Government Contracts Landmines - Spotting Them Before They Explode

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Avoiding troubles that lurk below is possible only if one knows what to look for, on the battlefield and in life in general.

Your Client Is On The Right Track

Don't Let This Happen To Them

Part One: The Basics

Part Two:
The Landmines and How to Avoid Them

Part One:
The Basics...
...very briefly.

Federal Government Procurements

- "'Procurement' describes the process whereby the government obtains goods and services .... Competition ... means that the government determines from whom to buy goods and services—and thus with whom to contract— by 'solicit[ing] or entertain[ing] offers from two or more competitors, compar[ing] them, and accept[ing] one based on its relative value.'" Nash, et al., *The Government Contracts Reference Book: A Comprehensive Guide to the Language of Procurement* 109-110 (2d ed. 2007).
- The U.S. govt. is the single largest procurer of goods and services in the world. DoD accounts for the lion's share of federal acquisitions – more than $600 billion / yr.
- Redstone Arsenal in Huntsville, Alabama accounts for 9.8% of Alabama's gross domestic product. The importance to Ala.'s economy is even greater when one also considers Anniston Army Depot, Montgomery's Maxwell Air Force Base, and Mobile's Austal shipbuilding complex.
- In the last 12 months alone, the federal govt. has awarded more than $12 billion in contracts to businesses in Ala.

Who Is Involved?

- Government Agency (DoD, NASA, GSA, USAF, Navy, etc.)
- Contracting Officer (CO)
- Source Selection Evaluation Board (SSEB)
- Source Selection Advisory Council (SSAC)
- Source Selection Authority (SSA)
- “The Customer”
- DCMA
- DCAA

- Contractor (more than 400 government contractors have offices in Huntsville)
  - CEO/President
  - HR Professionals - maybe
  - Contracting Professionals - maybe
  - (Accountants)
  - (Lawyers)

- Prime Contractors, Subcontractors

Risks

- Spending B&P Money and Not Getting Awards
- Termination of Contracts
- Suspension / Debarment
- Civil Fines, Financial Penalties
- Jail

Differences and Disputes

- The money is lucrative. But, the differences between contracts with the federal government and contracts between private companies mean that one could quickly run into problems.
- Also, with such a high volume of government contracts also comes contractual disputes; and, in a world where contract amounts can often exceed seven digits, a dispute over even a relatively small percentage of those funds can be significant.

Main Differences

There are three main differences between U.S. federal government procurements and private sector contracts:

1. Statutes, regulations, and policies, which are intended to **encourage competition** to the maximum extent practicable, **ensure proper spending** of taxpayer money, and **advance socioeconomic goals**, among other things.
2. **Mandatory clauses** that give the government special contractual rights, such as the right to unilaterally change contract terms and conditions and to terminate the contract for its convenience (Changes Clause, T4C Clause, Default Clause).
3. Because of the government's status as a **sovereign** entity, claims and litigation follow the unique procedures set forth in the Contract Disputes Act (CDA).

Others include IP Rights, Payments, and Audits.

The Differences Matter

- Changes Clause
- T4C Clause
- Default Clause
- The FAR (and other acronyms)
- Size Matters
- Audit Rights
- Intellectual Property Rights
- Criminal Penalties

Some Common Problem Areas

- **Changes By Someone Other Than CO**
- **Size**
  - NAICS
  - SBA
  - Affiliation
- **Service Contract Act**
  - Correct Wage Determination
  - CBAs
  - Exemptions
- **Security Clearances**
- **Pricing**
  - TINA, FCA

Part Two:
The Landmines and How to Avoid Them

Protests

Congressional Purpose

"The court's primary purpose in allowing protestors standing to challenge the government's procurement process is not to vindicate individual entitlement rights to government business. Rather, the court's objective is to advance the public interest by ensuring that the government obtains the most advantageous contracts by complying with applicable regulations and treating all bidders and offerors without discrimination. *(continued)*

Congressional Purpose

When protestors assert their personal rights by suing the government for injunctive relief or monetary damages, they simultaneously advance the public interest in preventing the granting of contracts through arbitrary and capricious action."

Grumman Data Systems Corp v. U.S. 28 Fed. Cl. 803 (1993)

I Protest! Who? And, What?

- Who?
- A protest must be filed by an "interested party," which means an actual or prospective bidder or offeror with a direct economic interest in the procurement. In challenges of the evaluation of proposals and the award of contracts, this generally means an offeror that would potentially be in line for award if the protest were sustained.

Some examples of common protest grounds include:
(1) failure to evaluate in accordance with stated evaluation criteria;
(2) unequal discussions;
(3) failure to evaluate for price realism;
(4) unreasonable evaluation of criteria;
(5) evaluation based on unstated evaluation criteria;
(6) affiliation; and
(7) decisions regarding set-aside or sole source.

Protests – Where?

- There are three different venues available to hear a bid protest challenging the terms of a solicitation—the agency, the Government Accountability Office (GAO), and the United States Court of Federal Claims (COFC).
- The agency and GAO are the most popular venues for a pre-award specifications protest. The reasons for this are two-fold: agency and GAO protests are less expensive to pursue than protests at the Court of Federal Claims and both venues offer an automatic stay of the contract award. 31 U.S.C. § 3553(c); FAR 33.103(f).
- Although the COFC has jurisdiction to hear pre- award protests, the cost of litigating there is high and the availability of an injunction stopping the award of the contract is not automatic.

Protests – When? Timeliness

- The regulations set forth the timeliness requirements for filing protests at GAO. 4 C.F.R. § 21.2.
- For post-award protests to GAO, the agency must suspend performance (Automatic Stay) if it receives notice of the protest from GAO within **10 days after contract award or within 5 days after the debriefing date** offered to the protester for requested and required debriefings under FAR 15.505 or 15.506, whichever is later. FAR 33.104(c).
- Agency-level protests must be filed in accordance with GAO's timeliness rules at 4 C.F.R. § 21.2(a)(1) and (a)(2), unless the agency imposes a more stringent time for filing, in which case the agency's time for filing will control.
- Protests at the COFC have to be filed **within 6 years**. **<u>But</u>**, parties must act promptly if they seek injunctive relief. A lengthy delay may affect the protester's ability to obtain a preliminary injunction and may also result in the court's barring the protest under the doctrine of laches. *Reilly v. United States*, 104 Fed. Cl. 68, 78 (2012).

"The lady doth protest too much, methinks"

- Why to protest
- Why not protest

Protest Landmines

- Landmines:
  - Not asking for debriefing
  - Not protesting problems with solicitation before submitting proposals
  - Not establishing “interested party” with “substantial chance of award”
  - Filing too late or Filing too soon. *See Celeris Systems, Inc*., B-416890 (Comp. Gen. Oct. 11, 2018).
  - Picking the wrong venue
  - Not intervening if you are the awardee

- Examples:
  - Avionics upgrades matter – pre-award debriefings, pre-award bid protest timeliness, competitive range determinations.
  - Showing standing can be complex – VA Sole Source Saga.
  - Pick the right venue – different rules in GAO and COFC and the rejection of proposal as untimely matter. The proposal submission matter.

Avionics Upgrades Matter

- Competitive Range Determinations
- Debriefings
- Timeliness for Review of Competitive Range Determinations (and issues with Solicitation – e.g. OASIS matter)
- “Discussions”
- What to ask
- What to do
- Don’t wait for award

Standing, VA EMR Sole Source Contract

- Issues:
  - Sole Source Contract – exception to Competition in Contracting Act – public's best interests.
  - Standing – interested party; substantial chance of award; qualified bidder.
  - COFC compared the work scope and value of a protester's prior contracts to those of the procurement at issue in making its required standing determination.
- In *CliniComp International Inc. v. U.S.*, the protester challenged a proposed sole-source award of a national electronic health records contract by the U.S. Veterans Administration to a much larger competitor. The Federal Circuit affirmed the underlying quasi-evaluation by the U.S. Court of Federal Claims decision, which compared CliniComp's current operations with the details of the proposed sole-source contract. The Federal Circuit upheld the COFC's finding that CliniComp did not have standing, as it had not shown itself to be capable of performing a national contract much larger than any of its current efforts.

Venue –Proposal Rejection Case

- GAO and COFC have different rules
- Some GAO / COFC differences:
  - COFC more expensive
  - Timeliness rules
  - Precedent
  - Subject matter of protests
  - Hearings
- Issues in case:
  - Venue
  - Submission of proposals
  - Dynamic of dealing with DOJ counsel rather than Agency counsel

Mind If I Cut In? Intervening

- Many contractors are familiar with post-award bid protests. Soon after receiving notification of award, the contracting officer may notify the awardee that a bid protest has been filed by a disappointed offeror at the Government Accountability Office ("GAO") or the Court of Federal Claims ("COFC"). However, some contractors are not aware of the option to participate in the proceeding if their award is challenged. Namely, at either the GAO or COFC, the awardee may intervene in the protest and assist the government in defending the award. This assistance can be invaluable.
- For example, we have intervened in several protests at the COFC and raised arguments the government counsel did not feel comfortable bringing up, with the COFC ultimately denying the protests on the bases we raised.
- Through its counsel, an intervenor can provide the agency with information about its proposal and help defend against the protester's arguments. For example, if the protester claims that the awardee has an organizational conflict of interest ("OCI"), the intervenor can help the agency understand why its situation does not present an OCI or how the OCI was mitigated. The intervenor can also help the agency understand complex or technical issues that are not familiar to those outside of a particular industry.
- In a GAO protest, intervenor's counsel can work with the agency to limit the amount of information about its proposal and evaluation that is released. And, intervenor's counsel can assist in identifying supporting case law or raising new arguments.

Intervening (cont'd)

- A decision from the COFC illustrates the value of intervening.
- *Excelsior Ambulance Service, Inc.*, No. 15-189C (Fed. Cl. March 23, 2016) - protester challenged the award of a contract by the VA. CO notified awardee of protest. The awardee opted not to intervene, largely because it believed the protest centered on the issue of pricing.
- COFC sustained the protest, finding the awardee failed to submit the required business license with its proposal, and that the VA allowed the awardee to revise its proposal during a corrective action.
- After the govt informed COFC that it wouldn't appeal the court's decision, awardee moved to intervene to pursue an appeal. Court denied the motion because they delayed in intervening. The awardee lost the contract.
- After reviewing the COFC's decision in *Excelsior Ambulance*, the awardee believed the case was wrongly decided, and it had information to support its position. However, it was not permitted to intervene and appeal because it did not decide to defend its award until it was too late.
- Perhaps the outcome of the protest would have been different had the awardee intervened at the outset.
- When faced with a protest, every contractor should seriously consider retaining counsel to intervene.

SCA

Service Contract Act – Wage Determinations

- SCA enforcement is on the rise
- Change in administration has had NO impact on the aggressiveness of local auditors
- Increase in targeted vs. complaint driven investigations
- Sanctions for non-compliance can be harsh: – Monetary impact: Back pay, interest, etc.
- Non-monetary impact: Contract termination, company and/or individual debarment, etc.
- Statutory 3-year debarment absent proof by contractor of "unusual circumstances."
- Recent examples of SCA debarment of companies and individuals.
- Recent Davis Bacon Act criminal case for false certifications of payrolls.

Common SCA Pitfalls/Issues:

- Part time or temporary employees are mistakenly ignored during the assessment of SCA coverage
- Pay stubs commingle wage and benefit amounts
- Benefits are included that are not "bona-fide"
- Contracts contain the SCA clause, but no incorporated WDs
- Failure to segregate SCA hours from commercial time
- Employees perform multiple functions
- Classify employees based on contract description vs. actual work performed
- SCA clause in master IDIQ contract but not task order

Follow On Contractor Problem

- Backpay was not the fault of the contractor (Contracting Officer failed to include SCA / incorporate WD, CO said not SCA, DOL disagreed after employee complaint, prior contractor treated as non-SCA)
- DOL decides, not CO
- Contractor agreed to provide backpay, part of a settlement so costs are allowable
- CO agreed to approve REA
- $500,000

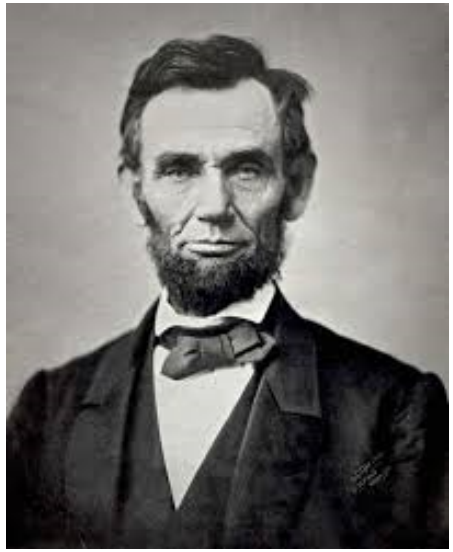
FCA

False Claims Act

- 31 U.S.C. 3729, et seq.
- FCA is the federal government's principal civil tool in its anti-fraud efforts.
- Qui tam cases by employees

Background

- Passed in 1863, during the Civil War to address fraud in military procurement contracts
- Also known as “Lincoln’s Law”
- Undergone substantial amendments by Congress in 1943, 1986, and 2009
- Allows for triple damages



False Claims Act

any person who—

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

31 U.S.C § 3729

Common Scenario

- Government contract to do particular work (*e.g.*, R&D)
- Money is spent on something else
- Misrepresentations are made in the documents regarding what work is done (Presentment)
- Contractor is paid on the claim
- Employee knows about the misspent money and files suit and reports it to the Government (Relator)

FCA Is Expansive

- SAIC entered into a contract with NRC to help develop a national standard for disposal of nuclear waste
- SAIC certified no OCIs and would alert NRC if an OCI arose

U.S. v. SAIC (D.C. Cir. 2010)

FCA and OCI

United States v. Science Applications International (D.C. Cir. 2010)

SAIC's non-compliance with a Organizational Conflicts of Interests clause.

Invoice held to be an implied certification that SAIC was complying with its COI obligations.

FCA

- In 2008 a jury held SAIC failed to disclose OCIs that had potential bias to SAIC's work for NRC
- Jury awarded Govt the full amount paid to SAIC ($1.97M)
- Triple damages for fraud increased award to $5.91M

U.S. v. SAIC (D.C. Cir. 2010).

The Burn Barrel Case

- Issues Involved
  - $6.2 million in DoD contracts – baseball caps and backpacks – promotional items for Army recruits
  - Buy American Act and Berry Amendment
  - FCA
  - Compliance
  - Criminal / Civil
  - Government Contracts Law is confusing

<u>Qui tam</u> pro domino rege quam pro se ipso in hac parte sequitur

(he who brings an action for the king as well as himself)

Sampling of *Qui Tam* Actions

1. Misrepresentation in proposal
2. Misrepresenting social economic status
3. Buying-in under false pretenses
4. GSA schedule most favored customer fraud
5. TINA violation

Sampling of *Qui Tam* Actions

6. Use of unapproved source
7. Davis Bacon violation
8. Ineffective approved purchasing system
9. Misallocation of indirect costs
10. Falsify QA records

Qui Tam Road Map

Relator files complaint under seal

Department of Justice investigates and decide whether to intervene

- DOJ often uses Civil Investigation Demands to investigate
- DOJ goal is to make decision in nine months

If DOJ declines – files a notice of non-intervention

- DOJ can intervene at later time
- DOJ declination rate is approximately 75%

Relator free to pursue law suit unless DOJ moves to dismiss

If DOJ intervenes:

- DOJ runs the litigation
- DOJ often files new complaint with additional FCA allegation

Teaming:
Joint Ventures, Teaming Agreements, Affiliation

Joint Venture or Teaming Agreement

- JV
  - Joint Venturers
  - JV is usually the “Prime”
  - Can be partnership or LLC
  - SBA rules and MPAs – may protect from affiliation
  - MPA 3-in-2 rule

- Teaming Agreement
  - Prime Contractor and Subcontractor
  - Prime has privity of contract with Govt
  - SBA doesn’t have to approve
  - If set aside, then Prime has to be the qualifying entity and do most of the work
  - Ostensible Subcontractor Rule still applies
  - Teaming Agreements – Unenforceable Agreements to Agree?
  - Typical timeline - NDA - TA - Subcontract Agreement

Affiliation

- Size matters
- If businesses do too much work together, or if one exerts control (or could) over the other, then the government will deem them “affiliated”
- If affiliated, then the companies’ numbers are added together when determining size
- Government contractors go to great lengths to not be found “affiliated”

Teaming Agreement Thoughts

- FAR requires prime contractors to insert certain provisions (commonly called “flow-downs”) in Government subcontracts.
- If the Prime fails to include the flow-downs, it could be in breach of the prime contract.
- Other provisions require Primes to obtain certifications from Subcontractors, and limit the amount of work Subcontractors perform.

- Mandatory FAR flow-downs
- Subcontractor certifications
- Limitations on subcontracting and control (must avoid ostensible subcontractor affiliation problems)
- Subcontractor representations and warranties
- Termination rights
- “Pass-through” claim provisions, to make sure the subcontractor’s Government-related claims are presented to the Government

Flow-downs

- Prime's tendency is to flow down as much as possible. Risk management strategy.
- Want to be compliant with Prime Contract requirements.
- But could be costly in terms of time to negotiate and to add unnecessary requirements.
- Better strategy is for Prime to ask the Sub to identify the terms and conditions that are increasing the proposed price.
- Sub – determine what the prime wants to flow down and why.
- Understand enough about the Prime Contract to determine if a clause really must be flowed down, or if it even applies.
- Review RFP and identify concerns to the Prime as early as possible.
- Offer reasoning for why clause may not need to be flowed down so that the Prime will understand the impact and alternatives to accomplish result at less cost.

JV Agreements and MPAs

- Improperly done, can result in affiliation
- *Straughan Environmental, Inc.*, SBA No. SIZ-5767 (SBA Office of Hearings and Appeals Aug. 1, 2016).
- SBA messed up on the "recertification"
- Since not "reapproved" during annual review, MPA didn't prevent affiliation
- So, wasn't qualified as small
- But, by the time COFC decided, entire contract term expired
- *Straughan Environmental, Inc. v. United States,* Nos. 15-1217C & 16-1181C (Fed. Cl. November 6, 2017).
- Straughan hadn't timely sought a preliminary injunction – essentially no relief
- Must timely seek injunction at COFC

Don’t Go Changing… Agreeing to Do More

Agreeing to do More

- Often the complexity of government contracts requires a contractor to do more than he bargained for. Getting paid for the additional work is fraught with risks.
- If a contractor believes that the Govt has or will effect a contract change, but the CO has not demonstrated the intent to change the contract, FAR 43.104(a) required notification to the CO "as soon as possible.“
- Disputes over whether work was “within scope” are common.
- Proving the amount of recovery merited can be difficult.

Changes

- The Idea
  - Through “changes” clauses, the government establishes the right to make changes in the contract’s statement of work or period of performance
- In Exchange
  - The Contractor receives a right to equitable adjustments in contract cost and/or schedule

Formal Unilateral Changes Clauses

- § 52.243-1 Fixed Price
- § 52.243-2 Cost-Reimbursement
- § 52.243-3 Time & Materials or LH
- § 52.243-4 Construction
- § 52.212-4(c) Commercial

FAR § 52.243-1

"The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

FAR § 52.243-1

(1) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications.
(2) Method of shipment or packing.
(3) Place of delivery.

FAR § 52.243-1

(b) If any such change causes an increase or decrease in the cost of, or the time required … the Contracting Officer shall make an **equitable adjustment**….”

FAR § 52.243-1

(c) The Contractor must assert its right to an adjustment under this clause within **30 days** from the date of receipt of the written order.

Claim

"Claim" means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, <u>or other relief</u> arising under or relating to the contract.

FAR § 2.101

Claim - "Or Other Relief…"

- If contractor is unwilling to accept a change that is not within the scope of the Changes clause, consider declaratory judgment under "or other relief."
- Example - *CliniComp International, Inc. v. United States*, U.S. Court of Federal Claims No. 17-1035C.

Constructive Changes

- “Constructive “Change” is where the govt changes the contract but won’t acknowledge it.
- Constructive changes not addressed in FAR.
- Best strategy is to observe early and put the C.O. on notice (as well as reserve right to an EA).

§

Constructive Changes

A "constructive change" is any conduct by a Contracting Officer or other Government representative empowered to order changes that are not a formal change order, but have the consequence of requiring the contractor to perform work beyond the original contract requirements….

Nash & Feldman Government Contract Changes § 10:2

Constructive Change

Occurs not as a result of govt direction, but as a result of circumstances the contractor encounters in performing the tasks

Settled through equitable adjustment

If the parties can't agree, the Contracting Officer will issue a formal decision, and the contractor can take an appeal

Should present to C.O. as soon as possible, but certainly before final payment

Request For Equitable Adjustment (REA)

REA is the embryonic stage of a claim

- Generally not adversarial
- Often based on other clauses
- Cost of preparing a REA (experts, accountants, attorneys) generally are allowable costs

Request For Equitable Adjustment (REA)

REA is the embryonic stage of a claim

- Make as detailed as possible
- Try to submit with 30 days
- If subject to DFARS, must include certification in § 243.204-71
  if > $150,000

Must Establish

ENTITLEMENT	QUANTUM
Has there been a change in the contractor's obligations under the contract?	How much is the contractor owed?

Preparing Equitable Adjustments Claim Assessment Checklist

- Does the contract contain any of the FAR clauses that provide for an equitable adjustment?
- Did the government fail to issue a formal or express change order under the FAR Changes Clause?
- Is the government demanding an unreasonable interpretation of the contract requirements?

Disputes Over What Is Required

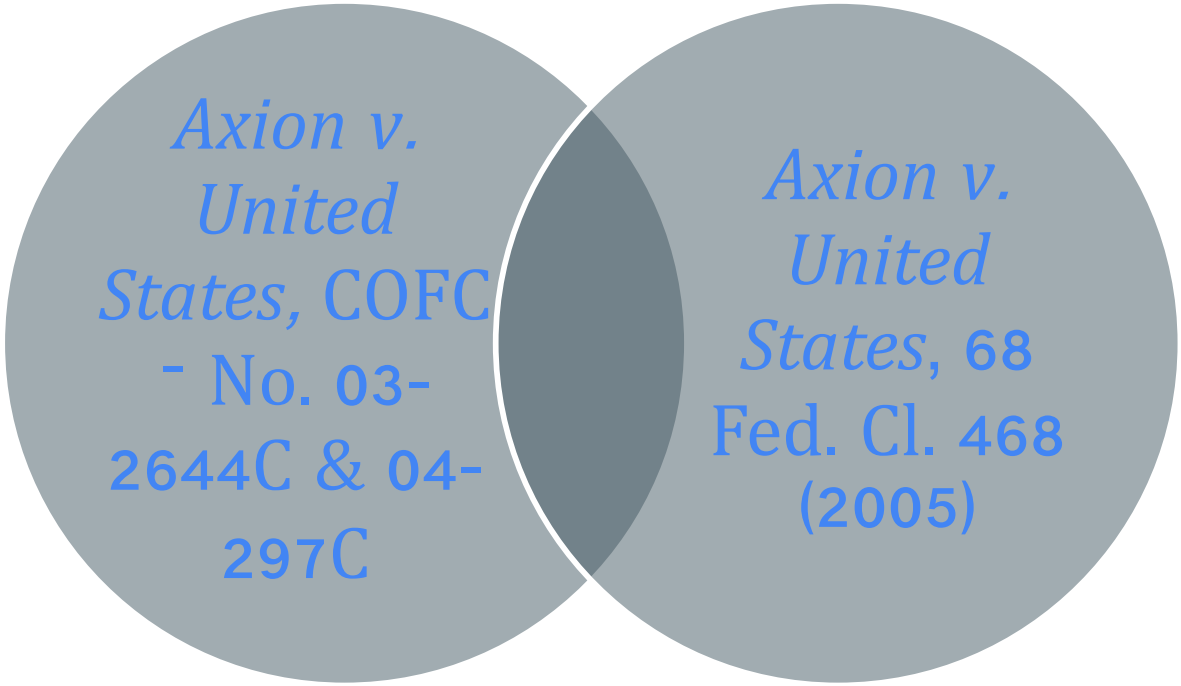
"The most frequently litigated issue in government contracting is probably the correct interpretation of contract language."

4 *Nash & Cibinic Report* ¶ 25

Equitable Adjustments / Claim Assessment Examples

- Are the contract specifications ambiguous?
- Has the government increased the scope of the tasks under the contract?
- Has the government rejected work that actually meets the requirements of the contract?
- Has the government failed to disclose superior knowledge vital to the successful performance of the contract?
- Did the government fail to provide government-furnished property or information in accordance with the contract requirements?
- Did the government fail to cooperate, through an action or inaction, during contract performance?

Defective Specifications



Concept of Quantum

The purpose of an equitable adjustment is to keep a contractor whole through reimbursement of increased costs and payment of a fair profit.

New York Shipbuilding Co., Div. of Merritt-Chapman & Scott Corp., ASBCA No. 16164, 83-1 B.C.A¶ 16534

Means of Proving Quantum

- **Actual Costs** - *Best hope to recover*
- **Total Cost Method** - Solid possibility
- **Jury Verdict** - *Not likely to recover*

Actual Costs - The "Safe" Bet

"[The actual cost method] provides the court, or contracting officer, with documented underlying expenses, ensuring that the final amount of the equitable adjustment will be just that–equitable–and not a windfall for either the government or the contractor."

Propellex Corp. v. United States, 342 F.3d 1335 (Fed. Cir. 2003)

Interest on Claim

FAR § 33.208 Interest on Claims.

(a) The Government shall pay interest on a contractor's claim on the amount found due and unpaid from the date that -

(1) The contracting officer receives the claim (certified if required by § 33.207)

Maximizing Recovery Tip #1

If the contractor is in a position to make a substantial profit on the contract, it may be able to retain a greater portion of its anticipated profits in a deductive change situation. Under the Changes Clause only profit attributable to the deleted work is lost. In the partial termination for convenience situation the contractor receives a "reasonable" profit on the work actually performed.

Maximizing Recovery Tip #2

Often the government deliberates for a prolonged amount of time deciding whether to proceed with the change. If the contractor has to stop work or otherwise suffer delay as the government deliberates, pursue the costs attributable to the delay. [For example, idle facilities and idle capacity.]

Maximizing Recovery Tip #2 *(continued)*

Days Of Compensable x Overhead = Daily Site Damages

Delay Rate

Maximizing Recovery Tip #3

Under the FAR 31.205-10 "cost of money," contractors are generally entitled to recover facilities capital cost of money. "Cost of money" is an imputed amount for the cost of capital for facilities devoted to contract performance. Recovery of cost of money does not depend on whether the contractor used borrowed funds or equity capital for the committed facilities.

Maximizing Recovery Tip #4

Costs arising from the negotiations were recoverable, administrative costs, because they were part of the increased cost to Tip Top from the change order.

Tip Top Construction, Inc. v. Donahoe, Postmaster General, 95 F.3d 1276 (Fed. Cir. 2012)

Maximizing Recovery Tip #7

When a contractor is required to perform extra work on a contract, it is not uncommon for it to use salaried employees to perform that work. In such cases, these employees may not be paid for the extra hours but the contractor has concrete proof of the hours that they worked.

GaN Corp., ASBCA 57834, 12-2 BCA ¶ 35103

Change Order Accounting

Change order accounting refers to the accounting procedures that a contractor uses to segregate its costs to perform the work identified in a particular change order from the other costs it incurs to perform the contract.

Change Order Accounting

Change order accounting helps the parties determine the amount that the contract price should be adjusted (up or down) for changed work.

FAR § 52.243-6
Change Order Accounting

"The contracting officer may require change order accounting whenever the estimated cost of a change or series of related changes exceeds $100,000. The contractor, for each change or series of related changes, shall maintain separate accounts, by job order or other suitable accounting procedure, of all incurred, segregable direct costs (less allocable credits) of work, both changed and not changed, allocable to the change."

FAR § 52.243-6 Change Order Accounting *(continued)*

"The contractor shall maintain such accounts until the parties agree to an equitable adjustment for the changes ordered by the contracting officer or the matter is conclusively disposed of in accordance with the Disputes clause."

Change Order Accounting

- The FAR § 52.243-6 clause is not mandatory - cannot be inserted through ***Christian*** doctrine.
- If clause is in contract, Contracting Officer still must direct use of change order accounting.

Change Order Accounting

If a contractor has a DCAA approved accounting system, typically change order accounting can be achieved by opening a separate charge number.

Change Order Accounting

If C.O. does not direct use of change order accounting, a court is less likely to require a contractor with a fixed price contract to prove its claim using actual cost data.

Advanced Engineering & Planning Corporation, Inc., IBCA No. 2844, 96-1 BCA ¶28,128.

Other

Displacement of Qualified Workers

IP

OCI

Audits

Displacement of Qualified Workers

Executive Order 13495

- Workers on a contract covered by the Services Contract Act are given a right of first refusal for employment with the successor contractor.
- A successor contractor may reduce the size of the workforce, may give first preference to certain of its current employees, and may offer employment to the predecessor's employees in positions for which they are qualified other than those which they held previously.
- Head of a contracting department or agency may exempt a contract from the requirement if it would impair the government's ability to procure services economically or efficiently.

Intellectual Property (Patents)

- The federal government has the right to use an invention, even if protected by a patent.
- Cannot sue a company for patent infringement if the infringement is occurring under a government contract.
- Must sue the United States in the Court of Federal Claims. Remedy is a reasonable royalty. 28 U.S.C. 1498.
- The United States can seek reimbursement from the infringing contractor if the government is required to pay a royalty to a patent holder in the COFC.

Intellectual Property (Tech Data/Software)

- Default Rules:
  - Contractor maintains ownership of technical data or computer software that the contractor develops under a government contract.
  - Government Rights:
    - Unlimited (if developed at Govt expense)
    - Limited/restricted (if developed at private expense)
    - Government purpose (mixed development)
- Marking requirements
- If the software is “commercial,” the Government will usually accept the same license as available on the commercial market.

Organizational Conflicts of Interest

- Three Types:
  - Unequal Access to Information
  - Biased Ground Rules
  - Impaired Objectivity

- Usually arise from work on other federal government contracts.

  - Can be complex to analyze ahead of time when pursuing new work.

- Can be used by the government (or a competitor via protest) to disqualify a company from receiving a specific contract.

- Must be based on "hard facts" and not mere "innuendo" or "speculation."

Audits

- Defense Contract Audit Agency (DCAA)
  - Pre-award audits
  - Desk audits of progress billings
  - Surprise, in-person floor checks
  - Post-award audits (defective pricing)

- Common Issues:
  - Expense coding
  - Time sheets
  - Uncompensated overtime
  - Subcontractor relationships
  - Indirect cost rates
  - Consultant relationships

- Defective Pricing (Elements)
  - Cost or pricing data;
  - Reasonably available to the contractor;
  - Not disclosed or known to the government;
  - Government relied on defective data; and,
  - Government's reliance increased the contract price.
- Tips:
  - Cooperate with the audit
  - Get a request in writing from CO before providing access to the records
  - Get scope of the audit in writing
  - Appoint a single point of contact
  - Get an exit briefing from the auditors

Conclusions

Thanks!

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