The Professor's Forum

Request for Equitable Adjustments v. CDA Claims

Virtual Class August 17, 2023 12:00 pm – 1:30 pm (ET)

During contract performance, if a contractor is ordered to do more work or it encounters an issue that is in the nature of a change (a constructive change) that increases its costs, it is entitled to an equitable adjustment. Similarly, the government is entitled to an equitable adjustment if a change reduces the contractor's costs. Such equitable adjustments are requested by either of two documents – a request for equitable adjustment (REA) or a Contract Disputes Act claim (CDA claim). The distinctive features of these documents are as follows:

CDA Claim	REA
Four prong certificate if over $100,000	Two prong certificate if over the simplified acquisition threshold (generally $150,000) and submitted to DOD agency No certificate if submitted to non-DOD agency
Must request CO decision	Should request negotiation
Must state sum certain and should contain statement of basis for compensation and pricing logic	Should contain statement of basis for compensation and pricing logic
Costs of preparation are unallowable claims prosecution costs	Reasonable costs of preparation are allowable contract administration costs
CDA interest starts to run when CO receives the claim	CDA interest does not start to run
If CO issues a decision (or failed to issue a timely decision), contractor can appeal to an appeals board or the Court of Federal Claims	If CO offers an unacceptable amount, contractor has no right of appeal but can submit a CDA claim to start the appeals process

The most common practice is to submit an REA first in an attempt to negotiate the equitable adjustment. If negotiation fails, a CDA claim can be submitted at any time within the six year statute of limitations.

I. Distinguishing REAs from CDA claims

In spite of the clear distinction spelled out in the above table, there has been considerable confusion in recognizing the difference between REAs and CDA claims. Much of this confusion has been caused by lack of understanding of the contracting parties. The Courts and appeals boards have also contributed to the confusion. The one clear principle is that the label placed on the document will not control – it is the words in the document and the conduct of the parties that will be scrutinized to determine whether the document is an REAs or a CDA claim.

We will look at three decision that have created the confusion in distinguishing between REAs and CDA claims – all holding that there had been *an implied request* for a CDA decision.

A. Air Services, Inc., ASBCA 59843, 2015 BCA ¶ 36,146

This case gave us an early warning of the consequences of the parties not understanding the distinction. There the board ruled that what the contractor had called an REA was a CDA claim – in spite of the fact that apparently the CO thought it was an REA. The board reasoned:

> The government argues appellant's revised REA is not a claim because it fails to request a final decision. Relying on this Board's decision in *Certified Construction Company of Kentucky, LLC*, ASBCA No. 58782, 14-1 BCA ¶ 35,662, the government contends the DFARS 252.243-7002 REA certification and the lack of an express request for a COFD render appellant's revised REA deficient as a CDA claim. Although the government acknowledges appellant's counsel's communications with the CO, the government maintains that the references to a final decision in those communications relate to the original REA, not the revised REA.
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> Reviewing the totality of the parties' correspondence, we find that appellant sought a final decision on its revised REA. The government is correct that appellant's revised REA does not itself explicitly request a COFD. A request for a final decision need not be explicit, however, but may be implied from the context of the submission. *Rex Systems, Inc. v. Cohen*, 224 F.3d 1367, 1372 (Fed. Cir. 2000); *Ellett*, 93 F.3d at 1543; *Transamerica Insurance Corp. ex rel. Stroup Sheet Metal Works v. United States*, 973 F.2d 1572, 1576-77 (Fed. Cir. 1992). To the extent that appellant's original 22 May 2014 REA did not indicate, either expressly or implicitly, that appellant was seeking a final decision, appellant subsequently corrected that defect. Appellant's counsel's 13 January 2015 letter to CO Belino-Coffeen unmistakably indicated that appellant was seeking a final decision on its REA. CO Belino-Coffeen's response acknowledged that appellant was seeking a final decision and requested an extension of time in which to render a final decision. Appellant's counsel's reply stated that it expected a final decision by 2 February 2015. Rather than issue a final decision by that date, CO Belino-Coffeen issued a 2 February 2015 letter indicating that she was inclined to deny appellant's REA absent additional information. Appellant submitted its revised REA in response to that letter. Contrary to the government's position, in light of the earlier request for a final decision, we find nothing in this series of communications to suggest that appellant was no longer seeking a final decision when it submitted its revised REA. See *Transamerica*, 973 F.2d at 1578 ("This court is loathe to believe that in this case a reasonable contractor would submit to the contracting officer a letter containing a payment request after a dispute had arisen solely for the contracting officer's information and without at the very least an implied request that the contracting officer make a decision as to entitlement.").

B. *Hejran Hejrat Co. v. United States Army Corps of Engineers*, 930 F.3d 1354 (Fed. Cir. 2019)

Although the ASBCA had found that what purported to be an REA was a CDA claim in *Air Services*, in this case it found that the parties' conduct through a long negotiation was based on several REAs, *Hejran Hejrat Co.*, ASBCA 61234, 18-1 BCA ¶ 37,039. However, the Federal Circuit reversed in a surprising decision. The court reasoned:

> Under our caselaw, HHL's March 5, [2015] submission constitutes a request for a final decision on a claim. In the March 5 submission, HHL requested that the contracting officer provide specific amounts of compensation for each of the alleged grounds. HHL submitted a sworn statement attesting to the truth of the submission, included detailed factual bases for its alleged losses, and claimed a sum certain based on the losses. This submission bears all of the hallmarks of a request for a final decision on a claim, and "[t]his court is loathe to believe that in this case a reasonable contractor would submit to the contracting officer a letter containing a payment request after a dispute had arisen solely for the contracting officer's information and without at the very least an implied request that the contracting officer make a decision as to entitlement. Any other finding offends logic." *Transamerica Ins. Corp. v. United States*, 973 F.2d 1572, 1578 (Fed. Cir. 1992), overruled in part by *Reflectone,[Inc. v. Dalton*], 60 F.3d [1572 (Fed. Cir. 1995)] at 1579 & n.10.

It's not clear whether the length of the negotiation or the amount of documentation led the court to this conclusion but it certainly blurs the distinction between REAs and CDA claims.

C. BB Government Services Srl, ASBCA 63255, 23-1 BCA ¶ 38,303

In what seemed to be a clear case, the ASBCA – possibly influenced by the decision in *Hejran Hejrat* – found that a straightforward REA was a CDA claim. There the contractor, after discussing additional work necessary to meet the contract requirements with agency personnel, submitted an REA for this work. The REA explicitly advised the CO that the purpose of its submission was to recover additional costs and requested an equitable adjustment of $ 121,214.66. There is no indication in the board's decision that the REA contained any certification. The CO treated this REA as a CDA claim and issued a final decision. The contractor appealed the decision and the board took jurisdiction, stating:

> The Board's jurisdiction under the Contract Disputes Act (CDA) is dependent upon the contractor's submission of its claim to the CO and a final decision on, or the deemed denial of, the claim. *CCIE & Co.*, ASBCA Nos. 58355, 59008, 2014-1 BCA ¶ 35,700 at 174,816. Because the CDA does not define the term "claim," we look to the Federal Acquisition Regulations (FAR) for a definition. *Reflectone*, 60 F.3d at 1575; *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1564-65 (Fed. Cir. 1995). The FAR 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 contract terms, or other relief arising under or relating to the contract." FAR 2.101; see also *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1328 (Fed. Cir. 2010).
> An REA, on the other hand, is a relatively non-adversarial request from a contractor to a

> CO to consider adjusting contract terms. *BAE Sys. Ordnance Sys., Inc*., ASBCA No. 62416, 2021-1 BCA ¶ 37,800 at 183,577. The distinction between a claim and an REA is frequently unclear and often comes down to the second CDA requirement--whether the contractor requested a final decision from the CO. *Id*. However, an REA may be converted into a claim by fulfilling the CDA's requirements of a valid claim, including a request for a COFD. See *Hejran Hejrat Co. Ltd. v. United States Army Corps of Engineers*, 930 F.3d 1354, 1357-59 (Fed. Cir. 2019); *Air Services, Inc*., ASBCA No. 59843, 2015-1 BCA ¶ 36,146 at 176,424-25 (even a document referring to itself as an REA often meets the definition of a claim in that it makes a non-routine written demand for payment as a matter of right).
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> Here, while it did not explicitly request a COFD, BBGS's September 15, 2021, REA "request[ed] the Government [for] a fair adjustment of the contract amount" which was a non-routine request for payment that provided the Air Force with adequate notice of both the basis of the dispute and the amount in question.

II. Requirement for a CDA Certification

As noted in the table, one of the mandatory requirements for a CDA claim is the four-prong certification. Yet these three decisions have given a very loose interpretation to this requirement.

In *Air Services* the REA contained the two-prong certification required by DFARS 252.243-7002 for REAs submitted to DOD. However, the board held that this was not dispositive of the issue, stating:

> The government places undue weight on the fact that appellant's revised REA contained a DFARS REA certification rather than a CDA certification. In Certified Construction, upon which the government relies, we first found that the contractor did not explicitly or implicitly request a final decision in the letter at issue. Certified Construction, 2014-1 BCA ¶ 35,662 at 174,572. We then noted that the letter referred to itself as an REA, and contained a DFARS REA certification. Id. Reviewing the totality of the record, we found that at all points after the submission of the REA the contractor did not treat the letter as a claim until the government raised a statute of limitations defense on appeal. Id. Accordingly, we held that the contractor had not submitted a claim until the contractor's subsequent letter that explicitly requested a final decision and included a proper CDA certification. Id. In reaching that conclusion, the certification provided by the contractor was one piece of evidence in determining whether a proper CDA claim had been submitted. Although the certification provided was relevant to our decision, we did not hold that the presence of a DFARS REA certification is outcome determinative and precludes a finding that a contractor submitted a CDA claim or implicitly requested a final decision.
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> The record in this appeal does not support the inference that by submitting its revised REA with a DFARS REA certification appellant intended its revised REA to not be a CDA claim. In arguing that appellant's revised REA was not a CDA claim, the government asserts that "[o]ne of the contracting officers e-mailed appellant with instructions for submitting a claim and an REA and asked appellant to clarify whether it was submitting an REA or a claim". While CO Wallace's 7 May 2014 email stated that a claim should be submitted under FAR 52.233-1 and an REA under DFARS 252.243-7002, appellant's response indicates that it did not understand CO Wallace's

> instruction. CO Belino-Coffeen's 8 May 2014 email then directed appellant to certify its "claim/REA" pursuant to DFARS 252.243-7002(b). Accordingly, appellant's certifying its revised REA in accordance with DFARS 252.243-7002(b), per CO Belino-Coffeen's instruction, does not suggest that appellant did not intend its revised REA to be a CDA claim.

In *Hejran Hejrat* the REA contained a signed affidavit stating: "The clauses and points reflected in REA (Request for Equitable Adjustment) in reference to contract # W5J9JE-11-C-0115, to the best of my knowledge are true." The court dealt with this defect with the following strange reasoning:

> It is unclear how the certification was inadequate, but, as the Board and the government recognize, defect in the certification of a claim does not deprive a court or an agency board of jurisdiction over the claim." "Prior to the entry of a final judgment by a court or a decision by an agency board, the court or agency board shall require a defective certification to be corrected." Here, the government concedes that HHL could cure any issues with its certification on remand. Therefore, on remand the Board may require HHL to correct any defects in the certification for the March 5 submission

In *BB Government Services* the board totally ignored the requirement for the CDA certification.

III. The Current State of Affairs

These decisions pose a dilemma for contractors. They generally want to negotiate the equitable adjustment and avoid litigation. But to persuade the CO that their REA has merit, it has to include clear information demonstrating the basis for compensation and the pricing logic. This makes it look like a CDA claim from the outset. This may be part of the explanation for these three decisions.In addition, some of the Federal Circuit judges apparently do not believe thst a contractor would continue to negotiate a settlement with the CO rather than incur the expenses of litigation.

This means that a contractor wishing to avoid having its REA called a CDA claim has to take very explicit action. First, it should state in the REA: “This is not a CDA claim.” Second, iy should insert the correct certification – the two-prong one if dealing with DOD, NASA or the Coast Guard and none if dealing with any other agency. Third, it should confirm with the CO that the document is an REA that comtains sufficient information to allow it to be analyzed and that negotiations will ensue in a reasonable period of time.

If the CO is uncooperative, the contractor has to weight whether the claim has sufficient merit to justify bearing the cost of litigation. If the answer is no, the contractor can either try to negotiate further or give up. If the answer is yes, the contractor should promptly prepare a correct CDA claim and submit it to the CO. Prolonging the attempt to negotiate a settlement with an uncooperative CO is generally not a good move but litigation costs are difficult to control and can be run up by aggressive government lawyers. This is part of the dilemma faced by contractors..