

MATERIAL BREACH OF CONTRACT FOR GOVERNMENT FAILURE TO PAY INVOICES-CONTRACTOR MAY ABANDON PERFORMANCE

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On November 5, 2024, the Armed Services Board issued a second ruling on an appeal of a Washington Metropolitan Area Transit Authority (“WMATA”) contract performed by Philips Lighting North American Corp. *Phillips Lighting North American Corp.*, ASBCA Nos. 61769, et al, Nov. 15, 2024. The contract was to upgrade and replace parking garage lighting fixtures with energy efficient light emitting diode technologies and installation of state of the art metering equipment. The contract had two phases, construction and a 10 year maintenance period.

WMATA issued a Notice to Proceed to Philips on Oct. 18, 2013. Philips completed the construction portion of the contract on Feb. 1, 2017. On August 21, 2017 Philips submitted its initial invoice for \$1.0 million for the first six month maintenance portion of the contract. Philips subsequently submitted five additional maintenance invoices through Oct. 16, 2018 (in total, \$5.9 million) and WMATA admitted that it not paid *any* of these invoices. Philips submitted two certified claims of \$4.2 million, both of which were denied in full by WMATA, and appealed to the Board. On July 30, 2020, the Board granted partial summary judgment as to the payment obligations in the claims and complaint. On September 3, 2020 WMATA filed a motion for reconsideration while Philips subsequently filed its opposition and concurrently moved for an order directing immediate payment of money now due, and requesting sanctions against WMATA.

The decision addresses many points in the litigation, but this blog only addresses the non-payment of invoices. The Board rejected WMATA’s argument contending that the invoices were not paid because the invoices did not show that Philips met a “guaranteed savings level,” and WMATA argued that it had no obligation to pay Philips because Philips had never reached “final completion.” These assertions by WMATA had previously been rejected by the Board in its July 30, 2020 opinion. Also, WMATA argued that the invoices were “contractually flawed” (wrong baseline, wrong dates, wrong utility rates, etc.). The Board rejected this argument noting that the “the purported flaws in Philip’s invoices could easily have been corrected with discussions between the parties and Philips could have amended its claims to reflect any payments.”

The Board then held that WMATA’s actions to make no attempts to make even a partial payment over a period of years despite the Board’s previous decision, had materially breached the lighting contract. Such a material breach permits Philips to make a choice. It could either allege a total breach, terminate the contract and bring an action, or instead elect to keep the contract in force, declare the default only a partial breach, and recover those damages caused by the partial breach. Because Philips continued to maintain the lighting system and did not cease performance, the Board awarded damages based on Philips’s past performance through Feb. 29, 2024. The Board calculated the damages as \$10.7 million in lost revenue \$88,000 in certain infrastructure repair costs, for a total of \$10,742,551. The Board held that “if Philips continues performance going forward, WMATA must pay any future invoices pursuant to the terms of the contract and consistent with this decision.”

Takeaway. A total breach of any contract is very serious, and here the breach was made by the Government. The case shows the choices the non-breaching contractor can make (in addition to receiving monetary damages).

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