Yes, you read that correctly. This is Part 3 of 2.

As we prominently noted in the prior blog article, we are not attorneys. We are self-styled government contract cost accountants with some background in other areas, such as contract management and procurement. We are Government Financial Managers (yes, we are! We have a Certificate to prove it!) but we are not legal scholars. At best, we are informed laypersons. Who write blog articles. Which you read for free.

Hey! You get what you pay for.

In Part 1 of 2, we discussed the onus on DCMA Contracting Officers to resolve "contractual issues in controversy by mutual agreement" instead of kicking the can over to the attorneys and the courts. We asserted, based on our experience in this area, that the COs ain't getting it done.

In Part 2 of 2, we discussed legal cases—some ancient and some very recent—that stood for the proposition that there needs to be a "proper" Contracting Officer's Final Decision in order for the courts to have jurisdiction over the matter. As we discussed (mostly by quoting actual honest-to-goodness attorneys), "routine" requests for payment do not constitute a "claim" (as that term is defined in the FAR) unless there is a pre-existing dispute; whereas a "non-routine" request for payment may or may not be a claim, depending on whether or not it 'be (1) a written demand, (2) seeking, as a matter of right, (3) the payment of money in a sum certain." (Certification will be required if the sum being sought is greater than $100,000.)

We think we got that right. But where we may have misled you, our readers, is when we said that "even non-routine requests for payment are not disputes within the meaning of the CDA [Contract Disputes Act] until and unless negotiations have ended because the parties are at an impasse." Though we had some (admittedly ancient) ASBCA cases that we thought supported that interpretation, we omitted any discussion of another key case in this area (***Reflectone, Inc. v. Dalton***) that would have cast a very different light on the situation. The *Reflectone* decision in 1995 reversed the previous line of reasoning regarding what constituted a "claim" under the CDA. We missed that. Thus: the need for this Part 3 of 2.

Fortunately, as the same time we were publishing Parts 1 and 2, Vern Edwards published his own blog article on the difference between "claim" and "Request for Equitable Adjustment"—one that was more well researched than ours. Here's **Vern's take** .

Vern wrote—

The determination of whether a contractor's submission to a CO is or is not a claim does not depend on what the parties call it. The mere fact that a contractor calls its submission a claim will not make it a claim if it lacks any necessary element of a claim. And calling a submission an REA does not mean that it is not a claim if it possesses all of the necessary elements of a claim. Claims and REAs are not categorically different things. It is the content of a submission, not what the parties label it or call it, that determines whether it is a claim.

Importantly, Vern wrote that "Many contracting practitioners think that there must be an impasse in negotiations or that the parties must be in dispute before REAs can be claims. That is not true, as determined in the landmark decision *Reflectone, Inc. v. Dalton, Secretary of the Navy* , 60 F.3d 1572, 1577 (Fed. Cir, 1995)."

Vern clearly corrected the part we got wrong. Non-routine requests for payment do not need a dispute, or negotiation impasse, in order for there to be a claim that requires a Contracting Officer's Final Decision. Only routine requests for payment carry with them the requirement for a pre-existing dispute.

As the Appellate Court wrote in the *Reflectone* decision—

The government's interpretation of the FAR must fail, as a matter of logic, because it recognizes only two categories of potential claims, undisputed routine requests for payment, which do not satisfy the definition, and disputed non-routine written demands seeking payment as a matter of right, which do. This interpretation ignores a third category, undisputed, non-routine written demands seeking payment as a matter of right. Under the literal language of the FAR, however, *the critical distinction in identifying a 'claim' is not between undisputed and disputed submissions, but between routine and non-routine submissions.*

[Emphasis added.]

So while the ancient ASBCA cases we cited stood for the proposition that the Contracting Officer and the contractor must have exchanged views in order for there to be a valid claim to litigate under the CDA, the reality is that current law (based on *Reflectone*) is clear that this requirement pertains only to routine requests for payment. For non-routine requests, there only needs to be a document that meets the requirements of the FAR definition of a claim in order for there to be a claim.

We're going to give Vern the last word, which is from a series of emails we exchanged after we read each other's blogs.

I certainly agree that a CO should consider the contractor's input before writing a final decision. He may lose the appeal if he doesn't. But I wouldn't use the word 'deficient,' because that might be taken to suggest that the decision would lack finality. If a board or the COFC finds that a decision lacks finality, then the board or the COFC will not have jurisdiction and will dismiss the contractor's appeal. Instead of saying it would be 'deficient,' I would say it's 'bad,' 'poor,' 'Ill-considered' or such.

So that's the story on settling disputes. We think the DMCA COs need to do more negotiating and settling, and less litigating. We think they ought to seriously consider the contractor's views before they rubber-stamp a DCAA audit report and issue a purportedly "Final" Decision that may lack merit or reflect poorly on the CO's judgment. Moreover, if the CO learns that s/he has submitted an erroneous Final Decision, then s/he has the obligation to correct it.

And of course, we sincerely thank Vern Edwards for showing us where we erred in our layperson's legal analysis.