MUST A LETTER REQUEST A CONTRACTING OFFICER'S DECISION TO COUNT AS A CLAIM?

The Federal Circuit recently considered the "request requirement," which is a contractor's request for a final decision by the Contracting Officer ("CO") on its claim. *Zafer Const. Co., AKA Zafer Taahhut Insaat ve Ticaret A.S. v. United States,* No. 2021-1547 (Fed. Cir. July 18, 2022). The position taken by the government was that Zafer's Request for Equitable Adjustment ("REA") on a water systems contract at Bagram, Air Force Base failed to explicitly request a final decision, and therefore was not a "claim" under the Contract Disputes Act ("CDA"). The Federal Circuit disagreed for the reasons below.

Zafer submitted a 167 page REA requesting $6.7 million and providing a breakdown of the reasons for this amount. The REA stated that it was submitted "so that the parties c[ould] engage in immediate discussions and negotiations to mutually amicably resolve" the request. Zafer certified its request in accordance with the CDA, 41 USC Sec. 7103(b)(1), which is more detailed and goes beyond the certification requirement in the Defense FAR Supplement (DFARS) 252.243-7002(b).

After negotiating for 4 ½ years without full resolution, Zafer requested that the REA be converted into a claim. The CO determined that most of the REA was time barred as a claim because much of the government's alleged conduct had occurred more than six years (the limitation period) before Zafer had converted its request to a claim. The Court of Federal Claims agreed and dismissed the claim stating that this document lacked a request for a final decision, and because it asked for negotiations, was simply a request for negotiation. The Federal Circuit reversed and remanded.

The Federal Circuit noted that a claim does not need to be submitted in any particular form or use any particular wording. To fulfill the requirement that the contractor must submit a claim for a decision (the "request requirement"), the Court held that the contractor's request for a final decision could be either explicit or implicit. The Court said "[t]he request requirement is not a hyper-technical requirement, and we have repeatedly rebuffed attempts to make it one, relying instead on a common sense analysis. Furthermore, the Court said that there is "no necessary inconsistency between a valid CDA claim and an expressed desire to continue to mutually work toward a claim's resolution."

Also, the Court noted that the REA does not explicitly request a final decision, its "content and the context surrounding its submission" placed the CO on notice that the REA was a claim requesting a final decision—and it was certified according to the CDA, which goes beyond a mere REA certification.

Finally, the Court noted that CO's would sometimes face the difficult challenge of determining whether an REQ is also a claim, but the government could easily cope with the problem by using its tools, namely communicating to the contractor that the document will be treated as a claim, or, alternatively, requiring the contractor to propose settlement terms and attempt to settle disputes before submitting a claim to the CO for final decision.

The Court held that Zafer's December 2014 REA implicitly requests a final decision, was a claim, and remanded the case to the Court of Federal Claims.

Takeaway. An REA may actually be a claim depending on an explicit or implicit request for a final decision contained therein, and whether or not the REA was certified as required by the CDA.

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.
By Richard D. Lieberman, Consultant & Retired Attorney