

INCORPORATION BY REFERENCE

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Incorporation by Reference “provides a method for integrating material from various documents into a host document...by citing such material in a manner that makes clear that the material is effectively part of the host document as if it were explicitly contained therein.” *Zenon Env’t Inc. v. U.S. Filter Corp.*, 506 F.3d 1370, 1378 (Fed. Cir 2007). Incorporation by reference requires the host contract to be express and clear, and leave no ambiguity about the identity of the referenced document, nor any doubt that the document is being incorporated. The Federal Circuit recently examined the incorporation of certain documents in a General Services Administration (“GSA”) Federal Supply Schedule Contract (“Schedule Contract”), and concluded that they had been incorporated by reference, vacating a decision of the Civilian Board of Contract Appeals (“CBCA”). *CSI Aviation, Inc., v. Dept of Homeland Security, General Services Admin*, No. 2021-1630 (Fed. Cir. April 14, 2022).

CSI submitted a proposal under a GSA Schedule contract for new air charter services. The proposal included CSI’s commercial price list and the CSI Terms and Conditions (Standard Commercial Warranty). The CSI Terms and Conditions included a “Cancellation Clause” entitling it to recover any special out of pocket expenses incurred directly and solely in connection with any canceled flights. After cancellation of numerous flights, CSI submitted a claim for \$40.3 million to Immigration and Customs Enforcement (the buying agency) based on the CSI terms and conditions for cancellation. The Contracting Officer found that CSI Terms and Conditions were incorporated in the contract, but were directly in conflict with FAR 52.212-4(l), Termination for convenience, that was in the schedule contract, and it took precedence over the CSI Terms and Conditions, and particularly CSI’s cancellation charges.

When CSI appealed to the CBCA, that forum held that the CSI Terms and Conditions were not incorporated by reference, asserting that there was no express incorporation language, it wasn’t clear they were being incorporated, and there was ambiguity about the document being referenced.

The Federal Circuit held that CSI’s offer plainly identified the Terms and Conditions, and expressly stated that CSI’s Terms and Conditions “will apply to all operations and are included for reference.” The Court held that the CSI offer used sufficiently clear and express language to establish the identity of the document referenced and to incorporate the CSI terms and conditions into the Schedule Contract by reference. The Court rejected CBCA’s objections to incorporation and reversed the CBCA holding, vacating and remanding the decision for further proceedings.

Takeaway. If you want to incorporate a document by reference, be sure to include the document in your offer (or other instrument), and explicitly state in the offer (or other instrument) that this document is incorporated by reference in the offer, and shall be incorporated by reference in the awarded contract. Leave no ambiguities.