



2007 Annual Update
on Government Contracts

LITIGATING CLAIMS UNDER THE CONTRACT DISPUTES ACT

U.S. Court of Federal Claims & Boards of Contract Appeals

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Overview



- Historical Background
- Contract Disputes Process
- CDA Coverage
- Contractor Claim Submission
- Contracting Officer's Decision
- Government Claims
- Appeal Forums
- Forum Selection Factors

Historical Background



- Pre-Civil War situation
- Reforms during/post Civil War
- Development of disputes clauses
- Creation of Boards of Contract Appeals
- The Contract Disputes Act of 1978
 - (41 U.S.C. §§ 601-13)
- Federal Courts Improvement Act of 1982

Historical Background (Cont'd.)



- Federal Courts Improvement Act of 1992
- Federal Acquisition Streamlining Act of 1994

Contract Disputes Process



CDA Coverage



- Applies to any express or implied contract entered into by an “executive agency” for
 - The procurement of property, other than real property in being
 - The procurement of services
 - The procurement of construction, alteration, repair or maintenance of real property
 - The disposal of personal property
- CDA does **not** apply to contracts for the Government to provide services

CDA Coverage (Cont'd.)



- The non-appropriated fund instrumentality (NAFI):
 - CDA applies to contracts of those NAFls identified in 28 U.S.C. § 1491. These are the so-called exchange services: Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, etc.
 - CDA does **not** apply to the contracts of lower tier military NAFls, such as individual morale and recreation funds

CDA Coverage (Cont'd.)



- CDA does **not** apply to the contracts of executive agencies that operate without the use of appropriated funds. For example:
 - Board of Governors of the Federal Reserve System
 - Federal Prison Industries, a wholly-owned government corporation within the Federal Bureau of Prisons which in turn is within the Department of Justice
 - U.S. Mint, within the Treasury Department

CDA Coverage (Cont'd.)



- CDA does **not** apply to the contracts of the Federal Aviation Administration

Contractor Claim Submission



- Who may submit a CDA claim?
 - The prime contractor – yes
 - Subcontractors – not directly
 - Sureties – no


Contractor Claim Submission (Cont'd.)



Basics Of A Claim


- Written demand to the contracting officer
- Seeking as a matter of right
 - Payment of money in a sum certain,
 - Adjustment or interpretation of contract term, or
 - Other relief arising under or relating to a contract
- Submitted for a final decision

Contractor Claim Submission (Cont'd.)



- Monetary claims in excess of \$100,000 must be certified
 - Claim is made in good faith
 - Supporting data are accurate and complete to the best of the contractor's knowledge and belief
 - Amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable
 - Person submitting the claim is duly authorized to certify the claim on the contractor's behalf

Contractor Claim Submission (Cont'd.)



- Interest
- Statute of limitations

Contracting Officer's Decision



■ Time limits

- Due within 60 days, or
- If involving a certified claim in excess of \$100,000 within 60 days the contracting officer must notify the contractor of a firm date by which a final decision will be issued

Contracting Officer's Decision (Cont'd.)



- Uncertified and defectively certified claims exceeding \$100,000
- Failure to issue a final decision – deemed denial
- Finality of a written decision

Government Claims



- Requirement for final decision
- No certification requirement
- Interest
- Finality

Appeal Forums



Court of Federal Claims

- Article I court
- 16 judges, serving 15 year terms, and an additional 10 active senior judges
- No government contracts experience needed
- World-wide jurisdiction
- Can tax costs and assess attorney fees
- Single judge decides the case

Appeal Forums (Cont'd.)



Boards of Contract Appeals

- Goals: informal, quick, cheap
- Experienced judges
- Decisions by panels, but a single judge takes the evidence

Appeal Forums (Cont'd.)



Boards of Contract Appeals (Cont.)

- Armed Services Board of Contract Appeals (ASBCA)
 - Jurisdiction over DoD and NASA CDA contracts
 - All other jurisdiction (e.g., HHS, AID) eliminated effective January 6, 2007
 - 17 members

Appeal Forums (Cont'd.)



Boards of Contract Appeals (Cont'd.)

- Civilian Board of Contract Appeals (CBCA)
 - Operational January 6, 2007
 - Consolidated eight pre-existing civilian boards, the most active of which was the General Services Administration Board of Contract Appeals (GSBCA)

Appeal Forums (Cont'd.)



Boards of Contract Appeals (Cont'd.)

- CBCA has jurisdiction over all civilian agency CDA contracts other than those of the Postal Service and the Tennessee Valley Authority
- 18 members (6 coming from GSBCA)

Forum Selection Factors



Jurisdiction – COFC and Boards

- Contracting officer's final decision
- Time for appeal
 - COFC – 12 months after receipt of decision
 - Board – 90 days after receipt of decision
- Complexity of case
 - Need for considerable preparation time may suggest appeal to COFC rather than Board

Forum Selection Factors (Cont'd.)



Workload – Contract Actions Filed

- COFC (exclusive of bid protests):
 - 1997-2006: 275 cases/year; 37% of docket
 - 2004-2006: 382 cases/year; 41% of docket
- ASBCA:
 - 2002-2005: 450 cases/year

Forum Selection Factors (Cont'd.)



Length of Process – Complaint to Decision

- COFC (exclusive of bid protests)
 - 1997-2006: 2 years, 8 months
 - 2004-2006: 3 years
- ASBCA
 - 2002-2005: 1 year, 4 months

Forum Selection Factors (Cont'd.)



Election Doctrine

- Selection of forum is usually binding
 - Cannot dismiss and refile in other forum
 - Selection is binding even if claim is not properly certified
 - But if selected forum lacks jurisdiction (e.g., appeal to Board more than 90 days after receipt of final decision), election is not binding

Forum Selection Factors (Cont'd.)



Legal Issues – Governing Precedent

- Research binding authority
 - Federal Circuit and Court of Claims
 - U.S. Supreme Court
- Research forum decisions
 - Technical government contract issues may suggest selecting Board rather than COFC

Forum Selection Factors (Cont'd.)



Need For Legal Counsel

- COFC
 - Representation by an attorney is required
 - Pro se representation limited
- Boards
 - Contractors may appear pro se

Forum Selection Factors (Cont'd.)



Different Government Counsel

- COFC – Department of Justice
 - Parties lose settlement flexibility
 - But fresh look by DoJ may facilitate settlement
- Boards – Agency counsel
 - Parties retain some settlement flexibility
 - But positions may be entrenched, impairing settlement possibilities

Forum Selection Factors (Cont'd.)



Alternate Dispute Resolution

- COFC and Boards both encourage ADR
 - Voluntary process
 - Many forms of ADR available

Forum Selection Factors (Cont'd.)



Litigation Procedures – COFC and Boards

- Pretrial
- Discovery
- Motions
- Trials
- Decisions

Forum Selection Factors (Cont'd.)



Forfeiture of Claims and Other Government Remedies For Fraudulent Claims

- 41 U.S.C. § 604
 - Liability for the unsupported part of a claim attributed to misrepresentation of fact or fraud, in addition to the cost to the Government of reviewing that part of the claim
 - Can be applied by the COFC

Forum Selection Factors (Cont'd.)



- 28 U.S.C. § 2514
 - Forfeiture in toto of claims made by those who commit or attempt to commit fraud in connection with any part of the claim
 - Can be applied by the COFC
 - Application ranges far beyond the literal words of the statute
- Civil False Claims Act (31 U.S.C. § 3729 et seq.)

Forum Selection Factors (Cont'd.)



- COFC can apply each of the foregoing statutes in a case before it, if fraud is found
- BCAs have no jurisdiction under the CDA over fraud issues. The government must move to stay the action pending decision in a government-initiated district court action

Forum Selection Factors (Cont'd.)



- Implications for “split” contractor claims: transfer of Board proceedings to the COFC and consolidation with the case pending there

Forum Selection Factors (Cont'd.)



Appellate Review

■ COFC

- Appeal to Federal Circuit
- Appeal within 60 days after entry of judgment
- Standard of review
 - Law – De novo
 - Facts – Final unless clearly erroneous

Forum Selection Factors (Cont'd.)



Appellate Review (Cont'd.)

■ Boards

- Appeal to Federal Circuit
- Appeal within 120 days after receipt of adverse Board decision
- Standard of review
 - Law – De novo
 - Facts – Final unless fraudulent, arbitrary, capricious, grossly erroneous or not supported by substantial evidence