IMPOSSIBILITY OR COMMERCIAL IMPRACTICABILITY

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Can "impossibility" or "commercial impracticability" be used as a good defense to non-performance if a contractor is defaulted by the Government? Although possible, both defenses are difficult to maintain and win. This was recently demonstrated in *Hearthstone, Inc. v. Dept of Agriculture*, CBCA 3725, Feb. 27, 2015. First, a discussion of the requirements, and then *Hearthstone.*

Impossibility

To establish the defense of impossibility, a contractor must show that performance was *objectively* impossible. It is not sufficient to show that performance was impracticable for the individual contractor--you must prove that performance would have been impossible for *any* similarly situated contractor. *Jennie-O Foods, Inc. v. United States,* 580 F. 2d 500, 410 (Ct. Cl. 1978). The ability of any other contractor to perform the disputed work is persuasive evidence that the contract was not impossible to perform. *Id.* Therefore, this defense is an extremely difficult one to maintain.

Commercial Impracticability

A contract is commercially impracticable when, because of unforeseen events, "it can be performed only at an excessive and unreasonable cost," *Int'l Elecs. Corp. v. United States,* 227 Ct.Cl. 208, 646 F.2d 496, 510 (1981), or when "all means of performance are commercially senseless," *Jennie–O Foods, Inc. v. United States,* 217 Ct.Cl. 314, 580 F.2d 400, 409 (1978). Whether performance of a particular contract would be commercially senseless is a question of fact. A contractor is not entitled to relief "merely because he cannot obtain a productive level sufficient to sustain his anticipated profit margin." *Natus Corp. v. United States,* 178 Ct.Cl. 1, 371 F.2d 450, 457 (1967).

The Supreme Court has formulated the doctrine of commercial impracticability in a government contract as follows:

> [W]here, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

United States v. Winstar Corp., 518 U.S. 839, 904, (1996) (quoting Restatement (Second) of Contracts § 261). This defense requires the contractor to show that (i) a supervening event made performance impracticable; (ii) the non-occurrence of the event was a basic assumption upon which the contract was based; (iii) the occurrence of the event was not the contractor's fault; and

(iv) the contractor did not assume the risk of occurrence. This is a four part test that is difficult to prove.

Hearthstone v. Dept of Agriculture

Heathstone was awarded a timber sale contract in September 2006. Hearthstone planned to use the timber to manufacture homes, but after the downturn in the economy, Hearthstone requested extensions in the date for it to make payments under the contract. (In a timber sale contract, the contractor pays the government for the timber and makes its profits on the use of the timber). The contract also included a rate redetermination clause, which Hearthstone requested use of. Despite the relief provided by the contract, Hearthstone failed to pay its initial progress payment in August 2013. After suspending the contract and giving Hearthstone additional time, the Forest Service terminated Hearthstone's contract in January 2013 for the company's non-payment.

Hearthstone argued that its performance should be excused because the contract was impossible to perform. The Board rejected that defense, noting that the doctrine of imposibility is "better applied to cases in which actual impossibility of performance is at issue, such as cases involving a defective specification."

Hearthstone also argued that its performance should be excused because the economic recession of 2008 and the resulting declines in the housing and timber market were greater than the economic conditions that the parties anticipated, and exceeded the mechanisms in the contract designed to address such changes. The Board rejected this defense, noting that a mere change in the degree of difficulty or expenses due to increased wages, price of raw materials or costs of construction, unless well beyond the normal range, does not amount to impracticability. *Restatement (Second) of Contracts,* §261 cmt. d. Typical examples of the rejection of this economic defense is found in the cases collected in *Raytheon Co. v. White,* 305 F.3d 1354, 1367 (Fed. Cir. 2002) ((57 percent cost overrun does not establish commercial impracticability); *Gulf and Western Industries, Inc.*, ASBCA No. 21090, 87-2 BCA ¶ 19,881 (claimed 70 percent overrun did not show commercial impracticability); *C&MMachine Products, Inc.*, ASBCA No. 43348, 93-2 BCA ¶ 25,748 (apparent 105 percent overrun did not result in commercial impracticability)).

The Board analyzed Hearthstone's situation by applying the four part test set forth by the Supreme Court, and explained why "commercial impracticability" did not apply. See below

ELEMENTS REQUIRED TO SHOW COMMERCIAL IMPRACTICABILITY IN A GOVERNMENT CONTRACT- and application to *Hearthstone, Inc.v. Dept of Agriculture,* CBCA 3725, Feb. 27, 2015

To establish Commercial Impracticability, Contractor	Can *Hearthstone* Establish This	Why Cant *Hearthstone* Establish This Element

must show:	Element?	
(1) a supervening event made performance impracticable;	YES	
(2) the non-occurrence of the event (non occurrence of a decline in timber prices) was a basic assumption upon which the contract was based	NO	The terms of the contract anticipated a possible decline in timber prices (mentioned extension of termination date when market declines, and allowed *Hearthstone* to request rate determination following market declines.)
(3) the occurrence of the event was not *Hearthstone's* faultt	YES	
(4) *Hearthstone* did not assume the risk of occurrence	NO	*Hearthstone* bore the risk that timber prices would decline, because this was a fixed price contract in which the contractor bears the risk of market decline.

Because Hearthstone could only establish two of the required four prongs, the Board rejected its defense of impracticability.

TIPS: If you are defaulted, showing that your contract was "impossible" to perform is nearly impossible to prove, because if another contractor could have done it, even at a higher cost, your defense will fail.

If you want to show commercial impracticability, i.e, that you could have only performed "at an excessive and unreasonable cost," you must meet all prongs of a four-part test, and they are quite difficult to meet.