

A COMMON SENSE ANALYSIS OF WHAT IS A CLAIM

Copyright Richard D. Lieberman, Consultant and Retired Attorney

How many contractor demands for payment make a claim? The Contract Disputes Act (“CDA”) requires that “each claim by a contractor against the Federal Government relating to a contract shall be submitted to the contracting officer for a decision.” 41 U.S.C. § 7103(a)(1). The Federal Acquisition Regulation (“FAR”) includes the same requirement at FAR 33.206. While the CDA itself does not define claim, the FAR does, as follows:

“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 [FAR] 33.206(a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

FAR 2.101. There is a reasonable question of when a contractor’s unpaid invoice is converted to a formal claim by other communications, and that question was addressed and answered in *Rover Const. Co.*, ASBCA No. 60703, March 1, 2017.

Rover involved an Army contract for rental and servicing portable latrines for a six month period beginning in November 2010. *Rover* apparently performed, but did not receive any payment. The company inquired of various procurement officials (not the contracting officer) asking for its payment in four emails. Then there followed numerous emails from *Rover* to the contracting officer asking for payment, resulting in the resubmission of the invoice. The contracting officer requested a minor correction in the invoice, which *Rover* apparently made. Then followed more emails, totaling 24 in all, where the contractor sought payment for its work. The Army never paid.

Rover filed an appeal to the Armed Services Board of Contract Appeals in July 2016, stating it had not been paid for work performed under the contract. No formal claim or final contracting officer’s decision was attached, and the Army moved to dismiss the claim, asserting that *Rover* had never submitted a certified claim to the contracting officer. Upon order, the Army produced 4 emails to the Board, and *Rover* produced 19 other emails. The dollar value of the invoice contained in the emails was \$36,411.43.

The Army pressed its motion to dismiss, asserting that no claim had been filed. But the Board took a more common sense approach. It noted that a claim does not have to be submitted in any particular form or use any particular wording, but must include (1) adequate notice of the basis and amount of the claim and (2) a request for a final decision. The Board noted that a contractor’s request for a decision can be implied from the context of the submission. The Board

stated that “[i]n determining whether a contractor has submitted a claim, the Board applies a common sense analysis on a case-by-case basis, examining the totality of the correspondence between the parties.”

The Board examined all 24 emails that Rover had submitted, only four of which the Army had produced to the Board. It noted that Rover had repeatedly and consistently informed the Army that it was still awaiting payment, and had supplied an invoice to the contracting officer in November 2012—even correcting that invoice when the contracting officer requested it. Thereafter, Rover again advised the Army it had not been paid for work performed. The Board concluded that “[t]hrough these repeated communications, appellant converted its routine request for payment into a claim within the meaning of FAR 2.101 and the law imposes no requirement for proof of performance [which Army had requested] to ‘convert an invoice into a claim after it becomes disputed or is not timely acted upon.’” And, because the claim was less than \$100,000, certification was not required. The Board denied the Army’s motion to dismiss the appeal, and it continues.

TAKEAWAY: A business cannot remain operational if it is not paid for its work. If a proper invoice is not paid in a timely manner, a contractor should immediately advise the contracting officer and permit him/her a week or so to research why the payment wasn’t made. *If no payment is forthcoming, the contractor should file an immediate claim with the contracting officer, demanding payment, in order to have a formal claim and presumably either a final contracting officer decision or a “deemed denial” by inaction.* This would avoid the problem of whether a claim had been filed, as mentioned in *Rover*. However, if you fail to file a formal claim, but submit a proper invoice, with subsequent communications requesting payment similar to those made by Rover, the Board will construe such communications as a claim, provided the claim is under \$100,000 and no certification is required. Of course, the better procedure is to file a formal CDA claim so there is no question.