

POSTAL SERVICE CONTRACT BOILERPLATE MAY BE UNENFORCEABLE AND CONTRARY TO PUBLIC POLICY

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In a recent decision by the Court of Federal Claims, the Court refused to dismiss a case over a terminated U.S. Postal Service (“USPS”) delivery contract, holding that three provisions in the contract were likely contrary to public policy. *Tabetha Jennings v. United States*, No. 14-132C (Fed. Cl. May 26, 2016). The Court ordered the USPS to show cause why three boilerplate sections should not be deemed unlawful and unenforceable, and ordered the General Counsel of the USPS to appear at a hearing on this matter.

Tabetha Jennings appealed the default termination of her \$34,000 per year contract to deliver mail. The Contracting Officer found that Ms. Jennings had conducted herself in an unprofessional manner and disrupted mail processing operations, and then permanently denied Ms. Jennings access to postal facilities. The same contracting officer then terminated her contract when she was unable to continue perform service by delivering mail as required by her contract.

Upon appeal to the Court, the Government moved for Summary Judgment, but the Court denied the motion, questioning three boilerplate sections of the USPS contract. The court noted that the Federal Circuit, in *Fomby-Denson v. Dept of the Army*, 247 F 3d 1366 (Fed. Cir. 2001) had explained that enforcement of a government contract was improper where enforcement would be contrary to the public policy of the United States as manifested in the Constitution, federal statutes and applicable legal precedents. This case includes three provisions, if enforced as a basis for termination, according to the Court, that would change an employment agreement into a contract of adhesion, where there is great disparity in bargaining power and where one party (Jennings) receives nothing for the provision.

The court noted that three provisions are ambiguous, not supported by adequate consideration and impose an unreasonable burden on due process, and explained as follows:

- One provision requires the supplier to have adequate contingency plans in place should the use of postal facilities be terminated or limited. But “adequate contingency plans” is an ambiguous term, not defined anywhere in the 48 page contract. Nor does this provision specify the circumstances under which USPS may terminate or limit access to postal facilities, and how long such access may be limited. Finally, the section provides that the USPS may not be held liable for, or incur any additional cost associated with use or termination of such use during the contract term. Therefore, any unilateral USPS decision to terminate or limit access are imposed on the supplier for the term of the contract—an unreasonable financial burden and obligation unsupported by consideration.
- A second provision requires that the supplier must perform or provide substitute performance during the entire period that any request for relief, claim, appeal or action arising under the contract is pending. This also permits USPS to impose an unreasonable financial burden on a supplier who elects to challenge any aspect of the contract.

- A third section requires that the supplier assure USPS that the supplier will assume continued performance if the other two sections are triggered, or risk termination for default.

The court noted that under the contract, Ms. Jennings was to be paid \$34,000 per year, but was required to assume potential liability of \$238,000 if she decided to exercise her due process rights to bring an action under the contract, or risk being terminated for default. The Court stated that this gross inadequacy of consideration “shocks the conscience,” and may be unenforceable by reason of lack of consideration or public policy.

The Court ordered the government to show cause why the court should not determine that the three above-cited sections are unlawful and unenforceable. In addition, the Court expressed concern that these boilerplate terms may have been invoked in other cases to terminate other contract employees. The Court ordered a status conference to hear argument on the show cause order and to determine if a permanent injunction is warranted, in the event these contract provisions are unlawful. The Court ordered the attendance of the General Counsel and Executive Vice President of the USPS at that status conference.