



# Financial Forum - 2024

**Pricing Requests for Equitable Adjustments and Pursuing Claims  
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# Your instructor



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# The Basics

# First – What Are They?

REA = Request that the CO enter into negotiations for a contract modification to provide an equitable adjustment for some event that has occurred during contract performance.

Claim = A request that the CO render a decision under the Contract Disputes Act to start the disputes litigation procedure.

# Definitions

- FAR 2.101 defines a claim 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 terms, or other relief arising from a contract.”
- REA is not expressly defined in the FAR or statute. Instead, REAs spring directly from FAR clauses allowing contractors to pursue equitable adjustments. See, e.g., FAR 52.243-4 (Changes).

# Why Does it Matter?

- REAs and claims have different consequences. For example:
- REAs do not place a CO under any time constraint to address the issue(s) raised.
- A claim imposes time constraints on the CO – CDA requires a decision within 60 days for claims of \$100,000 or less, or within a reasonable time for claims of a larger amount. 41 U.S.C. §7103(f).

## Why Does it Matter? (Cont'd)

- The costs of preparation and submission of an REA and the negotiation of the equitable adjustment are generally allowable costs.
- A claim starts the running of interest in the event of recovery through litigation or negotiation. 41 U.S.C. §7109.

# Pricing REAs



# Pricing of Adjustments

- Quantum vs. Entitlement
  - Quantum – the amount of a price adjustment
  - Entitlement – the right to a price adjustment
- First – Entitlement
  - Not generally a slam dunk
  - Many significant challenges
- Second – Quantum
  - Often subject to audit
  - Usually a negotiated result

# Equitable Adjustments

- Most clauses call for an “adjustment” based on increased cost of performance
- “Equitable Adjustment” – Term of art in Government Contracting
- Our primary focus is on increased cost – Government claims may focus on decreased cost

# Request for Equitable Adjustment

- Entitlement –
  - The government was directly responsible for the delay
  - Contractor could not have prevented additional cost
- “Cause”

# Request for Equitable Adjustment

- Quantum –
  - Must provide evidence that costs are reasonable
  - Cost must be necessary
  - Intended to make contractor “whole”
    - Does not allow for loss due to other contractor inefficiencies
- “Effect”

# Basic Pricing Formula

- Actions that add work plus
  - Actions that delete work plus
  - Actions that substitute one item of work for another
- 
- If the formula is so easy – why is pricing an adjustment so hard?

# Recoverable Delay Costs (Quantum)

- Idle time of facilities or equipment
- Increase in material prices
- Increase in wages
- Loss of efficiency
- Unusually severe weather
- Insurance and bond coverage
- Protection or storage of materials

# Recoverable Delay Costs (Quantum)

- Demobilizing and mobilizing of work force
- Unabsorbed overhead expenses
- Proposal preparation costs

# Pricing the Added Work

- Unless there is added cost, the contractor is not entitled to an equitable adjustment
- Basis of additional cost:
- Incurred cost for completed work if they can be ascertained
- Otherwise – estimated cost



# Subcontract Challenges

- Generally, prime is responsible for negotiating subcontractor equitable adjustments
- Prime is responsible for acting with reasonable promptness
- Issues that may arise:
  - Subcontractor files claim with customer bypassing prime
    - privity issues
  - Lack of equitable adjustment clause

# The Proposal

- To be successful, an Equitable Adjustment will require a solid, well supported proposal:
  - A logical, rational fact history
  - Timeline
  - Causation events and impact clearly identified

# Proposal Cost Buildup

- Similar price buildup to a new contract proposal
- Breakdown of direct costs
- Application of indirect costs
  - Fringe
  - Overhead
  - G&A
  - Etc.
- Profit
  - Proposed vs. actual to date

# The Proposal

- Likely subject to audit if in excess of \$2,000,000
  - DCAM Guidance – Chapter 12-500
  - TCPD/TINA Applicability
- Documentation,  
documentation,  
documentation . . .

# Contractor's Burden

- Clear proof of costs caused by change
  - Frequently not available
  - Substantial body of legal doctrine
- Types and amount of evidence
- Amount of costs
- Segregation of costs – beneficial but informal records have been accepted

# Price Negotiation Process

- Contractor submits proposal
- CO performs analysis
  - Price analysis
  - Cost analysis – field pricing support
  - Fact finding
- CO develops negotiating position
- Bi-lateral contract modifications
- Unilateral contract modifications

# Tips for Success

- Understand the contract and its requirements
- Embrace project cost accounting
- Avoid “favors” for the customer
- Plan and engage CO early to understand and document direction
- Be proactive and timely
- Understand the risks

# Pursuing Claims



# What Makes it a Claim?

- A Claim must contain “a clear and unequivocal statement that gives the [CO] adequate notice of the basis and amount of the claim.”
- A Claim must state a “sum certain” for monetary claims.
- A Claim must request a CO’s final decision.

# What Must a Claim contain?

- For claims more than \$100,000, the contractor must certify that –
  - (A) the claim is made in good faith;
  - (B) the supporting data are accurate and complete to the best of the contractor's knowledge and belief;
  - (C) the amount requested accurately reflects the contract adjustment for which the contractor believes the Federal Government is liable; and
  - (D) the certifier is authorized to certify the claim on behalf of the contractor.

# REA or Claim? Which path for me?

- If the contractor has good relationship w/ the agency, an REA is usually the best way to begin.
- If there is animosity—or a clear indication that the agency does not believe the contractor is entitled to an REA—then a Claim is likely the best bet.
  - TRAP ALERT! — Appeals of denied Claims must be filed at the Boards w/in 90 days or at the COFC w/in 12 months.
- Unclear? Start out with an REA.
  - TRAP ALERT! — Keep an eye on the 6-year statute of limitations for submitting a Claim.

# Best Practices

- Be decisive about the best course of action.
- Be clear about whether submission is REA or a Claim.
  - If a Claim, be sure to include all requirements.
  - If an REA, state that it is being submitted to:
    - Permit negotiation of an equitable adjustment under the appropriate clause;
    - Achieve the adjustment without litigation.
    - Remember: Costs incurred for furthering negotiations generally are allowable under FAR 31.205-33.

# Big Picture

- For both REAs & Claims, the contractor must demonstrate both entitlement and quantum
  - Entitlement – The right to a price adjustment.
    - Contractor must establish: (1) liability; (2) causation; and (3) resultant injury.
      - Not generally a slam dunk
      - Many significant challenges
  - Quantum – The amount of the price adjustment.
    - Often subject to audit
    - Usually a negotiated result

# Time for questions . . .

