RESOLVING CLAIMS ON Federal Construction Contracts

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The economic downturn of 2008 compelled many contractors to turn to federal construction work. After winning a federal project and getting to work, many contractors discovered the plans and specifications contained hidden costs and risks.

Perhaps in a rush to put out RFPs and bid invitations in 2009, the federal government issued less than complete contract documents managed by overworked contracting officers with less experience than their predecessors.

Maybe the subsurface conditions of the project differ materially from what was represented in the contract documents upon which the contractor based its estimate. Or, performance costs could be skyrocketing because of the need for more equipment and operators, leading to a slower rate of productivity and a delay to the critical path.

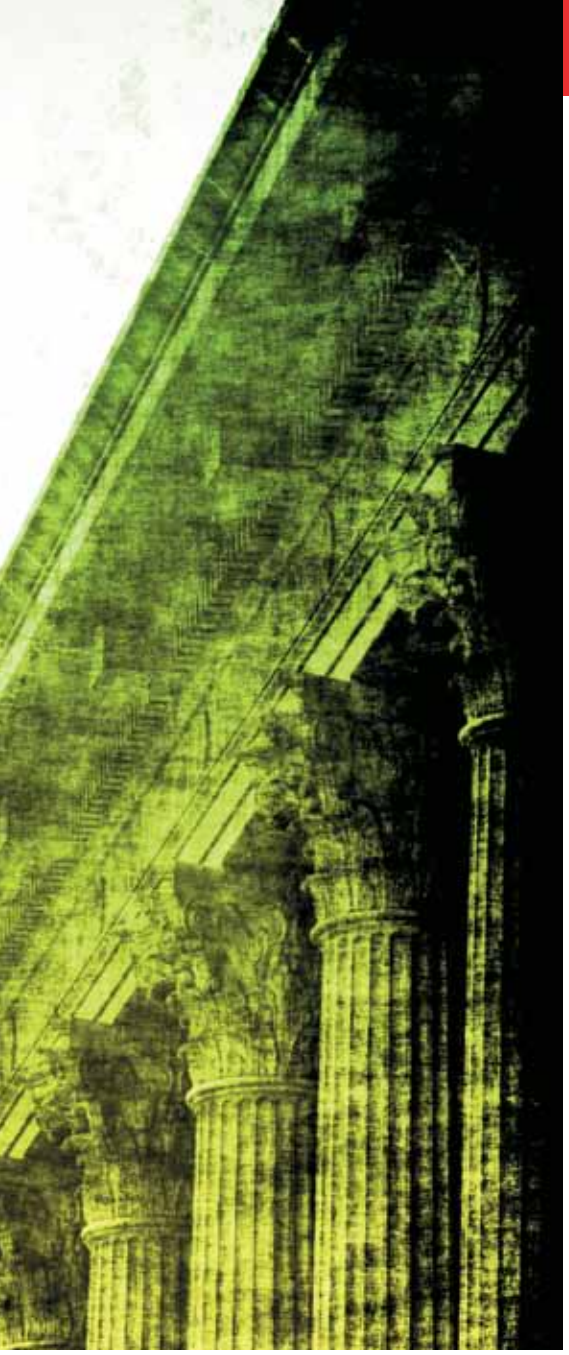
Contractors often worry change order proposals could hurt their chances of completing a project on time, financially unharmed and with an excellent performance evaluation. Following are details on how to negotiate proposed contract changes without interfering with these goals.

REMEDY-GRANTING FAR CLAUSES

If a contractor encounters a contract change such as overzealous inspection, a differing site condition, a constructive suspension of work—all of which create additional work—or the government has placed another contractor directly in the path of the company's work, it should first look for a remedy-granting clause in the contract. For example, the contract may contain Federal Acquisition Regulation (FAR) Clause 52.236-2 (Differing Site Conditions), which provides a remedy for two types of changed conditions: "subsurface or latent physical conditions at the site which differ materially from those indicated in the contract" and "unknown physical conditions … which differ materially from those ordinarily encountered" in this type of work and in the geographical area where the project is located. If the requirements contained in this FAR clause are satisfied, the contracting officer may equitably adjust the contract price and duration.

Often, the remedy-granting clause is the changes clause (FAR 52.243-4) under which the contracting officer may make changes to the scope of contract work, the specifications, the method or manner of the work, or the government-furnished property or services; or may accelerate the performance of the work. The changes clause provides the basis for written and oral changes issued by the government. If the change causes an increase or decrease in the contractor's cost of, or the time required for, performance of the work, the contracting officer must make an equitable adjustment and modify the contract in writing. The changes clause requires the contractor to give notice stating the date, circumstances and source of the change order, as well as note the contractor views the order as a change order.

Satisfying the written notice requirement is important because the contracting officer is prohibited from adjusting the contract upward for costs incurred more than 20 days before the contractor provides



written notice if the request for adjustment is based on a defective specification.

Other remedy-granting clauses include FAR 52.242-14(b) (Suspension of Work), FAR 52.249-2 (Termination for Convenience) and FAR 52.211-18 (Variation in Quantity). If an express remedy-granting provision isn't in the contract, contractors may have to look to other theories of relief, such as constructive acceleration, constructive change, constructive suspension of work or breach of the implied duty to cooperate.

COST RECOVERY CRITERIA

Contractors may be entitled to recover additional costs for differing site conditions. However, FAR Part 31 (Contract Cost Principles and Procedures) requires that any and all costs submitted to the federal government be reasonable, allowable and allocable. The basic standard for determining reasonableness is whether the cost exceeds that which would be incurred by a prudent person operating in a competitive business. FAR 31.201-2 defines whether a cost is allowable, and FAR 31.201-4 explains how to determine whether a cost is allocable to a specific contract. If questions arise about whether the costs satisfy the requirements, retain an independent auditor to evaluate the costs. This also can provide protection against potential False Claims Act allegations by the government.

With a differing site condition, the reasonable, allowable and allocable costs could include the cost of additional equipment and labor, lost labor productivity, extended general conditions and unabsorbed home office overhead. It does not include lost profits or new equipment lease payments that go beyond the life of the contract.

CLAIMS

If a company is unsuccessful at negotiating a bilateral contract modification after giving notice and submitting an informal request for an equitable adjustment, it could file a claim under the disputes clause (FAR 52.233-1). As with a change order proposal or request for equitable adjustment, contractors must provide sufficient information to establish the basis for, and the amount of, the claim. In addition, if the claim exceeds $100,000, the disputes clause requires the contractor to certify the claim is made in good faith; supporting data provided is accurate and complete to the best of its knowledge and belief; and the amount requested accurately reflects the contract adjustment for which the government is liable. This requirement flows directly from the Contract Disputes Act of 1978, which allows contractors to sue the government for breach of contract.

If the differing site conditions claim exceeds $700,000, FAR 52.215-20 (Requirements for Certified Cost or Pricing Data) requires the contractor to submit certified cost or pricing data—effectively forcing the firm to certify its pricing data under the Truth in Negotiations Act. Contractors also must request a final decision from the contracting officer in the event the contracting officer fails to adequately respond to the claim. Failure to do so could result in the Board of Contract Appeals or Court of Federal Claims determining no dispute existed, leaving the company with no right of appeal.

SUBCONTRACTOR CLAIMS

Because subcontractors do not have privity of contract or a direct contractual relationship with the government, a prime contractor must agree to sponsor a subcontractor's claim against the federal government. Under the Severin Doctrine, a prime contractor may only sponsor a subcontractor's claim if it has either reimbursed the subcontractor for its costs or damages or remains liable for reimbursement in the future. Typically, the prime contractor and subcontractor enter into a pass-through agreement that lays out the parties' responsibilities and limitations of liability before the subcontractors' claim is passed through to the government. Both the prime contractor and the subcontractor must certify the claim.

UNDERSTANDING THE KEY PLAYERS

To successfully resolve claims without litigation, understanding each government agency, district and command operates differently is critical. Ensure the firm is dealing with someone who has the authority to implement a solution, or can recognize when that person has roadblocks higher up the chain. The contracting officer may be handling several billion dollars in contracts, or the contractor's $10 million contract may be handled primarily by the administrative contracting officer, the contracting officer's technical representative or the resident engineer. If contractors understand the internal workings of their government client, they will be better positioned to help their government counterpart identify and resolve claims quickly and effectively.

Federal contracts feature unique risks in the change order and dispute resolution processes that differ from the commercial construction world, where nearly everything can be negotiated. It is imperative government contractors understand the FAR's performance requirements, cost principles and dispute resolution procedures to minimize risk related to cost or poor performance reviews.

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