Contract Claims Against

Business with the federal government is not business as usual. The federal government contract disputes process begins with the filing of a "claim;" however, contract claims against the government are more than letters of disagreement because claims serve as both the basis for resolution and litigation. This article focuses on the technical aspects of a contractor claim against the government.

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the Government

To ensure successful dispute resolution contractors must thoroughly research the disputed issue, adhere to the jurisdictional requirements, and provide the appropriate substantiating documentation. With a little common sense and practical government contracting know-how, contractors can avoid many common mistakes that impede the disputes process.

The Disputes Process

Definition

Under the Contract Disputes Act (CDA)[1] and the Federal Acquisition Regulation (FAR)[2], a contractor's claim must adhere to many jurisdictional requirements to constitute a valid claim against the government. While the CDA does not define "claim," the FAR, within the Disputes Clause, defines "claim" as:

> [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 this contract. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding $100,000 is not a claim under the Act until certified. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act.[3]

When to file

The CDA requires contractors to submit claims in writing to the contracting officer for a decision within six years of the claim's accrual.[4] The FAR states that a claim accrues when:

> [A]ll events, that fix the alleged liability of either the government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred.[5]

As with all timeliness issues, this is obviously a fact question that depends on the specific nature of your claim.[6] To determine your claim's accrual date, identify the central issue of the dispute, such as improper termination, increased costs, constructive change, contract modification, or other contract administration issues.[7] Also, use common sense; start with the date of contract award and work forward to determine when the claim truly accrued.

Ensure that your claim is filed within six years of that accrual date. Failure to do so may result in having to defend a dismissal motion challenging your claim's timeliness.

What to File

In addition to the timeliness rules, there are a number of other jurisdictional requirements to which contractors must adhere.

The CDA requires that: (1) the contractor must submit the demand in writing to the contracting officer; (2) the contractor must submit the demand as a matter of right; and (3) the demand must contain a sum certain.[8] The claim must request, expressly or implicitly, a final decision of the contracting officer, who must issue a decision thereon, or fail to decide the claim within the prescribed time.[9] If the contractor's claim exceeds $100,000, it must be certified with the appropriate certification language.[10]

Complete jurisdictional compliance is critical because failure to so do may void your claim and any purported contracting officer's final decision.[11] If you are serious about litigation, certain jurisdictional requirements are non-curable (e.g., flawed claim certification) that will bar the Boards of Contract Appeals or the Court of Federal Claims from hearing your appeal.[12] It may take many months from the time you submit your claim to the docketing of an appeal. Thus, it is important to properly

substantiate your claim the first time because, if not, you may have to start all over again.

Purpose: A Meaningful Dialogue Towards Settlement

Are claims only required to establish litigation jurisdiction? No. In fact, the entire purpose of the claim requirement is to encourage the parties to settle disputed matters at the local level, not to light the litigation fires.

At the time of the CDA's passage, Congress specified that claim submittals were intended to facilitate negotiation and avoid litigation.[13] Furthermore, the FAR states:

> The government's policy is to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level. Reasonable efforts should be made to resolve controversies prior to the submission of a claim. Agencies are encouraged to use ADR procedures to the maximum extent practicable.[14]

With that in mind, it behooves the contractor to provide the government with as much information as possible and avoid "hiding the ball." In *Westlox*, the Armed Services Board of Contract Appeals also recognized the importance and the purpose of submitting a properly substantiated claim before litigation:

> [I]t is vital that the contractor's claim be presented in sufficient detail to notify the contracting officer of the basic factual allegations upon which the claim is premised. Where a submitted claim fails to include basic factual allegations there is no basis upon which the parties can enter into a meaningful dialogue towards settlement, or upon which the issues can be sufficiently identified by a contracting officer's final decision to facilitate the litigation process.[15]

The good news is that not much information is actually required by the CDA to technically constitute a claim for jurisdictional purposes.[16] The CDA's "basic factual allegations" requirement does not mean you should only provide basic facts. Instead, you should do the exact opposite and provide all the facts that support your claim as well as any supporting documentation.

If you provide the government with only minimal facts and arguments, you may receive in return a very cursory denial. This is the classic "help-you, help-yourself" situation. By submitting a well organized and substantiated claim, you will save time and money in the long run by avoiding repeated government requests for information to explain your position or, in subsequent litigation, extensive discovery requests.

Benefits and Practical Considerations

A well organized and substantiated claim benefits both parties because it narrows the disputed issues, focuses negotiation, avoids wasting time over meaningless issues, as well as discourages litigation.

Claims Aid Negotiations

Again, one of the purposes of a claim is to encourage negotiations and avoid litigation. Usually, claims serve as the basis and roadmap for negotiations. As such, a thorough claim with substantiating documentation creates a cooperative negotiation environment for a few reasons.

First, if entitlement is clearly evident, a well- written claim may be enough to persuade the government to pay your claim. Second, a properly substantiated claim will assist the contracting officer to render a well organized and thorough final decision that narrows the issues in dispute and encourages the parties to focus on, and negotiate, the remaining disputed issues. Third, in the unfortunate event the parties are unable to resolve their differences through negotiation, the parties will have a better understanding of the issues ripe for litigation.

Practical Considerations

Before submitting a claim to the contracting officer, contractors should take into account a few practical considerations regarding the government's decision making process.

First, contracting officers very rarely work in a vacuum. Depending on the contract type and purpose, contracting officers will collect information from many different offices (e.g., program management, engineering, legal, etc.). Keep in mind that the different offices commonly have different missions, belong to different commands, and may be dispersed geographically. As with any business negotiation, know and tailor your arguments to the appropriate audience. If a dispute requires a particular professional expert opinion or expert review, state so in your claim. Use appropriate terms and arguments in your claim to ensure it is routed to the correct office for the appropriate review (i.e., technical questions should be reviewed by engineers, not lawyers). If not, your claim may not receive the necessary technical review that is central to your dispute.

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Second, government contracts and contract administration issues are complex. Therefore, unnecessarily broad claims that throw the entire kitchen sink at the contracting officer do not assist negotiation efforts. In a perfect world, a claim should cut through the irrelevancies to focus the decision makers' attention. Yet, often a contractor submits letters containing overly broad claims without any supporting documentation. This usually occurs because the contractor presumes the contracting officer is aware of previous discussions with, and submissions to, every government office associated with the dispute. However, do not presume the contracting officer is aware of, or will consider, any information outside of the four corners of your claim. This is because the contracting officer may rely solely on the information and arguments in your claim to make a final decision. By focusing your claim and citing direct evidence, it is far more likely that the government will resolve your

specific issue in a timely manner.

Third, sometimes despite all the efforts to resolve the issue at the local level, the parties simply cannot resolve the issue and litigation becomes necessary. Even if the claim is not resolved at the local level, a well written claim also serves litigation efforts because it: (1) requires the contracting officer to draft a focused final decision directly responding to your allegations and evidence; (2) permits litigation counsel to focus the scope of discovery; and (3) clearly defines the issues for the fact-finder. This focused approach to litigation allows the parties to avoid fighting over meaningless issues before the Boards of Contract Appeals or the Court of Federal Claims (i.e., lots of discovery equates to lots of time and money).

It is not a secret that federal government contract litigation may take a long time to resolve a dispute (actually, a really long time).[17] However, if the parties can identify the critical disputed issues early in the process, it is far more likely the parties will avoid litigation or, when litigation is necessary, result in an efficient litigation schedule.

Common Mistakes

Many contractors mistakenly submit deficient claims to the government (e.g., no sum certain, no certification, no request for final decision, etc.). Deficient claims are problematic for contractors because the deficiencies may be non-curable and contractors will have to start all over. Deficient claims are also problematic for the government because frequently the deficiencies do not ultimately resolve the issue and only slow the disputes process. The good news is that many oversights can be avoided with a little common sense.

Don't Rely on Previous Meetings or Discussions—Put It in Writing

Typically (at least I hope), the parties have met and discussed the issues before claim submission. A contractor must remember that its contract issues are only one of likely many contract disputes the contracting officer will consider. While all contractors are understandably focused on their contracts, contracting officers are simultaneously administrating multiple contacts; each with its own issues. Phone conversations and meeting requests with project managers are routine rituals. Consequently, contractors should not depend on the contracting officer recalling each detail of an undocumented private conversation. Instead, the claim should stand on its own as a clear and thorough dissertation of the issues that the contracting officer needs to address in a final decision.

Again, do not presume the contracting officer is fully cognizant of the entire situation with your contract. The best practice is to put everything in writing, even if it seems redundant. Provide all the background documentation necessary to fully illustrate your claim. This includes providing your email correspondence with other involved government offices so the contracting officer has a complete picture of the overall situation and what exactly was discussed with the other government offices. Simply stated, draft the claim, as though the contracting officer and other government officials are reviewing the issues for the first time.

Prepare for a Lengthy Process

Claims are not resolved overnight. The federal government does not operate or process actions like a private business; there may be multiple layers of review. Depending on the complexity of the issue, it may take weeks or months for a contractor to receive an official response. As such, it is very important that your claim focus the dispute to prevent numerous government questions. One way to avert delay is to accompany your straightforward arguments with substantiating documentation so that the contracting officer has everything he needs to resolve your issue and respond quickly.

Clearly State All Jurisdictional Requirements

Will the contracting officer notify you of your claim's jurisdictional defects? Probably not. Upon receiving a claim, the contracting officer reviews the claim to decide whether to negotiate with the contractor or issue a final decision. Because the contracting office focuses on the substance of the claim's allegations, it is unlikely technical jurisdictional defects will be brought to the contractor's attention before the docketing of an appeal.

If the contracting officer denies your claim and you proceed with litigation, failure to adhere to the jurisdictional requirements may void your claim and government litigation counsel will move to dismiss the appeal. Again, this only aggravates both parties because it does not ultimately resolve the merits and just kicks the can down the road. Side note, if your defective claim is docketed and subsequently dismissed for lack of jurisdiction, the silver lining is that this is a great opportunity to reinitiate negotiations at the local level because you will likely have the attention of all the necessary parties to resolve the issue.

Provide Sufficient Factual Detail and Supporting Documentation

Government officials are not mind-readers and need all the supporting documentation that you can provide. Again, depending on the complexity of the issue, contracting officers often seek input from other involved government offices to resolve a claim. Where many government offices are involved, providing all the relevant documents avoids delay and allows for a consistent, objective review of your claim.

It is very likely all the substantiating documentation supporting your claim exists at the time you submit it. If it does, do not be lazy and ensure that you include the information in your claim. Again, it is counterproductive to "hide the ball." If such substantiating information does not exist, then you probably do not have a justifiable claim.

Remain Objective

Although the process functions best when all parties exercise professionalism, sometimes they could needlessly focus on irrelevant minutia, particularly if they focus on fixing blame for the situation instead of fixing the problem. This can result in both contractor and government contracting professionals becoming bogged down in useless facts and overly personal disagreements. No matter how complex or emotional the issue is, remain objective and provide objective evidence to advance your cause. Think twice about hitting that send button if the only intent of your message is to question another party's judgment.

Do Not Seek a Windfall

Remember you are negotiating with the government, not a private business. Also remember, if the claim is over $100,000 you are required to certify that your claim is made in good faith and the amount requested accurately reflects your entitlement.[18] If you want to avoid fraud allegations, it is strongly recommended that you avoid certain deceitful negotiation tactics.

One such tactic is inflating your requested claim amount in an attempt to either actually receive a windfall or start big to negotiate down to a smaller settlement amount. Even if your claim is meritorious, if you inflate your costs as a negotiation tactic, your claim may be characterized as fraudulent. For example, in *Daewoo*, despite having recoverable costs, the claim was disallowed and penalties were imposed because the contractor fraudulently inflated its claim as a negotiation tactic.[19]

My point is very simple: only claim what you are entitled to and what you can prove. Inflating your costs is a useless tactic because, by law, the government will only pay what it believes it owes, not more.[20] Also, if the contracting officer is unable to determine your claim's accuracy, or believes it is inflated, the contracting officer may request a Defense Contract Audit Agency (DCAA) audit which frequently is a complex, time-consuming process.

Your claim should start and end at what you are owed and what you can prove. Be reasonable in your estimations. Do not get overly ambitious or utilize coy negotiation tactics. Avoid the start high and go low tactic or what Congress referred to as a "horse-trading theory."[21] Deceitful negotiation tactics prove ineffective because usually your claim will be denied, audited by DCAA, or investigated for fraud rather than actually getting resolved.

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Consult with Government Contract Counsel

A former boss told me that government contract and fiscal law does not make any sense; therefore, you must be fluent in nonsense to understand the issues.

Federal government contract law is a unique discipline of law that few business professionals have experience with. Government contract lawyers understand jurisdictional issues and the various quirks related to government contract law. Consulting with government contracts subject matter experts facilitates astute issue-spotting and will ultimately improve your claim and encourage efficiency in the disputes process.

Conclusion

A well written claim is essential to the disputes resolution process. It ideally provides a lucid explanation of the disputed issues, thereby allowing the contracting officer to easily coordinate the claim with appropriate government offices, and when appropriate, negotiate a resolution. In the case of litigation, a well written claim narrows the disputed issues, lessens the possibility that the parties will argue over meaningless issues, and avoids cumbersome discovery. If you ensure your claim has the required factual support with documentation as necessary, it is far more likely you will resolve your issue in a timely manner without the need for litigation. ⊙

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Endnotes

[1]41. U.S.C. §§ 7101-7109 (2013).

[2]48 C.F.R. §§ 1-53 (2013).

[3]FAR 52.233-1(c) (2012).

[4]41 U.S.C. § 7103 (2013); *Systems Development Corp.*, ASBCA No. 56682, 10-2 BCA ¶ 34,579.

[5]FAR 33.201 (2012).

[6]*TMS Envirocon, Inc.*, ASBCA No. 57826, 12-2 BCA ¶ 35,084.

[7]Ralph C. Nash, STATUTES OF LIMITATION: They're Biting, 27 NO. 3 Nash & Cibinic Rep. ¶ 14.

[8]*H.L. Smith, Inc.* v. *Dalton*, 49 F.3d 1563, 1565 (Fed. Cir. 1995).

[9]*See James M. Ellett Const. Co.* v. *U.S.*, 93 F.3d 1537, 1542-43 n.4 (Fed. Cir. 1996).

[10]*Ekra Construction Co., Ltd.*, ASBCA No. 57618, 2012 WL 3645367 (A.S.B.C.A.).

[11]*Madison Lawrence Inc.*, ASBCA No. 56551, 09-2 BCA ¶ 34,235 citing *Paragon Energy Corp. v. U.S.*, 645 F.2d 966, 971 (Ct. Cl. 1981).

[12]*AMR Group, Inc., T/A/ Landmark Allied*, ASBCA No. 51330, 01-1 BCA ¶ 31,361; *Doyon Properties-American, JV*, ASBCA No. 55842, 08-1 BCA ¶ 33,752.

[13]*H.L. Smith*, 49 F.3d at 1566 citing to S. Rep. No. 95- 1118, 95th Cong. 2d. Sess 1 (1978) *as reprinted in* 1978 U.S.S.C.A.N 5235.

[14]FAR 33.204 (2012)

[15]*Westclox Military Products*, ASBCA No. 25592, 81-2 BCA ¶ 15,270 citing *Newell Clothing Co.*, ASBCA No. 24482, 80-2 BCA ¶ 14,774.

[16]*See H.L. Smith*, 49 F.3d at 1565.

[17]Ralph C. Nash, Boards of Contract Appeals: Are They Meeting The Need?, 26 NO. 11 Nash & Cibinic Rep. ¶ 63; *Postscript* at 27 NO. 2 Nash & Cibinic Rep. ¶ 6.

[18]FAR 33.207 (2012)

[19]*Daewoo Eng'g & Const. Co., Ltd. v. U.S.*, 73 Fed. Cl. 547 (Fed. Cl. 2006) *aff'd*, 557 F.3d 1332 (Fed. Cir. 2009).

[20]31 U.S.C. § 1341 (2013)

[21]*Daewoo*, 557 F.3d at 1340 citing S. Rep. No. 95-1118 at 20, *as reprinted in* 1978 U.S.C.C.A.N. 5235.