Introduction to Claims

Generally, when a company enters into a contract to perform services or produce a product where the contract price and/or time is limited or fixed, they are entitled to expect the contract can be performed within the price and time parameters specified, and the buyer will not make demands or changes to that contract without compensation in cost and time of performance, or both. This is particularly true of government contracts and many commercial contracts which contain standard language governing the implementation of changes and guaranteeing an equitable adjustment to the contractor whenever changes to the contract occur.

On most projects where changes in work scope and the change related impacts are addressed through a formal change order administrative process, the development of claims are not required. But often during contract performance, a "constructive change" occurs, where the buyer has, through action or inaction, caused a change in contract performance and should have issued a formal change order, but did not. Such constructive changes have been recognized in the courts and usually take place in a contract when the contractor, in its effort to provide a timely, high quality product or service, fails to limit performance in strict compliance with the contract, its specifications, and its statement of work. This situation most frequently occurs when the time constraint of the work to be performed forces the contractor to proceed with work at his own risk rather than to wait for the often ponderous formal change approval cycle. In many such instances, the contractor might be trying to comply with instructions issued by the buyer's on-site representative or is reallocating resources and management priorities in an effort to meet project completion dates. Some of the most common types of constructive change are:

- Defective or deficient specifications
- Directed, out of scope work
- Buyer-responsible delays
- Acceleration of work
- Overly stringent or untimely inspection

While most companies may realize they are entitled to such an equitable adjustment, the process of preparing a claim which will result in an adequate resolution of the problem, requires use of personnel with a unique combination of experience and expertise resulting from years of contract dispute resolution experience.

Recognizing That You Have a Claim

If your company has experienced any of the constructive changes briefly discussed above, or if, your orderly progress in the job has been impeded by actions or inactions of the buyer, there is probable entitlement to an equitable adjustment of the contract. This adjustment could be in price and/or schedule.

Schedule adjustment is of particular importance on contracts which invoke a liquidated damages clause or where time related fixed costs are involved.

Even if you are not aware of specific constructive changes or of actions or inactions of the buyer which might have impacted work performance, it has been Contralytics' experience that most cost or schedule contract overruns are rarely the sole fault of the contractor. It is also our experience that in many cases on-the-job supervision and management did not recognize when constructive changes were occurring for which they were entitled to an equitable adjustment. Many such changes could no doubt have been processed as formal changes to the contract but were just never initiated. Contralytics has an experienced team of contracts and claims consultants who will help your company to find these changes to your contract, analyze their impact, and determine the full equitable adjustment to which you are entitled.

The Claims Process

Claims are usually developed as proposals to the buyer for equitable adjustment under the terms of the contract, and frequently, the issues can be settled in negotiation. Even where entitlement is strong and chances of a negotiated settlement are good, it is important to present your case for equitable adjustment in a clear and complete manner if the buyer is to fully appreciate your position.

If settlement is not possible, some contracts contain arbitration clauses which detail the procedures for settling contract disputes. When no arbitration clause is included in the contract, the parties might still agree to arbitration. Such arbitrations also require that the contractor present its case in the best possible manner if he is going to convince the arbiters of the validity of any proposed contract adjustment.

In government contracts, contract disputes which are not negotiable between the parties are taken before a Board of Contracts Appeal or Claims Court of which there are many to service the various arms of government. These Boards and Courts are generally comprised of judges with particular experience in the specifics of government contracting and in a particular branch of government. These agencies function as legal bodies and have built a large body of opinion relative to government contracts. Contralytics personnel are experienced in the requirements of presenting claims to these various agencies and have participated in their proceedings.

In commercial contracts, if a negotiated or arbitrated settlement cannot be achieved, the contractor must pursue his case in the civil courts. Such litigation will require the services of qualified attorneys who may be assisted by Contralytics personnel.

Some companies have legal counsel on their staff and will prefer to work through them in claims preparation. Other companies will prefer to engage outside law firms having specific experience in their industry and/or in the preparation of claims.

Contralytics personnel have worked for, at the direction of, and in concert with attorneys from numerous law firms in the development and presentation of claims. Should legal counsel be required, Contralytics will work in any mode preferred by the customer. In fact, we will be pleased to recommend legal counsel with experience to suit the particulars of your case.

Answers to Frequent Questions

Can I Do It Myself? Probably not, unless there are uncomplicated issues of contention where a reasonable settlement can be negotiated face-to-face with the buyer. Arbitration, contract appeal, and litigation require claim preparation experience not available in most companies. Even in seemingly simple cases, use of experienced claims preparation personnel will ensure that all recovery items are presented in the manner most likely to solicit a favorable settlement, often without litigation.

How Long Does It Take? As you might expect, the answer to this question depends on the size of the job (usually measurable in terms of cost overrun), and the complexity of both the work being performed and the contractual requirements. Generally, simple, small claims might be prepared in a few weeks. Larger, more complex claims, where contract cost overruns are in the millions of dollars and contract appeals or litigation are anticipated, can often be prepared in less than six months.

How Much Does It Cost? The answer to this question is dependent on the same circumstances as the previous question. The important things to remember are that the cost of preparing the claim is usually a small fraction of the contract recovery and that the cost of preparing a proposal for equitable adjustment can sometimes be included as a valid cost item of the proposal.

What Should I Expect to Recover? Typical contract recoveries regularly range between forty-five and seventy five percent of the total overrun. Of course, the exact amount depends on a determination of your responsibility for the cost overrun. Even if you anticipate a high responsibility, it is probably worth the effort to construct a proposal for equitable adjustment, since the cost of preparation is usually a low percentage of total cost overrun.

The Technical Aspect of Claims

The issues around which most claims are constructed are either technical in their nature or require technical analyses to determine their scope and assess responsibility. Many claim issues require heavy reliance on modern computer techniques for analysis and concise presentation.

Contralytics' approach to claims development stresses the technical analysis and presentation of entitlement and claim issues. Contralytics uses only highly experienced engineering and technical personnel, many with industry-specific

experience that provides insight and understanding of the basic problems experienced by your company. It has been our observation that a clear, concise presentation of the technical facts is the most effective method of achieving contract adjustments, whether they are presented in negotiation, arbitration, or litigation.

Whatever route your contract adjustment requirements might take, Contralytics can prepare your claim for you, assist you in claim preparation, or work with your attorneys in anticipation of litigation.