

Course Details

Date & Location

Tuesday, April 5, 2005
Marriott Tysons Corner
8028 Leesburg Pike
Vienna, Virginia 22182
Hotel Telephone: 703/734-3200
Marriott Tollfree: 800/228-9290
Hotel Fax: 703/734-5763

Schedule

8 am - 9 am: Registration, continental breakfast
9 am - 12 noon: Morning session
12 noon - 1 pm: Luncheon – be our guest
1 pm - 4 pm: Afternoon session

Course Materials

Attendees will receive a course manual containing our updated treatise on *Changes, Modifications, and Claims Under Postal Services Contracts*, as well as pertinent attachments, including applicable portions of USPS purchasing regulations, and sample

Cost

\$395 (registration on or before 3/4/05)
\$495 (registration after 3/4/05)
Cost includes seminar materials, continental breakfast, luncheon, and break refreshments.

Hotel Accommodations

Arrange directly with the Marriott Tysons Corner (800/228-9290 or 703/734-3200). Call before March 14, 2005 and mention that you are attending the Wickwire Gavin course to receive a special room rate of \$199. **Space at this rate is limited.** After March 14, rooms & rates are subject to availability.

In-House Presentations

For details on presentation of this course at your facility, specifically tailored to your needs, please contact Beth Hughes at the above number or e-mail her at bhughes@wickwire.com.

Marriott Tysons Corner Vienna, Virginia

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Marriott Tysons Corner

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Advanced Seminar on Postal Contracting

The law firm of Wickwire Gavin, P.C. presents

Changes, Modifications, and Claims under U.S. Postal Service Contracts

An advanced one-day course on how to: properly identify and respond to changes; deal with contract modifications; and prepare, price, and present claims

APRIL 5, 2005 | MARRIOTT TYSONS CORNER | VIENNA, VIRGINIA

Registration Form

Please register me for the following:

- April 5, 2005 seminar & materials
_____ \$395 on or before March 4, 2005
_____ \$495 after March 4, 2005

Payment Method:

- Check payable to Wickwire Gavin, P.C. (please mail with registration form)
 VISA MasterCard American Express

Card # _____

Expiration Date _____

Signature _____

4 Easy Ways To Register!

By telephone: please call Beth Hughes at Wickwire Gavin, P.C. at 703/790-8750

By mail: send form to Beth Hughes, Wickwire Gavin, P.C., Suite 700, 8100 Boone Boulevard, Vienna, VA 22182-7732

By fax: please fax this form to Beth Hughes at 703/448-1801

By e-mail: to Beth Hughes at bhughes@wickwire.com

Name _____ Title _____

Company _____

Address _____

City _____ State _____ ZIP _____

E-mail _____ Tel _____ Fax _____

CHANGES

- Identify & react to changes & changed conditions
- Properly respond to written & oral directions
- Preserve your rights to compensation

MODIFICATIONS

- Know which modifications to sign, *and not sign*
- Differentiate between unilateral & bilateral modifications
- Recognize common modification "gotcha" traps

CLAIMS

- Understand how to prepare, price, & present claims
- Avoid self-defeating actions (& inactions)
- Resolve claims successfully

Changes, Modifications & Claims on Postal Service Contracts

Poor contract administration damages your postal contract more than poor performance. Astonishing, but true. *Why?* Actual contract performance is usually within your control and is what your company does best. Poor performance is also infrequent. When it does occur, it is usually explainable and curable. Poor performance often has its roots in contract changes or changed conditions, so it's often not your fault anyway, and you may be entitled to a price adjustment. But even if poor performance is your fault, good contract administration can help you negotiate through it and reach an amicable resolution with the Postal Service.

By contrast, poor contract administration occurs frequently, and can make good performance look bad. Postal contracts, like other government contracts, can be unclear, and thus susceptible to misunderstandings and differing interpretations. Poor contract administration can arise on seemingly minor issues, and the supplier may be oblivious to it. But failing to respond correctly (or at all) to a contract administration matter can profoundly hurt your chances for success. For example, failing to promptly and properly identify a contract change and react accordingly can increase costs, cause delay, and subject you to harsh treatment from the agency – even though the cause of the problem wasn't even your fault! Good contract administration reduces cost by identifying uncompensated work, addressing issues proactively, and aiding the prompt resolution of potentially divisive issues.

The purpose of this seminar is to provide you with better tools for improving the administration of your postal contract. We begin by helping you better understand what the terms and conditions of your contract actually mean. This includes examples where your contract does not mean what it actually says. Next, we help you understand the contract modification process, and discuss helpful contract administration techniques. We identify the ten most common modification “gotchas” so you can avoid them. Since disputes often arise from contract changes, we describe the various types of contract changes and how to identify them. We also show you how to preserve your right to be compensated for a change, how to measure the cost impact of a change, and how to avoid self-defeating actions. We take you through the claims process and how best to resolve claims, including pointers on negotiating agreements.

Then, we put you through the **highlight of the seminar – a mock contract negotiation**, based on real-life issues that have occurred under postal contracts. Theory is one thing, practical application is another. The mock contract negotiation session brings to life issues that you may face under your own postal contract. Your participation and the analysis by the course instructors are sure to be eye-opening.

Your course instructors, David Hendel, Stephen Hurlbut, and Brian Waagner, are full-time practicing attorneys at the law firm of Wickwire Gavin, P.C. David and Stephen have advised and represented over 100 companies in a wide variety of matters that have arisen under postal contracts. Having both formerly served in the U.S. Postal Service's General Counsel's office, they have seen these issues from both the agency's and the supplier's perspective. They bring a well-rounded perspective and wealth of practice knowledge to the seminar. In addition, all attendees receive a comprehensive seminar manual covering every issue listed in the course curriculum, as well as other relevant materials.

◆ Course Outline ◆

Understanding Your Contract

- A. What is the contract?
 1. Cover page
 2. Table of contents
 3. Offer and award form
 4. Award data sheet
 5. Order of precedence clause
 6. Schedule
 7. Special and general clauses
 8. Standard clauses
 9. Modified clauses
 10. Specs and statement of work
 11. Drawings
 12. Other attachments
 13. Technical proposal
 14. Cost proposal
 15. Amendments
 16. Questions and answers
 17. Transcript
 18. *Christian* Doctrine
- B. Typical Problem Areas
 1. Don't have a copy of the contract
 2. Don't have the attachments
 3. Erroneous clause included
 4. Important clause missing
- C. What does your contract mean?
 1. What is a patent ambiguity?
 2. Contract interpretation rules
- D. When your contract doesn't mean what it says
 1. Custom and trade practice
 2. Taken out of context
 3. Mutual mistake
 4. Against public policy
 5. Waiver
 6. Abuse of discretion
 7. Notice provisions
 8. Estoppel
 9. Implied terms
- E. Novation Agreement

Modifications

- A. Authority
- B. Unilateral modifications
 1. Administrative changes
 2. Change orders
 3. Changes authorized by specific clauses or contract provisions
 4. Termination notices
- C. Bilateral modifications
- D. Effective date
- E. Modification “gotchas”
 1. “No Mention”
 2. “Not To Exceed”
 3. “Increase in Contract Funding”
 4. “One-Way/Partial Release”
 5. “Complete Release”
 6. “Contingent Agreement”
 7. “Subject to Audit”
 8. “Sole Discretion”
 9. “The Incredible Disappearing Modification”

Problems Getting Paid

- A. Invoices
- B. Withholding payment
- C. Setoffs
- D. Unclear rate of pay
- E. New conditions imposed on payment
- F. Retainage
- G. Prompt Payment Act
- H. Right to stop work

Recognizing and Reacting to a Contract Change

- A. Authority to issue contract changes
 1. Contracting officer reps
 2. Outside consultants
- B. Scope of the changes clause
 1. Constructive changes
 2. Suspensions and delays
- C. Cardinal changes
- D. Duty to proceed
- E. Types of changes
 1. Differing site conditions
 2. Defective specifications
 3. Impossibility
 4. Constructive acceleration
 5. Delay
 6. Superior knowledge
 7. Hindrance or interference
 8. Over-inspection
 9. Implied duty of cooperation & fair dealing

Preserving Your Right to Compensation for a Change

- A. Notice requirements
 1. Contents of notice
 2. Failure to give formal notice
 3. Prejudice
 4. USPS waiver of notice defense
 5. Notice requirements
- B. Record building
- C. Careful documentation
 1. What?
 2. How?
 3. How long?
- D. Separate cost accounting
 1. Total cost method
 2. Modified total cost
 3. A/B estimates
 4. Jury verdict
- E. Reservation of claim from modifications

Defeating Your Right to be Compensated for a Change

- A. Becoming a volunteer
- B. Errant admissions
- C. Silence as acquiescence
- D. Agree to a misinterpretation
- E. Delay in asserting position
- F. Rely on direction from a person without authority

- G. Failure to document
- H. Failure to give notice
- I. Failure to track costs
- J. Unwitting release or waiver

It's Not Your Fault — Excuses for Nonperformance

- A. Subcontractor performance failures
- B. Acts of God
- C. Acts of the government
- D. Strikes and freight embargoes
- E. Unusually severe weather
- F. Impossibility and commercial impracticability
- G. Waiver of delivery date
- H. Financial difficulty

Potential Postal Service Claims

- A. Actual damages
- B. Damages for delay
- C. Liquidated damages
- D. Consequential damages
- E. Warranty
- F. Implied warranty
- G. Service Contract Act
- H. Defective pricing
 1. Cost or pricing data
 2. Defective pricing audits
 3. Practical pointers
- I. Default termination
- J. Violation of non-disclosure
- K. False claims and fraud
- L. Interest
- M. Contract officer final decision

Claim Avoidance and Preparation

- A. Contract administration/claim avoidance
 1. Goals
 - a. Dispute avoidance
 - b. Prompt and efficient dispute resolution
 2. Keys to good administration
 - a. Communication
 - b. Control
 - c. Credibility
 - d. Preparation
 3. Key contract administrator qualities
 - a. Organized
 - b. Vigilant
 - c. Professional
 4. Post-award orientation/partnering
 5. Dealing with authorized contracting officers
 - a. Contracting officer reps
 - b. Outside consultants
 - c. Limits on authority of contracting officer reps
 6. Record keeping
 7. Payment issues
 - a. Progress payments
 - b. Reduction/withholding

- B. Alternative to claims
- C. Requests for equitable adjustment
- D. Contract Disputes Act claims
- E. Subcontractor claims

- 1. Subcontract flow-down provisions
 - a. Who is a subcontractor?
 - b. Mandatory clauses
 - c. Necessary clauses
 - d. Simplistic provisions
 - e. Conflicts
 - f. Subcontractor concerns
- 2. Pass-through claims
- 3. Severin doctrine
- 4. Liquidation agreements
- F. Tort claims
- G. Termination for convenience
 1. Allowable recovery
 2. Paid vs. incurred costs
 3. Pre-contract costs
 4. Profit
 5. Loss credit
- H. Pricing techniques
 1. Equitable adjustment
 2. Reasonable, allowable and allocable actual costs
 3. Total costs claims
 4. Modified total cost claims and “jury verdicts”
 5. Actual, estimated and projected costs
 6. Learning curve
 7. Loss of efficiency claims
 - a. Measured mile approach
 - b. Industry studies
 - c. Engineering/professional estimates
 8. Applicability of cost principles
 9. Delay claims
 10. Eichleay formula
 11. Profit
- I. Claim certification

Resolving Claims Successfully

- A. Trades
- B. Claim review and audit
 1. Contractual basis for audits
 2. Auditing agency
 3. Audit strategy
- C. Contracting officer's decisions
- D. Forums for dispute resolution
 1. Postal Service Board of Contract Appeals
 2. U.S. Court of Federal Claims
 3. District courts
 4. Alternative dispute resolution
- E. Recovery of attorneys' fees
- F. Settlement opportunities
- G. Negotiations
 1. Timing
 2. Preparation
 3. Use of audit report
 4. Typical negotiation ploys
- H. Settlement agreements
- I. Releases

About the Faculty

David P. Hendel is a shareholder in, and formerly Managing Director of, the law firm of Wickwire Gavin, P.C. He previously served as an Honors Attorney for the U.S. Postal Service General Counsel in the Office of Contracts and Property Law. While at the Postal Service, he reviewed hundreds of procurement actions, advised senior officials on contracting matters, drafted protest decisions, and received a special commendation for outstanding claims litigation. He counsels clients on all aspects of the postal procurement and contract administration process. David is co-author of the Federal Publications, Inc. *Briefing Paper* on “Contracting with the U.S. Postal Service II” (September 2002). Education: B.A., *magna cum laude*, with High Honors, Brandeis University; J.D., New York University School of Law.

Stephen B. Hurlbut is a shareholder in, and formerly Managing Director of, the law firm of Wickwire Gavin, P.C. He served as a trial attorney for the U.S. Postal Service in the Office of Contracts and Property Law. Since entering private practice in 1987, he has been lead counsel for postal contractors in a variety of Postal Service-related litigation. Steve is a former Chairman of the Postal Service Subcommittee of the Associated General Contractors' Federal Buildings Committee. He is co-author of the Federal Publications, Inc. *Briefing Paper* on “Contracting with the U.S. Postal Service II” (September 2002). Education, B.A., *with distinction*, University of Virginia; J.D., Washington University School of Law.

Comments from our recent postal contracting seminars . . .

“Very good overview of the underpinnings of postal contracts. The course materials provide good details and can be shared with others in my organization.”

*Henry Martin
FirstLogic, Inc.*

“Good overall synopsis of the workings of the USPS. Great case studies of current and past protests. This is a good course that taught me how much I don't know and how much there is to know.”

*Dave Colbert
URS Corporation*

“Most enjoyable and relevant seminar I've been to. The course materials are a great resource. This course will definitely help me in the future.”

*Scott Regal
DPRA, Inc.*

“Excellent speakers and course materials. I would definitely recommend this course to other contractors.”

*Michael Herbert
Alpine Air*

The course materials will cover all of these topics. The course will focus on those topics in which attendees express the greatest interest in pre-seminar questionnaires and during course instruction.