

Change Orders and Claims on Federal Contracts

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Perkins Coie

- 18 offices across the United States and China
- 22 attorney government contracts practice
- Web based resources regarding government contracts
- http://www.perkinscoie.com/government_contracts/

Agenda

- Changes – Formal and “Constructive”
- Requests for Equitable Adjustment
- Claims



**FORMAL
CHANGE**

**FAR Subpart 43.2
– Change orders**

**CONSTRUCTIVE
CHANGE**

**REQUEST FOR
EQUITABLE
ADJUSTMENT
("REA")**

**CLAIM
FAR 33.2 - Disputes
and Appeals**



Formal Changes

- Changes Clause
 - Contracts generally contain a changes clause permitting CO to make unilateral changes within the scope of the contract
- Clauses:
 - 52.243-1 Fixed Price
 - 52.243-2 Cost-Reimbursement
 - 52.243-3 Time and Materials or Labor-Hours
 - 52.243-4, 5 Construction
- Commercial Items – 52.212-4(c)
 - Unless contains above changes clause, only written Bilateral Modifications allowed

Formal Changes

- Actual authority
- Funding available
- Contractor must assert *in writing* right to adjustment within certain number of days of receipt
 - 30 days is standard, but not strictly enforced
 - CO can receive and act prior to final payment
 - Can be tailored – FAR 52.243-7 Notification
- FAR Policy encourages pricing of mods prior to execution, if possible, or at least a ceiling price FAR 43.102(b)

Contractor Duty to Proceed

- Contractor must perform the changed work
- Government can terminate the contract for default if the contractor does not proceed
- Contractor can submit a Request for Equitable Adjustment or a certified claim under the Contract Disputes Act

Formal Changes – Practical Issues

- CO and contractor discuss need for change
- Generally, a proposal is submitted
- CO reviews, directs audits and then negotiation may begin
- Agreement reached and Mod issues
- Contractor “Statement of Release” FAR 43.204

Deductive Change versus Partial Termination for Convenience

- Deductive Change
 - Price reduction for deleted work and profit as proposed
- Partial Termination for Convenience 52.249-1 *et seq.*
 - Intended to leave contractor in position had the parties initially contracted for reduced work
- No “hard and fast line” for which to use
 - Major (T4C) v. Minor (Changes)
 - T4C – more appropriate for reduction of identifiable work
 - T4C – ordinarily where Government need no longer exists
- Deductive Change
 - Contractor in high profit position *may* prefer
- Partial Termination for Convenience
 - “Reasonable” profit

Constructive Changes

- Changes Clause is also a means to handle a variety of other contractor claims:
- Contract Interpretation during performance
- Interference & Failure to Cooperate
- Defective Specifications
- Failure to Disclose Vital Information
- Acceleration

Constructive Changes

- Product of case law (not spelled out in your contract)
- Government order/action, inaction
- No fault of contractor
- Contractor did not volunteer
- A change in time or cost or both

Constructive Change

- Generally identified after it has occurred
- Contractor puts Government on notice to submit claim or REA
 - Initial notice may be high level
 - Whether Government is prejudiced is key
- Government responds
- Final payment cuts off “changes”
 - May subsequently pursue as claims

The Light Bulb Moment

- Extra work being done?
- Work different than identified in plans and specs? Revisions? Not enough detail?
- Different method of work?
- Out of sequence work?
- Stop work orders, disruption of work, interruptions of work?



- Congestion or trade stacking?
- Acceleration?
- No access or limited access to the site?
- Multiple mobilizations?

Light Bulb has Lit Up, Now What?

- Start the Process
- Notice
- Tracking Number(s)
- Accounting Number
- Segregation of Documentation



Preparing Requests for Equitable Adjustment



Requests for Equitable Adjustment

- No FAR form or definition
 - Purpose is to “keep a contractor whole when the Government modifies a contract”
- Narrative
 - Summary of Gov’t act or omission giving rise to it
 - Identify contract requirements
 - Detailed Statement of Gov’t Acts or Omissions
 - Statement of cause and effect
 - Detailed Computation
 - Legal brief with theory of recovery
- Appendix

Requests for Equitable Adjustment

- REA is like a claim under the Disputes Clause, but is regarded by some as less adversarial than a claim
- DOD REA greater than the Simplified Acquisition Threshold (\$150K) – Must be certified DFARS 243.204-71
 - Clause at DFARS 252.243-7002 – “I certify that the request is made in good faith and that the supporting data are accurate and complete to the best of my knowledge and belief”
 - Wording differs from CDA certification

Contract Administration versus Claim Preparation

Contract Administration

If a contractor incurred the cost for the “*genuine purpose of materially furthering negotiation process*” cost should normally be contract administration cost allowable under the FAR even if negotiation fails and CDA claim is later submitted

CDA or Appeal Preparation

“Legal, accounting, or consulting cost incurred in connection with prosecution of Contract Disputes Act claim or appeal against Government is *per se* unallowable”

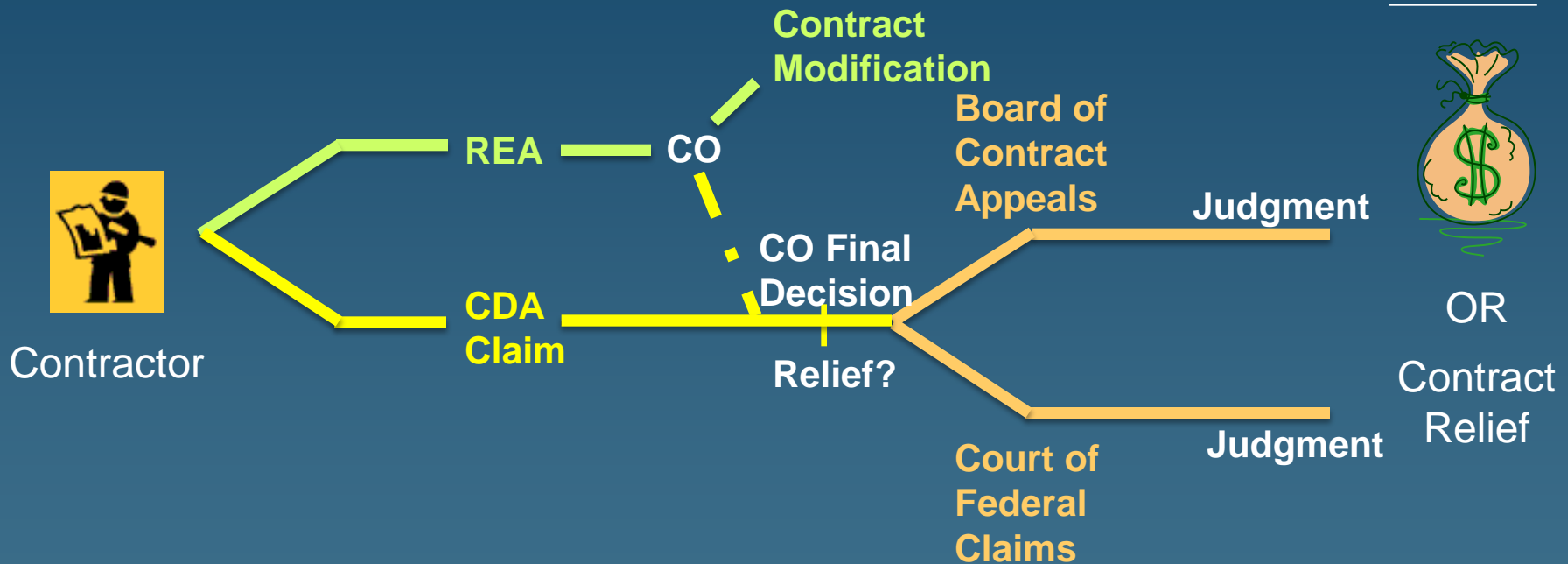
Bill Strong Enterprises, Inc. v. Shannon, 49 F.3d 1541 (Fed. Cir. 1995)

Methods of Proving Damages

- Actual Costs – Highly favored
- Total Cost Method – less favored
- Modified Total Cost Method
- Jury Verdict – Seldom used

REA versus Claim under Disputes Clause

PROCESSES



Also - ADR Option

REA Pros and Cons

- Pros
 - Can be viewed as less confrontational
 - Can recover REA preparation costs
- Cons
 - Cannot recover interest
 - No time limit on decision
 - Cannot appeal the denial of a REA to the BCA or CFC
 - So, can spend considerable time working on a REA only to have the Government deny the REA and have to go back and start over with a CDA claim

REA Pros and Cons

- Contractor has to seriously evaluate how serious the federal agency seems in addressing the contractor's REA
- If the federal agency gives the impression that it will deny the REA and force the contractor to file a CDA claim, you want to know that sooner rather than later

Contract Disputes Act Claims



Understanding the CDA

- Contract Disputes Act (41 U.S. Code Ch. 71)
 - FAR Disputes Clause 52.233-1
- Elements of a "Claim"
 - Written demand or assertion
 - By the prime contractor or the government
 - Seeking relief
 - If money, a sum certain
 - Adjustment or interpretation of contract terms
 - Voucher, invoice, or other "routine" request for payment not in dispute when submitted is not a claim
- \$100K+ claim requires "certification" FAR 33.207

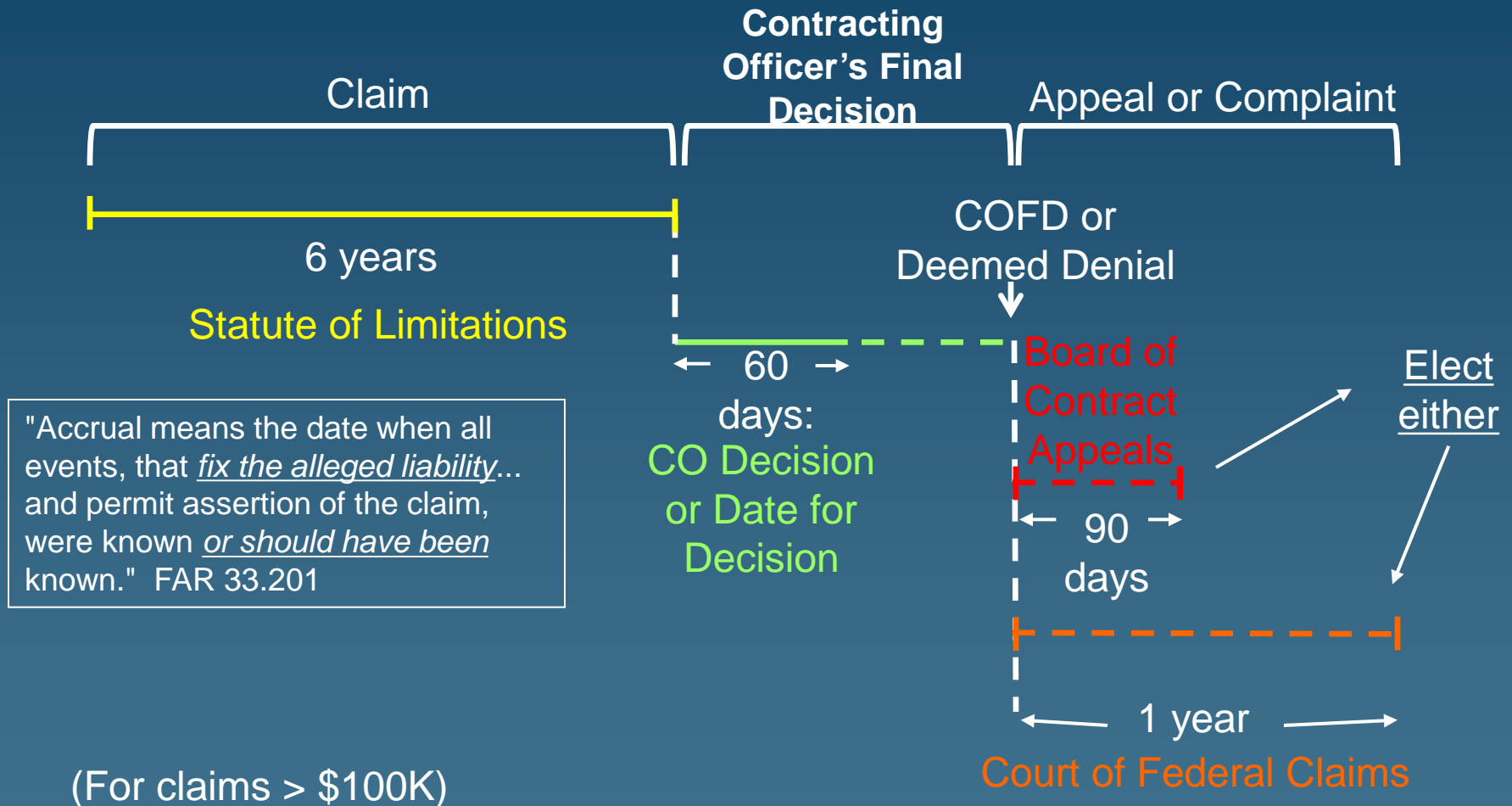
"I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor."

Understanding the CDA

- Contractor liable for unsupported claim attributable to misrepresentation or fraud
- Contracting Officer's final decision on claim:
 - < \$100 K – decision in 60 days
 - > \$100 K – decision or date for decision within 60 days
- If CO decides against contractor, right of appeal
- Government claims must also be the subject of a CO's final decision

CDA Pitfalls and How to Avoid Them

Statute of Limitations / Appeal Period

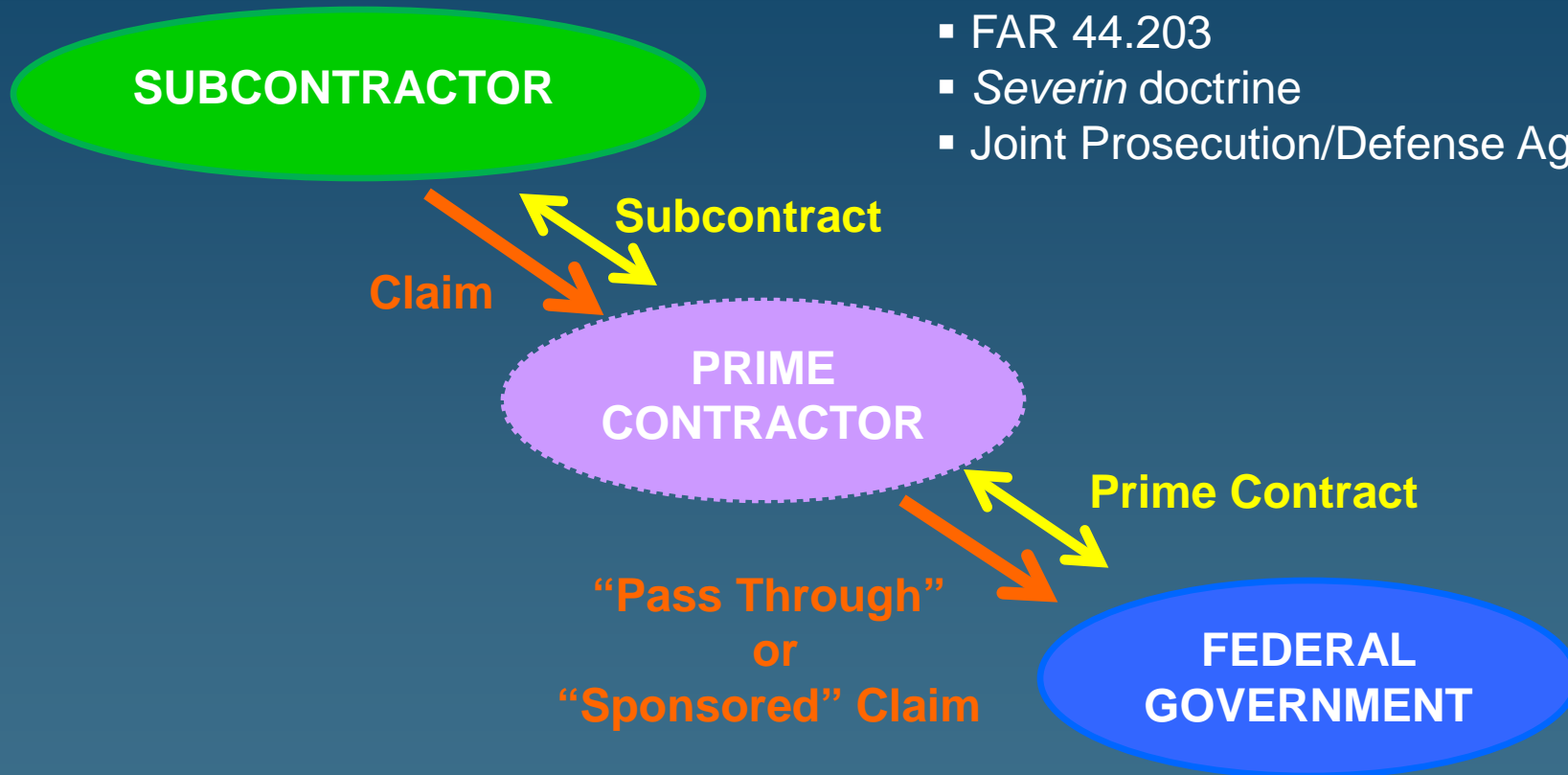


CDA Pitfalls and How to Avoid Them: Accuracy of Submission

- Not an "opening offer" or negotiation tactic
 - Frivolous or improper purpose
 - Speculative future costs
- Facts must be carefully and accurately represented
 - Avoid reckless factual assertions
 - Use of outside experts may be necessary
- Legal positions cannot be unreasonable
 - Including contract interpretation
- Potential Government counterclaim

CDA Pitfalls and How to Avoid Them: Subcontractor Claims

- FAR 44.203
- *Severin* doctrine
- Joint Prosecution/Defense Agreement



CDA Pitfalls and How to Avoid Them: Forums for Appeal of Adverse COFD

Boards of Contract Appeals

- 90 days to appeal
- Agency is settling authority
- Quasi-Judicial
- Panel
- ADR procedures
 - E.g., ASBCA Notice on webpage outlines options

Court of Federal Claims

- 1 year for complaint
- DOJ is settling authority
- Judicial
- One Judge
- ADR procedures
 - Appendix H

Release

- DOD agencies can include a broad release provision in a Modification
- Agency may contend that the release is SOP and that the contractor must agree
- However, the release may bar the contractor from submitting future claims
- We have worked with contractors to limit the scope of the release

Alternative Dispute Resolution

- Elements of ADR
 - Issue in controversy
 - Voluntary election by both parties
 - Agreement on alternative procedures and terms in lieu of litigation
 - Participation in process of officials who have authority
- Types of ADR – Third Party Assistance
 - Neutral Evaluation
 - Settlement Judge
 - Mediation
 - Mini-Trial

Alternative Dispute Resolution

- Pros:
 - Preserve customer relationship
 - Avoid time and expense of litigation
 - Can provide more flexible relief
- Con: Likelihood of something less than "total win"
- Government may be hesitant to use ADR if:
 - Precedent required, significant policy questions, full public record
- Timing of ADR
 - Any time
 - After CO Final Decision – Does not alter time limit on appeal of final decision FAR 33.214(c)

Settlement and Getting Paid

- Agency may consent or stipulate to judgment based on ADR
- The "Judgment Fund" is available for judgment or compromise settlement See 31 U.S. Code 1304(c)
 - Board or court orders the award from Judgment Fund
- Agency must reimburse the Judgment Fund, usually within one year See 41 U.S. Code § 7108(c)
- Budget pressure may increasingly limit settlements/ADR and force agencies to litigate

Summary

- Recognizing changes is key
- Comply with notice provisions
- Lay the groundwork to prove your damages
- Know CDA pitfalls and avoid them

**Questions or comments,
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