

Distinguishing Between Requests for Equitable Adjustment and Contractor Claims

A distinction that makes a difference



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Contractors working with the federal government often use the terms request for equitable adjustment (REA) and claim interchangeably. The blending of those two concepts is, in some ways, perfectly understandable, as both an REA and a claim are considered “non-routine” requests for payment or adjustment of contract terms and share many of the same features. Yet that confusion also overlooks important distinctions between the two concepts that could affect the scope or amount of a contractor’s recovery from the government if the contractor submits a request using the wrong terminology. Thus, it is important for contrac-

tors to keep those distinctions in mind when preparing a submission to the contracting officer seeking additional money or time. Contractors who mislabel an REA as a claim can inadvertently squander their opportunity to recover the professional and consultant service costs – the fees charged by attorneys, consultants and accountants – that were incurred in preparing, documenting and refining the contractor’s request. Similarly, contractors who mislabel a claim as an REA may fail to comply with certain formalities required by the Disputes Clause and thereby delay their ability to receive interest on their claim or pursue the dispute before a Board of Contract Appeals or the U.S. Court of Federal Claims.



Reimbursement Of Expenses



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Contract administration vs. dispute

Contractors frequently require the assistance of lawyers, consultants or accountants in preparing a request for additional money or time. A consultant may be needed to establish that slippage in the construction schedule is attributable to government-caused delays. Geotechnical experts may be needed to establish that a differing site condition exists. Accountants may be needed to quantify or explain the contractor's damages. Lawyers are often needed to help draft or refine the contractor's request, ensuring that it invokes all available legal theories of recovery, addresses potential government defenses or counterarguments and provides all of the factual information necessary to establish the contractor's right to the relief requested.

Under the cost allowability rules in the Federal Acquisition Regulation (FAR), a contractor is permitted to recover these types of professional and consultant service costs if they are incurred in connection with an REA, but not if they are incurred in connection with a claim against the government. Why does the FAR draw such a distinction, when the nature of the professional services may be identical in both contexts?

The explanation lies in understanding that an REA is viewed as a non-adversarial part of the contract administration process. The professional services costs reasonably incurred by the contractor in preparing an REA provide a benefit to the government by assisting in the efficient administration and resolution of a contract change. While the matter is being handled as an REA, the contrac-





tor and contracting officer are engaged in what should be (at least in theory) a collaborative effort to resolve the issue giving rise to the contractor's request in an equitable, mutually acceptable fashion. If the REA is denied or if the contractor and contracting officer reach an impasse in their negotiations, the contractor can then convert the REA into a claim and request a contracting officer's final decision.

Once a contractor frames their request as a claim, it has invoked the disputes process and embarked down an adversarial path toward litigation with the government. From the government's perspective, there is little benefit to subsidizing a contractor's efforts to improve its chances in a dispute or litigation against the government. That is why FAR 31.205-47(f) specifically prohibits a contractor's recovery of costs incurred in connection with "the prosecution of claims or appeals against the federal government."

There may be a natural tendency by contractors to defer seeking the assistance of lawyers, consultants or accountants until litigation seems inevitable. After all, the thought goes, why incur those expenses if there is a chance to resolve the matter short of a formal claim?

Savvy contractors take a more proactive approach. A shrewd contractor, familiar with the rules permitting recovery of reasonable attorneys fees and consultant fees incurred in preparing an REA, enlists the assistance of attorneys, consultants or accountants from the outset, using them to prepare the most well-developed and comprehensive REA possible. This approach, which "frontloads" the legal/consultant work into the REA process, rather than saving it for the claims process, has two direct benefits to the contractor. First, as discussed above, by incurring these costs in the REA process, the contractor is able to include them in their REA and to recover the costs from the government under FAR 31.205-33. Second, by presenting the most thorough and persuasive REA possible, the contractor increases their chances of convincing the contracting officer of the merits of the REA and the contractor's

entitlement to the relief requested. Thus, a well-prepared, professionally-assisted REA reduces the likelihood that the matter will devolve into a formal dispute and contractor claim. Moreover, if the matter does end up in a dispute, the contractor would have already incurred most, if not all, of the necessary legal and consulting costs, making it a relatively quick and inexpensive matter to convert a well-prepared, thoroughly documented REA into a formal contractor claim.

Confusing the concepts has consequences

Two cases in the U.S. Court of Federal Claims demonstrate the perils for contractors who fail to appreciate the distinction between an REA and a claim and the special rules applicable to each. In *Environmental Tectonics Corp. v. U.S.*, 72 Fed. Cl. 290 (2006), the contractor sought to recover over \$100,000 in costs associated with preparing a certified claim filed with the contracting officer. The court denied the request, pointing out that FAR 31.205-47 makes such "claim preparation" costs unallowable. Note, however, that the contractor could have recovered much of what it characterized as "claim preparation" costs, if they had shown the foresight to have incurred those same costs earlier in the process – as "REA preparation costs" incurred in connection with submitting an REA to the contracting officer. By waiting until the claims process to incur legal/consultant fees, the contractor lost the ability to recover those costs from the government.

A case decided earlier this year by the U.S. Court of Federal Claims, *Agility Defense & Gov't Servs., Inc. v. U.S.*, No. 11-101C (January 20, 2012), demonstrates the consequences a contractor faces when it errs in the opposite direction, by mislabeling as an REA a request it intended to submit as a contractor claim. In the *Agility* case, the contractor submitted a letter it labeled as a "Request for Equitable Adjustment," which included a certification required by the Department of Defense for REAs – a certification that is different from the certification required for contractor claims under the Contract Disputes Act (CDA). When the contracting officer did not respond to a request for a final decision on the REA letter, the contractor filed an appeal with the Court of Federal Claims, contending that the contracting officer's failure to act represented a "deemed denial" of its claim.

The government asked the court to dismiss the contractor's appeal, arguing that the contractor had not submitted a properly certified CDA claim to the contracting officer prior to bringing suit. The Court agreed, finding that the contractor's REA letter had not complied with the necessary formalities to be considered a CDA claim. Because proper certification of a CDA claim is a jurisdictional requirement that must be satisfied before appealing the denial of a contractor claim, the court dismissed the contractor's lawsuit, essentially forcing it to start the disputes process over again by filing a properly certified CDA claim with the contracting officer.

Thus, the contractor in the *Agility* case learned a harsh lesson about the importance of distinguishing between claims and REAs. By incorrectly labeling as an REA a demand for payment it wanted to be treated as a claim, the contractor wasted months of effort it had spent trying to litigate the case at the Court of Federal Claims. Moreover, because interest on a contractor claim runs from the date of certification, the contractor also lost the opportunity to recover 18 months of pre-judgment interest based on having submitted an incorrect REA certification in 2010.





Conclusion

As the two cases described previously indicate, confusing an REA for a claim – and vice versa – can prove to be a costly mistake for a contractor. Whenever possible, a contractor should first present its request as an REA,¹ and should enlist the support of any professionals needed to develop or prepare

the REA (attorneys, consultants, accountants) while the matter is still being handled as an REA and the costs of those professional services are still recoverable from the government. Once the contractor decides to convert the REA to a formal contractor claim, it needs to be attentive to the formalities required for submission of a CDA claim to ensure it can proceed with an appeal if the claim is denied by the contracting officer. ▼

1. It may not always be practical to submit an REA prior to filing a claim – for instance, if the expiration of the six-year limitations period to file a claim is approaching, and the claim might ultimately be time-barred if the contractor awaits resolution of the REA first.

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