

LATE REVOCATION OF ACCEPTANCE

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A recent Board case demonstrates that the government may revoke acceptance of a product, but that revocation must be made within a reasonable time after the reason for revocation is discovered or could have been discovered with ordinary diligence. The facts in *Standbuy Distributors, Inc.*, ASBCA No. 62721, July 12, 2021, demonstrated that the revocation by the Defense Logistics Agency (“DLA”) was untimely.

- On May 16, 2016 DLA ordered 123 laser rangefinders, Bushnell Part no. (“PN”) 20230 from Standbuy. The company supplied Bushnell PN 202421. DLA’S payment cleared on July 18, 2016.
- On Feb. 27, 2017, DLA ordered 106 laser range finders, Bushnell PN 20230 and Standbuy delivered Bushnell PN 202421
- On Oct. 3, 2018 DLA ordered 162 laser rangefinders, Bushnell PN 202720 under Purchase Order 0080, but the CO demanded “acceptable traceability documentation” demonstrating the material is PN 202720
- On November 5, 2018, Standbuy showed it intended to order PN 202421, and the CO on the same date canceled PO 0080 for failure to provide traceability documents.
- On Nov. 20, 2018, DLA informed Standbuy that it “was willing to take another look at the cancellation of PO 0080” and requested invoices from Bushnell
- After receiving Standbuy’s reply with invoices, on Nov. 21, 2018, DLA reinstated PO 0080 and on Nov. 30, 2018, issued a formal modification
- On Dec. 3, 2018, despite the reinstatement of PO 0080, Standbuy requested a modification to note that PN 202421 was acceptable for the reinstated order, in order to avoid issues with DLA, and since the same part had been supplied to DLA since 2014.
- On August 19, 2019 in response to a DLA Nov. 16, 2018 request for engineering support from the US Navy regarding PN 202421, the Navy recommended PN 202720.
- On Oct. 2, 2019 the Army accepted the Navy’s recommendation and on Oct. 23, 2019, DLA informed Standbuy that the only acceptable PN for PO 0080 was PN 202720. This was after Standbuy had shipped the parts to DLA.
- On Jan. 24, 2020, the CO revoked acceptance of the laser rangefinders in PO 0080.

FAR 52.246-2(k) (included in PO no. 0080) provides that:

(k) Inspections and tests by the Government do not relieve the contractor of responsibility for defects or other failure to meet contract requirements discovered before acceptance. Acceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the contract.

According to the case law, “acceptance must be revoked within a reasonable time after the mistake is discovered or could have been discovered with ordinary diligence. *Bar Ray Products, Inc. v. United States*, 162 Ct. Cl 836, 838 (1963). No precise formula exists to determine the reasonableness of the delay. The determination must be made on a case-by-case basis. However, the government’s efforts to determine conclusively that the work was defective or to

work with the contractor to solve the problem will be taken into consideration in determining the reasonableness of the delay. *Perkin-Elmer Corp. v. United States*, 47 Fed. Cl 6y72, 674-74 (2000) (latent defects). Revocation of acceptance more than six years after learning of the defect was unreasonable. *Id.* A seven month delay between discovery of the defects and revocation of acceptance for an architect/engineer to investigate the cause of the defense was reasonable. *Chilsted Bldgs. Co.*, ASBCA No. 49548, 002-BCA ¶ 31097. A one year delay between the CO's request for tests and revocation of acceptance where tests took less than two weeks was not "remotely prompt action". *Ordnance Parts & Engr. Co.*, ASBCA No. 40293, 90-3 BCA ¶23141. A 10 month delay to test wall paneling to determine if it had been "incombustible treated" was reasonable. *June Ah Ind. Co.*, ASBCA no. 22632, 79-1 BCA ¶13643, *affd on recon.*

The idea of a "reasonable time for revocation of acceptance" is also found in the Uniform Commercial code, Namely UCC §2-608, Revocation of Acceptance in Whole or in Part, which states:

(2) revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it....

The Board noted that DLA knew or had reason to know no later than Nov. 5, 2018 that Standbuy had been providing PN 202421 instead of the requested PNs 202320 and 202720. The CO's reinstatement of PO 0080 on Nov. 230, 2018 (without having any further "traceability information") and not revoking acceptance until Jan 24, 2020, more than a year later was too late. More than ten months of that period was attributable to DLAs own actions (its attempt to accommodate Standbuy's request for a modification to PO 0080 and its wait for the Navy to provide a technical acceptability determination.) The Board found that acceptance was conclusive and revocation was not possible. Standbuy's appeal was sustained.

Takeaway. Although the government may revoke its acceptance for "latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the contract," acceptance must be revoked within a reasonable time after a mistake is discovered or could have been discovered with ordinary diligence. Boards will examine the circumstances of each case, and the government's actions to determine "reasonable time."

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