

Litigating Claims: Big Rewards and Big Risks

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Objectives

- Discuss common issues that give rise to claims and strategies for minimizing performance risk as well as strategies for maximizing recovery of damages



Claims

Hey we won! ... And then something bad happened.....

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Common issues that give rise to claims

- Poorly defined specifications or statements of work
- Overly optimistic performance or financial assumptions
- Disconnect in drafting of a proposal between the capture and operations team
- Company's failure to understand scope of prime or subcontract
- Failure to immediately bring problems/concerns to the attention of corporate management or the customer
- Failure to document issues that arise during contract performance
- Failure to adequately track and document increased costs



Preparing for the unexpected: An ounce of prevention

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Avoiding Litigation: 3 Keys

1. Communication
2. Education
3. Evaluation

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Communication

- With Capture Team
- With Contracts Department
- With Business Leaders
- With Subcontractors
- With Customers
- With Outside Counsel

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Education

- How do you educate your workforce?
- What types of educational programs make sense?
- What can in-house counsel do to ensure they are keeping abreast of new issues in the law?



Evaluation

- What can in-house counsel do to ensure mistakes aren't repeated by the company?
- How do companies determine whether a claim is worth pursuing?



What steps should you take to avoid claims and disputes?

- Proposal Preparation and Submission
 - Work with the government in the pre-solicitation/contract phases to define the contract requirements and performance metrics as clearly as possible by utilizing the available tools
 - Comment on any draft RFPs
 - Submit questions concerning the RFP
 - Attend preproposal conferences
 - Ask questions and document responses



Contract Administration

- Managing contract changes
 - Ensure that personnel have good working understanding of the contract so that they can identify changes
 - Give prompt notice of any identified changes
 - Capture the costs associated with the changed work
 - Establish a separate charge number

Requests for Equitable Adjustments vs. Claims

- REA is matter of contract administration
 - Based on FAR clause/order
 - Generally, entitlement to some amount not in dispute
 - Costs preparing REA are allowable whereas costs of pursuing or defending a claim are expressly unallowable
 - Interest based on the guidance of the Contract Disputes Act accrues under a claim whereas interest does not accrue under a REA

Requests for Equitable Adjustments vs. Claims (con't.)

- Contract Disputes Act of 1978
 - Establishes procedures for filing and litigation claims
- Claim is:
 - “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, or other relief arising under or relating to the contract.” FAR 2.101.
 - If amount exceeds \$100,000, not a claim until certified.
 - “A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by complying with the submission and certification requirements of [52.233-1 Disputes], if it is disputed either as to liability or amount or is not acted upon in a reasonable time.”
- REA can be converted to claim, or you can begin with claim



Maximizing Claims & REAs

Claims versus REAs

- Decision of whether to bring a dispute as a claim or an REA may affect both the level of recovery and reimbursement of costs of the claim/REA.
 - Consider filing an REA *first*, since related costs are allowable under the FAR.
- Show Contracting Officer a “draft” of the claim to spur quick payment.



Cure Notice

- Required if T4D before delivery date (e.g., Failure to make progress or perform other contract provision)
- In writing
- Identify Contractor's problem / failure
- Minimum 10 days to correct



Key Points With Respect to Claims and Claim Avoidance

- Ensure that specifications clearly define contract work
- Identify potential problems early and bring them to the attention of the government, if possible, before they become the subject of potential claims
- Be prepared to negotiate where liability for problems is shared by the government and the contractor



Key Points With Respect to Claims and Claim Avoidance (Cont'd)

- Sensitize your employees to the fact that just about anything they say or write is fair game during future litigation
- Do not lose sight of your goals (although you may have to revise them as the case develops)
- Effective communication with the government is essential



Maximizing Your Company's Opportunity to Recover Any Damages

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Key Points with Respect to Claims and Claim Avoidance

- Notice requirements
 - Date, nature, and circumstances of the conduct or government direction that the contractor regards as a change
 - Name, position, and office of the government officials that are involved in or know about the change
 - An identification and description of any documents and oral communications relating to the change
 - Particularized description of the contract elements for which a contractor believes it is entitled to a change

Documentation is the key to recovery

- Contracting Officers and Courts will give greater weight to contemporaneous written documentation than they will to live testimony and expert analysis that is presented years after the fact
- Follow established document retention procedures (**Exception** – Do not destroy documents if litigation is imminent)
- An E-mail is a document!!!!
- Incumbent upon management to:
 - Consider written guidance on appropriate use of e-mail and instant messaging
 - Instruct employees on how to take notes
 - Instruct employees on the importance of taking a professional tone in every piece of correspondence

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What factors should you consider in pursuing a claim through litigation?

- Value of the case
- Litigation costs
- Potential impact of litigation on customer relationship
- Impact of litigation on other on-going business



What are some of the key factors that affect the outcome of a claim?

- Timely and adequate notice of changes
- Separate accounting for costs of changes
- Organization and planning
- Establishing an effective case management plan
- Identifying lines of authority for case strategy



To litigate or not to litigate, is that the question?

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Case Studies

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The Importance of Timeliness

- Contractor challenged the denial of a claim for \$6,791,155.63 arguing its claim did not accrue until negotiations with the government had ultimately failed. The Court of Federal Claims dismissed the suit, finding that contractor failed to submit a proper claim within the six-year statute of limitations.
- **Facts:** The period of performance ranged from 2009 to 2012. Following completion, the contractor submitted a request for equitable adjustment (“REA”) in 2013 and an amended REA in 2014. Following four and a half years of unsuccessful negotiations with the government, the contractor submitted its certified claim in 2018 to the contracting officer, who found the claims accrued no later than 2011. Consequently, the government denied the claim as it was submitted more than six years after the claim accrued.
- **Reasoning:** The court rejected contractor’s assertion that no “live dispute” existed until the contracting officer denied the claim. Instead, the court held that the contractor’s submission of an REA demonstrated that it knew or should have known its claims had accrued.
- **Lesson Learned:** Submitting an REA does not toll the statute of limitations.

Authority to Bind the Government

- Contractor appealed the denial of a claim relating to out of scope services provided to the government arguing that two contracting officer's representatives ("CORs") effectively managed the contract. The Court of Federal Claims denied the appeal holding that the contract reserved contracting authority exclusively to the contracting officer.
- **Facts:** The contractor provided ground maintenance and snow removal services at a federal facility. The contractor allegedly had little to no interaction with the contracting officer but routinely interacted with the CORs, who on several occasions directed the contractor to perform out of scope services. The contract expressly provided that only the contracting officer was authorized to bind the government to changes in specifications, terms or conditions.
- **Reasoning:** While the court noted that the contracting officer may have delegated management authority to the CORs, the delegation was limited by the terms of the contract. Of note, the Court stated that even though the CORs allegedly acted with authority or even believed they had authority to direct out of scope work was insufficient.
- **Lesson Learned:** Contractors should only perform work required under the terms of the contract or directed by a government agent with authority.

Addressing Ambiguous Terms in the Solicitation

- Contractor appealed the denial of a claim for \$392,187 arguing the government’s demand for an access control system (“ACS”) was an out of scope change. The Armed Services Board of Contract Appeals denied the appeal holding that no ambiguity existed and the requirement to install an ACS was in scope.
- **Facts:** The contract referenced an ACS multiple times in different places. The Company cited some provisions in the contract and a communication from the government in support of its argument that it was not required to provide an ACS. Of note, the contract included a drawing with a note stating that all devices and controls would be provided by others. However, information elsewhere in the contract indicated the note referenced another device, not the ACS.
- **Reasoning:** Citing caselaw concerning ambiguity, the Board noted that contract terms are ambiguous if they can reasonably be interpreted in more than one way. If the ambiguity is apparent at the time of proposal drafting, it is considered a patent ambiguity and triggers a duty on behalf of the contractor to inquire. In reviewing the terms of the contract, the Board found that no ambiguity existed.
- **Lesson Learned:** If solicitation terms appear inconsistent, contractors should raise them before proposal submission.

Proving Damages

- Contractor appealed a claim for \$257,300 arguing that the government ordered a constructive change. While the Court of Federal Claims agreed with the contractor's interpretation, the court found that the contractor failed to prove damages.
- **Facts:** The contractor's proposal had included 1,888 productive hours per employee but after a new contracting officer was assigned the government demanded 2,000 hours. The contractor claimed it was entitled to the difference between the hours it promised in its proposal and the hours the government demanded. In support of the amount owed, the contractor provided two spreadsheets showing the cost increase between the two requirements.
 - Of note, when the contractor submitted its claim to the contracting officer, the government offered to settle the matter for \$118,468.
- **Reasoning:** While the court found that the spreadsheets demonstrated "the math to support" what the contractor alleged it was entitled to, it failed to meet the burden of showing those costs were actually incurred. Specifically, the contractor failed to provide payroll records showing the hours worked by each employee. Moreover, the contractor admitted it did not provide 2,000 hours per employee. As such, despite the breach of contract, the contractor had not suffered any damages.
- **Lesson Learned:** Even if you were wronged, you must still prove you were harmed.

Contractor Risks Under a Fixed-Price Contract

- Contractor appealed denial of a claim for costs incurred relating to responding to the outbreak of the Ebola virus (“Ebola”). The Civilian Board of Contract Appeals denied the claim on the grounds that the contractor bore the risk under the firm, fixed-price contract.
- **Facts:** The contractor had been awarded a construction contract in Africa. Due to an outbreak of Ebola, the contractor repeatedly sought instructions from the government, who repeatedly said it would not order the contractor to evacuate and it must make its own business choices. The contractor evacuated its personnel and later remobilized after the outbreak was contained.
- **Reasoning:**
 - The court noted that absent a special adjustment clause the contractor bore the risk of unexpected costs under the fixed-price contract. The contract contained an excusable delay clause, which only provided additional time, not costs.
 - Because the government never ordered the evacuation nor did it cause the outbreak, the court rejected contractor’s arguments that the government changed the work under a cardinal change or constructive change theory.
- **Lesson Learned:** Given the COVID-19 pandemic, contractors should be aware of the risks they bear under fixed-price contracts.



Issues Relating to the Prime-Subcontractor Relationship

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Subcontracts to Prime Federal Contractors or Their Subs

- Generally considered to be private contracts.
- No privity of contract with the Government.
- Should contain FAR or FAR Supplement clauses that are flowed-down.
 - Some are mandatory.
 - Others are flowed down to help mirror the obligations of the prime.

Prime-Subcontractor Issues

Choosing the “Law of the Case”

- **Parties will be given great latitude to create “the law of the case.”**
 - “[A] term of the parties’ contract becomes the law of the case unless such term is repugnant to public policy or to some rule of law.”

Gordonsville Energy, L.P. v. Va. Elec. & Power Co., 257 Va. 344 (Va. 1999)



Prime-Subcontractor Issues

Use Contract as Risk Management Tool.

- **Address:**
 - Pre-requisites to litigation
 - Including informal or formal mediation
 - Where any litigation will take place
 - The manner of dispute resolution
 - Scope of dispute
 - The location/forum
 - Available relief



Prime-Subcontractor Issues

Consider incorporating the following as pre-requisites to filing suit:

- Notice of Claim provisions
 - Tie notice and waiver together
- Statute of Limitations
- Informal resolution efforts, such as management-level negotiation
- Formal resolution efforts, such as mediation



Prime-Subcontractor Issues

Selecting the Battlefield

- Forum/Requirements for claims involving the Government versus Sub-Prime disputes
 - Arbitration
 - Litigation



Managing Risk & Avoiding Litigation

Selecting the Battlefield

Forum Selection Clauses (cont'd)

- Careful drafting is critical
 - Decide on a forum and make it exclusive

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Prime-Subcontractor Disputes

Selecting the Battlefield

- **Arbitration versus Bench Trial**
 - Need for expertise
 - Predictability
- **Standard of Review for Arbitration Awards: High degree of deference to arbitrators!**

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Prime-Subcontractor Disputes

Limitation on Liability

Use the Contract to Address Remedies

- Can be Done by Negative/Limiting Remedies
- Affirmatively as Addressing Available Remedies
- Lost Profits
- Attorney Fees
- Interest

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Intellectual Property

- Trade Secrets v. Confidential Information
 - If you are the owner of the Trade Secrets at issue, you will want to protect the information in a contractual form.
 - On the other hand, the opposite party will want to protect itself from accusations of misappropriation.



Management of Outside Counsel

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Why should you get outside counsel involved in a potential dispute?

- Early identification of risks and potential early problem resolution
- Preserve claims of privilege
 - Attorney-client privilege
 - Work product privilege
- More efficient use of resources
 - It is very expensive to learn and reconstruct events that occurred years ago
 - Rule of thumb - 2 or 3 times as long to reconstruct events as it is to learn as you go



How do you effectively use and manage my legal team?

- Do not “hide the ball” from counsel concerning your business goals
- Obtain regular, objective, case assessments
- For major cases, request a budget linked to phases of the litigation (and update regularly!)
 - Is “mix” of personnel appropriate?
 - Does counsel provide notice when actual expenses are likely to exceed budget?

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APPENDIX

- Slide 25 – *See Zafer Construction Company v. United States*, 151 Fed. Cl. 735 (2020).
- Slide 26 – *See Baistar Mech., Inc. v. United States*, 128 Fed. Cl. 504 (2016).
- Slide 27 – *JAAAT Tech. Servs., LLC*, ASBCA No. 61180 (Apr. 3, 2019).
- Slide 28 – *Pac. Coast Cmty. Servs., Inc. v. United States*, 144 Fed. Cl. 687, 694 (2019), *aff'd*, No. 2020-1219, 2021 WL 1712268 (Fed. Cir. Apr. 30, 2021).
- Slide 29 – *See Pernix Serka Joint Venture*, CBCA 5683 (Apr. 22, 2020).
- Slide 37 – *Signal Corp. v. Keane Fed. Sys.*, 265 Va. 38 (Va. 2003).
- Slide 37 – *Lackman v. Long*, 266 Va. 20 (Va. 2003).

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