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COMMON CLAIMS UNDER CONSTRUCTION CONTRACTS

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A PilieroMazza Webinar
August 30, 2017



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ABOUT PILIEROMAZZA

PilieroMazza PLLC is a full-service law firm with offices in Washington, DC and Boulder, CO. We are most well known as a government contracting firm and for 25 years we have helped our clients navigate the complexities of doing business with the federal government. We also provide a full range of legal services including advice on corporate, labor and employment, SBA procurement programs, and litigation matters. Our clients value the diverse array of legal guidance they receive from us and our responsiveness as we guide their growth and secure their success.

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OVERVIEW

- The differences between requests for equitable adjustment (REAs) and claims under the Contract Dispute Act (CDA)
- The possible bases for REAs and claims
- Best practices for preparing and submitting REAs and claims
- Strategies for working with the Government and subcontractors



THE DIFFERENCES BETWEEN REAs & CDA CLAIMS



REAs VERSUS CLAIMS

- **REA:**
 - Request for compensation (time, money, or both) based on changes, suspensions of work, or other factors that may arise during contract performance
 - Filed as part of contract administration and negotiations between the parties; falls short of claim in procedural requirements and formality
- **Claim:**
 - Written demand seeking the payment of money in sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract
 - Filed under the Contract Disputes Act; formal dispute that may lead to litigation



REA BASICS

- REAs may be submitted any time during contract performance or close out, but generally not after
 - Contractor typically should assert right to REA within 30 days of the change giving rise to the REA
 - However, failure to provide 30-day notice will not bar the REA or Claim unless the Government was prejudiced
- REAs are based on a FAR or contract provision that provides for an adjustment of contract terms, such as:
 - FAR 52.243-1 Changes
 - FAR 52.236-2 Differing Site Conditions



REA BASICS

- No particular format required
 - Typically takes the form of a letter to the CO with exhibits
 - Detail change to direct costs, markups, time to complete – the more detail, the more likely it will be granted
- The Government is not required to respond by a particular date – or to respond at all
- Preparation fees are recoverable
 - Includes legal and accounting fees, and internal costs



CDA CLAIM BASICS

- **Must be filed within six years after claim accrues**
 - Contractor must provide the CO with notice of a Claim prior to final payment on the contract
 - Claims should be filed within 30 days of a cancellation of a stop-work order
- **No particular format required**
 - Typically takes the form of a letter to the CO with exhibits
 - Must constitute a clear and unequivocal written statement that gives the CO adequate notice of the basis and amount of the claim
- **Relief may be compensation or an adjustment of contract terms**



CDA CLAIM BASICS

- FAR Requirements
 - A written demand or assertion
 - By the prime contractor or the Government
 - Seeking "relief" to which the contractor or the Government believes it is entitled pursuant to the terms of a contract clause or due to breach of contract by the other party
- Claims seeking over \$100,000 must be certified
 - In accordance with 48 C.F.R. § 33.207(c), name, title of contractor, certifies this claim on behalf of contractor as follows:

I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.



COMMON BASES FOR REAS AND CLAIMS



DIFFERING SITE CONDITIONS

- Differing site condition:
 - Must be an actual physical condition of the job site
 - Must be a condition that existed at the time the contract was executed
 - Condition must not have been discoverable during site inspection
- Two types:
 1. Materially differs from the conditions indicated in the information about the job provided to bidders
 2. Unknown and unusual condition that differs materially from what is ordinarily encountered on the particular type of work in the particular locality



DELAY CLAIMS

- Delay must be excusable to receive time extension or compensation
- Excusable delays:
 - Beyond the control of the contractor;
 - Without contractor's fault or negligence; and
 - Unforeseeable prior to bidding
 - E.g. owner-initiated changes, unusually severe weather, strikes, wrongful acts by Government, acts of God



DELAY CLAIMS

- **Non-excusable delays:**
 - Delays which are foreseeable or preventable by the contractor
 - E.g. financial difficulties, supplier delays where supplies are obtainable from other source, defective specifications where defect is apparent prior to signing contract
- **Time extension granted only where contractor proves event caused delay to overall completion of contract**
 - Recovery may be limited if concurrent delay affects completion of project



DELAY CLAIMS

- **Compensable delays: contractor entitled to compensation plus time extensions when delay is Government's fault**
- **Suspension of Work clause (FAR 52.242-14) provides for payment of increased costs of performance, excluding profit, for unreasonable delays ordered by Government**
- **If no Suspension of Work clause, delay generally not compensable unless contractor proves Government at fault**
 - **E.g. Government breach of implied duty to cooperate**



DELAY CLAIMS

- Constructive suspension: work prevented by Government without express order of CO
 - E.g. delay in issuance of notice to proceed, delay in availability of site, delay due to interference with contractor's work, delay of approvals, delay in inspection of work
- Must notify Government of event causing delay w/in 20 days



DELAY CLAIMS – POTENTIAL RECOVERY

- Indirect cost increases that occurred during the extended performance period
- Unabsorbed Home Office Overhead that occurred during the extended performance period
- Material cost increases that occur during the delay
- Lost productivity caused by the delay
- Other damages directly related to or attributable to the delay



DEFECTIVE SPECIFICATIONS

- Contractor entitled to compensation for increased costs of performance when it follows Government-provided defective specifications
- Government has a duty to ensure specifications are adequate for the task at hand and reasonably accurate
- Design vs. performance specifications:
 - Design: Government states the materials to be employed and the manner in which the work is to be performed
 - Performance: Government provides the objective, and the contractor selects the means by which the objective is to be achieved
- Government impliedly warrants that design specifications are accurate



CHANGES

- FAR 52.243-4: contractor entitled to equitable adjustment if a change in contract work increases or decreases the cost or time of performance
- Directed Changes
 - CO may make unilateral changes within the scope of the contract
- Constructive Changes
 - Contract work is changed by Government action or orders but procedures of Changes clause not followed
 - Requires work beyond contract requirements and either an order or fault by the Government
 - E.g. disagreements as to contract requirements, defective specifications, acceleration of performance, failure of Government to cooperate



CHANGES

- Authority to order a change
 - Only the CO or a formally-designated representative can order a change or constructive change

- Notice requirements
 - Must assert right to adjustment within 30 days after written change order
 - Recovery for constructive changes limited to costs incurred no more than 20 days prior to notice



BEST PRACTICES FOR PREPARING & SUBMITTING REAS & CLAIMS



CLAIM OR REA?

- File an REA when a contractor has a good working relationship with the agency and the Government has indicated a willingness to reach an amicable resolution; or where there is a need to show contractor willingness and good faith to negotiate
- File a Claim if there is animosity, or a clear indication in prior discussions and correspondence that the Government does not believe the contractor is entitled to an equitable adjustment
- Before making the decision to file a Claim, avoid references to the matter as a “dispute”
- A well-supported REA may be converted to a claim later



KNOW THE LIMITS OF THE GOVERNMENT'S AUTHORITY

- Who has authority to bind the Government?
 - The CO
 - Formally-designated representative (i.e., COR, COTR)
- Methods of appointing authority
 - Look for designation in the contract
 - If not designated in the contract, must be a separate writing (i.e., letter) specifying authorization



BUILD A RECORD

- Documents can be essential in supporting a claim or REA
 - Emails or correspondence from the CO directing out of scope work or changes to the contract
 - Schedule updates to prove delays
 - Receipts, invoices, and internal records to support claimed costs
 - Photos to capture differing site conditions or provide evidence for work performed



WATCH OUT FOR WAIVERS & RELEASES

- Watch out for waiver language before you sign!
 - The Government often includes waiver language in contract mods releasing the Government from any liability for any action or inaction prior to the modification
 - Waivers and releases of rights may be absolute bar to recovery
 - If the release language is unambiguous, contractor more than likely is stuck with the plain and ordinary meaning of the release
- An executed bilateral modification that contains no reservations constitutes accord and satisfaction
 - If you believe you may have a claim, add your own language to the release to make clear you take exception and are reserving your right to file a claim in the future and describe the reserved issue(s)



EXAMPLES OF RELEASES

- These adjustments are an accord and satisfaction and constitute compensation in full, on behalf of the contractor and his subcontractors and suppliers, for all costs and markups, directly or indirectly attributable to the changes ordered herein, of all delays related thereto, and performance of the changes within the performance time so stated.
- The contractor hereby remises, releases, and forever discharges the United States, its officers, agents, and employees, of and from all manner of debts, dues, liabilities, obligations, accounts, claims and demands whatsoever, in law and in equity, under or by virtue of the said contract except:



USE EXPERTS & CONSULTANTS

- Claimed amount must be calculated based on reliable principles and methods
- Certification for claims over \$100,000 heightens emphasis to ensure the figures are accurate
- For these reasons, experts and consultants are prudent in most cases
 - In case of litigation, a third-party expert or consultant, or an expert within the company, should be used for calculating delay damages
 - Your attorney should not prepare delay damage calculation – risk of your attorney becoming a material witness in litigation



STRATEGIES FOR WORKING WITH THE GOVERNMENT & SUBCONTRACTORS



SUBCONTRACTOR CLAIMS

- A subcontractor cannot submit its own claim to the Government
- Prime contractor must clearly and affirmatively agree to sponsor the subcontractor's claim
- FAR 44.203(c) allows a subcontractor the right of indirect appeal to a Board of Contract Appeals ("BCA") or the Court of Federal Claims ("COFC")
- *Appeal of Binghamton Simulator Company, ASBCA No. 59117 (2014)*
 - Appeal dismissed because subcontractor did not ask, and prime contractor did not agree, to sponsor claim
 - Right to appeal granted in subcontract not enough



SPONSORING SUBCONTRACTOR CLAIMS

- Addressing sponsorship in the subcontract agreement
 - For the prime contractor, less may be better
 - Prime contractor needs to maintain the ability to decline to submit a claim if it cannot be submitted in good faith
 - As shown in *Binghamton*, boilerplate provision giving the subcontractor the right to take over a claim or file an appeal does not constitute a definitive agreement by prime contractor to sponsor a particular claim
 - Therefore, as a subcontractor, you should include language and mechanisms in the subcontract designed to require the prime contractor to provide clear expression of its sponsorship of a claim



LIQUIDATING AGREEMENT

- Used for pass-through claims
- Liquidates the liability of the prime to the subcontractor
- A liquidating agreement provides that if a subcontractor is owed money for completed work, the prime is responsible to pay the sum owed, but only to the extent that the prime recovers money, if any, for the subcontractor's work through settlement or disposition of a claim against the Government
- A liquidating agreement should be entered before the claim is submitted to the Government



WORKING WITH THE GOVERNMENT

- Do not wait until the last minute to submit an REA or claim
- Be patient ... up to a point
- Getting past roadblocks
 - If the contract is a small business set-aside, reach out to the SBA or agency Office of Small & Disadvantaged Business Utilization (OSDBU)
 - Involve a Member of Congress
 - Allies within the agency?
 - Request a meeting with counsel
- Be responsive to requests for additional information
- When to convert an REA to a claim?



Any Questions?

Thank you for joining us today.

If you would like to speak with Jackie or Michelle about REAs and Claims under Construction Contracts, please contact them at:

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