

# Roundup

An Update on Government Contracts Issues for Clients & Friends

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**"No Damages For Delay" Clause Equals No Pass-Through For Subcontractor**

By Claude P. Goddard (claude.goddard@akerman.com)

The Court of Federal Claims recently issued a decision that serves as a reminder that, under the Severin doctrine, commonly used "No Damages For Delay" clauses in subcontracts will likely bar any Government liability for delays in a pass-through claim. In Harper/Nielsen-Dillingham Builders, Inc. v. United States, No. 05-269C (filed April 29, 2008), the Court of Federal Claims held that a No Damages for Delay clause in a subcontract barred any recovery against the United States because that clause completely exonerated the prime contractor for delay damages towards its subcontractor, even though the prime contractor argued the No Damages for Delay clause was unenforceable under state law.

The Severin doctrine holds that a prime contractor may sue the Government on behalf of its subcontractor, in the nature of a pass-through suit, for costs incurred by the subcontractor that can be traced to the Government. Significantly, the prime must also prove that it is liable to the subcontractor under the subcontract for the damages claimed. Thus, a prime may maintain such a suit only when it can show it has reimbursed the subcontractor for damages or remains liable for such

reimbursement in the future. Prime contractors typically address this situation by agreeing to pass through the subcontractor's claim while agreeing that its liability to the subcontractor is limited to the amount of damages granted in the prime's suit against the Government.

Many construction subcontracts, however, contain a so-called No Damages for Delay clause, which provides that the prime will grant a time extension in the event of delay but will have no liability for damages. Because such clauses grant time but no money, they effectively exonerate prime contractors from damages and prevent the prime from successfully pursuing a Severin pass-through claim for damages against the Government. In other words, because the prime is not liable for damages, neither is the Government.

The prime contractor attempted to get around the Severin doctrine in the Harper/Nielsen-Dillingham Builders case by arguing that the No Damages for Delay clause was invalid or at least strongly disfavored under California state law. (The Court of Federal Claims noted the peculiar circumstance that the prime contractor was arguing the invalidity of a provision the prime had drafted.) Analyzing California statutes, the Court determined that California statutory provisions disfavoring such clauses had no application outside of contracts between California public entities and private contractors. Because the United States was not a California state or municipal entity, the prime could not take advantage of the statutory presumption that such clauses were invalid. The Court also relied on a 1933 California State Supreme Court decision holding that private parties were entitled to agree upon the exclusive remedy (time) for delays.

This decision serves as a reminder that prime contractors and subcontractors must understand the provisions in their subcontracts and their ramifications in federal work. If the parties agree that the prime contractor will have no damages liability for delay, the Government will most likely be able to avoid any pass-through claim.

### **As We Move Into The Electronic Age, Don't Leave Your Pen Behind**

By Sarah M. Graves ([sarah.graves@akerman.com](mailto:sarah.graves@akerman.com))

In Teknocraft, Inc., ASBCA No. 55438, 2008 WL 1765781 (Apr. 3, 2008), the Armed Services Board of Contract Appeals dismissed a contractor's claim for lack of jurisdiction based upon its failure to properly certify the claim at the time of submission.

In 2001, Teknocraft, Inc. ("Teknocraft") was awarded a contract to supply ammunition and explosives to the Government. The contractor's claim arose from its purchase of an x-ray machine for use in inspection, which it contends constituted a change to the contract. On March 14, 2006, Teknocraft submitted a claim for

\$284,992 by e-mail, accompanied by a "certification of claim." Neither of these documents "were signed by the traditional pen and ink method." Instead, Teknocrat's representative typed the designation "//signed//"—a method which the parties had consistently utilized in e-mail correspondence. In its defense, Teknocrat maintained "that the certification was properly executed since it was sent on company letterhead, from an individual with authority to bind the corporation, and marked with the word '//signed//' below his name." As such, Teknocrat argued that the missing signature was—at most—a curable defect.

Relying on the text of the Contract Disputes Act, and the interpretation set out in FAR 33.207, the Board held that a certification must "be 'executed' by an appropriate duly authorized representative of the contractor." Citing its decision in Hawaii CyberSpace, ASBCA No. 54065, 04-1 BCA ¶ 32,455, the Board held that proper execution requires "the certifier to sign the claim certification." In examining whether Teknocrat's claim contained the requisite "signature," the Board looked to the definition set forth in FAR 2.101, which includes "electronic symbols." Despite the inclusion of "electronic symbols," the Board deemed Teknocrat's notation "generic," and refused to find it "sufficiently distinguishable to authenticate" the signature and corresponding certification. Contrary to Teknocrat's argument that this was a curable defect, the Board held that a failure to sign indicates a complete failure to certify—a fatal defect going to the heart of the certification requirement.

With both contractors and Government representatives becoming increasingly dependent upon the use of e-mail during contract performance, the Board's decision should serve as a reminder that claim certifications must be submitted with care and attention to detail. While a claim may still be properly signed using an "electronic symbol," contractors should make sure that representatives use distinguishable symbols which allow the Government to authenticate the signature and the validity of the corresponding claim. That said, the only way to guarantee proper claim certification and circumvent the ambiguity surrounding "sufficiently distinguishable" electronic symbols is to sign in pen!

### **Contractor Must Submit Proposal to Protest Sole-Source Award**

By Pavan I. Khoobchandani (pik@akerman.com)

Contractors must be mindful of complying with standing and other prerequisites for maintaining bid protests and must structure their activities accordingly. Failure to adhere to proper protest prerequisites may result in a waiver of a contractor's protest rights. In Infrastructure Defense Technologies. v. United States, Nos. 07-582 C & 07-695 C, 2008 WL 1047660 (Fed. Cl. Apr. 7, 2008), the Court of Federal Claims denied a pre-award protest brought by Infrastructure Defense Technologies, LLC ("IDT") of the award of a sole source contract to Hesco Bastion, Ltd. ("Hesco") based, in part, on a lack of standing. The court found that IDC had

no standing to bring the protest because IDT did not submit a proposal expressing an interest in the procurement that would make it eligible for award.

Hesco, the awardee, had a \$500 million contract with the Defense Logistics Agency ("DLA") for Concertainers, which are collapsible force protection units used by the military in hostile areas as substitutes for sandbags and other barrier devices. Towards the end of Hesco's contract, the Government issued a presolicitation notice which stated that the Government intended to issue a request for proposal ("RFP") for a long-term, follow-on sole source indefinite delivery/indefinite quantity contract for Hesco Concertainers. The presolicitation notice described the Concertainers by part number and noted that Hesco held a patent on the design of the barriers. However, it also stated that all technically acceptable proposals would be evaluated to determine whether a competitive procurement would be more appropriate. Subsequently, an RFP was issued, which described the Concertainers by part number, manufacturer, and picture. Ultimately, Hesco's offer was the only technically acceptable offer.

IDT, which also manufactured a collapsible barrier product, did not submit a proposal in response to the RFP or a protest during the proposal period. However, prior to award, IDT filed a protest, alleging that a sole source award was improper. The court held that IDT lacked standing to maintain the protest because it did not submit a proposal in response to the RFP. In doing so, the court noted that IDT did not meet the requirements of being an "interested party" or of having a "direct economic interest" such that it was prejudiced by the award to Hesco. IDT argued that because the RFP lacked performance specifications and relied on part numbers to describe the barriers, the RFP was defective and IDT was unable to submit a proposal. The court held that IDT's failure to bid or to file a protest during the proposal period was a bar to the action, noting that the RFP sufficiently described the Concertainers such that IDP knew that its product was a competitor and that the presolicitation notice specifically stated that alternatives to the Concertainers would be considered.

IDT's failure to provide a bid or proposal in response to the presolicitation notice or the RFP was a bar to its right to protest the award, despite the fact that it indicated to the agency that it believed that a competitive procurement was warranted. Had IDT submitted a bid or filed a protest before the date called for in the notice for interested offerors, the agency would have had the ability to respond and may have conducted a competitive procurement. In short, when contractors want to compete for opportunities that are announced as sole source awards, they must submit a proposal expressing an interest in the procurement or file a protest before the date called for in the notice issued by the Government.

## **Fraud Prevention Corner**

By J. Michael Littlejohn (michael.littlejohn@akerman.com)

The Department of Justice and other agencies announced the following fraud-related matters in recent months. These situations provide sobering, but helpful, lessons for contractors:

\*An employee of a DOD fuel supply contractor pleaded guilty to conspiring to steal trade secret information from his employer and then selling the information to competing companies. The competitors used the information to underbid the contractor, and then gave the rogue employee cash and profits from the contracts.

\*A former employee of a defense contractor pleaded guilty to bid rigging and conspiracy to commit wire fraud on contracts for Navy straps to secure munitions and supplies. The employee agreed with other companies not to submit bids on certain Navy contracts. In addition, the employee received kickbacks of more than \$140,000 in exchange for agreeing to make a co-conspirator's company the exclusive supplier of his company's products. The employee faces a possible fine of \$1 Million (which could be doubled) and 10 years in prison. This guilty plea is the latest in an ongoing investigation in which two companies, a sales director, and a few company executives have pleaded guilty to bid rigging and agreed to pay substantial fines.

\*A munitions manufacturer, its CEO, a sales representative and a Government engineering technician were indicted by the US Attorney in Georgia for conspiring to defraud the Government, criminal false claims, mail fraud, money laundering, bribery of a government employee, and making false statements. The US Attorney alleges that the contractor manufactured a Navy-designed "flashbang" grenade that produces a bright, nonlethal flash when detonated. After several years of production, the Navy rejected the flares because of a flaw discovered in the Navy's design which could result in a premature detonation. The Navy stopped work and the contractor developed a process to resolve the defect. According to the indictment, however, the contractor attempted to sell the rejected grenades to DOD, the FBI, and state and local law enforcement agencies by relabeling the rejected items in a manner to appear that they had not been rejected. The DOJ also alleges that company officials represented to federal, state, and local agencies that the rejected items met DOD requirements and specifications when they did not. In 2004, an FBI agent was seriously injured when one of the flares detonated while still on his vest. Based on these allegations, the US Attorney alleges the company attempted to defraud the Government. It also alleges that, in order to advance the fraud, the CEO provided a Government technician who oversaw the contracts with a free visit to a strip club in Atlanta, GA. The allegation is that soon thereafter, the CEO attempted to negotiate acceptance of some of the flares with the Navy. Needless to say, the company and the individuals have a chance to defend the allegations, but they face considerable and serious potential consequences.

## *Upcoming Events*

### **Lawyers Have Heart 10-K and Fun Walk**

June 14, 2008

Washington, D.C.

Akerman Senterfitt's Tysons Corner and Washington, D.C. offices will be fielding a team for the Lawyers Have Heart 10-K and Fun Walk on Saturday, June 14, 2008. Over the past ten years, Lawyers Have Heart has raised more than \$4.3 million to benefit the American Heart Association, and Akerman Senterfitt is proud to be doing its part to help! If you would like to make a donation, or to find out how to join us on June 14, contact [sarah.graves@akerman.com](mailto:sarah.graves@akerman.com).

### **PWC-CRC Presents: "Killer Contract Clauses"**

July 10, 2008

Tysons Corner, VA

The Capital Region Chapter of Professional Women in Construction will be hosting an exciting and educational panel discussion addressing problematic contract clauses and the contracting process from the perspective of owners, design professionals, and contractors. The panelists will be: Susan Boggs (Turner Construction Corporation), Bob Carney (Whiteford, Taylor & Preston), *Don Gavin (Akerman Senterfitt Wickwire Gavin)*, and Tamara McNulty (Duane Morris). For more information, contact [sarah.graves@akerman.com](mailto:sarah.graves@akerman.com).

## About Our Government Contracts Group

The Government Contracts Group at Akerman Senterfitt Wickwire Gavin assists large and small businesses with all types of federal government contracts issues. To do business with the federal government, contractors must deal with a unique and complicated series of statutes, regulations and procedures. We help clients work with this system to maximize contracting opportunities with federal government agencies. We provide counseling and representation to clients in the areas of contract compliance issues, bid protests, Small and Disadvantaged Business matters, contractor and subcontractor claims administration, construction contracts, information technology contracts, and international contracts. In addition, we are uniquely qualified to advise and assist contractors who provide goods or services to the U.S. Postal Service.

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