

Claim Spotting on Government Contracts

One of the questions contractors often ask is: ***"How do I know if I have a claim against the government on my contract? There are so many regulations and rules that apply to my contract, how am I supposed to understand them all so that I can tell if the government is acting improperly?"***

The answer is that you do not need to know all the details of the rules and regulations that may apply to your contract to tell if you may have a claim against the government. The question you have to answer is: ***"Is the performance of the contract different than I planned when I bid the contract?"*** If it is, and the difference in performance is increasing the time or cost of performance, then you may have a claim against the government for the additional time or cost needed to perform the contract.

Whether you have a claim against the government, how strong it is, and what you may recover on the claim, depends upon the cause for the different performance. Generally, the government has to be the cause of the difference in performance. Therefore, in order for you to have a claim against the government, the first thing you have to establish is that government has, in some way, caused the different performance.

In some cases, such as unusually severe weather, flooding, fires, strikes, and other causes that are not the responsibility of the government or the contractor, you will have a claim for more time to perform the work but will not have a claim for any cost impacts from the delay. These causes are an excuse for nonperformance and the government cannot take deductions from your payment for nonperformance that are related to such causes.

There are two times when the government can cause performance to be different than you planned and lead to a claim. These are (1) during the bidding stage and (2) during performance.

During the Bidding Stage

The government has an obligation to tell you about information it has that impacts the costs or methods of performance. This is true if the government knows that you do not have the information or that it is unlikely that you will learn about the information while you are preparing your bid. The information could be about the site, such as a history of flooding, or it could be about the process of performance, such as problems that previous contractors had trying to manufacture a product to government specifications.

In construction contracts there is a Differing Site Conditions clause that allows you to recover under two circumstances; (1) there is an unusual subsurface condition that cannot be observed from a reasonable site inspection, or (2) conditions at the site differ from those indicated in the documents provided as part of the solicitation.

Subsurface conditions can be below the surface of the ground or water, but may also be below the surface of a structure, such as below a floor or concealed by a roof or wall. Conditions shown on drawings, described in specifications, or indicated or shown on technical exhibits or attachments, such as boring logs or site maps, are intended to help you prepare your bid. If actual conditions are different than those shown in the solicitation documents you may be entitled to additional time or money. Sometimes there is both a failure to disclose important information and a differing site condition at the same time. An example would be the failure to disclose that painted galvanized steel panels had been previously sandblasted.

If there is a differing site condition and the government does not pay you for the added cost or time caused by the condition, then you must submit a claim to recover for the impact of the condition.

The other issue that can arise during the bidding period relates to changes that occur between bidding and award of the contract. This can be a change to the site on a service or construction contract. For instance, if the government fails to maintain the site between the time bids are submitted and the award of the contract, and additional work is required because the maintenance was not done, the contractor has a claim for the additional costs or time needed to get the site back into the condition it was in when bids were submitted. Changes can also relate to internal budget problems or government policy. These may impact the estimated quantities of goods or services to be ordered under the contract.

Contract Performance

The most significant impact during performance is usually contract interpretation. That is, you interpret the contract as requiring a different type of performance than does the government. There is almost no limit to the types of issues that can arise because of a difference in contract interpretation. It can relate to the time of performance, the product to be delivered, the service to be provided, the method of construction, and almost any aspect of any contract. The issue arises because you believe that the reasonable interpretation of the requirement allows or requires one type of performance and the government directs you to perform in a different way based on a different interpretation of the contract documents.

There are basic rules that help determine whether your interpretation or the government's is reasonable. Although there are specific rules about interpreting contract terms, all start with a common sense approach to interpretation. This starts with looking at all parts of the contract to try to determine whether one of the interpretations considers all parts of the contract and the other only considers a part of the contract language by itself and ignores other provisions in the contract. The interpretation which considers all portions of the contract will normally be found to be correct.

This does not mean that because there is language in the contract that could apply to the work required that it does apply. Often government contracts incorporate technical exhibits that were developed for other contracts. Often there are specifications that tell you how to perform work that is not required for your contract. Computers make it easy to copy specifications and statements of work. These can be reproduced in contracts without care and produce conflicts with other language in the contract. There may be specifications for work that is not required by the line item pricing, normally section B of the contract, or not required by another schedule setting out the work to be performed. Just because there is a specification defining how to do the work does not mean that the work is required. This is one of the most common situations where the government wants to read part of the contract and ignore the rest.

One area where this happens is with inspection standards. The specifications and drawings contain the requirements for how the work will be performed. These are the performance standards that a contractor must meet. Often, another part of the contract contains inspection standards. This is almost always true on service contracts. This section defines how the government will inspect the work to determine if it is acceptable. This section does not define what work is required. Sometimes the inspection standards will direct inspectors to measure or consider work that is not required by other portions of the contract. The fact that work is mentioned in the inspection standards does not mean that the work is required. For example, an inspection standard that calls for the inspector to make sure all old floor wax is removed before new wax is applied, does not impose a requirement to strip and remove the old wax if that is not required by the specifications.

If there are no inspection standards provided in the contract, then reasonable inspection standards will be implied based on the purpose of the contract. A painting specification might be the same for a large warehouse and for a residence. It might state that there can be no brush marks, drips, sags, runs, holidays, etc. Although the performance standard is identical, the standard for determining whether performance is acceptable is not necessarily the same. For the warehouse the reasonable standard might be to determine if there are any brush marks, etc. when viewing the warehouse under normal lighting conditions at a distance of 20 feet from the walls. It would be unreasonable to inspect the walls from three feet. In the residence it might be reasonable to inspect the walls from a three foot distance to see if there are any defects. It could be unreasonable to apply the same inspection standard to painting the walls in a garage or attic as to a living room. It might be unreasonable to apply the same inspection standard to old housing as to new construction. The point is that the performance requirement may be worded the same but the inspection standard used to determine if performance is acceptable has to change in different situations so that it is reasonable. The costs associated with attempting to meet unreasonable inspection standards is recoverable.

The important thing to do when trying to determine if you have a possible claim is to investigate the causes for delay, additional costs, and why performance is different than you intended when you bid. This means you have to talk to your on site and field personnel. It is not safe to make assumptions about the causes for the changes. For example, on a grounds maintenance contract the home office believed that the workload estimates supplied by the government for mowing in a housing area were wrong because it was using much more manpower than was bid using the estimates. The government claimed the contractor just made a mistake in estimating the work and that his workforce was inefficient. When we talked to the on-site project manager we discovered that the government had installed thousands of feet of chain link fencing along sidewalks and enclosing yards. This fencing required the use of smaller mowers and hand trimming along all the new fences. Once the cause of the increase in man hours was identified, the government was willing to agree that this change to the site entitled the contractor to recover for its cost impact.

Conclusion

When a contract is costing more than estimated or taking longer to perform than estimated a contractor has to quickly investigate to determine the cause. If the cause is controlled by the contractor, such as poor quality of work or inexperienced labor, then the contractor has to remedy them at his own expense. When the cause is that performance is different than the contractor planned when bidding, it must consider the possibility that the cause is the government's

responsibility and that the government should pay for the cost impact. This requires discussing with on-site or production personnel how you intended to perform when you bid the contract and finding out from them how performance is different and why.

Look for changes during the bidding stage or before performance began. Did the government fail to give you crucial information? Did anything change between the time you bid and when you started performance? Is there a different site condition than you anticipated?

Do you and the government disagree on the terms of the contract and what work is required? Try to find out why they interpret the contract as they do. Is it reasonable? Did you fail to consider all parts of the contract? On the other hand, is the government trying to take some contract language out of context and impose an unreasonable performance requirement on you? Is the government's inspection reasonable? Is it following inspection standards required by the contract? Have there been changes in government policy or use of the facilities that have impacted your costs?

The key to claims identification and to claims presentation is identifying the specific causes for any changes to performance. General ideas about what the problems are do not allow you to correct the problems or identify who is responsible for them. General claims that the work is costing more than expected are almost always rejected by the government on the grounds that the contractor made a mistake in understanding the work required or in estimating the cost to perform the work. Presenting specific causes for the performance problems allows the government to understand what its role was in causing the problem. Knowledge of the causes for cost impacts and explaining the causes and impacts to the government is the key to identifying and resolving potential claims.
