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THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009: WHAT IT MEANS FOR YOU

Contributed by Michael H. Payne and Craig A. Schroeder

On February 17, the President signed the American Recovery and Reinvestment Act of 2009 (also known as "ARRA," the "Recovery Act," and the "Stimulus Act"), including a number of provisions to be implemented in federal government contracts. The Recovery Act's purposes are to stimulate the economy and to create and retain jobs. But along with additional funding come additional rules.

Five interim Federal Acquisition Regulation (FAR) rules went into effect March 31 that implement several requirements of the Recovery Act. These new rules only apply to federal procurement contracts funded with stimulus money. The new rules include:

1. Reporting requirements *(See 74 Fed Reg 14639)*

This is the most onerous of the new requirements and contractors must now file quarterly reports documenting their use of stimulus funds. The new mandated contract clause, FAR 52.204-11, which must be included in all contracts receiving stimulus funds, requires the prime contractor, and first tier subcontractors, to report the following:

(i) Contract and order number;
(ii) Amount of stimulus funds invoiced by the contractor for the reporting period;
(iii) List of significant supplies delivered or services performed;
(iv) Assessment of the contractor's progress on the contract;
(v) Employment impact of the contract (e.g., an estimate of the number of jobs created and retained);
(vi) In some instances, the names and compensation of the contractor's five most highly compensated officers for the calendar year in which the contract is awarded; and
(vii) Detailed information on first-tier subcontracts.

Reporting on invoices submitted prior to June 30 are due no later than July 10. After those dates, contractor reports must be submitted no later than the 10th day after the end of each calendar quarter. The new reporting requirements apply to all solicitations and contracts funded in whole or in part with Recovery Act funds, except classi-

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EQUITABLE EXCEPTIONS TO 'NO DAMAGES FOR DELAY' CLAUSES ARE VERY NARROW

Delay Damages
Mafco Electrical Contractors, Inc. v. Turner Construction Co.
U.S. District Court for the District of Connecticut
2009 U.S. Dist. Lexis 24499 (March 26, 2009)

To persuade a court to set aside a valid no-damages-for-delay clause, you must recite specific facts that show bad faith or egregious delays and that demonstrate the defendant knew its behavior was causing adverse effects.

Mafco Electrical Contractors, Inc. (Mafco) sued Turner Construction Company (Turner) for delay damages even though the parties' contract included a valid no-damages-for-delay clause. Turner was the general contractor for the Hartford 21 Project, owned by Northland Trumbull and Northland Tower LLC. Mafco subcontracted to perform electrical work for $1,717,089. In the event of a delay, the Mafco-Turner subcontract required Mafco to provide written notice within 48 hours of the commencement of delay; without such notice, Mafco would be entitled to no reimbursement or damages stemming from the delay.

The subcontract specified that Mafco's performance would be completed by May 2006. On March 31, 2006, Mafco submitted a request for payment and certification that it had substantially completed its work. Mafco continued to perform ancillary punch list work until February 2008.

Mafco then sued Turner for an $874,844 equitable adjustment to the contract, alleging that Turner's failure to properly and timely perform its duties under the subcontractor entitled Mafco to these damages. Turner moved for summary judgment based upon the no-damages-for-delay clause, which Mafco conceded would ordinarily bar its recovery. However, Mafco argued that equitable exceptions to enforcement of the clause should apply and allow recovery.

To act in bad faith is to act with malicious intent, not bumbling incompetence

Connecticut and New York recognize four equitable exceptions to no-damages-for-delay clauses: (1) delays caused by bad faith or willful, malicious or grossly negligent conduct, (2) uncontemplated delays, (3) unreasonable delays equivalent to intentional abandonment of the contract and (4) delays resulting from breach of a fundamental contractual obligation. Mafco targeted the first exception in its allegations against Turner.

Specifically, Mafco claimed Turner failed to: stick to the subcontract schedule (which required out of sequence work), provide reasonable access, complete antecedent work on time, coordinate work schedules, and timely issue necessary information. Turner also allegedly compressed and accelerated Mafco's work and continually required that the sub perform extra work. Mafco characterized Turner as "incompetent" and called its overall coordination "'the worst' ever witnessed."

However badly Turner may have mangled its management duties, none of Mafco's allegations rose to the level of bad faith or gross negligence. Mafco might have helped itself by alleging that "Turner was concurrently aware of the harms Mafco was allegedly suffering," the court pointed out.

In addition, although Mafco first notified Turner of its suffering in an August 2004 letter, the letter did "not describe any specific dates, circumstances or duration of non-performance, harms suffered, or consequences to Mafco." To successfully convince a court to invoke an equitable exception to an enforceable no-damages-for-delay clause, a plaintiff must explain to the court how cited facts prove one of the equitable exceptions. The plaintiff must also show that the defendant had notice of its defective behavior and that the defendant was aware its conduct would probably injure the plaintiff. Here, Mafco's allegations were too general and merely suggested incompetence, rather than malicious intent.

Don't try to argue uncontemplated delays after certifying your work is 100 % complete

Mafco also could not show uncontemplated delays (i.e., delays not foreseen by either party and not based on length alone). Mafco alleged that it suffered a 33-month delay. However, Mafco's original completion date was February 2006 and it completed the punch work in February 2008, which is over 24 months after the completion date. Moreover, Mafco certified before a notary public that its work was 100 percent complete on March 31, 2006. Mafco was only required to certify "substantial completion," which would have presupposed punch work to be completed later. Accordingly, Mafco was estopped from arguing uncontemplated delays.

Finally, Mafco couldn't make its charges of contract breach stick either. That equitable exception is very narrow and usually requires a complete failure of a condition precedent to the plaintiff's performance.

Mafco's allegations, which were insufficient, charged that Turner had failed to grant the sub extensions and did not submit Mafco's claims for delay damages to the project owner. However, Mafco did receive extensions, and the subcontract specifically stated that Turner had sole discretion over submission of delay damage claims to the project owner. Thus, no fundamental breach of contract could have occurred. Accordingly, the court granted Turner's motion for partial summary judgment.

Editor's Note: There was not even a suggestion in this case that the electrical contractor had done a schedule analysis. Without an as-planned /as-built schedule comparison, Mafco was not able to argue that Turner had "constructive notice" of the delays and related time impacts. In addition, Mafco could not point to specific delay events, which a schedule analysis could have provided, and so was left with more general arguments about Turner's failures as a project manager. Broad contentions are insufficient to overcome a motion for summary judgment. ❖

COURT FLOATS NOVEL CALCULATION METHOD FOR LUMP-SUM CONTRACTS

Contract Price — Lump-Sum Contract
Sea Byte Inc. v. Hudson Marine Management Services, Inc.
U.S. Court of Appeals for the Eleventh Circuit
2009 U.S. App. Lexis 8429 (April 20, 2009)

Pop quiz: When a lump-sum contract terminates on its own terms, but does not specify how to calculate the value of work performed before the termination, how big a check should the owner write? New answer: It should pay out the portion of the lump sum equal to the percentage of the project's total value the contractor has performed.

In March 2004, the vessel M/V Eastwind ran aground on a coral reef off the coast of Florida. Under Florida law, the ship's owner — an association of vessel owners managed by Thomas Miller P&I Ltd. and Thomas Miller (Miami) Inc. (Miller) — was obliged to reattach the live coral heads and repair any site damage. Miller entered into a contract with Hudson Marine Management Services, Inc. (Hudson), to restore the grounding site for a lump sum of $5,200,000. The contract included a "severe weather" provision, which stated: "Should changes occur due to severe weather, [Miller], [Hudson], and the Trustees would then need to readdress the scope of the project."

A few months in, two hurricanes struck the grounding area, scattering the already-removed rubble and causing new damage to the reef. Hudson asked Miller for an additional $2,100,000 to finish the project, but the parties could not agree on a price. Hudson and its subcontractor continued working on the project, restoring the site to its pre-hurricane condition. However, Miller stopped making payments. Hudson then abandoned the site, though it had already received from Miller several installments totaling $1,798,000. Miller hired Marine Resources Inc. (MRI) to complete the restoration project at a cost of $1,357,921.

A 'severe weather' provision calls for either a new project scope — or the end of the project

Hudson sued Miller for $1,870,000. The contractor claimed breach of contract, unjust enrichment, quantum meruit and a declaratory judgment as to what amount, if any, it would owe its subcontractor if it did not recover the full amount sought from Miller. Miller counterclaimed, alleging that it had overpaid Hudson by $500,000 for faulty or incomplete work.

The trial court held that neither Miller nor Hudson had breached the contract and that the hurricanes triggered the severe weather provision. Because the parties could not agree on a new scope of work or price, the contract had expired on its own.

The court determined that Hudson had performed quasi-contract work after the contract expired and was entitled to quantum meruit of $229,427. The court awarded Miller a credit for the $750,000 that it had paid to Hudson's subcontractor following mediation that party had also initiated for non-payment.

On appeal, the court affirmed the trial court's finding that the contract had expired by its own terms. A Hudson employee testified that Hudson had sought additional money to complete the job following the hurricanes because "the job was not able to be completed because the job was no longer as it has been" and that "the job site had been changed by the hurricane and that there needed to be additional monies set aside for the payment of Hudson's work due to the hurricane." In addition, Hudson ceased its restoration work after the hurricanes hit; all of its post-hurricane work consisted of redoing what it had done before the hurricanes.

Paycheck calculation: Court measures the fraction of work completed before weather hit

The appellate court then turned to calculating the value of Hudson's pre-hurricane work. In the absence of contractual instruction, the trial court concluded that Hudson was entitled to the full amount of payments received between when the contract went into effect (July 25) and the day the first hurricane hit (Sept. 2), which was $900,000.

Miller argued that the trial court should have calculated the value of Hudson's pre-hurricane work using the same method used to calculate Hudson's post-hurricane work: the amount that Hudson paid its subcontractor to perform the work, increased by a standard 15-percent markup, which totaled $513,417. But the court dismissed this quantum meruit-based calculation because quantum meruit arises from an implied contract. Here, a contract was in place.

Hudson argued the trial court should have calculated the value of its pre-hurricane work by subtracting from the lump sum the amount Miller paid to MRI to finish the job ($1,357,921) and the amount it had already paid Hudson ($1,870,000). Hudson's total came to $1,144,079.

The court also rejected this proposed calculation. Instead, it supposed the only fair and logical method would be to determine what percentage of the project's value Hudson had provided as of Sept. 2 and then multiply that percentage by the lump sum. Only then could the parties determine whether Hudson had been overpaid or underpaid.

The court found no basis for this calculation in admiralty law or Florida law, instead pulling it from a Michigan appeals court decision, *Plunkett & Cooney, P.C. v. Capitol Bancorp Ltd., 536 N.W.2d 886, 889 (Mich. App. 1995),* and into federal and admiralty jurisprudence. The court reversed the trial court's findings as to this issue and remanded to the trial court to follow the revised method of calculation.

Editor's Note: In federal government contracts, a termination for convenience essentially converts a lump-sum contract into a cost-reimbursable one, with markup. See *Southland Mfg. Corp, ASBCA 16930, 75-1 BCA , § 10,994.* In private contracting, other formulas are used, including percent complete at the date of termination. What the court in this case did was apply a qualitative standard: "The court should determine what percentage of the project's *value* Hudson completed" as a percentage of the original contract value. (Emphasis in original.) As such, non-construction activities, including planning, field engineering efforts, procurement activities and project start-up may be taken into account in assessing "value." ❖

CONTRACTOR RELIEVED OF ITS DEBT WHEN COURT REJECTS 'SHIFTING TRUST' ARGUMENT

Construction Fund Trust
Shafer Redi-Mix, Inc. v. Craft
U.S. District Court for the Western District of Michigan, Southern Division
2009 U.S. Dist. Lexis 21144 (March 17, 2009)

Building materials cannot form the content of a construction fund trust; the content must be actual funds paid to the contractor for building construction purposes.

Shafer Redi-Mix (Shafer) subcontracted to provide concrete and concrete supplies to Robert D. Craft for use in various construction projects in 2000 and 2001. Craft admitted that Shafer provided him with concrete and concrete supplies on an "open account" and that he used those materials in construction for third parties. However, he had no record of who those third parties were, what work he had done for them or how much he had been paid. He also claimed to have no independent recollection of the information. In 2003, Shafer sued Craft in state court for the money that Craft owed for those purchases. Craft did not answer the complaint and the court entered a default judgment against Craft in the amount of $21,989, which Craft did not pay.

In Michigan, contractors are trustees for payments by owners that are intended for subs

In 2007, Craft filed for Chapter 7 bankruptcy; almost all debts are discharged in Chapter 7. However, Shafer asked the bankruptcy court to determine whether Craft's debt to Shafer was not dischargeable. Shafer argued that the money Craft collected as a result of purchasing concrete supplies from Shafer created an express trust pursuant to the Michigan Building Contract Fund Act (the Act).

The Act is a criminal statute designed to prevent contractors from playing a shell game with their subcontractors and suppliers by juggling funds between unrelated projects. Under the Act, "the building contract fund paid by any person to a contractor . . . shall be considered . . . to be a trust fund, for the benefit of the person making the payment, contractors, laborers, subcontractors or materialmen, and the contractor . . . shall be considered the trustee of all funds so paid to him for building construction purposes." *Mich. Comp. Laws § 570.151.* Violation of the Act may give rise to civil actions when a contractor uses building contract funds for any purpose other than to first pay laborers, subcontractors and materialmen who worked on the construction project.

A loophole for cash-strapped contractors?

The court agreed that the money Craft collected from contracting parties would have been held in trust by Craft. However, Shafer couldn't present any evidence of payments to Craft from any of the contracting parties. Craft could not or would not supply such evidence, and Shafer couldn't offer other proof. Shafer tried to work around this problem by suggesting the concrete materials themselves could be the content of the trust, which would eventually "turn into cash." The court rejected this "shifting trust" argument.

Both the plain language of the Act and Sixth Circuit case law limits the content of a construction trust to "money" or "funds." Extending the definition to include building materials would be improper.

Shafer lamented that the outcome of its case created a "roadmap" for other dishonest contractors to discharge construction debt by not answering pleadings, not cooperating with discovery and not testifying. The court expressed no sympathy or concern for this possibility.

Editor's Note: Trust fund statutes provide powerful leverage to induce payments to subcontractors and suppliers. Although the Michigan statute applies to suppliers, this case underscores a difficulty in applying the trust fund concept when it is not known where the materials were used and therefore whether payment for them was made. This "tracing" problem can prevent the court from finding that there are, in fact, trust funds. In Shafer, the supplier was not able to prove that payments had been made on any specific job for the concrete supplied. ❖

WORD OF CONTRACT TRUMPS WORD OF MOUTH — NO EXCEPTIONS, SORT OF

Change Orders — Oral Contract
Industrial Window Corp. v. Federal Insurance Co.
U.S. District Court for the Southern District of New York
2009 U.S. Dist. Lexis 30637 (April 8, 2009)

A subcontractor made the mistake of trusting oral direction on a project where the contract explicitly required written-only work modifications. But then the contractor goofed by paying for work that had been verbally solicited — thereby weakening the iron-clad contractual requirement.

Hill International, Inc. (Hill), entered into a prime contract with the City of New York Department of Design and Construction to manage the construction of the Schomberg Center for Research in Black Culture (the Center). Beys General Construction Corp. (Beys) served as general contractor and Industrial Window Corp. (Industrial) served as subcontractor to install a curtain wall system at the Center.

A dispute arose when Industrial claimed that it performed additional work that was beyond the scope of its subcontract with Beys but that had been agreed to orally by Beys's project manager. Industrial also contended that Beys's project manager had agreed that stainless steel convector covers and bird screens, which the subcontract listed as being under the scope of Industrial's work, were actually not within the scope of contractual work. Industrial submitted change orders for the additional work, as well as the convector covers and bird screens that it provided. Beys and Federal Insurance Company, who provided the contractor's payment bond, moved for summary judgment on those pending charge orders, arguing that the so-called "additional" work was within the subcontract's scope.

Be aware of changes made to a contract before you sign — or live by the rules for changing it after the fact

First, Beys pointed out, Industrial was not entitled to additional recovery for the stainless steel convection covers and bird screens because those items were not listed as exclusions in the subcontract. On the contrary, the subcontract specifically identified those materials.

Industrial claimed that the subcontract was orally modified when the project manager allegedly agreed to remove the covers and screens from the subcontract's purview. However, the subcontract explicitly required all modifications to be made in writing. Thus, the court dismissed Industrial's claim.

Even though Industrial's president testified that the original subcontract excluded convection covers and bird screens and that Beys changed the subcontract's contents without Industrial's knowledge, "such extrinsic evidence is inadmissible to alter the meaning of [a] fully integrated and unambiguous subcontract[.]"

Don't neglect pre-bid site inspection and then claim 'changed conditions'

Industrial also submitted a change order asking for more money to cover the logistics of unloading and installing the curtain wall. It claimed the price listed in the subcontract for the curtain wall assumed that Industrial would be able to use an 18-wheeler truck on the site and a Lull machine on the sidewalk. In reality, the Center's location above a subway station meant that Industrial had to use a different, more expensive method since its heavy machinery and materials would have exceeded the load bearing capacity of the subway structure. Industrial submitted a change order for $110,978 to cover that difference, arguing that the "changed conditions" were "unforeseeable" because it did not know about the subway station. Industrial did admit that it had not inspected the site before signing the subcontract.

The court was unsympathetic, noting that Industrial "could hardly have been surprised to learn that the placement of an 18 wheeler truck, heavy machinery, and curtain wall materials directly above a subway station posed a risk of exceeding the load bearing capacity of the subway station." Industrial should have inspected the site, at which point the subway station's existence would have been obvious, the court chastised.

If you pay for extra work you condone it

The court granted summary judgment to the defendants as to the change orders discussed above, but it denied their motion for summary judgment as to "all of [Industrial's] pending change orders for extra work," which was based upon Industrial's failure to comply with the change order procedures in the subcontract. Those procedures forbid Industrial from performing extra work or modifying the work without first obtaining a written change order.

Industrial could not produce any evidence that it complied, but did produce evidence that Beys had paid five change orders for extra work that were based only upon verbal direction by the project manager.

The court held that those payments could be evidence of Beys's waiver of the contractual prohibition of oral solicitation of extra work. The court applied the same logic to deny summary judgment based upon Industrial's failure to keep "contemporaneous work records" of any extra work, another contingency for payment required by the contract.

Editor's Note: There are many cases where a written-notice clause (for extras or for time extensions) is strictly enforced. There are also many cases where the courts find that the clause was waived, or that one party is estopped from enforcing it. However, the written-notice provisions in the subcontract in this case may be impenetrable for the following reasons: (1) It requires that any extras must be in writing, signed by a named representative; (2) the writing requirement "may not be modified orally"; (3) there can be no estoppel as "subcontractor understands that it is not entitled to rely upon [any] oral directions"; and (4) the subcontractor expressly accepts the risk of loss as "any work done without the written authorization of the named party shall be at the sole risk of the subcontractor." ❖

DISPUTE RESOLUTION CLAUSE IN YOUR CONTRACT APPLIES TO CONTRACT CLAIMS ONLY

Arbitration — Tort
CEI Engineering Associates, Inc. v. Elder Construction Co.
Court of Appeals of Arkansas, Division One
2009 Ark. App. LEXIS 312, No. CA 08-601 (April 8, 2009)

If a contractor fails to perform a contractual duty that causes "foreseeable and unreasonable" damage, it may be responsible for more than a contract breach and end up paying the higher price of a costly lawsuit and reimbursement for injuries.

Elder Construction Company (Elder) hired CEI Engineering Associates, Inc. (CEI), to perform engineering services on six construction projects, one of which was known as Fox Creek. The Elder-CEI contract specified that any claims or disputes that arose out of the agreement and could not be resolved by discussion or mediation would be resolved by binding arbitration. Both Elder and CEI would be bound to whatever happened in arbitration and could not take their claims to court.

According to Elder, CEI negligently concluded that the Fox Creek property had access to adequate sewage. Elder relied on that conclusion and bought the property for $600,000, but later discovered that the property did not contain adequate sewage access. Allegedly, CEI's project manager concealed the lack of sewage access and performed and billed for services that Elder would not have approved had it known the truth about the property. Elder sued CEI in state court, alleging negligence, fraud and breach of contract claims.

Elder also claimed that CEI violated the Arkansas Deceptive Trade Practices Act (the Act), which allows recovery for victims of unconscionable, false or deceptive acts or practice in business, commerce or trade. Elder stated that CEI had falsely represented that it could perform services in a timely matter even though CEI knew that it was understaffed and had grossly overcharged for its services.

In response, CEI filed a motion to compel arbitration, citing the dispute resolution clause in the parties' agreement. Elder countered that the dispute resolution clause did not apply to its claims because they were tort claims, rather than contract claims, and the dispute resolution clause applied only to contract claims arising from the agreement. The trial court agreed, but CEI appealed to the Court of Appeals of Arkansas.

Your dissatisfaction doesn't necessarily make a tort claim — but provable damages do

The appellate court set out to determine the true nature of Elder's claims. If they were truly tort claims, then they should be decided by a judge or jury. If they were contract claims, then they should be decided by an arbiter.

Binding arbitration would actually be to the defendant's — CEI's — advantage because (1) arbitration is generally less expensive than litigation, (2) arbitration tends to produce lower and more predictable awards than litigation, and (3) contract claims tend to produce lower and more predictable awards than tort claims. Although differentiating between tort claims and contract claims is not an exact science, a contract plaintiff seeks to have the defendant fulfill its promises, while a tort plaintiff seeks payment for injuries suffered at the hands of the defendant.

Even if a plaintiff characterizes a particular claim as a tort claim, it may, beneath that label, truly be a contract claim. Similarly, a valid tort claim might arise from a failure to perform under a contract if that failure involved a foreseeable and unreasonable risk of harm to the other party. For example, a tenant had a valid tort claim against a landlord who had agreed to maintain the facilities of his property but failed to maintain a sprinkler that eventually flooded the tenant's inventory. *Westark Specialties, Inc. v. Stouffer Family Ltd., Partnership., 310 Ark. 225, 836 S.W.2d 354 (1992).* By comparison, a plaintiff developer did not have a contract claim when he alleged that the defendant construction company had made false and misleading statements about contractual terms, failed to make prompt payment and failed to complete accurate plans. *Lehman Props. v. BB&B Constr. Co., Inc., 81 Ark. App. 104, 98 S.W.3d 470 (2003).*

Here, Elder did not have a valid unfair and deceptive trade practices claim (a tort claim) because it only expressed dissatisfaction with the way that CEI fulfilled its contractual agreement. These allegations were only sufficient to plead breach of contract.

As to the inadequate sewage claim, however, Elder did have a valid tort claim. By failing to accurately assess the available sewage access at Fox Creek, CEI subjected Elder to a foreseeable and unreasonable risk that the property could not be developed as planned. Especially telling was Elder's damages claim, which included the diminished value of the land and the amount that it expended on a failed development.

Editor's Note: The decision in this case is a setback for arbitration, and further confuses tort and contract claims. Based on the above ruling by the Court of Appeals, an arbitration agreement can be substantially devalued by a party who wants to stay in court. That party only needs to frame its claim, and the relief sought, in tort terms. Given that Arkansas law bars arbitration of tort claims, the arbitration clause could have been better drafted. More importantly, CEI should have invoked the Federal Arbitration Act (FAA).

The arbitration agreement did not cover "all claims and disputes arising out of or concerning the contract or the breach thereof," as in a more standard clause. Instead, the disputes provisions seemed more limited, covering "the interpretation, application or enforcement of the Agreement." Even so, the FAA, 9 U.S.C. §1 et seq. would have required arbitration of the entire dispute.

Under the FAA, tort claims are subject to arbitration, including claims of fraud. *Prima Paint Corp. v. Flood & Conklin Mfg Co., 388 U.S. 395 (1967).* In addition, federal arbitration decisions create substantive law which applies in state courts (*Southland Corp. v. Keating, 465 U.S. 1 (1984)*) and preempts state law. (CEI made its arbitration demand under state statute and not by reference to the FAA.) ❖

STATE LAW AFFORDS DISAPPOINTED BIDDER NO RECOURSE

Bids — Procurement
EBI Detroit, Inc. v. City of Detroit and Detroit Water & Sewerage Dept.
Court of Appeals of Michigan
2009 Mich. App. LEXIS 945, No. 277953 (April 30, 2009)

Tough luck for government contractors in Michigan: An unsuccessful bidder cannot sue for compensation after losing out on the bid, even if the government played fast and loose with the bid selection criteria.

The City of Detroit and the Detroit Water and Sewerage Department (together, Detroit Water) solicited bids for two projects involving construction management and services for water system improvements on streets in Detroit. EBI-Detroit, Inc. (EBI), submitted bids for both projects. Based on the original bid selection criteria listed in Detroit Water's requests for proposals, EBI had the lowest bid for one project and the second lowest bid for the other project. However, Detroit Water changed the bid selection criteria after EBI had submitted its bid, with the result that EBI's bids were fifth lowest for both projects. Detroit Water awarded the contract to other bidders.

EBI sued Detroit Water under several legal theories, but the trial court dismissed the suit because EBI lacked standing. EBI appealed to the Court of Appeals of Michigan, which affirmed the trial court.

Unlike federal law, Michigan law provides no special rights to unsuccessful bidders like EBI. They also have no standing to sue as taxpayers for money. (A suit for injunction is allowed to prevent the award of a contract where there are allegations of "fraud, abuse, or illegality.") An unsuccessful bidder looking for compensation simply must accept the unfortunate outcome of unilateral change to a bid evaluation process by the government.

In addition, EBI had no breach of contract claim because there was no contract between the parties. Although Detroit Water did solicit bids and EBI did submit bids, no contract was formed at that point. ❖

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fied solicitations and contracts. This includes Government-wide Acquisition Contracts (GWACs), multi-agency contracts (MACs), Federal Supply Schedule (FSS) contracts, or agency indefinite-delivery indefinite-quantity (ID/IQ) contracts that will be funded with Recovery Act funds.

Resource: Information on the Recovery Act may be found on the Recovery Act Web site (www.recovery.gov). A new website under construction — www.federalreporting.gov — will facilitate online reporting. The site is expected to be operational before July 10.

2. Publicizing contract actions *(See 74 Fed Reg 14636)*

Contracting officers are now required to enter data in the Federal Procurement Data System for any contract action funded, even in part, by the Stimulus Act. They must now also post the following on the FedBizOpps.gov website for any covered contract action:

(i) Identification of action;
(ii) Pre-award notices for orders exceeding $25,000;
(iii) A "clear and unambiguous" description of supplies and services; and
(iv) A rationale for awarding any action that is not fixed-price and awarded through competitive procedures.

3. GAO, IG access to employees *(See 74 Fed Reg 14646)*

The interim rules amend the FAR to provide new authorities to the Comptroller General, or Government Accountability Office (GAO), and agency inspector generals (IGs). GAO and IGs are now authorized to audit prime contracts and subcontracts and interview prime contractor personnel, and GAO is authorized to interview subcontractor personnel for FAR Part 12, 14, and 15 contracts funded by the stimulus plan. The rules, however, do not grant IGs the authority to interview subcontractor employees.

Notably, a separate interim rule authorizes the Comptroller General to interview current contractor employees when conducting audits regardless of whether the contract is funded by the stimulus plan. Commercial-item contracts not funded by the stimulus plan are exempt from the new oversight authority.

4. Whistleblower protections *(See 74 Fed Reg 14633)*

The interim rules also provide additional protections for state, local, and government contractor whistleblowers. A new clause prohibits a non-federal employer receiving stimulus funds from discriminating against an employee as a reprisal for making a disclosure of what the employee reasonably believes to be evidence of gross mismanagement, misuse, or waste of stimulus funds or a violation of law related to a contract involving stimulus funds. In addition, contractors receiving stimulus funds must now post a notice of their employees' rights and remedies relating to whistleblower protections. This whistleblower clause must be included in all stimulus-funded contracts and subcontracts.

5. Buy American requirements *(See 74 Fed Reg 14623)*

Last, but not least, the rules implement the Buy American requirements for federal buildings and public works funded by the stimulus plan. Essentially, the Act prohibits, with certain exceptions, the use of stimulus funds for the construction, alteration, maintenance or repair of a public building or work unless all of the iron, steel and manufactured goods used in the project are produced in the United States.

Conclusion: The new and pre-existing compliance obligations will continue to be of paramount importance due to the increased authority and funding provided to GAO and the agency IGs to perform oversight functions. Undoubtedly, the mix of new reporting obligations and increased oversight is a significant change in the compliance environment faced by government contractors and could expose contractors to new liability risks. These requirements are evolving and further changes are possible when the final rules are issued.

Note: Michael H. Payne is the Chairman of the Federal Contracting Practice Group of the law firm of Cohen Seglias Pallas Greenhall & Furman PC located in Philadelphia. ❖