

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

**BY**

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### **I. NEW STATUTES**

#### **A. CONSOLIDATION OF THE CIVILIAN BOARDS OF CONTRACT APPEALS**

Effective January 6, 2007, the National Defense Authorization Act for Fiscal Year 2006 consolidated the eight existing Civilian Boards of Contract Appeals (the General Services Administration Board of Contract Appeals, the Department of Transportation Board of Contract Appeals, the Department of Agriculture Board of Contract Appeals, the Department of Veterans Affairs Board of Contract Appeals, the Department of Energy Board of Contract Appeals, the Department of Interior Board of Contract Appeals, the Department of Housing and Urban Development Board of Contract Appeals, the Department of Labor Board of Contract Appeals) into a new Civilian Board of Contract Appeals. The Act gave the civilian board jurisdiction over contract appeals from non-defense agencies and ensured that the board could, with the concurrence of the heads of affected agencies, assume responsibility for any other functions previously performed by the boards of contract appeals for civilian agencies.

The Board will not hear matters from the Department of Defense, the Department of the Army, the Department of the Navy, Department of the Air Force, National Aeronautics and Space Administration.

So, after January 7, 2007 there will be two multi-agency Boards of Contract Appeals, the Armed Services Board of Contract Appeals and the new Civilian Agency Board of Contract Appeals. The consolidation provisions of the Act did not apply to the Boards of Appeals for the

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Tennessee Valley Authority and the Postal Service Board of Contract Appeals. Those boards will not terminate and their members will not be transferred to the new Civilian Board.

The new Civilian Board of Contract Appeals is part of GSA. The new offices are located at 1800 M Street NW, Sixth Floor, Washington DC 20036. The mailing address of this Civilian Board is 1800 F Street (sic) NW, Washington DC 20405. The phone number of the Office of the Clerk of the Board is 202 606 8800; the facsimile number is 202 606 0019. The internet address of the Civilian Board website is [www.cbca.gsa.gov](http://www.cbca.gsa.gov).

On July 5, 2007, the Civilian Board of Contract Appeals issued its final rule of procedure at the Civilian Board of Contract Appeals.

## **II. NEW REGULATIONS**

### **A. FEDERAL ACQUISITION CIRCULARS\***

FAC 2005-23, 72 Fed. Reg. 73215, December 26, 2007, announced an interim rule which will require the use of Electronic Products Environmental Assessment Tool (EPEAT) when acquiring personal computer products such as desktops, notebooks (also known as laptops) and monitors pursuant to the Energy Policy Act of 2005 and a Presidential Executive Order. EPEAT is a system to help purchasers in the public and private sectors evaluate, compare, and select desktop computers, notebooks and monitors based on their environmental attributes.

The FAC also adopted, as a final rule, an amendment to the FAR implementing Executive Order 11246, which incorporated an exemption for religious entities prescribed in Executive 13279. Section 4 of Executive Order 13279 exempted religious corporations, associations, educational institutions and societies from certain non-discrimination requirements.

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\* As always, if you have particular questions regarding a new FAC, you should download the FAC from [www.acqnet.gov/far](http://www.acqnet.gov/far).

This final rule also amended the FAR to increase the use of performance-based payments as the method of contract financing and to improve the efficiency of performance-based payments when used.

On November 23, 2007, the government issued FAC 2005-22, 72 Fed. Reg. 65867. This FAC issued a final rule implementing § 104 of the Energy Policy Act of 2005. That section required that all acquisitions of energy consuming products and all contracts that involved the furnishing of energy consuming products require acquisition of ENERGY STAR or Federal Energy Management Program (PEMP) designated products. The FAC issued a clause for a Contracting Officer to insert in solicitations and contracts to insure that suppliers and construction contractors recognize when energy consuming products must be ENERGY STAR or FEMP designated.

The new clause, FAR 52.223-15, Energy Efficiency in Energy-Consuming Products, requires the contractor to insure that Energy-Consuming Products are energy efficient products (*i.e.*, ENERGY STAR products or FEMP-designated products) at the time of contract award, for products that are delivered; acquired by the contractor for use in performing services at a federally-controlled facility; furnished by the contractor for use by the government; or specified in the design of a building or work or incorporated during the construction, renovation, or maintenance.

The FAC also amended FAR Parts 2, 3, and 52 to require a contractor code of business ethics and conduct and to require their display of federal agency Office of the Inspector General Fraud Hotline Posters. In response to public content, this FAC reduced the burden on small businesses by making the requirements for a formal training program and an internal control system inapplicable to small businesses.

FAC 2005-21, 72 Fed. Reg. 63026, November 7, 2007 affected various sections of the FAR. First, it implemented the SAFETY Act which provides incentive for the development and deployment of anti-terrorism technology by creating a system of “risk management” and a system of “litigation management.” The purpose of the SAFETY Act is to insure that the fear of liability

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does not deter potential manufacturer or sellers of anti-terrorism technologies from developing, deploying and commercializing technologies that could save lives.

The FAC also clarified, streamlined, and updated the text and clauses on patents, data and copyrights in FAR Part 27 by attempting to rewrite the current FAR language into “plain language” with the ultimate goal of making the policies and procedures more understandable. Another section of the FAC amends the FAR to implement the Department of Labor’s final rule amending its regulations to exempt certain contracts for service meeting certain criteria from coverage under the Service Contract Act.

The FAC also announced a rule implementing the Local Community Recovery Act of 2006, Public Law 109-218, which addressed set asides for major disaster or emergency assistance acquisitions to businesses that reside or primarily do business in a geographic area affected by the disaster or emergency. This local area set aside could be done along with a small business set aside.

Finally, this FAC amended the FAR to revise references to published pricing sources available to the Contracting Officer in contracts containing construction requirements-contract pricing method references. The Rule removes the references to “R.S. Means Costs Estimating System” as a commercial source for pricing data. The revision is designed to provide greater flexibility for Contracting Officers when selecting sources of pricing data.

FAC 2005-20, 72 Fed. Reg. 51306, September 6, 2007 requires that contractors report specific subcontract awards to a public database. The Federal Funding Accountability and Transparency Act of 2006, Public Law 109-282, requires existence and operation of a searchable website that provides public access to information about federal expenditures. This Final Rule establishes a pilot program to test the collection and accession of subcontract award data. As a result, subcontracts awarded and funded with federal appropriated funds will eventually be

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disclosed to the public in a single searchable website. However, information reported under the pilot program will not be disclosed to the public.

FAC 2005-19, 72 Fed. Reg. 46342, August 17, 2007, made a variety of different changes to the rules on emergency acquisition and issued exemptions to the Buy American Act for purchases from Bulgaria, Dominican Republic, Romania, Bahrain, Guatemala, El Salvador, Honduras, and Nicaragua.

FAC 2005-18, 72 Fed. Reg. 36852, July 5, 2007, includes a Small Business Administration Rule to include the accuracy of Small Business Size Status Reporting over the life of certain contracts and to include clause FAR 52.219-28, Post-Award Small Business Program Representation.

FAC 2005-17, 72 Fed. Reg. 27364, May 15, 2007 is devoted entirely to government property – FAR Part 45. This is a substantial re-write which, besides deleting outdated clauses, combines selected FAR property clauses into a single clause and implements a new clause designed for military base and installation level contracts awarded under OMB Circular A-76 Process. This is an attempt to foster efficiency, flexibility, innovation and creativity regarding the use, protection and disposition of government property. The FAC reduced the number of property-related FAR clauses from 19 to 3 clauses. If you are involved in government property, you should review this thoroughly. It's effective June 14, 2007.

FAC 2005-16, 72 Fed. Reg. 13584, March 22, 2007, implements the Department of Labor Wage Determination On Line (WDOL) Internet Web Site as the source of federal contracting agencies to obtain wage determinations for the Davis Bacon Act and the Service Contract Act.

## **B. 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, 2007, and ending on June 30, 2007, is 5.250 per

centum per annum. From July 1, 2007 to December 31, 2007, the interest rate is 5 and  $\frac{3}{4}$  percent. From January 1, 2008 to June 30, 2008, the interest rate is 4  $\frac{3}{4}$ % per annum.

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

The Postal Service Board of Contract Appeals on June 29, 2007, 72 Fed. Reg. 35662, amended its rules regarding small claims (expedited and accelerated) procedures. The Board's rules now permit small business appellants to elect a small claims (expedited) procedure when the monetary amount in dispute is \$150,000 or less. For appellants that are not small businesses, this procedure may be elected only when the amount in dispute is \$50,000 or less.

On May 31, 2007, the Office of Federal Procurement Policy issued a memorandum and an attached guide entitled "Emergency Acquisition" which publishes "strategies for effective response planning and provides a list of acquisition reminders when contracting during emergencies. This will be used to supplement FAR Part 18, the newest part of the FAR which also deals with emergency contracting. The Guide describes how to effectively plan for responses to emergency and elaborates on flexibilities that Acquisition personnel may use once they are deployed to an emergency area.

Website:[http://www.whitehouse.gov/omb/procurement/guides/emergency\\_acquisitions\\_guide.pdf](http://www.whitehouse.gov/omb/procurement/guides/emergency_acquisitions_guide.pdf)

On September 25, 2007, the Defense Department issued a memorandum "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 Court's-Martial of Military Service Members . . . ."

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

On December 11, 2007, the Government launched a new website: [www.USASPENDING.gov](http://www.USASPENDING.gov) with a searchable database of federal contracts and grants which will include the name of the entity receiving the award, the amount of the award, information on the award including transaction type, funding agency, etc., the location of the entity receiving the award and a unique identifier of the entity receiving the award. This database is a mandate of the 2006 Federal Funding Accountability and Transparency Act.

#### **D. 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**

In *Blue and Gold Fleet, L.P. v United States*, and *Hornblower Yachts, Inc.*, 492 F.3d 1308 (Fed. Cir. 2007), in a case of first impression, the Court held "that [if] a party here has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process, it waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims." This puts the Court in harmony with the GAO rule.

In *EBSCO Publishing Inc.*, B-298918.4, May 7, 2007, the GAO recommended adjusting the \$150 per hour statutory cap on attorneys fees at 31 U.S.C., § 3554(c)(2)(B) to effect an increase in

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the cost of the living as measured by the applicable Consumer Price Index. Note that this is under the Competition in Contracting Act regarding Protests, not the Equal Access to Justice Act, which sets the rate at \$125 per hour.

In a fairly rare example of a court overriding the automatic stay provision of the Competition in Contracting Act (CICA), the Court of Federal Claims did just that in *Superior Helicopter LLC v. United States* and *Erickson Air-Crane, Inc. v. United States*, 78 Fed. Cl. 181 (2007). The Forest Service did not select the plaintiffs to receive “exclusive-use” contracts to provide and operate heavy lift helicopters for fighting forest fires. The plaintiffs protested at the GAO triggering an automatic stay of the contracts pursuant to CICA. The Forest Service announced that it intended to override the CICA stay to insure that sufficient numbers of helicopters were available for the 2007 firefighting season. Plaintiffs then sued for an injunction of the override from the Court of Federal Claims. That Court found that the administrative record did not support the rationale offered by the Forest Service in its written findings justifying the override. The Court found that the Forest Service had failed to consider an alternative of whether it could rely on its existing “call-when-need” contracts while the GAO bid protest was pending. The Court granted plaintiffs’ request to set aside the override of the CICA stay.

## **B. SITE VISITS**

In *Dellew Corp.*, Com. Gen. B-299408, May 1, 2007, the GAO ruled that the National Oceanic and Atmospheric Administration failed to reasonably accommodate the protestor’s request for a site visit. Although noting that procuring agencies have broad discretion in scheduling site visits, the GAO concluded that the agency acted unreasonably when it only gave the protestor one-day’s notice of the scheduled site visit, and refused to grant the protestor’s reasonable request for a later site visit to allow it a meaningful opportunity to compete.

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### **C. CONTRACT TYPES**

The entire use of award fee contracts is being reviewed. DOD had issued on April 24, 2007, a memorandum on the "Proper Use of Award Fee Contracts and Award Fee Provisions," which was supplemented on May 15, 2007. Part of this is in response to Congressional and media criticism of contractors doing a less than superb job but still receiving an award fee.

On December 4, 2007, OFPP issued a memorandum, "Appropriate Use of Incentive Contracts" with an attachment to be used as "a guide" by government acquisition officers on the awarding and monitoring of incentive fee contractors. One of the "guidances" expressed is to insure an incentive plan that allows a base fee of more than 0% and insures that rollover fees are allowed only in limited circumstances in accordance with agency policy.

In B-308968, November 27, 2007, the Comptroller General of the United States approved a no-cost contract to obtain conference event and trade show planning services that had been provided by National Conference Services Inc.'s (NCSI) counsel. In the model contract, NCSI offers to provide conference planning services with no financial obligation to the government; NCSI would recoup its costs by charging exhibitors, sponsors, and attendees of the conference. The Comptroller General concluded that the contract was a valid, binding no-cost contract the agencies could use to obtain conference planning services without violating the Voluntary Services prohibition of the Anti-Deficiency Act, 31 U.S.C. 1342.

### **D. SEALED BIDDING OR NEGOTIATION**

In *Weeks Marine, Inc. v. US*, 79 Fed. Cl. 22 (2007), the court dealt with an issue that rarely arises. For the first 100 years of our Nation's existence, sealed bidding (once called formal advertising) was the primary method of awarding contracts. Now negotiation is the method normally used. However, the statute and the FAR still mandate that an agency shall use sealed bidding when (1) time permits; (2) awards will be made solely based on price; (3) discussions are not necessary; and (4) the agency reasonably expects to receive more than one bid. Weeks

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protested contending that each of these four conditions was met for this procurement for dredging contracts and that no legal basis existed to use negotiation procedures. The court granted the motion and issued an injunction pointing the one disturbing feature of the agency's new procurement method was that approximately \$2 billion in task order awards during the next five years will become virtually immune from any judicial or administrative bid process review because they would be simply viewed as task orders negotiated onto an existing contract. The court concluded that the agency's attempt at justification for the new procurement approach is without a rational basis. The agency's acquisition plan fails even to address the legality of the agency's action and does not satisfy the rational basis test.

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

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

In *All-State Construction, Inc.*, ASBCA No. 50586, 07-1 BCA ¶ 33509, the Board reiterated the standard rule that a contractor can be terminated for default if it breaches its Disputes clause obligation to proceed diligently with performance pending final resolution of its claims. The Board stated "The diligent performance required by the Disputes clause is not covered by the disputed critical path and time extension claimed by All-State, but by the existing contract completion date and the work that can be reasonably performed to advance the project pending resolution of a dispute."

In *Moreland Corp. v. United States*, 76 Fed. Cl. 268 (2007), the court set aside a termination for default holding that the agency breached the commercial lease of this Las Vegas, Nevada building being used for a VA clinic by failing to allow plaintiff to make repairs and then, most surprisingly, also ruled that the termination was economically irrational given what it cost the VA to relocate. The Court also found that the VA repeatedly breached its duty of good faith and

fair dealing during its occupancy. The Court awarded plaintiff lost profits (“net rent”) for the remainder the leased term.

In a case of possible far-reaching importance, the Court of Federal Claims in *Keeter Trading Company, Inc. v. United States*, 79 Fed. Cl. 243, 261 (2007), the Court held that a cardinal change by the government excused the contractor’s non-performance. The United States Postal Service had terminated for default a carrier who had contracted to deliver mail in Arkansas. The carrier had refused to perform after the Contracting Officer unilaterally increased the number of mail boxes on the carrier’s route from 250 to 302 (20.1 percent), but only increased the contract price by \$1,087.56 (2.7 percent). The carrier argued that the change required increasing the contract price more than \$2500. The Court ruled that the government had made a cardinal change that excused the carrier’s refusal to perform.

## **B. SURETIES**

In *National American Insurance Company v. United States*, 498 F.3d 1301, 1304 (Fed. Cir. 2007), the Court affirmed the Court of Federal Claims that a payment bond surety was equitably subrogated to the rights of the contractor whose debt it discharged. This is the most recent pronouncement of the Court of Appeals for the Federal Circuit on this issue and it contains a good discussion of the Supreme Court and other decisions on the equitable subrogation rights of sureties.

In *Nelson Construction Company and Donald Nelson v. United States*, 79 Fed. Cl. 81, 93 (2007), the Court of Federal Claims ruled that it lacked jurisdiction to hear the claims of an indemnitor of a bond surety based on equitable segregation theories. Nelson Construction was a subcontractor to Lemhi Environmental Diversified, it was subpoenaed for a Federal Highway Administration contract. Nelson agreed to indemnify Travelers Casualty and Insurance Company of America for providing payment and performance bonds for the contract. Lemhi assigned all payments due under the contract to Travelers as escrow holder for Nelson, but the government

allegedly made the final payment to Lemhi. Nelson sued the government contending that under the indemnity and the assignment it could assert Travelers' equitable subrogation rights against the government and also claim standing as a third-party beneficiary of the assignment. The court disagreed and held that Nelson did not have standing to sue the government for wrongful payment to Lemhi.

### **C. AUTHORITY TO ORDER CHANGES**

In *Donald C. Winter, Secretary of the Navy v. Cath-Dr/balti Joint Venture*, 497 F.3d 1339, 1344 (Fed. Cir. 2007), the Court reversed in part the ASBCA which had found that a Resident Office in Charge of Contracts (ROICC) had the authority to commit the government to contract changes. This is another case in the never ending battle of whether the government is liable when a contractor does work at the direction of a government official. The case was remanded to determine whether a ratification by a proper Contracting Officer had occurred.

### **D. BREACH**

In *Northstar Alaska Housing Corporation v. United States*, 76 Fed. Cl. 158, 193 (2007), the Court found that "The record provides a virtual rancid cornucopia of electronic messages and other communications evidencing the specific intent by key government officials to injure Northstar." This case is a good example of breaching the covenant of good faith and fair dealing and being careful about what you say.

### **E. CONTRACT INTERPRETATION**

Counsel should review the *Travelers Casualty & Surety Company of America v. United States* case, 75 Fed. Cl. 696 (2007). While it involves a differing site condition, what is more important that this is a very scholarly 34-page opinion which deals extensively with the principles of contract interpretation and what the judge referred to as the "*Williston v. Corbin* feud."

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## **F. DUTY TO PRESERVE EVIDENCE**

In *AAB Joint Venture v. United States*, 77 Fed. Cl. 257 (2007), the Court rejected the government argument that the cost to restore backup tapes of emails negated the government's duty ( \$85,000 -- \$155,000). The Court ordered the government to restore, at its own expense, a portion of the backup tapes for the time period beginning with the date at which the first REA was filed. The Court ruled that the REA initiated the government's duty to preserve evidence.

See also, *United Medical Supply Co., Inc. v. United States*, June 27, 2007 at the Court of Federal Claims on spoliation of evidence.

## **G. DIFFERING SITE CONDITION/CHANGE**

In *Beyley Construction Group Corp. v. VA*, CBCA No. 5,763, 07-2 BCA ¶ 33693, the appellant experienced difficulty in excavating an area (a mogote) and claimed a differing condition. While the government denied the claim, it issued a change order deleting the excavation work from the contract and reducing the contract amount. Appellant claimed for the increased costs because it had to import fill material rather than use fill from the area that was originally to be excavated. The Board granted the appeal, stating that although there was probably a differing site condition, it did not decide on that basis, but rather that the change was a constructive change depriving the Appellant of the source of fill it planned to use on the project.

## **H. OSHA CITATIONS**

On April 27, 2007, in *Secretary of Labor v. Summit Contractors, Inc.*, OSHRC No. 03-1622, the Occupational Safety & Health Review Commission (OSHRC) struck down OSHA's authority to issue citations to general contractors based on violations committed by subcontractors in construction work settings. The Secretary of Labor has appealed the matter to the 8<sup>th</sup> Circuit Court of Appeals. The decision is limited to construction work defined in 29 CFR, § 1910.12 (b) as "Work for construction, alteration, and/or repair, including painting and decorating." (Summarized from Querrey Harrow Construction Law Quarterly, Issue 37, Summer 2001, page 1.

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## **I. SOVEREIGN ACTS**

*Conner Bros. Constr. Co., Inc.*, ASBCA No. 54109, October 11, 2007, shows an issue that become more problematic as the war on terror continues. In that case, the Corps of Engineers contractor was denied access to the worksite for forty-one days following the terrorist attack on September 11, 2001. The site at Fort Benning, Georgia, was being used by the Rangers as they prepared for operations in Afghanistan.

The Board denied the appeal, agreeing with the Corps, that the denial of access was a sovereign act. A good discussion of the sovereign act issue.

## **J. CLAIMS UNDER THE CONTRACT DISPUTES ACT**

In *Cubic Defense Applications, Inc.*, ASBCA No. 56097, October 2, 2007, Cubic submitted a certified claim on April 23, 2007, after failing to reach agreement on its REA. The certified claim was essentially the same as the REA. On June 14, 2007, the Contracting Officer acknowledged it had received the claim and said that the government “intends to respond approximately December 14, 2007.” On July 3, 2007, Cubic filed the appeal on the basis that the Contracting Officer had failed to issue a decision. The government moved to dismiss the appeal as premature but this was denied asserting that the Contracting Officer’s response had not provided a fixed or specific date for the decision, in fact, did not even state it would be issuing a decision. It is unclear, however, why the judge allowed the appeal since the July 3 appeal was prior to the 90 days the Contracting Officer would have had under the statute. Apparently, the Contracting Officer June 14 letter clearly indicated that it did not plan to make a decision within the statutory time frame.

In *Rex Systems, Inc.*, ASBCA No. 54436, November 6, 2007, the contractor had claimed for a breach of an implied in fact contract restricting the use of its drawings. The appellant claimed unjust enrichment and reasonable damage and “that at a minimum such reasonable damages are license fees for such unauthorized use of its trade secret information is 15 percent of the value of all transactions entered into, performed by or made possible by the government, unauthorized use

of RSI's trade secret information . . ." After the hearing, the government argued for the first time in its post-hearing brief that the appeal should be dismissed for lack of jurisdiction as the claim damages were not stated in a sum certain which is a requirement. The Board agreed and dismissed the claim noting "There is a complete absence in the claim of any quantification of the "unjust enrichment" to which RSI claims it is entitled, and the phrase "at a minimum," modifying the claimed 15 percent license fee is indistinguishable from the modifying phrases "no less than," "not less than," and "in excess of," which have been previously found to disqualify a stated amount as a sum certain." The obvious problem with this case is that without extensive Freedom of Information Act previous inquiries (which I doubt would be successful because the government probably would not release such information), there is no way that the contractor could specifically identify a sum certain for its damages since they would be dependent upon how much the government had used the drawings.

#### **K. PROMPT PAYMENT ACT**

In *Laurelwood Homes LLC v. United States*, 78 Fed. Cl. 290 (2007), the court ruled on the issue of Prompt Payment Act interest and pointed out that Prompt Payment Act interest accrues only when government payments are "inadvertently late, and not when the government refuses to pay or questions its underlying liability."

#### **L. SEVERIN DOCTRINE**

In *Acquest Government Holdings, OPP, LLC v. General Services Administration*, CBCA No. 413, November 7, 2007, the Board again dealt with the Severin Doctrine. The government argued that the claim submitted by the general contractor on behalf of a sub was barred by the Severin Doctrine as the prime had been released from liability to the sub. The Board rejected the government's motion for summary judgment that "Acquest was not totally absolved in liability, and the Severin Doctrine does not bar Acquest from sponsoring [the subs'] claims submitted prior to

the September 5, 2003 agreement. The government has not met its burden of establishing an ironclad release of those claims, . . ." (emphasis added).

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