

CONTRACT DISPUTES ACT OF 1978



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Negotiation and Resolution of Federal

Government Contractor Claims under the Contract Disputes Act



Contract Disputes Act of 1978

- Congressional intent:
 - Help resolve more disputes by negotiation
 - Equalize bargaining power of parties
 - Provide alternative forums for different types of disputes
 - Ensure fair and equitable treatment to contractors and government agencies

Government Contracts vs. Commercial Contracts

- “Fairness” is an issue
- Taxpayers should be treated fairly by their government, and vice versa
- In commercial contracts, the party with the superior bargaining power gets the better deal; “tuffy lucky” doctrine (E. Dale Searcy)

CDA Applicability

- CDA in contract via the Disputes clause FAR [§ 52.233-1](#)
- CDA applies to contracts for procurement of property, services, construction, maintenance, repair work, and disposal of personal property dealing with appropriated funds contracts

CDA and FAR Do Not Apply

- Non-appropriated Fund (NAF) contracts, i.e. contracts dealing with monies derived from sources other than congressional appropriations and commissary surcharge funds, primarily from the sale of goods and services to DoD military and civilian personnel that are used to support or provide morale, welfare, and recreation programs

CDA Also Does Not Apply To

- Claims that do not arise under contracts
- Claims for penalties or forfeitures prescribed by statute or regulation handled by non-DOD agencies
- Claims involving fraud
- Bid protests

Contractor Claims/Claim Definition

- CDA does not define the term “claim”, so what is a “claim”?

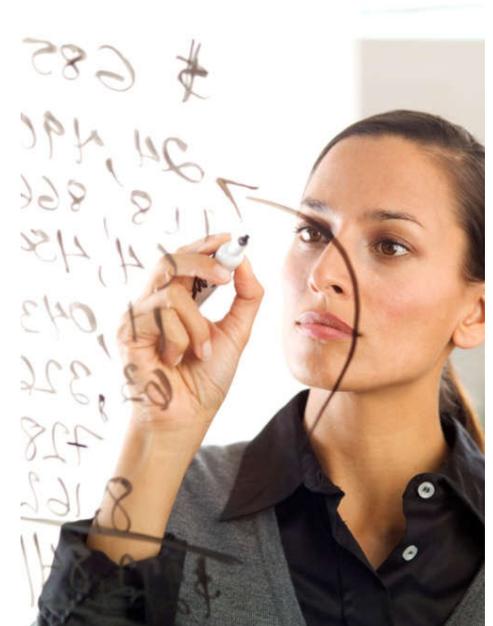


Contractor Claims/Claim Definition

- Asserted in writing
- Seeking as a matter of right:
 - Payment of money in a sum certain
 - Other relief arising under or relating to the contract
- Submitted to contracting officer for a decision
- Certified if over \$100,000
- FAR § 2.101; FAR § 52.223-1

Contractor Claims/Claim Elements

- Sum certain is stated, even though...
 - Sum is not given, but can be calculated by simple mathematical formula
 - Is based upon estimated future costs



Contractor Claims/Claim Certification

- Claim is made in good faith – the supporting data is accurate and complete to the best of the contractor’s knowledge and belief
- Amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable, and
- Person submitting the claim is duly authorized to certify the claim on the contractor’s behalf
- FAR § 33.207 (c)

Contractor Claims/Claim Certification

- Without valid certification, no “claim” exists under the CDA
- Claims cannot be divided to avoid certification threshold, nor can they be aggregated to require certification
- Contractor must consider aggregate effect of increased and decreased costs to determine whether claim exceeds certification threshold

Contractor Claims/Claim Certification

- Separate claims that total less than \$100,000 each require no certification even if combined total exceeds \$100,000
- Claims that are based on a common or related set of operative facts constitute one claim

Government Claims

- Typically, government must issue contracting officer's final decision
- Some actions do not require a final decision and are immediately appealable:
 - Termination for default
 - Withholding monies with communicated rationale
 - Allowability of costs under Cost Accounting Standards Determination
 - Demand for warranty work

Government Claims

- General Rule – government may not make counterclaim without final decision
- Assertion of government claim usually by:
 - Demand letter
 - Opportunity to respond
- Interest – runs when contractor receives government demand for payment
- Certification – neither party required to certify

Contractor Claims/Drafting

- Supporting data and financial information not required in a CDA claim as a jurisdictional prerequisite
- BUT, action on the claim will be delayed, and contracting officer will ask for more information, or deny the claim

Contractor Claims/Interest

- Interest begins to accrue upon submission of valid, compliant claim to contracting officer
- Interest calculated every six months by Secretary of Treasury and found at www.fiscal.treasury.gov/fsservices/gov/pmt/promptpayment/rates.htm



Contracting Officer's Final Decision



Final Decision

- For claims of \$100,000 or less, a decision must be issued within 60 days of request
- For certified claims exceeding \$100,000 the contracting officer must either issue a final decision, or notify the contractor of a firm date of the decision, within 60 days

Final Decision

- Must be in writing
- Describe the claim or dispute
- Refer to the pertinent contract terms
- State disputed and undisputed facts
- State the decision and explain the contracting officer's rationale
- Advise contractor of appeal rights
- FAR § 33.211 (a)

Final Decision

- Specific findings of fact are not required
- If made, are not binding on the government in any subsequent proceeding
- Final decision is binding and conclusive unless timely appealed

Final Decision/“Deemed Denial”

- If the contracting officer fails to issue a final decision within a reasonable period of time the contractor may:
 - Request the tribunal concerned to direct the contracting officer to issue a final decision, or
 - Treat the failure to issue a final decision as “deemed denial” and appeal
- FAR § 33.211 (f) (g)

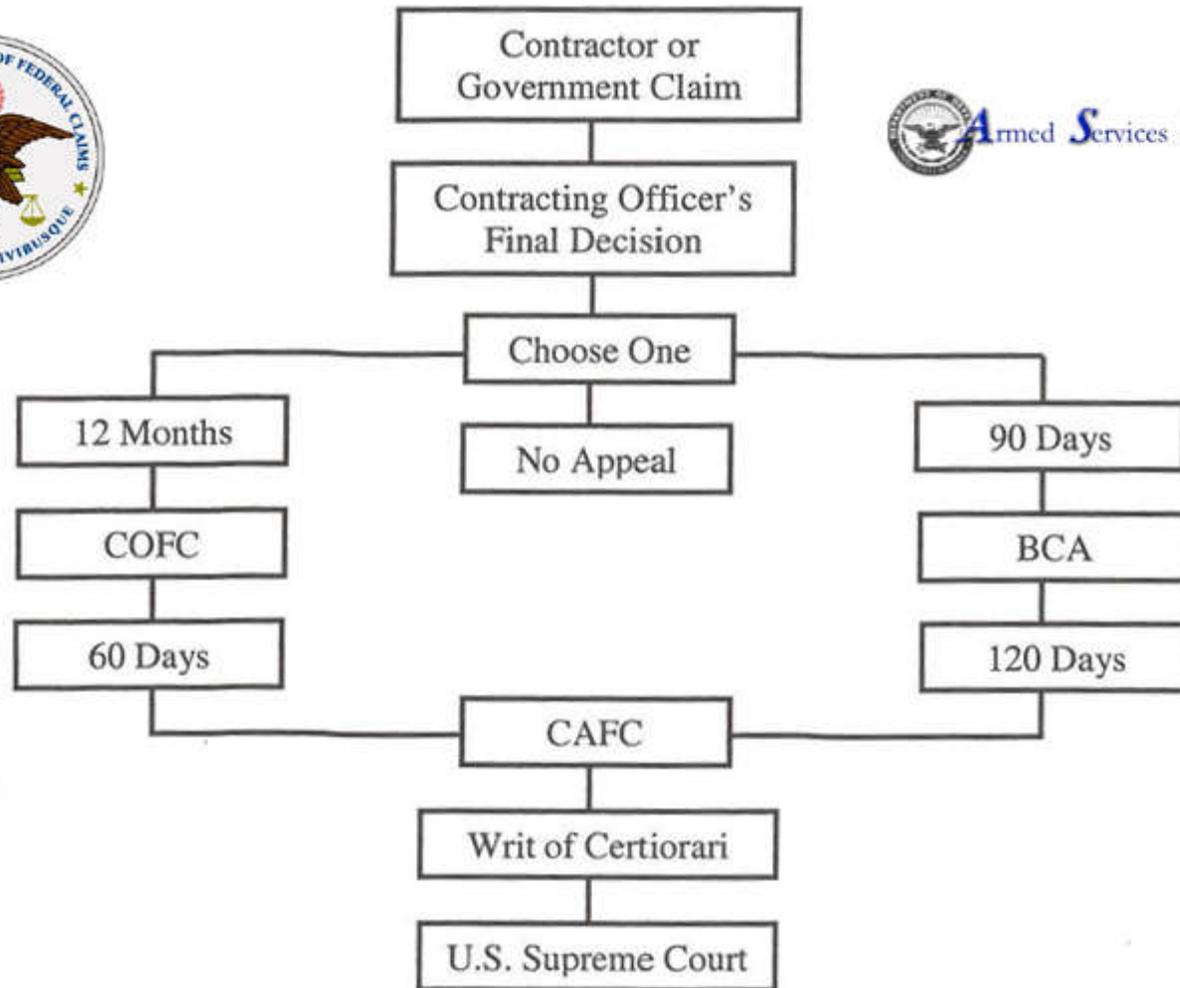
Final Decision/Duty to Proceed

- While claim is pending the contractor has “duty to proceed” under the Disputes clause pending resolution of the claim and resolution of any appeal
- Contractor may not stop work, or it may get terminated for default
- Contractor must comply with any decision under appeal

Final Decision/Duty to Proceed

- Lone exception
 - Material breach by the government since duty is limited to actions “arising under the contract”
 - If Disputes clause says, “...arising under or relating to the contract”, contractor must proceed even in the face of the material breach
 - This language used for acquisition of specified weapons systems vital to national security [DFARS § 233.215, § 52.233-1 Alternate I (Dec. 1991)]

Appeals Process



Filing Claims

- Any final decision must be appealed within the given time period (90 days to ASBCA, or 12 months to Court of Federal Claims)
- If not filed timely, CLAIM IS WAIVED (despite six year statute of limitations, which applies to the submission of the claim in the first instance, not an appeal from a final decision)

Practical Tips on Claim Resolution



Contractor Claims/Drafting

- Whether a CDA claim or a request for equitable adjustment (REA):
 - Claims should be based upon and cite applicable contract clauses and FAR/DFAR provisions
 - Contain all relevant facts regarding entitlement
 - Contain cost and pricing back up
 - Above all, be credible, factual, and not emotional or ego driven

When to Request a Final Decision?

- At a true impasse; negotiation is always better
- Make sure it is the fastest way to the money
 - Remember that development of claims and negotiation with the contracting officer are allowable contract administration costs; developing a claim for the CDA for litigation only may not be allowable costs
- Interest starts to run when “claim” is filed

“Discourage litigation; persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser – in fees, expenses, and waste of time.”

Abraham Lincoln, 1850



Claim Negotiation

- Be sensitive to dynamics and personalities
- Be firm about your right to be paid
- Circumvent an obstinate or procrastinating contracting officer
- Apply constant pressure
- Document, document, document

Questions?





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