CONTRACT LANGUAGE MATTERS-THE GOVERNMENT CANNOT REWRITE A CONTRACT

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The Court of Appeals for the Federal Circuit ("CAFC") recently issued a significant opinion that makes it very clear to agencies that the language they place in a contract matters, and the Government cannot rewrite a contract. *Kiewit Infrastructure West Co. v. United States*, No 2019-2125 (Fed. Cir. Aug. 26, 2020). Of course, the government can issue change orders, modifications or constructive changes (all of which may require an equitable adjustment), but it cannot arbitrarily rewrite a contract to suit its liking, without taking responsibility for so doing.

The Federal High Administration ("FHA") issued a solicitation for a road design and reconstruction project known as the Deweyville Project. Offerors were provided with access to a "Categorical Exclusion," a document that FHA had prepared in connection with the National Environmental Policy Act of 1969 ("NEPA"). This document stated that FHA had determined that the Deweyville Project would "not have a significant effect on the human environment." It further stated that material and waste sites are to be sources at existing quarries—and no further analysis of the environmental impacts is necessary at the sites in the report unless an expansion of a site is proposed.

The Deweyville Project solicitation placed responsibility for obtaining any necessary licenses and permits on the contractor, and also stated that the contractor was responsible for purchasing wetland mitigation credits if necessary. The solicitation also contained a provision, Revised Standard Specification 105.06 ("RSS 105.06") which stated that "no further analysis of the environmental impacts of using [government-designated waste] sites [would be] needed unless an expansion of the site [were] proposed." The solicitation also stated that the government designated waste sites had received NEPA clearance.

Kiewit was awarded the contract in August 2012. In March 2013, Kiewit submitted an equitable adjustment for the cost of purchasing mitigation credits for the wetlands it encountered at government-designated sites, asserting that there were 19 acres of wetlands at the designated sites (no expansion), and the cost of purchasing mitigation credits for wetlands was a constructive change. Its claim was for $491,000 for these credits. The contracting officer denied the claim entirely.

The Court of Federal Claims had previously considered this appeal, but granted no relief, stating that Kiewit should have inquired further concerning environmental impacts under the Clean Water Act. The government asserted that "wetland delineation and payment of wetland mitigation credits" were excluded from the "environmental impacts" covered by RSS 105.06 because the provision did not refer to the Clean Water Act or wetlands, but only to NEPA.

The CAFC disagreed, stating that the resolution hinged on the proper interpretation of the term "environmental impacts" in RSS 105.06, which was part of the contract. "By its plain terms, RSS 105.06 dictates that, unless a contractor decided to expand the government-designated waste sites, "[no] further analysis of the environmental impact of using" such sites would be necessary

The CAFC rejected the government's arguments for two reasons:

- The court's analysis began with the statement that "contract language matters." It examined the language of the contract, in accordance with its express terms and plain meaning thereof. It noted that RSS 105.06 does not state that no further environmental analysis would be necessary for NEPA clearance purposes if a contractor elected to dispose of waste and excess material at to government-designated waste states. Indeed, it stated that no further analysis of the environment impacts of using such sites would be required.

  The CAFC also noted that if the government intended to exclude wetland impacts from the "environmental impacts" covered by RSS 105.06, it should have included contract language to that effect. It also noted that the court "cannot rewrite a contract or insert words to which a party has never agreed," citing *Freightliner Corp. v. Caldera,* 225 F.3d 1361 (Fed. Cir. 2000).

- The CAFC rejected the government's argument that because the second sentence of RSS 105.06 stated that the government-designated waste sites had received NEPA clearance, Kiewit should have understood that the term "environmental impacts" in the next sentence excluded impacts to wetlands. The CAFC noted that the FHA had specifically considered the impact that the Deweyville project would have on wetlands as part of its NEPA analysis—bolstering Kiewit's reasonable conclusion that it would not need to conduct any further wetlands analysis at the designated waste disposal sites.

The CAFC concluded that "Kiewit reasonably interpreted RSS 105.06 to mean what it says—that no further environmental impacts analysis would be required if a contractor chose to dispose of waste and excess material at government-designated waste sites." FHA therefore had effected a constructive change. The CAFC remanded the case to the trial court (COFC), for further proceedings consistent with a constructive change.

Takeaway: Contract language really does matter. If the government rewrites your contract, or attempts to "read into" (place a gloss) on plain language but a contractor disagrees with that gloss, the contractor is entitled to an equitable adjustment for a constructive change.