## CONTRACT PROVISIONS TO DISCOURAGE INFLATED CLAIMS ON PRIVATE CONSTRUCTION PROJECTS

BY SCOTT D. CESSAR

Claims for additional compensation on construction projects are not uncommon. Many claims are well supported and meritorious and result in an adjustment to the contract. Some claims, however, while they may have merit as to entitlement, are greatly inflated as to costs. This is due to a mindset among some in the construction industry that it is an acceptable practice to submit claims with exaggerated costs for purposes of negotiating a compromise somewhere in the middle. These are the claims that stand the greatest chance of resulting in expensive and protracted litigation.

The practice of submitting inflated claims causes problems for owners faced with claims from general contractors and general contractors faced with claims from subcontractors. In addition, suppliers of equipment to both general contractors and subcontractors also find themselves sometimes in the position of having a large back charge due to alleged delivery delays or malfunctioning equipment that result in contractors seeking recovery of substantial delay and loss of productivity costs.

On federal government projects, inflated claims are constrained by the Contracts Disputes Act, which requires contractors to certify under oath all claims over $100,000. If a claim is determined to have been falsely certified, both the company and the representative that certified the claim may be held liable under the False Claims Act for civil penalties and damages of $5,000 to $11,000 per violation and up to three times the amount of the false claim. Also, 32 states have false claims acts that govern procurement between those states and private contractors.

Although state prompt payment acts, where enacted, may have prevailing party attorney's fee provisions, they generally do not have provisions comparable to the False Claims Act, which potentially penalize the submission of inflated claims on private construction projects. Here are, however, two suggested contract provisions intended to discourage the practice of submitting inflated claims.

First, the changes clause of the contract should require, as does the Federal Contracts Dispute Act, for the contractor to certify all claims over, at least, $100,000. The following language, borrowing from the Contract Disputes Act, would compel such a certification:

> "All change order requests for amounts in excess of $100,000 must contain a certification under oath and signed by an authorized representative of the Contractor that the supporting data are accurate and complete to the best of its knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Owner is liable. Contractor agrees that provision of this certification constitutes an express precondition for submission of a Change Order and that the failure to provide such a certification shall constitute grounds for denial of the Change Order."

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While it does not provide a direct financial consequence to submitting a false certification in support of an inflated claim, such as in federal contracting, requiring such a certification should cause a contractor some pause. From experience on federal projects, the certification process discourages the submission of frivolous or unwarranted claims. The certification process may also create potential credibility problems for the contractor that submits an inflated claim, files suit, and then later amends the claim to a more reasonable amount. He or she will be questioned at trial as to how he or she could attest under oath to a claim of "X" dollars pre-lawsuit and now the claim is one half of "X" dollars. There had better be a good explanation, or a skilled trial attorney will use these facts to impeach the credibility of the contractor and its claim.

Second, many construction contracts contain a provision by which the prevailing party may be awarded its attorney's fees

and costs. The court is then left to determine which party is the prevailing party. Oftentimes, courts will be reluctant to award significant attorney's fees based on the justification that, although one party prevailed, it was a "close call." A tighter prevailing party attorney fee provision, as set forth below, however, should serve to discourage the filing of inflated claims and oblige courts to award more significant amounts of fees:

"In any litigation, arbitration or proceeding brought under this Contract by either party, the prevailing party shall be awarded its reasonable attorney's fees, expert fees, and costs. In determining the prevailing party, the court or arbitrator shall base its determination by comparing the largest total amount of the claim or claims requested by the Contractor at any point in the proceeding and without reference to any subsequent downward modifications by the Contractor, as compared to the total amount awarded to the Contractor."

The purpose of this bilateral attorney fee provision is to discourage the filing of the inflated claim that is then amended prior to trial to a more reasonable amount. A more strident contract provision is a unilateral attorney fee provision under which only the owner may recover its attorney fees and not the contractor. Such a provision may even peg the amount of fees and costs recoverable by the owner to the percentage recovery of the contractor of its largest total amount claimed during the proceeding as follows:

"In the event of litigation or arbitration arising out of this Contract, the Owner shall be awarded its reasonable attorney's fees, expert fees and costs as measured by a percentage of the Contractor's claims, based on the largest amount claimed during the proceeding, as a function of the total amount awarded to the Contractor. By example and for the avoidance of doubt, if the Contractor is awarded 60 percent of its claim, the Owner shall be awarded 40 percent of its attorney's fees, expert fees, and costs."

This clause is a hammer clause, and the common law of some states may result in a challenge to its enforceability because it is unilateral. However, in view of the fact that construction contracts usually involve sophisticated parties dealing at arm's length, the odds are that the clause would be enforced. In addition, it is not highly likely that a contractor will want to fund a legal challenge to the enforceability of the clause on a somewhat esoteric legal issue that a court or arbitrator could defer until the end of the case.

In closing, if you are tired of exaggerated claims, there are ways to strengthen your contracts to discourage them and to penalize those who engage in the practice of presenting such claims. BG

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