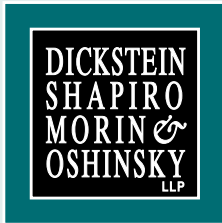




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Our attorneys guide clients through the maze of regulations to maximize a company's ability to secure government contracts. If you would like more information on this issue or any other government contracts issue, please contact us.

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An Upcoming Federal Circuit Decision Highlights The Need For Contractor Vigilance

By Robert J. Moss and Austin M. Fulk

The U.S. Court of Appeals for the Federal Circuit is set to issue a decision in the coming months that highlights a significant risk facing government contractors. At issue in *Tesoro v. United States* is the rule governing a contractor's right to challenge an illegal provision in a government contract. This issue is important because arguments concerning potentially illegal contract provisions arise fairly frequently in government contract disputes, particularly in disputes relating to Economic Price Adjustment clauses and wage determination provisions, which are subject to significant mandatory statutory and regulatory requirements. The *Tesoro* appeal is likely to resolve a conflict between two lines of cases relating to the illegality issue.

The first line of cases holds that when a contract provision violates the law, including any mandatory provision of the Federal Acquisition Regulation (FAR) or the agency FAR Supplements, a court can reform the contract to correct the illegal provision, even if the contractor has already performed part or all of the contract. See *Beta Sys., Inc. v. United States*, 838 F.2d 1179 (Fed. Cir. 1988). In *Beta*, the contractor objected, but later acquiesced, to an illegal pricing term in a government contract. That behavior was found to be insufficient to constitute waiver of the contract's illegal term, and the court held that the illegal provision was subject to reformation.

The second line of cases holds that if the contractor performs the contract, or takes any action to defend the contract, knowing that the contract contains the allegedly illegal provision, the contractor waives its right to challenge the provision and must effective-

ly live with the illegality, even if doing so places a heavy burden on the contractor. See *Am. Tel. & Tel. Co. v. United States*, 307 F.3d 1374 (Fed. Cir. 2002). In *AT&T*, the Federal Circuit held that AT&T had waived its right to challenge an illegal contract term because it had aggressively pursued the contract in question, including defending the award in a bid protest. The Court held that because AT&T actively pursued and defended the contract containing the allegedly illegal provision, it was barred from later challenging the legality of that provision in court.

Although it is unclear how the Federal Circuit will resolve the split of authority, the *Tesoro* appeal highlights the need for contractors to be vigilant in dealing with contract provisions that appear to be inconsistent with the law, even if it is a FAR or FAR Supplement provision. This is true even when the potential illegality may seem insignificant, because as contract performance progresses, the impact of the illegality may become far more significant, and, if the *AT&T* line of cases is upheld, the contractor's right to challenge will have been waived. Therefore, before entering into a government contract, a contractor must review all of the clauses, even the tedious boilerplate and clauses incorporated by reference, to confirm that they are consistent both with applicable FAR and FAR Supplement provisions and with federal statutes. If there is an inconsistency, it is essential that the contractor address the issue in writing to the Contracting Officer. If the Contracting Officer does not agree to remove or modify the illegal provision, the contractor must consider taking prompt legal action to reform the contract.

The Pendulum Swings Back

By David M. Nadler

Officials at the General Services Administration and the Defense Department recently launched the "Get It Right" campaign to improve contract compliance and the use of GSA's contracting vehicles.

The initiative is designed to increase accountability in procurement practices and to improve training for those involved in the procurement process. Get It Right has several broad objectives:

- ◆ Ensuring compliance with federal contracting regulations.
- ◆ Making policies and practices clear and explicit.
- ◆ Ensuring the integrity of GSA's contract vehicles.
- ◆ Ensuring that taxpayers get the best value when GSA vehicles are used.

Get It Right aims for a zero-deficiency compliance record, and DOD officials have emphasized that accountability will be expected at all levels, including for contractors, who will be responsible for reporting task orders that are outside a contract's scope. This has led some in industry to suggest that the burden of ensuring compliance is being shifted to contractors and that it is unrealistic to expect for-profit companies to turn down out-of-scope orders.

This view, however, seems shortsighted. Cheating diminishes all of us, and taxpayers are entitled to a government/industry partnership that works toward the common goal of a fair, transparent procurement system. Both parties are responsible for determining

whether an order is within the contract's scope. Some people will always bend the rules, but the government carries a big stick and the threat of enforcement action is a powerful deterrent.

Get It Right is a touchstone event in the evolution of procurement policy and marks a tightening of the reins on the free-wheeling practices ushered in with the acquisition reform movement of the 1990s.

In the 1990s, procurement reform brought important, commercial-based procurement practices and empowered contracting officials with a new level of discretion in the acquisition process. The acquisition reform movement was a reaction to the flurry of legislative efforts in the 1980s to curb sole-source contracting.

The result was a period focused on accountability, transparency and competition, and also inefficiency, excessive oversight and bureaucratic malaise.

Just as Operation Ill Wind highlighted the procurement abuses of the 1980s, the use of an Interior Department information technology contract to provide interrogation services at the Abu Ghraib prison in Iraq symbolizes the problems in today's procurement environment.

The Abu Ghraib incidents are the most visible example, but abuses have become common and more brazen, including the use of IT contracts to provide family counseling services and to

construct an office building, all with minimal or no competition. Orders on single blanket purchase agreements under GSA's schedule contracts essentially are sole-source contracts that can extend for years with a ceiling of hundreds of millions of dollars.

Get It Right reflects that the pendulum has swung too far in the name of acquisition reform. The challenge now is not to swing it back too far in the opposite direction. Time will tell whether GSA and DOD can strike this balance, but this is an important initiative that deserves industry support.

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The Government Contracts Practice of the Litigation & Dispute Resolution Group of Dickstein Shapiro Morin & Oshinsky LLP assists clients in obtaining and maintaining a competitive edge in government procurements.

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Holiday Gifts and Government Customers: How Much Is Too Much?

By Tina D. Reynolds

As the holiday season approaches, companies consider giving tokens of appreciation to their government customers. But a number of regulatory considerations come into play, imposing limits on generosity. As a general rule, federal government employees may not solicit or accept gifts or any other thing of value from prohibited sources (defined as persons or companies seeking official action by, doing or seeking to do business with, or otherwise regulated or affected by the employee's agency) or gifts given because of the employee's official position. See generally 5 C.F.R. Part 2635 (Standards of Ethical Conduct for Employees of the Executive Branch). Luckily, there are exceptions to this general rule which permit you to dispense a bit of holiday cheer. Below are some examples of these exceptions:

◆ **Gifts of \$20 or less:** Federal regulations permit government employees to accept non-cash gifts worth \$20 or less in value on any one occasion, so long as the total value of gifts given to a government employee from a single source do not exceed \$50 per calendar year. Companies and organizations are considered a single source – gifts from company employees are aggregated. Thus, if you, or anyone else from your company, have paid \$20 lunch tabs for a government customer twice in 2004, your 2004 holiday spending limit is \$10.

◆ **Gifts based on personal relationships:** Gifts based on family relationships and personal friendships are exempt from

federal gift-giving prohibitions. Thus, if your brother happens to work for a federal agency with which your company does business, you can still buy him that new table saw – you need not abide by the \$20 gift ceiling. However, the fact that you and your coworkers have developed a friendly relationship with a government customer does not convert a gift from your company into one based on friendship. Generally, if your relationship with a government employee pre-dated your business-related contacts, gifts will be subject to less scrutiny than if the friendship arose by virtue of your business dealings. If the latter is the case, it is probably best not to give gifts based on personal relationships. In addition, if you claim or seek reimbursement for the gift as a business expense, the gift cannot be said to be based on a personal relationship.

◆ **“Widely attended gatherings”:** Provided other customers are invited free of charge, you also may invite government customers to your company's annual holiday party. Each agency, however, will have to determine whether its employees' attendance at what may be characterized as a “widely attended gathering” is in the agency's interest. This exception is typically reserved for educational seminars and similar

events, not for social gatherings, so you may want to combine an information session about new developments in your field with some light refreshments.

Keep in mind that, notwithstanding these exceptions, some government employees take the position that it is never appropriate to accept gifts from contractors. In such cases, or where a regulation has been violated (for example, the value of the gift exceeds \$20), a gift may be returned or the recipient may pay the donor market value for the item. If the gift is perishable (i.e., food, flowers, etc.), the item may, at the discretion of the recipient's supervisor or an agency ethics official, be donated to charity, shared within the recipient's office, or destroyed.

If you have any concerns regarding giving gifts or entertaining customers during this holiday season, you should seek guidance from your in-house or outside counsel, who also may want to consider consulting with the applicable agency ethics official.



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