



PACA Pulse

FALL 2016

PROFESSIONAL AEROSPACE CONTRACTORS ASSOCIATION OF NEW MEXICO

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Spaceport America Names Daniel Hicks New Chief Executive Officer

by Tammara Anderton, Spaceport America

Daniel Hicks began his 34-year career with the U.S. Army White Sands Missile Range (WSMR) in 1982 as a Test Conductor within the Materiel Test Directorate. In 1991, he became the Supervisory General Engineer of the Patriot Missile System, leading the execution of all aspects of developmental testing and combined developmental/operational testing in the acquisition of a major military system. Mr. Hicks went on to become the acting Division Chief, where he managed the activities of the three branches in the Division: Air and Missile Defense, Tactical Missiles and Targets, and Space, Sensor and Interoperability. These programs focused on theater missile and national missile defense; air defense battle management; U.S. Army directed energy and space programs; space related programs/applications under NASA; and DoD, foreign, and other commercial programs.

Later, Mr. Hicks was appointed by the Commanding General to stand up a new Business Development Directorate with qualified engineers and scientists responsible for the strategic planning, transformation, business development, marketing, and staff functions for U.S. Army WSMR. His responsibilities included leading the overall business development and instrumentation and test infrastructure development. Here he led the successful merger of two directorates into one, maximizing investment dollars based on customer requirements which created direct cost savings for U.S. Army WSMR.

Following that assignment Mr. Hicks became the Technical Director of WSMR, the Chief of Staff, and in 2013, the Deputy

Executive Director. In these leadership roles, he was responsible for assisting the Commanding General and the Executive Director in the operations of the entire WSMR, with over \$11 billion of infrastructure and a noontime population of approximately twelve thousand personnel. Mr. Hicks was also responsible for the direct oversight of the command planning functions for the range including his recent completion of WSMR 2046, a 30-year strategic plan, as well as maintaining oversight for all



external relationships; congressional and state legislatures; federal, state, and local agencies; and other community and business stakeholders. He retired after 34 years of government service and on November 14 of this year took over the position as CEO of Spaceport America.

A graduate of Las Cruces High School, Mr. Hicks earned a B.S. in Mechanical Engineering from New Mexico State University where he received an honorary selection to the Mechanical and Aerospace Engineering Academy.

Comments from Mr. Hicks: *I am so excited and grateful for the opportunity to lead the great team at Spaceport America. I have always believed in Spaceport America. It is a national treasure that is important*

continued on the following page

Spaceport America *continued*

to our state's economy and our nation's commercial space industry. I am very impressed with what Chris Anderson, her team, and the Spaceport Authority leadership have accomplished these past five years. The construction is complete; a great foundation of tenant activities with Virgin Galactic and others are in place; and numerous successful launches have taken place. We are entering a very exciting phase of increased operations and I am looking forward to working with the team and sharing my 34 years of launch operations and business development experience from U.S. Army WSMR. I'm looking forward to getting out in the New Mexico communities, sharing our great successes, and especially meeting with our current and future commercial space industry partners. I want to thank the New Mexico Spaceport Authority Board of Directors and the Governor for their trust and allowing me to become the next CEO of this incredible national asset. •

Upcoming Luncheon Speaker

■ **January 17 – Daniel Hicks, Spaceport America, Chief Executive Officer**



Mr. Hicks' many accomplishments during a 34-year career with the U.S. Army White Sands Missile Range included testing and development of the Patriot Missile System, managing multiple air and missile defense programs, and leading energy and space programs under NASA and the Department of Defense.

Please see front page story for a complete biography.

We meet the third Tuesday of each month at **Tanoan Country Club** (Rolling Hills entrance east of Eubank off Academy). Registration begins at 11:30 a.m. followed by lunch at noon. Members are admitted free and our guest fee is \$20.

To RSVP, register online at www.pacanm.org. Include your name, guest's name, and menu selection. Please RSVP by the Wednesday before the week of the meeting. •



President's Corner

by *Michael Emerson*



As I write this column, Albuquerque is enjoying unseasonably warm November weather and the leaves are yet to drop from my mulberry trees. Nevertheless, the New Year is just around the corner and it's a great time to reflect on PACA's 2016 successes. And what year it was!

At 109 paid members, PACA membership is up 36% over this time last year. This is the result of 1) lowering the dues, 2) creation of an Associate Member category for retired members, and 3) Briefing for Industry (BFI) generating new members. We hope to continue this growth trend into 2017.

Speaking of BFI, it was another great year for the conference. Over 430 attendees from 24 states were presented with \$15.3 billion in upcoming contract opportunities. Due to popular demand, we will expand the next BFI to three full days. I hope to see you all there.


During the year, our members enjoyed two networking events and many interesting monthly luncheon speakers. Our annual Holiday Party on December 2 at Tanoan Country Club concludes 2016 with a celebration. As is our tradition, our Vice President, **Mark Menicucci** will host the event that he is busy organizing. Please contact Mark if you would like to help out with the party or donate gifts.

Representatives from the University of New Mexico, New Mexico Tech, and New Mexico State University will be our guests at the event to receive their annual PACA scholarship donations. The success of the 2016 BFI allowed PACA to donate \$20,000 to scholarships at New Mexico's flagship colleges. PACA scholarship donations have exceeded \$250,000 to date.


In the coming year, the PACA Board will continue to work to make the organization a rewarding experience for all of you. A new initiative in progress is a complete website update to make the site more user-friendly. Webmaster Dar Johnson is overseeing this effort. We are also considering new speakers to enhance the monthly luncheons including procurement representatives, base commanders, and business leaders. Please pass any speaker suggestions on to me.

I extend a heartfelt thank you to outgoing Legislative Liaison **Heather Brewer** for her valuable help in navigating the state and national legislative map with regards to aerospace and defense-related issues, and outgoing Program Chair **Clarence Culbert, Jr.** for his service.

As I mentioned in my last column, our success is due to the many dedicated PACA volunteers. To this end, I want to encourage members to consider a board or committee chair position when elections occur in March 2017. Openings include Vice President and the newly vacated Program Chair and Legislative Liaison positions. Please let me know if any of these openings interest you so we can get you involved now. In the meanwhile, happy holidays! •



Reminder:
December 2
Holiday Luncheon
(Friday)
Looking forward
to seeing you and
your guest there!



Legal Insights: Common Contract Claim Scenarios

By Ross Crown

Contractors who sustain an unexpected financial injury performing a contract with the federal government, either in the form of greater costs or lost profits, will need to consider whether the circumstances give rise to a claim against the contracting officer pursuant to the Contract Disputes Act. Contract claims can take many forms, but nevertheless certain common claim scenarios are well-established. These scenarios include negligent estimates, increased cost of performance, differing site conditions, terminations for convenience and breach of the duty of good faith and fair dealing. To assert a claim arising from one of these situations, a contractor needs to be cognizant of recent case law defining the requirements of such claims.

Negligent Estimates

In *Phoenix Mgmt., Inc.*, ASBCA No. 59273, 15-1 BCA ¶ 35,956, a contractor was awarded a contract to maintain fire detection and suppression systems for the Air Force at Homestead Air Reserve Base. The contract's work statement estimated the number of emergency calls that the contractor should expect during the period of performance. After award, the contractor sought an equitable adjustment to the contract price based on its allegation that the Air Force failed to disclose that (1) most of the systems were proprietary systems that could only be serviced at a higher price by firms licensed by the original equipment manufacturer, (2) more than half of the existing fire detection systems were in failing condition and in urgent need of repair, having not been previously maintained to industry standards, and (3) none of the detection systems had been inspected during the previous five years. The ASBCA held that the Air Force's failures to disclose prevented the Board from dismissing the contractor's appeal as a matter of law.

The Court of Federal Claims in *The Ravens Group, Inc. v. United States*, 112 Fed. Cl. 39 (2013), denied the government's motion for summary judgment to defeat a negligent estimate claim submitted under a combined firm fixed price/IDIQ contract for maintenance services on Army housing. The Army told the contractor it could expect 50 routine service calls each month. Shortly after contract award, the contractor began responding to 90 service calls per month. The Army admitted there was no "rhyme or reason" to its estimate and that it "just picked a number." No one with the Army investigated whether the number was accurate or what information was used to determine the estimate.

The Court explained that the risk of variance between contract estimates and actual requirements generally rests with the contractor. Government estimates are not guaranteed. Nevertheless, bidders are ordinarily entitled to rely on estimates as representing honest and informed

conclusions. The government may be liable if the contractor can prove that the government (1) failed to prepare an estimate in good faith, (2) prepared an estimate negligently, or (3) failed to use reasonable care.

Increased Cost of Performance

In *Agility Def. & Gov't Services, Inc. v. United States*, 115 Fed. Cl. 247 (2014), the contractor entered into a firm fixed price/IDIQ contract with the Army for the purchase of various Soviet-style weapons in support of Army's security assistance mission in Afghanistan. The contractor encountered difficulty procuring the specific weapons identified in its delivery order due to the objections of the Hungarian and Bulgarian governments. As a result, the parties entered into a bilateral modification to provide different types of weapons and to extend the delivery date. The modification did not, however, include a price increase. The contractor sought an equitable adjustment for the increased cost it incurred in procuring the different weapons. The Court of Federal Claims rejected the contractor's request for an equitable adjustment, however, finding the contractor assumed the risk of increased cost and scarcity of goods when it entered into a firm fixed price contract.

The Court stated that a firm fixed price contract provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract. A firm fixed price contract places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss.

The contractor argued that the contract was commercially impracticable. This doctrine applies when, because of unforeseen events, it can be performed only at excessive and unreasonable cost, or when all means of performance are commercially senseless. The Court held this doctrine is not available where the contractor assumes the risk of occurrence of the supervening event.

Differing Site Conditions

In *CCI, Inc.*, ASBCA No. 57316, 14-1 BCA ¶ 35,546, the ASBCA denied a contractor's \$35 million claim for differing site conditions. The contractor was awarded a contract to construct a pier and seawall in Iraq. At issue in this case was a "Type I" site condition, a latent condition that is materially different from that specified in the contract.

The Board stated that to establish a Type I differing site condition, the contractor must prove that (1) the contract contains positive indications of the conditions at the site; (2) the contractor reasonably interpreted and relied upon the indicated site conditions; (3) the conditions encountered were materially different from those indicated; (4) the conditions encountered were reasonably unforeseeable based upon



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Legal Insights *continued*

all of the information available at the time of bidding; and (5) the contractor's injury was caused solely by the differing site conditions.

In this case, the Board found the contractor unreasonably relied on site information provided in U.S. and Iraqi reports including express disclaimers that the reports were "provided for information only." The contract put the contractor on notice that it would be responsible for securing site-specific geotechnical information but the contractor conducted only a minimal pre-proposal site visit with no follow-up investigations. The contractor also disregarded a consultant's warning that its proposal price was too low.

Termination for Convenience

The Department of Defense in *TigerSwan, Inc v. United States*, 110 Fed. Cl. 336 (2013), awarded two contracts to a contractor for Iraq-based security services. The incumbent contractor protested both awards. Shortly after award, DOD terminated each of the contracts for convenience and then awarded sole-source contracts for the work to the incumbent. The replacement contractor submitted a breach of contract claim to the contracting officer asserting that the termination for convenience was an abuse of discretion and issued in bad faith. It alleged an improper personal relationship between the director of the DOD program for which the contracts were issued and the team leader of the incumbent.

The Court denied the government's motion for dismissal, noting that there are several circumstances where the government in exercising its contractual right to terminate for convenience may be liable for breach of contract. These circumstances include situations in which the government has acted with animus toward the contractor, where the government abuses its discretion, or where the government never intended for the contract to go forward. Bad faith does not necessarily require an intent to harm the contractor. The government can still be liable for a breach of contract based on improper termination for convenience where the government has engaged in some form of improper self-dealing for its own benefit or to benefit another contractor.

Breach of the Duty of Good Faith and Fair Dealing

A contractor who provided trucking services to the Army in Afghanistan filed a claim for payment of over 500 invoices in *Mansoor Int'l Dev. Services, Inc. v. United States*, 121 Fed. Cl. (2015). The contracting officer advised the contractor that the Army was willing to evaluate and settle the invoices in the aggregate. Rather than review each invoice, the Army proposed to use an audit technique involving a statistical sampling of the invoices.

The contractor objected and demanded that the Army consider each invoice individually. This objection was disregarded and the Army issued a final decision based on the aggregate approach denying the majority of the invoices. The Court of Federal Claims found the Army plausibly breached the implied duty of good faith and fair dealing by conducting settlement negotiations in a manner that defeated the contractor's reasonable expectations. The Court said the

implied duty exists because it is rarely possible to anticipate in contract language every possible action or omission by a party that undermines the bargain.

In *D'Andrea Bros. LLC v. United States*, 109 Fed. Cl. 243 (2013), the Court of Federal Claims considered whether the Army breached a Cooperative Research and Development Agreement (CRADA) with the contractor for the commercialization of nutritional energy bars used by the Army. The CRADA granted the contractor an exclusive five year license to use the trademark "HooAH!" for commercial sales of the energy bars in exchange for royalties. The government subsequently changed the name of the product to the "HooAH!/OOHRAH!" bar to appease the Marine Corps which objected to the sole use of the Army's battle cry. The contractor trademarked "OOHRAH!" Unfortunately, other private companies were supplying energy bars to the military using the words "HooAH!/OOHRAH!" and the contractor complained to the government. Thereafter, the government refused to communicate with the contractor for eight months and changed the name of its bar to the First Strike Bar. As a result, the contractor discontinued its royalty payments.

The implied covenant of good faith and fair dealing, said the Court, guarantees that the government will not interfere with the other party's performance and not act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.

The Court held the government breached its duty of good faith and fair dealing by refusing to communicate with the contractor for eight months and by changing the name of the bar to avoid trademark infringements. This nullified the understood purpose of the CRADA which was to commercialize a product used by active military members, using the same name as the military. The implied covenant of good faith and fair dealing, said the Court, guarantees that the government will not interfere with the other party's performance and not act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.

Claim Must be Supported by Legal Authority

While, as noted, contract claims can take many forms, the common claim scenarios described above represent well-established paths to an award of damages to the contractor. Before embarking upon the claims process, a contractor must determine if its theory of recovery is supported by legal authority. •

Ross is a partner in the Albuquerque office of Lewis Roca Rothgerber Christie LLP where his practice emphasizes government contracts. This article is intended for general information only and should not be construed as legal advice or opinion. Any questions concerning your legal rights or obligations in any particular circumstance should be directed to your lawyer.

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PACA Sponsorship Opportunities

Support to PACA in the form of sponsorships helps make the organization a success while promoting your business. The Board has recently added another sponsorship choice, the Premier Small Business sponsorship for \$1,000.

Please contact **Dar Johnson** if you have questions about sponsorships at **505-400-1639** or **d_r_johnson@comcast.net**.

ANNUAL SPONSORSHIPS of \$1,000 - \$7,500: *One time each year* space is provided for a tabletop display at a membership luncheon and the opportunity for a five minute corporate overview presentation. The table will be either in the lobby or in the banquet room, depending on the size of the room. Also, depending on room arrangement and speaker presentation, special rules may apply per event.

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- Sponsor level (Diamond) recognition on PACA website.
- Corporate logo on PACA signage at luncheons and events.
- Three registrations for the PACA annual Briefing for Industry.
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- Advance electronic list of BFI attendees.
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- Addition of company literature or giveaways in BFI Goody Bag.

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- Special reserved seating at BFI.
- Addition of company literature or giveaways in BFI Goody Bag.

SMALL BUSINESS QUARTERLY LUNCHEON \$400: (One sponsor per quarter for January, April, July, and October meetings and the December holiday party).

- Company logo on the PACA website.
- Booth at BFI.
- Two guests for the sponsored lunch.
- Corporate logo displayed on signage for the sponsored luncheon.
- Introduction as the luncheon sponsor and be allowed to present a 5-10 minute overview of company. Corporate brochures may be placed on the luncheon tables. A small business sponsor may not sponsor another luncheon for twelve months. •

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PACA membership annual dues are \$200.* The fiscal year runs from April 1 to March 31. Mid-year applications will be pro-rated. You may apply and pay dues at www.pacanm.org.

For more information, contact our Membership Chair, **Terel Anyaibe**, at tanyaibe@aerotek.com or **342-5007**.

* Dues are subject to change.

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Contributions are welcome! •