Goldberg & Connolly

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CONSTRUCTION LAW E-UPDATE

OWNER MISDEEDS - The Usual Suspects

MARCH 2010

Recently, in reviewing federal regulations incidental to differing site condition (DSC) and quantity overrun claims under the federal "Standardized Changed Condition Clause" with regard to a federally funded NYC DOT bridge project, I came across an interesting acknowledgement by the federal government of the typical "misdeeds" of state and city construction agencies.

It was truly remarkable, if not perversely amusing, to see "The List." Interestingly, The List came with a warning:

There are certain situations that grantees (state and/or city DOT's receiving federal funding) must seek to avoid because they may result in the grantee being liable to its contractor, but unable to recover from Federal Transit Association (FTA).

Thus, the feds are telling the state and city grantees that if and when they drop the ball, they should not necessarily rely upon the federal government to bail them out.

The federal government's instructions to avoid The List of all too familiar-sounding "owner misdeeds" are as follows:

1. obtain clear access to all needed right-of-way prior to award of the construction contract;
2. execute all required utility agreements in time to assume uninterrupted construction progress;
3. undertake comprehensive project planning and scheduling to achieve proper coordination among contractors;
4. inform potential contractors of all available geo-technical information on subsurface conditions;
5. assure that all grantee-furnished materials are compatible with contractor project facilities and/or equipment, and available when needed;
6. complete all pre-construction survey and engineering prior to issuing the contractor a Notice to Proceed;
7. obtain the necessary approvals and agreements from all other public authorities affected by the project prior to contract award; and
8. assure that all design and shop drawings are promptly approved and made available to the contractor as needed.

This list reminds me of the often quoted line from the classic movie Casablanca... "The first thing we do is round up the 'usual suspects'." The foregoing list is a sickeningly accurate summary of that to which we in the industry have, for far too long, been witness.

The context in which I came across The List was also telling, namely, the federal "Best Practices Procurement Manual". The avoidance of these classic pitfalls would certainly be a "best practice." But if the classic pitfalls are just that, classic, why can't more be done to eliminate their ubiquitous repetition?

Finally, for those of us dedicated to obtaining fair relief for contractors victimized by such "owner misdeeds," the following additional caveat to state and city grantees by the Federal Transit Administration (FTA) is noteworthy. It

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reflects that the feds desire to be fair – often a concept lost on state, and particularly city, procuring agencies. The feds further advised local grantee agencies that:

If grantees encounter any of these situations, and they believe the (Contractor's) claim to be legitimate, they should be prepared to support a challenge by FTA. If the grantees' claim records substantiate that reasonable and prudent measures were taken (by the local agency) to prevent or offset the causes underlying the claim, FTA may participate in the negotiated cost.

Thus, clearly, if despite reasonable and prudent measures to prevent a local-owner-caused problem it still occurs, and a meritorious contractor's claim is validly submitted as a result, the feds still might financially "participate in the negotiated cost" to settle the claim. What could be more reasonable than giving the poorly performing local government agencies a second chance at federal reimbursement for their own misdeeds?

It looks, therefore, as if the typical, self-protective, "it's-all-the-contractor's-fault" reflex is not the healthiest or most advisable course of action for wayward state and city contracting agencies and their personnel. Rather, they should roll up their sleeves and work with the affected contractor to "reasonably and prudently" take measures to prevent or mitigate further impact. This does not mean shifting blame, failing to timely respond to critical RFI's, or failing to timely address proposed change orders caused by List-type misdeeds.

This was a gratifying experience. Much to my amazement, there it was, in black and white. The List. The feds get it! Now we need the state, and especially the City, contacting agencies and their personnel to "get-it" as well. Fairness in contracting, while counter-intuitive to the "bureaucrat", is the hallmark of the government-based contracting professional and truly is a "best practice."

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