You Just Got a Call on a Public Project: Top 10 (plus Bonus) Tips and Traps for the Uninitiated

Paul A. Varela
Varela, Lee, Metz & Guarino, LLP
Tysons Corner, VA

Barbara G. Werther
Troutman Sanders LLP
Washington, DC

Ty D. Laurie
Laurie & Brennan LLP
Chicago, IL

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Formation:

Topic 1 - Incorporation of FAR clauses: what exactly is the contract?

The *Christian* Doctrine

I. If a clause is omitted from a contract between the Federal Government and a contractor, it will be read into the contract if

   A. the clause is required by law and

   B. the requirement is based on fundamental procurement policy.


   A. CO failed to include a termination for convenience provision, even though that provision was required by regulations.

   B. When the Federal Government terminated the Contract, the court held that since the omitted termination clause was required under the DAR (predecessor of the FAR), it had the force and effect of law and could be utilized.

   C. Rationale of the court was that since the regulation was published in the Federal Register, contractors were on notice of the requirements and COs had no authority to ignore such a regulation.

III. *Chamberlain Manufacturing Corp.*, ASBCA No. 18103, 74-1 BCA ¶ 10,368.

   A. ASBCA limited scope of *Christian* in that only mandatory provisions that constitute fundamental procurement policy would be incorporated by law into government contracts.

   B. *Chamberlain* has been adopted by the Federal Circuit and remains the law today.

IV. *Christian* Doctrine never applies to optional clauses.

   A. Contractor would not be on notice of any regulatory requirement that such optional clauses would be included in its contract.

V. Fundamental Procurement Policy v. Non-Fundamental Procurement Policy.

   A. Examples of Fundamental Procurement Policy Clauses.
1. Termination for Convenience Clause; the Changes Clause; the Payments Clause; the Disputes Clause; the Protest After Award Clause, etc.

B. Examples of Non-Fundamental Clauses.

2. Variation in Estimated Quantities Clause; the Cancellation Under Multiyear Contracts Clause, etc.

VI. As a result of Christian and its progeny, contractors must be aware which clauses are considered fundamental procurement policy and which are considered non-fundamental procurement policy.

Topic 2 - Incorporation of statutes and regulations in the IFB/RFP: bidder’s obligation to know

I. Incorporation without reference or as an operation of law:

A. The Christian doctrine states that certain clauses are of such importance in public procurements so as to be considered incorporated by operation of law. G.L. Christian & Assocs. v. United States, 312 F.2d 418 (Ct. Cl. 1963).

B. “Such regulations are law, binding on the contract parties” when otherwise applicable to the contract, Dravo Corp. v. United States, 480 F.2d 1331, 1333 (Ct. Cl. 1973), and “need not be physically incorporated into the contract,” First Nat’l Bank of Louisa, Ky. v. United States, 6 Cl. Ct. 241, 244 (1984) (citing Hills Transp. Co. v. United States, 492 F.2d 1394, 1396 (Ct. Cl. 1974)

C. The court in Bay County, Florida v. U.S., No. 11-157C, determined as a matter of law that the clause pertaining to independently regulated utilities, FAR § 52.241-7, is incorporated into the contract in place of the improper clause, FAR § 52.241-8, which is physically present."

D. When a contract subject to the FAR incorporates improper terms of the FAR, the correct provisions of the FAR control. See S.J. Amoroso Const. Co. v. United States, 12 F.3d 1072, 1075 (Fed. Cir. 1993)

E. “Under the so called Christian doctrine, a mandatory contract clause that expresses a significant or deeply ingrained strand of procurement policy is considered to be included in a contract by operation of law.” S.J. Amoroso, 12 F.3d at 1075.

F. “[a]pplication of the Christian doctrine turns not on whether the clause was intentionally or inadvertently omitted, but on whether procurement policies are being ‘avoided or evaded (deliberately or negligently) by lesser officials.’” Id. (citing G.L. Christian & Assocs., 320 F.2d at 351). The proper clause was consequently given effect. Id. at 1077.

1. Application: If contract expressly provides, wrongful termination for default is not converted to convenience and termination is a breach of K requiring payment for lost profit damages. However, public owner could invoke Christian Doctrine to argue that wrongful termination for default is converted to convenience language was incorporated into contract as a matter of law.

2. Buy American Act (BAA) evidences significant or deeply ingrained strand of public procurement policy that is required, under “Christian doctrine,” to be included in federal construction contract by operation of law. Court applied the Christian Doctrine to a construction contract to, in effect, delete the version of the BAA clause applicable to supply contracts and insert the BAA clause applicable to construction contracts. S.J. Amoroso Construction Co., Inc. v. United States, 12 F.3d 1072, 1075 (Fed. Cir. 1993)

3. The Differing Site Conditions clause (52.236-2) was incorporated into a construction contract under the Christian Doctrine. James R. Schmidtlein Co., GSBCA 5311, 79-2 BCA ¶ 14157 (GSBCA 1979)

4. The Equal Opportunity clause (52.222-26) was incorporated into a contract under the Christian Doctrine. General Exhibits, Inc., DOTCAB 72-38, 77-1 BCA ¶ 12236 (DOTCAB 1977)

5. Pursuant to the Christian Doctrine, the bonding requirements set forth in the Miller Act (and implemented by FAR 52.228-15) are mandatory and must be included in government construction contracts if they are omitted by the Government. K-Con, Inc., ASBCA 60686, 17-1 BCA ¶ 36632 (Armed Serv. B.C.A. 2017)

Topic 3 - Challenging a past performance determination: when and how

I. Jurisdiction under Todd Construction and Compucraft Inc.

A. Challenge to an unsatisfactory performance evaluation is subject to review by the Court of Federal Claims.

B. The Court of Federal Claims held that the right to challenge a past performance determination is guaranteed by the Contract Disputes Act because such a claim “arises under or relates to” the performance of the contract. Todd Construction, L.P. v. United States, 85 Fed. Cl. 34, 45-46 (Fed. Cl. 2008).
C. The Court of Federal Claims later affirmed this position but held that it lacks the authority to provide injunctive and equitable relief but it does have the authority to provide declaratory relief. Despite the Court’s ability to grant such relief, the Court recognizes that the only relief a contractor may seek is declaratory relief and then a remand of the case to the contracting officer with “proper and just” instructions. *Todd Construction, L.P. v. United States*, 88 Fed. Cl. 235, 248-49 (Fed. Cl. 2009).

D. Despite the Court of Federal Claims’ holding that Todd Construction had a legally enforceable right to an accurate and fair performance evaluation, *Todd Construction, L.P. v. United States*, 94 Fed. Cl. 100, 113 (Fed. Cl. 2010), the Court of Appeals for the Federal Circuit later held that Todd failed to “allege that the performance evaluations at issue …were based solely – or even substantially – upon the specific performance difficulties’ Todd claimed were not its fault.” *Todd Construction, L.P. v. United States*, 656 F.3d 1306, 1316 (Fed. Cir. 2011).


II. How to Challenge a Past Performance Evaluation

A. If a contractor wishes to challenge a past performance determination in the Court of Federal Claims, he or she should file a suit in the Court of Federal Claims under the Tucker Act and the Contract Disputes Act, and plead facts alleging that the government abused its discretion in issuing its evaluation. *Todd Construction, L.P., v. United States*, 645 F.3d 1306, 1316 (Fed. Cir. 2011). For example, if there was no reasonable basis for a contracting officer’s decision, the contracting officer acted arbitrarily or capriciously and thus abused his discretion. *Burroughs Corporation v. United States*, 223 Ct. Cl. at 64, 617 F.2d at 597; *Hoel-Steffen Construction Company v. United States*, 231 Ct. Cl. 128, 684 F.2d 843 (1982) (contracting officer ignored industry’s customary practice of phoning in bids at the last moment was arbitrary and capricious).

B. A contractor may also choose to appeal the decision to a Board of Contract Appeals. *Compucraft, Inc. v. General Services Administration*, 17-1 B.C.A. ¶ 3662 (Mar. 1, 2017).

III. Type of Relief Granted

A. The Court of Federal Claims may only rule that a contracting officer’s decision is arbitrary and capricious but does not have the ability to grant injunctive relief. *Todd Construction*, 88 Fed. Cl. at 248.
B. The Boards of Contract Appeals may not direct the contracting officer to revise a performance evaluation in a particular way. *Appeal of Versar, Inc.*, ASBCA No. 56857, 10-1 BCA ¶ 34,437 (May 6, 2010).

C. A contractor does not have the ability to seek monetary remedies or specific performance. *Appeal of Rig Masters, Inc.*, ASBCA No. 52891, 2003 WL 21489875 ¶ 31468 (June 13, 2001).

**Topic 4 - Protection of proprietary data during a bid protest: obligation to act**

**Protective Orders**

I. GAO

A. Utilized when the record in a protest contains proprietary or confidential information, or any information of which its release could result in a competitive advantage.

B. Issued by GAO to allow the protestor’s counsel limited access to protected information relevant to the protest.

1. It is the responsibility of the protestor’s counsel to request the protective order.

2. In order to obtain a protective order in a bid protest, the protestor MUST be represented by counsel, because a protective order only allows for counsel to view the information covered by the protective order. *See Vistron, Inc.*, 1997 WL 643303, at *3 n.2 (Comp. Gen. Oct. 17, 1997).

3. Protester’s and intervener’s attorneys are precluded from disclosing to their clients the majority of information concerning the protest.

II. COFC

A. The only court empowered to entertain federal bid protect actions.

B. Like GAO, COFC employs protective orders to prevent disclosure, except to counsel and any expert admitted to the protective order.

III. GAO Protective Orders in COFC Matters

A. Information covered under a GAO protective order may be used in a subsequent bid protest filed at COFC without authorization from the GAO under certain circumstances.

1. The information MUST be filed under seal;
2. COFC MUST be informed of GAO’s protective order; and

3. The Court is requested to issue its OWN protective order to cover the protected material.

B. Other than the circumstance enumerated in “III - A,” a party needs express written authorization to use material covered by a GAO protective order.

**Topic 5 - Discovery in a Federal Bid Protest: GAO vs. Court of Federal Claims**

I. Discovery in a GAO Bid Protest

A. The Agency Record

1. The agency has 30 days after notification of the protest to file a report on the protest with the GAO. 31 U.S.C. § 3553(b)(2)(A)

2. The agency record shall include a statement of relevant facts, a list and a copy of all relevant documents, including the bid or proposal submitted by the protestor (typically redacted), abstracts of bids or offers, and all evaluation documents. 4 C.F.R. §21.3(d).

3. The GAO will decide if the agency must provide any withheld documents and whether the documents should be provided under a protective order. 4 C.F.R. §21.3(h).

B. Protective Orders

1. If the record in a protest contains “protected information,” for example, the company’s proprietary or confidential data or the agency’s source selection sensitive information, that information cannot be made public. 4 C.F.R §21.4(a).

2. Only attorneys or consultants retained by counsel appearing on behalf of the party and admitted under a protective order have the authority to view any protected information contained under the order. 4 C.F.R § 21.4(c).

3. Any violation of the terms of the protective order may result in sanctions including “referral to appropriate bar associations or other disciplinary bodies, restricting the individual’s practice before the GAO, prohibition from participation in the remainder of the protest, or dismissal of the protest.” 4 C.F.R § 21.4(d).

II. Discovery in a Court of Federal Claims Bid Protest

A. Discovery Tools Available in a Court of Federal Claims Bid Protest
1. The Court of Federal Claims’ review of a bid protest is generally limited to the administrative record. The administrative record should include “all information relied upon by the agency as it made its decision, as well as documentation of the agency’s decision-making process.”

2. A protester may utilize additional discovery tools such as depositions and interrogatories, if pertinent information is missing from the administrative record. *Midwest Tube Fabricators, Inc. v. United States*, 104 Fed. Cl. 568, 574-75 (Fed. Cl. 2012).

B. The Court of Federal Claims may authorize additional limited discovery if it is “necessary for effective judicial review.” *Axiom Resources Management, Inc. v. United States*, 564 F.3d 1374, 1381 (Fed. Cir. 2009).

C. The Court of Federal Claims may also authorize additional limited discovery if there is a showing of 1) motivation for the Government employee in question to have acted in bad faith or 2) engaged in conduct that is hard to explain absent bad faith.” *Beta Analytics Intern., v. United States*, 61 Fed. Cl. 223, 226 (Fed. Cl. 2004).

III. Key Differences Between Discovery in the GAO and the Court of Federal Claims

A. In a GAO bid protest, a protective order is limited to counsel and consultants retained by counsel who are accepted into the protective order. Neither clients nor staff are able to view the protective order or the documents produced pursuant to the protective order. 4 C.F.R. §21.4(c). In the Court of Federal Claims, it is the responsibility of those admitted to the protective order to keep information confidential, but sanctions are not automatically filed in the event of disclosure. *Procedure in Procurement Protest Cases Pursuant to 28 U.S.C. §1491(b) Appendix C, section 16(c).*

B. Any agency or party filing a document that the agency or party believes to contain protected material shall, if requested by another party, provide to the other parties (unless they are not admitted to the protective order) an initial proposed redacted version of the document within 2 days of the request. This means that any documents requested or documents provided by a party, cannot be given to a client, because they are not admitted to the protective order. 4 C.F.R. §21.4(b)

C. In a GAO bid protest, an objection to an applicant’s admission to the protective order shall be filed within two days after the application is filed, although the GAO may consider objections filed after that time. 4 C.F.R §21.4(d). In the Court of Federal Claims, objections to an application for access to the protective order must be filed with the court within two days after a party’s receipt of the application. The Court of Federal Claims is silent as to whether it will consider
objections filed after the two days period of time. 28 U.S.C. §1491(b) Appendix C, section 18(b).

D. Counsel must be extremely careful regarding their responsibilities as it relates to the transmission of protected materials. Support staff for example have inadvertently included protected documents to be mailed or sent to clients, or improperly forwarded a GAO decision to a client. GAO-09-770 SP, Guide to GAO Protective Orders, Chapter V. Violations of GAO Protective Orders (June 1, 2009).

**Topic 6 - Authority of officials to bind the Federal Government: be careful from whom your client takes orders**

I. Issues arise as to who has authority in the realm of government contracts to issue such directives as a change in work, inspection, or testing requirements.

II. In government contracting, unlike private contracting, the Federal Government may only be bound through actions or omissions by representatives with actual or implied authority, but not apparent authority.

A. Actual Authority

1. Heads of government agencies or their designees are required by statute to appoint COs with actual authority to bind their agencies.

2. The CO has authority to enter into, administer, or terminate contracts and make related determinations and findings.

3. COs’ binding authority comes in the form of Standard Form 1402 – Certificate of Appointment.

B. Ratification

1. The Federal Government may be bound through action of a government representative if action eventually ratified, even if it was initially unauthorized.

2. FAR states that a government commitment is subject to ratification only if the reason it was not initially binding falls solely on the fact that the government representative who entered into the commitment lacked authority to do so.
.3 Government representatives allowed to ratify unauthorize actions.
   a. Head of contracting activity or
   b. Higher-level official.

C. Implied Authority
   .1 Authority to bind the government may be implied by a course of
government conduct or an assignment of managerial duties if such
authority is normally an integral part of the delegated responsibility.

   .2 Max Drill v. United States, 427 F.2d 1233 (Ct. Cl. 1970).
   a. Official who was sent by the CO for the express purpose of giving
guidance in connection with the contract was considered to have
implied authority to bind the Federal Government and the
contractor was justified in relying on the official’s representations.

   .3 Clevite Ordinance Division of Clevite Corp., ASBCA No. 5859, 1962
BCA ¶ 3330.
   a. Implied authority to direct changes where government
representative directing the change obtained such authority from
the CO.

   .4 Government course of conduct can change over time, which will affect an
official’s implied authority.

D. Apparent Authority
   .1 The doctrine of “Apparent Authority” is not applicable to the Federal
Government.
   a. “Appearance of authority” to bind the Federal Government is
irrelevant.

   a. Implied Authority v. Apparent Authority.

E. Authority of CO v. COR/COTR
   .1 CO delegates certain tasks and authority to COR/COTR.
.2 COR/COTR’s authority derives specifically from a written instrument by the CO that designates and authorizes COR/COTR to perform specific contract administration or technical functions on contracts or task/delivery orders.

.3 CO may not delegate to COTR certain authorities, including, but not limited to, the following:

  a. Authority to change any of the terms and conditions of a contract.

  b. Authority to approve contractors’ final invoices under cost-reimbursement contracts.

  c. Authority to sign contracts or contract modifications.

**Topic 7 - Antideficiency Act—does the Government really have the money to pay your client?**

I. How does the Government contract for services when it does not have money to fund the project?

   A. Antideficiency Act purpose

   1. The Antideficiency Act prohibits federal employees from:

      a. making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law. 31 U.S.C. § 1341(a)(1)(A).

      b. involving the government in any obligation to pay money before funds have been appropriated for that purpose, unless otherwise allowed by law. 31 U.S.C. § 1341(a)(1)(B).

      c. accepting voluntary services for the United States, or employing personal services not authorized by law, except in cases of emergency involving the safety of human life or the protection of property. 31 U.S.C. § 1342.

      d. making obligations or expenditures in excess of an apportionment or reapportionment, or in excess of the amount permitted by agency regulations. 31 U.S.C. § 1517(a).

   2. Voluntary Services: The Antideficiency Act provides that an agency “may not accept voluntary services” that exceed those authorized by law.
See 31 U.S.C. § 1342. According to the GAO, “[t]he purpose of the prohibition is to preclude situations that might generate claims for compensation that might exceed an agency’s available funds.” Dep’t. of the Treasury—Acceptance of Voluntary Servs., B-324214, 2014 WL 293545. The Federal Acquisition Regulations (FAR) also make clear that the mere act of “encouraging a contractor to [perform or] continue work in the absence of funds” is a violation. See FAR 32.704(c)

B. Applications of the Antideficiency Act:

.1 Contract is null and void: A contract may be null and void if the contractor knew, or should have known, of a specific spending prohibition. Hooe v. United States, 218 U.S. 322 (1910), C.f. American Tell. and Tel. Co. v. United States, 177 F.3d 1368 (Fed. Cir. 1999)

.2 Contract does not “exist:” A contract cannot exist if it would necessitate a violation of the Antideficiency Act. In Sam Gray Enterprises a contractor sought damages for the Government’s alleged breach of a lease agreement for housing. The Court of Federal Claims held there was no contract, primarily for lack of contracting authority. The Federal Circuit affirmed, explaining that “[n]o appropriation was shown to have been made that could cover five years’ worth of rental housing on any basis, whether as a lease or a guarantee.” Sam Gray Enters. v. United States, 2000 WL 701733, 250 F.3d 755 (Fed. Cir. May 31, 2000) (unpublished), aff’d 43 Fed. Cl. 596 (1999).

3. Scope of Contracting Officer Authority: Government official must possess actual authority to contract in order to enter a binding agreement with a private party. The authority of a Government official to enter into a contract may be restricted by fiscal law, even if that official otherwise possesses the necessary contracting authority in a general sense (i.e., the official has a contracting warrant). Do not hesitate to ask a Government official for the source of the official’s contracting or budgetary authority if you have a legitimate concern.

C. Government issued change orders for additional work, despite lack of funding.

.1 When the Government acts in violation of the Antideficiency Act (repercussions) Federal employees who violate the Act are subject to civil or criminal penalties. See 31 U.S.C. §§ 1349, 1350.

.2 Contractor moves forward with work: Federal agencies violate the Antideficiency Act, 31 U.S.C. § 1341 et seq., whenever Federal Agencies accept unpaid “voluntary services” from contractors without first obtaining written agreement that: (1) the services are offered without expectation of pay; and (2) expressly waives any future pay claims

II. Contractor Protections/Pitfalls: The Act creates special risks for contractors in three situations: (1) open ended or contingent liabilities; (2) annual service contracts; and (3) “availability of funds” clauses.

A. Limitation of Cost and Funds Clauses (Availability of Funds)

1. Limitation of Costs (“LOC”) FAR 52.232-20: This clause is used when the contract is fully funded which means the cost type contract is funded for the amount of the estimate of cost plus profit or fee that is specified in the contract. The notice requirements of the Contractor are set forth below.

2. Limitation of Funds (“LOF”) FAR 52.232-22: Applicable when the government obligates an amount that is more than the initial estimate of a contract that is incrementally funded by the government, as opposed to a fully funded contract. Limitation of Funds Clause specifically entitles a contractor to request a termination of the contract if additional funds are not provided and expressly provides for an adjustment of fee if the funds run out.

3. Notice requirements: There are two types of notice requirements, one relating to incurred costs and one related to sufficiency of funds.

   a. Incurred Costs: This type of notification is addressed in section (b)(1) of the LOC clause and (c) of the LOF clause. A contractor is required to notify the CO when the costs incurred and to be incurred within a stated period (e.g., the next 30, 60 or 90 days) will exceed a certain percentage of the costs or funds (e.g., 75% to 85%). This notice is required on all cost type contracts and is not dependent on an overrun or underrun of costs or funds. It simply advises the government that the contractor’s incurred costs are approaching the estimated costs or funds limitation. With this information the CO can assess the contractor’s progress with its incurred costs and take any necessary action. The CO is not required to take any particular action and the notification does not constitute notice of an approaching overrun even if the facts in the notice would indicate such an overrun is inevitable.
b. Sufficiency of Funds: Under (b)(2) of the LOC, the contractor is required to notify the CO at any time it has reason to believe the actual cost of completion will be greater than or substantially less than the earlier estimated cost. There is no timetable for this type of notice. It is required any time during performance when the facts indicate the incurred costs will vary. The courts have ruled notification of overruns for even minor amounts is required (e.g., notice was required for a 1.5% overrun amount). Though there is limited incentive for the contractor to notify the government its incurred costs are expected to be significantly less than the estimated costs, such notification for the government is important since it allows funds to be used for other purposes. Compliance with this notice provision of course does not guarantee a cost overrun approval. The CO also has other options such as terminating the contract, letting the funds run out, or reducing the scope of work for the contractor.

B. Stop Work: Service contractors can suffer during the gap between the end of one fiscal year when funds expire and the start of the next fiscal year when funds are not yet appropriated. During this period of limbo, contractors have the painful choice between stopping work and risking negative customer relations or continuing work and risking no payment for work performed before Congress appropriates funds.

C. Exceptions to the Antideficiency Act:

.1 Obligations for emergencies: This exception allows agencies to incur obligations and order its employees to continue work, if those obligations or employees are necessary to deal with emergencies that “imminently threaten the safety of human life or the protection of property.” 31 U.S.C. 1342.

.2 Express authorization: To the extent that Congress has expressly authorized an agency by statute to obligate the government for a particular purpose, the agency can do so despite the lack of annual appropriated funds. An example of this express authorization is the Feed and Forage Act, which explicitly permits the U.S. Department of Defense to purchase certain supplies — such as clothing, food, etc. — despite the Antideficiency Act.

Topic 8 – Federal Government inspection and acceptance issues: ongoing FCA obligations

I. What do you do when you have an ongoing project with the Federal Government and you discover that work you already completed and were previously paid for is actually defective or non-compliant? What steps do you need to take in terms of notifying the Federal Government?

A. Fact dependent analysis/warning and cautionary measures.

B. Mandatory Disclosure to avoid False Claims and Fraud Allegations.

   1. FAR Section 52.203-13 requires a contractor to voluntarily disclose to the Federal Government any overpayments.

      a. FAR 52.203-13 obligates contractors to disclose to the Federal Government whenever they have “credible evidence” of certain criminal violations, a violation of the civil False Claims Act, or a “significant overpayment” in connection with the award, performance, or a closeout.

   2. Overpayment would arise out of the likelihood that the newly discovered defective or non-compliant work would not meet certain contractual requirements.

II. Issues for Contractors to take into consideration when determining their responsibility and potential obligation to disclose.

   A. Latent Defect and Inspection/Testing Responsibility

   B. Gross Mistakes Amount to Fraud

   C. Warranties

      1. The Warranty of Construction Clause

Topic 9 - Be wary of crazy state and local rules

I. Many statutes and other codes are innocuously referenced in the RFP’s and contracts. Regardless of how mundane and seemingly inapplicable they may be, they could expose your client to financial risk. These provisions generally include a brief reference a local rule or regulation without providing more. They are incorporated and there may or may not be a Title, but unless you read the statute or code, you don’t know how it may affect your client.

   A. Typical language: “In accordance with …” or “Pursuant to …”
B. Failure to comply is a breach of k.

II. Know your local rules! Examples:

A. Use of 25 security guards:

MCC Sect. 2-92-610 provides for a Living Wage rate (see Section 3.3.6 above) for certain categories of workers employed in the performance of City contracts, specifically non-City employed security guards, parking attendants, day laborers, home and health care workers, cashiers, elevator operators, custodial workers, and clerical workers ("Covered Employees"). Accordingly, pursuant to MCC Sect. 2-92-610 and regulations promulgated thereunder:

if the Contractor has 25 or more full-time employees, and if at any time during the performance of this Contract the Contractor and/or any Subcontractor or any other entity that provides any portion of the Services (collectively "Performing Parties") uses 25 or more full-time security guards, or any number of other full-time Covered Employees, then the Contractor's obligation to pay, and to assure payment of, the Base Wage will begin at any time during the Contract term when the conditions set forth in (1) and (2) above are met, and will continue thereafter until the end of the Contract term.

As of July 1, 2016, the Base Wage is $12.15. The current rate can be found on the Department of Procurement Services’ website.

B. Parking Ticket setoff: MCC Sect. 2-92-380

Pursuant to MCC Sect. 2-92-380 and in addition to any other rights and remedies (including set-off) available to the City under this Contract or permitted at law or in equity, the City will be entitled to set off a portion of the contract price or any other compensation due the Contractor under the Contract, in an amount equal to the amount of the fines and penalties for each outstanding parking violation complaint and the amount of any debt owed by the Contractor to the City. For purposes of this Section 3.3.9, outstanding parking violation complaint means a parking ticket, notice of parking violation, or parking violation complaint on which no payment has been made or appearance filed in the Circuit Court of Cook County within the time specified on the complaint, and debt means a specified sum of money owed to the City for which the period granted for payment has expired.

However, no such debt(s) or outstanding parking violation complaint(s) will be offset from the contract price or any other compensation due under this Contract if one or more of the following conditions are met:

the Contractor has entered into an agreement with the Department of Revenue, or other appropriate City department, for the payment of all
outstanding parking violation complaints and debts owed to the City, and the Contractor is in compliance with this Contract; or

the Contractor is contesting liability for or the amount of the debt in a pending administrative or judicial proceeding; or the Contractor has filed a petition in bankruptcy and the debts owed the City are dischargeable in bankruptcy

C. Northern Ireland: MacBride Principles Ordinance, MCC Sect. 2-92-580

This law promotes fair and equal employment opportunities and labor practices for religious minorities in Northern Ireland and provides a better working environment for all citizens in Northern Ireland.

In accordance with MCC Sect. 2-92-580, if the Contractor conducts any business operations in Northern Ireland, it is hereby required that the Contractor will make all reasonable and good faith efforts to conduct any business operations in Northern Ireland in accordance with the MacBride Principles for Northern Ireland as defined in Illinois Public Act 85-1390 (1988 III. Laws 3220).

For those Bidders who take exception in Bids to the provision set forth above, the City will assess an eight percent (8%) penalty. This penalty will increase their Bid price for the purpose of canvassing the Bids in order to determine who is to be the lowest responsible Bidder. This penalty will apply only for purposes of comparing Bid amounts and will not affect the amount of any contract payment.

The provisions of this Section 3.3.10.2 will not apply to contracts for which the City receives funds administered by the United States Department of Transportation ("USDOT") except to the extent Congress has directed that USDOT not withhold funds from states and localities that choose to implement selective purchasing policies based on agreement to comply with the MacBride Principles for Northern Ireland, or to the extent that such funds are not otherwise withheld by the USDOT.

D. Dispute Resolution:

The Contractor and using/user Department must attempt to resolve all disputes arising under this Contract in good faith, taking such measures as, but not limited to investigating the facts of the dispute and meeting to discuss the issue(s).

In order to bring a dispute to the Commissioner of a Department, the Contractor must provide a general statement of the basis for its Claim, the facts underlying the Claim, reference to the applicable contract provisions, and all documentation that describes, relates to and supports the Claim. By submitting a Claim, the Contractor certifies that:
A. The Claim is made in good faith;
B. The Claim's supporting data are accurate and complete to the best of the person's knowledge and belief;
C. The amount of the Claim accurately reflects the amount that the claimant believes is due from the City; and
D. The certifying person is duly authorized by the claimant to certify the Claim.

The Commissioner shall have thirty (30) Calendar Days from receipt of the Claim to render a written "final decision of the Commissioner" stating the Commissioner's factual and contractual basis for the decision. However, the Commissioner may take an additional period, not to exceed ten (10) Calendar Days, to render the final decision. If the Commissioner does not render a "final decision of the Commissioner" within the prescribed time frame, then the Claim should be deemed denied by the Commissioner.

Procedure for Bringing Disputes before the CPO
Only after the Commissioner has rendered a final decision denying the Contractor’s Claim may a dispute be brought before the CPO.

If the Contractor and using/user Department are unable to resolve the dispute, prior to seeking any judicial action, the Contractor must and the using/user Department may submit the dispute to the CPO for an administrative decision based upon the written submissions of the Parties. The Party submitting the dispute to the CPO must include documentation demonstrating the Party’s good faith efforts to resolve the dispute and either the other Party’s failure to exercise good faith efforts or both Parties’ inability to resolve the dispute despite good faith efforts.

The decision of the CPO is final and binding. The sole and exclusive remedy to challenge the decision of the CPO is judicial review by means of a common law writ of certiorari.

**Topic 10 - Change Order release traps: Bell-BCI**

I. Contractors must **specifically and with particularity** reserve all rights when executing modifications

   A. *Bell BCI Co. v. United States*, 570 F.3d 1337 (Fed. Cir. 2009).

      1. The modification in this case states, “Bell hereby releases the government from any and all liability under this contract for further equitable adjustment attributable to the modification” which prevented the contractor from obtaining any cumulative impact relief. *Bell BCI*, 570 F.3d at 1340 (Fed. Cir. 2009).
2. Because contractors chose the language “any and all liability,” the Court determined that the contractor waived its rights to seek disruption or loss of productivity damages by the release it executed. *Id.* at 1341.

3. Contractors must state with specificity and particularity any rights they wish to reserve or risk losing those rights. *Id.*

B. Bell BCI Progeny

1. Despite a strongly worded dissenting opinion authored by Circuit Judge Newman stating, “my colleagues, finding no error in the trial court’s understanding of this contract, instead created a speculative theory that no party argued,” there have been no cases influencing or overturning the Bell BCI case.

   a. There are limited circumstances where a release may be voided. If the conduct of the parties during or after negotiation indicates that the release is not intended to serve as the abandonment of a claim, the release may be vitiated. In *Raytheon Co. v. United States*, the Court held that “continued negotiations regarding the CAS 413 segment closing adjustment after execution of the release may be sufficient to show that its claims for the Optical and AIS segments are not barred by the waiver of claims provisions in the subject novation agreements.” *Raytheon Co. v. United States*, 96 Fed. Cl. 548, 554 (Fed. Cl. 2011).

   b. If the parties settle claims that are purportedly waived under a release, the Boards may also interpret this action to indicate that the releases are not binding. *Walsh/Davis Joint Venture v. General Services Administration*, CBCA, 1460 (July 20, 2011).

**Topic 11 - Subcontractor Prompt Payment issues: another FCA trap for the unwary**

I. Prompt Payment Act (PPA)

   A. PPA was created as a means to avoid Federal Government delay in processing and making payments to prime contractors.

      1. If payment is not promptly made, interest begins to accrue.

   B. FAR requires all Federal Government construction subcontracts to contain a prompt payment clause requiring the following:

      .1 Payment to the subcontractor within seven (7) days from receipt by the prime contractor of payment from the Government;
.2 An interest penalty in favor of the subcontractor for late payments by the
prime; and

.3 A requirement that first-tier subcontractors flow down the prompt
payment clause to their lower-tier subcontractors.

II. Prime contractor must certify that payments made to subcontractors have been made from
previous payments and that timely payments will be made from the proceeds of the
payment covered by the certification.

A. False Claims Act liability arising out of both express and implied certification
regarding payment to subcontractors.

1. The Liquidating Trustee Ester Duval of KI Liquidation, Inc. v. United
States, 89 Fed. Cl. 29 (2009).

B. It should be noted that the prompt payment provisions of the FAR specifically
allow the contractor to withhold retainage from the subcontractor without cause.

C. The FAR allows the contractor to withhold subcontractor payments WITHOUT
incurring interest if the contractor does the following:

.1 Gives timely notice to the subcontractor of the withholding;

.2 Gives notice for the reason of withholding; and

.3 Provides a copy of the notice to the CO.

Claims/Disputes

Topic 12 - Government Duty of Good Faith and Fair Dealing: Metcalf

I. Types of Damages Contractor Can Recover

A. FAR Part 31.205 (“Cost Principles”): FAR Part 31 limits the damages a
contractor may recover.

1. Allowable: A cost is “allowable” if it is reasonable, allocable, permitted
under the terms of the contract, properly calculated, and subject to any
limitations in FAR subpart 31.2. FAR 31.201-2.

2. Allocable: A cost is "allocable" if "it is assignable or chargeable to one or
more cost objectives on the basis of relative benefits received or other
equitable relationship." FAR 31.201-4.
3. Reasonable: A cost is “reasonable” if "in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business." FAR 31.201-3.

B. Claim for Breach of Contract against the Government v. CDA Claim

1. CDA Claim: “Sum certain” (exact amount of damages); certified by contractor. Remedy granting clauses restrict recovery to only those extra costs incurred in the performance of the contract under which the changes were directed or the work delayed.

2. Breach of Contract:
   a. As general rule, the Federal Government consents to be sued for breach of contract only by those with whom it has privity of contract, and if party is not a signatory to a contract with government, then it may not bring a direct suit for breach of contract against government. *Fidelity and Guar. Ins. Underwriters, Inc. v. U.S.*, 805 F.3d 1082 (Fed. Cir. 2015) Pass-through claims, or sponsored claims, however, permit a prime contractor (who is in privity of contract with the government) to bring an action on behalf of a subcontractor unless the prime contractor has absolutely no liability on the claims. *See M.A. Mortenson Co.*, ASBCA No. 53761, 06-1 BCA ¶ 33,180 at 164,439; *See also Castagna & Son, Inc.*, GSBCA No. 6906, 84-3 BCA ¶17612.

   b. When the Government fails to carry out its agreement to perform certain work or to furnish articles necessary to the performance required by the contractor, it is liable for the actual damages sustained by the contractor, and it is liable to the contractor for damages sustained through wrongful interference by the Government. *Nolan Brothers, Inc. v. U.S.*, 194 Ct. Cl. 1 (1971); *WRB Corp. v. U.S.*, 183 Ct. Cl. 409 (1968)

C. Breach of the Duty of Good Faith and Fair Dealing

1. Reasonably foreseeable damages

2. Places Contractor in same position it would have been in had breach not occurred.

II. *Metcalf* Decision and Path Forward

A. Importance of Metcalf: Government found to have breached the duty of good faith and fair dealing, however because the case settled, there was no finding on damages.
B. What damages could be recoverable?

1. *CanPro Investments, Ltd. v. United States*, 130 Fed. Cl. 320 (2017): In *CanPro*, Judge Margaret Sweeney expanded the reach of *Metcalf*, when she opined that the contractor could prevail on a claim for breach of the implied duty of good faith and fair dealing if it could also prove it suffered damages as a result. Damages are calculated by “perform[ing] the necessary comparison between the breach and non-breach worlds.” *CanPro*, 130 Fed. Cl. 320, 350-351, quoting *Yankee Atomic Elec. Co. v. U.S.*, 536 F.3d. 1268, 1273 (Fed. Cir. 2008). In *CanPro*, the Court determined that it was reasonably foreseeable that if the government violated a provision of a lease with the contractor, the breach of the lease would lead to damages. *Id.* at 351. Because CanPro was decided on a motion to dismiss, the Court did not make an actual award of damages, but the Court did determine that the damages that the contractor could seek when left to its proofs would be damages that were reasonably foreseeable, and costs incurred to mitigate the contractor’s damages. *Id.*

2. *Appeal of Kelly-Ryan, Inc.* 2017 WL 6813324 (2017): What makes this case so significant is that the ASBCA, Judge Dickinson, in deciding entitlement and quantum at trial, awarded breach of contract damages for USACE’s breach of contract and breach of the duty of good faith and fair dealing, under the Restatement (Second) of Contracts §344 (1981). The legal framework is not what damages are allowable under FAR 31.205-33, but what damages are reasonably foreseeable as a result of the government's material breach. *Kelly-Ryan* now provides an example of awarded damages that were in fact reasonably foreseeable where there was a finding of a breach of the duty of good faith and fair dealing. This analysis and decision constitute a huge milestone for government contractors who often get pushback when seeking damages that the government may allege are “unallowable” under the FAR cost principles, when the limitations of FAR Part 31 do not even apply.

C. Where do attorney’s fees fit into the future of *Metcalf* and its progeny? To be recoverable, damages must be reasonably foreseeable by the breaching party at the time of contracting, the breach must be a substantial cause of the damages, and the damages must be shown with reasonable certainty. *Sys. Fuels., Inc. v. U.S.*, 666 F.3d 1306, 133 (Fed. Cir. 2012).

1. When are attorney’s fees “reasonably foreseeable?”
a. Contractor and subcontractor litigating when termination for default threatened by government of prime contractor, and prime default terminates subcontractor?

b. Performance bond claims, when bonds required on project.

c. Need more cases to be litigated, and cases where entitlement and quantum are decided at the same time.

i. When there is a clear breach of the Government's contractual duties during performance of the contract, entitling the contractor to an equitable adjustment to fully compensate for the consequences of the Government's breach, including the expenses of litigation with third parties, as in the circumstances here. See Liles Construction Co. v. United States, 455 F.2d 527 (Ct. Cl. 1972) (contracting officer wrongfully required the contractor to terminate for default its subcontractor, who successfully sued the contractor; entitlement to equitable adjustment included indemnification for the amount of the judgment and the legal expenses the contractor incurred in defending against the subcontractor's suit).

Topic 13 - State vs. Federal Pass-Through rules: is contingent liability permitted?

I. Due to lack of privity between a subcontractor and the Federal Government, a subcontractor usually is not permitted to directly pursue a contract claim it has against the Federal Government.

   A. Instead, a claim must be pursued in the name of the prime contractor.

II. Severin Doctrine (Severin v. United States, 99 Ct. Cl. 435 (1943)).

   A. Severin Doctrine GENERALLY provides that a subcontractor is not permitted to seek and obtain recovery of a pass-through claim by the prime contractor against the Federal Government where the subcontractor has released the prime from liability.

      1. However, case law has since narrowed the Severin doctrine and determined that the Federal Government has the burden of proving a sponsoring prime contractor has no liability to its subcontractor making the claim.

   B. The Severin Doctrine has now become limited to situations where an “iron-bound” release or contract provision completely immunizes the prime contractor from liability to the subcontractor.
C. Prime contractor may “pass through” the subcontractor’s claim to the Federal Government so long as the prime contractor remains liable to the subcontractor in some fashion.

.1 Sponsorship/Liquidation/Pass-through Agreements

a. This Agreement states that the prime contractor is liable to the subcontractor in the same way the Federal Government is liable to the prime contractor.

b. Contingent liability language of the prime contractor to the subcontractor overcomes the Severin Doctrine’s limitations on Federal Government liability for the subcontractor’s claim.

D. Severin Doctrine is also to be construed narrowly.

.1 Without an “iron-bound” release, as long as the prime contract contains a remedy-granting clause, the prime contractor may sponsor the subcontractor’s claim.

.2 The burden of proving such a release lies with the Federal Government.

.3 Subcontractors are cautioned that by signing standard form releases of liens and claims to obtain monthly progress payments from the prime contractor will subsequently release the Federal Government from any claims by the subcontractor.

E. Severin and pass-through claims in state courts.

.1 17 of the 19 states that have considered pass-through claims permit such pass-through claims with only contingent liability.


.2 Connecticut explicitly rejects pass-through claims, unless the prime contractor admits liability and impleads the state on a claim filed by a subcontractor against the prime contractor.

.3 Virginia treats pass-through claims the in the same way as Connecticut, unless such pass-through claims are expressly allowed by statute.
a. For example, Virginia permits pass-through claims against VDOT; however, they are not permitted against other Virginia government entities.

b. For those other Virginia government agencies, the prime contractor must confess non-contingent liability to its subcontractor, in order to pass the subcontractor’s claim on to the government.

c. It is important to note that in Virginia, unlike in Federal Government contracting, the use of liquidating agreements could result in a denial of the pass-through claim if the prime contractor’s liability is made contingent on recovery from the government.


2. The law regarding pass-through claims in the remaining 30 states is unsettled and subject to change, but permitting pass-through claims seems to be an emerging trend.

**Topic 14 - CDA Claim certification traps**

I. Bringing a Claim under the CDA

A. Certification of REA

1. An REA is an explanation of entitlement and damages sought, can be converted to a certified claim and usually has to be certified before settlement.

2. An REA does not require a corresponding certification unless it is submitted to an agency of the Department of Defense, in which case the certification found at DFARS 252.243-7002 is required.

3. In REAs, claim preparation costs are generally considered part of the contract administration cost and, therefore, compensable. *See Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541 (Fed. Cir. 1995)

4. Claim: “Sum certain” (exact amount of damages); certified by contractor. Costs in preparation are not recoverable under FAR cost principles. If the claim amount changes, during litigation, or based on facts developed, and the claim amount increases, the claim must be resubmitted and recertified, but the contractor may not present any new claims. *Santa Fe Engineers, Inc. v. United Sates*, 818 F.2d 856, 858 (Fed. Cir. 1987)
B. Certification of Claim Requirements

a. Claim amount

b. Certification language requirement (FAR 33.207(c)) “I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor. 48 C.F.R. § 33.207” This is different from DFARS which only requires the following certification: “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.” 48 C.F.R. § 252.243-7002

C. Pass-Through Claims: (Turner Certification) Although a contractor may and should obtain a certification from a subcontractor for any pass-through claims, the contractor is required to provide a certification for the claim as well. However, a contractor does not have to agree with every aspect of a pass-through claim and must only certify that the pass-through claim is brought in good faith and is colorable.

D. Statute of Limitations and Exceptions

1. CDA claims 6 year window (do not accept final payment)

2. Exceptions: FAR 52.249-2 (1-year window for termination for convenience cost proposal submission on fixed price contracts).

II. Implied Certification – False Claims Act

A. The FCA imposes liability on anyone who knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval to the federal government. The FCA also punishes whoever knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.

B. Case Law Examples

1. Universal Health Services, Inc. v. United States ex rel. Escobar, 136 S.Ct. 1989 (2016). The Supreme Court confirmed that “implied certification” can be a basis for False Claims Act liability- if the Contractor requests payment when the good or service provided violates an applicable statutory, regulatory or contractual requirement. Escobar also held that the
requirement need not be a condition of payment to satisfy the FCA's materiality element.

2. The Court’s holding in Escobar allows liability under the False Claims Act on the theory of implied certification.

3. It provided two conditions under which liability may result under this theory: 1) the party seeking payment makes specific representations about its goods or services, but 2) fails to disclose non-compliance with the material legal requirements of the program that make those representations misleading.

   a. The United States of America, ex rel. Brady Folliard v. Comstor Corporation, 2018 WL 1567620 (March 31, 2018). Recently, the United States District Court for the District of Columbia dismissed a qui tam action involving allegations of fraud in connection with country of origin requirements imposed by the Trade Agreements Act (“TAA”). Comstor involved a False Claims Act (“FCA”) action filed by a serial whistleblower who alleged two contractors violated the FCA by selling non-TAA compliant products on their General Services Administration (“GSA”) Federal Supply Schedule (“FSS”) contracts to federal government customers. In dismissing the case, the Comstor court found the relator failed to adequately plead that the alleged TAA noncompliance was “material.” Among others, materiality is a necessary element in every FCA case and requires a showing that the alleged noncompliance had an effect on the government’s payment decisions.

**Topic 15 - Strategic considerations: REA vs. Certified Claim**

I. Submitting a Request for Equitable Adjustment (REA).

   A. A less formal method for Federal Government and contractor to resolve an issue and reach an amicable resolution.

      1. Generally, does not need to be certified except in limited circumstances, such as if REA submitted to the Department of Defense (“DOD”).

         a. DFARS §252.243-7002 requirement.

      2. No specific submission deadline for the REA, but contractor must adhere to the notice requirements for changes in the contract.

         b. No firm or fixed deadline for the Federal Government to respond.
B. Preparation costs such as consultant fees and attorney fees are recoverable.

.1 Does not allow recovery of interest.

II. Filing a Certified Claim

A. A formal dispute which may lead to litigation.

1. Must include an expression of damages in the amount of a “sum certain.”

2. Must be certified if the claim amount exceeds $100,000.

   a. Must additionally include specific wording and a signature by an authorized company official.
   b. Proper certification language as set forth at FAR §33.207(C).

3. Each Certified Claim by a contractor against the Federal Government must be submitted within 6 years of actual knowledge of event giving rise to the claim.

   a. A Certified Claim establishes a fixed deadline for the Federal Government to formally respond, which is typically sixty (60) days from the date it is filed.

B. Certified Claim preparation costs such as consultant fees and attorney fees are not recoverable.

.1 Does allow for recovery of interest, provided that a contractor properly submits a Certified Claim.

   a. Interest clock starts and interest begins accruing on the date of certification.

III. It is important to note that an REA may be converted into a Certified Claim, but a Certified Claim may not be converted into an REA.

A. Thus, a contractor may want to consider preparing an REA in order to recover claim preparation fees and costs, then certify the REA as a claim after it is denied, in order to start the interest clock.
Topic 16 - More strategic considerations: Appeals to Boards of Contract Appeals vs. COFC

I. Legal Spend

A. The length of time in a proceeding may increase a contractor’s legal spend. The Court of Federal Claims requires a more detailed complaint which will require a contractor to have a substantial amount of facts and knowledge on hand at the outset of the case to ensure a well-pleaded complaint. At the ASBCA, for example, a complaint is filed within 30 days after receipt of notice of docketing of the appeal, a complaint, “setting forth simple, concise, and direct statements of each of its claims. The complaint shall also set forth the basis, with appropriate reference to contract provisions, of each claim and the dollar amount claimed, if any. This pleading shall fulfill the generally recognize requirements of a complaint, although no particular form is required.”

B. The Boards of Contract Appeals consistently emphasize their commitment to prompt and efficient resolution, especially with their commitment to offering alternative dispute resolution as a method for shortening the process. Using a more efficient method of dispute resolution often lowers the cost to contractors. Judge Peacock, an ASBCA judge, recently authored an article in the Procurement Lawyer, Vol 53, Number 2, Winter 2018, regarding the benefits of nonbinding post trial mediation, which is a non-traditional alternative dispute resolution mechanism.

C. Discovery at the Boards of Contract Appeals is only slightly less formal that at the Court of Federal Claims. The CBCA encourages parties to agree on a discovery plan that the Board may adopt into a scheduling order. The scope of discovery is the same as under Rule 26(b)(1) of the Fed. R. Civ. P. Thus, discovery may not be any less costly, unless the parties agree on a discovery plan that provides for a limitation of the number of depositions, interrogatories, requests for admissions or requests for documents. However, the length of time to respond to discovery requests is longer. For example, at the ASBCA a party has forty-five (45) days to respond to interrogatories, requests for documents, or admissions. ASBCA Rule 8(c)(1-3).

II. Discovery Tools

A. In the Court of Federal Claims, the parties may obtain discovery “regarding any non-privileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount of controversy, the parties’ relative access to relevant information…and whether the burden or expense of proposed discovery outweighs the benefits.” RFRC 26(b)(1). The extent and duration of discovery is proposed by parties. RFRC app. A, (25).
B. At the Civilian Board of Contract Appeals, the parties may obtain “discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending case, whether it relates to the claim or defense of the party…or other tangible or intangible things…” 48 C.F.R. 6101.13(b). The Armed Services Board of Contract Appeals allows similar discovery. 48 C.F.R. app. A (2)(8)(a).

C. The Court of Federal Claims and the Boards of Contract Appeals allow the use of additional discovery tools such as depositions, depositions, and requests for production. RFRC 27(a), 33(a), and 34(a); 48 C.F.R. 6101.13(a); 48 C.F.R. App. A (2)(8)(a), (b), and (c).

III. Rule 4 File

A. At the Court of Federal Claims, the Government has 60 days to file an answer, which includes affirmative defenses and counterclaims. The Court of Federal Claims does not have as extensive of a Rule 4 requirement as the Boards of Contract Appeals but they do require initial disclosures which require the names of any individuals who may possess discoverable information. RFRC 26(a)(1)(A).

B. In the Boards of Contract Appeals, the Government has 30 days to file the Rule 4 file which must contain documents related to the appeal including 1) the CO’s final decision, 2) the contract, 3) relevant correspondence between the parties, and 4) any additional relevant information. 48 C.F.R. 6101.4(a).

IV. Relief That May Be Sought

A. Attorney’s fees may be awarded under the Equal Access to Justice Act in the Court of Federal Claims and the Boards of Contract Appeals. 28 U.S.C. § 2412(d)(1)(A); 48 C.F.R. 6101.30(a); 48 C.F.R. app. § 2(e)(1) (2007). The EAJA authorizes the payment of attorney’s fees to a prevailing party in an action against the United States absent a showing by the government that its position in the underlying litigation "was substantially justified.” A party must meet the threshold requirement of having a net worth not in excess of $7,000,000 for any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization. Or, $2,000,000 at the time the action was filed for an individual. 28 U. S. C. §2412(d)(2)(B))

C. Time to File

1. If a contractor is appealing a final decision to the agency board of contract appeals, the contractor must file the appeal within 90 days of the date he receives written notice of the final decision. 48 C.F.R. 33.211(v).

2. If a contractor is appealing a final decision to the Court of Federal Claims, he may do so within 12 months of receipt of the final decision. 48 C.F.R. 33.211(v).

V. Filing an Appeal

A. Filing a Notice of Appeal at the Boards of Contracts Appeal is less formal than at the Court of Federal Claims and only requires that the appeal be in writing, signed by the appellant, appellant’s attorney or authorized representative, include a copy of the claim and a copy of the contracting officer’s decision on the claim or a statement that the appeal is from a failure to issue a decision on the claim. This notification must be sent to the contracting officer. 48 C.F.R. 6101.2(a)(1). A complaint is filed thirty (30) days after the Notice of Appeal is docketed.

B. The Court of Federal Claims has more formal procedures than the Boards of Contract Appeals. Filings are subject to particular formatting requirements concerning the size and type of paper, the margins, the number, and the binding of the documents. RFRC (5.5)(c). Furthermore, the request must “state with particularity the grounds for seeking the order and state the relief sought.” RFRC 7(b)(B) and (b)(C).

C. Cases that are Settled

1. Although the Court of Federal Claims does not readily disclose the amount of contracts appeals cases that utilize alternative dispute resolution (ADR), the Court of Federal Claims encourages the use of such resolution. The presiding judge is the regularly assigned judge to the case but the Court of Federal Claims will provide a “settlement judge” who is tasked with acting as a mediator between the parties before the actual resolution of the case before the assigned judge. RFRC app. H (2)(a) and (2)(b).

D. Quality of Judges

1. The Court of Federal Claims is composed of 16 active judges who are appointed by the President, confirmed by the Senate, and serve 15 year terms. These judges preside over a variety of cases including tax claims, patent claims, and taking claims under the Fifth Amendment. There is no requirement for the judges to have government contracts knowledge, unlike at the Boards. About the Court, https://uscfc.uscourts.gov/about-court (last visited June 25, 2018).


E. Binding Authority

F. The Court of Federal Claims and the Boards are bound by the decisions of the Supreme Court, the precedential (published) decisions of the Federal Circuit, and by the published decisions of the Federal Circuit’s predecessor courts, e.g. the Court of Claims. The Court of Federal Claims judges are not bound by the decisions of other Court of Federal Claims judges or board of contract appeals’ decisions, though they may be persuasive. See Casa De Cambio Comdiv S.A. De C.V. v. United States, 291 F.3d 1356, 1364 n.1 (Fed. Cir. 2002) (citing W. Coast Gen. Corp v. Dalton, 29 F.3d 312, 315 (Fed. Cir. 1994)); see also West Coast General Corp. v. United States, Cl. Ct. 98,101 n.* (Cl. Ct. 1989).

G. The Boards of Contract Appeals are bound by the decisions of the Boards of Contract Appeals and its predecessor boards, for example at CBCA, the CBCA is bound by predecessor decisions at the Board of the Department of Agriculture.