

SO YOU THINK YOU GOT A GOVERNMENT CONTRACT?

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Many people *think* they have a valid government contract, but much of the litigation in the Courts and the Boards of Contract Appeals revolves around whether a contract was valid. To prove the existence of a contract with the government, a contractor must prove four basic elements: (1) mutuality of intent to contract; (2) offer and unequivocal acceptance; (3) consideration; and (4) a government representative having actual authority to bind the United States. *See Cal. Fed. Bank, FSB v. United States*, 245 F.3d 1342, 1346 (Fed.Cir.2001). In *1200 Sixth Street, LLC v. United States*, No. 12-388C (Fed. Cl. Feb. 14, 2013), the Plaintiff (1200 Sixth) allege that the Government breached a contract for purchase of real property in Detroit, but the Court found that the facts were insufficient to demonstrate that a contract existed, and therefore there could be no breach.

There can be many reasons why what appears to be a good contract is held to be invalid by a Court or Board, including (but not limited to):

- (1) You received only a letter from a contracting officer stating he/she “intends to make award” to you. *This is not an award, and should be treated as a nice advisory, but not a contract.*
- (2) You received an award that contains the Availability of Funds Clause at FAR 52.232-18, which states:

Funds are not presently available for this contract. The Government's obligation under this contract is contingent upon the availability of appropriated funds from which payment for contract purposes can be made. No legal liability on the part of the Government for any payment may arise until funds are made available to the Contracting Officer for this contract and until the Contractor receives notice of such availability, to be confirmed in writing by the Contracting Officer.

If there is no legal liability on the part of the Government for any payment, there is no contract.
- (3) You receive a letter from the contracting officer that your offer is “approved in principle” subject to certain things being worked out.
- (4) You received an acceptance of your offer signed by a Contract Specialist, Contracting Officer’s Representative, Program Manager, *or some other person who is not a Contracting Officer and has no authority to sign a contract.*
- (5) You received something other than an unequivocal acceptance of your offer by the Government.

1200 Sixth Street is a good example of the improper formation of a contract because of something other than unequivocal acceptance. The General Services Administration (“GSA”) wanted to create new field offices for the Federal Bureau of Investigation (“FBI”) in Detroit, Michigan, and began to negotiate with 1200’s Managing Member, Mr. Danou for a specific property where this could be built. After preliminary meetings, the parties executed a Real Estate Option Agreement, which said that GSA could exercise the option whether or not GSA had selected a developer. The Option agreement obligated both parties to expend money to pursue the project even though GSA was not obligated to buy the property until GSA exercised the option.

1200 Sixth believed that option exercise was imminent. The last encumbrance on the property for sale was removing antenna towers, held under an easement by the FAA and State Police, at a cost of \$114,000. Soon thereafter, by email (as had most of the communications on performance that was due under the option), GSA’s agent contacted 1200 Sixth and instructed them to “proceed with contacting the State regarding the 90 day notice for removal of the antennas.” GSA’s email also said it was “GSA’s intent to further discuss the assignable option the following day,” and said it would “be in contact with 1200 Sixth the next week.” 1200 Sixth assumed that this email constituted the exercise of the option, and immediately proceeded to have the towers removed at a cost of \$114,000. However, approximately 1 ½ years later, when GSA could not secure an acceptable developer (having lost the only one it had negotiated with), GSA ended the deal with 1200 Sixth Street.

1200 Sixth Street sued for breach of contract damages of \$4.5 million for losses and expenses.

Noting that the plain language of the contract controls, the Court held that the email fell well short of the ambiguous exercise of the requirements contained in the option agreement, which were:

- (1) A no-cost assignable option, which said that if Optionee “elects not to exercise rights, option or fee simple interests granted herein and to complete the purchase within the time *and in the manner* provided herein, then this option shall terminate without further action or obligation on the part of either party.
- (2) To exercise the option in accordance with the terms, GSA had to serve “written notice on [1200 Sixth] by [] certified or registered, return receipt requested, postage prepaid, US Mail, personal delivery, or recognized private overnight courier.”]

The Court stated that even if it overlooked the service requirements above, GSA’s acceptance in the email was not “clear, precise and unequivocal—any equivocation prevents the creation of the contract, citing *Williston on Contracts* Sec. 6:10 (2012). The email never exercised the option or ratified the purchase agreement, but merely directed 1200 Sixth to contact the State regarding removal of antennas. Furthermore, the email

underscored the continued existence of an option by saying “We [GSA] are meeting internally tomorrow to discuss the assignable option and remaining items.”

The Court said that “at best, the meaning of the email is ambiguous” and there are insufficient facts to prove that a contract existed. 1200 Sixth was completely out of luck.

- TIPS:
- (1) Always be sure there are no conditions on the acceptance of your offer or the exercise (acceptance) of an option. If you are unsure, write to the contracting officer and do not begin work.
 - (2) Always be sure your contract is signed by a contracting officer with proper authority (warrant)
 - (3) Make sure that acceptance of your offer is clear, precise and unequivocal, to ensure you have a valid contract.