Regulatory Coordinating Committee

Certification of Requests for Equitable Adjustment

Summary to be added later.

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September 9, 1997

Via Hand Delivery

Ms. Amy Williams
Defense Acquisition Regulations Council
PDUSA (A&T) DP (DAR)
IMD 3D139
3062 Defense Pentagon
Washington, D.C. 20301-3062

Re: Defense Federal Acquisition Regulation Supplement;
Certification of Requests for Equitable Adjustment;
DFARS Case 97-D302; , 62 Fed. Reg. 37146 (July 11, 1997)

Dear Ms. Williams:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry, and Government service. The Section's governing council and substantive committees contain a balance of members representing these three segments to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

BACKGROUND

On July 11, 1997, the Director of Defense Procurement issued an interim rule amending the Department of
Defense ("DoD") FAR Supplement ("DFARS") to require contractors to certify that requests for equitable adjustment that exceed the simplified acquisition threshold are made in good faith and that the supporting data are accurate and complete. The interim rule implements 10 U.S.C. \( \text{\textsection} 2410(a) \), as amended by Section 2301 of the Federal Acquisition Streamlining Act of 1994 ("FASA"), by adding a clause at DFARS 252.243-7002, entitled "Certification of Requests for Equitable Adjustment." See DFARS; Certification of Requests for Equitable Adjustment, 62 Fed. Reg. 37146 (1997) (codified at 48 C.F.R. pts. 235, 243, 252) (published as an interim rule with request for comments July 11, 1997).

A similar clause, entitled "Certification of Claims and Requests for Adjustment or Relief," previously existed at DFARS 252.233-7000. The previous clause implemented 10 U.S.C. \( \text{\textsection} 2410e \), which required contractor certification of claims, requests for equitable adjustment, and requests for relief under Public Law 85-804. Section 2301 of FASA repealed 10 U.S.C. \( \text{\textsection} 2410e \) and amended 10 U.S.C. \( \text{\textsection} 2410(a) \) to "make it clear" that DoD-unique certification requirements apply only to requests for equitable adjustment and requests for relief under Public Law 85-804. See H.R. Rep. No. 103-712, at 202 (1994). In making these changes, Congress contemplated that provisions of the Contract Disputes Act of 1978 ("CDA") would continue to govern the certification of "claims" on a government-wide basis. Id.

**COMMENTS**

In its comments on FASA \( \text{\textsection} 2301 \), the Section of Public Contract Law advocated the elimination of DoD-unique certification requirements on the grounds that the uniform CDA requirement would be sufficient to protect the Government's interests and would eliminate the confusion that arose from applying two different certification requirements. Although Congress ultimately elected to retain a modified version of the DoD-unique certification, the Section remains concerned that confusion may arise from the application of dual certification requirements. The Section is also concerned that the DFARS clause exceeds the statutory requirement and, in addition, may create confusion regarding the type of cost data that must be disclosed to support a request for equitable adjustment.

These concerns, along with recommended changes to the interim rule, are addressed in more detail below. For convenience, Attachment A hereto is a copy of the Federal Register notice of the interim rule, and Attachment B is the Section's proposed redraft of the interim rule.

**1. DFARS Clause Creates Confusion Regarding The Appropriate Certification To Use In A Particular Matter.**

As noted above, FASA amended Title 10 of the United States Code to make clear that: (a) the certification of contract "claims" is controlled exclusively by the CDA; and (b) the DoD-unique certification applies only to a "request for equitable adjustment to contract terms" or a "request for relief under Public Law 85-804."1/ Thus, the amendment attempted to eliminate the overlapping and often-confusing requirements regarding the certification of contract "claims." In doing so, FASA distinguished between a contract "claim" and a "request for equitable adjustment" ("REA"), as well as created a certification for REAs that is slightly different than -- although a subset of -- the certification for CDA claims.2/

At the time of FASA's passage in October 1994, the distinction between an REA and a claim was more significant, and less likely to create confusion, than it is today. At that time, the courts and administrative boards of contract appeals were applying the "pre-existing dispute" requirement established by Dawco Construction, Inc. v. United States, 930 F.2d 872 (Fed. Cir. 1991); that is, the courts and boards were holding that a contract "claim" -- over which they had jurisdiction -- had to be based upon a pre-existing dispute between the contractor and the Government. As a result of this holding, the submission of a valid CDA claim effectively became a two-step process: submission of an "REA" to generate the requisite pre-existing dispute between the parties; followed at some appropriate interval by submission of a CDA "claim." Notably, even if the REA was accompanied by a CDA certification, it typically was not deemed a "claim" at that time because there was no pre-existing dispute between the parties.

In July 1995, some ten months after passage of FASA, the Court of Appeals for the Federal Circuit issued its en banc decision reversing Dawco to the extent it required a pre-existing dispute for a valid CDA claim. Reflectone, Inc. v. Dalton, 60 F.3d 1572 (Fed. Cir. 1995). In reaching its decision, the Court held that only

"routine" requests for payment must be in dispute when submitted to constitute a CDA claim and that there is no such pre-existing dispute requirement for "non-routine" requests for payment. Notably, the Court went on to state that an REA, by way of example, is "anything but a 'routine request for payment.'" Id. at 1577.

Thus, under current law, an REA constitutes a CDA "claim" unless the REA either: (a) fails to meet one of the three criterion for a claim in FAR 33.201; 3/ or (b) is not certified in accordance with the CDA. See 41 U.S.C. 605(c). As a practical matter, because an REA almost always will meet the three basic criteria for a claim, the certification of an REA/claim (and the particular form of that certification) often is the sole factor that determines whether a submission is an "REA" or a "claim."

Given this narrow distinction between contract claims and REAs, the Section believes that the interim rule creates two potential areas of confusion. First, in a situation where a contractor wishes to submit a CDA claim to the DoD (and, thus, start the accrual of interest on the claim), it is unclear whether the contractor may submit only the CDA certification required by 41 U.S.C. 605(c) or must also submit the DoD-unique certification required by 10 U.S.C. 2410(a). Although the better view is that the CDA certification would be sufficient in such a case (because it is broader and specifically encompasses the elements of the DoD-unique certification), contractors and the Government have wasted resources arguing over similar issues in the recent past, and a clarification would, therefore, be appropriate.

Second, again in a situation where a contractor wishes to submit a CDA claim to the DoD, the DFARS clause may mislead a contractor into submitting a certification that meets the DoD-unique requirements, but fails to meet CDA requirements for certification (and thus precludes recovery of interest from the date of submission). 4/ This is most likely to occur with smaller, less-sophisticated contractors who, ironically, also may be most in need of recovering interest on an REA/claim to offset the cost of financing contract performance. Thus, to prevent the DFARS certification requirement from being a trap for the unwary, appropriate clarification should be provided.

The Section suggests that both of the above problems could be solved or at least mitigated by adding an additional subparagraph to DFARS sections 243.204-70 and 252.243-7002. That additional subparagraph would put Contracting Officers and contractors on notice of the potentially meaningful differences between the CDA and DoD-unique certifications. The additional subparagraph, which logically should appear as subparagraph (b) in both sections, should read substantially as follows (proposed new language is in bold italics):

\[(b) \text{ The certification required by this clause is different than the certification required by the Contract Disputes Act of 1978, 41 U.S.C. 605(c), and has different legal consequences. See FAR Subpart 33.2 regarding the certification of a contractor "claim." If the contractor certifies its REA or claim in accordance with the Contract Disputes Act of 1978, 41 U.S.C. 605(c), the certification at DFARS 252.243-7002 shall not be required.}\]

There is precedent for this cross-referencing and synthesis of the two certification requirements. In fact, language substantially similar to that proposed above was included in the previous DFARS provision on certification. See DFARS 233.77000(c) (as of January 1, 1997). Given the potential for confusion of the two certifications, the Section recommends that similar language be included in the final DFARS rule.

2. DFARS Clause Exceeds The Statutory Requirement.

As described above, 10 U.S.C. 2410(a) creates a DoD-unique certification requirement applicable to a request for equitable adjustment or a request for relief under Public Law 85-804 that exceeds the simplified acquisition threshold. The certification language in the statute is faithfully reproduced in subparagraph (a) of the DFARS clause.

The DFARS clause goes on, however, to state additional requirements and "clarifications" -- which are not
reflected in the statute -- in three subsequent subparagraphs. Although recognizing that most of the language in these three subsequent subparagraphs was included, in some form, in the previous DFARS certification clause (i.e., DFARS 252.233-7000), the Section questions the authority and necessity for certain of these additional requirements and clarifications. In particular, the Section is concerned that portions of these additional subparagraphs may be misinterpreted to provide a basis for denying or delaying payment of an otherwise meritorious REA. The following paragraphs address the Section's concerns and recommendations in more detail.

a. Subparagraph (b): Overly Broad Disclosure Obligation

Of particular concern is the introductory portion of subparagraph (b), which goes beyond the statutory certification requirement -- as did the previous DFARS certification clause -- to create a broad requirement for "disclosure of all relevant facts related to the REA" and, worse, which links that broadened requirement to the representations made in the statutorily required certificate. See DFARS 252.243-7002(b). See also 62 Fed. Reg. at 37147, D.11 ("The clause at DFARS 252.243-7002 requires contractors to . . . provide full disclosure of all relevant facts in support of the requested adjustment") (emphasis added).

Although the Section endorses the apparent intent of the proposed DFARS to ensure that REAs are accurate, thoroughly supported, and sufficient to allow fair and prompt processing, the Section believes that there are more acceptable (and effective) ways to move toward that objective, especially where the controlling statute provides no basis for the proposed approach. Thus, the Section suggests that the DFARS might profitably (and properly) be amended to provide guidance -- perhaps linked to expeditious processing of REAs -- designed to make REAs better, for example, (1) that REAs should be supported by a clear written statement of the basis for the price increase or adjustment in terms and conditions sought, (2) that supporting documents, including copies of contract provisions and relevant correspondence, should be attached and referenced in the text of the REA, (3) that processing of an REA is likely to be more prompt if known facts and arguments adverse to the contractor's theory are addressed in the REA and thereby dealt with early in the process, (4) that auditable cost data should be provided either at the time an REA is initially submitted or, in any event, at such time as the statement of entitlement is deemed sufficient to merit consideration of costs, and (5) that regulatory or legal authority may be but need not necessarily be referenced in the REA.

The Section opposes, however, adding a regulatory requirement for the "disclosure of all relevant facts" particularly if done, as proposed, in the context of a mandated certification. That linkage, which seems inescapable since the required disclosure is tied by regulation to the required certification, is certain to provide the basis for delays in processing REAs or, more serious, civil and perhaps criminal false claims litigation regarding the meaning of "disclosure" and of "all relevant facts." Care should be taken to avoid such disputes; the proposed language invites them. The certificate required by the statute already requires a statement that supporting data are "complete," a term regarding which there is judicial guidance in the context of CDA claims (discussed elsewhere in these comments). There is simply no good reason to introduce new, broad, undefined and almost certainly contentious language into an area that is not only disputatious, but that poses such high risks for contractors. This is especially true where, as here, there has been no suggestion that the existing provisions are in any way insufficient to protect the Government's interests.

Accordingly, the Section recommends that the introductory language in subparagraph (b) be modified to put contractors on notice of the Government's reasonable expectations regarding REA submission, without creating a broad disclosure obligation that exceeds the statute's requirement. Specifically, the Section recommends that subparagraph (b) be reformulated -- and moved to subparagraph (e) of the clause -- as follows:

(e) Timely and effective consideration of a request for equitable adjustment is best served by the submission of sufficient information to provide a basis for meaningful review and dialogue between the parties, with an aim toward negotiating an equitable adjustment, if appropriate, to the contract terms. Such information may include the following:
(1) information supporting the contractor's entitlement to an equitable adjustment;

(2) [see discussion in part 2.b below].

(3) [see discussion in part 2.b below].

DFARS 252.243-7002(b) (proposed modifications in bold italics).

In recommending the language above, the Section has attempted to endorse the Government's legitimate need for supporting information without creating a potential procedural impediment to the submission of an REA. This approach is consistent with the Federal Circuit's decision in H.L. Smith v. Dalton, 49 F.3d 1563 (Fed. Cir. 1995). In that case the Court reversed a decision of the Armed Services Board of Contract Appeals in which the Board had dismissed a contractor's appeal for lack of jurisdiction. The Board had concluded that a series of one- and two-page letters from the contractor seeking significant equitable adjustments were not CDA "claims," because the contractor had failed to provide supporting documentation to explain the basis and calculation of its claims.5/ The Federal Circuit reversed the Board, holding that a CDA claim requires only "a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim." Id. at 1565-1566. Given this holding, the Section believes that the final DFARS rule should not attempt to create either an "obligation" or an independent procedural "requirement" for submission of data to support an REA, but should express the DoD's reasonable needs and expectations with regard to supporting documentation.

b. Subparagraph (b): Ambiguous and Overly Broad Requirement for Cost Data

As noted above, subparagraph (b) of the DFARS clause currently requires the disclosure of "all relevant facts relating to the requested adjustment," including specifically:

(1) Cost or pricing data if required in accordance with FAR 15.804-2; and

(2) Actual cost data and data to support any estimated costs, even if cost or pricing data are not required.

DFARS 252.243-7002(b). Thus, the DFARS clause properly recognizes that "cost or pricing data" may be obtained by a Contracting Officer only in accordance with FAR 15.804-2.6/ Nonetheless, potential problems with the new DFARS clause arise from the requirement for submission of "[a]ctual cost data and data to support any estimated costs, even if cost or pricing data are not required" (emphasis added).

First, although the Section recognizes the need to justify many REAs with appropriate cost and/or estimating data, the terms "actual cost data" and "data to support any estimated costs" are undefined and could be a source of significant dispute between the parties. In effect, because the terms are so broad and undefined, and because such data may be required by a Contracting Officer "even if" cost or pricing data is not required, the Section is concerned that a contractor could be forced to provide the equivalent of "cost or pricing data" to support a requested adjustment, regardless of the specific regulatory prohibitions that may otherwise apply in the situation. For example, under the interim DFARS rule, a Contracting Officer could seek "actual cost data" on a commercial-item modification, even though the FAR may clearly prohibit a request for "cost or pricing data" on the same modification. See FAR 15.804-1(a)(4).

Second, the interim rule fails to recognize that, in certain circumstances, it may be sufficient and appropriate to conduct a "price analysis" of an REA rather than a "cost analysis." For example, FAR 15.804-5(a)(1) provides that, if cost or pricing data are not required because an exception applies, or an action is at or below the cost or pricing data threshold, the Contracting Officer "shall perform a price analysis to determine the reasonableness of the price and any need for further negotiation." The interim rule makes no provision for such a situation.
To address these issues, the Section recommends that the DFARS clause refer to the appropriate terms and provisions of FAR Part 15 and FAR Part 43. Specifically, subparagraph (b) of the DFARS clause -- which the Section recommends be moved to Subparagraph (e) and be modified as described in part 2.a above -- should be amended to provide for a contractor’s provision of:

(2) Cost or pricing data if required in accordance with FAR 15.804-2; or

(3) Information other than cost or pricing data (as described by FAR 15.804-5) that will allow the Contracting Officer to conduct a reasonable cost or price analysis when required by FAR 15.805 and FAR 43.204(b)(4).

DFARS 252.243-7002(b) (proposed modifications in bold italics). The Section believes that these changes would enable the Government to conduct cost or price analysis, as appropriate, while providing both the Contracting Officer and the contractor with the appropriate regulatory framework for deciding upon the types and levels of data appropriate to the situation.

c. Subparagraph (d): Ambiguous Clarifications

The potential problems created by the extra-statutory language of the DFARS clause are also illustrated by subparagraph (d), which states that a request "shall include only costs for performing the change," "shall not include any costs that already have been reimbursed or that have been separately claimed," and "shall only include indirect costs that are properly allocable to the change." The Section submits that these "clarifications" are unnecessary and create more opportunity for misinterpretation than appropriate guidance to contractors and Contracting Officers.

For example, the clarifications could be misinterpreted to preclude recovery of unabsorbed overhead associated with a Government-caused delay, because such costs arguably would not include only those for "performing the change." Similarly, what does it mean to require that an REA cannot include costs "separately claimed" -- could an REA (or more than one REA) present alternative theories of recovery that would be appropriate but overlapping to some degree? Again, contractors and the Government have spent significant resources arguing and litigating over such narrow and unproductive issues in the recent past. The Section suggests that these extra-statutory and unnecessary clarifications be deleted from the final DFARS rule to prevent a repeat of such wasteful arguments.

CONCLUSION

The Public Contract Law Section recommends that the final DFARS rule on certification of REAs be amended as reflected in Attachment B hereto. The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

Marcia G. Madsen
Chair
Section of Public Contract Law

cc: David A. Churchill
Rand L. Allen
Gregory A. Smith
Council Members
Chair and Vice Chairs of the Judicial Remedies Committee
Chair and Vice Chairs of the Federal Claims and Remedies Committee
Chair and Vice Chairs of the Accounting, Cost and Pricing Committee
Alexander J. Brittin
FOOTNOTES:

1/ The DoD certification statute provides as follows: "A request for equitable adjustment to contract terms or request for relief under Public Law 85-804 (50 U.S.C. 1431 et seq.) that exceeds the simplified acquisition threshold may not be paid unless a person authorized to certify the request on behalf of the contractor certifies, at the time the request is submitted, that (1) the request is made in good faith, and (2) the supporting data are accurate and complete to the best of that person's knowledge and belief." 10 U.S.C. 2410(a).

2/ The CDA provides that the contractor shall certify (i) that the claim is made in good faith, (ii) that the supporting data are accurate and complete to the best of the certifier's knowledge and belief, (iii) that the amount requested accurately reflects the adjustment for which the contractor believes the Government is liable, and (iv) that the certifier is duly authorized to certify the claim on the contractor's behalf. 41 U.S.C. 605(c). By contrast, the DoD-unique statute requires an individual authorized by the contractor to certify (i) that the request is made in good faith and (ii) that the supporting data are accurate and complete to the best of the certifier's knowledge and belief. 10 U.S.C. 2410(a).

3/ The Court of Appeals for Federal Circuit held in Reflectone that the essential elements of a CDA claim are (1) a written demand, (2) seeking a sum certain (or other contract relief), (3) as a matter of right. See Reflectone, 60 F.3d at 1576.

4/ One factor contributing to this potential confusion is that the DoD-unique certification is now prescribed in Subpart 243 of the DFARS ("Contract Modifications"), rather than in Subpart 233 ("Protests, Disputes, and Appeals"). The previous DFARS certification requirement appeared in Subpart 233, and the CDA certification requirement appears in the related FAR Part 33. Thus, although the Section understands the logic of placing the new DFARS certification provision in the Subpart on Contract Modifications, such placement nonetheless could mislead an unsuspecting contractor into believing that the FAR contained no complementary or related certification provision. Accordingly, cross-referencing of the two certification requirements, as recommended above, is all the more appropriate.

5/ The Board reasoned that a "satisfactory claim provides the Contracting Officer with sufficient information to conduct a meaningful review and furthers the desired goal of providing a basis for meaningful dialogue between the parties with an aim toward settling the dispute." H.L. Smith, Inc., ASBCA Nos. 45111 et al., 94-2 BCA 26,723, at 132, 933. The Section has drawn upon this language in formulating its recommended changes to the interim rule.

6/ This is an improvement over the previous DFARS certification clause, which ambiguously required disclosure of "cost and pricing data" (whatever that term meant) for all requested adjustments over $100,000. See DFARS 252.233-7000(b) (as of January 1, 1997).

ATTACHMENT A


ATTACHMENT B

ABA Section of Public Contract Law's Recommended Changes to DFARS Interim Rule On Certification of Requests for Equitable Adjustment

252.243-7002 Certification of Requests for Equitable Adjustment.
(a) A request for equitable adjustment to contract terms that exceeds the simplified acquisition threshold may not be paid unless the contract certifies the request in accordance with the clause at 252.243-7002.

(b) The certification required by the clause at 252.243-7002 is different than the certification required by the Contract Disputes Act of 1978, 41 U.S.C. § 605(c), and has different legal consequences. See FAR Subpart 33.2 regarding the certification of a contractor "claim." If the contractor certifies its REA or claim in accordance with the Contract Disputes Act of 1978, 41 U.S.C. § 605(c), the certification at DFARS 252.243-7002 shall not be required.

(c) The aggregate amount of both the increased and decreased costs shall be used in determining when the dollar threshold requiring certification is met (see example in FAR 15.804-2(a)(1)(iii)).

252.243-7002 Certification of Requests for Equitable Adjustment.

As prescribed in 243.205-72, use the following clause:

Certification of Requests for Equitable Adjustment (July 1997)

(a) In accordance with 10 U.S.C. 2410(a), any request for equitable adjustment to contract terms that exceeds the simplified acquisition threshold shall bear, at the time of submission, the following certificate executed by an individual authorized to certify the request on behalf of the Contractor:

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.

(Official's Name)

(Title)

(b) The certification required by this clause is different than the certification required by the Contract Disputes Act of 1978, 41 U.S.C. § 605(c), and has different legal consequences. See FAR Subpart 33.2 regarding the certification of a contractor "claim." If the contractor certifies its REA or claim in accordance with the Contract Disputes Act of 1978, 41 U.S.C. § 605(c), the certification set forth in paragraph (a) above shall not be required.

(c) The certification requirement in paragraph (a) of this clause does not apply to:

(1) Requests for routine contract payments; for example, requests for payment for accepted supplies and services, routine vouchers under a cost-reimbursement type contract, or progress payment invoices; or
(2) Final adjustments under an incentive provision of the contract.

(d) The amount requested shall accurately reflect the contract adjustment for which the Contractor believes the Government is liable.

(e) Timely and effective consideration of a request for equitable adjustment is best served by the submission of sufficient information to provide a basis for meaningful review and dialogue between the parties, with an aim toward negotiating an equitable adjustment, if appropriate, to the contract terms. Such information may include the following:

(1) information supporting the contractor's entitlement to an equitable adjustment;

(2) Cost or pricing data if required in accordance with FAR 15.804-2; or

(3) Information other than cost or pricing data (as described by FAR 15.804-5) that will allow the Contracting Officer to conduct a reasonable cost or price analysis when required by FAR 15.805 and FAR 43.204(b)(4).

NOTE: Recommended changes are in bold italics.

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