



**FEDERAL PUBLICATIONS
SEMINARS®**

The Leader in Government Contracts
Training for Over 65 Years

The Lightning Learning Version:

**Government Contracts Compliance –
Contract Claims**

HOSTED BY: Federal Publications Seminars

PRESENTED BY: Teddie Arnold

Speakers



Edward (Teddie) Arnold

Seyfarth Shaw LLP

Partner

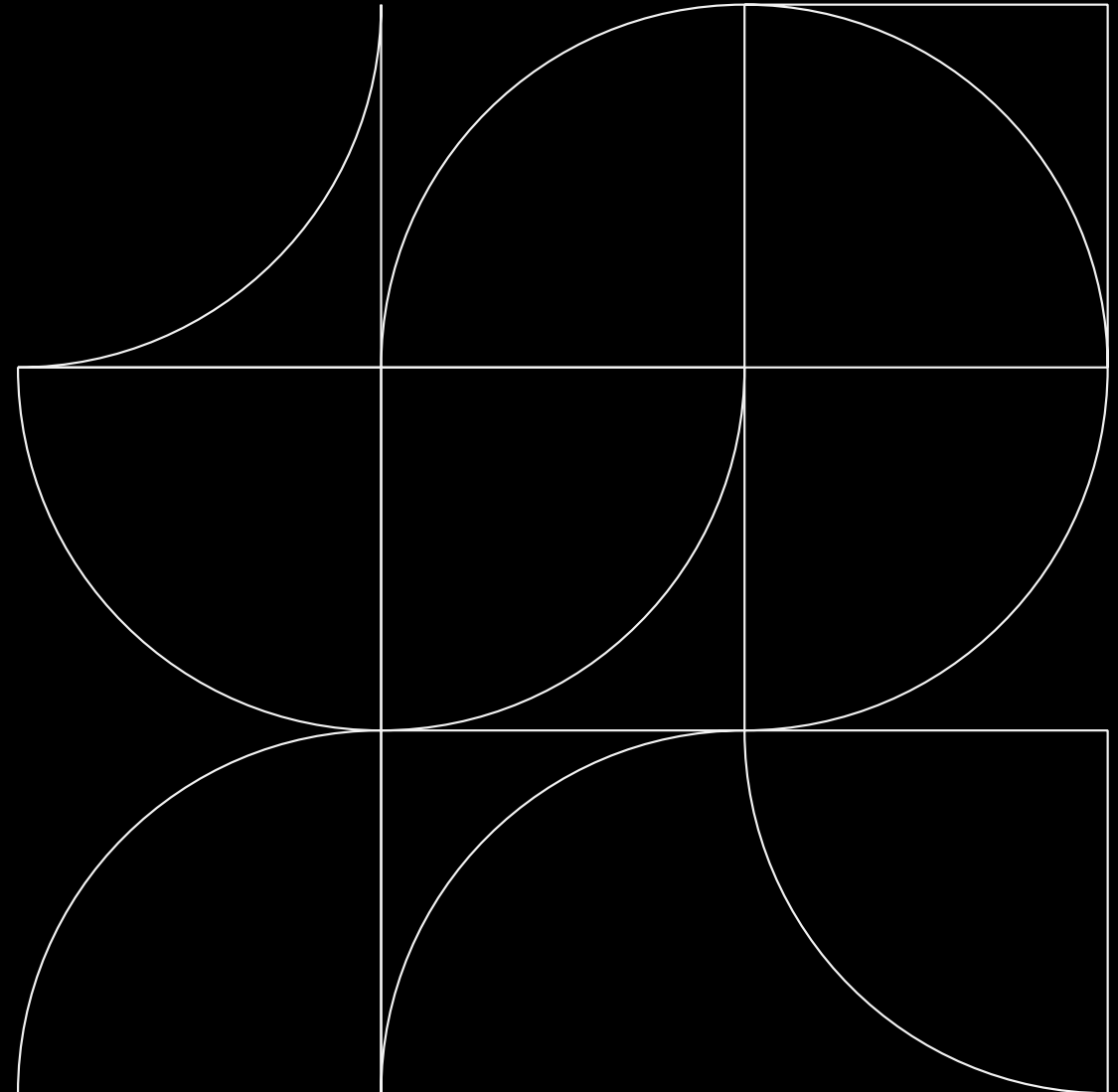
Washington, DC

earnold@seyfarth.com

Topics

- 1 Offenses & Penalties
- 2 Compliance Programs & Mandatory Disclosure
- 3 Setting Up An Effective Ethics & Compliance Program
- 4 Handling Procurement Information
- 5 Influencing Government Action
- 6 Personal Conflicts of Interest
- 7 Organizational Conflicts of Interest
- 8 Defective Pricing
- 9 Time Charging
- 10 Contract Claims

Contract Claims



Overview of Contract Claims: Preliminary Points

1. Procedural and Jurisdictional Requirements

- Contract Disputes Act (CDA) Claim Certification
- Pricing Mechanisms
- Contracting Officer's Final Decision
- Timely Appeal

2. Duty to Continue Performance

- Changes typically permitted within “general scope” exclude only “cardinal changes.”
- Different FAR Changes clause may be nuanced as to allowable scope of changes.
- Relatively absolute duty to continue performance.

3. Requests for Equitable Adjustment (REAs) v. Claims

- See next slide.

REAs v. Certified Claims

- Written precursor to a certified claim, goal being to achieve mutual settlement with the agency.
- REA legal and accounting prep costs may be included in the REA submission, but not in certified claim.
- Certification of REA is not a jurisdictional issue, but sometimes required by special agency regulations.
- No interest under the CDA.
- CDA Claim = “written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract.” Invoices and other routine payment requests are not claims.
- No claim preparation costs allowed by the FAR → REA as precursor.
- Claims in excess of \$100,000 must be certified in accordance with the CDA.
- Interest accrues from the date a proper certified claim is submitted.

Claim Certification

Four Elements

Every claim (or combination of related claims) in excess of \$100,000 must attach a written certification containing the following four elements:

1. Claim is made in good faith;
2. Supporting data are accurate and complete to the best of the contractor's knowledge and belief;
3. amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable;
4. Person certifying is authorized to certify on behalf of the contractor.

Claim Certification

Important Caveats

Multiple Claims – two or more claims relating to the same contract may be considered as a single claim for purposes of the \$100,000 jurisdictional threshold.

Defective Certification – old rule was that *any* material defect in claim certification was jurisdictionally fatal, even at the end of the case. Current rule is that only a *missing* certification deprives jurisdiction. Defective cert. can be corrected any time before final order.

Non-Dispositive Evidence – claim certification is evidence against both company and signer, but is not per se proof of fraud.

Claim Certification

Turner Certification

- Derived from 1987 Federal Circuit Case involving Turner Construction Company.
- Applies when prime contractor is submitting costs of subcontractors and suppliers to the Government.
- Slightly lower standard requiring the prime contractor to certify that there is a “good basis,” i.e., that the contractor has reviewed the claim and determined it is not frivolous.
- Good practices include: (1) requiring subcontractor to provide separate certification; (2) entering into liquidating agreement with indemnity obligation.

CDA Statute of Limitations

“Each claim by a contractor against the Federal Government relating to a contract and each claim by the Federal Government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim.” 41 U.S.C. § 7103(a)(4)(A).

- Claim “accrues” and statute begins to run upon the first date the contractor knew or should have known the basis for the claim, which is fact-intensive.
- Limitations period also applies to Government claims, including claims for CDA fraud under Section 7103(c). Recent case held that CDA fraud claims accrue the moment the fraud is committed by the contractor. Penalties under 7103(c) include partial forfeiture and payment of Government costs of reviewing invalid portion of claim.
- Recommended practice is to submit all claims relating to the contract at a single time, in order to consolidate all negotiation and leverage points during settlement discussions and avoid subsequent readjustment of damages.

Claim Pricing Methods

Direct Cost Method

- Focus is always on increased cost to the contractor, not added value to Government.
- Method calculates as the net increase of contractor's cost due to additional scope, quantity, type, or manner of performance.
- Important to deduct additional scope and allowable mark-ups (net).

Total Cost Method

- Calculated as the ultimate actual cost billed to project, less total budgeted cost of performance.
- Highly frowned upon by courts and boards and outright rejected where better method available.
- Compromises causation element by assuming all cost overruns attributable to one cause.

Modified Total Cost Method

- Identical to total cost method, but contractor reduces claim to account for inherent inefficiencies or other issues that were its responsibility.
- More accepted by boards and courts because it closes the causation gap.
- May require an experienced expert to opine on calculation of labor hour reduction.

Claim Preparation: Who Needs to Be Involved?

- Contracts Personnel – project manager or other person familiar with the scope of work, the Government personnel, and the contract terms.
- Technical Personnel – project engineer or other technical-minded person where claim involves questions of liability, interpretation of drawings or specifications, etc.
- Accounting Personnel – project accountant or other person experienced in FAR Part 31, who can vouch for damages calculation.
- Legal Personnel – in-house counsel, outside attorneys, or person with experience in CDA claims who can corral the claim, vet the claim narrative, pricing methodologies, and claim certification.

The COFD

- Contracting Officer's Final Decision (COFD) is a jurisdictional pre-requisite to any judicial or administrative appeal.
- Contracting Officer has 60 days from receipt of certified claim to issue a decision denying or granting the claim in whole or in part (may request more time).
- No magic words, though COFD usually states that it constitutes a “final decision” and identifies the contractor's appeal rights.
- Parties are free to engage in information exchange and negotiations about the claim pending a COFD.
- Deemed Denial = Contracting Officer fails to issue COFD within 60 days of receipt, rendering decision automatically appealable.

Appeals

Court of Federal Claims (COFD)

- Appeal must be filed within 1 year of receiving COFD.
- Article III judges appointed by President and confirmed by Senate.
- Procedural and evidentiary rules mimic those of federal district courts.
- DOJ attorneys head defense and court has FCA jurisdiction.

Boards of Contract Appeals (BCAs)

- Appeal must be filed within 90 days of receiving a COFD. ASBCA = DoD and CBCA = all civilian agencies.
- Administrative law judges who are not appointed by President, but are specialists in government contracts.
- Informal and more relaxed procedural and evidentiary rules than COFC.
- No FCA jurisdiction.

THANK YOU

FOR JOINING US

CHECK OUT FPS PODCASTS

fedpubseminars.buzzsprout.com/

FOLLOW US!



linkedin.com/company/fedpubseminars/



[@fedpubseminars](https://twitter.com/fedpubseminars)