

# Subpart 33.2 - Disputes and Appeals

**Parent topic:** [Part 33 Protests, Disputes, and Appeals](#)

## 33.201 Definitions.

As used in this subpart-

*Accrual of a claim* means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the *claim*, were known or *should* have been known. For liability to be fixed, some injury *must* have occurred. However, monetary damages need not have been incurred.

*Alternative dispute resolution (ADR)* means any type of procedure or combination of procedures voluntarily used to resolve issues in controversy. These procedures *may* include, but are not limited to, conciliation, facilitation, mediation, fact-finding, minitrials, arbitration, and use of ombudsmen.

*Defective certification* means a certificate which alters or otherwise deviates from the language in [33.207\(c\)](#) or which is not executed by a person authorized to bind the contractor with respect to the *claim*. Failure to certify *shall* not be deemed to be a *defective certification*.

*Issue in controversy* means a material disagreement between the Government and the contractor that-

- (1) *May* result in a *claim*; or
- (2) Is all or part of an existing *claim*.

*Misrepresentation of fact* means a false statement of substantive fact, or any conduct which leads to the belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

## 33.202 Disputes.

[41 U.S.C. chapter 71](#), Disputes, establishes procedures and requirements for asserting and resolving *claims* subject to the Disputes statute. In addition, the Disputes statute provides for-

- (a) The payment of interest on contractor *claims*;
- (b) Certification of contractor *claims*; and
- (c) A civil penalty for contractor *claims* that are fraudulent or based on a *misrepresentation of fact*.

## 33.203 Applicability.

- (a) Except as specified in paragraph (b) of this section, this part applies to any express or implied contract covered by the Federal *Acquisition* Regulation.

(b) This subpart does not apply to any contract with-

(1) A foreign government or agency of that government; or

(2) An international organization or a subsidiary body of that organization, if the *agency head* determines that the application of the Disputes statute to the contract would not be in the public interest.

(c) This part applies to all disputes with respect to *contracting officer* decisions on matters "arising under" or "relating to" a contract. Agency Boards of Contract Appeals (BCAs) authorized under the Disputes statute continue to have all of the authority they possessed before the Disputes statute with respect to disputes arising under a contract, as well as authority to decide disputes relating to a contract. The clause at 52.233-1, Disputes, Disputes, recognizes the "all disputes" authority established by the Disputes statute and states certain requirements and limitations of the Disputes statute for the guidance of contractors and *contracting* agencies. The clause is not intended to affect the rights and obligations of the parties as provided by the Disputes statute or to constrain the authority of the statutory agency BCAs in the handling and deciding of contractor appeals under the Disputes statute.

### **33.204 Policy.**

The Government's policy is to try to resolve all contractual issues in controversy by mutual agreement at the *contracting officer's* level. Reasonable efforts *should* be made to resolve controversies prior to the submission of a *claim*. Agencies are encouraged to use ADR procedures to the maximum extent practicable. Certain factors, however, *may* make the use of ADR inappropriate (see 5 U.S.C. 572(b)). Except for arbitration conducted pursuant to the Administrative Dispute Resolution Act (ADRA), (5 U.S.C.571, *et seq.*) agencies have authority which is separate from that provided by the ADRA to use ADR procedures to resolve issues in controversy. Agencies *may* also elect to proceed under the authority and requirements of the ADRA.

### **33.205 Relationship of the Disputes statute to Pub. L.85-804.**

(a) Requests for relief under Public Law85-804 (50 U.S.C. 1431-1435) are not *claims* within the Disputes statute or the Disputes clause at 52.233-1, Disputes, and *shall* be processed under subpart 50.1, Extraordinary Contractual Actions. However, relief formerly available only under Public Law85-804; *i.e.*, legal entitlement to rescission or reformation for mutual mistake, is now available within the authority of the *contracting officer* under the Contract Disputes statute and the Disputes clause. In case of a question whether the *contracting officer* has authority to settle or decide specific types of *claims*, the *contracting officer should* seek legal advice.

(b) A contractor's allegation that it is entitled to rescission or reformation of its contract in order to correct or mitigate the effect of a mistake *shall* be treated as a *claim* under the Disputes statute. A contract *may* be reformed or rescinded by the *contracting officer* if the contractor would be entitled to such remedy or relief under the law of Federal contracts. Due to the complex legal issues likely to be associated with allegations of legal entitlement, *contracting officers shall* make written decisions, prepared with the advice and assistance of legal counsel, either granting or denying relief in whole

or in part.

(c) A *claim* that is either denied or not approved in its entirety under paragraph (b) of this section may be cognizable as a request for relief under Public Law 85-804 as implemented by [subpart 50.1](#). However, the *claim* must first be submitted to the *contracting officer* for consideration under the Disputes statute because the *claim* is not cognizable under Public Law 85-804, as implemented by [subpart 50.1](#), unless other legal authority in the agency concerned is determined to be lacking or inadequate.

### **33.206 Initiation of a claim.**

(a) Contractor *claims* shall be submitted, *in writing*, to the *contracting officer* for a decision within 6 years after *accrual of a claim*, unless the *contracting* parties agreed to a shorter time period. This 6-year time period does not apply to contracts awarded prior to October 1, 1995. The *contracting officer* shall document the contract file with evidence of the date of receipt of any submission from the contractor deemed to be a *claim* by the *contracting officer*.

(b) The *contracting officer* shall issue a written decision on any Government *claim* initiated against a contractor within 6 years after accrual of the *claim*, unless the *contracting* parties agreed to a shorter time period. The 6-year period shall not apply to contracts awarded prior to October 1, 1995, or to a Government *claim* based on a contractor *claim* involving fraud.

### **33.207 Contractor certification.**

(a) Contractors shall provide the certification specified in paragraph (c) of this section when submitting any *claim* exceeding \$100,000.

(b) The certification requirement does not apply to issues in controversy that have not been submitted as all or part of a *claim*.

(c) The certification shall state as follows:

I certify that the *claim* is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the *claim* on behalf of the contractor.

(d) The aggregate amount of both increased and decreased costs shall be used in determining when the dollar thresholds requiring certification are met (see example in [15.403-4\(a\)\(1\)\(iii\)](#) regarding *certified cost or pricing data*).

(e) The certification may be executed by any person authorized to bind the contractor with respect to the *claim*.

(f) A *defective certification* shall not deprive a court or an agency BCA of jurisdiction over that *claim*. Prior to the entry of a final judgment by a court or a decision by an agency BCA, however, the court or agency BCA shall require a *defective certification* to be corrected.

### **33.208 Interest on claims.**

(a) The Government *shall* pay interest on a contractor's *claim* on the amount found due and unpaid from the date that-

(1) The *contracting officer* receives the *claim* (certified if required by [33.207\(a\)](#)); or

(2) Payment otherwise would be due, if that date is later, until the date of payment.

(b) Simple interest on *claims shall* be paid at the rate, fixed by the Secretary of the Treasury as provided in the Disputes statute, which is applicable to the period during which the *contracting officer* receives the *claim* and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the *claim*. (See the clause at [52.232-17](#) for the right of the Government to collect interest on its *claims* against a contractor.)

(c) With regard to *claims* having *defective certifications*, interest *shall* be paid from either the date that the *contracting officer* initially receives the *claim* or October 29,1992, whichever is later. However, if a contractor has provided a proper certificate prior to October 29,1992, after submission of a defective certificate, interest *shall* be paid from the date of receipt by the Government of a proper certificate.

### **33.209 Suspected fraudulent claims.**

If the contractor is unable to support any part of the *claim* and there is evidence that the inability is attributable to *misrepresentation of fact* or to fraud on the part of the contractor, the *contracting officer shall* refer the matter to the agency official responsible for investigating fraud.

### **33.210 Contracting officer's authority.**

Except as provided in this section, *contracting officers* are authorized, within any specific limitations of their warrants, to decide or resolve all *claims* arising under or relating to a contract subject to the Disputes statute. In accordance with agency policies and [33.214](#), *contracting officers* are authorized to use ADR procedures to resolve *claims*. The authority to decide or resolve *claims* does not extend to-

(a) A *claim* or dispute for penalties or forfeitures prescribed by statute or regulation that another *Federal agency* is specifically authorized to administer, settle, or determine; or

(b) The settlement, compromise, payment, or adjustment of any *claim* involving fraud.

### **33.211 Contracting officer's decision.**

(a) When a *claim* by or against a contractor cannot be satisfied or settled by mutual agreement and a decision on the *claim* is necessary, the *contracting officer shall*-

- (1) Review the facts pertinent to the *claim*;
- (2) Secure assistance from legal and other advisors;
- (3) Coordinate with the contract administration officer or *contracting office*, as appropriate; and
- (4) Prepare a written decision that *shall* include-
  - (i) A description of the *claim* or dispute;
  - (ii) A reference to the pertinent contract terms;
  - (iii) A statement of the factual areas of agreement and disagreement;
  - (iv) A statement of the *contracting officer's* decision, with supporting rationale;
  - (v) Paragraphs *substantially as follows*:

"This is the final decision of the *Contracting Officer*. You *may* appeal this decision to the agency board of contract appeals. If you decide to appeal, you *must*, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the *Contracting Officer* from whose decision this appeal is taken. The notice *shall* indicate that an appeal is intended, reference this decision, and identify the contract by number.

With regard to appeals to the agency board of contract appeals, you *may*, solely at your election, proceed under the board's-

- (1) Small *claim* procedure for *claims* of \$50,000 or less or, in the case of a small business concern (as defined in the Small Business Act and regulations under that Act), \$150,000 or less; or
- (2) Accelerated procedure for *claims* of \$100,000 or less.

Instead of appealing to the agency board of contract appeals, you *may* bring an action directly in the *United States Court of Federal Claims* (except as provided in 41 U.S.C. 7102(d), regarding Maritime Contracts) within 12 months of the date you receive this decision"; and

(vi) Demand for payment prepared in accordance with 32.604 and 32.605 in all cases where the decision results in a finding that the contractor is indebted to the Government.

(b) The *contracting officer shall* furnish a copy of the decision to the contractor by certified mail, return receipt requested, or by any other method that provides evidence of receipt. This requirement *shall* apply to decisions on *claims* initiated by or against the contractor.

(c) The *contracting officer shall* issue the decision within the following statutory time limitations:

(1) For *claims* of \$100,000 or less, 60 days after receiving a written request from the contractor that a decision be rendered within that period, or within a reasonable time after receipt of the *claim* if the contractor does not make such a request.

(2) For *claims* over \$100,000, 60 days after receiving a certified *claim*; provided, however, that if a decision will not be issued within 60 days, the *contracting officer shall* notify the contractor, within that period, of the time within which a decision will be issued.

(d) The *contracting officer shall* issue a decision 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.

(e) The *contracting officer shall* have no obligation to render a final decision on any *claim* exceeding \$100,000 which contains a *defective certification*, if within 60 days after receipt of the *claim*, the *contracting officer* notifies the contractor, *in writing*, of the reasons why any attempted certification was found to be defective.

(f) In the event of undue delay by the *contracting officer* in rendering a decision on a *claim*, the contractor *may* request the tribunal concerned to direct the *contracting officer* to issue a decision in a specified time period determined by the tribunal.

(g) Any failure of the *contracting officer* to issue a decision within the required time periods will be deemed a decision by the *contracting officer* denying the *claim* and will authorize the contractor to file an appeal or suit on the *claim*.

(h) The amount determined payable under the decision, less any portion already paid, *should* be paid, if otherwise proper, without awaiting contractor action concerning appeal. Such payment *shall* be without prejudice to the rights of either party.

### **33.212 Contracting officer's duties upon appeal.**

To the extent permitted by any agency procedures controlling contacts with agency BCA personnel, the *contracting officer shall* provide data, documentation, information, and support as *may* be required by the agency BCA for use on a pending appeal from the *contracting officer's* decision.

### **33.213 Obligation to continue performance.**

(a) In general, before passage of the Disputes statute, the obligation to continue performance applied only to *claims* arising under a contract. However, the Disputes statute, at [41 U.S.C. 7103\(g\)](#), authorizes agencies to require a contractor to continue contract performance in accordance with the *contracting officer's* decision pending a final resolution of any *claim* arising under, or relating to, the contract. (A *claim* arising under a contract is a *claim* that can be resolved under a *contract clause*, other than the clause at [52.233-1](#), Disputes, that provides for the relief sought by the claimant; however, relief for such *claim* can also be sought under the clause at [52.233-1](#). A *claim* relating to a contract is a *claim* that cannot be resolved under a *contract clause* other than the clause at [52.233-1](#).) This distinction is recognized by the clause with its Alternate I (see [33.215](#)).

(b) In all contracts that include the clause at [52.233-1](#), Disputes, with its Alternate I, in the event of a dispute not arising under, but relating to, the contract, the *contracting officer shall* consider providing, through appropriate agency procedures, financing of the continued performance; provided, that the Government's interest is properly secured.

### **33.214 Alternative dispute resolution (ADR).**

(a) The objective of using ADR procedures is to increase the opportunity for relatively inexpensive and expeditious resolution of issues in controversy. Essential elements of ADR include-

- (1) Existence of an *issue in controversy*;
- (2) A voluntary election by both parties to participate in the ADR process;
- (3) An agreement on alternative procedures and terms to be used in lieu of formal litigation; and
- (4) Participation in the process by officials of both parties who have the authority to resolve the *issue in controversy*.

(b) If the *contracting officer* rejects a contractor's request for ADR proceedings, the *contracting officer shall* provide the contractor a written explanation citing one or more of the conditions in 5 U.S.C. 572(b) or such other specific reasons that ADR procedures are inappropriate for the resolution of the dispute. In any case where a contractor rejects a request of an agency for ADR proceedings, the contractor *shall* inform the agency *in writing* of the contractor's specific reasons for rejecting the request.

(c) ADR procedures *may* be used at any time that the *contracting officer* has authority to resolve the *issue in controversy*. If a *claim* has been submitted, ADR procedures *may* be applied to all or a portion of the *claim*. When ADR procedures are used subsequent to the issuance of a *contracting officer's* final decision, their use does not alter any of the time limitations or procedural requirements for filing an appeal of the *contracting officer's* final decision and does not constitute a reconsideration of the final decision.

(d) When appropriate, a *neutral person may* be used to facilitate resolution of the *issue in controversy* using the procedures chosen by the parties.

(e) The confidentiality of ADR proceedings *shall* be protected consistent with 5 U.S.C. 574.

(f)

(1) A *solicitation shall* not require arbitration as a condition of award, unless arbitration is otherwise required by law. *Contracting officers should* have flexibility to select the appropriate ADR procedure to resolve the issues in controversy as they arise.

(2) An agreement to use arbitration *shall be in writing* and *shall* specify a maximum award that *may* be issued by the arbitrator, as well as any other conditions limiting the range of possible outcomes.

(g) Binding arbitration, as an ADR procedure, *may* be agreed to only as specified in agency guidelines. Such guidelines *shall* provide advice on the appropriate use of binding arbitration and when an agency has authority to settle an *issue in controversy* through binding arbitration.

### **33.215 Contract clauses.**

(a) Insert the clause at 52.233-1, Disputes, in *solicitations* and contracts, unless the conditions in

33.203(b) apply. If it is determined under agency procedures that continued performance is necessary pending resolution of any *claim* arising under or relating to the contract, the *contracting officer shall* use the clause with its Alternate I.

(b) Insert the clause at 52.233-4 in all *solicitations* and contracts.