CONTRACTOR CLAIM FUNDAMENTALS: PART 2

Some Pitfalls and Variations Under the CDA

INTRODUCTION

To every rule, there are exceptions and nuances. Such is the case with CDA claims. Part 1 of this series set forth the fundamental requirements and procedures for perfecting a claim. This Part II will discuss some of the common variables, pitfalls and interpretations that may be associated with claims.

WHAT ELSE QUALIFIES AS A CLAIM?

Part 1 discussed the elements that constitute a valid claim: (1) a description of the facts surrounding the claim; (2) A request for a final decision; and (3) a description of the quantum requested. In order to qualify as a claim under the FAR, a non-routine[1] request for payment must be a written demand or assertion, seeking as a matter of right, payment of money in a sum certain. FAR § 52.233-1(c). A routine[2] request for payment must also be "in dispute" when submitted to meet the definition of a "claim."

In addition to an express, written claim submission, at least two variations on the rule may also qualify as a valid claim: a REA and a Termination for Convenience settlement proposal may each convert into a valid claim under the CDA.

For example, a termination for convenience settlement proposal is a starting point for negotiations. However, the proposal can become a claim if the subsequent negotiations reach an impasse and the contractor indicates that it would like a final decision. See *Ellet Constr. Co. v. United States*, 93 F.3d 1537 (Fed. Cir. 1996). It should be noted that a contractor must still certify this type of "converted" claim if the contractor seeks quantum of more than $100,000.

Similarly, a REA may be converted into a claim if the contractor makes it known that it wants a final decision from the CO. See *Isles Eng'g & Constr., Inc. v. United States*, 26 Cl. Ct. 240, 243 (1992). This holds true even when the contractor indicates that they are interested in continuing negotiations- the determining factor being whether the a final decision has been requested. Compare *Isles* with *Huntington Builders*, ASBCA No. 33945, 87-2 BCA ¶ 19,898. Conversely, however, the passage of time alone may not convert a proposal into a claim where the contractor never requested a final decision from the CO. See *Santa Fe Engineers, Inc. v. Garrett*, 991 F.2d 1579, 1583 (Fed. Cir. 1993)(indicating that the lack of request for final decision denoted that the parties had not reached an impasse).

RAISE CLAIM AMOUNT AFTER CERTIFICATION?

It is well established that a claim in excess of $100,000 must be certified in order for an appeal to be properly submitted for consideration. But what happens when the claim amount changes, and rises above the certification threshold *after* a final decision has been made?

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[1] See *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1576-75 (Fed. Cir. 1995).

[2] See *Id*.

The general rule set forth in *Tecom, Inc., v. United States*[3] is that after an *uncertified* claim below the $100,000 threshold is duly considered by the CO, the contractor may increase its demand above $100,000 in its appeal *if* the increase is based on further information **reasonably developed during litigation**. *Tecom*, 732 F.2d at 936-38. The ASBCA interprets this rule to allow increases above the threshold only when the increase is based on information that was not reasonably available when the original claim was submitted. *Jema Corp.*, ASBCA No. 40985, 93-3 BCA ¶26,076.

Application of this rule is illustrated in the appeal of *Development & Evolution Constr. Co.*, ASBCA No. 58342, 13-1 BCA ¶ 35453. The contractor in that appeal, DECC, had a contract with the government that was terminated for convenience. DECC's first settlement proposal for approximately $128,500 was rejected by the government. In an effort to settle, DECC submitted a second settlement proposal seeking the reduced amount of $75,833. After the parties reached an impasse, the government issued a final decision in an amount well under DECC's second proposal.

DECC then appealed the final decision to the ASBCA ("Board"), seeking the original $128,500. The Board questioned whether it had jurisdiction to hear the appeal, citing the fact that the amount sought in the appeal exceeded the $100,000 threshold, and was not duly certified. DECC argued that its claim was based on the final decision that denied its second settlement proposal of $75,833. DECC argued that because the amount of it's second proposal was below the CDA threshold, the claim need not be certified.

The Board disagreed with DECC. Stating the rule above, the Board held that DECC's claim needed to be certified because DECC **knew about** the full $128,500 at the time it submitted its original claim of $75,833 to the Board. The Board stated that although a contractor has an obligation to attempt a negotiated settlement (following a Termination for Convenience), the contractor must comply with the certification requirement when it knows that its claim exceeds the $100,000 threshold (even though it offered to accept less than the threshold during settlement negotiations).

This case highlights the important point that a contractor should include in its claim ALL costs that it knows of, or should reasonably know of, at the time of the claim submission.

APPEAL ON DEEMED DENIAL BASIS

A CO's final decision is required before bringing an appeal before a board of contract appeals or filing with the Court of Federal Appeals. But what if the CO issues no decision at all?

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. Regardless, a final decision must be issued within a reasonable amount of time, taking into account the size and complexity of the case. See 41 U.S.C. § 7103(f)(3).

If the CO fails to issue a final decision (or notification) within 60 days, or a reasonable amount of time, the contractor may deem the claim denied and file an appeal. See 41 U.S.C. § 605(c)(5). The CO must have authority to issue a final decision before his lack of decision can be deemed denied. *Case, Inc. v. U.S.*, 88 F.3d 1004 (Fed. Cir. 1996). Importantly, It should be noted that the court or Board may stay such an appeal in order to obtain a final decision from the CO.

An interesting interpretation of this rule is found in the recent *Metag*[4] case. In *Metag*, government contractor Metag requested a final decision from the CO. Having not received a decision from the CO, Metag deemed its request denied and filed a Notice of Appeal with the ASBCA only 51 days after requesting the final decision. The

[3] 732 F.2d 935 (Fed. Cir. 1984).

[4] *Metag Insaat Ticaret A.S.*, ASBCA No. 58616 13-4 BCA ¶35454.

government moved to have the appeal dismissed, arguing that the appeal was premature because 60 days had not passed since Metag filed the claim, and the government had not been allowed a reasonable time to respond. At the time of the ASBCA's decision, 176 days had passed. The Board held that, even if 51 days was too early to bring the appeal, the claim was ripe because the CO still had not issued a final decision in the 176 days since the original request. The Board therefore held that 176 days was more than a reasonable amount of time for the CO to make a final decision, and upheld its jurisdiction to hear the appeal.

CONCLUSION

While adhering to the fundamental principles is wise, it is important for contractors to be aware of the variations on the general rules surrounding CDA claims. These variations may be applicable one day to your specific fact pattern, and knowing how to approach your claim could be the difference between recovery and losing out on time or money to which you are entitled. The experts at Excell can help you identify which, if any, of these variations may apply to your situation.

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

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Author's note: The information contained in this article is for general informational purposes only. This information does not constitute legal advice, is not intended to constitute legal advice, nor should it be relied upon as legal advice for your specific factual pattern or situation. – Taylor Benson, Esq., Asst General Counsel