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NEWSLETTER

Claim or REA? Final Decision or Not? These Questions Can Be Hard, but They Are Important for Appeal Jurisdiction

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Contractors often face disagreements with their agency customers during performance – maybe an unforeseeable delay, a cost spike, or some sort of change – that prompts action involving the contract terms. This action might be the agency issuing a unilateral contract modification, the contractor submitting a request for equitable adjustment (REA), or some other event in which the contractor or agency seeks compensation or modification of contract terms.

If the parties cannot reach a resolution, and litigation follows, they may find they have a second disagreement on their hands: whether the actions taken to date constitute a claim (by the agency or the contractor) that has resulted in a contracting officer's final decision.

Finding out too late that the two sides differ on the point at which a claim or a final decision exists can raise jurisdictional questions for an appeal. Recent Federal Circuit decisions highlight how fuzzy the line can be between a claim and an REA, and challenges in discerning when certain actions by the contracting officer – such as unilateral modifications – are final decisions on claims that are immediately appealable. This article explores the implications of this uncertainty for appellate jurisdiction and strategies for contractors to consider to manage the risk of not timely appealing a final decision on a claim.

Uncertainty: Did the Contractor Submit a Claim or an REA?

Authors

Craig Smith
Partner
202.719.7297
csmith@wiley.law

Practice Areas

Federal Contract Claims, Disputes, and Terminations

Government Contracts

When contractors seek compensation under a contract, or other outcomes like an adjustment to the delivery schedule, they generally have a choice between submitting a claim or an REA. The choice involves weighing each option's pros and cons. An REA can be a better option if, for example, the contractor wants to strongly signal that there's room for negotiation, as compared to a claim, which is generally thought to be more adversarial. An REA also does not require a written final decision by the contracting officer, so it might generate a faster response. Or, it might not – unlike claims, for which the Contract Disputes Act establishes a response time, there is no deadline for the agency to respond to an REA.

The choice may seem binary: A contractor submits either a claim or an REA. But as the Federal Circuit reinforced earlier this year in *Zafer Construction Company v. United States*, No. 2021-1547 (Fed. Cir. Jul. 18, 2022), it is not always easy to tell which choice the contractor has made. The Federal Circuit has long held submitting a claim requesting a final decision requires no "magic words." Indeed, elements of a claim can even be implicit. This creates the opportunity for gray areas if a contractor submission bears some, but not all, of the indicia of a claim.

Zafer Construction arguably stretched this flexibility a bit further. The contractor submission in question had been labeled by the contractor as an REA. The submission requested an opportunity for negotiations, and did not request a final decision. Yet the Federal Circuit nevertheless held that the submission was a claim.

The court found that under the flexible, objective standard for identifying claims, the contractor had "meticulously allege[d] changes and delays caused by the government, explain[ed] the reasoning behind its allegations, and request[ed] a sum certain," and stated that the request encompassed "all claims incurred" by the company "as a result of changes, constructive changes, [and] delay."

The court recognized that under its framework, differences between claims and REAs can be hard to discern – especially for REAs that involve more complex matters and thus generate robust, detailed submissions. This blurry dividing line worked to the contractor's benefit in *Zafer Construction*, which concerned whether the contractor had submitted a "claim" within the Contract Disputes Act's six-year limitations period.

Unaddressed in *Zafer Construction*, though, are the potential unintended consequences of what happens when a contractor's "REA" is later construed, after a submission, to be a "claim." When a contractor thinks it has submitted an REA, but under the Federal Circuit's standard it has actually (and unintentionally) submitted a claim, how does that affect the subsequent question of whether (and when) the contracting officer has issued a final decision? Put another way: How does the contractor know when its period to appeal a denied "claim" has started to run, if the contractor intended to submit only an REA, not a claim?

It is not hard to imagine a contracting officer rejecting an REA in writing, but continuing to negotiate with the contractor; all the while, the 90 days for the contractor to appeal the denial of any "claim" to the responsible board of contract appeals (or year for the Court of Federal Claims) runs. Or a situation where a contractor converts its rejected REA into a claim and the contracting officer responds with the same written rejection, only this time expressly labeled as the contracting officer's "final decision." Which rejection was *the* final decision?

These hypotheticals show how the Federal Circuit's cases involving the distinctions between claims and REAs can lead to uncertainty for contractors about when their appeal period has started. Contractors may feel the need to scrutinize each step in the REA submission and negotiation process for whether a judge might determine in retrospect that an REA or other exchange constituted a claim.

As a contractor, your instinct in response to *Zafer Construction* might be to avoid the ambiguity altogether and forswear the REA process, in favor of submitting only certified claims. That solution might prove to be both unsatisfying (it gives up the advantages REAs can offer) and, as a pending case before the Federal Circuit highlights, incomplete as a risk mitigator.

Uncertainty: Did the Contracting Officer Issue a Final Decision?

In the coming months, the court will hear argument in *Lockheed Martin Aeronautics Company v. Secretary of the Air Force* on whether an agency's unilateral modification of a contract constituted a contracting officer's final decision on a government claim. The modification in question definitized contract pricing. The argument for appealability follows from cases over the years permitting contractors to appeal certain other types of unilateral modifications and similar actions straightaway as final decisions on a government claim, instead of having to submit an affirmative contractor claim and waiting for a contracting officer's final decision.

Being able to proceed directly to appeals is efficient and can put the contractor on the path to recovery through litigation faster. But it can also act as a two-edged sword. Say, for example, the contractor wishes to negotiate with the agency first, without the deadlines to file an appeal hanging over the parties. Or the contractor might not appreciate that a unilateral modification was intended to be a final decision; the *contracting officer* might not have even intended it. In *URS Federal Support Services*, ASBCA No. 59998, 21-1 BCA ¶ 37,848, the Armed Services Board of Contract Appeals worried about this latter scenario just a few years ago, namely contractors being caught unawares by what the Board called "secret final decisions."

The Board had a reasonable solution in that case: If a contract modification or similar "government document" *could* qualify as a final decision on a claim, but there was no indication to the contractor that it was intended to be one, then the contractor can appeal *at its option* or instead wait and later submit a claim of its own. Until this framework is adopted by the Federal Circuit, however, contractors should remain on guard for modifications or other actions by the contracting officer that might later be deemed to be final decisions that could have been appealed.

The initial reaction may be to appeal anything that looks like it might be a final decision. But here, too, that approach may be unsatisfying. It may cut off negotiations, as the disagreement shifts to a litigation posture. Or a contractor might incur significant litigation costs only to have a board or court dismiss the appeal for lack of jurisdiction, finding that there wasn't actually a final decision, and send the contractor back to square one – hopefully with sufficient time remaining to submit a new claim before the six-year limitations period expires.

Managing the Attendant Jurisdictional Risks

No contractor would welcome learning that a deadline to appeal a final decision has passed unknowingly. Contractors can manage this risk of losing appeal jurisdiction through their communications with the contracting officer.

First, contractors should ensure their submissions are clearly labeled. If the contractor intends to submit an REA or something equally informal like a proposal, instead of a claim, the contractor should make it clear both in the submission itself and during any discussions with the contracting officer, so there is no room for ambiguity or any misunderstanding.

Second, contractors should consider seeking the contracting officer's concurrence, in writing, on the type of submission being made. Concurrence might be particularly helpful when submitting a detailed and extensive REA that may resemble a certified claim, given how the Federal Circuit has sometimes focused on the overall nature and context of a submission and given less weight to whether the submission was labeled a claim or REA. Plus, if there is disagreement on what the contractor is submitting, better to learn of it early instead of after issuance of a (purported) final decision.

Third, contractors should include only the formalities required for the submission being made. For example, DFARS 252.243-7002 specifies a certification for REAs over the simplified acquisition threshold. When it applies, use that certification, and not the certification required in FAR 33.207 for certified claims. Getting the formalities right might not be dispositive as to what has been submitted, but it can help avoid adding to any confusion.

Fourth, contractors should carefully review unilateral modifications and similar documents sent by the contracting officer for any indicia of being a final decision on a claim. The indications might be obvious, like clearly stating the contractor's appeal rights or other formalities of a final decision. Other times, the indications might be drawn from the broader context surrounding the modification.

Fifth, if there is any doubt about whether the contracting officer intended to issue a final decision, ask for written confirmation. As above, it's better to surface any disagreement on this question sooner rather than later.

We've described these steps as "managing" risks because the Federal Circuit's flexible framework means that deciding when a claim is submitted and when a final decision has been issued can at times be highly fact-specific and difficult to predict in advance. But close attention to the contents and context of these exchanges between contractor and contracting officer can go a long way to ensuring that appeal jurisdiction remains preserved.