

HAYNES BOONE

Navigating Claims Against the Government

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May 12, 2023



Sovereign What?

- The Government is protected from suit by *sovereign immunity*
 - Originates from the English common law – “the king can do no wrong.”
 - We jettisoned the king but kept this rule
- Claims against the Government require an express waiver of sovereign immunity
 - Courts interpret waivers narrowly
- For most government contracts, this waiver is found in the Contract Disputes Act (CDA)
- Because of sovereign immunity, must be particularly cautious to abide by procedural requirements—many are jurisdictional and cannot be waived

Contract Disputes Act

- The CDA applies to “any express or implied contract . . . made by an executive agency for—
 - (1) the procurement of property, other than real property in being;
 - (2) the procurement of services;
 - (3) the procurement of construction, alteration, repair, or maintenance of real property; or
 - (4) the disposal of personal property.” (41 USC § 7102(a))
- Primary, but not the sole, source of jurisdiction—
 - Other bases of jurisdiction for claims relating to grants, cooperative agreements, and OTAs

What is a Claim?

- The CDA addresses “claims”
- Claim is defined by the FAR as:
 - A **written demand** or **written assertion** by one of the contracting parties seeking, as a matter of right,
 - the payment of **money** in a **sum certain**,
 - the **adjustment** or **interpretation** of **contract terms**, or
 - other relief arising under or relating to the contract.
 - However**, a written demand or written assertion by the contractor seeking the payment of money exceeding \$100,000 is not a claim under 41 U.S.C. chapter 71, Contract Disputes, **until certified** as required by the statute.
 - A **voucher, invoice, or other routine request for payment** that is **not in dispute** when submitted is **not a claim**. The submission may be converted to a claim, by written notice to the contracting officer ... if it is disputed either as to liability or amount or is not acted upon in a reasonable time.” (Emphasis added).
- Not always straightforward—in some instances, a self-titled request for equitable adjustment (REA) might be deemed a “claim”
- Best practice is to be explicit

Examples of Claims

Contractor Claims	USG Claims
<ul style="list-style-type: none">• Changes• Delay• Disruption• Defective specifications• Differing site conditions• Termination for convenience settlement costs• Interpretation of contract provision, specifications• Adjustments to incentive type contract formulas• Breach• Bad faith• CPAR challenges• Adjustment to award fees	<ul style="list-style-type: none">• Defective pricing• Termination for default• Disallowances, determinations of noncompliance, penalties, monetary demands or reductions based on violations of the FAR cost principles and clauses and CAS• Recovery of overpayments• Assertions of unlimited data rights• Breach• Liquidated damages assessments• Expenses to correct or replace defective work

What is NOT a claim?

- Routine requests for payment are NOT claims, such as:
 - Invoices
 - Vouchers
 - Not always a clear distinction (see, e.g., *Textron v. United States*)
- Request for Equitable Adjustment
 - Part of ordinary contract administration process
 - BUT can convert REAs or routine requests into claim

Requests for Equitable Adjustment

- Benefits:
 - Fewer formalities
 - Less adversarial
 - Costs can be allowable
 - Can permit more extensive evaluation of merits by the stakeholders—permitting more informed and early go/no-go decisions
- Negatives:
 - Government not obligated to respond
 - May only be a prelude to a claim
 - Can take longer to resolve because less pressure to address

Elements of a Claim

- Must be in writing
- Seeking as a matter of right
 - the payment of money in a **sum certain**,
 - Requires quantification and support, although can be revised in appropriate circumstances after submission
 - the adjustment or interpretation of contract terms, or
 - other relief arising under or relating to the contract.
- Must be certified if over \$100,000
 - Need to consider carefully if the claim is really seeking monetary relief even if framed as non-monetary
- Should expressly request for final decision

Preparing the Claim

- Analysis always starts with the terms of the contract
 - For task or delivery orders, need to assess the base contract requirements as well
 - Proposal terms may or may not apply – when possible, best to incorporate proposal terms by reference into the contract
- Identify issues
- Gather the facts
 - Collect, preserve, and review relevant documents
 - Legal hold
 - Interview key personnel
- In a financing scenario, ensure that you are engaging with your partners early and often

Preparing the Claim

- Develop theories of entitlement
- Calculate damages (“quantum”)
 - Different methodologies to calculate
 - Actual cost incurred
 - Total cost method
 - Modified total cost method
- In almost all circumstances, must continue performing
 - If a contractor stops work, it risks termination for default.
 - A safer option is for a contractor to continue performance under protest and seek a declaratory judgment that it is entitled to suspend performance.

Claim Certification

- The CDA and FAR 33.207 define certification requirements:

(a) Contractors shall provide the certification specified in paragraph (c) of this section when submitting any claim exceeding \$100,000.

(b) The certification requirement does not apply to issues in controversy that have not been submitted as all or part of a claim.

(c) The certification shall state as follows:

I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.

(d) The aggregate amount of both increased and decreased costs shall be used in determining when the dollar thresholds requiring certification are met (see example in 15.403-4(a)(1)(iii) regarding certified cost or pricing data).

(e) The certification may be executed by any person authorized to bind the contractor with respect to the claim.

(f) A defective certification shall not deprive a court or an agency BCA of jurisdiction over that claim. Prior to the entry of a final judgment by a court or a decision by an agency BCA, however, the court or agency BCA shall require a defective certification to be corrected.

- Certification is by the **prime contractor**. *Privity of contract is critical.*

Time for Submitting Claims

- Under the CDA, both contractor and government claims must be submitted within six years of accrual of the claim.
 - Congress did not define “accrual,” so the FAR was amended to provide the following definition (FAR 33.201):

Accrual of a claim means the date when all events that fix the alleged liability of either the government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred.
- Claim accrual is not straightforward
 - Courts and boards analyzing the timeliness of a claim “start by examining the legal basis of the particular claim.”
 - Claim accrual “does not turn upon what a party subjectively understood; it objectively turns upon what facts are reasonably knowable.”
 - A party cannot unilaterally postpone the running of the statute of limitations (e.g., by delaying an audit or other financial analysis).

What Happens Next

- Contracting Officers must issue final decisions (a “COFD”) within a specified time:
 - Claims under \$100k: must issue final decision within 60 days.
 - Claims over \$100k: must either (1) issue a final decision within 60 days; or (2) must notify the contractor within 60 days and provide a time when the decision will be issued.
- If the CO fails to issue a timely written decision, that is considered a “deemed denial” which can be appealed.
 - Can appeal and request an order for the Contracting Officer to issue a COFD

Contracting Officer's Final Decision

- Under FAR 33.211, a COFD must include:
 - A description of the claim;
 - References to any pertinent contract terms;
 - A statement of factual areas of agreement and disagreement;
 - The CO's decision on the merits of the claim;
 - Supporting rationale;
 - A statement that it is the final decision of the CO; and
 - A description of the contractor's appeal rights.
- A valid COFD can lack one or several of these elements—another trap for the unwary

Appeals from the COFD

- Two choices for appeals:
 - U.S. Court of Federal Claims (“COFC”)
 - Boards of Contract Appeals (“BCAs”)
 - Civilian agency appeals are heard by the Civilian Board (CBCA)
 - DoD agency and NASA appeals are heard by the Armed Services Board (ASBCA)
- Different deadlines:
 - 90 days for BCA
 - 1 year for COFC

Appeals from the COFD – BCA vs. COFC

- Appeals before BCA:
 - Agency represented by agency counsel
 - Presiding judge and 3-judge board panel
 - Subject matter experts
 - Less rigid adherence to Federal Rules of Evidence and Civil Procedure
- COFC:
 - Government represented by Department of Justice attorneys
 - More diverse docket
 - Judges may not have subject matter expertise
 - More formal
- Both appeal to the United States Court of Appeals for the Federal Circuit

Court of Federal Claims

- Standard Federal litigation procedures appeal
 - Complaint filed
 - Answer/Motion to Dismiss (60 days)
 - Initial disclosures/ Joint status report (49 days after answer)
 - Discovery- documents and depositions (6-12 months)
 - Summary judgment motions
 - Pre-trial/trial
 - Post-trial briefing
 - Judgment.
- Cases that go to trial are often at least 2-4 years old.

Boards of Contract Appeals

- Notionally less formal, less expensive, and faster
 - Federal Rules of Civil Procedure and Federal Rules of Evidence do not apply per se – more flexibility
- Cases initiated with notice of appeal
 - In instances of a Government claim, appellant may request that the Government file the complaint
- Discovery begins with “Rule 4 file” due 30 days from notice of appeal, must include:
 - COFD
 - Contract, specifications, amendments, plans, and drawings
 - All relevant correspondence between the parties, including claims
- 30 days after receipt, appellant to provide relevant documents not contained in Government’s file
 - Supplementation permitted at times that are fair and reasonable
 - Frequently an iterative process

Alternative Dispute Resolution

- ADR is encouraged at COFC and CBAs
- Frequently an opportunity to resolve contentious matters without risks of litigation
- Can occur at any time, but often after some discovery has taken place
- Typically, parties request Board or Court facilitated mediation
 - Mediator ordinarily will not hear the appeal if the parties fail to resolve in mediation

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