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## View From Brown Rudnick: Payment of Fixed Fee Under CPFF Contracts



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**A**ccording to Federal Acquisition Regulation 16.306(d), a “cost-plus-fixed-fee contract may take one of two basic forms – completion or term.” The FAR describes both forms and gives examples of how the fixed fee should be paid.

The “completion form” cost-plus-fixed-fee (CPFF) contract “describes the scope of work by stating a definite goal or target and specifying an end product.” FAR 16.306(d)(1). A completion form CPFF contract generally requires the contractor to complete and deliver the “specified end product (e.g., a final report of research accomplishing the goal or target) within the estimated cost, if possible, as a condition for payment of the entire fixed fee.” The “term form” CPFF contract “describes the scope of work in general terms and obligates the contractor to devote a specified level of effort for a stated time period.” FAR 16.306(d)(2). Under the term form CPFF contract, if the government finds the contractor’s performance satisfactory, the fixed fee is payable at the end of the agreed time period, “upon contractor statement that the level of effort specified in the

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contract has been expended in performing the contract work.” The FAR also states that the completion form contract is preferred over the term form “whenever the work, or specific milestones for the work, can be defined well enough to permit development of estimates within which the contractor can be expected to complete the work.” FAR 16.306(d)(3). In fact, the FAR prohibits use of the term form CPFF contract, “unless the contractor is obligated by the contract to provide a specific level of effort within a definite time period.” FAR 16.306(d)(4). Sounds simple, right?

A January 2014 decision by the Armed Services Board of Contract Appeals shows that applying these basic principles can be tricky.

In *Teledyne Brown Engineering, Inc.*, ASBCA No. 58636, Jan. 6, 2014, a contractor appealed the deemed denial of a claim against the Army seeking a greater fixed fee under an indefinite delivery/indefinite quantity CPFF contract. The Army had paid \$416,480 in fixed fee but Teledyne sought an additional \$406,565 to achieve the full fixed fee under the contract.

Teledyne argued that it was entitled to the full fixed fee because it completed all work under the contract. The Army moved for summary judgment and argued that the total cost ceiling in the contract was not reached, so Teledyne was not entitled to the full fixed fee. The Army argued that the contract was only funded to 50.6 percent of the cost ceiling so, logically, only 50.6 percent of the work anticipated under the contract could have been performed by Teledyne. And, only 50.6 percent of the full fixed fee could be paid to Teledyne. The Army asserted that the contract was a term form CPFF contract under which Teledyne only would be entitled to its full fixed fee if it performed the agreed-upon level of effort for the agreed-upon time period, but here the agreed-upon level of effort was never fully funded. Thus, argued the Army, Teledyne did not fully perform

the agreed level of effort and the full fixed fee was not payable.

In *Teledyne*, there were lots of disagreements over basic facts. Significantly, the parties could not even agree on which form of CPFF contract was involved. Apparently, the Teledyne contract did not identify which form of CPFF contract or which FAR clause controlled the fixed fee determination. Moreover, the contract had the hallmarks of both forms of CPFF contracts. The ASBCA noted that the contract appears to be consistent with the term form contract because the contract stated a “specified level of effort for a stated” period of time that is characteristic of a contract under FAR 16.306(d)(2). But the parties also agreed in a contract modification that Teledyne would “produce 360 armor plates by the specified delivery date.” That requirement was noted to be consistent with the preferred completion form CPFF contract under FAR 16.306(d)(1). Obviously, on this record, the ASBCA denied the Army’s motion for summary judgment.

The ASBCA also introduced a new wrinkle when it suggested that the Army’s interpretation of the contract “would result in a prohibited cost-plus-a-percentage-of-cost contract.” See 10 U.S.C. § 2306(a); 41 U.S.C. § 3905(a); and FAR 16.102(c). That issue may control the ultimate outcome of the case and points to a favor-

able outcome for Teledyne. Or maybe not. The ASBCA decision contemplates the development of a fuller record through the discovery process—including both documents and depositions. Some of the points that the ASBCA wants to be developed include what was the parties’ contemporaneous interpretation of the contract at issue.

Note that the dispute in *Teledyne* was only about how much of the fixed-fee the contractor was entitled to receive, not about whether the contractor had performed adequately. It is indisputable that, under a cost-type contract, the government generally is not contracting for a finished product or service. If, despite its best efforts, the contractor cannot meet the contractual requirements, the government has obtained precisely what it bargained for—namely, the contractor’s best efforts.

In conclusion, a word to the wise: it’s always better to resolve these types of issues on the front end before all the work is performed and before there is any dispute over how much fee should be paid. That avoids disappointing results and sets realistic expectations as to just how much of the fixed fee a contractor is entitled to under the contract. It also avoids the messy dispute after the fact and all the expenses that go along with it.