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Fundamentals of Government Contracting

Session Eight



Session Eight – Season Finale!

CLAIMS and DISPUTES



Today's Agenda

- 1) Requests for Equitable Adjustments
- 2) Claims
- 3) The Disputes Process

But First,
Let's Play



No-No's for \$400

**“Unequal Access to Nonpublic Information,”
“Biased Ground Rules,”
and “Impaired Objectivity” represent these.**

No-No's for \$600

Submitting invoices for services not provided, or submitting invoices on the basis of erroneous time cards, violates this.

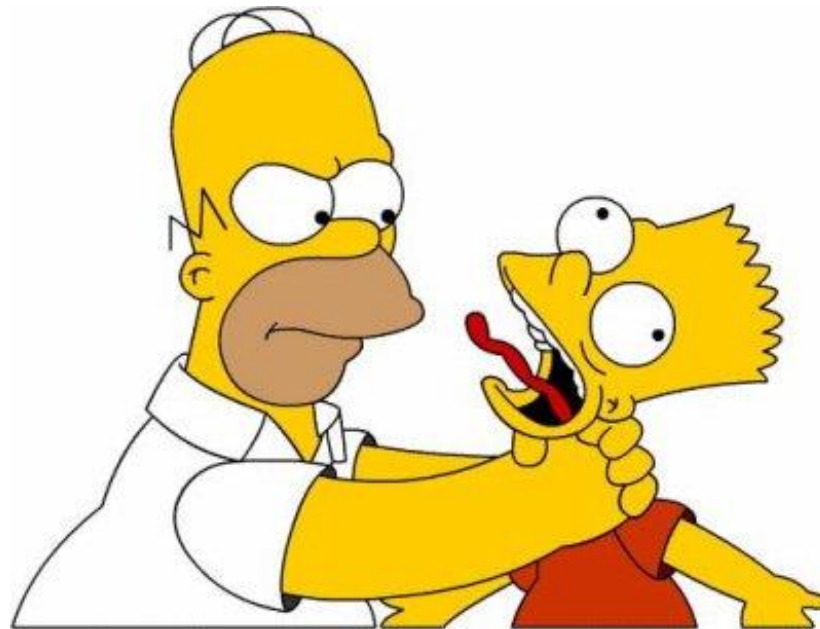
No-No's for \$800

The Certificate of Independent Price Determination, FAR 52.203-2, requires an offeror to do what.

No-No's for \$1,000

This not meant as punishment for wrongdoing, but a way to protect the integrity of the public procurement system.

Disputes and Remedies



Review: “Changes” Clause (e.g., FAR 52.243-1)

- Allows Government to make changes within the scope of the contract - unilaterally
- Provides an “equitable adjustment” to the contractor for increased cost or schedule needs
- If parties can’t agree on price change, contractor still has duty to proceed but can file Request for Equitable Adjustment (REA) and, if necessary seek relief under the Disputes process.

Review: Constructive Changes

- No formal change order, but . .
- Government action (or failure to act) causes increase in cost or delay in schedule
 - Delay and disruption
 - Acceleration
 - Defective specifications
 - Government's "superior knowledge"
 - Contract misinterpretation
- Contractor may not identify constructive change until after cost overrun is spotted or program falls behind schedule.
- Contractor submits REA, which may turn into a claim.



The Bottom Line

Contractors (and gov't personnel) need to understand that the clause which provides the contractor with a remedy also specifies what the remedy is.



Bases for Entitlement to More Money



“Equitable Adjustments”

“Adjustments”

“Damages”

What does the remedy-granting clause allow??

Equitable Adjustments

Vast majority of cases

Additional Costs + Profit



Remedy-Granting Clauses

- () Changes (52.243-1)
- () Stop Work Order (52.242-15)
- () Differing Site Conditions (52.236-2)
- () Variation in Estimated Quantity (52.211-18)

“Equitable Adjustment” (as specified by clause)

Changes (FAR 52.243-1): If any change...causes an increase...in the Contractor’s cost...the Contracting Officer shall make an **equitable adjustment**...

“Equitable Adjustment” (as specified by clause)

Differing Site Condition (FAR 52.236-2):

... If the conditions do materially so differ and cause an increase...in the Contractor’s cost...an **equitable adjustment** shall be made....

“Adjustments”

Costs only (No Profit!)

Work Stoppage

- Suspension of Work (52.242-14)
- Gov’t Delay of Work (52.252-17)

Labor Standards

- Fair Labor Standards Act and Service Contract Labor Standard
 - Price Adjustments (52.222-43)



“Adjustment” (as specified by clause)

Suspension of Work (FAR 52.242-14):
...an **adjustment** shall be made for any increase in the cost of performance of this contract (**excluding profit**) necessarily caused by the unreasonable suspension....

Damages

- Common Law Breach
- Very, Very Unusual
 - Lack of Remedy-Granting Clause
 - Breach
 - Bad Faith Termination
 - Govt Failure to Disclose Material Info

General Pricing Formula

The DIFFERENCE between what it would have reasonably cost to perform the work as ORIGINALLY required, and what it would REASONABLY cost to perform AS CHANGED (PLUS a REASONABLE PROFIT where permitted).



Pricing Example

- Contractor agrees to construct a new building for a fixed price of \$4M.
- The work includes installation of an asphalt roof, with 10-year shingles.
- Post-award, the Gov't wants to change the **quality of the roof** and now require 25-year shingles.
- The contractor states that the new roofing materials will cost \$250K.



Pricing Example

So, how much additional compensation should the contractor be paid for the change order?

“It’s as easy as A, B, C.”

Action by government
on
Baseline of contract
results in
Cost or schedule increase.



Crucial point is that these items are causally linked.

Review: Equitable Adjustments

Contractor bears burden of proof to show cost impact.

- Reasonable cost (direct and indirect) to perform added work, minus cost to perform deleted work.
 - Were costs separately tracked?
- May include delay and disruption and stand-by costs, and impact on other work, but these are hard to prove.
- Does not include consequential damages
- Subcontractor costs – only if prime is obligated (Severin doctrine) (Is Changes clause in your subcontract?)
- Does not entitle contractor to reprice the entire Contract!!!
 - Note: Contrast with partial termination for convenience.
- Contractor may seek extension of time and adjustment of other affected provisions of the contract.

So What's the Difference Between an "REA" and a "Claim"?

REA: Not as formal or confrontational

A "soft" claim

Doesn't need to be certified

Often used when there's no dispute as to entitlement

Can be a precursor to a claim

Claim: More formal, confrontational

May require certification

Often used when there is no agreement as to entitlement

Contractor's next step when an REA fails



DISPUTES

The Disputes Process

- When parties are not able to resolve an REA or other request for relief, they may begin the “disputes process.”
- A Request for Equitable Adjustment may be converted into a Claim.
- Contract Disputes Act (CDA) of 1978 (41 U.S.C. 7101 et seq.) covers disputes “arising under” or “relating to” contract.
 - Solved problem of where to go for relief involving “non-standard” claims.
- Disputes Clause - FAR 52.233-1

Claims

- Claims are a standard part of the Government contracting process.
- “Claim is not a four-letter word!” [Why is this in quotes?]
- Most claims fall under the Changes clause (including constructive changes), but claims can also arise under other contract provisions (e.g., stop work, differing site conditions, termination).
- All claims are processed under the Contract Disputes Act and the “Disputes” clause
- The Government may also make claims (e.g., liquidated damages, deductive changes, defective pricing)

But Let's Take a Deep Breath

The decision to file a claim is a substantial business decision. It should be made after considering:

- The facts and merits of the claim
- The law
- The likely business impact

What is a Proper Claim?

- Written demand requesting decision by contracting officer
- Request for payment in sum certain or other contract relief
- Seeking relief as a matter of right
- Non-routine (in dispute), i.e. not invoice, voucher or routine request for payment
- Certified if over \$100K
- Six year statute of limitations period.
- Interest runs from the date the claim is received.



What is in a Claim?

- Summary of the claim
- Statement of Facts – straightforward and unemotional
 - Discussion the relevant contract requirements
 - Explain how work performed was augmented, or how it was impeded
 - Outline the extra or changed work that form the basis of the claim
- Pricing – compute the amount of the claim
- State legal basis for the claim

The Factual Analysis

Conduct an objective investigation and evaluation of the merits of the claim.

- Review pertinent contract documents (including solicitation)
- Review cost and schedule records
- Review pertinent correspondence, particularly e-mail
- Interview personnel (and document each interview)
- Consider FOIA request for information in possession of government



CDA Certification

"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."

FAR 33.207(c)

- Required if claim is >\$100,000.
- Prescribed language should be followed verbatim
- May be executed by any person duly authorized to bind Contractor with respect to a claim.



Legal Input

- Identify legal issues and possible arguments
- Consider case law and other support
- Identify possible Government defenses and counterclaims
- Preserve evidence!
- Consider additional support – e.g., expert analysis
- Consider choice of potential legal forum for appeal

Ultimately, Filing a Claim Is a Business Decision

- How likely are you to win?
- What is the potential impact on your relationship with this customer?
- What will it take to meet your burden of proof? (Will you need to prove that a Government employee is a liar?)
- How will the customer feel about that claim?
- Will it be a surprise? Is shouldn't.
- Are there ways to mitigate negative customer impact – e.g., using ADR?



Claim – Best Practices

- Proportionality: Degree of analysis should vary with size of claim.
- Do not attack government statements – make it easy for government to save face and change mind.
- Remember that the Contracting Officer is not an island – write for multiple audiences:
 - Contracting officer and staff should be familiar with contract and claim issues.
 - Senior government reviewer may not be familiar with contract or claim issues.
 - Court or board member may be asked to rule if contracting officer denies claim.
- Avoid Obfuscation. Make it clear, clear, clear.

Recognizing Potential Claims

Examine cost growth or schedule slippage.

- Was it caused by government action or inaction (such as contract modifications or improper rejection reports or testing)?
 - Not every cost overrun is the Government's fault!

Major question: **When** do you look?

Claim Recognition - AFTER

The Loss Approach (Reactive)

- Contractor realizes the problem after-the-fact.
- Money has already been lost, so it may be difficult to resolve – someone will get hurt.
- Contractor may not have the means to mount the fight necessary to maximize recovery.
- Evidence and witnesses may not be available.
- Claim may be untimely.

Claim Recognition - BEFORE

- The Event-Oriented Approach (Proactive)
 - Contractor's personnel are trained to recognize potential claims
 - E.g., when agency requests task that falls outside SOW in contract.
 - E.g., when agency hinders work.
 - Claims can be resolved before money is spent (which is easier!)
 - Costs of changed work can be charged to a new job number and tracked.
 - Claim will be timely.
 - Witnesses and evidence are generally available.
 - Costs of dispute will be reduced.

APPEALS

When the Contracting Officer Denies the Claim

- CO decision is due within 60 days of receipt of claim.
 - If claim is >\$100K, CO can extend period and specify decision timetable.
- If CO Issues Final Decision (COFD), Contractor can accept decision, or appeal.
- What happens if CO doesn't issue timely COFD?
 - Contractor can appeal "deemed denial" of claim (FAR 33.211(g))
 - Usual result is that CO is directed to issue decision for benefit of Board or Court
- Contractor must continue performance while claim is pending or on appeal.

Let's Strategize

For two years you have been arguing with the CO that Government delays and other failures greatly increased your costs, but the CO has been unyielding. Finally, on January 15th you submitted a certified claim for \$3.4M. On March 15th the CO told you that she will issue her decision by June 15th. But June 15th has come and gone, as have July, August, and September. Meanwhile, you have submitted a major proposal to the same agency and are waiting for the (competitive) award decision.

What should you do?

- A) File an appeal now, treating the CO's failure to issue a decision as a "deemed denial."
- B) File an appeal as soon as the new contract is awarded, so the appeal doesn't jeopardize your chances to win.
- C) File an appeal now to show the agency that you won't be pushed around, so they had better not "disrespect you" in the new procurement.
- D) Wait for a final decision.

Where Does Contractor Take Its Appeal?

Two forums have jurisdiction over an appeal of a contracting officer's decision:

- Board of contract appeals (Armed Services Board of Contract Appeals or Civilian Board of Contract Appeals)
- U.S. Court of Federal Claims ("COFC")

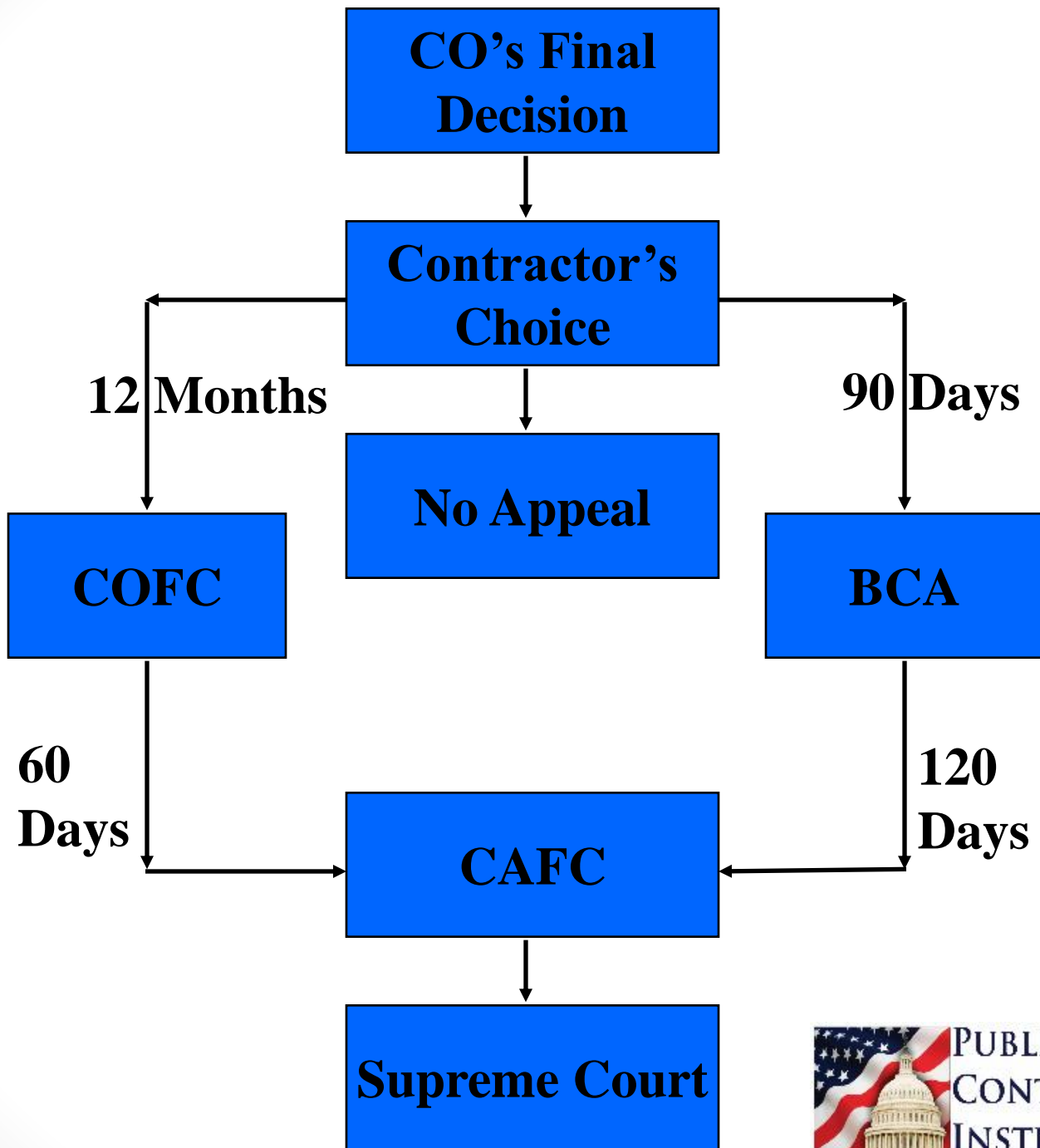


A contractor has 90 calendar days to appeal to the board and one year to file suit in the COFC.

Once a filing is made, the contractor has "elected" its forum and may not change.

Contractor can continue to negotiate with CO while appeal is pending!





Appeal Strategy – Forum Selection

- Which forum has better legal precedents?
- Which forum may have more favorable outlook toward claim?
- Which forum has more favorable procedures?
- Are there differences in cost to pursue?
- How long it will forum take to reach decision?
- Different deadlines to appeal:
 - Board – 90 days
 - COFC – 12 months
- Different counsel
 - Board – Agency counsel
 - COFC – Department of Justice



Appeals Process

Boards and Courts have similar processes:

- Complaint and Answer (if ADR not selected)
- Agency prepares appeal file (“Rule 4 file”)
- May be counterclaims and motions to dismiss
- Discovery
- Motions (e.g., summary judgment)
- Hearings (optional)
- Briefs
- No deadline for decision
- Decision (of either Board or COFC) may be appealed to U.S. Court of Appeals for the Federal Circuit.

Best Practices – Avoid Disputes

Communicate, communicate,
communicate

Document, document,
document

Stay current: Bad news is not
like wine; it does not improve
with age.





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