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Government Delay Claims

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Because of the continuing political impasse over debt ceiling and sequestration issues, the prospect of significant budget cutbacks looms and government programs are again at risk. Many contractors, and nearly all services contractors, could experience performance disruptions this year, with consequent cash flow interruptions and the possibility that some invoices may not be processed and paid.

This does not mean, however, that the ultimate risk for these delays (however long) shifts to contractors. To the contrary, the Federal Acquisition Regulation provides several relief-giving clauses for delays of performance. Contractor recovery of the costs related to these delays will vary depending on the contract clause to which the contracting officer resorts. Although the titles of the clauses used are well-known to experienced government contractors, their specific provisions are less familiar. This article will explore the rights of contractors to reimbursement by examining the similarities, differences, and nuances of the various relief-granting clauses related to work delays.

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I. FAR Clauses

a. FAR 52.242-14, Suspension of Work (APR 1984). The Suspension of Work[1] clause applies only to fixed-price construction or architectural-engineering (A&E) contracts. Although its applicability is limited, under the clause the contracting officer may ''. . .suspend, delay, or interrupt all or any part of the work of [the] contract for the period of time that the Contracting Officer determines appropriate for the convenience of the government.''[2] The contractor may assert a claim for costs if the work suspension, delay or interruption is for an unreasonable period of time or longer than periods specified in the contract.[3] The clause also specifies strict timelines for filing claims for the work disruption.[4]

In general, construction contractors are accustomed to handling government work delays, and usually have project-specific performance and cost templates in place. Inasmuch as the cost relevant data are being collected on an ongoing basis, determining the impact of a delay is usually a straightforward matter of simply compiling those data.

The Boards of Contract Appeals (''BCAs'') have considerable experience in applying the Suspension of Work clause. As a typical example, in *Tidewater Contractors, Inc.*, CBCA 50, 07-1 BCA ¶ 33525, the civilian board explained: ''[t]he Suspension of Work clause contemplates equitable adjustments for unreasonable delays in the performance of the contract. *Triax-Pacific v. Stone*, 958 F.2d 351, 354 (Fed. Cir.1992). In order to recover under the Suspension of Work clause, a contractor must show that: (1) contract performance was

[1] - FAR 42.1305(a): ''The contracting officer shall insert the clause at 52.242-14, Suspension of Work, in solicitations and contacts when a fixed price construction or architect-engineer contract is contemplated.''

[2] - *Id.*

[3] - FAR 52.242-14(b).

[4] - FAR 52.242-14(c).

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delayed; (2) the government directly caused the delay; (3) the delay was for an unreasonable period of time; and (4) the delay injured the contractor in the form of additional expense or loss. *John A. Johnson & Sons, Inc. v. United States*, 180 Ct. Cl. 969, 986 (1976). . . . However, a contractor is only entitled to recover under the Suspension of Work clause when the government's actions are the *sole* proximate cause for the contractor's additional loss, and the contractor would not have been delayed for any other reason during that period. *Triax-Pacific v. Stone*, 958 F.2d at 354.''

Many non-A&E or non-construction contractors informally refer to all work stoppages as ''suspension of the work,'' implying that the clause may apply, when in fact the clause does not apply and another clause may have been used to discontinue work. For non-A&E or fixed-price construction contracts, contracting officers must resort to other clauses for work delays or stoppages.

b. FAR 52.242-15, Stop-Work Order (AUG 1989). The Stop-Work Order clause is used for ''solicitations and contracts for supplies, services, or research and development.''[5] For cost reimbursement contracts, the contracting officer must insert the Alternate clause.[6] By its terms, a contracting officer can direct that all or part of the work cease for any period of less than 90 days.[7] After the ninety day period, any further extension requires the agreement of the contractor.[8] Within the ninety (90) day period, the contracting officer must either: 1) cancel the stop-work order and resume the work; or 2) terminate the work covered by the order.[9] If the work is resumed, the contracting officer must make an equitable adjustment to the delivery schedule, price, or both.[10] In this regard, the contractor must assert its right to a contract adjustment within thirty (30) days of the work stoppage.[11] On the other hand, if the work is terminated for convenience, then the contracting officer *must allow* reasonable costs in the proposal resulting from the work stoppage.[12]

Additionally, the contractor is responsible under subparagraph (b) to resume the work as soon as the order is canceled.[13] While the contractor is required to ''minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage,'' the contractor must nonetheless maintain the capability to re-commence performance. Even while idle, there are costs associated with contractor down-times and the burden is on the contractor to substantiate its costs during the delay period.

As under the Suspension of Work clause, it is the contractor's burden to document its delay costs. Unabsorbed overhead, additional labor and material costs, and other expenses that cannot be mitigated, must be accounted for. Thus, even under fixed-price contracts, a contractor must carefully track its costs.

The BCAs have routinely provided relief under this clause even where no formal stop-work order was issued. For example, in *Dynamics Research Corp.*, ASBCA No. 53788, 04-2 BCA ¶ 32747, a contractor was entitled to recover suspension costs for payments related to data entry personnel during three periods when the Air Force's computers had crashed. The Air Force program manager had sent the employees home without using the Stop Work Order clause. Notwithstanding this oversight, the Board found that the government's actions constituted constructive stop-work orders within the meaning of the Stop-Work Order clause.

c. FAR 52.242-17, Government Delay of Work (APR 1984). The Government Delay of Work clause is routinely incorporated by reference in non-commercial fixed-price supply and service contracts, and for that reason has wide applicability for work stoppages.[14] The contracting officer inserts the Government Delay or Work clause ''when a fixed-price contract is contemplated for supplies other than commercial or modified-commercial items.''[15] The clause is optional for services contracts.[16]

A significant aspect of this clause is the 20-day notice requirement: ''A claim under this clause shall not be allowed unless for any costs incurred more than 20 days before the contractor shall have notified the contracting officer in writing of the act or failure to act involved . . .''[17] Accordingly, in the event of work stoppage, the contractor should immediately send in the written notice, and await events, in order to comply with the relatively short twenty (20) day requirement.

The clause may be activated by delays or interruptions caused by: 1) an act of the Contracting Officer in the administration of [the] contract that is not expressly or impliedly authorized by [the] contract, or (2) by a failure of the Contracting Officer to act within the time specified in [the] contract. . .''[18] Despite its wide applicability, these triggers, involving acts outside the scope of the contract or even *failures to act* on the part of the contracting officer, may incentivize the use of any other clause but this one in order to avoid internal blame or embarrassment for such acts or failures. In a case involving the applicability of the clause, the Labor BCA noted that FAR 52.242-17 is mandatory for a fixed-price contracts for supplies and optional for a fixed-price contracts for services, but has no application to construction contracts. *Wu and Associates, Inc.*, LBCA No. 2003-BCA-1, 07-2 BCA ¶ 33595.

d. FAR 52.243-1, Changes. One of the clauses to which contracting officers may resort (perhaps when seeking to avoid the self-incrimination of the Government Delay of Work clause) is the Changes clause.[19] Whether the Changes clause is in a fixed-price contract (FAR

[5] - FAR 42.1305(b)(1).

[6] - FAR 42.1305(b)(2). The Stop-Work Order clause may also apply to contracts for the leasing of motor vehicles. *See* FAR 52.301.

[7] - FAR 52.242-15(a): ''The Contracting Officer may, at any time, by written order to the Contractor, require the Contractor to stop all, or any part of the work called for by [the] contract for a period of ninety (90) days after the order delivered to the Contractor. . .''. Note that we are aware of recent instances in which contracting officers have unilaterally extended the 90-day period, without contractor assent.

[8] - *Id.*

[9] - *Id.* at (a)(1)-(2).

[10] - *Id.* at (b).

[11] - *Id.* at (b)(2).

[12] - *Id.* at (c).

[13] - *Id.* at (b).

[14] - FAR 52.242-17.

[15] - FAR 42.1305(c).

[16] - FAR 52.242-17.

[17] - *Id.* at (b).

[18] - *Id.* at (a).

[19] - FAR 52.243-1-5.

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52.243-1) or cost reimbursement contract (FAR 52.243-2), there are five alternate versions of the Changes clause depending on whether the contract is for supplies, services, A&E, transportation, or research and development (R&D). FAR 52.243-3 is used in labor hour or time-and-materials contracts, while FAR 52.243-4 applies to construction contracts. FAR 52.243-5, Changes and changed conditions, is reserved for construction contracts that do not exceed the simplified acquisition threshold. For whatever reason, Changes clauses are invoked each year for a wide variety of contract modifications, and are also used to cover constructive changes. For these reasons, claims under the Changes clause are heavily litigated.[20]

The Changes clause, taken as a whole, authorizes the contracting officer unilaterally to make changes within the scope of the contract, and allow relief in the form of an equitable adjustment to compensate for such changes.

Use of the Changes clauses triggers significantly different requirements on contactors that are not found in any of the other clauses discussed above. One of those requirements relates to change order accounting, a subject about which many contractors are unaware.[21] Change order accounting essentially requires contractors to track separately their additional costs related to the change:

> The contracting officer may require change order accounting whenever the estimated cost of a change or series of related changes exceeds $100,000. The contractor, for each change or series of related changes, shall maintain separate accounts, by job order or other suitable accounting procedure, of all incurred, segregable direct costs (less allocable credits) of work, both changed and not changed, allocable to the change. The contractor shall maintain such accounts until the parties agree to an equitable adjustment for the changes ordered by the contracting officer or the matter is conclusively disposed of in accordance with the Disputes clause.

[22]

Note that this clause establishes two new requirements. First, the contractor must reorganize its accounting system to accumulate separately the costs related to the changed work. Second, the contractor must rearrange its record-keeping practices to maintain the documents related to these accounts until the ''matter is conclusively disposed of.''

As a general rule, it is advisable for a contractor to identify and separately accumulate its costs related to changed work, regardless of the estimated costs, because (again) the contractor bears the burden of proving its costs, either to the contracting officer or on appeal under the Disputes clause. To the extent that a contractor commingles its change order costs with its contract costs, it increases the likelihood of cost duplication in its claim and unwisely increases its burden of proof. While it is always a good idea for the contractor to establish separate accounts to track costs for delays or suspensions of work, the Changes clause specifically provides for the contracting officer to direct that such separate accounts be established.

To recover under the Changes clause, a contractor will rely on its accounting system for the information necessary to achieve full recovery of its additional costs of performance. Hence, it is important that the accounting system be adequate to segregate and track the changed costs.

The Changes clause has been described as one of the most litigated clauses in government contracts.[23] Examples of the many diverse matters contested under the Changes clause include the following: *Logics. Inc.*, ASBCA No. 46914, ASBCA No. 49364, 97-2 BCA ¶ 29125 (where contract specifications were defective, contractor was entitled to an equitable adjustment under the Changes clause); *IBI Sec. Service, Inc. v. U.S.*, 19 Cl.Ct. 106 (1989) (government did not exercise strict control over wages so as to entitle contractor to a price adjustment under changes clause); *ThermoCor, Inc. v. U.S.*, 35 Fed.Cl. 480 (1996) (where the cost of performance greatly differs from the stated unit price due to changes ordered by the government, the Changes clause may override the variations in estimated quantity clause); *L.G. Lefler, Inc. v. U.S.*, 6 Cl.Ct. 514 (1984) (where there was no evidence that change order effected a decrease in a contractor's cost of performance so as to warrant claimed equitable adjustment, changes clause in contract, by itself, did not entitle Government to an equitable adjustment in contract price for contractor's use of foreign steel in project); *M.A. Mortenson Co. v. U.S.*, 843 F.2d 1360 (Fed. Cir. 1988) (contractor's receipt of notice to proceed 77 days after the assumed date of receipt as stated in the contract did not constitute a change in contract for purposes of changes clause, and did not entitle the contractor to an equitable adjustment for winter work, where the contractor unreasonably relied on the assumed date in extending its bid); *In re LA Ltd.*, ASBCA No. 52179, 01-1 BCA ¶ 31319 (government changed the contract work when it required appellant to purchase a computer, which entitled it to an equitable adjustment in the price of the contract under the Changes clause); *Arvol D. Hays Construction Co.*, ASBCA No. 25122, 84-3 BCA ¶ 17661 (where government failed immediately to furnish correct information to the contractor when it was needed to perform work in its planned construction sequence, which caused it to perform in a less efficient and more costly manner, the loss in efficiency entitled contractor to an equitable adjustment under the Changes clause).

II. Analysis Entitlement to compensation is usually a given in delay claims, except where there are delays occurring during the same period that are unrelated to the government's actions. Concurrent delay matters can be very complex and may require technical experts to sort

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[20] - *See, e.g.,* FAR 52.243-1, Changes — Fixed-Price (''The Contracting Officer may at any time, by written order, and without notice to sureties, if any, make changes within the general scope of [the] contract. . .'').

[21] - FAR 52.243-6. While contracting officers may include it in change orders where the costs are expected to exceed $100,000, it is wise policy to implement change order accounting whenever actual or constructive changes occur, regardless of the estimated amount.

[22] - FAR 52.243-6, Change order accounting. *See also* FAR 43.203 (''Contractors' accounting systems are seldom designed to segregate the costs of performing changed work. Therefore, before prospective offerors submit offers, the contracting officer should advise them of the possible need to revise their accounting procedures to comply with the cost segregation requirements of the Change Order Accounting clause at 52.243-6.'').

[23] - ''Government Contracts Under the Federal Acquisition Regulation,'' § 43.11 (3d ed.).

out who should be held responsible for what delay period(s).

While all of the above clauses have broadly similar provisions, there are also significant differences. For example, profit is not allowed for the costs of a delay under the Suspension of Work clause. As briefly mentioned above, the written notice requirements are different as well, i.e., 30 days for Stop-Work Order and Change Order delays, but 20 days for delays under the Suspension of Work and Government Delay of Work clauses. Finally, the impact of the delay is also very significant. In some contracts, the length of the delay is merely added to the end of the period for performance. However, this is not always done. There are occasions when the original due date must still be met, regardless of the delay. In these cases, the contractor suffers a delay followed by a constructive acceleration of performance, which can result in added costs of performance.

Many non-accountants assume that the term ''fixed costs'' refers to costs that are uniform from one period to the next. This is incorrect; actually, most fixed costs are just similar in amount from one accounting period to the next. While there are some fixed costs that are exactly the same in each period, such as lease payments or depreciation expense, most fixed costs fluctuate within a narrow range. Regardless of the amount, though, accountants consider fixed costs to be those that are unaffected by variations in work activity. Variable costs, on the other hand, rise and fall in a manner that is directly commensurate with the volume of work being done, although the relationship between variable costs and work output may not be mathematically precise. However, there are normally comparable trends, i.e., when the workload increases, the variable costs increase, and when the workload decreases, the variable costs decrease as well.

Fixed and variable costs in indirect cost pools (such as overhead and G&A) may be affected when the time allowed for completing the work changes, as well as when the costs of performance change. Mathematically speaking, fixed costs operate as a function of time, while variable costs are a function of work activity. In plain language, this means that fixed costs increase when the contract schedule or period of performance increases, and variable costs increase when the intensity of the contractor's performance increases. Stated differently, a change only in the period of performance affects the fixed costs but not the variable costs, while a change only in the level of work output affects the variable costs but not the fixed costs.

The classification of expenses as fixed or variable is important in understanding a company's operations from a financial perspective. Fixed expenses do not normally require much attention unless they are disproportionately large, such as when office rent is too high. Instead, astute financial managers usually focus their attention on the variable costs because they tend to be the most volatile. Such costs can quickly exceed budgeted limits, and thus threaten profitability. Of course, a company cannot perform too many contracts at a loss before its very existence is endangered. Interestingly enough, there are no FAR or FAR Supplement clauses on the categorization of expenses as fixed or variable. Instead, costs are defined factually, i.e., a cost is fixed or variable depending on whether it responds to changes in the performance period or work activity.

III. Conclusion Contractors are well advised to be prepared for the coming fiscal storms. Indeed, most government contractors have long been actively engaged in cost-cutting initiatives as a means of building their cash reserves. However, as discussed above, more action will be needed. Specifically, a contractor must have an accounting system that can track and segregate suspension, delay or change costs, and the contractor's legal, accounting, and contract administration staffs must be vigilant in documenting all performance- and cost-related impacts of government directives. Depending on the nature and complexity of the work, as well as the length of the delay, the pertinent documents must be assembled into a detailed, coherent request for an equitable adjustment (REA). This process should be accomplished with the understanding that the contractor's submission is likely to be unsympathetically audited. Thereafter, the contractor's submission and the government audit report will serve as the basis for bilateral negotiations.

To the extent that a REA is unsuccessful, either in whole or in part, contractors need to be fully prepared to pursue recovery through the claims process. At a minimum, contractors should assess their contracts for the types of clauses that provide the government the right to suspend, delay, interrupt or modify work described in the contract. For less sophisticated contractors, an immediate assessment of the firm's accounting system is essential to ensure that change or delay costs can be properly identified and substantiated.

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