



The Alaska

Winter 2016

Contractor

Publication of the Associated General Contractors of Alaska

www.agcak.org



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HOWARD W. ROTH
*Oles Morrison
Rinker & Baker*

Federal contracts: Tips for successful sponsorship of subcontractor claims

The federal government spends billions of dollars on prime contracts each year. A large percentage of those dollars is paid to subcontractors. Therefore, disputes between prime contractors and their subcontractors on federal contracts are relatively common. One frequent area of dispute is subcontractor claims, such as for differing site conditions.

In the federal contract context, these claims are often “passed through” the prime contractor to the federal government. Thus, two important issues for both prime contractors and subcontractors to understand are “sponsored claims” (or “sponsorship”) and the related certification requirement. If both levels of contractors understand the rules for sponsorship and certification, then they can all protect themselves as they resolve disputes on a federal contract.

For prime contractors, being able to submit a sponsored claim to the government is certainly preferable to litigation between the prime contractor and subcontractor. Prime contractors must understand their duty to sponsor a claim in good faith and that they must believe there are good grounds for the sponsored (and certified) claim. If a prime contractor sponsors and certifies an improper claim, it risks liability for a fraudulent claim under the Contract Disputes Act (CDA) and/or possible Civil False Claims Act (CFCA) liability.

Sponsored CDA claims

Often, prime contractors will “flow down” federal requirements from the prime contract to the subcon-

tract concerning disputes and claims. Because there is no privity of contract between the subcontractor and the government, the subcontractor must then submit its claim to the prime contractor for sponsorship to the government.

Even when the terms of the subcontract do not require the subcontractor to submit a sponsored claim to the government, a subcontractor may not want to litigate with the prime contractor for a variety of reasons, such as prime was not at fault or the prime does not have resources to pay the claim. Therefore the subcontractor submits a claim to the prime contractor and requests that it be “passed through” or “sponsored” by the prime contractor to the government.

Generally, a prime contractor will be aligned with its subcontractor for purposes of sponsoring a claim submitted to the government. However, prime contractors should not simply “rubber stamp” their subcontractor claims without first conducting due diligence into the validity of the subcontractor claim. Conversely in some instances the prime contractor may refuse to sponsor a subcontractor’s claim because it has no belief in the claim or because the prime contractor does not want to jeopardize its relationship with the government. If the prime contractor does not sponsor the claim, then it will end up in litigation with the subcontractor.

The prime contractor sponsors the subcontractor’s claim by submitting the claim to the contracting officer for a decision. The prime contractor then brings an appeal, to the appli-

cable agency board of contract appeals or U.S. Court of Federal Claims, of any adverse CO’s decision on the subcontractor’s behalf or by permitting the subcontractor to bring an appeal in the contractor’s name. The Federal Acquisition Regulation (FAR) 44.203(c) permits such “indirect” subcontractor appeals. As long as the claim is made in good faith, the claim may be sponsored even when the prime contractor has not paid the claim or even admitted liability. Naturally, the prime contractor must not have already waived its right against the government through a release in a modification or final payment.

In most instances, once the parties agree the government is responsible for the subcontractor’s increased costs, then the prime contractor enters into an agreement with the subcontractor that states whatever the government pays on the claim will be in full satisfaction of the claim.

Certification

Under the FAR and CDA, a prime contractor must certify a subcontractor’s claim where the value of the claim is above \$100,000. Certification requires the prime contractor to certify that: (1) the claim is made in good faith, (2) the supporting data are accurate and complete to the best of the contractor’s knowledge and belief, (3) the amount requested accurately reflects the amount for which the contractor believes the government is liable and (4) the signer is duly authorized to certify the claim. In order to protect itself, the prime contractor should require the same certification

from the subcontractor as a part of its due diligence to confirm the claim is made in good faith.

Certification creates serious issues for the prime contractor because it may have no knowledge of the facts or may have problems with the subcontractor's claim for legal reasons based on the facts it does know. In these circumstances, the prime contractor puts itself at risk of liability for a fraudulent CDA and/or CFCA false claim if it certifies the claim. In order to protect themselves, prime contractors must follow the standard set forth in *United States v. Turner Construction Co.*, 827 F.2d 1554, 1561 (Fed. Cir. 1987), where the court stated "the certification requirement requires not that the prime contractor believe the subcontractor's claim to be certain, but that the prime contractor believe that there is good ground for the claim."

This standard for the prime contractor acknowledges the prime contractor's inability to be as aware of the facts and numbers as its subcontractor. In order to meet the "good ground for the claim" standard, a prime

contractor should conduct a thorough due diligence of all potential subcontractor claims before sponsoring. Also the prime should use a subcontract indemnification clause that shields the prime from civil fraud liability arising from sponsored claims.

Conclusion

In prime subcontractor disputes, sponsorship and related certifications are two important issues for contrac-

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tors to understand. Naturally, there are a number of other considerations and legal requirements, but if contractors understand the basic rules for sponsorship and certification, then they can each protect themselves as they navigate other requirements and resolve disputes on a federal contract. 

This column provides information about the law designed to help users safely cope with their own legal needs. But legal information is not the same as legal advice — the application of law to an individual's specific circumstances. Although we go to great lengths to make sure our information is accurate and useful, we recommend you consult a lawyer if you want professional assurance that our information, and your interpretation of it, is appropriate to your particular situation.

Howard W. Roth is of counsel at Oles Morrison Rinker and Baker, LLP. His experience includes service as Commissioner of the Armed Services Board of Contract Appeals and contract law advisor to a major military command.

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