

## ARE YOU A VOLUNTEER?

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Do you know what a government contract volunteer is? A volunteer is someone who embarks on duties of their own free will and without any expectation that they will be paid for their work. A contractor who elects to perform work not required by a contract without a formal change order is considered to be a volunteer who will not be paid for the services. *North Star Alaska Hous. Corp. v. United States*, 30 Fed. Cl. 259, 272 (1993), citing *Calfon Constr., Inc. v. United States*, 17 Cl. Ct. 171 (Cl. Ct. 1989).

Is it not only small businesses who fall into the trap of becoming an unpaid volunteer. Even one of the largest aerospace companies in the U.S. (Boeing) became a volunteer. Read on.

In *The Boeing Co.*, ASBCA No. 57409, Dec. 3, 2013, Boeing had a cost plus award fee contract to perform engineering assignments as ordered by the government. The contract included FAR 52.232-22, Limitation of Funds (“LOF”), which stated:

(f) [Except as otherwise required by specific provisions of this contract] the government is not obligated to reimburse the contractor for costs incurred in excess of the total amount allotted by the government in this contract and ...

The contractor is not obligated to continue performance under this contract (including acts under the termination clause...) or otherwise incur costs in excess of (i) the amount then allotted to the contract by the government...until the Contracting Officer notifies the Contractor in writing that the amount allotted by the Government has been increased [by a specified amount]

...

(h) No notice, communication or representation in any form that than specified in [the paragraph immediately above] ...shall affect the amount allotted by the Gov't to this contract. In the absence of the specified notice, the Gov't is not obligated to reimburse the contractor for any costs in excess of the total amount allotted by the government to this contract, whether incurred during the course of the contract or as a result of termination.

Here is the sequence of events:

- March 21, 2000: the government gave The Boeing Company (“Boeing”) an engineering assignment to develop and certify a Global Air Traffic Management System for the KC-10 aircraft (“KC-10 GATM”) for \$79 million.
- September 24, 2003: Boeing provided the Government a schedule and a revised estimated cost of \$155 million. Although the contracting officer spoke with Boeing and prepared a draft modification to add \$6 million to the allotted funding, this modification was never signed or sent to Boeing.

- March 10, 2004: the Contracting Officer issued a stop work order and 14 days later notified Boeing that he would not be obligating any additional funding to the KC-10 GATM.
- March 26, 2004: the contracting officer issued a letter to Boeing notifying it that the KC-10 GATM was terminated for the convenience of the Government.
- After March 26, 2004: Boeing asked for additional funding to cover project completion price, but was told by the Contracting officer that the Limitation of Funds Clause applied, there would be no additional funds requested, and “the amount remaining in the contract is it.”
- August 31, 2005: Boeing and its subcontractor Honeywell entered into an agreement settling the Honeywell subcontract termination for a net payment of \$11 million, and this agreement was included in Boeing’s certified termination settlement proposal.
- July 29, 2008: the contracting officer refused to ratify the Honeywell settlement except for \$182,000.
- August 3, 2010: the contracting officer issued a final decision denying ratification of all but \$280,000 of the \$10.8 million Honeywell settlement. The final decision was based on cost allowance and cost allocation grounds, but also that the Limitation of Funds clause barred recovery over the allotted amount.

The Armed Services Board denied Boeing’s entire claim. The Board said that it disagreed with Boeing that the government by its conduct otherwise waived or was estopped from invoking the Limitation on Funding Clause as a limit on Boeing’s recovery. Boeing claimed that its discussions with the contracting officer were a commitment to increase funding during performance of the KC-10 GATM, and by directing termination settlement activities with full knowledge of the cost overrun, the contracting officer led Boeing to reasonably believe that he was waiving the Limitation of Funds Clause.

The Board rejected both of Boeing’s contentions, noting that the Government repeatedly had advised Boeing that the Limitation of Funding clause was applicable to this task. The most telling part, and the part indicating that Boeing had acted as a volunteer, is the penultimate paragraph which stated:

Boeing had notice that the government considered the Limitation of Funds cause to be applicable to the termination settlements eight months before it concluded the Honeywell settlement agreement. Boeing also knew, or is chargeable with know, the terms of the LOF clause, the amount of the allotted funding in the contract, and the amount of its incurred costs in performing the contract. Subparagraphs (f) and (h) of the LOF clause expressly provided that Boeing was not obligated to incur, and the government was not obligated to reimburse, any costs of performing the contract, including termination activities, that would exceed the allotted funding in the contract. **If Boeing did incur termination costs in excess of the allotted funding, it was a volunteer and did so for its own account.** (Emphasis added)

TIPS: Whether the issue is incurring costs in excess of a contract ceiling, or a limitation of funds amount, or *anything else where it is clear the government is not obligated to pay you*, proceed at your own risk, or you, like Boeing, may become a “volunteer” that is not entitled to payment. How could Boeing have rectified this problem? By writing and meeting with the contracting officer and reaching agreement on its subcontractor’s costs, and by obtaining an increase in the LOF ceiling. Absent that, Boeing might have been better off just to refuse to make the additional payments to Honeywell. (We do not know if the LOF clause had been flowed down to Honeywell, but it is likely. If it had been flowed down, and the dollars were clear, Honeywell would likely not have had a claim against Boeing either).