You Just Got a Call on a Public Project: Top 10 (plus Bonus) Tips and Traps for the Uninitiated

Concerns and Scenarios When Representing a Client on a Government Construction Project

Ty Laurie, Laurie & Brennan, LLP | Chicago, IL
Paul Varela, Varela, Lee, Metz & Guarino, LLP | Tysons Corner, VA
Barbara Werther, Troutman Sanders, LLP | Washington, DC
About the Presenters

• Ty Laurie – Laurie & Brennan, LLP
• Paul Varela – Varela, Lee, Metz & Guarino, LLP
• Barbara Werther – Troutman Sanders, LLP

• “Christian Doctrine” (Christian & Assocs. v. United States, 312 F.2d 418 (Ct. Cl. 1963)).
  • Certain FAR clauses are automatically incorporated into the contract even if not physically included.
  • A clause will be inserted by operation of law if:
    1. Required by the FAR; and
    2. Expresses significant public procurement policy.

- Examples of clauses *automatically* incorporated:
  - Termination for Default
  - Termination for Convenience
  - Changes
  - Disputes
  - Buy American Act (“BAA”)
  - Equal Opportunity

- Examples of clauses *NOT* automatically incorporated:
  - Variation in Estimated Quantities
  - Cancellation Under Multiyear Contracts

- New Federal Circuit case applying the *Christian* Doctrine:
  - The Federal Circuit found that standard construction bonding requirements were part of K-Con’s contract even though they were not physically written in.
  - The Court held: “Under the *Christian* doctrine, a court may insert a clause into a government contract by operation of law.”
Termination for Convenience

• Standard AIA A-201 allows for profit on unexecuted work on a termination for convenience.

• Incorporation of termination for convenience clause per *Christian Doctrine*.

• Assume wrongful termination that converts termination to a “T for C.”

• What is that clause? ANSWER: Not AIA but rather FAR.

• Can K recover lost profit on unexecuted work? ANSWER: No!

• *Advanced Team Concepts, Inc. v. United States, 77 Fed. Cl. 111, 113 (2007).*
The Crazy State and Local Laws

• In addition to the *Christian* Doctrine requiring you to incorporate non-referenced provisions, be aware of the referenced laws and regulations.
• They may seem non-material but they aren't and could have substantial financial implications to your novice construction client.
• Many times the titles may be innocuous, sometimes not even used, but the regulation section will always be cited.
• Make sure you or your client does appropriate due diligence!
The Crazy State and Local Laws: Some Outlandish Examples

• Living Wage Regulation:
  • Security guards, parking attendants, day laborers, home and health care workers, cashiers, elevator operators, custodial workers, and clerical workers for any company over 25 employees must have a minimum wage rate.
  • Even if company less than 25 employees but it supplies more than 25 of the above types of workers, company must pay this rate.

• Weird Dispute Resolution Procedure:
  • K must make certified claim to Commissioner first.
  • If denied, then must make to Chief Procurement Officer.
  • Only after this second denial can K file legal action.
  • Action MUST be in the form of a writ of certiorari—high burden.
  • Forces settlement on Agency's terms.
The Crazy State and Local Laws: Some Outlandish Examples

• Parking Ticket Set Off:
  • City can deduct from otherwise valid amounts due for parking tickets and penalties.

• Northern Ireland Regulations:
  • MacBride Principles for Northern Ireland—anti-discrimination rules promoting fair employment practices.
  • Has nothing to do with the City of Chicago.
  • But, a Bidder in Chicago must certify it will comply for work in Northern Ireland!
  • If Bidder takes exception then it is penalized 8% on bid.
Challenging “Report Cards”: Performance Evaluations

• The Court of Federal Claims held that the right to challenge a past performance determination is guaranteed by the Contract Disputes Act because such a claim “arises under or relates to” the performance of the contract. *Todd Construction, L.P. v. United States*, 85 Fed. Cl. 34, 45-46 (Fed. Cl. 2008)

• The Court of Federal Claims lacks the authority to provide injunctive and equitable relief but it does have the authority to provide declaratory relief
Challenging “Report Cards”: Performance Evaluations


• The Boards of Contract Appeals may not direct the contracting officer to revise a performance evaluation in a particular way. *Appeal of Versar, Inc.*, ASBCA No. 56857, 10-1 BCA ¶ 34,437 (May 6, 2010).

• A contractor does not have the ability to seek monetary remedies or specific performance. *Appeal of Rig Masters, Inc.*, ASBCA No. 52891, 01-2 B.C.A (CCH) ¶ 31468 (June 13, 2001).
Protective Orders: Getting to the Good Stuff in a Bid Protest

• Most bid protests require access to proprietary and confidential information of other bidders.

• Two avenues for federal bid protests – neither will allow access without a Protective Order:
  1. Government Accountability Office (“GAO”)
     • Rigid filing deadline (10 days after basis of protest is known or should have been known).
     • Automatic stay – Competition in Contracting Act (“CICA”) stay.
  2. Court of Federal Claims (“COFC”)
     • No specific deadline for filing.
     • No automatic stay.
       • Must get TRO or preliminary injunction.
Protective Orders: Getting to the Good Stuff in a Bid Protest

• **GAO Bid Protest**
  
  • The GAO will issue a protective order permitting limited access to protected information.
    
    • The protester **must** ask for this.
  
  • **BUT** – GAO protective orders *strictly limit* persons able to review the protected information.
    
    • Allowed:
      
      • Outside counsel
      
      • Retained expert
    
    • Not allowed:
      
      • Your client
      
      • Your client's in-house counsel (probably)
  
  • Therefore, parties normally must be represented by outside counsel, if they desire to obtain confidential or proprietary information.
Protective Orders: Getting to the Good Stuff in a Bid Protest

• **COFC Bid Protest:**
  • Like the GAO, COFC will issue protective orders precluding all but outside counsel and retained experts from viewing the protected information.
  • Protected information obtained pursuant to a GAO protective order *may* be used in a subsequent COFC protest, *if*:
    1. Filed under seal;
    2. COFC is informed of the GAO protective order; and
    3. COFC is requested to issue its own protective order.
• **Protective Orders**

  • If the record in a protest contains “protected information,” for example, the company's proprietary or confidential data or the agency's source selection sensitive information, that information cannot be made public. 4 C.F.R §21.4(a).

  • Only attorneys or consultants retained by counsel appearing on behalf of the party and admitted under a protective order have the authority to view any protected information contained under the order. 4 C.F.R § 21.4(c).
The Minefield of GAO Bid Protests

• Any violation of the terms of the protective order may result in sanctions including “referral to appropriate bar associations or other disciplinary bodies, restricting the individual's practice before the GAO, prohibition from participation in the remainder of the protest, or dismissal of the protest.” 4 C.F.R § 21.4(d).
You're Not the Boss of Me!
(or, Not Everyone Can Bind the Government)

• With ordinary commercial contracts, an owner may be bound by its representative under the doctrine of “apparent authority.”

• This is not the case with Federal Government contracts.

• “Appearance of authority” to bind the Federal Government is irrelevant.
You're Not the Boss of Me!
(or, Not Everyone Can Bind the Government)

• The Federal Government may only be bound by a Contracting Officer ("CO"), appointed by the Agency, with specific and limited authority.
  • Only the CO has authority to enter into, administer, or terminate contracts.
  • The CO may only bind the Government to the extent of his or her delegated authority.
    • The CO's authority to bind the Government should be spelled out in the Standard Form 1402, Certificate of Appointment.
You're Not the Boss of Me!
(or, Not Everyone Can Bind the Government)

• Authority of the COR/COTR: It depends . . .
  • The CO may delegate (by written instrument) certain limited authority to a Contracting Officer's Representative (“COR”) or Contracting Officer's Technical Representative (“COTR”).
  • Typically, the CO may not delegate to the COR/COTR:
    a. Authority to change a term of the contract.
    b. Authority to approve final invoices under cost reimbursement.
    c. Authority to sign contracts or contract modifications.
You're Not the Boss of Me! (or, Not Everyone Can Bind the Government)

• Therefore, contractors must be wary of who issues an instruction or makes a promise on a Government Contract.
  • Particularly if it involves extra or changed work.
• If in doubt, ask the CO to confirm in writing that the COR/COTR has the required authority to issue the instruction or make the promise.
Antideficiency Act
Show Me The Money!

• Making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law. 31 U.S.C. § 1341(a)(1)(A).

• The government in any obligation to pay money before funds have been appropriated for that purpose, unless otherwise allowed by law. 31 U.S.C. § 1341(a)(1)(B).

• Accepting voluntary services for the United States, or employing personal services not authorized by law, except in cases of emergency involving the safety of human life or the protection of property. 31 U.S.C. § 1342.
Antideficiency Act
Show Me The Money!

• Contract does not “exist:” A contract cannot exist if it would necessitate a violation of the Antideficiency Act. In *Sam Gray Enterprises* a contractor sought damages for the Government's alleged breach of a lease agreement for housing. The Court of Federal Claims held there was no contract, primarily for lack of contracting authority. The Federal Circuit affirmed, explaining that “[n]o appropriation was shown to have been made that could cover five years' worth of rental housing on any basis, whether as a lease or a guarantee.” *Sam Gray Enters. v. United States*, 2000 WL 701733, 250 F.3d 755 (table ) (Fed. Cir. May 31, 2000) (unpublished), aff'd 43 Fed. Cl. 596 (1999).
Limitation of Costs ("LOC") FAR 52.232-20: This clause is used when the contract is fully funded which means the cost type contract is funded for the amount of the estimate of cost plus profit or fee that is specified in the contract.

Limitation of Funds ("LOF") FAR 52.232-22: Applicable when the government obligates an amount that is less than this estimate the contract is said to be incrementally funded. Limitation of Funds Clause specifically entitles a contractor to request a termination of the contract if additional funds are not provided and expressly provides for an adjustment of fee if the funds run out.
Notice Requirements

- Incurred Costs: A contractor is required to notify the CO when the costs incurred and to be incurred within a stated period (e.g., the next 30, 60 or 90 days) will exceed a certain percentage of the costs or funds (e.g., 75% to 85%): This notice is required on all cost type contracts and is not dependent on an overrun or underrun of costs or funds. The CO is not required to take any particular action and the notification does not constitute notice of an approaching overrun even if the facts in the notice would indicate such an overrun is inevitable.
Notice Requirements

• Sufficiency of Funds: The contractor is required to notify the CO at any time it has reason to believe the actual cost of completion will be greater than or substantially less than the earlier estimated cost. No timetable

• It is required any time during performance when the facts indicate the incurred costs will vary. Notification of overruns for even minor amounts is required (e.g., notice was required for a 1.5% overrun amount).
False Claims Act: “Overpayment” Concerns

- FCA applies to any request for money.
- A “reverse false claim” is making a materially false statement or concealing information in an attempt to avoid paying money to the Government.
  - e.g., Retaining an overpayment made by the Government.
False Claims Act: “Overpayment” Concerns

• FAR § 52-203.13 requires a contractor to voluntarily disclose to the Government any significant overpayment.

• Problem: Should your client disclose if, after the Government accepts and pays for certain work, your client discovers the work is non-compliant/defective?
  • e.g., The concrete mix is out of spec.
False Claims Act: “Overpayment” Concerns

• Issues to consider in deciding whether to disclose:
  a. Materiality of the non-compliance.
  b. Who has responsibility for testing/inspection.
  c. When the non-compliance is discovered.
    • Warranty obligations.
• Investigations should be conducted under the direction of outside counsel.
• Bell BCI Co. v. United States, 570 F.3d 1337, 1340 (Fed. Cir. 2009).

• “Bell hereby releases the government from any and all liability under this contract for further equitable adjustment attributable to the modification” which prevented the contractor from obtaining any cumulative impact relief.
Spell It Out: Reservations of Rights in Change Orders

• Because contractors chose the language “any and all liability,” the Court determined that the contractor waived its rights to seek disruption or loss of productivity damages by the release it executed. Id. at 1341.

• Despite a strongly worded dissenting opinion authored by Circuit Judge Newman stating, “my colleagues, finding no error in the trial court's understanding of this contract, instead created a speculative theory that no party argued,” there have been no cases influencing or overturning the Bell BCI case.
False Claims Act: Risks Associated with Holding Money Back from Subs

• FAR requires Federal Government construction subcontracts to contain a prompt payment clause.
  • Payment within 7 days of the prime's receipt of payment from the Government.
• For payment, a prime typically must certify to the Government:
  1. Past payments owed subs have been made from previous payments;
  2. Timely payment will be made from this invoice; and
  3. The request for payment does not include payments to be withheld from the sub.
False Claims Act: Risks Associated with Holding Money Back from Subs

• False Claims liability can arise out of both express and implied certification regarding payment to subcontractors.

• Lesson: Unlike the commercial sector, the prime generally may *not* hold money back from subs once the Government has paid the prime.
  • Exception – retainage.
False Claims Act: Risks Associated with Holding Money Back from Subs

• Therefore, the prime cannot invoice the Government for the following if the prime intends to hold such money back from a sub for:
  • Defective work.
  • Liquidated damages.
  • Incomplete work.

• If in doubt, provide a copy of the notice of the withholding to the CO.
There’s a Rat in the Woodpile: Government Duty of Good Faith and Fair Dealing

• FAR Part 31.205 ("Cost Principles"): FAR Part 31 limits the damages a contractor may recover.
  • Allowable: A cost is “allowable” if it is reasonable, allocable, permitted under the terms of the contract, properly calculated, and subject to any limitations in FAR subpart 31.2. FAR 31.201-2.
  • Allocable: A cost is “allocable” if “it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship.” FAR 31.201-4.
  • Reasonable: A cost is “reasonable” if “in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business.” FAR 31.201-3.
There's a Rat in the Woodpile: Breach of the Duty of Good Faith and Fair Dealing

• Reasonably foreseeable damages
• Places Contractor in same position it would have been in had breach not occurred.
Metcalf Decision and Path Forward

• What damages could be recoverable?

• *CanPro Investments, Ltd. v. United States*, 130 Fed. Cl. 320 (2017)
  
  • Damages are calculated by “perform[ing] the necessary comparison between the breach and non-breach worlds.”
  
  • Reasonably foreseeable that if the government violated a provision of a lease with the contractor, the breach of the lease would lead to damages.
  
  • Decided on a motion to dismiss, so the Court did not make an actual award of damages, but the Court did determine that the damages that the contractor could seek when left to its proofs would be damages that were reasonably foreseeable, and costs incurred to mitigate the contractor's damages.
Appeal of Kelly-Ryan, Inc.  
2017 WL 6813324 (2017)

• Awarded of breach of contract damages for USACE's breach of contract and breach of the duty of good faith and fair dealing, under the Restatement (Second) of Contracts §344 (1981).

• The legal framework is not what damages are allowable under FAR 31.205-33, but what damages are reasonably foreseeable as a result of the government's material breach.
What About Attorneys' Fees?

• When are attorneys’ fees “reasonably foreseeable?”
• Contractor and subcontractor litigating when termination for default threatened by government of prime contractor, and prime default terminates subcontractor?
• Performance bond claims, when bonds required on project.
• Need more cases to be litigated, and cases where entitlement and quantum are decided at the same time.
Attorneys’ Fees

• When there is a clear breach of the Government's contractual duties during performance of the contract, entitling the contractor to an equitable adjustment to fully compensate for the consequences of the Government's breach, including the expenses of litigation with third parties, as in the circumstances here. See *Liles Construction Co. v. United States*, 455 F.2d 527 (Ct. Cl. 1972).
There are strict rules regarding subcontractor pass-through claims against the Government.

Subcontractor claims against the Federal Government must be passed through:

• With the consent and cooperation of the prime;
• In the name of the prime; and
• Certified by the prime (“Turner Certification”).
Pitfalls Pertaining to Subcontractor Pass-Through Claims

• “Severin Doctrine” (*Severin v. United States*, 99 Ct. Cl. 435 (1943)).
  • Held that a sub cannot pass a claim through the prime to the Federal Government if it has released the prime from liability for that claim.
  • The prime must retain liability for the sub's claim.

• Problem:
  • The prime is loath to pass on a sub's claim to the Federal Government without some restriction on its ultimate liability.
  • Wants to avoid double exposure.
Pitfalls Pertaining to Subcontractor Pass-Through Claims

• Subsequent Federal Government holdings have narrowed the *Severin* Doctrine.
  
  • “Contingent liability” is permitted.
    
    • The prime can limit its liability to the sub to the degree the Federal Government is liable to the prime.
  
  • “Iron bound” releases are still not permitted.
    
    • *i.e.*, The prime cannot be released from all liability.
Pitfalls Pertaining to Subcontractor Pass-Through Claims

• What about the states?
  • 19 states have explicitly considered whether contingent liability is permitted.
  • 17 of those 19 states recognize contingent liability:
    • Alaska, California, Florida, Georgia, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Jersey, New York, North Carolina, Oregon, and Rhode Island.
Pitfalls Pertaining to Subcontractor Pass-Through Claims

• 2 states **DO NOT:**

1. **Virginia** – Does not allow for contingent liability (unless expressly allowed by statute, *e.g.*, VDOT).
   • 2 options:
     • Do not pass it through – litigate with the sub instead; or
     • Pass it through with no restriction on liability.

2. **Connecticut** – No pass-through claims allowed unless prime admits liability.
   • 2 options:
     • Do not pass it through – litigate with the sub instead; or
     • Admit liability, then bring suit against the state.
Bringing a Claim under the CDA

• Certification of REA
  • REA is an explanation of entitlement and damages sought, can be converted to a certified claim and usually has to be certified before settlement.
  • An REA does not require a corresponding certification unless it is submitted to an agency of the Department of Defense, in which case the certification found at DFARS 252.243-7002 is required.
In REAs, claim preparation costs are generally considered part of the contract administration cost and, therefore, compensable. See *Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541 (Fed. Cir. 1995)

- Claim: “Sum certain” (exact amount of damages); certified by contractor. Costs in preparation are not recoverable under FAR cost principles.
- Certification language requirement (FAR 33.207(c))
Pass-Through Claims: (Turner Certification)

• Contractor must obtain a certification from a subcontractor for any pass-through claims.
• Contractor is required to provide a certification for the claim as well.
• Contractor does not have to agree with every aspect of a pass-through claim and must only certify that the pass-through claim is brought in good faith and is colorable.
Implied Certification

- *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S.Ct. 1989 (2016). The Supreme Court confirmed that “implied certification” can be a basis for False Claims Act liability when a contractor fails to disclose noncompliance with requirements resulting in misleading representations about the provided goods or services.
How Much Will It Cost? Strategic Considerations: REA v. Certified Claim

- A contractor has 2 avenues for pursuing time and/or money against the Federal Government:
  1. Request for Equitable Adjustment (“REA”)
     - A non-litigious submission requesting that the Government grant relief pursuant to the remedy granting clauses in the contract.
  2. Certified Claim
     - A formal submission requesting damages in a sum certain.
       - Certified by an authorized company official.
### Strategic Considerations: REA v. Certified Claim

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<tr>
<th>REA</th>
<th>Certified Claim</th>
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<tr>
<td><strong>Threshold Amount?</strong></td>
<td>No</td>
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<tr>
<td><strong>Deadline for Submission?</strong></td>
<td>No specific submission deadline – Adhere to contract notice requirements for changes</td>
</tr>
<tr>
<td><strong>Preparation Costs Recoverable?</strong></td>
<td>Yes – Consulting fees and attorneys' fees recoverable</td>
</tr>
<tr>
<td><strong>Interest Recoverable?</strong></td>
<td>No</td>
</tr>
<tr>
<td><strong>Deadline for Federal Government to Respond?</strong></td>
<td>No</td>
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Strategic Considerations: REA v. Certified Claim

• Key Considerations:
  • An REA may be converted into a Certified Claim (but not vice versa).
  • Thus, a contractor may want to consider preparing an REA in order to recover claim prep fees and costs.
  • Then if the REA is denied, the contractor may certify it as a claim to start the interest clock.
Boards vs. COFC

• Legal Spend
• More formal proceedings at Ct. Fed. Cl. than BCA
• Legal spend may be greater at Ct. Fed. Cl. (but not by much)
• The Boards consistently emphasize their commitment to prompt and efficient resolution, especially with their commitment to offering alternative dispute resolution as a method for shortening the process.
• Discovery at the Boards is less formal than Court.
Rule 4 Requirement

• At the Court of Federal Claims, the Government has 60 days to file an answer, which includes affirmative defenses and counterclaims.

• COFC requires initial disclosures which require the names of any individuals who may possess discoverable information. RFRC 26(a)(1)(A).

• Boards have Rule 4 requirement – all documents relevant to the project.
Attorneys' Fees

Equitable Remedies

Time to File

• If a contractor is appealing a final decision to the agency board of contract appeals, it must file the appeal within 90 days of the date it receives written notice of the final decision. 48 C.F.R. 33.211(v).

• If a contractor is appealing a final decision to the Court of Federal Claims, it must do so within 12 months of receipt of the final decision. 48 C.F.R. 33.211(v).
Cases that are Settled

• Although the Court of Federal Claims does not readily disclose the number of contracts appeals cases that utilize alternative dispute resolution (ADR), but encourages the use of such resolution.

• Court of Federal Claims will provide a “settlement judge” who is tasked with acting as a mediator. RFRC app. H (2)(a) and (2)(b).
ADR at the Boards

• In Fiscal Year 2017, the parties bringing cases before the ASBCA “requested the Board's ADR services 31 times, covering 91 appeals and 3 undocketed disputes.” ASBCA Report of Transactions Memo.

Quality of Judges

• The Court of Federal Claims is composed of 16 active judges who are appointed by the President, confirmed by the Senate, and serve 15 year terms. These judges preside over a variety of cases including tax claims, patent claims, and taking claims under the Fifth Amendment. There is no requirement for the judges to have government contracts knowledge. About the Court, https://uscfc.uscourts.gov/about-court (last visited June 25, 2018).

• The Boards of Contract Appeals judges must have at least five years of experience in public contract law and are usually appointed by a senior official of their agency. 41 U.S.C. § 7105 (a)(2), 41 U.S.C. § 7105 (b)(2)(B).