

“COURSE OF DEALING” CAN DEFINE GOVERNMENT CONTRACT REQUIREMENTS

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A *course of dealing* occurs when transactions between the contractor and the government have been regular and/or numerous enough to cause a reasonable expectation that a particular method of performance or product was acceptable to the government. Put another way, a “course of dealing” is a history of previous relations between the contractor and the government which can fairly to be said to have established a common basis of understanding for interpreting the contract. Course of dealing can be used to resolve questions regarding interpretation of the contract, or even to override contract provisions.

The power to interpret a contract by a course of dealing increases as the number of past similar transactions increases. The facts and circumstances of each contract determine how many past transactions establish a course of dealing. For example, an interpretation which was acceptable on the printing of the same large job in 1994 and 1995 may well control what can be required of the same printer on the same job in 1996. However, a waiver or interpretation on 2 out of 100 orders on an annual term contract is not usually sufficient to establish a course of dealing.

Course of dealing has been relied on by courts where the government wrote an ambiguous provision into the contract. Where the past transactions which establish a course of dealing were on the same contract or a previous identical contract, they will control what *unclear* contract language really means. The same principle can also be applied in certain situations involving past similar (but not identical) contracts between the parties.

Past conduct has also been used where the government has administered an initially *clear* or unambiguous contract in such a way as to give a reasonably intelligent contractor the impression that a contract requirement has been changed, suspended or waived. In the latter case, courts and boards of contract appeal have not allowed the government to suddenly enforce a contract provision which has been previously waived or revised through a course of dealing, where a contractor has changed the way he performs in reliance on the government’s past conduct.

In the leading case, prior contracts had required automatic detergent dispensers to be provided with all single and double tank dishwashing machines. However, in all prior contracts between the contractor and the government, the contractor had not provided the dispensers with single tank machines, and the government did not insist upon receiving them. The absence of these dispensers on the machines was obvious to anyone who looked. After several years, the government finally decided to make the contractor install the dispensers on all of the single tank washers to be delivered in the future, and

claimed a credit for the contractor's past failure to furnish the product called for in the specifications. The U.S. Court of Claims held that the contractor was induced by the government's actions to reasonably believe that even though the contract may have been written to require automatic detergent dispensers on the single unit dishwashing machines, the enforcement of that requirement had been waived by the government's actions.

A course of dealing between the parties can also control how and how much the government pays for work performed. In an often cited Board of Contract Appeals case, the contractor had always been paid at the unit price for each component under prior contracts containing the same or similar language, without regard to contract limits. After a number of years the government argued that the contract should be read literally, and that the contractor should only be entitled to received the maximum amounts listed in the contract. The decision disregarded contract language, and paid the contractor just as he had been paid for the work in the past.

The current well-established rule is that, even if it were to be determined that the language of the contract prohibits a particular action, or requires a particular method of performance, the parties' prior course of dealing disregarding the requirement over an extended period can override even clear and unambiguous contract language.

Using "course of dealing" to interpret government contract provisions is an excellent way to provide consistency in contract performance. It also can prevent the aggravation and expense caused when the government decides to change the rules by re-interpreting the contract or enforce a requirement which had consistently been waived in the past. Although the principle involved in this theory of contract interpretation is fairly simple, the rules and decisions can get complex. Contractors should consult their attorney to determine if a prior course of dealing exists, and if so, whether it controls interpretation of the contract provision in question.

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