THE PARTIES TO A GOVERNMENT CONTRACT MAY NOT LIMIT THE APPLICABILITY OF THE DISPUTES CLAUSE

Should the parties to a Government contract be able to agree contractually on which provisions of the contract are subject to the Disputes clause? The Court of Appeals for the Federal Circuit answered that question in the negative in a 1997 decision that was recently implemented in the Federal Acquisition Regulation (FAR). Federal Acquisition Circular (FAC) 97-15, effective February 25, 2000, implements the Federal Circuit's decision in Burnside–Ott Aviation Training Center v. Dalton, 107 F.3d 854 (Fed. Cir. 1997).

Burnside-Ott involved a cost plus award fee contract for aircraft maintenance, repair, and overhaul at six naval air stations. Under the contract, the contractor was entitled to recover all of its allowable costs and earn an award fee of up to 10% of the estimated costs of the contract, depending on the contractor's performance. The award fee clause in the contract provided that "The Award Fee decision is a unilateral determination made by the FDO [Fee Determining Official] and is not subject to the 'DISPUTES' Clause of the contract." The clause cited FAR 16.404-2(a), which provided essentially the same limitation.

During the course of contract performance, the parties became involved in a dispute concerning the method of computing the award fee. The contractor filed a certified claim, seeking additional award fees based on its method of calculation. The contracting officer denied the claim, stating that the determination of award fee is excluded from the Disputes clause and not subject to appeal. The contractor appealed to the Armed Services Board of Contract Appeals (ASBCA). The Government moved to dismiss for lack of jurisdiction, based on the contract clause. The contractor alleged that the clause was ineffective to remove the statutory right of appeal afforded by the Contract Disputes Act of 1978 (41 U.S.C. 601-613), and the Board should conduct a de novo review of the Government's action. The Board held that it had jurisdiction to hear the appeal, but the standard of review was whether the Government acted arbitrarily or capriciously in determining the award fee. In this case, the Board found the Government acted reasonably.

On appeal to the Federal Circuit, the court held that the parties could not contract away the contractor's right to ASBCA review of its claim under the Contract Disputes Act. Any attempt by the parties to deprive the Board of jurisdiction to hear a dispute that otherwise falls under the Contract Disputes Act defeats the

purpose of the Act and the intent of Congress. The only instance where the parties could agree that a contractual provision is not subject to the Disputes clause is where another statute provides a more specific remedy, e.g. review of wage determinations under the Davis-Bacon Act.

Concerning the standard for review, the Court held that the Contract Disputes Act requires a de novo review of the contract provision at issue. Where the contract provision gives the Government the unilateral discretion to determine the award fee, the court will not disturb that determination unless it is arbitrary or capricious. In this case, the court found no evidence that the award fee determination was arbitrary or capricious. Thus, the Board decision was affirmed.

In order to implement the Burnside-Ott decision, FAC 97-15 has added or modified FAR language in three areas:

1. Award Fee (amount and methodology for determining)
2. Value Engineering Change Proposals (VECPs) (decision to accept or reject, determination of collateral costs or savings, sharing rates, duration of sharing period)
3. Incentive subcontracting program (determination that exceeding goals was not due to contractor efforts)

Prior to Burnside-Ott, the FAR provided that determinations such as these were made unilaterally by the Government and not subject to the Disputes clause of the contract. However, after FAC 97-15, the above FAR provisions now merely state “This determination is a unilateral decision made solely at the discretion of the Government.” There is no longer any mention of the Disputes clause.

How significant a change this may be is yet to be seen. Contractors will certainly file more claims and appeals on these issues once they become aware they are not precluded from using the Disputes process. Board decisions subsequent to Burnside-Ott have found jurisdiction to hear appeals concerning VECPs, award fees, and other contractual provisions where the parties attempted to eliminate the applicability of the Disputes clause, e.g. a contracting officer’s decision not to renew a contract. However, Burnside-Ott is cited for the proposition that although the Board has jurisdiction over the dispute, the discretion of the decision-maker will be reviewed only for abuse.

In summary, it is important to note that the Government may no longer be able to defeat Board jurisdiction in cases which have traditionally been exempt from the Disputes clause. However, the Board's review can be limited by the use of carefully drafted contractual language which gives the contracting officer the right to make unilateral decisions solely at his or her discretion.

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