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PRATT'S GOVERNMENT CONTRACTING LAW REPORT

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

By Justin M. Ganderson, Alejandro L. Sarria, and Ryan M. Burnette*

Two recent Board of Contract Appeals decisions demonstrate why government contractors must closely assess the scope and terms of release of claims provisions. The authors of this article discuss how such provisions can have a significant impact on the resolution of contract disputes.

In the wake of several decisions involving release of claims provisions in government contracts, the Armed Services Board of Contract Appeals ("ASBCA") and the Civilian Board of Contract Appeals ("CBCA") recently issued another round of notable opinions on this subject: *Supply & Service Team GmbH*[1] and *ServiTodo, LLC,*[2] respectively. Both decisions are important, albeit for different reasons. The ASBCA decision demonstrates how a release provision in a contract modification 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.

WHAT'S GOOD FOR THE GOOSE IS GOOD FOR THE GANDER (*SUPPLY & SERVICE TEAM GMBH*[3])

In June 2006, Supply & Service Team GmbH ("SST") entered into a contract with the U.S. Army to provide personnel 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

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* Justin M. Ganderson is a special counsel in Covington & Burling LLP's Government Contracts Practice Group focusing his practice in the areas of claims and disputes resolution, internal investigations, public-private partnerships/privatizations, and federal government contract counseling and compliance. Alejandro L. Sarria is a special counsel in the firm's Government Contracts group, specializing in the areas of contract claims/disputes resolution and contractor tort risk mitigation and defense. Ryan M. Burnette is an associate at the firm, representing government contractors from a range of industries in counseling matters and disputes. The authors may be reached at jganderson@cov.com, asarria@cov.com, and rburnette@cov.com, respectively.

[1] ASBCA No. 59630 (Mar. 1, 2017), *available at* http://www.asbca.mil/Decisions/2017/59630%20Supply%20&%20Service%20Team%20GmbH%203.1.17.pdf.

[2] CBCA No. 5524 (Mar. 3, 2017) *available at* http://www.cbca.gsa.gov/files/decisions/2017/GOODMAN_03-03-17_5524__SERVITODO_LLC.pdf.

[3] ASBCA No. 59630.

under Task Order 02 ("TO 2") for increased costs incurred by SST. To memorialize the contract adjustment, the Army issued Modification 4 under TO 2, which stated in pertinent part:

> 3. This modification finalizes all actions under this contract.
>
> 4. 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 the modification was executed, the Army Audit Agency ("AAA") reviewed costs billed under TO 2 and concluded, among other things, that SST overbilled the Army by approximately 689,000 Euros. The Army demanded payment and ultimately collected the majority of the alleged overpayment through administrative offsets under other SST task orders. SST submitted a certified claim to the contracting officer to recoup this money and subsequently appealed the contracting officer's deemed denial of the claim to the ASBCA.

In sustaining the appeal, the ASBCA held that the Army waived its right to challenge the amount paid to SST under Modification 4 (*e.g.*, through the subsequent administrative offsets) because of the "extremely broad" release language in paragraph 3 quoted above.

The Board disagreed with the Army's assertion that the release language was ambiguous and determined that the "only plausible reading of the release language is that it applies to potential claims on TO 2." The Board explained that "just because the purpose of the modification was settlement of the REA does not mean that it was limited to addressing that REA alone." The Board found that, through Modification 4, "the Army sought to obtain finality in its TO 2 pricing . . . and to foreclose *any* future changes, not just those associated with the REA then before it."[4] Thus, the release was *not* limited to potential claims by SST; it applied *equally* to potential claims by the Army.

In reaching this conclusion, the Board noted: "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."[5]

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[4] Emphasis added.

[5] 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. 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." *Laguna Construction Co.*

THINK CAREFULLY ABOUT WHAT YOU BARGAIN FOR (*SERVITODO, LLC*[6])

After completion of four contracts with the Department of Health and Human Services ("HHS"), ServiTodo filed several claims with the contracting officer that ultimately were appealed to the CBCA. The parties entered into a settlement agreement to resolve some of the appeals, and ServiTodo was paid $1.15 million. The settlement agreement provided, in relevant 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 sought to reopen the claims addressed in the settlement by submitting a new certified claim. Among other things, ServiTodo alleged that HHS took advantage of ServiTodo "in promulgating an unconscionable Settlement Agreement," and demanded $10.6 million because, after entering into the settlement agreement, it was now "able to more accurately calculate its unabsorbed costs." Five days later, the contracting officer issued a final decision denying the claim. After ServiTodo appealed to the CBCA, HHS filed a motion to dismiss based on the parties' prior settlement agreement and the release contained therein. In response, ServiTodo argued that the agreement was ambiguous, unconscionable, and executed under duress. ServiTodo also argued 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 dismissed the duress argument because, according to the Board, ServiTodo could have rejected HHS' 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]," and there was no evidence that ServiTodo executed the settlement agreement "without knowledge of its terms, or without consent."

Finally, the CBCA concluded the release in the settlement agreement was valid, and held that ServiTodo was "equitably estopped from challenging it"

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v. Carter, 828 F.3d 1364, 1368–69 (Fed. Cir. 2016) (citation omitted) *available at* http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/15-1291.Opinion.7-13-2016.1.PDF.

[6] CBCA 5524.

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."

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 and 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 place more of an emphasis on crafting release language that is intended to foreclose the contractor's right to submit future claims, while leaving the door open to future claims 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 the language of any release provision included in a settlement agreement with the government because such a provision can have significant consequences. A release may cut-off a contractor's ability to obtain additional compensation or relief from the government in the future, or even inhibit a contractor from raising potential defenses.