

REQUIREMENTS CONTRACTS: WORDS OF EXCLUSIVITY

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The Federal Circuit recently clarified that an agency's contract may still contain requisite language to make it a requirements contract, even if the contract does not include the required Federal Acquisition Regulation ("FAR") clauses. *Caring Hands Health Equipment & Supplies, LLC, v. Secy of Veterans Affairs*, No 2022-2202 (Fed Cir. Jan. 22, 2024). In this case, the contract language made it clear that the agency made a promise to purchase the subject matter of the contract exclusively from the seller.

The FAR defines a requirements contract as:

A requirements contract provides for filling all actual purchase requirements of designated Government activities for supplies or services during a specified contract period (from one contractor) with deliveries or performance to be scheduled by placing delivery orders with the contractor. FAR 16.503(a).

The case notes that an essential element of a requirements contract is the promise by the buyer to purchase the subject matter of the contract *exclusively* from the seller.

FAR 16.506 specifically directs the contracting officer to include the clause at FAR 52.216-18, Ordering, in requirements contracts. The same FAR section also directs the contracting officer to insert the clause at FAR 52.216-21, Requirements, in contracts which are requirements contracts.

What happens when the contracting officer fails to include the required clauses? Does this negate the requirements nature of the contract? The Federal Circuit explained that this depends on the "exclusivity words" (if any) in the contract.

The Department of Veterans Affairs ("VA") awarded two series of contracts to Caring Hands to deliver government-owned home medical equipment from VA warehouses to VA medical beneficiaries. The court labeled these the "2014 contracts" and the "2015 contracts." The 2014 contracts contain FAR 52.216-22 (indefinite quantity clause) and FAR 52.216-19 (order limitations clause) but not the FAR requirements clause. The 2015 contracts do not contain the FAR indefinite quantity clause, order limitations clause or the requirements clause. When VA ordered home medical equipment from entities other than Caring Hands during the 2014 and 2015 periods, the contractor submitted a claim stating it was the sole party entitled to receive such orders.

Upon appeal to the Civilian Board of Contract Appeals, the Board held that the 2014 contracts were indefinite delivery contracts, and Caring Hands was not entitled to additional recovery. The Board held that the 2015 contracts were illusory because they were not requirements contracts or enforceable indefinite delivery contracts.

Caring Hands appealed to the Federal Circuit, which held that the 2015 contracts unambiguously established an intent to create a requirements contract. Even though the FAR requirements clause was not present, the General Requirements clause in the contract states that "the contract shall be for the actual requirements of the VA as ordered by the VA during the life of the contract." The words "actual requirements of the VA" thereby obligated the VA to order all required services from Caring Hands.

The Federal Circuit also considered the 2014 contracts, finding they were *not* requirements contracts because they did not contain the FAR requirements clause or any other words of exclusivity in the language of the contract.

The Federal Circuit reversed the Board's decision on the 2015 contracts, but affirmed the Board's decision on the 2014 contracts.

Takeaway. Although the FAR directs the inclusion of certain FAR clauses in requirements contracts, even if these clauses are omitted the Federal Circuit will examine whether there are "words of exclusivity" in the contract itself that would result in its being interpreted as a requirements contract. It may be best practice to raise this issue prior to the award, however, and request the inclusion of all required clauses to eliminate possible litigation later.

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