

CONTRACTS WITHOUT CONSIDERATION: WHAT IS A “NUDUM PACTUM”

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One of the three the three basic requirements for a contract to be enforceable is consideration, which usually means a promise to pay money, but could mean that other valuable items would be provided instead (as in a trade of a car, for example, of one valuable car for another valuable car). In federal procurement contracts, the courts have said that to be a valid contract, it “must show a mutual intent to contract including an offer, an acceptance, *and consideration*. A contract with the United States also requires that the Government representative had actual authority to bind the United States. ... (emphasis added). *Trauma Serv. Group v. United States*, 104 F.3d 1321, 1325 (Fed.Cir.1997). What if there’s no consideration? The answer is simple: it’s a “nudum pactum” and there is no valid contract.

A “nudum pactum” is a bare agreement, a promise or undertaking without any consideration for it. *Blacks Law Dict*, 5th Ed., 1979. Where there is a nudum pactum, there is no consideration, and the contract is not valid and not enforceable. Government contractors must be wary of performing anything under a “nudum pactum.” Simply stated, you will likely not be paid for your goods or your work, and unlike a valid contract, you will have no recourse to the Boards or the Court of Federal Claims. The issue primarily arises where the contract contains one or more “availability of funds” clauses, which are discussed below. However, first, here is an example of a real live, nudum pactum.

The New Iraq Ahd Company (“NIAC”) signed a memorandum of agreement with the government (presumably a contracting officer) wherein the 25th Infantry division was to receive the construction of a specified fence, but the contract stated:

This agreement will not become effective until funding is approved and the contractor is notified by the project officer to begin work. Funds are not presently available for this contract. The Government’s obligation under this contract is contingent upon the availability of appropriated funds from which payment for contract purposes can be made. No legal liability on the part of the Government for any payment may arise until funds are made available to the contracting officer for this contract and the Contractor receives notice of such availability, to be confirmed in writing by the contracting officer.

New Iraq Ahd Co., ASBCA No. 58778, June 12, 2014. NIAC spent \$175,440 to buy materials for the fence, but funding never became available, and the contracting officer never provided notice of funds availability. Although NIAC sought to recover the \$175,440 it spent *in anticipation* of building the fence, the Board ruled that the contract was contingent upon the availability of funds, the funds never became available, and therefore “the agreement never became binding.” NIAC recovered nothing because there was no contract to enforce because there was no consideration—it was a purely “nudum pactum.”

Although the NIAC case is a classic nudum pactum, the same situation can arise whenever the government includes “availability of funds” clauses, like those on the next page, which contain

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language very similar to the NIAC contract. (Indeed, we suspect that the NIAC contracting officer took the words right out of these FAR clauses).

52.232–18 Availability of Funds. (APR 1984)

Funds are not presently available for this contract. The Government's obligation under this contract is contingent upon the availability of appropriated funds from which payment for contract purposes can be made. No legal liability on the part of the Government for any payment may arise until funds are made available to the Contracting Officer for this contract and until the Contractor receives notice of such availability, to be confirmed in writing by the Contracting Officer.

FAR 52.232-19 Availability of Funds For The Next Fiscal Year (APR 1984),

Funds are not presently available for performance under this contract beyond 30 September 1994. The Government's obligation for performance of this contract beyond that date is contingent upon the availability of appropriated funds from which payment for contract purposes can be made. No legal liability on the part of the Government for any payments may arise for performance under this contract beyond 30 September ____, until funds are made available to the Contracting Officer for performance and until the Contractor receives notice of availability, to be confirmed in writing by the Contracting Officer.

If any of these clauses is in your contract, **you have a nudum pactum until the contracting officer receives funds, and the same contracting officer provides the contractor with notice of the availability of funds. Meaning: do not deliver any goods or perform any services until you receive that written notice of availability of funds. You are likely never to receive payment.**

There is an interesting twist to this problem. What if the government exercises an option for performance of a service contract, but includes FAR 52.232-19, stating that it has no funds to pay you? The Boards have said that “so long as FAR 52.232-18 [or FAR 52.232-19] is included in the basic contract, the Government may validly exercise an option even though funds are not presently available for the work. *American Contract Services, Inc.*, 94-2 BCA ¶ 26855 (citing references). Although the option may be exercised, there is no consideration until the contractor receives the notice of funds availability—and the contractor has no legal obligation to perform without that notice.

TIPS: (1) Always review Solicitations and Contracts to see if FAR 52.232-18 or -19 is included, or if some other clause provides a similar requirement that funds be made available to the contracting officer and that the contractor is notified in writing. The Government owes you nothing until both of those things happen, and if the Government owes you nothing, all you have is a nudum pactum.

(2) What do you do if the new fiscal year (October 1st) rolls around, FAR 52.232-19 applies, and you have received no notice of funds availability from the contracting officer? *The correct answer is “stop performing the contract.”* For example, if you are performing any type of

service, notify the contracting officer that you will stop work at midnight September 30th, and don't perform anything after midnight on September 30th. The Government has no legal obligation to pay you anything for the work that begins on October 1st. Just read the availability of funds clause in your contract. Always comply with your contract. If your work is critical or stopping it will threaten lives, your contracting officer will always find the money somewhere. Do not work without a valid contract. Do not work under a "nudum pactum."