

# **SUPERIOR KNOWLEDGE - THE GOVERNMENT'S DUTY TO DISCLOSE**

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## **I. INTRODUCTION**

“If the government possesses special knowledge which is vital to the performance of a contract but which is unknown and not reasonably available to a bidder who is thereby misled, the government must disclose its superior knowledge or be held liable for breach of contract.”<sup>1</sup> Liability is based upon an implied duty to disclose information that is vital for the preparation of estimates for contract performance.<sup>2</sup> Stated differently, liability is based upon “an implied condition in the contract that neither party will hinder the other in the discharge of the obligations created by the contract.”<sup>3</sup> This duty is consistent with the general contract law concepts of good faith and fair dealing.<sup>4</sup>

“The doctrine of superior knowledge is not aimed at compelling disclosure whenever the Government knows more than the contractor *might*, its aim, instead, is to address those situations where the Government knows more than the contractor *should*.”<sup>5</sup> “Cases in which the Government has been held to have breached a duty of disclosure involved situations where the information withheld was not only vital to successful performance, but more important, was information of a character which the Government knew or should have known, the contractor was neither aware or reasonably likely to become so.”<sup>6</sup> Prior cases also require the contractor to have been misled by the Government’s failure to disclose the information.

## **II. ELEMENTS WHICH ESTABLISH A BREACH OF CONTRACT FOR FAILURE TO DISCLOSE SUPERIOR KNOWLEDGE**

To establish a breach of contract under the doctrine of superior knowledge, a contractor must produce specific evidence that it:

- (1) attempted to perform without vital knowledge of a fact that affects performance costs or direction,
- (2) the Government was aware the contractor had no knowledge of and had no reason to obtain such information,
- (3) any contract specification supplied misled the contractor, or did not put it on notice to inquire; and
- (4) the Government failed to provide the relevant information.<sup>7</sup>

### **1. THE GOVERNMENT’S KNOWLEDGE OF VITAL INFORMATION**

#### **a. VITAL INFORMATION**

The term “vital information” refers to the type of information which would impact upon the contractor's estimates or performance.<sup>8</sup> The duty to disclose applies to specific information that impacts the cost of the work.<sup>9</sup> However, the doctrine neither imposes on a buyer an affirmative duty to inquire into the knowledge of an experienced seller,<sup>10</sup> nor, when a contractor is supplied with a performance specification, a duty to disclose information which outlines the manufacturing difficulties which had been experienced by all prior contractors.<sup>11</sup> Moreover, “[t]he government is under no duty to disclose information, such as an opinion or conclusion of its geologist, where the knowledge of both the government and the bidder is based on data equally available to both parties and where more conclusive data is available, but neither party chooses to obtain it.”<sup>12</sup> Last, in the absence of affirmative misrepresentations, the Government is not required to be a guarantor against a contractor’s poor judgment regarding its selected method of performance.<sup>13</sup>

For example, in *Hardeman-Monier-Hutcherson v. United States*,<sup>14</sup> the Navy possessed two reports which described the severity of weather and sea conditions off the coast of Australia where the contractor was required to build, among other things, a pier and radio communications facility. Neither report was shared with bidders who were unable to conduct their own studies due to the limited bidding period. Although the Navy knew that the site was virtually unusable during certain periods of the year, the only information contained within the bid documents was a comment that the area was subject to periodic hurricanes. In this case, the court had no difficulty concluding that the information was vital and unique to the Navy, and ruled that the Navy breached the contract by failing to disclose this information to the plaintiff.

In *GAF Corp. v. United States*,<sup>15</sup> the U.S. Court of Appeals for the Federal Circuit affirmed the Claims Court’s earlier determination that the Navy had no contractual obligation to warn an asbestos producer of the hazards associated with its own product. GAF sought to recover the costs it incurred in judgments, settlements, and legal fees defending wrongful death and personal injury claims due to shipyard workers’ prolonged contact with its own product, asbestos.

In another case, *Intercontinental Manufacturing Co.*,<sup>16</sup> the plaintiff contracted with the Navy for the manufacture of containers for sea mines. Prior to Intercontinental’s contract, there had been previous contracts for the containers, and each prior contractor had encountered manufacturing difficulties. In fact, all prior contractors had filed claims. At a pre-bid conference, the government had discussed some of the prior disputes. Nonetheless, the plaintiff still experienced manufacturing difficulties of its own and filed a claim for its increased costs. In its claim, the plaintiff argued that the government’s disclosure was misleading and, therefore, the government should be liable for the increased costs of performance. The court disagreed and questioned the plaintiff’s assertion that the government had an underlying duty to disclose this information to begin with. The court concluded there was no duty and explained:

... the case for imposing upon the Government a duty of disclosure proceeds entirely upon the assumption that since manufacturing difficulties of varying degrees had been experienced by all prior contractors, it could reasonably be

anticipated that [plaintiff] too would come to share this plight and that it was the Government's responsibility to forestall that occurrence.

. . . it is simply too large an assumption to rest upon. It is important to recognize that with an end-product specification such as is here involved, an imposition upon the Government of a duty of disclosure regarding the manufacturing processes and techniques, accomplishes, in practice terms, a reallocation of the performance risks normally shouldered by the fixed-price contractor. Caution demands, therefore, that that before such a shift in contractual obligations be enforced, the record substantiate that the performance difficulties likely to be encountered exceed a rightfully expected level of skill and competence of the industry.

. . . it is incumbent on the aggrieved contractor to explain why, in this procurement, it would have been beyond its properly expected skills and abilities to have foreseen the manufacturing problems that were encountered and the solutions that they demanded. To recognize a duty of disclosure on any lesser basis -- to require it, for example, simply because claims arose in past procurements -- would carry with it the real possibility of obligating the government to assume the duty of informing the contractor about what it ought to know.<sup>17</sup>

In *American Shipbuilding Co. v United States*,<sup>18</sup> the Court of Claims ruled that a delivery schedule contained in bid documents is not an affirmative representation by the government that a project can be performed within the stated period.<sup>19</sup> In *American Shipbuilding*, the specifications were not performance, but design.<sup>20</sup> Contrary to the plaintiff's assertions, the Court of Claims found the specifications were sufficient to show the plaintiff what was required under the contract, and, therefore, there was no issue of defective or misleading specifications.<sup>21</sup> The Court of Claims also found the government did not withhold a vital fact affecting performance which the government knew the plaintiff was not aware of. To the contrary, the court found that all the plaintiff needed to do was to evaluate the specifications and decide whether it could complete the work by the due date.<sup>22</sup> The court concluded that it is "reasonable for the government to assume that a contractor is the best judge of its competency and will exercise good judgment in deciding to bid on a contract."<sup>23</sup> In light of its findings, the Court of Claims concluded that *American Shipbuilding* was not entitled to relief under the doctrine of superior knowledge.<sup>24</sup>

In *L.G. Everist Inc. v. United States*,<sup>25</sup> the government contracted for the excavation of "riprap" from a quarry. Although the government's geologist expressed reservations regarding the quality of the "riprap" in light of its intended use, the government did not share this opinion with the plaintiff. The court ruled that the Government was not liable for its failure to disclose its opinion because both parties could have ascertained the true quality of the "riprap" through "test

quarrying,” but neither party chose to do so. Since information regarding the true quality of the quarry rock was reasonably available to the plaintiff, there was no breach of contract.

In *Granite Construction Co., v. United States*, the plaintiff contracted with the U.S. Army Corps of Engineers for the construction of a salmon fingerling bypass in the John Jay Dam on the Columbia River. One part of the project involved excavation of approximately 1000 feet of the former bypass tunnel which was constructed of concrete and stone aggregate of various sizes. The plaintiff never seriously considered hand-mining the former by-pass tunnel, because it felt such a process would be too labor intensive and costly. Instead, it chose to employ a “roadheader” to excavate the existing tunnel. (A roadheader is a large piece of mining equipment which uses a rotating cutting head attached to a long arm.) Although the plaintiff understood that a roadheader was used primarily to excavate soft materials, such as coal, and would not cut through the stone aggregate, it concluded that the teeth of the cutting head would be able to push through the cement matrix and break off chunks of the matrix with aggregate imbedded.

From the first instant the plaintiff attempted to use the roadheader to excavate, it was apparent that the machine would work poorly at best. In finding for the government, the court concluded:

. . . the Government is not a guarantor against poor judgment with respect to methodologies selected by the contractor. In this case, [the plaintiff’s] belief that the teeth of the cutter head would make constant contact with the low-strength matrix is inexplicable. It was at best a triumph of hope over data. . . . ‘any misleading that occurred was due to plaintiff’s own unreasonable assumptions.’<sup>26</sup>

#### b. THE GOVERNMENT’S KNOWLEDGE

To prevail in its claim of breach under the doctrine of superior knowledge, the contractor must show that the government possessed the undisclosed information. However, in light of the vastness of the business engaged in by the United States Government, with its multitudinous departments and bureaus and independent agencies scattered all over the world, knowledge of one government agency generally will not be imputed to another Government agency absent some meaningful connection between the agencies.<sup>27</sup>

Such a connection was found to exist in *J.A. Jones Construction. Co. v. United States*.<sup>28</sup> In *J.A. Jones*, the plaintiff sued to recover overtime wages paid by it and its subcontractors which resulted from an alleged breach of its contract with the Army Corps of Engineers. The contract required J.A. Jones Construction to build various facilities at the Air Force Missile Test Center at Cape Kennedy. During this procurement, the Corps of Engineers acted as the “construction agency” for the Air Force. In its complaint, J.A. Jones Construction asserts the Corps of Engineers knew but failed to divulge that, during the time J.A. Jones Construction’s contract was being performed, the Air Force intended to initiate a large, high priority construction program in the area premised, in part, on the payment of premium wages. As a result of the Air Force’s project, J.A. Jones Construction experienced a labor shortage which required it to pay higher

wages to acquire the labor necessary for its timely performance. In this instance, the court concluded that the Air Force, the “using agency” of the Corps of Engineer’s services, was obligated to inform the plaintiff that substantial overtime pay probably would be required on its contract. The court further concluded that this obligation applied whether or not the Corps of Engineers actually knew of the Air Force’s plans.

## 2. THE CONTRACTOR’S KNOWLEDGE OR REASON TO KNOW

### a. ACTUAL KNOWLEDGE

The government will not be liable for its failure to disclosure information if it can show that the contractor possessed actual knowledge of the information in question.<sup>29</sup> If the government can not demonstrate a contractor’s actual knowledge prior to the time of contracting, it can still avoid liability for its failure to disclose if the contractor had reason to know of the information.<sup>30</sup>

### b. REASON TO KNOW

Unless the contractor can show that “its claims were borne of problems exceeding the industry’s knowledge, practices and skills; it cannot . . . be heard to say that the Government withheld *superior* knowledge.”<sup>31</sup> Accordingly, the fact that the government may possess more extensive knowledge in a particular area than a contractor does not constitute superior knowledge *per se*.<sup>32</sup> Moreover, the contractor’s size and sophistication may have a bearing on whether the contractor should be charged with reason to know.<sup>33</sup>

In *Drillers, Inc.*<sup>34</sup> for example, the board found that the government’s failure to inform the contractor of the presence of hydrogen sulfide in subsurface water was not a breach of contract because the information was reasonably available to the contractor had it conducted a reasonable site investigation and made pertinent inquiries as required by the contract.

In another case, *Tyroc Construction Corporation*,<sup>35</sup> the government was required to compensate a contractor for additional work caused by onsite water because the government failed to disclose the presence of a nearby sump pump and soil borings that indicated a water problem. In this case, the Board of Contract Appeals considered the contractor’s status as an 8(a) business when it concluded that “it would not seem reasonable to require Tyroc to conduct its own engineering investigation in order to ascertain the accuracy or the completeness of the . . . estimates supplied to Tyroc”<sup>36</sup> by the Government. The Board further concluded that, “[i]n a situation involving a small business set-aside project under 8(a), it is especially important for the Government to reveal the information it possesses that would bear on the conditions of performance.”<sup>37</sup>

Arguably, the degree of a contractor’s sophistication may be born out by its prior experience; the manner in which both the government and private industry recognize the contractor as an (if not the) industry leader in its particular technology; and the detail of the contractor’s purported pre-bid investigation.

Before a court concludes that a contractor *did not have* a reason to know the information, it will consider whether the contractor performed a reasonable investigation of the RFP. A reasonable investigation includes: proper review of the RFP and its drawings; gathering information from the public and the industry; and, where reasonable, asking appropriate questions of the Government. At a minimum, the contractor is expected to have such knowledge as a reasonable investigation of the bidding documents or work site would reveal.<sup>38</sup> For example, a demilitarization contractor may have demonstrated that it possessed the knowledge and expertise to study, research, and develop a safe and effective demilitarization plan.

### 3. GOVERNMENT KNOWLEDGE OR REASON TO KNOW OF THE CONTRACTOR'S IGNORANCE

The government will not be held liable for nondisclosure of information unless it is found to have knowledge or reason to know of the contractor's ignorance of the information.<sup>39</sup> A crucial factor in determining whether the government in fact had superior knowledge is whether the knowledge is exclusively held by the government or so nearly so as to make it unreasonable to expect a contractor to obtain the information elsewhere.<sup>40</sup> Where the information is specific and the contractor likely would not be able to obtain the information, the government is assumed to have reason to know of the contractor's ignorance.<sup>41</sup> Also, when the government has control of the information and has restricted its release, the government is deemed to have reason to know of contractor ignorance.<sup>42</sup>

For example, in *Hardeman-Monier-Hutcherson v. United States*,<sup>43</sup> "a construction contract case, the government refused to disclose certain weather and sea reports despite the plaintiff's requests to examine them."<sup>44</sup> "A limited bidding period made it impossible for the plaintiff to make its own studies of the unusual wind and sea conditions at the site where it was to construct, among other things, a pier for the Navy."<sup>45</sup> "The plaintiff contended that the reports contained information vital to contract performance and that the information was not reasonably available from either a site inspection or from an examination of other weather data provided to the plaintiff. The court ruled that the defendant had breached the contract by failing to disclose the reports."<sup>46</sup>

In *Helene Curtis Indus., Inc. v. United States*,<sup>47</sup> Helene Curtis Industries contracted with the Army to supply large quantities of disinfectant chlorine powder, a mixture of chemicals, to be used by troops in the field to disinfect mess gear and fresh fruits and vegetables. Although the specification stated that the disinfectant was to be "a uniformly mixed powder or granular material" composed of certain ingredients in specified percentages by weight, it failed to inform bidders that grinding of the main ingredient, chlormelamine, would be required. At that time, chlormelamine was a new and patented chemical whose properties were not widely or generally known. In this instance, the Claims Court ultimately found the government liable for breach of its contract with Helene Curtis. Specifically, the court found "the circumstances here gave rise to a duty to share information . . . [In particular, the] Government had sponsored the research [of

the disinfectant] and knew much more about the product than the bidders did or could . . . [I]t knew in particular, that the main ingredient, chlormelamine, was a recent invention, uncertain in reaction, and requiring extreme care in handling; it also knew that the more costly process of grinding would be necessary to meet the requirements of the specification, but that in their understandable ignorance the bidders would consider simple mixing adequate and the urgency for the disinfectant was such that potential bidders could not expend much time learning about it before bidding. In this situation, the Government, possessing vital information which it was aware the bidders needed but would not have, could not properly let them flounder on their own.”<sup>48</sup>

#### 4. CONTRACTOR WAS MISLED

“Mere governmental failure to disclose each and every bit of information it possesses is not, in and of itself, enough to serve as a basis for recovery by the contractor.”<sup>49</sup> “A bare withholding of information is insufficient without a showing that the contractor was misled by the withholding.”<sup>50</sup>

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<sup>1</sup> *J.F. Shea Co. Inc. v. United States*, 4 Cl. Ct. 46, 53 (1983). See *Hardeman-Monier-Hutcherson v. United States*, 198 Ct. Cl. 472, 487, 458 F.2d 1364, 1370 (1972); *Helene Curtis Indus., Inc. v. United States*, 160 Ct. Cl. 437, 442, 312 F.2d 774, 777 (1963); *Ragonese v. United States*, 128 Ct. Cl. 156, 120 F. Supp. 768 (1954).

<sup>2</sup> J. CIBNIC & R. NASH, ADMINISTRATION OF GOVERNMENT CONTRACTS, 255-56 (3d ed. 1995).

<sup>3</sup> *Bateson-Stolte, Inc. v. United States*, 145 Ct.Cl. 387, 390 (1959).

<sup>4</sup> CIBNIC & NASH, *supra* note 2, at 255.

<sup>5</sup> *Intercontinental Manufacturing, Co. Inc. v. United States*, 4 Cl.Ct. 591, 600 (1981) (emphasis original).

<sup>6</sup> *Id.* at 598-599.

<sup>7</sup> *GAF Corp. v. United States*, 932 F.2d 947, 949 (Fed. Cir. 1991), *cert. denied*, 112 S. Ct. 965 (1992); See Also. *American Shipbuilding Co. v. United States*, 654 F.2d 75, 79 (1981).

<sup>8</sup> CIBNIC & NASH *supra* note 2, at 257.

<sup>9</sup> *Id.*

<sup>10</sup> *GAF Corp. v. United States*, 932 F.2d at 949.

<sup>11</sup> *Intercontinental Manufacturing, Co. Inc.*, 4 Cl.Ct. at 599.

<sup>12</sup> *J.F. Shea Co.*, 4 Cl. Ct. at 53. See Also *Petrochen Servs., Inc. v. United States*, 837 F.2d 1076, 1079 (Fed. Cir. 1988); *McCormick Constr. Co. v. United States*, 18 Cl. Ct. 259, 265 (1989), *aff'd* 907 F.2d 159 (Fed. Cir. 1990).

<sup>13</sup> *Granite Construction Co. v. United States*, 24 Cl. Ct. 735, 753 (1991).

<sup>14</sup> *Supra*, note 1.

<sup>15</sup> *GAF Corp.*, 932 F.2d at 949.

<sup>16</sup> *Intercontinental Manufacturing Co. Inc.*, *supra* note 5.

<sup>17</sup> *Id.* at 599.

<sup>18</sup> *Supra* note 7.

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- <sup>19</sup> See *J.F. Shea Co., Inc*, *supra* note 1.
- <sup>20</sup> *American Shipbuilding Co.*, 654 F.2d at 80.
- <sup>21</sup> *Id.* at 79.
- <sup>22</sup> *Id.* at 80.
- <sup>23</sup> *Id.* at 79.
- <sup>24</sup> *Id.* at 80.
- <sup>25</sup> *Everist Inc. v. United States*, Ct.Cl. No. 671-80C (order entered September 24 , 1982)
- <sup>26</sup>
- <sup>27</sup> See *Bateson-Stolte, Inc.*, 145 Ct.Cl. at 391-92; *Bateson-Stolte, Inc. v. United States*, 158 Ct.Cl. 455, 458 (1962); See Also. *Fansteel Metallurgical Corp. v. United States*, 145 Ct.Cl. 496, 501 (1959), *S.T.G. Construction Co. v. United States*, 157 Ct. Cl. 409, 416-17 (1962).
- <sup>28</sup> *J.A. Jones Construction. Co. v. United States*, 182 Ct.Cl. 615 (1968).
- <sup>29</sup> CIBNIC & NASH, *supra* note 2, at 260.
- <sup>30</sup> *Id.*
- <sup>31</sup> *Intercontinental Manufacturing, Co. Inc*, 4 Cl.Ct. at 600 (emphasis original).
- <sup>32</sup> CIBNIC & NASH, *supra* note 2, at 261.
- <sup>33</sup> *Id.* at 264.
- <sup>34</sup> *Drillers, Inc.*, 90-3 BCA ¶23,056 (EBCA).
- <sup>35</sup> *Tyroc Construction Corporation*, 84-2 BCA ¶17,308.
- <sup>36</sup> *Id.* at 86,261.
- <sup>37</sup> *Id.*
- <sup>38</sup> CIBNIC & NASH, *supra* note 2, at 263.
- <sup>39</sup> *Id.* at 264.
- <sup>40</sup> *Drillers, Inc.*, 90-3 BCA ¶23,056 (EBCA), citing *Continental Rubber Works*, 80-2 BCA ¶14,754 (ASBCA).
- <sup>41</sup> CIBNIC & NASH, *supra* note 2, at 266.
- <sup>42</sup> *Id.* at 265.
- <sup>43</sup> *Hardeman-Monier-Hutcherson*, *supra* note 1.
- <sup>44</sup> *J.F. SheaCo. Inc.*, 4 Cl.Ct. at 53.
- <sup>45</sup> *Intercontinental Manufacturing, Co. Inc.*, 4 Cl.Ct. at 599.
- <sup>46</sup> *J.F. SheaCo. Inc.*, 4 Cl.Ct. at 53-54.
- <sup>47</sup> *Helene Curtis Indus., Inc.*, *supra* note 1.
- <sup>48</sup> *Helene Curtis Indus., Inc.*, 160 Ct. Cl. at 444-45.
- <sup>49</sup> *Drillers, Inc.*, 93-3 BCA at 115,744. See *Piasecki Aircraft Corp. v. United States*, 229 Ct.Cl. 208, 222 (1981).
- <sup>50</sup> *Alvin H. Leal v. United States*, 149 Ct.Cl. 451, 480 (1960).