

WHEN CAN A PRICES IN A FIXED PRICE CONTRACT BE REFORMED?

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There are only very narrow circumstances under which the prices in a fixed-price contract can be reformed. Unfortunately, in the case of *Cooper Ports America, LLC*, ASBCA No. 61349, Feb. 10, 2022, those circumstances didn't exist.

The government entered into a contract with Shippers Stevedoring Co. However, Cooper/Ports ("CPA") purchased Shipper's interest in the contract, and entered into a novation agreement. CPA sought reformation of the contract's prices based upon an alleged misrepresentation made by the government contracting officer. Here's what happened.

After award of the contract, Shippers realized it was losing money on the contract and attempted to sell it to a company that wanted Shipper's assets. CPA told Shippers it could not afford to assume the contract because Shipper's prices were too low (presumably because it had underbid the contract).

In working on the novation, the CO advised CPA that he would make no guarantee that the prices (rates) would change, but he would consider a claim under the disputes act—no guarantee that the rates would be changed.

Before the actual novation, CPA began to perform the contract, and advised a new CO that the contract rates weren't good, asking how CPA could revise the prices, admitting that Shippers underbid the contract. The CO made it clear he would hold price discussions if CPA provided a reason for price discussions. CPA asserted that the CO said he "would work with us on prices" but the CO only said he would hold price discussions if there were a written reason for discussing prices.

After the contract was novated to CPA, that company requested revision to the prices and the government rejected that request. CPA filed a request for equitable adjustment, stating the contract should be reformed due to a unilateral mistake, and later asserting misrepresentation. These were later resubmitted as claims.

The Board summarized the doctrine of reformation based upon misrepresentation as follows:

- Reformation is a remedy in equity where a written instrument is made as to express the real intention of the parties when an error or mistake has been committed (the written instrument doesn't express what was actually intended by the parties)
- The cause of this problem is mistake by one party accompanied by inequitable conduct by the other, such as, for example, misrepresentation
- Where a written contract fails to express the agreement, such as because of a misrepresentation, the victim of the misrepresentation can obtain reformation.

The Board demonstrated that the conditions were not present here. First, the alleged "promise to work on the prices" wasn't a binding promise, let alone a promise to revise prices. The

term “work with” is vague, indefinite, uncertain and lacking clarity as to all essential terms to constitute a binding promise. Furthermore, the government may not revise a fixed price contract’s prices due to underbidding.

Second, there was no misstatement of existing fact because the government never stated it could revise prices on a fixed price contract due to underbidding.

Third, CPA never showed that the parties’ real intention was to agree to revise the prices. The government cannot reform a contract to make it illegal (by changing fixed prices because of underbidding).

The Board denied the appeal.

Takeaway. Vague promises on changes to promises are just that, vague and illusory promises. In order to promise to change prices, a contractor must have a definite writing, specifying how, when and why fixed prices are to change. And it must be signed by a contracting officer. These would be the components of a valid equitable adjustment or claim.

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