

REAs, Claims, and CDA Claims Litigation: A Primer

January 24th, 2024

Agenda

- Introductions
- Presentation
- Q&A – Please use the chat feature to ask question

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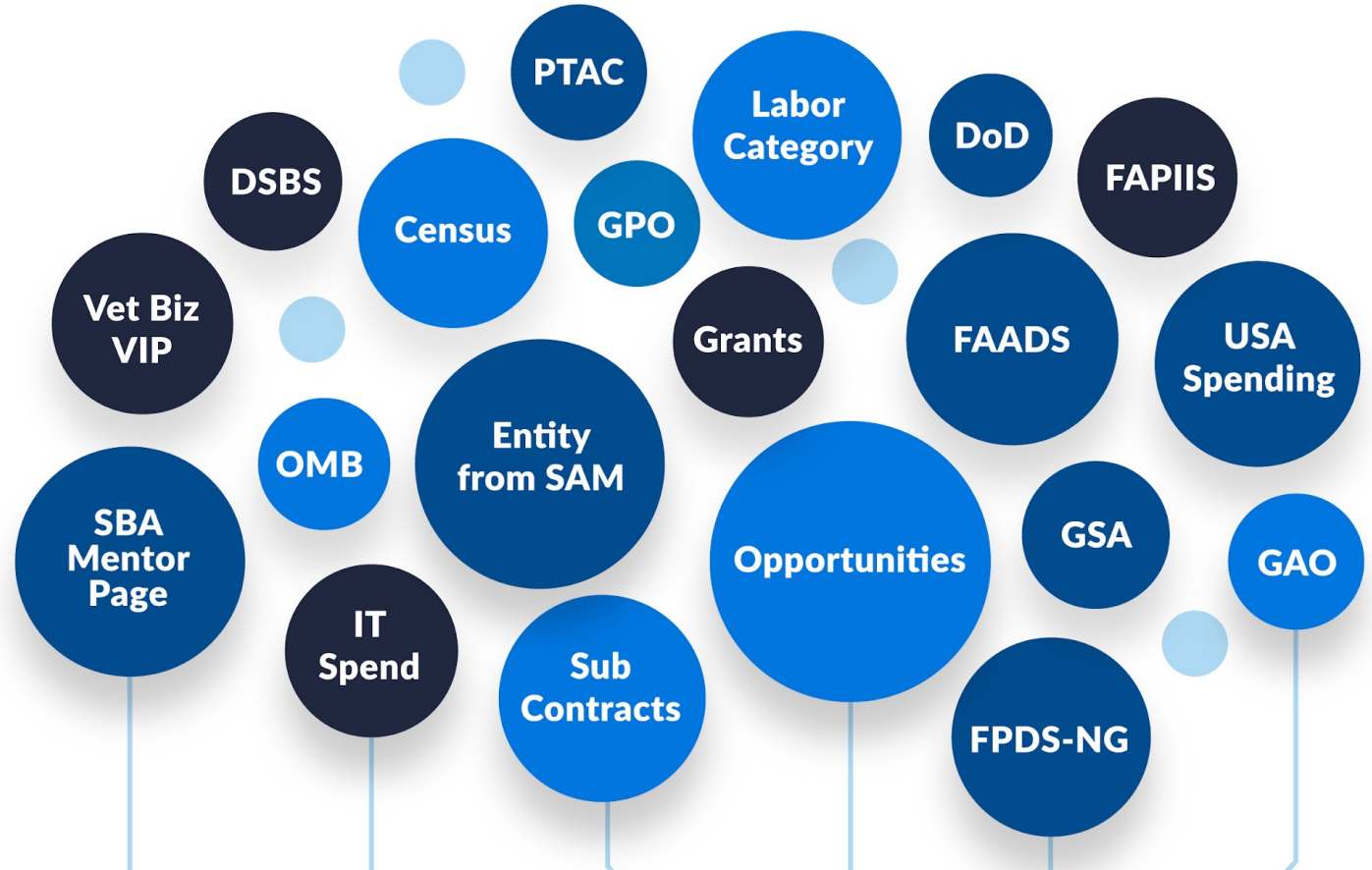
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**REAs, Claims, and CDA
Claims Litigation: A
Primer**

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Agenda

- What are Requests for Equitable Adjustment (“REAs”) and Claims?
- Similarities and Differences Between REAs and Claims and When to Use Each
- Pass Through Claims
- CDA Claims Litigation
- Common Government Defenses

First Things First: What are REAs and Claims?

- Simply put, REAs and Claims are requests/demands for compensation in the following forms:
 - Additional time
 - Additional money
 - Other relief

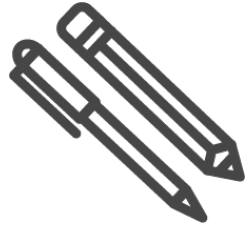
First Things First: What are REAs and Claims?

- Unlike in other contexts, a contractor cannot initiate a suit with a complaint in state/district court
- Federal contracting – requires use of administrative remedies before “litigation” in court
- REAs and claims are dispute resolution mechanisms used in federal government contracting
 - Both are requesting an “equitable adjustment”
 - Claim is that first administrative remedy step

What Legal Basis Exists for REAs and/or Claims?

- Substantively, justified by various issue-specific FAR/Contract clauses – Look in YOUR contract
- For claims, procedure and practices are laid out in Contract Dispute Act (“CDA”) and FAR Subpart 33.2
- FAR Disputes Clause – 48 C.F.R. § 52.233-1

Key Clauses / Common Bases



Changes (Express/Directed and Constructive/Implied)



Defective Specifications



Differing Site Conditions



Delays (v. Disruption/
Inefficiency, Suspension,
Acceleration)



CPARS (Other Declaratory
Relief, GFFD)



Terminations

REAs v. Claims

REAs v. Claims – General

REAs

- Less formal than a claim
- Is a creature of “contract administration” rather than litigation
- Is generally considered a “negotiation” tool rather than a foray into litigation

Claims

- More formal than a REA
- No longer contract administration; first step in litigation
- Less of a negotiation tool; positions are more fixed
- A formal request for relief
- Exhaustion of Admin. Remedies

REAs v. Claims – Certification

REAs

- General Rule: REAs do not generally require certification
- Exception: REAs on DoD contracts, seeking amounts in excess of the simplified acquisition threshold, do require a certification
- 48 C.F.R. § 243.205-71 and § 252.243-7002

Claims

- Certification is required for claims over \$100,000
- FAR § 33.207(c)

REAs v. Claims – When to Submit

REAs

- May be submitted during contract performance/close out
- Best practices: submit within 30 days when possible
- (Legal basis for deadlines is in various substantive topic-specific FAR clauses)

Claims

- A Claim must be filed within 6 years of claim accrual
- A contractor should provide notice of a claim to contracting officer prior to final payment/closeout
- (Again, check the issue-specific clauses of the contract for specifics)

REAs v. Claims – A Trigger?

REAs

- A REA does not trigger any formal obligation on behalf of the government to answer the contractor

Claims

- A claim triggers obligations on behalf of agency. Pursuant to FAR § 33.211(a) - Agency must:
 - Review the facts pertinent to the claim
 - Secure assistance from legal and other advisors
 - Coordinate with the contract administration office or contracting office, as appropriate
 - Prepare a written decision (“COFD”)

REAs v. Claims – Format

- No specific format required for either
- Both REAs and Claims typically take the form of a letter, with supporting exhibits:
 - Relevant Contract Provisions
 - Specs, Drawings, etc.
 - RFPs (for changes)
 - Correspondence/Notice Letters
 - RFIs
 - Schedule Info
 - Cost/Damage Info
 - Any other relevant information
- The key in either case is to provide an explanation of the facts (and applicable legal arguments) entitling the contractor to compensation or relief
- Best Practices for Claims?

REAs v. Claims – Recovery of Costs

REAs

- Preparation Costs ARE Recoverable
 - Legal/Consultant
 - Accounting
 - Internal Costs

Claims

- Preparation Costs are NOT Recoverable

REAs v. Claims – Which to Choose?

Things to Keep in Mind:

- Claim is only way to Exhaust Admin. Remedies and pave the way to litigation
- Filing of an REA does not preclude later filing of a claim
 - An REA can later be converted to a claim
 - Many contractors start with REA, move to claim (if necessary)
- Strategy Issues: Recovery of Costs; Timing; Settlement

Other Considerations

A Note about Pass-Through Claims

- Sovereign Immunity
- Waiver of immunity of certain claims
 - Contract Disputes Act, 41 U.S.C. §§ 7101 – 7109
 - Tucker Act, 28 U.S.C. § 1491
- Waivers are based on existence of contract with the government

A Note about Pass-Through Claims

- Subcontractors have no privity of contract = no ability to file claim on own behalf
- Prime must “sponsor” or “pass through” sub’s claim
 - Common cause of Prime v. Sub conflict
 - Prime’s concern: Certification/responsibility issues
 - Sub’s concern: Lack of remedies
 - Address concerns in Subcontract, Liquidating Agreements

A Note about Prosecution of the Work

- The Disputes Clause, FAR § 52.233-1(i), states: “The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.”
- Unlike a private contract, government contractors are legally obligated to proceed with disputed work even if they have not received payment. If the contracting officer directs you to proceed, you cannot refuse to do so.

A Note about Prosecution of the Work (cont.)

- Consequences of refusing to perform as directed:
 - Uncompensated Delay
 - Cure Notices
 - Termination for Default
 - To convert a termination for default to a termination for convenience, contractor would have to prove that the Government was in material breach of the contract.

CDA Claim Litigation

What Do You Appeal?

- A contractor may appeal:
 - A COFD that denies a claim
 - A “Deemed Denial”

What's A Deemed Denial?

FAR § 33.211(c)

- (1) - For claims of \$100,000 or less, the contracting officer shall issue the decision 60 days after receiving a written request from the contractor that a decision be rendered within that period, or within a reasonable time after receipt of the claim if the contractor does not make such a request
- (2) - For claims over \$100,000, the contracting officer shall issue the decision 60 days after receiving a certified claim, provided, however, that if a decision will not be issued within 60 days, the contracting officer shall notify the contractor, within that period, of the time within which a decision will be issued

What's A Deemed Denial?

FAR § 33.211(d) - COFD Timing:

- The contracting officer shall issue a decision within a **reasonable time**, taking into account --
 - (1) The size and complexity of the claim;
 - (2) The adequacy of the contractor's supporting data;
and
 - (3) Any other relevant factors

A Quick Note on Causes of Action

- Statutory Right of Appeal from Denial of Claim
- ...v. Breach of Contract
- What about Good Faith and Fair Dealing?

Where do You Appeal?

- 41 U.S. Code § 7104(a) - Boards of Contract Appeals
- 41 U.S. Code § 7104(b) - Court of Federal Claims
("COFC")

When do You Appeal?

- 41 U.S. Code § 7104(a) - Boards of Contract Appeals
 - Appeal within 90 days (From COFD)
- 41 U.S. Code § 7104(b) - Court of Federal Claims (“COFC”)
 - Appeal within 12 months (From COFD)

Which Forum is Best?

- Size of Dispute v. Cost of Litigation
- Complexity of Issues/Government Contracting Knowledge (and Specialty Knowledge) of Judges
- Objectivity/Distance, and Government Contracting Knowledge of Opposing Government Counsel
- Formality (Discovery Differences → Cost Impact)
- Duration of Litigation
- Deadlines/SOL
- Ruling Precedent

Claim Appeal Litigation Timeline

- [REA] → [Negotiations]
- Claim [→ Negotiations]

In an ideal world, it ends here, and you get what you want. If not...

- COFD (or Gov't Failure to Issue COFD in "Reasonable Time")
- Appeal / Complaint to Board or COFC
- Discovery (In Board Cases, "Rule 4" File); Depositions
- [Motions]
- Trial; [Post-Trial Briefing]; Decision
- Appeal (Fed. Circuit)

Common Government Defenses

- (Lack of) Notice
- Modification → Waiver/Release/Accord and Satisfaction
- Patent (v. Latent Defect)
- Design Specifications v. Performance Specifications
- Critical Path or Concurrent Delay
- (Lack of) Authority

Notice

- Notice required under many FAR clauses
 - Ex. FAR § 52.243-4:
 - “....provided, that the Contractor gives the Contracting Officer written notice” ...
 - Ex. FAR 52.236-2:
 - “The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer ”... “No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed, unless the Contractor has given the written notice required”

Waiver/Release/Accord & Satisfaction

D. CLOSING STATEMENT

It is understood and agreed that pursuant to the above, the contract time is extended the number of calendar days stated, and the contract price is increased as indicated above, which reflects all credits due the Government and all debits due the Contractor. It is further understood and agreed that this adjustment constitutes compensation in full on behalf of the Contractor and its Subcontractors and Suppliers for all costs and markups directly or indirectly attributable for the change ordered, for all delays related thereto, for all extended overhead costs, and for performance of the change within the time frame stated.

Waiver/Release/Accord & Satisfaction

- What can you do to rebut a Release/Waiver/Accord and Satisfaction Defense?
 - Limit scope by date, subject matter of Modification
 - Evidence parties did not intend for it to be release
- TL;DR - Reserve Your Rights!
 - Refuse to sign the bilateral modification and ask that the Agency issue it unilaterally (or direct you to do the work)
 - See if you can agree on elimination or modification of the release language
 - Cross out the release
 - Attach a letter specifically reserving your claims or write the reservation directly onto the modification form

Patent v. Latent Defect

- “Where a contractor-claimant seeks to recover an equitable adjustment for additional work performed on account of a defective specification, the contractor-claimant must show that it was misled by the defect. To demonstrate that it was misled, the contractor-claimant must show both that it relied on the defect and that the defect was not an obvious omission, inconsistency or discrepancy of significance— in other words, **a patent defect**—that would have made such reliance unreasonable.”
 - *E.L. Hamm & Assocs., Inc. v. England*, 379 F.3d 1334, 1339 (Fed. Cir. 2004)

Design v. Performance Specifications

- The law is clear that the government warrants design specifications, and if such specifications are deficient, the government bears the risk.
- In general, in order for a contractor to recover an equitable adjustment it must demonstrate that the specification is a design specification, not a performance specification, and that such design specification is defective or impossible to perform.
 - *Big Chief Drilling Co. v. United States*, 26 Cl. Ct. 1276, 1293–94 (1992)

Critical Path

Only Delays on the Critical Path Entitle the Contractor to an Equitable Adjustment

- There is a distinction in the law between: (1) a “delay” claim; and (2) a “disruption” or “cumulative impact” claim. Although the two claim types often arise together in the same project, a “delay” claim captures the time and cost of *not* being able to work, while a “disruption” claim captures the cost of working less efficiently than planned

Concurrent Delay

Types of Delay:

- **Compensable** – Delay that is the fault of the Government alone. The contractor is entitled to an equitable adjustment for time and money.
- **Excusable** – Delay that is caused by something beyond either parties' control (i.e. third-party actions, weather, acts of God). The contractor is entitled to an equitable adjustment for time, but no money.
- **Contractor Caused** – Delay that is caused by the contractor or its subcontractors. The contractor is not entitled to time or money.
- **Concurrent** – Government caused delay which occurs at the same time as contractor caused delay. These are treated as excusable delays and the contractor is entitled to an equitable adjustment for time, but no money.

Concurrent Delay

- For the government to be found to have caused compensable delay, the general rule is that the government must have been the sole proximate cause of the contractor's additional loss, and the contractor would not have been delayed for any other reason during that period . . .
- Thus, even if the government has caused an unreasonable delay to contract work, that delay will not be compensable if the contractor, or some other factor not chargeable to the government, has caused a delay concurrent with the government-caused delay

Authority

Only a Contracting Officer has Authority to Change the Contract

- FAR § 43.102 states:
 - (a) Only contracting officers acting within the scope of their authority are empowered to execute contract modifications on behalf of the Government. Other Government personnel shall not—
 - (1) Execute contract modifications;
 - (2) Act in such a manner as to cause the contractor to believe that they have authority to bind the Government; or
 - (3) Direct or encourage the contractor to perform work that should be the subject of a contract modification

Authority

COR (/ COTR)

- May not be delegated responsibility to perform functions that have been delegated to a contract administration office [to the ACO], but may be assigned some duties by the contracting officer
- **Has no authority to make any commitments or changes that affect price, quality, quantity, delivery, or other terms and conditions of the contract nor in any way direct the contractor or its subcontractors to operate in conflict with the contract terms and conditions**

Questions?

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