Legal Insights: Common Contract Claim Scenarios

By Ross Crown

Contractors who sustain an unexpected financial injury performing a contract with the federal government, either in the form of greater costs or lost profits, will need to consider whether the circumstances give rise to a claim against the contracting officer pursuant to the Contract Disputes Act. Contract claims can take many forms, but nevertheless certain common claim scenarios are well-established. These scenarios include negligent estimates, increased cost of performance, differing site conditions, terminations for convenience and breach of the duty of good faith and fair dealing. To assert a claim arising from one of these situations, a contractor needs to be cognizant of recent case law defining the requirements of such claims.

Negligent Estimates

In Phoenix Mgmt., Inc., ASBCA No. 59273, 15-1 BCA ¶ 35,956, a contractor was awarded a contract to maintain fire detection and suppression systems for the Air Force at Homestead Air Reserve Base. The contract’s work statement estimated the number of emergency calls that the contractor should expect during the period of performance. After award, the contractor sought an equitable adjustment to the contract price based on its allegation that the Air Force failed to disclose that (1) most of the systems were proprietary systems that could only be serviced at a higher price by firms licensed by the original equipment manufacturer, (2) more than half of the existing fire detection systems were in failing condition and in urgent need of repair, having not been previously maintained to industry standards, and (3) none of the detection systems had been inspected during the previous five years. The ASBCA held that the Air Force’s failures to disclose prevented the Board from dismissing the contractor’s appeal as a matter of law.

The Court of Federal Claims in The Ravens Group, Inc. v. United States, 112 Fed. Cl. 39 (2013), denied the government’s motion for summary judgment to defeat a negligent estimate claim submitted under a combined firm fixed price/IDIQ contract for maintenance services on Army housing. The Army told the contractor it could expect 50 routine service calls each month. Shortly after contract award, the contractor began responding to 90 service calls per month. The Army admitted there was no “rhyme or reason” to its estimate and that it “just picked a number.” No one with the Army investigated whether the number was accurate or what information was used to determine the estimate.

The Court explained that the risk of variance between contract estimates and actual requirements generally rests with the contractor. Government estimates are not guaranteed. Nevertheless, bidders are ordinarily entitled to rely on estimates as representing honest and informed conclusions. The government may be liable if the contractor can prove that the government (1) failed to prepare an estimate in good faith, (2) prepared an estimate negligently, or (3) failed to use reasonable care.

Increased Cost of Performance

In Agility Def. & Gov’t Services, Inc. v. United States, 115 Fed. Cl. 247 (2014), the contractor entered into a firm fixed price/IDIQ contract with the Army for the purchase of various Soviet-style weapons in support of Army’s security assistance mission in Afghanistan. The contractor encountered difficulty procuring the specific weapons identified in its delivery order due to the objections of the Hungarian and Bulgarian governments. As a result, the parties entered into a bilateral modification to provide different types of weapons and to extend the delivery date. The modification did not, however, include a price increase. The contractor sought an equitable adjustment for the increased cost it incurred in procuring the different weapons. The Court of Federal Claims rejected the contractor’s request for an equitable adjustment, however, finding the contractor assumed the risk of increased cost and scarcity of goods when it entered into a firm fixed price contract.

The Court stated that a firm fixed price contract provides for a price that is not subject to any adjustment on the basis of the contractor’s cost experience in performing the contract. A firm fixed price contract places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss.

The contractor argued that the contract was commercially impracticable. This doctrine applies when, because of unforeseen events, it can be performed only at excessive and unreasonable cost, or when all means of performance are commercially senseless. The Court held this doctrine is not available where the contractor assumes the risk of occurrence of the supervening event.

Differing Site Conditions

In CCI, Inc., ASBCA No. 57316, 14-1 BCA ¶ 35,546, the ASBCA denied a contractor’s $35 million claim for differing site conditions. The contractor was awarded a contract to construct a pier and seawall in Iraq. At issue in this case was a “Type I” site condition, a latent condition that is materially different from that specified in the contract.

The Board stated that to establish a Type I differing site condition, the contractor must prove that (1) the contract contains positive indications of the conditions at the site; (2) the contractor reasonably interpreted and relied upon the indicated site conditions; (3) the conditions encountered were materially different from those indicated; (4) the conditions encountered were reasonably unforeseeable based upon

continued on following page
Legal Insights continued

all of the information available at the time of bidding; and (5) the contractor’s injury was caused solely by the differing site conditions.

In this case, the Board found the contractor unreasonably relied on site information provided in U.S. and Iraqi reports including express disclaimers that the reports were “provided for information only.” The contractor put the contractor on notice that it would be responsible for securing site-specific geotechnical information but the contractor conducted only a minimal pre-proposal site visit with no follow-up investigations. The contractor also disregarded a consultant’s warning that its proposal price was too low.

Termination for Convenience

The Department of Defense in TigerSwan, Inc v. United States, 110 Fed. Cl. 336 (2013), awarded two contracts to a contractor for Iraq-based security services. The incumbent contractor protested both awards. Shortly after award, DOD terminated each of the contracts for convenience and then awarded sole-source contracts for the work to the incumbent. The replacement contractor submitted a breach of contract claim to the contracting officer asserting that the termination for convenience was an abuse of discretion and issued in bad faith. It alleged an improper personal relationship between the director of the DOD program for which the contracts were issued and the team leader of the incumbent.

The Court denied the government’s motion for dismissal, noting that there are several circumstances where the government in exercising its contractual right to terminate for convenience may be liable for breach of contract. These circumstances include situations in which the government has acted with animus toward the contractor, where the government abuses its discretion, or where the government never intended for the contract to go forward. Bad faith does not necessarily require an intent to harm the contractor. The government can still be liable for a breach of contract based on improper termination for convenience where the government has engaged in some form of improper self-dealing for its own benefit or to benefit another contractor.

Breach of the Duty of Good Faith and Fair Dealing

A contractor who provided trucking services to the Army in Afghanistan filed a claim for payment of over 500 invoices in Mansoor Int’l Dev. Services, Inc. v. United States, 121 Fed. Cl. (2015). The contracting officer advised the contractor that the Army was willing to evaluate and settle the invoices in the aggregate. Rather than review each invoice, the Army proposed to use an audit technique involving a statistical sampling of the invoices.

The contractor objected and demanded that the Army consider each invoice individually. This objection was disregarded and the Army issued a final decision based on the aggregate approach denying the majority of the invoices. The Court of Federal Claims found the Army plausibly breached the implied duty of good faith and fair dealing by conducting settlement negotiations in a manner that defeated the contractor’s reasonable expectations. The Court said the

implied duty exists because it is rarely possible to anticipate in contract language every possible action or omission by a party that undermines the bargain.

In D’Andrea Bros. LLC v. United States, 109 Fed. Cl. 243 (2013), the Court of Federal Claims considered whether the Army breached a Cooperative Research and Development Agreement (CRADA) with the contractor for the commercialization of nutritional energy bars used by the Army. The CRADA granted the contractor an exclusive five year license to use the trademark “HooAH!” for commercial sales of the energy bars in exchange for royalties. The government subsequently changed the name of the product to the “HooAH!/OOHRAH!” bar to appease the Marine Corps which objected to the sole use of the Army’s battle cry. The contractor trademarked “OOHRAH!” Unfortunately, other private companies were supplying energy bars to the military using the words “HooAH!/OOHRAH!” and the contractor complained to the government. Thereafter, the government refused to communicate with the contractor for eight months and changed the name of its bar to the First Strike Bar. As a result, the contractor discontinued its royalty payments.

The implied covenant of good faith and fair dealing, said the Court, guarantees that the government will not interfere with the other party’s performance and not act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.

The Court held the government breached its duty of good faith and fair dealing by refusing to communicate with the contractor for eight months and by changing the name of the bar to avoid trademark infringements. This nullified the understood purpose of the CRADA which was to commercialize a product used by active military members, using the same name as the military. The implied covenant of good faith and fair dealing, said the Court, guarantees that the government will not interfere with the other party’s performance and not act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.

Claim Must be Supported by Legal Authority

While, as noted, contract claims can take many forms, the common claim scenarios described above represent well-established paths to an award of damages to the contractor. Before embarking upon the claims process, a contractor must determine if its theory of recovery is supported by legal authority. •

Ross is a partner in the Albuquerque office of Lewis Roca Rothgerber Christie LLP where his practice emphasizes government contracts. This article is intended for general information only and should not be construed as legal advice or opinion. Any questions concerning your legal rights or obligations in any particular circumstance should be directed to your lawyer.