

KNOWING YOUR RIGHTS IN GOVERNMENT CONTRACTS

Government construction contractors are finding out more often recently that the government contract they were awarded, or the designs and specifications provided to them for bidding, are not what they thought they were, or are incomplete or defective in material respects. Unfortunately, with the ongoing fund sequestration and overall reduction in government funding of projects, this scenario is becoming more common. The Government Contracting Officers (“CO”) and their staffs are not as well trained or experienced as their predecessors. Often they are pressed for time, overworked/understaffed, but still under pressure to deliver complete projects. As a result, the quality of construction documents supplied by the Government has declined. Contractors find that the COs are attempting to get the contractors to find the problems, make corrections and do work not in the original contract documents for no additional compensation. They often do not care if the contractors relied on accurate documents to set their prices.

So if you have been awarded a construction contract by the Government, you need to be ready to take steps to protect yourself. Although the Federal Government has set up many programs to attract minority contractors and carve out a portion of the construction work for them, it does not always do a good job of educating these contractors on what to do after award, and even less so in what to do if the contracts or contract-related documents are flawed. The first thing you should do is to carefully read the contract as a whole. Too often, in the rush to put in a bid, a contractor thinks it understands the contract but has missed certain essential points – or missed problems and inconsistencies within the contract. So, read it again, and don’t forget to read key clauses incorporated by reference in the contract (often in Section I, but also in other sections). Look for any obvious gaps and inconsistencies in the language and requirements that can blur the picture of which party, you or the Government has rights and obligations. Also review the design and specifications carefully and compare them to each other for completeness and coordination of trades or different work areas.

Once you find that there are problems with contract language or Government furnished drawings or specifications (or both), or think that they exist, you must understand that it is up to you and not the Government to raise the red flag. You must not be afraid to ask questions or challenge the adequacy of documents. The Federal Government contracting people are familiar with contractors raising issues and there is no shame in doing so. But you must do so in a timely manner as usually defined in the contract clauses and notice should be in writing whenever possible. Even if you initially give notice of a problem verbally, as in a meeting, make sure you follow up with something in writing, even if by email. This is very important in Government construction contracting and equally in commercial construction, and if in doubt, send in a notice. In most cases, the notice should be given to the Contracting Officer (“CO”), although in some cases it can be given to the Government’s on-site Resident Engineer (“RE”) or the Contracting Officer’s Technical Representative (“COTR”). When you give your notice to the RE or COTR, confirm that they are sending it to the CO, typically the only Government employee authorized to bind the Government contractually, or send him/her a copy of the initial notice.

The next thing you should do is consider the problem that you have identified in light of certain remedy-granting clauses in the contract, such as the Changes Clause, Differing Site Conditions Clause and Government-Furnished Property (or Equipment) Clause. These clauses govern the process for steps to be taken after notice, such as submitting a proposal for extra costs and time, called an “equitable adjustment” in the various clauses. You will need to submit a schedule fragnet also if you want more performance time. Contractors are usually entitled to additional direct costs (labor, material, equipment) and time-related costs (extended general conditions and home office overhead), because of the extra work done and the impacts and inefficiency affect on unchanged work.

If the RE, COTR or Contracting Officer refuses to acknowledge the changes or to grant change orders as requested you do not have to accept their decision as final and binding on you. Contractors may file either a request for equitable adjustment (“REA”) or a claim under the Contract Disputes Act (“CDA”). Costs for legal and expert consultants may be claimed under an REA and consultants under a claim and often the cost you incur to get help will be very beneficial to you. The Government must consider your claim and make a written determination before granting, granting in part, or denying your claim. They cannot ignore it. If the claim is denied either in part or in

whole, you then can pursue an appeal before one of the Federal Boards of Contract Appeals (Military or Civilian) or at the Court of Federal Claims.

The attorneys of Asmar, Schor & McKenna, PLLC (www.asm-law.com) are well versed in all areas of commercial and government contracting with over 80 years collective experience in guiding new and established contractors through the complexities of the Federal Acquisition Regulation ("FAR") and laws unique to government contracts. The firm counsels and represents government contractors large and small in disputes, bid protests, and claims before local, state (including the District of Columbia) and Federal boards of contract appeals, the Government Accountability Office ("GAO"), the U.S. Court of Federal Claims, and U.S. Court of Appeals for the Federal Circuit. The firm's work in the government contracts area is not limited to construction contracting but includes the entire spectrum of government procurement, including IT, base services contracts, other services contracts, manufacturing, architect-engineer contracts, and supply contracts including GSA Schedule contracts. Although the firm's client list includes large national and multi-national firms, the firm is sensitive to the needs and financial constraints of smaller and start-up companies and pride themselves on helping small, disadvantaged/minority, 8a, Alaskan native, woman-owned, veteran-owned, and service disabled veteran-owned small businesses solve their problems in a cost effective manner so that they can thrive and grow.