



Claims and Affirmative Recovery: Keeping the Customer Happy While Watching the Bottom Line

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Overview

- Affirmative Contractor Claims and REAs
- Defending Against Government Claims
- Steps to Take Right Now

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Affirmative Recovery

- Identifying Affirmative Recovery Opportunities
- Pursuing Claims Recovery

Affirmative Recovery

- Companies doing business with the U.S. Government may be entitled to affirmative recovery based upon a variety of legal theories.
 - Increased performance costs attributable to Government
 - Costs resulting from Government-initiated contract termination
 - Costs arising from Government-caused delay
 - Costs arising from differing site conditions
 - Unpaid costs under money-mandating statutes
 - Costs of remediating certain environmental pollution and toxic tort litigation costs
 - Indemnification for certain hazardous activities
- What they all share in common: the Government does not pay claims unless they are asserted, pursued, and appropriately documented.



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Changes

- Express or constructive
- Importance of defining terms during contract negotiation
 - *Family Entertainment Servs.*, ASBCA No. 61157, Oct. 24, 2017.
- Impact of limited funding
 - “Scope creep”
 - Increased use of termination for convenience (and importance of addressing contract changes promptly during performance)
- Impact of failure to provide timely notice
 - *K-Con Bldg. Sys., Inc. v. United States*, 778 F.3d 1000 (Fed. Cir. 2015).
- Value of timely claim to securing advantageous settlement

Deductive Changes

- Deductive change (“de-scope” by deleting work). Permissible if “in the general scope of the contract”
 - Similar to a partial Termination for Convenience.
- Produces a *downward* equitable adjustment to the extent of the savings to the contractor due to the deletion
 - Generally priced based on how much the deleted work “would have cost” (or “anticipated cost” approach)
 - But if the de-scoped work is “severable” (e.g., FFP CLIN), then boards typically use an “as-bid” approach (similar to T4C methodology)
 - Government has burden to prove its entitlement to an equitable adjustment under either methodology
- Considerations:
 - Would the deleted work have been profitable?
 - Potential downstream performance impacts of the work deleted (e.g., subcontract pricing and supplier chain complications)

Differing Site Conditions

- When the conditions at a particular site are different from what was expected.
- Two types: (1) conditions encountered are different than RFP; or (2) conditions encountered are different than industry would typically expect.
- Applies to Construction and Non-Construction (e.g., latent condition encountered during installation, maintenance, repair)

Commercial Items

- Under Commercial Item clause (FAR 52.212-4), all changes must be agreed bilaterally.
 - But if the CO issues a **unilateral** direction / change order, must the Contractor perform the change?
 - Is it a Government **breach**?
- How should the equitable adjustment to perform the change be measured?
 - As **actual costs + profit** (standard) **or** something else?
- *ULS*, ASBCA No. 56850, June 2016.
 - Commercial item contract for satellite launch services. FFP prices per launch vehicle (CLINs by size/weight)
 - Government ordered a “small” (cheaper) rocket.
 - CO’s constructive changes made payload weight grow to need a “medium” rocket.
 - ULS didn’t reject the constructive change. Chose to launch with medium rocket (for safety).
 - Gov’t wants to pay for the actual cost impact of launching the medium (~\$60M). ULS wants to re-price all FFP CLINs (~\$400M).

Government Delays

- FAR 52.242-17 provides a broad remedy for “any” CO action “or inaction” that affects performance and causes cost or schedule impacts
 - Submit timely notification of delay(s) to CO (at least CC’d)
 - Ensure your potential delay claim is not released through contract modification
 - No profit for -17 delays
- Stop Work Order:
 - Can be issued for 90 days (or more by agreement).
 - When the period ends, the contractor must resume or the CO must terminate the work.
 - Contractor entitled to equitable adjustment remedy + profit (FAR 52.242-15)

Termination for Convenience

- Unilateral termination without stated reason
- Generally entitles contractors to costs and losses incurred
- FAR cost principles and case law can inform extent of negotiated settlement (including commercial item contracts, *SWR, Inc.*, ASBCA No. 56708, Dec. 2014)
 - Loss of useful value
 - Initial costs
 - Subcontractor claims
 - Costs preceding Notice to Proceed (*Pro-Built Const. Firm*, ASBCA No. 59278, June 1, 2017)

Termination for Convenience

- Efforts to restrict agency funding
- Limitation of Cost/Funding provisions
 - require contractor notice where funds are running out and put the risk of continued performance on the contractor
 - Relieves the Government of liability for “costs incurred in excess of” allotted funding “[e]xcept as required by other provisions of this contract, specifically citing and stated to be an exception to this clause”
- Uncertain funding for negotiated equitable adjustments
- Greater emphasis on the need to address contract changes promptly during performance

Termination for Convenience

- Hypo: Under a contract to manage soldiers' vehicles in Hawaii, the Government issued a stop-work order and then T4C'd, but CO refused to reimburse costs that post-date termination.
- Result: \$123,489.37 plus CDA interest awarded because contractors are entitled to "fair compensation" with reference to FAR 31 cost principles. *SWR, Inc.*, ASBCA No. 56708, Dec. 2014.

Breach as Recovery

- Government's inadequate preparation of estimates in solicitation
 - *Agility v. United States* (Feb. 2017, Federal Circuit)
- Government duty of good faith and fair dealing
 - Affirmative duty to cooperate
 - Negative duty not to hinder
- Improper T4C allows recovery of breach damages
 - Old and new cases show this is still a viable allegation
- What appears to be a small breach can lead to big damages
- Sword vs. Shield: Use breach as both offensive avenue for recovery and defensively to shield company from Govt's allegations of breach/noncompliance.
 - Prior Material Breach Doctrine: *Laguna Constr. Co. v. Carter*, 828 F.3d 1364 (Fed. Cir. 2016)

Statute of Limitations

- Claims must be submitted “within 6 years after the accrual of a claim.” (CDA § 7103(a)(4)(A)).
 - SOL is a double-edged sword. Strict enforcement is helpful to bar untimely Govt claims (e.g., cost disallowances, defective pricing).
 - But if your company has an Equitable Adjustment that you are attempting to negotiate with the Govt, the SOL can bar your claim if you aren’t vigilant.
 - Must: (1) ascertain date of “accrual,” and (2) keep an eye on the calendar.
- Ascertaining the moment of “accrual” is tricky and subject to constantly changing case law.
 - *Kellogg Brown & Root Servs., Inc. v. Murphy*, 823 F.3d 622 (Fed. Cir. 2016) (“some injury” vs. “sum certain”)



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Statutory Claims

- Recovery under money-mandating statutes
- Company or group(s) of companies to recover money from the U.S. Government in the event of non-payment
- Recent examples:
 - The Affordable Care Act (risk corridors, reinsurance, CSR)
 - The American Recovery and Reinvestment Act

Environmental / Indemnification

- Costs of remediating certain environmental pollution and toxic tort litigation costs
 - Recovery under P.L. 85-804 and 10 U.S.C. § 2354 indemnification clauses
 - Recovery under “Taxes” clauses
 - Recovery under World War II era indemnification clauses
 - In addition to traditional CERCLA actions

Defending Against Govt Claims: 1) Termination for Default

- It can happen!
- Considerations
 - Liquidated damages
 - Reprourement costs
 - SAM record: reputation damage
- Importance of timely appeal
 - *Elham Ahmadi Const. Co.*, ASBCA No. 61031, Sept. 21, 2017

Defending Against Govt Claims:

2) Fraud

- Boards' Jurisdiction is Evolving
- Fraud during **formation** has always been grounds to deny Contractor's claim because the contract is "Void Ab Initio." *International Oil (2018)*
- ASBCA: Govt can now assert "Void Ab Initio" as an affirmative Govt claim (seeking complete forfeiture) based on alleged fraud committed during contract performance (e.g., re-pricing CLINs in a Mod).
 - *Supreme Foodservice (ASBCA)* – Govt claim for \$8.3B forfeiture
 - No need for DOJ to obtain conviction or even pursue charges.
- CBCA: In matter of first impression, Board found that the CO's subjective "suspicion" and referral based on potential fraud vitiated the Board's jurisdiction to accept the appeal (even as a deemed denial). *Savannah River (2017)*.





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Takeaways

- Impact of uncertain funding
 - Pressure to provide concessions after performance begins
 - Terminations for convenience
 - Delays due to Government constraints
 - Uncertain funding for negotiated equitable adjustments
- Proactive protection of rights under the law **during performance**
- Continuous identification of potential claims
 - Training
 - Timely and adequate documentation
 - Prevention of waiver
 - Prevention of release

Two Steps to Take Right Now

- **Identify contracts and programs that are either losing money or less financially viable than anticipated**
 - Determine whether underperformance is fully or partially the Government's fault
- **Seek recovery where the Government has not lived up to its end of the bargain**

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QUESTIONS?

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