

RATIFICATION OF AN UNAUTHORIZED COMMITMENT

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Although the Government Contracting Officer contended that FireEye/Force 3 support services provided to the Dept. of Health and Human Services (“HHS”) beyond the first option year of a base year and two one-year option contract were “not ordered, requested, authorized or required by HHS” the Civilian Board of Contract Appeals (“CBCA”) held that HHS ratified its commitment to use the Force 3/FireEye Support services. *Force 3 LLC v. Dept of Health and Human Services*, CBCA 6654, April 14, 2021.

HHS placed a delivery order for FireEye support services (malware protection) for appliances previously purchased by HHS. The contract included a base year and two one-year option periods. HHS exercised the first option year, but did not exercise the second option year.

Force 3 had purchased in advance a three year subscription to the FireEye services. FireEye provided license keys to HHS. FireEye’s standard practice was not to sell support services for less than one year, and not to provide refunds for those who discontinue services before the end of the purchased terms.

The HHS contract incorporated the terms and conditions of Force 3’s proposal by express reference, and these stated that “[a]fter the date of expiration, non-renewal or termination of the contract, the Government shall certify in writing that it has deleted or disabled all files and copies of the software from the devices on which it was installed and is no longer in use by the Government.”

Even after the contract expired, FireEye notified Force 3 and Force 3 notified HHS that HHS continue to download software updates and security updates, and to seek technical support after the contract had expired. HHS failed to certify that it had deleted or disabled all files and copies of the software from the FireEye devices.

The HHS contract specialist notified the contracting officer that HHS continued to use the FireEye support services after the contract ended, despite failing to exercise the second option period. The contracting officer maintained that the services were not ordered, requested authorized or required by HHS and instructed the contract specialist to ask Force 3 to discontinue the services. However, Force 3 could not discontinue the updates or software, could not stop HHS from using the software or stop FireEye from providing the services to HHS, because the services came with a 36 month software license and could not be shut off remotely by FireEye. FireEye advised HHS that HHS could stop the downloads of security content or software delivery by unplugging the FireEye appliances, disabling internet access to the appliances or changing configuration settings in the appliances. HHS did nothing, and continued to download security content or updates, as well as obtain technical support, well into the second option year.

In the Appeal, HHS contended that it had no requirement to exercise option 2, and Force 3 accepted the risk that HHS would not exercise the option, therefore nothing was owed to Force 3. The CBCA saw things quote differently, holding that HHS had ratified its commitment to use

Force 3 support services. HHS had no right to use the support services, but continued to use them at no cost and with the knowledge of the contracting officer. The decision notes that “Both the Court of Claims and the Comptroller General have held that acceptance of benefits with the actual or implied knowledge of the contracting officer who does nothing to deter a contractor will, [] result in a ratification by inaction or implication entitling the contractor to recover.” *HFS, Inc.*, ASBCA 43748, et al, 92-3 BCA para 25,198 (citing other cases). The CBCA noted that the contracting officer’s actual ratification of the commitment was not relevant—implicit ratification is fact-based and occurs when those with the authority to ratify gain actual or constructive knowledge of an unauthorized contract commitment and then affirmatively act, or fail to act in a manner that implicitly adopts or improves that commitment.

Because the contracting officer failed to take action to stop the use of the support services or disable or delete the software updates, the contracting officer implicitly ratified and adopted the commitment for HHS’s continued use of the support services. There was no evidence that it was impossible for HHS to delete or disable the software or that performance was impracticable.

The CBCA held that Force 3 was entitled to recover damages for HHS’s continued use of FireEye support services—namely the cost of the full year of the FireEye services.

Takeaway: The Government contracting officer must take action when an option is not exercised, but services continue as if it were, and the contracting officer has actual or constructive knowledge that these services continue. Failure to act means there will be implicit ratification of the contract to provide the services.

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