



Effective Allocation of Damages for Federal Contract Claims

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Federal construction contracts law generally recognizes four basic methods for pricing damages: (1) Actual Cost Method (ACM); (2) Total Cost Method (TCM); (3) Modified Total Cost Method (MTCM); and (4) Jury Verdict Recovery Method (JVRM). In practice, it is difficult to obtain significant recoveries on TCM and JVRM claims, and only marginally easier on MTCM claims. That is because the courts and boards that hear federal government contracts cases have developed a clear preference for the ACM. Despite this preference, many contractors do not have systems in place to maximize their opportunity to recover damages under the ACM. This article introduces various strategies for tracking and allocating damages during project performance in a manner that will support an ACM analysis if a federal construction claim is litigated.

Background: Four Basic Methods for Pricing Damages

The four methods for pricing damages are described, below:

1. Actual Cost Method

The actual cost method claims damages based on records of “actual costs” that were documented during the performance of the contract. All additional costs must be separately recorded from the costs incurred in the normal course of contract performance. Because contractors provide the court or board with documented underlying expenses under the actual cost method, courts and boards prefer this method. However, the actual cost method may not always be feasible where a contractor is confronted with drastic changes early and often in a project.

2. Total Cost Method

The total cost method enables the contractor to

recover the difference between its bid price and the total costs incurred in the performance of the contract. Courts and boards disfavor the total cost methodology because the method assumes that contractor’s costs are fault-free.

3. Modified Total Cost Method

The modified total cost method employs the total cost method and adjusts the final cost to remove those increased costs that are attributable to deficiencies or inefficiencies in the contractor’s performance.

4. Jury Verdict Recovery Method

When a tribunal is confronted with competent yet conflicting evidence of the reasonable amount of damages based on the change, the tribunal may use the jury verdict recovery method. This method prevents a situation where the tribunal feels that a recovery should be permitted but disagrees with the contractor’s damages methodology.

In summary, the total cost method provides the simplest approach, but tribunals disfavor that methodology. While the actual cost method is preferred, it may not always be practical. That is because generating and maintaining competent cost records that identify all the impacts on a project based on a change can be challenging.

Problems in Complying with the FAR Cost Accounting Principles

To recover damages, contractors must establish relevant costs pursuant to the FAR Cost Principles. Two basic types of costs are direct costs and indirect costs. While recording direct costs is easy for contractors to follow,



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measuring indirect costs related to delay or acceleration can be challenging. Therefore, it is advantageous to consult an expert early in building a model supportive of indirect costs.

A contracting officer may mistakenly require a contractor to implement the change as though the changed work is being executed as initially planned. By imposing a “most efficient” standard on the contractor, the contracting officer may unreasonably evaluate the contractor’s submission of costs allocable to the change and decline to award those costs that relate to adjustments in the sequencing of work. Compounded by the fact that a contracting officer will more closely scrutinize a cost allocation that is not contemporaneously coded, and the result could be a unilateral modification that fails to fully compensate the contractor for the difference in executing the as-planned versus changed work.

Nevertheless, tribunals have repeatedly held that a contractor need only establish a causal connection between costs allegedly incurred and the actions of the government and must provide a reasonable basis for the estimates of such costs. Planning in construction is critical, and a cardinal change to the project can throw the entire plan of execution out the window. The government should recognize and afford a contractor a reasonable time for a recovery to adapt to the new universe. A contractor’s duty to coordinate the work should not absolve the government of fully reimbursing the contractor for the impacts resulting from the changes.

Cases Requiring “Reasonableness” in Cost Allocation

The following cases evaluate a contracting officer’s decision to deny or materially reduce the contractor’s recovery for major change orders or changes in design, contending

that the contractor could have prevented the incurrence of added costs had it coordinated to perfection. These tribunals have noted that perfection is not the standard.

1. **J.S. Alberici Const. Co., Inc. v. General Services Admin., GSBGA No. 12386, 94-2 BCA ¶ 26776**

In *J.S. Alberici*, the contractor sought additional compensation for installing a number of sprinkler heads beyond those depicted on the contract drawings. The additional sprinkler heads were necessary because the specifications required it to install the sprinklers in accordance with the National Fire Code. The board granted the contractor’s claim and noted that “contractors are not required to expend great effort, expense and time in order to verify the accuracy and suitability of Government-provided specifications and drawings.” *J.S. Alberici Const. Co., Inc. v. General Services Admin.*, GSBGA No. 12386, 94-2 BCA ¶ 26776 (citing *Ithaca Gun Co. v. United States*, 176 Ct. Cl. 437 (1966)).

2. **Suffolk Construction Company, Inc., CBCA Nos. 2953, 2954, 2955, 3596, 4175, 4377, 5006, 20-1 BCA ¶ 37488**

In *Suffolk Construction*, the GSA design team prepared the MEP drawings using original building blueprints, some photographs and as-built drawings during earlier renovations. The record showed many dimensional discrepancies in the drawings such that MEP systems could not fit in the actual ceiling/wall spaces once a ceiling had been opened through demolition. The contractor brought space and coordination conflicts to the attention of GSA and its design team, which did not respond in a timely manner. “While Suffolk



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and its subcontractors had missteps in their construction coordination efforts, we cannot find from the record any instance where Suffolk coordination issues aggravated from a discernable standpoint the coordination re-work necessitated by the major design coordination deficiencies in the original design created by GSA's design team.”

3. **Sergent Mechanical Systems, Inc. v. United States, 34 Fed.Cl. 505 (1995)**

In *Sergent Mechanical*, the project was to upgrade stand-by power systems for missiles. The upgrade involved digging up many underground storage tanks 20 feet below surface. During the excavation, the contractor ran into trouble on one particular tank, which had an endangered species of plants. The government argued that the contractor compounded problems by over-excavation. While the court did not decide on the issue of damages, the court noted that the standard for evaluating damages should be “reasonableness.”

Recommendations and Conclusion

Contractors need not expend “great effort” to verify the accuracy of government change orders or the costs arising from those orders. Contractors are only required to “reasonably” allocate what they believe are costs resulting from impacts based on the changes. For damages incurred as part of a time-related impact, the contractor should contemporaneously cost-code its damages by assigning

those damages to one of the time-related causes of impact

. A comprehensive damages analysis is less about having a perfect methodology and more about making judgment calls contemporaneously about what the impact was and exactly how many dollars are associated with the impact. Even if the contractor cannot prove perfect correlation at the time of the impact from some type of rigorous methodology, a simple explanation about cause inserted in the notes of the cost-code category would almost certainly make it difficult for the government to defend against this type of contemporaneous cost-coding of inefficiency. Therefore, as long as each additional cost is thought out and recorded, the reasonable standard will likely be satisfied and a recovery permitted.

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