Silence Is Not So Golden

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Arnie Mason recently contributed an article, titled "Silence Is Not So Golden" to Law360?s Expert Analysis section. The article is available to subscribers here and re-printed below:

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As illustrated in the recent decision issued by the Federal Circuit Court of Appeals in *Bell/Heery, a Joint Venture v. United States*, No. 2013-5002 (Fed. Cir. Jan. 7, 2014), a contractor must carefully articulate how the Government has breached a contract and be persistent in imploring the Government to cure its breach or otherwise formally respond. Otherwise, a contractor?s silence may result in it assuming a financial risk it did not anticipate.

Background of *Bell/Heery*

The facts of *Bell/Heery* concerned the Federal Bureau of Prisons (?FBOP?) award of a $238,175,000 design-build contract to Bell/Heery, a Joint Venture (?BH?), in May 2007 to build a federal correctional institution in New Hampshire. The contract required completion by June 10, 2010 at the risk of $8,000 a day in liquidated damages for each day of delay.

The key issues in *Bell/Heery* surrounded the work required by the Request for Proposal (?RFP?) for a ?cut to fill? site, such that the contractor had to level the ground by excavating materials from one area of the site to fill lower areas of the site. These cut-to-fill operations had to be performed in compliance with the requirements of the New Hampshire Department of Environmental Sciences (?NHDES?). BH assumed a single-step, cut-to-fill operation in which it would transport cut materials directly to the final fill location without interruption. Instead, NHDES limited BH to disturbing no more than 40 acres of land at any one time. Rather than approve one plan for the entire Project, NHDES required a phased plan of operation, and ultimately imposed ten additional limits on BH?s plan.

By written correspondence and during progress meetings, BH repeatedly notified FBOP of the impact

on its operation, including potential delay, from not being able to perform the single-step operation that formed the basis of BH?s bid and which BH alleged was standard in the industry. According to BH?s allegations, FBOP representatives did advise that BH ?would be treated fairly ? .? Importantly, however, the Court cautioned that BH did not ?refuse to proceed with construction under the restrictions imposed by the NHDES, nor did BH press the Government to directly intervene with the NHDES on BH's behalf.?

Ultimately, BH submitted a Request for Equitable Adjustment (?REA?) seeking $7,724,885 for the impact on its cut-to-fill operation. After FBOP?s Contracting Officer (?CO?) denied the REA, BH filed a lawsuit in the Court of Federal Claims based upon theories of breach of contract, breach of the implied duty of good faith and fair dealing, constructive change and cardinal change. Upon motion by the Government, the Court of Federal Claims dismissed BH?s lawsuit for failure to state a claim upon which relief could be granted. On appeal, the Federal Circuit Court of Appeals upheld the trial court?s ruling.

Summary of Court?s Holdings in *Bell/Heery*

Breach of Contract ? Permits and Responsibilities

The contract incorporated the FAR?s Permits and Responsibilities clause, which, the Government argued, controlled who was responsible under the contract for the costs of obtaining the necessary approval for the cut-to-fill work. The Permits and Responsibilities clause provides in relevant part that the ?Contractor shall, ***without additional expense to the Government***, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work.?[i] While acknowledging that the Permits and Responsibilities clause ?can be constrained by other contractual provisions that specifically limit the scope of the contractor's obligations for permitting requirements ?,? ultimately the Court concluded that no such limitation existed in the FBOP-BH contract.

In this regard, the contract contained three provisions of note:

1. ? The ***Contractor shall perform the following in conjunction with the FBOP*** Project Management Team:

a. ***In preparing for the design for the project, consult with appropriate officials*** of the State or a political subdivision of a State, or both, in which the project is located and who would have jurisdiction over the project if it were not a project constructed or altered by a federal agency.?

2. ***?[i]n preparing construction documents, the Contractor is to consult with appropriate officials*** of the State or a political subdivision of a State, or both, in which the project will be located, who would have jurisdiction if it were not constructed by a federal agency.?

3. ?[i]n no case are the comments or recommendations of these officials to be implemented into the developmental documents without the approval of the FBOP.?

(citing RFP § C.4(d)(1), 4(e) and Technical Design Guideline 01415(D) (emphasis added))

Based upon the foregoing provisions, Judge Mayer concluded in his dissenting opinion that, accepting well-pleaded factual allegations as true and making all reasonable inferences in BH?s favor, the contract could be read as requiring FBOP ?to confer with local permitting authorities and to approve or not any recommendations made by them.? The Court disagreed, however, finding that BH had failed to plead a breach of any contractual obligation by FBOP.

In reaching its conclusion, the Court made two primary points. First, the Court rejected BH?s argument that the requirement for approval of FBOP as a condition to implementation of comments or recommendations made by NHDES somehow created any FBOP duty with respect to BH?s obligations under the Permits and Responsibilities clause. Second, the Court concluded that any duty of FBOP to consult ?with the appropriate officials? applied only during the design phase, not during the preparation of construction documents. Because BH did not make any allegations that FBOP refused to consult with NHDES *during the design phase*, but instead alleged that FBOP failed to consult during the ?construction phase of the project?, the Court concluded that no breach of contract was alleged. The Court reached this conclusion notwithstanding the dissent?s view that the alleged failure of FBOP to consult occurred when BH revised its phasing plan, including detailed drawings for its excavation and clearing plan?i.e., as part of the design process, not construction.

Breach of Contract ? Changes Clause

The Court also rejected BH?s argument that the Government breached the FAR?s Changes clause, also incorporated into the contract.[ii] Central to the Court?s holding was the absence of any allegation that the CO ever ordered specific, additional work. Instead, BH only alleged that the Government?s silence ratified the alleged changes to the work. In rejecting this argument, the Court noted that ??[s]ilence in and of itself is not sufficient to establish a demonstrated acceptance? of a contractual change by the Contracting Officer.? (quoting *Harbert/Lummus Agrifuels Projects v. United States,* 142 F.3d 1429, 1434 (Fed. Cir. 1998))

Constructive/Cardinal Change and Duty of Good Faith and Fair Dealing

The Court also dismissed BH?s remaining counts for constructive/cardinal change and breach of the implied duty of good faith and fair dealing. The Court rejected the constructive change and cardinal change claims because it was the actions of NHDES, not FBOP, that resulted in modified cut-to-fill operations. In addition, while acknowledging the well-established rule that ?Implied in every contract is a duty of good faith and fair dealing ?,? the court rejected BH?s claim of a breach of this duty because the ?implied covenant, however, cannot ?create duties inconsistent with the contract's provisions.?? (quoting *Precision Pine & Timber, Inc. v. United States,* 596 F.3d 817, 831 (Fed. Cir. 2010))

Lessons Learned

There are several lessons that can be learned from the decision in *Bell/Heery* for both practitioners and

contractors:

1. The court?s decision in *Bell/Heery* examined the specific breach of contract allegations with tremendous scrutiny, ultimately dismissing the claim because, in the court?s view, the breach alleged concerned the construction phase of the project rather than the design phase. While the dissent was highly critical of the Court?s scrutiny at the pleadings stage, practitioners must be careful to ensure that the specific breach alleged matches up with the contractual obligations of the party alleged to have breached the contract.

2. A contractor?s obligations under the Permits and Responsibilities clause may be limited by other contract provisions, but there remains the risk that a court will read the obligations of the Permits and Responsibilities clause broadly as did the Court in *Bell/Heery*.

3. While the implied duty of good faith and fair dealing applies to every government contract, it cannot create obligations that are contrary to the express terms of the contract. Thus, a theory of recovery based upon the implied duty of good faith and fair dealing must be asserted in light of, and consistent with, the contractual obligations of the parties.

4. Silence is not always golden. A pre-bid question regarding the interaction between the Permits and Responsibilities clause and FBOP?s apparent approval authority may have established better parameters for the extent to which actions by NHDES would be permitted without ?additional expense to the Government.?

5. Similarly, as good as it is to be vigilant in notifying the Government of delays and the impact of delays, it may not be enough. Had BH asked the Government if it had to comply with the permitting requirements imposed by NHDES post-bid (while noting the additional costs), the Government may have overruled the requirements imposed by NHDES or agreed to issue a change order. By allowing the Government to stay silent and not forcing a response, the contractor took the financial risk.

6. Contractors should act to obtain direction from the Government, in writing, to maximize protection of the contractor?s rights and to obtain clarity as to the Government?s official position. This written direction should be insisted upon before proceeding with the work in question, especially when the financial impact is so great, as evidenced by the amount of BH?s claim and its significant exposure to liquidated damages.

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[i] 48 C.F.R. § 52.236-7 (emphasis added).

[ii] *See* 48 C.F.R. § 52.243-4(a).

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