



# **Overview of the Request for Equitable Adjustment, Claim and Appeal Process for Government Contractors**

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PilieroMazza – a business law firm – serves as a strategic partner to government contractors and commercial businesses from across the United States.

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# Meghan Leemon

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Meghan Leemon counsels clients on a broad range of matters including government contracts, employment, and small business matters. Her experience includes bid protests at all levels, size protests, and contractor requests for equitable adjustment, claims and appeals. In addition, Ms. Leemon advises clients on small business procurement matters, particularly on issues related to eligibility and participation in small business federal procurement programs, such as the SBA's SDVOSB, WOSB, 8(a) BD, and HUBZone programs. She also assists clients in maintaining compliance with the FAR and small business regulations. Ms. Leemon also has experience in defending employers against alleged discrimination complaints.

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Lauren Brier represents commercial businesses in a variety of government contracting and litigation matters.

A highly skilled practitioner, Ms. Brier offers guidance on bid protests, terminations, constructive change claims, multiple award schedule (MAS) contracts, and solicitation reviews. She is also adept at counseling clients on suspension and debarment proceedings, mandatory disclosures, alternative dispute resolution, base debarments, False Claims Act (FCA) actions, and other issues under the Federal Acquisition Regulation (FAR) and Contract Disputes Act (CDA).

# Overview

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- Overview of REAs and Claims
- Considerations and Tips for REAs and Claims
- Subcontractor Claims
- Overview of the Claims Appeal Process

# Overview of REAs and Claims

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# REAs vs. Claims

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- REA: No official definition
  - Request for compensation (time, money, or both) based on changes, suspensions of work, or other factors that may arise during contract performance
  - Filed as part of contract administration and negotiations between the parties; falls short of claim in procedural requirements and formality
- Claim:
  - Written demand seeking the payment of money in sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract
  - Filed under the Contract Disputes Act; formal dispute that may lead to litigation

# REA Basics

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- REAs may be submitted any time during contract performance or close out, but not after
  - Contractor typically should assert right to REA within 30 days of the change giving rise to the REA
  - However, failure to provide 30-day notice will not bar the REA or claim unless the government was prejudiced
- No particular format required
  - Typically takes the form of a letter to the contracting officer with exhibits
  - Detail change to direct costs, markups, time to complete – the more detail, the more likely it will be granted
  - DoD certification requirement
- May include attorneys' fees, administrative costs, and internal costs

# Claim Basics

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- Generally, must be filed within six years after claim accrues
- No particular format required
  - Typically takes the form of a letter to the contracting officer with exhibits
  - Must constitute a clear and unequivocal written statement that gives the contracting officer adequate notice of the basis and amount of the claim
  - Identify as claim under Contract Disputes Act and request a contracting officer's final decision
  - Certification requirement
- Claim preparation fees are NOT recoverable

# Certifications – REAs

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- REAs generally do not need to be certified
  - Exception: For DoD contracts when the value of the REA exceeds the simplified acquisition threshold
  - If required, an REA certification must state:
    - The request is made in good faith
    - The supporting data is accurate and complete to the best of the submitter's knowledge
- An REA exceeding \$100,000 may be converted into a claim by complying with the claim certification steps

# Certifications – Claims

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- Certification required for claims > \$100,000
- Certification must state:
  - The request is made in good faith
  - The supporting data is accurate and complete to the best of the submitter's knowledge
  - The amount requested accurately reflects the contract adjustment for which the submitter believes the government is liable
  - The submitter is duly authorized to certify the claim on behalf of the contractor

# Considerations and Tips for REAs and Claims

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# Should I File an REA or a Claim?

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- File an REA when a contractor has a good working relationship with the agency and the government has indicated a willingness to reach an amicable resolution; or where there is a need to show contractor willingness and good faith to negotiate
- File a claim if there is animosity, or a clear indication in prior discussions and correspondence that the government does not believe the contractor is entitled to an equitable adjustment (i.e., there is a dispute)
- Before making the decision to file a claim, avoid references to the matter as a “dispute”

# Understand What You Can Pursue

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- A contractor is often entitled to its actual costs and / or additional time, and may also be able to recover reasonable profit (except for suspensions), overhead / G&A, and bond costs
- Arguments and issues you can pursue via REA and claim include:
  - Delay
  - Variation in estimated quantity
  - Changes to prevailing wages (price adjustments under SCA have specific rules)
  - Differing site conditions
  - Suspension of work
  - Changes
  - Stop work order
  - Terminations
  - CPAR

# Delay Claims

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- Indirect cost increases that occurred during the extended performance period
- Material cost increases that occur during the delay
- Lost productivity caused by the delay
- Other damages directly related to or attributable to the delay

# Differing Site Conditions

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- Differing site condition:
  - Must be an actual physical condition of the job site
  - Must be a condition that existed at the time the contract was executed
  - Condition must not have been discoverable during site inspection
- Two types:
  - Materially differs from the conditions indicated in the information about the job provided to bidders
  - Unknown and unusual condition that differs materially from what is ordinarily encountered on the particular type of work in the particular locality

# Terminations

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- Default
  - Contracting officer final decision
  - Must appeal
  - Warning – submit defenses as a claim
- Convenience
  - Impasse with settlement proposal
  - Bad faith?

# Know the Limits of Government Authority

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- Who has authority to bind the government?
  - The contacting officer
  - Formally designated representative (i.e., COR, COTR, GTS, GTE)
  - Representative assigned without formal designation
- Methods of appointing authority
  - Look for designation in the contract
  - If not designated in the contract, must be a separate writing (i.e., letter) specifying authorization

# When Is the Government Bound?

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- The government official acted within the scope of his / her actual authority
  - The government is not bound by apparent authority
- The government official acted with implied actual authority
  - May arise when the government intended to grant authority but failed to do so, and such authority is considered to be an integral part of the duties assigned to the government official
  - Do not bet the farm on implied actual authority
- Unauthorized action is later ratified by an authorized representative

# The Government's Duty to Cooperate

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- The government has an implied obligation to carry out its duties under a contract in good faith
- The duty not to hinder and the duty to cooperate are aspects of the implied duty of good faith and fair dealing
- The duty of good faith and fair dealing is limited by the original contract
  - Prevents a party's acts or omissions that are inconsistent with the contract's purpose and deprive the other party of the contemplated value
- Bad faith is not an essential element of a breach of the implied duty of good faith and fair dealing claim

# Waivers and Reservations of Rights

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- Watch out for waiver language before you sign
  - The government often includes waiver language in contract mods releasing the government from any liability for any action or inaction prior to the modification
  - Waivers and releases of rights may be absolute bar to recovery
    - If the release language is unambiguous, contractor more than likely is stuck with the plain and ordinary meaning of the release
- An executed bilateral modification that contains no reservations constitutes accord and satisfaction
  - If you believe you may have a claim, add your own language to the release to make clear you take exception and are reserving your right to file a claim in the future and describe the reserved issue(s)

# Use Experts and Consultants

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- Claimed amount must be calculated based on reliable principles and methods
- Certification for claims over \$100,000 heightens emphasis to ensure the figures are accurate
- For these reasons, experts and consultants are prudent in most cases
  - In case of litigation, a third-party expert or consultant, or an expert within the company, should be used for calculating delay damages
  - Your attorney should not prepare delay damage calculation – risk of your attorney becoming a material witness in litigation

# Subcontractor Claims

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# Sponsorship of Subcontractor Claims

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- A subcontractor cannot submit its own claim to the government
- Prime contractor must clearly and affirmatively agree to sponsor the subcontractor's claim
- FAR 44.203(c) allows a subcontractor the right of indirect appeal to a Board of Contract Appeals (BCA) or the Court of Federal Claims (COFC)
- *Appeal of Binghamton Simulator Company, ASBCA No. 59117 (2014)*
  - Appeal dismissed because subcontractor did not ask, and prime contractor did not agree, to sponsor claim
  - Right to appeal granted in subcontract not enough

# Sponsorship of Subcontractor Claims Cont.

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- Addressing sponsorship in the subcontract agreement
  - For the prime contractor, less may be better
  - As shown in *Binghamton*, boilerplate provision giving the subcontractor the right to take over a claim or file an appeal does not constitute a definitive agreement by prime contractor to sponsor a particular claim
  - Therefore, as a subcontractor, you should include language and mechanisms in the subcontract designed to require the prime contractor to provide clear expression of its sponsorship of a claim

# Overview of the Claims Appeal Process

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# When and Where to Appeal

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- Appeal may be filed based on the contracting officer's final decision, or the contracting officer's failure to make a decision within 60 days (i.e., deemed denial)
- Choice of forum:
  - Armed Services or Civilian BCA (depending on contract)
    - Some agencies have their own BCA, like the Postal Service and FAA
  - COFC
  - Election doctrine: contractor is bound by its forum decision, may not appeal in both forums
- Both BCA and COFC decisions may be further appealed to the U.S. Court of Appeals for the Federal Circuit

# What to Expect – Boards

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- ASBCA / CBCA
- Notice of appeal due within 90 days of the contracting officer's final decision
- BCA will docket the case and send a docketing notice to the parties
- Contractor's complaint is due within 30 days of the notice docketing the appeal
- The government has 30 days to answer after being served with the complaint, then the government creates the Rule 4 file

## What to Expect – Boards Cont.

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- Small claim procedures available for claims of \$50,000 or less or for small business concerns for claims of \$150,000 or less
  - Appellant must make election no later than 30 days after the receipt of the agency's answer, and the presiding judge shall resolve the appeal within 120 calendar days
- Accelerated procedures available for claims of \$100,000 or less
  - Appellant must make election no later than 30 days after the receipt of the agency's answer, and the board shall resolve the appeal within 180 calendar days

# What to Expect – COFC

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## ■ COFC

- Complaint must be filed within one year of the contracting officer's final decision
- The government has 60 days to answer after being served with the complaint
- The parties may request an expedited trial schedule in the joint preliminary status report. Generally appropriate when:
  - Discovery can be completed within a 90-day period
  - The case can be tried within three days
  - No dispositive motions are anticipated
  - The parties are seeking a bench trial

# Alternative Dispute Resolution

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- Available at BCAs, COFC, and some agencies
- Can be used before or after the contracting officer's final decision and after filing appeal (sometimes possible prior to filing appeal)
- Voluntary = both sides must agree to participate
- Methods
  - COFC: Judge or neutral; mediation; early neutral evaluation; mini-trial
  - BCAs: Facilitative and evaluative mediations; mini-trial; non-binding advisory opinion; summary binding decision

# Questions?

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