

Experience from the 'Trenches': Dredge Contract Claims

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What are Contract Claims?

- Claims primarily seek increased costs over the fixed-price contract value for unforeseen, different, or changed conditions
- Can also seek increased time, and/or delay costs
- Governed by the Contract Disputes Act and associated regulations: FAR, DFAR, Cost Principles, etc.

What is Dredging?

- Even the Wikipedia (layman) definition immediately highlights areas where danger may lie (i.e., extra time/cost)

“Dredging is the form of excavation carried out underwater or partially underwater, in shallow waters or ocean waters. It keeps waterways and ports navigable, and assists coastal protection, land reclamation and coastal redevelopment, by gathering up bottom sediments and transporting it elsewhere. Dredging is a four-part process: loosening the material, bringing the material to the surface (together extraction), transportation and disposal.”

- <https://en.wikipedia.org/wiki/Dredging>

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- **“Excavation”**
 - *Rock, debris – accuracy of geotech survey, boring logs*
 - *Sand, silt v. cobbles, gravel – “character of materials to be dredged”*
 - *Maintenance v. new work, channeling deepening*
- **“Underwater”**
 - *Limited/Zero visibility pre-bid, unforeseen conditions, marine life*
- **“Ocean Water”**
 - *Ocean conditions, impact of severe weather/storm*

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 - **“Waterways/Ports”**
 - *Channel Traffic, Ongoing port activities*
 - **“Coastal Protection”**
 - *Beach activity, coastal environment; protection of docks, wharfs, seawalls from scour, erosion arising out of dredge activities*
 - **“Transporting”**
 - *Length/positioning of pipeline*
 - *Processing plant, material separation*



Elements of the Fixed Price Bid for Maintenance Dredging:

- Mobilization/Demobilization
- Cubic yard quantity price
- Adds/Alternates

Common Legal Avenues Available:

- Differing Site Conditions – FAR 52.236-2
- Changes – FAR 52.243-1
- *Spearin* – Warranty of Plans and Specifications
- *Contra Proferentem*

FAR 52.243-7 – Notification of Changes

- Requires prompt notice of any conduct the Contractor regards as a change to the Contract and an estimate of any change to the Contract price or time

Constructive Claim

- “A constructive change occurs when a contractor performs work beyond the contract requirements without a formal change order, due either to an informal order from, or through the fault of, the Government”
- “If the COR or other authorized person, without issuing a formal change order, requires the contractor to perform work or utilize materials which the contractor regards as beyond the contract requirements, the contractor may elect to treat the directive as a constructive change and prosecute a claim for equitable adjustment.”

Appeals of N. Am. Landscaping, Construction & Dredge Co., ASBCA Nos. 60235-38 (Aug. 9, 2018)

Stone Revetment within Beach Renourishment Zone not shown on Plans ruled a ‘Constructive Change’

“There were ongoing directions to protect the golf course’s newly constructed stone wall from hydraulic pumping discharge (ie, scour)”



Appeals of -- N. Am. Landscaping, Constr. & Dredge, Co., Inc.,
ASBCA No. 60235, 18-1 B.C.A. (CCH) ¶ 37116 (Aug. 9, 2018)

Requires a Vigilant and Creative Outlook

- Virtually any direction, instruction, or other occurrence should be analyzed for its potential as a Change to the Contract – look at all events through a “change order lens”



FAR 52.236-2 – Differing Site Conditions

- Requires prompt notice of any subsurface or latent physical conditions which materially differ from those indicated in the Contract; or
- unknown physical conditions of an unusually nature which differ materially from those ordinarily encountered

Oyster Beds and Shell Crusts can be a Differing Site Condition

“[The Contractor has proven] the materials it actually encountered - firm layers of crust in patches and high concentrations of broken and whole shell at various locations - differed materially from those the contract documents indicated, i.e., zero blow-count unconsolidated sediment with little to some sand, and trace to little sand-size shell fragments.”

Appeal of -- Optimum Servs., Inc., ASBCA No. 58755, 15-1 B.C.A. (CCH) ¶ 35939 (Mar. 25, 2015)



United States v. Spearin
Supreme Court of the United States
248 U.S. 132 (1918)

- Established the Government's plans and specifications as “a warranty implied by law”
- Has evolved into a central aspect of Contractor *offensive* claims
- Routinely deems unworkable plans and/or specifications as “defective”
- Effect of a “defective” specification can be very broad

Contra Proferentem

- ***Contra proferentem*** (**Latin**: "against [the] offeror"), also known as "interpretation against the draftsman", is a doctrine of contractual interpretation providing that, where a term is ambiguous, the preferred meaning should be the one that works against the interests of the party who provided the wording.

Legal Definition of Ambiguity:

- Two or more reasonable interpretations
 - If the Contractor's interpretation is reasonable, it will prevail!

Take-Aways

- Document, Document, Document!



Pre-bid Documentation



- Maintain an Estimate sheet that clearly sets forth the basis for the bid
- Document site investigation findings
- Draft a memo to 'File' identifying the contract interpretations made in estimating and preparing the bid
 - i.e., document anticipated down-time based on solicitation language, field/site conditions, anticipated weather as historically documented, etc.
- Obtain written estimates from subcontractors, suppliers and other vendors and save to the file – captures the market price

Post-bid documentation

- Keep detailed daily logs – include weather, descriptions of any unplanned downtime, channel obstructions, debris or unanticipated cobbles, silts, clay or other high blow count material, extra-ordinary repairs, etc.
- Maintain cost code/segregation for all potential claims
- Notice(s) of Increased Cost/Time
 - Can be sent via email if necessary, just ensure KO is copied
- Change Orders
- Releases – ensure ongoing claims/pending changes/disputes are not released!
- Email can be your best friend or your worst enemy – use it wisely!



Track successful projects just as well

..... Because they will be a source of data for problem projects!

- Known in the claims industry as the “Measured mile” - comparing the cost of “impacted” work with the cost incurred to perform the same or similar “unimpacted” work.



Working with Your Professional Service Providers

- Speak to your lawyer and/or accountant about how you can streamline your claims procedures, i.e.:
 - Recognize a potential change in real time
 - Capture and segregate *all* costs of changes at their infancy





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THANK YOU!

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