

TMA Procedures, Guidance, and Information (PGI)

TMA PGI 233 - PROTEST, DISPUTES, AND APPEALS

(May 29, 2012)

233.2 - Disputes and Appeals

- (1) TRICARE Acquisition Directive – None
- (2) Overview – A dispute is a disagreement between the contractor and the Contracting Officer (CO) regarding the rights of the parties arising under or related to a Government contract. Except as provided in the Federal Acquisition Regulation (FAR) [Subpart 33.210](#) the CO, within the specific limitations of their warrants, are authorized to resolve all contractual issues by mutual agreement at the CO level. COs should include FAR Clause [52.233-1](#), in contracts as applicable. The Contract Disputes Act (CDA) of 1978, as amended ([41 U.S.C. §§ 7101-7109](#)), allows either party to file a claim to resolve a dispute subject to the act. The CDA defines the responsibilities of the parties at each step of the dispute process. The disputes process begins with a claim. The CO shall follow the FAR, CDA, Defense Federal Acquisition Regulation Supplement (DFARS), and DFARS Procedures, Guidance, and Information (PGI) as well as the requirements below.
- (3) When the CO receives a claim, the CO shall –
 - a. Record the date of receipt of the claim;
 - b. Determine the nature of the claim and the contract term(s) under which claim is being made;
 - c. Evaluate the claim for completeness and compliance with the cited contract clause, otherwise, return to the contractor for correction;
 - d. Obtain information on claims previously filed by the contractor, in accordance with DFARS PGI 233.210; and
 - e. For all claims over \$100,000, verify that the contractor has submitted the required certification in accordance with FAR [52.233-1](#).
- (4) If the contractor submits an uncertified claim over \$100,000, the CO shall provide a written notice to the contractor regarding the failure to certify as required by the CDA. The notice shall state that a final decision cannot be issued until the claim is certified.
- (5) The CO will request an evaluation of the claim from appropriate subject matter experts (e.g., Technical/Program Manager, Cost & Pricing).
- (6) The contractor is subject to civil penalties for misrepresentation of the facts therefore, the CO shall refer suspected fraudulent claims to the TMA Office of General Counsel (OGC). Suspected fraudulent claims arising out of Contract Operations Division-Aurora issued contracts shall also be submitted to the Program Integrity Office.

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- (7) Before issuing a final decision on a claim under the CDA, the CO must make all reasonable effort to resolve a claim by mutual agreement. Upon concluding that the final decision is appropriate, the CO shall prepare the final decision.
- (8) When a claim cannot be settled by mutual agreement, the CO will take action in preparation of the proposed final decision in accordance with [FAR 33.211](#).
- (9) As part of the final decision, the CO shall identify the Armed Services Board of Contract Appeals (ASBCA) as TMA's authorized representative for hearing appeals and provide the ASBCA's address.
- (10) Before sending the final decision to the contractor, the CO shall refer the proposed final decision to the TMA OGC for review and comment. The file forwarded shall contain:
 - a. A copy of the claim including the date of receipt;
 - b. A copy of the contract and all applicable modifications, specifications and drawings;
 - c. All communications relative to the dispute;
 - d. Any additional pertinent information such as memorandums for record;
 - e. All legal reviews and opinions; and
 - f. A draft of the contracting officer's final decision.
- (11) The CO will adjudicate and document any legal comments and the reasons for each. If the CO accepts the legal advice and comments, the appropriate revisions will be made to the final decision. Refer to the TRICARE Acquisition Directive – Legal Review ([TAD 01-05](#)).
- (12) The CO shall transmit the final decision to the contractor via certified mail, return receipt requested. The CO is cautioned against opening discussions with the contractor after the final decision has been issued as doing so may nullify the finality of that decision.
- (13) Appeals to the Armed Services Board of Contract Appeals.
 - a. Upon receiving a notice that the contractor has filed an appeal with ASBCA, the CO shall notify the Branch Chief and/or the Chief/Director of the Contracting Office, and the TMA OGC.
 - b. In the event the contractor sends a notice of appeal directly to the CO in lieu of filing with the ASBCA, and the notice indicates an election to appeal to the ASBCA, the

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CO shall note the date on which the appeal was received and forward the entire appeal, including its envelope, to the ASBCA. The CO shall seek advice from TMA/OGC prior to forwarding the package to ASBCA as a misdirected appeal. Copies of all documents shall be sent to TMA/OGC.

- c. The CO shall comply with Rule 4 of the ASBCA Rules ([DFARS Appendix A, Part 2](#)). In assembling the Rule 4 file, the CO shall not include any legal opinions or inter-governmental or intra-governmental documents of the types described in the Freedom of Information Act, Privacy Act, or DFARS Subpart 224.2 without obtaining concurrence of TMA OGC. The CO shall transmit any questions concerning whether or not a particular document should be included in the Rule 4 file to TMA OGC for resolution.
 - d. The CO shall submit the completed Rule 4 file to TMA OGC for review prior to submission to the ASBCA.
 - e. After TMA OGC review, the CO shall concurrently mail one copy of the Rule 4 file to the ASBCA Recorder and the contractor. Contractors shall not be given access to Government files or documents, other than the Rule 4 file, without specific approval of TMA OGC.
 - f. As stated in ASBCA [Rule 28](#), all ASBCA decisions will be forwarded simultaneously to the CO and the contractor. The CO is responsible for responding to the decision in accordance with Rule 28.
- (14) If the CO receives notice that an action has been filed in the United States Court of Federal Claims, the CO shall notify TMA OGC by forwarding a copy of the notice of appeal with a copy of the envelope in which the notice was received and take the following action. Further, the CO shall:
- a. Notify the Branch Chief and the Chief/Director of the Contracting Office and
 - b. Advise them of any resources that may be needed to support TMA OGC in defending or disposing of the appeal.
- (15) U.S. Government Claims against the Contractor.
Government claims against the contractor substantially follow the same process as contractor claims. Typical Government claims include excess procurement, liquidated damages, and defective pricing. In cases involving recoupment of overpayment to the contractor, the CO shall coordinate with the appropriate Government payment office regarding the issuance of a demand letter to the contractor. In all other situations where the contractor owes money to the Government, the CO will deduct the amount owed from payments to the contractor, or issue a demand letter for payment, or specify the recoupment terms in a contract modification.