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Leaving Money On the Table? How to Optimize Your Claims Package

Presented by

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Introductions



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Agenda

- Requests for Equitable Adjustment (“REA”) & Claim Overview
- Section 3610 REA Nuances
- Methods for Quantifying REA/Claim
- Potential Audit Risk
- Best Practices for REA/Claim Preparation
- Questions

Requests for Equitable Adjustment (“REA”) & Claim Overview

REA Process Overview

- An REA starts with the terms of the contract.
 - The government reserves rights to unilaterally take certain actions, and agrees that it will pay the contractor fair/equitable compensation and/or make other changes to terms and conditions to keep the contractor whole
 - The government reserves rights via standard contract clauses (e.g.):
 - *Changes — Fixed Price, FAR 52.243-1*
 - *Changes — Cost Reimbursement, FAR 52.243-2*
 - *Changes and Changed Conditions, FAR 52.243-5*
 - *Differing Site Conditions, FAR 52.236-2*
 - *Suspension of Work, FAR 52.242-14*
 - *Government Property, FAR 52.245-1*
 - The government action or order can be formal/written and the order can be constructive
 - Contractors generally must perform, subject to an REA and/or claim under the disputes clause.
 - Includes notification obligations

REA & Claim Overview

- Requests for Equitable Adjustment
 - Less formal submission for negotiation purposes
 - Preparation costs are potentially recoverable as contract administration costs
 - Certification generally not required
 - But see DFARS 252.243-7002 (certification required for REAs above SAT)
- Claims
 - Claim triggers formal disputes resolution process under the Contract Disputes Act
 - Preparation costs not allowable
 - CDA “claim” means a written demand or written assertion 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.
 - Certification is required for any claim exceeding \$100k.
 - Claim triggers requirement for Contracting Officer’s Final Decision (COFD)
 - COFD within 60 days if claim amount \leq \$100k
 - If claim exceeds \$100k, CO must issue the COFD within 60 days or notify the contractor within 60 days of a date the COFD will be issued
 - Contractor “appeals” COFD to initiate litigation. Two options:
 - Appeal within 90 days to the appropriate agency Board of Contract Appeals; or
 - Appeal within 1 year to the Court of Federal Claims

Importance of REA and Claim Pricing

- Approach REAs with the end game in mind, but the goal is a negotiated settlement.
- Done last and reviewed first
- Pricing drives the decision-making process
- Government often ignores entitlement and defends claim with attack on quantum
- Requires coordinated cross-functional team effort
- Contractor risks
 - False Claims, fraud
 - Defective pricing under TCPD/TINA
 - Disapproval of estimating system and possibly others
- REA outline:
 - Executive summary
 - Factual background
 - Grounds for entitlement
 - Quantum/Relief requested (price increase or schedule extension)

Section 3610 REAs Nuances

Section 3610 REAs Nuances

The CARES Act

- Coronavirus Aid, Relief and Economic Security (CARES) Act
 - One of the first major pieces of COVID relief legislation
 - Enacted March 27, 2020
- Section 3610 gives contracting officers authority to reimburse paid leave provided to keep employees and subcontractors in a “ready state” through September 30, 2020 if:
 - (1) they cannot perform work on a site approved by the Federal Government; and
 - (2) they cannot telework because their job duties cannot be performed remotely.
- Ensures contractors have the ability to mobilize and resume work in a timely manner.
- Reimbursement at applicable contract billing rates not to exceed an average of 40 hours per week.
- Government may provide reimbursement “without consideration.”
- Reimbursement is discretionary

Section 3610 REAs Nuances

Agency Implementation Guidance

	March	April			May			June			July			August		
Coronavirus Aid, Relief, and Economic Security Act	03/27															
Office of Management and Budget				04/17									07/14			
Department of Defense	03/30	04/08 04/09 04/09	04/17	04/24 04/30	05/01							07/02				08/17 (5 documents)
Department of Energy			04/15	04/27 04/28												
Department of Health and Human Services									06/09	06/18		07/01				
Department of Homeland Security			04/11	04/21		05/13										
Department of Veterans Affairs					04/30											
General Services Administration			04/21	04/24												
National Aeronautics and Space Administration		04/02 04/06 04/07			05/04 05/15				06/04 06/04							

Source: GAO analysis of selected agency documents. | GAO-20-662



Section 3610 REAs Nuances

Key Issues

- Reimbursement is discretionary
 - No contractual/statutory entitlement to money
 - Statute provides that available funds “may be used...to reimburse” paid leave costs.
- Subject to the availability of funding
 - CARES includes no specific appropriations for Section 3610 reimbursements
 - Congress is considering additional appropriations in the next round of stimulus (e.g. HEALS Act ~\$11B for DoD).
- Effective period: March 27, 2020 to December 11, 2020 (via CR)
 - DoD initially interpreted Section 3610 as authorizing reimbursement of paid leave starting January 31, 2020 (date of National Emergency Declaration).
 - OMB Memorandum M-20-27 confirmed that Section 3610 does not authorize retroactive reimbursement
- No “double dipping”
 - Reimbursement must be reduced by applicable credits/loan forgiveness provided by other elements of COVID stimulus (e.g. Paycheck Protection Program).

Section 3610 REAs Nuances

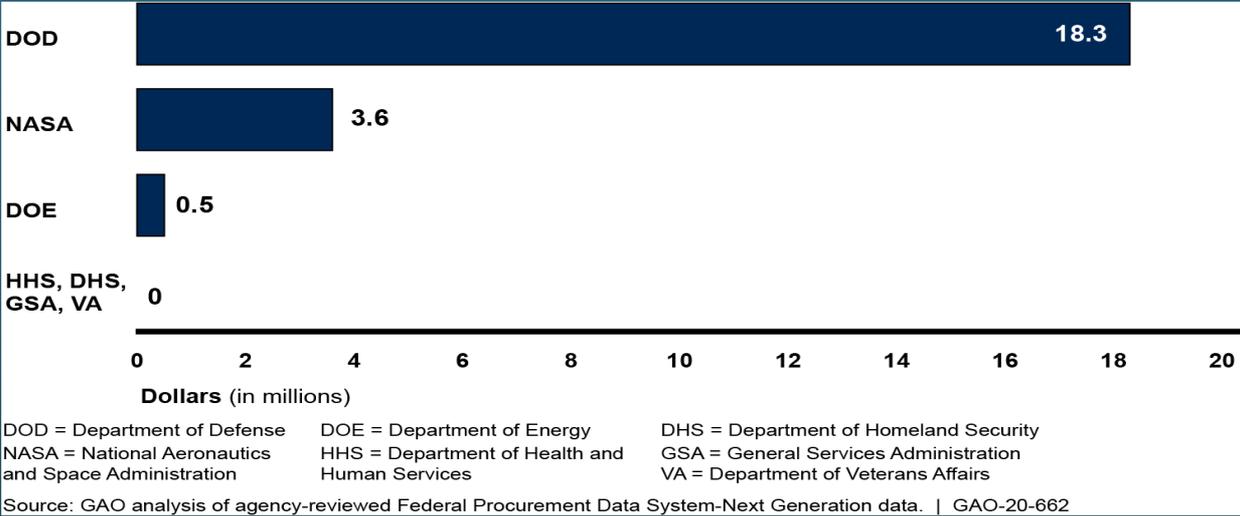
Class Deviation 2020-00021 & DFARS 231.205-79

- Three types of REAs under Section 3610
 - Abbreviated – single contract less than \$2M
 - Multipurpose – single contract above \$2M, or multiple contracts if Global approach is not used
 - Global – seeks reimbursement at the business unit (or segment) level
- Request should include a narrative to establish your status as an “affected contractor”
- Subcontractor requests must be submitted through the prime
- Seven Mandatory contractor/subcontractor representations
 - No double dipping (with other COVID-related relief programs or separate Section 3610 requests)
 - All eligible subcontractor requests included
- Reimbursement at “appropriate rates”
 - Up to an average of 40 hours/week
 - Rates may include labor rates, overhead, and G&A, but no profit/fee.
 - *Note – some inconsistency in agency guidance as to whether profit/fee is allowable.
 - GSA – request should not include profit/fee “where practicable”
 - NASA – request submitted by FFP contractor may include profit that is part of the original contract price
 - Bilateral contract modification (DFARS 252.243-7999)

Section 3610 REAs Nuances

Reimbursements as of July 20, 2020

- Obligations reported to FPDS-NG related to section 3610 amounted to approximately \$22 million on 39 contract actions.
- Over \$1 billion in reimbursements was projected, and much has been funding via existing obligations (e.g., >\$550M from DOE)



Section 3610 REAs Nuances

Risk Areas and Pitfalls

Risk Areas

- Claiming costs not attributable to COVID
 - Example: requesting the cost of paid leave to which an employee was otherwise entitled
- Accounting for paid leave costs
- Reimbursement under Firm-fixed price contracts
- No profit or fee
- Double dipping
- FAR 31 / CAS compliance
- Multiple requests including duplicative costs (failure to properly allocate)
- Subcontractor reimbursement
- Differing guidance among agencies
 - Largely harmonious, but be careful
 - USAID expressly addresses the impact of adjustments on incentive contracts, which are not addressed by DoD Guidance
- False or misleading representations

Methods for Quantifying REA/Claim

Methods for Quantifying REA/Claim - General Pricing Considerations

- Objective: calculate the increased cost of the changed work
 - Contractor should be in the same profit or loss position as if no change occurred
- Generally broken out into four components:
 - Calculating costs directly attributable to added work
 - Calculating costs directly attributable to eliminated work
 - Calculating overhead and profit for costs attributable to changed work
 - Contract administration costs
- No presumption of reasonableness
- FAR 15.408, Table 15-2(III)(B), provides the format for change orders, modifications, and claims

Methods for Quantifying REA/Claim - Estimated Cost Method

- REAs/claims often require some type of estimates
 - Cost of deleted work
 - Actuals are unavailable for added work
 - Lack of segregation
 - Future impacts
- Good faith estimates are preferred when actual costs are not available
- Support: detailed substantiating data or reasonably verifiable cost experience
- Methods include:
 - Buildup through studies, use of subject matter experts (SMEs)
 - Analogy/actual cost of single event
 - Parametric/cost estimating relationship
 - Engineering build-up

Methods for Quantifying REA/Claim - Actual Cost Method

- Actual cost data is the preferred method for proving costs
- Requires early recognition and establishment of separate job cost codes
- Best evidence available under the circumstances
- Key point: establish connection to government conduct
- Cumulative impact of multiple changes
- FAR 52.243-6, Change Order Accounting
 - Permits CO to order the accumulation of actual costs
 - Contractor must indicate in its proposal which proposed costs are actual and which are estimates

Methods for Quantifying REA/Claim - Total Cost Method (TCM)

- Difference between the bid cost/price and actual cost
- Disfavored; assumes entire cost overrun is government's fault
 - Fails to identify specific extra costs caused by changes, differing site conditions, or delays
- Four factors the contractor must show:
 - Impracticality of proving actual costs
 - Contractor's bid was realistic
 - Reasonableness of its actual costs
 - Lack of responsibility for added costs

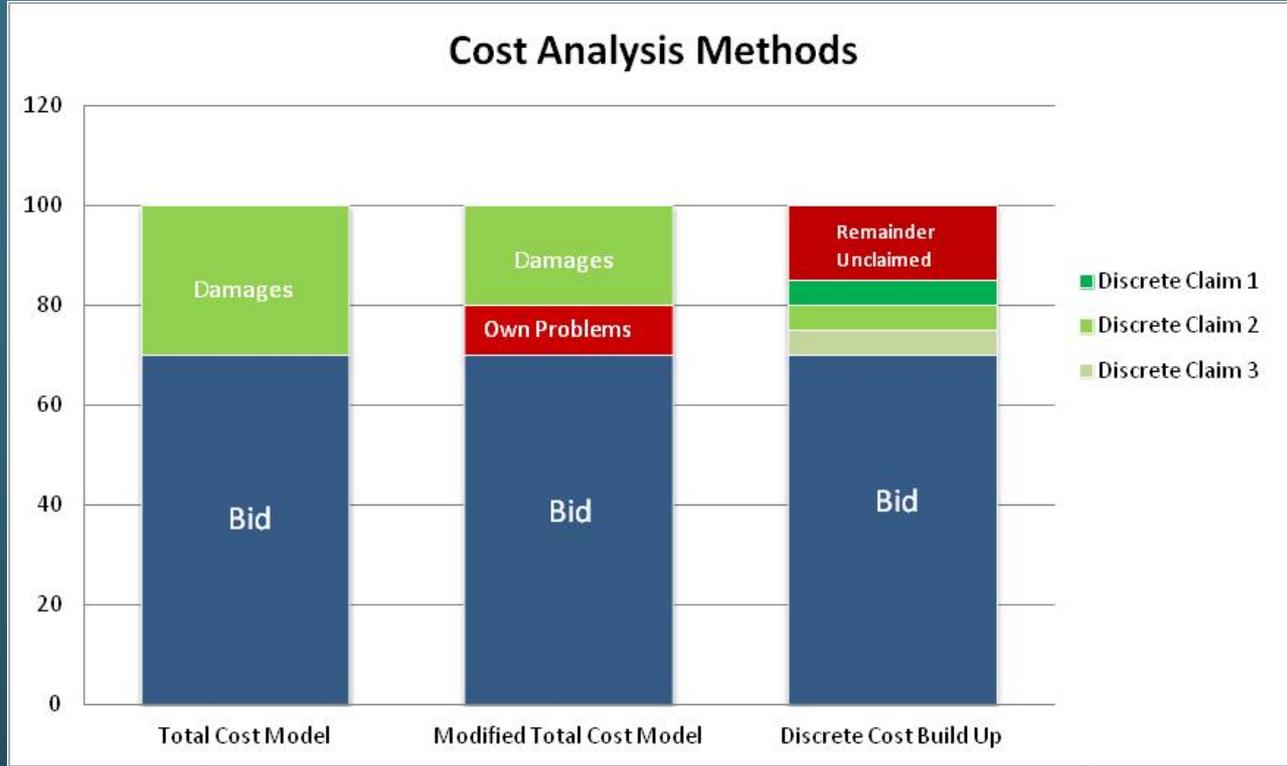
Methods for Quantifying REA/Claim - Modified TCM

- Contractor may adjust the total cost method to account for other factors
- Two elements of the total cost method computation are adjusted:
 - Original costs in the contract price
 - Total costs of performance
- Goal of adjustments: eliminate amounts for which the government is not responsible
- May occur in situations where the bid was not realistic or there were other causes for the extra costs

Methods for Quantifying REA/Claim - Discrete Cost Build

- Provides for direct quantification of any increased costs
- Ties increased costs to contract changes (i.e., claim elements)
- Most precise method; generally preferred
- Often used for termination settlement proposals

Methods for Quantifying REA/Claim - Discrete Cost Build



Mitigate Potential Audit Risk

Mitigate Potential Audit Risk

- Audits should be expected on substantial REAs and claims
- REAs are often audited prior to negotiations
- Post-completion audits typically occur prior to closeout on those contracts with multiple, major change orders
- Expect the auditor to find something; be prepared
- Proper documentation to support the claimed costs are key
 - Review supporting documentation prior to the audit and identify any potential gaps; leave no surprises to the audit itself
 - Organize the support documentation and make available to the auditor
 - Make sure you lead the narrative of the audit

Best Practices for REA/Claim Preparation

Best Practices for REA/Claim Preparation

- Be proactive and start early
- Cross-function cooperation and communication (legal + contracts + pricing)
- Identify potential changes and segregate increased costs immediately
 - Assign separate cost accounting number
 - Contract may require change order accounting
- Scrub costs for unallowables
- Anticipate DCAA challenges to estimates
 - Relevance, causation, reliability of increased costs data
 - Unallowables
 - Labor hour reasonableness
 - Attorney, accountant, and consultant fees
 - Profit
 - Interest on claim

Best Practices for REA/Claim Preparation

- Document estimates in sufficient detail; verify bases of estimate
- Delays: regularly update the contract schedule to reflect changes as they occur
- Cost allowability: separate negotiations/ contract administration costs from claim costs
- Well-supported claims can achieve quicker and more favorable settlements
 - Provide a narrative that tells your story and justifies each claim element
 - Include all records to substantiate claim elements,
- Claim elements should be credible
- Submissions should be easy to understand
- Remember preparation costs may be directly recoverable
- May consider separating your claim in two where you know CO agrees with only certain pieces

Disclaimer

- The information provided in this presentation is of a general nature; it does not carry the force of legal opinion and is not intended to be legal advice.
- Participants should contact appropriate legal counsel with specific questions to receive legal advice.
- This presentation is copyrighted.

The Contracting Officer Has Denied Your Claim: *Now What?*

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Presentation Overview

- Overview of the Contract Disputes Act (CDA)
- COVID-19 Impacts at Court & Boards
- Court of Federal Claims
- Boards of Contract Appeals
- Practical advice from our experience



Overview of the CDA

- What is the CDA?
 - 41 U.S.C. §7101 *et seq.*
 - Statute establishes prerequisites for litigating contract disputes
 - Certified claim
 - Contracting officer final decision
 - Appeal to Board or Court
- Who may submit a CDA claim?
 - The prime contractor — yes
 - Subcontractors – not directly
 - Sureties – no

Overview of the CDA

- Applies to any express or implied contract entered by an “executive agency” for (41 U.S.C. §7102):
 - The procurement of property, other than real property in being
 - The procurement of services
 - The procurement of construction, alteration, repair, or maintenance of real property
 - The disposal of personal property

Overview of the CDA—The Disputes Process



COVID-19 Impact at the Boards

- ASBCA and CBCA “open for business”
- Judges primarily working remotely
- No apparent time lag in handling status conferences, discovery issues or oral arguments
- Surprisingly prompt in issuing decisions
- Boards availing themselves to virtual (Zoom) hearings

COVID-19 Impact at the Boards

- Agency counsel not as prompt
- Department of Defense and Civilian lawyers working remotely, with less urgency
- Agency counsel not equipped with “at-home” technology equivalent to private practitioners
- Commonly seek extensions to respond to discovery and motions
- Boards commonly grant those extensions

COVID-19 Impact at the Court

- The National Courts building in Washington, DC – which houses the US Court of Appeals for the Federal Circuit and the COFC remains closed through 11/22/20 – but both courts are continuing to conduct arguments and hearings remotely
- The Department of Justice Commercial Litigation branch represents the Government in all cases; its attorneys are working remotely, but with some delays in processing matters and getting DOJ upper-level review and approval
- Presenting live witnesses remains a challenge

COVID-19 Impact at the Court

- Law clerks of the judges remain actively involved in scheduling matters, and typically communicate by email with all counsel
- Bid protests remain a high priority, and may take precedence over claims matters
- Electronic filing procedures adopted several years ago have facilitated litigation of matters during COVID-19
- Significant turnover of judges during Trump administration – pending cases are being reassigned to new judges

Court of Federal Claims (COFC)

- Sixteen judges appointed by the President and subject to Senate confirmation
 - *See* 28 U.S.C. § 171(a)
- 15-year judicial terms
- Current COFC composition
 - Ten active judges (seven appointed by President Trump)
 - Six vacancies with two known pending nominations (Zachary Somers, Chief Counsel of Senate Judiciary Committee and Stephen Kubiowski, General Counsel of Kindred Healthcare)
 - Judge Roumel appointed Chief Judge October 19, 2020

COFC Active Judges

- Chief Judge Eleni M. Roumel
 - Judge Patricia Elaine Campbell-Smith*
 - Judge Lydia Kay Griggsby*
 - Judge Richard A. Hertling
 - Judge Ryan T. Holte
 - Judge Matthew H. Solomson
 - Judge Elaine D. Kaplan*
 - Judge David A. Tapp
 - Judge Edward H. Meyers
 - Judge Kathryn C. Davis (confirmed 12/2 awaiting judicial commission)
- * Not appointed by President Trump

COFC 2019 Statistics & Trends



- Contract cases FY 2019
 - Filed: 123 (15% decline from 145 contract cases filed in FY 2018)
 - Pending (close of FY 2019): 335
 - Disposed: 127
 - No information on success rate
- The Federal Circuit reversed five COFC decisions and affirmed 77 during FY 2019
- Total judgments for Plaintiffs/Petitioners: \$329 million (all case types)
- Total amounts claimed: \$7.2 billion

Armed Services Board of Contract Appeals

- Currently 24 administrative judges
- Appointment process (41 U.S.C. § 7105):
 - Appointment by the Secretary of Defense
 - A presumptive judge may not be appointed without at least 5 years of experience in public contract law
 - Life term / removal only for cause, *see* 5 U.S.C. § 3105
- Panel of at least two (and usually three) judges decides an appeal, only one of whom will be present and preside over a hearing
- Jurisdiction over Department of Defense (DOD) and National Aeronautics and Space Administration (NASA) contracts

ASBCA Composition – The Long Timers

- Judge Richard Shackelford (Vice, 1987)
- Judge Owen C. Wilson (Vice, 2007)
- Judge Terrence S. Hartman (1993)
- Judge Reba Page (1994, 2000)
- Judge Michael T. Paul (1987)*
- Judge Cheryl Scott (1990, 2001)*
- Judge Alexander Younger (1987)

* Private practice experience

ASBCA Composition—Appointees Since 2011

- Hon. John J. Thrasher (Chair)
- Judge Craig S. Clarke
- Judge J. Reid Prouty
- Judge Stephanie Cates-Harman
- Judge David F. D'Alessandris
- Judge Donald E. Kinner
- Judge Timothy P. McIlmail
- Judge Christopher McNulty *
- Judge Mark Melnick
- Judge Michael O'Connell *
- Judge Heidi Osterhout
- Judge Lynda O'Sullivan*
- Judge David Stinson*
- Judge James Sweet*
- Judge Elizabeth Witwer
- Judge Kenneth Woodrow*
- Judge Lis Young

* Private practice experience

ASBCA 2020 Statistics & Trends



- 497 docketed appeals in FY 2020
 - Army Corps (90); Navy (95); DCMA/DLA (45); Army (63) and Air Force (47)
 - Previous years: 418 (FY 2019); 490 (FY 2018); 557 (FY 2017); 644 (FY 2016)
 - 363 dispositions in FY 2020 (506 in 2019)
 - 240 dismissals; majority after settlement
 - 123 decided on the merits, 52.8%
"found merit in whole or in part" (was 69.1% in FY 2018)
- Alternate Dispute Resolution (ADR) at the ASBCA in FY 2020
 - 32 cases referred to ADR
 - 25 resolved successfully – success rate of 78%
 - Resolution rate in 2019: 89% on 76 cases referred
 - Resolution rate in 2018: 85% on 81 cases referred
 - Historical resolution rate more than 80 percent

Civilian Board of Contract Appeals

- Civilian Board of Contract Appeals (CBCA):
 - 14 administrative judges, appointed by the Administrator of General Services
 - CBCA judges can only be removed for “cause”
- Establishment in January 2007 consolidated the functions of eight BCAs
- Jurisdiction over most civilian federal executive agency contracts (not NASA, Tennessee Valley Authority, or U.S. Postal Service)
- Panel of three administrative judges decides appeals

CBCA Composition

- Hon. Jeri K. Somers (Chair)*
 - Judge Erica Beardsley (Vice)*
 - Judge Kyle E. Chadwick*
 - Judge Jerome Drummond
 - Judge Allan Goodman*
 - Judge Catherine Hyatt*
 - Judge Harold Kullberg*
 - Judge Harold Lester*
 - Judge Kathleen O'Rourke
 - Judge Beverly Russell
 - Judge Patricia Sheridan*
 - Judge Marian Sullivan
 - Judge Joseph Vergilio
 - Judge Jonathan Zichkau*
- * Private practice experience

CBCA 2019 Statistics & Trends



- 418 docketed appeals in 2019
 - Previous years: 409 (FY 2018); 385 (FY 2017); 505 (FY 2016); 815 (FY 2015)
 - 52% were Contract Disputes Act (CDA) appeals of a Contracting Officer's Final Decision
 - Most of the remaining cases ADR and relocation & travel expense cases
- For second FY in a row more cases docketed than resolved
 - Electronic docketing now at 96%
- ADR at the CBCA in FY 2019
 - 59 pending ADR proceedings at the close of FY 2019
 - CBCA judges traveled to six hearings and 20 ADRs in FY 2019

Practical Advice—Where Should You Appeal?

FACTORS	COFC	ASBCA/CBCA
Neutrality	Judges Nominated by the President	Judges Appointed by Agencies
Jurisdiction	Broad: <i>e.g.</i> , Bid Protests, CDA, Tortious Breach of Contract	Narrow: CDA primarily
Time to Appeal from COFD	12 Months	90 Days
Proceedings	Formal	Informal/Less Formal
Adversary	Department of Justice	Agency Counsel
Alternative Dispute Resolution	Atypical	Actively Participates
Counterclaims and Fraud	Heightened Risk, Broad Jurisdiction	Limited Jurisdiction

Practical Advice—Counterclaims and Fraud



- *Int'l Oil Trading Co.*, ASBCA Nos. 57491, 57492, 57493, 18-1 BCA ¶136,985
 - *Laguna Construction*: 828 F.3d 1364 (Fed. Cir. 2016)
 - Appellant pursued fuel delivery claims
 - USG affirmative defense that appellant obtained contracts through fraud or bribery
 - Appellant argued *Laguna* prevented ASBCA from hearing fraud-based affirmative defense
 - Board lacks jurisdiction to entertain fraud claims
 - *Laguna* does not restrict its power to determine defenses of contract validity when the government alleges a contract is *void ab initio*

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Questions?



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