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# **Federal Contracts: The Year in Review**

**SPEAKER: JAMES F. NAGLE**



# Contractors Now Required To Use Department of Homeland Security's E-verify System to Guard Against Employment Of Unauthorized Aliens

- Executive Order 12989
- New FAR Rules Proposed
- Applies to both Prime and Subcontracts over \$3,000

# FAC 2005-28

- Increased requirements on contractor for internal controls
- Mandatory disclosure of criminal law, civil law, false damages, negligent overpayments

# FAC 2005-25

- Electronic subcontracting reporting system replaces standard forms
- New clause 52.223-27 for service and construction contracts to insure that contractors deliver and make maximum use of products containing recovered materials

# FAC 2005-25 (continued)

- Refusal to pay delinquent federal taxes now affects responsibility and possible basis for suspension and debarment **FAR 52.209-5**
- New Small Claims Procedures for Small Businesses
  - Small Business
  - Claim up to \$150,000
  - Decision within 120 days

# FAC 2005-24

- Contractor personnel providing support in a designated operational area or supporting a diplomatic or consular mission outside the United States – Rules for Use of deadly force

# Continued Guidance on Applying Court Martial Jurisdiction to Contractors

- March 10, 2008 – Gates Memorandum

# Pre-Award

## ➤ Protests

- New Rule Changes
- Interested Party
  - Infrastructure Defense Technologies – no proposal and untimely
  - *Evans Security Solutions, Inc.* – even if protest were granted, protestor would not be in line for award

## Failure to provide adequate documentation hurts the government

- *Carahsoft Technology Corporation* – Contemporaneous records failed to adequately document Agency's decision and the Agency's explanation was inconsistent with the limited contemporaneous record

# Post Award

## ➤ Terminations for Default

- *Kostmayer Construction, LLC*
- Default termination overturned because the government unreasonably underestimated the appellant's ability to timely complete the project

# Don't Just Follow the Directions of Any Government Employee

- If it is not the Contracting Officer, get confirmation from the Contracting Officer
- *States Roofing Corporation*
- *Information Systems & Networks Corp.*

# Email “Signed” Claim is Not a Claim

➤ *Teknocraft, Inc., ASBCA 55438*

# Severin Doctrine

- In order for the Severin Doctrine to apply, the subcontractor's release of the prime must be "ironclad"
- *Harper/Nielsen-Dillingham Builders, Inc. v. United States* – it was ironclad

# CDA Jurisdiction

- *Kenney Orthopedic, LLC* – no jurisdiction over claims of tortious interference with contract advantage or prospective advantage and intentional infliction of emotional distress
- *Valenzuela Engineering, Inc.* – no standing to bring action because under California law a suspended corporation owing taxes may not initiate or defend a lawsuit

# Claims

- *Bell BCI Company v. United States* – NIH slammed for improper contracting
- *See Metric Construction Company* (constructive changes, duty to mitigate and the use of the dataquest blue book to determine standby equipment rights)
- *Anchor Savings Bank FSB v. United States* (damages, especially lost profits, foreseeability and certainty)
- *San Carlos Irrigation & Drainage District* – “Incompetence will be sufficient” to provide violation of covenant of good faith and fair dealing

# Attorneys' Fees

- *Bill Hubbard v. United States*, attorneys' fees can be larger than the award
- *Richlin Sec. Serv. Co. v. Chertoff*, 120 S. Ct. 2007 (2008), prevailing party under EAJA is not limited in its recovery of paralegal fees to the attorney's costs but may recover the paralegal fees at the prevailing rates
- *Francisco Javier Rivera Agredano v. United States* -- \$554,000 in damages of which \$350,000 was attorneys fees

## **FEDERAL CONTRACTS: THE YEAR IN REVIEW**

**BY**

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### **I. NEW STATUTES**

The Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 contained numerous sections which will affect government contracting. Most give general requirements and mandate specific implementation regulations. Even so, I will mention some even before the other shoe of regulations drops.

In Section 866, it extends to all federal agencies, something that had previously applied only to the Defense Department, i.e., that the FAR be amended to address the use of subcontractors that add no or negligible value on cost reimbursement contracts and prohibit profit on work performed by lower tier subcontractors if higher tier contractors add no or negligible value. Section 867 requires guidance on the amount of award or incentive fees the contractor may receive.

Section 868 requires regulations that mandate that the contracting officer make a written determination that an offeror proposing a service that is not offered and sold competitively in the commercial marketplace, but is “of a type” offered and sold in substantial quantities in the commercial marketplace, has provided sufficient price and/or cost information to allow price reasonableness determination.

Section 871 gives greater authority to the GAO to inspect the contractor’s records to include interviewing any current prime or subcontractor employee about a contract unless it was awarded through sealed bidding.

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## **II. NEW REGULATIONS**

### **A. EXECUTIVE ORDER**

On June 6, 2008, President Bush issued Executive Order 12989 to require all companies who contract with federal agencies to use the Department of Homeland Securities E-Verify System. The order is designed to insure that the federal government only contracts with providers who “do not knowingly employ unauthorized alien workers.” The order also directed amendments to the FAR to insure that contractors who employ illegal aliens shall be considered for debarment or suspension. Implementation of the order is to be carried out in a manner that minimizes “the burden on participants in the Federal Procurement Process.”

Six days later at 73 Fed. Reg. 33374, on June 12, 2008, a new FAR rule was proposed to require certain contractors and subcontractors to use the US Citizenship and Immigration Services Electronic Employment Eligibility Verification (E-Verify) System to insure that their employees are eligible to work in the United States. This implements EO 12989 and applies to both prime and subcontracts over \$3,000. It does not apply to contracts for Commercially Off-The-Shelf (COTS) items or items that would be considered as COTS but for minor modifications. The rule would apply to solicitations issued and contracts awarded after the effective date of the final rule, but would only cover employment in the United States. Contractors would have to use the E-Verify System for all newly hired employees and all employees directly engaged in performance of work under federal contracts. That rule became final in FAC 2005-29, but is delayed until February 20, 2009.

### **B. FEDERAL ACQUISITION CIRCULARS**

FAC 2005-30, January 15, 2009, is one of those hodge-podge regulations which deals with such things as the Federal Procurement Data System, renders inapplicable more laws to the

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acquisition of Commercially Available Off-The-Shelf (COTS) for items; exempts more service contracts from the Service Contract Act. One matter which may be of no significant importance on the general basis is a requirement now that justification and approval for non-competitive contracts must be made available for public inspection within fourteen (14) days after contract award on the website of the agency and at the government-wide point of entry. In the event of an urgent and compelling basis the justification must be posted within thirty (30) days after contract award.

FAC 2005-29, Fed. Reg. November 14, 2008, is the executive order mentioned earlier which implements Executive Order 12989. This actually is the final rule which replaced the interim which would have been announced June 12, 2008. This final rule inserts a clause into federal contracts that are above the simplified acquisition threshold (basically \$100,000) and have a performance period of at least 120 days, committing government contractors to use the US Citizenship and Immigration Services E-Verify System to verify whether all the contractors new hires, and all employees (existing and new) directly performing work under federal contracts, are authorized to work in the United States. There are some exemptions (commercially available off the shelf items and items that would be COTS but for minor modifications). The final rule requires prime contractors to include the clause in subcontracts over \$3,000 for services or for construction. The government can waive this requirement in exceptional circumstances.

DoD, GSA and NASA issued their final rule, FAC 2005-28, on November 12, 2008, amending the FAR to amplify the requirements for a contractor code of business ethics and conduct, an internal control system, and disclosure to the Government of certain violations of criminal law, violations of the civil False Claims Act, or significant overpayments. Most notably, the final rule now requires mandatory disclosure of violations and overpayments rather than voluntary disclosure.

FAC 2005-28 implements "The Close the Contractor Fraud Loophole Act," Pub. L. 110-252. The statute defines a covered contract to mean "any contract in an amount greater than \$5 million

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and more than 120 days of duration.” This final rule also provides that the contractor’s Internal Control System shall be established within 90 days after contract award, unless the contracting officer establishes a longer time. The Internal Control System is not required for small businesses or commercial item contracts.

FAR 52.203-13 is the FAR clause most affected by these changes. As modified, the contractor is obligated to (a) exercise due diligence to prevent and detect criminal activity, and (b) timely disclose to the Government certain violations of criminal law or the civil False Claims Act. In connection with these requirements, the Contractor’s internal control system shall (a) establish standards and procedures to facilitate timely discovery of improper conduct, and (b) ensure corrective measures are promptly instituted and carried out.

Among other minimum requirements are that such system provide for timely disclosure of the above described violations. The disclosure obligation on each contract continues for 3 years after final payment on the contract. Furthermore, the Contractor is obligated to fully cooperate with any Government agencies responsible for audits, investigations or corrective actions. Full cooperation includes providing timely and complete response to Government auditors’ and investigators’ request for documents or access to employees with information.

Knowing failure to report (a) certain violations of federal criminal law, violations of the civil False Claims Act or significant overpayments on a Government contract is now a cause for debarment pursuant to FAR 9.406-2 or suspension pursuant to FAR 9.407-2. FAR 3.1003 specifically references FAR Payment clauses for the reporting obligation relating to overpayment.

The commentary associated with this final rule noted “There is no doubt that mandatory disclosure is a ‘sea change’ and ‘major departure’ from voluntary disclosure, but DoJ and the OIG point out that the policy of voluntary disclosure has been largely ignored by contractors for the past 10 years.”

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FAC 2005-27, issued on September 17, 2008, is primarily a housekeeping regulation covering fourteen different subjects. Among other things, it extended until January 1, 2010, the timeframe in which an agency may use simplified procedures to purchase commercial items in amounts greater than the simplified acquisition threshold (basically \$100,000) but not exceeding \$5,500,000. The FAC also implemented portions of the PY 2008 National Defense Authorization Act to mandate enhanced competition for task and delivery order contracts. The FAC also adopted as a final rule, the implementation of the Presidential One Dollar Coin Act of 2005 so that by January 1, 2008, federal agencies must insure that entities that operate any business, including vending machines, on any premises owned by the United States, or under the control of any agency or instrumentality of the United States, are capable of accepting and dispensing one dollar coins and that the entities display notices of this capability on the business premises.

FAC 2005-26, Prohibition on Restricted Business Operations in Sudan and Imports from Burma Interim rule, 73 Fed. Reg. 33636, June 12, 2008. FAC 2005-26 implements Section 6 of the Sudan Accountability and Divestment Act of 2007 and Executive Orders 13310 and 13448. It requires the certification that the contractor does not conduct certain business operations in Sudan and it also updates the list of countries for which most imports are prohibited to include Burma as well as Sudan.

FAC 2005-25, 73 Fed. Reg. 21772, April 22, 2008, requires that small business subcontract reports be submitted using the electronic Subcontracting Reporting System (eSRS) rather than Standard Form 294 and Standard Form 295. It also amended and revised the Defense Priorities and Allocation System and changed the Standard Forms 26 and 1447. The rule also issued a new clause for use in service or construction contracts to insure that contractors deliver and make maximum use of products containing recovered materials. The new clause is 52.223-17, Affirmative Procurement of EPA-Designated Items in Service and Construction Contracts in which the contractor certifies that it shall make

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“maximum use of products containing recovered materials that are EPA-designated items” unless the product cannot be acquired competitively and within a timeframe providing for compliance with the contract schedule; meeting contract performance requirements or at a reasonable price.

Perhaps most significantly, the rule amended the FAR to add refusal to pay delinquent federal taxes to the certifications regarding standards of responsibility and as a possible basis for suspension and debarment. This was in response to a request from the Senate Permanent Committee on Investigations. The new clause is 52.209-5, Certification Regarding Responsibility Matters and adds a subparagraph (d) which requires the contractor to certify that within a three-year period preceding the offer, it has or has not been notified of any delinquent federal taxes in an amount that exceeds \$3,000 for which the liability remains unsatisfied. The clause states that taxes are considered delinquent if both of the following criteria apply: the tax liability is finally determined (i.e., there is not a pending administrative or judicial challenge) and the taxpayer is delinquent in making payment. Similar changes were also made to FAR 52.212-3, Offeror Representations and Certifications – Commercial Items.

Finally the rule fully implemented a different higher dollar ceiling enabling small businesses to use a small claims procedure for appealing the contracting officer's final decision. Section 857 of the John Warner National Defense Authorization Act for FY 2007, Public Law 109-364, changed the ceiling under the Contract Disputes Act from \$50,000 or less to \$150,000 or less for small businesses.

Federal Acquisition Circular 2005-24, 72 Fed. Reg. 10942, February 28, 2008, concerns contractor personnel that are providing support to the mission of the United States Government in a designated operational area or supporting a diplomatic or consular mission outside the United States but not authorized to accompany the US Armed Forces. This final

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rule clarifies that contractor personnel are only authorized to use deadly force in self defense or in the performance of security functions when use of such force reasonably appears necessary to execute their security mission. It also allowed contracting officers to purchase the goods and services of the Dominican Republic without application of the Buy American Act if the acquisition is subject to the Free Trade Agreements and also added Bulgaria and Romania to World Trade Organization and Government Procurement Agreement countries wherever it appears.

### **C. OTHER FEDERAL WIDE REGULATIONS**

The Treasury rate for interest payments under the Contract Disputes Act or the Prompt Payment Act for the period beginning January 1, 2009, and ending on June 30, 2009, is 5-5/8 per centum per annum.

On October 1, 2008, the Small Business Administration announced, in the Federal Register, its regulations to govern the new Women-Owned Small Business (WOSB) Federal Contract Assistance Procedures. This new rule, effective October 31, 2008, also allows the designation of certain women-owned businesses as Economically Disadvantaged Women-Owned Small Businesses (EDWOSB). Under this new regulation, contracting officers will be able to set contracts aside for bidding solely by Women-Owned Small Businesses. This rule is at 73 Federal Register 56940, October 1, 2008.

In that same Federal Register at 73 Federal Register 57014, October 1, 2008, the SBA issued a proposed rule and is seeking comments to determine the representation of WOSBs in federal procurement. Responding to this request for comments is very important. If you believe your particular industry (for example, construction, forest fire fighting) is under-represented in the number of participating WOSBs, then you should send comments regarding that. Comments should be submitted to Linda Korbol, Assistant Administrator for

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Women's Procurement, Office of Government Contracting, Small Business Administration, 409 Third Street, SW, Washington DC 20416. Comments must be received on or before October 31, 2008.

Once the federal government has completed its review of the comments, this data will enable the federal government to designate those industries in which women-owned small business set-asides are most required.

#### **D. AGENCY SPECIFIC REGULATIONS OR MANUALS**

On March 10, 2008, Robert M. Gates, Secretary of Defense, issued a memorandum for Secretaries Of The Military Departments, Chairman Of The Joint Chiefs Of Staff, Under Secretaries Of Defense, Commanders Of The Combatant Commands, on "UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations." The Memorandum updated an earlier September 25, 2007 Memo, "Management of DOD Contractors and Contractor Personnel Accompanying US Armed Forces in Contingency Operations Outside the United States." While focused primarily on operations in Iraq and Afghanistan, it applies to all DOD contractors supporting groups and contingency operations anywhere outside the US. It states "Commanders have UCMJ (Uniform Code of Military Justice) authority to disarm, apprehend, and detain DOD contractors suspected of having committed a felony offense in violation of the rules and the use of force (DODI 3020.41) or outside the scope of their authorized mission, and to conduct the basic UCMJ pretrial process and trial procedures currently applicable to the Courts-Martial of Military Service Members . . . ."

<http://www.aschq.army.mil/gc/files/DepSecDef%20Memo%20Mgt%20of%20Contractors%2025Sep07.pdf>

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## **E. OTHER DEVELOPMENTS**

When Hurricane Katrina struck in August 2005, FEMA had only 36 Contracting Officers on staff. In November 2007, according to FEMA's Chief Acquisition Officer, Deidre Lee, the Agency now employs nearly 200 procurement professionals. It is unclear how many of those procurement professionals have Contracting Officer warrants, but it clearly shows a new emphasis and appreciation for the contracting effort in the event of emergencies.

## **III. PRE AWARD**

### **A. PROTESTS**

#### **1. Rule Changes**

On April 7, 2008, GAO issued a notice regarding changes to its protective orders. These were basically minor changes allowing a party to use protected material obtained under a protective order in a subsequent matter involving the Court of Federal Claims and also to remind practitioners that dismissal of the protest is a possible sanction where the terms of a protective order violated.

Also, effective March 3, 2008, the filing window at GAO's headquarters building will no longer accept deliveries. All packages must be delivered to GAO's new mail center located on the Fourth Street side of the GAO building. This new directive, available at the GAO website, contains a diagram as to where the location is and further instructions as to labeling and procedures to be followed.

## **2. Competition**

*Savantage Financial Services Inc. v. United States*, COFC No. 08-21C, April 15, 2008, is an interesting case. It involved a bid protest in which the plaintiff contested what it alleged was an improper sole source procurement by the Department of Homeland Security for financial systems application software. The government contended that there was no procurement, only the decision by DHS to standardize its software. The court disagreed with the government and held that DHS's Brand Name Justification was a procurement. The judge enjoined DHS until it "conducts a competitive procurement in accordance with the law to select financial management systems application software."

## **3. Interested Party**

In *Infrastructure Defense Technologies, LLC v. United States and Hesco Bastion, Ltd., Invenor*, COFC No. 07-582C, 695C, April 7, 2008, the protest was dismissed because the plaintiff lacked standing as it was not an interested party. It did not submit a proposal and it was untimely because it did not file the protest during the proposal period.

In *Evans Security Solutions, Inc.*, B-311035, March 19, 2008, the protest was dismissed because the protester was not an interested party because even if the protest were sustained on the grounds raised, the protester would not be next in line for award.

## **4. Evaluation**

In *Circo Inc., et al. v. United States, et al.*, COFC No. 07-691C, et al., March 5, 2008, in this bid protest apparently everybody involved in the procurement was suing everyone else involved in the procurement. The court enjoined the government from performance of the contract basically because the court found that the evaluation process was flawed.

The court concludes that GSA, in attaching talismanic significance to technical calculations that suffer from false precision, made distinctions that, in their own right, likely were arbitrary, capricious, and contrary to law, but certainly became so when the agency failed adequately to account for price and to make appropriate tradeoff

decisions. Those compounding errors prejudiced the plaintiffs and obliged this court to set aside the awards in question and order appropriate injunctive relief.

In *Global Solutions Network Inc.*, B-298682.3; B-298682.4, June 23, 2008, the protester alleged that the awardee's price was unreasonably low. The GAO denied the protest because even though the awardee was significantly lower than the government estimate, it was considered reasonable because a third highly rated offeror had submitted a similar price.

In *MZMCT JV*, B-311245.2, May 16, 2008, the protest was sustained where the agency in the solicitation instructed offerors not to propose unrealistically low costs because it was concerned about the negative effect on contract performance. Nevertheless, the awardee had capped its indirect rates at levels that the agency concluded were significantly below its costs. The agency failed to consider performance risk associated with the decision to cap those indirect costs.

In *Carahsoft Technology Corporation*, B-311241, May 16, 2008, the GAO granted the protest where the contemporaneous record failed to adequately document the basis for the agency's decision and the agency's explanation of its reasoning in its response to the protest was inconsistent with the limited contemporaneous record.

In *Boeing*, B-311344.11, June 18, 2008, the protest of Boeing regarding the KC-35 Tanker, GAO sustained the protest on seven grounds. Basically, the Air Force changed the evaluation criteria set out in Section M and otherwise favored Northrop Grumman improperly.

## **B. SOCIO-ECONOMIC**

For the present, it appears the Department of Defenses' ("DOD") preference program for small disadvantaged businesses is suspended. On November 4, 2008 the Court of Appeals for the Federal Circuit, essentially the Supreme Court of Government contracting, decided *Rothe*

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*Development Corp. v. Department of Defense*, 2008 WL 4779586 (Fed.Cir. 2008). The court held unconstitutional the statute that imposes a goal for DOD that 5 percent of federal defense contracting dollars for each fiscal year be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals (10 U.S.C. § 2323 or “Section 1207”).

The court based this decision on the fact that the statute incorporates the Small Business Act’s presumption that Black Americans, Asian Americans, Hispanic Americans, and Native Americans are socially and economically disadvantaged individuals and provides that special assistance should be given to such entities to achieve the 5 percent goal. Because this is a race-based preference, the court used a standard of strict scrutiny to determine whether the statute was constitutional and whether Congress had strong evidence in enacting the law. Essentially, the court held the Congress when reenacting Section 1207 in 2006 did not have a “strong basis in evidence” to support the conclusion that minorities “are currently and have been subject to discrimination in state and local contracting throughout the United States.”

This decision may be appealed by the DOD to the United States Supreme Court or DOD may ask the entire Court of Appeals to re-hear the case. Also, Congress is free to reenact Section 1207 if it so chooses, and the constitutionality of that law, if enacted, will likely depend on the Congressional record regarding its enactment. The Appellate Court specifically stated it would make no pre-judgment regarding “whether any such new enactment will be supported by a strong basis in evidence.”

#### **IV. POST AWARD**

##### **A. TERMINATIONS FOR DEFAULT**

*Kostmayer Construction, LLC*, ASBCA No. 55053. May 30, 2008, involved a COE post Katrina construction contract for hurricane protection and enlargement of an existing levee. The Corps terminated the contract for default for failure to make progress. The

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ASBCA sustains the appeal of the TFD: “We consider that the government has failed to sustain its burden of proving that the termination was justified. The decision to terminate here was unreasonable and an abuse of the contracting officer’s discretion because it was based on a materially inaccurate, misleading analysis by the contracting officer of the percentage of contract completion and a flawed assessment of appellant’s capabilities to complete the work in the more than seven months remaining for performance. The government unreasonably underestimated appellant’s ability to timely complete the project. Most significantly, the government underestimated and misanalyzed the degree of completion at the time of termination, appellant’s commitment of additional resources to timely complete, and the results of the government’s own test when it direct[ed](sic) appellant to ‘cure’ performance deficiencies.”

#### **B. AUTHORITY TO ORDER CHANGES**

In *States Roofing Corporation*, ASBCA Nos. 55500, 55503, December 9, 2008, the Board denied the appellant’s claim on a Corps of Engineers contract. It supplied a full-time safety officer allegedly ordered by the resident officer in charge of construction (ROIC). Because the actual contracting officer never ordered the extra full-time safety officer or was aware of the alleged order, the Board stated that it was bound by the Federal Circuit’s decision in *Winter v. Cath-Dr/Balti Joint Venture*, 497 F.3d 1339 (Fed. Cir. 2007) which held that under the terms of the contract, that only the contracting officer had the authority to modify the contract.

*Information Systems & Networks Corp. v. United States*, COFC No. 02-796C, May 6, 2008 is another case in which because of explicit contract language stating that only the contracting officer could approve changes to the contract, the government wins on its motion for summary judgment rejecting plaintiff’s constructive changes. The best advice for clients now is if you receive directions from anyone other than the contracting officer, even if the

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contracting officer is copied on letters or emails, you must contact the contracting officer directly and ask them to confirm whether you are to follow the direction.

### **C. CONTRACT INTERPRETATION**

In *Northrop Grumman Information Technology, Inc. v. United States*, CAFC No. 2008-50003, August 5, 2008, the court held the government contract law rule is that to incorporate a document by reference, the incorporating contract must use language that is express and clear so as to leave no ambiguity about the identity of the document being referenced, nor any reasonable doubt about the fact that the referenced document is being incorporated into the contract.

### **D. CONTRACT DISPUTES ACT LITIGATION**

In *Teknocraft Inc.*, ASBCA No. 55438, April 03, 2008, the ASBCA dismissed the appeal for lack of jurisdiction because of an improper certification. The certification was sent by email and signed “//signed//” followed by a typed name. The board holds that notation is “not a discrete, verifiable symbol. It is not a unique signature. The generic notation is not sufficiently distinguishable to authenticate that the certification was issued with [appellant’s] knowledge and consent or establish his intent to certify. Therefore, the certification was not properly executed as it was not signed.”

### **E. SEVERIN DOCTRINE**

*Harper/Nielsen-Dillingham, Builders Inc. v. United States*, COFC No. 05-269C, April 29, 2008, dealt with one of the rare government successes on the Severin doctrine where the judge granted the government motion for summary judgment because the claim, asserted by a prime on behalf of a subcontractor, was thrown out because the prime

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contract contained an unambiguous “no damage for delay” clause which precluded liability of the prime to the sub.

## **F. JURISDICTION**

In *Kenney Orthopedic LLC v. United States*, COFC 08-0003C, August 7, 2008, the court stated it has no jurisdiction over claims of “tortious interference with a contractual advantage; tortious interference with a prospective advantage; and intentional infliction of emotional distress.”

In *Valenzuela Engineering, Inc.*, ASBCA Nos. 54939, 55464, February 21, 2008, the appellant was a suspended corporation under California law. Appellant argued that even though its charter has been suspended, it may still maintain this action in the context of winding up its affairs under California law. The board rejected this argument noting that under California law a suspended corporation that owes back taxes, as does appellant, may not initiate or defend a lawsuit while its taxes remain unpaid. The Board dismisses the appeals finding that appellant lacks the capacity to maintain the action.

## **G. CLAIMS**

For a good discussion of constructive changes, duty to mitigate and the use of the Dataquest Blue book to determine standby equipment costs, see *Metric Construction Company, Inc. v. United States*, COFC No. 04-635C, May 21, 2008.

*Bell BCI Company v. United States*, COFC No. 03-1613C, April 21, 2008, is particularly interesting. After construction was well under way, NIH decided to add an additional floor to the building. The plaintiff complied but filed an impact claim for the cumulative effect of the many changes required. The government defended, based on an

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accord and satisfaction plus counterclaims for liquidated damages. The court found for the plaintiff on most of the issues and noted that the liquidated damages defense had no basis and was only used as a negotiating ploy by the government. Also interesting is the fact that the court denied the government's accord and satisfaction defense noting that although the contracting officer was listed as a witness, she did not testify. The judge noted: "by her failure to testify, the court may infer that her testimony would not have supported defendant's position."

For those of you who are interested in a scholarly decision on damages, specifically lost profits, "foreseeability," and "certainty," see *Anchor Savings Bank, FSB v. United States*, COFC No. 95-39C, March 14, 2008.

In *San Carlos Irrigation and Drainage District v. United States*, COFC No. 06-576 C, December 3, 2008, the Court of Federal Claims, although denying both parties' motions for summary judgment, observed regarding the good faith and fair dealing argument, "If plaintiff establishes by a preponderance of evidence that the challenged actions were unreasonable, the Government cannot elude liability by augmenting plaintiff's burden to prove personal animus on the part of BIA employees. Incompetence will be sufficient."

## **H. CRIMINAL AND CIVIL LIABILITY**

In *Allison Engine Company v. U. S., ex. rel. Sanders*, 2008 WL 2329722 (U.S. June 9, 2008), the Supreme Court rejected the Sixth Circuit's expansive reading of the False Claims Act. The Court held that liability may not be imposed under 31 U.S.C. § 3729(a)(2) and § 3729(a)(3) based on fraud directed against private entities, such as prime contractors, that receive federal funding. Rather, liability attaches under those sections when the defendant "intend[s] that [a] false record or statement be material to the government's decision to pay or approve [a] false claim." The Court held that under those statutes it is

necessary for the defendant to intend that a claim be paid by the government and not by another entity. The Court explained that a subcontractor on a government project “violates § 3729(a)(2) if a subcontractor submits a false statement to the prime contractor intending for the statement to be used by the prime contractor to get the government to pay its claim.” On the other hand, “[i]f a subcontractor or another defendant makes a false statement to a private entity and does not intend the Government to rely on that false statement as a condition of payment, this statement is not made with the purpose of inducing payment of a false claim ‘by the government’” and does not give rise to liability under the False Claims Act. Merely effecting a fraud scheme to cause a private entity to make payments using money obtained from the government is not enough. It must be shown that the conspirators intended to “defraud the government.”

#### **I. ATTORNEYS FEES**

In *Bill Hubbard v. United States*, COFC No. 95-396C, January 28, 2008, the court allowed \$68,797.31 in reasonable attorneys fees even though the plaintiff had been awarded very little in damages. The court noted

It is the purpose of the EAJA to encourage people to bring in good faith claims against the government where the government acts in a manner that is contrary to the high and noble standard to be expected from a great Nation. As it is the policy of the EAJA that attorney’s fees are not limited to the dollars awarded, the Court hereby finds that the amount of \$68,797.31 in reasonable attorney’s fees need not be reduced further and that the amount is not excessive . . . .

*Richlin Sec. Serv. Co. v. Chertoff*, 128 S. Ct. 2007 (2008), reversed the United States Court of Appeals for the Federal Circuit. The Federal Circuit had held that prevailing party in a case brought by or against the government can recover fees for paralegal services only at the cost to the parties’ attorney rather than at the prevailing market rates. The Supreme Court held that a prevailing party that satisfied the Equal Access to Justice Act’s other

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requirements is not limited in its recovery of paralegal fees to its attorneys costs for such services, but may recover its paralegal fees from the government at the prevailing rates.

In *Francisco Javier Rivera Agredano v. United States*, COFC No. 05-608C, July 22, 2008, the plaintiff had purchased a vehicle “as-is” at government auction following a Custom Service federal forfeiture sale. The plaintiff and a passenger spent a year in a Mexican prison following the discovery that the vehicle contained seventeen kilograms of marijuana hidden in the upholstery. The plaintiff sued alleging breach of contract in that the government failed to conduct a thorough search of the car prior to its sale. After denying government’s motions to dismiss for lack of subject matter jurisdiction, the judge found that the government had breached an implied warranty that the purchased item would be free of contraband and awarded \$550,854 in damages, \$350,000 of it in attorneys fees.

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