

# Selective Contract Administration Issues

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# Government Authority to Administer Contracts

The Government engages in a wide array of administrative duties during contract performance, including:

- Issuing Change Orders
- Suspending Contract Performance
- Inspection and Acceptance
- Technical Reviews
- Terminations – Default & Convenience

Who has the authority to perform these functions?

# Contracting Officer's Delegation of Authority

- Contracting Officer has the authority to administer the Contract.
- This authority may be delegated to Contracting Officer Representatives (COR)
- COR's authority is defined in a Delegation of Authority Letter.
- The COR may not exceed his or her delegated responsibilities.



“Anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.”  
*Federal Crop. Ins. Corp. v. Merrill*, 332 U.S. 380, 384, 68 S. Ct. 1, 92 L. Ed. 10 (1947)

# Government is Bound by COR's Actions

- Where the Contracting Officer authorizes technical personnel to give guidance or make decisions under the specifications, the government is liable for the consequences of the action taken. *Appeal of DOT Sys., 1982 DOT BCA LEXIS 20, 49-50 (D.O.T.B.C.A. June 10, 1982)*
- Even if the COTR's interpretation of the specification was erroneous, the Government still is bound by it, since he was the Government's authorized representative. *Chrysler Corp., ASBCA No. 17259, 1975 ASBCA LEXIS 402, 75-1 BCA P11,236*

# Limitation on Contracting Officer's Authority

Neither the Contracting Officer, nor the COR, can waive a statutory requirement unless the statute so provides.

## Examples

- Contracting Officer does not have the authority to waive wage determination under the Davis Bacon Act. *Appeal of DOT Sys., supra.*
- CO does not have the authority to waive Buy American Act, exceptions not shown *LaCoste Builders, Inc., ASBCA No. 29884 et al., 88-1 BCA P 20,360 at 102,981-82*
- CO had no authority to waive CDA requirement that claim be certified. *Hawaii CyberSpace, ASBCA No. 54065, 04-1 BCA P 32,455 at 160,535*

# Implied Actual Authority

- In *Reliable Disposal Company, Inc.*, ASBCA No. 40100, 91-2 BCA ¶23,895, it was held that under certain limited circumstances government personnel may be found to have implied actual authority:

*In limited circumstances, authority has been implied when considered an "integral part of the specific duties" assigned to the employee. See DOT Systems, Inc., DOTCAB No. 1208, 82-2 BCA P 15,816 at 78,386, citing Urban Pathfinders, Inc., ASBCA No. 23134, 79-1 BCA P 13,709 and Contractors Equipment Rental Co., ASBCA No. 13052, 70-1 BCA P8183; Precision Products, ASBCA No. 25280, 82-2 BCA P 15,981. The determination obviously depends on the particular facts surrounding each transaction.*

- Inspector authorized to reject work authorized to constructively change work through an improper rejection. *Cameo Curtains, Inc.*, ASBCA 3574, 58-2 BCA ¶2051

## Ratification of Unauthorized Acts

- A CO may ratify an unauthorized contract act under certain circumstances.
- Ratification requires knowledge of material facts involving the unauthorized act and approval of the activity by one with authority." *Winter v. CATH-dr/Balti Joint Venture*, 497 F.3d 1339, 1347 (Fed. Cir. 2007).
- Ratification must be based on a demonstrated acceptance of the unauthorized act. Silence, without more, is not sufficient. *Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1434 (Fed. Cir. 1998)
- "Ratification generally requires that the superior official had authority to ratify, knowledge of the subordinate's unauthorized act, and then acted to adopt the unauthorized action" *Real Estate Technical Advisors, Inc.*, ASBCA Nos. 53427, 53501, 03-1 BCA ¶ 32,074 at 158,508



# Government's Implied Duty Not to Hinder Contract Performance

## General Rule

There is in every contract an implied duty on the part of both parties to cooperate and not to interfere negligently or willfully with the performance of the other party. *C. Sanchez & Son, Inc. v. United States*, 6 F.3d 1539, 1542 (Fed. Cir.1993)

## Examples of Government breach of duty not to hinder performance:

- Government conducts an over zealous inspection. *H.G. Reynolds Co., ASBCA 42351, 93-2 BCA ¶ 25,797.*
- Government fails to help a contractor who runs into a problem during performance, such as differing site conditions, changes, and defective specifications. *Hardrives, Inc., IBCA 2319, 94-1 BCA ¶ 26,267.*
- Government failure to coordinate work of other contractors working at the site so as not to interfere with each other. *Toombs & Co., ASBCA 34590, 91-1 BCA ¶23,403 (failure of other contractor to meet contract schedule)*

# Government's Duty of Good Faith and Fair Dealing

The implied duty of good faith and fair dealing has been used where the Government engages in improper contract administration.

## Examples of breach of the duty of good faith and fair dealing:

- Even if there is no specific provision requiring the Government to provide certain information, the implied duty to cooperate still requires the Government to timely supply essential information necessary for the contractor to address problems that arise under the contract. *Spectrum Leasing Corp., GSBCA Nos. 7,347, 7,379, 7,425-27, 90-3 BCA ¶22,984.*
- The Government breaches the duty to cooperate if it fails to timely respond to RFIs. *Hardie-TynesMfg. Co., ASBCA No. 20,582, 76-2 BCA ¶11,972.*
- Government does not act promptly on claims for constructive changes. *Nash Janitorial Serv., Inc., GSBCA 6390, 84-1 BCA ¶ 17,135.*
- Government enforces a contract provision that “produces an egregious, unfair, or unreasonable result.” *Forest Emtl. Servs. Co. v. United States, 5 Cl. Ct. 774, 777 (1984)*

# Subcontractor and Supplier Delays

- A delay encountered by a subcontractor is not excusable unless it can be shown to be beyond the fault and fault of the subcontractor as well.
- The delay will not be excusable if it can be shown that the delay could have been averted by procuring supplies from other sources. *Cryer & Parker Elecs., Inc., ASBCA 15150, 71-2, BCA ¶ 8943.*
- Thus, there is no excusable delay where the prime contractor could have procured supplies elsewhere, but did not want to pay the higher price. *Northern Va. Elec. Co. v. United States, 230 Ct. Cl. 722 (1982)*
- Dispute between contractor and subcontractor, which results in delays, is not excusable delay. *Fairfield Scientific Corp., ASBCA 21152, 78-1 BCA ¶ 12,869.*

## Delays Due to Defective Specifications

- The Government implicitly warrants that the plans and specifications are suitable for their intended purpose. *U.S. v. Spearin, 248 U.S. 132 (1918)*
- A cause of action for defective plans/specifications arises when the Government negligently prepares the specifications or plans.
- In such a case, the contractor is entitled to additional compensation (time and money) if the defects delayed or changed his method of performance. *Appeal of W.G. Yates & Sons Construction, 01-2 BCA ¶31,428, ASBCA No. 49,399 (May 18, 2001)*

# Government Delay in Approvals

- When the Government is required to render approvals during contract performance, any unreasonable delays in doing so will result in a compensable suspension of work. *M.S.I. Corporation, VACAB 503, 65-2 BCA ¶ 5203; Sydney Construction Company, ASBCA 21377, 77-2 BCA ¶ 12,719.*
- Contractor must show the period it could have reasonably anticipated Government approval given the status of the project and particular work involved.
- Contractor not entitled to relief for delays if it was responsible for the delay in approval. *Joseph Penner, GSBCA 4647, 80-2 BCA ¶ 14,604* [contractor at fault because its submittal did not include all of the required information]
- Contractor not entitled to relief, however, if the delay in approval did not actually impede performance.

# Government Delay in Inspections

- Unreasonable delay in inspection has been held to be a breach of the Government's implied duty of cooperation.
- Typically, the contract will specify the time in which the Government must conduct the inspection.
- If no period is noted in contract, then the Government is entitled to a "reasonable time period" in which to inspect. *Southern Roofing & Petroleum, ASBCA 12841, 69-1 BCA ¶ 7599* (eight day delay in inspection reasonable even though no defects were found)

## Government Delay in Issuance of Changes

- Government delays preceding issuance of a modification are generally excusable.
- Contractor justified in not proceeding with changed work until Government issues mod to contract. *George A. Fuller Co., ASBCA 8524, 1962 BCA ¶ 4582* (it would have been “irresponsible” for contractor to proceed without contract modification)
- If there is a dispute over whether a change exists, the contractor must continue with the work under protest. *Plandel, Inc., HUDBCA 92-7171, 93-3 BCA ¶ 26,103.*

## Contract Provisions Providing For Relief for Excusable Delays

- Changes Clause (FAR 52.243-4)
- Suspension of Work Clause/construction contracts (FAR 52.242-14)
- Government Delay of Work Clause/supply contracts (FAR 52.242-17)
- Differing Site Condition Clause (FAR 52.236-2)
- Time Extension Clause (FAR 52.211-13)



# Government Delay/Suspension of Work Clause

- Under the Suspension of Work Clause and Government Delay in Work Clause, a contractor is entitled to relief (monetary and schedule) if the period of delays is considered unreasonable.
- What is unreasonable is highly dependent of the facts of each case. The following three (3) part test has been used to determine if a delay is unreasonable:
  - Whether the delay is due to Government fault;
  - Whether the overall completion of the project was delayed; and
  - Whether the delay is not concurrent with delays within the contractor’s control.
- A suspension caused by defective specifications is *per se* unreasonable. *Chaney & James Constr. Co. v. United States, 190 Ct. Cl. 699, 421 F. 2d 728 (1970)*

# Available Relief for Delays

- Additional Time
- Extended Field Office Overhead
- Extended Home Office Overhead, i.e. Eichleay Damages
- Material and Labor Price Escalations
- Labor Inefficiencies

# Failure to Lock-in Suppliers

A surprising number of small business Government Contractors get into trouble because they fail to control subcontract and supply delivery schedules. It is difficult to extend the prime contract based on late suppliers.

- Excusable Delay – for delay to be excusable, it must be beyond the reasonable control of the contractor and without its “fault or negligence.” The prime contractor is generally responsible for the deficiencies of its suppliers and subcontractors.
- Long Lead Time Items – identify work inputs that require advance ordering and scheduling -- anything not “off the self” should be scheduled in advance.
- Be Professional -- Schedule Subcontractors and suppliers; include the schedule in the subcontracts; Include long lead time procurement activities in the schedule.
- Get time-frame commitments for delivery before award based on projected time elapsed and then include specific dates in the subcontracts and supply agreements.
- Confirm the delivery dates up front and then reconfirm periodically during performance. These steps will help insure timely delivery and it will provide a paper trail to demonstrate entitlement to a time extension if the supplier fails to deliver and an extension is required.

# In-Scope and Cardinal Changes

- **In-Scope Change** – Under Changes clause, CO may make changes within “general scope of contract.” CO’s authority to make changes is very broad.
- **Cardinal Change** – CO may not order changes outside the general scope of the contract. Whether change is “in-scope” or “cardinal” depends on three factors:
  - whether there is a significant difference in the magnitude of work to be performed;
  - whether the change is designed to procure a totally different item or drastically alter the quality, character, nature or type of work contemplated by the original contract; and
  - whether the cost of the work ordered greatly exceeds the original contract cost.

# **Duty to Proceed in Face of Changes**

- Disputes Clause (FAR 52.233-1) requires contractor to proceed with performance in accordance with directions from the contracting officer.
- When faced with a disagreement over whether a change exists, the contractor should continue performance and file a claim for an equitable adjustment with the contracting officer.
- The contractor should keep good records of the additional work (labor and material), as well as the time to perform this additional work.

## **There are three exceptions to the Duty to Proceed recognized by the boards and courts:**

1. The specifications are so defective that performance cannot continue without assured failure;
2. The contractor cannot proceed until it receives a response to a clarification request; and
3. The Government materially breached the contract, i.e. cardinal change.

# Mistakes in Bid or Proposal

## Mistakes Raised Before Award

- A bidder may be permitted to upwardly correct its bid price prior to award where there is clear and convincing evidence that a mistake was made, the manner in which the mistake occurred, and the intended price. FAR 14.407-3(a)
- No price adjustment for errors in business judgment.

## Mistakes Raised After Award

- To reform a proposal or bid after award, the price must not exceed the next lowest offer under the original solicitation and it must be clear that the mistake was -- (1) mutual, or (2) if unilaterally made by the contractor, so apparent as to have charged the contracting officer with notice of the probability of the mistake" (FAR 14.407-4(b)(2) and (c)).

# Understanding Remedy Granting Clauses

Don't guess your rights based on fairness. Your rights in a dispute probably depend on the remedies in contract clauses. Some clauses limit remedies to time extensions, recovery of costs incurred, or even no-cost termination. This will affect how you frame your claim. Read the clauses before you communicate your position. Here are the most common remedy granting clauses:

- **Changes Clauses (FAR 52.243-4)** - entitles contractor to an equitable adjustment for increased costs caused by the change –(if the contractor has provided proper notice). Equitable adjustment normally includes overhead and profit, but the VA Construction Changes Clause (§ 852.236-88) limits percentage markups according to a precise formula.
- **Differing Site Conditions (FAR 52.236-2)** – if the contractor has provided timely written notice, DSC clause provides an equitable adjustment for additional costs incurred on account of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.
- **Suspension of Work Clause (FAR 52.242-14)** -- gives the contractor an adjustment for increase in costs, excluding profit, caused by “unreasonable” suspension, delay, or interruption caused by (1) by an act of the CO or (2) by the CO's failure to act within the contract-specified time or within a reasonable time.

## Understanding Remedy Granting Clauses (cont'd)

- **Default Clause, FAR 52.249-10, (Fixed-Price Construction)** -- provides two important sets of remedies, one for the Government and one for the Contractor:
  - if the Contractor fails to prosecute the work with the diligence to insure its completion, or fails to complete the work on time, the Government may terminate. The Government may take over the work and complete the work and use any materials, appliances, and plant on the work site necessary for completing the work. The clause makes the Contractor and its sureties liable for any damages, including the cost to complete.
  - If, after termination, it is determined that the Contractor was not in default, or the delay was excusable, the termination is converted to a “Termination for Convenience.”
- **Termination for Convenience Clauses** -- include precise formulations for a contractor’s recovery, depending on the type of contract and the clause included. Generally, a contractor terminated for convenience is entitled to the contract price, or to the costs incurred for the work performed, plus profit and overhead, minus a loss adjustment.
- **Disputes clause, FAR 52.233-1** – specifies detailed process by which, upon submission of timely Claim, CO must issue a final decision subject to appeal. The Contractor must proceed diligently with performance of this contract pending final resolution of any request for relief, claim, appeal, or action arising under or relating to the contract, and comply with any decision of the Contracting Officer.



# BRAND NAME OR EQUAL

- **FAR 52.211-6, BRAND NAME OR EQUAL** (AUG 1999), provides in part:

(a) If an item in this solicitation is identified as "**brand name or equal**," the purchase description reflects the characteristics and level of quality that will satisfy the Government's needs. The salient physical, functional, or performance characteristics that "equal" products must meet are specified in the solicitation.

\* \* \*

(d) Unless the offeror clearly indicates in its offer that the product being offered is an "**equal**" product, the offeror shall provide the **brand name** product referenced in the solicitation.

# Government's Discretion to Cite Brand Name Products

- Specifications may be based upon a particular product if it is reasonably related to the agency's minimum needs. *Hewlett-Packard Co., B-239800, Sept. 28, 1990, 69 Comp. Gen. 750, 90-2 Comp. Gen. Proc. Dec. P 258 at 6.*
- When a protester challenges a salient characteristic included in a **brand name or equal** solicitation as unduly restrictive of competition, the GAO will review the record to determine whether the restrictions imposed are reasonably related to the contracting agency's minimum needs. *Herley Indus., Inc., B-246326 92 Comp. Gen ¶243*
- Under a **brand name or equal** solicitation, firms offering **equal** products must submit sufficient descriptive literature to permit the contracting agency to assess whether the equal product meets all the salient characteristics specified in the solicitation. *OnSite Sterlization, LLC, B-405395, 2011 Comp. Gen. Dec. ¶228*
- When the descriptive literature submitted fails to establish that the offered products would meet all of the listed salient characteristics, the response to the solicitation is properly rejected. *Infrared Techs. Corp., B-255709, Mar. 23, 1994, 94-1 Comp. Gen. Proc. Dec. P 212 at 3-4.*