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Murky Waters

A recent ASBCA decision highlights the murky distinction between claims and requests for equitable adjustments. BY STEPHEN L. BACON

In a series of recent decisions, the U.S. Court of Appeals for the Federal Circuit has blurred the line between a request for equitable adjustment (REA) and a formal "claim" under the Contract Disputes Act (CDA).[1]

The U.S. Court of Federal Claims and the Boards of Contract Appeals are beginning to apply the Federal Circuit's most recent guidance in decisions that examine whether a contractor's submission meets the criteria for a claim.[2]

Whether a submission constitutes an REA or a claim can have profound legal, practical, and monetary consequences. Each approach has pros and cons that contractors should carefully consider before one is selected. It is, therefore, critical for contractors to understand how they can draft payment requests so that they qualify as the type of submission intended.

In the *Appeal of Mindseeker, Inc.*, the Armed Services Board of Contract Appeals (ASBCA) ruled that the contractor's submission was a claim even though the contractor itself identified the document as a "Request for Equitable Adjustment."

This decision highlights the challenges that can arise when trying to decipher whether a particular submission qualifies as a claim or REA. It also offers important clues as to how judges will distinguish between REAs and claims under the framework established by the Federal Circuit.

REA Versus Claim – Why It Matters

Before examining how to distinguish between REAs and claims, it is important to understand why that matters. REAs and claims can look very similar in many respects, but there are key differences between the two types of submissions that have significant implications for the contractor and the government.

If a claim is submitted, the contractor is entitled to a "final decision" from the contracting officer and may recover interest on the amount claimed.[3] The contractor may appeal a final decision to either the U.S. Court of Federal Claims within one year or the appropriate agency Board of Contract Appeals within 90 days.[4] Thus, if a contractor submits a claim, it must be prepared to potentially litigate the dispute if the final decision is unfavorable.

Unlike a claim, an REA is an informal submission that is prepared by the contractor for the purpose of negotiating a resolution with the government. The contracting officer has no obligation to issue a "final decision" on an REA, and the contractor has no right to "appeal" a decision on an REA.

Although contractors are not entitled to interest on amounts included in an REA, they may recover reasonable REA preparation costs including legal and consulting costs.[5] Such preparation costs are expressly unallowable for a claim.[6]

Critically, an REA does not satisfy a contractor's legal obligation to submit a claim within six years of when the claim "accrues."[7] This means that a contractor will forfeit its right to recover amounts from the government if none of its submissions within the CDA's six-year statute of limitations period constitute a claim.

The Federal Circuit's Framework

The Federal Circuit has eschewed a focus on "hyper-technical requirements" in favor of a "common sense analysis" that examines the document in question and the context surrounding the submission to determine if it qualifies as a claim.[8] The analysis focuses on three objective criteria.

The starting point for the analysis is whether the submission satisfies the definition of a "claim" under the *Federal Acquisition Regulation (FAR)*. Under that definition, a "claim" is "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract."[9]

The Federal Circuit also examines whether the submission includes a certification, which is required under the CDA for claims that exceed $100,000.[10] The Federal Circuit has

made clear that even an imperfect certification that does not match the CDA certification language is sufficient to satisfy the criteria for a claim as long as it is capable of being perfected.[11]

Finally, the submission must include a "request for a final decision" that "can be either explicit or implicit."[12] Although no "magic words" are required, the "content and context surrounding [the] submission [must] put the contracting officer on notice that the document is a claim requesting a final decision."[13] A contractor's expressed desire to negotiate is not inconsistent with a request for a final decision.[14]

Appeal of Mindseeker, Inc., ASBCA No. 63197

This case involved a contract between the Army and Mindseeker, Inc. to provide medical coding services using a government-provided browser-based Application Virtualization Hosting Environment (AVHE). In 2019, Mindseeker submitted a "Request for Price Modification" that sought additional costs for several issues including lost production due to "government-imposed downtime for the AVHE system."[15]

In July 2020, Mindseeker made a revised submission that was labeled a "Request for Equitable Adjustment."[16] This submission sought $615,199 for the AVHE system downtime and requested a prospective price increase for coded records. Mindseeker requested either an increase to the contract's price-per-unit rate or, alternatively, a new contract line item number (CLIN) to pay for system downtime at an established hourly rate.

After some exchanges between Mindseeker's president and the Army's contract specialist regarding the submission, the contract specialist asked Mindseeker to resubmit it with certification language that matched the required certification language for a claim under the CDA.

Mindseeker's president complied with that direction by submitting a revised "request for equitable adjustment" with the required CDA certification on December 9, 2020.[17] Mindseeker's submission did not include – and the contract specialist did not request – the alternative certification required under the *Defense Federal Acquisition Regulation Supplment (DFARS)* for REAs in excess of the simplified acquisition threshold.[18]

On August 26, 2021, in response to the contract specialist's request, Mindseeker updated its downtime losses through July 2021 and submitted a revised REA for $924,384. The updated/revised REA included the same CDA certification language.

Mindseeker's new submission included the same closing as its previous submission, which said, "Mindseeker appreciates the opportunity to present our concerns and requests for the Government to consider. We are ready, willing, and able to meet with you at your request and convenience to discuss the requests presented herewith."[19]

When Mindseeker's president followed up on the REA in September 2021, the contract specialist stated that "the Contracting Officer's Decision document was just about complete."[20]

However, in November 2021, before Mindseeker received the decision, the Army assigned a new contracting officer. The new contracting officer issued a decision in January 2022 that denied Mindseeker's "REA." In that decision, the contracting officer asserted that the updated/revised REA, dated August 26, 2021, was not a claim pursuant to the Disputes clause under FAR 52.233-1.

Mindseeker appealed the contracting officer's decision to the ASBCA. The Army moved to dismiss Mindseeker's appeal for lack of jurisdiction because Mindseeker failed to convert its REA into a claim.

Mindseeker's Request for Downtime Losses Was a Claim

Applying the Federal Circuit's framework, the Board found that Mindseeker's request for downtime losses was a claim. Mindseeker had demanded those losses in a "sum certain" and provided "a clear and unequivocal statement explaining the basis" for its claim.[21] Mindseeker's submission thus met the definition of a "claim" under the *FAR*.

Mindseeker's submission also included the proper claim certification statement required under the CDA and the Disputes clause. The Board noted that Mindseeker's signed certification provided that the "*claim*" was made in good faith and that the signatory had authority to certify that "*claim*" on behalf of Mindseeker.[22]

The Board also analyzed "the content and context of the correspondence between the Army and Mindseeker" and found that it "requested a final decision for a CDA claim."[23] Although Mindseeker's submission began as an REA, the Board concluded that it subsequently became a claim once it was certified.

Relying on recent Federal Circuit precedent, the Board explained that

the existence of a certification is "a key fact serving to imply a request for a final decision because it can show, as it did here, a formality lacking in earlier submissions."[24]

The Board rejected the Army's assertion that the existence of the certification should be ignored because the Army's contract specialist is the one who requested it. According to the Board, "[t]he Army placed itself on notice that Mindseeker was converting its REA to a CDA claim by requesting that Mindseeker certify its REA using the CDA certification, which goes beyond an REA's certification."[25]

The Board also disagreed with the Army's contention that Mindseeker did not request a final decision because its submission "ended with language that appeared to seek settlement rather than demand a decision."[26] According to the Federal Circuit, such "hortatory language seeking settlement does not signify that a submission is an REA rather than a claim."[27]

Mindseeker's Contract Modification Request Did Not Qualify as a Claim

Although Mindseeker's claim for down-time losses survived the Army's motion to dismiss, Mindseeker's request for a price per unit adjustment or new CLIN did not. The Board dismissed this aspect of the appeal because Mindseeker's request did not satisfy the criteria for a claim.

Mindseeker's request for a contract modification sought "future monetary payment" and, thus, did not qualify as a demand for money "as a matter of right" under the *FAR* definition of a "claim."[28] Moreover, Mindseeker failed to specify the amount due in a "sum certain." While Mindseeker requested a specific change to the contract's per-unit price, the request did not quantify the number of units to be ordered and so a "sum certain" total could not be derived.

Conclusion

The Board's decision underscores the highly factual nature of the inquiry into whether a submission qualifies as a claim or REA. The *Mindseeker* decision is yet another illustration of what the Federal Circuit has now repeatedly affirmed: a submission labeled as an "REA" or that the parties refer to as an "REA" may nevertheless constitute a claim if all of the objective criteria for a claim are satisfied.

Moreover, the ASBCA decision shows how important the inclusion of a certification is to the "REA versus claim" analysis. REAs will often satisfy the basic elements of a claim under the *FAR's* definition to the extent they demand a "sum certain" and explain the factual and legal basis for recovery.

In those cases, the existence of a certification and a request for a final decision becomes determinative. As highlighted in *Mindseeker*, including a certification is particularly key because it is evidence that a final decision is being requested by the contractor where the contractor's submission does not include an explicit request.

Although the Board found that Mindseeker's submission qualified as a claim, contractors should endeavor to avoid this kind of dispute in the first place, given the potentially extreme consequences for getting it wrong. If a contractor intends to submit a claim, its submission should satisfy the *FAR* definition, include a signed CDA certification, and explicitly request a final decision. To avoid any ambiguity, contractors should also clearly state that their submission is a "claim" pursuant to the CDA and the Disputes clause. **CM**

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ENDNOTES

1 See Hejran Hejrat Co. v. United States Army Corps of Eng'rs, 930 F.3d 1354 (Fed. Cir. 2019); Zafer Constr. Co. v. United States, 40 F.4th 1365 (Fed. Cir. 2022).
2 See, e.g., Appeal of Mindseeker, Inc., ASBCA No. 63197 (Aug. 29, 2024); ELA Group, Inc. v. Department of Labor, CBCA No. 8235 (Nov. 22, 2024).
3 41 U.S.C. §§ 7103(d), 7109.
4 41 U.S.C. § 7104.
5 Bill Strong Enterprises, Inc. v. Shannon, 49 F.3d 1541, 1549-50 (Fed. Cir. 1995).
6 FAR § 31.205-47(f)(1).
7 41 U.S.C. § 7103(a)(4).
8 Zafer, 40 F.4th at 1368.
9 FAR § 52.233-1(c).
10 See 41 U.S.C. § 7103(b)(1); 48 C.F.R. § 52.233-1(d)(2)(iii).
11 See Herjan, 930 F.3d at 1359.
12 Zafer, 40 F.4th at 1367.
13 Id. at 1369.
14 Id. at 1367-68.
15 Mindseeker, Slip Op. at 1.
16 Id. at 2.
17 Id. at 3.
18 See DFARS 242.204-71.
19 Id. at 3.
20 Id. at 4.
21 Id. at 7.
22 Id. at 10.
23 Id.
24 Id. at 11.
25 Id. at 11-12.
26 Id. at 12.
27 Id. at 13.
28 Id. at 8.