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The Difference between REAs and Claims

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The Contract Disputes Act of 1978

41 U.S.C. § 7103

- Establishes procedures for handling claims relating to U.S. Federal Government contracts. FAR Subpart 33.2
- Requires claims by contractors against the Federal Government be submitted in writing to the Government's Contracting Officer. FAR 33.206; FAR 52.233-1
- Claims must be submitted within 6 years after the accrual of the claim. FAR 33.206; 52.233-1
- If the contractor is dissatisfied with the Contracting Officer's decision, they may:
 - Appeal within 90 days to the designated Board of Contract Appeals (41 U.S.C. §7104(a)); or
 - Appeal within 12 months to the U.S. Court of Federal Claims within 12 months (41 U.S.C. §7104(b)(3)).

What is a Claim?

- A claim is:
 1. A written assertion or demand for:
 - Payment of money, e.g a “sum certain”
 - Adjustment or interpretation of Contract Terms;
 - Other relief arising under or relating to the Contract. FAR 52.233-1(c).
 2. Requesting a Contracting Officer’s Final Decision. FAR 33.206(a).

What is a Claim (cont'd)

3. And, certified. If a claim is over \$100,000, it must be certified by an authorized person stating: “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

What is a Request for an Equitable Adjustment?

- A request to negotiate with the Agency; you owe me money, let's negotiate and end up with a Mod.
- Think of it as a *post facto* request for a change order
- It lays out the basis for the change or other circumstance that the contractor believes entitles it to an adjustment in money and/or time.

What is a Request for an Equitable Adjustment?

- Submission of an REA is not required, but most contractors prefer to see if the matter can be resolved before resorting to or submitting a formal claim. It's an attempt to settle the issue informally.
- There are not specific deadlines or time periods applicable to the REA process. No deadlines for a Government response.
- If a REA doesn't go anywhere, the Contractor is free to submit a Claim under the CDA.

What goes into a REA?

- It is a more informal version of a Claim; often written as a letter.
- It should contain:
 - What the problem is
 - The applicable contract provisions
 - A detailed narrative of the facts that support the request (and why any obvious, negative facts don't change the outcome).

What goes into a REA?

- A detailed discussion of the amount of compensation or time extension requested and why.
 - Provide backup to support the costs requested
 - Explain clearly why the methodology used to determine the additional costs requested produced a fair, reasonable and calculable amount
 - Provide backup to support the number of days of extension requested
 - Explain the methodology for how the days of delay or days caused by additional work were calculated and why that methodology produced a fair and reasonable result.
 - If requesting daily operating costs for each day of extension, explain that process/methodology (and use the same approach as previously used – do not be inconsistent in how you calculate the indirect costs of performing a contract for a longer period.)

What goes into a REA?

- It should request a time to meet with the agency key personnel (e.g. CO, COTR, DCMA) to review the REA and provide any additional information or answer any questions the Government may have
- It should clearly request the opportunity to negotiate the REA for the purpose of resolving the issue as soon as possible.

What goes into a REA?

- If the REA is being submitted to a civilian agency, it should not include a Certification similar to that required by the Contract Disputes Act for claims over \$100,000.
- NOTE: Even if the Contractor does not include a CDA Certification, if the text of the REA represents the key elements of the certification:
 - The contractor is submitting the request in good faith
 - The REA provides supporting documentation that is represented to be accurate and provide the complete picture, and
 - The specific amount is what the contractor believes it is entitled to receive

Then the submission may be treated as a Claim regardless of what it is called.

What goes into a REA?

- If the REA is being submitted to a Department of Defense agency, per DFARS 252.243-7002 (Request for Equitable Adjustment), and is above the Simplified Acquisition Threshold (\$150,000), the DOD requires that it contain the following 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.

- Signing this requires full disclosure of all certified cost or pricing data and, even if certified cost or pricing data is NOT required, the contractor agrees to provide actual cost data to support any estimated costs. DFARS 252.243-7002(c).

When Can you Submit A Claim?

- Most Contractors prefer to submit a REA first, to initiate a dialog and try to work out something with the Government for the payment of additional monies.
- When submitting a REA first, the Contractor foregoes the right to interest but can include the cost of preparing and negotiating a REA in its costs.

When Can you Submit A Claim?

- It's tricky; in some circumstances, the Contractor can't submit a Claim first
 - for example, a contractor must submit a Termination Proposal before it can submit a CDA Claim
 - if there is a payment problem with a “voucher, invoice or other routine request for payment,” the Contractor must first get the CO to dispute the Contractor's interpretation or position before it can submit a CDA Claim. *See Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995).
- But, other than these few exceptions, hardly anyone submits a Claim right out of the box.

**So, if you're going
to submit a Claim...**

No. 1 What is your goal?

- Where do you want to be?
 - Think about money, time, and relationships.
- Decide on this at the outset and plan backwards.
- Think about how likely it is that the goal will be achieved?
- Is money and/or time available?
- How long will it take to achieve?

(These same 10 considerations can be applied when preparing a REA and could result a quicker result.)

No. 2 “Red Team” Your Claim

- You already know how you (the “Blue Team”) view it.
- But what about the “Red Team?”
- How will the Government view your claim?
- How will they react?
- What will they say happened in contract performance?
- What *really* happened? Is it somewhere in-between?

3. Prepare your strategy

- Plan your strategy at the outset as if you will have to go the distance, to appeal. (An appeal could be taken in: U.S. Court of Federal Claim or Appropriate Board of Contract Appeals (CBCA/ASBCA))
- How well will your legal theory work in each of the possible forums?
- Where is the case law strongest?
- Are the discovery and other rules more beneficial for you in one jurisdiction?
- What about the deadlines?

No. 4 Make sure you know what the contract requires.

- *Read and re-read* the contract.
- Know your contract provisions.
 - Changes clause
 - Suspension of work clause
 - Stop order clauses
 - Or any other clauses that are relevant to the claim
- Know the pertinent contract performance requirements.
 - Specific terms of the Statement of Work (SOW)
 - Standards referenced in the SOW
- What will the government rely on to support the opposite view?

No. 5 Make sure you have all the facts

- Check all sources of support.
- Check all communications, internal as well as external, letters, memoranda, minutes.
- E-mail is especially important.
- Don't ignore unfavorable facts, recognize their impact and look for support to mitigate/offset their harm.

No. 6 Strong factual narrative.

- Address all facts. Build on/expand on any previous REA
- Be able to cite to sources/documents to support your narrative. Be prepared to attach them to the Claim.
- Ensure that you address facts, even those not supportive of the Claim.
 - Don't let the other side raise those issues and facts first.

No. 7 Strong legal analysis.

- Simplify your argument.
- Break down your explanation of the basis for entitlement.
 - Contract clauses
 - FAR/DFARS/Agency Supplement
 - Case law
- Be thorough but don't over-do it.
- KISS

No. 8 Explain Damages or Equitable Adjustment

- Theory of damages should be easily explainable.
- Would someone unfamiliar with the case understand your theory of damages?
- Articulate each element of damages and explain why it was caused/incurred because of the claim.
- Just because a cost is incurred doesn't mean that it's automatically reimbursable via the Claim, there must be a causal nexus
- Two pots for \$; one for Government and one for Contractor. The Contractor must accept responsibility for contractor mismanagement or inefficiencies of its own.
- Be prepared to explain why each cost (damage) is also allowable and reasonable.

No. 9 Quantum & Remedies

- Precision in calculating quantum
 - Supporting documentation
 - Include support for all quantum and remedies with your claim
 - Do not exaggerate! Doing so not only compromises the validity of the claim but can expose a contractor to forfeiture as well as payment to the Government if there is a finding of fraud. See, *Daewoo Eng'g & Const. Co., Ltd. v. United States*, 557 F.3d 1332 (Fed. Cir. 2009)
 - Try not to rely on the “total cost” approach (e.g. the difference between what the Contractor spent and the amount of the Contract). See *Raytheon Co. v. White*, 305 F.3d 1354, 1365 (Fed. Cir. 2002) (“method has always been viewed with disfavor”).

No. 9 Quantum & Remedies (cont'd)

- Contractors using the “total cost” approach anticipate damages will be calculated using the Jury Verdict method. To do so, the trier of fact must determine:
 - There is clear proof of injury
 - There is no more reliable method of calculating damages;
 - The evidence is sufficient to make a fair and reasonable approximation of the damages.

Raytheon Company v. U.S., 305 F.3d 1354 (US. CAFC 2002).

- Clarity in requested remedies.
 - Explain *why* you need additional time
 - Explain *why* you are requesting additional costs

No. 10 Tone

- Credibility.
- Compelling but without emotion or personal rhetoric. Try to keep the “ly” words to a minimum.

Questions?