FEDERAL CONSTRUCTION PROJECT MANAGER'S BULLETIN

Devoted exclusively to problems encountered while performing Government construction contracts

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ENFORCEABILITY OF CONTRACTS

Readers of this bulletin that regularly study or track decisions issued by the various federal agency boards of contract appeals or federal courts are keenly aware that clear, concise, and unambiguous contract language is generally enforceable. Two or more individuals or entities can enter into a legally binding contract to accomplish almost any imaginable task or mission so long as that task or mission is commercially practical to accomplish, the parties are of legal age to enter into a contract, the parties are competent (of sound mind), the contract does not require an illegal act, and something of value, typically money, changes hands as part of the transaction. Obviously, an extremely wide variety of transactions meet all these tests. The contractual and legal systems would rather quickly breakdown if clear, concise and unambiguous contract language was not rigidly enforced. Notwithstanding this fact, CCSI repeatedly encounters situations where individuals sign contracts, without formally protesting any of the requirements or conditions contained therein, which are extremely slanted in favor of the government, owner or prime contractor. The overriding short term goal often appears to be to obtain the project and then confront or worry about the terms and conditions of the contract documents. The consequences of such an action can be devastating.

Admittedly, a Project Manager has very limited ability to influence the terms and conditions of a public advertised, competitively bid, solicitations issued by one of the Federal Government procurement agencies such as the U.S. Army Corps of Engineers, U.S. Navy or NASA. Even in these situations, it is often possible to either get certain potentially problematic terms and conditions changed or too effectively perform damage control. The Federal Government does not resist making changes to their solicitation package as much as they resist delaying the procurement process, especially those procurement actions taking place in September near the end of the government's fiscal year. For this reason, one of the keys to success is too voice any objections very early in the procurement cycle and provide a detailed and logical basis for the objection.

Provided there is a valid justification, prior to the award of the contract it is often possible to get excessive liquidated damages substantially reduced or to get additional time added to the required contract duration. Liquidated damages are required to reflect the Government's estimate of what actual damages it reasonably expects to incur if the contract is not completed on a timely basis. For example, if the scope of work involved the rehabilitation of some mechanical or electrical system that, with the exception of some rather short disruptions, must be kept in full operation during the rehabilitation process then it is unlikely the Government could justly deny a properly prepared and timely submitted challenge of liquidated damages that are established as $5,000 per calendar day. If the scope of work involved the design, submission for approval, Government approval, procurement and installation of long lead time items such as electrical switchgear, electrical transformers, emergency generators, et cetera then it is unlikely that the Government could justly deny a properly prepared and timely submitted challenge of a specified duration of only one hundred eighty calendar days. A pre-bid written challenge of any unreasonable terms and conditions in the solicitation often later proves to be very valuable even if it is contemporaneously disapproved or even ignored. The problem is that frequently Project Managers do not challenge even the areas that can often be successfully challenged.

Government agencies have almost totally gotten out of the business of designing significant construction projects. To a very great extent, they rely upon architect engineer (AE) firms to perform this service. Many AE firms attempt to limit the Contractor's ability to allege a constructive change in accordance with the Changes clause, a subsurface or latent defect in accordance with the Differing Site Conditions clause or design defects by inserting language in general notes within the various drawings making it the Contractor's responsibility to perform their own site investigation, review of the drawings, et cetera. As a general rule, Federal Government guide specifications are not as significantly biased in the Government's favor or against the Contractor as is the case with regard to contracts in the private sector. However, Federal Government guide specifications are routinely site adapted by the same AE that prepared the contract drawings and possibly performed, or was responsible for the performance of. the geotechnical study. During this site adaptation process, language is often inserted within the specifications with the clear intent of limiting the ability of the Contractor to obtain an equitable adjustment. Such language appears in many forms and formats. If such language is clear and concise enough to raise a red flag in front of the potential bidders then it is prudent to assume that the language will be enforceable.

After a dispute develops on a project, it is often speculated by the Contractor that the Government would not have permitted them to do certain things during their pre-bid site investigation even if they had requested permission to do so. Such speculation is of little value. During the bidding process, an alert Project Manager will eliminate the need for such post dispute speculation and actively search for and identify numerous opportunities for performing pre-bid damage control.

Perspective bidders will often be informed that they should not rely on the accuracy of the contract drawings with regard to the location of the existing utilities but rather should perform their own independent investigation and arrive at their own conclusions. If the project is in a highly visible location on the installation then the Project Manager may be able to take advantage of the fact that the majority of base commanders do not want pot holes dug all over portions of their base unless and until such work is absolutely necessary. If the Project Manager requests permission to mobilize one or more backhoes and expose critical sections of the existing utilities during their pre-bid site investigation then often such a request will be disapproved. Proof of such disapprovals makes it far more difficult for the Government to get a judge or arbitrator to enforce the problematic language at a later date. If the work involves the modification or renovation of a facility that is in full operation during the period of time when the pre-bid site visit must be performed then damage control is almost always possible. For example, if the fully functional facility has a lay in type acoustical ceiling and work must be performed above that ceiling then the Project Manager could reasonably request permission to remove and replace twenty-five percent or more of these panels during the pre-bid site visit for the purpose of accurately assessing the existing above ceiling conditions. This would be very disruptive to the ongoing operations within the facility and very likely the request would be disapproved. This or any other similar disapprovals can become very useful if a dispute later arises with regard to a differing site condition. The down side to such requests is that if they are approved by the Government but the task is never performed then the Government can use this fact to their advantage. The fact is that if the contract clearly and concisely shifts certain responsibilities and risk to the Contractor then these type tasks should be performed prior to the submission of a firm fixed price bid. Therefore, in reality, there is no down side to such requests.

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Even if the Project Manager has performed work for a particular governmental agency or owner on numerous previous occasions, they should not assume that clear and concise language in the contract will not be rigidly enforced on this occasion. The Project Manager should read and understand the provisions of every contract or subcontract they personally execute or recommend to be executed by an officer of the corporation. A prudent Project Manager will make the assumption that the other party will enforce or take advantage of all the terms and conditions of the contract they or members of their organization so carefully crafted. Short of attempting to prove that cohesion was utilized in the solicitation process, which is extremely difficult to accomplish, there are absolutely no safeguards built into the contracting or legal system to protect an individual or entity that is of legal age and sound mind from entering into a contract that has the potential of driving their company into bankruptcy.

With regard to subcontract agreements, professional organizations such as the AGC and AIA provide blank subcontract agreements for a reasonable fee. These subcontract agreements, which we will refer to as industry standard agreements, reflect years of trial, error, litigation, and subsequent editing to the point where they have been perfected to the maximum extent reasonably possible. Project Manager's should immediately become suspicious when they are requested to sign a subcontract agreement that was written by the prime contractor or their attorney and dramatically departs from one of the industry standard agreements. Regardless of the stated or perceived reason for not utilizing one of the industry standard subcontract formats, one-of-a-kind subcontracts must be closely studied before they are executed. CCSI recently encountered a non-standard subcontract agreement that only required a two day verbal notification of the intent to terminate for default for lack of performance. This verbal notification had to eventually be reduced to writing but the written notification could have conceivably been issued after the effective date of the termination for default. If a prime contractor is not willing to change such unjust and unfair language then it is likely very wise to avoid doing business with that particular company.

The fact that a subcontract agreement is only five pages long is by no means automatically good. Quite often what is not covered in these unique subcontract agreements can be almost as important as what is covered. Insist on a subcontract agreement that addresses all the known potential situations such as how change orders will be issued that are not in dispute, how disputed change orders will be issued unilaterally, the claims or disputes process, what documentation is necessary to justify a periodic payment, when the periodic payments will be made, the payment of interest if payments are made late, et cetera.

As an unrelated matter of general interest, in a previous bulletin it was noted that the number of Agency Boards of Contract Appeals were being dramatically reduced effective January 2007. The Civilian Board of Contract Appeals is now a reality and fully functional within the General Services Administration. The decisions rendered by this new board can be viewed and downloaded at www.gsbca.gsa.gov. The site has a link to the websites where two of the predecessor board's decisions can be found. Another interesting development is the creation of blog sites. A site that should be of interest to our readers was created by and is being maintained by a prominent beltway law firm that specializes in government contract law, Payne, Hackenbracht & Sullivan, and can be accessed at www.fedconblog.com. The articles appearing on this blog site beautifully supplement, compliment or expand upon these bulletins.

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