



Effectively Prosecuting Claims Against the Government

Alexander W. Major

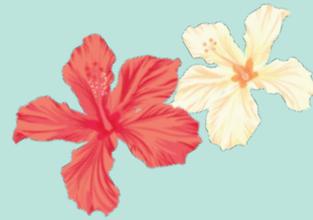
Franklin C. Turner

NHOA Business Summit Conference

Honolulu, HI, May 2019

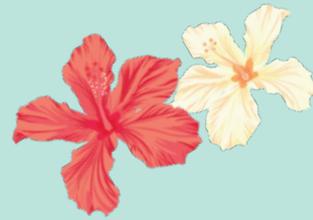
**McCARTER
& ENGLISH**

Who Are These Guys?

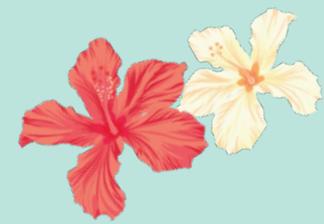


- Partners and Co-Leaders of the Government Contracts and Export Controls PG at McCarter & English LLP
- Significant experience handling “bet the company” litigation for multinational corporations
- Handled claims valued, in the aggregate, in the tens of billions of dollars

Agenda

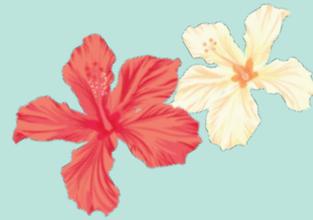


- Understanding “Disputes” With The Government
- Pertinent Definitions
- Claim Initiation
- The Government’s Response
- Appeals
- Ten Tips



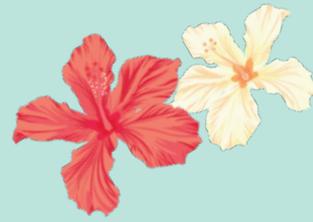
UNDERSTANDING “DISPUTES”

Disputes With The Government



- Most contracts are subject to the Contract Disputes Act of 1978 (“CDA”)
- The CDA provides for:
 - The payment of interest on contractor claims
 - Certification of contractor claims
 - Civil penalties for contractor claims that are based on misrepresentation of fact
- Most contracts contain a “Disputes” Clause (*e.g.*, FAR 52.233-1)

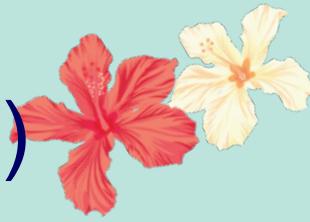
Disputes – Solicitations and Contract Clauses



FAR 33.215 – Contract Clauses

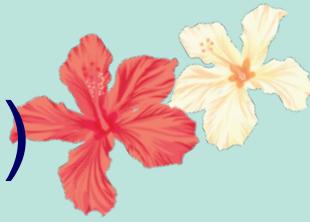
- **FAR 52.233-1, Disputes**
 - Unless conditions in 33.203(b) apply
 - If it is determined under agency procedures that continued performance is necessary pending resolution of any claim arising under or relating to the contract, CO shall use clause with Alternate I
- **FAR 52.233-4, Applicable Law for Breach of Contract Claim**
 - In all solicitations and contracts
 - United States law applies

Disputes With The Government (cont'd)



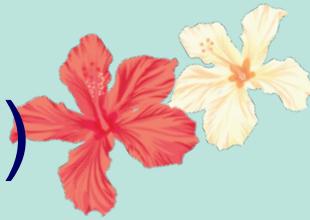
- We live in a complicated world
- Government contracts – which are often replete with regulations and highly specific technical requirements – further complicate that world
- And, of course, there is money
- Money makes life even more complicated
- Without it, your business would not exist

Disputes With The Government (cont'd)



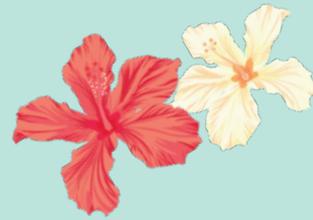
- When the Government doesn't live up to its end of the bargain, the project usually suffers
- Performance becomes more expensive
- Your costs escalate
- Your schedule becomes delayed
- You LOSE MONEY

Disputes With The Government (cont'd)

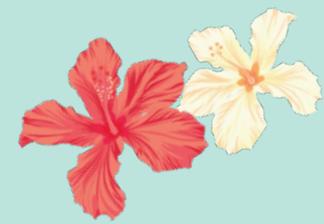


- Who likes to lose money?
- Who likes to turn in late work product?
- Who likes to lay off employees?

Discussion Questions

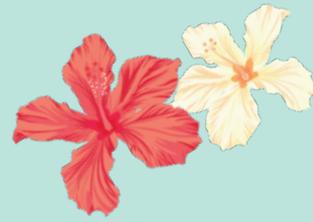


- Have any of you had a “dispute” with the Government?
- How long did it last?
- Did you win or lose?



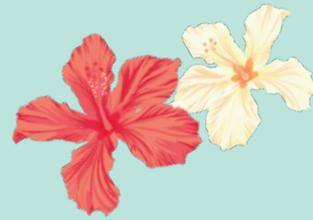
PERTINENT DEFINITIONS

Pertinent Definitions



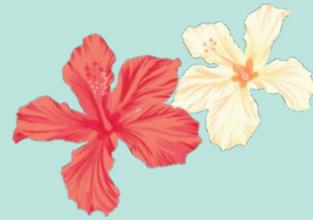
- A “dispute” is not defined at FAR 2.101 or elsewhere in FAR Part 33
- But a “claim” is defined at [FAR 2.101](#) ...
 - “Claim” means a **written demand** or **written assertion** by one of the contracting parties seeking, as a matter of right, the **payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract**. However, a written demand or written assertion by the contractor seeking the payment of money exceeding \$100,000 is not a claim under 41 U. S. C. chapter 71, Contract Disputes until certified as required by the statute. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the contracting officer as provided in 33.206(a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

Pertinent Definitions (cont'd)



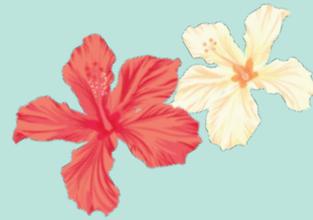
- So ... a “claim” MUST
 - Be in writing
 - Be for a specific amount of money, if monetary
 - Clearly articulate the basis for your relief
 - Be certified if in excess of \$100k, assuming that the contract is subject to the CDA

Pertinent Definitions (cont'd)



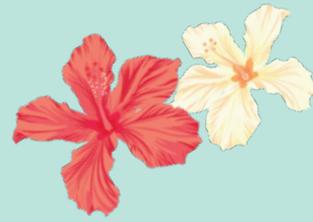
- **FAR 33.201, Definitions**
 - “Accrual of a claim” means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, **were known or should have been known**. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred.

Pertinent Definitions (cont'd)

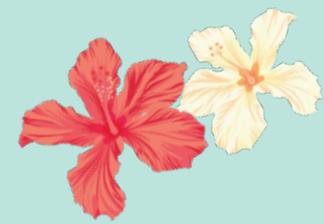


- A claim accrues when . . .
 - You knew or should have known of the basis for the claim
 - When preparing the claim, ask yourself:
 - When, specifically, did the events occur?
 - How do you prove it?
 - Statute of limitations for submitting a claim is 6 years (discussed in depth later)

Claim vs. REA

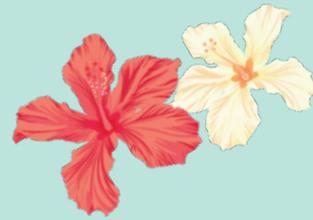


- A claim is not a request for equitable adjustment (“REA”)
- A REA arises under the changes clause
- A claim arises under the disputes clause
- A REA can later be converted to a claim as long as the key components of a “claim” are established (discussed later)



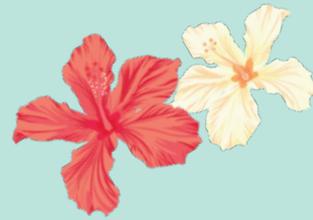
CLAIM INITIATION

Background



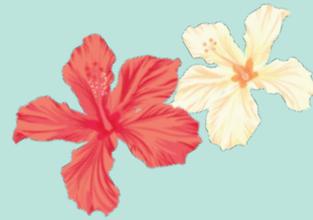
- FAR Subpart 33.2 sets forth regulations governing the initiation of disputes and appeals
- FAR 33.203(b) provides that the Subpart does not apply to:
 - (1) a foreign government or an agency of that government, or
 - (2) an international organization or a subsidiary body of that organization, if the agency head determines that the application of the Disputes statute would not be in the public interest

Background (cont'd)



- **FAR 33.203(c)** -- applies to all disputes with respect to Contracting Officer decisions on matters “arising under” or “relating to” a contract
- Agency Boards of Contract Appeals authorized under the CDA (*e.g.*, ASBCA) continue to have all of the authority they possessed prior to the enactment of the CDA

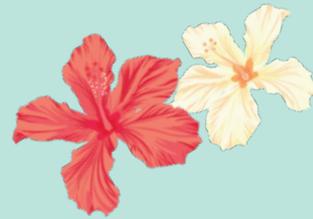
Policy Guidance



FAR 33.204 – Policy

- Government's policy: try to resolve all contractual issues in controversy by mutual agreement at the CO level
- Agencies encouraged to use ADR procedures to the maximum extent practicable

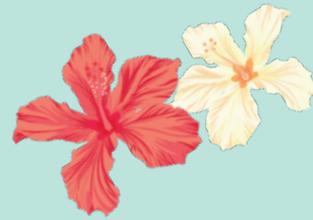
A Note on Public Law 85-804



FAR 33.205 – Relationship of the Disputes Statute to Pub. L. 85-804

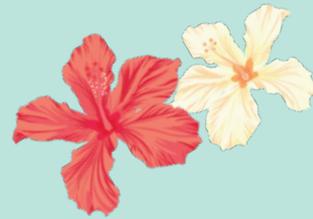
- Pub. L. 85-804 allows any agency which exercises functions in connection with the national defense to enter into contracts (or amend or modify contracts) whenever appropriate for the national defense
 - Extraordinary contractual actions, governed by FAR Part 50
- Requests for relief under Public Law 85-804 are **not claims** within the Disputes statute or the Disputes clause at 52.233-1 and shall be processed under Subpart 50.1
- However, rescission or reformation due to mutual mistake is within the authority of the Contracting Officer under the Disputes statute and the Disputes clause

Claim Triggering Events



- A claim may be triggered by numerous Government actions or omissions, *e.g.* –
 - Asking that you perform work that departs from SOW/PWS requirements
 - Manifesting an interpretation of contract terms/conditions that vary from your interpretation
 - Not paying you in accordance with contract requirements

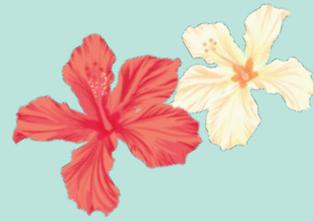
Claim Initiation



FAR 33.206 – Initiation of a Claim

- Contractor claims shall be submitted:
 - In writing
 - To the Contracting Officer for a decision
 - Within **6 years** after accrual of a claim (unless the parties agreed to a shorter time period)
- Contracting Officer shall:
 - Issue a written decision on any Government claim initiated against a contractor within 6 years after accrual of the claim

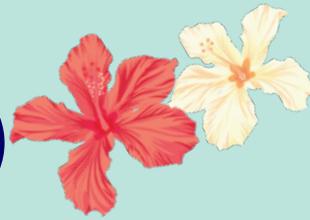
Contractor Certification



FAR 33.207 – Contractor Certification

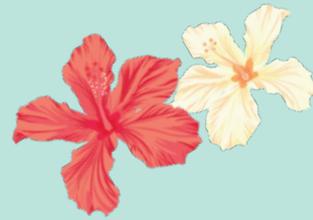
- Contractor must provide certification in this provision when submitting any claim exceeding **\$100,000**
 - “I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.”
- Ensure that certification is executed by a person authorized to bind the contractor with respect to the claim

Contractor Certification (cont'd)



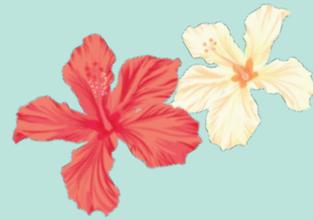
- **FAR 33.207(d)** – the aggregate amount of both increased and decreased costs shall be used in determining when the \$100k dollar threshold requiring certification is met
- **FAR 33.207(f)** – a defective certification shall not deprive a court or an agency BCA of jurisdiction over that claim
 - Prior to the entry of final judgment by a court or a decision by an agency BCA, the court or agency BCA shall require that the defective certification be corrected

Discussion Questions



- Does your company have policies and procedures in place to identify the existence of a claim?
- Do you have a change order accounting capabilities?
- Is there a centralized POC for each contract, such that the a single individual could certify a claim if necessary?

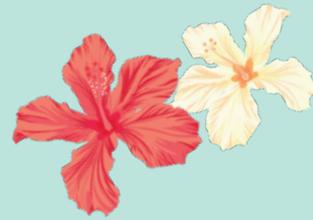
Interest on Claims



FAR 33.208 – Interest on Claims

- Government shall pay interest on a contractor's claim on the amount found due and unpaid from the date that:
 - The CO receives the claim; or
 - Payment would otherwise be due, if that date is later, until the date of payment
- Simple interest at Treasury Rate applicable to the period during which the Contracting Officer receives the claim
 - And then at the rate applicable for each 6-month period during pendency of the claim

A Note on Fraud

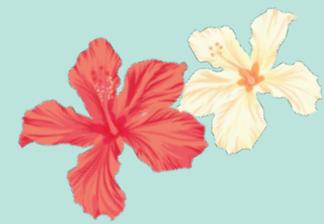


FAR 33.209 – Suspected Fraudulent Claims

- Beware of submitting claims that might be perceived as misrepresenting facts!
- Contracting Officer is required to refer the matter to the agency official responsible for investigating fraud

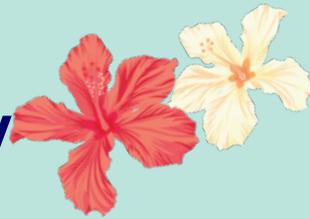
FAR 33.201 – Misrepresentation of Fact

- Means a false statement of substantive fact, or any conduct which leads to the belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead



THE GOVERNMENT'S RESPONSE

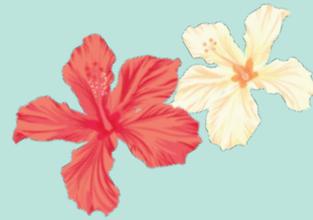
Disputes Process – CO Authority



FAR 33.210 – Contracting Officer's Authority

- COs are authorized, within the limitations of their warrants, to decide or resolve all claims arising under or relating to a contract
- COs authorized to use ADR (see FAR 33.214)
- Authority to decide or resolve claims does not extend to:
 - Claim for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle or determine; or
 - Any claim involving fraud

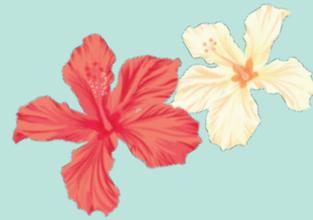
CO Review Procedure



FAR 33.211 – Contracting Officer’s Decision

- The CO must
 - Review the facts pertinent to the claim;
 - Secure assistance from legal and other advisors;
 - Coordinate with the contract administration office or contracting office, as appropriate; and
 - Prepare a written decision

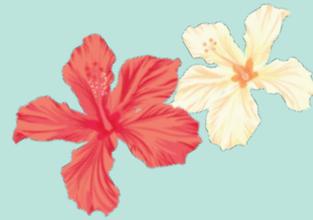
CO Review Procedure (cont'd)



FAR 33.211 – Contracting Officer's Decision

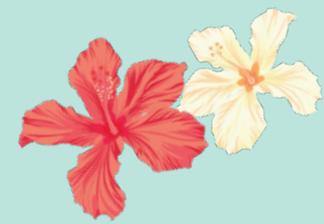
- The written decision shall include, *inter alia*:
 - A description of the claim or dispute
 - A reference to the pertinent contract terms
 - A statement of the factual areas of agreement or disagreement
 - A statement of the Contracting Officer's decision, with supporting rationale;

Disputes Process – COFD



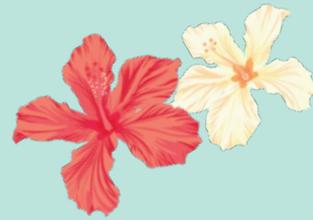
FAR 33.211 – Contracting Officer’s Decision

- When a claim cannot be settled by mutual agreement, the Contracting Officer shall issue a final decision
- Final decisions must include instructions for appealing the decision
- Decisions must be issued within statutory time limits
 - For claims of \$100,000 or less, 60 days after receiving a written request from contractor that a decision be issued within 60 days
 - For claims greater than \$100,000, 60 days after receiving a certified claim
 - If decision will not be issued within 60 days, CO shall notify the contractor, within that period, of the time within which a decision will be issued
 - Claim is “deemed denied” if the Government fails to issue the decision in a timely manner



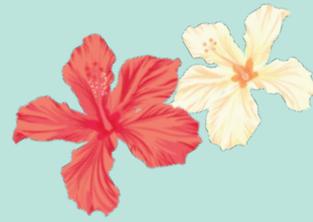
APPEALS

Background



- [FAR 32.211\(a\)\(4\)\(v\)](#) – Decisions on claims submitted under the CDA may be appealed to the agency Board of Contract Appeals if submitted within 90 days from the date you receive the COFD or to the Court of Federal Claims if submitted within 1 year from the date you receive the COFD

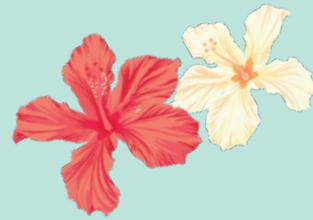
Disputes Process – Post-COFD



FAR 33.212 – Contracting Officer's Duties Upon Appeal

- Consistent with any agency procedures, Contracting Officer shall provide data, documentation, information, and support as may be required by the agency Board of Contract Appeals for use on a pending appeal from the COFD

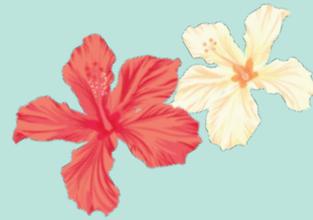
Disputes Process – Post-COFD



FAR 33.213 – Obligation to Continue Performance

- Contractors may be required to continue contract performance in accordance with the COFD pending final resolution of any claim
- If a claim arises not under, but relating to a contract, CO may consider providing financing of the continued performance

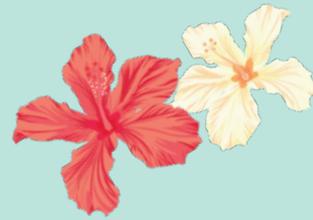
Disputes Process – ADR



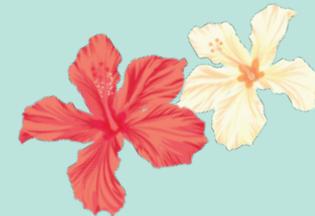
FAR 33.214 – Alternate Dispute Resolution (ADR)

- Objective: provide for relatively inexpensive and expeditious resolution of issues in controversy
- If CO rejects a contractor's request for ADR, they need to provide a written explanation justifying their rejection of the request
- ADR procedures may be used at any time that the Contracting Officer has authority to resolve the issue in controversy
 - When ADR procedures are used subsequent to issuance of a COFD, their use does not alter any of the time limitations or procedural requirements for filing an appeal of the COFD and does not constitute a reconsideration of the final decision

Discussion Questions

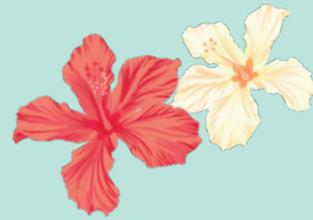


- How do you initiate a claim against the Government?
- Do all claims need to be certified?
- If all or part of your claim is denied, what are your options?



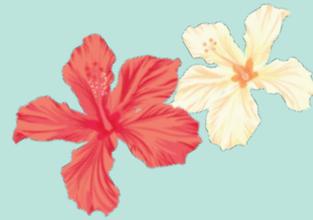
10 TIPS FOR EFFECTIVELY PROSECUTING CLAIMS

Practical Guidance



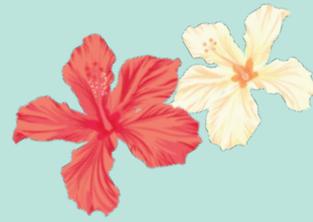
1. Understand your contract obligations (e.g., SOW, PWS, etc.) so that you can quickly identify the accrual of a claim
2. Establish and implement robust change order accounting and document retention procedures to track the cost/schedule impact of Government acts/omissions
3. Ensure that the CO is copied on all communications with Government personnel, as the CO is the only individual with authority to bind the Government
4. Ensure that all claims are submitted within six years from the date of accrual

Practical Guidance (cont'd)



5. Identify the appropriate POC for claim certification purposes (if necessary)
6. Remember to continue performance in the face of a dispute unless otherwise directed by the Government
7. Carefully analyze the COFD upon receipt
8. Choose your appellate forum carefully
9. If it isn't in writing, it didn't happen
10. At the outset of the process, consider consulting with skilled legal counsel to maximize your chances of success

Mahalo!



Questions?
We're here to help...

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