CAN A REQUEST FOR EQUITABLE ADJUSTMENT BE CONSIDERED A CLAIM?

Copyright 2021 Richard D. Lieberman, Consultant & Retired Attorney

Readers of this blog understand that there can be a difference between a Request for Equitable Adjustment ("REA") and a claim under the Contract Disputes Act ("CDA"). But there frequently are situations where a contractor submits something styled as an REA, but really intends for that submission to be a claim. Two recent court cases indicate a somewhat different approach. *Hejran Hejrat Co Ltd. V. US Army Corps of Engineers,* 930 F.3d 1354 (Fed. Cir. 2019) and *Zafer Const. Co. v. United States,* No. 19-673C (Fed. Cl. Dec. 30, 2020).

First, we review the required elements of a claim under the CDA, which are:

1. Written demand or assertion
2. Submitted to the contracting officer
3. Seeking as a matter of right
4. Payment of money in a sum certain (or adjustment or interpretation of a contract)
5. Including adequate notice of basis and amount of the claim
6. Indicating or stating that the contractor requests a final decision by the contracting officer
7. Submission within 6 years of the date the claim accrued
8. Certification as required by the Contract Disputes Act, if amount is over $100,000.

There are very few requirements for an REA, except in Department of Defense contracts which include the clause at DFARS 252.243-7002 (Requests for Equitable adjustments must accurately reflect the contract adjustment requested, and all REA's that exceed the simplified acquisition threshold must include a certification—although the certification is somewhat different from the CDA certification). Other agency contracts may include contract-specific requirements for REAs.

In ***Hejran*,** the contractor submitted a document that was styled as an REA, and expressly requested that the document be "treated as an REA." The government argued that the REA failed to include any language requesting a final decision by the contracting officer. The Federal Circuit noted that that request did not require "any particular form or use any particular wording," and held that Hejran's submission constituted a request for a final decision on the claim. Hejran requested that the contracting officer provide specific amounts of compensation for each of the alleged grounds, it submitted a sworn statement attesting to the truth of the submission, included detailed factual bases for its alleged losses, and asked for a specific sum certain. The court said that this submission:

"bears all of the hallmarks of a request for a final decision on a claim and [the] court is loathe to believe that in this case a reasonable contractor would submit to the contracting officer a letter containing a payment request after a dispute had arisen solely for the contracting officer's information and without at the very least an implied request that the contracting officer make a decision as to entitlement."

The court also noted that the contracting officer himself treated the denial of Hejran's REA as a "final determination" and although he later attempted to deny that this was a qualifying claim

document, the court refused to revise the nature of the request after the contracting officer had made that final determination. The court held that the REA was a proper claim, although a defect in Hejran's certification would need to be cured (corrected) upon remand.

Zafer turned out the other way. Once again, the question was whether an REA submitted on December 17, 2014 was a valid claim. This submission included the following language: "This REA is submitted so that the parties can engage in immediate discussions and negotiations to mutually amicably resolve this request…" The Court of Federal Claims ("COFC") examined the REA and stated that it did not include any indication that Zafer was expecting a final decision—it asked for negotiations. It was not a current demand for payment, but was a proposal for negotiations. Although Zafer cited the *Hejran* decision discussed above for the proposition that a claim need not be submitted in any particular form or use any particular wording, the COFC, while recognizing that rule, held that the claim must still "indicate to the contracting officer that the contractor is requesting a final decision." Zafer's REA went to some lengths to emphasize that it wanted negotiations, not a final decision—and thus did not qualify as a claim.

Takeaways: Examine the eight requirements for the claim in the introduction to this blog. Contractors should ensure that their claim document (or an REA that they wish to be considered as a claim) includes all of the elements and *specifically states what the contractor wants—e.g. "We request a final decision by the contracting officer" and "we seek this sum certain from the government as a matter of right" etc.* Do not leave openings for a contracting officer or a court to say that your "claim" (or an REA you wish to restyle or resubmit as a claim) is incomplete.

For other helpful suggestions on government contracting, visit:
Richard D. Lieberman's FAR Consulting & Training at https://www.richarddlieberman.com/, and
Mistakes in Government Contracting at https://richarddlieberman.wixsite.com/mistakes.