

## COURSE OF DEALING

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A “course of dealing” is a “sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.” *T&M Distribs., Inc.*, ASBCA No. 51405 (quoting *Restatement (Second) of Contracts § 223(1979)*). Course of dealing evidence can be used either (1) as extrinsic evidence to interpret ambiguous contract terms or (2) evidence of a waiver of unambiguous contract terms. *Id.* In a recent Armed Services Board of Contract Appeals Case, the Board used a course of dealing to conclude that a contract was ambiguous, but the prior course of dealing established a common basis of understanding of how the contract was to be interpreted. *Raytheon Co.*, ASBCA Nos. 60448, 60785, June 25, 2020.

Raytheon sold Advanced Medium Range Air-to-Air Missiles to the Air Force. In the Statement of Contents (work), there were two disputed relevant paragraphs:

- 2.a. required Raytheon to produce a certain number of missiles over a three year period of performance.
- 2.b. required Raytheon to provide Systems Engineering/Program Management (“SEPM”) over a one year period of performance.

The case turned on which paragraph covered the production SEPM. If paragraph 2.a. pertained to the production missiles, then Raytheon would have been required to support the missiles for three years. However, if paragraph 2.b. covered production SEPM, Raytheon would have been required to provide SEPM for only one year.

The Board held that there was a course of dealing because, among other things:

- The government repeatedly expressed its understanding that paragraph 2.b covered missile production (prior course of dealing on earlier missile lots).
- The Contracting Officers repeatedly expressed an understanding that paragraph 2.b included production SEPM. This was expressed in numerous Emails from the contracting officers (prior course of dealing on earlier missile lots).
- Other government employees involved in this program verified the government’s understanding that paragraph 2.b. included production SEPM

Raytheon submitted a Request for Equitable Adjustment when the Contracting Officer advised Raytheon that paragraph 2.a. covered three years of SEPM. The Contracting Officer denied the equitable adjustment, and a subsequent claim that were both based on a constructive change because the Contracting Officer insisted that paragraph 2a. covered production SEPM.

The Board held that the parties’ prior course of dealing established that paragraph 2.b covered production SEPM, and Raytheon was only required to support the disputed lots of missiles for one year under paragraph 2.b. Therefore the government had constructively changed the contract by demanding support for three years. Furthermore, when the Government interpreted

paragraph 2a as covering production SEPM, and required Raytheon to cover the three year period of SEPM, the Board concluded that there was an order for the change by the government. The Board held that Raytheon was entitled to an equitable adjustment of \$48.4 million.

Takeaway. A contractor can benefit if it can show a constructive change in the contract from the way that the same contract had previously been interpreted by the parties. In this case, the Raytheon missiles were a follow-on buy, so the earlier buys, which had similar contract wording, formed an effective basis of a prior course of dealing, and a well-supported constructive change entitling Raytheon to its claim.

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