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Litigating Construction Delay Claims Caused by Federal Non-Disclosure

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One of the primary goals of the federal stimulus program recently enacted by Congress is to put people to work on public construction projects, many of which will involve contracts with the federal government. Delay claims by contractors will undoubtedly result from some of these projects, often related to government failure to disclose information, including but not limited to environmental problems. What theories of recovery are available to a contractor in this scenario?

Withholding of Superior Knowledge by the Government

Under the implied duty of good faith and fair dealing inherent in every contract, the government has an implied duty to disclose information fundamental to the preparation of estimates or contract performance. *Miller Elevator Co., Inc. v. U.S.*, 30 Fed. Cl. 662, 667, App. dism'd., 36 F.3d 1111 (1994); *Helene Curtis Indus. v. U.S.*, 312 F.2d 774 (Ct. Cl. 1963). Stated another way, where the government possesses special knowledge, not known to the contractor, which is vital to the performance of a contract, the government has an affirmative duty to disclose such knowledge. It cannot remain silent with impunity. If the government fails this duty, the government breaches the contract. *Miller Elevator Co., Inc. v. U.S.*, *supra* 30 Fed. Cl. at 675.

In order for a contractor to succeed on a theory of withholding of superior knowledge, it must prove four elements: (1) the government possessed knowledge of vital facts regarding a solicitation or a contract, (2) the contractor neither knew nor should have known of the facts, by contract specification or otherwise, (3) the government knew or should have known of the contractor ignorance of the facts and (4) the government failed to disclose the facts to the contractor. Once a party demonstrates nondisclosure of superior knowledge, the party must show reliance and injury by the failure to disclose.

Courts have not hesitated to grant relief to contractors where the government fails to disclose facts material to a contract. In *Miller*, for example, Miller entered into an elevator maintenance contract with GSA for a federal office building in St. Louis, Mo. Sixteen months after the execution of the contract, and without prior notice to Miller, the GSA authorized substantial renovation to the building. Miller claimed that the amount and extent of work to maintain the building elevators increased as a result of the renovation. The government did not dispute its prior knowledge of the renovation, but claimed that the contractor knew or should have known about it as well, based upon the publicity regarding the project. The court rejected this defense and ruled in favor of the contractor.

Issuance of Defective Specifications

When specifications indicate how the work should be done, and those specifications are substantially deficient, the government breaches its contract with the contractor. Stated another way, the risk is allocated to the government when the specifications it furnishes are not suitable for their intended purpose. This is known as the *Spearin* doctrine, following the landmark case of *U.S. v. Spearin*, 248

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U.S. 132 (1918). Under *Spearin* and its progeny, when the government makes a positive statement of fact about the character of work to be performed, upon which the contractor may reasonably rely, it is binding on the government, notwithstanding the inclusion of exculpatory clauses in the contract. This differs from state public contract law, where exculpatory clauses sometimes succeed in shifting the risk of defective specifications to the contractor under certain conditions.

Bad-Faith Failure To Cooperate

It is black-letter law that every contract with the government contains an implied obligation that neither party will do anything to prevent, hinder or delay performance. *Sterling Millwrights, Inc. v. U.S.*, 26 Ct. Cl. 49, 67 (1992). As part of this general duty, the government has an implied duty to cooperate with its contractors. The government has a duty not only not to hinder contractor performance, but also to "do whatever necessary to enable the contractor to perform." *Lewis-Nicholson, Inc. v. U.S.*, 550 F.2d 32 (Ct. Cl. 1977).

Courts have found that the government acts in bad faith when it fails to issue timely orders, see *Appeal of Raytheon Service Co.*, GSBCA 5695, 81-1 BCA ¶15002 (1981), fails to issue a timely Notice to Proceed, see *Abbett Electric Corp. v. U.S.*, 162 F.Supp. 772 (Ct. Cl. 1958), or misleads a contractor through evasive conduct. See *Malone v. U.S.*, 849 F.2d 1441 (Fed. Cir. 1988).

Cardinal Change

The "cardinal change" doctrine prevents government agencies from circumventing the competitive procurement process by making significant modifications during the course of a project beyond the original scope of a contract. The standard is whether the modified contract calls for essentially the same performance as that required by the contractor when originally awarded, so that the modification does not materially change the field of competition. See *Cray Research, Inc. v. Department of Navy*, 556 F. Supp. 201, 203 (D.D.C. 1982). Thus, a cardinal change describes a change outside the scope of the contract which is thus not governed by the "Changes Clause" often found in government contracts. When the government makes a cardinal change, including a cardinal change that results in a delay, it is in breach of contract. See *Green Management Corp. v. U.S.*, 42 Fed. Cl. 411, 429 (1998). No rule of thumb exists to measure what constitutes a cardinal change. As a result, application of the doctrine depends on the totality of each set of facts and circumstances.

Failure To Issue a Notice To Proceed in a Timely Manner

When a contract does not contain an express provision as to the time within which the government will issue a Notice to Proceed ("NTP"), there is an implied obligation to issue it within a reasonable time. See *Ross Engineering Co., Inc. v. U.S.*, 92 Ct. Cl. 253, 258 (1940). In *Ross*, the government unreasonably delayed giving the contractor a NTP after the contract had been executed, and therefore the contractor was entitled to recover its reasonable and necessary expenses incurred on account of a 2½-month delay. What constitutes a reasonable period of time depends on an examination of the particular circumstances of the case. In *Marine Constr. & Dredging, Inc.*, ASBCA Nos. 38412, et al, 95-1 BCA 27,286 (1984), the board held that a delay of approximately seven months in issuing a NTP while the government obtained necessary permits was unreasonable. In *Abbett Electric Corp. v. U.S.*, 162 F. Supp. 772 (Ct. Cl. 1958), the government failed to timely issue a NTP. The contractor sued to recover the increased cost of its performance. The court held that the fact that the government might not have been negligent in meeting its obligations under the contract was irrelevant, where the delays attributable to it constituted a breach of contract. The court accordingly held that the contractor was entitled to damages caused by the delay, including damages caused by having to work during bad weather.

Conclusion

As the foregoing reveals, a contractor who has been delayed on a federal construction project and suffers damages as a result has a number of remedies available to him. The contractor may enforce his rights in the various Boards of Contract Appeals of the particular agency involved, e.g. Department of Labor Board of Contract Appeals, Armed Services Board of Contract Appeals, etc., or in the U.S. Court of Claims. Although the government would appear to have a "home field" advantage in these courts, in fact they are generally fairly independent, and the contractor will receive a fair hearing of his dispute. ■