

NO DURESS IN SIGNING A WAIVER

Copyright 2022 Richard D. Lieberman, Consultant & Retired Attorney

An interesting case concerning waivers was recently decided by the Court of Federal Claims. *Cornelio Salazar d/b/a USA Ranch v. United States*, No. 211-1114C (Fed. Claims May 3, 2022). The most interesting issue concerns whether there was duress in signing two waivers.

USA Ranch (Mr. Salazar) received a clean water hauling contract from the U.S. Forest Service in 2019. Subsequently in August 2020, the Forest service sought “gray water” transportation (requiring a change to plumbing and hoses) apparently used for a different purpose. Ranch’s truck was demobilized from clean water transportation and reassigned to gray water. On Sept. 22, 2020, Ranch and the government entered into an Emergency Equipment Rental Agreement (“EERA”—a separate contract) for a gray water truck. At this same time, Ranch executed two separate invoices—one for the original clean water contract and one under the EERA contract. Both invoices contained the statement that “Contractor hereby releases the government from any and all claims arising from this agreement except as reserved in “remarks”. In both invoices, the remarks section contains the word “Final” and make no reference to outstanding disputes over payments.

In an affidavit submitted to the court, Mr. Salazar (Ranch) claimed he was forced the sign the waivers and that government agents misrepresented their effect:

- I was told in no uncertain terms that if I did not agree to waive my objection about my previous [clean water] contract, I would not be paid anything except for the two days before I started hauling gray water.
- ...I was informed that my waiver was qualified to only apply to accepting the EERA contract and did not waive my dispute regarding the original agreement or the modification of it to haul gray water.

The court noted that “absent special vitiating circumstances, a general release bars claims based upon events occurring prior the date of the release.” The following circumstances might vitiate a general release: (1) economic duress; (2) fraud; (3) mutual mistake; or (4) continued conduct between parties suggestive of their never having contemplated the claim in question as covered by release.

Because Mr. Salazar alleged duress, the court noted that there is a three part conjunctive test for duress. It requires that a party establish (1) that is involuntarily accepted the other party’s terms; (2) that circumstances permitted no other alternative; and (3) that such circumstances were the result of the other party’s coercive acts.

The court held that Salazar’s statement that he would only be paid for two days if he did not sign the waivers was insufficient to establish that he had no other alternative. He had a choice between immediate payment upon signing the waiver or a potentially larger future payment after litigation. The court also noted that this kind of litigation is precisely the kind of alternative that precludes a duress defense. The court further noted that duress might be

appropriate in exceptional circumstances, such as when the government's own wrongful acts have placed the waiving party under extraordinary financial pressure at the time of waiver—mere stress of business conditions not caused by the government was insufficient.

Takeaway: When presented with an unpalatable waiver, either “carve out” future matters you wish to litigate and note them on the waiver, or elect not to sign the waiver and pursue litigation against the agency.

**For other helpful suggestions on government contracting, visit:
Richard D. Lieberman's FAR Consulting & Training
at <https://www.richarddlieberman.com/>, and Mistakes in Government Contracting
at <https://richarddlieberman.wixsite.com/mistakes>.**