

# Best Practices in Government Contracting

*Dispute Avoidance and Resolution*

*Successful Strategies in Defense Bid Protests*

by Edward J. Kinberg



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## **ABOUT THE AUTHOR**

Edward J. Kinberg is the owner and managing attorney of Kinberg & Associates, LLC in Melbourne, Florida, near the Kennedy Space Center and many high tech government manufacturers. The firm concentrates its practice on government contract law, construction law, administrative law and business law. Mr. Kinberg has represented numerous clients in bid protests and government contract disputes.

Mr. Kinberg is certified by the Florida Bar Association as an expert in construction law. In addition to his law practice, he is a certified mediator and qualified arbitrator in Florida. Mr. Kinberg has been practicing law since 1978. He began his legal career as an officer in the U.S. Army Judge Advocate General's Corp (JAG). During that time he served in numerous positions such as a trial attorney with the U.S. Army Contract Appeals Divisions in Washington, DC where he represented the U.S. Army in contract disputes throughout the United States. He also served as the Deputy Chief of Contract Law and Procurement Fraud Coordinator for U.S. Army Europe and as a Senior Staff Attorney for contract law for the U.S. Army Troop and Aviation Command.

Mr. Kinberg is active in numerous professional organizations. He is an active member of the National Contract Management Association (NCMA), which awarded him the status of Fellow based on his many contributions to the contract management profession and has been inducted into the Hall of Fame for his local Chapter. Florida Today newspaper selected Mr. Kinberg as one of three finalists for its annual volunteer recognition award. He has written numerous articles involving contract and construction management and he is a frequent speaker on a variety of subjects. Mr. Kinberg received the Distinguished Service Award and the Community Service Award from the Melbourne/Palm Bay Chamber of Commerce and is a past president of his local Chapter of the Associated Builders and Contractors.

# Dispute Avoidance and Resolution

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## **The Foundation for Government Contract Dispute Resolution**

Successful resolution of a government contract dispute requires balancing the contractor's right to be paid a fair price for the work it has performed and the government's need to obtain the best value for goods or services it needs at the least cost to the agency. This goal can be reached through the application of basic dispute resolution techniques by all parties.

The first step is ensuring you have a firm understanding of the terms and conditions of the contract and all supporting technical data. I have seen instances in which a dispute has gone “out of control” because one or more of the individuals involved based their position on what they assume the contract requires instead of examining the actual terms of the contract.

Once assumptions start to “rule the roost,” it is increasingly difficult to resolve the dispute without incurring extensive costs, in both money and time. Instead of arguing about what the contract means, ask the other party to sit down with you and review the actual terms of the contract. In many cases, simply sitting down and talking about the plain meaning of the provision in dispute can open the door to a meaningful discussion and a quick resolution of what could have been a long and unpleasant fight.

Knowledge of and strict adherence to the terms and conditions of the contract are essential to resolving any contract dispute. This requires careful review of all contract documents, both the provisions printed in the contract document and those that may be incorporated by reference, before you submit your proposal and after contract award.

In the event that any terms appear unclear, uncertain, or ambiguous, you must question those terms and document your questions and the responses. The principle of patent defects, discussed in more detail later in this chapter, could result in your firm becoming responsible for failing to clear up obvious errors during the bidding process.

In effect, the courts tend to apply a “last chance” doctrine in determining which side to a contract must bear the consequences of a mistake in the contract requirements. If you could have avoided the problem by asking a

question early on, you may be found to have assumed the risk that resolving the ambiguity may cost more than you bid for that element of the work.

Upholding the terms of the contract in good faith is the principal dispute resolution practice to remember. If the other party feels you are exerting your best efforts to provide the goods and services you agreed to provide at the agreed price, they are more likely to work with you to resolve truly unexpected problems you may encounter during the course of performance.

Overall, the best way to avoid a long and expensive dispute is to firmly but fairly enforce strict compliance with the terms and conditions of the contract.

Regular and explicit communication is likewise necessary for a successful resolution, both to appeal for assistance or leniency and to document the problem as soon as possible. Early identification of problems, early appeals for clarification, and early claims or requests for adjustment all expedite the dispute resolution process, ensure a minimal cost in time and money, and improve one's chances for a successful outcome.

Clear, concise, and compelling documentation of all issues that arise during the course of the performance of contracted duties is necessary. Verifiable, contemporaneous, easy-to-understand records are the foundation of early dispute resolution. An advocate in possession of all relevant facts, an accurate chronology and supporting documents is an advocate in position to close early, amicably and favorably for the client.

It is in your best interests to send the other party a short letter confirming your understanding of any meeting discussing any contract requirements. Each such letter should end with the following words: "If your understanding of our discussion (or agreement or whatever is appropriate under the circumstances) is different from mine, please let me know at your earliest convenience."

In most cases, the other side will not respond. If they do not and you end up in a dispute months or years later, your letter will be the only record of what was agreed to at the time. In virtually all cases, a finder of fact (e.g.,

court, arbitrator, or senior agency official) will rely on the real-time documents rather than the memory of someone's undocumented recollection that is tainted by their long-term resistance to your position.

Several years ago, I read an interesting article called “Nice Contractors Finish Last.” Despite its title, the article did not advocate being a “mean” contractor. It advocated early, forceful, and strict insistence on the plain meaning of the contract terms and providing immediate notice of any problems that may arise.

In was the author's position that a contractor is more likely to avoid a time-consuming and expensive dispute at the end of the contract if the contractor strictly enforces the contract from the first day. In this regard, the author noted that overlooking problems in the early phases of performance results in a great deal of resentment when problems arise for the “first” time toward the end of performance.

The author also noted it is easy to overlook early problems because they do not appear to have much impact on cost or schedule. However, as the “little” problems you ignored early in contract performance build up to a large problem (i.e. a cost overrun or inability to meet your delivery date), tempers rise and the specter of a long and troublesome dispute begins to rear its ugly head.

## **Common Obstacles**

Unfortunately, your best efforts at building a solid foundation for a quick and amicable resolution by thorough knowledge of the contract terms and conditions, conscientious communication, and rigorous documentation can be negatively influenced at any point by a number of common situational hurdles.

Time and money, always driving factors in the business world, can derail early dispute resolution. For many contractors, the low margins common to government work make it very difficult to provide the additional resources needed to properly protect your business in a dispute. Time and money prove particularly difficult issues for small businesses facing substantial competition for goods and /or services.

Many businesses are reluctant to bring in outside consultants and/or attorneys that may be needed early in the process to put your case in the best position for early resolution. This problem is further complicated as delayed use of outside experts and attorneys prevents you from getting an early and independent assessment of the issues involved in your dispute which may result in you pursuing issues that have little value and overlooking issues that may have significant value in resolving the dispute.

A government bureaucracy can also slow or impede a dispute resolution case. Clients are well advised to solve problems as they occur, when problems are relatively small in scope, because government bureaucratic systems are ponderous, expensive and difficult to work with.

Several common client and employee viewpoints in contract disputes create or exacerbate problems for resolution lawyers. Many clients commit the fallacy of diminution or underestimating the effects of individual, minor problems that, when combined with other similarly insignificant problems over time, present substantial difficulties. Employees involved with government contracts are also often guilty of the avoidance fallacy, failing to report problems as they occur, blindly hoping that issues encountered will either disappear with a lack of attention or at least move into another employee's jurisdiction. From my perspective, this is the single biggest cause of disputes.

Most people are reluctant to admit a problem is developing, slow to recognize they are in the early phase of a developing problem, or worried about telling their boss there is a problem. For many of us, avoidance is a built-in reflex action arising from overconfidence, insecurity, and/or time. In this regard, we tend to persuade ourselves that we can solve the problem before:

1. Performance time is impacted.
2. Budget is affected.
3. Quality is affected.
4. We have to explain to our boss why we have a problem.
5. We have to explain why we can't solve the problem without bothering the boss or having to involve another work group.

6. We have to explain why we didn't see the problem earlier when it could have been readily avoided.

The most critical and least expensive tool available for avoiding disputes is developing a corporate culture (whether private or government) where a key skill is the ability to identify a problem at the earliest possible time and do what needs to be done to correct the problem or minimize the impact. Avoidance does not resolve disputes. You must be willing to acknowledge a likely problem and take prompt, affirmative action to prevent the problem from growing out of control.

Closely related to the diminishing point of view is the cost analysis fallacy, which finds employees assuming, in the early phases of performance, that a minor issue is not worth the financial and temporal cost of a proper solution. Problems are instead incompletely addressed by employees themselves along with their other duties.

Finally, the customer service fallacy erroneously posits that the preservation of friendly working relationships is more important than a conscientious effort to solve problems as they occur. As a consequence, contractors prefer to absorb costs rather than risk irritating their customers. This frequently results in more costs over time, a project that cannot be completed on time and an irritated customer because of delays.

By addressing problems in real time, your customers will become accustomed to efforts to address and resolve problems at the earliest possible time. There will be fewer issues to work through at the close of the contracted work. You will have a better chance at resolving any remaining disputes inexpensively, minor problem by minor problem, avoiding the opportunity cost and financial cost of a protracted legal action.

Allegations of fraud are always potential issues in a government contract dispute resolution. Fraud is most often alleged in cases involving contractors and government officials with an especially tense working relationship. The more personal friction, the more likely fraud charges will surface during negotiation.

Thankfully, assiduous clients/contractors who adhere to the terms of their contract and are mindful of complex governmental rules for accounting, quality control, production, invoicing, and so on need not fear any serious threat from the allegations. Any instance, however, of a request for payment, in the form of an equitable adjustment or a claim, not firmly based on verifiable supporting data, will be in danger of drawing fraud charges from the government agency involved.

A client's own employees may also share in governmental recovery from a fraud suit by bringing legal actions of their own under the False Claims Act. It is always in the best interests of the client to immediately make a voluntary disclosure to the government contracting agency when potential fraud is discovered to minimize assessed penalties.

## **Research**

All disputes require rigorous research into the facts of the case, the terms of the contract, all applicable regulations, and all relevant court and board decisions. Generally, more complex or unusual disputes require a greater volume of conducted research. A successful dispute resolution lawyer faced with a government contracts case will first read the contract, again and again, until a full understanding has been established. A personal review of the contract and all preserved, supporting documentation is best, since one can only trust one's self to examine the contract's different terms and sections and determine how relevant regulations and relationships may affect the eventual outcome.

One must interview not only the key players, but also anyone with a past or present role in the problem to ensure a firm and accurate grasp of all technical issues surrounding the government contract dispute. Superior managing officers should be kept informed of case progress and issues encountered during the resolution process. The contract manager or other official responsible for the contracted work should be the first party interviewed. The supporting case documents will be a guide for seeking out other involved parties.

Outside experts may prove helpful in the early stages of a dispute resolution case involving a scheduling issue, for instance, or an unclear technical issue.

A fundamental guideline in evaluating an ongoing government contracts conflict is the question of, first, whether the position taken is solid, and, second, whether that position can be explained convincingly to a judge. Outside experts may be required to provide unbiased answers to both questions and to identify any other weaknesses in the case that may not be readily apparent to the team assembling it.

A veteran disputes lawyer evaluates his or her team's research by playing devil's advocate, forcing team members to demonstrate a sound understanding of the contract by explaining in detail certain provisions contained therein and any applicable practices or regulations that will be relied upon to argue the case.

### **The Client's Role in Government Contract Dispute Resolution**

Lawyers hired for dispute resolution must always remember that the client's interests are of paramount importance. The dispute is the client's dispute, the resolution process is paid for by the client's financial resources and it is the client's employees who will be diverted from productive work for the months and years a resolution may require—the end of which may not even feature a payoff if the case is lost.

In the dispute resolution environment of teamwork, leadership, and communication, the client is the primary source of critical information. Client involvement is critical in that the client aids research and maintains team focus on the ultimate goal of resolving the dispute. Clients who distance themselves from their dispute typically find that the time and financial cost of their case increase while the likelihood of a favorable result decreases. A wise contract dispute lawyer, however, will recognize that clients often lack perspective in evaluating their own issues, tending toward extreme optimism or even failing to render a complete or accurate picture of the case or offering contradictory information or testimony of the facts. Uninvolved clients also tend to underestimate the time involved in resolving government contract disputes and may even become hostile in the face of mounting costs and an unfinished case.

Client priorities generally involve seeking everything they deserve at the lowest possible cost. It is essential that clients be briefed explicitly on the uncertainty of the litigation process and the time and cost involved in a dispute resolution. Once one is satisfied that the client understands the resolution process, client interviews should be carried out to determine both what the client hopes to gain through the dispute and why the case is particularly important to the client. Perhaps it is simply the recovery of money or the protection of the client's reputation that is at stake or the case may involve a desire for vengeance to cause some retributive harm to a party that has harmed the client.

### **How to Resolve Government Contract Disputes: Five Steps**

Government contract dispute resolution cannot be neatly categorized into a sequential process. However, following the five steps discussed below, which may be applied concurrently as the facts of the case are learned and the nature of the problem becomes increasingly clear, will assist you in reaching an early resolution.

#### *Step One: Learn the Issues*

One must understand what is in dispute in order to plan an argument and define likely outcomes for the client. The resolution team will review documents, interview interested parties, meet with staff members for discussion and confer with involved management officials gathering as much information as possible on the problem in question.

#### *Step Two: Learn the Facts*

Every dispute resolution is controlled by the facts and the accumulation and internalization of the facts is a continual process throughout dispute resolution. One must begin with the facts known to the client then add more data as client interviews progress and documentation is reviewed and opposing data is presented. Remember that the goal is not simply the assembly of data, but the development of a thorough understanding of the facts and how they apply to the issues in your case.

Often, relevant facts are not fixed and may seem even subjective. A dispute arises, after all, when two involved parties each have a different understanding of the facts of a contract situation. As the number of disputed facts decreases, the outlook for a successful resolution improves.

*Step Three: Identify All Involved Parties*

To piece together an accurate narrative of the dispute, one must find out how the problem started and how it developed into a dispute. To see the problem from every vantage point, both opposing parties must be known and their perspectives taken into account. As with previous steps, this knowledge will be gained through review of documentation, more interviews with involved parties and more discussion with a leadership group.

*Step Four: Ascertain Client Objectives and Goals*

Since success in dispute resolution is determined by the client, one must understand what the client seeks for an end result in order to favorably close the case. Clearly discussing client objectives can prevent one's team from straying into extraneous areas of research that do not work toward the ultimate goal and thus minimizing time and cost involved in the resolution process. Again, client objectives will be learned through the review of applicable documents, interviews and more discussion with a leadership group.

*Step Five: Develop a Path to Success*

A plan must be identified that will resolve the case and meet the client's objectives. Plans cannot be rigid, as new facts and variations on existing facts are added to one's foundation. The plan must be revised and must evolve to include every new development yet still lead toward a favorable outcome.

## **Alternatives in Government Contract Dispute Resolution**

While the majority of disputes are resolved without resorting to litigation, once a case enters litigation, the government agency involved will vigorously defend its interests and pursue all possible defenses. One must be mindful of this determination when deciding how limited resources are to be allocated in building a solid defense.

Thankfully, litigation can often be avoided by the early application of good dispute avoidance practices. From an administrative perspective, the dispute resolution lawyer's goal should be to create a record of all issues that develop with the government agency and then use that record to convince the agency of the veracity of the client's position or at least foster enough doubt on the agency's part in their own position that the opposing party enters into an early agreement favorable to the client.

Government contract disputes can be divided by source into two categories: disputes between a contractor and a government agency and disputes between a contractor and a contractor's subcontractors and suppliers. The dispute resolution alternatives listed below apply to disputes between a contractor and a government agency.

The following alternatives in dispute resolution will seem cumbersome, expensive and impractical to businesses involved in the real world of competitive contracting, but they have been identified through many years of experience in representing clients in governmental and commercial contract disputes.

### *The Importance of Pre-Contract Inquiries*

If a likely defect is detected in contract documents, a wise government contractor, cognizant of his or her responsibility for additional costs due to "patent" defects in the contract, seeks immediate clarification. A patent defect can be loosely defined as an error that should be obvious to a reasonable person upon ordinary review of the documents—an ambiguous definition that may be applied with some amount of subjective input from an arbitrator. If a judge finds that the contract defect in question, which

triggered a motion for seeking additional payment for correction, was “patent,” then no recovery of costs will take place.

Some contractors will purposefully ignore a contract with obvious defects. To bid a low price, a contractor may not include the cost of performing the contracted work correctly or may not account for the possibility of substantial unknown costs and/or delays in fixing an obvious defect and then expect to recover the extra costs through a change order once the defect is “discovered” and disclosed to the government agency. While this tactic may work in some cases, it creates a number of serious problems.

First, if the agency realizes this was an obvious error that should have been addressed pre-award, your credibility will be seriously diminished. This will create a hostile environment for the remainder of the performance period, and result in greater agency scrutiny of your performance.

Second, if the agency decides to fight the change order, a judge will find that the defect was obvious and patent and should have been addressed prior to bidding. Your change order will be denied and you will be responsible for the cost of the additional work and lose the time and money involved in an appeal.

Third, if the contract has a number of problems, most of which were truly unavoidable, a finder of fact will be less inclined to acknowledge your claim. It is not unusual for a case that should be a solid case to fall apart during trial because the finder of fact concludes you are not a credible contractor.

Fourth, you could be charged with fraud. If you knew the contract was defective and bid with the intent of using the known defects to make up for a low bid, the claim you submit to correct the problem could be considered a fraudulent claim. Even if you prevail on a fraud charge, the time and cost involved, which could include suspension from bidding on government contracts during the investigation, could seriously damage or destroy your business.

If a defect is honestly found after the contract is awarded (i.e. it is a latent defect), the best policy is to question involved staff members about the defect and why it was not discovered earlier then start building a documented record to protect change orders from challenge by the government agency.

While defects in a bid package may not be unusual, you must be prepared to demonstrate that a reasonable contractor would not have discovered the error during the bid preparation process. This type of defect is known as a latent defect. From my perspective, it would be good to use that terminology when you first notify the agency of the defect and explain why it could not have been reasonably noticed in the bid process.

### *Build a Record of Communication*

The earliest and most effective method for avoiding disputes and reducing the negative effects of disputes that cannot be avoided is to build a record of communicating directly with the contracting officer. On federal contracts, the contracting officer is the only authorized decision-maker. Regardless of the titles, apparent authority or technical expertise of other officials, the contracting officer is the only individual authorized to direct a contracted client to perform any action other than what is specified in the contract.

If any direction, instruction, or interpretation is received that in any way varies from the terms and conditions of the contract, a memo should be sent at once to the contracting officer to confirm the interpretation and request immediate notification in writing as to the course of action to be taken.

Earlier, I mentioned standard language that should accompany all such communications. Keep in mind that the primary purpose of any communication with the contracting officer is to confirm you are doing what you are supposed to be doing. Keep in mind that any deviation, no matter how slight, from the strict requirements of the contract is a change and the only one who can approve a change is the designated contracting officer.

Keeping regular communication with the contracting officer can prove difficult in the real-time job of faithfully performing contracted work. If you are placed in a situation requiring immediate action based on the direction of

a government representative other than the contracting officer, immediately notify the contracting officer in writing, explaining what happened, who gave direction to do what you did and why you could not wait for approval from the contracting officer.

In many cases, you will find that simply telling the individual giving you direction that you will be confirming the direction in writing will result in the individual withdrawing the instruction or confirming that they do not have the authority to make that decision. Building a solid record and making sure the agency representatives know you are doing so, is the key to protecting yourself.

### *Go to the Source*

Successful dispute resolutions are built on fact. A lawyer cannot rely on the interpretation others have gathered from a source, but must instead seek out the source of the dispute themselves. Many disputes are based on the interpretation of a requirement by one party, which causes an argument with an opposing party and starts a conflict based not over the contract, but around who is right and wrong. An argument like this can be avoided by all parties reviewing the documents together.

### *Listen*

Often, so much opposition and conflict has built in a case that communication has long since broken down. If both parties can be given an adequate opportunity to explain their positions (and be forced to do so with support from contract documents), sometimes one party may realize that a mistake has been made and the dispute can be resolved with relative ease.

### *Try Mediation*

It need not take the form of official mediation, but if a problem cannot be worked out, a meeting might be called with both opposing parties and a neutral, respected third party. Even if the opposing party does not consent to a mediation session, it can be helpful for lawyers and clients in revealing possible weaknesses and identifying strengths in their case plan. If both sides are amenable to the meeting this joint evaluation can occur at a very

early phase of the resolution process and a wise advocate always works to resolve issues at the earliest possible level.

*Try an Agency Competition Advocate or Ombudsman*

Most federal agencies employ a competition advocate or an ombudsman. If the dispute cannot be solved with the contracting officer, a client may be advised to appeal to one of these officials. Unfortunately, competition advocates and ombudsmen may not yield promising results. They are often briefed on the agency position prior to the meeting, and they rarely serve in the neutral position of helping parties solve a problem.

*Insist on Written Orders*

If a resolution cannot be worked out, one must insist that the contracting officer state in writing the action that the client is to take. Lawyers must be cognizant that disputes clause 48 C.F.R. Section 52.233-1 (2008) requires that the client:

...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.

As such, it is important that the client possess documentation of the contracting officer's instructions to take specific actions. If a written record is obtained, the contracting officer will know a disagreement exists regarding the performance of the contract and the position of the contracting officer is clearly established.

If a change order is issued by the contracting officer, you need to make sure the change order states that it is limited to the issues raised in your request for equitable adjustment and/or claim. If not, you may waive all claims up through the date of the change order.

You need to carefully read the change order before you sign to make sure it accurately represents the change to which you believe you are entitled. The change order should specifically state whether it includes additional time, and how much.

If you intend to reserve any rights to be settled later, make sure the change order includes a specific statement that you are reserving your right to request additional time for the issues identified in the change order, both for performance and payment issues. In many cases, the agency may be willing to pay for your additional direct costs involved in the change order, but will refuse to include a time extension or payment for extended overhead.

Make sure the change order does not give up any rights you intend to preserve. If the government insists on you waiving your right to a time extension or to extended overhead, you need to carefully consider whether recovering the direct cost is worth giving up time-related claims.

#### *Requests for Equitable Adjustment and Claims*

Once instructions are received from the contracting officer, a timely request for equitable assessment or claim should be submitted to obtain an extension of time and/or recover the actual costs incurred because of following the documented instructions. A request for equitable adjustment simply asks for a consideration from the contracting officer for additional funds and/or time for the contracted work.

At the time a request for equitable adjustment is filed, there exists only a disagreement, not a dispute (i.e. you believe you have been instructed to take an action that was not included in the scope of the original contract and the government agency believes the action was within the scope of the contract). You must proceed with contract performance pending resolution of the time and cost issues associated with the “disagreement.”

The contracting officer is under no time constraint to respond to a request for equitable adjustment and may evaluate the request for months. Even if you have completed the work while your request for equitable adjustment is under consideration, you are not entitled to interest on the funds you

advanced to do the changed work. If you want to recover interest, you must submit a formal claim in strict compliance with the Federal Acquisition Regulation.

A claim is a demand for additional time and/or money. The client is entitled to interest from the date of submission of the claim to the contracting officer. The time allowed for the contracting officer to issue a final decision on the claim varies based on the value of the claim. For claims under \$100,000, the contracting officer must make a decision on the claim within sixty days of submission if a request is made in writing. If a request is not made in writing, the contracting officer must still yield a decision on the claim within a reasonable period.

Claims in excess of \$100,000 require that the contracting officer return either a final decision within sixty days of the date of claim submission or a notification of when a final decision will be issued. If the contracting officer fails to deliver a decision within a reasonable time, the decision is considered denied. If an appeal is filed, the government agency will file a motion to dismiss and state a specific date the final decision will be issued.

Claims over \$100,000 must also be “certified,” 48 C.F.R. § 33.207 (2008), in order to be considered properly submitted. A contracting officer is not obligated to issue a final decision on a claim with a defective certification, provided the contracting officer informs the contractor in writing within sixty days as to why the certificate is defective.

The contracting officer issues his or her decision on the claim by issuing a final decision. When I first started practicing in this area, my supervising attorney told me that to him, the most interesting thing about a contracting officer’s final decision is that it is typically not the contracting officer’s, it is not final and it is not a decision.

Contracting officers typically rely on the various technical experts advising them in preparing a final decision. In reality, the decision is frequently a group decision, with the strongest voice being that of the technical experts on the contract. The decision is not final, as you may appeal to an agency board of contract appeals within ninety days or to the Federal Court of Claims within one year of the date the decision is issued.

If the contracting officer does not act on the claim within the required time, you can submit a “deemed denial” appeal to the agency board of contract appeals or the Court of Federal Claims. In most cases, the agency will respond to the appeal asking the board or court to allow them sufficient time to respond to the claim. If the agency does not set a specific date in its request to the court, the court will set a date by which the contracting officer must issue the final decision. If the contracting officer fails to do so, the board or court will require the agency to begin its defense before the board or court.

For the contractor, claims must be submitted within six years of the date of “accrual,” which is defined in the Federal Acquisition Regulation, rather vaguely, as:

...the date when all events, that fix the alleged liability of either the Government or the Contractor and permit assertion of the claim were known or should have been known.

The “accrual” definition gives a fact finder (administrative judge or Court of Federal Claims judge) significant discretion in determining exactly when a claim actually begins to accrue interest.

Here, one must bear in mind that the various versions of the “change” clause in government contracts (48 C.F.R. 52.243-1 through -4) require a contracting entity to:

...assert its right to an adjustment under this clause within thirty days from the date of receipt of the written order. However, if the contracting officer decides that the facts justify it, the contracting officer may receive and act upon a proposal submitted before final payment of the contract.

If the change involves a delay, one must consult the requirement in 48 C.F.R. Section 52.242-17 (2007), “Government Delay of Work,” which states:

A claim under this clause shall not be allowed (1) for any costs incurred more than twenty days before the contractor

shall have notified the contracting officer in writing of the act or failure to act involved, and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the delay or interruption, but not later than the day of final payment under the contract.

### *Where to File Your Appeal*

The contracting officer's final decision will advise you of your rights to appeal. You have two choices. You can appeal to the agency board of contract appeals within ninety days of the date of the final decision or to the Court of Federal Claims within one year of the date of the final decision.

The boards and courts have substantially different procedures. A board of contract appeals is an administrative tribunal. The rules of procedure are much more relaxed than those of the court. The entire process is much more informal and can be significantly less expensive. The administrative law judges at the boards are typically very experienced in the federal procurement law, as that is the only type of case they hear.

While the board may appear to be a part of the agency due to its name (e.g., the Armed Services Board of Contract Appeals, the Interior Department Board of Contract Appeals), they are very independent. You can rest assured a board decision will be based on the law and facts and there will not be any bias in favor of the agency.

In a case appealed to a board, the agency counsel will typically be an attorney assigned to the agency headquarters. While this can be a problem in many cases, agency counsel may simply support the agency decision with little or no independent investigation. In my experience, this is the exception, not the rule.

As a former agency counsel (for the Army), I believed we had a duty to conduct our own investigation and do the right thing. If the case needed to be settled, I would take that position and if the case involved a good faith dispute, I would aggressively defend the agency. From my perspective, attorneys on both sides of the issue should take the same approach.

A good independent analysis is critical to good legal work. If your counsel does not challenge your assumptions and your version of the facts, your counsel is not doing their job. As counsel, our primary objective is to give our clients a good, solid, independent opinion as to the pros and cons of their case. From my perspective, your time and money are too valuable to be wasted on a case in which you have little or no likelihood of success. A good attorney, regardless of whether they work for private business or a public agency, should always take this approach.

If you are concerned agency counsel may not independently evaluate your case, you should appeal to the Court of Federal Claims. While appeals to the court can be time-consuming and expensive, they can be beneficial if you feel there is a strong agency bias.

In appeals to the court, the agency is represented by an attorney from the Department of Justice. The first time the attorney learns of the case is when it shows up on his or her desk. Once the attorney is assigned to the case, he/she will review the complaint filed with the court and direct the agency to submit a litigation report explaining the pros and cons of the case.

In many cases, preparation of the litigation report may be the first time the contracting officer and their supporting legal office carefully review the case from the perspective of strength and weakness. Once the contracting officer completes the report, it is forwarded through “channels” before it goes to the Department of Justice.

The trip through channels may be the first time senior agency contract officials and attorneys see the details of the case. As the file passes through its layers of review, senior officials may see weaknesses in the case that indicate it would be more reasonable to settle than to go into full-blown litigation.

Once the litigation report reaches the desk of the attorney handling the case, the Department of Justice will make its own assessment as to the merits of the case. At this level, a new level of consideration will be applied: given the many different cases the Department of Justice has in litigation, is this case good enough to use the department’s limited resources to aggressively defend? Even if the agency feels it’s a great case, the

department may conclude that it needs to be resolved without extensive litigation.

The final difference between the agency and court involves the authority to settle. At the board, the contracting officer is the decision-maker as to a settlement. While higher-level officials may be able to pressure the contracting officer to agree to a settlement or reassign the case to a different contracting officer for decision, such an action is rare.

In effect, by agreeing to settle, the contracting officer must admit he or she was wrong when they denied the claim. Admitting you are wrong is a tough decision for anyone and you can expect substantial resistance to settlement by the contracting officer in a board appeal.

In a Court of Federal Claims case, the Department of Justice can agree to a settlement without the contracting officer's approval. As a general rule, it has been my experience that the department is reluctant to use its authority and will only do so when you demonstrate you have a very strong case. As with any government agency, there are layers of approval. Before a decision to override a contracting officer is made, the matter will be staffed through several levels at the Department of Justice.

The decision as to which level to file your appeal is not an easy one. You need to carefully review the matter with your counsel considering both the procedural differences between the two different forums and the difference in time and expense.

### *Remain Faithful to the Contract*

When dispute is inevitable, one must ensure strict compliance with the contract terms. While courts can—and often do—waive strict time requirements, the decision is not automatic and should not be counted on. The dispute resolution team must be aware of all deadlines involved for taking various actions under the contract, and see that the client meets the deadlines, thereby eliminating a possible weakness in the client's dispute case: failure to deliver in a timely fashion the contracted work.

Filing claims early in the dispute will also free time to complete contracted duties, enable program staff to focus on the program, and allow administrative staff to focus on the claim. The resolution process runs smoothly when problems are not allowed to fester with delays or inattention.

### *Request Alternative Dispute Resolution*

Alternative dispute resolution is provided for in 48 C.F.R. Section 33.214 (2008). Many government agencies typically deny alternative dispute resolution requests, perhaps because all forms of it require that both parties involved empower an individual with the authority to make a decision. Given the “group think” often employed by the federal government, alternative dispute resolution presents a difficult challenge for officials disinclined to reverse, change or modify a position the government agency has previously assumed.

Alternative dispute resolution has received a strong push in government agencies in the last few years. As the practice becomes more mainstream and accepted, more agencies may approve such a request. The biggest obstacle to dispute resolution is a lack of communication. While opposing parties may feel some trepidation at the prospect of potentially hurting their individual case by revealing certain facts, the reality is that if a case features a weakness the likes of which might be exploited in an alternative dispute resolution setting, then exposing that weakness in a negotiating atmosphere can only lead to an early and more cost-effective resolution.

In this regard, it should be kept in mind that the parties can agree that all proceedings and/or discussions in alternative dispute resolution are to be considered confidential settlement negotiations. By doing so, the comments made and documents drafted in support of the process cannot be used during litigation if the case is not resolved before then.

It is not unusual for both sides to believe alternative dispute resolution will be a waste of time and money. I disagree. In most cases, a good mediator helps the parties develop a realistic perspective about their case and is able to help the parties reach a settlement that is acceptable to both sides.

Keep in mind that alternative dispute resolution may be the first time a neutral, unbiased person has looked at the case in any depth. A mediator does not have a connection to either side to the dispute. The mediator's loyalty is to the process and to the reality that if an amicable settlement can be reached both parties will be better served.

### **Final Thoughts**

It will always be in the client's and the dispute lawyer's best interests to identify and pursue claims against a government agency as early as possible. Each issue should be systematically worked through from the bottom up, starting with the client, researching, reviewing documentation, interviewing all relevant parties, keeping regular and clear communication throughout, and remaining focused on the ultimate goal. Strict compliance with contract terms at all times must be ensured and if an exception is made at the instruction of a government official, the contracting officer must give their approval of the action in writing.

Each member of the dispute resolution team should share the "firm but fair" approach toward contract completion. One must adhere firmly to contract requirements and be willing to work toward a fair solution to any issues that impede the joint goal of contractor and government agency: delivering the right product or service at the right time.

There is no benefit from delaying the inevitable. Simply ignoring problems during the course of performance does not make the problems go away. It makes them more difficult to resolve. All parties to a contract have an obligation to identify and resolve problems as quickly as possible.

The bottom line is to always apply the golden rule in business as you would in your personal life. Treat all of the parties to the contract the way you would want to be treated. If you don't want to be kept in the dark about potential problems, don't keep the other side in the dark.

Related Resources:

- Army Office of the Chief Trial Attorney “Alternative Disputes Resolution – Policies and Procedures Guide for Trial Attorneys.”  
<https://acc.dau.mil/GetAttachment.aspx?id=21775&pname=file&aid=2036&lang=en-US>
- Electronic Guide to Federal Procurement ADR  
<https://acc.dau.mil/CommunityBrowser.aspx?id=21754>



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