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# CONSTRUCTION LAW UPDATE

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# SUBSTANTIVE RULES WHEN BIDDING PUBLIC WORK

# Interpreting Plans and Specifications -- AMBIGUITIES

- ❑ Normal Rule: Ambiguities are normally interpreted against the party that drafted the document.
- ❑ Federal Exception to the Normal Rule: Where the ambiguity is patent, bidders have a duty to inquire.

The rule that a contractor, before bidding, should attempt to have the government resolve a patent ambiguity in the contract's terms is a major device of preventative hygiene; it is designed to avoid just such post-award disputes as this by encouraging contractors to seek clarification before anyone is legally bound. *S.O.G. of Ark. v. United States*, 546 F.2d 367 (Ct. Cl. 1976)

# Interpreting Plans and Specifications -- AMBIGUITIES

- BUT, the duty to inquire is not absolute:

“[Contractors] are obligated to bring to the Government’s attention major discrepancies or errors which they detect in the specifications or drawings, or else fail to do so at their peril. But they are not expected to exercise clairvoyance in spotting hidden ambiguities in the bid documents and they are protected if they innocently construe in their own favor an ambiguity reasonably susceptible to another construction.” *Blount Bros. Constr. Co. v. U.S.*, 171 Cl. Ct. 478, 346 F.2d 962 (1965) at 496-97.

# Interpreting Plans and Specifications – BRAND NAME OR EQUAL SPEC

- ❑ FAR policy is to “promote competition to the maximum extent practicable.” FAR 13.104.
- ❑ The government must not restrict solicitations to suppliers of well-known and widely distributed makes or brands. FAR 13.104(a)(2).
- ❑ The government should consider solicitation of at least three sources to promote competition. FAR 13.104(b).

# Interpreting Plans and Specifications – BRAND NAME OR EQUAL SPEC

- ❑ The test for acceptance of a substituted or proposed “equal” for the brand name product is whether the substituted product functions as well as the specified product. *Jack Stone Co. v. U.S.*, 344 F.2d 370 (Ct. Cl. 1965). The substituted product must function as well in all essential respects as the specified product, but does not have to comply with every detail of the specifications. *Sherwin v. U.S.*, 436 F.2d 992 (Cl. Ct. 1971).
- ❑ A contractor is entitled to provide an “equal” product if the specification is “written around” a proprietary product. *Sherwin v. U.S.*, 436 F.2d 99s (Cl. Ct. 1971).

# Site Visit

- ❑ In contracts containing the *Differing Site Conditions* and *Site Investigations and Conditions Affecting the Work* clauses, the government is required to arrange for a site visit. FAR 36.523.
- ❑ Failure to attend the site visit could adversely affect any claims for Type II differing site conditions:
  - “An unknown condition is one that could not have been reasonably anticipated from the contractor’s . . . Inspection of the site.” *Youngdale and Sons Constr. Co. v. U.S.*, 27 Fed. Cl. 516 (1993).

# Pre-Bid Conference



- ❑ The pre-bid conference is a useful method of briefing potential bidders and discussing complex specifications and requirements prior to bid/proposal.
- ❑ While an excellent source of information, the pre-bid conference “shall never be used as a substitute for amending a defective or ambiguous [IFB/RFP]”. FAR 14.207



# Waiving Minor Informalities

- ❑ Minor Informalities: A minor informality or irregularity is one that is merely a matter of form and not of substance. It also pertains to some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders. FAR 14.405
- ❑ Examples: failure of a bidder to –
  - ❑ Return the number of copies of signed bids required by the invitation;

# Waiving Minor Informalities

- ❑ Furnish the required information concerning the number of employees;
- ❑ Sign its bid, but only if—
  - ❑ The unsigned bid is accompanied by other material indicating the bidder's intention to be bound by the unsigned bid (such as the submission of a bid guarantee or a letter signed by the bidder, with the bid, referring to and clearly identifying the bid itself; or
  - ❑ The firm submitting a bid has formally adopted or authorized, before the date set for opening of bids, the execution of documents by typewritten, printed, or stamped signature and submits evidence of such authorization and the bid carries such a signature;

# Waiving Minor Informalities

- ❑ Acknowledge receipt of an amendment to an invitation for bids, but only if –
  - ❑ The bid receipt clearly indicates that the bidder received the amendment, such as where the amendment added another items to the invitation and the bidder submitted a bid on the item; or
  - ❑ The amendment involves only a matter of form or has either no effect or merely a negligible effect on price, quantity, or delivery of the item bid upon; and
- ❑ Execute the representations with respect to Equal Opportunity and Affirmative Action Programs, as set forth in the clauses at 52.222-22, Previous Contracts and Compliance Reports, and S2-222-25, Affirmative Action Compliance.

# Mistakes in Bidding

- Relief can be granted for mistakes in bids if the mistake is a “clear cut clerical or arithmetical error, or misreading of specifications, and the authorities cited to do not extend to mistakes of judgment.” *Ruggerio v. U.S.*, 190 Cl. Ct. 327, 420 F.2d 709 (1970).
- In other words, relief can be afforded for factual/ministerial mistakes, but not for mistakes in judgment.
- Examples: Relief can be granted for: clerical or arithmetic errors (transposed numbers, costs not transferred to recap sheets). Relief not granted for: mistaken judgment (amount of effort required, failure to read complete specification or drawings).



# THE CONTRACT



# Importance of a Written Contract



## A. Arbitration Provision

1. Should be broad enough to cover all claims
2. Must be signed by everyone

# Important Terms of a Contract



B. No Damage for Delay

# Important Terms of a Contract



c. “Pay When Paid”



# Important Terms of a Contract



## D. Notice of Claims

# Important Terms of a Contract



## E. Indemnity

# Important Terms of a Contract



## F. Documents Needed in Pay Applications

# Important Terms of a Contract



## G. Liquidated Damages

# CHANGES AND EXTRA WORK

# Typical Procedures for Change



## A. Formal Change Orders

- In writing
- Signed by all parties to contract
- Identifies the change in work, change in price, and change in time

# Typical Procedures for Change

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## B. Constructive Change Directives

- In writing
- Signed by owner/architect (if directed to general contractor)
- Used when parties cannot agree on change
- Contractor must do the work as directed, use dispute resolution procedure to determine payment and time extension

# Put the Change in Writing



- A. Get change order or constructive change directive in writing before you do the work
- B. Avoid verbal orders. If you cannot get written directive to perform changed work,
  - ▣ Give advance written notice of extra payment and time you seek for change, or
  - ▣ Do not do the work



# Delays



## A. Excusable Delays

- Extensions of time only
- Time extension and possible increase in compensation
- Beware:
  - No damage for delay clause
  - Release in application for payment

# Delays



## B. Inexcusable Delays

- Actual damages
- Liquidated damages

## C. Concurrent Delays

- Fault of two or more parties
- Apportion time extensions and delay damages

# CONTRACT TERMINATION

# Contract Termination



- Two types of Termination
  1. Termination for default
  2. Termination for convenience
- Steps to Proper Termination – Declaring a Default
- Documenting Events of Default
  1. Written documentation is critical
  2. Perform an analysis of your position

# Contract Termination



- Comply with Terms of the Contract
  - ▣ Two Types of Notifications
    1. Notice to cure
    2. Notice of termination
- Damages Related to Termination

# PROMPT PAYMENT ACT

# Prompt Payment Act



## A. General Contractor

- Payment within 30 days after invoice

## B. Concurrent Delays

- Payment within 7 days after receipt unless contract says otherwise

# Prompt Payment Act

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- c. If Disputed, Must Notify in Writing
  - 15 days from pay request if owner
  - 5 days from pay request if contractor or subcontractor
- D. Interest
- E. Attorney fees
- F. Retainage must not exceed amount withheld by state