

## **REQUEST FOR FINAL DECISION ON EQUITABLE ADJUSTMENT REQUEST WAS NOT EXPLICITLY OR IMPLICITLY MADE, HENCE IT WAS NOT A CLAIM**

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Two previous blogs have discussed *Hejran Hejrat Co. Ltd., v. U.S. Army Corps of Engineers*, 930 F.3d1354 (Fed. Cir. 2019), and considered exactly what is needed for a contractor's submission to be a "claim" under the Contract Disputes Act ("CDA"). See "No Magic Words or Form Needed for a Claim," Nov. 19, 2019 and "Can A Request for an Equitable Adjustment be Considered a Claim," April 21, 2021. The importance of *Hejran* is that a contractor's request submitted to the contracting officer for payment after a dispute has arisen, may contain at the very least an "implied request" for the contracting officer to make a decision as to entitlement. That request is an essential part of the definition of a CDA claim. If the request contains all of the other essential elements of a claim, as well as a clear and unequivocal statement that gives the contracting officer ("CO") adequate notice of the basis and amount of the claim, then no "magic words" are necessary, and there is an implied request for a final decision.

But the principle in *Hejran* was tested in *BAE Sys. Ordnance Sys., Inc.*, ASBCA No. 62416, Feb 10, 2021. BAE had two contracts with the Army, one for operation and maintenance and the other for production of artillery propellants. An issue arose concerning the cost of complying with environmental conditions, and certain fines BAE was incurring. BAE submitted three letters to the CO, explicitly labeling them as Requests for Equitable Adjustments ("REA"), and certifying them as REAs as required by DFARS 252.243-7002 (not using the CDA certification). The CO responded to the letters, even referring to the response as a "final determination" on the REAs. BAE subsequently submitted a claim for a nearly-identical amount as the REAs, and certified it with the CDA-required certification. After delaying the CO's final decision, the CO failed to respond, and BAE appealed the deemed denial of its claim to the Board.

The Army asserted that the REAs were in fact CDA claims, and that the CO's final determinations were final decisions. BAE noted that its three REAs did not meet the requirements for claims under the CDA, and specifically, that BAE did not request a CO's final decision. During the litigation the Army sought to dismiss the appeal because the time between the denial of the REAs and the submission of the appeal was beyond the CDA's statute of limitations.

The Board held that *Hejran* did not require such a result and the Army's motion to dismiss was denied. The Board noted that the Government was mistaken in its belief that BAE had *implicitly* requested a final decision. Instead of the year long course of dealing, resulting in a change in the documents in *Hejran*, in this case there were three documents plainly *not* requesting CO decisions, and little exchange of information. Nothing significant changed substantially during the discussions on the REAs, as it had in *Hejran*. The Board noted that "[b]y contrast, the reasonable contractor here, for its own good reasons, did not wish to cross the Rubicon by requesting a final decision. Thus we will not find a request for a final decision where it was not explicitly made and not implicitly intended. At the end of the day (consistent with the law, of course), whether a contractor submits a claim or a non-claim REA should be up to the contractor."

Takeaway. Once again, be very specific in your documentation. Include all eight items required if you intend it to be a claim as follows:

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.

If you want your document to be treated as an REA, use the REA certification (if required), do not explicitly ask for a final CO decision, and proceed as BAE proceeded above.

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