

BRIEF: DONALD C WINTER V CATH-DR/BALTI JOINT VENTURE

497 F.3d. 1339

8/17/2007

Facts

Navy appeals from armed Services Board of Contract Appeals

- Ruled in favor of Cath for 13 of 37 claims
- Found Meland direct changes which resulted in extra costs
- Meland was delegated authority by clause of construction management and contract administration – charges are compensable
- Found Meland had “express actual authority” to resolve minor problems
- Finding of authority based on Navy’s response to RFI

9/29/1998 – parties enter contract

- Meland was EOICC and PM
- Cath began work 1/25/1999
- Navy sent letter “The Navy reassigned the day to day administration of the contract” to Meland
- Cath submitted RFI seeking “documentation of authority” and “level of authority” of Meland
- Navy Responded – he is to prepare/coordinate contract modifications, among other things

After work is substantially complete Cath submits request for a contract modification to Meland “in accordance with the procedure for equitable adjustment set forth in the pre construction conference presentation”

Contracting officer issued decision on 7/27/2001 – entitled to 12 claims and recommended Cath and Meland negotiate charges

Issue

Was contract modified by someone with actual authority?

Did Meland have actual authority?

Did CO ratify Meland’s modifications?

Is ratification sufficient to bind government?

Rule

Some rules expressly incorporated into contract:

- FAR §52.243-4 (aug 1987) Changes clause
- FAR §52.236-2 (April 1984) Differing Site Conditions – Contractor has to give written notice of physical differences of site, CO investigates, makes contract modification of equitable adjustment

NAVFAC 5252.201-9300 Engineering Command Contracting Officer Clause – Reserves authority to bind government exclusively to CO, no one else
NAVFAC 5252.242-9300 Government Representatives clause – Engineer may be delegated some authority by all changes to contract must be by CO only
104 F.3d. 1321 – Apparent authority is not sufficient to bind government. Actual authority may be express or implied
48 CFR §§43.102, 1.602-1, -2 – Only Cos can bind government by entering contracts, CO has authority to administer contract and ensure compliance
DOD regulation – 48 CFR §§201.602-2, 252.201-7000 – CO can't delegate authority to EIC to make changes to contract
Despite what Navy said in presentation, response to RFI the language of the law and the contract govern
Unauthorized changes may be ratified by the CO, if certain elements are met
(Harbert/Lummus)

Application/Analysis

CO's delegation of authority to EIC didn't include power to make/change contract – by law it couldn't have
ONLY CO can make changes to the contract
Meland didn't have authority to change contract because the law/contract disallow it
What was said in presentation is irrelevant, especially if it contravenes the law/contract
Changes could have been ratified by CO, and thus bind the government, but that determination requires findings of fact that haven't yet been made

Conclusion

Remand case to try facts and determine if changes were ratified by CO
“we cannot conclude that Meland had implied authority to direct changes in the contravention of the unambiguous contract language”