The Amsterdam-Vigo Research Project

The Impact of Competitive Tendering on the Execution of Public Contacts and Concession Contracts: Contract Administration Under U.S. Federal Procurement

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Case Study 4: Parties Hold Differing Meanings as to the Interpretation of an Ambiguous Term in the Contract

4.1. Description of the case study

Contracting authority A undertakes a tendering procedure. Subsequently, A concludes a contract with B. In the course of the performance of the contract, it becomes clear that A and B hold differing meanings as to the interpretation of an ambiguous term in the contract. A dispute arises between A and B on the question whether the contract is to be performed by the parties in accordance with A's interpretation. If so, the result would be that B will suffer financial loss. In the event that the contract is to be performed according to B's interpretation, this would be detrimental to A.

4.2 Overview of US Federal Contracting Disputes Process

Disputes involving interpretation of contract terms occur regularly in US federal procurement contracts, especially with regard to specialized terms in Section H of a standard contract or the contract-specific specifications of work in Section C. Disputes are less likely to arise under long-established clauses, which have been litigated for decades (sometimes over a century). The pandemic showed resilience of standardized "force majeure" clauses, for example -- those clauses allocate risk in very transparent and predictable ways.

Where a dispute does arise, the contractor will raise the issue through notice to the agency, if appropriate.[1] The Contractor then will enter a Request for Equitable Adjustment (REA),

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[1] For example, FAR 52.243-7, Notification of changes, requires the contractor to provide notice to the contracting officer of an action it believes to be a change to the contract, within the period of days negotiated by the parties, which is typically 15-30 days.

which is not a claim or dispute -- it is a negotiation.[2] If the REA is ignored or rejected by the contracting officer, the contractor will submit a formal claim.[3]

Because of the unique demands of public work, the contractor must continue performance during the pendency of the dispute.[4]

The contracting officer will decide the claim in a formal decision.[5] The contracting officer's decision can be appealed for de novo review by the cognizant Board of Contract Appeals or the U.S. Court of Federal Claims.[6] The board or court's decision can be appealed to the U.S. Court of Appeals for the Federal Circuit (which is rare), and then on to the U.S. Supreme Court (almost never).

If it prevails, the contractor will be able to recover any additional costs, including delay and disruption caused by the government, and any additional contract administration costs it incurred as a result of presenting the issue (before the formal claim).[7] The contractor will be able to recover interest from the date of the formal claim.[8]

4.3 Application of contract interpretation law to the case study

Under U.S. federal law, contract interpretation is a question of law.[9] In determining whether a term is ambiguous under a federal government contract, federal courts and boards of contract appeals apply basic rules of contract interpretation to determine the parties' intent.[10] In determining intent, the first of these rules of interpretation gives consideration to intrinsic evidence under the "four corners rule" which focuses on the plain meaning of the contract's language.[11] Under the Plain Meaning rule, the courts and boards seek to give meaning to the contract language that would be derived from the contract by

[2] Zafer Constr. Co. v. United States, No. 19-673C, 2020 WL 7767509 (Fed. Cir. 2020) (REA seeking negotiation of adjustment in contract price did not constitute a demand for a final decision and payment from contracting officer and was therefore not a claim under the Contract Disputes Act).
[3] FAR 52.233-1, Disputes, provides that a claim must be made in writing within 6 years after accrual of the claim to the contracting officer for a written decision.
[4] FAR 52.233-1 (i), requires the contractor to "proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under or relating to the contract, and comply with any decision of the Contracting Officer."
[5] FAR 52.233-1 (e) provides that: "For Contractor claims of $100,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For Contractor-certified claims over $100,000, the Contracting Officer must, within 60 days, decide the claim or notify the Contractor of the date by which the decision will be made."
[6] See 41 U.S.C. § 7014, which permits a contractor to file an appeal with the appropriate agency board of contract appeals within 90 days from the date of receipt of a contracting officer's final decision, or the contractor may file an appeal with the U.S. Court of Federal Claims within 12 months from the date of receipt a contracting officer's final decision of the contractor's claim.
[7] Turner Constr. Co., Inc. v. United States, 367 F.3d 1319 (Fed. Cir. 2004) (contractor entitled to recover the additional costs incurred as a result of ambiguous specifications).
[8] *See* FAR 52.233-1(h).
[9] Lucent Techs. v. Gateway, Inc. U.S., 543 F.3d 710, 717 (Fed. Cir. 2008), NVT Techs., Inc. v. United States, 370 F.3d 1153, 1159 (Fed. Cir. 2004).
[10] Firestone Tire & Rubber Co. v. United States, 444 F.2d 547, 551 (Ct. Cl. 1971).
[11] Hol-Gar Mfg. Corp. v. United States, 351 F.2d 972 (Ct. Cl. 1965).

a reasonably intelligent person in contemporaneous circumstances.[12]
A second principle of contract interpretation requires reading the contract as a whole, interpreting terms in a manner that does not render any provision superfluous or meaningless, having specific terms control over general terms, and harmonizing the provisions to reconcile any conflicting terms.[13]

A third principle of contract interpretation provides that disagreement between the parties over the meaning of a term does not, by itself, render the term ambiguous.[14]

A contract is unambiguous if by its plain terms the provisions are susceptible to only one meaning.[15] If such a determination is made, the court or board will not consider extrinsic evidence.[16] The federal courts hold that unambiguous contract provisions must be given their plain meaning and parol evidence must not be considered, reasoning that to so otherwise "would cast a long shadow of uncertainty over all transactions' and contracts."[17] Thus, courts and boards will only consider extrinsic evidence if the contract language is found ambiguous.

Under U.S. law, a contract term is ambiguous only when it is reasonably susceptible to more than one interpretation.[18] Such differing interpretations must amount to more than disagreement.[19] To establish an ambiguity a party's interpretation must fall within the "zone of reasonableness".[20] If a contract term is found ambiguous, extrinsic evidence may be considered to determine the parties' intent.[21]

Ambiguities discovered in a government contract are normally construed against the drafter under the rule of *contra proferentem*.[22] However, before applying the rule of *contra proferentem* a court or board must determine whether the ambiguity is latent or patent.[23]

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[12] Teg-Paradigm Environmental, Inc., v. United States, 465 F.3d 1329, 1338 (Fed. Cir. 2006). *See also* Metric Constructors, Inc. v. NASA, 169 F.3d 747, 752 (Fed. Cir. 1999).
[13] Dalton v. Cessna Aircraft Co., 98 F.3d 1298, 1305 (Fed. Cir. 1996).
[14] Community Heating & Plumbing Co. v. Kelso, 987 F.2d 1575, 1578 (Fed.Cir.1993).
[15] Sterling Winchester & Long, L.L.C. v. United States, 83 Fed. Cl. 179, 183 (2008) (when a contract term is "clear and unambiguous in its face, the ordinary meaning of the contract controls").
[16] Barron Bancshares, Inc. v. United States, 366 F.3d 1360, 1375 (Fed. Cir,. 2004) "If the terms of a contract are clear and unambiguous, they must be given their plain meaning – extrinsic evidence is inadmissible to interpret them."
[17] Barseback Kraft AB v. United States, 121F.3d 1475, 1479 (Fed. Cir. 1997); Barron Bancshares, Inc., 366 F.3d at 1375-76.
[18] Metric Constructors, Inc. v. NASA, 169 F.3d 747, 752 (Fed. Cir. 1999); *Barron Bancshares, Inc.*, 366 F.3d at 1375-76.
[19] Community Heating & Plumbing Co. v. Kelso, 987 F.2d 1575, 1578 (Fed. Cir. 1993).
[20] *Metric Constructors*, 169 F.3d at 751; WPC Enters., Inc. v. United States, 323 F.2d 874, 876 (Ct. Cl. 1964).
[21] BPLW Architects & Engineers, Inc. v. United States, 106 Fed. Cl. 521 (2012).
[22] *See* Turner Construction Co. v. United States, 367 F.3d 1319, 1321, (Fed. Cir. 2004) where the Federal Circuit stated: "When a dispute arises as to the interpretation of a contract and the contractor's interpretation of the contract is reasonable, we apply the rule of *contra proferentem,* which requires that ambiguous or unclear terms that are subject to more than one reasonable interpretation be construed against the party who drafted the document."
[23] Newsome v. United States, 676 F.2d 647, 649-50 (Ct. Cl. 1982); Burchick Constr. Co. v. United States, 83 Fed.Cl. 12, 19 (2008).

A patent ambiguity is one that is so obvious is raises a duty to inquire.[24] A patent ambiguity should be apparent on the face of contract.[25] The courts and boards hold that a patent ambiguity places a reasonable contracting party on notice to rectify the inconsistency by inquiry to the other party.[26]

Where a contract is found to have a patent ambiguity, and the contractor failed to seek clarification from the contracting officer, the contractor's claim will be denied.

A latent ambiguity, in contrast to one that is patent, is "a hidden or concealed defect which is not apparent on the face of the document, could not be discovered by reasonable and customary care, and is not so 'patent and glaring a to impose an affirmative duty to inquire on plaintiff to seek clarification.'"[27] A latent ambiguity is one that generally becomes evident only when the contract is applied.[28]

The rule of *contra proferentem* applies in the case of a latent ambiguity where the ambiguity cannot otherwise be resolved by the principles discussed above.[29] The boards and courts will adopt the non-drafting party's interpretation of a latent ambiguity where, as discussed above, its interpretation is found reasonable.

In addition to establishing that its interpretation of a latently ambiguous term is reasonable, a contractor must also demonstrate that it relied on its interpretation during bidding.[30] Such evidence may include bid/proposal documents and in some cases affidavits of persons with information concerning the contractor's reliance on the ambiguous term.[31]

In the case of a government contract, where the government drafted the contract, and the contractor relied on its reasonable interpretation of a latent ambiguity, the contractor will prevail over the government, who authored the contract.[32]

Under U.S. federal procurement law, the award and execution of a government contract is governed by the same set of laws and regulations. Therefore, the use of a competitive tendering procedure does not impact the application of the common rules of contract interpretation to a dispute concerning a contract term. Thus, the courts and boards examine disputes involving matters of contract interpretation by examining the specific facts of each case regardless of the use of a competitive tendering procedure.

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[24] H & M Moving, Inc. v. United States, 499 F.2d 660, 671 (Ct. Cl. 1974); *Metric Constructors,* 169 F.3d at 751.
[25] Travelers Cas. & Sur. Co. of Am. v. United States, 277 F.3d 1346, 1355 (Fed. Cir. 2002); Beacon Constr. Co. of Mass. v. United States*,* 314 F.2d 501, 504 (Ct. Cl. 1963); P.R. Burke Corp. v. United States, 277 F.3d 1346, 1355 (Fed. Cir. 2002).
[26] Metcalf Constr. Co. v. United States, 53 Fed. Cl. 617, 630 (2002); Fortec Constructors v. United States, 760 F.2d 1288, 1291 (Fed. Cir. 1985).
[27] Diggins Equip. Corp. v. United States, 17 Cl. Ct. 358, 360 (1989).
[28] *Travelers Cas. & Sur. Co. of Am*., 75 Fed. Cl. at 711.
[29] Gardiner, Kamya & Assocs., P.C. v. Jackson, 467 F. 3d 1348, 1352 (2006); Chris Berg, Inc. v. United States, 455 F. 2d 1037, 1044 (Ct. Cl. 1972).
[30] *Fruin-Colnon Corp. v. United States*, 912 F.2d 1426, 1430 (Fed. Cir. 1990).
[31] MCSD Constr. Co., ASBCA 37226, 91-2 BCA ¶ 23,986.
[32] *Alliant Techsys., Inc*., 74 Fed. Cl. 566, 577; *Diggins Equip. Corp.*, 17 Cl. Ct. at 360.

Case Study 5: Contract Does Not Provide for a Particular Matter and May Need Supplementation with an Additional Term

5.1. Description of the case study

Contracting authority A undertakes a tendering procedure and decides to award the contract to tenderer B. Subsequently, A concludes a contract with B. In the course of the performance of the contract, it becomes clear that the explicit terms of the contract do not provide for a particular matter. A dispute arises between A and B on the question what should be the content of the additional term to be implied in the contract in order to deal with the matter not provided for in the contract.
This case study assesses the factual situation above against the well-established U.S. regime for contract claims and modifications. The case study then focuses specifically on a recent failed attempt by the U.S. government to use that contracting process to mitigate the effects of the COVID-19 pandemic under Section 3610 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act.

5.2. U.S. Contract Administration Legal Regime

As the companion Case Studies (4) and (6) reflect, the U.S. federal government has a very stable and mature legal regime regarding contract administration. The rules and processes for resolving contractual disputes have evolved since the early days of the U.S. republic, and are largely separate from commercial contracts law and regular civil courts.

5.3. U.S. Contract Disputes Act Process

As companion Case Study (4) reflects, there is an established system under the Contract Disputes Act for addressing the type of dispute suggested by this case study. If a contractor has a disagreement with the government's interpretation of a contract term – here a disagreement "on the question what should be the content of the additional term to be implied in the contract" – the contractor may submit a request for equitable adjustment to the contract, which does not constitute a formal claim. The contracting officer overseeing the contract in essence acts as an arbiter in hearing the request. The contracting officer may grant the requested adjustment to the contract, or may reject it, in which case the contractor may file a formal and certified claim typically based on the same facts and arguments. If the contracting officer denies that claim, the denial may be appealed to the U.S. Court of Contract Appeals (COFC) or the Board of Contract Appeals (BCA) (either for the Armed Services or the Civilian Agencies). The decision of the COFC or the BCA may, in turn, be appealed to the U.S. Court of Appeals for the Federal Circuit, and from there (though this is very rare) to the U.S. Supreme Court.

5.4 Special Allocation of Risks of Loss During the Pandemic

The long history and stability of the disputes process in the U.S. federal procurement system should, in principle, make it easier for the system to flex to accommodate new demands. This type of anomalous situation arose during the pandemic, as contractors

incurred costs due to public quarantines and being "locked out" of government facilities. Under Section 3610 of CARES Act, Congress provided that contractors could be compensated for the leave paid their employees sidelined by the pandemic. In practice, however, the federal contract disputes process proved unable to accommodate change and a new direction.

5.5 Section 3610 Changed Allocation of Risks To Provide Funding

While generally the federal procurement system allocates anticipated risks in an economically efficient manner to the party in the best position to bear those risks, under Section 3610 the allocation of risks was driven by public imperatives which reached beyond contracting – such as containing disease, reducing the economic impact of the pandemic, and providing a fiscal stimulus. Under Section 3610, agencies were allowed extraordinary authority to draw on funds available from any existing appropriation to modify contracts in order to compensate contractors for employees stilled by the pandemic. These extraordinary authorities to compensate contractors in theory should have (1) reduced the economic pressures for contractors to insist that their employees hazard returning to work, thus reducing health risks and improving employee retention (a key issue for the U.S. intelligence community); (2) provided a fiscal cushion to contractors; and (3) provided a broader fiscal stimulus to the beleaguered U.S. economy. In practice, however, Congress' initiative under Section 3610 was a failure, in part because contracting officials resisted modifying contracts to redirect funds to contractors.

5.6 Why Section 3610 of the CARES Act Failed

Section 3610 – a unique experiment in using contract modifications to reallocate government resources in an emergency – failed in large part precisely because the contract disputes process is so deeply entrenched in federal procurement. Contracting officers, the guardians of the public fisc under that established system, had neither the training nor the mandate to redirect funding through the contract modification process. Instead, regular reports from the contracting community confirmed that contracting officers were refusing contractors' requests for contract adjustments under Section 3610. Because Congress appropriated no new funds and the agencies' existing contract funds were at stake, neither the contracting officers nor their superiors had any institutional incentive to take a new approach to contract modification and compensation, and the Trump White House failed to provide effective leadership to encourage agencies to redirect contract funds. The individual agencies proved incapable of assimilating broader public imperatives into their disputes processes, which are quite good at allocating costs and risks efficiently in a traditional contract dispute, but failed in a time of crisis to look beyond agencies' parochial interests to address broader national concerns.

Case Study 6: Contracting Authority Invokes an Allegedly Unfair Contract Clause

6.1. Description of the case study

Contracting authority A undertakes a tendering procedure and decides to award the contract

to tenderer B. Subsequently, A concludes a contract with B. In the course of the performance, A decides to invoke a particular contract clause. The consequences of this are, however, detrimental to B. B argues that A cannot invoke the contract clause for reason that the clause is abusive. A dispute arises between A and B on the question whether A can invoke the contract clause.

6.2 Overview of US Federal Contracting Disputes Process

Since 1984, the Federal Acquisition Regulation (FAR) has applied to all contracts with the executive branch of the U.S. federal government. The FAR derives its statutory authority from the Office Federal Procurement Policy Act.[33] Having been authorized by Congress,[34] it has the force and effect of law when its provisions are published in the Federal Register.[35] Contractors are thus bound by the standard contract clauses found in the FAR,[36] and in some cases are bound by those clauses even if they were not included in the contract provisions.[37] The latter contract doctrine has been called a vivid example of the "exceptionalism" of the U.S. federal procurement system in terms of its disparity with the law of private contracts.[38]

Some standard clauses that can have the harsh effects envisioned in the case study include the changes clause,[39] the differing site conditions clause,[40] and the standard delays clause.[41] Each of these are described in turn, followed by an explanation of terminations for default, before considering their application.

6.2.1 Changes Clause

Most U.S. federal contracts include a changes clause.[42] This provides the government with the unilateral right to order almost any change during contract performance.[43] If the change

[33] FAR 1.103, citing Pub. L. No. 98-101, 41 U.S.C. § 405.
[34] Chrysler Corp. v. Brown, 441 U.S. 281 (1979) (explaining that regulations have the force and effect of law only if authorized by Congress).
[35] 41 U.SC. § 418b.
[36] *See generally* FAR part 52.
[37] G.L. Christian & Assocs. v. United States, 312 F.2d 418, 426 (Ct. Cl. 1963), *cert. denied*, 375 U.S. 954 (1963) (holding that mandatory clauses that express a "significant and deeply engrained strand of public procurement policy" are deemed incorporated by operation of law).
[38] Joshua Schwartz, *United States of America*, *in* DROIT COMPARÉ DES CONTRATS PUBLICS 613, 637–38 (Rozen Noguellou & Ulrich Stelkens eds., 2010).
[39] FAR 52.243-1 (fixed-price supply contracts); FAR 52.243-4 (fixed-price construction contracts).
[40] FAR 52.236-2.
[41] FAR 52.249-8.
[42] JOHN CIBINIC, RALPH C. NASH & JAMES NAGLE, ADMINISTRATION OF GOVERNMENT CONTRACTS 379 (4th edn., 2006).
[43] *Id.*

is within the procurement's scope[44] and is one of the enumerated permissible changes,[45] contractors have a "duty to proceed".[46] Requests for equitable adjustment cover the costs that may ensue.[47] Failure to comply with such orders can result in termination for default.[48] Contractors can dispute whether the change is within scope, but they are in general pleased to receive what is in effect a sole-source for the additional work, and so litigation is rare.[49]

One source of disputes for the changes clause, however, is the duty to provide *timely* notice of the right to additional compensation.[50] What triggers that requirement is often unclear.[51] Further, even if formal notice has not been required, the government may have constructive notice of additional costs in the course of its normal oversight. This would make the strict application of the notice requirement seem unfair. Thus, when contracting authorities oppose claims based on late notice, the courts will often side with the contractor,[52] unless the government can prove that it suffered actual prejudice from the late notice,[53] thereby shifting the burden to the "least-cost avoider" rather than granting the agency a windfall.[54]

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[44] There are two tests for determining whether a contract is within scope. First, one test concerns the nature of the work. Under this test, work falls within the general scope of a procurement if it "should be regarded as having been fairly and reasonably within the contemplation of the parties when the contract was entered into." Freund v. United States, 260 U.S. 60, 63 (1922). To the contrary, there is a "cardinal change" if the deviations alter the nature of the thing to be built. Air-A-Plane Corp. v. United States, 408 F.2d 1030, 1034 (Ct. Cl. 1969). Second, the other test concerns the cost and disruption that the change would entail. *See* Peter Kiewit Sons' Co. v. Summit Constr. Co., 422 F.2d 242 (8th Cir. 1969) (holding the change would be so disruptive as to be a change beyond the scope because it added 200 percent to the cost of the work in question).

[45] FAR 52.243-1(a) (supplies and services); FAR 52.243-4(a) (construction).

[46] FAR 52.243-1(e) ("nothing in this clause shall excuse a Contractor from proceeding with the contract as changed").

[47] FAR 52.243-1(b) and (c) (mandating that when changes increase the cost of performance and the contractor makes a timely assertion that the contracting officer "*shall* make an equitable adjustment") (emphasis added).

[48] Max M. Stoeckert v. United States, 183 Ct. Cl. 152, 162 (1968) (finding termination for default proper when contractor refused to proceed as directed and abandoned the project).

[49] *See* CIBINIC, NASH & NAGLE, *supra* note 42, at 381, 388–89.

[50] Kings Elecs. Co. v. United States, 341 F.2d 632 (Ct. Cl. 1965) (announcing a ruled denying contractors compensation for costs that might have been avoided had timely notice been provided).

[51] FAR 52.243-1(c) requires that contractors assert their rights withing 30 days from the date of the receipt of the *written* change order but fails to specify a deadline when change orders are not in writing. FAR 52.243-4 (b) and (d) also limit recovery based on constructive changes to costs incurred no more than 20 days prior to notice of such changes, and the boards continue to enforce this strict requirement unless the government had actual knowledge of the change. *See* Preferred Contractors, Inc., ASBCA 15569, 72-1 BCA ¶ 9283 (1972).

[52] CIBINIC, NASH & NAGLE, *supra* note 42, at 471–72 (reporting that courts and boards of contract appeals have been reluctant to strictly enforce contract notice requirements).

[53] *See, e.g.*, Precision Tool & Eng'g Corp., ASBCA 14148, 71-1 BCA ¶ 8738 (1971).

[54] *See* Stephen G. Giles, *Negligence, Strict Liability, and the Cheapest Cost-Avoider*, 78 VA. L. REV. 1291, 1306 (1992) (explaining that the awkward term "least-cost avoider" originated with Steven Shavell), citing STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 8 (1987); *id.* at 1293 (observing that Guido Calabresi coined the cognate term "cheapest cost-avoider" two decades earlier), citing GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970).

6.2.2 Differing Site Conditions Clause

The differing site condition clause is another clause that, when strictly enforced, sometimes imposes onerous duties on contractors. Though its name would suggest that this applies only to construction, and that was its original purpose, this clause has also been extended to include service contracts.[55] Under its the provisions, contractors are sometimes relieved of the unforeseen costs resulting from subsurface conditions or other latent conditions.[56] In this manner, the government assumes the risk, so that that there are neither disasters nor windfalls for the contractor and the purchasing agency benefits from "accurate bidding, without inflation for risks which may not eventuate."[57] Yet this clause does not obviate all assumption of risk for contractors. The condition in question must predate the contract.[58] Covered conditions include (1) weather and acts of God and (2) man-made conditions, but in both cases it is usually the timing that controls rather the force creating the condition.[59] For example, frozen ground, excess ground water, severe sea conditions, and abnormally heavy rainfall have all been held to be wearing conditions arising during performance.[60] Not least, contractors also bear the burden of proof,[61] and recovery may be denied even for challenging site conditions if they cannot prove that the problems were not foreseeable.[62]

6.2.3 Delay Clause

The last standard clause that if strictly enforced may impose a heavy burden on contractors is the delay clause. The government is responsible the time and cost for delays it causes, and the contractor unsurprisingly shares reciprocal responsibility for its own delays.[63] And for delays neither party controls, the delay is "excused" but the contractor bears the cost.[64] It is this third category that is potentially most harmful to contractors, if strictly enforced. Not every fire, quarantine, strike, or embargo is sufficient grounds for an excusable delay.[65]

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[55] *See, e.g.*, FAR 37.110(e) (requiring that contracting officers include the differing site conditions clause in services contracts when applicable).
[56] FAR 52.236-2(b) (holding that where site conditions materially differ and increase the contractor's costs, the contracting officer shall make an equitable adjustment and modify the contract accordingly).
[57] Foster Constr. C.A. & Williams Bros. Co. v. United States, 435 F.2d 873, 887 (Ct. Cl. 1970) (stating that this policy was designed to remove "some of the gamble on subsurface conditions out of the bidding").
[58] John McShain, Inc. v. United States, 375 F.2d 829, 833 (Ct. Cl. 1967) (holding the clause only covers a condition "existing at the time the contract was entered into and not one occurring thereafter").
[59] CIBINIC, NASH & NAGLE, *supra* note 42, at 485–88.
[60] *Id.* at 486–87 (citations omitted).
[61] For subsurface and latent physical conditions, the contractor has the burden of proving the differing site condition to a preponderance of the evidence. Stuyvesant Dredging Co. v. United States, 834 F.2d 1576, 1581 (Fed. Cir. 1987). For a second category concerning unknown physical conditions that are of an unusual nature, differing materially from those usually encountered, the standard is even higher. Charles T. Parker Constr. Co. v. United States, 433 F.2d 771, 778 (Ct. Cl. 1970) (calling the standard of proof for Category II differing site conditions "a relatively high burden of proof").
[62] CIBINIC, NASH & NAGLE, *supra* note 42, at 493.
[63] *Id.* at 537.
[64] *Id.* at 537–39.
[65] United States v. Brooks-Callaway Co., 318 U.S. 120, 123 (1943), quoting Brooks-Callaway Co. v. United States, 97 Ct. Cl. 689, 701 (1942) (observing, "Not every fire or quarantine or strike or freight embargo should be an excuse for delay under the proviso.") (J. Madden, dissenting in part).

First, the delay must be "beyond the control" of the contractor.[66] Under one definition, this requires a showing of commercial impracticability.[67] At least for fixed-price contracts, mere "economic hardship" does not constitute impossibility of performance.[68] Further, the contractor must also be without fault or negligence.[69] A third requirement applying only to construction[70] is that in order to be excusable causes of delays must be unforeseeable.[71]

Apart from these general requirements, causes for delay are rarely excused unless listed among the enumerated delays.[72] If not, courts are more restrictive.[73] Excusable delays are usually limited to the listed categories.[74]

6.2.4 Termination for Default

Lurking behind each of these three clauses has been the specter of termination for default.[75] Default terminations are issued for unexcused present or anticipated failure to perform.[76] Contractors seek to avoid such terminations because they want to be paid for their work,[77] because they do not want to be debarred from future contracts,[78] because they hope to avoid payment of liquidated damages,[79] and for other good reasons.[80] Fear of default termination frames consideration of the case studies below because it is the worst that the government can threaten the contractor with in order to enforce the other clauses.

6.3 Application of contract interpretation law to the case study

When the contracting authority seeks to enforce a particular clause and the contractors cries foul because doing so would be "unfair", what can be done depends on the clause at issue and the particular facts and circumstances. To make this example more concrete, consider

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[66] This "beyond the control" standard is applied in three ways. First, if the event causing the delay is foreseeable, it is not beyond the contractor's control. Second, it is not beyond the contractor's control if it could prevent the event. Third, it may not be beyond the control if the event could be overcome. CIBINIC, NASH & NAGLE, *supra* note 42, at 539, 540–41.
[67] Jennie-O-Foods, Inc. v. United States, 580 F.2d 400, 409–10.
[68] *Id.* at 408–09 (saying that impossibility instead requires that costs be "excessive and unreasonable, thus rendering performance so costly as to be impracticable").
[69] CIBINIC, NASH & NAGLE, *supra* note 42, at 542–43.
[70] 39 Comp. Gen. 478 (B-141269) (1959) (considering a case involving both supply and construction contracts and finding that the unforeseeability requirement applied only to the latter).
[71] CIBINIC, NASH & NAGLE, *supra* note 42, at at 543–44.
[72] *Id.* at 545–60 (listing strikes, weather, government acts, subcontractor and supplier delays, floods, fires, epidemics, freight embargoes, and acts of God).
[73] Carnegie Steel Co. v. United States, 240 U.S. 156, 165–66 (1916) (holding that excusable delays do not extend to "extraneous" causes).
[74] *See, e.g.*, Austin Co. v. United States, 314 F.2d 518, 520 (Ct. Cl. 1963), *cert. denied*, 375 U.S. 830 (1963) (finding the rule of *ejusdem generis* applies, restricting excusable delays to the enumerated categories).
[75] FAR 52.249-8; FAR 52.249-10.
[76] FAR 49.401(a).
[77] FAR 49.402-2(a) (establishing that the government is not liable for costs of unaccepted work and that contractors are paid only for work that has been accepted).
[78] FAR 9.406(b)(1).
[79] FAR 49.402-7(a).
[80] CIBINIC, NASH & NAGLE, *supra* note 42, at 883–84.

how complaints about the "unfairness" as to the strict enforcement of these three clauses would be received at the boards of contract appeals and the U.S. Court of Federal Claims. In each case, the government has the upper hand.

6.3.1 Changes Clause

Suppose that A invokes the changes clause, demanding that B perform work that exceeds the original terms of the contract. Unless B can prove that the change is clearly outside of scope or that the change isn't one of the enumerated permissible changes, B must perform. B is entitled to additional compensation ("equitable adjustments"), but awaiting payment does not excuse B from its "duty to perform". Failure to perform the requested work in a timely fashion may result in a termination for default. Though B must provide timely notice of its request for equitable adjustment, this requirement will only be enforced if A suffered some actual prejudice as result of any delays.

6.3.2 Differing Cite Conditions Clause

The clause is distinct in that it is designed to protect contractors. In rare cases, it relieves them of their duties or offers further compensation. Conflict may arise, however, because contractors will invoke this limited "escape" clause when it clearly does not apply. Suppose that B encounters subsurface conditions that render construction of a building substantially more expensive. B will perhaps want to invoke the differing cite conditions clause so that is relieved from the terms of contract or provided additional compensation. But timing matters. The benefits of this clause will not accrue if the subsurface condition arose after the contract was signed. Further, even if the differing site condition does predate the contract, B still has the burden of proof. If B cannot meet that burden, it must perform or risk a termination for default.

6.3.3 Delay Clause

Suppose that there is delay that neither A nor B causes. B may be excused for the lost time but still must bear the cost. To be excused, B must satisfy the three general requirements: the delay must be beyond its control (for which mere economic hardship will not suffice), B must be without fault or negligence, and the delay must be unforeseeable. Otherwise, B's delay is not excusable and a termination for default could result.

What these scenarios illustrate is that U.S. procurement was designed around the military, especially its wartime needs.[81] Contracting authorities, thus, have disproportionate power to enforce contract clauses even if they are burdensome, unfair, or abusive to the contractor.

[81] Joshua I. Schwartz, The Centrality of Military Procurement: Explaining the Exceptionalist Character of United States Federal Public Procurement Law 10, 25 (Oct. 17, 2004) (unpublished manuscript) (GW Law Faculty Publications & Other Works, Paper 1077) (arguing that the U.S. federal procurement "built around the needs and exigencies of military procurement" so that the government is granted "extraordinary" powers).