

THIRTEEN POTENTIAL GOVERNMENT CLAIMS

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Just as a contractor may submit a claim arising from a government contract, so too may the government file a claim against a contractor in a variety of situations. An agency may (but is not required) to issue a demand letter requiring action by the contractor by a certain date. Absent other statements, the letter is probably not a government claim. However, alternatively (and more likely), if the demand letter states that the demand is a final decision by the contracting officer, and notifies the contractor of its appeal rights to the Court of Federal Claims or the Board of Contract Appeals, it would be final contractor officer's decision. After issuance of such a final decision, the contractor has 90 days to file an appeal with the appropriate Board or one year to file an appeal at the Court of Federal Claims.

There are at least 13 reasons why the government may file a claim against the contractor.

1. **Overpayment.** A government overpayment might occur where there has been a clerical error by the payment office, where the contractor was paid for costs that are specifically unallowable in its contract or in the FAR, or for incorrect numbers of hours or items allegedly delivered by the contractor on the contract and included in its invoice submitted to the government. In addition to these types of overpayments, the contractor may have billed for costs that the contracting officer disallows, such as certain types of pension costs. The demand for the return of these funds would all be government claims.
2. **Defective Pricing.** The Truth in Negotiation Act requires offerors to disclose all relevant cost or pricing data in connection with negotiated contracts that are within certain boundaries set forth in Federal Acquisition Regulation ("FAR") Subpart 15.4. Prior to agreement on price, the offeror is required to make a written certification that the data it has provided to the government is accurate, current and complete. If it is later determined (for example, through an audit) that the price disclosure was inaccurate, not current or not complete, the contract is said to be "defectively priced" and the government is entitled to, and may demand a price reduction for any significant amount by which the price was increased as a result of the defective data. The demand would be a government claim.
3. **Inspection Issues.** Government inspection and warranty clauses are found at FAR 52.246-1 through 52.246-27. These clauses generally state that supplies and materials must be free from defects in material or workmanship and conform with the requirements of the contract (supplies) and services must conform to the contract requirements. If the products or services do not conform, the government may (1) require the contractor to reperform or redeliver conforming services or products; (2) retain the supplies or services and reduce the contract price; or (3) demand a refund of the price. All such actions would be accompanied by a letter from the contracting officer which may constitute a government claim, depending on how it is worded.
4. **Noncompliance with specifications of the contract.** When a contractor fails to comply with specifications, the government may initiate a claim. See *Thomas J. Davis, Inc.*,

ASBCA No. 62634, 21-1 B.C.A. ¶ 37886 (July 1, 2021) (costs incurred by government as a consequence of a defect in the air filtration system and certain electronic controls because of a defective design by contractor).

5. **Breach of Warranty.** See “Inspection Issues” number 3 above. Where nonconforming product or services are delivered, this is a breach of warranty and may become a government claim.
6. **Fraud.** There are many potential areas where a contractor may commit fraud. For example, fraud may be committed in a proposal or other formation document (fraud in the inducement, such as falsely certifying the accuracy, currency or completeness of cost or pricing data the contractor has submitted), in the documents submitted by a contractor in support of a claim, or documents submitted to the government concerning the contract (including knowingly false invoices that are intentionally submitted). All could give rise to a government claim.
7. **Termination for Default (or Cause in a Commercial Item Contract).** Whenever a contract is terminated for default or cause, the termination is treated as a final decision and also as a government claim requiring the government to prove that there is a proper basis for default. Terminations for default also may give rise to a demand that the contractor reimburse the government for the “excess costs of reprocurement” (see below).
8. **Government claim for excess reprocurement costs.** Where there has been a default, the Default Clause (FAR 52.249-8), permits the government to “acquire, under the terms and in the manner the Contracting Officer considers appropriate, supplies or services similar to those terminated, and the Contractor will be liable to the Government for any excess costs for those supplies or services.” This is known as the “excess cost of reprocurement” and is designed to make the government whole. But the contracting officer bears the burden of proving the costs, and that the costs the government incurred comply with the FAR.
9. **Liquidated Damages.** The FAR permits the use of liquidated damages in supplies, services or research and development contracts as well as in construction contracts. FAR 52.211-11, 52.211-12. The purpose of the liquidated damages clause is to specify a pre-determined damage amount (instead of actual damages or assessing a default) for each calendar day if the contractor fails to deliver in compliance with the contract. The assessment of liquidated damages is a government claim.
10. **Cost Accounting System noncompliance.** Where the Cost Accounting Standards are applicable, FAR 52.230-6, the contractor is required to follow them. If they are not followed and there is a noncompliance (usually stemming from an audit) and there is an upward effect on the contract price, the contracting officer may demand payment in a formal claim.
11. **Unilateral Definitization of a Contract Action.** A unilateral contract action that reduces the price is considered by the Boards to be a government claim. When the government unilaterally definitizes a contract price (without obtaining contractor agreement), this is

such a government claim. See *Lockheed Martin Aeronautics Co.*, ASBCA No. 62505, 21-1 B.C.A. ¶ 37888 (June 24, 2021)

12. **Government withholding of payment under a contract.** When the government withholds payments due under a contract to recoup other costs it seeks, such a withholding for recoupment or refunds is a government claim. See *Art Prop. Assocs., LLC, Appellant in Cbca 6493, 6498, 6509 & 1101 Wilson Owner, LLC, Appellant in Cbca 6494, 6495, 6504, 6512 & Nash St. Prop. Assocs., LLC*, CBCA 6493 (May 25, 2021)
13. **Recoupment of advance payments (similar to overpayment).** Advance payments are a method of government financing. If the government makes advance payments on a contract pursuant to FAR 52.232-12, and then seeks to obtain repayment of the advance payment, this would be a government claim.

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