

Government Contracts Recovery

“Frequently Asked Questions” About Requests for Equitable Adjustment and CDA Claims

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Agenda

- Introduction
- CDA Claims Overview
- Differences Between CDA Claims and REAs
- Pursuing Claims at COFC vs. Boards
- Sponsored Claims
- Other FAQs
- Q & A

CDA Claims Overview

- **Contract Disputes Act “Claim”**
 - Requires “claim” to be in writing and submitted to (or issued by) Govt
 - Doesn’t define “claim”
- **FAR Claim/Dispute Process**
 - “Disputes Clause” Implements the relevant portion of the Contract Disputes Act
 - FAR defines “claim” (next slide)
 - Govt CO issues “Final Decision”
 - The Contractor may appeal that Final Decision to either the Court of Federal Claims (“COFC”) or the appropriate Board of Contract Appeals (“BCA”)

CDA Claims Overview

- **“Claim” must be**
 - Written demand (by contractor or Government)
 - Seeking as a matter of right
 - Payment in a sum certain
 - Adjustment of contract terms
 - Certification if over \$100k
- **A claim is NOT**
 - A routine invoice for payment

CDA Claims Overview

- **Typical bases for a claim**
 - Changes
 - Delays & Stop Work Orders
 - Differing Site Conditions
 - Breach
 - Termination for Convenience
 - [Cost disallowances and Terminations for Default are **Govt** claims]
- **Damages – “How much can I recover?”**
 - Typically get an “Equitable Adjustment” (“EA”) – actual costs to perform the disputed work, plus markups.
 - Occasionally, the Contractor can recover EA based on contract/CLIN prices rather than actual costs (if parties prospectively priced the changed work and Board/Court finds it fair)
 - Anticipated/lost profits are limited to cases of breach or Govt bad faith (rare).

CDA Claims Overview

- **Changes**
 - Express or constructive changes
 - Changes to express contract terms
 - Defective specifications
 - Scope creep
 - Deductive Changes: De-scoping work
 - Within general scope vs. Cardinal change
 - Requirement to NOTIFY the CO
 - Typically within 20 – 30 days of the “change,” depending on the clause

CDA Claims Overview

- **Government Delays**
 - Any action or inaction by Govt CO that delays or impedes any part of the Contractor's performance
 - Entitled to EA, but without profit (FAR 52.242-17)
- **Stop Work Orders**
 - Can be issued for 90 days (or extended by mutual agreement).
 - When the period ends, CO must either terminate (full or partial) or allow the contractor to resume performance
 - Contractor entitled to EA for costs of standby, mitigation, etc. (FAR 52.242-15)
- **Requirement to NOTIFY the CO**
 - Typically within 20 – 30 days of the “change,” depending on the clause

CDA Claims Overview

- **Differing Site Conditions**
 - When the expected (bid) conditions at the performance site differ from what is later/actually encountered.
 - Two types.
- **Requirement to NOTIFY the CO**
 - “...promptly, and before the conditions are disturbed...”

CDA Claims Overview

- **Termination for Convenience**
 - Unilateral Govt decision to terminate.
 - No need for specific justification – just needs to be in the “best interests of the Govt”
 - Contractor required to submit a termination settlement proposal identifying incurred costs (of performance to date), mitigation expenses, administrative costs, markups, etc.

CDA Claims Overview

- **Statute of Limitations**
 - 6-years from the date of claim accrual
 - “Knew or should have known”
 - No longer “jurisdictional” (*Sikorsky*)
 - Now SOL can be tolled or waived by the parties, or equitably tolled by the court.
 - *But Note:* COFC has an independent “jurisdictional” 6-year SOL for bringing any matter (28 U.S.C. § 2501)

Differences Between CDA Claims & REAs

	<u>CDA Claims</u>	<u>Requests for Equitable Adjustment (REAs)</u>
<u>Format</u>	<ul style="list-style-type: none"> • Written demand • Seeking relief as a right: sum certain, adjustment of contract terms, or other relief in dispute • Certification required if over \$100k 	<ul style="list-style-type: none"> • Written demand • Seeking payment of money, adjustment of contract terms, or other relief • DoD contracts require a watered-down REA certification.
<u>Timing</u>	<ul style="list-style-type: none"> • Contractor/Govt – Claim within 6 years of accrual • Govt – Final decision within 90 days • Contractor – Appeal the Final Decision within 90 days (to Board) or 12 months (to COFC) 	<ul style="list-style-type: none"> • No time limits • <i>[Don't forget to convert the REA into a claim before the 6-year Statute of Limitations expires!]</i>
<u>Interest</u>	<ul style="list-style-type: none"> • Interest begins from date of claim submission. 	<ul style="list-style-type: none"> • No interest.
<u>Cost Allowability</u>	<ul style="list-style-type: none"> • Costs of claim preparation and litigation are unallowable. 	<ul style="list-style-type: none"> • Costs of REA preparation and settlement negotiations are allowable as “contract administration” costs.

COFC v. Boards of Contract Appeals

	<u>Court of Federal Claims</u>	<u>Boards of Contract Appeals</u>
<u>Timeline</u>	<ul style="list-style-type: none"> 12 months after receipt of final decision 	<ul style="list-style-type: none"> 90 days after receipt of final decision
<u>CO's Ability to Settle</u>	<ul style="list-style-type: none"> No. 	<ul style="list-style-type: none"> Yes.
<u>Judges</u>	<ul style="list-style-type: none"> Article I court 16 judges, serving 15 year terms, and an additional 10 active senior judges Single judge decides case 	<ul style="list-style-type: none"> Article I Tribunal Experienced judges Single judge presides over admission of evidence, but decisions made by 3-judge panel
<u>Who Litigates on Behalf of Govt?</u>	<ul style="list-style-type: none"> Department of Justice 	<ul style="list-style-type: none"> Agency Lawyers
<u>ADR</u>	<ul style="list-style-type: none"> Yes, voluntary and several types. 	<ul style="list-style-type: none"> Yes, voluntary and several types. Some may aid in ADR before issuance of final decision.

Sponsored Claims

- Generally, subcontractors lack privity with the Government and cannot bring claims on their own. Prime contractors must “sponsor” the claims.
- The Process
 - Subcontractor submits a claim to prime contractor
 - <\$100,000, prime submits claim in its own name
 - >\$100,000, prime certifies the claim then submits

Sponsored Claims

- **Exceptions to Privity**
 - If subcontractor has an allegation that it is entitled to money under assignment or novation (or if the Government guaranteed payment) then it would get paid.
 - When prime contractors act as Government agents to place subcontracts
 - FAR 49.108-8 Assignment of rights under subcontracts

Sponsored Claims

- Risks and Considerations for Prime Contractor
 - Defective certification
 - Hedging bets, losing the appeal
 - The sponsored subcontract claim turns out to be fraudulent
 - CDA Fraud
 - Civil FCA Liability

Sponsored Claims

- Risks and Considerations for Subcontractor
 - Appealing claim *without* sponsorship
 - Appeal dismissed (*Binghamton Simulator*)
 - Terms of subcontract requiring prime to sponsor an appeal is irrelevant.
 - Prime's refusal to sponsor the claim
 - Consider including strong claim sponsorship provisions in subcontract

Other FAQs

- Should I be concerned that filing a claim could “insult” or “provoke” the government customer?
- How do I know if I have a claim?
- How do I know if my potential claim is big enough to pursue? Are small claims worth pursuing?

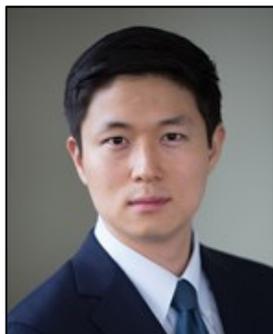
Q & A



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