



## Government Contracts Advisory

September 3, 2010

### Real Property Buyers Beware: Court of Federal Claims Dismisses Complaint Against the U.S. Government Involving Attempted Property Transfer

A recent decision by the United States Court of Federal Claims reveals that the complicated and sometimes arcane rules for contracting with the government extend to private parties' attempted acquisitions of real property. Although venture capitalists, investors and contractors have many more opportunities in today's economy to acquire property that the government wishes to divest, such entities must approach these transactions with an abundance of caution – or risk getting burned.

On August 6th, 2010, the U.S. Court of Federal Claims dismissed a complaint against the U.S. government that had alleged breach of contract with regard to a transfer of real estate, finding that no contract existed between the parties. *Peninsula Group Capital Corp. v. United States, Fed. Cl., No. 09-747C*. The Court ruled that the parties had failed to adhere to 10 U.S.C. § 18240 (2008), which details the requirements that the government and a private party need to establish to effectuate the private party's acquisition of federal facilities. Although sympathetic to the amount of time and money that the Plaintiff invested in the venture, the Court determined that the Army and the Plaintiff did not form a valid contract for a real property exchange because the Plaintiff could not identify an agreement signed by the appropriate governmental agency official with the authority to form a binding agreement.

Due to military downsizing, the Army decided to sell the McCoy U.S. Army Reserve Center and Aviation Support Facility 49 (the "ASF Property") located at the Orlando International Airport in Florida. Plaintiff, Peninsula Group Capital Corporation expressed an interest in acquiring the ASF Property. Following discussions, the parties decided to pursue a transfer of the property in exchange for renovations of another property that the Army owned. These types of "transfer transactions" are governed by 10 U.S.C. § 18240, which requires that: (i) the Deputy Assistant Secretary of the Army for Installations and Housing ("DASA") execute such contracts on behalf of the agency; (ii) before an exchange agreement may be signed, the Secretary of the relevant military department must send a report with details of the proposed agreement to the congressional defense committees; and (iii) the agreement can only be made after a certain number of days—either 30 or 21 depending on a few technical factors—has elapsed after this report is delivered to Congress. See 10 U.S.C. § 18240(f)(2)(2008).

After the Plaintiff had expressed interest in the transaction, the Army's DASA issued a brief memorandum to the Plaintiff expressing that the Army had "conceptually approved" of the contemplated exchange. Upon receipt of this memorandum, the Plaintiff invested large sums of money into the proposed transaction, which included hiring contractors and obtaining the necessary permits to complete the renovations for the other property. After ongoing negotiations over the course of several years, DASA rescinded its conceptual approval and withdrew from the negotiation, explaining that the negotiation had not "yielded an exchange agreement" and that, "during the interim, events have occurred which change the conditions and assumptions under which the concept approval was granted...." The Plaintiff thereafter filed this breach of contract suit on November 2, 2009, and months later the government filed a motion to dismiss under Rule 12(b)(1), asserting lack of subject matter jurisdiction.

The Court held that the government has not entered into a binding contract unless a government agent with actual authority to bind the United States signs the agreement. According to the Court: "[A]nyone entering into an agreement with the Government takes the risk of accurately ascertaining the authority of the agents who

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purport to act for the Government, and this risk remains with the contractor even when the Government agents themselves may have been unaware of the limitations on their authority." *Trauma Serv. Group v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997). And, with respect to 10 U.S.C. 18240, the Court noted that the elements were missing, notably: (i) DASA had not executed a bilateral agreement; and (ii) the Secretary of the Army never sent a report about the proposed agreement to the congressional defense committees.

**Buyer Beware:**

This case emphasizes that government transfers of real property must strictly comply with certain requirements, such as 10 U.S.C. § 18240, in order to be deemed valid. Developers and investors dealing with the United States government need to understand, among other things, who has the authority to effectuate such transfers and the inter-governmental steps that must be taken prior to a transfer. If you are not careful, you might invest years of time and millions of dollars, and have nothing to show for your efforts. If your business is interested in identifying opportunities for these types of investments or needs help in executing such a transaction, please contact any of the authors listed here.

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