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A Lawyer's View of Superior Knowledge

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The Superior Knowledge Doctrine—Under Attack!

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Introduction

The superior knowledge doctrine has been around for almost forty years. Over the years, contractors have evoked the doctrine in a variety of situations resulting in various formulations of the doctrine and its requisite elements. Recently, our office successfully defended two contractor appeals in which contractors alleged violations of the superior knowledge doctrine. In one case, the traditional notion of disclosure of superior knowledge applied; in the second case, the contractor attempted to expand the use of the doctrine to information unrelated to performance or the costs of performance. For this reason, we believe that every contracting officer should be familiar with the doctrine and understand its traditional applications as well as current attempts to expand its usage.

Aspen Helicopters, Inc. Case

The case which seeks to expand the traditional claims of superior knowledge is *Aspen Helicopters, Inc. v. Dept. of Commerce,* GSBCA No. 13258-COM, 1999 WL 795489 (1999), *appeal pending*, Fed. Cir. No. 00-1015.[3] The GSBCA denied a contractor's claim for costs incurred in acquiring and modifying a Partenavia aircraft. Aspen contracted with NOAA for lease of a twin-engine aircraft to perform aerial surveys of cetacean life in Gulf of Mexico waters. The period of performance consisted of a base survey period with three additional option periods, not to exceed two years. Aspen performed the base period; NOAA elected not to exercise any of the option survey periods.

During the same time as Aspen's lease contract procurement, NOAA was concurrently procuring a lease with option to purchase a Twin Otter II aircraft for the use of NOAA's Aircraft Operations Center (AOC), the agency responsible for coordinating requests for aircraft usage from all user agencies, to serve any mission need out of NOAA or the Department. NOAA publicized the requirement in the CBD (to which Aspen subscribed) and successfully obtained the Twin Otter. NOAA subsequently utilized the aircraft for the remaining Gulf surveys that were scheduled during 1993.

Aspen alleged, among other things, that the government failed to disclose its superior knowledge of its plans to lease or purchase a second aircraft, and not to exercise Aspen's contract options after the second aircraft became available to perform the work. Had it known about the concurrent procurement, Aspen argued, it would not have submitted a bid because of the diminished probability that Aspen would recover its costs across the entire contemplated period of performance.

Aspen attempted to expand the application of the superior knowledge doctrine beyond information related to technical specifications or information related to the costs of performance. The likelihood that the government will exercise an option period relates to the risk a bidder assumes when it spreads its costs over an entire contemplated period of performance. The costs Aspen incurred in the base period were not affected by the acquisition of the second aircraft. The GSBCA refused to expand the doctrine to cover this type of information and stated as follows:

> The superior knowledge doctrine is inapplicable to these circumstances. First, this is not a situation in which Aspen's costs of

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[3] Aspen has appealed the Board's decision to the Court of Appeals for the Federal Circuit. The appeal is pending.

> performance, or ability to perform, were affected by the information that Aspen maintains was withheld. The fact that NOAA was attempting to acquire a second Twin Otter aircraft, and the possibility that, if this attempt succeeded, a Twin Otter might at some point be available to perform some part of all of the optional survey periods under Aspen's contract, are not the types of information required for the contractor to perform under the contract that the doctrine contemplates the Government must disclose. In essence, the superior knowledge doctrine prohibits the Government from withholding special knowledge of novel information that it knows the contractor needs to complete performance and that the contractor would not have reason to know.

Id., at pg. 17, citing *Florida Engineered Constr. Products Corp. v. U.S.*, 41 Fed. Cl. 534, 542-43 (1998). Indeed, referring to the fact that NOAA synopsized the requirement in the CBD, the Board, in finding constructive knowledge, also recognized that this was not an instance of special knowledge available only to the government.

Aspen's second theory of recovery rested on its claim that the government breached its implied duty to communicate by not advising the company of its plans to lease, and eventually purchase, a Twin Otter aircraft, thereby negating exercise of the options in the contract. Consequently, there is no doubt that Aspen's position attempts to foist responsibility onto the government for business decisions and risks traditionally—and properly—assumed by contractors. The body of law that has developed around the affirmative duty of cooperation encompasses fact situations where a unique set of circumstances, of which a contractor could not have been aware, adversely affected performance and/or the costs of performance. *See also Norair Engineering Corp.*, GSBCA No. 2394, 72-1 BCA ¶9305 (where there were building and security restrictions, the government was under an obligation to provide the most complete information possible); *Hempstead Maintenance Service, Inc.*, GSBCA No. 3127,71-1 BCA ¶8809 (the weight of the evidence supported appellant, where stuck windows were deemed an unusual circumstance that should have been revealed.). Thus, the unusual nature of the circumstances militated against contractor assumption of risk of performance, evidence of which did not exist in *Aspen*.

Technical Systems Associates, Inc. Case

The case which raised traditional claims of superior knowledge was *Technical Systems Associates, Inc. v. Dept. of Commerce*, GSBCA Nos. 13277-COM and 14538- COM (Denied, Dec. 7, 1999). The Board described this case as "an object lesson in how imprecise specifications and haphazard contract administration can result in prolonged agony for both the contractor and the Government...." The appellant contracted with respondent for the supply of a fan beam antenna (radar) for measuring under-surface ocean currents. After seven contract extensions, during which time TSA apparently struggled to meet certain specifications, while simultaneously lulling the government into a false sense of security about the appellant's competence, the government terminated the contract for default. Appellant contested the default termination, claiming, among other things, substantial compliance, superior knowledge and commercial impracticability. TSA also sought an equitable adjustment for an alleged constructive change to the contract. After a trial on the merits (with TSA submitting its case on the record), the GSBCA held for the government. The Board found that the doctrine of superior knowledge was not applicable to this case because the information about which TSA complained was "in the public engineering domain equally available to appellant's personnel as to the Government contracting personnel. The article was, in fact, used by both sides as a reference document...." *Id*. Additionally, the Board found that the government was under no obligation to advise TSA of another earlier contractor's difficulties in building a fan beam antenna because the antenna designs differed significantly; and appellant did not show that the

government's knowledge of the other contractor's problems would have made any difference to the difficulties encountered by TSA.

History of the Doctrine.

The seminal case on the superior knowledge doctrine, *Helene Curtis Industries, Inc. v. United States*, 160 Ct. Cl. 437, 312 F.2d 774 (1963), involved an Army contract for large quantities of a disinfectant chlorine powder to be used by U.S. troops in Korea to disinfect mess gear and fresh fruits and vegetables. The Army prepared a specification for the new disinfectant product which contained the active ingredients and directions for its production. Based on the specification, the contractor concluded that a simple mixing technique was involved and submitted its bid. After award, the contractor's disinfectant failed to meet the solubility test of the specification. Study of the problem showed that prior to mixing, the chemicals required a grinding in order to meet the Government standards.

In the contractor's suit against the Government for damages, the Court of Claims found that the Government, which had sponsored the research for the new disinfectant, knew that grinding would most likely be required. The Court also found that the Government knew that the grinding process was more costly to produce and realized that the contractor did not plan to grind the chemicals. Thus, the Government was in a better position to know what was required, and, as a consequence, was obligated to pass the information on to the contractor. The emergent superior knowledge doctrine established that where, before award, the Government possesses special knowledge, not shared by the contractor, which is vital to the performance of the contract, the Government has an affirmative duty to share such knowledge.

Although the superior knowledge doctrine began in the context of a misleading technical specifications case, the Court of Federal Claims[4] took the opportunity to expand the nascent application of the doctrine in *J.A. Jones Constr. Co.,* 390 F.2d 886 (Ct. Cl. 1968). In that case, the court held that the government breached its duty to disclose information to a contractor on a federal construction project regarding a large, high priority, classified federal construction program that was to be initiated in the same labor area during the time of the contract performance. As a result of this nondisclosure, the contractor incurred increased costs of performance due to labor shortages. The contractor had prepared its bid on the assumption that an adequate supply of straight time labor would be available. In the *Jones* case, the withheld information was vital to the costs of performance under the contract: the labor shortage caused by the simultaneous construction project forced the contractor to pay its laborers premium wages, rather than straight time wages. Because the concurrent construction project was classified and information released even to other federal agencies was on a "need-to-know" basis, there was no way for private businesses to assess the true situation. The information was uniquely within the province of the Government.

Essential Elements for Application of the Doctrine

After propounding numerous formulations of the requisite elements, the United States Court of Appeals for the Federal Circuit in *Petrochem Services, Inc. v. United States*, 837 F.2d 1076, 1078-79 (Fed. Cir. 1988), described the requirements as follows:

> The disclosure of superior knowledge doctrine applies in situations where: (1) a contractor undertakes to perform without vital knowledge of a fact that affects performance costs or duration; (2) the government was aware the contractor had no knowledge of and no reason to obtain such information; (3) any contract specification supplied misled the contractor, or did not put it on notice to inquire; and (4) the government failed to provide the relevant information.

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4 Formerly the Court of Claims and the Claims Court.

Petrochem, supra, which involved a contract for the cleanup of an oil spill. The government estimated that approximately 21,000 gallons of oil had been spilled based on the amount that had disappeared from its inventory. At the on-site inspection, the bidder (ultimately the contractor) roughly estimated that 6,000 gallons of oil would need to be removed. Although the government had ascertained an approximate number of gallons of oil requiring removal, the precise number was omitted from the technical specifications for the cleanup provided to the bidders. The Court found that the government possessed a vital fact that affected the performance costs of the contract and the contractor undertook performance without this specific and essential information. Numerous board of contract appeals decisions have followed *Helene Curtis* and its progeny. *See*, *e.g.*, *Joe E. Woods, Inc.*, DOTCAB No. 2777, 98-1 BCA ¶ 29,370 (government held not liable for increased costs for contractor's failure to ascertain labor costs in a specific locale, where the government had no reason to believe that the contractor did not have that information); *Midland Maintenance, Inc.*, ENGBCA Nos. 6080, 6083, 6092, 96- 2 BCA ¶ 28,302 (government liable for increased costs where it knew that contractor did not know of vital information about wages for laborers who acted incidentally as truck drivers); *AVISCO, Inc.*, ENGBCA No. 5802, 93-3 BCA ¶ 26,172 (government not liable for costs resulting from an alleged mistake in bid where information on road abandonment and relocation was available to the contractor); *Outside Plant Engineering & Construction Co., Inc.*, NASA BCA No. 58-1191, 93-1 BCA ¶ 25,489 (contractor's claim for labor costs to pay electrician wages for laying of fiber optic cable was denied where information was available by inquiry of local sources); *T.L. James and Company, Inc.*, ENGBCA No. 5328, 89-2 BCA ¶ 21,642 (government plan regarding change in operations of four reservoirs found not to be a "vital fact" materially affecting the contractor's performance of dredging operations); *Value Engineering Co.*, DOTCAB No. 72-27, 74-2 BCA ¶ 10,861 (claim under a research and development contract for an airport tower window washer unit was denied where the information was equally available to appellant and was not of such a unique character as to mandate a *Helene Curtis* type of disclosure).[5]

The Government's Duty to Communicate

In the view of the GSBCA, the "implied duty to communicate" is just another way to describe the government's obligation to volunteer information essential to a contractor's performance. It is not a separate theory of recovery but rather is "closely akin" to the doctrine of superior knowledge. *Aspen Helicopters, Inc. v. Dept. of Commerce*, GSBCA No. 13258-COM, *supra.*

The GSBCA relied heavily on its 1981 decision in *Automated Services, Inc.*, GSBCA EEOC-2, *et al.*, 81-2 BCA 15,303, which provided an exhaustive insight into the history of the concept of government duty to communicate unique information which would have a material effect on performance or the cost of performance. Therein, the GSBCA found that while not wholly at fault, the agency failed to meet its implied duty of communication by remaining silent and allowing the appellant to continue to use an ineffective and unnecessarily expensive system, when the agency had known from the time of evaluation of

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5 The thread that binds all of Aspen Helicopters' theories of recovery is its fervent demand that the government be responsible for the firm's business judgment in the development of its offer. The Engineering Board of Contract Appeals aptly stated the principle of "business risk" in formulating an offer in *AVISCO, Inc.*, 93-3 BCA ¶ 26,172, *supra* at 130,222: "The Government is not obligated to assume the risk of difficulty in estimating the cost of accomplishing a project. The Government has the right to seek bids on difficult projects and on difficult-to-bid projects, and to structure the contracts it offers for bids so that most or all of the risks of such difficulties are placed on the bidders/contractors. (citation omitted). Bidders have the right to assume the risks of such projects or to refrain from bidding. When a bidder elects to bid under those conditions, it takes 'the bitter with the better.'"

offers that appellant's system was bound to encounter costly difficulties.[6]

In support of its holding in *Automated*, *supra*, the Board cited numerous Court of Claims cases which dealt with the implied duty of cooperation. The Board concluded that the duty of cooperation "is an affirmative one which requires that the Government render active assistance to those contractors which it believes will require it." *Id*. at 75,763.

One of the more significant Court of Claims decisions on which the Board relied in *Automated* was *J.A. Jones Construction Co. v. U.S., supra*. In that case, the Court held that the government's failure to reveal information regarding a labor shortage, discussed *supra*, greatly increased the costs of the contractor's overtime wages. In the Court's view, the government allowed the contractor to be overwhelmed by an "avalanche" of costs without warning.

Citing *First Trenton National Bank v. United States*, 15 CCF ¶ 83,959 (Ct. Cl. 1970), the GSBCA set forth the rationale for the implied duty of cooperation: "[F]ull disclosure in almost every conceivable instance will promote and protect the government's interests as well as those of the contractor and will often nip incipient litigation in the bud."

The GSBCA also reviewed numerous administrative decisions to support is holding in *Automated*. It focused on the 1975 appeal of *Bry-Air, Inc*., ASBCA Nos. 19282, 19452, 75-1 BCA 11,022. In that case, even though the government made clear to the appellant its extreme doubts as to the compliance of its product with contract specifications, the government obtained written assurances from the contractor that the product would comply--and then terminated the contract for default when the product did not comply *exactly* with the requirements. The ASBCA believed that the government was remiss in not advising appellant that *any* deviation from the contract requirements would result in a default termination.

More current decisions have also held to the traditional view of the implied duty to communicate. In *ECOS Management Criteria, Inc.,* VABCA No 2058, 86-2 BCA 18,885, the Board held that the appellant was chargeable with knowledge that it could have obtained on a reasonable site inspection and therefore was not entitled to an equitable adjustment. Similarly, in *Maitland Brothers Co.*, ENGBCA No. 5782, 94-1 BCA 26,473, the Board summarily rejected the appellant's "breach of duty of cooperation and communication" argument, where the information in question was a statutory enactment and part of the public domain. What sealed appellant's fate there was that while it apparently inquired about local taxes, it failed to make a simple inquiry regarding local labor laws.

Lessons Learned

(1) Each situation should be viewed under its own facts and circumstances;

(2) The government has an implied duty to cooperate, including to communicate, with a contractor and not hinder its performance;

(3) The government should, at its peril, provide a contractor with *vital* information, *i.e.* information material to performance of its contract, including the costs of performance;

(4) If contracting officials know, or have reason to know (through review of bid or proposal documents), that a bidder or offeror lacks understanding of the work to be performed, they should be honest with the bidder or offeror and not award a contract for work which they know will not comply with government requirements or will create extreme financial hardship for the contractor;

(5) Contracting officials are not required to disclose information if a contractor can reasonably be expected

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6 *But see*, *Automated Services, Inc.*, *supra* (Hendley, J., dissenting) (the majority's findings evidenced the judgment that appellant did not have the competence or technical capacity to perform the contract, not that its methodology precluded performance.). Similarly, Judge Borwick found that TSA lacked competence in a number of areas relating to the antenna reflector fabrication and application of scientific principles.

to seek and obtain the information elsewhere, *i.e.* the information is not unique to (or solely within the possession of) the government;

(6) As Judge Hendley said in *Automated Services, Inc.*, *supra*, citing *American Ship Building Co. v. United States*, 654 F. 2d 75, 78 (Ct. Cl. 1981):

> [I]t is reasonable for the government to assume that a contractor is the best judge of its own competency and will exercise good judgment in deciding to make a bid or offer on a proposed contract. More is required for relief on theories of superior knowledge, misrepresentation, or the implied duty to communicate than just that responsible Government officials questioned an offeror's competency and technical capacity.

(7) Contracting officials must remain vigilant for ambiguous or vague specifications; and

(8) If contracting officials must err, err on the side of full disclosure.