

Dispute Resolution Tips

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Claim Recognition



- There are two basic approaches to recognizing claims: the loss approach and the event-oriented approach.

The Loss Approach



- The potential claim is discovered, for example, as a result of reviewing monthly or quarterly financial numbers and discovering they are much higher than projected or expected.
- This approach is problematic for several reasons:
 - It is after-the-fact.
 - The contractor has already spent the money.
 - Critical personnel may have left.
 - Records may not be available.
 - Contemporaneous photographs can't be taken.
 - It increases the risk of filing an untimely claim.

The Event-oriented Approach



- You start by educating your personnel about the contract—contract type, SOW, schedules, worrisome clauses, possible personnel issues, *etc.*
- This enables your personnel to recognize a claim as it arises, allowing you to put the C.O. on notice in writing.
- This approach is cost-effective, reduces or eliminates the possibility of filing an untimely claim, minimizes the spending of your own money, and generally results in the highest cost recovery if a claim should ensue.

Start with the Facts



- Perhaps the most important aspect of any claim is the Statement of Facts.
- You must start the process by gathering all the facts, including documents from the proposal stage, all contract documents, and contract correspondence.
- After reviewing all of the documentation, you must interview critical personnel, not just to get their story but to help you determine if they will be good witnesses.

Start with the Facts



- As you interview your personnel, always remember to ask them what the other side would say when presented with their story—the answers can be fascinating.
- Using all this information, you should prepare your Statement of Facts, perhaps the most important document in the disputes process.
- The Statement of Facts should be accurate, complete, and devoid of any inflammatory language or self-serving language. (*e.g.*, “The dishonest agency engineer denied our good-faith claim.”)

Start with the Facts



- Remember, you are trying to persuade the C.O. and the agency to pay you more money or add time to your contract, so the tone of your submission is critical.
- While the Statement of Facts is being prepared, someone knowledgeable needs to be working on the numbers—at some point they will have to marry up with the facts.

Legal and Cost Review



- Once you have prepared an adequate Statement of Facts, ask competent counsel to review it.
- Let them tell you whether they think you have a valid claim or not and what other possible claims might exist.
- As for your costs, have them reviewed by a knowledgeable accountant or auditor—one who is very familiar with FAR Part 31.

Deciding to File a Claim



- This is a business decision—not your lawyer’s and not your accountant’s.
- In deciding to file, you must weigh several factors, including the amount at stake, the consequences of not filing, your relationship with the agency, the expense of pursuing the claim to its conclusion, and its effect on other business.

Consider ADR



- Alternative Dispute Resolution (“ADR”) is growing in popularity for use in disputes between primes and the Government and disputes between primes and subs.
- It gets scant coverage in FAR 33.214, but it is well worth exploring because it allows the parties to control their schedule, limit their legal expenses, and resolve the dispute without destroying the relationship.
- You may request ADR whenever you have identified an “issue in controversy.”

Subcontracting



- In negotiating your subcontracts, keep in mind that the “Disputes” clause must address two separate types of disputes—those that are between the prime and the sub and those that are really between the sub and the Government.
- With respect to the prime-sub dispute, we recommend using ADR language in your subcontract’s Disputes clause—this can prevent a lot of nightmares down the road.

Thank you



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