A Primer on Prime Contractor-Subcontractor Disputes Under Federal Contracts

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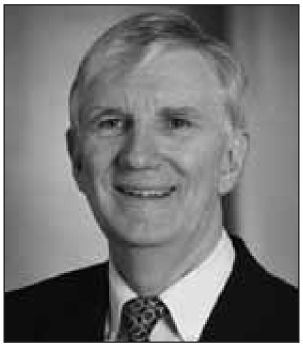

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The federal government spends more than $500 billion a year on contracts.[1] More than 50 percent of that total works its way down to subcontractors. Thus, disputes between prime contractors and their subcontractors on federal contracts are relatively common, but may nevertheless contain some issues unfamiliar even to the experienced government contractor or government contract lawyer.

Applicable Law

Certainly, the subcontract itself can identify the applicable body of law that will be used to interpret it. If the prime contractor and the subcontractor are both California corporations and the contract is formed and performed in California, it would be logical for the parties to agree that California law will apply. Frequently, however, the parties will designate "federal procurement law" as the body of law used to interpret the subcontract.[2]

Federal procurement law typically means the decisions of the federal forums in the area: the United States Court of Appeals for the Federal Circuit, the United States Court of Federal Claims, the applicable boards of contract appeals, and, in certain circumstances, the Government Accountability Office.[3] At one time, there were numerous agency boards of contract appeals. Now, there are two multiagency boards: the Armed Services Board of Contract Appeals (ASBCA), which deals with appeals from the Department of Defense agencies and the Corps of Engineers, NASA, the CIA and a few other departments; and the Civilian Board of Contract Appeals (CBCA), which in January 2007 replaced such former agency boards as the General Services Administration Board of Contract Appeals and the boards of the Departments of Energy, Interior, Health and Human Services, Transportation, and Veterans Affairs.[4]

Federal procurement law also includes the regulations set forth in the Federal Acquisition Regulation (FAR), which can be found at Title 48 of the Code of Federal Regulations (CFR), Chapter 1, and the agency supplements that are also in Title 48 of the CFR. For example, Chapter 2 of Title 48 is the Defense Federal Acquisition Regulation Supplement (DFARS). Chapter 9 is the Department of Energy Acquisition Regulation (DEAR)—another example of an agency's supplemental regulation. The FAR and its supplements implement numerous statutes that apply to federal procurements, such as the Contract Disputes Act of 1978, the Truth in Negotiations Act, the Competition in Contracting Act, and the Buy American Act.

Choosing federal procurement law to govern a subcontract makes sense for two reasons. First, the prime contractor will often want to be bound by the same set of rules upstream (to the government) and downstream (to the subcontractor); the prime does not want to be caught in the middle and face the danger of inconsistent results.[5] Second, it is common that federal contract clauses are "flowed down" in the subcontract. While relatively few clauses are mandatorily flowed down,[6] it is prudent for the prime contractor to flow down such clauses as the Changes[7] and Termination[8] clauses, and a host of others.

Even if a particular state's law is the applicable law for the agreement between the prime contractor and its subcontractor, very often the parties will have to brief the trial judge on the meaning of an "equitable adjustment," "allowable costs," or a "component" under the Buy American Act. These definitions have already been established by numerous federal court and board cases involving federal procurement law.

If the subcontract does not designate which law will apply, a judge may sometimes fill the void by designating federal procurement law as the applicable law.[9] This is done relatively rarely and normally only in the case of national defense or Department of Energy contracts where a judge may decide that uniform law across all 50 states must apply.

Besides the applicable statutory, regulatory, and case law, it is critical that counsel for the subcontractor review the prime contract with the government because the subcontract often states that the subcontractor will be bound by all of the terms and conditions in the prime contract. This very common clause is frequently inappropriate, however, such as when the prime contract with the government is a cost-reimbursable construction contract and the subcontract in question is a fixed-price supply contract. Such fundamental discrepancies are frequently overlooked.[10]

Pass-Through or "Sponsored" Claims

Regardless of which law applies to the subcontract, the prime contractor may agree fully with the subcontractor's

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claim that, for example, the government's specifications were defective, a differing site condition was discovered, or that the government interfered with performance of the work. In these situations, because there is no privity of contract between the subcontractor and the government, the subcontractor will submit its claim to the prime.

Often a subcontractor does not want to litigate with its prime because it recognizes that the prime was not at fault, or the prime is on shaky financial ground and may not have the resources to pay the claim, or both.[11] In that event, the subcontractor will present a claim to the prime contractor and request that it be "passed through" or "sponsored" by the prime to the government. Although the prime is often very anxious to pass through a claim, sometimes the prime demurs because it has very little or no faith in the subcontractor's claim as to the narrative or costs, or because the prime does not want to pass a problem on to the government customer with which it wants to do more business. If the prime does not sponsor the claim, almost certainly it will be locked in litigation or arbitration with the subcontractor; if it does sponsor the claim, it must take a variety of procedural steps. Unless the subcontract covers the point, the prime must enter into an agreement with the subcontractor that defines the parties' obligations.

First, the prime will want to negotiate with the subcontractor something like the following:

> We both agree that the government specifications/interference/change caused your increased costs. Let's submit this to the government and whatever amount the government ultimately agrees to pay (from the contracting officer, the Board of Contract Appeals, the Court of Federal Claims) will be in full satisfaction of your claim.

In other words, if the subcontractor's claim is for $1 million but the contracting officer or the appropriate federal forum concludes that the claim is only worth $300,000, the prime wants the subcontractor to accept that $300,000 in complete satisfaction of its claim and never to seek further money from the prime. Understandably, subcontractors are often reluctant to do this. Their contention would be "our contract is with you. Whether you get reimbursement from the government is immaterial. We refuse to let you walk out."[12]

Despite this potential obstacle, very often the parties will agree to the pass-through, with or without this release, for three reasons. First, the prime contractor may not be financially viable enough to make the payment. Second, the subcontractor may need the full cooperation of the prime, not only in terms of sponsoring the claim but also for providing witnesses and documents, and other tactical considerations. Third, the terms of the subcontract may give the prime the right to attempt to pass the claim through, and so the subcontractor may have no choice. In any event, there frequently will be a haggling process in which the parties work out a joint prosecution agreement or a joint defense agreement, including a release.

The prime contractor sponsors the subcontractor's claim by bringing an appeal on the subcontractor's behalf or by permitting the subcontractor to bring an appeal in the contractor's name. FAR 44.203(c) explicitly allows such "indirect subcontractor appeals." It provides:

> Contracting officers should not refuse consent to a subcontract merely because it contains a clause giving the subcontractor the right of indirect appeal to an agency board of contract appeals if the subcontractor is affected by a dispute between the Government and the prime contractor. Indirect appeal means assertion by the subcontractor of the prime contractor's right to appeal or the prosecution of an appeal by the prime contractor on the subcontractor's behalf. The clause may also provide that the prime contractor and subcontractor shall be equally bound by the contracting officer's or board's decision. The clause may not attempt to obligate the contracting officer or the appeals board to decide questions that do not arise between the Government and the prime contractor or that are not cognizable under the clause at 52.233-1, Disputes.

The right of a subcontractor to appeal in the name of a prime contractor has been affirmed, even when the prime has neither paid the claim nor admitted liability, as long as the claim is made in good faith.[13] The prime must not have already waived its right against the government. Such waivers occur surprisingly often when the prime issues a final release to the government in return for final payment or issues a release on a claim before ensuring that all the claims from affected subcontractors have been submitted.[14]

Although a prime contractor may sponsor the claim of a subcontractor, the subcontractor does not have privity of contract with the government and is not a proper party before a board of contract appeals. In *Zenith Data Systems*, for example, the ASBCA denied a prime contractor's request to add its subcontractor as a "co-appellant."[15] After a termination for default, a surety took over and entered into a subcontract with the original contractor to complete the job. On appeal, the default termination was overturned and converted to a termination for convenience. The ASBCA held that it did not have jurisdiction over that part of the termination settlement proposal covering costs incurred while the contractor was acting as subcontractor to the surety because the claim was not sponsored by the surety.[16]

Certification

In the federal system, for claims of more than $100,000, the contractor must certify that: (1) the claim is made in good faith; (2) the supporting data are accurate and complete to the best of the contractor's knowledge and belief; (3) the amount requested accurately reflects the amount for which the contractor believes the government is liable; and (4) the signer is duly authorized to certify the claim.[17] If the prime is prudent, it will require the same certification from the subcontractor, but this alone is not sufficient. The prime itself must certify the subcontractor's claim. That puts the prime on the horns of a dilemma.

First and foremost, the prime may not have intimate knowledge of the facts and certainly will not know as much about the subcontractor's books as it does about its own. The prime may have some doubts about the claim on legal or factual grounds. Fortunately for prime contractors, the United States Court of Appeals for the Federal Circuit has provided an escape route. In *United States v. Turner Construction Co.*,[18] Turner was the prime contractor and had earlier recommended to the government that the claim of its subcontractor, Johnson Controls, be denied. Later, not willing to be caught in litigation with Johnson, Turner sponsored the claim to the government.

The government tried to dismiss the claim because of the earlier rejection, but the Federal Circuit disagreed. The court stated "the certification requirement requires not that the prime contractor believe the subcontractor's claim to be certain, but that the prime contractor believe that there is good ground for the claim." The court's rationale was partly premised on the recognition of the prime's inability to be as intimately aware of the facts and numbers as its subcontractor.[19]

The *Severin* Doctrine: Is Government Potentially Liable?

Sponsored claims are permitted only if the prime contractor is liable to the subcontractor and can charge the cost of the subcontractor's claim to the government, or can make a claim against the government based on the subcontractor's actual or anticipated recovery. This is known as the *Severin* doctrine.

The *Severin* doctrine states that if the prime contractor has not paid the subcontractor, and has no possible liability to the subcontractor on the claim (e.g., because the subcontractor has released the prime), the prime has suffered no harm at the hands of the subcontractor and cannot pass the claim through to the government.[20] Judges have narrowed the doctrine by strictly interpreting any release or exculpatory clause. If the release or exculpatory clause is anything less than "iron-clad"[21] and does not completely free the contractor from liability, sponsorship will be permitted. Even when the subcontract provides that the contractor will pass subcontractor claims through to the government but will have no further liability, it has been held that the *Severin* doctrine does not bar the claim.[22] Further, a clause that relieves the prime of responsibility to the subcontractor for price increases, damages, and additional compensation as a consequence of delay does not necessarily preclude the prime contractor from recovering against the government on behalf of its subcontractor.[23]

A subcontractor can assure itself of the right to pursue the government by entering into an agreement that establishes the conditional liability of its prime contractor. In *W.G. Yates & Sons Constr. Co. v. Caldera*,[24] both Yates, the prime, and IDC, the subcontractor, pursued their claim against the government under a Liquidation and Consolidation Claim Agreement (LCCA). Under the LCCA, Yates agreed to sponsor IDC's claims to the contracting officer and, if necessary, to the ASBCA. In the event that they prevailed on their claim, the parties agreed that Yates would pay IDC whatever Yates recovered from the government for IDC's losses. In exchange for the assurances that it made to IDC, Yates received a promise from IDC to pay Yates's reprocurement costs regardless of the board's decision. Applying the *Severin* doctrine, the Army sought dismissal of Yates's claim because Yates "[bore] no real liability to IDC for IDC's damages." The Federal Circuit determined that, under the subcontract and the LCCA, Yates could not "avoid liability if it receiv[ed] payment from the government for its damage," so Yates was "conditionally liable" to IDC. The court affirmed the ASBCA's holding that Yates had standing to bring suit "on behalf of IDC for IDC's damages and expenses." The court also affirmed that Yates had standing to sue on behalf of IDC for the excess reprocurement costs that Yates had recovered from IDC.

Although the *Severin* doctrine has infrequently precluded sponsored claims, it still has vitality in those cases where the contractor has not paid the subcontractor and is not even conditionally liable.[25] In *George Hyman Constr. Co. v. United States*,[26] the subcontractor executed a general release in favor of the contractor. The court found that this release was unconditional and held that sponsorship was not permitted. The court rejected the contractor's argument that the parties had not intended to include the particular claim in the release. It also rejected a later release excepting the claim. The court held that, even if the later release were binding under state law, sponsorship would not be permitted because it depended on "continuing," not "revived" liability.

Privity

To avoid the pass-through process, very often subcontractors will try to allege privity with the government. This is an extremely difficult task. It is against the government's policy to deal directly with subcontractors.[27] As a result, direct subcontractor claims are very rare.

The government will try to maintain the rule of privity as much as possible. In 2007, the government had prime contracts with approximately 169,000 different contractors.[28] That is a very large, but manageable, number. If subcontractors (which, under the FAR, normally means subcontractors at any tier) were included, millions of entities would have the ability to sue the government directly. Unless the government has agreed to make joint checks to the prime contractor and the subcontractor,[29] had the prime assign the subcontract to the government,[30] and specifically designated the prime as the government's purchasing agent,[31] subcontractors have no right to use the disputes process in their own name, but can sue the government only if their claims are sponsored by the prime contractor.[32]

There is one other notable instance in which the standard privity rules may be relaxed: when the prime has not been paying the sub, but the government has paid the prime. This resulted when Congress discovered that, very often, the subcontractor would perform the work and send a bill to the prime, which the prime would include within a billing to the government. The government would pay the prime promptly, but the prime would then put the money into an interestbearing account for 60, 90, or 120 days and then pay the sub without any interest. During that time, if the subcontractor approached the government to complain, the government would very often simply dismiss the sub saying there was no privity. When Congress became aware that the government was essentially making interest-free loans to prime contractors, it passed a statute, now implemented at FAR 32.112-1, that allows the subcontractor to contact the contracting officer. In such event, the contracting officer may take one of the following actions: encourage the prime to get current with the sub; withhold further payments to the prime until it becomes current with the sub; or refer the matter to other appropriate authorities. These authorities may be criminal investigators, on the basis that the prime's failure to pay the sub violates its certifications of payment to the government and constitutes a false claim.

Contract Termination Issues

If the government concludes that continued performance of a contract is no longer in its best interest, it has the right to terminate the contract for its convenience. Generally speaking, a subcontractor has no contractual rights against the government upon the termination of a prime contract.

FAR 49.108-8 states that when the government terminates a contract for convenience, the prime is obligated to assign all "rights, titles and interest" under any subcontract that is terminated because of the termination of the prime contract, when the TCO (termination contracting officer) determines that such assignment is in the government's best interest. The FAR also provides the government the right to settle and pay any settlement proposal arising out of the termination of subcontracts. This is not to say it is the government's obligation to settle and pay proposals; rather, the general rule is that the prime contractor is obligated to settle and pay these proposals. However, when the TCO determines it is in the government's best interest, the TCO may settle the subcontractor's proposal using the same procedures used by the government for the settlement of prime contract terminations.

If a subcontractor obtains a final judgment against the prime (or reaches a settlement with a prime) in connection with a contract termination, the FAR instructs the TCO to treat the amount of such judgment or settlement as a cost of settling with the prime, provided the prime has taken certain steps to limit the amount of the subcontractor's rights to recover what the government deems fair and reasonable.[33] These steps include, for instance, reasonable efforts by the prime to include a clause in the subcontract excluding payment of anticipatory profits or consequential damages and to settle with the subcontractor, and diligent efforts by the prime to defend against any lawsuit or assist the government in such suit, if the government has assumed control of the defense.

Miller Act

As most federal contractors and subcontractors are aware, payment and performance bonds must generally be secured before commencing work on federal or state public construction projects. The Miller Act, 40 U.S.C. §§ 3131-34, was enacted in 1935 to require that such bonds be in place on federal projects exceeding $100,000 in value. These statutory requirements are implemented at FAR Subpart 28.102. In addition, most state and local governments have adopted similar legislation, often referred to as "Little Miller Acts."

In theory, a performance bond is issued to protect the government from increased costs in the event the prime contractor runs into problems during performance. By contrast, a payment bond is issued to protect subcontractors and suppliers in the event they are not paid by the prime.

The Miller Act provides that the payment bond protection applies to first-tier subcontractors, or those subcontractors and suppliers that contract directly with a prime. In addition, certain second-tier parties that supply labor or materials directly to a subcontractor performing work are protected. Second-tier parties that contract with a material supplier rather than with a subcontractor, and subcontractors and suppliers further down the chain, however, do not receive Miller Act protection. The question of whether a party is a subcontractor or a material supplier—and whether that party falls under the protection of the Miller Act—has been extensively litigated and is an issue of continuing debate.

The Miller Act contains specific notice requirements for parties seeking its protection. Although first-tier subcontractors and suppliers are not required to provide notice of a claim to the prime contractor, second-tier claimants must give written notice of the claim within 90 days after the last day labor or materials are furnished. The notice must contain both the amount claimed and the name of the party to which the material or labor was provided.

As a consequence, dispute resolution between the prime contractor and the subcontractor will see another party in the room: the surety. This does not fundamentally change the process, but it may add an extra step.

Conclusion

Unique aspects of law and practice affect prime contractor-subcontractor disputes arising out of federal projects and drastically impact the handling and outcome of these matters. It is especially problematic for practitioners who do not regularly deal with federal contracts but whose clients, perhaps because of the recession, are venturing into that arena, either as primes or subcontractors. Shepherding the prime in its dealing with the government is difficult enough, but advising on federal subcontracting adds an additional level of complexity. We hope that this article and the articles, cases, and treatises we have cited will help practitioners navigate through this minefield. PL

Endnotes

1. *See* www.usaspending.gov.

2. *See, e.g.,* Sulzer Bingham Pumps, Inc. v. Lockheed Missiles and Space Co., 947 F.2d 1362, 1365 (9th Cir. 1991).

3. *See* James F. Nagle & Bryan A. Kelley, *Exploring the Federal Forums for Government Contracts*, 2 J. Am. C. Constr. Law. 189 (2008) (details on forums and their predecessors). The clause used in the *Sulzer* case was as follows:

This subcontract shall be governed by and construed in accordance with the law of U.S. Government contracts as set forth by statute and applicable regulations, and decisions by the appropriate courts and Board of Contract Appeals. To the extent that the law referred to in the foregoing sentence is not determinative of an issue arising out of the clauses of this subcontract recourse shall be to the law of the State of California.

4. Nagle & Kelley, *supra* note 3, at 199-204.

5. For this reason, many prime contractors also insert subcontract clauses by which subcontractors agree (1) to stay the prosecution of any claims against the prime that are passed through by the prime to the government, and (2) to be bound by the results of any dispute proceedings between the prime and the government concerning the pass through claim.

6. Some that are, include the Audit clause, FAR 52.215-2, and the Equal Opportunity clause, FAR 52.222-25.

7. *E.g.*, FAR 52.243-1.

8. *E.g.*, FAR 52.249-1.

9. *E.g.*, American Pipe & Steel Corp. v. Firestone Co., 292 F.2d 640, 644 (9th Cir. 1961); New SD, Inc. v. Rockwell Inter. Corp., 79 F.3d 953, 955 (9th Cir. 1996).

10. It is amazing how often no one considers this until it is too late. The author was arbitrating one case in which that clause appeared. During the first preliminary conference call, the arbitrator said he would like to get a copy of the prime contract. The subcontractor's representatives said they would like one too because they had never seen it. This was long after they had agreed to be bound by it.

11. As noted above, the subcontractor may have agreed that any claim that relates to the government's conduct or the design may be passed through to the government, and that the subcontractor shall be bound by the results of any dispute proceedings between the prime and the government concerning the pass through claim

12. For a discussion of pass-through agreements, see Joel D. Heusinger, *Practical Concerns in Prosecuting Pass-Through Claims*, Constr. Law., 25:2 at 26 (Spring 2005).

13. TRW, Inc., ASBCA No. 11373, 66-2 BCA ¶ 5882.

14. *See* John Cibinic, Jr., Ralph C. Nash, Jr. & James F. Nagle, Administration of Government Contracts (4th ed. 2006) (discussion of matters—changes, delays, differing site conditions, defective property, interference—that typically arise in claims).

15. Zenith Data Sys., ASBCA No. 49611, 98-1 BCA ¶ 29,721. *See* McPherson Contractors, Inc., ASBCA No. 50830, 98-1 BCA ¶ 29,349 (board has no jurisdiction over appeal by prime contractor on behalf of its subcontractor after prime withdrew its sponsorship).

16. Walsky Constr. Co., ASBCA No. 52772, 01-2 BCA ¶ 31,557.

17. FAR 52.233-1.

18. 827 F.2d 1554, 1561 (Fed. Cir. 1987).

19. *Accord* Arnold M. Diamond, Inc. v. Dalton, 25 F.3d 1006 (Fed. Cir. 1994), *reh'g denied* (Jul 07, 1994); Alvarado Constr., Inc. v. U.S., 32 Fed. Cl. 184 (1994) (citing Turner and Transamerica v. United States, 973 F.2d 1572 (Fed. Cir. 1992) (case subsequently overruled in part on different point of law) ("In *Transamerica* and *Turner*, the Federal Circuit recognized that a contractor often will not have the same quality of information about a subcontractor's costs as it does about its own costs. The court also recognized, in effect, that [41 U.S.C.] Section 605(c)(1) does not require a contractor, prior to submitting a certified claim covering subcontractor costs, to secure an equivalent level of certainty as to the government's liability for the subcontractor costs as it would have for a claim covering the contractor's own costs.").

20. *See* Severin v. United States, 99 Ct. Cl. 435 (1943), *cert. denied*, 322 U.S. 733 (1944).

21. M. A. Mortenson Co., ASBCA No. 53761, 06-1 BCA ¶ 33,180 at 164,439.

22. Castagna & Son, Inc., GSBCA No 6906, 84-3 BCA ¶ 17,612; *see also* Folk Constr. Co. v. United States, 2 Cl. Ct. 681 (1983); Pan Arctic Corp. v. United States, 8 Cl. Ct. 546 (1985).

23. *Castagna & Son.*

24. 192 F.3d 987 (Fed. Cir. 1999).

25. *See* James Reeves Contractor, Inc. v. United States, 31 Fed. Cl. 712 (1994) (arbitration binding under state law operated to deny subcontractor's claim against contractor without reservation).

26. 30 Fed. Cl. 170 (1993), *aff'd,* 39 F.3d 1197 (Fed. Cl. 1994)

27. *See* FAR 44.203(b)(3), which prohibits contracting officers from giving their consent to "subcontracts obligating the contracting officer to deal directly with the subcontractor."

28. Christopher Yukins, *U.S. Contractor Compliance Rules Are Likely to Expand*, 50 The Gov't Contractor, April 23, 2008, at 1.

29. In D&H Distributing Co. v. United States, 102 F.3d 542 (Fed. Cir. 1996), the court found that a subcontractor had a third-party beneficiary relationship with the government when the contracting officer had modified the prime contract to make the contractor and the subcontractor joint payees. In addition, despite the statutory prohibition on the assignment of rights in government contracts, the court found that the contract modification at issue could be viewed as a valid assignment of payment rights from the contractor to the subcontractor because the contracting officer assented to the assignment. The government's subsequent failure to make payments according to the modified contract was a breach entitling the subcontractor to damages. Note, however, that this decision has been significantly restricted by the Federal Circuit in Winter v. FloorPro, Inc., 570 F.3d 1367 (Fed. Cir. 2009). In that case, a subcontractor sought payment directly from the government on the basis that it had a third-party beneficiary relationship with the government pursuant to a contract modification by which the government agreed to issue joint checks to FloorPro, the subcontractor, and the prime contractor. Following *D&H Distributing*, the ASBCA concluded that the government was liable to FloorPro for breaching the payment provision in the modification. On appeal, the Federal Circuit disagreed, reasoning that the waiver of sovereign immunity under the Contract Disputes Act (CDA) is strictly construed and that, because FloorPro was not a "contractor" within the meaning of the CDA, it could not maintain a direct claim against the government. The Federal Circuit distinguished its earlier decision in *D&H Distributing*, which it acknowledged had similar facts, on the basis that the Tucker Act jurisdiction under which the subcontractor claims in *D&H Distributing* were raised is broader and more accommodating of direct subcontractor claims than the CDA, which was the jurisdictional basis for FloorPro's claims.

30. *See* FAR 49.108-8; United States v. Georgia Marble Co., 106 F.2d 955 (5th Cir. 1939) (court found that government entered into implied contract to pay subcontractor for material government took from subcontractor).

31. Direct subcontractor claims have been permitted if the contractor is an agent of the government. *See, e.g.,* Kern-Limerick v. Scurlock, 347 U.S. 110 (1954). Here, too, the likelihood of a contractor's being considered an agent of the government is remote. In United States v. Johnson Controls, Inc., 713 F.2d 1541 (Fed. Cir. 1983), *aff'd,* 827 F.2d 1554 (Fed. Cir. 1987), the court held that a contractor that served as a construction manager was not, for that reason, an agent of the government. The court stated that the contractor was not a purchasing agent, there was no contractual designation of an agency relationship with the government, and the government was not bound to pay the subcontractor directly. *See also* United States v. New Mexico, 455 U.S. 720 (1982) (contractors operating government facilities had substantially independent role in making purchases, were not agents of the government, and, therefore, were not immune from taxation).

32. *See* Lockheed Martin Corp. v. United States, 50 Fed. Cl. 550 (2001), *aff'd,* 48 Fed. Appx. 752 (Fed. Cir. 2002); Detroit Broach Cutting Tools, Inc., ASBCA No. 49277, 96-2 BCA ¶ 28,493; Southwest Marine, Inc., ASBCA No. 49617, 96-2 BCA ¶ 28,347; Dept. of Army v. Blue Fox, 525 U.S. 255 (1999).

33. FAR 49.108-5.