



Teton Update

TETON CONSTRUCTION CONSULTANTS

CONTRACT ADMINISTRATION

• CLAIMS PREVENTION

• DISPUTE RESOLUTION

Fall/Winter 2008

Stephen C. Forgét

CAN YOU RELY UPON WRITTEN DIRECTION?

A recent federal court decision reflects a troubling trend in federal contracting. The United States Court of Appeals for the Federal Circuit (CAFC) in the matter of Cath-DR/Balti Joint Venture (Cath) found that a construction contractor could not rely upon the written direction of the Resident Officer in Charge of Construction (ROICC) when seeking recovery for certain directed extra work.

This precedent-setting court decision questions a trend reflected in Board of Contract Appeal decisions whereby contractors could rely upon the direction of contracting officer's representatives (ROICC, PM, ARCO, RE, etc), even if those representations result in a change. The court's finding is especially troubling as the ROICC is typically the only Government representative of authority with whom the contractor interfaces.

The contract involved a fixed-priced Navy construction project which included several clauses that clearly restricted change order authority to the Contracting Officer. During performance, the contractor submitted a number of Requests For Information (RFI) and received in reply from the ROICC unambiguous written clarifications, interpretations and direction, some of which constituted additional work. There was no mention of Contracting Officer knowledge or involvement in the RFI responses.

During the course of the project the Navy had given the contractor every indication that the ROICC had express - or at least implied - authority to direct changes. An example of this implied authority was a slide presented at the preconstruction conference which advised that "No work is to be performed beyond the contract requirements without written notification from the ROICC". It further advised that the ROICC was "authorized to provide technical and administrative direction to resolve problems encountered during construction".

Cath dutifully followed the ROICC's written directives and then submitted a cumulative change request at the end of the project. The Navy failed to reply to the request. Cath submitted a certified claim. The Contracting Officer issued a detailed final decision finding merit to 12 of the issues and suggesting that Cath resolve quantum with the ROICC. The Navy then refused to meet to settle the costs.

Cath then appealed to the Armed Services Board of Contract Appeals. The Contracting Officer then issued a second final decision denying merit to any of the 12 claims because the Contracting Officer did not direct the changed work. The Board then ruled that the ROICC-directed changes were compensable. This finding was predicated upon the ROICC's delegation of authority from the Contracting Officer, which stated that he was responsible for construction management and contract administration and was "authorized to provide technical and administrative direction to resolve problems encountered during construction". The Board found that the ROICC has "express actual authority to make any changes that were necessary to resolve problems at the site".

(continued)

This finding is consistent with everyday understandings of how the Navy and other Federal agencies administer contracts. The Contracting Officer is rarely involved in the project and defers to the ROICC/PM/ARCO to administer the project and solve problems on a daily basis. The Board decision was consistent with the status quo in Federal contracting.

But this is not the end of the story. The Navy appealed this Board decision to the Federal Circuit which then reversed the Board and found that the ROICC did not have authority to make contract changes that affect price or other contract terms. The Court cited multiple clauses in the contract that vested change order authority in the Contracting Officer only, and despite the Navy's contrary actions and assertions during performance, only the Contracting Officer had authority to direct change orders. Recently, the Federal Circuit, in *S&M Management* (June 2008) cited the principles in *Cath* related to delegation of authority to deny contractor recovery for PM-directed change work.

These decisions present some real-world problems when contracting with the Federal government. There are valuable lessons to be learned from these precedent-setting cases. The following lessons can be easily incorporated into the administration of any contract:

1. *Review your contract for change order authority limitations.* This is what sunk *Cath*. Also, review all authority letters which are typically provided by the Government at the beginning of any project. Identify who has change-order authority and to what limits. These letters are often ambiguous, therefore be assertive in clarifying such authority letters in writing with the contracting officer. If you fail to involve the Contracting Officer, you could be at risk. Even Government agents may not be fully aware of the limitations on their authority.

2. *Authority is in the eye of the beholder.* If the Contracting Officer's representative does not have absolutely clear authority from the Contracting Officer to direct changes, then the Contracting Officer must be included on all correspondence related to direction from the representative. Often a change may not be immediately recognized; therefore, it is simply good practice to copy the CO on all correspondence concerning any direction from the Government representative.

3. *Submit change requests contemporaneously rather than at the end of the project.* This offers the parties a chance to flush out misunderstandings and implement corrective actions. This was an opportunity that *Cath's* post-completion submission did not offer.

All was not lost for *Cath* as the Court found that it had a possibility for partial recovery for the directed work under the theory of "ratification" -- another step on a long and torturous path. Contractors will be well served by applying the lessons to be learned from *Cath* as you cannot always rely upon the written direction of Government representatives. Teton is available to help scope issues like this early in the contract. 🍷

Mr. Forget founded Teton Construction Consultants, which for 25 years has specialized in assisting experienced Federal contractors with the prevention and resolution of disputes on Federal construction projects, while maintaining contractor-owner relationships.

A copy of the *Cath* case and this update may be found at www.tetoncc.com.