

## UNDERSTANDING A RELEASE

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Government contractors sometimes fail to recognize how difficult it is to “undo” a general release they have signed, typically at the end of their contract. (The government often forgets or ignores this as well and seeks to pursue a contractor after it has signed a mutual release—which is a specific recommendation that all contractors should insist upon when signing any release). A general release is a broad release that frees a party or parties from an obligation or duty, and normally includes all potential claims, excluding only specific claims that are “carved out” as not being covered by the release. See *Blacks Law Dict.* 10<sup>th</sup> Ed., 2014 Thomson Reuters. In a recent case, a National Aeronautics and Space Administration (“NASA”) contractor failed to undo a release it had signed. *Exceed Resources, Inc.*, ASBCA No. 61652, June 11, 2020.

Exceed received a five year indefinite delivery, indefinite quantity contract for secretarial and administrative support. During a phase-in period a dispute arose between the parties over the number of “productive hours” and the application of health and welfare benefits to those hours. Exceed sought a change in contract terms, alleging a mistake had been discovered after award.

The NASA contracting officer advised Exceed that she would not alter the contract terms and requested that the contractor confirm that it was willing and able to perform the contract. Exceed responded and stated it could perform, but only if the mistake in bid was corrected. In its response, Exceed also stated that it “would be willing to entertain either a minimum amount for a termination for convenience or a no-cost termination for convenience.” To this, NASA responded that it would accept the offer of a no-cost convenience termination, and would pay the full amount of Exceed’s phase-in costs.

The parties signed a modification terminating the contract for convenience with the government agreeing to pay no costs except the phase-in costs. The modification stated:

“The contractor unconditionally waives any charges against the government because of the termination of the contract and, except as set forth below [phase in costs], releases the government from all obligations under the contract due to its termination. The Government agrees that all obligations under the contract are concluded.”

Two years later, Exceed submitted a 72 page claim seeking \$2.6 million in breach of contract damages (including lost profits). NASA sought and obtained summary judgment from the Board without paying any breach costs.

First, the Board found that the release language was plain and ambiguous and there was no “carve out” that allowed Exceed to pursue a claim for lost profits.

Second, the Board considered whether there had been bad faith or duress—which could have been a basis for undoing the release. The Board noted that “to render a contract unenforceable for duress, a party must establish (1) that it 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. *N. Star Steel Co. v. United States*, 477 F 3d 1324, 1334 (Fed. Cir. 2007). However, in this case Exceed did not involuntarily accept NASA's terms, rather, Exceed *proposed* the no-cost termination—making it impossible to show duress in signing the release.

The Board entered judgment against Exceed's claim for lost profits, finding there had been no bad faith and because Exceed executed a valid release, which would have precluded such a recovery in any event.

Takeaways: (1) Always ensure you understand any release you sign. If you have potential claims, be sure to set them forth in the release and "carve them out" as still unresolved. (2) When a contractor signs a release, it is advisable to see a bilateral (government and contractor) release of the other party. This prevents the government from later making claims against the contractor, except for those permitted by law.

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