METCALF: A GAME-CHANGER FOR GOVERNMENT CONTRACTORS AND DESIGN-BUILD CONTRACTORS

Part II: Who Bears the Risk of Differing Site Conditions in a Design-Build Context?

INTRODUCTION

The U.S. Court of Appeals for the Federal Circuit (CAFC) recently reversed an opinion by the U.S. Court of Federal Claims (CFC) that is already being called the most important federal construction opinion of the last decade. In *Metcalf Constr. Co. v. United States*, 742 F.3d 984 *(Fed.Cir. 2014)*, the CAFC clarified two important issues that will strengthen contractors' positions in disputes with government contracting personnel. Part I of this 2-part series discussed the Government's revived duty of good faith and fair dealing. This Part II will discuss the case's clarification on who bears the risk of differing site conditions in a design-build context.

THE *SPEARIN* DOCTRINE

It is well-settled that in a traditional owner/designer/contractor approach to construction, a project owner has an implied warranty that their plans and specifications will be adequate. This is commonly known as the *Spearin* doctrine. See *U.S. v. Spearin*, 248 U.S.132 (1918). In essence, *Spearin* doctrine holds that when the Government provides specifications directing how a contract is to be performed, the Government impliedly warrants that the contractor will be able to perform the contract satisfactorily if it follows the specifications. If the plans and specifications are for some reason inaccurate and the contractor builds according to the specifications, and the resulting construction is defective, the Government bears responsibility. The Government typically cannot avoid this responsibility by inserting a general disclaimer into the contact. See *Hollerbach v. United States*, 233 U.S. 165 (1914).

SPEARIN IN A DESIGN-BUILD CONTEXT

Prior to *Metcalf*, some uncertainty surrounded the applicability of the *Spearin* doctrine when a contractor assumes both design and construction responsibilities on a contract. The CAFC in *Metcalf* helped to clarify the issue as applied to Differing Site Conditions. In *Metcalf*, the Government provided a soil report in its bid package with a disclaimer that it was "for preliminary information only." The design-build contract also required the contractor (Metcalf) to perform its own independent investigation of the soil conditions on site. Metcalf's subsequent investigation revealed that the soil conditions on site were materially different from those listed in the government's soil report.

Upon its finding, Metcalf timely reported the Differing Site Conditions to the government pursuant to FAR 52.236-2, along with a recommendation that a redesign was needed to accommodate actual soil conditions. The Government

rejected the recommendations amid Metcalf's repeated protests, and insisted that Metcalf proceed according to the contract. After more than a year of failed negotiations, Metcalf ultimately decided that the risk of following the original plans was too great and moved forward with construction based on Metcalf's modified plans. When construction was complete, Metcalf submitted a claim for $25 million in additional costs related to the redesign. The CO rejected this claim, and Metcalf appealed to the U.S. Court of Federal Claims (CFC).

The CFC ruled in favor of the Government, causing a lot of confusion and concern on the issue. The CFC held that because Metcalf was on notice that it would need to perform its own investigation of the site conditions, it was also on notice that it could not rely on the Government's "information only" report. This ruling effectively allowed the Government to shift the risk of differing site conditions onto the design-builder, Metcalf, by inserting a disclaimer into the contract.

Metcalf then appealed to the CAFC, which overruled the lower court's decision. The CAFC held that the Government's disclaimer language in its soil report, that it was for "preliminary information only," merely signaled that the information might change, and did not shift the risk to Metcalf if the preliminary soil report turned out to be inaccurate. The CAFC further explained that a contractor's duty to inspect site conditions "does not negate the changed conditions clause," making contractors responsible only to discover changed soil conditions within the limits of an inspection that is appropriate to the time available.

For contractors, and especially for design-builders, this language is important. It means that the Government cannot insert broad disclaimers into bid documents in order to shift the risk of unforeseen site conditions or incorrect Government-provided information onto the contractor. The *Spearin* doctrine forbids these types of disclaimers in traditional construction situations where the Government provides the contractor with the design. The *Metcalf* decision clarified that the *Spearin* doctrine applies to design-build contracts as well. Therefore, the Government cannot disclaim its way out of its implied warranties under *Spearin*, and therefore cannot shift to the design-builder the risk of unforeseen site conditions or incorrect Government-furnished information, including plans, reports, or specifications, from which the design-builder will prepare its design documents.

The *Metcalf* decision relieves a design-build contractor from going through the analysis of whether the specifications are design specs, performance specs, or mixed specs. However, the contractor must still show good faith. Just as the Government is bound by the duty of good faith and fair dealing, the design-build contractor has a duty to exercise due diligence in the design process. The Government will undoubtedly argue that the *Metcalf* decision applies only to differing site conditions and not to other issues. The litmus test, as discussed in Part I, is whether the alleged breach involves a violation of the bargain struck in the contract.

CONCLUSION

Understanding the implications of *Metcalf* is key to a design-builder, especially when issues relating to differing site conditions arise. With the assurance that the *Spearin* doctrine applies to design-build, contractors will not need to incur additional costs for insuring against the risk of differing site conditions. Additionally, contractors will be able to better assess contract clauses and disclaiming language regarding site conditions. Excell can help you navigate these issues in any stage of your contracting process. Give Excell a call!

In the end, you will be glad you made the call; by the way, it's a FREE CALL.

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