REQUEST FOR EQUITABLE ADJUSTMENT

Maximize Recovery by Developing a Factual Basis for a Request for Equitable Adjustment

Failure to Do So Could Be Fatal

INTRODUCTION

Editor's Note: In the spirit of "Throwback Thursday," we are re-publishing the following article originally written by CEO John Balch, which was originally printed in the May, 2012 issue of Engineering News Record Magazine (ENR). The fundamental principles expressed in the article are every bit as important now as they were when first written. Here is the latest updated version based upon very recent developments.

The original article can be accessed here: **http://www.zinio.com/reader.jsp?issue=416215504&o=ext**

MAXIMIZE RECOVERY BY DEVELOPING A FACTUAL BASIS FOR A REQUEST FOR EQUITABLE ADJUSTMENT

Equitable adjustments compensate contractors for increased costs incurred during performance due to owner-caused delays, disruptions and changes. However, let us not forget that the BURDEN OF PROOF associated with the NEXUS is absolutely axiomatic, because a failure to tie the cause and effect relationship together can and will be, in almost all cases, fatal.

While the costs in an REA can be accepted on Generally Accepted Accounting principles, there has been a change in philosophy at the Defense Contract Agency level (DCAA). Wherein the DCAA is consistently becoming not just an administrative tool for the Government, but rather is becoming an administrative roadblock in defense of the payment of potentially valid contractor expenses and reimbursable costs.

The classic phraseology that all contractors are seeing in the last 5-10 years points to a simple statement that the "costs are not suitable" for audit, and are returned without action or asking for additional support.

Therefore, to maximize compensation and avoid lawsuits, it is important for contractors to maintain a complete, conformed set of contract documents and to keep track of all correspondence with owners and subcontractors beginning at the time of bid, as if they were preparing a Request for Equitable Adjustment (REA). Whether a contractor files for it or not then becomes strictly a business decision, but the failure to have the "critical tie-outs" can become financially costly.

With the advancements in technology and the ability to sort and search information on a whim, the administrative layout of your contracts should now be of significant concern.

METHODOLOGY

In essence, how your data flows, how it is captured, and how you use it during the life of your contract is now being reviewed- not just for reasonable compliance, but the methodology of capturing facts and costs is a brand new area of concern.

While a schedule analysis is a wonderful tool to have, your administrative timeline (whether you're a $5 million company or a $5 billion per year company) is your common-sense thread that can be used to link and portray the life of the project. Therefore, if the data being captured during the life of the project cannot be assimilated in to a common-sense understandable scenario, the ability to sell your position may be in jeopardy.

Most contractors, after years of experience, know exactly what they need to have in their possession to make a factual decision with regard to how to propose and/or price a competitive proposal. However, what has not evolved concerns today's "managerial jump" associated with actually knowing that a contract is guaranteed to change; thus, the real-time question now on the table is: how do I track it, prove it, and support it?

Obviously, financial records should be kept in sufficient detail to allow the identification of negative cost impacts early on. Let's not forget that such records must be retained for the life of the project, taking into consideration IRS rules and state and federal retention requirements, as a matter of standard operating procedure.

Track everything. Timelines and facts are what bring otherwise adversarial parties to the negotiation table. It is much better to have too much information than too little. All tracking should occur contemporaneously with project performance. Historically, a contractor needs an AUTOBIOGRAPHY relative to the life of the project. A BIOGRAPHY (while valuable), is always suspect and a dangerous way to go. In essence, data gathered throughout the life of a project carries real weight and is much more difficult to challenge than information collected after the fact.

It is also important to make sure everything is in writing. Contractors should be proactive in their communications approach, notifying the owner as soon as a negative impact is identified.

Such written notification serves as supporting evidence and FORMAL NOTICE in the event an REA turns into a formal dispute. For the same reason, it is good practice to document, in writing, any verbal agreements made between owners and prime contractors; such agreements should be formalized where possible, or at least transmitted in writing, to and from, to ensure that you have a capturable record in the event a need arises. Supporting photographs are another must, especially if taken with a camera displaying the date and time.

CONSULTANT'S FEES OFTEN RECOVERABLE

In that regard, we would like to point out that: a claim situation does not exist until it is certified and filed. All actions up to that point are designed to exhaust all administrative remedies available to the parties. Thus, consulting, legal and accounting fees are recoverable up until the claim is certified.

The *Bill Strong v. Shannon* decision supports recoverability and allowability of consulting costs. Excell's Vice President, Judi Mattox, Esq. litigated that case and wrote the brief. *Bill Strong* was the seminal case establishing recoverability of consulting costs under FAR 31.205-33. It has since been applied consistently by the Federal Courts. The *Bill Strong* case specifically discusses three distinct categories of legal, accounting and consulting costs:

1. Costs incurred in connection with the work performance of a contract,
2. Costs incurred in connection with the administration of a contract, and
3. Costs incurred in connection with the prosecution of a CDA claim.

The Court held that "costs that fall within the first and second categories are presumptively allowable if they are also reasonable and allocable." The opinion further explained that:

> *…[in] classifying a particular cost as either a contract administration cost or cost incidental to the prosecution of a claim, contracting officers, the Board, and courts should examine the objective reason why the contractor incurred the costs. If a contractor incurred the cost for the genuine purpose of materially furthering the negotiation process, such cost should normally be a contract administration allowable expense under FAR 31.205-33, even if negotiation eventually fails and a CDA claim is later submitted. On the other hand, if a contractor's underlying purpose for incurring a cost is to permit the prosecution of a CDA claim against the Government, then such cost is unallowable under FAR 31.205-33. (Emphasis added).*

Bill Strong is still good law today. Under this precedent, which specifically concerned Excell's consulting fees, there is a substantial basis for contractors to recover costs associated with consultants. In fact, in the majority of negotiation scenarios, consulting fees are covered as part of the "bottom line settlement," rendering these fees "transparent" to the contractor!

Finally, get outside help early on. The odds are, if you think you need it, you do! The initial expense will be well worth the reward, and in many situations, these fees and others, including consulting and legal fees, may actually be recoverable costs in an REA or dispute scenario.

-John Balch, CEO

In the end, you will be glad you made the call; by the way, it's a FREE CALL.

EXCELL CONSULTING: "HERE TODAY FOR YOUR TOMORROW."

Author's note: The information contained in this article is for general informational purposes only. This information does not constitute legal advice, is not intended to constitute legal advice, nor should it be relied upon as legal advice for your specific factual pattern or situation. – Taylor Benson, Esq., Asst General Counsel