CONTRACTOR CLAIM FUNDAMENTALS: PART I

The Basics and Pitfalls Under the CDA

INTRODUCTION

Disputes stemming from a government construction contract are governed by the Contract Disputes Act (CDA), which sets forth rules as to how disputes between contractors and the federal government will be resolved. In order to access the remedies available through the CDA, a claim must be in dispute and must be properly submitted. After proper submission and a final decision is issued by the contracting officer, that final decision becomes appealable to either the U.S. Court of Federal Claims or the Armed Forces Board of Contact Appeals (ASBCA) or other agency Board of Contract Appeals.

This Part I lays out the fundamental requirements and procedures for perfecting a claim. Failure to follow these CDA requirements can be costly, both in time and money. Part II will discuss some of the common pitfalls, rule interpretations and variables that may be associated with claims.

WHAT CONSTITUTES A CLAIM?

The CDA states that "[a]ll claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision." 41 U.S.C. § 605(a). There are three elements of a monetary claim:

(1) a description of the facts and basis for the claim,
(2) a request for a final decision, and
(3) a description of the quantum requested

Reflectone, Inc. v. Dalton, 60 F.3d 1572, 1575 (Fed. Cir. 1995). The written claim does not need to follow any particular wording or format, but must contain sufficient information that gives the contracting officer adequate notice of the basis of the claim. The written claim should emphasize the "nexus," or cause and effect relationship between the government's disputed performance and the relief requested by the contractor.

Specific wording in a request for final decision is not necessary. All that is required is that the claim indicates that a final decision was desired. See *James M. Ellet Constr. Co. v. United States*, 93 F.3d 1537 (Fed. Cir. 1996). While various statements or documents may qualify as a request for final decision, the safe approach is to explicitly request a final decision from the contracting officer.

Importantly, the description of the quantum requested must state a "sum certain." FAR § 52.233-1(c); *Reflectone*, at 1572. A contractor should provide the factual and contractual basis for its claim, asserting specific rights and requesting specific relief, again with an emphasis on the nexus between the two.

Whether a certain submission qualifies as a claim depends on the surrounding circumstances. There are different forms of submissions that may qualify as a claim, as will be discussed in Part II. However, to avoid ambiguity or confusion contractors should clearly indicate that they are requesting a final decision from the contracting officer with the intent of perfecting a claim.

WHO MAY SUBMIT A CLAIM?

Generally, only a prime contractor may assert a claim against the government under the CDA. Both the CDA and the FAR require that a claim be brought by one of the contracting parties. 41 U.S.C. §§ 605(a), 601(4); FAR § 33.201. Therefore, subcontractors are rarely in "privity of contract" and consequently cannot bring a claim directly against the government on a construction contract. This does not mean that subcontractors are without a remedy, however. A prime contractor may certify a subcontractor's claim, thus acting as a "sponsor" for the claim which allows for the claim to be properly submitted under the CDA.

In sponsoring a subcontractor's claim, the prime contractor need not agree with everything in the claim, but does certify that the sub's claim is made in good faith and is not frivolous. Therefore, it is important for a sponsoring prime contractor to review the sub's claim as diligently as it would review its own claims.

WHEN TO SUBMIT CLAIM

A contractor may submit a claim within 6 years after the "accrual" of the claim. The accrual of a claim is generally defined as the date when all the events which fix alleged liability and permit assertion of the claim were known or should have been known. 41 U.S.C. §605(a). Although there must be some type of injury, no monetary damages need be incurred for a claim to accrue.

Even if the six year statute of limitations does not apply, contractors should be aware that the government may invoke the equitable defense of "laches" if enough time lapses from time of accrual that the government would be substantially prejudiced in its ability to defend the claim. Therefore, contractors should submit their claim as soon after the accrual of the claim as is reasonably prudent.

DOES MY CLAIM NEED TO BE CERTIFIED?

The CDA requires that a claim in excess of $100,000 must be certified. Consequently, claims of $100,000 or less need not be certified. Claims that arise from a common or related set of operative facts cannot be broken down into separate claims, but must be filed as one claim.

The certification is sent to the contracting officer. Per the CDA, the contractor must certify

> "that the claim is made in good faith, that the supporting data are accurate and complete to the best of [the contractor's] knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable."

41 U.S.C. § 605(c)(1). The CDA also requires the person signing the certification to state that "the certifier is duly authorized to certify the claim on behalf of the contractor." Because the courts and Boards are split as to whether a certification must use the CDA language verbatim, it is prudent to use the exact statutory language when certifying a claim.

A CO is under no obligation to issue a final decision on a defective certification. In such a case, the CO must provide the contractor with written notice of their finding within 60 days. The contractor may then correct and resubmit the certification.

WHAT HAPPENS AFTER A CLAIM IS CERTIFIED?

After a claim is properly submitted and/or certified under the CDA requirements, the next step is for the contracting officer to issue a final decision on the claim. See FAR § 33.211. A final decision, or lack thereof, is a requirement to bringing an appeal before a board of contract appeals or filing with the Court of Federal Appeals.

Under the CDA, a CO must issue a final decision on claims of $100,000 or less within 60 days of receiving a written request for final decision. For claims over $100,000, the CO must either issue a final decision or notify the contractor of the time within which a final decision will be issued, within 60 days of receiving a certified claim.

CAN I APPEAL THE CO'S FINAL DECISION?

Contractors may appeal a CO's final decision to either an appropriate board of appeals (ASBCA or GSBCA) within 90 days, or alternatively to the Court of Federal Claims within 12 months of a final decision. If a contractor decides to take no action on the final decision, the decision becomes binding.

If the CO fails to issue a final decision within 60 days of the triggering submission, a contractor may deem the claim denied. This "deemed denial" likewise allows the contractor to file an appeal in the appropriate forum.

CONCLUSION

The timely and accurate filing of a claim under the CDA is a pivotal process in resolving disputes with the federal government. Failure to properly prepare and file a claim, or to understand all of the damages that may be available, can result in extensive time delays and/or significant loss of quantum.

It can be beneficial, and sometimes vital, to consult with an expert when navigating the claims requirements. Give Excell a call to ensure that you are maximizing the probability of your claim's success.

In the end, you will be glad you made the call; by the way, it's a FREE CALL.

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