



DEPARTMENT OF THE NAVY
COMMANDER MILITARY SEALIFT COMMAND
WASHINGTON NAVY YARD BLDG 210
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WASHINGTON DC 20398-5540

COMSCINST 4365.7B
N10
6 November 1997

COMSC INSTRUCTION 4365.7B

Subj: CONTRACT CLAIMS MANAGEMENT

Ref: (a) Federal Acquisition Regulation (FAR) 33.2
(b) Department of Defense FAR Supplement (DFARS) 233.2 and 233.70
(c) Navy Acquisition Procedures Supplement (NAPS) 5233.2 and 5233-90

1. Purpose

a. To provide written procedures for processing, controlling and disposing of all claims under the Contract Disputes Act (CDA) of 1978 (41 U.S.C. 601-613), whether by or against the Military Sealift Command (MSC), from claim receipt through settlement or issuance of a contracting officer's final decision, including the litigation stage if the claim is appealed.

b. To assign command-wide responsibilities for the management of contract claims in accordance with the regulatory requirements of references (a), (b) and (c).

c. This is a complete revision and should be read in its entirety.

2. Cancellation. COMSCINST 4365.7A.

3. Definition

a. The term "claim," as used in this instruction, has the same meaning as in FAR 33.201 and the CDA. A 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 related to the contract. A written demand or written assertion by a contractor seeking the payment of money exceeding \$100,000 is not a claim under the CDA until certified, as required by the CDA and FAR 33.207.

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b. Routine requests for payment that are not in dispute when submitted are not claims. However, a routine request for payment such as a voucher or invoice may be converted to a claim by written notice to the contracting officer if it is disputed either as to liability, entitlement or amount or is not acted upon in a reasonable time. Such notice must request a final decision and, in the case of a claim exceeding \$100,000, the claim must be certified by the contractor as prescribed by the CDA.

c. Non-routine requests, such as Requests for Equitable Adjustment (REAs), require the contractor provide written notice with supporting data for a sum certain to be considered a claim. There is no requirement, should the Government dispute entitlement or quantum for a non-routine request, that it be considered a claim.

4. Scope

a. Contractor claims. All claims submitted by MSC contractors under the CDA are within the scope of this instruction. The following are not claims under the CDA:

(1) Requests for relief under Public Law 85-804, (50 U.S.C. 1431-1435), as amended, and as implemented by FAR Part 50, Extraordinary Contractual Actions; and

(2) Admiralty tort claims such as crew personal injury and collision damage claims.

b. Government claims. The formal management procedures defined herein have limited applicability with respect to government claims against a contractor. However, in accordance with NAPS 5232.690, the documentation, review and approval requirements applicable to contractor claims (NAPS 5233.9001) also apply to government claims.

5. Responsibilities

a. Director and Deputy Director, Contracts and Business Management Directorate (COMSC N10/N10X) are responsible for oversight and review of claims management within MSC and for ensuring compliance with the requirements of this instruction.

b. Contracting Officer. The contracting officer, by statute and regulation, is ultimately responsible for the processing of claims from receipt through disposition.

c. Program/Technical/Requirements Office. MSC personnel having technical cognizance of the requirement will provide technical specialists to assist the contracting officer in the evaluation, processing and documentation for the disposition of contract claims. This includes providing qualified individuals to serve as members of Claim Settlement Teams (CSTs).

d. Office of Counsel (N2). The Office of Counsel shall provide support and advisory legal support to the contracting officer in evaluating, processing and documenting contract claims asserted by or against the Department of the Navy.

6. Claims Process

a. The contracting officer shall receive and record the initial submission of a contractor's claim.

b. A preliminary assessment shall be conducted.

(1) The contracting officer will review a claim promptly in order to ascertain its completeness and acceptability, including compliance with the claim and data certification requirements of FAR 33.207 and 15.804.2, as applicable.¹

(2) The contracting officer will return an uncertified or inadequately documented claim to the contractor when appropriate.

(3) The contracting officer shall gather documents and information relevant to the claim. The contracting officer shall assess those facts which will be used to establish a government position. The contracting officer may request the following documents to assist:

(a) Technical Analysis Report (TAR). The cognizant program/technical/requirements office personnel are responsible for preparation of a TAR when one is requested by the contracting officer. The TAR shall include a summary statement of each element of the claim; a statement of the facts as they are known, based upon first hand knowledge provided by on-site government representatives and all available documents; a technical evaluation and analysis of the validity of the claim, identification of all individuals having knowledge of the facts underlying the claim and the extent of their knowledge. The TAR should include an assessment of the contractor's entitlement to an equitable adjustment, if any, including quantum estimates and supporting rationale. Estimates may be based on a "should cost" scenario. The TAR may also set forth questions or issues requiring additional facts or expert testimony.

¹ Whether several claims under \$100,000 should be aggregated for purposes of the certification requirement depends on whether each claim is separate and distinct or whether the claims are merely related segments of a larger claim. When initial analysis reveals that individual claims of \$100,000 or less are factually intertwined with other claims so as to increase their value to an amount in excess of \$100,000, those claims should be returned to the contractor for certification with an explanation as to why the contracting officer believes certification is required. Counsel's advice should be obtained in such situations.

(b) Audit Assistance. Upon receipt of a claim, the contracting officer shall determine whether there is a need for an advisory audit report from the Defense Contract Audit Agency (DCAA). The contracting officer shall consult with the cognizant DCAA auditor as necessary to obtain or provide assistance in evaluation of the contractor's claim(s). Depending upon the scope of the audit desired, the contracting officer may provide the auditor with a copy of the TAR when it becomes available. Refer to NAPS 5242.191 guidance on prompt resolution and disposition of contract audit reports. Semiannual contract audit follow-up reports must be prepared in accordance with DoD Directive 7640.2, paragraph F.3.

(4) The contracting officer shall prepare an initial government position concerning the factual and contractual basis of the claim, both as to entitlement and quantum issues, including an assessment of the completeness and veracity of the contractor's characterization of relevant facts. In preparing this initial assessment, the contracting officer shall secure the assistance of the technical or requirements office to the extent necessary to determine relevant facts.

c. Based on the preliminary assessment, the contracting officer will notify the contractor in writing of any deficiencies in claim documentation. The contracting officer will determine if the establishment of a Claims Settlement Team (CST) is appropriate.

(1) A CST is a formal working group established to assist the contracting officer in the processing of a claim. A CST should be established whenever the contracting officer determines a claim involves difficult or complex technical, legal, factual or fiscal issues requiring extensive fact-finding and analysis. A CST will normally include a contract specialist who will serve as team leader, an attorney, and a technical office representative.

(2) The contracting officer is responsible for the appointment of CST members and supervising its work and progress.

d. Each claim shall be supported with a Legal Memorandum.

(1) Upon receipt of the contracting officer's initial assessment, the TAR, the audit report, if any, and all documents relied upon, the assigned attorney will analyze the relative legal merits of the contractor's and contracting officer's positions, both as to entitlement and quantum. The analysis shall be based upon the facts pertaining to each element of the claim considering the terms of the contract and any modifications, the TAR, interviews with persons possessing knowledge of the facts and any other

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documentation provided by the contracting officer. The analysis shall enumerate all issues raised by the facts, including any defense and counterclaim, and shall include a discussion of the law applicable to each issue. It also shall identify those areas where there is insufficient information available to determine entitlement.

(2) The legal memorandum shall include a discussion of the litigative risk associated with each element of the claim based upon all the available information. The costs of potential litigation should normally not be included or considered.

(3) The legal memorandum is subject to protection from discovery in any subsequent litigation on the basis of attorney-client privilege, provided the privilege is not waived. It also may be protected from discovery on the basis of the "attorney work product" doctrine, should litigation be anticipated at the time it is prepared, and if it is not disclosed to anyone other than the MSC client. Consequently, the legal memorandum shall be plainly marked attorney-client privilege and, if appropriate, attorney work product. Any disclosure of the memorandum shall be coordinated with the Office of Counsel and documented in the file, to prevent the government from later making an erroneous assertion that the document is protected from discovery in any subsequent litigation. The attorney-client privilege may only be asserted with regard to legal advice and communications between attorney and client, in confidence, concerning Government business. The privilege operates to reduce the amount of information discoverable during the course of a lawsuit, and therefore is narrowly construed by the courts.

e. The contracting officer is responsible for completing the claim analysis considering all the relevant information including the contractor's assertions, the TAR, the audit report, if any, and the legal memorandum. The contracting officer will determine the course of action to dispose of the claim. The format for the contracting officer's analysis will depend on whether a price adjustment is involved.

(1) No Price Adjustment. If the claim does not involve a demand for money or the contracting officer determines the claim should be denied, a memorandum format may be used and no business clearance memorandum is required. Forward proposed claim settlements and contracting officer's final decisions, with appropriate documentation and analysis, to COMSC N10 for review and approval (see paragraph i below).

(2) Price Adjustment. A business clearance memorandum is required for contractor claims that will result in a price adjustment. The contracting officer is responsible for developing the negotiation objectives and preparing the pre-negotiation business clearance. Business clearances shall be prepared and approved in accordance with NAPS 5215.808(90) and COMSCINST 4310.2D. Content and format of the business clearance memorandum should be adapted to the circumstances and complexity of the instant claim, while meeting general requirements for establishing and

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documenting pre-negotiation objectives as defined by FAR 15.807 and NAPS 5215.808(90). The business clearance memorandum may take into account the potential cost of litigating the claim and any potential adverse precedent resulting from either litigating or settling.

f. A claim processing milestone plan will be prepared by the contracting officer and submitted as part of the claim report as required by paragraph 7 of this instruction.

g. The contracting officer shall attempt to resolve the claim with the contractor through mutual agreement.

(1) The contracting officer is responsible for conducting negotiations with the contractor as soon as practicable after receiving written approval of the pre-negotiation business clearance. Attendance by technical representatives, the assigned attorney and auditor will depend on the circumstances of the individual case. However, since most claims result from matters in dispute, if the contractor is represented by counsel at claim negotiations, government legal counsel will participate.

(2) In order to facilitate settlement of claims, the Federal Rules of Evidence bar the admission of evidences of settlement or attempted settlement of a disputed claim when offered in court as an admission concerning liability or amount. However, the rule does not require exclusion of the contents of settlement negotiations if it is offered for the purpose of proving bias or to negate a contention of undue delay. In order to allow for claim settlement negotiations to be frank, open and candid, the contracting officer at the commencement of negotiations should attempt to obtain an agreement, in writing, which reads substantially as follows:

The Military Sealift Command, represented by _____
and XYZ Corp., represented by _____ on this date
entered into negotiations regarding the possible settlement of a disputed claim, filed pursuant to the Contract Disputes Act, such claim covering (describe). The parties hereto agree that the contents of these negotiations, including any admissions, offers of compromise made or any compromise ultimately reached and agreed to, during the course of these negotiations and any subsequent negotiation sessions on the above described claim, shall not, except as provided in Rule 408 of the Federal Rules of Evidence, be offered to any future adjudicatory body as evidence of liability, except in an action to enforce any agreement of compromise resulting directly herefrom.

Inability to obtain such an agreement does not preclude entering into settlement negotiations.

(3) The contracting officer should consider whether alternative dispute resolution (ADR) procedures are appropriate to facilitate settlement.

(4) The contracting officer is responsible for preparing a post-negotiation business clearance memorandum upon completion of negotiations. Applicable requirements for content are at FAR 15.808 and NAPS 5215.808. Use the format for a post-negotiation business clearance memorandum if a pre-negotiation business clearance memorandum was required. Otherwise, a standard format is not established since circumstances will differ with the issues and complexity of the individual claim. If discussions do not result in an agreement, a proposed contracting officer's final decision (COFD) will also be prepared and reviewed by legal counsel in accordance with FAR 33.211 (see below).

h. Disposition of the Claim

(1) Final disposition of a claim by the contracting officer is by supplemental agreement, a COFD, or combination thereof. A COFD should be issued when reasonable attempts to negotiate a settlement fail. Final decisions are not settlement offers, and, if appealed, may be construed by the adjudicatory body as an admission by the government of entitlement and/or quantum. Consequently, final decisions should reflect a reasonable estimate of the amount due the contractor, if any, based upon all available documentation and information. In conjunction with the issuance of a final decision, the contracting officer shall issue a unilateral contract modification incorporating the COFD when a price adjustment is allowed by the final decision. Before signing any contract modification with a value of \$5,000,000 or more, the contracting officer must initiate the required notification to the Navy Chief of Information in accordance with DFARS 205.303.

(2) Pursuant to the CDA, a final decision shall be issued within the following statutory time limitations:

(a) For claims of \$100,000 or less, within 60 days after receiving a written request from the contractor that a decision be rendered within that period.

(b) For claims over \$100,000, within 60 days after receiving a certified claim; provided, however, that if a decision cannot be issued within 60 days, the contracting officer shall notify the contractor within that period of the date by which a decision will be issued. Any additional period of time required to issue a decision must be a reasonable time.

(3) When a COFD is issued, all files and back-up data shall be retained. This data is essential to the defense of the government position in the event the contractor appeals the decision. Such data shall be retained by the contracting officer pending either the filing of a timely appeal or suit by the contractor as provided by the CDA, or normal contract close out upon the expiration of such appeal periods.

i. Approval of the Proposed Claim Disposition

(1) Review and approval of claim settlements and final decisions shall be at a level above the contracting officer. Sufficient information must be submitted for evaluation. Rather than preparing a separate document, contracting officers may submit the post-negotiation business clearance memorandum for approval. Approval of a post-negotiation business clearance memorandum shall constitute the required approval for a proposed claim settlement or final decision.

(2) The following individuals are authorized to approve proposed claim settlements and final decisions of the contracting officer involving payments up to the amounts indicated.

(a) For MSC field offices and activities, the Directors of Contracting, N10 East, N10 West, MSCEUR N10, and MSCFE N10 for proposed dispositions not in excess of \$1,000,000.

(b) For Headquarters N10 contracts, the Director, Contracting Support Division (N102) for proposed dispositions not in excess of \$1,000,000.

(c) For Headquarters Program contracts, the Director, Policy and Program Support Division (N101) for proposed dispositions not in excess of \$1,000,000.

(d) COMSC N10 or N10X shall approve all proposed dispositions over \$1 million but not in excess of \$25 million.

(e) Those claim settlements and final decisions involving payments in an amount greater than \$25 million will be forwarded via COMSC N10 to the Office of the Assistant Secretary of the Navy, ASN (RDA) (ABM), in accordance with NAPS 5233.9001.

j. Appeals

(1) Appeals to the Armed Services Board of Contract Appeals (ASBCA). In the event a claim is appealed to the ASBCA, in addition to the requirements of NAPS 5233.9002, the contracting officer shall:

(a) Notify the appropriate Office of Counsel that an appeal has been filed. In the event the Office of Counsel receives notification of the appeal first, counsel will be responsible for notifying the contracting officer of the appeal.

(b) The contracting officer is responsible for preparing an indexed² Rule 4 File (see DFARS Appendix A, Part 2, II-4) and forwarding it to the appropriate counsel's office within 14 days of notification that an appeal has been filed. The contracting officer shall consult with counsel to determine which documents should be included in the Rule 4 File. These documents will consist mainly of the documents already compiled in preparing the business clearance memorandum. The Rule 4 File should consist of all documents pertinent to the appeal, including:

1. The decision from which the appeal is taken;
2. The contract, including pertinent specifications, amendments, plans and drawings;
3. All correspondence between the parties relevant to the appeal, including the letter or letters of claim in response to which the decision was issued;
4. Transcripts of any testimony taken during the course of proceedings, and affidavits or statements of any witnesses on the matter in dispute; and
5. Any additional information considered relevant to the appeal.

(c) After counsel has reviewed the Rule 4 File, the contracting officer is responsible for making three copies (four copies if the claim is to be handled by the Office of General Counsel's Litigation Division (LITOFF)) of the Rule 4 File.

(d) Counsel will be responsible for filing a copy of the Rule 4 File with the ASBCA and the Appellant.

(e) Once the Rule 4 File is submitted, the contracting officer, in consultation with the CST, if there was one for the particular claim, will draft preliminary responses to the contractor's complaint. The contracting officer, in conjunction with the CST, will continue to work closely with counsel in defending the government's position before the ASBCA.

(2) Appeals to Federal Court. If the contractor appeals a claim to a Federal court, primary responsibility for the disposition of the claim is transferred to the Department of Justice. Once suit has been filed in Federal Court, only the Department of Justice has authority to compromise or settle the claim. In such circumstances, MSC personnel are prohibited from negotiating, discussing or otherwise compromising the claim with the contractor or the contractor's representatives without specific permission of the cognizant

² Documents shall be numerically indexed (numbered). Letter identification is not permitted.

Department of Justice Attorney. The contracting officer, in conjunction with the CST if one was established, will work closely with counsel in preparing a litigation report for the Department of Justice and drafting answers to the complaint. The contracting officer and CST will continue to provide assistance to counsel in defending the government's position in the Federal District Court litigation.

7. Reporting

a. Each contracting officer is responsible for the management of his/her respective contract claims, including reporting all contractor and government claims of \$1,000,000 or more to COMSC N101 by the eighth day of January, April, July and October.

Quarterly claim reports should include: (1) contractor name, (2) contract number and description, (3) date claim was received, (4) amount of claim, (5) alleged basis of claim, (6) participating activities or agencies, (7) assessment of validity of claim, (8) current status, (9) provisional payment, and (10) planned handling and disposition of claim.

b. After a claim is settled or disposed of by the COFD, the contracting officer shall prepare and submit to COMSC N101 a final report containing:

(1) The settlement amount and factual conclusions supporting the settlement or COFD; and

(2) Comments on lessons learned and corrective actions taken or to be taken to preclude or minimize recurrence of the circumstances leading to the claim.

c. Updated reports are required quarterly until the claim is resolved. Any change of dollar amounts of claims under review, or before the ASBCA or a federal court, from the prior quarterly report must be explained.

d. COMSC N101 will review these reports for content and any necessary follow-up action.

e. COMSC N101 will notify USCINCTRANS of the receipt or initiation of transportation related claims in excess of \$1 million as required by USTRANSCOM Regulation 24-1.

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f. The reporting requirement prescribed by this instruction is assigned Report Control Symbol MSC 4365-6 and is approved for 3 years from the date of this instruction.

Distribution:

COMSCINST 5000.19

List I (Case A, B)

SNDL 41B (MSC Area Commands)