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NEWSLETTER

Five Lessons From Framaco Litigation: How Construction Contractors Can Best Position Themselves Before Filing Claims

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A string of recent decisions issued by the Civilian Board of Contract Appeals (CBCA) provide helpful reminders for construction contractors that have encountered difficulties in performance and are seeking relief from the Government. These decisions all relate to a contract issued to Framaco International Inc. to construct the New Embassy Compound in Papua New Guinea. In more than 100 appeals, Framaco sought to recover for various changes and delays. The CBCA granted some of the appeals and denied others—the board has issued 11 merits decisions this year alone—while the parties settled several more.

Contractors would be well served to look past the volume of claims and their relatively small dollar values to focus on the underlying disputes. There are at least five lessons to take from them:

Lesson #1: If there is an obvious conflict in the specifications, contractors must inquire about the conflict.

Government-provided specifications are not infallible and may contain requirements that are internally inconsistent. When those inconsistencies are obvious from the face of the specifications, a contractor bidding on the work has an obligation to inquire about the ambiguity before it submits a proposal. Otherwise, it risks being unable to recover for the additional work required to resolve those inconsistencies. For example, as addressed in one of the *Framaco* decisions, the contract drawings required Framaco to place a chlorine analyzer in a specific location. But applicable zoning codes required that location to be part of a "clear zone" free of auxiliary

Authors

Cara L. Sizemore
Partner
202.719.4192
csizemore@wiley.law

Craig Smith
Partner
202.719.7297
csmith@wiley.law

Practice Areas

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structures or other man-made features. When Framaco tried to recover its costs for relocating the chlorine analyzer to outside the clear zone, the CBCA rejected the argument, finding that Framaco failed to inquire about this obvious inconsistency and was therefore not entitled to recover costs for moving the analyzer.

Inquiring also has the benefit of helping to later support your interpretation of the requirements. In a different *Framaco* appeal decision, Framaco had sought to recover for the cost to procure and install an X-ray machine that it believed would be provided as government-furnished, government-installed (GFGI) equipment. Framaco had asked the contracting officer's representative to confirm that the X-ray machine would be GFGI, which it did. The CBCA found that by requiring Framaco to subsequently procure and install the machine, the Government had changed the contract and Framaco was entitled to recover its additional costs to acquire and install the X-ray machine.

Lesson #2: Document compliance with the terms of the contract.

Disputes under construction contracts often hinge on whether the contractor has adequately documented obstacles it encounters during performance, direction from the contracting officer, or the impact of delays. Equally important, however, is that the contractor document its compliance with contractual provisions that prescribe certain steps before recovery. Most familiar may be the changes clause found at FAR 52.243-4 that calls for a contractor to notify the contracting officer within 30 days of a change as a condition to recovering additional costs. Other contract clauses may similarly prescribe certain steps for a contractor to take, and contractors should be sure to document their compliance with those clauses.

As an example, in the *Framaco* decisions, the contract required Framaco to visit the project site and flag any differing site conditions for the Government. The contract also stated that Framaco acknowledged the contract documents were "sufficiently complete and detailed" for Framaco to perform the work, and that Framaco agreed it would not bring any claim against the Government based on differing site conditions unless those conditions had been concealed. When Framaco sought to recover costs of fixing bollards on-site, the CBCA found the record to lack evidence that Framaco had visited the project site, as required by the contract, and that Framaco had not alleged that the site concealed the bollards' condition. The CBCA therefore found there was no basis under the contractor for Framaco to recover.

Lesson #3: Get contracting officer approval of any change and contracting officer buy-in on your interpretation of the requirements.

Even the most experienced contractors can, when in the throes of performance, lose sight of the principle that it takes direction from someone with actual authority to bind the government (usually, the contracting officer) to change the contract. When a contractor is regularly working side-by-side with other agency personnel like the contracting officer's representative (COR), it may seem that getting the COR's direction on an issue is enough to later seek compensation or other contract adjustments for directed changes. But the COR lacks authority to change the contract, and contractors should default to seeking the contracting officer's approval of anything they view to be a change.

Contractors should also seek the contracting officer's agreement on their interpretation of contract requirements if they are not entirely clear. For example, one of the *Framaco* appeals involved a claim for the cost of installing fire-rated plywood that the contractor believed was not required by the contract. In arguing that the contract did not require fire-rated plywood, Framaco pointed to discussions with the COR, who agreed with Framaco's interpretation of the contract's plywood requirements. In rejecting Framaco's argument, the CBCA explained that the COR's interpretation was irrelevant, because the contracting officer is the only individual that could change the contract by modifying the specifications. If Framaco had gotten the contracting officer to agree with its interpretation, it may have been successful in its claim.

Lesson #4: Stay positioned to keep performance moving along by making contractually required submissions on time.

When there is a delay in performance, contractors often point out that the Government failed to review and approve the contractor's submissions in a timely manner. The success of these arguments often depends on whether the contractor submitted those materials on time. Contractors that submit documents late for review may find it more difficult to establish that any ensuing delay in performance is the fault of the Government.

As an example from one of the *Framaco* appeals, the contract required Framaco to install a specific exhaust hood. The contract also stated that if the contractor could not procure the specific exhaust hood, the contractor had to request a substitution in writing within 90 days. Framaco submitted its request for substitution after the 90-day period. The CBCA found that the Government was under no obligation to even consider the substitution request and therefore concluded that any delay in installation was the responsibility of Framaco, not the Government.

Lesson #5: When disputes are flaring, remember there's often still a chance to negotiate.

Even though Framaco filed more than 100 appeals, many of the appeals were dismissed because the parties were able to settle the disputes. This is an important reminder that contractors should try and work with the Government to resolve any disputes, even once they've risen to the level of litigation. Of course, it is usually preferable to work with the Government to remedy any issues that arise during performance, but there are some instances where the parties just can't agree. Even then, the parties should continue to consider negotiations in parallel with the litigation, in the hopes of amicably resolving the dispute without needing to see any litigation through to a decision.

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In our view, all five of these lessons tie into a common theme: communication. Whether due to time pressure, interpersonal dynamics, or other circumstances, many contractor and government disputes get their start—and keep progressing—because the two sides have not been communicating as well as they could. And no matter who might be (arguably or actually) responsible, often the path out of a dispute starts with one side recognizing the opportunity to pick up the phone and give the communications a reset.