

## WHEREAS CLAUSES ARE NOT CONTRACTUAL

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A recent dispute involving three separate claims resulted in the Court of Federal Claims noting that “[w]hereas clauses are not contractual; they are recitations laying out the background understandings of the parties.” *THR Enterprises, Inc., v. United States*, No. 20-558C (Fed. Claims June 8, 2022). The contractor that made the claims attempted to exclude one claim from a general release that it signed, but the Court refused to do so.

THR Enterprises entered in a renovation contract on Langley Air Force Base. There were multiple task orders issued under an overarching Indefinite Delivery, Indefinite Quantity (“IDIQ”) contract. Disputes arose regarding Task Orders 22, 25 and 26, with THR seeking equitable adjustments or breach of contract damages, and THR filed claims and appealed their denial by the Contracting Officer.

The Government produced a “general mutual release” and sought judgment on the pleadings. The general release was signed after Orders 22 and 25 were settled but before Order 26 was settled. The general release included the following:

Upon execution of this Agreement, the modification to the Contract incorporating this Agreement and payment of the Settlement Amount, each Party hereby generally and specifically releases, discharges and acquits the other Party, its officers, officials, administrators, members, directors, managers, employees, attorneys, agents, representative, affiliate, predecessors and successors, from any and all claims, demands, liabilities, actions, causes of action, damages, expenses and obligations whatsoever,, including without limitation those arising out of or in any way related to the Appeal...whether known or unknown..

THR asserted that this agreement only released Orders 22 and 25, and did not release Order 26. The Court noted that the Supreme Court has indicated that general language in a release indicates an intent to make an ending of every matter arising under or by virtue of the contract, and if the parties intend to leave some things open and unsettled, their intent to do so should be manifest. Because THR knew about the dispute over Order 26 at the time of signing the settlement, THR needed to expressly reserve its rights with respect to Order 26, but it did not do so.

THR also relied on the whereas clauses in the agreement, which apparently stated that the Release was limited to Orders 22 and 25. The Court rejected that as well, noting that the language in the body of the release had only one permissible meaning, and the words in the whereas clause could not have the effect of making the words “including without limitation” limit the general release preceding it. The Court entered judgment against THR.

Takeaway. Use caution when drafting settlement releases (or read a release carefully if it was drafted by the government), particularly with the government, and especially where there are potential existing or future claims. Always “carve out” those claims or potential claims in the coverage of the settlement agreement so you may pursue them separately.

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