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CONTRACTORS MAY BE ABLE TO RECOVER COSTS CAUSED BY GOVT. SHUTDOWN

By Aron C. Beezley

The recent government shutdown is now the longest in U.S. history, and many federal contractors have incurred costs as a result of shutdown-related work stoppages and delays.

Luckily, many federal contracts contain clauses that provide a potential avenue for recovery of such costs. Further, there are practical steps that contractors can take to increase their chances of recovering shutdown-related costs from the government.

What contract clauses might apply?

Several Federal Acquisition Regulation (F.A.R.) clauses, including the following ones, could provide contractors with an avenue to recover costs incurred as a result of shutdown-related delays or work stoppages:

- FAR 52.242-14 (Suspension of Work)
- FAR 52.242-15 (Stop Work Order)
- FAR 52.242-17 (Government Delay of Work)
- FAR 52.243-2 (Changes – Cost-Reimbursement)
- FAR 52.243-3 (Changes – Time-and-Materials or Labor-Hours)

It is important to note that these clauses generally impose very short timeframes in which a contractor must provide the government with notice and/or assert its right to an adjustment. For instance, FAR 52.242-15 (Stop Work Order) requires a contractor to assert "its right to the adjustment within 30 days after the end of the period of work stoppage[.]"

How can my company increase its chances of recovering shutdown-related costs?

One way federal contractors can increase their chances of recovering costs caused by the government shutdown is by

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setting up separate charge codes in their accounting systems to identify and segregate all costs incurred as a result of shutdown-related delays or work stoppages. These types of costs often include, but are not necessarily limited to:

- Idle facility/staff/equipment costs
- Costs to implement a stop work order
- Severance pay if layoffs are necessitated
- Recruiting costs for replacement employees
- Unabsorbed overhead
- Remobilization costs once work recommences

Moreover, contractors would be wise to document justifications for shutdown-related costs and document steps taken to mitigate the impact of the shutdown.

Finally, contractors should document any and all communications with the government regarding shutdown-related delays and work stoppages, as these may come in handy if the government attempts to invoke the Sovereign Acts Doctrine as a defense against a contractor's claim for shutdown-related costs.

CONTRACTOR'S 'UNREASONABLE' INTERPRETATION OF FILL SPECS COST IT $4.5M

Delay — Differing Site Conditions

CKY Inc. v. United States, 2018 U.S. Claims Lexis 1316 (October 12, 2018)

A government contractor will shoulder more than $4.5 million in additional costs—and pay $400K in delay damages—because it unreasonably read a geotechnical report to guarantee the contract compliance of fill material.

In June 2012, the U.S. International Boundary and Water Commission (the Commission) awarded a small business set-aside construction contract to CKY, Inc. (CKY) in the amount of $6,399,900 to widen a levee in Presidio, Texas. The contract required CKY to "'excavate into the existing levee to create a series of keys and benches as shown in the plans,' then fill the benches with new embankment material." This embankment material had to meet certain contract requirements before CKY could deposit it on the levee. The contractor experienced difficulty getting the material to pass subgrade moisture and density tests, which resulted in delays and requests for extended work hours.

In August 2016, CKY filed a complaint seeking $4,528,676 in damages, claiming differing site conditions, defective specifications, constructive change, and breach of an oral and implied-in-fact contract. It had no luck. The U.S. Court of Federal Claims instead granted the Commission's motion for summary judgment and its counterclaim for liquidated damages for delayed work in the amount of $424,125.

Improper reliance on contract silence re: specs

CKY claimed that the contract documents and incorporated materials misrepresented the project site conditions and that the existing site conditions (i.e., the unsuitability of the fill material) were not reasonably foreseeable. CKY relied on the contract's silence to make its point: It specifically argued that "the omission of express subgrade material specifications meant that the subgrade soil was required to comply with all embankment material specifications."

The government countered that "a reasonable contractor could not have interpreted the contract in such a way as to expect the subgrade to meet the embankment specifications."

The court agreed, finding that CKY improperly relied on an omission of specifications, rather than on specific, affirmative information in the contract, to conclude that the materials would comply. It also pointed out that the Commission, during pre-award communications, warned CKY that, while the existing levee was constructed with soil that met the required classifications at the time, it "cannot state that excavated material will meet these requirements" now. The Commission also told CKY: "The Contractor is required to meet the embankment specification regardless of the source of the embankment material."

Improper reliance on disclaimed geotech report

CKY argued that it relied on the Commission's geotechnical report, which failed to disclose the actual materials encountered, and that the contractor did so because it was unable to see underground prior to bidding. CKY claimed that it, along with all other contractors, "had to rely entirely on the contents of the Government-issued solicitation package."

However, that geotechnical report contained this disclaimer: "The data and report are not intended as a representation or warranty of continuity of conditions between soil borings nor groundwater levels at dates and times other than the date and time when measured." The disclaimer went on to state that the Commission "will not be responsible for interpretations or conclusions drawn there by the Contractor."

Other contract provisions also highlighted the inconsistency in materials throughout the levee: "Drill, sample, and [geotechnical report] test results are an indication of the subsurface condition at the location of the boring and tests. Variations in subsurface condition may exist between boring and test locations."