
KNOWLEDGE IS POWER

Do You Know What You Don't Know?

INTRODUCTION

I recently met with the president of a midsize general contracting company to discuss his company's REA on one of its federal construction contracts. As we all leaned back in our chairs during a break, the president reflected back on the many years his company had been contracting with the Government, and compared his past contracts to his more recent claims, where his company had recovered more than they originally thought was possible. He then made a profound statement that, if true, should give us all cause to reassess. He believed that:

“90% of contractors don't know their options with these contracts, and are just giving away money because of it.”

If this is true (and we have seen ample evidence that it is), then it leaves vast opportunity for improvement. Part of purpose of this newsletter is to discuss the options available to contractors, as well as helpful tips and new developments in the law and practice of Government contracting. In furthering that purpose, we will start a series of articles that focus on contracting fundamentals with the intent of making this knowledge readily available.

THE RULES OF THE GAME

Knowing the rules of the game will inevitably allow you to take advantage of all of your options. Conversely, not knowing the rules, or only knowing partial rules, can lead to **missed opportunities** and **unintended consequences**.

In baseball, for example, a team manager must operate under the rules of the game when deciding which of their players will play, and when. In the bottom of the 9th inning with the score tied, and the pitcher next in line to bat, knowing the rule that allows for a slugger to pinch-hit in place of the poor-hitting pitcher will dramatically increase the team's chances of getting a hit, and thus **winning** the game.

However, the manager must also be aware of the consequent rule that, once the pitcher comes out of the game, he can't come back in to play. This knowledge allows the manager to take other factors into consideration (e.g., whether there is another decent pitcher on the bench) in making a decision that will give the team the best chance to win. A failure by the manager to learn either

of these rules will eventually result in **lost opportunities** to score, win games, and even continue in his job.

The same is true in the Government contracting arena. If contractors do not know both the fundamental and more intricate rules – as spelled out in each contract, the statutes, regulations, and case law – they will have less likelihood of recovering all of the costs or time to which they may be entitled. Their ability to **“remain whole”** or to be **“made whole”** on the contract is significantly diminished.

For example, a contractor generally knows that it has the option to file a claim under certain conditions (e.g., Changes clause or Differing Site Conditions) in order to recover certain costs. However, if the contractor is not aware that interest on those costs begins to accrue as soon as the claim is submitted (or certified if claim is \$100,000 or more), then it may not get the timing of filing right and miss out on some of the interest to which it was entitled.

FUNDAMENTAL CLAUSES

With these principles in mind, [The Excell Report](#) will start a series of articles that will address some of the fundamentals associated with federal construction contract administration, claims, and claim avoidance. In doing so, we will build upon some of our **past articles** that have addressed important **fundamentals**, including:

- Contractor [Claim Fundamentals](#)
- [Contract Interpretation](#)
- [Rules](#) for Small Businesses (including size limitations and the [EAJA](#))
- [Site Visits](#)
- [Differing Site Conditions](#)
- [Change Orders vs. Warranty Work](#)
- Duty of [Good Faith and Fair Dealing](#) (*Metcalf* case)
- [Quantum](#)
- [Bid Protests](#)
- Termination for [Convenience](#)
- Termination for [Default](#)
- Preventing [Fraud and Debarment](#)
- [REA vs. Claim](#)
- Understanding [Concurrent Delay](#)
- [False Claims Act](#)
- Rights and Remedies under the [Miller Act](#)
- [Timing](#) and Proper Filing of Claims

Then, future articles will address the fundamentals of those FAR clauses that are typically in play in **avoiding** and **resolving disputes**. When assessing options within a contract, a knowledge of the fundamental clauses and how they interplay is vital to ensuring that contractors truly receive the **benefit of their bargain**. Therefore, future topics will include:

- Changes
- Differing Site Conditions
- Disputes
- Specifications and Drawings for Construction
- Suspension of Work
- Davis Bacon Act
- Value Engineering – Construction
- Pricing of Contract Modifications
- Requests for Equitable Adjustments

CONCLUSION

In baseball, life, and especially government contracting, knowledge truly is power: the power to navigate the FAR and other regulations in order to **keep yourself whole** on a contract. Enlisting an expert in the industry can be the difference between recovering your costs and letting them slip away. In government contracting, Benjamin Franklin's old maxim holds true: **An ounce of prevention is worth a pound of cure**.

The experts at Excell are more than glad to share our 80+ years of combined knowledge to help you assess what your options may be. Please give us a call.

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