

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 the fundamentals of properly identifying and responding to changes; dealing with contract modifications; and preserving, preparing, and presenting claims.

**NOVEMBER 6, 2003 | SAN DIEGO MARRIOTT HOTEL & MARINA | SAN DIEGO, CALIFORNIA**

## **MODIFICATIONS**

- Unilateral modifications
- Bilateral modifications
- Modification “gotchas”

*Learn which modifications you should and should not sign. Also learn how to avoid falling into modification “gotcha” traps.*

## **CHANGES**

- Written and oral directions
- Authority to make changes
- Preserving your right to compensation

*Identifying and reacting to changes is critical to successfully performing your contract. We show you what to do when your performance is being changed.*

## **CLAIMS**

- Identify the right recovery theory
- How to preserve, prepare, & price claims
- Avoid self-defeating actions (& inactions)

*Sometimes, you must file a claim if you want to be paid for extra work. Find out what steps to take before you do so, and how to prepare and present a claim.*

## Changes, Modifications & Claims on Postal Service Contracts

**Walking a tightrope.** If you have a Postal Service contract, you are walking a tightrope. You want to do all you can to please a frequently difficult customer, while also protecting your company's interests. Everything can be going well until an unexpected gust of wind throws you off-balance. If you don't know how to react and recover, you could be headed for a fall.

In our firm's postal contracting law practice, we've seen many contractors thrown off-balance by changes or other unexpected events. Perhaps a disagreement arises over the required scope of work. Or you're faced with different conditions than you had expected. Maybe you've been directed to perform differently or do additional work. Or the Postal Service blames you for a problem that USPS actually caused. Knowing how to respond to such events is vital to successful contract performance.

Once you start down the tightrope of contract performance, you have little choice but to move ahead. Under your contract, you agreed that the Postal Service may unilaterally change the scope of work (within broad limits). You also agreed that you would continue to perform the contract, as changed, without reaching agreement on price. And you agreed as well that the Postal Service may examine the directly pertinent records relating to your contract.

Like the tightrope walker, you need to be prepared in advance. We'll show you how to recognize and respond to changes and unexpected events. We'll help you identify dozens of events which create "changes" to your contract. Some are not always familiar to contractors, such as a breach of the implied right of good faith and fair dealing. Promptly and correctly identifying a change is crucial to successful contract performance and – ultimately – maintaining your relationship with the Postal Service. Equally important is making sure you do not inadvertently waive, release, or otherwise imperil your right to an equitable adjustment. We'll show you what to do, and what *not* to do, when walking the tightrope. Many of these pointers will also apply to your contracts with other government agencies.

Contract modifications can also throw you off-balance. For example, when should you sign them, and when should you properly refuse? We'll review 10 frequently used modification "gotchas" that you must be able to recognize - and know how to deal with.

An essential part of contract administration is knowing how to recover the costs you incurred in complying with contract changes. We'll show you how to preserve your recovery rights, prepare and price your claim, and advance your claim through the Postal Service's claims resolution process.

All attendees will receive a comprehensive seminar manual covering every issue listed in the course curriculum and other relevant materials as well. Your instructors are full-time practicing attorneys at the Wickwire Gavin, P.C. law firm, who advise and represent postal contractors on a wide range of issues. David Hendel and Stephen Hurlbut both formerly served in the USPS General Counsel's office and for the past two decades have represented postal contractors. Having "walked in the shoes" of Postal Service officials and postal contractors alike, they bring a well-rounded perspective and wealth of practical knowledge to this seminar.

## ◆ 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

**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.**

# ◆ Course Outline ◆

- 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.

**Brian P. Waagner** is a shareholder in the law firm of Wickwire Gavin, P.C. He assists postal suppliers in identifying, preserving, and presenting claims against the Postal Service and in defending against USPS claims. Brian appears on behalf of clients in the United States Court of Federal Claims and the Postal Service Board of Contract Appeals, as well as in alternative dispute resolution forums such as arbitration and mediation. He received his law degree from Cornell Law School, where he was Managing Editors of the Cornell Journal of Law and Public Policy.

## Comments from our recent postal contracting seminars . . .

“Very knowledgeable speakers. I learned a lot, and interaction with the speakers and other attendees was very helpful.”

*Beverly Loftus  
GE-TIP*

“Great information on avoiding and preparing claims. Session on best practices is great. The course gave me tools to do a better job for my company.”

*Anthony Veltri  
Veltri, Inc.*

“Excellent speakers, very informative seminar. I love the materials — I know they will be a great tool for me in the future.”

*Tanya McIntyre  
Siemens Dematic Rapistan*

“Good coverage of all topics. Well-written materials. Great networking opportunity.”

*Richard Stroup  
Alan Ritchey, Inc.*

“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 Regel  
DPRA, Inc.*

**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.**

## Course Details

### Date & Location

November 6, 2003  
San Diego Marriott Hotel & Marina  
333 West Harbor Drive  
San Diego, California 92101  
Hotel Telephone: 619-234-1500  
Hotel Fax: 619-234-8678

### 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 claims.

### Cost

\$450 (registration prior to 10/23/03)  
\$550 (registration after 10/23/03)  
Cost includes seminar materials, continental breakfast, luncheon, and break refreshments.

### Hotel Accommodations

Arrange directly with the San Diego Marriott (telephone: 619-234-1500). Call before October 6 and mention that you are attending the Wickwire Gavin course to receive a special room rate of \$129. **Space at this rate is limited.** After October 6, rooms & rates are subject to availability.

### In-House Presentations

For details on presentation of this course at your facility, specially tailored to your needs, please contact Rose Shaheen at the above number or e-mail her at [rshaheen@wickwire.com](mailto:rshaheen@wickwire.com).

## San Diego Marriott Hotel & Marina

Standing gloriously at the water's edge, the San Diego Marriott Hotel & Marina offers a superior level of service in a lush resort setting and an atmosphere that lends itself beautifully to business and leisurely pursuits. With its ideal location within minutes of the historic Gaslight District and adjoining Seaport Village, it puts you close to San Diego's popular attractions and landmarks, providing uncommon convenience and an extraordinary experience from the moment you arrive.

Providing spectacular views of San Diego Bay, the hotel is located just 2 miles from the San Diego International Airport.



San Diego Marriott Hotel & Marina

For more information  
visit [www.marriott.com/SANDT](http://www.marriott.com/SANDT)

## Registration Form

### 4 Easy Ways To Register!



**By telephone:** please call Rose Shaheen at Wickwire Gavin, P.C. at 703-790-8750



**By mail:** send form to Rose Shaheen, Wickwire Gavin, P.C., Suite 700, 8100 Boone Boulevard, Vienna, Virginia 22182-7732



**By fax:** please fax this form to Rose Shaheen at 703-448-1801



**By e-mail:** to Rose Shaheen at [rshaheen@wickwire.com](mailto:rshaheen@wickwire.com)

### Please register me for the following:

- November 6, 2003 seminar & materials  
\_\_\_\_\_ \$450 on or before 10/23/03  
\_\_\_\_\_ \$550 after 10/23/03

### Payment Method:

- Check payable to Wickwire Gavin, PC (please mail with registration form)  
 VISA                       MasterCard

Card # \_\_\_\_\_

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E-mail \_\_\_\_\_ Tel \_\_\_\_\_ Fax \_\_\_\_\_