Untimely Government Actions and CAS (Cost Accounting Standards)

By Michael E. Steen, CPA, Senior Director at Redstone Government Consulting, Inc.

One of the most common complaints from Government contractors relates to untimely government actions, ranging from delays in issuing solicitations, delays in awarding contracts, delays in issuing additional task orders or additional funding, delays in audits and dispositioning audits and in making decisions on contractor claims (discussed in more detail in the article which follows). Industry attempts to compel the government to be more timely have gone nowhere as evidenced by the May 31, 2011 changes to FAR 52.216-7 wherein numerous public comments sought regulatory relief in terms of compelling government agencies to more timely audit and to more timely disposition any audit exceptions (The May 31, 2011 change was purportedly to streamline the processes for contract close-out). The FAR Councils rejected public comments (suggestions) for due dates imposed on the Government based upon the fact that due dates could impact the quality of the Government audits or administrative decisions.

Recent experience (and an unrelated court case) serve as a reminder that the Government can inexplicably delay issue resolution; however, the Government's inactions do not necessarily stop the "interest clock". In the case of a noncompliance with CAS, to the extent the noncompliance increased costs on government contracts, a contractor is subject to refunding the increased costs as well as incurring interest charges based upon IRS Section 6621 and 6622 (section 6622 implicates compound interest). The recent (client) experience involved a CAS noncompliance to which the contractor concurred and provided a General Dollar Magnitude cost impact in late 2010. Absolutely nothing happened until early 2016 when the ACO engaged DCAA to audit the contractor's 2010 cost impact, DCAA timely completed its analysis and provided alternative (slightly higher) amounts for the cost impact. In addition, DCAA provided the ACO with a calculation of Section 6621/6622 compound interest and the ACO issued a demand letter for the principle and interest (the interest portion added approximately 40% to the tab). The contractor cried "foul", noting the inequity of being assessed an interest charge while the Government made no attempt to timely disposition the matter; unfortunately, the CAS Administrative Clause (FAR 52.230-6) is what it is and the ACO asserts that he/she cannot dismiss the interest nor can the ACO agree to resolve the issue as adjustments to current contract prices or billings (the amount must be paid to the US Treasury).

It is more than coincidental that the Government awakened in early 2016 (on an issue which dates back to October 2010) because of FAR 33.206(b), the six- year statute of limitations which requires the Government to issue a written decision on any Government claim initiated against a contractor within 6 years of the accrual date of the claim. At this point the Government's actions are about 6 months shy of passing the 6-year limitation and contractually the Government remains entitled to the amount of the cost impact and the compound interest. The unrelated decision is Secretary of Defense v. Raytheon Co., 2009 WL 2914340, Sept. 14, 2009).

Is The Contracting Officer Taking Too Long To Process Requests For Equitable Adjustments?

Guest article by Jerry Gabig, Attorney, Wilmer & Lee

Often Contracting Officers take an inordinate amount of time to respond to requests for equitable adjustment ("REA"). Sometimes, the Contracting Officer is busy and places a low priority on a contractor's REA. Other times, the Contracting Officer is intentionally "slow rolling" the processing of REAs as a negotiation tactic since there is no incentive for the Government to reach a quick settlement. Fortunately, there are strategies available to a contractor who is faced with a Contracting Officer who is unreasonably delaying the processing of an REA.

Although the term "equitable adjustment" appears in various places in the Federal Acquisition Regulation (FAR), the term is never defined. Generally, an REA is a request under the Changes clause requesting the Contracting Officer to negotiate an increase in price for some event that has occurred during contract performance that was not included in

the original contract price. There are no firm deadlines on a Contracting Officer to respond to an REA.

Other noteworthy aspects of an REA include: the cost of preparing an REA and negotiating the equitable adjustment are typically allowable;[1] the contractor is not entitled to interest for the period of time that the REA is pending; and DOD requires a certification for REA that exceed the simplified acquisition threshold.[2]

If an agency procrastinates an unreasonable amount of time in processing an REA, the contractor is entitled to convert the REA into a claim. The following is the definition of a "claim" in the FAR:

> "Claim" means 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 the contract. However, a written demand or written assertion by the contractor seeking the payment of money exceeding $100,000 is not a claim under 41 U. S. C. chapter 71, Contract Disputes, until certified as required by the statute. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the contracting officer as provided in 33.206(a), if it is disputed either as to liability or amount or is **not acted upon in a reasonable time**.

FAR § 2.101 (emphasis added). Notice the bolded language above, which shows that a routine request for an equitable adjustment can become a claim if "not acted upon in a reasonable time."

In converting an REA to a claim, the contractor must certify the claim using the language set forth in FAR § 33.207(c). By converting an REA to a claim, the contractor is entitled to interest on a meritorious claim beginning the date the Contracting Officer receives a properly certified claim.[3] Additionally, if the claim specifically requests a final decision, the Contracting Officer is confronted with deadlines to either resolve the claim or issue a final decision. If the claim is for $100,000 or less, the Contracting Officer must issue a final decision within 60 days.[4] If the claim is for more the $100,000, the Contracting Officer must either issue a final decision within 60 days or notify the contractor within 60 days of a specific date on which the final decision will be issued.[5]

In setting an issuance date beyond 60 days, the FAR requires the date be: within a reasonable time, taking into account --

(1) The size and complexity of the claim;
(2) The adequacy of the contractor's supporting data; and
(3) Any other relevant factors.

FAR § 33.211(d). If a contractor thinks the date set by the Contracting Officer is an unreasonably long amount of time, the contractor can petition a Board of Contract Appeals or the Court of Federal Claims to order the Contracting Officer to more promptly issue the final decision.[6]

The bottom line is that if a Contracting Officer is taking an unreasonable amount of time to pay an REA, pressure can be placed on the Contracting Officer by converting the REA into a claim and seeking a final decision. Anecdotally, the pressure on the Contracting Officer to act more expeditiously has occasionally caused the government to settle on terms that are more beneficial to the contractor. Also, pursing the REA as a claim has the benefit of reminding the Contracting Officer that his or her decision will not be given any credence by the Board of Contract Appeals or the Court of Federal Claims since the judge will decide the matter *de novo.*[7]

If, within 60 days of receiving the claim, the Contracting Officer ignores his or her duty under FAR § 33.211 to identify the date in which he or she will issue a final decision, the claim is deemed denied. Stated differently, after receiving a claim that seeks a final decision, if the Contracting Officer has not notified the contractor within 60 days of a specific date by which the final decision will be issued, the contractor is

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[1] See Bill Strong Enterprises, Inc. v. Shannon, 49 F.3d 1541 (Fed. Cir. 1995).
[2] DFARS § 243.204-71(a).
[3] FAR § 33.208.
[4] FAR § 33.211(c)(1).
[5] FAR § 33.211(c)(2).
[6] See SoCo-Piedmont, J.V., LLC, ASBCA No. 59318, 14-1 BCA ¶ 35,665 (2014); SUFI Network Services, Inc. v. United States, 102 Fed. Cl. 656 (2012).
[7] De novo means starting from the beginning; anew; afresh. 41 U.S.C. § 7104 states that contracting officer decisions are reviewed "de novo."

permitted to appeal to either a Board of Contract Appeals or the Court of Federal Claims.

In Aetna Government Health Plans, ASBCA No. 60207, 16-1 BCA 36247 (2016), Aetna filed a claim that requested a final decision. The Contracting Officer failed to give notification within 60 days. The Contracting Officer responded that the Government needed additional documentation to review the claim and would issue a final decision within 90 days after receipt of such documentation.

Without providing the requested documentation, Aetna appealed to the Armed Services Board of Contact Appeals (ASBCA) on a "deemed denial" basis. The Government moved to dismiss since there was no Contracting Officer final decision. The Board held that the failure of the Contracting Officer, within 60 days of receiving the claim with a request for a final decision, to commit to a specific date constituted a deemed denial of the claim.

The bottom line is that once a matter is docketed with a Board of Contract Appeals or the Court of Federal Claims, it can no longer be neglected by the Contracting Officer. In fact, if the matter is before the Court of Federal Claims, the Contracting Officer no longer has authority to settle the matter. Put in perspective, proceeding towards litigation as a means to accelerate settlement usually is a good tactic for contractors to stop the government from extensive procrastination. Moreover, sometimes the contractor settles on more favorable terms when the Contracting Officer is pressured to meet deadlines. It is true that litigation itself is undesirable because of its expense and uncertainty, however, proceeding towards litigation does not necessarily dictate that litigation is likely to occur. In fact, most claims before a Board of Contract Appeals or the Court of Federal Claims are settled without any hearing.

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