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Government Contracting Phase One: Transitioning From Commercial to Government Work

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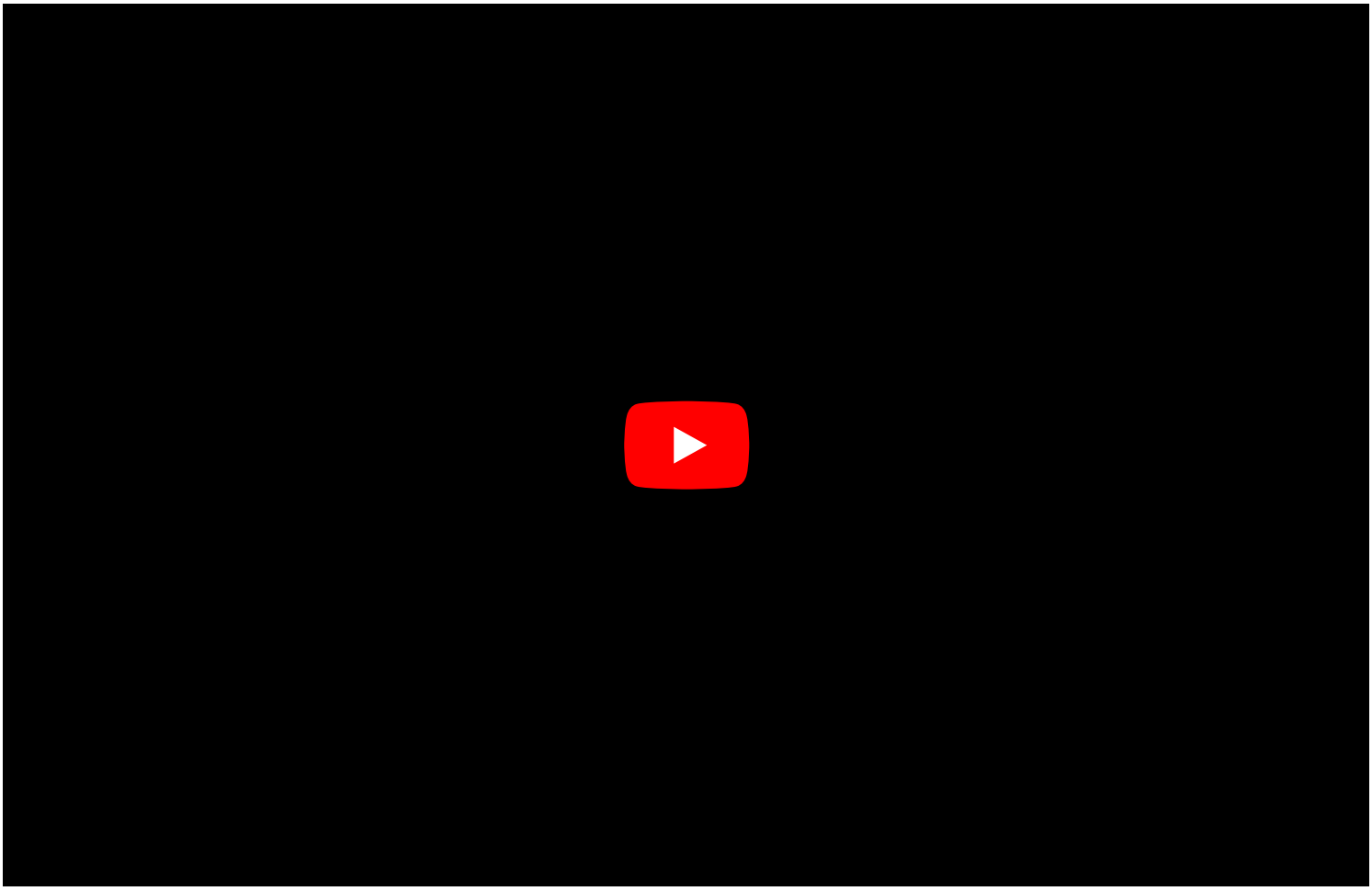

Due in large part to the COVID-19 pandemic, there's been significant movement toward the government contracting arena and away from the commercial world. Join Carlton Fields attorney Joe

McManus and Paul Williams, former chief judge of the Armed Services Board of Contract Appeals, as they discuss the transition from commercial work to government contracting and the contract administration phase of the contracting process.

Click here to attend the accompanying live webinar on February 18, 2021.

Transcript:

Joe McManus: Hello, everyone. My name is Joe McManus. I'm a shareholder of Carlton Fields law firm, heading up the Government Contract office here in Washington, D. C. and part of the Construction practice group. I'm also president of Centinel Consulting, LLC which is one of three Carlton Fields consultancies. Centinel is a consultancy, a full service for the construction and real estate industries.

This is the first of a series of podcasts dealing with government contracts. Specifically, on these early podcasts we're dealing with the transition from the commercial world to the government world as the commercial world starts to shrink as a result of COVID, people will be gravitating into the government contract arena, which is an arena which is full of benefits and potholes at the same time.

I'm very happy to have as my first guest for these podcasts Judge Paul Williams, formerly Chief Judge of the Armed Services Board of Contract Appeals.

Government contracts, although they're incapable of division, falls into three basic aspects of government contracting. There's the getting the contract phase, there's the administration phase, and there's the wrap-up, the conclusion phase. We'll be dealing with all three of those. Primarily we'll be probably focusing most heavily on the contract admin phase, which is, we believe, a nice introduction into your introduction to government contracts.

So, Judge Williams, it's a pleasure to have you here. Would you care to comment or criticize any of my early comments here on what we're doing?

Paul Williams: I told you, I'm going to save my criticism for private talk, OK?

Joe McManus: [*laughs*]

Paul Williams: I'm really delighted to be here and I agree with you that a number of contractors would like to migrate into the federal contracting system or state system. That's where the money is. However, there are a lot of pitfalls, and just with a few words from yourself and myself, I think we can save a lot of people a lot of trouble.

Joe McManus: OK. What about the getting the contract phase? I mean, years ago there was just bidding. Everything was hard bid. The project was designed and you're just going to fight with everybody else and the low bidder gets it. As long as you're responsible and responsive, you get it. And that has changed. So, can you give us your perspectives on obtaining government contracts?

Paul Williams: What I find is that for the contracts that you're implying other than field bidding, a lot of that is done by the bigger companies and they generally have the necessary support, etc., to be aware of the complications of the regulations and statutes and the pitfalls. But there's a lot of that that they have to be very careful just as like sealed bidding, that they have to file a timely bid, they have to negotiate, and I don't have a whole lot more to say in a podcast like this on those particular problems. But I think it's the smaller contracts or the smaller contractors who are trying to get themselves their first contract that we're going to focus on because those will show you what easy problems to avoid but easy problems to also step into and lose work or have a dangerous contract that they become the victim of having to spend a lot of money and losing a lot of money.

Joe McManus: What about, you know, in the commercial arena the low bidder or the most responsible, responsive person cannot get the job. He may or may not get the job. But in the government contract arena we have the ability to have bid protests. Can you just give us a little window into the bid protest arena here?

Paul Williams: First of all, a lot of times when someone thinks they should get the award and they don't, the problems are easy to analyze. They don't file timely, they don't include all the required documents. There are a lot of contracts which tell you specifically and will highlight more than once, you must include these certain documents with your bid. And if you miss that, you're in deep trouble because the law basically is designed to protect the public. You can't just have anybody getting into the government money. And they're to protect the contracting community so that you aren't able to take advantage of bidding after the fact or changing your bid after the closing date. And so all of these little things can lead to someone who thinks they're timely and they don't get the award and then they have to see what their options are.

Joe McManus: So, it would be the second low bidder who would be protesting and saying to the government that this person was not fully responsive to the solicitation.

Paul Williams: Yes.

Joe McManus: OK.

Paul Williams: Yes.

Joe McManus: Alright. You know, when we first talked about this podcast, Judge Williams, I said, "What do you think is the biggest issue out there for people making the transition?"

And you said, "Authority!" [*laughs*] Authority was a big issue.

Paul Williams: Yes, a big issue.

Joe McManus: So, can you give us some enlightenment on that comment there?

Paul Williams: You and I have discussed this before that it's very difficult for a contractor to know who they're dealing with and what authority that individual has. We were laughing in a conversation we had because there are so many individuals with titles. You can have a Contracting Officer with the acronym of CO or an Administrative Contracting Officer (an ACO), or a Termination Contracting Officer, or you can have representatives like a contracting officer's technical rep. And so we get lost with all these acronyms.

But the issue is who has what authority? And often a number of people don't know what actual authority they have. Some agencies give authority, which means essential to be able to handle money and make decisions, whether you accept products, etc., and whether you're going to issue changes to the contract. But they give somebody a certificate they can hang on their wall and it shows they're authorized to make these decisions up to a certain dollar threshold.

But other times, it comes with the nature of the job. Whatever they're doing, it's assumed that they have to manage this contract and that they have authority, but you don't know to what extent.

And so I always caution people, if you're dealing with someone and you don't know what their authority is - I've had cases when you asked the government representative, "Show me your authority," they can't. They don't really know what the ultimate limit is.

Joe McManus: And I guess the pitfall there is that the only people who can bind the government fiscally are contracting officers.

Paul Williams: Yes.

Joe McManus: And so when a contractor shows up for the job and he meets a person who's announced that he's the ARCO, the Authorized Representative of the Contracting Officer, they should ask to see his warrant to find out if in fact he's got the power to bind the government.

Paul Williams: That's true, but you don't want to start by kicking in doors and saying, "Show me!" So you have that relationship you have to be careful with.

Joe McManus: It is. But it's a more difficult world. Years ago, there was no problem identifying the contacting officer because it was the full colonel who was there at the job site with the eagles on his shoulders who told you he was the contracting officer. That's all you needed to know.

Paul Williams: I've had a case before me where there is a relatively new contracting officer who does have a warrant and she's dealing with a contractor who insists that she issue a change order on some work the government is asking to be done and the contractor is saying it's not required. And he's pressuring. And it happened to be a young lady, and he's pressuring her, and she is insisting that she is not going to issue a change, she doesn't believe it's a change. So what does he do? He says, "I know how to take care of this. I'm going to your boss."

And he has the boss come over and the boss tells this young lady, "This is change. You will issue a change order."

And she tells him, "I am the contracting officer. You're my boss, but you do not have a warrant. I do. If I issue that decision then my name is on there, not yours. And I don't feel it's correct."

And I gave her full credit for doing that because, I can tell you in that particular case the boss was overbearing and he was incorrect. The work that was being required, from my point of view, was contract work that should have been performed that should not have been a change issue. So, it shocked me. That's the first time that I encountered a situation where a contracting officer's boss did not have a warrant to proceed. So, interesting case. It just shows you the hardship.

My remedy for most of this stuff is if you have any doubt at all - and you're the contractor - that you're dealing with an authorized official, you need to write letters and make sure they go to someone up the chain who is authorized. Could be the head of a department or you can find someone less than that. But you need to make sure the government's put on notice because if you don't give them notice and you're dealing with someone who's not authorized, you're in trouble.

Joe McManus: So that resident engineer who's there on the jobsite every day is not the person who's going to be issuing the change to you.

Paul Williams: Correct. He may issue the directive to do the work, but he won't issue the formal paper because you need someone who's authorized. And if you're authorized, you have to have the money. That's another thing that people don't understand. I, as a contracting officer, cannot issue a change order unless there's money in the till.

Joe McManus: You mentioned the word "change" and that sort of brings up the Federal Acquisition Regulations and change obviously is a contract clause that's set forth in the FAR. Tell us about the

FAR and how is a contractor supposed to wade into it and what is its importance in the contract administration phase?

Paul Williams: Well, the FAR is the Federal Acquisition Regs, so it's where the regulations are. And it certainly would let you know what's required, both statutory requirements and regulatory requirements, and all kind of requirements on how you make awards, what type of contracts you can award, and all kinds of clauses. There is an issue with the FAR, which is that if you have a contract and a required clause that should be in the contract is inadvertently left out, the FAR basically tells you if it's a required clause, even if it's not in your contract, you are required to follow that clause. So you can have a contractor who is being told to do something in the contract and he says, "The clause that would require me to do it isn't there, so I don't have to." But it is there by operation of the law.

The FAR is very difficult to follow for newcomers, very difficult to understand, very complicated, and it's broken down into all the areas of how to award contracts, how to administer them, what have you. But you are going to need help if this is your first time in the wagon to have to deal with government contracts. And one of the things you really need to follow, there are a number of requirements which require you to provide things, notice, etc. with a specific dates. And you better be aware of this and follow those requirements because there may be ways to overcome them, but it just makes your job much harder. You need to provide opportunity to the government to find out what you're doing and if there's a problem they can deal with you. And if you don't give them that notice, then they can easily dismiss a lot of your problem areas and say, "You have to eat them because you didn't give us adequate notice."

Joe McManus: Yeah, I think you pointed out, I really do, the contractor who's wading in needs to get an assistance, for example, to find out what clauses are implied. [*laughs*] Because, as you pointed out, you may have a - you will have a listing in your contract or your subcontract of the clauses that are "in your contract" but they don't have a listing of the implied clauses. Alright, so they're going to need help there. I mean, it sounds like - well, we government contract lawyers think of ourselves as, we call ourselves FAR Freaks is what we are because we wade into the FAR every day. Alright? But it's like, for new contractors, trying to file a tax return and never having looked at tax code.

Paul Williams: And it's daunting to look at it. And then you see in addition to that, you're dealing with whatever government agency and you find out, OK I can figure out who's got the authority and I can see what that would do in terms of if there's additional work or I have other problems. But lo and behold, you find out that you're also dealing with all kinds of government agencies. When you have that government contract, you're going to have to deal with Department of Labor to make sure that you're paying the proper wages that are required, the Environmental Protection Agency. You're going to have clauses in your contract that frequently require certain activities because of the environment. You have the Small Business Administration. It's just, you deal with city and state. I've had contracts that I'm dealing with, say, construction of a high rise building in New York City, and

there's an issue where the government, federal and state, don't get along. You need to have water brought into that building. It's a contractor's responsibility to deal with the state. But they also have to deal with the federal government who are sort of feuding between themselves. And that just delays and disrupts and costs money. So, you can't just find an individual who can sit down and say, "What's your problem? I got it. Here's the decision. Move on."

Joe McManus: Yeah, I've had a similar situation dealing with, for example, a Corp of Engineers contract. Alright. But the EPA has got regulations and they say, "No, you're not going to do that!" [*laughs*] And how do you best get those cases resolved? Do they call you, Judge Williams, for consultation on how to get those resolved, or what?

Paul Williams: You know, I have had situations where that's occurred, but normally what takes place is it's a gradual problem you're hoping to resolve between yourselves and the immediate government people you're dealing with. And unfortunately, some of it goes on forever and you have problems with people you never expected to have. And by that time you've incurred a lot of money, delay, disruption, and that's when they start knocking on doors to file claims or to look for mediators.

As an example, I had a case where a contractor was building a road, designs it, builds it, whatever it is, and he has to match a bridge over a little creek nearby. And so he builds it and the government comes in and says, "You didn't put this big metal shield with the design, etc."

And the contractor says, "Why should I put that thing on there? You can't even see that bridge from the highway."

It's because Fish and Game want all the bridges over that creek to be identical. So in comes this work, which is probably between $100,000-150,000 to do, just for decorative purposes. And who would have thought that it was a Fish and Game person that was going to make the decision of go/no-go to continue with that work? It's mind boggling at times. And most contractors just can't wrap their minds around it.

So they need to be aware of, this is a possibility, get it on the table early, and if you've got problems with the environment or what have you, get them on the table. So you may have to do things to change the location or direction or whatever it is to make sure you're not hitting some environmental situation where you're impinging on whatever, the local collection of birds or mice or different animals or different species of plants.

Joe McManus: Two points: one is you mentioned other agencies and the contractors who are wading in need to know, for example, that it's not just the FAR but you could also have the DFAR, which is various agencies have their own supplemental regulations.

Paul Williams: Yes, and by DFAR you mean the Defense Federal Acquisition Regs.

Joe McManus: Exactly right. Yeah.

Paul Williams: A lot of the civilian agencies sort of take a lot of their information they're getting from the regulations from the military and that's what they build their regulations by. For many years, it was the Department of Defense that was ahead of the regulation curve.

Joe McManus: So they need to be aware that there's agency regulations which may be applicable, too, in addition to the FAR.

Paul Williams: Yes.

Joe McManus: So, if they're in, especially in a claims situation, you better check them both out. We talked about the changes clause. To me the changes clause is sort of the heart of government administration. And I've always loved government contracting because it has the concept of the "constructive change." Alright? Can you give us a little education on constructive changes and what are they?

Paul Williams: Sure. So the government very frequently, you'll never have a perfect set of specs and drawings. And a lot of times, to clarify things, they have to issue changes. We would call those formal change orders. Also, you sit down, you negotiate a price, you incorporate it in the contract, the contractor does the work. However, you have these other activities that can lead to a change that that was not the intended purpose by a government activity, an individual, whatever it is, they are changing the work or the performance, the method of operation, whatever. They're causing changes and they're doing it by direction as opposed to by issuing a formal change to the contract. When they do that, as a general rule, they're not looking to pay for any more money. And they don't understand that there may be a real impact on the contractor that delays, disrupts, and causes additional costs. So, if you're in a situation where it's clear that if the government, by their actions, caused some sort of additional work, the contractor should be entitled to recover that money.

Joe McManus: I take it he makes what we've called a claim, which we'll talk about in a little bit.

Paul Williams: Yes. So, when you do that, one of the issues that you have is that the government may tell this contractor, "You're wrong. This is not additional work."

And the contractor may say, "I'm not wrong. It's not required work and I'm not going to do it. I'm going to stop work."

And that in the government contract is deadly. If the government issues a change to the contract, the contractor is required by the terms of the contract to continue working. That's not something you'll find in most commercial contracts.

Joe McManus: Yeah, and if they can't get a bilateral change, meaning both sides agree to it, they can issue a unilateral change, which is the vehicle that happens not infrequently in government contracting. They issue the unilateral change, which means you must do the work. And they will pay you the fair amount, subject to later discussion if in fact it's not fair.

Paul Williams: Yes. So, for a contractor to be told that he has to continue working and he's not going to get paid for it and he can't stop, so do and therefore their contract gets terminated.

Joe McManus: Yeah, yeah. Let's follow that up because you mentioned it a few days ago when we were chatting about clauses. You mentioned the termination clauses. Alright? And can you tell us how they operate and what a contractor can understand or appreciate about the termination articles?

Paul Williams: Yes. Basically, there are two types of terminations. Every time we talk about something, you can find all kinds of exceptions, etc. But there are two types. One is a termination for default because it's generally the contractor has gotten themselves in a position where they dispute the work or they're not able to complete on time. They didn't have excuses for it. So the government comes in and says, "You haven't delivered or you're not going to be able to deliver on time. We terminate your contract."

Then there's a termination for convenience where the government may terminate the contract and basically the government cannot default. It would be very hard to ever find a contract that the contract is actually terminating for default and going to be responsible for all the costs that flow from that. Essentially, the government will terminate for convenience and often those end up with a claim and it's disputed. It either is resolved by the parties at some point or it goes into litigation and we can talk later about what the options are for litigation. But with the termination for convenience, the government is going to terminate the contract and they're going to pay the contractor, and so they will get the cost, etc.

Joe McManus: And you can also get to the termination for convenience article if in fact they get into a fight. You have to go, for example, to the Board of Contract Appeals, of which you were the chair, and it's determined there that the termination for default was wrongful. And being wrongful, it's converted to a termination for convenience.

I had case not too very long ago in Florida. A contractor was building a road through the Everglades and the government had represented that he was going to have certain under laymen available there

on jobsite and it turned out that it wasn't there. The government and he got into a fight and they terminated him for default. And he had, by the way, only a high school education. He ended up taking on the government. And rather than having to pay the government $3 million, is what they wanted, he ended up recovering $2.5 million because that was his cost and a reasonable profit on it. OK. It was converted from a termination for default to termination for convenience by virtue of the Board of Contract Appeals.

Paul Williams: One of the issues with the termination for default, for example, is a contractor can be delivering widgets, and he delivers some widgets. He has another order to deliver, and it has to be by 1 February. And the contractor has some problems and he can't deliver by 1 February. He's going to be three days late - one day late. Meanwhile, the government discovers they have widgets in the warehouse galore. They don't need any more. They'd like to terminate this contract, but it's going to be expensive. And lo and behold when the contractor is one day late, the government can run in and say, "You failed to deliver. You violated the contract. You're hereby terminated for default." In a commercial world, that would be almost unheard of to be one day late.

Now, under those circumstances, you're going to find where if you're in the dispute before a judge, you're going to find we're warm and wonderful people. We find that abhorrent to think that you can deliver one day late and be told, "We're not going to take it now." So there are a lot of those tough situations with terminations that are way beyond what you would find in the commercial world.

Joe McManus: No, and you bump into a new contracting officer on a termination for convenience. You end up with a TCO, a terminating contractor officer…

Paul Williams: Yes.

Joe McManus: …who's supposed to be organizing the file and making sure you're getting paid your costs that you've now presented in a termination settlement proposal.

Paul Williams: With a termination you can have a contractor who can be shocked by the rules, regulations, the fire, etc., because in addition to being one day late, you can have a situation where they come in and they admit, "We're a day late. But you know what? It's not me; it's my subcontractor. They didn't get the product to me so that I could get it to you on time. It's not me."

And the government would say, "You were responsible for all the delays for your subcontractors at any tier." So if you have someone who can't get the material because they can't afford it and they're four tiers down so they can't deliver it to the third tier and they couldn't deliver to the second tier, and get it to the prime, that's too bad. The government is going to put that burden on the prime contractor's shoulder. And a lot of contractors just can't understand how they can be at risk for.

Joe McManus: The nice thing about - from the government's perspective - the nice thing about terminations for convenience is they can terminate for any reason, any reason, you know, absent true bad faith, which is very difficult to prove. And I notice that when the COVID first hit, the GSA had a very good set of advice to their contracting officers. They said, "Hey, you know, you may want to exercise your termination rights under termination for convenience," because if in fact they were going to be liable for delay damages…

Paul Williams: Mm-hmm.

Joe McManus: … the government could figure it's a lot cheaper to terminate the contract early here, OK, and be only pay the contractor for his actual cost to date.

You also mentioned in addition to the authority issue you mentioned notice and how important notice is in government contracting. Can you explain and educate us on that?

Paul Williams: Well, there are different kinds of notice and you can read them in your clauses. So that's why you have to read the clauses in your contract. But, for example, in terms of notice, even when you file a claim, in the contract - and we'll talk about this later - but the contract [*inaudible*] will issue a decision that we deny your claim. And they will give you maybe 30, 60 days, whatever they give you, depending on the agency, etc., they'll give you that notice and you must meet that deadline. If you are required to give notice in 60 days and you do it in 61, even if you have a valid claim, you've just lost in all likelihood. It's highly, highly unlikely.

As an example, I was aware of a case of where a contractor is filing notice of appeal from a final decision by the contracting officer denying his claim and supposedly has a very valid claim for a lot of money. He goes to his lawyer. The lawyer on the last day for filing that claim notice of appeal, the daughter of that lawyer was in a serious automobile accident and the lawyer doesn't get to mail the letter. And it was held in that case. It was required to be sent by mail or any other way, hand delivered, within 60 days. It wasn't. He missed by a day. Done. You're out. Just coldhearted. In the commercial world, I don't think that would stand in most cases.

Joe McManus: Yeah, and it is harsh, but it's also jurisdictional in many cases. The board doesn't have jurisdiction if [*inaudible*].

Paul Williams: But there are cases where we have in the government contracting field the differing site condition clause where you mention your case where your contractor goes in and thinks he has a different foundation. So the contractors can do that. And they would go to the government and say, "Look, I expected this to be what I'm going to encounter. Instead I get this kind of soil, which is much harder to work with." And they have to give notice to the government before they start working on that situation. And what judges have sometimes said is, the clause requires you to give written notice

of something that's different on the site, a different site condition, and you have to do it before you disturb that condition so the government can investigate. And you'll find situations where the contractor fails to give written notice. And so they should be thrown out and not get paid for that.

And you'll find that because judges, a lot of us, are warm and wonderful people, we look for ways to find how to get around that. And we might say, "Oh, Mr. Contracting Officer, you were aware of that because you were onsite when they went there and they played with the dirt and it's different, and so you do have notice. So even though it's written, we find that you have actual notice and it's close enough."

Joe McManus: You know, on private jobs, OK, you often have a different project manager or different superintendent than you would have on a public job. You know, that private job may be someone who's a most cooperative person, likes everybody to be happy. You know, to move that person onto a government job where notice is so important, you know, there's a natural reaction there. I'm hesitant to write these nasty letters to the contracting officer. Right? Should the superintendent just toughen up here, or what?

Paul Williams: The answer to that is clear. You need to provide notice, you need to provide written notice, you need to make sure it gets to an authorized individual at some level, and you can get - if you're worried about doing a rough letter, find yourself someone who can write a smooth letter. "Now, you people have been so wonderful to me, and I'm sorry we have this problem. However, we've encountered a situation, and we'll do the best we can to minimize the cost of taking care of the problem. Love and kisses, have a wonderful day."

Joe McManus: [*laughs*]

Paul Williams: But you've got to do it. And there are a lot of people, obviously it's nature, that you don't want to ruffle feathers. But in the federal government, because we're protecting people, if you've got the contract and your contractor across the street didn't get it and we start giving you favors, the contractor across the street can say, "If I had that job, you wouldn't treat me the same way and therefore you're violating the regs to treat everybody fairly to protect the public [*inaudible*]." You're into those situations.

Joe McManus: So the average contracting officer and the average resident engineer, etc., they're not being offended by getting these notice letters. They expect you to send them on, OK, when you want to assert your rights.

Paul Williams: Wait a minute. I didn't say that!

Joe McManus: [*laughs*]

Paul Williams: You know that there are a number of people that any time, if you write a letter, it's probably going to mean additional work for them. And some people by nature don't want to be bothered. They just want you to do your job and they don't need to have any additional disruptions on their record.

But you got to do what you got to do. If you don't protect yourself - think about cases where you have a client. They come in and they show you that we've won this award and we're going to make $100,000 profit on it. It's a small construction job. Now they have one of these issues and they don't pursue it timely and they spend $50,000 on solving this problem and they don't get that money back. So there goes half the profit from one problem. And if you have two or three problems, you're going to lose money. Contractors have to protect themselves and knowing what is required for notice in various things such as the changes clause, the differing site conditions clause, the termination for default clause. They have to know those time dates and comply with them.

You know, getting back to termination for default, a lot of times the government will issue a letter called a 10-day Show Cause Letter. They will send the contractor a letter saying, "We are very concerned. We don't think you're going to be able to deliver on time, that you're going to be in default. Advise us within 10 days how you're going to make us feel comfortable that we're going to be able to receive or the contract will be completed or whatever it is." If the contractor fails to respond in 10 days, the government can terminate them.

And how about two days later they respond and the government shows the letter to the contracting officer or whoever it is and says, "Wow, these are very valid reasons. We can't terminate him. But we already did." Well, the contractors could very well lose in a case like that because they failed to assure the government within the 10 days. So there are a lot of these slippery slopes that you wouldn't find in the commercial world. And you need to know what notice is required, you need to put it in writing, you need to get it into the hands of someone who is authorized or at least up the chain so that you can help protect yourself the best you can.

Joe McManus: You've mentioned cases. That sort of brings us to another inquiry which is sort of on the tail end, what we call the cleaning up phase here, and that's the resolution phase. Alright. And obviously we're talking to the person here who has the best knowledge since you were the Chief Judge of the Armed Service Board of Contract Appeals. Tell us about the resolution, how contractors resolve, you know, close out these jobs and resolve their outstanding claims that they may have.

Paul Williams: You find claims that are filed from soup to nuts. They could be just money, they could be just time, they could be different site conditions, they could be changes that may or may not be authorized. A whole bunch of things, the full spectrum. It could be a small little contractor, it can be a big contractor. We've had cases where a claim is $10,000 and the contract is, you know, $25,000.

We have had cases where it's $1 billion for the contract and there's hundreds of millions of dollars in claims. So we cover the full spectrum.

The way it's done is that you draft your claim. Hopefully, you've provided all the appropriate notices, etc., and you submit the claim to the government. Now, they're supposed to decide your claim in a reasonable period of time. If you've got $100 million claim, it's going to take time to do it. If you've got a small claim, it should be not a big deal. But the government will issue what is called a COFD, a Contracting Officer's Final Decision. And that will tell you specifically how long you have to file an appeal because it's a decision you're appealing from it, so most people would think I'm filing a claim - we call it a claim - but it's an appeal. And they will appeal that final decision.

And you can go to a couple of places. One of the places is the Court of Federal Claims and the other is to the Board of Contract Appeals. In the old days, there were, like, 11, 12, 13 different boards of contract appeals, so your agency would have one. The Armed Services Board of Contract Appeals, on which I was the Chief Judge, is by far the largest and virtually every other board has disappeared except for the General Services Board of Contract Appeals. So if you have a contract for general services, you would use their board for dispute resolution or you could go to the Court.

If you go to the Court of Federal Claims, often what you'd find there are judges - and I have to be careful what I say because I've known many of them and some of them are very capable, very knowledgeable. But a lot if it, you may have more of a political bent as to how they get there. And a number of them have a very specialized area of knowledge. They may be an expert in, let's say, insurance law or something. A lot of them have no experience with contracts for construction and other types. With the Board of Contract Appeals, before I hired anybody, by law, they had to have a minimum of five years public contract law experience. So there were no newbies who would show up. And that was a big benefit. In addition, the Court may issue a decision with one judge. And I have observed long ago on one week period of time, one judge issues a decision and says, "Based on these facts, determination for default is wrong."

Another judge, similar facts, you can't distinguish them. "Based on these facts, the appeal is OK."

So, you can get divergent. In our case, if I get up on the morning and the dog bites me and the kid is nagging and the wife needs money from my wallet and I go to work in a bad mood and I write a decision, you're going to find other people have to participate. When I first was on the Board, you had to have five signatures to get a decision held. I changed that to three because if you have three people you have a majority; you don't need the other two. But it means that you have that group-think. And a lot of things can be resolved in house to avoid those kinds of situations that I just mentioned.

So it's a wonderful process, except it takes so long. It's so expensive. You know, Joe, with some of your clients that come in with big cases, you can spend hundreds and hundreds of thousands of dollars on experts, etc. So, in order to solve the problem I had which was being inundated with cases, we created a mediation process. In fact, it was award-winning by the Offices of Procurement Management for coming up with this program. And we do most of our cases. They don't go to litigation. They're there, but we end up negotiating through a mediation process. And most of them go away. Those that stay there are generally there for a valid reason. It may be a specific contract clause, legal issue that isn't fully defined, or something along those lines.

The last big case that I mediated at the Board, in fact, to show you how recognized we were as the experts, these people had - big company - a huge company contract, and they authorized us to sit down. And the judge who had the contract dispute on her docket was told that she and I could negotiate the meditation. And if, in fact, it didn't resolve that they would let her go ahead and still stay on the case and render a decision when the time was appropriate. And you don't find people doing that because in mediation, you're talking about a lot of things in the open that would never be discussed as evidence. So I was very proud of that situation.

Joe McManus: And for good reason. For our listeners' benefits, Judge Williams and Judge Reba Page of the Board wrote a law journal article in the *Public Contract* law journal about the success of the Armed Services Board, which was well over 90% of hit rate of being able to resolve cases. So it's a remarkable statistic, especially with my experience with the Court of Federal Claims now. You get Justice Department lawyers there and they are much more resistant to sitting down and trying to mediate the way out of a claim and get it resolved than taking a case to the Board of Contract Appeals where you don't have the Justice Department lawyers, you have agency council. But, it's a great piece that you and Judge Page put together.

Paul Williams: The law has been bouncing around on claims and who has authority to sign a certificate that is proper, is the right amount, etc. But when a contractor comes to you and they're thinking about whether to, you know, negotiate, etc., or to actually file a claim, the law was changed to when a contractor files a claim, interest starts running. And I found that to be strange because, as a quick example, a contractor has to build a building and install certain windows. And they're expensive. And the government says, "Oh, no, no, no. You can't put the cheap ones in. You've got to put the expensive ones in."

And he says, "Oh, it's going cost me a fortune. Here's my claim." Interest starts running. The building isn't up. The windows aren't going to be ordered for a year or two, but interest is running on the cost of those windows. And Congress would tell you that was an incentive for the contracting officers to quickly issue final decisions because often a claim would be filed and it would linger for a long time.

Joe McManus: Yes, it's a great point because a lot of contractors - even a lot of skilled contractors - they don't make a formal claim first. They file a request for an equitable adjustment. They call it an REA. Alright? And the government will come in and want to audit it and it sits around for a year. Otherwise it could be drawing interest if in fact you made it a claim and triggered the contracting officer's requirement to timely respond to that claim and issue a contracting officer's final decision and off you go. So that's the two big differences there. And that interest, during periods where interest rates are up, it makes quite a difference.

Paul Williams: Well, they've got at the bottom now. They can't be any lower.

Joe McManus: [*laughs*] So, we're about to conclude here, but any other thoughts that you want to give the incoming contractor to the government contract world, be it on keeping records or technical terms or any other practical advice that you can give?

Paul Williams: I think we've highlighted where you can't know everything. You have to deal with some people have that knowledge like what notices are required, how to do that, etc. But another area where I'm sure you as a lawyer who have clients have to deal with is a client can come in and have a very strong case, but how do they prove damages? And like in any court, you're going to find proving damages is most difficult and they need experts to help them. And certainly you're in a situation where you've used experts many times to help you put the claim together, particularly if the claim is involving disputes for delay, disruption, acceleration. Very expensive to put those kinds of claims together. But you've got to know what you're doing because we have a number of contractors who come in and they win their case, but they only win part of the money when they should win more. But, like in any court, they have to bring the proof.

Joe McManus: Well, in a way, I'm happy that you are retired from the Board.

Paul Williams: What do you mean by that? [*laughs*]

Joe McManus: Well, what I mean by that is that people who are struggling, those contractors out there who are struggling with government contract issues have, you know, the ability to reach out to you through Centinel and get some assistance there because it is a road filled with a lot of opportunities and a lot of potholes.

So, this was the first of our podcasts. The next planned podcast is anticipated to have another Centinel consultant who was the head of a very large construction group that lived in both worlds, the commercial world and the government world, and they'll have some unique perspectives also.

So, Judge Williams, thanks so much for joining us today and I look forward to seeing you real soon.

Paul Williams: Thank you! Have a good day!

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