

LAW REVIEW CONTINUED



THE HIDDEN RISKS OF FEDERAL CONSTRUCTION CONTRACTS

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The largest purchaser of construction services in the U.S. is the federal government, but contracting with the government is inherently different from contracting with a private party. Federal statutes and regulations control not only the actions of the prime contractor, but

its subcontractors as well. Payment issues and associated ethics requirements are two significant differences.

Most contractors on government construction projects are paid based on the amount of work completed as reflected in a schedule of values. Similar to commercial contracts, the Federal Acquisition Regulation (“FAR”) provides for monthly progress payments. However, unlike commercial projects, the FAR requires a contractor to certify three things in exchange for payment: (1) amount requested is for work performed per the contract; (2) all previous payments due to subcontractors/suppliers have been made; and (3)

all amounts intended to be withheld from subcontractors/supplier have been excluded. These certifications should be taken seriously by contractors as an inaccurate certification could serve as the basis of a False Claims Act violation.

The contractor’s obligation to accurately invoice for work performed does not end upon receipt of payment. If the contractor discovers that it has invoiced improperly, it must notify the government and will be liable for interest on any unearned funds not returned after eight days from payment.

The core principle underlying payment on federal construction projects is that the contractor performing the work should be timely paid for its efforts. The government requires not only that the contractor pay its subcontractors, but that the contractor ensures that the sub-subcontractors (and on down the line) are all paid. Contractors must pay subcontractors within seven days of payment from the government; failing to do so obligates the contractor to pay interest to the subcontractor on late/unpaid funds.

All communications with the government, particularly payment claims, require that the contractor be truthful and accurate. An untruthful payment request may violate the False Claims Act, violations of which can range from fines of \$5,000 to \$11,000 and/or imprisonment for up to 5 years.

Government contracting requires not just the proper performance of the work, but honesty and transparency when invoicing for payment and after accepting payment. ■