

GOVERNMENT BREACH OF PAYMENT CLAUSE

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In an interesting case whose outcome is not yet finally determined, the Federal Circuit held that the Army materially breached a payment clause by making payments to an entity not in the contractor's Central Contractor Registration ("CCR") database entry. *Aspen Consulting, LLC v. Secy of the Army*, No. 2021-1381 (Fed Cir. Feb. 9, 2022). Although the Army breached, the Court remanded the case to the trial body (the Armed Services Board of Contract Appeals) to determine if depositing payments into the wrong accounts benefitted the contractor—which would be an affirmative defense.

Aspen, a U.S. based company, was awarded a contract to outfit military dental clinics in Germany. The contract contains a payment clause that incorporated Federal Acquisition Regulation ("FAR") 52.232-33, which states:

The Government shall make payment to the contractor using the [Electronic Funds Transfer] EFT information contained in the Central Contractor Registration (CCR) database. In the event that the EFT information changes, the Contractor shall be responsible for providing the updated information to the CCR database.

The purpose of FAR 52.232-33 was to make an efficient shift to mandatory EFT payments, and require that contractors provide EFT information only once into a common governmentwide data source. A separate FAR clause (52.232-34) which was *not* included in Aspen's contract, details procedures for government payments using an EFT account *not* listed in the CCR database.

The Army made the first 12 payments to the account designated in Aspen's CCR database entry. Then it directed the next two payments, totaling \$264,000, to an account not listed in the CCR database for Aspen, and the company submitted a certified claim seeking payment of that money. The final contracting officer decision denied payment stating that the person who directed payment to the non-CCR bank had apparent authority to do so. The Armed Services Board denied Aspen's appeal, concluding that a contractor could change its EFT information before updating its CCR data.

Reading the plain language of the contract, the Court held that the Army's failure to pay the account listed in the CCR database was a material breach of the contract, because FAR 52.232-33 serves an important purpose for both parties—it protects the government and contractors who do business with it. Under the Board's interpretation, a contractor would have discretion to request that outstanding payments be made to unlisted accounts. The Court also found that the *non-inclusion* in the contract of FAR 52.232-34 was important, because this clause would have allowed the Army to make payments to accounts other than those listed in the CCR—and clearly the contract did not contemplate that.

However, the Court considered an alternative ground for affirming the Board—that Aspen used and benefited from the misdirected payment. Under UCC 3-602, payment is an affirmative defense and the defendant (Army) bears the burden of proof. In this case however, the Court

remanded this issue to the Board, because finding out whether Aspen benefitted from the misdirected payments was a fact intensive task that must be addressed by the trial body.

Takeaway. First, make sure your CCR entry (especially the EFT portion) is accurate and current. Use the CCR procedures to make any changes, which must be made by the person authorized to change your CCR.

Second, although the claim may ultimately be denied if Aspen benefitted from payment, it is important that the Federal Circuit used the plain language of the payment clause to hold the Army in breach. If payments are improperly made to a totally unrelated entity from the Contractor in the CCR, and there is no benefit to the contractor, recovery from such a breach should be straightforward.

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