

VENABLE

Preparing and Prosecuting Government Contracts Claims

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12:00 pm – 1:00 pm ET

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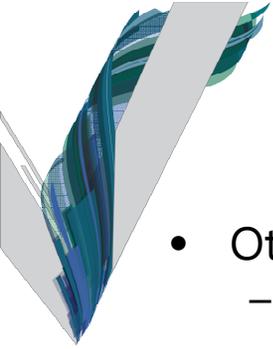
Overview of Government Contract Claims

- Two sides to most claims – legal/entitlement and quantum/cost
 - Claims may also be non-monetary, e.g., interpretation of contract terms, adverse past performance assessment, or change in delivery schedule
- Legal/Entitlement
 - Contractual obligations
 - Statutory and regulatory framework (Contract Disputes Act, FAR)
- Quantum/Cost
 - Contract damages
 - FAR cost principles



Legal/Entitlement

- Must establish legal entitlement to adjustment
- Identify source of right
 - Contract terms – breach of contract
 - FAR clauses
- Most common claims are based on “changes”
- Contractor directed to perform additional or out-of-scope work
- Evidence of government authority/direction is critical
 - Cannot rely on apparent authority



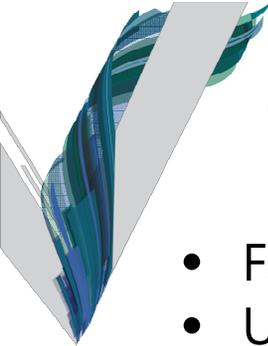
Legal/Entitlement (cont'd)

- Others include:
 - Stop work orders (FAR 52.242-15)
 - “The Contracting Officer shall make an equitable adjustment in the delivery schedule or contract price, or both, and the contract shall be modified, in writing, accordingly ...”
 - Suspension due to bid protest (FAR 52.233-3)
 - Same as FAR 52.242-15
 - Revision to technical data (FAR 52.227-21)
 - “The Contractor may submit a request for an equitable adjustment to the terms and conditions of this contract for any revisions to technical data made pursuant to this paragraph.”
 - Differing site condition (FAR 52.236-2)
 - “If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.”
 - Failure to include Service Contract Act wage determination (FAR 22.1015)
 - “The contracting officer shall equitably adjust the contract price to reflect any changed cost of performance resulting from incorporating a wage determination or revision.”



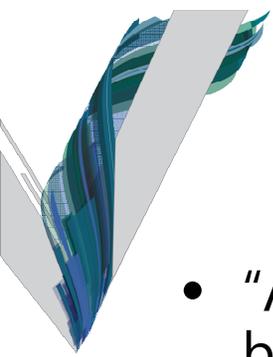
Changes

- FAR changes clauses – traditional vs. commercial
- Constructive change



Traditional Changes Clause

- FAR 52.243-1, Changes - Fixed-Price
- Unilateral changes - authorizes the contracting officer to make changes within general scope of contract
 - Drawings, designs, or specifications
 - Method of shipment or packing
 - Place of delivery
- Right to equitable adjustment
 - “(b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.”
 - Similar for FAR 52.243-2, Changes – Cost Reimbursement
- Must assert right to adjustment within 30 days of written order



Constructive Change

- “A constructive change occurs where a contractor performs work beyond the contract requirements without a formal order under the Changes provision of the contract, due either to an **informal order** from, or **through the fault of, the government**. If the CO or other authorized person, without issuing a formal change order, requires the contractor to perform work or to utilize materials which the contractor regards as being beyond the requirements of the pertinent contract specifications or drawings, the contractor may elect to treat the CO’s directive as a constructive change order and prosecute a claim for an equitable adjustment.” *Lamb Engineering & Construction Co.*, ASBCA No. 53304 et al., 06-1 BCA ¶ 33,178 at 164,417 (citations omitted).



Commercial Changes Clause

- FAR 52.212-4, Contract Terms and Conditions - Commercial Items
 - “(c) *Changes*. Changes in the terms and conditions of this contract may be made only by written agreement of the parties.”
- “If a contract’s Changes clause does not authorize unilateral action by the contracting officer, then an erroneous contract interpretation by the government is not a constructive change. It might generate a breach of contract.” *Tkacz Eng’g, LLC*, ASBCA No. 60358, Dec. 7, 2017, 18-1 BCA ¶ 36,940



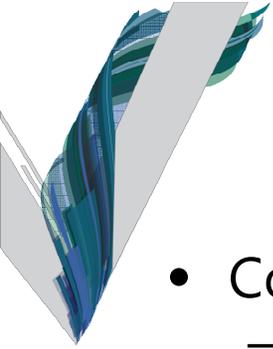
Breach of Contract

- The elements of a breach of contract claim are: (1) a valid contract between the parties; (2) an obligation or duty on the part of the government arising out of the contract; (3) a breach of that duty; and (4) damages caused by the breach." *Ciyasoft Corp.*, ASBCA No. 59519, June 27, 2018, 18-1 BCA ¶ 37,084



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



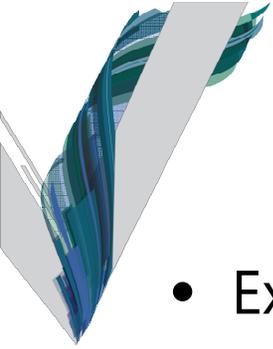
Requests for Equitable Adjustments vs. Claims (cont'd)

- 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 written notice to the contracting officer as provided in 33.206(a), 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



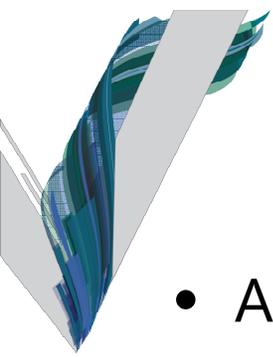
Effect of a Change Order

- Subject to LOC/LOF clauses and ceiling price of T&M contract, contractor is obligated to perform changed work
- If there is a change in the cost of performance or time required to perform as a result of a Change Order, contract is to be equitably adjusted
- Adjustment may be additive or deductive
- Adjustment covers total impact of Change Order, not just impact on changed work



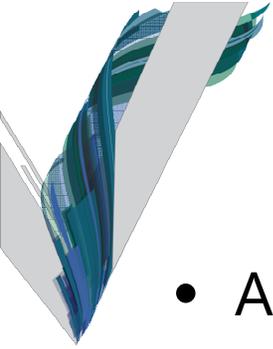
Pricing of Change Orders

- Except for construction contracts, contractor must assert right to adjustment within 30 days of receipt of Change Order and before final payment
- Change order accounting (FAR 52.243-6)
- Pricing of adjustments clauses in agency supplements makes cost principles applicable to change orders



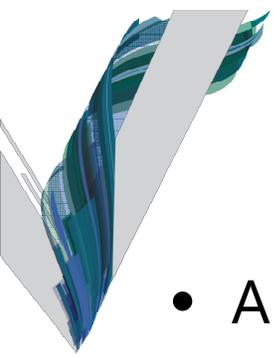
Suspension of Work

- Applies to construction contracts
- Covers actual and constructive suspensions
- Contractor is entitled to a price adjustment (excluding profit) for increased costs caused by unreasonable suspensions or delays
- No schedule adjustment



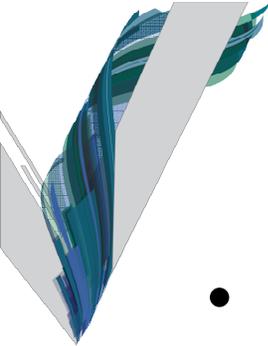
Government Delay of Work

- Applicable to fixed price supply contracts and is optional for service contracts
- Covers only constructive delays of work
- Contractor is entitled to a price adjustment (excluding profit)
- A PoP schedule adjustment is available under this clause



Stop-Work Order

- Applicable to fixed price, cost reimbursement supply and service contracts
- Covers only actual suspensions
- Suspensions are limited in duration (90 days but can be extended by agreement of the parties)
- Contractor is entitled to an equitable adjustment i.e., increased costs, profit and schedule adjustment
- Unabsorbed Overhead (Eichleay Formula- 3 Step Process)



Change Order Accounting Procedures.

FAR 43.203

- The contracting officer should advise offerors of the possible need to revise their accounting procedures.
- The following direct costs normally are segregable and accountable:
 - Nonrecurring costs (e.g., engineering costs and costs of obsolete or reperformed work).
 - Costs of added distinct work caused by the change order (e.g., new subcontract work, new prototypes, or new retrofit or backfit kits).
 - Costs of recurring work (e.g., labor and material costs).



Where to Start From a Cost Perspective

- Start document and cost collection early
- Create new project numbers
- Federal Pricing Instructions
 - FAR Table 15-2 (if applicable)
 - Recently increased \$2 million in 2018 NDAA
- Consistent Accounting Practices
 - By Cost Element
 - CASB DS-1 (if applicable)
 - Estimated and/or Actuals. Actuals are prefer over estimates
 - Consistent to policies



Impact by Cost Element

Direct Labor

- Added Work
- Larger Crews
- Overtime
- Idle Time or Layoffs
- Detection or Correcting of Problem
- Discussions with Government
- Coordination with Subcontractors
- Loss of Efficiency & Learning
- Impact on Labor Rates

Materials, Subcontracts & ODCs

- Material Prices
- Pricing Inventory
- Scrap, Spoilage, Rework, Obsolete Materials, etc.
- Storage
- Market Conditions
- Supplier Terms

Indirect Costs

- Consistency with Current Accounting Practices
- Application of Forecasted Rates due to Timing of Scope
- Shifting of work between years
- Corporate Allocations
- Change in Sales
- Impact on Other Costs



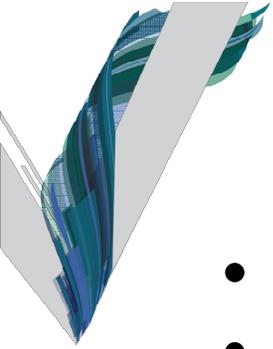
Impact on Profit

- Not precluded
 - But not for Suspension of Work or Government Delay
- Consistent with Proposal and Company practices
 - Weighted Guidelines
 - Not required for a Contractor but a good tool to identify the Government's position
 - Historical Data
 - Policy



Sources of Supporting Documentation

- Accounting Records
- Engineering Log Books
- Time Records
- Travel Records
- Visitor Logs
- Meeting Documentation
- Correspondence
- Program Status Reports
- Activity Reports



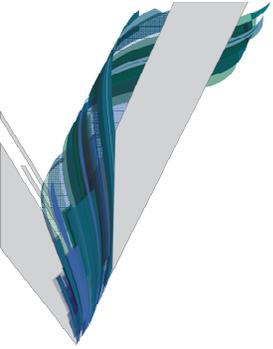
Documenting Claim

- Ensure the cost workbook is realistic and well organized
- Organizational Impact
 - Technical, Accounting, Legal
- Narrative: State the case
 - Entitlement and Quantum
- Calculations: In Detail
 - Best practice is to start with the proposal and work from there
- Charts and Attachments
- Dealing with the Auditors
 - It's a negotiation



Process for Litigating Claims

- Contracting officer must issue “final decision” within 60 days, or notify contractor of extension within 60 days. 41 U.S.C. § 7103(f)(2).
- Appeal denial of final decision to the Civilian or Armed Services Boards of Contract Appeals (90 days), or the U.S. Court of Federal Claims (12 months).
- REA/claim is foundation for subsequent litigation
 - Investment upfront in REA/claim strengthens litigation position
 - Not only must be made in “good faith,” but cost support increases credibility and chance of resolution
 - Relevant to litigation cost/benefit analysis



Questions?

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Next Month's Government Contracts Webinar:

**Support Anti-Terrorism by Fostering
Effective Technologies (SAFETY) Act**

Wednesday, October 30, 2018

12:00 pm – 1:00 pm ET