Neel, Hooper & Banes, P.C.

Counsel Leaders Trust

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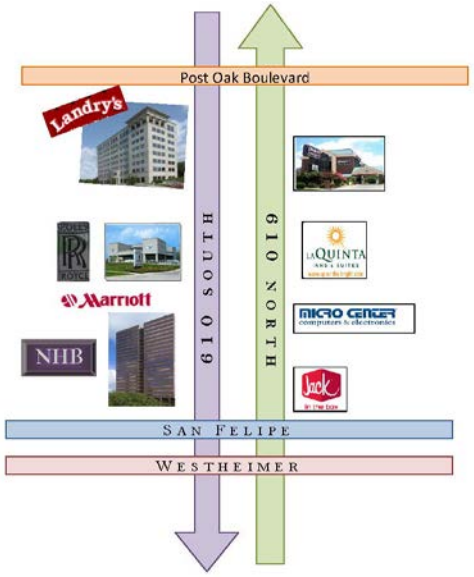
"NHB" NEWS:

We want to remind everyone of our new office address at 1800 West Loop South, Suite 1750, Houston, Texas 77027-3272.



Bryant S. Banes has been recognized as a leader in the field of labor and employment law in the upcoming 2012 edition of Chambers USA, and has recently become a Fellow of the Litigation Counsel of America and a member of the Wage & Hour Defense Institute.

According to Martindale Hubbell's peer review, Bryant S. Banes, Sean D. Forbes and Paul T. Gregory have received AV® Preeminent ratings in their respective fields of government contract, labor and employment law, and commercial litigation.

Super Lawyers® has named Sean D. Forbes a Texas Rising Star in Government Contracts for the fourth year running.

SPECIAL ALERTS:

NLRB Issues Effective April 30, 2012: The NLRB has made changes in the procedures for union elections which are not very employer-friendly. These changes involve limiting the issues that can be heard in a pre-election hearing, limiting post-hearing briefs subject to the hearing officer's discretion, consolidating pre- and post-hearing appeals into one post-election procedure, eliminating the 25 day waiting period before an election can be held following a pre-election decision, establishing stricter guidelines on when an interlocutory appeal will be allowed and establishing standards for post-election procedures which will limit the review of decisions. The rule changes are being contested in court, but for now the deadline is coming! If you have questions, give us a call.

Posting Deadline Postponed Again! The NLRB was going to require all employers to post notices in the workplace informing employees of their rights to unionize. This requirement has now been postponed until at least September 2012. We will keep you posted on this!

GOVERNMENT CONTRACTS:

A Few Perspectives on War and Government Contracting. Several articles have been published recently relating to Wartime Contracting, otherwise known as Contingency Contracting. For most of these, the thoughts and recommendations miss the mark. They do this because they either do not understand the vagaries of contracting in a wartime environment or they are overambitious to build layers of oversight that will ultimately do little to cure the real challenges. They also forget what contingency contracting is really about: supporting military commanders.

With all that has occurred in Iraq and Afghanistan over the last 10 years, it is very interesting to see

how little in-theater contracting has changed from a practical standpoint. In 2004, this writer was the Chief of Procurement Fiscal Law for the military in Iraq. Brigadier General Casey Blake details the current contracting structure in Afghanistan in his recent article *Putting Contracting on the Offensive in Afghanistan*, Contract Management (March 2012), pp. 22-29.

General Casey emphasizes that the tough contracting challenges existing in war can only be solved with a strong partnership between commanders, program managers, contracting officers and, last but not least, contractors.

Commanders detail their needs and protect the battle space, program managers define the requirements and provide the money and technical oversight, contracting officers identify the best contractors to fulfill those requirements and perform administrative oversight, and contractors provide the solutions for value and report on their progress. It gets expensive when any of these partners forget their roles and shirk their responsibilities. To his credit, General Casey understands this. He may be unique.

Distrust and an "us vs. them" mentality seem to permeate the current climate between the government and contractors. Whether this is because federal dollars are scarce or the often mistaken impression that each is trying to get over on the other is irrelevant. Ultimately, it is the taxpayer that funds all of these shenanigans. It is high time both sides understood this and began working together. This does not mean that we don't do things to either protect your company or the public fisc, as appropriate. It does mean, however, that mission accomplishment, safety, civility and competition are still overarching goals in government contracting, and all have a responsibility for them.

The Commission on Wartime Contracting has spent three years investigating why the government wasted over $30 billion on contracting in Iraq and Afghanistan. The answer was clear to this writer in 2004: (1) the government should always work to ensure that it has and maintains a sufficient contractor base to foster competition for the major products and services it buys; (2) the government should never contract out force protection of military missions; and (3) the government should engage its contractors and always oversee not only the award of a contract, but more importantly, performance to ensure everyone has and meets the same objective. When these simple rules are not followed, problems occur.

There are many examples of this. The Congressional Research Service recently published a report entitled *Wartime Contracting in Afghanistan: Analysis and Issues for Congress* (November 14, 2011). The report made several recommendations, but it is the case study on the Host Nation Trucking Contract that is the most interesting. A review of this case study demonstrates that all three rules above were violated. There was an insufficient base for competition, exorbitant costs fueled by corruption and private security costs, and no performance oversight that ensured success. Unfortunately, the recommended options to fix these problems are where this report breaks down.

As is often seen in such reports and articles discussing them, the writers believe that a combination of flow down contract clauses, enforcing debarment and suspension rules, and greater "strategic oversight," *i.e.*, micromanaging from the Pentagon, will fix all such ills. This is silly. Anyone familiar with these proposals know that they offer too little too late. It takes six years to get anyone debarred, and often just as long for the Pentagon to react to simple issues. Commanders on the ground in a war need real-time solutions to ensure that their service and supply chain does not grind to a halt.

In 2004, while serving the military in Iraq, one of the first actions we did in February was preclude private security for military-related missions (we also barred interrogations using anything other than the Army manual, but that is another story for another time). This was despised and criticized at the time, at least until April 9, 2004; it was formalized in May. The next action we took in March, 2004 was to establish a formal procedure, known as the Joint Acquisition Review Board (JARB); the JARB confirmed and prioritized requirements and ensured all were funded appropriately. In May 2004, we worked to ensure that contracting was done only on a progress payment basis, with no payments made until deliveries were confirmed. In September 2004, we were able to convince all the military services that a Head of Contracting Activity (HCA) was needed in theater; the Joint Contracting Command was born. This provided the necessary contracting flexibility and policy oversight that Commanders needed.

We spent the rest of our time in theater that year building relationships to develop a contractor base and training those responsible for oversight. Those

contractors violating the rules were terminated, not paid, and dealt with swiftly by Commanders, who could exclude them from theater or pull their privilege to visit military bases. The foregoing cured most issues before they became problems. This is not to say mistakes were not made.

Some years later, using hindsight, politics, and useless rules, those with their own agenda seek to further complicate things beyond recognition. They have departed far from measures designed to ensure Commanders get what they need when they need it, for fair value. They also ignore that there are a multitude of good contractors who have served—and continue to serve—honorably and fairly. What was once a partnership to fulfill a military mission has, in many cases, devolved into a "gotcha" game between the government and contractors. Perhaps someday it will be different, but I fear such will not occur before we are all at the wrong end of the proverbial gun.

Marketing v. Misrepresentation: Honesty Is Always The Best Policy.

Contractors should put their best foot forward when submitting a bid for a competitive proposal, but be careful that those efforts don't cross the line from marketing into misrepresentation (aka lying!). In a recent protest decision, *GTA Containers, Inc. v. United States*, the Court of Federal Claims outlined the factors it considered in determining that the awardee made a material misrepresentation requiring termination of the awarded contract.

The RFP solicited proposals for the Marine Corps Systems Command (MCSC) which intended to make a single award based on overall best value to the MCSC. The Solicitation identified three factors that would be evaluated in order of decreasing importance: (1) past performance, (2) technical capabilities, and (3) price. Because the awardee used a subcontractor whom the government had favored in the past, the government gave the awardee a high rating for past performance. However, the evidence indicated that the proposing of the subcontractor was just used to secure a high past-performance rating, and that the awardee had no intention of utilizing this subcontractor in its performance of the contract.

In order to establish a material misrepresentation sufficient to set aside an award, a Plaintiff must show (1) that the awardee made a false statement; and (2) that the agency relied on that false statement in selecting the awardee's proposal for the contract award.

The court found that Plaintiff had met its burden and established a substantial chance that it would have won the award but for the misrepresentation of the awardee by showing that the awardee made a material misrepresentation in listing the sub-contractor's past performance; that this constituted a clear violation of an applicable procurement regulation; that the awardee represented to the MCSC that the subcontractor was being proposed as a supplier and a subcontractor for this procurement; and that the MCSC's evaluation showed that the agency relied on the misrepresentation in evaluating the awardee's past performance, which was prejudicial to the plaintiff. Because of this finding the court set aside the award.

Remember the difference between successful marketing and misrepresentation…don't make false statements in any proposal!

Staying In Court Where You Belong – Exceptions To The Anti-Assignment Act. The U.S. Court of Federal Claims recently considered the case of *Liberty Ammunition, Inc. v. U.S.*, in which Liberty claimed that the Department of Defense (DoD), copied its patented bullet design and violated the terms of a non-disclosure agreement (NDA) by disclosing confidential information to potential vendors. The government denied Liberty's allegations and claimed that personnel reviewed samples and schematics of Liberty's designs and found them wanting, and decided to proceed with an in-house design.

The government filed a motion to dismiss, claiming that the court lacked jurisdiction under the Assignment of Contracts Act, one of the twinned acts comprising the Anti–Assignment Act, which provides that "[n]o contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned." According to the government, Liberty did not show that the NDAs survived when the Liberty assigned them to Liberty Ammunition Inc. However, the court found that the Federal Circuit has held that "jurisdiction under [the Tucker Act] requires no more than a non-frivolous allegation of a contract with the government," and that the government could not argue that Liberty's

contract claim was so baseless as to constitute a frivolous allegation.

Alternatively, the government claimed that the Liberty had failed to state a claim upon which relief could be granted, essentially making the same argument as that made under their jurisdictional claim. However the government conceded that courts have recognized a number of exceptions to the Anti–Assignment Act under which a government contract can be validly assigned to another party including the waiver and operation of law exceptions.

While the government often attempts to aggressively employ the provisions of the Anti-Assignment Act to excuse actions that infringe upon the intellectual property of government contractors, it is important for contractors to remember that there are significant carve-outs to the Act, including the waiver and operation of law exceptions which can provide the contractor with protection. Call us if you need to know more about these possibilities.

The Defense Base Act: Is Your Liability Limited? Recent opinions issued by the U.S. District Court for the Southern District of Texas (*Fisher v. Halliburton*) and the U.S. Court of Appeals for the Fifth Circuit (*Fisher v. Halliburton*) considered whether the Defense Base Act (DBA) applied to claims made by employees who were injured while working for a defense contractor supplying various aspects of civilian support to the U.S. Army effort in Iraq. The DBA is administered by the U.S. Department of Labor (DOL) and extends workers' compensation coverage, establishing a uniform, federal compensation scheme for civilian contractors and their employees for injuries sustained while providing functions under contracts with the U.S. Compensation is provided for injury or death for any employee engaged in any employment under a contract entered into with the U.S. where such contract is to be performed outside the U.S. If an employee's injury is covered under the DBA, he is generally precluded from pursuing a tort claim against his employer to recover for the same injury.

In reaching their decision on the employer's motion for summary judgment, the district court held that for the DBA to apply, the harm must result from one of the following: (1) an accidental injury or death-both undesired and unforeseen-arising out of and in the course of employment, or (2) an injury caused by the willful act of a third person directed against an employee caused by the employee's trade or occupation.

As a preliminary matter, the DBA only applies to claims made against an employer by their employees, not by independent contractors. Whether a worker is an employee or an independent contractor for the purposes of the DBA is determined by the relationship between the parties, not their contractual status. For an event producing an injury to be expected, and thus not "accidental" under the DBA, the employer must have had grounds or reasons to believe that the event was likely to occur; mere anticipation of or uncertain apprehension regarding the event will not suffice. Additionally, in order for an injury caused by the willful act of a third person to fall under the DBA, the willful act must be caused by the employees' trade or occupation. In Fisher, the plaintiffs had been injured in Iraq because they were Americans and not because of their occupation as fuel truck drivers; therefore the injuries did not qualify for coverage under the DBA as a willful act of a third person.

However, the Fifth Circuit heard this case on appeal and reversed the district's court decision, holding that the court did not properly interpret the scope of the DBA's coverage. Whether an employee's claims come within the DBA is resolved by determining whether the employee suffered an injury as defined by the DBA. Under the DBA, injury includes "an injury caused by the willful act of a third person directed against an employee because of his employment." While the district court found that the plaintiffs' injuries were not due to their employment, the Fifth Circuit disagreed, believing the only plausible inference to be drawn from the facts was that the plaintiffs were attacked because of their employment. The plaintiffs' employment consisted of supporting the U.S.'s rebuilding and security efforts in Iraq. Insurgents attacked targets related to those efforts. Consequently, the attacks occurred because of plaintiffs' employment and were the direct cause of the employees' injuries. The statutory requirement that an injury be directed against an employee "because of" his employment is meant to exclude injuries willfully caused by third parties that are motivated by purely personal reasons, rather than any nexus to employment. In fact, the court held that the attacks and resulting injuries fell squarely within the DBA's definition of injury. Plaintiffs' injuries were due to willful acts committed by third parties because of their employment and thus, the injuries were covered under the DBA. As a result of the plaintiffs' injuries being covered under the DBA, they

were barred from proceeding with their intentional tort and fraud claims. The court found that the DBA clearly evidences the intent that the act shall serve as the sole remedy for injuries or death suffered by employees in the course of employments which fall within its scope.

Government contractors performing on contracts that are under the DBA should be aware of the applicability to employee injury claims because once it is determined that a person falls within the scope of the DBA, the compensation scheme that it provides replaces all other liability. By the same token, a person not qualifying under the DBA would not lose all common law remedies against an employer. This is significant because while the DBA limits the liability of an employer in much the same way as a worker's compensation claim, a common law court action, such as a claim for negligence, could expose an employer to more extensive monetary liabilities.

Five Of The Worst Mistakes In Government Contracting Solicitations). Below are five of the most common mistakes made by government contractors at the solicitation phase of the federal contract procurement process.

1. Failure to read the entire solicitation, including clauses incorporated by reference.
2. Failure to read, consider, and acknowledge all of the subsequent amendments to the solicitation.
3. Failure to ask about a patent ambiguity in the solicitation.
4. Relying on the verbal representations of a government official rather than on the written solicitation.
5. Failure to request a post-award debriefing in a negotiated procurement.

For more information on these mistakes in the federal contract procurement process and others in various phases of the same, please see the book The 100 Worst Mistakes in Government Contracting. It is a wonderful resource for government contractors and may help you in identifying deficiencies you hadn't otherwise considered.

Risk of Withholding 10% of Contractor Payments for Deficient Business Systems. As some of you may have known, contractor business systems have come under fire by the Department of Defense (DoD), Congress, and the Commission on Wartime Contracting. The following is a description of relatively recent changes in the Defense Federal Acquisition Regulation Supplement (DFARS) that could potentially impact a contractor's ability to seek payment, as an attempt to control the "wasteful" spending and poor recordkeeping employed by some contractors. However, if this rule is not closely followed, it could provide ample room for the government to abuse its power and improperly deny payment to contractors.

On February 24, 2012, the DoD incorporated into the DFARS a rule requiring contractors on covered DoD contracts to establish and maintain acceptable business systems without any major deficiencies. Failure to do so could result in the government withholding partial payment on covered contracts. Such revisions have been incorporated into the. The interim rules were released on May 18, 2011.

The new rule adds a "Contractor Business Systems" subpart to the DFARS that requires contracting officers to include a new Contractor Business Systems clause in solicitations and contracts that require the use of a business system and are covered by the Cost Accounting Standards (CAS). This clause exempts small business contracts and defines a business system to mean an accounting system, earned value management system (EVMS), estimating system, material management and accounting system (MMAS), property management system, or purchasing system. The clause further requires a contractor to establish and maintain acceptable business systems in accordance with the terms of the contract. Be sure to review the clauses that are incorporated into your contract and be aware of whether or not you would be exempt from these newly imposed rules. Should you be unsure, feel free to contact our office.

Each of the clauses that apply to the various business systems contains criteria that must be met in order for a specific type of system to be deemed acceptable. Equally important, each clause contains procedures that outline how a contracting officer will determine that a significant deficiency exists. For all systems, a significant deficiency is defined as a "shortcoming in the system that materially affects the ability of officials of the [DoD] to rely upon information produced by the system that is needed for management purposes." As you can imagine, this definition can be used and abused by the DoD. NHB will keep a close eye on any developing case law to limit or expand this definition of "significant deficiency" so as to keep you prepared for any event.

Defense contractors should become familiar with the business system requirements outlined in the new DFARS clauses and be prepared to provide documentation establishing that their business systems are "acceptable." Also, if your company might fall into the category of those not having appropriate business systems in place, be aware of this potential ramification and take the necessary steps as soon as practical to ensure you don't find yourself in a withholding situation.

Good News Alert … New SBA Mentor/Protégé Program Might Be Coming Your Way! There's been some buzzing by the Small Business Administration (SBA) that the mentor/protégé programs are in the development stage for other non-8(a) programs, such as the HUBZone, Service-Disabled Veterans and the Women-Owned Small Business (WOSB) programs.

Did you know one major benefit to the 8(a)'s mentor-protégé program is that it protects participants from findings of affiliation? Word on the street indicates that the new programs for the other SBA groups will model that of the 8(a) program, including the protections against affiliation.

The SBA has not come out with the final rules and regulations for these new programs, so we are not sure as to how the new programs will actually be structured and regulated. But, having this program for those who are HUBZone and WOSB can provide great opportunity and assistance in an otherwise uncertain economic market.

Once the final regulations are released, we will be sure to notify those to whom it applies in the event they are interested in participating. In the meantime, if your company is part of an SBA program, start thinking about whether you would be interested in such a program.

A Termination For Convenience Can Be Anything But! There has been a sudden increase in terminations for convenience. This is attributable not only to the drawdown of services in Iraq and Afghanistan as the war effort comes to a close, but is also in response to serious budgetary concerns which have impacted the government's ability to secure funding for its contracts. In the next year, you might find yourself in this situation.

Thus, to ensure our clients are prepared for this possibility, we want to remind you of your rights, benefits and duties in the event that one of your contracts is terminated for convenience.

1. The government can essentially do this at anytime they feel it is necessary with few exceptions. Your contract can be terminated for convenience for a myriad of reasons such as: funding problems, scope of work increases or decreases early in the performance stage, and protests. Even if the government intends to recompete the contract, and you could be the new awardee, you are still entitled to file a claim for your expenses.
2. Some terminations for convenience can be done improperly or fall within those few exceptions. If you feel the termination has been done in bad faith, please be sure to let us know. You could be able to recoup expenses, including attorney's fees.
3. You are entitled to expenses associated with the contract up to the date of termination. Off hand, you might not feel that you have any such expenses, but a more careful review can reveal expenses you had failed to consider and are entitled to receive.
4. There are time limitations on how long you have to submit your claim, so act quickly!

Should you find yourself in this situation, please contact us at NHB so that we can assist your efforts to obtain funds to which you are entitled.

On appeal with the Office of Hearings and Appeals (OHA), the board cited to the following regulations:

A size protest in a negotiated procurement must be received by the contracting officer prior to the close of business on the fifth day after the contracting officer has notified the protester of the identity of the prospective awardee.

The board was not persuaded by Garco's argument regarding Ross's status, as the identification of the prospective awardee was enough to start the clock. The OHA denied Garco's appeal, confirming it was untimely.

This is important as it is different than the rule imposed in most other types of protests. Typically, it is not until the debriefing that the contractor learns

the reasoning behind government's decision. For purposes regarding the potential protest of an awardee's size status for a negotiated procurement, all should be aware of this distinction and file accordingly.

SBA Decisions are Reversed and 8(a) Applications Granted! NHB is witnessing a shift in how the Office of Hearings and Appeals (OHA) handles the SBA's improper denials of 8(a) Business Development Program applications. The SBA's 8(a) program can be highly lucrative and regularly assists many companies who, without the 8(a) preferential set-asides due to their small business status, would have some difficulty competing against bigger companies to secure government contracts. However, some classes of people are finding it almost impossible to gain admission, despite their application meeting all of the regulatory criteria. NHB has successfully argued before the OHA that previously denied applications should be granted admission into the program, resulting in their automatic admission. This recent trend is rare. Typically, the OHA treads lightly against the SBA's decisions and remands them back to the SBA to re-do the evaluation, suggesting they decide differently. This further delays the process of gaining admission into the program and is no guarantee as to how the SBA will re-evaluate. However, in several recent cases we have argued, the OHA has found that the SBA committed such blatant legal errors to require reversal of the SBA's decision, granting the applicant's admission immediately! Specifically, the OHA found that the SBA improperly justified the denial in violation of federal regulation, often ignored the value of the personal evidence statement (PES) as substantive evidence, and did not provide any cogent reason in the record for discrediting the accounts contained therein. Despite urging from the OHA with strongly worded opinions, we find that the SBA continues to commit the same errors and refuses to follow applicable statutes and regulations. Specifically, the errors we see most commonly are that the SBA improperly requires corroborating evidence, discounts the PES as evidence, holds Caucasian females to an impermissibly high evidentiary standard, and actively seeks to discredit the applicant in any way. Our hope is to eventually demonstrate to the SBA that their methods of evaluating applications are so fatally flawed so as to require a complete overhaul of their practices and training to comport with the regulations. There has already been a shift in the manner in which they support their denials, which is based in large part upon our appellate work. NHB is carrying this momentum forward into 2012 with many pending appeals before the OHA. We are highly optimistic about our efforts to change the SBA's practices through consistent case law. If you feel that the SBA has committed these errors against your firm, or know of any companies who might benefit from this unique service, please feel free to contact our offices.

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