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10 Ways To Maximize Success Of Gov't Contract Claims

Law360, New York (February 19, 2013, 3:08 PM ET) -- Securing a government contract is but one step in a journey that is both fraught with risk — of all sorts and dimensions — and ripe with the potential for significant rewards. Generally, the most obvious and immediate risk is the red ink associated with a losing financial proposition; the most obvious immediate reward, of course, is the near term profit to be earned from successful performance.

Although some contracts are priced in a way that makes profitability a challenge, most contractors approach the pricing process with an eye on a reasonable profit and a price that will be adequate to compensate for the obvious risks posed by the contract terms, the specifications, and the statement of work ("SOW"). They therefore greet the award of the contract with enthusiasm and look forward to the gobs of black ink that they will be spilling on the balance sheet as performance progresses.

And then performance begins. Somehow, somewhere along the line, something went wrong. The "actual cost of work performed" somehow outpaces (by a significant margin) the "budgeted cost of work performed," and the schedule variances foreshadow even higher erosion of your margin or even the prospect of the ever-dreaded red ink.

There will be times, of course, when this development will be your fault. Your team will have misread the solicitation, forgotten to have priced some element of the work, used outdated and understated rates, experienced higher scrap losses than anticipated, overrated the experience and skill of your team, understated the risk, lost some key personnel, or just done a poor job of managing the project. It happens, and when it does, your have only yourself to blame. Maybe your vendors are late, or are delivering inferior goods that need to be reworked or remanufactured. Presumably — and I suppose this is a subject for another day — your subcontracts provide you with adequate recourse against those vendors, i.e., recourse that will compensate you for the impact of the vendors' delinquencies on your performance of your upstream contract.

Sometimes, however, it is not your fault, and it is not your suppliers' fault. Sometimes the blame resides with your Uncle Sam. How do you know? And what do you do if you suspect it is the government's fault? To whom do you talk? In the discussion that follows, you will find 10 steps that you should always take when trying (1) to evaluate the assignment of liability for cascading red ink and (2) to ensure that the blameworthy party actually bears the financial responsibility for its conduct.

1) What Is Your Obligation?

If you approach a lawyer with a question about your contract obligations, such as whether you have a responsibility to take a particular action being required of you by the government, any lawyer worth his salt will always ask you, "What does the contract say?" This is the singularly most important question. You may have all kinds of reasons why you think the contract language does not matter, or that it has a certain meaning that is not apparent on its face, but you cannot reasonably evaluate whether you have a claim unless you identify the particular language of the contract that is relevant to the increased costs you are experiencing.

2) What Are You Actually Doing?

If you are doing something other than what the contract actually says or how you interpret that language, you may have a claim. A variance between what the contract says or what you think it means and what you are now doing to complete the job is always a sign that something is wrong. But note the word "may" in the first sentence of this paragraph. A variance between the language of the contract or your interpretation of that language and your actual performance is no guarantee of a viable claim. As explained below, you may be departing from the contract requirements for reasons unrelated to any government act or omission. But if you do not know the difference between what the contract actually says and what you are actually doing, you cannot assess blame.

3) "Why Am I Doing This?"

Now that you have identified and isolated the difference between what the contract said and what you thought it meant, on the one hand, and your actual performance on the other, the obvious question in terms of any possible claim whether Uncle Sam did or failed to do something that caused you to perform differently or more expensively. Like what?

It could be as simple as interpreting a specification, provision of the SOW or contract term differently than you do. Perhaps that specification is commercially impracticable. Maybe you were told (more about who "told" you later) to do it differently. Maybe you were denied access to the job site or you received defective government-furnished property, government-furnished equipment or government-furnished information, or you received it late. Maybe the government did not approve drawings, plans or other submittals within the time prescribed in the contract or perhaps it unreasonably disapproved of key personnel proposed along the way.

On the other hand, you or your vendors could be the source of the problem and, if that is the case, you have no basis for blaming the government. Or, you may have simply decided to "build a better mousetrap" than the contract required and discovered it was not easy and it was damnably expensive. That makes you a volunteer, and volunteers don't get paid.

4) Perform a "Root Cause" Analysis

All too often, your folks will say, "We missed it. That's on us." This is particularly true of engineers, who, no matter how obtuse the specification or SOW may be, honestly believe that they should have intuited the interpretation the government is now espousing. They may be right, but ... they may be wrong. Make the naysayers on your team show you the contract language and other documents that support their conclusions and make them walk through the logic chain that leads them to their conclusions. You would not accept an untested thesis in evaluating a technical problem; don't do it for a contractual problem.

5) Notify the Contracting Officer

Early, often and in writing. This is really simple. If you think the contract has been changed, if you think a government act or omission is affecting your performance, say so in writing to the CO. It need not be a long — simply state the fact of the act or omission, that it is increasing your cost and extending your schedule, and that you regard it as a change. Ask the CO to confirm or disavow the direction and tell him that that you will be submitting a request for an equitable adjustment.

6) Accept No Substitutes

Johnny Carson's first TV game show was called "Who Do You Trust?" While grammatically incorrect, that question is spot-on here, because in government contracting there is only one right answer — the contracting officer. The CO is generally the only person who can legally bind the United States. If anyone but the CO issues you an order, do not follow it until you ask the CO, in writing, to confirm the order to you, also in writing, and advise the CO that you regard it as a change (See Paragraph 5 above).

Unless the person issuing you an order holds a contracting officer's warrant, follow this rule, even if the order comes from a program manager, a contracting officer's technical representative, a contract specialist, a system program office, a general, an admiral, or any government official accustomed to hearing "yes" every time he or she speaks. "The customer is always right" sounds so reassuring and works so well in the commercial world, but it does not translate well into government contracting unless you understand that the only customer — or at least the only one who counts legally — is the CO. Can you overcome reliance on a non-CO's direction? Maybe, but why invite that kind of risk?

7) Trust But Verify

Never act on an oral direction. Send a letter to the procuring contracting officer asking for confirmation and advising that you regard the direction as a change. This rule applies to oral direction from the CO and it particularly applies to oral direction received from any of those nonwarranted personnel discussed in Paragraph 6 above who are ever so prone to telling you what to do, often to the accompaniment of a promise to "take care of you later." Remember, that promise has no value whatever because nonwarranted folks have no contracting authority. They will of course "feel bad" when the CO and the CO's lawyer move to dismiss your claim, but neither the CO, his/her lawyer, nor the judge will be moved by that remorse.

8) Read Your "Changes" and "Notification of Changes" Clause(s)

They impose time limits for notification of a change. Comply with them. Enough said. Can you overcome the time limits? Maybe, but as was posited under Paragraph 6 above, why invite the risk?

9) Use Change Order Accounting

Your claim is only as good as your provable costs. Establish separate job numbers to collect the costs of the changed work. This is one of the most frequently overlooked elements of good claims analysis and preparation. It is not always possible to use change order accounting, e.g., when your claim is for the cumulative impact of iterative events that give rise to delay and disruption, but discrete changes — such as "change to this material," "extend the trench by 400 yards," "add two more coats of sealant," or "redesign the circuit" all lend themselves to separate accounting. Do it. The judge will be happy and, when the judge is happy with what you have done, you generally have a much better chance of ending up happy in the end as well.

10) Earn Interest

A claim is not a "claim" until certified. Interest runs on "claims," not requests for an equitable adjustment. So, you can engage in fact-finding and negotiate your REAs until the proverbial cows come home but you are not earning interest until you submit a certified claim. And don't forget — it is the submission of your certified claim that stops the running of the Contract Disputes Act's six-year statute of limitations.

Adherence to these suggestions will not guarantee a successful claim. But these suggestions will certainly facilitate your ability to distinguish between potentially successful claims and those that will only put money in your lawyer's pockets. And they will enhance the prospect that the claims you do pursue will be successful, and they will serve to deprive the government of some of its more popular defenses.

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