before and after modification. Further, the government took the position that there is no foundation for incorporating FAR Part 31 cost principles and procedures using the Christian doctrine and permitting cost principles and procedures would negate the policy purposes of allocating risk to the contractor in firm-fixed-price contracts.

Analysis

Applicability of Cost Principles and Procedures to Pre-modification Task Order 10

In analyzing the argument of whether the pre-modification Task Order was a cost-type contract or a pure firm-fixed-price contract, the parties overlooked that FAR Part 31 cost principles and procedures would apply in either scenario. If Tolliver were reimbursed for effort expended as contrasted to results achieved, the pre-modification Task Order would effectively operate as a cost-type contract. In contrast, the *FAR* would still dictate application of cost principles and procedures if the Task Order was a pure firm-fixed-price contract. Further, the modification includes no indication that it was to have a retroactive effect.

Second, "[a] firm-fixed-price, level-of-effort term contract is suitable for investigation or study in a specific research and development area." FAR § 16.207-2. Third, the Task Order required cost analysis because none of the exceptions in FAR § 15.403-1(b) applied to the developmental nature of the technical manuals in the contract.

Incorporation of FAR § 31.205-47

"For a court to incorporate a clause into a contract under the Christian doctrine, it generally must find (1) that the clause is mandatory; and (2) that it expresses a significant or deeply ingrained strand of public procurement policy." *K-Con, Inc. v. Sec'y of Army*, 908 F.3d 719, 724 (Fed. Cir. 2018) (discussing *Christian*, 160 Ct. Cl. at 11-17).

As evidenced by the contract, cost principles and procedures, specifically FAR § 31.205-47, were mandatory to the pre-modified Task Order as the government was required to conduct cost analysis as part of Tolliver's level-of-effort contract. The court read FAR § 31.205-47 as a mandatory element into the pre-modification Task Order.

FAR § 31.201-2(a)

After the above findings, the court addressed the allowability analysis factors outlined in FAR § 31.201-2(a). "A

cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business." FAR § 31.201-3(a).

"A cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship." FAR § 31.201-4; see also *Boeing N. Am., Inc. v. Roche*, 298 F.3d 1274, 1281 (Fed. Cir. 2002)

Cost Allocation

"The Cost Accounting Standards [("CAS")] . . . are designed to achieve 'uniformity and consistency' in allocating costs to government contracts." Boeing, 298 F.3d at 1283 (quoting *Rice v. Martin Marietta Corp.*, 13 F.3d 1563, 1565 (Fed. Cir. 1993)).

FAR § 31.201-4 provides that "a cost is allocable to a government contract if it (a) is incurred specifically for the contract; (b) benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or (c) is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown."

Similarly, FAR § 31.205-47(b) provides that "costs incurred in connection with any proceeding brought by . . . a third party in the name of the United States under the False Claims Act" in which the contractor successfully defends itself.

Further, FAR § 31.205-47(e) provides that the costs referenced in § 31.205-47(b), "may be allowable to the extent that" the costs are reasonable, are not otherwise recovered from the government or a third party, are appropriate, and do not exceed 80% of the fees incurred.

Court Findings and Ruling

The court found there was no genuine dispute that Tolliver incurred its legal fees "specifically for the contract" and to preserve "the overall operation of [its] business."

Had the Army not directed Tolliver to proceed without the technical data package, Tolliver would not have been open to the *qui tam* suit. As a result, the fees were allocable to the Task Order as "it is fair to allocate to government contracts the costs of services which . . . are essential to the existence and continuance of the business entity."

Further, as the Task Order was a firm-fixed-price, level-of-effort development contract, under *FAR*, the government was required to conduct cost analysis and therefore incorporated the mandatory cost principles and procedures in FAR Part 31. As a result, the court concluded (1) that the cost principles and procedures in FAR Subpart 31.2 applied to the contract during the period of performance prior to modification and (2) that plaintiff's request for attorneys' fees satisfies the allowability standards in that subpart. In short, the COFC awarded $195,899.78 to Tolliver for attorneys' fees spent to defend the *qui tam* suit.

Best Practice Tips for Federal Prime Contractors

1. Become familiar with laws, regulations, and case law that can modify clear contract terms. These modified terms can go against the prime contractor, as they did in the original Christian case.
2. Submit comments and requests for information if there are missing clauses in the solicitation.
3. Include all claim issues in the request for a contracting officer's final decision to ensure that the boards and courts have jurisdiction over the appeal, if necessary.
4. Contracts that require the government to conduct cost analysis may incorporate the cost principles and procedures of FAR Part 31, even if they are not expressly incorporated into the written contract.

Best Practice Tips for Federal Agencies

1. Become familiar with laws, regulations, and case law that can modify clear contract terms. These modified terms can go against the agency, as they did in this case and the original Spearin case.
2. Include all required provisions and clauses in outgoing solicitations.
3. If modifications are likely (e.g. firm-fixed-price construction), describe how cost principles will apply to future requests for equitable adjustment. CM

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