

## **A REQUEST FOR AN EQUITABLE ADJUSTMENT WAS ACTUALLY A CLAIM**

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The Court of Appeals for the Federal Circuit has provided guidance in *Zafer Const. Co. v. United States*, 40 F. 4<sup>th</sup> 132 (Fed. Cir. 2022) that directs the Courts and Board that when deciding if a payment request is a claim or a Request for Equitable Adjustment (“REA”) the content of the payment request should be reviewed objectively and not to focus on subjective intent. This is a case where objective review of a payment request concluded that it was a claim. *ELA Group, Inc. v. Dept of Labor* (“DOL”), CBCA 8235, Nov. 22, 2024.

ELA’s appeal was that the CO failed to issue a final decision on a payment demand that ELA submitted to the CO in October 2023. DOL filed a motion to dismiss the appeal for lack of jurisdiction asserting that ELA filed a more formal claim on September 12, 2024, and the appeal was premature (filed before the 60 day limit for the CO to issue her decision.) ELA’s notice of appeal did not mention the September 12, 2024 claim, but relied solely on the “deemed denial” of its October 2023 submission. DOL argues that the October 2023 submission was an REA, not a claim.

ELA was performing certain construction work in Louisiana, and submitted a Request for Information (“RFI”) to the CO suggesting a change in contract plans to add a fire seal. DOL informed ELA that it rescinded the basis for the RFI. Soon thereafter, on Oct. 27, 2023, ELA submitted a letter to the CO seeking payment of \$26,424 for the price of the RFI, including days expended working on a change order and a time extension.

The CO responded that it was in receipt of ELA’s REA, and essentially denied it in a letter dated Nov. 13, 2023. The CO did not include any notice of appeal rights in the letter or state that it was a final decision under the Contract Disputes Act. ELA filed a notice of appeal on Oct. 11, 2024 based on the failure of the contracting officer to issue a final decision on the claim from the date of Nov. 13, 2023.

The Board stated that the FAR definition of claim is a written demand or written assertion by one of the contracting parties, 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 this contract.” FAR 52.233-1(c). All that the claim must submit is a clear and unequivocal statement that gives the CO adequate notice of the basis and amount of the claim. Beyond that, for the submission to be a claim, a contractor need only show that “what the contractor desires by its submission is a final decision from the contracting officer” citing *Zafer*.

In holding that ELA’s October 2023 submission was a claim, the Board says that the requirement doesn’t focus on a contractor’s subjective intent, and that the contractor’s request for a final CO decision can be implicit—no explicit request is needed. The Board must look objectively at the language of ELA’s October 2023 submission, and it constituted a claim.

Takeaway: Make clear in your submission to the CO if your document is a claim or REA. Do not use these terms interchangeably. Request a final CO decision if it’s a claim. On an REA it’s also advisable to ask for the CO to render a decision (and give a cutoff date since the FAR doesn’t include on for REA’s), but make it clear that you (the contractor) reserves your right to submit a claim. All of this might eliminate the fights over “nomenclature” such as those in the ELA case.

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