LEGAL ADVISOR

A PilieroMazza Update for Federal Contractors and Commercial Businesses

Government Contracting

ONE SIZE DOES NOT FIT ALL: BEWARE OF "BOILERPLATE" WHEN DRAFTING CONTRACT PROVISIONS

By Paul W. Mengel III

It is not uncommon in contract negotiation for parties to devote the majority of their efforts to the business terms, while glossing over the "boilerplate" provisions of the contract. You may believe the boilerplate is not as important as the business terms, or you may think that standard terms you have used in past contracts will work just as well in your latest agreement. However, should the arrangement go south, you may end up wishing you had paid more attention to the boilerplate up front because, in the event of a dispute, the boilerplate provisions may well set the rules of the game, and determine who wins or loses. This article addresses several of the critical boilerplate provisions that come into play in dispute resolution that should not be ignored.

Choices of Applicable Law and Venue

Two of the often underemphasized subjects of contract boilerplate are the related concepts of forum selection and governing law. Such provisions are deserving of particular scrutiny in the negotiating process because often the boilerplate forum selection provision may specify a location for the dispute resolution that is convenient only to the drafting party. This can result in a great deal of expense for the other party that has to travel. Indeed, when a relatively small amount is at stake, the inconvenience and expense occasioned by a choice of forum clause could be the determining factor in settling a dispute.

The choice of governing law provision is also typically buried deep within the boilerplate section of a contract. Such provisions are usually friendly to the drafting party and can substantially impact the parties' rights. For example, differences in two states' decisional law or statutes of limitations could strongly favor your opponent if not carefully considered and selected during the drafting phase.

Litigation vs. Alternative Dispute Resolution

The trend for small businesses when entering into contracts has been to specify that disputes will be resolved by some method of alternative dispute resolution (ADR), such as mediation or arbitration, rather than litigation. This trend in the private sector is mirrored by the government's commitment to ADR as a preferred method of conflict resolution. In fact, the American Bar Association has observed that ADR is now the preferred and likely outcome of disputes brought before the Armed Services and Civilian Boards of Contract Appeals, the Court of Federal Claims and the Government Accountability Office.

But is arbitration a better choice for you? While arbitration can be less costly and time- consuming than litigation, there are pros and cons to both processes that should be carefully weighed at the drafting stage.

An advantage of arbitration is that it generally leads to a quicker resolution. Another attractive aspect of arbitration is that, unlike in litigation, the parties can select their fact-finder and they have more control of the process. One of the drawbacks of arbitration, however, is the parties must compensate the fact-finder for his or her time, and these fees can be significant. Judges are free to the parties and the federal court system pushes mediation and the use of Magistrate Judges to help settle disputes when possible.

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In addition, some court systems are known for expediency – such as the "rocket docket" of the Eastern District of Virginia. If the venue for the resolution of your dispute is such a jurisdiction, litigation may be a better choice for you.

Moreover, a party aiming to draw out arbitration might be able to do so, whereas a judge would be able to keep the parties closer in check. Other factors to consider: a judge is a known entity whereas an arbitrator may be selected from a pool of which the parties know very little, other than what is presented on resumes; the arbitrator may not issue a written opinion or an explanatory document; arbitrators are sometimes inclined to "split the difference" rather than come down too hard on any one party; an appeal for the review of arbitration decisions is difficult to obtain; and the parties typically have to go through a second process in court to enforce an arbitration award.

Thus, on balance, litigation may be the better option for you, despite the trend favoring arbitration. In our experience, arbitration infrequently is as simple and cost-effective as clients expect it to be.

Construing the Contract

When a dispute among contracting parties arises, we are often requested to assess provisions in contracts that have been less-than-artfully drafted and, as a result, contain ambiguities that are subject to interpretation. In the event of a dispute over the meaning of an unclear contract provision, the general rule is that any ambiguity will be resolved against the party that drafted the agreement. A boilerplate provision addressing construction of the agreement can avoid this potential problem for the drafter by stating that, in the event of an ambiguity, the contract will be considered to have been drafted by both parties, and thus not construed against either.

On the other hand, if one of the parties to a negotiation has been presented with a "take-it-or-leave-it" contract, drafted solely by the party in control of the process, the omission of such a clause may work to the non-drafting party's advantage in the event of a dispute with ambiguous terms at issue.

Attorneys' Fees Provisions

I have been asked by aggrieved contractors many times: "So, if we sue these guys, can I get my attorneys' fees?" It is surprising the number of contractors that fail to consider the impact of a contractual attorneys' fee provision until it is too late. It is common for a drafter of the contract to include in the boilerplate a provision stating that the loser pays not only for its own attorneys' fees but the fees of the prevailing party as well. If such a provision is omitted, it is unlikely that either side will have to pay for the other side's attorneys' fees. As a general rule, a "loser pays" provision will deter litigation, and these clauses must be carefully drafted in order to achieve the desired result.

Conclusion

While it may be tempting in these trying economic times to roll out the same old boilerplate you have used in the past, the prudent contractor will devote considerable attention to these provisions at the outset, so at the end of the dispute resolution you will not be looking back and saying "if only we had considered…." ❒

About the Author: Paul W. Mengel III, counsel with PilieroMazza, leads the Litigation Group. He is a seasoned trial attorney with a broad range of experience in all aspects of civil litigation as well as complex commercial disputes. Mr. Mengel has substantial first-chair trial and appellate experience, successfully representing clients ranging from small businesses, individuals and insurers, to Fortune 500 companies in a diverse range of areas. He can be reached at pmengel@pilieromazza.com.

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GUEST COLUMN

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LOWEST PRICE TECHNICALLY ACCEPTABLE: IT DOESN'T WORK FOR YOUR RETIREMENT PLAN EITHER

John P. Keenan, CFP®, AIF®

In order to be a progressive, forward thinking government contractor, you have to be adept at navigating a maze of challenges in order to win bids. With sequestration, continuing resolution, and lowest price technically acceptable being the equivalent of "lions and tigers and bears, oh my," it's no wonder that many contractors are finding it difficult to stay on the golden road to Oz.

The ongoing debate surrounding lowest price technically acceptable is a simple one – how do you find the best value while weighing both cost and quality? Is it possible to achieve good performance when contracts are being awarded to those who barely meet minimum requirements at the lowest possible cost? While everyone has his or her own opinions about the effectiveness and acceptability of this contract evaluation method, we find that many government contractors are unaware of the reality that they use the same standard when running their business; specifically as it relates to human capital and employee benefits.

As financial advisors specializing in retirement plans, we work with government contractors to help them achieve greater retirement outcomes for themselves and their employees. In the beginning stages of our independent retirement plan evaluations, we often hear the same thing from owners; "I want to get the best possible outcome, I don't want to worry about the requirements and I want to decrease costs." Sound familiar? If you don't think a lowest price technically acceptable standard works for the government, you will probably agree that it won't work for your organization either. In order to achieve the best possible results for you and your employees, you need to shift your thinking toward value creation when it comes to your retirement plan.

The "lions and tigers and bears" of retirement plans include ERISA compliance/fee disclosure, the national retirement income crisis, and hesitancy toward innovative plan design.

ERISA Compliance & Fee Disclosure

Last year, the Department of Labor made major rule changes to retirement plans – some of the most significant changes in 30 years. Section 408(b)(2) and Section 404(a)(5) address required fee disclosures at both the plan sponsor and plan participant levels. All retirement plan fiduciaries should be aware of these new regulations. If you're wondering whether you could be identified as a plan fiduciary, the answer is most likely yes.

According to the Department of Labor, if you hold any type of decision-making authority over administration of the plan or more importantly its investments, you are considered a fiduciary to the plan. As a plan fiduciary you are federally required to act in the participant's best interest, pay only "reasonable" plan expenses, document the fees (both direct and indirect) clearly in writing, and carry out your duties following the "prudent man" rule.

These regulations were in response to a wide misconception that the retirement savings problem in America could be largely attributed to the "high fees" that participants pay in their retirement plans. A U.S. Senate report stated in July 2012 that Americans are \$6.6 trillion underfunded for retirement[1] and they needed to point the finger at something – fees were the first target. Similar to the lowest price technically acceptable method, the knee-jerk reaction is to cut costs. While it is true that fees can absolutely erode retirement savings over time, these regulations will do very little to move the needle in solving the national retirement income crisis. This crisis is a savings problem, not a fee problem.

National Retirement Income Crisis

A recent study by the Employee Benefits Research Institute paints a dreary picture when it comes to the retirement savings of Americans. This study concluded that 56% of the nation's workforce have an entire life savings of less than \$25,000 and only 2% of Americans have an adequate pension or retirement account.[2]

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[1] US Senate Committee on Health, Education, Labor and Pension, "The Retirement Crisis and a Plan to Solve It" July 2012.

[2] Employee Benefits Research Institute, March 2011.

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The statistics are endless and staggering. Americans will not have enough money to fund their retirement. We will have to work longer, decrease our standard of living and hope that our minimal savings can cover us if we need to fund a long term care health need.

There is no simple solution for the national retirement income crisis but the reality is that we are all responsible; individually, organizationally and nationally. It is critical to deal with this crisis sooner rather than later, whether through better savings instruments, more incentives to save or even mandatory savings requirements.

Hesitancy Toward Innovative Plan Design

During our work with plan sponsors we often find hesitancy toward reviewing options that can drastically enhance the retirement outcome of their executives and employees. Typically most government contractors are using antiquated matching designs that are only focused on passing the testing or as a way to keep up with competitors. Either solution is probably costing more money than needed and also not delivering desired retirement results for all of your employees.

Innovative plan design strategies such as plan automation, census driven retirement gap analysis and a combination of qualified/non-qualified retirement plans will have a tremendous impact on your plan. These solutions can actually save your company money while providing tremendously greater value through positive impact on retirement outcomes.

As we all face our own "lions and tigers and bears" it is important to remember what the desired outcome is. Just as lowest price technically acceptable standards are unnecessarily hindering the government outcome, your organization may be doing the same to employees and executives by taking a similar approach. Choosing the right partners and framing your focus toward value creation versus cost cutting will provide dramatic results for your organization; both in recruiting top talent and building a competitive organization. ❒

About the Author: John P. Keenan, CFP®, AIF®, is a Partner with Signature Estate & Investment Advisors, LLC; a Registered Investment Advisory Firm managing over $3 Billion in AUM as of 3/31/2013. John's professional focus is in 401(k) plans, deferred compensation plans, executive benefits, investment management, retirement planning, and estate planning for government contractor owners/executives. He can be reached at jpk.seia@jhnetwork.com or (703) 287-7151.

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RISKS OF DELAYING YOUR DEBRIEFING UNTIL AFTER AWARD

By Alexander O. Levine

When an offeror is excluded from a competition prior to the award of a contract, it is usually offered two choices: it can request a pre-award debriefing or it can wait until after the contract is awarded and receive a post-award debriefing. Indeed, under FAR 15.505(a)(2), an excluded offeror generally has the right to delay its debriefing until after award.

Often, the option to delay the debriefing can seem desirable. A pre-award debriefing is limited in scope to information regarding the agency's evaluation of the significant elements of the offeror's proposal and includes only a summary of the agency's rationale for eliminating the offeror from the competition. In fact, the FAR specifically prohibits an agency from disclosing information about the other offerors remaining in the competition, including the number of offerors, their identity, the content of their proposals, their ranking, or any information regarding the evaluation of such offerors' proposals. Without such information, it can be difficult for offerors to know whether it is worthwhile to protest its exclusion from the competition. In addition to not knowing where it stands relative to other offerors, an excluded offeror cannot know whether it was treated unfairly vis-à-vis other offerors.

Yet, delaying the debriefing until after the award can have serious and unintended consequences on an offeror's ability to protest the agency's exclusion of its proposal. Under the GAO bid protest regulations, a protest of an exclusion from the competitive range must be protested either: (1) within 10 days of when the basis of protest is known (or should have been known); or (2) within 10 days of the receipt of a required debriefing, i.e., a debriefing that once requested, the agency is required to provide.

When an offeror chooses to delay its debriefing until after award, it unintentionally jeopardizes the timeliness of any potential protest relying upon the second option under the GAO's timeliness rules. The reason for this is that such a debriefing is not considered a "required debriefing" because, under the Competition in Contracting Act, a post-award debriefing of an offeror excluded from the competitive range is required "only if that [excluded] offeror requested and was refused a preaward debriefing." Accordingly, such a delayed debriefing is no longer considered "required" and therefore no longer tolls the deadline for an offeror to file a GAO protest.

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And, perhaps less readily apparent, choosing to delay the debriefing also jeopardizes the timeliness of a protest relying on the first option, i.e., filing within ten days of when the basis of protest is known (or should have been known). The reason for this stems from the "should have known" portion of the requirement. GAO case law has interpreted this language as imposing an obligation on a protester to diligently pursue the information on which its protest is based. What this means is that a protester's failure to utilize the "most expeditious information-gathering approach" can often constitute grounds for the dismissal of its protest as untimely. Numerous GAO cases have held that where a protester files a protest based on information learned during a delayed, post-award debriefing – and where such information could have been learned during a pre-award debriefing – the protester failed to diligently pursue the information upon which its protest is based. Consequently, the GAO has dismissed such protests as untimely.

A delayed debriefing however is not necessarily fatal to all potential protests. If a protester can demonstrate that its protest is based on information that would not have been available to it during a pre-award debriefing, e.g., a mistake in the agency's ranking of offerors, then the offeror can plausibly assert that it met its obligation to diligently pursue the information forming the basis of its protest.

Still, such protest bases are the exception, not the rule. Since a pre-award debriefing is required, under the FAR, to include the "agency's evaluation of significant elements of the offeror's proposal," most potential protest grounds will arise from information that could have been learned at such a debriefing. Consequently, an offeror that chooses to delay its debriefing risks losing its ability to challenge almost any part of the agency's exclusion decision. The decision to delay a debriefing, therefore, should be made only with extreme caution. ❒

About the Author: Alex Levine, an associate with PilieroMazza, focuses his practice in the areas of litigation and government contracts law. Mr. Levine counsels clients in variety of government contract matters advises including regulatory compliance, bid protests, debarment and suspensions, government investigations, and general litigation matters. He can be reached at alevine@pilieromazza.com.

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Government Contracting

HUBZONE DESIGNATION UPDATE

By Katie Flood

As participants in the HUBZone Program were painfully made aware in 2011 and 2012, HUBZone district designations are subject to change based upon economic and demographic shifts. If you are a HUBZone small business concern, it is important to keep tabs on the designation status of your district for purposes of your federal contract forecasting, particularly in light of several recent developments.

Generally, HUBZones are located within one or more qualified census tracts; qualified nonmetropolitan counties; Indian reservation lands; qualified base closure areas; or those areas "redesignated" as HUBZones after losing their qualifying status. If a HUBZone has been redesignated, it may only retain its HUBZone status for three years after the date on which the government had released the information triggering the redesignation. HUBZone designations are determined through data gathered and analyzed by the U.S. Census Bureau, the American Community Survey, and the U.S. Bureau of Labor Statistics. Such data constantly evolves, generating an unfortunate situation of having HUBZone designations which may be revised multiple times per year. Ultimately, a HUBZone designations is meant to reflect a district's income levels, unemployment rates, Difficult Development Area status (designated by the U.S. Department of Housing and Urban Development), base closure status, and Indian land status.

This January, HUD published its list of the 2013 qualified census tracts. SBA plans to make these new designations effective as of October 1, 2013 for the HUBZone Program. HUBZone firms should check out their dependent HUBZone addresses at the SBA's HUBZone maps page, available at http://www.sba.gov/content/hubzone-maps. While the January 2013 data has not yet been fully incorporated into the current HUBZone maps, a table listing all of the January 2013 changes is available at that site. If your currently qualified HUBZone address is no longer part of a qualifying census tract, that address will be "redesignated" as a HUBZone until October 1, 2016.

In addition to the new data regarding the qualified census tracts, the SBA has also recently released information regarding HUBZone nonmetropolitan county designations. The list of the currently qualifying counties has been updated to reflect newly released 2007-2011 American Community Survey income data, as well as 2013 Difficult Development Area designations. Twenty-two counties have been newly

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888 17th Street, NW, 11th Floor, Washington, DC 20006

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qualified as a result of this update, while thirty-nine have been "redesignated." The newly released information confirms a general trend towards a decline in the number of nonmetropolitan counties that qualify as HUBZones. A projection of the data reveals that the "redesignated" HUBZone status of 60 nonmetropolitan counties will expire on October 1, 2013; following that, 138 will expire in October of 2014, 78 will expire in 2015, and 39 will expire in 2016. While it is possible that some of these counties may be newly qualified when new unemployment data is released by the Bureau of Labor Statistics in May 2013, if your principal office or employees' addresses are dependent upon one of these expiring counties, it is best to prepare early for such an outcome. If it is feasible, it might be worth exploring moving office locations to a qualified HUBZone location, or targeting new employee hires from qualified HUBZones.

In further HUBZone news, the SBA has identified 2,067 currently certified HUBZone firms that have been identified for "recertification" in 2013. HUBZone firms are required to undergo recertification every three years in order to maintain their HUBZone certification. The SBA has advised the affected firms that it, the SBA, will initiate the recertification process – a firm's HUBZone eligibility will not "automatically expire" while waiting for the SBA to contact it, even if the SBA contacts you after the three-year anniversary of your certification or last recertification. An affected firm will receive a letter in the mail asking it to either recertify or submit a voluntary decertification form within 15 calendar days of receipt.

For firms that initially certified their HUBZone eligibility in 2007 and wish to recertify their status, you will be asked to submit a full set of supporting documentation to demonstrate that you are currently meeting all HUBZone eligibility requirements, similar to if you were submitting an initial eligibility application. For firms certified in 2001, 2004, or 2010, you will simply be asked to notarize a recertification form stating that you are meeting all of the eligibility requirements.

HUBZone firms should make sure that maintaining HUBZone compliance is a top priority. If your firm is facing issues because of expiring HUBZone designations, redesignated HUBZone districts, or recertification, and you would like assistance, please contact us. ❒

About the Author: Kathryn V. Flood, an associate with PilieroMazza, practices in the areas of government contracts, small business administration programs, business and corporate law, and litigation. She can be reached at kflood@pilieromazza.com.