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FEATURE COMMENT: *Hejran* And *Zafer*: Reiterating The CDA's March To Meaningful Review On The Merits

The ability for a Government contractor to secure fair resolution of a contract dispute is essential for maintaining a vibrant competitive marketplace for federal contracts. The perceived fairness of the contract dispute resolution process is influential on contractor participation. S. Rep. No. 95-1118, at 4 (1978) ("The way potential contractors view the disputes-resolving system influences how, whether, and at what prices they compete for Government contract business."). Yet even after passage of the Contract Disputes Act of 1978, it is often difficult for a contractor to secure a review of a claim on the merits due to a barrage of procedural and jurisdictional hurdles. The U.S. Court of Appeals for the Federal Circuit has cleared some of the thicket in recent years by reiterating its commonsense approach to evaluating the sufficiency of claims, finding that if a submission meets the requirements of a claim, it may be heard on the merits, even if it was not originally styled as a claim.

This Feature Comment discusses this recent guidance, including the Federal Circuit's treatment of the difficult question of which contractor submissions may be treated as valid claims under the CDA, even if not styled as such in the first instance. We then offer practical guidance for contractors navigating these issues.

A Brief History of Federal Contract Dispute Resolution and the Contract Disputes Act of 1978—The right to sue the U.S. Government to recover money under a contract is not a given. *U.S. v. Sherwood,* 312 U.S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued.") (citations omitted). At the inception of the U.S., "contractors had no access to the courts and their only recourse to enforce their contract rights was by private bill in Congress." U.S. Comm'n on Gov't Procurement, *Report of the Commission on Government Procurement* Vol. 4, 222 (1972). To relieve itself from granting these private bills and to assure due process to contractors, Congress established the Court of Claims in 1855. Id. In 1887, Congress passed the Tucker Act, providing the Court of Claims nationwide jurisdiction over monetary claims against the U.S. Government. Id. The "rationale of the Tucker Act, which greatly limited the doctrine of sovereign immunity, was that the Government subjects itself to judicial scrutiny when it enters the marketplace and should not be the judge of its own mistakes nor adjust with finality any disputes to which it is a party." S. Rep. No. 95-1118, at 12 (1978).

As time passed and federal procurement activities continued to increase, agencies began to handle "disputes by executive branch fiat—that is by the insertion of contract terms specifying how disputes in specific areas will be resolved—and by agency regulations governing the procedural and substantive adjudication of disputes." S. Rep. No. 95-1118, at 2 (1978). In December 1972, the Commission on Government Procurement concluded "the present system for resolving contract disputes needs significant institutional and substantive change if it is to provide effective justice to the contractors and the Government." U.S. Comm'n on Gov't Procurement, *Report of the Commission*

on Government Procurement Vol. 4, 3 (1972). The Commission made recommendations to improve the disputes process so "the Government and its contractors will benefit from less complicated and more economical means for resolving disputes." Id. at 4.

After the Commission, Congress passed the CDA in 1978. The CDA provided a framework to resolve claims both by the Government and contractors. There are five primary aspects of the CDA framework. Castellano*, "*After *Arbaugh*: Neither Claim Submission, Certification, Nor Timely Appeal Are Jurisdictional Prerequisites To Contract Disputes Act Litigation," 47 Pub. Cont. L.J. 35, 56 (2017). First, the CDA provides the process of submitting claims "in writing" to the contracting officer for a decision. 41 USCA § 7103(a). Second, for claims above $100,000, the CDA requires a four-prong certification that:

1. the contractor's claim is made in good faith,
2. the supporting data are accurate and complete to the best of the contractor's knowledge and belief,
3. the amount requested accurately reflects the amount for which the contractor believes the Federal Government is liable, and
4. the certifier is authorized to certify the claim on behalf of the contractor.

41 USCA § 7103(b)(1)(A)–(D). Third, upon receipt of a properly certified claim, a CO is required to issue a decision within 60 days or notify the contractor within the 60 days when a decision will be issued. 41 USCA § 7103(f). Fourth, the CDA provides the procedures for appealing the CO's final decision. Contractors have 90 days to appeal to an administrative board or 12 months to appeal to the U.S. Court of Federal Claims. 41 USCA § 7104(a)–(b). Fifth, if a contractor's claim is successful, the contractor is entitled to interest on the claim beginning on the date the CO received the claim until the date of payment of the claim. 41 USCA § 7109(a)(1).

What Is a Claim and What Are the Claim Requirements for a Court to Hear the Case on the Merits—The claim is the centerpiece of the CDA framework. However, the CDA does not statutorily define a claim. One commentator lamenting the regulatory definition of a claim stated:

> Of course, as we know, the "claim" thus defined by regulation with all of these unnecessary barnacles, caused delaying and disruptive litigation. Government lawyers, properly motivated to represent aggressively their client's interests, seized upon the definitional complexities to forestall the running of interest and payment of claims. Even worse, the complex definition afforded parties the opportunity to challenge subject matter jurisdiction of the CDA forums. These challenges, while considerably successful, undermined the Act's fundamental purposes. Further, the challenges disrupted (sometimes outrageously) the resolution of contractor claims, created confusion, and caused dismay in the private bar.

Johnson, "A Retrospective on the Contract Disputes Act*,*" 28 Pub. Cont. L.J. 567, 574 (1999).

Currently, a claim seeking monetary relief must meet the following three elements:

1. Meet the requirements of the Federal Acquisition Regulation definition of a "claim" (found in FAR 2.101 and FAR 52.233-1(c));
2. Contain a certification if over $100,000; and
3. Request a final decision from the CO.

With regard to the first element, the Federal Circuit instructs that the "definition of the term 'claim in the FAR' governs the use of that term in the Contract Disputes Act." *Zafer Constr. Co. v. U.S.,* 40 F.4th 1365, 1367 (Fed. Cir. 2022); 64 GC ¶ 233. FAR 52.233-1(c), included in most contracts, defines a claim as:

> a 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.

Notably, the above sentence "sets forth the only three requirements of a non-routine 'claim' for money: that it be (1) a written demand, (2) seeking, as a matter of right, (3) the payment of money in a sum certain." *Reflectone, Inc. v. Dalton,* 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc); 37 GC ¶ 411.

Second, a claim should contain the four-prong certification in 41 USCA § 7103(b)(1). A CO is not required to issue a final decision for a claim with a defective certification that a contractor failed to fix after the CO's notification of the defect. Additionally, a defect in the certification "does not

deprive a court or an agency board of jurisdiction over the claim" and a defective certification shall be corrected "[p]rior to the entry of a final judgment by a court or a decision by an agency board." 41 USCA § 7103(b)(3). Some boards and judges on the COFC hold that a missing certification may deprive jurisdiction. *Estes Express Lines v. U.S.,* 123 Fed. Cl. 538, 550 (2015); *Glob. Eng'g & Constr., LLC*, ASBCA 60072, 16-1 BCA ¶ 36,338; Castellano, "After *Arbaugh*: Neither Claim Submission, Certification, Nor Timely Appeal Are Jurisdictional Prerequisites To Contract Disputes Act Litigation," 47 Pub. Cont. L.J. 35, 62 (2017).

Third, a contractor must request a CO's final decision on the claim. This requirement is derived from 41 USCA § 7103(a)(1) and 48 CFR § 33.206(a), which instructs contractors to submit claims "to the contracting officer *for a decision*." *Zafer,* 40 F.4th at 1367 (emphasis added) (citations omitted). The request for a CO's final decision can be either express or implied. Id.

Once, a valid claim is submitted to the CO, there are two remaining requirements before a contractor can pursue judicial relief. First, there must be a CO's decision or deemed denial on the claim. A claim is deemed denied if the CO does not issue a decision on the claim "within the period required." 41 USCA § 7103(f)(5). For claims over $100,000, a CO has 60 days to issue a decision or notify the contractor of the time within which a decision will be issued. 41 USCA § 7103(f)(2); FAR 33.211(c)(2). If a claim was not presented to the CO or the CO does not issue a final decision on the claim, a board or the COFC will not address the merits of the case.

Second, a contractor must appeal to the appropriate board of contract appeals within 90 days of the CO's final decision or to the COFC within 12 months of the CO's final decision. 41 USCA § 7104(a); 41 USCA § 7104(b)(3). An untimely appeal fails to satisfy the statutory appeal requirements and, therefore, cannot be heard on the merits. *Bowman Constr. Co. v. U.S.*, 154 Fed. Cl. 127, 137 (2021).

An REA Can Be a Claim If the REA Meets the Attributes of a Claim—A request for equitable adjustment (REA) does not have a statutory or regulatory definition. Generally, an REA is a request (rather than a demand) from a contractor to a CO to adjust the contract for price, schedule, or other terms. *BAE Sys. Ordnance Sys., Inc.*, ASBCA 62416, 21-1 BCA ¶ 37,800. The table below highlights the differences between claims and REAs, although as discussed below, in practice, many REAs will also constitute claims:

	Claim	REA
Requests a CO's Final Decision (COFD)	Yes—request may be implied	No
Certification	Yes—if over $100,000 use FAR 33.207 certification	No—unless Department of Defense and amount over $250,000. Only Defense FAR Supplement 252.243-7002 two prong certification.
Required Submission	Yes—within six years of accrual of claim (CDA statute of limitation)	No—but if outside of CDA statute of limitation or after final payment, no recourse.
CO Required to Render Decision	Yes—response within 60 days or deemed denied	No
CDA Interest as part of settlement	Yes	No
Cost Allowability	Claim preparation costs are generally unallowable	Costs of REA preparation and settlement negotiations are allowable contract administration costs.

The Federal Circuit's Guidance Regarding the Distinction between REAs and Claims—*Federal Circuit History of Reviewing REAs as Claims*: The Federal Circuit has long been clear both that an REA may be a claim and that a request for a CO's final decision may be implied. For example, in *Transamerica Ins. Corp., Inc. v. U.S.*, 973 F.2d 1572, 1577–78 (Fed. Cir. 1992); 34 GC ¶ 551, the Court found that it was "obvious" that the contractor desired a final decision on its "equitable adjustment claim," even though the contractor did not use any "magic words" conveying a request for a final decision. Additionally, the fact that the contractor requested future meetings to discuss the matter did not undermine this conclusion. Id. As explained by the Court:

> The September 1 letter was in writing, was submitted to the contracting officer for a decision, requested payment of a sum certain, and gave the contracting officer adequate notice of the basis and the amount of the claim. This court is loathe to believe that in this case a reasonable contractor would submit to the contracting officer a letter containing a payment request after a dispute had arisen solely for the contracting officer's information and without at the very least an implied request that the contracting officer make a decision as to entitlement. Any other finding offends logic.

Id. at 1578.

Just a few years later, in the course of resolving the question of whether a pre-existing dispute is a necessary component of a claim (it is not), the Federal Circuit found that an REA can constitute a claim if the requirements for a claim are otherwise met. *Reflectone,* 60 F.3d 1572.

Having established that an REA may be a claim and that the request for a final decision may be implied, one might assume that nearly all REAs would be treated as claims, particularly those meeting any applicable certification requirement. However, the very next year, the Court cautioned that "not every nonroutine submission constitutes a CDA claim," and held that the contractor's submission did *not* impliedly request a final decision. *James M. Ellett Constr. Co., Inc. v. U.S.,* 93 F.3d 1537, 1543 (Fed. Cir. 1996); 38 GC ¶ 426. However, the facts of *Ellett* are readily distinguishable because the submission in question was a termination settlement proposal, which the Court found, by its very nature, to be a "proposal" that seeks to initiate negotiations with the Government, rather than obtain a final decision by the CO. Id. at 1544.

In *M. Maropakis Carpentry, Inc. v. U.S.*, 609 F.3d 1323, 1327–28 (Fed. Cir. 2010); 52 GC ¶ 225, the Court again confirmed that a claim need not contain an *explicit* request for a final decision, "as long as what the contractor desires by its submissions is a final decision." (quotations and citations omitted). But the Court nonetheless found that the contractor's submission was lacking because it "appear[ed] to promise a forthcoming written claim, which never materialized." Id. at 1328. "A claim cannot be based merely on an intent to assert a claim without any communication by the contractor of a desire for a contracting officer decision." Id.

In light of these cases, as well as the lack of a statutory or regulatory definition of an REA, commentators have rightly asked whether there is truly any difference in consequence between an REA and a claim. See "Requests for Equitable Adjustment vs. Claims: Is There a Difference?," 26 Nash & Cibinic Rep. ¶ 10; "Postscript: Requests for Equitable Adjustment vs. Claims," 26 Nash & Cibinic Rep. ¶ 42. As Vernon Edwards wrote in 2012:

> I do not think that the Contract Disputes Act makes any distinction whatsoever between REAs and claims. In fact, the CDA does not address that issue at all, explicitly or implicitly. COs might make such a distinction. Contractors might. But the law does not. Neither does the Federal Acquisition Regulation.

26 Nash & Cibinic Rep. ¶ 42. Despite this, the submission of "REAs" remains incredibly common, largely due to the possibility of negotiating a resolution amicably, without the procedural pressures that arise once a formal claim has been submitted.

Hejran Hejrat Co. Ltd. v. U.S. Army Corps of Eng'r, 930 F.3d 1354 (Fed. Cir. 2019); 61 GC ¶ 237: In its 2019 *Hejran* decision, the Federal Circuit examined a case involving the dual issues of whether an REA may be a claim and whether an implied request for a final decision may suffice under such circumstances. The Court reversed the Armed Services Board of Contract Appeals determination that the appellant had not submitted an adequate CDA claim where its submission was styled as an REA and did not expressly request a CO's final decision.

The *Hejran* Court notably did not profess to be making new law in this area. Rather, the Court cited a long line of precedent, dating back to *Transamerica* and *Reflectone*, for the propositions that an REA may be a claim and that a request for a final decision may be implied. The Court specifically found that Hejran's prior request that the submission be treated as an REA was not dispositive in determining whether the submission was, in fact, a claim, noting that Hejran's request that the submission be treated as an REA occurred more than a year after the submission was provided to the Government. *Hejran*, 930 F.3d 1354 at 1358. Instead, the Court focused on whether the submission otherwise met the requirements for a valid CDA claim, finding that it did. Id.

With regard to the requirement to request a decision by the CO, the Court once again con-

firmed that there is no requirement that the contractor use "particular words" to satisfy this requirement. The Court found that the submission constituted a request for a final decision on a claim because it "requested that the contracting officer provide specific amounts of compensation for each of the alleged grounds," and included "all of the hallmarks of a request for a final decision on a claim." Id. at 1357–58. The Court also found relevant the fact that the CO treated the denial of the REA as a "final determination" in the matter. Id. at 1358.

The lesson of *Hejran* is that, if an REA meets the requirements of a claim, including by at least impliedly requesting a final decision, it is a claim over which the board of contract appeals or COFC may exercise jurisdiction, even if the contractor previously expressly requested that the submission be "treated as an REA." But even with this clarification, questions remained, including how one determines whether a submission implicitly requests a final decision.

Zafer Constr. Co. v. U.S., 40 F.4th 1365 (Fed. Cir. 2022): The Federal Circuit's 2022 *Zafer* decision provided an opportunity to further clarify the most significant question following *Hejran*: what it means to implicitly request a final decision. In *Zafer*, the Federal Circuit reversed the COFC, finding that Zafer's submission was, in fact, a claim, despite not being labeled as such and not expressly requesting a final decision by the CO.

Zafer's REA was submitted in September 2013 and amended in December 2014. After several years of unsuccessful negotiations, Zafer sought to convert the REA into a claim in February 2018. However, the Government asserted that the February 2018 claim was time barred because the alleged conduct had transpired more than six years earlier. Thus, Zafer could only proceed if its earlier REA was, in fact, a claim.

According to the Federal Circuit, the only issue in dispute was whether the submission met the requirement that it request a decision by the CO. The Government contended that Zafer's submission only expressed an intent to negotiate, rather than a request for a final decision, while Zafer contended that the submission contained a detailed request for the money Zafer believed it was owed and thus manifested an intent for the CO to make a decision regarding entitlement.

The COFC considered whether Zafer's 2013 submission adequately requested a final decision in light of *Hejran*, concluding that it did not. The lower court reasoned:

> The December 17, 2014 REA (which incorporates the 2013 request), lacks a request for a final decision. Instead, it asks for negotiations and is void of any indication that Zafer was asserting a claim: "[t]his REA is submitted so that the parties can engage in immediate discussions and negotiations to mutually amicably resolve this request." This language plainly is not a current demand for payment but is a proposal for negotiations. This is further emphasized when Zafer "requests the opportunity to meet with and negotiate this matter so it may be resolved amicably by the parties without the necessity of pursuing additional avenues of relief available." Zafer explains the purpose of the REA when it discusses the REA preparation costs: "Government contract principles have long recognized that REA preparation costs incurred for the purpose of materially furthering the negotiation process is allowable." In closing, Zafer reiterates that the REA's purpose is to negotiate the matter further, "As stated in the outset we trust that immediate negotiations will ensue. ZAFER is prepared to engage in meaningful dialogue on site to further this process. ZAFER knows that the USACE is committed to use good faith in resolving a REA." Finally, the actions of the parties for more than three years following the submission of the amended REA show that the REA's intent was to trigger negotiations.

Zafer Constr. Co. v. U.S., 151 Fed. Cl. 735, 741–42 (2020) (citations omitted).

Thus, the COFC identified numerous indicators that Zafer was not demanding payment, but rather seeking to negotiate. What distinguishes *Zafer* from prior decisions is the Federal Circuit's rejection of these indicators, even when taken together, as a basis for concluding that the submission is an REA. That is, pursuant to the *Zafer* Court, a request for a final decision may be implied, despite the contractor labeling the submission as an REA, requesting negotiations, expressly stating that it desires to "amicably resolve" the request, seeking REA preparation costs (which are not compensable in the context of a claim), and otherwise treating the submission as an REA for over three years.

In reversing the lower court, the Federal Circuit explained that the inquiry regarding whether the submission adequately requests a final decision must focus on "whether, objectively, the document's content and the context surrounding the document's submission put the contracting officer on notice that the document is a claim requesting a final decision." *Zafer*, 40 F.4th at 1368. The Court then quoted its *Transamerica* decision from three decades earlier, noting "[t]here is no necessary inconsistency between the existence of a valid CDA claim and an expressed desire to continue to mutually work toward a claim's resolution." Id. (quoting *Transamerica*, 973 F.2d at 1579) (internal quotation marks omitted). With this holding, the Court paved the way for contractor submissions to be treated as valid CDA claims, even when the contractor styles the document as an REA, requests to negotiate, requests to recover its REA preparation costs, and otherwise manifests a subjective intent to "engage in a meaningful dialogue," rather than demand an immediate decision.

Practical Implications: The Federal Circuit through *Zafer* and many other decisions has shown a willingness to clear technical hurdles in order to permit meaningful judicial review of contractor claims. Although many contractors will benefit from these decisions, contractors should be prepared for these decisions to be used as a sword against them, rather than a shield. For example, a contractor might accrue significant REA preparation costs, only to find that the CO is treating the submission as a claim (for which such costs are not compensable), or a contractor may inadvertently miss an appeal deadline because it does not recognize a final decision as such.

Contractors should consider the following practice pointers when submitting an REA:

- Consider requesting a meeting with the Government customer to discuss the REA and its basis before providing a written submission. This provides the contractor an opportunity to share its position with the customer, discuss a negotiated solution in real time, and avoid (or delay) the written element of submitting a claim.
- For written REA submissions, contractors need to be intentional and "scrupulously" avoid submitting a claim. One way to do this is to carefully avoid "making a request—explicit or implicit—for a CO's final decision." *BAE Sys. Ordnance Sys., Inc.*, ASBCA 62416, 21-1 BCA ¶ 37,800 (finding the contractor's REAs did not implicitly request a CO final decision because the contractor "carefully avoid[ed] making a request" and the posture of the parties did not change in discussing the REAs). However, this alone may not be enough for a submission to be treated as an REA; other factors such as a lack of a sum certain or lack of any certification at all (unless one is required for the REA itself) may also be necessary.
- Importantly, contractors can seek clarification from the Government on whether the Government treated the REA as a claim and issued a final decision. See *Zafer,* 40 F.4th at 1371 (contemplating a CO communicating that it will treat the contractor's REA submission as a claim). A collaborative approach is often advantageous to resolution of the REA and preserving the customer relationship.
- Keep in mind the potential that the CO may treat the REA as a claim but note "allow[ing] the government to unilaterally designate when a submission becomes a 'claim' disrupts the balance of power between the government and contractors that the CDA sought to establish." *Reflectone*, 60 F.3d at 1582. Contractors should still anticipate appeal timelines and an audience that may review the REA to determine if it meets the requirements of a claim.
- A contractor can also mitigate risk by not only timely appealing the COFD but also submitting the REA ahead of any statute of limitation issues (six years from claim accrual). REAs themselves do not have a statute of limitation but contractors should leave sufficient time to negotiate a resolution with the Government to retain the option of submitting a claim. REA negotiations do not toll the statute of limitations for submitting a claim. *Globe Trailer Mfg., Inc.*, ASBCA 62594, 21-1 BCA ¶ 37,973) (rejecting contractor's argument that the Government employed misleading tactics to extend the parties' settlement negotiations beyond the expiration of the statute of limitations).
- Subcontractors wishing to submit an REA

must work closely with their prime to ensure the REA submission is not a claim.

In submitting a CDA claim, contractors must submit a valid claim to withstand a motion to dismiss so a claim can be heard on the merits. Contractors should consider the below:

- The claim must meet the three elements of a claim and request a COFD. Contractors should explicitly request a final decision to mitigate the risk of potential disputes regarding this required jurisdictional element of a CDA claim.
- The claim should contain the FAR 52.233-1(d)(2)(iii) certification. While a defective certification can be cured, this can complicate the road to recovery. A person authorized to sign the claim should do so in ink. Despite the ASBCA's *Kamaludin Slyman CSC*, ASBCA 62006 et al., 20-1 BCA ¶ 37,694; 62 GC ¶ 291 decision, there may be issues tracing an electronic signature back to the person who signed the claim which could unnecessarily complicate the recovery.
- Submit the claim within six years of accrual. Review CO correspondence carefully for items such as a FAR 33.211(d)(v) statement, to ensure a timely appeal from a CO's final decision.
- Clearly provide the CO with the facts and legal basis for how the Government's acts or omissions caused additional cost, work, and/or delay. Persuasively provide the legal explanation, relevant facts, and documentation such as the contract terms.
- Subcontractors need to work closely with the prime contractor to ensure all elements of a claim are met and to make it easy for the prime to submit the claim in "good faith."
- Pursuant to FAR 52.233-1(i), contractors must continue to perform required work, even while a contract dispute is pending, unless the Government fails to provide clear direction or performing is impractical.
- The submission of a claim does not preclude an offer to negotiate. In fact, one of the stated purposes of the CDA is to "induce resolution of more contract disputes by negotiation prior to litigation." *Zafer*, 40 F.4th at 1370 (citing S. Rep. No. 95-1118, at 1 (1978)).

Conclusion—The Federal Circuit recognizes that "contracting officers will sometimes face the difficult challenge of determining whether a request for equitable adjustment is also a claim." *Zafer,* 40 F.4th at 1370. Contractors should be aware that no matter how the submission is styled, titled, or described, if a purported REA contains the attributes of a claim and requests a COFD, even impliedly, it is a claim under the CDA and will not serve as a barrier for a hearing on the merits.

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This Feature Comment was written for THE GOVERNMENT CONTRACTOR by* Michael J. Bauer*, Deputy General Counsel of WSP USA, and* Stephanie M. Harden*, a partner, and* David L. Bodner*, an associate, with Blank Rome LLP. Mr. Bauer focuses primarily on Government Contracts matters and is responsible for some of the company's U.S.-based litigation. Ms. Harden and Mr. Bodner have extensive experience in Government Contracts matters, including claims and pricing disputes. Mr. Bauer may be reached at michael.bauer@wsp.com, Ms. Harden may be reached at stephanie.harden@blankrome.com, and Mr. Bodner may be reached at david.bodner@blankrome.com.

