Ruling May Aid Recovery Under Fixed-Price Service Contracts

By David Hendel
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Contractors who toil under a fixed-price service contract now have a new claim theory they can use to recover unexpectedly high performance costs.

A recent opinion by the Postal Service Board of Contract Appeals in Weber Trucking LLC v. U.S. Postal Service has breathed new life into the theory of defective specifications, holding that the doctrine applies to service contracts.[1] The case and its application could have broad implications for government contractors.

Weber Trucking

Weber Trucking held a fixed-price contract with the Postal Service to sort and "carry all mail tendered" along a designated route in Las Vegas, Nevada. The solicitation and resulting contract set out estimated hours and mileage but contained disclaimers as to their accuracy.

The contract stated that the estimated annual miles were given only as information and instructed the supplier to determine the actual miles. Similarly, the solicitation stated that the estimated annual hours were approximately the hours needed, and that the contractor must determine the actual hours.

No estimate was provided for the amount of mail that would be tendered. The Postal Service tendered far more mail than could be delivered within the time allotted in the contract's schedule.

To cope with the overflow of mail, the contractor hired an additional carrier and added a second vehicle. When the Postal Service provided only a slight increase based on the contract's adjustment formula, Weber Trucking filed a claim seeking to recover all of its additional performance costs.

Weber's claim was sustained, with the three-judge panel splitting on their rationale for the holding. The presiding judge, Peter F. Pontzer, upheld Weber Trucking's claim based on the legal theories of defective specifications and superior knowledge.[2]

Applying Defective Specifications to a Service Contract

When the government provides a contractor with defective specifications, the government is deemed to have breached the implied warranty that satisfactory contract performance will result from adhering to the specifications. In such case, the contractor is entitled to recover the increased performance cost caused by the defective specifications.[3] This is called the Spearin doctrine.[4]

There are two types of specifications: performance and design. Performance specifications dictate a result the contractor must achieve, leaving the contractor discretion to determine how to achieve it. Design specifications detail the manner in which the contract is to be performed, leaving the contractor no discretion to deviate from those details.[5]

Generally, the government is liable only if the contractor relies on defective design specifications,[6] so the Spearin doctrine has typically been applied only to contracts for construction or manufactured items [7]

But in Weber Trucking the Postal Service Board of Contract Appeals extended the doctrine beyond construction and supply contracts and applied it to performance specifications in service contracts.

Extending the doctrine beyond construction and supply contracts provides service contractors with a new basis under which they can potentially recover their additional performance costs.

Citing the specifications in the contract, such as a daily work schedule, required vehicle cargo capacity, exact line of travel and other prescribed aspects of the contractor's performance, Judge Pontzer noted that it would have been impossible for the contractor to drive the routes and gain an understanding of the amount of time needed to complete the routes, particularly when the Postal Service failed to provide any information about mail volume.

The contract's attempted disclaimers did not absolve the Postal Service from liability on these grounds.

Judge Pontzer's reasoning would apply to any federal agency contract for the provision of services in which the contractor is compensated by a fixed price or fixed rate. While the defective specification in Weber Trucking was a daily work schedule, the doctrine would equally apply to equipment requirements and work procedures that stymie performance.

For example, if a janitorial services contract specified use of a particular cleaning product or trash container that was not suited to the cleaning work required, a defective-specification claim could be made for the additional cost of cleaning services.

Contract Schedules and Implied Warranties

Contract schedules do not serve as implied warranties that the particular contractor can complete the work within the schedule time.

The Armed Services Board of Contract Appeals' 2020 decision in ECC International LCC dismissed a claim that a contractor's 365-day performance period served as a warranty that the project could be completed by the contractor within that period.[8] In

that case, the government awarded a contract that required completion of a facility in Afghanistan within 365 days after issuance of a notice to proceed.

The board held that a due date in a contract is not a warranty by the government that the contractor could perform it by that date. The contractor should have been aware of the performance requirements and its own capabilities, and thus the contractor assumed the risk of performing by the specified due date.

The key takeaway here is that the contractor's failure to complete performance on time was a function of the contractor's own inability to meet the one-year deadline and not the one-year completion period itself.

Superior Knowledge Claims

Where a defective-specification claim exists, a superior knowledge claim may be lurking as well.

To recover under a superior knowledge claim, the contractor must prove: (1) it lacked knowledge of a vital fact that affected performance; (2) the government was aware the contractor lacked knowledge of the vital information and had no reason to obtain it; (3) the contract specification misled the contractor or did not put it on notice to inquire; and (4) the government failed to provide the relevant information.[9]

In Weber Trucking, Judge Pontzer also found entitlement under the theory of withheld superior knowledge.

The judge found the specification misled Weber Trucking by representing that the contract could be performed within the hours identified and that the Postal Service did not provide it with the correct hours needed to perform the contract, and therefore, the contractor could not have knowingly accepted the risk.[10]

Overriding Risk-of-Performance Provisions

Weber Trucking opens up a new avenue for redress for fixed-price service contractors because a defective specification overrides any contract provision that places the risk of performance on the contractor.

Agency contracts frequently place the risk of performance on the contractor, especially in fixed-priced contracts. But while the contract may place the risk of performance on the contractor, the contractor never accepts the risk it will be provided defective specifications.

A claim of defective specifications may provide fixed-priced contractors their only way to recover their additional cost of performance.

Practitioner Takeaways

Practitioners should not be deterred from pursuing defective-specification claims

simply because the contract has a fixed-rate or built-in price adjustment formula. If a defective specification exists, the contractor is entitled to full compensation for its attempted compliance and is not limited to the contract's fixed-rate or price-adjustment formula.

To prevail on a theory of defective specifications, the contractor must also show that it both relied on those specifications and the defect was not patent.[11] Thus, practitioners will need to show the contractor relied on the defective specification when it prepared its proposal and performed the work.

You will also need to show that the defective specification was not an obvious omission, inconsistency or significant discrepancy, as that would obligate the contractor to make an inquiry before submitting its proposal.

Practitioners will also need to show that the performance difficulties encountered were not due to the individual contractor's own capabilities, or lack thereof, and that any contractor trying to perform under the defective specification would have faced similar issues will be needed.

Where defective specifications exist, the government may also have failed to disclose its superior knowledge about the defect. This provides yet another theory under which a service contractor could recover for unexpectedly high performance costs. In addition, claim theories of impossibility of performance and impracticability of performance may also apply.

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[1] Weber Trucking LLC v. U.S. Postal Service, PSBCA Nos. 6784 and 6813 (November 19,2021).

[2] The other two panel members, Chairman Alan R. Caramella and Judge Diane Mego, issued a concurring opinion. They found the parties had an oral agreement to amend the contract. They thus did not need to consider the defective specifications and superior knowledge theories. Presiding Judge Pontzer, however, did not agree there was a binding oral agreement and thus based his opinion on the defective-specification and superiorknowledge theories.

[3] Magnus Pac. Corp. v. U.S., 133 Fed. Cl. 640, 677 (2017)(citing Hol-Gar Mfg. Corp. v. U.S., 360 F.2d 634, 638 (Ct. Cl. 1966).

[4] J.L. Simmons Co., 412 F.2d at 1362; Franklin Pavkov Const. Co. v. Roche, 279 F.3d 989, 994-95 (Fed. Cir. 2002)(citing Spearin v. U.S., 248 U.S. 132 (1918)).

[5] See Kiewit Const. Co. v. U.S., 56 Fed. Cl. 414, 421 (2003); see also P.R. Burke Corp. v. U.S., 277 F.3d 1346, 1357 (Fed. Cir. 2002).

[6] See Martin Constr., Inc. v. U.S., 102 Fed. Cl. 562, 574 (Fed. Cl. 2011); Dewey Elec. Corp. v. U.S., 803 F.2d 650, 658 (Fed. Cir. 1986).

[7] See, e.g., American Ordnance LLC, ASBCA No. 54718, 10-1 BCA ¶ 34,386; Northrop Grumman Systems Corp. v U.S., 140 Fed. Cl. 249, 281-82 (Fed. Cl. 2018).

[8] ECC International LCC, ASBCA Nos. 60165, 60282 (June 2, 2020.).

[9] Weber Trucking, citing Hercules Inc. v. U.S., 24 F.3d 188, 196 (Fed. Cir. 1994); C.M. Moore Div., K.S.H. Inc., PSBCA No. 1131, 85-2 BCA ¶ 18,110, 1985 WL 17160, recon. denied, aff'd 818 F.2d 847 (Fed. Cir. 1987).

[10] Weber Trucking, citing J.A. Jones Const. Co. v. U.S., 390 F.2d 886, 888 (Ct. Cl. 1968); C.M. Moore, 85-2 BCA ¶ 18,110.

[11] E.L. Hamm & Associates Inc. v England, 379 F.3d 1334, 1338-39 (Fed. Cir 2004).
