



Disputes Can Happen

For the most part, federal government contracts are paid and performed satisfactorily. However, when problems arise, it is important to know what to do and how to do it. Generally, when parties to a contract have a dispute they choose to make an attempt to settle their disagreement. If this is not possible, then the contractor must decide what to do next. This reader explores the option of filing a claim, pursuant to the Contract Disputes Act of 1978 (“CDA”)¹, 41 U.S.C. § 7101*et seq.* or of requesting an equitable adjustment of the contract.

There is no direct definition of a Request for Equitable Adjustment (“REA”) contained in the Federal Acquisition Regulation (“FAR”). However, this concept is generally understood as a request made to the federal government for compensation for time and/or money that doesn’t meet the specific procedural requirements of the CDA.

Contract disputes are usually governed by the CDA, implemented through the FAR. When the CDA was implemented, it enlarged the scope of previous disputes procedure by deleting the requirement for a “remedy granting clause” in order to obtain jurisdiction. It also provided a contractor the right to appeal a contracting officer’s decision to an agency board of contract appeals or the U.S. Court of Federal Claims.

What Disputes Might Arise?

There are any number of potential disputes that may arise during the performance of a federal contract. Some common examples of disputes that you may face are:

- Differing Site Conditions
- Variations in Quantities
- Delays
- Changes in Prevailing Wages
- Changes- Fixed Price
- Stop Work Orders
- Terminations

¹ Although other avenues of relief and forums may be available in contract cases, this reader is intended to address only the Contract Disputes Act and the practice of requesting equitable adjustment of the contract.

While each of these types of disputes has its own unique aspects, if they do arise, you will need to determine whether to proceed with an REA or submit a formal claim under the CDA.

Making A Request for Equitable Adjustment

- Although there is no formal definition of an REA in the FAR, an REA is basically a request for compensation (time, money, or both) based on changes, suspension of work or other factors. An REA is considered part of the contract administration and negotiation process.
- An REA can really be submitted at any time during the performance of the contract, but should be made within 30 days of the change giving rise to the request.
- While there is no specific format for submitting an REA, providing written detail with adequate supporting documentation to the CO is recommended.
- Usually an REA does not need to be certified like most formal claims, but in some instances such as in a Department of Defense request, certification may be required.
- Unlike a formal claim, there are no designated time constraints for the government to address and respond to an REA.
- Since an REA is considered a part of contract administration and negotiation, instead of the pursuit of a claim, costs are generally recoverable for the preparation and activities related in submitting an REA. That is not usually true for pursuing a claim under the CDA. However, interest is not available under an REA claim, whereas under a CDA it is.

How Do I Choose Whether To File Claim Or Make An REA?

- Filing a claim under the CDA is a fairly formal process and is considered a dispute between the contractor and the government.
- An REA on the other hand is less formal process and should be viewed as an effort to work through an issue through contract administration and negotiation, more of an effort to resolve a “change” than an actual dispute.
- Within that framework, an REA may be the approach to take in instances where there is a good working relationship between the contractor and the government (contracting officer) and there are no pressing concerns about time constraints. Given the informal nature of the REA process, a contractor may have a good sense of whether it will be successful even before it is submitted.
- In a situation where there is already animosity between the parties, or an answer is needed quickly, the formal procedures of a claim under the CDA may be the appropriate approach.

- Another consideration to keep in mind is the ability to easily convert an REA to a formal claim if the REA process is not working or the issue becomes more time sensitive.

If I Choose to File A Claim, What Types Of Contracts Are Covered By The CDA?

- Generally, the CDA applies to any express or implied contract made by an executive agency for:
 - (1) the procurement of property, other than real property;
 - (2) the procurement of services;
 - (3) the procurement of construction, alteration, repair, or maintenance of real property; or
 - (4) the disposal of personal property.
- CDA covers all claims “relating to a contract”.
- The Act does NOT cover (1) independent torts; (2) fraud; (3) penalties/forfeitures administered by other agencies; (4) contract award disputes and mistakes alleged prior to the award of the contract; (5) violation of statutory or constitutional rights; (6) grants and cooperative agreements; (7) void contracts; (8) commitments not authorized; (9) the sale of government *services* to contractors; (10) maritime contracts; (11) suspension and debarment actions; (12) non-procurements actions; among others.

When Must A Claim Be Filed?

- A claim by the contractor or a claim by the government must be submitted within *6 years* after the accrual of the claim.
- This limitation period does not apply to a claim of fraud brought by the government against a contractor.

How Do I File A Claim?

- The contractor must submit the claim in writing to the contracting officer (“CO”). The government must also submit any claim in writing to the CO.
- In addition, the claim should seek as a matter of right the payment of money in a sum certain. The claim must include sufficient detail to permit the CO to give meaningful, reasoned consideration to the claim.
- If the claim is more than \$100,000, a certification is required. The contractor must certify that (1) the claim is made in good faith; (2) the supporting data are accurate and complete to the best of the contractor’s knowledge and belief; (3) the amount requested accurately reflects the contract adjustment for which the contractor believes the federal government is liable; and (4) the certifier is authorized to certify the claim on behalf of the contractor.

- If the claim is for \$100,000 or less, the CO must provide a written decision within 60 days from the CO's receipt of the written claim from the contractor.
- If the claim is for more than \$100,000, the CO must provide a written decision within 60 days from the CO's receipt of the certified claim from the contractor or must notify the contractor when a decision will be made.
- The decision of the CO is final, unless an appeal or an action is timely initiated.
- Interest on an amount found due a contractor on a claim must be paid to the contractor for the period beginning with the date the CO receives the contractor's claim until the date of payment of the claim.

Once Filed, Can I Still Attempt To Settle The Claim?

- At any time during the claims process, unless you are before the U.S. Court of Federal Claims, the contractor may attempt to negotiate with the CO to settle the claim.

How Do I Appeal The CO's Decision?

- The contractor, within *90 days* from the date of receipt of a CO's decision, may appeal the decision to an agency board – usually the Civilian Board of Contract Appeals or the Armed Services Board of Contract Appeals.
- The Armed Services Board of Contract Appeals has jurisdiction to decide any appeal from a decision of a CO of the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, or the National Aeronautics and Space Administration relative to a contract made by that department or agency.
- The Civilian Board of Contract Appeals has jurisdiction to decide any appeal from a decision of a CO of any other executive agency² relative to a contract made by that agency.
- Agency boards have accelerated and expedited procedures available for small claims (\$100,000 or less). This procedure is available at the election of the contractor and the CDA provides that the claim should be resolved within 180 days from the date the contractor elects to use the accelerated procedure.
- An agency board may grant any relief that would be available to a party asserting a contract claim in the U.S. Court of Federal Claims.
- The decision of an agency board is final except that a contractor may appeal the decision to the United States Court of Appeals for the federal Circuit within *120 days* from the date the contractor receives a copy of the decision.

² This does not include the United States Postal Service, the Postal Regulatory Commission, or the Tennessee Valley Authority

How Do I File An Action With The U.S. Court Of Federal Claims?

- Instead of filing an appeal, the contractor may bring an action directly on the claim in the United States Court of Federal Claims. In this event, the court will decide the matter *de novo*, that is it will decide the issues on its own, without reference to the conclusions or assumptions made by the CO.
- A contractor must file an action with the U.S. Court of Federal Claims within *12 months* from the date of receipt of the CO's decision.
- Relief Available: (1) breach of contract damages; (2) contract price adjustments; (3) non-monetary relief (declaratory relief, equitable relief like reformation of contract); (4) quantum meruit relief (equitable theory of implied contract); and in some instances (5) legal costs (under the Equal Access to Justice Act).

How Do I Decide Whether To Appeal To An Agency Board Or File Suit With The U.S. Court Of Federal Claims?

- The first thing to know is that the after a decision as to forum is made, this decision cannot be changed. This is called the Election Doctrine. Thus, you should carefully consider your options before making the choice whether to appeal the decision of the CO or to file suit in the U.S. Court of Federal Claims. This decision will be final.
- One consideration is time. An appeal to an agency board must be made within 90 days, while you can wait until 12 months from receipt of the CO's decision to file a suit with the U.S. Court of Federal Claims. This means that if you miss the filing deadline for an appeal to an agency board, you may still file a claim with the U.S. Court of Federal Claims.
- The formality of the forums also differs. Appeals to an agency board tend to be more informal. Also, if you have a small dollar claim, you might be able to take advantage of the agency boards' accelerated procedures.
- In choosing a forum, it is possible for a contractor to decide to appeal one or more claims to an agency board and file suit on other claims in the U.S. Court of Federal Claims.
- It is important to know that once you file suit in the U.S. Court of Federal Claims, the CO will not have authority to settle the matter. This is because federal statute provides that the Department of Justice has exclusive authority to act in pending litigation.
- Another consideration is jurisdiction. That is, which forum has authority to hear the matter. There are some instances in which the agency boards or the U.S. Court of Federal Claims may not have jurisdiction to hear the dispute.
- Lastly, it is important to consider the risk involved in deciding to file suit in the U.S. Court of Federal Claims because, in this forum, the government may counterclaims based on alleged fraud. This might include the special plea in fraud statute, the False Claims Act, the Anti-Kickback Act or the anti-fraud provisions of the CDA.

May I File A Claim If I Am A Subcontractor?

- For the most part, subcontractors do not have the right to file a claim against the government in their own name because they have no privity with the government.
- One exception to this is contracts administered through the Small Business Administration (“SBA”) 8(a) program, as these are technically contracts between the agency and the SBA. The agency boards have held that such SBA contractors are in privity with the government and may make a claim directly against the government.
- In certain circumstances, the subcontractor may have the right to an indirect appeal if a prime contractor can “charge the cost of the subcontractor’s claim to the government contract or make a claim against the government based on the subcontractor’s recovery”, then a Sponsored Claim may be filed. In this case, the prime contractor can (1) sponsor the claim of the subcontractor by bringing an appeal on the subcontractor’s behalf, or (2) can permit the subcontractor to bring an appeal in the name of the prime contractor.
- This right is recognized in FAR 44.203 (c), where it is recognized that subcontractors may have the right of indirect appeal to an agency board if the subcontractor is affected by the dispute between the prime contractor and the government.

Is There Any Alternative Dispute Process?

- The CDA provides that a contractor and the CO may use alternative means of dispute resolution, such as mediation or arbitration, or any mutually agreeable means of dispute resolution.
- Resolution of the dispute through alternatives to litigation, including settlement and alternative dispute resolution is encouraged.

Where Do I Go To Get Help With This Process?



Deale Services is ready to assist and guide you through the significant business and legal issues involved when a dispute with the government arises. Our experienced attorneys will provide guidance in all phases and forums of the dispute process. We recognize that important decisions must be made and are ready to partner with you going forward. Feel free to contact us to discuss any questions or concerns you may have. We are here for you.

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