

## CONTRACTING OFFICER'S FINAL DECISION

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*If Findings of Fact are not Binding on Appeal,  
What Good are They?*

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### INTRODUCTION

A Contracting Officer (CO) must support their final decision on a contractor claim with some type of finding of fact. While the Contracting Officer's Final Decision (COFD) must contain findings of fact under the Federal Acquisition Regulation (FAR), the **findings of fact are not binding on the CO or the government in subsequent appeals**. This post attempts to reconcile the seeming ambiguity between these two rules, explain the purpose behind the COFD, and offer some useful purposes for the findings of fact made therein.

### RULES FOR CONTRACTING OFFICER'S FINAL DECISION

After a contractor submits a claim to the Contracting Officer (CO), the CO's first obligation is to try and negotiate a reasonable settlement. If no settlement can be reached, the CO must issue a final decision within 60 days of receipt of a written request for a COFD if the claim is under \$100,000. For claims over \$100,000, the CO must either issue a final decision within 60 days or notify the contractor within 60 days of when the final decision will be issued. At any rate, the COFD must be issued within a reasonable amount of time. See FAR 33.211.

Since 1978, the Contract Disputes Act (CDA) has not required that COFDs contain specific findings of fact, but states that if findings of fact are made, they are "not binding in any subsequent proceeding" such as an appeal to a federal court or a board of contract appeals. See 41 U.S.C § 7103(a)(3). However, the corresponding FAR section is more stringent, requiring that the COFD contain a statement of the factual areas of agreement and disagreement. FAR 33.211(4)(iii).

COs are then instructed by their respective contracting agency how to include findings of fact in their COFDs. For example, the USACE Acquisition Instruction Manual (UAI) requires that a **COFD must contain a separate "Findings of Fact" section** in order to inform the contractor of the facts and reasons upon which the CO's conclusion is based. Finally, the UAI instructs that the COFD, and specifically the findings of fact section, will be drafted by a USACE attorney, and that the CO will then review and become familiar with the COFD and findings of fact and adopt them or make changes as needed.

### FINDINGS OF FACT ARE NOT BINDING

If findings of facts are a required part of a COFD, why are these findings not binding on any subsequent proceeding? It seems intuitive that if a CO bases their decision on certain facts, and those facts are true, then the CO should be required to stick with those findings throughout subsequent litigation.

The **answer to this question** can be found in the scant supply of court decisions that have addressed this issue. The courts have reinforced the CDA rule that "specific findings of fact are not binding on any subsequent proceeding." In fact, once a COFD is appealed, the court or board of contract appeals hears the appeal "de novo," meaning that

the parties “start in court or before the board with a clean slate” and the CO’s decision is “not presumed to be correct.”<sup>1</sup> Similarly, another court has stated that the COFD is not considered to be evidence.<sup>2</sup>

In the *Wilner* case, for example, the contractor filed a claim for costs resulting from what it claimed were government-caused delays.<sup>3</sup> The CO issued a final decision that granted the contractor roughly half of its claim, stating in the COFD that the other delays were not on the critical path and therefore were not compensable. The contractor appealed the COFD to the Court of Federal Claims, which relied on the findings of fact in the COFD in granting the contractor all of its claimed costs. The Court based its decision on both the COFD and the testimony of the CO. On appeal from that decision, however, the United States Court of Appeals for the Federal Circuit (CAFC) held that the lower court’s ruling was flawed, and remanded the case back to that court.

The CAFC reasoned that the lower court erred in relying on the COFD as evidence in coming to its decision. Although the lower court relied on the COFD and heard testimony of the CO, the CO testified only as to how he came to that decision and did not testify as to any of the facts contained in his final decision. Because the lower Court could not presume that the facts contained in the COFD were true, the lower court’s reasoning was necessarily flawed.

The *Wilner* Court went on to mention that there is nothing stopping a CO from testifying at trial. Indeed, the parties started with a clean slate and the CO’s decision was not presumed to be correct.

What the *Wilner* Court and others are saying is that the contractor can’t simply submit the COFD as evidence and then rely on it to prove its case – the court cannot presume that the facts stated therein are correct, or that any assertions made therein are binding. Consequently, findings of fact and assertions in COFDs will play virtually no role in subsequent litigation.<sup>4</sup>

In light of these rules, **the contractor must still prove up its case on appeal.** If the contractor has proved its case in its claim to the contracting officer, it should be a rather straightforward process to use the same facts, evidence and analysis asserted in its claim and provided in the COFD to prove up the same assertions again on appeal. However, the contractor must prove, on its own and de novo, that the COFD’s facts and assertions are true and correct. A CO’s testimony as to how he came to his decision will not be enough – but a CO’s testimony of the supporting facts will be admissible and therefore would carry enough weight for the court to find one way or the other.

## WHAT, THEN, IS THE PURPOSE OF FINDINGS OF FACT?

If the COFD is not evidence and its “findings of fact” are not binding on appeal, **of what use are they?**

One **purpose for the COFD** and findings of fact are to establish a court or board’s jurisdiction to hear the appeal. Any such appeal must arise out of the same operative facts and be within the scope of the claim presented to the CO.<sup>5</sup> Indeed a court or board cannot have jurisdiction to hear the appeal if a COFD has not been issued.

Another purpose for the COFD and findings of fact is fairness. The lawmakers behind the CDA and FAR apparently believed that a contractor was entitled to a reasonable explanation for why their claim was denied, accepted, or

<sup>1</sup> *Wilner Constr. Co. v. United States*, 24 F.3d 1397 (Fed. Cir. 1994)

<sup>2</sup> *Conner Bros. Const. Co. v. United States*, 65 Fed. Cl. 657 (2005).

<sup>3</sup> See *Wilner*, 24 F.3d 1397 (Fed. Cir. 1994)

<sup>4</sup> Administration of Government Contracts, 4<sup>th</sup> Ed., pg. 1312, Cibinik, Nash & Nagle (2006).

<sup>5</sup> Administration of Government Contracts, 4<sup>th</sup> Ed., pg. 1311, Cibinik, Nash & Nagle (2006).

otherwise.

Yet another use for the findings of fact is that they give the contractor some indication of the CO's thinking that went into their final decision. These findings of fact may give the contractor insight into the CO's assertions and legal positioning might be if the contractor appeals the final decision, therefore allowing the contractor can **make a more informed decision** as to whether an appeal is in its best interest.

Another question arises from this discussion: if the findings of fact are not binding, what prevents a CO from misinterpreting or misrepresenting facts? (This is a hypothetical question and does not imply that a CO would actually do such a thing.) The check against misrepresentation in its findings of fact is the CO's **duty of good faith and fair dealing**, as recently clarified in the *Metcalf*<sup>6</sup> decision. Because a breach of this duty equates to a breach of the contract, a CO is thus deterred from making anything other than correct factual statements.

## CONCLUSION

In a contract governed by the FAR, a COFD must contain findings of fact. These findings of fact can be valuable to a contractor even though they are not, of themselves, binding upon the CO or the government in subsequent litigation. Interpreting a CO's findings of fact for correctness and meaning can be a complex task. Utilizing the assistance of a consultant with expertise in this area can give contractors the **peace of mind that their decisions are based on the best and most correct information available**. This is especially true when what is *not* stated in the COFD speaks volumes.

**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*

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<sup>6</sup> *Metcalf Constr. Co. Inc. v. United States*, Case No. 2013-5041 (Fed. Cir. Feb. 11, 2014).