



Successfully Crafting and Prosecuting Contract Disputes Act Claims Against the Government

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Agenda

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- Contract Disputes Act (CDA)
- What is a Claim
- Establishing the Claim
- Structure and Content
- Review by the Government
- Appealing a Contracting Officer's Final Decision

Contract Disputes Act

Contract Disputes Act

- Provides the current statutory framework for resolving claims arising out of or relating to certain federal government contracts
 - Codified at 41 USC § 7101, *et seq.*
 - Enacted in 1978 (at 41 USC § 600, *et seq.*)

Applicability of the CDA

- Focus today is on executive agency contracts
 - 41 USC § 7102(a): “[T]his chapter 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.”
 - Includes contracts with certain nonappropriated fund activities (NAFIs), including the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, etc.

The Definition of a Claim

The Definition of a Claim

- FAR 2.101 defines a “claim”:
 - 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.
 - A written demand or assertion seeking the payment of money in **excess of \$100,000** must be **certified** to qualify as a claim.
 - 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.

The Definition of a Claim

- FAR 52.233-1, Disputes (May 2014)
 - Subsection (c) defines a “claim” in a substantially similar manner
- The Contract Disputes Act (41 USC § 7101, *et seq.*)
 - Does not define a “claim”

Establishing a Claim

Steps to a Claim

- Recognize the problem
- Gather the facts
- Develop theories of entitlement
- Calculate quantum
- Claim vs. request for equitable adjustment designation?
- Special considerations

Case Study

- Working on a contract to produce and deliver a widget for fixed price of \$1 million
- Estimated cost to deliver widget has doubled from \$.8M to \$1.6M, facing \$.6M loss
 - Government required that widget provide more advanced capabilities than what specification required
 - Government performed a more in-depth inspection than what contract required
 - Government requested that widget be delivered sooner than what schedule required

Initial Steps

- **Recognition of an actual or projected overrun**
 - Conduct preliminary investigation to determine existence of a potential claim
 - Preliminary assessment of entitlement
- **Identify a claims team**
 - Program
 - Technical
 - Cost
 - Legal
- **Segregate relevant costs**
 - Claim preparation costs
 - Overrun
 - Potentially retain outside cost accounting expert

Gathering / Assessing the Facts

- **Collect and preserve relevant documents**
 - Define types of documents
 - Hardcopy
 - E-mails
 - Electronic documents
 - Text messages
 - Identify location of documents
 - Servers
 - Employees' local hard drives
 - Department file cabinets
 - Litigation hold
 - Establish central repository

Gathering / Assessing The Facts

- Obtain (and read!)
 - The solicitation (and amendments), proposal and negotiation documents
 - Base contract and all modifications (including all attachments)
 - Correspondence with the Government related to dispute
 - Internal documents related to dispute

Gathering / Assessing The Facts

- Review documents
 - Consider preparing a chronology
 - Identify “hot” documents
 - Supporting or undermining (a) preliminary theories of entitlement or (b) alternative theories of entitlement
- Interview key personnel
 - Confirm / clarify existing understandings
 - Identify new facts / documents

Definitizing Theories of Entitlement

- “Remedy-granting” contract clauses
 - (1) the Changes clause;
 - (2) the Government Furnished Property clause;
 - (3) the Suspension of Work clause;
 - (4) the Stop-Work Order clause;
 - (5) the Government Delay of Work clause; and
 - (6) the Termination for Convenience clause
- Breach of contract

Definitizing Theories of Entitlement

- Follow the money
 - Identify where cost overrun occurred
 - Determine factual reasons for cost overrun
 - Conform theory of entitlement the facts

Case Study: Change

- Remedy-granting contract clause
 - Changes Clause (FAR 52.243-1)
 - “The Contracting Officer may at any time
 - by written order
 - make changes within the general scope of this contract
 - in any one or more of the following:
 - drawings, designs or specifications
 - method of shipping or packing
 - place of delivery”
 - Constructive Change
- Breach
 - Cardinal Change

Quantum

- Quantum is the dollar amount associated with a claim to which a theory of entitlement has been identified

Case Study: Change

- Changes Clause (FAR 52.243-1)
 - “If any such change causes an increase or decrease in
 - the cost of
 - or time required for performance
 - whether or not changed by the order
 - the Contracting Officer shall make an equitable adjustment in
 - the contract price
 - the delivery schedule
 - or both”

Calculating Quantum

■ Costs

- Direct costs, e.g., labor and material
- Indirect costs, e.g., overhead and G&A
- Delay and disruption
 - Cost of delay represented often by so-called “time-oriented men” and by “work in later time periods”
 - Cost of disruption is the increased cost of unchanged work due to the change

■ Profit

- Most often apply profit formula from bid or proposal
- Otherwise, look to profit factors at FAR 15.404-4

Calculating Quantum

■ Time

- Day for day schedule extension
- Concurrent delay
 - Government change causes delay, but contractor would have been delayed in any event for other reasons
 - Contractor entitled to time extension for concurrent delay, but not price adjustment
 - Acceptable when actual injury is certain so relief is due
 - Conflicting evidence on impact of the change

Calculating Quantum

- Means of Measuring Quantum (Cost)
 - Actual cost incurred (bottoms up)
 - Total cost method (top down)
 - Difference between total actual cost and bid cost as to whole contract
 - Bid versus should cost
 - Not favored except where quantum is of multiple overlapping changes so that costs associated with discrete changes not possible
 - Modified total cost method
 - Begin with total cost but remove all costs incurred not related to the change
 - Jury verdict
 - Acceptable when actual injury is certain so relief is due
 - Conflicting evidence on impact of the change

Claim Versus Request for Equitable Adjustment

- Determine if claim or request for equitable adjustment (REA)
 - REA
 - Similar to claim, but generally less formal and less argumentative
 - Matter of contract administration
 - Cost of administering REA generally is allowable
 - Claim
 - Cost of prosecuting CDA claim is not allowable
 - CDA interest
 - Generally more confrontational
 - Can easily turn REA into claim if REA is denied

Special Considerations

- Calculating Quantum Outside of Remedy-Granting Clause
 - Breach Damages
 - Consequential damages not permitted
- Usually quantum is determined after additional cost has been incurred
 - Occasionally will include prospective costs using estimates

Special Considerations

- **Sponsorship**
 - Prime contractor must “sponsor” subcontractor claim against government
 - *Severin* doctrine – narrowly construed
- **Check for prior waivers or releases of claims**
- **CDA statute of limitations** (41 USC § 7103(a)(4))
 - Must submit claim 6 years from claim accrual
- **Obligation to continue performance pending resolution** (41 USC § 7103(g))

Structure and Content of a Claim

Structure and Content of a Claim

- Entitlement
- Quantum
- CDA Certification

Entitlement

- Relevant facts
 - Provide underlying support
- Legal basis
 - Make your argument

Quantum

- Methodology for quantifying claim
- Supporting documentation
- Sum Certain

CDA Certification

- **Certification** (41 USC § 7103(b))
 - Applies to claims of more than \$100,000
 - Cannot avoid certification obligation by submitting separate claims arising from same operative facts
- **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
- **Certification must be complete, unqualified and explicit**
 - FAR 33.207 provides a form CDA certification

CDA Certification

- Who must certify?
 - Individual authorized to bind the contractor with respect to the claim
- What about a certification for a subcontractor sponsored claim?
 - Prime contractor still must certify

Review by the Government

Review by the Government

- **Government audit of quantum**
 - Contractor certifies currency, accuracy and completeness of cost or pricing data supporting claim if in excess of \$700,000
- **Contracting officer may request additional supporting information**
- **Potential IG investigation if potential for fraud**

Contracting Officer's Final Decision

(41 USC § 7103(d)-(g))

- Shall provide reasons for decision, but specific finding of facts not required
- Timing of decision is based on value of claim
 - \$100,000 or less
 - Decision within 60 days from receipt of contractor request for decision
 - Otherwise reasonable time period
 - More than \$100,000
 - Decision or notification of when decision will be issued within 60 days of receipt of certified claim
 - If over 60 days, decision must be issued within reasonable time period
 - Deemed denial

Final and binding unless appealed

Appealing a Contracting Officer's Final Decision

Fora for Appeal

Boards of Contract Appeals (ASBCA, CBCA)	U.S. Court of Federal Claims
Authorized by CDA	Article I court
Each BCA has own rules; less rigid than Federal Rules of Civil Procedure (FRCP)	Rules closely modeled after FRCP
Less formal	More formal, analogous to US District Court proceeding
Panel decision, but trial before one judge	Trial before one judge
Judges have government contracts backgrounds	Not all judges have government contracts backgrounds
Bifurcates entitlement and quantum unless otherwise requested	Bifurcation possible, but not starting point

All further appeals go to US Court of Appeals for the Federal Circuit, and then to US Supreme Court

Selecting the Forum

■ CDA Election Doctrine

- BCA *or* COFC

■ Research applicable case law

- Both bound by Federal Circuit precedent
- But BCA or COFC decisions may be more favorable to position

■ Location

- All are located in DC metropolitan area
- Judges from each forum may be willing to travel for hearing

Selecting the Forum

- **Adversary and settlement considerations**
 - **BCAs**
 - Agency counsel represents agency
 - Agency has settlement authority
 - **COFC**
 - DOJ represents agency
 - DOJ has settlement authority
- **Expedited resolution procedures for BCAs**
(41 USC § 7106)
 - Accelerated procedures for claims of \$100,000 or less
 - Small claims procedures for claims of \$50,000 or less
(\$150,000 or less for small business concerns)
- **Alternative Dispute Resolution**

Time For Filing Appeal

■ BCAs

- File notice of appeal within 90 days from receipt of contracting officer's final decision (COFD)
- Complaint is filed later

■ COFC

- File complaint within 12 months from receipt of COFD

Final Thoughts

Final Thoughts

- Recognize when a claim may arise
- Draft claim (or REA) in a clear and concise manner
- Preserve relevant documents
- Track all deadlines
- Carefully consider which forum to commence appeal

Final Thoughts

- **Fraud considerations**
 - **CDA anti-fraud provision** (41 USC § 7103(c))
 - Penalty equal to unsupported part of claim plus government's costs in reviewing unsupported part of claim
 - **False Claims Act** (31 U.S.C. § 3729, et seq.)
 - Treble damages
 - Civil penalties between \$5,500 and \$11,000 per claim
 - **Forfeiture of Fraudulent Claims** (28 U.S.C. § 2514)

Contact us with any questions

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