

## VOID AB INITIO

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A contract is void or voidable if the award resulted from misrepresentations in a contractor's offer. This remedy is necessary when a contractor materially misrepresents information in its offer due to the potential "injury to the public interest by actions which compromise the integrity of the government contracting practice." A contract is *void ab initio*, which is essentially the same as the common law defense of fraud in the inducement, which may be established either by proof of fraud or material misrepresentation. The Boards of Contract Appeal may not make findings of fraud, but they make findings about the material facts relating to material misrepresentation, and *Gilbert Solutions, LLC, ASBCA No. 63508, June 22, 2023*, is an example of a contract that the Board found *void ab initio* based on material representation in the contractor's offer.

The Army awarded a firm-fixed price commercial items contract to Gilbert Solutions, LLC ("Gilbert") to purchase four portable restroom trailers for delivery to Guantanamo Bay, Cuba. The restrooms required 2 stalls, 1 women's suite and 1 men's suite with one stall, with 60 day delivery time. It was required to include an Americans with Disability Act wheelchair accessible sink, shatterproof mirror and grab rails. The solicitation included FAR 52.211-6, Brand Name or Equal. Gilbert submitted a bid which referenced part no. CHS40899 and provided a description of the Comforts of Home four ADA restroom trailer.

The contracting officer asked Gilbert in an email if he could meet the 60 day delivery time. Finding out that the Comforts of Home model would not meet this timeframe, Gilbert apparently decided to deliver a smaller trailer to the government, known as the UltraLav trailer. When the government received the first two trailers, they were rejected because they did not meet contract specifications. The government noted that the contract was awarded based on Gilbert's proposal and floor layout provided in response to the RFP, but the delivered trailer did not match the floor layout. The government issued a termination for cause for failure to meet contract specifications. Gilbert appealed to the board.

The government contended that the contract was *void ab initio* because of Gilbert's misrepresentation about the items it delivered. The Board noted that three requirements must be met in addition to the misrepresentation to render a contract voidable:

- (1) The misrepresentation must have been fraudulent or material (Gubert signed the contract for the Comforts of Home trailer even though it intended to provide a different one than that which was in its offer and Gilbert knew he was providing a different item);
- (2) The misrepresentation must have induced the recipient to make the contract (the government clearly relied on Gilbert's representation in its offer that it intended to provide the Comforts of Home trailer); and
- (3) The recipient must have been justified in relying on the misrepresentation (the government's reliance on Gilbert's representation in its offer was reasonable).

The government was entitled to receive the product specified in the contract, and Gilbert would not have been awarded the contract had Gilbert not misrepresented its product to the

government. Accordingly, the board found that Gilbert's material representation in its offer resulted in the contract being *void ab initio*. Since it was *void ab initio*, the board had no jurisdiction to consider Gilbert's appeal of the termination for cause, and denied the appeal.

Takeaway: Misrepresentations in an offer in order to receive an award should never be made. If circumstances change and you cannot deliver what your offer promised, either withdraw your offer, or notify the government and attempt to reach agreement on a modification, if the government is willing to do so.

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