



DEPARTMENT OF DEFENSE
Defense Contract Management Agency

INSTRUCTION

Contract Claims and Disputes

Office of General Counsel
OPR: DCMA-GC

DCMA-INST 905
December 17, 2013
Validated Current, 1 June 2015

NOTE: This Instruction should be read entirely to understand the changes since the previous publication. Significant changes include:

- Reformatted to comply with DCMA-INST 501, “Policy Publication Program”
 - Updates References
 - Chapter 2 establishes roles and responsibilities
 - Chapter 3 provides narrative description of procedures
 - Process flowchart
 - Glossary list of acronyms
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1. PURPOSE. This Instruction:

a. Reissues and updates DCMA Instruction (DCMA-INST) 905, “Contract Claims and Disputes,” (Reference (a)).

b. Establishes policy and provides guidance to DCMA personnel involved in contract claims and disputes; describes appropriate dispute resolution practices; and puts into place preventative measures to reduce litigation risk. If followed, the procedures described herein will minimize risk and encourage effective dispute resolution practices.

c. Is established in compliance with DoD Directive 5105.64 (Reference (b)) and FAR Part 33.2.

2. APPLICABILITY. This Instruction applies to all organizational elements of DCMA.

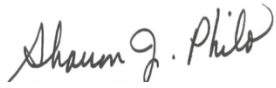
3. MANAGERS’ INTERNAL CONTROL PROGRAM. In accordance with the DCMA-INST 710, “Managers’ Internal Control Program” (Reference (c)), this Instruction is subject to evaluation and testing. The process flowchart is located at Appendix A.

4. RELEASABILITY – UNLIMITED. This Instruction is approved for public release and is located on DCMA’s Internet Web site.

5. PLAS CODE. 156 Disputes, ADR and Appeals.

6. POLICY RESOURCE PAGE. <https://home.dcma.mil/policy/905r>

7. EFFECTIVE DATE. By order of the Director, DCMA, this Instruction is effective December 17, 2013, and all applicable activities shall be fully compliant within 60 days from this date.



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REFERENCES

- (a) DCMA-INST 905, "Contract Claims and Disputes," November 2007 (hereby incorporated and superseded)
- (b) DoD Directive 5105.64, "Defense Contract Management Agency (DCMA)," January 10, 2013
- (c) DCMA-INST 710, "Managers' Internal Control Program," September 12, 2011
- (d) DCMA-INST 104, "Contract Debt," December 11, 2012
- (e) United States Code, Sections 7101-7109 of Title 41, "Contracts Dispute Act of 1978
- (f) FAR 33.204, Policy
- (g) FAR 33.210, Contracting officer's authority
- (h) FAR 33.214, Alternative dispute resolution (ADR)
- (i) DCMA INST 134, "Boards of Review," October 15, 2012
- (j) FAR 33.206(a), Initiation of a claim
- (k) FAR 33.207, Contractor certification
- (l) FAR 33.211, Contracting officer's decision
- (m) FAR 33.211(a)(4), Contracting officer's decision
- (n) FAR 33.211(a)(4)(v), Contracting officer's decision
- (o) FAR 33.211(b), Contracting officer's decision
- (p) FAR 32.605(c)(2), Final decisions
- (q) FAR 33.211(a)(2), Contracting officer's decision
- (r) FAR 33.211(c)(1), Contracting officer's decision
- (s) FAR 33.211(g), Contracting officer's decision
- (t) FAR 33.211(c)(2), Contracting officer's decision
- (u) FAR 33.211(d), Contracting officer's decision
- (v) FAR 32.604, Demand for payment
- (w) FAR 32.605, Final decisions
- (x) FAR 32.603(a), Debt determination
- (y) FAR 32.604(a)(1), Demand for payment
- (z) FAR 32.604(b)(8), Demand for payment
- (aa) FAR 32.607-2(c), Installment payment and deferment of collection
- (ab) FAR 32.604(b)(3) and (b)(4), Demand for payment
- (ac) FAR 30.605, Final decisions
- (ad) FAR 33.209, Suspected fraudulent claims
- (ae) FAR 42.709, Scope
- (af) FAR 30.601(a), CAS Administration, Responsibility
- (ag) FAR 30.605(b)(3)(ii), Processing noncompliances
- (ah) FAR 30.605(B)(3)(iii), Processing noncompliances
- (ai) FAR 30.605(c), Processing noncompliances
- (aj) FAR 30.605(c)(2), Processing noncompliances
- (ak) FAR 30.605(i), Processing noncompliances
- (al) FAR 30.604(i)(2)(ii), Processing changes to disclosed or established cost accounting practices
- (am) DFARS 252.242-7005
- (an) Federal Register, Volume 77, No. 37, Page 11363 (Comment 45), February 24, 2012
- (ao) DCMA-INST 904, "Alternate Dispute Resolution," September 2004

- (ap) FAR 32.601, Contract Debts, General
- (aq) FAR 33.214(b), Alternative disputes resolution (ADR)
- (ar) DFARS Appendix A, Armed Services Board of Contract Appeals
- (as) FAR 33.212, Contracting officer's duties upon appeal

CHAPTER 1

POLICY

1.1. GENERAL.

1.1.1.. This Instruction provides policy guidance to DCMA personnel involved in contract claims and disputes. It also describes appropriate dispute resolution practices. Finally, it puts into place preventative measures to reduce litigation risk.

1.1.2. If followed, the procedures described herein will minimize risk and encourage effective dispute resolution practices.

1.1.3. For this policy to work best there must be close coordination between DCMA contracting officers and DCMA counsel at all levels of the process.

1.2. POLICY. It is DCMA policy to:

1.2.1. Attempt to resolve all contractual issues before they become disputes.

1.2.2. Use Alternate Dispute Resolution (ADR) procedures to the maximum extent practicable, if unassisted negotiations fail to resolve disputes.

1.2.3. Issue a decision or determination (depending on the circumstance) when a contractual issue cannot be resolved, such as: Final Decisions, Determinations of Cost Accounting Standard (CAS) Noncompliance, or Unilateral Rate Determinations.

1.2.4. Secure assistance from pertinent DCMA legal and other advisors prior to issuing the final decisions/determinations referred to above.

1.2.5. Require Contracting Officers to pay special attention to the 6-year Contract Disputes Act (CDA) statute of limitations when they learn of a potential Government claim so that they can insure that any action taken is timely.

1.2.6. Forward to DCMA headquarters (HQ), Contracts Directorate, Finance and Payment Branch (DCMA-AQCF), all contractor requests for a deferment of a contract debt with a recommendation as to whether to grant the request during the pendency of the litigation.

1.2.7. Report any suspected fraudulent claim or misrepresentation to the DCMA Contract Integrity Center (CIC).

CHAPTER 2

ROLES AND RESPONSIBILITIES

2.1. CONTRACTING OFFICER. The term Contracting Officer as used in this Instruction refers to all DCMA contracting officers to include Administrative Contracting Officers (ACO), Divisional Administrative Contracting Officers (DACO), Corporate Administrative Contracting Officers (CACO), Procuring Contracting Officers (PCO) and Termination Contracting Officers (TCO). When a potential claim by or against a contractor cannot be satisfied or settled by mutual agreement and use of ADR procedures has been considered, and a final decision on the potential claim is necessary, the Contracting Officer shall:

2.1.1. Review and gather all facts pertinent to the claim.

2.1.2. Secure assistance from assigned DCMA legal and other advisors prior to issuing the final decisions/determinations referred to in paragraph 2.1.4.

2.1.3. Issue a decision or determination (depending on the circumstance) when a contractual issue cannot be resolved, such as: Final Decisions, Determinations of Cost Accounting Standard (CAS) Noncompliance, or Unilateral Rate Determinations.

2.1.4. Issue decisions/determinations which represent the independent decision or determination of the Contracting Officer.

2.1.5. Support DCMA Trial Attorneys and/or the Department of Justice (DoJ) in any litigation which results from the final decisions/determinations issued.

2.1.6. Process contractor requests for a deferment of a contract debt in accordance with DCMA-INST 104, "Contract Debt" (Reference (d)).

2.2. ASSIGNED LEGAL COUNSEL. Assigned Legal Counsel are those counsel who are directly assigned by the Office of General Counsel to serve as the primary legal advisor to a specific DCMA Contracting Officer. The assigned Legal Counsel shall:

2.2.1. Provide primary legal support to the Contracting Officers to whom they are assigned.

2.2.2. Provide direct input and legal advice to the Contracting Officers as they are developing their positions on matters that could result in a contract claim and dispute. As part of this process, evaluate all final decisions/determinations proposed by Contracting Officers for litigation risk and provide that evaluation to the client.

2.2.3. Submit all draft proposed Contracting Officer final decisions, determinations of CAS noncompliance, and other types of claims to the Contract Disputes Resolution Center (CDRC) and the Contract Law Group (CLG) Steering Committee (with sufficient background information) for review prior to issuance of the proposed final decision/determination.

2.2.4. Assist the Contracting Officer in the use of ADR that takes place prior to any appeal of a Contracting Officer final decision/determination to the Armed Services Board of Contract Appeals (ASBCA) or United States Court of Federal Claims (COFC).

2.2.5. Support DCMA Trial Attorneys and/or DoJ, as needed, in any litigation which results from the final decisions/determinations that have been issued.

2.3. CONTRACT DISPUTES RESOLUTION CENTER (CDRC) DIRECTOR/CHIEF TRIAL ATTORNEY. The Director, CDRC, shall:

2.3.1. Assign trial attorneys to conduct the CDRC review of Contracting Officer final decisions/determinations.

2.3.2. Assign trial attorneys to litigate the issues that are appealed to the ASBCA or to support DoJ in the litigation of the issues that are appealed to the COFC.

2.3.3. Coordinate on decisions by Contracting Officers not to utilize ADR in a particular case.

2.4. CONTRACT DISPUTES RESOLUTION CENTER (CDRC). Trial Attorneys assigned to the CDRC shall:

2.4.1. Review for legal and litigation sufficiency all Contracting Officer final decisions/determinations before they are issued.

2.4.2. Provide comments/recommendations through assigned legal counsel to the Contracting Officer for his/her consideration.

2.4.3. Represent DCMA, and defend the Contracting Officer final decisions/determinations, before the ASBCA.

2.4.4. Coordinate with and assist DoJ in representing DCMA interests in Federal Courts.

2.4.5. Explore the possible resolution of all disputes that are in litigation through ADR.

2.4.6. Prepare Litigation Risk Assessments in all assigned cases in accordance with CDRC internal Standard Operating Procedures.

2.4.7. Issue litigation hold notices to the Contracting Officer and to other individuals and offices that have relevant documents. Upon conclusion of the litigation, notify the same individuals and offices that the litigation is concluded and that contract closeout can proceed, if applicable.

2.5. CONTRACT LAW GROUP (CLG) STEERING COMMITTEE. The CLG Steering Committee shall:

2.5.1. Review for legal sufficiency all Contracting Officer final decisions/determinations before they are issued.

2.5.2. Provide comments/recommendations through Assigned Legal Counsel to the Contracting Officer for his or her consideration.

2.6. HQ, CONTRACTS DIRECTORATE, FINANCE AND PAYMENT BRANCH (DCMA-AQCF). DCMA-AQCF is responsible for taking action on contractor debt deferment requests. DCMA-AQCF will process the debt deferment request in accordance with DCMA-INST 104 (Reference (d)).

CHAPTER 3

PROCEDURES

3.1. RESOLVING CONTRACTUAL DISPUTES.

3.1.1. A dispute between the Government and contractor may arise in a variety of situations. These include, but are not limited to: (1) Inability to agree upon an equitable adjustment; (2) Inability to agree upon the amount due following a termination for convenience; (3) Disallowance of costs; (4) CAS noncompliance; (5) Increased costs to the Government resulting from a contractor's unilateral cost accounting practice change; (6) Assessment of penalties against contractors; (7) Unilateral rate determinations; etc.

3.1.2. Contracting Officers should attempt to resolve all contractual issues in controversy by mutual agreement at the lowest possible appropriate Contracting Officer's level (Federal Acquisition Regulation (FAR) 33.204) (Reference (f)). DCMA ACOs and TCOs have the responsibility and the authority to resolve disputes, including through the use of ADR methods (FAR 33.210) (Reference (g)) and FAR 33.214 (Reference (h)). The Procuring Contracting Officer (PCO) shall be notified if the issue is outside the scope of the DCMA Contracting Officer's authority or delegation. If necessary, a Contracting Officer may seek a further delegation of authority from the PCO when appropriate. DCMA Contracting Officers shall also notify the PCO if the issue may impact a contract's cost, schedule, or performance.

3.1.3. For matters meeting the criteria for a Board of Review, the issue should be reviewed by the appropriate level board before the ACO takes dispositive action on it. See DCMA-INST 134, "Boards of Review" (Reference (i)).

3.1.4. The three principal means of dispute resolution between the contractor and the Contracting Officer are unassisted negotiation, ADR, and appeal of a Contracting Officer's final decision/determination to the ASBCA or the COFC under the Contract Disputes Act (CDA) of 1978, (Sections 7101 through 7109 of Title 41, United States Code) (Reference (e)).

3.1.5. For claims made by a contractor, the contractor shall submit a claim in writing (FAR 33.206(a)) (Reference (j)). A claim must ordinarily request a sum certain or seek a decision concerning contract terms. In addition, the contractor shall certify the claim if it seeks in excess of \$100,000 (FAR 33.207) (Reference (k)). The ACO or TCO should ensure that contractors properly certify all such claims.

3.1.6. Products of the disputes process are negotiated settlements (which may include use of ADR), determination of CAS noncompliance issued by a DCMA CACO, DACO or ACO (collectively ACO), final decisions issued by ACOs, PCOs or TCOs, unilateral rate determinations of the ACO, and judgments arising from appeals of final decisions to the ASBCA or the COFC.

3.2. FINAL DECISIONS, DETERMINATIONS OF CAS NONCOMPLIANCE, AND UNILATERAL RATE DETERMINATIONS.

3.2.1. When a claim by a contractor or a Government claim cannot be satisfied or settled by mutual agreement and a decision upon the claim is necessary, the Contracting Officer shall prepare a final decision pursuant to FAR 33.211 (Reference (l)). Contracting Officers shall issue final decisions upon matters in which they have authority to take definitive action, within any specific limitations of their warrants. (FAR 33.210) (Reference (g)).

3.2.2. A final decision must represent the independent decision and determination of the Contracting Officer issuing the decision. While it may be necessary to obtain assistance from legal and other advisors (e.g., Defense Contract Audit Agency auditors, technical specialists), Contracting Officers are responsible for the ultimate decision and must make that decision after thoroughly reviewing all facts and recommendations (FAR 33.211) (Reference (l)). Their decisions must be personal and independent, and even the appearance of coercion must be avoided.

3.2.3. Final decisions shall: describe the claim or dispute; refer to the pertinent contract terms; state the factual areas of agreement and disagreement; and set forth the Contracting Officer's decision, with its supporting rationale (FAR 33.211(a)(4)) (Reference (m)). Final decisions shall also include notification that the contractor may appeal the decision to the ASBCA within 90 days or the COFC within 12 months of receipt of the final decision. FAR 33.211(a)(4)(v) (Reference (n)) provides wording for the notification of the contractor's appeal rights. Contracting Officers shall send or hand-deliver final decisions to the contractor in a manner that provides evidence of receipt (such as certified mail, return receipt requested, or a receipt for hand-delivery) (FAR 33.211(b)) (Reference (o)). The Contracting Officer shall forward a copy of the issued final decision to the payment office identified in the contract. (FAR 32.605(c)(2)) (Reference (p)).

3.2.4. In preparing the final decision, the Contracting Officer shall secure advice from assigned legal counsel, and other advisors (FAR 33.211(a)(2)) (Reference (q)). In addition to making their own independent review of the facts of any claim, Contracting Officers shall provide assigned legal counsel all the facts necessary to support the Contracting Officer's proposed final decision during the counsel's review. Assigned legal counsel is responsible for providing information to the CDRC and the CLG Steering Committee for their review of the proposed final decision. The CDRC and the CLG Steering Committee should review every final decision before it is issued. Comments and recommendations shall be provided to the Contracting Officer through assigned legal counsel for consideration in his/her final decision. After seeking advice, the Contracting Officer should issue an independent decision in his/her fiduciary responsibility to the United States. (**NOTE:** The CDRC recommends that Contracting Officers not cite legal precedents or make legal arguments in final decisions.)

3.2.5. For contractor claims of \$100,000 or less, the Contracting Officer shall issue a final decision within a reasonable time after receiving a written request from the contractor (FAR 33.211(c)(1)) (Reference (r)). Where a contractor has requested in writing that a decision be rendered within 60 days after the Contracting Officer receives a written request from the contractor, any failure of the Contracting Officer to issue a final decision upon a contractor claim

within that period may be deemed a decision denying the claim, and will authorize the contractor to file an appeal upon the claim (FAR 33.211(g)) (Reference (s)). In claims exceeding \$100,000, Contracting Officers through assigned legal counsel shall issue a final decision within 60 days or provide a written notification within 60 days as to when such a decision will be issued (after consultation with assigned legal counsel) (FAR 33.211(c)(2)) (Reference (t)). The Contracting Officer shall issue a final decision within a reasonable time (FAR 33.211(d)) (Reference (u)).

3.2.6. Contracting Officers shall immediately coordinate all contractor requests for final decisions and Government claims with assigned legal counsel to ensure a timely decision is issued.

3.2.7. Affirmative Government Claims. The Government can issue nonmonetary and monetary affirmative claims. While most Government claims are monetary claims, case law has established that there are instances where the Government can issue a nonmonetary claim. Examples include ACO determinations of CAS noncompliance (see paragraph 3.2.10) and Contracting Officer direction to correct or replace defective work.

3.2.7.1. For a monetary claim by the Government, the Contracting Officer shall state an amount certain, make a demand for payment, provide an address for payment, and notify the contractor of the debt deferment process. Procedures for issuing a demand and final decision are governed by FAR 32.604 (Reference (v)), FAR 32.605 (Reference (w)), and FAR 33.211 (Reference (l)). The same requirements for functional area coordination exist as in paragraph 3.1.2. Contracting Officers shall seek involvement and review of the proposed final decision by assigned legal counsel as described in paragraph 3.2.4. After seeking advice and coordination, the Contracting Officer should issue an independent and personal decision in his/her fiduciary responsibility to the United States Government.

3.2.7.2. Government monetary claims shall be made as soon as the Contracting Officer has determined that an actual debt is due the Government and the amount of refund or payment due the Government (FAR 32.603(a)) (Reference (x)) and FAR 32.604(a)(1)) (Reference (y)). Detailed procedures for issuing and processing demands for payment are provided in DCMA-INST 104 (Reference d)).

3.2.7.3. Where a dispute concerning a refund or payment due the Government cannot be mutually resolved within a reasonable period, the Contracting Officer should issue a final decision after first consulting both assigned legal counsel and, through assigned legal counsel, the CDRC and the CLG steering committee. If a refund or payment is due the Government, the Contracting Officer shall make a demand for payment as part of the final decision, if a final decision is required (FAR 32.604) (Reference (v)), (FAR 32.605) (Reference (w)). Detailed procedures for issuing and processing demands for payment are provided in DCMA-INST 104 (Reference (d)).

3.2.7.4. Government claims for equitable adjustments and for the recovery of the Government's share of a pension surplus in a segment closing should be made in a final decision.

3.2.7.5. Contracting Officers, when making a demand for payment, shall notify the contractor that it may submit a request for installment payments or deferment of collection (FAR

32.604(b)(8)) (Reference (z)). DCMA does not have the authority to defer the collection of debts or authorize installment payment agreements. Upon the receipt of any request for installment payments or debt deferment, Contracting Officers shall ensure it is forwarded to DCMA-AQCF, with a recommendation as to whether to grant the request (FAR 32.607-2(c)) (Reference (aa)). Detailed procedures for issuing and processing deferment requests are provided in DCMA-INST 104 (Reference (d)).”

3.2.7.6. Monetary claims must: (1) demand payment of a sum certain; (2) include a demand for interest, when appropriate; (3) state the date when such interest started to accrue; and state whether the interest is calculated as simple interest or compounded interest. (FAR 32.604(b)(3) and (b)(4)) (Reference (ab)).

3.2.8. Statute of Limitations. There is a 6-year CDA statute of limitations upon claims by either party for contracts awarded after October 1, 1995, that may not be waived. Contracting Officers must pay special attention to the date when CAS noncompliance issues develop or accrue, so they can comply with FAR notice requirements to contractors before issuing a final decision. (FAR 30.605) (Reference (ac)). The determination of when a claim “accrues” can be a complicated issue of law. Therefore, Contracting Officers should promptly seek assistance of assigned legal counsel when they learn of a potential Government claim or receive a contractor’s claim that may be barred by the statute of limitations.

3.2.9. The Contracting Officer is not authorized to decide or resolve claims or disputes that: (1) involve fraud or (2) involve penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine (FAR 33.210) (Reference (g)). In addition, Contracting Officers may not settle disputes that can negatively affect existing disputes or appeals under the cognizance of any other service, DoD Agency, or DoJ without first consulting with assigned legal counsel. Consultation with assigned legal counsel is necessary to ensure that any adverse effects are mitigated. (Assigned legal counsel is responsible for consulting with the CDRC upon these matters.) Disagreements between the Contracting Officer and assigned legal counsel concerning a settlement shall be elevated for resolution at least one level above each individual.

3.2.9.1. The Contracting Officer shall not take any action to settle or disposition any contract action while it is under review or investigation by another Government authority including the DoD Inspector General or the General Accountability Office. However, Contracting Officers should be aware that these reviews or investigations do not toll the accrual of the CDA statute of limitations. Therefore, Contracting Officers must maintain frequent communication with the review or investigative organization to insure that the statute of limitations deadline is not missed.

3.2.9.2. The Contracting Officer shall report any suspected fraudulent claim or misrepresentation to the Contract Integrity Center (CIC) (FAR 33.209) (Reference (ad)). The CIC is the DCMA organization responsible for coordinating fraud matters. For matters arising in Special Programs, the Contracting Officer shall report such matters to the DCMAS Chief Counsel, who will, in turn, coordinate with the CIC as security regulations and guides allow.

3.2.9.3. For those penalties that a Contracting Officer is authorized to resolve, the Contracting Officer should refer to FAR 42.709 through FAR 42.709-6 (Reference (ae)) for further guidance.

3.2.10. Determination of CAS Noncompliance. ACOs are charged with determining whether a CAS-covered contractor has committed a CAS noncompliance (FAR 30.601(a)) (Reference (af)); (FAR 30.605(b)(3)(ii)) (Reference (ag)). The ACO shall notify the contractor in writing of the determination of CAS noncompliance (FAR 30.605(b)(3)(iii)) (Reference (ah)). If the ACO determines that the CAS noncompliance is material, the ACO shall direct the contractor to submit a proposed cost accounting change needed to correct the noncompliance (FAR 30.605(c)) (Reference (ai)). Following a determination that the proposed change to correct the noncompliance is both adequate and compliant, the ACO shall request the contractor to submit a general dollar magnitude proposal (GDM) sufficient to provide information on the estimated overall impact of the noncompliance on affected CAS-covered contracts (FAR 30.605(c)(2)) (Reference (aj)). There is no requirement for the ACO to include contractor appeal rights in the written determination of CAS noncompliance. Where the contractor does not correct the noncompliance or submit the GDM (or Detailed Cost Impact proposal), the ACO shall follow the FAR procedures that could lead to the issuance of a final decision. (See FAR 30.605(i)) (Reference (ak)); (FAR 30.604(i)(2)(ii)) (Reference (al)); (FAR 33.211) (Reference (l)).

3.2.10.1. Though there is no requirement to provide a contractor with appeal rights in the written determination of CAS noncompliance, both the COFC and the ASBCA have held that a contractor can appeal that determination under the CDA, if it constitutes a Government “claim” under the CDA. In order to constitute a claim, the determination of CAS noncompliance must include a demand for the contractor to change its current accounting practice to a CAS-compliant practice. However, if such written determination does not contain appeal rights language, the contractor is not required to appeal it within the statutorily-imposed appeal periods (see paragraph 3.2.3.).

3.2.10.2. Because contractors can appeal determinations of CAS noncompliance to the COFC and ASBCA, the ACO shall secure advice from assigned legal counsel and, before issuing the determination, comply with the requirements for legal review specified in paragraph 3.2.4.

3.2.11. Contractor Business Systems. Final determinations on the acceptability of contractor business systems under DFARS 252.242-7005 (Reference (am)) are not Contracting Officer’s final decisions for the purposes of the CDA. Because the final determinations are not made in response to a claim submitted for a decision by a contractor against the Government related to a contract, they are not final decisions in accordance with the CDA. (Reference (an)).

3.2.12. Unilateral Rate Determinations. An ACO’s determination to issue unilateral rates is not generally an appealable matter. However, the ASBCA or COFC may review a Contracting Officer’s unilateral rate determination if it is issued in conjunction with a Government claim. A claim, as defined in FAR 2.101, can consist of a demand for payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. Appeal rights should be included when a Contracting Officer’s unilateral rate determination is issued in conjunction with a Government claim.

3.3. USING ALTERNATE DISPUTE RESOLUTION (ADR).

3.3.1. ADR is any procedure or combination of procedures used to resolve issues in controversy with the assistance of a third party neutral. ADR procedures and methods are outlined in DCMA-INST 902, “Alternate Dispute Resolution (ADR)” (Reference (ao)).

3.3.2. Contracting Officers must attempt to resolve issues in controversy; e.g., upon the failure of unassisted negotiations. ADR should be used to the maximum extent practicable and, if appropriate, attempted even before issuing a final decision upon claims by or against contractors. (See FAR 33.204) (Reference (f)).

3.3.2.1. In using ADR, Contracting Officers (in conjunction with assigned legal and CDRC counsel) add value to the resolution process by minimizing disruptions in contract performance, maintaining ongoing business relationships with contractors, avoiding delays in settlement of terminated contracts, and avoiding and reducing costs of litigation.

3.3.2.2. Contracting Officers should not delay issuing a mandatory demand for payment of contract debt and final decision because of ADR (See FAR 32.604) (Reference (v)). Accordingly, it is not advisable to attempt ADR upon Government demands for repayment until after a demand for payment has been issued and the interest has started to accumulate for situations contemplated under FAR 32.601 (Reference (ap)).

3.3.3. Either party (the Government or the contractor) may request ADR methods be used to resolve the dispute at any step of the claim/appeal process. In order for ADR to be used, the parties must mutually agree to the ADR method. Contracting Officers shall coordinate with assigned legal counsel in selecting the most beneficial method if the Contracting Officer elects to utilize ADR. Binding Arbitration is not currently permitted. Only DoJ can approve ADR for Federal litigation. If the Contracting Officer, after consultation with assigned legal counsel, makes an initial determination not to utilize ADR, follow the procedures in paragraph 3.3.4.

3.3.4. Normally, decisions not to use ADR should be approved by an official at least one level above the Contracting Officer, unless the contractor refuses to participate in meaningful ADR. Once the Contracting Officer makes an initial determination not to utilize ADR, that determination shall be submitted in writing to an approving official at least one level above the Contracting Officer. In documenting a decision not to use ADR after a contractor has made a legitimate request, the approving official shall consult with assigned legal counsel and coordinate with the Director, CDRC, as the designee of the DCMA General Counsel, and explain, in writing, specifically why ADR is inappropriate or not practicable in the case. Once it is determined that ADR is not appropriate in accordance with these procedures, the Contracting Officer shall comply with FAR 33.214(b) (Reference (aq)) in notifying the contractor. Detailed procedures upon DCMA’s ADR program are provided in DCMA-INST 902 (Reference (ao)).

3.3.5. ADR procedures do not substitute for a Contracting Officer’s final decision for purposes of entitling a contractor to file an appeal, nor does the use of ADR alter any of the time limitations or procedural requirements for filing an appeal of a final decision (FAR 33.214(c)) (Reference (h)). A Contracting Officer may elect to withdraw or reconsider a final decision pending the outcome of ADR. However, Contracting Officers are not obligated to do so, and

should consult with assigned legal counsel before taking such an action. Assigned legal counsel, in turn, should consult with the CDRC. Contracting Officers are reminded that ADR does not toll any statute of limitation imposed by law. Contracting Officers must be conscious of that deadline and issue a timely final decision/determination, if necessary.

3.3.6. The key to ADR is to achieve justifiable and fair settlements for all of DCMA's customers. Justifiable and fair ADR settlements achieve cost savings and avoid unnecessary expense, disruption, and delay. Contracting Officers should also pay attention to the long term consequences of their actions, since DCMA serves as the lead agency for the entire DoD in matters involving CAS, contract administration, and terminations for convenience. Justifiable and fair settlements also take into account the role of DCMA Contracting Officers as "honest brokers" among the Armed Services for matters within their core competencies. Other significant considerations are consistency of policy, regulatory interpretation, and precedent.

3.4. DEFENSE OF THE GOVERNMENT'S POSITION IN LITIGATION.

3.4.1. The DCMA Chief Trial Attorney and trial attorneys assigned to the CDRC shall represent DCMA and defend the appeals of Contracting Officer final decisions/determinations before the ASBCA. The CDRC shall coordinate with and assist DoJ in representing the DCMA in Federal Courts. Attorneys litigating the appeal will continue to explore possible resolution through ADR. Contracting Officers, along with assigned legal counsel, shall assist assigned CDRC trial attorneys.

3.4.1.1. Legal Evaluation of Likelihood of Success in Litigation. Assigned legal counsel to a Contracting Officer shall evaluate all proposed final decisions/determinations for litigation risk and will inform the client of their findings. Assigned legal counsel is responsible for obtaining CDRC and CLG steering committee review of the proposed final decision or determinations as noted in paragraph 3.2.4.

3.4.1.2. Litigation Risk Assessments. Following the appeal of the final decision/determinations to the ASBCA or Federal Courts, CDRC trial attorneys will prepare Litigation Risk Assessments in accordance with the CDRC's internal standard operating procedures. The CDRC trial attorneys prepare these assessments upon a periodic basis during litigation to enable DCMA Contracting Officers to be knowledgeable of the risk(s) inherent with the litigation, which, in turn, should enable them to make informed decisions.

3.4.2. ASBCA Rule 4 (DFARS Appendix A) (Reference (ar)) requires a submission of an appeal file by the Contracting Officer within 30 days of an appeal. To permit timely review of this submission, the Contracting Officer shall provide the CDRC trial attorney with the information required by ASBCA Rule 4 within 15 days after receiving an appeal or notice of an appeal. (**NOTE:** Contracting Officers should keep this in mind as they prepare final decisions – in other words, they should keep an orderly file of all matters they considered. Contracting Officers should also consult with assigned legal counsel and CDRC trial attorneys for advice on what to put in their Rule 4 submission.) The Contracting Officer, as well as other knowledgeable DCMA personnel, shall assist the CDRC trial attorney in assembling all facts and documents (manual or electronic) and in all other aspects of case preparation (FAR 33.212) (Reference

(as)). Coordination by the Contracting Officer with the applicable buying offices is also essential.

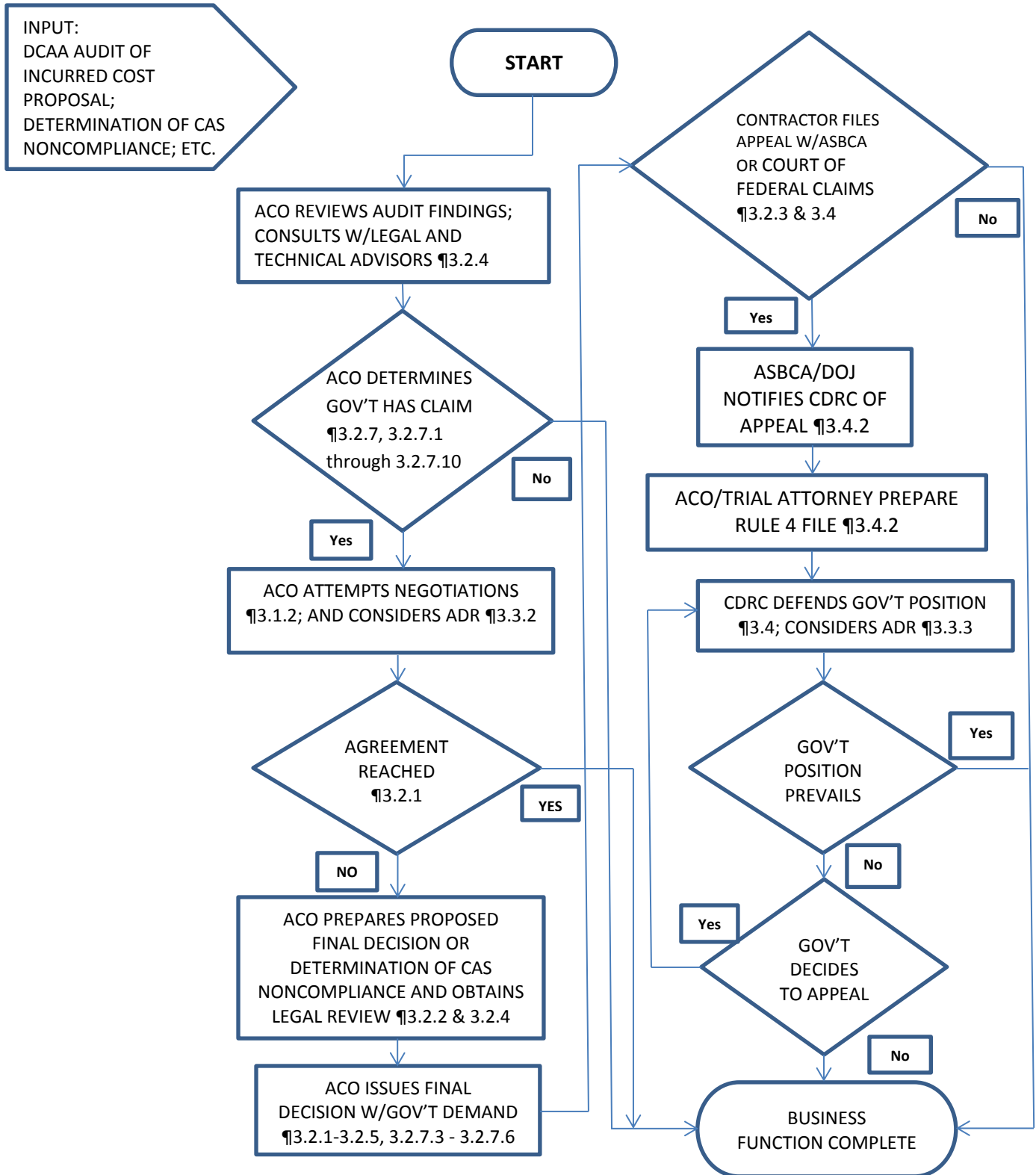
3.4.3. Once litigation at the ASBCA has commenced, the Contracting Officer shall consult with the assigned CDRC trial attorney and other appropriate advisors (e.g., audit, technical) before attempting any settlement. In the event of any material disagreement between the Contracting Officer and the CDRC trial attorney concerning the best course of action for the agency, the Contracting Officer shall elevate the matter for resolution at least one level above each individual.

3.4.3.1. Only DoJ attorneys are authorized to settle appeals filed in Federal courts. In addition, only DoJ attorneys are authorized to settle any subsequent appeals of Federal court trial level or ASBCA decisions filed at the United States Court of Appeals for the Federal Circuit or any other Federal level appellate court.

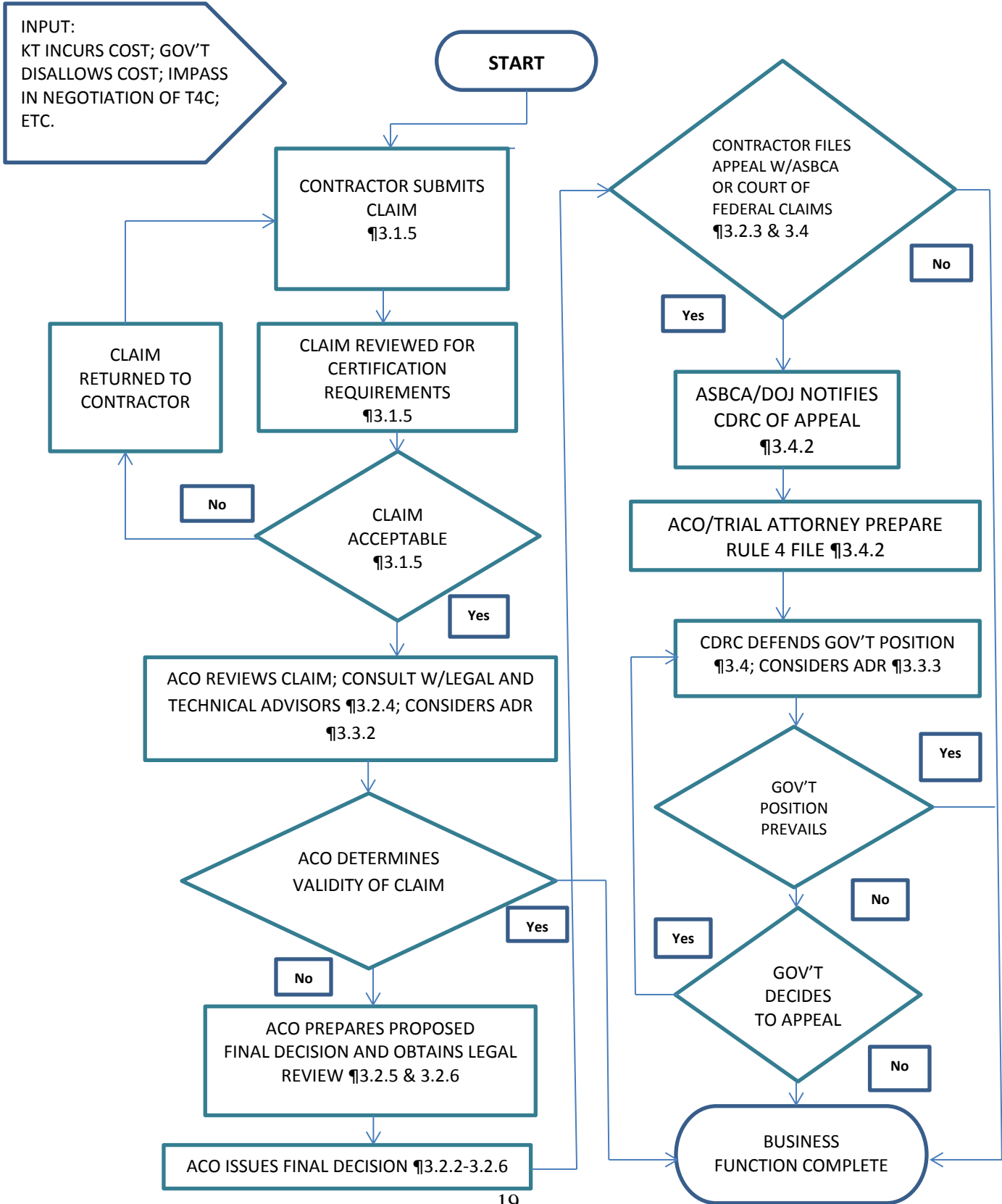
APPENDIX A

Contract Claims and Disputes Flowcharts

GOVERNMENT CLAIM



CONTRACTOR CLAIM



GLOSSARY

ACRONYMS

ACO	Administrative Contracting Officer (includes DACOs and CACOs)
ADR	Alternate Dispute Resolution
ASBCA	Armed Services Board of Contract Appeals
CACO	Corporate Administrative Contracting Officer
CAS	Cost Accounting Standards
CDA	Contract Disputes Act
CDRC	Contract Disputes Resolution Center
CIC	Contract Integrity Center
CLG	Contract Law Group
COFC	United States Court of Federal Claims
DACO	Divisional Administrative Contracting Officer
DCMA-AQCF	DCMA Contracts Directorate, Finance and Payment Branch
DCMA-INST	DCMA Instruction
DFARS	Department of Defense FAR Supplement
DoJ	Department of Justice
FAR	Federal Acquisition Regulation
GDM	General Dollar Magnitude
HQ	Headquarters
OPR	office of primary responsibility
PCO	Procuring Contracting Officer
PLAS	Performance Labor Accounting System
TCO	Termination Contracting Officer