The Teton Update

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Bond Claim Rights Apparently Limited

Kansas City N.O Nelson Co. v Mid-Western Construction Co. of Mo. mc, 782 SW 2d 672 (1989)

The Missouri Court of Appeals held that a supplier to a second tier subcontractor may not sue on the first tier subcontractor payment bond for nonpayment for materials supplied to the second tier subcontractor. In this action, the supplier, relying on common subcontract language, argued that it was a third party beneficiary of the subcontract between the prime contractor and the first tier subcontractor. The supplier also contended that it was entitled to recover under the first tier subcontractor's payment bond. The Appeals Court reversed the trial court on the third party beneficiary claim, finding that the supplier was in fact a donee beneficiary of the subcontract. Therefore, the supplier could sue the first tier subcontractor on a third party beneficiary theory. However, in a somewhat unusual ruling, the Appeals Court upheld the trial court in finding that the supplier had no rights under the payment bond because the bond was expressly limited to parties having a direct contractual relationship with the first tier subcontractor. As a result of this ruling, suppliers and remote subcontractors should attempt to establish direct contractual relationships as high in the contracting chain as possible.

Accord & Satisfaction

Hawkins & Powers Aviation Inc., IBCA No. 2387, 89-2 BCA 21, 768

A contractor's signature on an unilateral modification barred recovery for costs in excess of the modification. A contractor was issued a notice to proceed for additional work and directed to submit a proposal within 20 days. The Government unilaterally reduced the proposal by 30% and forwarded a modification to the contractor at the Government's estimate. The contractor immediately signed the modification without reservation. The contractor however failed to understand the legal effect of its signature, for several months latter the contractor disputed the amount paid and submitted its actual increased costs which the Government denied. The Board subsequently dismissed the appeal, finding that the contractor's signature on the unilateral modification amounted "to an accord and satisfaction in law and releases the Government from any further liability by reason of the ordered change."

EDITOR'S NOTE: If a modification does not cover all cost elements, such as unknown impact costs, a reservation of rights statement should be incorporated into the terms so as to retain~ rights to pursue such recovery at a latter date. The Prompt Payment provisions of Federal contracts directs payment of 80% of the change amount on completed work irrespective of the status of the modification settlement efforts. This has greatly reduced the economic leverage wielded by the owner in attempting to force bilateral settlement of change order costs.

About **the Authors**

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GAO Proposes Changes to Bid Protest Procedures

The General Accounting Office has recently proposed major changes to its bid protect regulations which generally enhance a protesting contractor's rights to challenge agency decisions at GAO.

Historically, the GAO bid protest procedures have lacked mechanisms whereby contractors could discover the basis for agency decisions, and have lacked formal hearing requirements where agency officials could be questioned by protesting parties. These and other limitations have diminished the effectiveness of bid protests and have forced parties into federal courts where these procedures and rights are available.

In April. 1990 however, GAO proposed several sweeping changes to the bid protest procedures which were aimed at curing some long standing deficiencies. Some of the significant proposed changes included: (i) expanded contractor rights to review agency documents related to an award dispute; (ii) procedures in which GAO may hold evidentiary hearings in certain protest disputes; (iii) a mechanism to allow adverse findings to be made against an agency when it refuses to release requested information; (iv) recognition of a right for the protester to recover its attorney fees where the agency elects to take corrective action at the initial phases of the protest procedures. A future amendment to the regulations is expected in January 1991.

Although these proposed changes are likely to be significantly modified before the final rules become effective, the GAO bid protest remedy is likely to become a more effective tool in future award controversies.

Site Inspection

Zenith Construction, ASBCA No 33576, 89-3 BCA 21, 894

In bidding for a contract to remove and replace existing windows, the contractor's failure to perform a detailed site visit and "verify" dimensions of the drawings negated recovery for changed conditions. The existing concrete walls at window frames undulated and varied from the straight line contract dimensions. The window drawings prominently noted to "Verify in Field." The contractor performed a site visit, but did not take measurements or view the building interior. Trial testimony noted that this type of construction was notorious for its inconsistent dimensions. The Board ruled that the existing conditions were not latent or unusual for this type of construction. Accordingly, the contractor "runs the risk of not investigating the site and ignoring the cautionary language on the drawings."

EDITOR'S NOTE: The Board will normally obligate the Government to warrant detailed drawings and not unreasonably hide behind such terms as "verify." Herein the Board found it reasonable for the Government to direct verification, but also cautioned that this case should not be interpreted as an erosion of the Governments obligation to warrant its detailed drawings.

Contract Award Unenforceable

F S. Crook v. C & R Heating, 787 SW 2d 763 (Mo. App 1990)

A heating subcontractor who received a notice of contract award from the prime contractor learned that post-award negotiations could invalidate the award.

In F.S. Crook v. C & R Heating, after some negotiations, a heating subcontractor received a letter from the prime contractor stating that his company had received that contract award. The contractors then exchanged various correspondence concerning the contract terms, however there was never a clear agreement on the payment terms. Two months after the notice of award, the prime contractor eliminated the majority of the work, and the subcontractor invoiced the prime contractor for "cancellation charges" which were awarded by the lower court. On appeal, the Court of Appeals reversed, and ruled that no valid contract had ever been formed because there was no agreement on the payment terms. Thus, a notice of award may be insufficient to bind a contracting party where every material contract term is not agreed upon.