

## No smiling matter

Better to seek expert assistance before filing a claim



BY LARRY CAUDLE

Several of my colleagues and I have been following the appeal of a 2006 U.S. Court of Federal Claims trial decision, under which a contractor forfeited its \$64 million claim against the U.S. Army Corps of Engineers and was ordered to pay the government over \$50 million in penalties because a significant portion of the damages was deemed fraudulent. On Feb. 20, 2009, the U.S. Court of Appeals

for the Federal Circuit upheld the trial court's ruling.

The lengthy trial court opinion and the decision issued by the Federal Circuit are must-reads for any contractor, consultant or lawyer involved in the submittal of claims to public entities.

### Blame it on the weather

*Daewoo Eng'g & Constr. Co. v. U.S.*, 73 Fed Cl. 547 (2006) involved a contractor that contracted with the Corps to construct a 53-mile road around the island of Babeldaob in the Republic of Palau. While the project was still in progress, the contractor submitted to the Corps a claim for delays and additional costs incurred because of high humidity, rainy weather and moist soils encountered on the project. The contractor sought \$13,348.07 in additional costs incurred through Dec. 31, 2001, and an additional \$50,629,855.88 for future costs not yet incurred.

In a scathing written opinion, the trial court criticized the contractor's witnesses for lacking credibility and concluded that the \$50 million portion of the contractor's claim addressing future costs was no more than "a claim to gain leverage against the United States [and] violates the principles on which Congress enacted the Contract Disputes Act." Apparently, the contractor was seeking a substantial modification of compaction requirements for embankment that would have greatly reduced problems for the contractor. In the court's view, the \$50 million in future costs was an inflated figure inserted into the claim as a ploy to expedite the Corps' decision on whether to

modify the compaction requirements. It is obvious that the court's fraud determination was made from the totality of the circumstances described in its 46-page opinion rather than from any single problem it had with the contractor's case.

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The most notable lesson from *Daewoo* is that contractors should seek the guidance of experts to assist in calculating damages and performing schedule analyses for their claims, so if it is not settled the experts may step in seamlessly and testify. Otherwise, experts

hired after the fact might not agree to adopt the contractor's methodologies. Indeed, most reputable experts are not "hired guns."

The difference of opinion is precisely what doomed the *Daewoo* contractor, which apparently prepared its claim using in-house personnel. The outside experts hired for trial abandoned altogether the methodologies the contractor utilized in the claim and, as I like to say, set out to recreate the Mona Lisa. The trial court concluded that "the experts' method resulted in an entirely different claim to the Government . . . [and] . . . the claim that was certified by the plaintiff's project manager became an orphan during trial, supported by no one and barely acknowledged by plaintiff's attorneys."

Even on the smallest claims involving the calculation of damages, contractors should—at a minimum—seek the guidance of an expert on the most desirable methodology and should permit the expert to review the results prior to inclusion of them in the claim submitted to the public entity. This will ensure that if the expert is later needed during the claims resolution process, there will be no need to recreate the Mona Lisa. 📧

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