

CONSULTING CAPABILITIES: THE EXCELL WAY

I. Excell Consulting Capabilities

Stop A Moment – Did You Know? Consultant Fees Are Recoverable!

John G. Balch, CEO, CPCM Resume & Bio

Strategic Partner Xpiori adds Digital Forensics & Data Management Capabilities

Partial Client List

Recent Victories

II. Excell Report – *Knowledge is Power*

III. Excell Report Brochure

IV. Excell Report Blog Posts

Consulting and Legal Fees Are Recoverable

Contracting Officer's Final Decision

Contractor Claim Fundamentals – Part I

Contractor Claim Fundamentals – Part II

FCA Scrutiny on the Rise: Federal Contractors Beware!

False Claims Act – Ramifications – Part II

False Claims Act – Ramifications – Part III

False Claims Act Update

Government Must Specifically Exclude EAJA Application

Implied Duty of Good Faith and Fair Dealing

Metcalf: Part I – Duty of Good Faith and Fair Dealing

Metcalf: Part II – Who Bears the Risk of Differing Site Conditions?

Pass-through Claims and the Severin Doctrine

Prime Contractor Cannot Pass Liquidated Damages through to Subcontractor

REA vs Claim

Request for Equitable Adjustment (REA)

Stop Work Orders – How Will You Manage the Return to Work?

The VA's Nightmare Breach – Part I

The VA's Nightmare Breach – Part II

Stop a Moment... Did You Know???

Consultant's Fees are Often Recoverable!

Before elaborating on the question of recovery of consulting fees and/or legal fees, let's be clear on a major point: 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. However, once the certification and filing of the claim takes place, it's a whole new ballgame.

The *Bill Strong* decision (1995) supports recoverability and allowability of consulting costs. Excell's Vice President, Judi Mattox, litigated the case and wrote the brief, with Oral argument by Chris Darby of Mattox and Associates.

Bill Strong was the seminal case establishing recoverability of consulting costs under FAR 31.205-33. It has been applied consistently by the Federal Courts, and in *Johnson v. Advanced Eng. & Planning Corp.*, the Court upheld the recovery of \$270,017 for Contract Administration costs.

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 cost. 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.

Bill Strong is still good law. 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!

If you are facing a potential claim situation (or want to educate yourself on how to *avoid* claims in the future), I urge you to call 877-322-3955 today for a FREE consultation!

Sincerely,
EXCELL CONSULTING INTERNATIONAL, INC.

John Balch

John G. Balch
CEO

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.

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). With this information, it is much easier to establish a timeline and identify the critical factors that contribute to cost overruns and justify their relevance.

Obviously, financial records should be kept in sufficient detail to allow the identification of negative cost impacts early on. Such records must be retained for the life of the project 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. Data gathered throughout the life of a project carries real weight, and is much more difficult to challenge, than information collected after the fact.



John Balch
CEO
Excell Consulting
International

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 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 with owners or subcontractors. Supporting photographs are another must.

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. ■

“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.”



EXCELL CONSULTING INTERNATIONAL, INC.

“Here Today for Your Tomorrow”



- Claims & Requests for Equitable Adjustments
- Complex Negotiation Strategy Formulation
- Claims Defense / Offense
- Contract Management
- Disputes Resolution
- Terminations for Default and/or Convenience
- Arbitration/Litigation Support
- Fact-Based Illustrative Graphics
- Expert Witness Efforts

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Visit our Website www.ExcellConsulting.net*

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John G. Balch, CEO, MA, CPCM

John G. Balch, a Certified Professional Contract Manager, has over 40 years of business operational experience in contract administration, contract disputes, arbitration proceedings and settlements, alternative disputes resolution (ADR), mini trials, expert witness testimony, negotiations, and business development and strategy. In addition to Contract Administration experience, Mr. Balch started and successfully ran a construction company for one of the largest Danish conglomerates in the world i.e. Monberg-Thorsen. Mr. Balch has been involved in the strategy and Risk Management for a number of companies involved in disputes, Federal government contracts, and contract consulting in construction. Mr. Balch is a unique, multifaceted individual and has diverse experience with contracts. Mr. Balch also served as a Warranted Contracting Officer for the United States Air Force and was responsible for the preparation, solicitation, negotiation, contract award and administration of hundreds of millions of dollars worth of major projects and critical system acquisitions, involving both domestic and international contracts.

Graduated from Virginia Military Institute in 1968. Operated as an "Unlimited Warranted Contracting Officer"/PCO on one of the largest Air Force O&M contracts i.e. Distant Early Warning System and as the alternate PCO on the Ballistic Missile Early Warning System and responsible for implementing the computer upgrade of the Computer Systems in Cheyenne Mountain, Colorado i.e. North American Air Defense Command / 427M Program. Note: This effort was 18 months in length. Conducted extensive high-end negotiations and held the title of "Systems Contract Negotiator".

Founder and CEO of Excell Consulting International, Inc. Excell was a leading Contract Management / Disputes company in the U.S.A. Excell

EDUCATION:

B.S., Biology, Virginia Military Institute, 1968
M.A., Procurement / Management, Webster University, 1978

REGISTRATIONS:

CERTIFIED PROFESSIONAL CONTRACT MANAGER,
CPCM #3117 (MAY 1985)

PROFESSIONAL MEMBERSHIPS:

National Contract Management Association
American Bar Association, Associate Member
Society of American Military Engineers
Professional Services Council

PROFESSIONAL PUBLICATIONS:

"Project Problems and Early Detection - Early Cure," The Excell Report, (1996)

NOTE: The Excell Report was a monthly publication with 10,000 plus monthly readers with tremendous specific Construction Claims and Quantification Analysis information e.g. Changes Management, guest speaker at the International Association of Cold Storage Contractors Annual Conference, Cabo San Lucas, Mexico. Practical Lessons in Project Management, Contract Administration, and Claims Avoidance, and International Association of Certified Public Accountants of America, San Diego, CA.

Oversees production of 'The Excell Report', which has published in excess of 100 blogs with approximately half being authored by Mr. Balch personally

SEMINARS:

Participated or conducted seminars within the United States to include Alaska and Hawaii.

Seminars were conducted for major contractors and at the request of the AGC, ABC and AICPA and in joint venture scenarios with Willis Corroon. Topics included: Claims Management, Change Order Management, Executive Level Claims Avoidance, Executive Level Contract Administration, Negotiation Techniques, Contract Administration Techniques, Risk Analysis, Cost Analysis and Scheduling.

Excell Sponsored Seminars (EX), Willis Corroon (WC), Assoc. General Contractors (AGC), Associated Builders and Contractors (ABC).

Alabama: (WC)

Alaska: (EX), (AGC), (WC)

Arizona: (AGC), (WC)

California: Los Angeles (WC), Irvine (EX), Fresno (WC), Newport Beach (WC), San Francisco (WC),

Colorado: (AGC), Connecticut: (WC)

Florida: Gainesville (WC), Orlando (WC), Tampa (ABC)



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specialized in REA's and has been involved in that capacity in one form or another since 1983. *Excell's clients included: Bechtel, Fluor Daniels, Turner, CBI, Granite, Arctic Slope Regional Corporation, ITT, PCL, Marnell Corrao, Utopia, Akima, Aleut Management Services, Wackenhut Services, California Department of Corrections, Kitchell Contractors, Cold Storage Inc., American Waterworks, McDermott Will Emery, KEAR, Bryan Construction, TRI-TECH, KBR, RCA, Big-D Construction, as well as Small Business Contractors.*

Responsible for Developing Program Management Documents/Contract Administration Procedures and taught negotiation theory to some of the largest companies in the country to include: ICF Kaiser (Fairfax, VA) and Bechtel (San Francisco, CA). Guest speaker at the American Bar Association conventions, as well as the Certified Public Accountants National Convention in San Diego, CA. Lectured and/or presented at 95 seminars for the Association of General Contractors and Associated Builders and Contractors concerning various topics of Contract Administration and Claims for the construction industry.

Assembled a "cradle to grave" construction package regarding the largest "lease back" construction program undertaken by the U.S. Navy i.e. 525 houses constructed under "lease back" in Sigonella, Sicily. Drafted and developed the proforma for Cogefar-Impresit, and negotiated all contractual arrangements between the U.S. Navy and Cogefar-Impresit. The effort was undertaken, project built, completed, and this housing is being utilized per the terms and conditions of that agreement i.e. 40 year payoff. The negotiation instruments amounted to an approximate \$440 million dollar contract with a 2.9 CPI Index over 40 years.

Since May 2008, involved in a Contract Dispute matter which was a multi-million dollar issue i.e. UTOPIA (Utah Telecommunication Open Infrastructure Agency) in Salt Lake City, Utah vs. U.S. Department of Agriculture and in September 2008. This matter recently settled in excess of \$10 million.

Historically functioned as an Expert Witness on numerous occasions regarding contractual disputes in CG Williams vs. Air Force; Tempo Construction vs. Air Force, C&K vs. Colorado, R&O Construction vs. California, Linpro vs. GSA Foley Square, T. Frederick Jackson, vs. Marriott Hotel, S&E Contractors vs. Dade County Florida; West Electronics vs. U.S. Navy; and Intelligent Investments vs USACE.

Experience:

Various Projects, Excell Consulting International, Inc., Colorado Springs, Colorado, Chairman of the Board/Chief Executive Officer. Mr. Balch was responsible for the overall management and fiscal profit and loss of this disputes oriented organization.

Projects included a major contract dispute between the United States Navy/United States Air Force and Contel, Inc. The organization was

Georgia: (AGC with Smith, Currie, Hancock and later with WC) Overton Currie & John Balch

Hawaii: (AGC)

Indiana: (WC)

Kansas: (WC)

Kentucky: (WC)

Massachusetts: (WC)

Michigan: (WC)

Minnesota: (WC)

Missouri: (WC)

Nebraska: (WC)

Nevada: (EX), (WC)

New Mexico: (WC)

New York: (WC)

North Carolina: (WC)

Ohio: (WC)

Oklahoma: (WC)

Oregon: (WC)

South Carolina: (WC)

Tennessee: (WC)

Texas: (WC), (ABC)

Utah: (WC)

Virginia: (EX)

Washington: (WC)

Washington D.C.: (AGC)

Wisconsin: (WC)

Wyoming: (AGC)

Edmonton, Alberta, Canada: (Excell / PCL Construction Enterprises)

Calgary, Alberta Canada: (EX)

San Juan, Puerto Rico: (EX)



comprised of 80 full-time individuals with an additional cadre of professionals on an on-call basis. The company specialized in disputes management efforts associated with complex problem solving and complex negotiations. The firm was versed extensively in claims preparation, negotiations, arbitration, and/or litigation, which included pre-trial investigative services, as well as discovery, presentation, expert witness efforts, and other activities necessary to protect the client's rights in any forum. Excell's clients have included the Aleut Corporation, AMEC Engineering, American Water Works, Arctic Slope Regional Corporation, Ball, Ball & Brosamer, Bechtel, Bill Strong Enterprises, C-G Construction, California Department of Corrections, CBI Nacon, Cogefar Impresit USA, Contel/GTRE, Fluor Daniel, ICF Kaiser Engineers, ITT Industries, Koll Construction, Marathon Steel Company, Monberg-Thorson (Denmark), Pettit & Martin, Smith Currie & Hancock, The Triax Company, The Weitz Company, Willis Corroon, Swinerton/Walberg, Wackenhut and many others.

Construction Background:

Various Projects, Danac, Inc., Western Division, Vice President. Mr. Balch started this domestic construction division with three people in 1980. Responsible for overall management including the profit and loss profile of the Western Division of this international firm dealing directly with Federal government contracts in Bermuda, Cuba, Azores, The Virgin Islands, and the United States. The company grew and operations averaged \$30 million annually with a staff of 300+ personnel. Projects located in: Newport, RI; Cherry Point, NC; Brooks AFB, TX; Randolph AFB, TX; AFA Colorado Springs, CO; Loring AFB, Maine; Ft. Bragg, NC; Pope AFB, NC; Kelly AFB, Lackland AFB; and the U.S. Virgin Islands radar site.

Claims Related Activity:

Renovation of Army Barracks, Fort Wainwright, Alaska. For the US Army Corps of Engineers, and governed by the Federal Acquisition Regulation (FAR), Mr. Balch (Excell, Inc.) assisted with development of a comprehensive Request for Equitable Adjustment. Excell directed the actual costs reconstruction and reclassification effort and subsequent identification/quantification of the damages incurred. Also assisted with the research and development of individual entitlement issues; the matter was successfully concluded.

Foley Square – Solely responsible on behalf of Linpro & Associates, New York City for the renegotiation of the largest high-rise built in Manhattan in the last 20 years. This immense structure started as a design build effort until an Indian Burial Ground was encountered. This differing site condition matter caused the project to approach \$400 million in cost with a substantial overrun. Mr. Balch along with CPA Norman Lorch in concert with Linpro-Turner Construction, successfully negotiated a 100% recovery of costs and all profits



on behalf of the client, with all consulting and Excell fees reimbursed by GSA.

Consolidated Space Operational Center – On behalf of Bechtel, responsible for the resubmission and renegotiation of a \$10 million cost overrun associated with a defective design problem and the attenuate costs associated with same. This single REA resulted in the first “mini-trial” conducted by the U.S. Corps of Engineers. Bechtel recovered all costs and profits, as well as Excell fees in the matter and the world of mini-trials was born.

Value Engineering Change Proposals – Designed, structured, implemented and conducted a VECP program for ITT Federal Services. The program was the first of its kind and 100% under the control and direction of Mr. Balch. The program was hugely successful and responsible for millions of dollars worth of unanticipated profits dropping to the bottom line of ITT. Latest VECP effort: \$2.5 million+, Federal Courthouse, San Francisco, CA.

Termination for Convenience vs. Deductive Change Order – On behalf of a Corpus Christi construction firm, challenged the United States government on a matter where a partial termination was the correct methodology to make the contract change, but the government had elected to make a unilateral deductive change. The matter was reversed and all efforts to include the formulation of the REA, its contents, cost analysis, impact and areas of recoverable costs were asserted and recovered.

Heilig-Meyers Furniture Company Corporate Headquarters Building, Richmond, Virginia, Owner’s Representative. Acting as Owner’s Representative on a dispute with the contractor concerning over-billing on a cost-plus contract, Mr. Balch performed comprehensive analysis of budgeted and actual costs, and provided expert testimony during formal arbitration conducted by AAA which resulted in cost recovery.

Other Claim Related Matters

Excell had complete responsibility for, and participation in, the following types of efforts relative to numerous agencies of the Federal Government.

Implementation of complex program management/contract administration procedures.

Preparation, negotiation, and evaluation of Request for Equitable Adjustment proposals.

Preparation, negotiation, and evaluation of Claims.

Termination for Convenience Settlement Proposal development and negotiations.

Change order/modification development and negotiations.



Development and negotiation of entitlement/recovery positions for issues related to differing site conditions, delays, directed and constructive changes, directed and constructive acceleration, defective/deficient contract design documents, owner interference, site access denial, unusually severe weather, overzealous inspection, impossibility and impracticality of performance, liquidated damages, variations in estimated quantity issues, support during audits accomplished by the Defense Contract Audit Agency (DCAA), support of litigation team(s) in various government litigation and alternative dispute resolution forums. As the CEO of Excell, involved in all ranges of negotiated disputes from as small as \$10,000 to as large as \$100M i.e. Contel vs. U.S. Air Force.

Other Accomplishments:

Excell received ENR's award for business development when Excell joined forces in a formal venture to proffer Contract Negotiations and Alternate Dispute Resolution scenarios to the construction industry by coupling Excell with Willis Corroon (out of London England), with its U.S. headquarters in Nashville, TN. This arrangement placed Claims Avoidance and Contract Management at the executive level within the construction arena. Taught negotiation techniques, contract administration techniques, risk analysis, risk avoidance and the like to enhance management's understanding of contract awareness issues designed to keep contractors out of the courts. The program was so successful that a quarterly outstanding meritorious award was received for the development of the concept and the placement of it in the construction industry.

Involved in numerous mock negotiation scenarios and red team reviews for some of the largest corporations in the United States which include: RCA and ITT. The matters were both domestic and international and were in the millions of dollar range.

One successful ADR method included the Contel claim by assisting three different sets of attorneys on what came to be known as the "Omnibus" claim that involved 39 separate, but linked REA's impacting a \$69M Firm Fixed Price contract that escalated with changes to \$370M. The effort resulted in an award to Contel that was just short of \$100M.

Other Personal Victories:

During May of 1997, as the CEO and Owner of a related company (Injection Research Specialists, Inc.), at the time, received the largest jury verdict in the 100-year history of the State of Colorado for theft of Trade Secrets, to include: software programs, electronic control unit, misappropriation and outright theft of a proprietary product conceived, designed, built and sold, both domestically and internationally. This Electronic Fuel Injection system was the first of its kind related to two stroke engine technology. The jury verdict came in at \$57



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million dollars against Polaris Industries and FUJI Heavy Industries and on appeal, nearly doubled that figure and ultimately, the settlement approached \$80 million. The verdict took 9 years and efforts included all aspects associated with the start up of the business through Research and Development and production.



Trust Your Claims and Contract Issues To The Excell Consulting – Xpiori Team

Excell Consulting International Inc. and **Xpiori, LLC** team to provide you with the best in consulting and information technology support services for any claims made under government and construction contracts.

Excell Consulting specializes in government and construction claims, disputes avoidance, contract management and litigation/arbitration support. Excell's expertise in every phase of construction and contract management has been assisting construction projects, companies and careers for 32 years.

Excell has enabled its clients – large and small – to recover hundreds of millions of dollars on their federal and commercial projects/contracts, while avoiding potential losses and expensive litigation. Excell provides professional services for all areas of federal and commercial contracting and construction management, including:

- **Contract Disputes and Claims Avoidance:** Excell understands disputes from the contractor's and owner's point of view, and uses a graphics-oriented approach that has proven effective in settling disputes before they become full-blown claims or litigious.
- **Claims/REA Preparation:** Excell is expert in preparing and negotiating contract claims, Requests for Equitable Adjustment and Change Order Proposals, including evaluation of the viability of entitlement issues and quantum analysis; this includes representing both contractors and owners on Claims Defense issues.
- **Contract Administration:** Excell has "cradle to grave" capability, from Red Team reviews of O & M or Firm Fixed-Price contracts, bid protests, through project turnover.
- **Litigation/Arbitration/Mediation Support:** Excell provides clear and comprehensive presentations and expert testimony in support of our clients' dispute resolution efforts.
- **Expert Testimony:** CEO John Balch has testified in claims disputes, trials, and arbitrations, drawing from his deep prior experience as both a General Contractor and Air Force Contracting Officer, coupled with 30+ years of handling contract disputes as founder and CEO of Excell Consulting.

For more than eight years, **Xpiori** has provided state of the art information technology and analysis to support **Excell's** consulting practice. **Xpiori's** automated processes will speed access to your information and locate items that you did not anticipate even existing. **Xpiori** has continually developed and acquired best of breed technologies and, in recent months, has deployed processes that eliminate significant manual efforts normally associated with organizing and reviewing documents and other unstructured information.

What Xpiori Offers Is Truly Unique: Data content self-organizes and informs us, not the other way around! Clustering algorithms now help us sort and understand data to content categories in ways heretofore unachievable -- even when working with larger data sets or in the cloud.

Clusters are created to their textual and visual similarity (algorithmic concepts) to discrete content categories without prior human definition and then the clusters, not individual documents, are initially reviewed for cull or acceptance. Much manual effort is avoided.



What Is So Different and Why Is It Important To You: Prior to having the ability to use algorithms to help vast quantities of data to self-contextualize itself, people would come at their data from a pre-defined point such as a key word search, Boolean inquiry, or predictive coding. This pre-defined view of data is grounded in presumptions about the data which by its very nature creates a “data horizon” (data risk or value that is not “visible”, addressable or otherwise readily usable by an organizational stakeholder). Now you can analyze all of the data – not just key word search results -- held by any custodian of potentially relevant material quickly and easily, avoiding risk of misfiled documents and a custodian or reviewer’s limited understanding. Avoid sorting through all of the false positives that return with standard search technologies.

Having data describe itself to the user enables the user to ***see data in its complete context***. Data blind spots for which there is no or insufficient classification are revealed in terms of relevance to other known data objects or documents within the corpus of content examined.

Xpiori technology **works with all forms of data** including text and non-textual forms of documentary information – logos, tokens, pictures are not a problem. Clusters of documents are reviewed at varying percentages of similarity including non-textual material.

Xpiori Systems Learn and Carry Forward Code that has been automatically created – avoiding duplicative coding efforts when new information is added to the data set. As Xpiori automatically normalizes data to a common format, we identify and eliminate documents duplicated by their having been converted to several different file types.

Xpiori’s Significant Advances and Value-Add in Working with Emails: Xpiori’s email process gives users the ability to cluster and analyze data within or across email threads independent of or with emails and attachments. This unprecedented flexibility removes analysis constraints that are typically encountered in various data classification efforts -- litigation, records management or internal investigations.

In eDiscovery, Xpiori Considers All Documents, Not Just Key Word Search Results, Xpiori enables informed preservation/legal hold and discovers risk and provides leadership to the entire eDiscovery process. In both preservation and production, Xpiori empowers you to be more productive and accurate by deploying a few highly informed people with subject matter knowledge – to assessments and to provide informed results. No more initial review by relatively unformed people stacking documents in a remote warehouse.

As the Xpiori clustering approach is new, Xpiori’s referential user contacts are now only available on request. Ask for Xpiori’s case study of an enterprise scale data classification project at one of America’s leading petroleum companies.

Excell and Xpiori team to provide you with the best support for your claims, disputes, and review of your government and construction projects...and, together we scale to even the largest matters.



Corporate Profiles:

Xpiori, LLC

Xpiori is a privately held company, headquartered in Colorado Springs, CO. The company has developed proprietary technologies, products and services for the Information Governance, eDiscovery, compliance and review markets since 2006 as well as for XML-based data management. As part of its product and service offerings, Xpiori offers services based upon automated advanced algorithmic Clustering technologies, as well as best of breed predictive coding, concept search and other proprietary and leading IG and eDiscovery solutions.

Xpiori scales to handle large scale IG, data migration and eDiscovery projects. The overarching objectives are not limited to the classification of legacy content (business related documents and email). The objectives also include the development and codification of sustainable day forward procedures and methodologies deployable into a set of scalable, automated processes to handle newly added data as well as legacy information. With the persisting of the code associated with the clustering processes and its application to newly ingested data, Xpiori enables this as an automated process.

Visit Xpiori at www.xpiori.com or contact info@xpiori.com or call 719-425-9840 for more information, arrange a demonstration or discuss your needs and requirements.

Excell Consulting International, Inc.

Excell is a leader in the Contract Disputes/Claim Avoidance arena with few equals. Excell was the pioneer of today's **means**, **method**, and **manner** in handling contractual matters correctly without regard to their size, dollar value, or complexity. Excell specializes in Claims, Request for Equitable Adjustment, Change Order Preparation, Complex Strategy Formulation, Claims Defense, Dispute Resolution, Contract Management, Termination for Default or Convenience, Arbitration/Litigation Support and Negotiation and Complicated Graphics. Excell's clients have included: *Johnson Controls, ITT, Bechtel, Turner Construction, Granite Construction, Wackenhut, Linpro, California Department of Corrections, PCL, Big-D Construction, REO Construction, Trine Aerospace, AECOM, iAccess Technologies, Jaynes Construction and Chicago Bridge & Iron*, to name just a few.

To learn more, visit www.excellconsulting.net or contact info@excellconsulting.net, or call 719-599-8336.



Excell Partial Client List:

Kiewit

Bechtel

PCL

Fluor

Johnson Controls, Inc.

Turner Construction

Arctic Slope Regional Corp.

Aleut Corporation

Inuit Corporation

Impreglio

Cogefar-Impresit S.p.A.

Marnell Carrao Assoc.

ITT

Northrop Grumman

Granite

UTOPIA

Linpro

Akima

Raytheon

Chicago Bridge & Iron

Wackenhut Services, Inc.

Petit & Martin

Willis Faber

Calif. Dept. of Corrections

AMEC Engineering

Southern Structures

Kitchell Contractors

NANA Corporation

Actus Corporation

Cold Storage, Inc.

Blaine L. Wadman Corp.

Dynalectric Colorado

Swinerton Builders

American Water Works

R & O Construction

McDermott Will & Emery

TRI-TEC Manufacturing

KBR



RECENT VICTORIES

Termination for the Convenience of the Government

- **\$1.3 million Partial Termination Proposal**
 - » A USACE Firm Fixed Price Contract in the Middle East was partially Terminated for the Convenience of the Government. Excell was hired to evaluate the costs recoverable under the partial termination, which “cancelled” approximately 40% of the project nearly 1 year into construction. Excell was able to allocate the costs expended by the Prime due to early-on delays, Differing Site Conditions, change orders, and owner changes. Excell was instrumental in the development of a system that allowed the Prime Contractor, a Joint Venture with one partner based in the United States and the other based in Turkey, to collect, identify, and categorize the costs submitted by each of the companies, as well as ensure that there were not any duplicative costs submitted.
 - » Excell further assisted in the preparation of a Request for Equitable Adjustment (“REA”) for increased costs associated with the completion of the construction project, and obtained a settlement from the Government of \$750,000, CPARS corrections, and conversion of the Termination for Default into a Termination for Convenience.
- **\$1.2 million Termination Proposal Settlement**
 - » A USACE Firm Fixed Price Contract in the Middle East was completely Terminated for the Convenience of the Government. Excell was hired to evaluate and prepare a proposal that would recover the contractor’s costs as allowable under the FAR provisions.
 - » Navigating through a DCAA audit and differing direction from two contracting officers, Excell brought the original Settlement Offer from a \$770K credit, to the Government finally settling the T4C with a payment of over \$650K to the contractor – a \$1.4 million swing in favor of the contractor!
- **\$4.95 million Termination Proposal**
 - » A Veteran Owned, Service Disabled, Small Business was awarded a Firm Fixed-Price contract by USACE for a natural disaster clean up. The Contract was terminated by the Government due to FEMA time restrictions.
 - » Excell was retained by both the Prime Contractor as well as the Subcontractors to assist with the review, recovery, and preparation of the costs allowable in the proposal to be submitted to the Government. Excell was able to show the Prime Contractor a significant amount of recoverable costs, which had been overlooked when estimating their termination proposal costs.
- **\$4.2 million Termination Settlement Proposal**
 - » A \$50 million subcontract under an IDIQ contract was Terminated for Convenience after approximately 90% completion. This was a Technology Subcontract that was a complex mix of Firm Fixed-Price, Cost-Plus Incentive Fee, and Cost-Plus Award Fee Contract Line Item Numbered (“CLIN”) items.
 - » Excell was retained to prepare the Subcontractor’s Termination Settlement Proposal, intended to be submitted along with Prime Contractor’s Settlement Proposal. Excell is working to get the Prime Contractor and Subcontractor to work in harmony to maximize recovery for each. This contract was partially funded and experienced a Partial Stop Work Order, a Stop Work Order, and finally, a Termination Notice. Excell identified which costs are recoverable during each of those periods, to be submitted on the proper mix of Government forms to ensure maximum recovery.

Termination for Default

- **\$1 million + Wrongful Termination**
 - » This Client’s USACE Firm Fixed-Price contract in the Middle East was wrongfully Terminated for Default. Excell navigated the administrative remedies and procedures, challenging the Termination while building a contractual portfolio including strong responses to a Cure Notice, Show Cause Notice, and a challenge to an Unsatisfactory CPARS evaluation – reserving the contractor’s rights throughout the process.
 - » Excell helped identify Government Delay and Maladministration, and in the process, has built a strong justification for converting a Termination for Default into a Termination for Convenience, allowing the client to recover all of its incurred costs.



- **\$1.2 million in Costs Recovered after Wrongful T4D**
 - » USACE wrongfully terminated a contractor for Default before construction was scheduled to begin. Excell strategically orchestrated contractor responses to the Cure Notice, Show Cause Notice, and reconsideration after a Notice of Default was issued.
 - » Excell discovered contractual contradictions to the Contracting Officer's assertions in the T4D Notice, and assisted the contractor in successfully recovering its costs through a settlement agreement.

Operation & Maintenance Contracts (O&M)

- **\$150 million Complex Billing Issue Resolved**
 - » An industry leading contractor was not paid \$150 million on its aircraft maintenance contract at a U.S. airbase located in a war zone. The contract was for the 24-hour maintenance and repair of various models of fixed-wing and rotary aircraft. The main issues were related to labor qualification and how to properly account for the multipliers related to the complexity of the labor force. The contractor could not effectively explain the issues to government in a palatable way, and the two sides reached an impasse.
 - » Excell was retained to audit and verify all labor costs using a "look-down" analysis. Excell successfully formulated a revised position, got a formal claim set aside, and aided the parties to reach a mutually beneficial resolution within 90 days of engagement.

Value Engineering Change Proposals (VECP)

- **\$20 million Complex Billing Issue Resolved**
 - » On a contract for a Large Federal building, VECP proposals were submitted and approached \$3 million dollars. The VECP Package had 102 separate items, with voluminous strategy and detail included therein. The process allowed for Changes upon Changes. Excell was engaged to set forth strategy, outline and develop proposals, and assist in negotiations. All parties satisfied, job successfully completed.

Bond and/or Insurance Claims

- **\$7.5 million Claim Request Submitted to Zurich**
 - » A Subcontractor was Defaulted for Cause on a construction project in Las Vegas, NV. Excell conducted a policy review and then prepared the Subguard Claim for the client seeking recovery of \$7.5 million in losses and additional expenses incurred as a result of the Subcontractor Default. Excell supported the Contractor during the life of the submission, including 8 requests for additional information and clarification from the adjuster. The Contractor was successful in receiving compensation from Zurich.

Bid & Proposal Review

- **\$1 billion plus proposal submitted to U.S. Army Rock Island Contracting Center**
 - » Excell performed an extensive review and analysis of the proposal being submitted for the Kuwait Base Operations and Security Support Services Contract. Client received award of the contract by the U.S. Army Rock Island Contracting Center to provide comprehensive support services for all U.S. Army facilities in Kuwait. The award is worth an estimated \$1.4 billion with all options exercised.

DCAA Audits

- **Termination for Convenience Proposal(s) Audited by DCAA**
 - » Excell worked as the point of contact for the DCAA auditor during their audit of our client's USACE project Termination for Convenience Proposal. Excell worked closely with DCAA representatives as well as the client to recover, organize, and present all additional data being requested by DCAA auditors. Contractor was a Joint Venture with one party residing in the United States and the other Joint Venture party residing in Istanbul, Turkey. Project was performed in Afghanistan. Excell was responsible for the recovery and translation of all relevant documents. Excell oftentimes had to supplement submittals to DCAA with an explanation and supporting documentation on the unique aspects associated with and required by foreign-based contractors, in addition to the foreign-based job site.
 - » Ultimately, Excell was hired to perform these services once again, when the Contractor had a second Task Order Partially Terminated for the Convenience of the Government.



Expert Opinions

- Arbitration/Mediation Expert Witness
 - » Excell was retained to serve as an Expert Arbitration/Mediation Witness during a \$2.5 million Arbitration/Mediation hearing for the USOC Headquarters. Excell was instrumental in supporting the Contractor's claims of Delay and Disruption. The Client was successful in receiving deserved and effective compensation.
- Litigation Expert Witness
 - » Excell was brought in as an Expert to evaluate the Prime Subcontractor interface on a \$40 million Government National Guard Readiness facility being built under direction of USACE. A significant cost over-run occurred due to Maladministration. The Client was successful and satisfactorily compensated. Excell's involvement caused the one-year litigation matter to settle in less than 6 weeks, much to the satisfaction of the client.

Contract Formation and Administration

- Proprietary Rights Protection
 - » Excell advised an Avionics Contractor with an un-definitized Letter Contract on how to protect its Proprietary Rights under the FAR, beyond execution of a Non-Disclosure Agreement with the Prime Contractor. Excell assisted the Contractor to the extent of preserving its rights to revenue in the range of \$5.5 million to \$7 million.
- Review of Electrical Subcontractor Contract Documents
 - » Excell reviewed a Multi-million-dollar subcontract on a USACE project for compliance with applicable FAR flow-down clauses. Excell's actions alerted the Subcontractor to excessive requirements being improperly passed through by the Prime Contractor and saved the Subcontractor substantial costs associated with such requirements.

Requests for Equitable Adjustment (REAs)

Excell has long been an Industry Leader in Contract Disputes, with innovative methods for analyzing, organizing and presenting REAs. Excell continues to successfully recover money that is due to our clients. Some recent highlights of our REA victories include:

- **\$2.1 million-dollar REA, Firm Fixed-Price Contract, Department of Labor, Job Corps Center**
 - » *This REA included Breach of the Doctrine of Good Faith and Fair Dealing and the Architect/Engineer was held responsible for General Contractor errors and a Government-caused delay of over 900 days without promised compensation.*
 - » *Excell was then engaged on a \$6.3 million A/E contract to identify and package a \$2.2 million REA. A 900-day suspension of work was incurred, major changes to the design were caused by the government, and delays were occasioned during the life of the project. Excell performed the preparation of a \$2.1 million-dollar REA to assist the Architect/Engineer recover its extended overhead and additional costs expended during the Government-caused delay that resulted in a Modification that only awarded additional time and no compensation.*
 - » *Ultimately, Excell negotiated a \$1.75 million-dollar settlement on behalf of the client, and successfully resolved all outstanding, due and recoverable costs incurred over the course of the contract for efforts performed outside of contractual requirements.*
- **\$4.5 million-dollar REA, Firm Fixed-Price Contract, Naval Facilities Engineering Command**
 - » *This REA included two wrongful Notices of Default being issued, Defective and Deficient Contract Documents, Maladministration of the Contract, Violation of the Contract Terms and Conditions, Lack of Partnering, and Out of Scope Work.*
 - » *Excell was enlisted to assist a sizeable subcontractor on a Firm Fixed-Price Government Contract to furnish and install all the hardware and software, perform the testing and balancing, and conduct training as specified. The subcontractor contacted Excell for help seven (7) years AFTER the original contract completion date. Seven years after the project should have been finished, the owner was still making cosmetic, and whimsical changes to a software program, which by this time had become a completely custom, created in the field software system. The owner would imagine a report or a system command that they wanted, liked, or would be handy, and the subcontractor was forced to custom code the software to meet the day's lists of wants/demands. In fact, the project had steered so far off course that many of the people involved in the signing of the Basic Ordering Agreement from which this was issued under had retired or couldn't even remember what the original contract was for. The Subcontractor had simply become a personal software-programming fixture, free of charge to the Government. This very extensive and detailed REA was prepared as a twofold approach.*
 - » *Ultimately, Excell custom designed extensive graphics that visually displayed the numerous violations and combined these with an interactive digital presentation; this digital presentation was a companion to the standard printed proposal submitted. The eleven-year contract, originally anticipated to be two years or less in duration, was successfully resolved within 120 days of Excell's presentation.*



- **\$2.3 million REA, Firm Fixed-Price Contract, California University**
 - » *This REA included Defective and Deficient Contract Documents, Differing Site Conditions, Out of Scope Work, Unreasonable Specifications, Cardinal Change, Maladministration, Delay, Disruption, and Ripple Effect.*
 - » *A subcontractor was hired to assist in the building of a hospital in California. From the onset of construction, it became apparent that there were serious issues with the issued RFP. In fact, by the time Excell was contacted to assist, over Eight Thousand (8,000) RFIs had been issued including 5 years of delay, and millions of dollars in change orders had been submitted. What was currently being demanded from the owner no longer even resembled the project our client bid. Excell worked closely with all parties and other consultants to design a cohesive REA that represented all parties and could successfully be presented to the owner. The REA was amended due to further delays from the owner, and was ultimately resolved with all contractors receiving fair and just compensation for the project.*
- **\$5.1 million REA, Firm Fixed-Price Contract, USACE**
 - » *Delay, Disruption, Ripple Effect, Critical Path Delay, Defective Specifications, Defective Contract Documents, Maladministration, lack of Partnering.*
 - » *Our client was selected by the Corps of Engineers to build aircraft hangers, runways, and an additional fire station on an existing Air Force Base. Ultimately the job was two years behind schedule and had an overrun of over \$5 million. Excell was able to retrieve all relevant project data and create a global REA, with full supporting data, for our client to submit to USACE. After negotiations with the Contracting Officer, our Client was awarded 97% of the requested amount, without an audit.*
- **\$3.5 million REA, Firm Fixed-Price Contract, USACE**
 - » *This REA included prescriptive vs. performance specifications, delay, disruption, ripple effect, critical path delay, and maladministration.*
 - » *The Government directed our client to work, and the client refused. Excell put together a position paper in support of the issues required to be addressed at the District level; A Modification was issued for \$3.5 million. Client satisfied.*
- **\$1 million + REA, Firm Fixed-Price Contract, Department of Labor**
 - » *Three REAs were put together based upon Task Orders under a Master Contract, two of the three were settled and one went forward to ASBCA and was resolved without Litigation. Excell remained involved in a support position. The settled matters satisfied the client's requirements. One matter included CPARS and it was reversed without the need of ASBCA intervention.*
 - » *Additionally, another matter required a reversal of a finalized and delivered USAF Final Decision; Excell intervention caused the Final Decision to be withdrawn and satisfactorily settled*
- **\$1 million REA, Firm Fixed-Price Contract, USACE**
 - » *A Prime contractor was responsible for Maladministration of the contract, and the Subcontractor engaged Excell to assist in resolving a year-old litigation. Excell discovered important documents that led to an immediate settlement satisfying the Subcontractor's efforts and eliminating further litigation expenses.*
 - » *NOTE: Resolution occurred within six weeks of Excell's engagement.*
- **Multi-million-dollar lawsuit, State of Utah against Department of Agriculture**
 - » *Utopia, a semi quasi-governmental organization, was harmed by the unilateral actions of the Office of the Secretary of Agriculture. Excell was engaged from day one, and it positioned the law firm and the State of Utah for the necessitated actions. Negotiations were conducted, a legal proceeding was imminent, and matter was settled on the courthouse steps. Millions involved, exact amount not disclosable.*

COMMON ISSUES RESULTING IN REQUESTS FOR EQUITABLE ADJUSTMENTS

*While the above list is not all-inclusive, it does highlight the unique situations in which Excell has assisted various contractors not only to “deal with,” but to move forward in a positive position. So, while all REAs include a multitude of unique issues encountered during the life of the project, there are many issues that seem to reoccur when dealing with construction contracts. Some of the most common issues Excell handles when preparing REAs for our clients include:

- **Defective Specifications:**
 - » *Overly Generic Specifications*
 - » *Government’s implied warranty of constructability*
 - » *Impractical/Impossible specifications*
 - » *Multiple Specification Interpretations*
 - » *Nondisclosure Issues*
 - » *Prescriptive vs. Performance Specifications*
- **Defective Contract Documents:**
 - » *Ambiguity or inconsistency*
 - » *Order of Precedence errors*
 - » *Unreasonable interpretation of applicable standards*
 - » *Unresponsive to RFIs*
 - » *Failure to incorporate correct Guidelines*
- **Incomplete/Incorrect Design Drawings**
 - » *Lack of Design Discipline Coordination*
 - » *Improper control asserted on Design-Build Contracts*
 - » *Failure to issue a proper RFP*
 - » *Inadequate, or Incorrect As-Builts issued with RFP*
 - » *Refusal to enforce A&E requirements*
- **Differing Site Conditions**
 - » *Category I*
 - *Nondisclosure of site conditions*
 - *Refusal to allow contractor to do non-destructive testing*
 - » *Category II*
 - *Interference with site inspection/investigation data*
 - *Hazardous Materials*
 - *Failure to conduct or provide hazardous materials testing*
- **Delay, Disruption, Ripple Effect**
 - » *Notice To Proceed (“NTP”) Delays*
 - » *Constructive Suspension of Work*
 - » *Stop Work Orders*
 - » *Interference with Contractor’s work*
 - » *Delays in Inspections*
 - » *Delays in approving Drawings, Proposals, Submittals, etc.*
 - » *Weather Delays*
 - » *Site Access Issues*
 - » *Critical Path Delay(s)*
 - » *Time Impact Analysis*
 - » *Concurrent vs. Nonconcurrent Delays*
- **Maladministration**
 - » *Refusal to participate in contractually required partnering*
 - » *Overzealous inspections*
 - » *Multiple people issuing directives to the contractor with no clear authority*
 - » *Violations of Duty of Good Faith and Fair Dealing*
 - » *Anti-Deficiency Act violations*
- **Purchase Order / Pricing Disputes**
 - » *Unilateral deductive Modifications issued without justification*
 - » *Unabsorbed Overhead*
 - » *Extended General Conditions*
- **Liquidated Damages**
 - » *Concurrent delays*
 - » *Beneficial Occupancy Date*
 - » *Punitive or retaliatory in nature actions (Non-Allowance)*

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



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Excell Report

Contract Interpretation: Guidelines and Best Practices (Reference on back cover)

The process of determining the original intent of the contractor and owner is referred to as contract interpretation. This procedure typically involves establishing definitions, adding omitted words, and clarifying confusing or contradictory phrases.

Contract performance disputes are often the result of simple misunderstandings. Therefore, it is important for all parties-

contract owners, prime contractors, and subcontractors- to understand the guidelines courts typically use to interpret contracts. Carefully drafting contracts according to some well-defined best practices is just as important; clear and explicit wording is the best defense against misinterpretations.

Courts and Boards of Contract Appeals typically focus on two sources of information to establish intent: the contract language and extrinsic information.

Courts interpret contracts by using the "objective test." This means that the court's interpretation of a contract

must be "consistent with a reasonably intelligent person familiar with all of the facts and circumstances surrounding contract formation." To help reach their conclusions, courts take several things into consideration:

First, the contract must be read as a whole. The agreement between two or more parties is defined by the document as a whole, not by a single word, phrase, or clause. Therefore, disputed terms are to be considered within the context of the document as a whole. The best interpretation is the one that "gives effect to all terms and leaves no clause meaningless."

Secondly, key contract terms must be clearly defined. In the best-case scenario, terms are clearly defined within the contract, leaving no room for misinterpretation. In Government contracts, key terms are often referenced in the Federal Acquisition Regulation 2.1. If a key term is not defined in the contract or referenced by FAR, courts next use dictionaries and common usage to determine the proper definition. Finally, if the context suggests that the word or phrase in question was a technical term and not a common usage, then the appropriate technical term will be used as the definition. It's important to realize that key terms can, and often do, appear throughout the contract in several different sections.

The Order of Precedence Clause helps courts when one section contradicts another, not uncommon with lengthy, complicated contracts. The Order of Precedence described in FAR 52.214-29 and 52.215-33 dictates that precedence be given in the following order:

1. The schedule

TABLE OF CONTENTS

Contract Interpretation: Guidelines and Best Practices

Are You Aware? Default Not Justified When Parties Are Negotiating

Warranty Work or Change Order?

Do Recent Decisions Limit Contractors' Ability to Limit Liability?

Termination for Default - What Should You Do?

Distinguishing Between Delay and Disruption

Site Visit Can Be An Unreasonable Requirement When...

Using the Eichleay Formula in Today's World

Attorney Fees - Contracts with Government Entities

Continued on Back Cover

Are You Aware? Default Not Justified When Parties Are Negotiating

The Boards of Contract Appeals and Courts consistently hold that Termination for Default is a “drastic sanction” that should only be imposed for good cause and on the basis of solid evidence.

Stopping performance would normally be good cause for Termination for Default. In a recent case, however, the General Services Board of Contract Appeals found circumstances which made a default improper. The contractor was defaulted for abandoning the job when there was no Government-caused delay, and for its failure to respond to a show cause notice.

The contractor was to install scientific equipment provided by the Government. During performance, inadequacies with electrical components were discovered and a request for a cost proposal to correct the problems was made. Pricing for part of the change was considered by the Government to be too high. The contractor left the job site believing that negotiations were continuing, and that performing any more of the original contract work would mean removal of the work when the change was finally approved.

The Government’s record of a conversation showed that the contractor intended returning to the job after negotiations and the change order was issued.

The Board of Contract Appeals found that when the show cause notice was issued the contractor’s offer was pending and the parties were, in essence, negotiating. **The Board held that when parties are engaged in a dialogue and the Government is aware that work has ceased pending resolution of the dialogue, it has an obligation to affirmatively cut off that dialogue and put the contractor on notice that it must proceed or face default.**

Under these unusual circumstances, failure to respond to the show cause notice was not sufficient grounds for termination. The contractor believed the Government was considering its offer. However, the Government never did negotiate, but instead issued the notice stating for the first time that the modification was not needed. When it did not receive a response, the contract was immediately terminated. In fact, the modified work was needed and was performed under the reprocurement contract.

Further, the default could not be justified on the grounds that the contractor wasn’t proceeding in a timely fashion with the remaining work. The contractor showed that proceeding before the Government’s decision on the modification would have been commercially impracticable, if not altogether senseless. The modification changed the original electrical work which was on the critical path of remaining work. Had the original work been completed and then work under the modification been ordered, at least some of the original work would be rendered useless. The default was converted to a Termination for Convenience of the Government. A.J.C.A. Const. v. GSA, 94-2 BCA ¶26,949.



photo courtesy of Thierry Photography

Warranty Work or Change Order?

When additional work is directed by the Government after contract completion and acceptance, it is in the Government’s best interests to attempt enforcement of the contract’s warranty clause. However, the Government must prove that the work was required because of some deficiency in the contractor’s performance to invoke the clause.

In this case, the contractor sealed cracks and joints in the pavement at an Air Force base. The contract required that machines, tools, and equipment be approved by the Contracting Officer, and that a trial joint sealant installation be performed prior to work starting on the entire project. In addition, the Contracting Officer would not permit sealing until cleaning and condition of the joints had been inspected and approved as meeting contract requirements. Both the Government and the contractor monitored the equipment used to heat the sealant to assure it was in proper condition prior to being installed.

The contractor completed performance, the Government gave final acceptance and payment and the contractor executed a

release. Later, the Government notified the contractor that some of the sealant had come out of the joints and that the contractor was to correct the situation under the warranty provisions of the contract. The contractor visited the site and did not find any fault with its preparation, application, or installation. It did find water pumping from the high water table under the runway, taxiway, and apron. There were also sealant failures at other parts of the base caused by subsurface water pressure. Those failures were in areas sealed by other contractors.

The Government maintained that faulty workmanship was the cause of the failures and insisted on repair under the warranty clause. The contractor subcontracted the repair work to another contractor and paid for the work. The subcontractor found the joints to be “pretty clean” and used sealant from the same batch used previously. The subcontractor also observed water coming up from below the joints where the sealant had come loose. The Contracting Officer denied the contractor’s Request for Equitable Adjustment, but on Appeal, the Armed Services Board of Contract Appeals found that the Government failed to prove that the contractor’s work did not conform to contract requirements. The contractor’s equipment, materials, and work were continually

Continued on Page 7

Do Recent Court Decisions Limit Contractors' Ability to Limit Liability?

In the Spring 2010 edition of *The Construction Lawyer*, attorneys Melissa Orien and Buck Beltzer examined cases involving design professionals' liability limitation clauses. Recent court decisions in a handful of states seem to render these clauses unenforceable. Does this mean liability clauses are on their way out? Orien and Beltzer don't think so. Rather, the wording and scope of a clause determine its validity.

The courts take several factors into consideration. Are anti-indemnity statutes in place? Do the terms of the contract violate public policy? And how do business entity and professional licensing

statutes apply to the contractor?

In general, limitation of liability clauses are enforceable. However, problems occur when a contract's wording turns a limitation of liability into a hold harmless, indemnity, or exculpatory clause.

In the 1984 case, *Bicknell v. Richard M. Hearn Roofing & Remodeling Inc.*, a Georgia appeals court refused to enforce a limitation that held the building's owner responsible for a potential roof failure. The court determined that this was essentially a "hold

Continued on Page 6

Termination for Default- What Should You Do?

It does happen-- it's unfortunate, but your company could be fired from a Government contract -- Terminated for Default! All Government contracts contain the Default clause provided for at 52.249-8 in the Federal Acquisition Regulations (FAR), and the Government has the right (FAR 49.402-1), subject to the notice requirements of the clause, to terminate the contract completely or partially for default if the contractor fails to:

- a) Make delivery of the supplies or fails to perform the services within the time specified in the contract;
- b) Perform any other provision of the contract; or
- c) Fails to make progress and endangers performance of the contract.

In order to Terminate a contractor for Default, the Government must first deliberate and decide the most appropriate action to take. The Government must review and ultimately prepare a Memorandum for Record (MFR) addressing the following considerations (FAR 49.402-3) before deciding to terminate a contract for default:

- 1) The terms of the contract and applicable laws and regulations;
- 2) The specific failure of the contractor and the excuses for the failure;
- 3) The availability of the supplies or services from other sources;
- 4) The urgency of the need for the supplies or services and the period of time required to obtain them from other sources as compared with the time in which delivery could be obtained from the delinquent contractor;
- 5) The degree of essentiality of the contractor in the Government acquisition program and the effect of a Termination for Default upon the contractor's capability as a supplier under other contracts;
- 6) The effect of a Termination for Default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments; and/or
- 7) Any other pertinent facts and circumstances.

FAR 49.607 requires that the Government issue a **Cure Notice** if the contractor is responsible for a condition that is endangering performance of the contract. Unless the condition is cured within 10 days after receipt of the notice, the Government may Terminate for Default. If the time remaining in the contract delivery schedule is not sufficient to permit a realistic cure period of 10 days or more, the Government may issue a **Show Cause Notice** advising the contractor that the Government is considering Terminating the contract for Default and, pending a final decision as to this matter, it will be necessary to determine whether the contractor's failure to perform

arose from causes beyond its control and without fault or negligence on the contractor's part. Thus, the contractor is given the opportunity to present, in writing, any facts bearing on the questions to the Contracting Officer within 10 days after receipt of the notice. Failure to present any excuses within the 10 day period may be considered an admission that none exist.

The contractor should present the following information in response to a Cure Notice:

- Discussion of issue alleged to be a condition endangering contract performance
- Corrective plan to cure the alleged condition
- Who will bear the cost of the corrective work
- Schedule for performance of corrective work
- Impact of corrective work on completion of contract
- Actions contractor has taken and will take to mitigate the effect of the condition upon completion
- Government's role in causing the condition
- Any other factors bearing on timely completion

The Contractor should present the following information in response to a **Show Cause Notice**:

- Discussion of contractor's performance of the work for the term of the contract
- Discussion of contractor's control of work
- Discussion of reasons why the contractor is not at fault or negligent as to alleged deficiency
- Percent completion of contract
- Delay to project completion caused by Wrongful Termination
- Potential conversion of Default Termination to a Convenience Termination

A Termination for Default has serious consequences for both the contractor and the Government. A contractor must disclose such a Default Termination in bidding for new work. The Government may be held responsible for costs if the default is converted to a Convenience Termination. If the contract work is at the stage of 80% complete, it would be economically wasteful to Terminate for Default because the procurement costs would probably be excessive. This does not restrict the Government from Terminating for Default; however, the Contracting Officer must be able to show that he considered the cost and time impact at the time the termination decision was made.



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Distinguishing Between Delay and Disruption

Due to the complexity of construction, combined with changes often inherent as a result of the very nature of construction, a contractor's actual performance can deviate significantly from its originally planned method, manner, sequence, and duration of work. A deviation can impact both the scheduled performance period and the overall cost of the project. Determining the cause-and-effect relationship of the impact is primarily the responsibility of the contractor even though the owner and contractor may both be responsible for assigning the result of the impact to the responsible party.

One recognized entitlement theory that a contractor can utilize for recovering damages caused by an impact is "Delay and Disruption." Even though it is a common practice to generically refer to delay claims and disruptions as being synonymous, they are in fact very different, especially in terms of damages. For example, a contractor may experience a disruption to its planned method, manner, and sequence of work, but still complete the project on time without any total delay, through acceleration or other mitigative efforts.

While "delay and disruption" issues are usually easily identified, the effects of these types of issues are very complex and often difficult to quantify. **When determining if a delay and/or disruption has occurred, it is necessary to distinguish the technical difference between a delay and a disruption. These are distinctions of considerable significance.**

Delays are specific, singular events or conditions that result in the project completion and/or a work activity starting or completing later than originally planned. **Disruptions include the effects** of individual or multiple delays, as well as interruptions to the planned method, manner, sequence, and duration of work activities directly and/or indirectly associated with the impacting event. Disruptions usually affect labor productivity and can cause significant cost overrun variances in labor budgets. Disruptions are often contributing causes to a project delay when the delay-related impacts ripple throughout the project to both the work activities directly changed and the unchanged work not directly affected.

Once events have caused a delay and/or disruption, the next and most complicated tasks are to quantify the effects that the resultant impacts have on the contracted performance period and determine the costs associated with the delay and/or disruptions. Quantifying the direct costs for delayed work can be a relatively simple task, but secondary disruption impacts caused by the "ripple effect" require more sophisticated techniques. Costs can be segregated into two categories, delay costs and disruption costs.

Delay Costs include, but are not limited to:

- Extended project management support
- Extended engineering staff
- Extended administrative support
- Extended project and home office overhead, and general conditions costs
- Idle tools and equipment, and
- Direct costs of the change work directly affected by the delay

In addition to the aforementioned delay costs, Disruption Costs

include, but are not limited to:

- Efficiency decreased due to re-sequencing work or additional work activities in progress at a given time
- Performance extended into a period of adverse weather
- Dilution of supervision due to additional work activities to be managed

- Overcrowding of trades, and
- Acceleration-- premium time/increases in manpower

Quantifying the costs associated with "delay and disruption" requires a cause-and-effect analysis addressing both the work directly affected by the delay/disruption and other work indirectly affected by the delay/disruption. Once the impacting events have been identified, demonstrating the resultant effects of the impacts on work in progress and successive work activities is crucial to recovery of delay/disruption damages.

To maximize the recovery of the costs associated with delay and disruption, contractors must illustrate how the planned method, manner, sequence, and duration of work were affected/changed. Methods for measuring impacts associated with delays are different than those for disruptions. Delays can often be adequately illustrated using a Critical Path Method (CPM) schedule. Disruptions usually affect productivity rates and labor costs and proof of impacts are best measured by CPM schedule analyses, trending analyses, labor productivity data, and "clean period" ("measured mile") analyses. In both cases, it is essential that the contractor have a CPM schedule developed prior to mobilizing to the project site or beginning work, and to status the schedule as the project progresses.

If a delay does occur, it can be incorporated into the CPM schedule network using a "Time Impact Analysis" to illustrate the net effect of the delay on individual work activities and the contract performance period.

With the ever-present, day-to-day directed and constructive changes that occur on a construction project, and the burden of proof resting with the contractor, it is advisable for contractors to take a proactive approach to protecting their rights and their company from possible financial impact caused by delay/disruption. Contractors can maximize their recovery of delay and disruption damages by:

- Identifying impacts relative to delay and disruption as they occur
- Notifying the owner and reserving contractual rights to recovery
- Knowing and understanding the appropriate contract clauses which allow recovery
- Proving damages with credible and supportable cost and schedule data, and
- Explaining and demonstrating the causal link(s) in detail

If a contractor does not have sufficient factual data (e.g. contemporaneously prepared letters, supporting cost and schedule information, daily job reports, etc.) to support the local and global effects of the delay and/or disruption on its work performance, costs, and schedule, then the chances of a fair and reasonable adjustment may be diminished. ☒

If you are experiencing delay and disruption impacts on a project, give us a call at 1-877-322-3955 for a consultation on how Excell, Inc. may be of assistance.



photo courtesy of USACE



Site Visit Can Be An Unreasonable Requirement When...

The Site Visit clause states that offerors are “urged and expected to inspect the site where services are to be performed and to satisfy themselves regarding all general and local conditions that may affect the cost of contract performance, to the extent that the information is reasonably obtainable....” (FAR 52.237-1) This clause is specified by the Federal Acquisition Regulations for service contracts, but in this case, appeared in construction contracts.

The contractor was to provide materials and labor to cover exposed interior roof trusses and ceiling joists in a large amphitheater in accordance with the Government’s design. The work involved fabrication of tubular steel frames resting upon steel supports welded to existing trusses and beams. The frames were to be covered with cloth and would serve to conceal stage lighting and other items mounted on and above the trusses and beams.

The successful bidder did not visit the site before bidding.

The work area was 25’ above the floor and a thorough survey would have taken two days and required scaffolding and permission and coordination with engineering staff and other users of the building. Even if someone had crawled in and around the beams with a flashlight, not all of the existing conditions would have been visible. The fabrication subcontractor verified drawing dimensions at the site, and found that the frames would fit, except for spaces in two

bays containing conduit (which were shown on the drawings), and made adjustments to account for the conduit. During verification, the fabricator found many obstructions which would conflict with the frames. The obstructions had not been noted on the drawings, and the Board found that they could not have been reasonably discovered by a prudent bidder.

The Government agreed to remove the obstructions before installation began, but removed only some of them. Only 60 of 95 frames fit into the spaces as designed. The Government observed the condition, but refused to remove the obstructions or direct the contractor how to proceed. The contractor was told “to get your tail over there and get to work,” and was continually threatened with default and liquidated damages if it did not solve the problem promptly. The frames were cut and remanufactured at the site to fit around the obstructions and the work was completed on time by using overtime work. The Government argued that the contractor was not entitled to equitable adjustment because of its failure to make a site visit. **The Board disagreed, finding it unreasonable to expect a bidder to expend the extra time and effort this job would have required to discover the concealed obstructions. Packard Construction Corp., 94-1 BCA ¶126,577.**

Using the Eichleay Formula In Today’s World

Recovery of unabsorbed or extended overhead costs is often, but not always, allowable when contractors encounter owner-caused extensions or delays. These costs associate to fixed overhead costs which continue to mount, without a direct cost base over which to allocate them.

Most unabsorbed overhead involves the recovery of home office overhead on construction contracts, where the cost is computed on a *pro rata* amount per day basis. This is normally accomplished by using the Defense Contract Audit Agency-accepted Eichleay Formula. This formula consists of three steps, as explained below (see table on page 6).

To determine the “Overhead Allocable to the Contract” in Step 1, the total contract billings are divided by the total company billings for the actual contract period. The resulting factor is multiplied by the total company overhead incurred during the original contract period. The total company overhead amount is obtained from annual financial reports, and is adjusted by eliminating unallowable costs such as penalties, advertisement costs, donations, bad debts, and so forth. Another adjustment that may be required is to redistribute General and Administration (G & A) salaries within the financial reports as direct job expenses/project costs. It is very important that the period of performance be well defined. Both the total company billings and company overhead amounts must be for the same period of time and obtained from monthly cost reports or factored by dividing the number of months of contract performance into the respective total fiscal year amounts.

In Step 2, the resulting “Overhead Allocable to the Contract” from Step 1 is divided by the actual number of contract performance

days within the applicable period. This will provide the daily amount of overhead allocable to the contract.

Finally, multiply the daily overhead from Step 2 by the number of days the project was delayed or extended to determine the amount of unabsorbed overhead which can be claimed.

The following are some important points to remember when using the Eichleay Formula:

- The formula is not appropriate if actual cost data is available.
- The company must be able to demonstrate that an actual under-absorption occurred-- that is, no damage, no recovery. The company must demonstrate that it was not able to pick up additional work during the delay period, due to:
 - Bonding capacity limitations
 - Necessity to retain workers for delayed job due to uncertainty of the delay duration and/or
 - Consideration for special training provided to employees on the delayed job
 - Other justifiable recovery
- The formula is used to calculate losses for long periods of delay (usually involving a stop work order) or extended contract performance periods when there is a potential Termination for Convenience or the like. Unabsorbed overhead is rarely incurred:
 - During short delays within a single accounting period

Continued on Page 6



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Using the Eichleay Formula *Continued from Page 5*

- When the contractor has the option to perform other work using the resources that became available as a result of the delay, thus generating alternate revenue to absorb the overhead expenses
- The formula is not used to determine overhead for contract changes or modifications which do not involve time extensions. Such costs are normally established by the overhead rates accepted at the start of the contract.
- The formula must be adjusted to credit the owner for G & A allowed on other contract modifications which provide cost and schedule

Step 1	$\frac{\text{Contract Billings for Actual Contract Period}}{\text{Total Billings for Actual Contract Period}} \times$	$\text{Total Overhead Incurred During Contract}$	=	$\text{Overhead Allowable to the Contract}$
Step 2	$\text{Allocable Overhead}$	$+ \text{Actual Days of Contract Performance}$	=	$\text{Overhead Allowable to Contract Per Day}$
Step 3	Daily Overhead	$\times \text{Number of Days of Delay}$	=	$\text{Unabsorbed Overhead}$

- compensation for the damaging delay or extension period.
- If modifications have been agreed to regarding the damaging delay or extension period, then release language and reservations of rights must be researched to establish the allowability of additional extended overhead compensation.
- Support your submission of the Eichleay Formula with all source documents, financial statements, and computations used in the calculations.

Source:

Cibinic, John, Jr. and Ralph C. Nash, Jr., *Administration of Government Contracts*

Do Recent Court Decisions Limit Contractors' Ability to Limit Liability?

Continued from Page 3

harmless" clause, designed to insulate the contractor from liability caused by his own negligence.

In the 1990s, many states passed anti-indemnity legislation. These laws were designed to prevent contractors from benefitting from cutting corners. By eliminating liability for negligence, indemnity clauses also eliminate any incentive to exercise due care.

In Markborough, California, Inc. v. Superior Court, "the court specifically distinguished the enforceable limitation of liability clause from an unenforceable indemnification provision," according to Orient and Beltzer.

In 1987, the court in the Burns & Roe, Inc. v. Central Maine Power Co. had reached a similar conclusion, ruling that "the limitation of liability...did not explicitly create an obligation to indemnify."

Still, advocates for limitations on liability were dealt a blow in the 1994 Alaskan case, City of Dillingham v. CH2M Hill Northwest. That court ruled that because early drafts of the state's anti-indemnity statute also prohibited limitations on liability, the engineer's contract was in violation of anti-indemnity laws.

Rulings like Dillingham's have proven to be the exception, rather than the rule in recent court cases. Valhal Corp v. Sullivan Associates, Inc. held that a contract designed to completely shield a contractor from liability is significantly different from one designed to limit liability to a reasonable amount. **Although an anti-indemnity statute was in effect in Pennsylvania,** the court recognized that the clause was not, in fact, an indemnity clause, and ruled in the design professional's favor.

Over the next several years, courts in Massachusetts, New Jersey, New York, and Ohio all found limitation of liability clauses to be enforceable, provided certain conditions were met. In New York's Sea-Brown Group v. Jay Builders, Inc., the court determined that a limit of liability was valid, provided the claim did not arise from negligent misrepresentation or gross negligence on the contractor's part.

The **New Jersey** court ruled that limitations on liability are

enforceable as long as they are clearly worded, not in violation of public policy, and are reasonable considering the scope of the project. In Marbro, Inc. v. Borough of Tinton Falls, the court further determined that the client's agreement to indemnify the designer for damages "unless and until a court of competent jurisdiction finds that the Consultant ...is liable for damages."

Further, when **New Mexico's** court in Fort Knox Self Storage, Inc. v. Western Technologies, Inc. refused to enforce a liability limitation on the grounds that it violated the state's anti-indemnity statute, the decision was overturned by a court of appeals. The appellate court determined that the engineer's limit of liability was so high, compared to the contractual fee, that it exposed him to "substantial damages," instead of shielding him from responsibility, as an indemnity clause would have.

In this case, the court determined that the limitation of liability must be high enough, compared to the contractual fee, to provide the contractor with significant incentive to exercise due care. If the limit is too low, the court said, the clause could function as an exculpatory clause and thus be rendered unenforceable.

An Arizona court ruled similarly in 2008, determining that a liability limit high enough that the contractor has "a substantial interest in exercising due care" is enforceable.

The addition or omission of just a few words has the power to render a limit on liability unenforceable, depending on state laws. **In Georgia,** for example, the 2008 case Lanier at McEver, L.P. v. Planners and Engineers Collaborative, Inc., hinged on the agreement to "limit the liability of....any third parties." This phrase was held to be in direct violation of Georgia's anti-indemnity statute. The court also determined that the contract absolved the engineer of liability resulting from its own negligence, another violation of the statute.

In North Carolina the same year, a court held that a "key factor distinguishing the limitation of liability clause from an indemnity clause is reference to third parties."

While **some states, such as Wisconsin, specifically prohibit limitation of liability clauses,** most don't. These clauses are usually enforceable when the contract writer has a thorough knowledge of the state's statutes and an understanding of courts' reasons for adverse decisions in these cases. Careful drafting is critical.

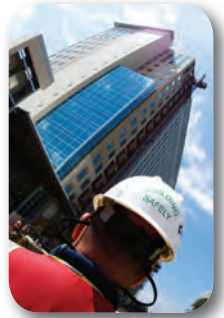
Source: Buck Beltzer and Melissa Orient, Attorneys, Holland & Hart

If you'd like the full article, please contact Excell Consulting.

Warranty Work or Change Order? *Continued from Page 2*

inspected and approved by the Government. The Government, in fact, admitted that the equipment, materials, and workmanship were satisfactory. The Board held that, "The mere fact that some of the sealant came out of some of the joints approximately two months after its installation is not proof, by itself, that [the contractor] was responsible for the same." The contractor was not required by the contract to perform the added work and the Government's demand amounted to a change order for which the contractor was entitled to an equitable adjustment. Blakelee, Inc. 94-3 BCA ¶127,099

photo courtesy of USACE



Contracts with Government Entities *by Judith Ward Mattox, Attorney at Law*

The **Equal Access to Justice Act (EAJA)**, provides a statutory exception to the "American Rule" on attorney fees, which requires that each party shall bear its own attorney fees. Under the EAJA, a contractor who prevails on a claim before the agency board of contract appeals and courts may recover its reasonable attorney fees and expenses incurred pursuing the claim.

There are two threshold requirements for attorney fees under EAJA. First, the contractor must show that the Government's position was substantially unjustified. Second, the contractor must meet eligibility under the size standards set forth by EAJA. This requires that the contractor has a net worth of not more than \$7 million and employs no more than 500 employees as a partnership, corporation, or association. If the contractor is an individual, his net worth may not be more than \$2 million and he may not employ more than 500 employees. Note: compliance with these standards is mandatory for an award of fees under EAJA.

The purpose of EAJA is to ensure that contractors with limited resources will not be prevented from enforcing their rights against unjustified Government action. The reasonableness of fees depends upon what amount of fees were incurred to enforce such rights, not what amount was recovered by the contractor.

Presently, EAJA limits attorney fees to \$125 per hour unless a determination is made by regulation that can increase the cost of living or other special factors such as the limited availability of qualified attorneys should justify a higher rate. Note, consultation and outside professional assistance is not considered part of the attorney fee structure and the Act is open for discussion in that regard.

In fact, EAJA allows recovery of any study, analysis, engineering report, test or similar matter prepared on behalf of the party where the study or analysis was incurred for the preparation of the contractor's claim. **EAJA permits recovery of expert witness fees and consultant costs where the costs were incurred for the purpose of furthering the negotiation process which would benefit the Government.** Because such consultant costs are incurred as



part of the exchange of information involved in the negotiations, they are considered beneficial to the contract. However, such costs are not unallowable under FAR 31.205-33, which precludes costs incurred in the prosecution of the claim. See *Bill Strong Enterprises Inc. v. Shannon, Acting Secretary of the Army*, 49 F.3d 154 (Fed. Cir. 1995).

EAJA became effective 1 October 1981. EAJA was enacted to prevent the Government from the use of the "Bully Rule" which enabled the Government to enforce a Contracting Officer's decision upon a contractor which lacked resources to pursue a claim due to the present day high cost of litigation. Thus, EAJA enables a small contractor to defend its rights on a more level playing field because the Government is responsible for the attorney fees if the contractor's position is justified.



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Contract Interpretation: Guidelines and Best Practices

(continued from front cover)

2. Representations and other instructions
3. Contract clauses
4. Other documents, exhibits and attachments
5. The specifications

Individual agencies may also have their own supplementary Order of Precedence clauses.

Extrinsic evidence is another powerful tool used to interpret contracts. Documentation of phone calls and meetings; emails; quotes and proposals can help a court determine both parties' intent at the beginning of the contract. In addition, the parties' conduct after the contract's award, but before the dispute, can help the court discern the original interpretation of the disputed term.

Prior dealings can also be used to establish intent of the involved parties; past actions set a precedent for future interactions.

Related documents, such as bids, quotes, and proposals, can put certain phrases in context and help the court better define contract terms.

Although this information can help clarify vague items, extrinsic evidence does not supersede the contract itself. The Parol Evidence Rule states that "only what is written in the contract really matters and all previous verbal and/or written statements are null and void."

When a contract term is patently ambiguous, Restatement (Second) of Contracts, Section 206, dictates that the writer of the contract loses any arguments of interpretation. However, interpretation against the drafter (*contra proferentum* in Latin) will not be applied if the non-drafting party fails to seek clarification on

an uncertain term for which it was (or should have been) aware.

Clearly, with so many variables, it's better to draft an explicit, clear-cut contract than to rely on a court's interpretation of a poorly written one. By implementing best practices, contractors can shield themselves from poorly written, misleading, contradictory, or confusing



photo courtesy of Nan Palmer

contracts and the potential problems that go along with them.

A common-sense approach to contract drafting involves three critical elements:

Clearly define key words and terms

Key words and terms can be defined within the contract itself; in a contract glossary or dictionary of terms; or can be referenced within specific publications, such as the FAR, related agency supplements, technical dictionaries, industry standards, etc.

Tailor the terms and conditions to the contract situation

Many contracts, especially Government contracts, contain so many clauses that the average contractor does not read (or understand) them all. Contracts should be tailored to fit a specific job; consideration should be given to the nature of the services and/or products provided, the complexity of the project, and the urgency of each requirement.

Read and understand all contract terms

Unfortunately, skimming over contract details or relying on the other party's summary of a contract's contents is not uncommon. A thorough knowledge of all contract details is critical to avoiding disputes. This is not an area to cut corners.

Reference:

Garrett, Gregory A., "Contract Administration, Part 3: Contract Administration Guidelines - Best Practices" *Contract Management*, April 2010.

PUBLISHED BY



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CONTRACTOR ALERT!!!

CONSULTING AND LEGAL FEES ARE RECOVERABLE!

FEDERAL CIRCUIT CASES REAFFIRM THAT COSTS OF CONTRACT ADMINISTRATION ARE ALLOWABLE

INTRODUCTION

Before elaborating on the question of recovery of consulting fees and/or legal fees, let's be clear on a major point: *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. Once the certification and filing of the claim takes place, it's a whole new ballgame, however.

The *Bill Strong* decision (1995) supports recoverability and allowability of consulting costs. Excell's Vice President, Judi Mattox, litigated the case and wrote the brief, with Oral argument by Chris Darby of Mattox and Associates. Bill Strong was the seminal case establishing recoverability of consulting costs under FAR 31.205-33. It has been applied consistently by the Federal Courts, and in *Johnson v. Advanced Eng. & Planning Corp*, the Court upheld the recovery of \$270,017 for Contract Administration costs.

Case law supports the recoverability of such costs. In *Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541 (Fed. Cir. 1995), the Federal Circuit Court of Appeals upheld the allowability of consulting costs and attorney fees. 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.* 49 F.3d at 1549.

The Court held that “costs that fall within the first and second categories are presumptively allowable if they are also reasonable and allocable.” *Id.*

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.

The *Bill Strong* case has been applied consistently by the Federal Courts and remains good law today.

RECOVERY OF COSTS UPHELD

In *Tip Top Construction, Inc. v. Patrick R. Donahoe*, 2012 U.S. App. LEXIS 19683 (Federal Circuit, September 19, 2012):

“The Court of Appeals sided with the contractor. A contract administration cost is one incurred with a genuine purpose of materially furthering the negotiation process even if negotiations eventually fail and a claim is later pursued. The Court ruled that these costs were genuine administrative and claim preparation costs concerning estimates and pricing over the changed work. The consultant and attorney directly involved themselves in the cost review and price negotiations and the Court held that these types of fees are recoverable even if the negotiations concerning a change order fail and litigation or actual claims are filed.”

The *Tip Top Construction* case has been applied consistently by the Federal Courts and remains good law today.

CONCLUSION

The value of an experienced consultant or attorney cannot be emphasized enough, because it is typically the difficult and/or complex issues that will end up as a dispute or claim. This value is compounded exponentially when these costs are compensable.

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Author's note: The information contained in this article is for general educational 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*

CONTRACTING OFFICER'S FINAL DECISION

*If Findings of Fact are not Binding on Appeal,
What Good are They?*

INTRODUCTION

A Contracting Officer (CO) must support their final decision on a contractor claim with some type of finding of fact. While the Contracting Officer's Final Decision (COFD) must contain findings of fact under the Federal Acquisition Regulation (FAR), the **findings of fact are not binding on the CO or the government in subsequent appeals**. This post attempts to reconcile the seeming ambiguity between these two rules, explain the purpose behind the COFD, and offer some useful purposes for the findings of fact made therein.

RULES FOR CONTRACTING OFFICER'S FINAL DECISION

After a contractor submits a claim to the Contracting Officer (CO), the CO's first obligation is to try and negotiate a reasonable settlement. If no settlement can be reached, the CO must issue a final decision within 60 days of receipt of a written request for a COFD if the claim is under \$100,000. For claims over \$100,000, the CO must either issue a final decision within 60 days or notify the contractor within 60 days of when the final decision will be issued. At any rate, the COFD must be issued within a reasonable amount of time. See FAR 33.211.

Since 1978, the Contract Disputes Act (CDA) has not required that COFDs contain specific findings of fact, but states that if findings of fact are made, they are "not binding in any subsequent proceeding" such as an appeal to a federal court or a board of contract appeals. See 41 U.S.C § 7103(a)(3). However, the corresponding FAR section is more stringent, requiring that the COFD contain a statement of the factual areas of agreement and disagreement. FAR 33.211(4)(iii).

COs are then instructed by their respective contracting agency how to include findings of fact in their COFDs. For example, the USACE Acquisition Instruction Manual (UAI) requires that a **COFD must contain a separate "Findings of Fact" section** in order to inform the contractor of the facts and reasons upon which the CO's conclusion is based. Finally, the UAI instructs that the COFD, and specifically the findings of fact section, will be drafted by a USACE attorney, and that the CO will then review and become familiar with the COFD and findings of fact and adopt them or make changes as needed.

FINDINGS OF FACT ARE NOT BINDING

If findings of facts are a required part of a COFD, why are these findings not binding on any subsequent proceeding? It seems intuitive that if a CO bases their decision on certain facts, and those facts are true, then the CO should be required to stick with those findings throughout subsequent litigation.

The **answer to this question** can be found in the scant supply of court decisions that have addressed this issue. The courts have reinforced the CDA rule that "specific findings of fact are not binding on any subsequent proceeding." In fact, once a COFD is appealed, the court or board of contract appeals hears the appeal "de novo," meaning that

the parties “start in court or before the board with a clean slate” and the CO’s decision is “not presumed to be correct.”¹ Similarly, another court has stated that the COFD is not considered to be evidence.²

In the *Wilner* case, for example, the contractor filed a claim for costs resulting from what it claimed were government-caused delays.³ The CO issued a final decision that granted the contractor roughly half of its claim, stating in the COFD that the other delays were not on the critical path and therefore were not compensable. The contractor appealed the COFD to the Court of Federal Claims, which relied on the findings of fact in the COFD in granting the contractor all of its claimed costs. The Court based its decision on both the COFD and the testimony of the CO. On appeal from that decision, however, the United States Court of Appeals for the Federal Circuit (CAFC) held that the lower court’s ruling was flawed, and remanded the case back to that court.

The CAFC reasoned that the lower court erred in relying on the COFD as evidence in coming to its decision. Although the lower court relied on the COFD and heard testimony of the CO, the CO testified only as to how he came to that decision and did not testify as to any of the facts contained in his final decision. Because the lower Court could not presume that the facts contained in the COFD were true, the lower court’s reasoning was necessarily flawed.

The *Wilner* Court went on to mention that there is nothing stopping a CO from testifying at trial. Indeed, the parties started with a clean slate and the CO’s decision was not presumed to be correct.

What the *Wilner* Court and others are saying is that the contractor can’t simply submit the COFD as evidence and then rely on it to prove its case – the court cannot presume that the facts stated therein are correct, or that any assertions made therein are binding. Consequently, findings of fact and assertions in COFDs will play virtually no role in subsequent litigation.⁴

In light of these rules, **the contractor must still prove up its case on appeal.** If the contractor has proved its case in its claim to the contracting officer, it should be a rather straightforward process to use the same facts, evidence and analysis asserted in its claim and provided in the COFD to prove up the same assertions again on appeal. However, the contractor must prove, on its own and de novo, that the COFD’s facts and assertions are true and correct. A CO’s testimony as to how he came to his decision will not be enough – but a CO’s testimony of the supporting facts will be admissible and therefore would carry enough weight for the court to find one way or the other.

WHAT, THEN, IS THE PURPOSE OF FINDINGS OF FACT?

If the COFD is not evidence and its “findings of fact” are not binding on appeal, **of what use are they?**

One **purpose for the COFD** and findings of fact are to establish a court or board’s jurisdiction to hear the appeal. Any such appeal must arise out of the same operative facts and be within the scope of the claim presented to the CO.⁵ Indeed a court or board cannot have jurisdiction to hear the appeal if a COFD has not been issued.

Another purpose for the COFD and findings of fact is fairness. The lawmakers behind the CDA and FAR apparently believed that a contractor was entitled to a reasonable explanation for why their claim was denied, accepted, or

¹ *Wilner Constr. Co. v. United States*, 24 F.3d 1397 (Fed. Cir. 1994)

² *Conner Bros. Const. Co. v. United States*, 65 Fed. Cl. 657 (2005).

³ See *Wilner*, 24 F.3d 1397 (Fed. Cir. 1994)

⁴ Administration of Government Contracts, 4th Ed., pg. 1312, Cibinik, Nash & Nagle (2006).

⁵ Administration of Government Contracts, 4th Ed., pg. 1311, Cibinik, Nash & Nagle (2006).

otherwise.

Yet another use for the findings of fact is that they give the contractor some indication of the CO's thinking that went into their final decision. These findings of fact may give the contractor insight into the CO's assertions and legal positioning might be if the contractor appeals the final decision, therefore allowing the contractor can **make a more informed decision** as to whether an appeal is in its best interest.

Another question arises from this discussion: if the findings of fact are not binding, what prevents a CO from misinterpreting or misrepresenting facts? (This is a hypothetical question and does not imply that a CO would actually do such a thing.) The check against misrepresentation in its findings of fact is the CO's **duty of good faith and fair dealing**, as recently clarified in the *Metcalf*⁶ decision. Because a breach of this duty equates to a breach of the contract, a CO is thus deterred from making anything other than correct factual statements.

CONCLUSION

In a contract governed by the FAR, a COFD must contain findings of fact. These findings of fact can be **valuable to a contractor** even though they are not, of themselves, binding upon the CO or the government in subsequent litigation. Interpreting a CO's findings of fact for correctness and meaning can be a complex task. Utilizing the assistance of a consultant with expertise in this area can give contractors the **peace of mind that their decisions are based on the best and most correct information available**. This is especially true when what is *not* stated in the COFD speaks volumes.

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

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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

⁶ *Metcalf Constr. Co. Inc. v. United States*, Case No. 2013-5041 (Fed. Cir. Feb. 11, 2014).

CONTRACTOR CLAIM FUNDAMENTALS: PART I

The Basics and Pitfalls Under the CDA

INTRODUCTION

Disputes stemming from a government construction contract are governed by the [Contract Disputes Act](#) (CDA), which sets forth rules as to how disputes between contractors and the federal government will be resolved. In order to access the remedies available through the CDA, a claim must be **in dispute** and must be **properly submitted**. After proper submission and a final decision is issued by the contracting officer, that final decision becomes appealable to either the U.S. Court of Federal Claims or the Armed Forces Board of Contract Appeals (ASBCA) or other agency Board of Contract Appeals.

This Part I lays out the fundamental requirements and procedures for perfecting a claim. Failure to follow these CDA requirements can be costly, both in time and money. Part II will discuss some of the common pitfalls, rule interpretations and variables that may be associated with claims.

WHAT CONSTITUTES A CLAIM?

The CDA states that “[a]ll claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision.” 41 U.S.C. § 605(a). There are **three elements** of a monetary claim:

- (1) a description of the facts and basis for the claim,
- (2) a request for a final decision, and
- (3) a description of the quantum requested

Reflectone, Inc. v. Dalton, 60 F.3d 1572, 1575 (Fed. Cir. 1995). The written claim does not need to follow any particular wording or format, but must contain sufficient information that gives the contracting officer adequate notice of the basis of the claim. The written claim should emphasize the “**nexus**,” or **cause and effect** relationship between the government’s disputed performance and the relief requested by the contractor.

Specific wording in a request for final decision is not necessary. All that is required is that the claim indicates that a final decision was desired. See *James M. Ellet Constr. Co. v. United States*, 93 F.3d 1537 (Fed. Cir. 1996). While various statements or documents may qualify as a request for final decision, the safe approach is to explicitly request a final decision from the contracting officer.

Importantly, the description of the quantum requested must state a “**sum certain**.” FAR § 52.233-1(c); *Reflectone*, at 1572. A contractor should provide the factual and contractual basis for its claim, asserting specific rights and requesting specific relief, again with an emphasis on the nexus between the two.

Whether a certain submission qualifies as a claim depends on the surrounding circumstances. There are different forms of submissions that may qualify as a claim, as will be discussed in Part II. However, to avoid ambiguity or confusion contractors should **clearly indicate** that they are requesting a final decision from the contracting officer with the intent of perfecting a claim.

WHO MAY SUBMIT A CLAIM?

Generally, **only a prime contractor** may assert a claim against the government under the CDA. Both the CDA and the FAR require that a claim be brought by one of the contracting parties. 41 U.S.C. §§ 605(a), 601(4); FAR § 33.201. Therefore, **subcontractors** are rarely in “privity of contract” and consequently cannot bring a claim directly against the government on a construction contract. This does not mean that subcontractors are without a remedy, however. A prime contractor may certify a subcontractor’s claim, thus acting as a “sponsor” for the claim which allows for the claim to be properly submitted under the CDA.

In sponsoring a subcontractor’s claim, the prime contractor need not agree with everything in the claim, but does certify that the sub’s claim is made in good faith and is not frivolous. Therefore, it is important for a sponsoring prime contractor to review the sub’s claim as diligently as it would review its own claims.

WHEN TO SUBMIT CLAIM

A contractor may submit a claim within 6 years after the “accrual” of the claim. The accrual of a claim is generally defined as the date when all the events which fix alleged liability and permit assertion of the claim were known or should have been known. 41 U.S.C. §605(a). Although there must be some type of injury, no monetary damages need be incurred for a claim to accrue.

Even if the six year statute of limitations does not apply, contractors should be aware that the government may invoke the equitable defense of “laches” if enough time lapses from time of accrual that the government would be substantially prejudiced in its ability to defend the claim. Therefore, contractors should submit their claim as soon after the accrual of the claim as is reasonably prudent.

DOES MY CLAIM NEED TO BE CERTIFIED?

The CDA requires that a claim **in excess of \$100,000** must be certified. Consequently, claims of \$100,000 or less need not be certified. Claims that arise from a common or related set of operative facts cannot be broken down into separate claims, but must be filed as one claim.

The certification is sent to the contracting officer. Per the CDA, the contractor must certify

“that the claim is made in good faith, that the supporting data are accurate and complete to the best of [the contractor’s] knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable.”

41 U.S.C. § 605(c)(1). The CDA also requires the person signing the certification to state that “the certifier is duly authorized to certify the claim on behalf of the contractor.” Because the courts and Boards are split as to whether a certification must use the CDA language verbatim, it is prudent to use the exact statutory language when certifying a claim.

A CO is under no obligation to issue a final decision on a defective certification. In such a case, the CO must provide the contractor with written notice of their finding within 60 days. The contractor may then correct and resubmit the certification.

WHAT HAPPENS AFTER A CLAIM IS CERTIFIED?

After a claim is properly submitted and/or certified under the CDA requirements, the next step is for the contracting officer to issue a **final decision** on the claim. See FAR § 33.211. A final decision, or lack thereof, is a requirement to bringing an appeal before a board of contract appeals or filing with the Court of Federal Appeals.

Under the CDA, a CO must issue a final decision on claims of \$100,000 or less **within 60 days** of receiving a written request for final decision. For claims over \$100,000, the CO must either issue a final decision or notify the contractor of the time within which a final decision will be issued, within 60 days of receiving a certified claim.

CAN I APPEAL THE CO'S FINAL DECISION?

Contractors may appeal a CO's final decision to either an appropriate board of appeals (ASBCA or GSBCA) within **90 days**, or alternatively to the Court of Federal Claims within **12 months** of a final decision. If a contractor decides to take no action on the final decision, the decision becomes binding.

If the CO fails to issue a final decision within 60 days of the triggering submission, a contractor may deem the claim denied. This "deemed denial" likewise allows the contractor to file an appeal in the appropriate forum.

CONCLUSION

The timely and accurate filing of a claim under the CDA is a pivotal process in resolving disputes with the federal government. Failure to properly prepare and file a claim, or to understand all of the damages that may be available, can result in extensive time delays and/or significant loss of quantum.

It can be beneficial, and sometimes vital, to consult with an expert when navigating the claims requirements. Give Excell a call to ensure that you are maximizing the probability of your claim's success.

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

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CONTRACTOR CLAIM FUNDAMENTALS: PART 2

Some Pitfalls and Variations Under the CDA

INTRODUCTION

To every rule, there are exceptions and nuances. Such is the case with CDA claims. [Part 1](#) of this series set forth the fundamental requirements and procedures for perfecting a claim. This Part II will discuss some of the common variables, pitfalls and interpretations that may be associated with claims.

WHAT ELSE QUALIFIES AS A CLAIM?

Part 1 discussed the **elements** that constitute a valid claim: (1) a description of the facts surrounding the claim; (2) A request for a final decision; and (3) a description of the quantum requested. In order to qualify as a claim under the FAR, a non-routine¹ request for payment must be a written demand or assertion, seeking as a matter of right, payment of money in a sum certain. [FAR § 52.233-1\(c\)](#). A routine² request for payment must also be “in dispute” when submitted to meet the definition of a “claim.”

In addition to an express, written claim submission, at least **two variations** on the rule may also qualify as a valid claim: a REA and a Termination for Convenience settlement proposal may each convert into a valid claim under the CDA.

For example, a termination for convenience settlement proposal is a starting point for negotiations. However, the proposal can become a claim if the subsequent negotiations reach an impasse and the contractor indicates that it would like a final decision. See *Ellet Constr. Co. v. United States*, 93 F.3d 1537 (Fed. Cir. 1996). It should be noted that a contractor must still certify this type of “converted” claim if the contractor seeks quantum of more than \$100,000.

Similarly, a REA may be converted into a claim if the contractor makes it known that it wants a final decision from the CO. See *Isles Eng’g & Constr., Inc. v. United States*, 26 Cl. Ct. 240, 243 (1992). This holds true even when the contractor indicates that they are interested in continuing negotiations- the determining factor being whether the a final decision has been requested. Compare *Isles* with *Huntington Builders*, ASBCA No. 33945, 87-2 BCA ¶ 19,898. Conversely, however, the passage of time alone may not convert a proposal into a claim where the contractor never requested a final decision from the CO. See *Santa Fe Engineers, Inc. v. Garrett*, 991 F.2d 1579, 1583 (Fed. Cir. 1993)(indicating that the lack of request for final decision denoted that the parties had not reached an impasse).

RAISE CLAIM AMOUNT AFTER CERTIFICATION?

It is well established that a claim in excess of \$100,000 must be certified in order for an appeal to be properly submitted for consideration. But what happens when the claim amount changes, and **rises above the certification threshold** after a final decision has been made?

¹ See *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1576-75 (Fed. Cir. 1995).

² See *Id.*

The general rule set forth in *Tecom, Inc., v. United States*³ is that after an *uncertified* claim below the \$100,000 threshold is duly considered by the CO, the contractor may increase its demand above \$100,000 in its appeal *if* the increase is based on further information **reasonably developed during litigation**. *Tecom*, 732 F.2d at 936-38. The ASBCA interprets this rule to allow increases above the threshold only when the increase is based on information that was not reasonably available when the original claim was submitted. *Jema Corp.*, ASBCA No. 40985, 93-3 BCA ¶26,076.

Application of this rule is illustrated in the appeal of *Development & Evolution Constr. Co.*, ASBCA No. 58342, 13-1 BCA ¶ 35453. The contractor in that appeal, DECC, had a contract with the government that was terminated for convenience. DECC's first settlement proposal for approximately \$128,500 was rejected by the government. In an effort to settle, DECC submitted a second settlement proposal seeking the reduced amount of \$75,833. After the parties reached an impasse, the government issued a final decision in an amount well under DECC's second proposal.

DECC then appealed the final decision to the ASBCA ("Board"), seeking the original \$128,500. The Board questioned whether it had jurisdiction to hear the appeal, citing the fact that the amount sought in the appeal exceeded the \$100,000 threshold, and was not duly certified. DECC argued that its claim was based on the final decision that denied its second settlement proposal of \$75,833. DECC argued that because the amount of its second proposal was below the CDA threshold, the claim need not be certified.

The Board disagreed with DECC. Stating the rule above, the Board held that DECC's claim needed to be certified because DECC **knew about** the full \$128,500 at the time it submitted its original claim of \$75,833 to the Board. The Board stated that although a contractor has an obligation to attempt a negotiated settlement (following a Termination for Convenience), the contractor must comply with the certification requirement when it knows that its claim exceeds the \$100,000 threshold (even though it offered to accept less than the threshold during settlement negotiations).

This case highlights the important point that a contractor should include in its claim ALL costs that it knows of, or should reasonably know of, at the time of the claim submission.

APPEAL ON DEEMED DENIAL BASIS

A CO's final decision is required before bringing an appeal before a board of contract appeals or filing with the Court of Federal Appeals. **But what if the CO issues no decision at all?**

Under the CDA, a CO must issue a final decision on claims of \$100,000 or less **within 60 days** of receiving a written request for final decision. For claims over \$100,000, the CO must either issue a final decision or notify the contractor of the time within which a final decision will be issued, within 60 days of receiving a certified claim. Regardless, a final decision must be issued within a reasonable amount of time, taking into account the size and complexity of the case. See 41 U.S.C. § 7103(f)(3).

If the CO fails to issue a final decision (or notification) within 60 days, or a reasonable amount of time, the contractor may deem the claim denied and file an appeal. See 41 U.S.C. § 605(c)(5). The CO must have authority to issue a final decision before his lack of decision can be deemed denied. *Case, Inc. v. U.S.*, 88 F.3d 1004 (Fed. Cir. 1996). Importantly, it should be noted that the court or Board may stay such an appeal in order to obtain a final decision from the CO.

An **interesting interpretation** of this rule is found in the recent *Metag*⁴ case. In *Metag*, government contractor Metag requested a final decision from the CO. Having not received a decision from the CO, Metag deemed its request denied and filed a Notice of Appeal with the ASBCA only 51 days after requesting the final decision. The

³ 732 F.2d 935 (Fed. Cir. 1984).

⁴ *Metag Insaat Ticaret A.S.*, ASBCA No. 58616 13-4 BCA ¶35454.

government moved to have the appeal dismissed, arguing that the appeal was premature because 60 days had not passed since Metag filed the claim, and the government had not been allowed a reasonable time to respond. At the time of the ASBCA's decision, 176 days had passed. The Board held that, even if 51 days was too early to bring the appeal, the claim was ripe because the CO still had not issued a final decision in the 176 days since the original request. The Board therefore held that 176 days was more than a reasonable amount of time for the CO to make a final decision, and upheld its jurisdiction to hear the appeal.

CONCLUSION

While adhering to the fundamental principles is wise, it is important for contractors to be aware of the variations on the general rules surrounding CDA claims. These variations may be applicable one day to your specific fact pattern, and knowing how to approach your claim could be the difference between recovery and losing out on time or money to which you are entitled. The experts at Excell can help you identify which, if any, of these variations may apply to your situation.

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FCA Scrutiny and Penalties on the Rise: Federal Contractors Beware

INTRODUCTION

Two major developments in 2016 have altered the scope of both liability and damages under the False Claims Act ("FCA"). First, the Supreme Court has endorsed the "implied false certification" theory of liability. Second, federal agencies have implemented a new federal regulation that almost doubled FCA penalties. These developments continue the federal government's trend of increased scrutiny and enforcement of the FCA, and signal a warning to federal contractors to take extreme precaution in submitting any payment or claim for money to the government.

In 2015, for example, the Justice Department recovered \$3.6 billion (down from a record \$5.7 billion in 2014) in either settlements or judgments involving fraud, waste, abuse or other false claims brought under the FCA. Early reports indicate that this amount will increase by the end of 2016. Increased scrutiny of contractors under the FCA is due to certain factors that have caused FCA enforcement to increase in recent years, including financial incentives for whistle-blowers, attorneys, and the government. These incentives are not going away, and the increase is likely to continue. A key indicator that investigation and enforcement will continue to increase is the Obama Administration's most recent budget, which increased funding for fraud and compliance enforcement. That budget demonstrates a focus on fighting fraud, waste, and abuse in government contracting by increasing the number of compliance and fraud enforcers at several agencies, including the Department of Labor, the Department of Defense, the Department of Health and Human Services, and the General Services Administration. This added enforcement

IMPLIED FALSE CERTIFICATION RULE

A recent Supreme Court ruling opened a new avenue of liability for contractors. For years, the circuit courts have been split in determining whether a defendant's "implied false certification" of its compliance with contractual, regulatory, or statutory requirements is a valid basis for liability under the tenets of the FCA. On June 16 of this year, the U.S. Supreme court issued its long-awaited decision on the "implied false certification" theory of liability under the FCA. In June 2016, the Court held in *United States ex rel. Escobar v. Universal Health Services*, that, "at least in certain circumstances, the implied false certification theory can be a basis for liability." No. 15-7, 1 (2016). In the same decision, however, the Court defined the FCA's materiality requirement as rigorous and demanding, thus bolstering that standard.

In *Escobar*, the parents of a mental health patient alleged that the hospital providing inadequate treatment to their son by using under qualified personnel to deliver counseling services. The parents filed suit under the FCA alleging that the hospital “impliedly certified” that the counseling services were provided by certain types of professionals as required by state Medicaid requirements, when in reality, they were not. The parents’ claims hinged on the viability of the “implied false certification” theory because the hospital’s claims for payment did not expressly state anything about the medical professionals.

The Court held that the “implied false certification” theory can provide a basis for FCA liability, given, however, that the claims meet two conditions: (1) that the claim makes specific representations about the goods or services provided, and (2) that the defendant’s failure to disclose noncompliance with material legal requirements “makes those representations misleading half-truths.” *Id.* The Court also limited the kinds of undisclosed violations that can support an “implied false certification” claim, and did not address the question of whether all claims for payment implicitly represent that the billing party is legally entitled to payment.” *Id.* at 9-10.

FCA PENALTIES DOUBLED

The impact of this new theory of liability was compounded when Congress mandated an increase in FCA penalties due to inflation, as part of a budget deal struck last year. Agencies were required to implement the new rule by August 1st of this year, which rule almost doubled FCA penalties on a per-claim basis. Under the new rule, minimum per-claim penalty rose to \$10,781 (from \$5,500), and maximum per-claim penalty rose to \$21,563 (from \$11,000). This increase in per-claim penalties could result in an explosion of big-dollar judgments and settlements, especially in cases involving thousands of potential claims or payments.

Such potentially astronomical judgments and settlements are expected to be accompanied by proportionally heightened challenges to the same, as being unconstitutionally excessive under the Eighth Amendment and Due Process Clause. Historically, contractors have been successful in challenging FCA penalties as “excessive fines” prohibited under the Eighth Amendment, especially in cases involving an immense number of fraudulent billing claims compared to a relatively small amount of actual damages. While doubled penalties under the new rule will greatly increase the disparity between the claimed amount and actual damages in some cases –seemingly increasing a contractor’s odds of a successful challenge – a contractor still must overcome significant hurdles, and success is not guaranteed.

For example, in the 2013 case of *Bunk v. Gosselin*, the Fourth Circuit allowed a whistleblower to seek FCA penalties below the statutory minimum per-claim amount in order to avoid an Eighth Amendment challenge. Interestingly, the court also allowed the whistleblower to recover an amount far in excess of its actual damages. In that case, defense contractor Gosselin allegedly conspired in a price-fixing scheme that resulted in the submission of thousands of fraudulent invoices. Although the district court judge recommended only \$500,000 in FCA penalties, the Fourth Circuit held that a \$24 million recovery “appropriately reflects the gravity of Gosselin’s

offenses and provides the necessary and appropriate deterrent effect going forward.” Now subjected to the potential impacts of this new rule, federal contractors should take precautionary measures and prepare themselves for higher-stakes FCA cases.

Given these two major developments in FCA enforcement, contractors and their counsel should be ever vigilant and disciplined in assuring compliance to all regulations and contract provisions pertaining to the submission of claims for payment to the government. The consequences for failing to do so are far too great, as evidenced by the increasing intensity and rate by which the government is now detecting and prosecuting FCA violations.

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Authors: John G. Balch is CEO, and Taylor Benson is Assoc. General Counsel at Excell Consulting International, Inc., a Colorado Springs based firm specializing in government contracts.

DO YOU THINK YOU KNOW THE RAMIFICATIONS UNDER THE FALSE CLAIMS ACT? THINK AGAIN!

PART II: ISSUES INVOLVING PENALTIES, “QUI TAM” ACTIONS, AND UNDERBIDDING AS A SOURCE OF LIABILITY

INTRODUCTION

As discussed in Part I, the False Claims Act (FCA) contains significant provisions to discipline parties who defraud the Government. One such provision is a "Qui Tam" provision which allows third parties who are not affiliated with the Government to file actions on behalf of the Government (also called “whistleblowers” or “relators”).

Whistleblowers or relators are eligible to receive a portion (usually about 15–25 %) of damages recovered by the Government from violators. Application of the FCA can encompass multiple claims and can include both prime contractors and subcontractors. Liability can also extend to contractors who provide false statements through their estimates. In this second installment about the FCA, we discuss each of these topics and their ramifications.

ISSUES INVOLVING THE NUMBER OF PENALTIES (DEALING WITH SUBCONTRACTORS)

When the FCA is applied to contractors and subcontractors, the number of penalties assessed will be based upon the number of independent claims submitted by a contractor. A decision is based upon individual claims that were submitted together. In *United States v. Bornstein*, 423 U.S. 303, 313, 96 S. Ct. 523, 46 L. Ed. 2d 514 (1976) the court evaluated whether a subcontractor should be liable for each claim submitted by the prime contractor or only for acts committed by the subcontractor. It was determined that the number of infractions caused by the subcontractor should be the number of penalties assessed against the subcontractor. Even if a prime contractor submitted multiple false claims based upon one action of a subcontractor, the subcontractor would only be liable for one penalty and the prime contractor would be held liable for the number of multiple false claims it submitted to the Government. (<http://www.hg.org/article.asp?id=22065>)

Damages authorized by the FCA were increased as part of amendments enacted in 1986 which changed the range of damages from double to triple the amount of the Government’s damages. Penalties, under the FCA, also increased from \$5,000 - \$10,000 to \$5,500 - \$11,000 per violation. (http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Primer.pdf) For example, if a false claim in the amount of \$100,000 is submitted to the Government, the Government may be entitled to recover \$300,000 in damages plus \$5,500 in penalties.

“QUI TAM” ACTIONS

Another 1986 amendment to the FCA includes a “Qui Tam” provision, also known as the Whistleblower or relator provision which enables another party, who has actual knowledge of the deceitful act, to file a suit on behalf of the Government, when proof of misrepresentation or false claims has been submitted to the Government.

(<http://governmentfraud.us/whistleblowers/>) The evidence that comes from the relator, however, cannot be “...from a publicly disclosed source such as a newspaper, TV, magazine, radio, court record, administrative hearing, Congressional hearing, U.S. General Accounting Office report, or Freedom of Information Act request.” (Id.)

An incentive for the relator(s), whether or not they are directly working on a Government project, is that the relator is entitled to receive anywhere from 15-30% of the monetary damages recouped depending upon whether or not the Government “...intervenes and conducts the litigation...” The relator may be entitled to 25-30% of recovery if the Government decides not to intervene. (<http://fcaexpert.com/articles/FCA-FAQ.html>) Section 3730(d)(1) & (2)

Protection for relators under the FCA includes a provision that whistleblowers/relators cannot be:

“...discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of a [qui tam action], including investigation for, initiation of, testimony for, or assistance in a [qui tam] action filed or to be filed..., shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement ... 2 times the amount of back pay, interest ... compensation for any special damages ... including litigation costs and reasonable attorneys' fees.... An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection”.

See the FCA’s Whistleblower Protection Provision of the Federal False Claims Act, 31 U.S.C. Section 3730 (h).

Contractors who encounter or suspect that a Qui Tam action has been filed against them can, and often do, require counseling and guidance with respect to § 3730(h) and its effects. In the event this occurs, it is helpful to obtain the services of a knowledgeable consultant or legal professional.

UNDERBIDDING AS A SOURCE OF LIABILITY

In United States ex rel. Hooper v. Lockheed Martin Corp., 688 F.3d 1037, 2012 WL 3124970 (9th Cir. Aug. 2, 2012), the Ninth Circuit Court of Appeals held that “a bidder’s false cost estimates, defined to include fraudulent underbidding in which the bid is not what the defendant actually intends to charge, can be a source of liability under the FCA, assuming that the other elements of an FCA claim are met.” (*Id.* at 1049)

In this Qui Tam action stemming from alleged fraud by Lockheed Martin against the United States Air Force, Lockheed argued that a purported false estimate could not form the basis of FCA liability because it was essentially an opinion or prediction that could not be deemed as false within the meaning of the FCA. The Ninth Circuit Court reasoned that to establish a cause of action under 31 U.S.C. § 3729(a)(1)(A), “the United States or relator had to prove the following elements:

- (1) a false or fraudulent claim (2) that was material to the decision-making process (3) which a defendant presented, or caused to be presented, to the United States for payment or approval (4) with knowledge that the claim was false or fraudulent.” 688 F.3d at 1047

The Court's decision was that Lockheed Martin had knowingly submitted a false estimate and as such, the FCA applied liability related to underbidding in estimates which were false and fraudulent. (<http://www.rjo.com/updatesOSZ-JMC-060252013.html>)

CONCLUSION

FCA liability can stem from virtually any false or fraudulent statement or claim that is knowingly and deliberately made to the Government. Issues related to the number of claims can be utilized in assessing penalties in cases where a subcontractor is alleged to have committed wrongdoing. This can lead to multiple claims and result in an expensive outcome for subcontractors and for prime contractors.

Given the increasing number of complexities of the FCA, as well as the possibility of whistleblower actions, it would be prudent to enlist the services of an outside consultant such as Excell Consulting International, Inc. By engaging the professional assistance of experts in the field, contractors can rest assured that their rights are being protected and preserved. With Excell Consulting, you will receive professional recommendations after review of all factors that apply to an alleged FCA claim.

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DO YOU THINK YOU KNOW THE RAMIFICATIONS UNDER THE FALSE CLAIMS ACT, THINK AGAIN!

PART III: TRENDS AND EXPANSION OF THE FALSE CLAIMS ACT

INTRODUCTION

The False Claims Act (FCA) [31 U.S.C. §§ 3729–3733](#) was enacted to impose liability for contractors or suppliers who knowingly make or present a false claim or statement to the Government and also addresses liability for using false statements to conceal, hide, or limit a monetary obligation owed to the Government.

The Government now requires all contractors to obtain a Commercial and Government Entity (CAGE) code before they can be awarded any Government contracts. This makes the process of communication and awarding projects more efficient. (<http://www.onvia.com/business-resources/articles/naics-cage-and-other-Government-codes>)

CHANGE IN THE PROCUREMENT SECTOR

The Department of Defense's Defense Logistics Agency (DLA) issues five-digit CAGE codes consisting of numbers and letters used as identification for participating contractors. Contractors must first be registered with the System for Award Management (SAM) in order to obtain a CAGE code; this automatically occurs during the SAM registration process. The CAGE codes have been required as part of the Defense Federal Acquisition Regulation (DFAR) since 1999. See **SUBPART 204.72-CONTRACTOR IDENTIFICATION** (Revised May 16, 2013) (http://www.acq.osd.mil/dpap/dars/dfars/html/current/204_72.htm)

Currently a CAGE code is required if a contractor wishes to do business with the Government. In particular, a CAGE code is necessary to bid for and be awarded Department of Defense (DOD) contracts. (<http://govwin.com/knowledge/cage-codes>) CAGE codes allow the Government to determine the location of a particular facility, what clearances are required for the facility and a

list of contract bidders for that location. (*Id*)

Examples of how CAGE codes identify particular locations or regions can be found on the DLA website. (<http://www.dlis.dla.mil/cage/help.html>) Depending on the letter or number, a CAGE designation can be either foreign or domestic. Additionally, a CAGE code identifies a supplier, its affiliation, the size and type of an organization, a corporate organization, a business category, or even if an entity's status is active, obsolete, or if a contractor has been canceled or debarred. (*Id*)

EXPANDING THE REACH OF THE FCA

The FCA now imposes liability for both civil as well as criminal infractions, holding those who knowingly and intentionally commit fraud against the Government, liable for probable financial loss to the United States Government. www.lw.com/thoughtLeadership/expanding-application-state-federal-fca Criminal penalties can include up to five (5) years in prison and fines up to \$250,000 against anyone who "...makes or presents...any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent." 18 U.S.C. § 287

False claims can include charging the Government for any inadequate materials, underbidding or "bid-rigging", or goods and services that conflict with specifications set forth in a contract with the Government. Civilly, Qui Tam (whistleblower/relator actions) cases have increased over the last four (4) years. As mentioned in the previous installment (Part II), there are incentives for whistleblowers or relators to come forward and bring "action" on behalf of the Government. These individuals can receive portions of any recovery obtained by the Government including expenses and attorney's fees. Consequently, fraud cases initiated by prosecutors have increased as a result of Qui Tam actions.

Due to the expanded reach of the FCA, subcontractors can be penalized if a fraudulent claim or invoice is presented to a contractor when a subcontractor then bills fraudulently for work performed. Government money is involved in the payment of the contractor's performance and therefore trickles down to the subcontractor through payment from the contractor. (*Id*) The Government's ability to reach and penalize those who choose to submit false claims, payment requests, or hide reimbursements to the Government has increased to higher levels and has allowed the Government, just in the past two years, to recover "...at least \$3 billion through FCA prosecutions and settlements..." (*Id*) State Governments have begun to also impose FCA penalties for false claims under their own statutes, some of which now include provisions for tax fraud. (*Id*)

CONCLUSION

The professional consultants at Excell Consulting International, Inc. can help you gain a better understanding of the FCA and show you how to avoid pitfalls before they occur, long before you reach the point of no return. With that empowerment via partnership, you can expect that, with a specialized review of your particular situation, Excell Consulting will guide you through possible FCA claims, should they arise.

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Author’s note: The information contained in this article is for general educational 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. – *John G. Balch, CEO CPCM*

FALSE CLAIMS ACT UPDATE

Avoiding Pitfalls through Knowledge of the Law – And Your Business

INTRODUCTION

In 2013, the Federal Government secured \$3.8 billion in settlements and judgments from civil cases involving fraud against the Government, under the False Claims Act (FCA). An estimated \$887 million of that amount is attributable to the Defense/Procurement industry. Those numbers have undoubtedly risen in 2014, although the statistics are still pending, and will likely rise in 2015.

This post will recap the fundamentals of the FCA, discuss a recent example of a successful claim, and cite some factors that indicate an uptick in Government enforcement and prosecution of false claims.

THE FUNDAMENTALS

The False Claims Act is federal law that imposes liability on persons and companies who defraud governmental programs. It is the federal Government's primary tool in combatting fraud against the Government. A more in depth discussion on the FCA can be found [here](#) (pdf).

The FCA provides that any person who:

- (1) *knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;*
- (2) *knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;*
- (3) *conspires to defraud the Government by getting a false or fraudulent claim paid or approved by the Government...; or*
- (7) *knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus three times the amount of damages which the Government sustains because of the act of that person.” 31 U.S.C. § 3729(a).*

The increasing majority of false claims brought by the U.S. Government against contractors are Qui Tam, or “whistleblower” actions, as discussed in a [previous post](#).

Finally, the reach of the FCA has been expanded, and some recent changes to the FCA have impacted the procurement sector, as previously discussed [here](#).

A RECENT EXAMPLE OF A FALSE CLAIM

A “false claim” can be made in a number of ways, but the courts generally agree that a claim against the Government that is “**legally false,**” or a false statement made in support of such a claim, qualifies as a false claim. Additionally, a number of courts have found that a claim can be “legally false” under the FCA based on a defendant’s “implied certification” of compliance with a statutory, regulatory, or contractual provision that is a precondition to government payment. See *United States ex rel. Steury v. Cardinal Health, Inc.*, 735 F.3d 202, 204 (5th Cir. 2013); see also *United States ex rel. Ketrosor v. Mayo Found*, 729 F.3d 825 (8th Cir. 2013).

In a **recent example**, a majority owner of a defense contracting company was [sentenced to over 3 years](#) in prison for defrauding the U.S. Government out of \$1.2 million. The owner was also fined \$7,500, and sentenced to 3 years supervised probation after his release from prison. This punishment was a result of a scheme to divert and steal about \$1.2 million in progress payments that the Government paid to his company under contracts to produce drive train parts for military helicopters. The owner also admitted that he made the false claims to the Government in order to continue receiving the progress payments, although he knew that his company did not earn them.

Additionally, the owner tried to cover up his fraud by **lying**, and **submitting false documents** to Government auditors, and directing his employees to do the same.

TRENDS: INCREASED ENFORCEMENT OF THE FCA

All of the factors that have caused FCA enforcement to increase in recent years – including financial incentives for whistle-blowers, attorneys, and the Government – aren't going away, and the increase is likely to continue.

A [key indicator](#) that investigation and enforcement will increase is President Obama’s 2015 budget, which **increases funding for fraud and compliance enforcement**. The budget shows a focus on fighting fraud, waste and abuse in government contracting by increasing the number of compliance and fraud enforcers at several agencies, including the Department of Labor (DOL), the Department of Defense (DOD), the Department of Health and Human Services (HHS), and the General Services Administration (GSA).

CONCLUSION

The professional consultants at Excell Consulting International, Inc. can help you gain a better understanding of the FCA and show you **how to avoid pitfalls** before they occur, and long before you reach the point of no return. With that empowerment via partnership, you can expect that, with a specialized review of your particular situation, Excell Consulting will guide you through potential FCA claims to eliminate the possibility of such an oversight or occurrence.

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Government Must Specifically Exclude EAJA Application In Settlement Agreement

The Equal Access to Justice Act (EAJA) gives qualified contractors the right to recover a portion of the legal expense of pursuing a contract claim against the Government. When the contractor is the prevailing party against the Government and the Government was not substantially justified in the actions that led to the claim or in the defense of its actions, the contractor is permitted by the statute to apply for compensation for the cost of prosecuting the claim.

In a contract with the Veteran's Administration for electrical renovations at a medical center, the work was completed, but a dispute arose about whether corrections were required for some of the work. The contractor maintained that the work met contract and electrical code requirements, and that it would file a claim for additional costs if it was required to perform the work the Government demanded. The Government then terminated the contract for default and demanded credit for a deductive change order for work it claimed was not done, and the contractor appealed those decisions to the Board of Contract Appeals.

The parties subsequently notified the Board that the dispute had been settled. The Government converted the default termination to one for the convenience of the Government and released the contractor from any claims, including procurement costs and deductive change orders. The contractor released the Government "from any and all claims whatsoever for loss or damages arising out the performance of [the] Contract ...including claims for change order work and reimbursement of contract retainage."

The contractor submitted an EAJA "Application for Fees and Expenses" to the Board, and the Government argued, among other points, that the Application was barred by the terms of the settlement agreement. The Government stated that the contractor agreed to release it from "all claims whatsoever" and that the use of the phrase "arising out of the performance of [the] Contract" did not change the liabilities of the parties.

Citing with approval a decision from the Armed Services Board of Contract Appeals, the Veteran's Administration Board held that an application under EAJA derives from a

statutory right independent from any rights granted by either the contract or the Contract Disputes Act. “EAJA applications do not constitute claims by a contractor ... relating to a contract.” “[A]lthough the parties may provide for an EAJA award in their Settlement Agreement, the Government has the burden of proving that the parties made such a provision or otherwise agreed to foreclose application for any EAJA award.” In this case, the Board held that the Government had failed to prove that the parties agreed during settlement discussions that an EAJA application would be precluded under the Settlement Agreement. *Danrenke Corp.*, 94-1 BCA 126,504.

The professional consultants at Excell Consulting International, Inc. can help you gain a better understanding of how the Equal Access to Justice Act works and help you understand what remedies may be available. When you partner with Excell Consulting, our consultants will conduct a specialized review of your particular situation and develop recommendations to guide you in making a business judgment towards potential recovery of funds

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

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IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING

INTRODUCTION

*This article is a supplement to the Differing Site Conditions newsletter provided by Excell because the Implied Duty of Good Faith and Fair Dealing has just been decided (in the same case) in a most favorable light by the United States Court of Appeals for the Federal Circuit dated **February 11, 2014**. The original case information, as well as other information regarding this subject, is included as a link for ease of reference below.*

The Implied Duty of Good Faith and Fair Dealing in reference to Government Contracts is considered to be an integral part of Government claims as well as procurement principles ([Duty](#)). As explained in Cibinic & Nash's *Formation of Government Contracts*:

"The duty is stated in two forms: (1) a duty not to act in a way that will hinder performance, and (2) a duty to cooperate by taking affirmative action."

If a contractor is pursuing a claim of breach by the Government on the basis of the Duty of Good Faith and Fair Dealing, it is required to provide "...clear and convincing evidence". *Id.* The Implied duties are outlined further below.

ALABAMA V. NORTH CAROLINA, 120 S. CT. 2295, 2312 (2010)

The basic guidelines contained in the U.C.C. regarding Good Faith state that "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement." (See Restatement (Second) of Contracts § 205 (1981) ("Restatement") as stated in *Alabama v. North Carolina*. A breach of contract by the Government, for example, includes a failure to fulfill a duty as "...imposed by a promise stated in the agreement." (See Restatement § 235) (See [Metcalf Construction Company v. US](#))

PURPOSE

The essential purpose underlying recognition of the Implied Duty of Good Faith and Fair Dealing is to ensure that neither party acts or fails to act in a manner that would cause one party to benefit more or less than the other. This protection extends to provide that the parties to the contract cannot delay or hamper the other party and the parties must agree to cooperate with one another. (See [First Nationwide Bank v. US](#), 431 F.3d 1342, 1350 (Fed. Cir. 2005))

METCALF CONSTRUCTION COMPANY, INC. V. UNITED STATES

This very important case decision includes the Implied Duty of Good Faith and Fair Dealing issue i.e. *Metcalf Construction Company v. United States*. (See [Metcalf](#)) Metcalf Construction asserted a breach of the Duty of Good Faith and Fair Dealing against the Government and proved that the Government attempted to invalidate its own contractual obligations with Metcalf Construction by reallocating "...the benefits [that] the other party expected to obtain from the transaction...", thereby allowing the Government to benefit from the contractual obligation more than Metcalf Construction. *Id.*

As part of its defense, the Government alleged that Metcalf Construction could not produce a particular “provision” that had been breached; the US Court of Appeals for the Federal Circuit pointed out that the claim is for **Implied** Duty of Good Faith and Fair Dealing and as such, does not “...require a violation of an “express” provision in the contract.” *Id.* The Court then referenced *Racine & Laramie, Ltd. v. California Dep’t of Parks and Recreation*, 11 Cal. App. 4th 1026, 1031-32, 14 Cal. Rptr. 2d 335, 339 (1992) (internal quotation marks omitted) and stated that:

*“...the covenant is implied as a **supplement** to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party’s rights to the benefits of the contract.”* (Bold lettering added for emphasis)

The parties to a contract can differ on the interpretation of the provisions in the contract as well as any issues that arise during the course of carrying out the work. This is why there is an Implied Duty, which is meant to provide an even “playing ground” for all parties involved. Each party is expected to act in a reasonable manner and not make any attempt to hinder or prevent the other party from performing its duties. With respect to *Metcalf Construction Company v. United States*, Metcalf construction filed an appeal which resulted in the US Court of Appeals for the Federal Circuit ruling dated February 11, 2014 **agreeing with Metcalf**.

CONCLUSION

Contractors should be aware of situations that can occur, such as the breach of Implied Duty of Good Faith and Fair Dealing, as outlined above. Knowing that one party cannot “hinder or interfere” with performance by the other party is an important component to the Implied Duty of Good Faith and Fair Dealing. Contractors need to educate themselves in order to ensure that they (or the other contractual party) are compliant with the Implied Duty of Good Faith and Fair Dealing as well as all of the terms and conditions included in Government contracts and any other rules or guidelines that are in place. This case ([Metcalf](#)) is absolutely excellent in that regard and should be mandatory reading for construction managers.

Thus, retaining the assistance of a professional consultant should be seriously considered to protect a contractor’s interests properly and thoroughly. The experts at Excell Consulting International, Inc. have experience with contract provisions; express and implied, and stand ready to assist and evaluate your company’s position and provide valuable and cost-effective guidance for your business.

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METCALF: A GAME-CHANGER FOR GOVERNMENT CONTRACTORS AND DESIGN-BUILD CONTRACTORS

Part I: Duty of Good Faith and Fair Dealing

INTRODUCTION

The U.S. Court of Appeals for the Federal Circuit (CAFC) recently reversed an opinion by the U.S. Court of Federal Claims (CFC) that is already being called the most important federal construction opinion of the last decade. In [*Metcalf Constr. Co. v. United States*](#), 742 F.3d 984 (*Fed.Cir.* 2014), the CAFC clarified two important issues that will strengthen contractors' positions in disputes with government contracting personnel. Each of these issues will be addressed in a two-part series. This Part I will discuss the Government's revived duty of good faith and fair dealing. Part II will discuss the case's impact on allocation of risk regarding differing site conditions in a design-build context.

THE GOVERNMENT'S DUTY

The Government's duty of good faith and fair dealing is alive and well. The CAFC recently revived this duty in *Metcalf*, and in doing so opened up the Government's potential liability for breach of contract when it fails to reasonably administer its construction contracts. Contractors must be aware of this duty - what it is and how to identify it - in order to protect their interests against unreasonable or arbitrary conduct by Government contracting personnel.

The Plaintiff in *Metcalf*, Metcalf Construction Company (Metcalf), entered into a contract with the U.S. Navy to design and build housing units on a Marine Corps base in Hawaii. Metcalf sought to recover a \$27 million cost overrun that it claimed was the result of maladministration by the Navy. Metcalf filed a lawsuit in the CFC, which found that the Navy acted unreasonably in the following ways: the Navy failed to promptly investigate a differing site claim; an overzealous Navy inspector acted in a retaliatory manner; the Navy used bullheaded tactics in forcing Metcalf to withdraw certain claims; and the Contracting Officer displayed a general lack of experience and ability.

Despite these findings, however, the CFC denied Metcalf's breach of contract claim. The CFC interpreted the standard set forth in [*Precision Pine & Timber, Inc. v. United States*](#), 596 F.3d 817 (*Fed.Cir.* 2010) to mean that the Government can only breach its duty of good faith and fair dealing when its actions 'specifically target' the contract to reappropriate any benefits guaranteed by it.

The CAFC reversed the CFC decision, stating that the lower court interpreted the standard too narrowly. The CAFC then clarified the standard for both parties' duty of good faith and fair dealing. The CAFC explained that the duty imposes obligations on both parties, including a duty to not interfere with the other party's performance, and "not to act so as to destroy the *reasonable expectations* of the other party (i.e., to cooperate) regarding the *fruits*

of the contract.” *Metcalf*, at 9. The duty of good faith and fair dealing is an implied duty, and is focused on honoring the reasonable expectations created by the express terms of the contract. The duty cannot require acts that are outside the scope of the contract, and breach of the duty does not require a violation of an express provision in the contract. Therefore, conduct by either party that is inconsistent with the contract’s *purpose* may breach the duty of good faith and fair dealing.

POTENTIAL EFFECTS

The *Metcalf* decision provides contractors the assurance that the Government will be held accountable for acting unreasonably in administering its contracts. This accountability should aid contractors both in considering potential claims and in assessing the risk of potential projects.

CONCLUSION

The court in *Metcalf* revived the duty of good faith and fair dealing, which many feared was dead. The duty requires the Government to act reasonably and not interfere when administering construction contracts. If they do not, they may be liable for breach of contract. The success of future claims for breach of contract will rely heavily on the facts surrounding the claim. Thus, it will be important for contractors to consult with an expert in determining whether certain facts may constitute breach.

Excell Consulting International, Inc. is available to assist contractors in the analysis of maladministration resulting from unreasonable or arbitrary Government conduct. Previously, contractors had no relief for such maladministration unless the contractor could prove bad faith, which required near “irrefragable proof” of malicious intent to injure the contractor. *Metcalf* has changed the game by relieving contractors from meeting this nearly impossible burden of proof. Under *Metcalf*, Government personnel are now subject to consequences for such maladministration, which was previously unattainable.

Perhaps the most significant impact of the *Metcalf* decision is the recognition that a breach of contract entitles a contractor to recovery of ALL costs incurred for violation of the implied duty of good faith and fair dealing. Excell’s experience in preparing comprehensive cost summaries recouping all damages for breach can provide contractors with the opportunity for total cost recovery. Give Excell a call!

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METCALF: A GAME-CHANGER FOR GOVERNMENT CONTRACTORS AND DESIGN-BUILD CONTRACTORS

Part II: Who Bears the Risk of Differing Site Conditions in a Design-Build Context?

INTRODUCTION

The U.S. Court of Appeals for the Federal Circuit (CAFC) recently reversed an opinion by the U.S. Court of Federal Claims (CFC) that is already being called the most important federal construction opinion of the last decade. In [Metcalf Constr. Co. v. United States](#), 742 F.3d 984 (Fed.Cir. 2014), the CAFC clarified two important issues that will strengthen contractors' positions in disputes with government contracting personnel. [Part I](#) of this 2-part series discussed the Government's revived duty of good faith and fair dealing. This Part II will discuss the case's clarification on who bears the risk of differing site conditions in a design-build context.

THE SPEARIN DOCTRINE

It is well-settled that in a traditional owner/designer/contractor approach to construction, a project owner has an implied warranty that their plans and specifications will be adequate. This is commonly known as the [Spearin doctrine](#). See [U.S. v. Spearin](#), 248 U.S.132 (1918). In essence, *Spearin* doctrine holds that when the Government provides specifications directing how a contract is to be performed, the Government impliedly warrants that the contractor will be able to perform the contract satisfactorily if it follows the specifications. If the plans and specifications are for some reason inaccurate and the contractor builds according to the specifications, and the resulting construction is defective, the Government bears responsibility. The Government typically cannot avoid this responsibility by inserting a general disclaimer into the contract. See [Hollerbach v. United States](#), 233 U.S. 165 (1914).

SPEARIN IN A DESIGN-BUILD CONTEXT

Prior to *Metcalf*, some uncertainty surrounded the applicability of the *Spearin* doctrine when a contractor assumes both design and construction responsibilities on a contract. The CAFC in *Metcalf* helped to clarify the issue as applied to Differing Site Conditions. In *Metcalf*, the Government provided a soil report in its bid package with a disclaimer that it was "for preliminary information only." The design-build contract also required the contractor (Metcalf) to perform its own independent investigation of the soil conditions on site. Metcalf's subsequent investigation revealed that the soil conditions on site were materially different from those listed in the government's soil report.

Upon its finding, Metcalf timely reported the Differing Site Conditions to the government pursuant to [FAR 52.236-2](#), along with a recommendation that a redesign was needed to accommodate actual soil conditions. The Government

rejected the recommendations amid Metcalf's repeated protests, and insisted that Metcalf proceed according to the contract. After more than a year of failed negotiations, Metcalf ultimately decided that the risk of following the original plans was too great and moved forward with construction based on Metcalf's modified plans. When construction was complete, Metcalf submitted a claim for \$25 million in additional costs related to the redesign. The CO rejected this claim, and Metcalf appealed to the U.S. Court of Federal Claims (CFC).

The CFC ruled in favor of the Government, causing a lot of confusion and concern on the issue. The CFC held that because Metcalf was on notice that it would need to perform its own investigation of the site conditions, it was also on notice that it could not rely on the Government's "information only" report. This ruling effectively allowed the Government to shift the risk of differing site conditions onto the design-builder, Metcalf, by inserting a disclaimer into the contract.

Metcalf then appealed to the [CAFC, which overruled the lower court's decision](#). The CAFC held that the Government's disclaimer language in its soil report, that it was for "preliminary information only," merely signaled that the information might change, and [did not shift the risk](#) to Metcalf if the preliminary soil report turned out to be inaccurate. The CAFC further explained that a contractor's duty to inspect site conditions "does not negate the changed conditions clause," making contractors responsible only to discover changed soil conditions within the limits of an inspection that is appropriate to the time available.

For contractors, and especially for design-builders, this language is important. It means that the Government cannot insert broad disclaimers into bid documents in order to shift the risk of unforeseen site conditions or incorrect Government-provided information onto the contractor. The *Spearin* doctrine forbids these types of disclaimers in traditional construction situations where the Government provides the contractor with the design. [The Metcalf decision clarified that the Spearin doctrine applies to design-build contracts as well.](#) Therefore, the Government cannot disclaim its way out of its implied warranties under *Spearin*, and therefore cannot shift to the design-builder the risk of [unforeseen site conditions or incorrect Government-furnished information, including plans, reports, or specifications, from which the design-builder will prepare its design documents.](#)

The *Metcalf* decision relieves a design-build contractor from going through the analysis of whether the specifications are design specs, performance specs, or mixed specs. However, the contractor must still show good faith. Just as the Government is bound by the duty of good faith and fair dealing, the design-build contractor has a duty to exercise due diligence in the design process. The Government will undoubtedly argue that the *Metcalf* decision applies only to differing site conditions and not to other issues. The litmus test, as discussed in Part I, is whether the alleged breach involves a violation of the bargain struck in the contract.

CONCLUSION

Understanding the implications of *Metcalf* is key to a design-builder, especially when issues relating to differing site conditions arise. With the assurance that the *Spearin* doctrine applies to design-build, [contractors will not need to incur additional costs](#) for insuring against the risk of differing site conditions. Additionally, contractors will be able to better assess contract clauses and disclaiming language regarding site conditions. Excell can help you navigate these issues in any stage of your contracting process. Give Excell a call!

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PASS-THROUGH CLAIMS AND THE SEVERIN DOCTRINE

Solving the Problem of Subcontractor Claims

INTRODUCTION

In Federal Government contracting, Subcontractors and Prime Contractors often face the dilemma of how to handle **Subcontractor claims against the Prime** that result from **Government action or inaction**. The most common solution is a “**pass-through**” or “**sponsored**” claim, which allows the Prime to assert a claim against the Government on behalf of the Sub. Because the *Severin Doctrine* places some restrictions on these types of claims, contractors commonly use Liquidating Agreements to avoid such restrictions and properly assert their claims.

THE PROBLEM

The scenario often arises where a Subcontractor’s claims against the Prime Contractor arise out of the actions of the Government (i.e., delays, changes, etc.). The Subcontractor in that situation can rarely assert a claim directly against the Government,¹ because there is **no privity of contract** between the two parties — that is to say, no contractual relationship exists between the Sub and the Government.

In that case, the Sub may then look to the Prime for recovery under the terms of the subcontract. Often, however, the Sub does not want to litigate with the Prime for any number of reasons: the Sub recognizes that the Prime was not at fault, the Prime is on shaky financial ground and may not be able to pay on the claim, or bringing this type of claim may damage a working relationship with the Prime.

THE SOLUTION

The issue then becomes whether the Prime Contractor can assert a claim against the Government on behalf of its Sub. The solution is what is referred to as a “pass-through” or “sponsored” claim. In this type of claim, the Sub presents its claim to the Prime, and asks that it be passed-through or sponsored by the Prime, to the Government. Therefore, the Prime asserts the claims

¹ See Nagle and DeMella, *A Primer on Prime Contractor-Subcontractor Disputes Under Federal Contracts*, The Procurement Lawyer, Winter 2011 at 13 (illustrating the difficulty in establishing privity of contract with Government as owner).

to the Government **on behalf of the Sub**. This is legally possible because the Prime is in privity of contract with both the Sub and the Government.

One benefit of a pass-through claim is that, instead of pursuing two separate claims — one between the Sub and Prime, and another between the Prime and the Government — pass-through claims allow the Prime to **pursue the Sub’s claims directly against the Government** in one cause of action (including an REA or other administrative claim). Under typical “pass-through” claims the Prime remains liable to the Sub, but only to the extent that the Prime receives payment from the Government.

SEVERIN DOCTRINE

One hurdle to overcome in pursuing “pass-through” or “sponsored” claims is what is known as the **Severin Doctrine**.² Under this doctrine, pass-through claims are allowable only if the Prime is liable to the Sub and can charge the cost of the Sub’s claims to the Government, or can make a claim against the Government based on the Sub’s actual or anticipated recovery.³ Therefore, a Sub’s claims may be passed through to the Government if the Prime has already reimbursed the Sub for the Sub’s damages on the contract, or if the Prime **remains liable** to the Sub on the claim (i.e., the Sub has not released Prime’s liability).

Since the inception of the *Severin Doctrine*, the courts have narrowed the scope of its limitations. In fact, sponsorship of claims will currently be allowed unless the Prime Contractor has absolutely no liability on the claims. Therefore, even a conditional liability will not invoke *Severin’s* limitations.⁴

LIQUIDATING AGREEMENTS

The best, most straightforward method to avoid the *Severin Doctrine* limitations and establish a right to bring a pass-through claim is by entering into a **Liquidating Agreement** (a/k/a Liquidation Agreement, or Pass-through Agreement). Liquidating Agreements recognize the existing liability of the Prime to the Sub and outline how that liability will be satisfied.

These agreements do not settle the issues of damages or liability between the two, but rather set forth what claims will be brought in the Prime’s name, what damages are sought, and how any damages that are collected from the Government will be disbursed. A Liquidating Agreement

² See *Severin v. United States*, 99 Ct. Cl. 435 (1943), *cert. denied*, 322 U.S. 733 (1944).

³ Nagle and DeMella, *A Primer on Prime Contractor-Subcontractor Disputes Under Federal Contracts*, The Procurement Lawyer, Winter 2011 at 14.

⁴ See *M.A. Mortenson Co.*, ASBCA No. 53761, 06-1 BCA ¶ 33,180 at 164,439; See also *Castagna & Son, Inc.*, GSBCA No. 6906, 84-3 BCA ¶17612.

may be included as a clause in the subcontract, or may be entered into later during the life of the subcontract as a stand-alone agreement.

Both parties will want to incorporate some **standard clauses** in their Liquidating Agreement, including the establishment of the Prime's liability to the Sub, liquidation of all other claims on the subcontract, and a determination formulating the share of any recovery that will be passed on by the Prime to the Sub.

Additionally, the **Prime** may want to consider including clauses regarding indemnification, the Prime's control of claims assertion and litigation, and the authority to settle claims. The **Sub** may want to consider including clauses that ensure the Sub is present and has the final decision in all settlement negotiations, as well as favorable cost sharing formulas for attorneys' fees and witness fees.

CONCLUSION

In situations where Subcontractors have claims against the Prime Contractor that are attributable to the Government, Liquidating Agreements that enable pass-through claims are often a necessary tool in recovering costs. These agreements, if drafted carefully by a seasoned professional, can be beneficial to both Subcontractors and Prime Contractors. Please give the experts at Excell Consulting a call to discuss whether a Liquidating Agreement is the right tool for your (potential) claims.

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Prime Contractor Cannot Pass on Liquidated Damages to Subcontractor

The prime contractor for a highway construction project subcontracted the excavation, grading, and paving work, and retained the rock crushing and placement work for itself. Because the prime contract allowed only two miles of highway to be excavated and ungravelled at a time, the excavation and grading subcontractor's progress depended on a steady supply of crushed rock being placed.

While two detours were still under construction, the excavation contractor began work on the shoulders of the highway. The prime contractor promised that a large rock crusher would soon be on-site, and because of this promise, the subcontractor began excavation and grading on the highway itself. However the large crusher did not arrive and the state, displeased with the lack of gravel cover on the excavated portion of the highway, stopped the excavation and grading progress.

The subcontractor left the job and returned a month later when the prime contractor began producing crushed rock in sufficient quantities to continue the work. There was some additional excavation done late in the job, but even with these delays, the subcontractor completed excavation and grading ahead of schedule. The prime contractor completed its work well ahead of schedule as well; however, the paving subcontractor (not a party to this lawsuit) began work seven days after it could have and completed seven days after the project deadline.

The state withheld liquidated damages from the prime contractor, and the prime contractor withheld the same amount from the excavation subcontractor, blaming it for the delay because it had left the job, and because of the extra excavation done later in the project. The subcontractor appealed the withholding and eventually the Idaho Supreme Court ruled. The Court found that a general contractor cannot recover from a subcontractor for delay under a liquidated damages clause when the general contractor contributed to the delay by failing to perform a contractual duty, such as failing to provide adequate equipment. The Court held that although the failure to provide the large rock crusher was not a breach of the contract, it was a failure to provide adequate equipment and contributed to the overall delay of the job. The prime contractor was not allowed to assess liquidated damages. [Seubert Excavators, Inc. v. Eucon Corp](#) [1], 871 P.2d 826 (Ida. 1994)

NOTE: There was no explanation why the paving contractor was not charged with the delay, especially since both the prime contractor and the excavation subcontractor were ahead of schedule.

Excell can help a contractor to gain a better understanding of the intricacies of Liquidated Damages. When you partner with Excell Consulting, our consultants will conduct a specialized review of your particular situation and develop recommendations to guide you in making a business judgment. Please feel free to fill out the form below, return it to us and one of our consultants will contact you right away to discuss your particular situation.

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

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REA vs. CLAIM

DO YOU KNOW THE DIFFERENCE?

INTRODUCTION

Requests for Equitable Adjustment (REA) and Claims are similar by definition; however, the purposes for filing either a REA or a Claim are **quite different**. It is important for a contractor to know the differences in order to understand which may be used in any given situation. Some of the differences between a REA and a Claim include:

- Consultant fees, attorney fees, profit, and overhead are recoverable under a REA, whereas they are not recoverable under a Claim.
- A REA is considered collaboration between a Government Contracting Officer and a contractor attempting to resolve an issue and reach an amicable resolution; a Claim however, is a formal dispute which may lead to litigation.
- A REA must be **certified** if it is submitted to the Department of Defense, regardless of the dollar amount submitted. A Claim however, must be certified if the claim amount exceeds \$100,000 and must additionally include specific wording and a signature by an authorized company official.
- A REA does not require a Government Contracting Officer's **final decision** but, a Claim does require a Government Contractor's final decision as a jurisdictional requirement.
- A REA does not allow recovery of interest. A Claim does allow for recovery of interest, provided that a contractor properly submits a certified Claim, and interest begins accruing on the date of certification.
- A REA can be filed as soon as a modification to a contract arises and must be filed within a year of a modification. However, a Claim must be filed within 30 days of cancellation of a stop-work order, or within 90 days in other situations. A Claim based upon defective specifications is not time-barred because the Government had knowledge of the defective specifications.

This article will discuss only a few of those differences.

DEFINITION

As referenced in the Federal Register, FAR § 2.101 "Final Rule":

"Claim" means a written demand or written assertion by one of the contracting parties seeking as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. However, a written demand or written assertion by the contractor seeking the payment of money exceeding \$100,000 is not a Claim under the Contract Disputes Act of 1978 until certified as required by the Act. (See FAR § 2.101).

A **Request for Equitable Adjustment (REA)**, on the other hand, allows a contractor to recover costs associated with any suspensions of work or terminations for convenience or other constructive changes by the owner of a project. Use of a REA is guided by a number of FAR clauses such as FAR 52.236-2, FAR 52.42-14, FAR 52.243-1,

52.249-2, and 52.212-13. (Differing Site Conditions, “Suspension of Work”, Changes – Fixed Price, Termination for Convenience, and Stop Work Order, respectively).

DISTINCTION

The time frame allowed for filing of a Claim versus filing a REA is different. When a Claim is filed, it must be in writing and must be certified if the dollar amount of the Claim exceeds \$100,000 as directed by FAR § 33.207(c). A Claim must also be submitted to a Government Contracting Officer for a final decision. REAs however, do not require certification unless they are submitted to the Department of Defense and “...exceed the simplified acquisition threshold.” (See 10 U.S.C. 2410(a)). REAs also do not require a Contracting Officer’s final decision and are not limited by the same time constraints as Claims.

A Claim must be filed within 30 days upon returning to work, if it is related to a Stop Work Order, or 90 days if related to other contract changes. Conversely, a REA should be filed as soon as there is a need to request additional time or money due to an unforeseeable Government change or delay. A REA must be filed within a year of a change to a contract i.e. an addition, deletion, substitution or change to the work required. http://www.acq.osd.mil/dpap/cpf/docs/contract_pricing_finance_guide/vol4_ch6.pdf

REAs require that costs be “allowable, allocable, and reasonable” and can include overhead, profit, and consulting fees/preparation costs. Claims do not allow for any consulting fees or preparation costs and do not allow any legal expenses to be recovered. (See FAR 31.205-47(f)(1)).

CONCLUSION

It is important to note that a REA can be converted into a Claim, but a Claim cannot be converted into a REA. The reason for this is that a REA is considered a recovery remedy for increased contract performance costs associated with unforeseen Government modifications to the original contract. A Claim is considered a “routine request for payment” and usually involves a voucher or invoice. An REA is “...anything but a ‘routine request for payment.’” (See *Reflectone, Inc. v. Dalton*, 60 F.2d 1572, 1577 (Fed. Cir. 1995)).

A contractor may, at any given point, decide to file either a Claim or a REA depending upon its situation and contractual requirements. Assistance by a consultant should be obtained to protect a contractor’s interests properly and thoroughly. The experts at Excell Consulting International, Inc. can assist and evaluate your company’s position and provide valuable and cost-effective protection for your business. With empowerment through partnership, **you can rest assured that you will be guided through the Claim and REA processes.**

In the end, you will be glad you made the call.

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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

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STOP-WORK ORDERS – HOW WILL YOU MANAGE THE RETURN TO WORK?

RETURNING TO WORK AND RECOVERING YOUR COSTS

INTRODUCTION

In the event that a stop-work order is lifted by the Government, the contractor is required to return to work immediately, and has only a 30-day period “after the end of the period of work stoppage” to provide the contracting officer with any cost increases incurred due to the stopped work. FAR 52.242-15 (b)(2). If the contractor fails to submit a claim within the **30-day period** following the return to work, the **contractor relinquishes its right to file a claim stemming from the stop-work period.**

By knowing what to expect and taking proactive steps, contractors can efficiently manage work stoppages subsequent return to work, and **recover their related cost and time increases.**

STOP WORK ORDERS

Under FAR 52.242-15, a stop-work order is a means by which a contracting officer (“CO”) may direct a contractor, in writing, to stop all or part of the work on a project for 90 days. If a stop-work order needs to be extended beyond the initial 90 days, both parties must agree to such an extension in writing (the CO may also expressly reduce this time period to less than 90 days). Otherwise, the order is **automatically lifted** when the 90 days expires.

The “Stop-Work Order” clause applies to Government contracts including fixed-price or cost-reimbursement contracts, supplies contracts, and services contracts and must be given to a contractor in writing. Reasons for issuing a stop-work order may include changes in programs, unavailability of funding, or engineering breakthroughs. Notwithstanding the availability of this clause, the FAR encourages the parties to use a supplemental agreement instead of a stop-work order where possible. FAR 42.1303(b).

A stop work order should include: (1) a description of the work to be suspended; (2) instructions concerning the contractor’s issuance of further orders for materials or services; (3) guidance to the contractor on action to be taken on any subcontracts; and (4) other suggestions to the contractor for minimizing costs. FAR 42.1303(c).

Upon receipt of a stop-work order, contractors are required to take steps to ensure that costs incurred during the work stoppage are kept to a minimum. Contractors should also begin accounting separately for those costs associated with the stopped work, so that they can be accurately tracked and easily identified when the contractor asserts its right to the corresponding adjustment of the contract.

Contractors should also be aware that they are required to immediately take action to ensure compliance with the requirements of a stop-work order. Some of those actions include:

- Making immediate plans to properly account for all costs that may be incurred during the stop-work period; these costs must be kept separate from other job account costs
- Ensuring that all subcontractors have been notified that a stop-work order has been issued
- Tracking the stop-work period to ensure time is properly tracked for deadlines
- Inquiring about a possible stop-work order cancellation or time extension

Failure to take these steps may cause a contractor to incur **unnecessary costs** and/or hinder its ability to recover its costs.

CRITICAL 30-DAY PERIOD

When the period of work stoppage ends, the CO shall make an equitable adjustment to the contract price IF the work stoppage caused increased costs, AND the contractor “asserts its right” to the **adjustment** within 30 days of the end of the stop-work period. Although this 30-day time limit is strictly enforced, the contracting officer has the discretion to receive and act on a change order request any time before final payment. See FAR 52.242-15(b)(2).

In any event, the contractor should be prepared to submit and assert its right to equitable adjustment within the 30-day timeframe to avoid missing the opportunity to recover its costs.

An equitable adjustment provides recovery for time of performance, costs incurred, or both. A stop-work order is considered to be a **contract modification** and action must be taken so that the contractor is afforded a just and reasonable recovery. Some of these recoverable costs can include:

- Management costs
- Idle time and facilities
- Remobilization costs
- Additional staff/labor
- Unabsorbed overhead
- Costs associated with preparing the claim for equitable adjustment (i.e., consultant’s fees and administrative costs)

Because there are many cost items that a contractor can claim under an equitable adjustment, costs can accumulate quickly. Provisions for equitable adjustments in the case of stop-work orders are broadly construed because the contractor can be strongly impacted by the inability to work.

ADDITIONAL CONCERNS

Contractors can take proactive measures while navigating a directed work-stoppage to make a turbulent process go as smoothly as possible. The following are some suggestions:

Communicate with the contracting officer. Seek a meeting with the CO as soon as you learn of a work stoppage. Ask for direction, and **get it in writing!** Ask about the cause of the stoppage and the status of funding issues. Proactively conduct an analysis of how the stoppage will impact

your contract and operation, and communicate the same to the contracting officer. Because you know your operation better than anyone else, this at the very least can help the CO make the most informed decision possible as it relates to your operation. Keep in mind, however, that your operation and contract may not be the CO's first concern.

Contractors should also communicate the stoppage and its expected impacts to its employees in order to be in front of logistical and morale issues. Similarly, contractors should communicate with their subcontractors, suppliers, and other team members to mitigate costs resulting from the work stoppage. Alternatives should be explored in advance. Can employees be reassigned to other projects? If so, is it possible for the employees to return to the government contract work? Can the contractor reasonably anticipate that it will recover costs for reassignment?

Finally, contractors should **meticulously document** their work in order to increase the likelihood of recovering increased costs and time associated with the work stoppage.

CONCLUSION

Navigating the processes of a stop-work order can be complicated – especially when trying to recover additional costs and time that were incurred directly from the work stoppage. Contractors that are unsure of what to do during a stop-work period are left on “standby,” waiting to be told to resume work by a contracting officer. For example, an uninformed contractor may wait out the period stated in the stop-work order only to find that the Government plans to terminate the contract for convenience. The contractor would therefore incur unnecessary and avoidable costs as a result.

Contractors that attempt a resolution without some expert guidance may find the process very complex.

Assistance by a consultant should be explored to properly and thoroughly protect a contractor's interests in the event a contractor is issued a stop-work order. The experts at Excell Consulting International, Inc. can assist and evaluate your company's position and provide valuable and cost-effective protection for your business. With empowerment through partnership, **you can rest assured that you will be guided through the claim process.**

In the end, you will be glad you made the call.

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THE VA'S NIGHTMARE BREACH: PART I

“Material Breach” and Walking Away

INTRODUCTION

Much has been written about the now infamous Department of Veterans Affairs’ (VA) medical facility construction project in Aurora, Colorado, which is projected to have over **\$1 billion in cost overruns** (projected final cost of approximately \$1.7 billion). The storylines include Kiewit-Turner Joint Venture (KT) walking away from the project after an alleged “material breach” of the contract, and the litigation that ensued contains **valuable lessons regarding material breach** and stopping work, which will be discussed here.

This Part I of a two-part series will focus on what constitutes a “material” breach, highlighting the specific examples in the appeal of *Kiewit-Turner, a Joint Venture v. Dep’t of Veterans Affairs*, C.B.C.A. 3450 (Dec. 9, 2014). Part II will focus on the consequences of a material breach for both the non-breaching and breaching parties to the contract, focusing on the right to stop work on a project in light of a material breach.

WHAT IS A MATERIAL BREACH?

What is a “material breach” of contract, and what are some **common circumstances** under which material breach is found? Under contract law, a material non-compliance with the terms of the contract will be considered a material breach. A breach is considered “material” when it affects the **essence of the contract** or a matter of **vital importance**. Whether a failure to comply with the terms of a contract is material is generally a **mixed question of law and fact**: contract interpretation is a question of law, and what the parties did or did not do is a question of fact.

The courts have historically relied on the following considerations when determining whether a breach is material or not:

- a) The extent to which the injured party will be deprived of the benefit that he reasonably expected;
- b) The extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
- c) The extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- d) The likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
- e) The extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. (Restatement (Second) of Contracts § 241 (1981))

Accordingly, courts have found material breach for failure to construct the work in a workmanlike manner, failure to maintain bonding, failure to obtain and maintain liability insurance, the unjustified nonpayment of amounts due, or the presence of a cardinal contract change.

Conversely, some breaches, such as a GC's failure to make a relatively small progress payment, are not considered material. Again, the question of materiality depends heavily on the facts of a given case and contract interpretation and will likewise depend on various factors including the relative size of the breach and the breach's impact on the continued performance on the contract.

BRIEF FACTS OF THE *KIEWIT-TURNER* APPEAL

The VA awarded Kiewit-Turner (KT) a contract for pre-construction services for its medical center campus in Aurora, Colorado in 2010. The contract was an integrated design-and-construct type contract (which the VA had never used before). Despite this type of contract being designed to involve KT at an early stage, **the design of the medical center was well underway** when KT began its involvement. On the day of the award to KT, the VA set the project's funding limit, or Estimated Construction Cost at Award (ECCA) at \$582,840,000. The ECCA was based upon design drawings that were established without any input from KT and were only 50% complete.

Soon after award, the estimated cost of completion rose significantly, and KT informed the VA that the project could not be built for the ECCA amount. In fact, when the design drawings were 65% complete, KT estimated that construction costs would be \$76 million more than the ECCA amount. In light of KT's warnings, the VA asked KT to submit a firm target price proposal for construction on the project at a price that would not be more than \$603 million. KT submitted a proposal for less than that amount, **based on the condition that the VA would implement \$23 million worth of engineering design changes.**

After the VA refused to implement the engineering design changes, the parties entered into bilateral modification SA-007, which required that both parties make efforts to keep the price under \$604 million, and required the VA to ensure that its design team would produce a design that could be constructed for the ECCA amount of \$582,840,000.

After the 100% drawings were submitted (although still incomplete), KT estimated that the cost of construction would be \$200 million more than the ECCA amount. In spite of this estimate, the VA continued to refuse to implement any value engineering changes and ordered KT to proceed with construction.

After failing to come to an agreement, KT requested a decision from the Contracting Officer as to whether the VA breached the contract by failing to provide a design that could be built for the ECCA amount. The Contracting Officer denied the allegation and ordered KT to continue with the work. KT did continue to perform, **under protest** (which was well documented).

KT then appealed the Contracting Officer's Final Decision decision to the Civilian Board of Contract Appeals (Board), in *Kiewit-Turner, a Joint Venture v. Dep't of Veterans Affairs*, C.B.C.A. 3450 (Dec. 9, 2014). The Board found that, as of June 2014, KT had performed \$20 million worth of work for which it had not been paid. Based on testimony at the hearing, the Board found that the VA did not have any plans to redesign the project, had only \$630 million appropriated for construction, and did not have any plans to seek additional funding.

(For a more in-depth summary of the project's factual background, See *Living in a Material World: Kiewit-Turner, Material Breach, and Implications for Breaching and Nonbreaching Parties*, Burke and Dockery, *The Construction Lawyer*, Spring 2015.)

THE VA BREACHED ITS CONTRACT

In *Kiewit-Turner*, the Board made **three specific findings** regarding whether the VA materially breached the contract and the results of the alleged breach:

First, the Board found that the contract required the VA to provide an ECCA-compliant design, and that modification SA-007 required the VA to **provide a design that could be constructed for the ECCA amount.** The Board determined that modification SA-007 clearly required the VA to provide a design that could be constructed

for the ECCA amount of \$582,840,000. In making this finding, the Board decided that the ECCA amount was material (and “critical”), and rejected the VA’s argument that the ECCA was not material because KT’s firm target price proposal was subject to scope changes.

Second, the Board found that the VA materially breached the contract by **failing to provide a design that could be constructed for the ECCA amount**. Considering the five factors listed above, the Board reasoned that KT could not be adequately compensated for the lack of an appropriate design because the VA did not have sufficient funding to pay for the design, nor did it intend to ask for more. The Board also stated that the VA was not likely to cure its breach, citing the fact that the VA insisted that it would not redesign the project. The Board considered the VA’s behavior in this regard to be a violation of its duty of good faith and fair dealing (which is a breach of contract in and of itself).

Third, the Board found that the VA’s material breach **justified KT to stop work on the project**. This finding and its implications will be discussed more in depth in next week’s blog post.

The Board’s finding of material breach saved KT from spending more of its own money to continue construction on the project, and ultimately resulted in the two sides negotiating a settlement that allowed the parties to continue work on the project.

CONCLUSION

When a breach of contract is alleged, a contractor must determine **whether the breach is material and assess its options**. Determining one’s rights and options in light of a material breach is often a **technical analysis** involving contract interpretation and fact analysis. As is often the case, Kiewit-Turner was able to exercise its legal rights because of its detailed documentation of its requests, responses, and protests to the VA – all of which were timely. The help of an experienced consultant in these technical and time sensitive matters can be vital to ensuring that all of the administrative requirements are met, and that all of the options are available under the circumstances.

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THE VA'S NIGHTMARE BREACH: PART II

"Material Breach" and the Decision to Walk Away

INTRODUCTION

As discussed in last week's post, much has been written about the now infamous Department of Veterans Affairs' (VA) medical facility construction project in Aurora, Colorado, which is projected to have over **\$1 billion in cost overruns** (projected final cost of approximately \$1.7 billion). The storylines include Kiewit-Turner Joint Venture (KT) walking away from the project after an alleged "material breach" of the contract, and the litigation that ensued contains **valuable lessons regarding material breach** and stopping work, which will be discussed here.

***Note:** *[The U.S. Senate agreed Friday](#) to raise the project's spending cap by \$100 million, enough to continue work for three weeks. Further funding and assurances to continue the project are currently being sought.*

Part I of this two-part series focused on what constitutes a "material" breach, highlighting the specific examples in the appeal of *Kiewit-Turner, a Joint Venture v. Dep't of Veterans Affairs*, C.B.C.A. 3450 (Dec. 9, 2014). This **Part II** will focus on the fallout of a material breach, including the **right to stop work** and the options for both the breaching and non-breaching parties.

BRIEF FACTS OF THE KIEWIT-TURNER APPEAL

The VA awarded Kiewit-Turner (KT) a contract for pre-construction services for its medical center campus in Aurora, Colorado in 2010. The contract was an integrated design-and-construct type contract (which the VA had never used before). Despite this type of contract being designed to involve KT at an early stage, **the design of the medical center was well underway** when KT began its involvement. On the day of the award to KT, the VA set the project's funding limit, or Estimated Construction Cost at Award (ECCA) at \$582,840,000. The ECCA was based upon design drawings that were established without any input from KT and were only 50% complete.

Soon after award, the estimated cost of completion rose significantly, and KT informed the VA that the project could not be built for the ECCA amount. In fact, when the design drawings were 65% complete, KT estimated that construction costs would be \$76 million more than the ECCA amount. In light of KT's warnings, the VA asked KT to submit a firm target price proposal for construction on the project at a price that would not be more than \$603 million. KT submitted a proposal for less than that amount, **based on the condition that the VA would implement \$23 million worth of engineering design changes**.

After the VA refused to implement the engineering design changes, the parties entered into bilateral modification SA-007, which required that both parties make efforts to keep the price under \$604 million, and required the VA to ensure that its design team would produce a design that could be constructed for the ECCA amount of \$582,840,000.

After the 100% drawings were submitted (although still incomplete), KT estimated that the cost of construction would be \$200 million more than the ECCA amount. In spite of this estimate, the VA continued to refuse to implement any value engineering changes and ordered KT to proceed with construction.

After failing to come to an agreement, KT requested a decision from the Contracting Officer as to whether the VA breached the contract by failing to provide a design that could be built for the ECCA amount. The Contracting

Officer denied the allegation and ordered KT to continue with the work. KT did continue to perform, **under protest** (which was well documented).

KT then appealed the Contracting Officer's Final Decision to the Civilian Board of Contract Appeals (Board), in *Kiewit-Turner, a Joint Venture v. Dep't of Veterans Affairs*, C.B.C.A. 3450 (Dec. 9, 2014). The Board found that, as of June 2014, KT had performed \$20 million worth of work for which it had not been paid. Based on testimony at the hearing, the Board found that the VA did not have any plans to redesign the project, had only \$630 million appropriated for construction, and did not have any plans to seek additional funding.

(For a more in-depth summary of the project's factual background, See [Living in a Material World: Kiewit-Turner, Material Breach, and Implications for Breaching and Nonbreaching Parties](#), Burke and Dockery, *The Construction Lawyer*, Spring 2015.)

THE DECISION TO WALK AWAY

When a material breach occurs, **what options do the parties have** and what factors should be considered when making the decision to stop work or continue performance? The Federal Circuit summarized the nonbreaching party's options when facing a material breach:

- (1) Entirely discontinue performance under the contract,
- (2) Explicitly reserve its right to discontinue performance for the material breach (and continue to work), or
- (3) Waive the right and continue performance under the contract.

Precision Pine & Timber, Inc. v. United States, 62 Fed. Cl. 635 (2004)(emphasis added). The *Precision Pine* Court summarized these three options from the different approaches to the question as addressed by previous courts. That Court noted that the determination should be **based on the facts** surrounding the breach, as well as the relationship between the parties and whether the breaching party has relied on and been impacted by the nonbreaching party's continued performance on the contract.

Note that under factor (3) the waiver does not need to be a written waiver, but mere continued performance under the contract will constitute a waiver of the contractor's right to stop performance. Conversely, the explicit reservation of rights of factor (2) must be an express reservation.

Before a contractor makes the decision to stop work, it should be confident that the other party has indeed materially breached the contract. The consequences can be severe where a contractor stops work on the project, but it is later determined that no material breach existed. In that type of situation, the contractor could potentially face a default termination and other liabilities associated with possible reprocurement costs.

KIEWIT-TURNER HAD RIGHT TO "WALK AWAY"

In *Kiewit-Turner*, the Board made three specific findings: (1) that the contract required the VA to provide an ECCA-compliant design, (2) that the VA materially breached the contract by not doing so, and (3) that **KT was justified in stopping work** on the project in light of the VA's material breach.

After KT suspected that the VA materially breached the contract, **it chose to continue performance** on the contract while "explicitly reserv[ing] its right to discontinue performance for the material breach." Indeed, after the Contracting Officer issued his final decision and directed KT to proceed with the work, KT did so **"under protest,"** and stated multiple times thereafter that it was continuing to perform under documented protest. KT therefore argued that it was justified in stopping performance even though it had continued to perform, because it expressly reserved the right to do so.

Conversely, the VA argued that KT did not reserve its right to stop work, but merely reserved the right to “suspend work.” The VA also relied on case law which holds that the obligations of both parties remain intact if the nonbreaching party continues to perform on the contract, without protest, even though the government breached the contract. The VA argued in the alternative that even if KT did reserve its right to stop work, the stoppage would result in the VA experiencing an enormous forfeiture and damage to the public in the form of a delayed hospital, which would be an inequitable result. The VA relied on the aforementioned reasons in arguing that KT waived its right to stop work, specifically citing the fact that KT continued to work on the project.

The Board ultimately agreed with KT, noting that the decision to stop work or continue performance is that of the nonbreaching party (KT), and that only in exceptional circumstances will equity require the nonbreaching party to continue with the work. Additionally, the Board pointed out that the VA failed to address the phrase “without protest” in its discussion of the relevant case law and corresponding argument. Citing this oversight, the Board recited the facts showing that KT had sufficiently documented and given notice that it was continuing work on the project “under strenuous protest” (in an effort to avoid the risk of default termination, which effort included the proactive advancement of Value Engineering proposals intended to drive costs down), and therefore adequately reserved its right.

Finally, the Board rejected the VA’s argument that KT reserved only the right to “suspend” and not “stop” performance, noting that what KT requested initially was not the determining factor, but that KT had the right to stop performance as a matter of law. *Id.*

OPTIONS

When material breach is suspected or alleged, the nonbreaching party has three basic options, as listed above: to stop performance, to continue performance under express protest, or to continue performance and thereby waive its right to stop performance on the contract work. The decision to stop work or continue performance is a business decision for the nonbreaching contractor, and can be an effective leveraging tool of last resort when used properly. The decision to stop work, however, if used improperly, can result in disastrous consequences.

The decision to continue performance after a material breach should be done **under express protest** and be thoroughly documented. While the absence of a written protest may not directly result in a court or board finding waiver of the right to stop performance, it may be a determining factor.

The alleged breaching party should document and notify the nonbreaching party of any reliance it is making as a result of the nonbreaching party’s continued performance. This will strengthen that party’s position that it incurred costs from such reliance.

CONCLUSION

The *Kiewit-Turner* decision is a good illustration of the factors used to determine whether a material breach has occurred, and the options available to both parties when such allegations arise. Contractors should be cautious about stopping work when material breach is suspected, because the ensuing analysis relies heavily on the facts of each case and the associated risks can be severe.

Contractors should likewise be cautious when deciding to continue performance after a material breach, and take the necessary steps to ensure that it reserves its right to stop work and walk away from the project in the future.

At any rate, contractors facing a material breach situation should consult closely with counsel or a trusted consultant to carefully weigh its options and strategy going forward.

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