



# PACA Pulse

FALL 2017

PROFESSIONAL AEROSPACE CONTRACTORS ASSOCIATION OF NEW MEXICO

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## Roger Hoppe Retires After 43 Years of Ballooning

Longtime PACA member **Roger Hoppe** retired from hot air ballooning after 43 years of experience and 1,513 flight hours following this year's Albuquerque International Balloon Fiesta. He took his first balloon ride in 1971 and was immediately hooked on floating through the skies. By 1974 he was piloting his first of many flights under the tutelage of Sid Cutter (founder of the annual event), and has since flown in every Fiesta. He was the fiesta's overall champion in 1983.

Roger has owned 11 balloons in his four decades of flying, closing this chapter of his life with Volcanic Motion. Two of his Volcanic Motion crew members were with his team since his maiden flight in balloon number one.

Roger plans to remain in the ballooning community coaching and mentoring other pilots as they take to the skies. He has instructed more than 55 pilots over the years. •



Roger lifts off with his sister Dotty Ford.



Photos by Jim Thompson of the Albuquerque Journal

## President's Corner

by Mark Menicucci



Autumn is in the air, the International Balloon Fiesta concluded with the best weather ever, leaves are turning, and the morning air is certainly cooler. The holidays are around the corner, that treasured season when we can all relax and enjoy family, friends and the wonderful country we are blessed to live in.

PACA's membership count is up and the 2017 BFI, which attracted the highest attendance in history, provided the opportunity for contractors and government representatives to discuss many billions of dollars' worth of upcoming contract opportunities. I want to take this time to acknowledge the PACA Board of Directors and Chairs who every month serve you.

**Stuart Purviance**, our Program Officer, has been very successful in attracting relevant and interesting luncheon meeting speakers. Thanks to Treasurer **Lee Brinckerhoff**, PACA's revenues are expertly monitored and managed. **Dar Johnson**, our Sponsorship and Website Officer, is coaching us on how to successfully garner more corporate sponsorships. Without our valued sponsors, we would not be able

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## President's Corner *continued*

to accomplish PACA's mission. **Ron Unruh**, BFI Officer, is already planning extra special activities for next year's BFI that will attract even more attendees. Small Business Officer **Lenny Bean** educates small businesses on the many governmental opportunities available to them. **Tere! Anyaibe**, Membership Committee Chairman, is looking into the southern part of the state to recruit new members who have expressed an interest in PACA. Education Officer **Carol Yarnall** does a great job in coordinating with New Mexico's four universities that we bestow scholarship money to from the BFI proceeds. **Bill Dettmer** is the Space Authority Liaison and possesses the vision and tenacity for seeing the Space Authority succeed. General (Ret) **Dave Eichhorn**, Air Force Liaison, keeps the Board apprised of new possibilities to develop relationships with the Air Force. **Ross Crown** is our Legal Counsel (assisted by **Ryan Waters**) in addition to the PACA Pulse Editor. **Cynnamon Spain** provides administrative support and coordinates PACA events. Vice President **Malini Hoover** will be hosting our annual Christmas party and has been a 'spark plug' for the Board! Immediate Past President **Michael Emerson** continues to lead with great advice and knowledge of past operations. Lastly, welcome to **David Rosprim** of Torch Technologies, Inc., the new Legislative Liaison.

As first introduced in the Spring issue, a committee has been formed to explore the viability of PACA changing or expanding its charter and possible ramifications, including the opening up of new member benefits and opportunities. Questions to be debated include: What will PACA look like in several years? Does it continue as it has in the past? No one can dispute that PACA has been beneficial to the New Mexico aerospace community. Are there other things PACA could do for its membership? Please let me know if you wish to participate in these committee discussions that will transpire in December and January. David Rosprim will soon announce dates. The committee's conclusions and recommendations will be presented to the PACA Board for consideration. •

## Upcoming Luncheon Speakers

### ■ January 16 – Dan Hicks, Chief Executive Officer, Spaceport America



Dan Hicks began his 34-year career with the U.S. Army White Sands Missile Range (WSMR) in 1982 as a Test Conductor within the Material 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.

Later positions included Acting Division Chief, Technical Director of WSMR, the Chief of Staff, and in 2013, the Deputy Executive Director. He retired after 34 years of government service and in November 2016 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.

### ■ February 20 – Colonel Brenda Cartier, (selected for promotion to Brigadier General) Commander of the 58th Special Operations Wing, KAFB



Colonel Brenda Cartier, heads the wing responsible for training mission-ready special operations, combat search and rescue, nuclear security/support, and distinguished visitor aircrews. She oversees the activities of 2,600 airmen, administering more than 118 training courses in 32 different crew positions, and training 20,000 students annually.

Prior to this assignment, Col. Cartier served as the vice commander, Air Force Special Operations Air Warfare Center, Air Force Special Operations Command at Duke Field, Florida.

Col. Cartier has deployed in support of US Special Operations Command missions worldwide including combat missions in Bosnia, Afghanistan, and Iraq.

She holds a B.A. in Biology from the University of California and an M.A. in Military Studies from the American Military University.

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](http://www.pacanm.org). Include your name, guest's name, and menu selection. Please RSVP by the Wednesday before the week of the meeting. •



PACA members and a guest are invited to attend the

- PACA Holiday Luncheon
- Friday, December 1, 2017
- Tanoan Country Club
  - 11:30 Social
  - 12:00 Lunch
- RSVP: [www.pacanm.org](http://www.pacanm.org)

# Legal Insights: Contractor May Pursue Claim for Violation of Implied Contractual Duty Even Where No Express Breach of Contract Occurred

By Ross Crown

This past spring, the U.S. Court of Appeals for the Federal Circuit permitted a federal contractor to pursue a claim for breach of the implied covenant of good faith and fair dealing under its contract even though the government did not breach an express provision of that contract. *Agility Public Warehousing Company KSCP v. Mattis*, 852 F.3d 1370 (2017) was an appeal by the contractor from a decision of the Armed Services Board of Contract Appeals finding that the government did not breach the terms of a supply contract.

## Contractor Seeks Additional Costs Not Recoverable Under Contract Terms

In 2002, Agility entered into an indefinite delivery/indefinite quantity contract with the Defense Logistics Agency to provide food products to the military in Iraq from distribution facilities in Kuwait. Some of the food was delivered in refrigerated supply trucks. Unfortunately, the refrigerated supply trucks were often subject to major delays in returning to Kuwait when delivery was made to forward operating bases. At forward bases, the military generally lacked cold storage facilities. Without any place else to keep items needing refrigeration, the soldiers at these bases often held the refrigerated trucks on-site to store food.

The need to maintain refrigerated trucks on site caused the average turnaround time for these trucks to increase to 15 days, which was greater than the seven day turnaround time anticipated by the parties when they signed the contract. Some trips, however, greatly exceeded the average, resulting in large expenses for the agency. One 154-day trip cost the government \$99,445, which was more than the cost of a truck. Other deliveries resulted in the government paying \$82,030, \$65,905, and \$63,325 for single trips.

In light of these unexpected cost increases, the agency began discussions with Agility about capping the fees for any single trip. These discussions resulted in a modification to the contract which called for a minimum number of days constituting a single trip and a minimum cost for trips. Additional days beyond the minimum trip length would result in increased daily fees. In return for these accommodations by the agency, the modification imposed a maximum number of 29 allowable trip days on Agility. The agency was not required to pay transportation fees beyond the maximum.

Although Agility agreed to the 29 day cap in the contract modification, it claims that it did so with the understanding that it could submit exceptions to the cap if the agency caused delays beyond the length of the cap. The modification does not contain this language, however. Instead, Agility based its argument on an e-mail exchange with the contracting officer. In those e-mails, Agility informed the contracting officer that it

would prefer to have the ability to submit exceptions to the 29 day cap if a trip in excess of 29 days is unavoidable despite its best efforts to prevent it. The contracting officer replied that "exceptions to the 29 day rule will only be considered in the form of a claim." According to Agility, this e-mail amounted to an agreement by the agency to make exceptions to the 29 day cap so long as Agility provided documentation to show that the government caused the delay beyond the 29 days.

Agility subsequently submitted a claim for turnaround delays resulting from trucks held in Iraq by the military for longer than 29 days. The contracting officer denied this claim in reliance on the modification. Agility appealed the claim denial to the ASBCA where the appeal was also denied.

Agility appealed again to the Federal Circuit. The Court affirmed the ASBCA's decision that the government did not commit an express breach of contract. It stated that the contract modification imposing a 29 day cap on all transportation fees resulted in the parties sharing the risk of increased travel time rather than having the agency shoulder the burden alone. The agency did not breach the contract by failing to pay for days beyond the 29 day cap, even when delays beyond the 29 day cap were caused by the military using the trucks for refrigerated storage.



## Contractor Permitted to Seek Relief for Breach by Agency of Implied Contractual Duty

Although it found no breach by the agency of an express provision of the contract, the Federal Circuit did not simply affirm the denial of the claim by ASBCA. Instead, it noted that Agility's belief that it may be entitled to some relief beyond the 29 day cap was not irrelevant. The Court observed that an implied duty of good faith and fair dealing exists in government contracts just as it does between private parties. Although a party to a contract cannot use an implied duty of good faith and fair dealing to expand the other party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions, a party might still breach this implied duty by interfering with the other party's performance or by acting in such a way as to destroy the reasonable expectations of the other party regarding the benefits to be provided by the contract. According to the Court, possible breaches of the implied duty of good faith and fair dealing can include evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of the power to specify terms, and interference with or failure to cooperate in the other party's performance.

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## Legal Insights *continued*

Applying these principles to Agility's appeal, the Federal Circuit stated that the government may have breached its implied duty of good faith and fair dealing by unnecessarily delaying the return of Agility's trucks and by not increasing the military's on-site food storage capabilities. In other words, if the government simultaneously imposed a cap and engaged in conduct that made it impossible for Agility to perform within that cap, the agency may have breached its implied contractual duties to Agility. Thus, the Federal Circuit sent the appeal back to the ASBCA and instructed the Board to consider whether Agility proved that the government breached its implied duty of good faith and fair dealing.

### Significance of Decision

The Federal Circuit's decision in the *Agility* case is an important tool that can be utilized by contractors in formulating contract claims. When the government's acts or omissions impede a contractor's ability to perform a contract, the contractor may be entitled to relief even if no express term of the contract is breached. Instead, the contractor has the right to maintain that the government interfered with its reasonable expectations of the benefits it would realize under the contract. This legal authority helps to significantly expand the grounds upon which contractors may pursue valid claims. •

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.

## Join PACA!

PACA membership annual dues are \$150\*. 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](http://www.pacanm.org).

For more information, contact our Membership Chair, **Terel Anyaibe**, at [tanyaibe@aerotek.com](mailto:tanyaibe@aerotek.com) or 342-5007.

\* Dues are subject to change.

## Spread the News

If you know a potential member or anyone else who would like to receive the *PACA Pulse*, please forward their e-mail address to [RoSaavedra@msn.com](mailto:RoSaavedra@msn.com).

This is your newsletter. If you would like to contribute an article, make announcements (promotion, job change, or a new product or service), please submit your newsletter contribution to the editor, Ross Crown, at [RCrown@lrrc.com](mailto:RCrown@lrrc.com) or call him at 764-5402.

Contributions are welcome! •

## 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](mailto: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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- Three registrations for the PACA annual Briefing for Industry.
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- 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. •

# Thank You PACA Sponsors!



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