

PRIOR COURSE OF DEALING

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The Armed Services Board of Contract Appeals (“ASBCA”) recently held that on a matter of contract interpretation, a prior course of dealing should be used in awarding a contractor its full claim on the requirements for personnel staffing. *Fluor Federal Solutions, LLC*. ASBCA No. 61093, August 19, 2019. The issue revolved around whether a Navy contract for base operations support in Florida required 24 hours/7 days a week for staffing of the Mayport Water Treatment plant, which was part of the contract. As awarded, the contract provided for a base period of four one-year options and three one-year option periods. The Navy had awarded the base year and exercised three of the one year options. After 2 ½ years of performance the contracting officer decided to take deductions of \$284,000 from Fluor’s payments because of “noncompliance with [24/7] manning requirements at the Mayport Water Treatment plant. Fluor submitted a claim for the amount of the deductions plus other related costs. The Board disagreed and awarded summary judgment for Fluor.

The Board stated that Fluor had submitted monthly logs to the Navy that documented the hours worked by its employees and during the two and a half year time period of contract performance, and the Navy knew Fluor was not manning the water treatment plant 24/7 but did not object.

The Board gave the following reasons:

- In two Requests for Information during the solicitation period, the Navy failed to clarify the 24/7 requirement. The Board noted that pre-bid questions are not wiped from the record by the formal execution of a contract, and that two questions directly asked the Navy if the water treatment plants “require 24 hr/7 day a week staffing.” Instead of responding clearly and directly, the Navy furnished unclear and evasive answers.
- Fluor relied on a Florida Department of Environmental Policy permit, and various Florida Administrative code provisions cited in the permit that supported Fluor’s position that 24/7 manning was not required. The Navy argued that these were not controlling for this contract dispute, but the Board noted that although the code provisions were for construction, during post-construction, the permit continued to require compliance. The code does not require 24/7 manning, but required 6 hours/day for 5 days/week.
- The Navy contended that the contract clearly and unambiguously required 24/7 manning, and the Florida permit and code were not controlling, even though the Navy held and administered the contract under a different interpretation (no 24/7 manning required) for 2 ½ years of performance.
- The Navy knew of Fluor’s water treatment plant manning through a monthly operating report that Fluor submitted to the Contracting Officer (required in the contract) that included “personnel records.” This report clearly documented that Fluor was not manning 24 hours/7 days a week.

- The water treatment plant specifications relied on by the Navy were performance specifications, which gave Fluor the discretion to set its manning so long as performance objectives and performance standards were achieved, and they apparently were achieved.

The Board noted that there was a prior course of dealing between a contractor and the government. A prior course of dealing between the parties can often aid in the interpretation of contract language. A prior course of dealing is “a sequence of previous conduct between the parties to the agreement” which can afford “a common basis of understanding for interpreting their expressions and other conduct.” RESTATEMENT (SECOND) OF CONTRACTS § 223 (1981); Uniform Commercial Code § 1-205(1). In *Gresham & Co., Inc. v. United States*, 470 F.2d 542, 554 (Ct. Cl. 1972), the Court held that, where there were numerous actions by the Government involving many contracts, “[t]here can be no doubt that a contract requirement for the benefit of a party becomes dead if that party knowingly fails to exact its performance, over such an extended period, that the other side reasonably believes the requirement to be dead.” Cited in *Lear Siegler Servs., Inc.*, 05-1 BCA ¶ 32937. Essentially the Board concluded that the 24/7 requirement on the instant contract “became dead” because the Navy, knowingly failed to require it for the first 2 ½ years of contract performance.

Takeaway. Showing that a contract requirement is ambiguous, and demonstrating that the government has knowingly accepted your reasonable interpretation over an extended period of contract performance, can result in the establishment of a “prior course of dealing” that will eliminate the unreasonable contract requirement and substitute the actual performance.

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