SCRIBBLES SQUIBS #37 (August 3, 2015)*

MEANS AND METHODS – CONTRACTOR ENTITLED TO EQUITABLE ADJUSTMENT WHEN OWNER INSISTS ON MORE EXPENSIVE METHOD OVER ONE THAT COMPLIES WITH THE BID DOCUMENTS

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I. INTRODUCTION.

Apropos to our last *Squib* on how courts determine the meaning of every day words, the case being reviewed in this *Squib* significantly depends on the meaning of the word 'concealed' and, to a lesser extent, the meaning of the words 'building materials'.

The discussion of 'means and methods' in my experience usually involves a defense by the owner or architect to avoid responsibility for claims by contractors for their increased costs caused by unclear or erroneous bid documents, particularly as to the sequencing and time durations of operations. In other words, this is often used as a *defensive* strategy to avoid responsibility for claims. After all, from an owner's standpoint, it is the contractor which establishes by what 'means and methods' the contract work will get done, which phrase is capable of very wide and expansive interpretation.

In this case, the contractor used its contractually compliant 'means and methods' to support a claim for an equitable adjustment from the owner. Here, the 'means and methods' employed by the contractor met the requirements of the contract documents but the owner wanted a different and more expensive method of construction. The United States Civilian Board of Contract Appeals (Board) held in the case of Columbia Construction Company against General Services Administration ('case' or 'the case') that the contractor was entitled to an equitable adjustment under these circumstances. (If you would like a copy of this decision or of any court case we review, send us an email and we'll send it along.)

The project was a modernization project involving the IRS service center in Andover, MA.

This decision was obtained, at least in part, by the contractor's use of a key document obtained through discovery prior to the hearing before the Board in which the owner's engineer told the owner, essentially, that it had no basis for its decision and would probably lose the case. "Discovery" is one of the phases in litigation where a party has a right to question the other side in writing (or, in person) as to aspects of their claim or defense and to review their information and documents prior to a hearing or trial. In an upcoming *Squib*, we will review how a contractor can use requests for production of documents (while in litigation) and Freedom of

Information Requests (not requiring a pending litigation) to develop and prove their claims and defenses.

II. THE DECISION.

In the above-referenced case, the Board held that the contractor would be entitled to an equitable adjustment on the following facts.

The general contractor (Columbia) contracted with the General Services Administration (GSA) to upgrade an existing IRS service center in Andover, Massachusetts (project or Project). The upgrade included the provision and installation of a security system, which work was to be performed by Columbia's electrical subcontractor (Griffin).

The issue in this case involved the security system work. The existing construction had an "open" system with security cabling not run in conduit or in raceways. For the upgrade, the security cabling was required to be "concealed *or* in conduit (EMT)" unless specifically approved in writing by the contracting officer." (Emphasis added). So, in essence, the former 'open' system of cabling was to be replaced by a 'closed' system of cabling.

The specifications defined "concealed" as follows: "covered completely by building materials, except for penetrations (by boxes and fittings) to a level flush with the surface as necessitated by functional or specified accessibility requirements."

In Section 010900, "Definitions and Standards", is the following:

> 1.2.C "Except for overlapping or conflicting requirements, where more than one set of requirements are specified for a particular unit of work, **option is intended to be <u>contractor's</u> regardless or whether or not it is specifically indicated as such**." (Emphasis added).

In specification Section 260519, "Conductors and Cables," is the following:

> 3.2.A "Conceal cables in finished walls, ceiling and floors unless otherwise directed."

In Section 271000, "Communications Cabling Systems," is the following:

> subpart 3.3.A: "Conceal conductors and cables in accessible ceilings, walls, and floors where possible."

Griffin interpreted these specifications to mean that the 'concealed' requirements could be met by installing the security cabling in cable trays either above the drop ceiling or underneath the raised access flooring system, which was to be provided under this contract, because this would "cover" the security cabling "with building materials." (**ED**. This seems to be a reasonable interpretation. Based on a legal doctrine known as *'contra proferentem'*, when one of the two parties to a contract drafts the contract, then the non-drafting party is entitled to the more

favorable interpretation when multiple conflicting meanings are contained in the contract documents.)

When GSA observed Griffin installing security cable in this manner, it immediately directed Griffin to stop this work and to install this cabling in conduit "per the contract." Griffin complied and then submitted a claim for its increased costs. GSA denied the request and the case came to the Board.

The Board's interpretation of the bid documents was that the contract gave the contractor the option of using conduit or another installation method that concealed the security cabling by covering it completely in building materials. The Board rejected the GSA's argument that the drop ceiling and the raised access flooring did not meet the definition of "building materials" under a plain interpretation of the contract. Considering the contract as a whole and various other specifications which defined "concealed" as including installation below the raised access flooring or above the drop ceiling – such as for communications cable - the Board held that it would be unreasonable to interpret the contract to exclude security cabling from this permitted installation method. Because "GSA unreasonably stopped [Griffin's] planned installation", it was required to "pay the increased price for demanding that the security cabling be installed in conduit."

Of some importance to the decision is that Columbia obtained during 'discovery' a document from a GSA electrical engineer that essentially admitted that the GSA requirement to use conduit exceeded the security system specifications and which noted that "if this case were to proceed forward, the government would likely be found responsible for a large portion of the stated costs..." The document also detailed a lack of consensus among GSA personnel as to whether or not a raised floor should be treated as a piece of equipment or furniture, adding: "If we're unable to agree with this statement ourselves , we'd likely be on shaky ground if this case were to proceed."

It won't come as any surprise that in his testimony, the engineer tried to move away from some of these statements, saying that since he wrote that memorandum, his thinking had 'evolved'. While the Board cited several specific passages from this document, it did not state that it based its decision upon it. But, as a practical matter, such statements in litigation are considered to be 'admissions' or 'admissions against interest' and can be very significant evidence. Where pre-trial document reviews often involve a weary examination of supernumerous documents, trying to separate the wheat from the chaff, this document was clearly wheat. *Enriched* wheat.

Some practice points to keep in mind and to help you win more of your cases. When a witness appears in court, assuming the lawyer and the witness did their jobs, the witness was 'prepared' and at least that witness's direct testimony (elicited by the attorney for the party who hired him) should go relatively smoothly. While opposing counsel did not have an opportunity to 'prepare' the witness, since the witness is meeting the attorney for the first time from the witness stand on cross-examination, that witness had no opportunity to prepare opposing counsel. For, 'preparation' goes in both directions. The lawyer would say during preparation,

'these are the questions I am going to ask you, in this order and in this way' and then the lawyer and witness would discuss together what that witness's answers to these questions would be.

Searching for documents and taking document reviews very seriously – although often a mind-numbing process in going through the 98% or more documents that have nothing to do with the dispute or won't help you – is very important. The great majority of time, when a fact witness makes a statement or writes a letter or responds to a letter, that individual is not thinking about 'how will this look in litigation'. Rather, the witness is simply trying to do his/her job and is working towards accomplishing his/her employer's desired result and/or the next step necessary to achieve that result. In other words, as compared with court or arbitration testimony, these oral and written statements can often be unguarded, not prepared to support anyone's position in the matter. This is especially so with less formal forms of written communications, such as emails, where many writers use a 'stream of consciousness' approach – thinking as they are writing (or, possibly not until after their writing) rather than thinking *before* they write. Discovery as to emails and other 'electronic communications' is one of the current fads in the lawyer business, one that is likely to stay.

Some comments on witnesses. I attended a seminar where Attorney James St. Clair was speaking about witnesses. As some may recall, he was President Nixon's attorney during the Watergate scandal, which essentially drove President Nixon out of office in 1974. He said something to the effect that: "There aren't 'the plaintiff's witnesses' and 'the defendant's witnesses'. There are just plain 'witnesses.' "

I have found in my trial practice that some of my best witnesses have been *the other guy's* witnesses. It is important when preparing a trial strategy to consider what any particular witness might testify to rather than to automatically discount the other guy's witnesses as some folks you might use to prove a point. These suggestions only apply to non-expert witnesses, so-called 'fact witnesses'.

'Expert witnesses', who testify for a living, tend to 'stay on message' a lot more consistently than do 'fact witnesses', who are witnesses who will testify about what they saw, heard, said, did, etc. Having said that, I was trying a million dollar case in which both sides had scheduling experts as to various delay issues in the case. On cross-examination, the other side asked my expert a question about what the contract required as to a certain scheduling aspect. The witness did not know the answer without reference to the contract. The lawyer asked him if he knew where in the contract this was discussed. Our feckless witness went to the table of contents of the specifications trying to look this up. Suffice it to say that the 50k plus the client had paid to this witness might have been more or less wasted.

III. CONCLUSION.

From a Massachusetts legal perspective, this case has some precedential worth but more as 'persuasive' authority (law that a judge *can* follow but is not compelled to follow), rather than as 'mandatory' authority (law that a judge *has* to follow). But, even with the more limited persuasive authority status, my experience has been that Massachusetts judges can be impressed

by well-reasoned and well-written decisions written by whomever. I had a matter in front of a superior court judge and tried to quote to him some decisions by other superior court judges, which, strictly speaking, is not 'authority' for the judge in question because it is not a decision from a higher (appellate) court. I said to the judge, 'Judge, you can refer to decisions of other superior court judges'. The judge said, rather candidly, that this depended on who the judge was.

A great deal of public contract law and principles come from the federal realm, which cases are often controlled by the Federal Acquisition Regulations. Two examples of this are the origination or further development of 'Eichleay' claims (a certain kind of a delay claim) and of terminations for convenience. Sooner or later, much of this federal law finds its way into Massachusetts courtrooms and Massachusetts law, with or without local modifications.

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* A *'squib'* is defined as 'a short humorous or satiric writing or speech'. Wiktionary defines a '*squib'* as: "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses." This case is being studied rather intensively by my new friend Earl who with the able assistance of his two factotums, Rocco and Luigi, is reviewing every job he has done in the last five years to see if he has any 'means and methods' claims lurking in his files. When confronted with files containing complete, executed final releases of the owner by Earl's company, he says things such as: "that can't be enforced because I signed that after lunch, if you catch my drift". Or: "that was signed by that incompetent imbecile Joe, whose sorry a** I had to fire". When all else fails, he may be silent for a bit but, invariably, he fondly looks with a smile at his new Fellowes 79Ci shredder, a device some use to manage their files. "Much improved over earlier models," Earl allows. "It doesn't make those long skinny shreds that some nitwit who's got five days and absolutely no life and a lot of scotch tape can put together. Rather, it cross-shreds *everything*," he says, demonstrating by making a cutting gesture with his arms as if they were scissors, "so that what goes into the basket is something that looks a lot like confetti." That's good information to have. The Walpole Fire Department is getting *very* sick of coming out to our office because some unknown employee keeps setting the waste baskets on fire. Who are Rocco and Luigi you might ask? (Long time ***Scribbles*** readers already *know* all about Rocco and Luigi.) For the very few Johnny-come-latelies – an extremely small number, *Squibs only* being sent to those with a proven track record of success and erudition, most of whom also vote Republican, have at least one dog and no more than six cats. Rocco and Luigi? More on them later.

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