

BOOK REVIEW



By **JONATHAN A. DEMELLA**

Federal Government Construction Contracts

The second edition of *Federal Government Construction Contracts* has declared dual purposes: “to provide the occasional construction lawyer, consultant and contractor with the basic knowledge of

federal government construction contracting regulations and case law,” and “to provide the experienced government contract practitioner with a sophisticated analysis of the issues and a ready source of case law.” Along the way, the book also seeks to fill the gap between several well-known treatises on federal government contract law (perhaps the most notable being the Nash & Cibinic series) and the numerous treatises on construction law that do not address the complexities and challenges of building for the federal government.

For the most part, the book achieves its aim. The editors, each of whom is an experienced government contracts counselor and litigator, clearly took pains to ensure that the book covers key issues with up-to-date citations. There are frequent and helpful cross-references among chapters, a useful index, and comprehensive endnotes behind each chapter that are cross-referenced to a table of cases. That said, the book’s most evident strength, and the key to its longevity, lies in the balance struck between its breadth of coverage and depth of treatment. For this reason, I believe that *Federal Government Construction Contracts* will have a continuing presence and be a frequently consulted text by both novices and experienced government contracts practitioners.

The introduction reflects a tone of cautious optimism for those considering contracting with the government, and opens with a humorous but nonetheless accurate warning: “Contracting with the federal government is like dancing with a gorilla. With very few exceptions, you dance the way the gorilla wants you to dance and if you don’t do what the gorilla wants, things can get ugly very quickly.” Although most seasoned practitioners will not find the substance of the introduction surprising, practitioners new to government contracting will find its discussion of the Federal Acquisition Regulation (FAR) system and governing law, the typical commercial practices that are illegal with a federal government customer, the role and significance of the contracting officer, and the dispute resolution process, to be most enlightening.

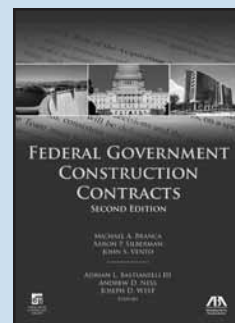
Following the introduction, the chapters are sensibly

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organized. The first seven focus primarily on the bid through pre-award period, beginning with a discussion of sealed bidding, competitive negotiation, and alternate delivery systems, including indefinite delivery/indefinite quantity (IDIQ) task order contracts and the construction specific design-build contracts and construction management contracts. Fundamental government contract principles—for example, what “best value” means in a negotiated procurement—are discussed and illustrated with cases focusing on construction disputes. Legislative and regulatory history is also covered to provide helpful, historical context when appropriate. A good example of this is the exception from the general rule requiring price competition for the acquisition of design services, and how this led to the passage of the Brooks Architect-Engineers Act, including recent amendments thereto.

Among the more notable features of the book, Chapter 4, “Architect-Engineer Contracting,” is new to the second edition. It discusses in detail the Brooks Act and why, even with the aforementioned exception for the acquisition of professional design services, the architect and engineer must still navigate through a highly regulated procurement and performance process. Specifics of the selection process, with emphasis on the scope of services, funding limits, and the standard of care applicable to architects and engineers, are covered, as well as issues specific to architect-engineer contracts and, significantly, how the federal government’s cost estimate can affect the basis for the funding limitation incorporated into the design services contract.

Chapter 7 is also a “must read” for the novice and experienced practitioner alike. After a review of the *Christian* doctrine and the standard rules regarding contracting authority, the chapter takes on improper business practices, first focusing on transparency requirements and, specifically, recent mandatory disclosure and internal control provisions, and whistle-blower protections. These sections deal extensively with changes to the FAR that were implemented in 2008, as well as the enhanced protection afforded whistle blowers under the American Recovery and Reinvestment Act of 2009 (ARRA). The chapter continues with an analysis of improper pricing practices and the rules for interacting with



Federal Government Construction Contracts, 2d ed.,
edited by Michael A. Branca,
Aaron P. Silberman and
John S. Vento
880 pp.
ABA Forum on the
Construction Industry
\$199.95
(\$159.95 for Forum members)

federal employees; notably, a contractor new to federal procurement will find that certain practices otherwise permissible in the private sector—for example, offering a gratuity to an owner as a showing of goodwill—are illegal when dealing with employees and officials of the federal government.

The succeeding chapters cover issues that arise during performance, prior to the pre-litigation (i.e., “request for equitable adjustment,” or REA) and litigation period. Where the introductory chapters center on traditional government contract concepts, many of the chapters that follow build on traditional construction concepts or, at the very least, concepts common to commercial and government construction, such as changes, differing site conditions, inspection, acceptance and warranties, and termination for default. Consistent with the book’s general theme, however, such commonality of issues does not necessarily mean that the commercial contractor will know what to expect when dealing with the government, and these chapters appropriately address and highlight the distinctions.

For instance, the chapter on changes discusses the contracting officer’s extensive, and at the same time rather circumscribed, authority to issue change orders, as well as the elements and types of “constructive changes” typical to government construction contracting, such as interpretation of and inconsistencies between specifications and drawings, defective specifications, inspection and testing, limits on or changes to contractor means and methods, constructive acceleration, breach of implied duties, and the cumulative impact of many changes. The chapter covering differing site conditions (DSCs) offers a thoughtful synthesis of the law from the various courts and boards of contract appeals interpreting the DSC clause, and flows into various “practical issues” that the contractor and practitioner must consider when pressing a DSC claim. The chapter covering termination for default includes a practical comparison of FAR and American Institute of Architects (AIA) default termination provisions, a list of contractor defenses, and a discussion of the government’s burden of proof for sustaining a default termination.

For the most part, the remaining chapters in this section of the book address issues specific to government contracting that arise in the course of performance—issues with which the commercial construction contractor may not be familiar. The chapter on payment and acceptance covers the legal and practical significance of government acceptance, the various exceptions to the finality of acceptance, and the warranty provisions on which the government can rely to protect itself from defects after acceptance. Chapter 11, “Payment and Contract Funding,” addresses satisfaction of requirements under the Prompt Payment Act, limitations on the obligation of government funds set forth in the Anti-Deficiency Act (and the special exceptions available to agencies such as the Army Corps of Engineers to obligate the full price of a contract in advance of appropriations), the government’s right to set off or withhold funds, and the procedures by which contract debt collection occurs.

The chapter devoted to “Socioeconomic Issues in Government Contracting,” covers a broad range (perhaps a bit too broad) of special government contracting programs such as those administered by the Small Business Administration, and those governed by the Buy American and Trade Agreements Acts, and the Davis-Bacon and Service Contract Acts. It offers a fine general overview and, as the author acknowledges, each program discussed could justify a chapter in itself. That said, given the increasing number of set-aside contracts designated for small businesses and the distinct advantages available to smaller contractors seeking construction work from the federal government (such as through the SBA’s mentor-protégé program), future editions of the book may benefit from more comprehensive treatment in separate chapters placed earlier within the book.

The next several chapters address the substantive and procedural issues common to litigation against the federal government. These include an informative discussion of the difference between an REA and a claim, the prima facie elements of a claim, the importance of the certification required for larger claims, timeliness requirements for presentation of a claim, and what the contractor can expect from the contracting officer in the form of a “final decision.” Also addressed is how to choose the appropriate forum (which the legal practitioner or advisor will find very helpful and thought-provoking), how to get paid if one finds oneself in the enviable position of prevailing against the government, and the extent to which attorney’s fees and expenses are recoverable under the Equal Access to Justice Act. An entire chapter is appropriately reserved for alternative dispute resolution (ADR). In addition to a discussion of the various types of ADR used by the federal government, this chapter addresses the significant differences between negotiating with a government representative and a private owner, perhaps the most significant being the government representative’s motivation to protect the public purse and how this affects the negotiation process.

The following chapters address the problems that most frequently arise in construction contracting: defective specifications and delay, suspension of work, acceleration, and disruption. In addition to covering basics such as the *Spearin* doctrine, there is an interesting and timely discussion devoted to the interaction between design-build contracting and the government’s implied warranty, which advises that a properly administered design-build contract transfers the risk of design insufficiency from the owner to the design builder. This will certainly be significant (and frustrating) to any contractor that has endured an overactive and overbearing design review process that not only departs from the contract terms, but also essentially transforms the contract from design-build to the more traditional design-bid-build model, in which the government, not the contractor, should be responsible for any defective specification. The chapter on delay is equally engaging and informative. “Time is money” sets the tone and, after a brief introduction of basic delay concepts, the chapter pro-

ceeds to define and describe the various categories of delay in government contracting, including excusable delay, compensable delay, and unexcused delay, discussing the implications of each upon the contractor.

The next two chapters address pricing of claims and overhead costs. Notably, this section discusses standards of proof required of the successful claimant and is appropriately punctuated by the cautionary tale (read, horror story) likely known to all who have ever even contemplated the certification of a claim to a contracting officer, *Daewoo Engineering & Construction Co. v. United States*, in which the U.S. Court of Federal Claims imposed \$50.6 million in damages on a contractor that filed a \$64 million inflated (and false) claim against the federal government. The chapter on overhead costs complements its predecessor by focusing on how the contractor can best capture and recover overhead as part of any claim or REA. Sources of law controlling recovery of overhead are introduced and explained, including a discussion of the longstanding *Eichleay* formula and the several prongs that must be established for recovery. This chapter's strength is best seen in its organized and clear presentation of an arguably complex and confusing, but nonetheless significant, element of contract damages, and will undoubtedly prove to be a go-to source for any contractor contemplating a claim that includes project or home office overhead.

The book's final chapters cover issues unique to public procurement, as well as issues that, although present in private construction, warrant coverage because of the special rules that apply in public procurement situations, such as the rules regarding subcontracting. Complementing the chapter on subcontracting is a separate chapter devoted to surety bonding, which significantly expands on the discussion of the Miller Act in the preceding chapters and reviews the various statutes and regulations requiring bid, payment and performance bonds on federal construction projects. A discussion of the types of claims covered by the Miller Act, and the payment bond defenses available to the surety against payment bond claimants offers further practical guidance.

Fraud, funding, and federal grants are discussed in the book's final three chapters. The discussion on fraud opens with an overview of the recent trend in private contracting to throw in all claims when confronted with a dispute—actual, potential, and perhaps overstated—to see what will fall out, and then well-advisedly warns of the disastrous consequences awaiting the contractor that utilizes this approach against the federal government—witness *Daewoo*. The special concerns of qui tam litigation, as well as a basic outline for defending against a False Claims Act (FCA) claim and the other antifraud statutes that commonly arise in an FCA action offer welcome practical guidance. Keeping current, the chapter closes with a discussion of the recent FAR requirement that contractors have a written code of business ethics and conduct, and makes a number of helpful recommendations for avoiding civil and criminal FCA and other fraud actions.

In view of the massive increase in U.S. military spending since the publication of the first edition in 2003, as well as the recent passage of the ARRA, the editors of the second edition wisely included a chapter devoted to funding and related issues regarding federal government construction outside the United States. This discussion aims to provide lawyers with a fundamental understanding of the fiscal, statutory, and regulatory legal regime applicable to military construction and, particularly, military construction outside the continental United States (OCONUS). The chapter opens with an interesting overview of the constitutional authority to fund U.S. military operations (including construction projects), followed by a discussion of the legislative framework regulating that funding, emphasizing the three fundamental limitations on expenditure of funds: purpose, time, and amount. This framework is then discussed within the context of Department of State and Department of Defense (DoD) authorizations and appropriations, the primary means by which Congress

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has provided funds necessary for DoD to fund its worldwide contingency operations, including the global war on terror and combat-related construction.

The book's last chapter addresses federal grants, a topic also new to the second edition. The chapter first identifies the important laws and regulations controlling federal grant programs and, in turn, the effect of those laws on state and local contracting efforts supported by such programs. State and local procurement under federal grants is also addressed, including basic procurement procedure, the difference between discretionary and mandatory grants, federal clauses and provisions required in state and local contracts supported by federal grants, and conditions regarding the proper use of grant funds. The chapter closes with an important discussion of the recent expansion of the FCA that now covers contractors receiving federal grant funds, and a brief statement on where contractors can find construction project grants.

Notwithstanding my positive response to this book (which should be evident from the foregoing comments), there is always room for improvement, and such is the case here. Perhaps most significant, future editions may benefit from the increased input of its editors to lend greater flow and cohesion across the chapters. Although this may not necessarily assist the more experienced practitioner occupied with a pointed research topic—a task for which this book is well suited—the less experienced practitioner,

consultant, or contractor will undoubtedly benefit from the editors' keen insight in linking, distinguishing, and synthesizing the broader concepts facing the construction contractor that contemplates working for the federal government. If the editors succeed in doing that, I believe the larger and more significant themes critical to an understanding of federal construction contracting will be appropriately emphasized and allow the reader to come away with a sharper impression of the "big picture."

That said, it is only on rare occasions that events align in such a way as to offer a particular insight that one might miss or fail to appreciate under slightly different circumstances. It so happens that my deadline for this review fell within the same week during which I had the opportunity to hear senior leaders of the Naval Facilities Engineering Command, the Air Force Center for Engineering and the Environment, the General Services Administration, and the Corps of

Engineers speak to the Associated General Contractors of America on the most current and pressing issues affecting federal construction. With the substance of "Federal Government Construction Contracts" fresh in my mind, I found that the issues most on the minds of our government's leaders who are responsible for overseeing military and civil construction—for example, the increasing use of design-build, the use of construction management or "early contractor involvement contracts," and funding for extensive construction in Guam, to name but a few—were often anticipated and addressed by the editors and authors of this second edition. A stronger confirmation of this book's relevancy and near- and long-term usefulness would be difficult to imagine. I, for one, know that it will continue to be among my primary sources for legal authority when I confront issues involving construction for the federal government. 