ContractManagement

Resolving Disputes on Public Contracts

Like the common cold, claims will probably always be with us. But the preventative and curative methods mentioned in this article may help to avoid or quickly resolve them.

By James F. Nagle

Contract disputes are a fact of life, especially when dealing with the large dollar values, tight schedules, and complicated projects that seem endemic in public contracts. The disputes may arise from the contractor's belief that it is entitled to more time or more money, or the public entity's belief that what has been completed or delivered is inexcusably late or does not meet the required quality.

Here are some general guidelines on point. Much of what follows is not unique or new; on the contrary, many of you have thought about these concepts and principles one time or another, but as Saul Bellow wrote, "It is sometimes necessary to repeat what we all know."[1]

Pre-Contract

The best way to resolve disputes is to avoid them altogether and the best time to do that is at the very beginning of the process. Both sides have the capability to do this. Governments have the ability to select the best contractor for a project, and contractors have the ability to take only the best jobs.

Advice to the Government

As all procurement officers know, the most airtight contract in the world will not do much good if you have a lousy or mediocre contractor. Selecting a good contractor means more than a simple evaluation of the past performance ratings of those who bid. It means increasing the pool of interested contractors as much and as prudently as possible.

▪ Drafting Your Solicitation

The only past performance ratings that are reviewed are those of contractors who have submitted bids or proposals. Therein lies the problem. Outstanding contractors may well have decided not to bid because something about the solicitation made them decide their time was better spent elsewhere.

Agencies should not make the contracts unnecessarily onerous. When confronted with the solicitation for an onerous contract, in which the risks are so one-sided, prudent contractors (and those are the only

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ones that the government should want to contract with) may: 1) refuse to bid because the risks are so one-sided, or 2) prudently bid the project to cover all the associated risks. As a result, their bid is either beyond the agency's budget or is much larger than those from the other less prudent bidders.

Much of public contracting is done on the "biggest fool" theory. The government can include all the risks of a space age technology and marry it with an incredibly tight delivery schedule and there will still be some "fool" contractor who will agree to do it at an unbelievably low price.

▪ Ignoring the Red Flags

If the government gets an unbelievably low price or a bid that is otherwise too good to be true, then the agency should ask about it during discussions or send a bid verification letter.[2] A low bid is a red flag. Ignoring warning signs does not result in a quality timely project. On the contrary, it results in headaches, shoddy work product, a replacement contractor, and years of litigation. Government agencies should draft fair contracts because onerous, one-sided contracts result in two things: 1) lousy contractors who will remain at the table, or 2) expensive bids.

Advice to the Contractor

Contractors should analyze the solicitation carefully. Remember, "education is what you get when you read the fine print; experience is what you get when you don't."[3]

▪ Negotiate Changes

If the solicitation and the model contract contained therein are too onerous, can you convince the agency to change the requirements? You may be able to lower the liquidated damages or reduce the warranty requirements, amend the technical specifications, etc. If you decide to request a change, avoid coming as a supplicant asking for relief; point out that you cannot submit a bid under the solicitation as written or that if you do submit a bid, it will be substantially higher because of these risks. This can be done informally via a question, such as a pre-proposal inquiry, or with the proposal via an alternate bid.

▪ Consider Alternate Bids

Very often solicitations specifically ask for alternate bids. For example, Federal Acquisition Regulation (FAR) 52.215-1, the standard provision for instructions to offerors in a negotiated procurement, has an Alternate II, which specifically allows offerors to submit proposals "that depart from stated requirements." The paragraph goes on, however, to mandate that such proposals "shall clearly identify why the acceptance of the proposal would be advantageous to the government" and that "the deviation and the comparative advantages to the government shall be clearly identified and explicitly defined." The alternate clause ends by "reserving to the government the right to amend the solicitation to allow all offerors an opportunity to submit revised proposals based on the revised requirements." If such alternate bids are unsuccessful or if you decided not to submit alternate bids, determine if you can share or shift the risks with teaming members, suppliers, or insurers.

▪ Avoid Mistakes

Remember Murphy's Law and check and re-check the bid. Be especially careful of being too optimistic or too hurried in your bid. For example, many contractors will put in a bid quickly, asserting that all of the items they deliver will comply with the Buy American Act. Then, during performance, they discover a particular part is only made in Germany or China and must go back to the government and ask for a change in the contract after award. Even if the contracting officer agrees, the contracting officer is required to obtain sufficient consideration for the change.[4]

Very often contracting officers will not agree to a change because they do not want a "bait and switch" (i.e., "you promised to give me something that complied with the Buy American Act, now you want to change your mind"). This is unfair to the public agency and to the competitors.

- **Run Away**

Finally, if you cannot avail yourself of any of these above suggestions, decide whether you should bid or not; or agree to perform only as a subcontractor. If you do bid, bid the job fairly. Successful contractors bid to do the work, not to get the contract. What that means is that these contractors figure how much it will cost to do the job; not perfectly, but how much it will realistically cost to the do the job and then bid a fair profit on it. And that is the bid they submit without further reduction for competitive reasons.

Agree to Disagree: Resolve the Dispute Process Up-front

On major contracts, it is especially prudent to incorporate a specific dispute resolution method into the contract. This is typically an intermediary step between the very informal dealings between the contractor and the owner's representative and the formalized litigation process. These matters can range from partnering to dispute review boards.[5]

The partnering process, where parties agree soon after award to enter into the project as partners, not as adversaries, and to meet regularly to try to settle matters before they fester into disputes, has met with mixed success. In the author's experience, if 1) the dollar amounts involved are minor, 2) there is fault on both sides, and 3) especially if there are comparable "potential claims" from both sides that can be traded off, then partnering will work well. However, if the dollar amounts are large and/or one side clearly thinks that the other side is exclusively or nearly so at fault and there is nothing close to comparable to trade off, then partnering will not suffice.

Other forms of alternative dispute resolution can include mediation or arbitration. Such clauses mandating their use are common on non-federal projects. While such clauses are rare at the federal level, the principles are still present in federal contracts.

During Performance

After award, problems inevitably develop. They will develop from the contractor's side (for example, difficult or incompetent suppliers or subcontractors, price escalations due to matters outside the contractor's control, but not severe enough to rise to the level of commercial impracticability) or on the government's side (change orders, differing site conditions, partial terminations for convenience). If such a problem develops, acknowledge it on a timely basis. Trying to hide the ball from the other side is normally foolhardy at best and criminal or bad faith at worst.

Advice to the Government

Acknowledge the problem, offer consideration and don't mindlessly try to be tough. As the government, very often you have a legal right to take a specific action; for example, terminate for default. Do not get trapped in what you can do, but decide whether that is truly in your best interests to do. A termination for default results in delayed completion of the contract and years of litigation to boot. It might be more practical to continue working with the contractor and resolving the problem through less onerous methods.

Advice to the Contractor

If you are the contractor, even if you believe you have a clear right to recover because of interference by the government, first decide whether suing your customer is a smart thing to do. Secondly, recognize that suing the sovereign, whether it's the United States or your local county's government, can often result in years of litigation during which your adversary will not have to pay separate fees to its attorneys, which it already has on staff. Reaching a prompt settlement now might mean more money for you in the grand scheme of things.

Making a Claim

If you do submit a claim, whichever side you are, remember these prerequisites. First, the government and contractor must meet the notice requirements in the contract. If the contract says you must give notice within 30 days, make sure you do it. While some jurisdictions will allow the consideration of claims when timely notice was not given, unless the recipient was harmed by the late notice,[6] other jurisdictions, such as Washington state, will adhere strictly to the contract and if the contractor is one day late, the claim may very well be denied on that basis.[7] Understand the distinction between notice of claim and submitting the claim. Giving the notice that a claim is coming is one requirement. Submitting the claim itself within any requisite time period is a separate but essential requirement.

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Second, recognize to whom notice must be given. Submit the claim to the appropriate person in the prescribed format. Some jurisdictions prescribe the exact individual, normally by title, but sometimes even by proper name. A claim submitted to someone other than the designated official is not yet a claim. If that undesignated person timely forwards the claim to the correct individual or informs the contractor of its mistake thereby allowing the contractor to timely file a claim with a designated official, then the problem is minimized. However, if you send the claim to the incorrect official and that person either does not forward the claim in time or inform the claimant in time so it can forward, then the claim may be jurisdictionally barred.

Third, consider the form of notice. Some public agencies do not particularize how the claim is to be submitted, while others will go into the minutest detail, even prescribing specific forms that must be submitted and must go through various persons administratively before any suit can be filed in court. Even if no form is specified, all claims will be in three parts:

- The narrative,
- The supporting data, and
- The cost or other quantification.

The narrative should be professional and compellingly persuasive. Do not get personal, insulting, or use derogatory comments. Even if you know the individual is diametrically opposed to your claim, recognize that you are really writing for a reviewing judge, arbitrator, or supervisor. State your claim logically, persuasively, and comprehensively. Do your research and show that the claim meets all of the required elements; that this is what the contract required you to do, this is what you were forced to do by a person with requisite contract authority, that you gave the necessary contract notice, that you mitigated your costs/damages as much as possible, and that at no time did you ever waive or release your ability to file this claim.

The supporting documentation should be equally prepared with caution. This documentation includes:

- The appropriate portions of the contract,
- Directives from the public official requiring different work,
- Notice to the appropriate party that this extra work has been designated,
- That the party considers this a claim, and
- Any other appropriate documentation which contemporaneously supports the basis of the claim.

Ensure these are contemporaneous documents. Nothing is worse than documents (memos, meeting minutes, etc.) that are created weeks, months, or sometimes years after the critical events. If contemporaneous documents are lacking, judges very often will view that as a fatal flaw.

Finally, always remember the "quantum portion"—documents which detail exactly how many dollars or how many days the claimant is entitled to. In this case, it is imperative for credibility reasons that the claimant point out what the reasonable baseline is—how long it reasonably would have taken the contractor to build this particular building or how much it reasonably would have cost. The contractor cannot simply assert its original schedule or bid price and expect to be paid the difference.

The actual cost method is always preferred. While the total cost method (simply the difference between the total cost expended and the contract price) is not illegal or prohibited, it is severely limited and can only be used upon showing that no other method is permitted under the circumstances. Also, the claimant must be able to support any component pricing methods. If the contractor is asserting unabsorbed overhead under the Eichleay Formula, it must show that it has met all the prerequisites for using that formula (e.g., the government action that prevented work or whether the contractor was forced into a standby situation and was not able to find replacement work in the interim). If the claimant is alleging disruption, it must show that a reasonable level of efficiency would have been earned during the time in question but for the disrupting event.

Resolving a Claim

When presented with a problem significant enough to justify a formal claim, try to resolve it as effectively and amicably as possible to preserve the relationship.

Claims are settled either fairly early in the process, before battle lines are drawn and feelings have been hurt, or on the courthouse steps, shortly before or even during the trial/hearing. By then, the parties are both bled dry and they decide to throw in the towel and make and accept offers that were unpalatable earlier.

Advice to the Government

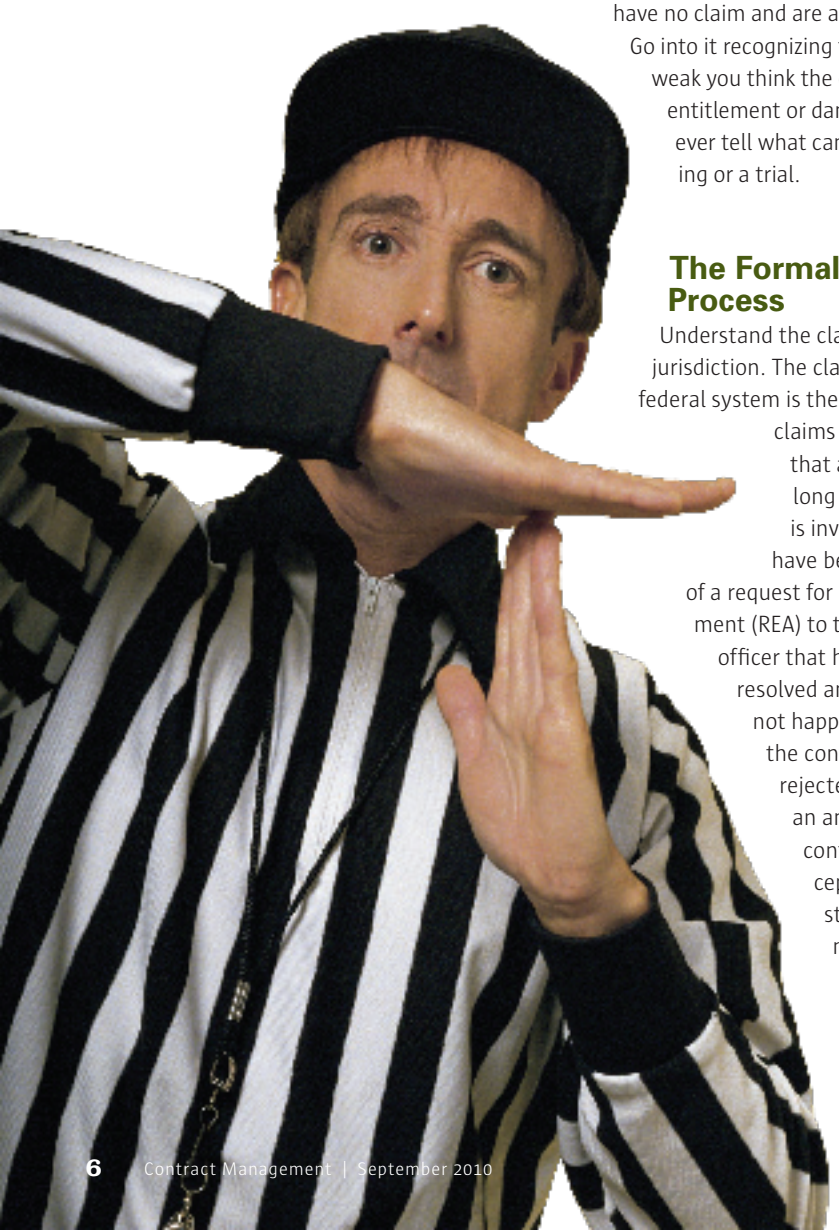
As the government, recognize that litigation is a drain on your resources, taking attorneys and contracting personnel away from their jobs, often at the worst possible time of the contracting year. Also recognize that the government has one major concern that the contractor does not, i.e., the precedential value of a decision. If a contractor loses a case in a published opinion, most contractors don't litigate often enough that they have to worry about having that bad precedent cited against them. The government, on the other hand, is always in court on contract matters. One bad precedent has a multiplier effect far beyond the value of any one case, so it is far better to try to resolve the matter through arbitration or mediation.

Advice for Contractors

For contractors it is obvious that the longer the dispute proceeds, the more money contractors will pay in attorney fees, the vast majority of which will not be reimbursable even if the contractors finally prevail. Moreover, very often contractors need the money immediately. Accepting 30 cents on the dollar now might be better than getting

85 cents on the dollar three years from now, after you have incurred numerous amounts of attorney fees and spent tremendous hours supporting the litigation.

Once you have submitted a claim, either a disputed matter or a pure request for an equitable adjustment, it is prudent to try and resolve it once and for all. For that matter, FAR 43.204(c) recommends that contracting officers include a release in modifications incorporating equitable adjustments into the contract. The suggested language does allow the contractor to list exceptions although contracting officers frequently omit the exceptions language since it is not mandatory.



Alternative Dispute Resolution

Using mediators or arbitrators well-versed in the subject matter and who are recognized as objective people can do wonders to resolve the matter quickly. In federal contracts, the Boards of Contract Appeals judges provide an invaluable service. They will appoint a settlement judge to help resolve the matter.[8] I have never heard anyone say "boy, I wish we had litigated that case rather than settle it." Very often parties settle because they recognize that this is the best solution under the circumstances. But if you go into a settlement conference, don't just appear. Go into the process not only in good faith but reasonably. Very often one side will go into a mediation in good faith, willing to accept the abject surrender of the other side, where the other side admits they have no claim and are a bunch of scoundrels. Go into it recognizing that no matter how weak you think the other side's proof on entitlement or damages is, no one can ever tell what can happen at a hearing or a trial.

The Formal Disputes Process

Understand the claims process in your jurisdiction. The claims process in the federal system is the most well-known claims process and the one that applies globally as long as a federal contract is involved. There may have been the submission of a request for equitable adjustment (REA) to the contracting officer that hopefully will be resolved amicably. If that has not happened, if, for example, the contracting officer has rejected the REA or offered an amount that the contractor feels is unacceptable, then the next stage is the more formal disputes process. The contractor submits a formal claim under the Contract Disputes Act, certified if necessary, more than $100,000. The contracting officer will then issue a decision on a timely basis, typically 60 days, but that can be extended for sufficient grounds, but only for a reasonable period. The phrase "reasonable" is purposely vague to allow the parties and any reviewing judge to determine reasonableness in light of facts of a particular case.

Once the contracting officer has rendered a decision, the contractor has 90 days to appeal to the Board of Contract Appeals or one year to go to the U.S. Court of Federal Claims. The choice is the contractor's. As a safety valve, if the contracting officer does not issue a timely response, the contractor can either deem it a denial and start the litigation or ask the court or board to direct the contracting officer to issue a timely decision. After that, the matter is within the control of the rules of the boards or the court, which is a topic beyond the scope of this article.

Participants in the claim process, whether at the federal, state, county, city, or lower municipality level, must be aware of the process to avoid waiving a claim since the disputes process is governed by statute or ordinance and is not waivable by the contracting officials. So if you file an appeal late, it cannot be adjudicated.

At the end of the contract, it is prudent for the parties to know that the contract can now be closed and final payment can be made or whether there are other matters that are still on the table. For that reason, people will typically require releases at the end of the contract. This is mandatory, for example, in federal cost reimbursement contracts[9] and federal fixed-price contracts for construction.[10] Once the release is signed, it is extraordinarily difficult to overcome a release.

Conclusion

Certainly, claims will continue to arise—like the common cold, they will probably always be with us. But the preventative and curative methods mentioned in this article may well help to avoid or quickly resolve them. **CM**

ENDNOTES

1. From *Mr. Sammler's Planet* (1970).
2. See *Federal Acquisition Regulation* (*FAR*) 14.407, 15.306.
3. Variously attributed to Pete Seeger or James E. Faust.
4. *See* FAR 25.205(c).
5. A classic example of this is one of the largest and infamous public works projects of the last three to five years: the Central Artery/Tunnel Project, otherwise known as the Big Dig. See Dettman, Harty, and Lewyn, "Resolving Mega Project Claims: Lessons from Boston's Big Dig," *The Construction Lawyer,* 30(2) (ABA Forum on the Construction Industry, Spring 2010): 5.
6. *See Gruman Aerospace Corp.*, ASBCA 46834, et al. 03-1 BCA ¶ 32,203 at 159, 185, *modified on other grounds on Recons.* 03-2 BCA ¶ 32,289.
7. See, e.g., *Michael C. Johnson Company v. City of Spokane.* Mike C. Johnson Const. v. Spokane County, 150 Wn.2d 375 (2003).
8. *See* "ASBCA Notice Regarding Alternative Methods of Dispute Resolution," attached to the *ASBCA Rules*.
9. FAR 52.216-7.
10. FAR 52.232-5.

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