Foster Garvey

Recent Court Decisions Address Vulnerabilities for Government Transportation Contractors

Legal Alert
March 3, 2008

Related Services

Government Contracts

Garvey Schubert Barer Legal Update, March 3, 2008.

Three judicial decisions issued in the last two months highlight important issues for government contractors, especially Transportation Service Providers (TSPs). Issues involved in the decisions include: 1) how the government can be bound in contract by the communications of its employees; 2) the legal effect of missing a required delivery date, and 3) the enforceability of a "no compete" and confidentiality employment agreement. The last issue is not unique to government contracts, but the court offered good guidance on how to structure a "no compete" agreement in the context of the transportation industry.

Stevens Van Lines v. United States, Court of Federal Claims, Case Nos. 05-1278, Jan. 23, 2008

In a case involving the authority of Government employees to bind the Government, the Court of Federal Claims found an implied in fact contract where the plaintiffs argued that communications with mid-level Government employees modified the contract. Stevens Van Lines, Inc. v. United States.

The dispute concerned whether the Government or Household Goods Carriers handling shipments for the Department of Defense were required to pay a new 1% fee for using the mandatory computerized payment program called "PowerTrack," administered by U.S Bank. Given the hundreds of millions of dollars of services procured through the DoD's household goods program, 1% of the total represented a significant amount of money at issue.

The dispute arose, and the Government ultimately lost, because it sent mixed messages to TSPs concerning who would be responsible for the payment. When the PowerTrack program came on-line in 2004, to encourage users, the Government reimbursed TSPs the 1% fee. In early 2005, the Government published a Federal Register notice stating that beginning with the October 2005 rate cycle, it would no longer reimburse the 1% fee. Nevertheless, mid-level household goods program officials subsequently told TSP representatives that the Government would continue to reimburse the fee past the October 2005 rate cycle, contradicting the Federal Register notice. Contributing to the confusion, the relevant contractual document, the October 2005 rate solicitation, did not contain any language about the fee. As a result, TSPs filed rates in the summer of 2005 for the upcoming October rate cycle believing that they would be reimbursed the fee and formulated their rates accordingly. However, once the rate cycle began, the director of the household goods program sent a notice to TSPs that the fee would not be reimbursed.

The Government argued that no enforceable agreement existed because the employees communicating with the TSP representatives had no actual authority to bind the Government; only the program director had authority to bind the Government. The Court disagreed, finding that all the elements of a government contract had been met - there was mutuality of intent, consideration (the TSPs filed lower rates thinking the fee would be reimbursed the fee), lack of ambiguity in offer and acceptance, and authority on the part of the government employees. While the Court found that the lower-level employees did not have actual authority to bind the Government, it found that they had implied actual authority based on their job descriptions, their duties, and the nature of their communications with the TSPs and could thus bind the Government in contract.

Fortunately, the TSPs' representatives obtained the Government's promises in writing, on several occasions. Relying on oral statements would have led to a more complicated assessment where the court would have needed to make credibility determinations. Even with written statements, Government contractors typically fail to recover on a theory of implied actual authority. While this case highlights a theory of recovery for contractors who rely on promises outside of a formal contract modification, there would have been no issue had the terms regarding the fee been incorporated into the contract. Therefore, anyone doing business with the Government should make great efforts to insist that all contract terms, conditions, and modifications (a common problem area) are incorporated into the contract.

Syracuse International Technologies, ASBCA No. 55607, December 30, 2007

The holding in this Board of Contract Appeals case should probably be limited to its facts regarding purchase orders made pursuant to FAR 13.201, but creative Government counsel could try to apply it to the transportation services context because it involves meeting required delivery dates, which is often an issue in transportation contracts.

The Defense Logistics Agency issued a solicitation to procure four electronic control panels. In response, S.I.T. Corp. submitted a quote and the Government issued a purchase order for the panels requiring delivery within 135 days. S.I.T. never signed the purchase order, nor was it asked to. Several months after the required delivery date, the contracting officer unilaterally cancelled the purchase order. Notwithstanding the cancellation, S.I.T. delivered the panels about two weeks afterward the cancellation, apparently because it thought it was owed payment for having nearly completed the order at the time of the cancellation.

In finding for the Government, the Board started from the premise that purchase orders not accepted in writing are not deemed to be binding contracts until delivery. Delivery in conformance with the terms of the purchase order constitutes acceptance where there is no written acceptance. The Board found that the Contracting Officer's unilateral cancellation after the required delivery date to be effective, despite S.I.T.'s near completion of the order and eventual late delivery. The Board further found that the Contracting Officer was under no obligation to warn S.I.T. that the contracting officer intended to cancel the order due the delay in delivery. Not all cases of late delivery, however, would necessarily allow the Government to cancel a purchase order. For instance, the Board distinguished these facts in S.I.T. from a situation where the evidence showed a course of dealing of the Government ignoring late deliveries made within a reasonable period of the required delivery date. *C.f. Buffalo Forge Company*, ASBCA No. 22887, 78-2 BCA ¶ 13,491.

This decision should reinforce the importance of contractors doing business with the Government to accept purchase orders in writing, before undertaking performance. To the extent that purchase orders are similar to the Government's procurement of transportation services under Government Bills of Lading, outside of Federal Acquisition Regulation procedures, creative Government counsel could attempt to rely on S.I.T.'s holding to refuse to accept a shipment past its required delivery date.

Total Quality Logistics, Inc. v. Filipiski, Case No. 2007 CVH 00903, Court of Common Pleas Clermont County, OH

Though issued by an Ohio state court, this case provides employers with a good example of what "no-compete" and confidentiality agreement terms a court will enforce.

A transportation broker, TQL, brought suit against a former employee, Filipiski, to enforce the terms of its "no-compete" and confidentiality agreement that Filipiski signed when he accepted employment. The terms of the "no-compete" agreement, among other things, stated that after termination of employment, the employee would not solicit customers of the TQL or take a job where he could use confidential information he learned about TQL's business.

Filipiski was fired in 2006 and soon thereafter found employment with another transportation broker and TQL sued to enjoin him from violating the agreement. After a trial, the court issued an opinion enforcing the agreement by enjoining Filipiski from revealing confidential information about TQL's operations and restricting him from taking competitive employment for one year. The confidential matter subject to the agreement included, customer contact information, TQL's business model, information regarding TQL's proprietary software, TQL's pricing methods and information in TQL's training program that is not publicly available.

In a minor setback for TQL, the Court found that the "no-compete" agreement was partially invalid. It found that two-year term, in connection with the limitless geographic application, was overly-restrictive and limited the term of the agreement to one year. However, in issuing the order, the court ordered that the one-year limit run 60 days from the date of the decision rather than from the date Filipiski was fired.