



# Getting Paid on Government Contracts: Fresh Strategies on Requests for Equitable Adjustments and Claim

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# CDA Claim vs. Request for Equitable Adjustment

- What are the key differences?
  - Timing
  - Certifications
  - Certainty
  - “Adversarial” nature
  - Attorneys’ fees vs. Interest

# For what reason do you need a Claim or REA?

- Monetary claims
  - Damages for breach of contract
  - The costs associated with the change to the Contract
- Non-monetary claims
  - Time
  - Interpretation of the specifications

# Entitlement – Reasons to File REA or Claim

- Adding work
- Deleting work
- Changing work
- Substituting work
- Delaying work
- Accelerating work
- Disrupting work
- Terminations for Convenience

# Claim Elements

- Must Be in Writing to the Contracting Officer
- State a Sum Certain if Seeking Monetary Damages OR clearly identify the relief you are seeking (i.e., interpretation of contract terms)
- If over \$100,000, must contain a certification
- Must request a final decision

# Can the Government Assert a Claim?

- Yes- Government can technically bring a Claim (does not require a certification)
- Examples: liquidated damages or default termination or backcharges through a DCAA audit for “unallowed costs”

# What cannot be a Claim?

- Prevailing wage disputes arising under the Davis Bacon Act
- Tort claims that do not arise under or relate to the Contract
- Nothing “pre-award” – the CDA only governs post-award claims

# What is a “Sum Certain”?

- Sums certain need not be totaled, but the total **must be calculable from information contained in the claim**
- Ceiling amounts for claims are not sums certain – the sum certain must be a definite number
- Sums certain are required for claims disputing liquidated damages
- An appeal seeking money damages of “approximately \$150,000” is dismissed for lack of jurisdiction; *Appeal of High-Tech Launderette LLC*, ASBCA No. 62259 (Feb. 26, 2020)



# Allowable Costs

- **Reasonable**—nature, amount, mitigation
- **Allocable**
  - Direct costs
  - Overhead
  - General and administrative
- In accordance with cost accounting standards (CAS) or generally accepted accounting principles
- **Not** in conflict with the contract or the cost principles

# Reasonableness of a Cost

- FAR 31.201-3 states that a “cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business”
  - This statement is subject to interpretation
- The burden for proving the reasonableness of an incurred cost is on the contractor

# Profit & Interest

- FAR 15.404-4 – Profit/Fee for price negotiations
- What is a reasonable and customary profit for a Claim?
  - The Government will often use weighted guidelines in DFARS 215.404-71 (see Texas Instruments Inc., ASBCA 27113, 90-1 BCA 22537) – but the Court is not bound by them
  - G&A should not be excluded from the profit calculation
- You can get interest on your Claim (from the date of submission) per CDA – but you cannot claim any interest you paid as a result of financing costs (FAR 31.205-20)

## Certifications – 41 USC § 7103

- Failure to include a certification (or sign it) is fatal to a claim over \$100,000
- Technical defects such as inaccurate wording can be remedied without having to submit a new claim to the Contracting Officer
- The certification must be signed with an identifiable mark
  - Overruling prior precedent, the ASBCA now accepts electronic signatures either through a digital signature application or a typed name as long as it can be traced back to the individual making the claim. *Kamaludin Slyman Csc*, ASBCA No. 62006, 20-1 BCA (CCH) ¶ 37694 (Sept. 25, 2020)

# Claim Timeline

- Must be submitted to the Contracting Officer within 6 years of when the claim arose.
  - Not contract award or contract completion
  - 6 years starts running from when the contractor knew or should have known about the circumstances giving rise to the claim
- Contracting Officer has 60 days to issue a Final Decision for Claims under \$100,000, or
- 60 days to advise you of the “reasonable time” when it will decide claims above \$100,000

# Final Decision

- Need a Final Decision to Appeal or “Deemed Decision”
- What happens if you get a response from the CO – but it does not contain all of the elements of an official rejection?
- A recent decision in *Hof Construction, Inc. v. General Services Administration*, CBCA No. 6306 (Dec. 12, 2018) – ruled that the Agency’s response does not have to be “perfect” and need not include the exact language of FAR 33.211 – it is enough if the intent is clear and not misleading.

# Appeals Process

- An Appeal is triggered if the Claim is either “denied” or “deemed denied”
- 90 days to appeal to the Boards of Contract Appeals
- One year to appeal to the Court of Federal Claims

# Request for Equitable Adjustment

- Less formal “request” to the Government
- Considered a “negotiation in furtherance of the contract administration”
- FAR 52.243-1 (Changes)
- FAR 52.249-2 (Termination for Convenience)
- FAR 52.242-14 (Suspension of Work)
- FAR 52.236-2 (Differing Site Conditions)
- FAR 52.211-18 (Variation and Estimated Quantity)



# Request for Equitable Adjustment

- Whichever side wants the benefit bears the burden
- Must prove two things:
  - Entitlement
  - Quantum-costs/time caused by the claimed event
- Remember that DoD requires a certification for an REA per DFARS 243.204-70 & 252.243-7002

# REA Certification

- "I certify that the request is made in good faith, and that the supporting data are accurate and complete to the best of my knowledge and belief."
- From the DoD Manual:
  - "The instructions for completing the certification put the contractor on notice that the certification requires full disclosure of all relevant facts, including:
    - Any required cost or pricing data; and
    - Actual cost information and information to support any estimated costs, even if cost or pricing data are not required."

# Attorney & Consultant Fees

- “Presumptively allowable” so long as they are reasonable
  - *Bill Strong Enterprises v. John Shannon* 49 F.3d. 1541 (1995)
  - *States Roofing Corp.*, 10-1 BCA 34360 (2010)
- The CO/Board/Courts should examine the objective reason why the contractor incurred those costs. If for the “genuine purpose of materially furthering the negotiations process” then the costs are allowable under FAR 31.205-33 – even if the negotiations fails and a Claim is later submitted.

# Which One to Chose?

- Relationship between the Contracting Team and Contractor
- Relationship with the government agency
- Where are you in relationship to negotiating your next option or do you have outstanding bids on RFPS under your IDIQ?
- How confident are you on entitlement
- History of the dialogue on the issue(s)

# Conversion of your REA to a Claim

- Review and Update
- Are there additional legal theories? (Changes Clause vs. DSC vs. Constructive Change)
- More detail (think of your Claim as Exhibit 1 in your Appeal to the Board or COFC)
- Proper Certification
- Proper Request for a Final Decision

# Maximizing Recovery During COVID shutdowns

- If the Government has indicated it agrees to a portion of the REA, but claims there are no available funds, what can you do?
- Request the Government to set up a Judgment Fund
- How?
  - Convert REA to CDA Claim
  - Appeal based on a deemed decision to Board
  - Parties sign settlement agreement.
  - Contractor alerts Board as to settlement – Board issues decision entering judgment.
  - Contractor can then be paid directly from Judgment Fund at Treasury

# Methods to Expedite Claim Resolution

- The Boards of Contract Appeals will provide a free ADR judge, paying all travel and per diem costs for Claims submitted before a CO decision is received by the contractor and before the appeal – this is known as “off docket” ADR mediation services.
- Will do the same thing to mediate an REA before it is converted to a CDA Claim
- Key – the Government has to agree to the ADR
- Outside of COVID – Judge would normally travel to the Contractor’s location for these mediations

# Key considerations from recent appeal decisions?

- Failure to submit a claim to the contracting officer for a final decision
- "Bad faith" allegations against government clients for contract termination, which did not hold up because government clients are always presumed to have acted in good faith in the execution of their duties. This becomes a difficult burden of proof for contractors
- Allegations that third-party actions interfered with the delivery of contract terms, for which a government client cannot be held responsible in the absence of specific contract terms
- Neglecting to conduct diligence needed to track and record work to quantify damages; no proof of damages was shown, so causation was not established



# Questions?

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LEGAL INSIGHT FOR GOVERNMENT CONTRACTORS

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