

EXCULPATORY CLAUSE DOES NOT INSULATE GOVERNMENT FROM ITS OWN BREACH

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Where a contract imposes an obligation on the government, and that obligation is a condition that ensures the contractor can perform its duties, but the government breaches that obligation, an exculpatory clause in the contract does not relieve the government of liability. *Manitou Island Transit, LLC v. United States*, No. 21-953, (Fed. Cl. Oct. 26, 2023).

Manitou had a concession contract from the National Park Service (“NPS”) under which it was to provide commercial ferry services to certain islands in a National Park. Manitou’s claims were that the government breached its contractual obligation by failing to ensure that the docks on both of the islands were accessible during the 2020 season. The two claims by Manitou were detrimental reliance and breach.

Detrimental Reliance

Manitou’s detrimental reliance claim was that the contract and the parties’ longstanding course of conduct that the area would be maintained, the docks fixed and the passageways would be dredged in time for the 2020 season. Manitou said that in reliance upon those things, it commenced taking reservations, hiring staff and purchasing inventory, repairing its facilities, and incurring great expenses. Previously, the court held that a claim for detrimental reliance is a claim for promissory estoppel (i.e. “a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.” Restatement (Second) of Contracts, § 90(1) (1981)). The Court of Federal Claims has no jurisdiction over these claims because they require finding of a contract implied-in law against the government, for which there has been no claim of sovereign immunity. The court therefore dismissed Manitou’s detrimental reliance claim.

Breach

Manitou alleged that the government breached the contract by failing to maintain the docks on the islands so that Manitou could provide ferry service during the 2020 season. For a breach of contract claim, plaintiff must show a valid contract between the parties, an obligation arising out of the contract, a breach of that obligation and damages caused by the breach. The court held that the plain language of the contract imposed an obligation on the NPS to maintain the docks on the island because the operating plan stated this:

[NPS] is committed to the upkeep and maintenance of the docks...to ensure access by the Concessioner’s vessels.

Further, the court held that the clause plainly means that the maintenance performed by NPS must be done to a level that ensures Manitou’s ferries can access the docks. Finally the government asserted that the NPS’s liability was limited by an exculpatory clause in the contract which stated:

In the event of suspension or termination of this Contract for any reason or expiration of this Contract, no compensation of any nature will be due Concessioner, including but not

limited to compensation for personal property, or for losses based on lost income, profit or the necessity to make expenditures as a result of the termination.

The court held that the exculpatory clause in the contract did not relieve NPS of liability. General provisions seeming to immunize the government from paying damages due to the government's own breach or negligence should be construed, if possible, as not covering serious breaches causing important loss to the contractor. The Federal Circuit has declined to apply these types of limitation on liability clauses where the Government's own unreasonable conduct caused a delay or suspension. The overarching principle is that the Government cannot limit its liability if it acted unreasonably, failed to cooperate with, or hindered its contracting partner in the performance of the contract.

The court held that the contract imposed an obligation on NPS to maintain the docks on the islands in a condition that ensured the contractor access by Manitou's ferries for the duration of the season, and the NPS breached that obligation in 2020. Manitou is entitled to summary judgment on the government's liability for breach of contract. The court directed the parties to submit a status report on damages.

Takeaway. Generally, an exculpatory clause in a contract does not limit the government's liability if the breach is caused by government's unreasonable actions, failure to cooperate or hindering the contractor in performance of a contract.

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