The Contract Disputes Act: What Every Federal Government Contractor Should Know

Claims on construction projects are unpleasant, but sometimes unavoidable. Contract with the federal government and you are by statute and by contract required to resolve any and all disputes under the Contract Disputes Act. So what is the Contract Disputes Act? This article sets forth basic information all federal government contractors should know when faced with the necessity of making or defending a claim on a federal project.

What Is the Contract Disputes Act?

The Contract Disputes Act of 1978 (CDA or Act) was enacted by Congress to implement a comprehensive statutory scheme for the resolution of government contract claims. The CDA provides a framework for asserting and handling claims by either the government or a contractor. All disputes under the CDA must be submitted to either the U.S Court of Federal Claims or to an administrative board of contract appeals. The vast majority of board cases are handled by either the Armed Services Board of Contract Appeals or the Civilian Board of Contract Appeals. The ASBCA is generally responsible for deciding appeals from decisions of contracting officers in the Department of Defense, the Department of the Army, the Department of the Navy, NASA, and when specified, the CIA. The CBCA hears disputes from all other executive agencies except the United States Postal Service (USPS), the Postal Rate Commission, and the Tennessee Valley Authority.

The USPS is served by the Postal Service BCA. In addition, the Government Accountability Office Contract Appeals Board handles contract disputes arising in the legislative branch, and the Office of Dispute Resolution for Acquisition handles contract disputes and bid protests arising out of Federal Aviation Administration procurements.

What Types of Claims Are Subject to the CDA?

The CDA governs post-award monetary claims, such as breach of contract, non-monetary claims, such as a claim for time or interpretation issues regarding a specification, and claims arising out of an implied-in-fact contract between the federal government and a contractor.

What Types of Claims Are NOT Subject to the CDA?

There are a few categories of claims that may arise between the government and a federal contractor that are not subject to the CDA. For instance, a prevailing wage claim arising under the Davis Bacon Act is not subject to the CDA because claims or disputes which another federal agency is specifically authorized to handle are not subject to the disputes process under the CDA. Additionally, any tort claim that does not arise under or relate to a contract or implied-in-fact contract between the government and a contractor is not subject to the CDA. Lastly, it should be noted that the CDA governs only post-award disputes; therefore, pre-award claims, such as bid protest actions, are not subject to the Act.
Who Can Assert a Claim under the CDA?

The federal government and government contractors may bring claims under the CDA. Claims by the government, such as claims for liquidated damages or claims for default termination, are subject to the CDA and may be brought by the government against a contractor after a contracting officer has issued a final decision on each claim. Generally, a final decision by the contracting officer is a prerequisite to the government’s assertion of any claim or counterclaim against a contractor. However, an important exception to this rule is that a contracting officer’s final decision is not a prerequisite to the government’s assertion of a counterclaim against a contractor under the False Claims Act.

Generally, only the parties to the contract—the government and the prime contractor—can bring a claim under the CDA. A subcontractor cannot bring a claim against the government under the CDA. However, a prime contractor may assert a pass-through claim against the government on behalf of a subcontractor. A prime contractor may only sponsor a claim on behalf of a subcontractor if the prime contractor has paid the subcontractor’s claim or, more commonly, the prime contractor otherwise remains potentially liable to the subcontractor pursuant to a claims cooperation or liquidating agreement. Most liquidating agreements limit the prime contractor’s liability to the amount the government agrees to pay or is required to pay.

When Can a CDA Claim Be Asserted?

Claims by both the government and federal contractors are subject to a six year statute of limitations which means that claims under the CDA must be submitted within six years of the time when all events establishing alleged liability for an injury were known or should have been known. Additional time limitations under the Federal Acquisition Regulation may apply to claims related to changes, differing site conditions, or suspension of work. For instance, a contractor is required to give “prompt” written notice to the contracting officer of a differing site condition before it is disturbed.

How to Make a Claim under the CDA?

A contractor is not required to submit its claim under the CDA in a particular format. However, a contractor’s claim must strictly satisfy the criteria set forth below to constitute a claim under the CDA.

First, a contractor must make a written demand or assertion. A mere notification by a contractor notifying a contracting officer of an issue or an amount the contractor believes it is entitled to does constitute a claim under the CDA.

Second, the contractor’s written demand or assertion must seek the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to a contract between the government and the contractor. The contractor’s claim must be sum certain or capable of determination by a simple mathematical formula. A contractor’s assertion for payment “approximately” or “in excess of” an amount will not constitute a claim under the CDA.

Third, all contractor claims exceeding $100,000.00 must be certified by the contractor. Claims asserted by the government are not
required to be certified under the CDA. For claims exceeding $100,000.00, a contractor must certify that (i) the claim is being asserted in good faith, (ii) the supporting data is accurate and complete to the best of the contractor’s knowledge, (iii) the amount requested is accurate, and (iv) the person asserting the claim is duly authorized to certify the claim.

Fourth, the claim must be submitted within the six year statute of limitations.

Fifth, the claim must be submitted to a contracting officer, not a field officer or other administrative official.

Sixth, the claim must include a specific request for a final decision or otherwise set forth a clear indication that the contractor would like the contracting officer to issue a final decision.

If a contractor’s claim satisfies the six requirements set forth above, then the claim may be properly asserted under the CDA. A claim does not initially need to include supporting data, such as a detailed cost breakdown, if it otherwise satisfies the criteria of a CDA claim. However, a contractor’s claim should contain sufficient information to show the basis for the contractor’s entitlement to the relief requested.

What Is the Difference Between a Request for Equitable Adjustment and a Claim under the CDA?

As is discussed below, once a CDA claim is made, the contracting officer is obligated to issue a final decision that, if unfavorable, must be appealed within ninety (90) days to a BCA or one year to the Court of Federal Claims. Rather than start the running of this clock, a contractor may ask for a change order or submit an uncertified request for an equitable adjustment or REA. Such requests give the contractor and the government an opportunity to discuss and negotiate the contractor’s request outside the time limits imposed by the CDA. If, as often happens, the contracting officer agrees to issue a change order, both sides are spared from the formal dispute resolution process. On the other hand, contractors should avoid falling into endless letter writing and negotiations. If it becomes apparent that the contracting officer has no intention of issuing a change order, the contractor should proceed to the formal CDA claims process described above.

What Happens Once a Claim Under the CDA Is Asserted?

Once a contractor submits a claim to a contracting officer meeting all of the criteria of a CDA claim, the contracting officer must issue a final decision on the claim. If the contractor’s claim is for an amount less than $100,000.00, the contracting officer must issue a final decision within sixty (60) days of receipt of the claim. However, if the contractor’s claim is for an amount exceeding $100,000.00, the contracting officer may issue a final decision within sixty (60) days or provide to the contractor a firm date within a “reasonable time” by which the contracting officer will issue a final decision. If the contracting officer fails to issue a final decision within a reasonable time, such failure may constitute a deemed denial, and the contractor may proceed with an appeal to the appropriate BCA or the Court of Federal Claims. Frequently, deemed denial appeals result in an order directing the contracting officer to issue a final
decision.

How to Appeal a Final Decision?

After a contractor receives a final decision by a contracting officer regarding its claim, the contractor may choose to appeal the final decision to the Court of Federal Claims or the BCA that has jurisdiction over its contract. A contractor may appeal the entirety of the contracting officer’s final decision or some portion thereof.

Timing may be dispositive for a contractor in determining which forum to file its appeal of the contracting officer’s decision. A contractor must file its appeal with the BCA within ninety (90) days of receipt of the contracting officer’s final decision. Or, a contractor may file an appeal with the Court of Federal Claims within twelve (12) months of receipt of the contracting officer’s final decision. Timing may play a crucial role in a contractor’s decision, but many factors, such as preference for a more—Court of Federal Claims—or less—BCA—formal set of procedural rules or the ability of the government to bring a False Claims Act counterclaim, should be weighed by a contractor in making its forum selection for its appeal. Generally, once a contractor chooses its forum, its decision is binding, and the contractor cannot pursue its claim in the other forum.

A formal complaint is not required to file an appeal of a contracting officer’s final decision to a BCA. An appeal to the BCA must be in writing, express dissatisfaction with the final decision, manifest intent to appeal the final decision, and be sent to the contracting officer and the BCA. To appeal a contracting officer’s decision before the Court of Federal Claims, the contractor must file a complaint setting forth the factual and legal basis for its claims.

Are Attorneys’ Fees Recoverable for a Claim under the CDA?

Generally, a contractor may not recover its attorneys’ fees incurred pursuing a claim under the CDA. The Equal Access to Justice Act allows some individuals and small businesses to recover attorneys’ fees up to $125 per hour if it is determined that the claimant is the prevailing party and the government’s position was not substantially justified. The claimant must also comply with the size standards set forth in the Act.