

National 8(a) 2013 Winter Conference

Change Orders and Federal Contracts: How to Get Paid and Avoid Losing Your Shirt

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Perkins Coie

- Offices: 18 across the United States and China, including Anchorage, Seattle and D.C.
- Perkins has represented ANCs for well over 30 years
- Perkins has a strong government contracts practice
- Web based resources for government contractors
- http://www.perkinscoie.com/government_contracts/

Agenda

- Types of Changes / Recognizing Changes
- Notice / Duty to Proceed / REAs
- CDA Claims and ADR

The Importance of Recognizing Changes

- NOTICE (owner has to be involved or document non-involvement)
- \$\$\$\$
- Time
- Agreements
- Tracking accurately
- Segregating information

General FAR Clauses that Apply

- Always read your contract (either as a sub or prime) We are talking about prime clauses
- *Christian Doctrine*
- 52.243-1 Supplies and Services/FFP
- 52.243-4 Construction
- 52.234-2 Cost Reimbursement
- 52.234-3 T&M
- 52.243-7 Commercial Items

General FAR Clauses that Apply

- 52.243-5 Changes and Changed Conditions
- 52.243-6 Change Order Accounting
- 52.243-7 NOTIFICATION

Changes to Your Contract

- Recall, there are in scope changes and out of scope changes
- Is this a cardinal change because it is so far from the scope
- Is this a cardinal change because a series of changes that amount to a cardinal change

Two Main Types of Changes

- Formal and Constructive
- Each with its own process and requirements
- Formal is more of the bow tie approach
- Constructive looks to the scope of the contract

Formal

- Government and contractor discuss need for change
- Generally, a proposal is submitted
- Government reviews, maybe audits and then negotiation may begin
- Agreement reached
- Mod issues,
- Release language? FAR 43.204

Formal

- Within the scope of the contract and changes clause
- Actual authority
- Money is there
- Happens before final payment on the contract

Out of Scope Changes/Cardinal

- How does the change work look in relation to the rest of the work of the contract
- Is this the type that would be normally expected

Constructive Changes

- Product of case law (not spelled out in your contract)
- Government order/action, inaction, no fault of contractor
- No contractor volunteer (warrant issue)
- A change in time or cost or both

Constructive Change

- Change is generally identified after it has occurred (more on that later)
- Contractor puts Government on notice to submit claim or REA
- Government responds

Some Examples of Changes/Claims

- Change in plans/methodology of prosecution of work
- Differing Site Condition
- Inadequate Plans and Specifications
- Indemnification
- Changed Condition
- Delay
- Cumulative Impact

Recognizing The Claim

- Extra work being done?
- Work different than identified in plans and specifications? Revisions? Not enough detail?
- Different method of work?
- Out of sequence work?
- Stop work orders, disruption of work, interruptions of work.

Recognizing The Claim

- Congestion or trade stacking?
- Acceleration?
- No access or limited access to the site?
- Multiple mobilizations?
- Get the field to recognize claims so notice may be given.
- Work with accounting to assign appropriate tracking numbers.

The Light Bulb Moment



What sets the light bulb off in your company?

- Extra work being done?
- Work different than identified in plans and specifications? Revisions? Not enough detail?
- Different method of work?
- Out of sequence work?
- Stop work orders, disruption of work, interruptions of work?

Light Bulb has Lit Up Now What

- Start the Process
- NOTICE
- Tracking Number(s)
- Accounting +
- Field
- Segregation of Documentation



Preparing the Claim

- Conduct entitlement claim analysis
 - Culminate and analyze data
 - Prepare logical timeline of key events
 - Prepare list of people
- Prepare narrative
 - Contractual/factual entitlement
 - Legal arguments
 - Unemotional/no inflammatory language
 - Tell your story
- Prepare delay/damages calculations
- Organize supporting documentation as exhibits to claim

Notice Requirements

- Applies to constructive changes
- FAR 52.243-7 – Notification of Changes
- Timely – 20 days is standard time limit
- In writing and sent to CO
- Set forth the nature of the claim

Notice Requirements

- Need not provide the schedule and cost impact in this initial notice
- Strictly enforced for Differing Site Condition claims
- Early notice may help resolve an issue by permitting a change in the method of performance

Exceptions to Notice Requirements

- Defective Specification claim
- Where the Government knows about the basis of the claim
 - Presence of Government personnel
 - Government working with contractor to address the issue
 - Meetings with Government

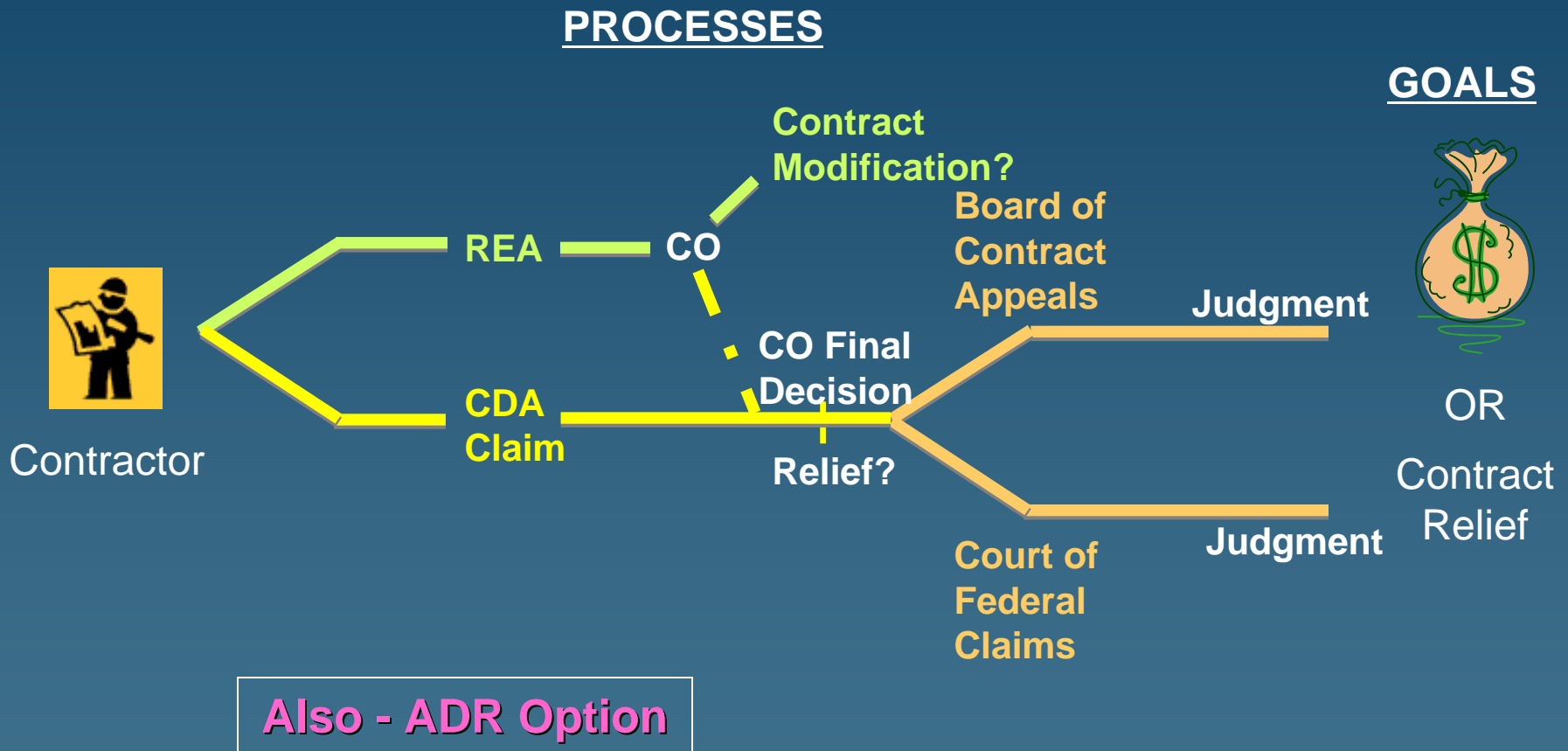
Exceptions to Notice Requirements

- Where the Government considers the claim on the merits without complaining about lack of notice
- Where the Government is not prejudiced by lack of notice
 - Prejudice occurs if Government cannot no longer elect an option that would have been available if notice was provided earlier
 - Government bears the burden of establishing prejudice

Contractor Duty to Proceed

- Contractor must perform the changed work
- Government can terminate the contract for default if the contractor does not proceed
- Contractor can submit a Request for Equitable Adjustment or a certified claim under the Contract Disputes Act
- Problem is that the contractor must finance this work – Can present a real problem

General Paths for Reaching Your Goals



Requests for Equitable Adjustment

- REA is like a claim, but is regarded by some as less adversarial than a claim
- Still need all the elements of a claim
 - Identify the basis for the REA
 - Statement of Entitlement
 - Prove the requested equitable adjustment in cost and schedule
 - DOD REA greater than \$100K – Must be certified

Requests for Equitable Adjustment

- Unlike a CDA claim, interest on the requested costs does not begin to accrue when the CO receives the REA
- Unlike a CDA claim, a contractor can recover the costs of preparation of a REA
- Unlike a CDA claim, there is no time limit by which the CO must issue a decision or inform the contractor of a reasonable time in which the CO will issue the decision on the REA

REA Pros and Cons

- Pros
 - Can be viewed as less confrontational
 - Can recover REA preparation costs
- Cons
 - Cannot recover interest
 - No time limit
 - Cannot appeal the denial of a REA to the BCA or CFC
 - So, can spend considerable time working on a REA only to have the Government deny the REA and have to go back and start over with a CDA claim

REA Pros and Cons

■ Conclusion

- Contractor has to seriously evaluate how serious the federal agency seems in addressing the contractor's REA
- If the federal agency gives the impression that it will deny the REA and force the contractor to file a CDA claim, you want to know that sooner rather than later

Release

- DOD agencies can include a broad release provision in a Modification
- Agency may contend that the release is SOP and that the contractor must agree
- May bar submission of future claims
- We have worked with contractors to limit the scope of the release



Proving Your Claim

- Entitlement analysis:
 - What are the key events?
 - Who are the knowledgeable personnel?
 - What does the contract say?
 - What are the key points establishing that the incident is a change and was caused by the Government?
 - What are the key documents?

Proving Your Claim

- Must prove entitlement and damages
- Early identification of change and segregation of documentation is critical
 - Field personnel and Accounting must work together
 - Accounting must establish an account to record changed work and field personnel must use that account for all changed work

Proving Your Claim

- Identifying documentation
 - Contract, specifications, plans and modifications including revisions
 - Government direction
 - Project records that document additional costs and schedule impact – logs, reports, meeting minutes, job cost time stamped photographs
 - Identify the "as-planned schedule" and develop the "as-built schedule"
 - Invoices, rental contracts, subcontracts

Proving Your Claim

- Real-time segregation of costs will save time and money later
- If not, outside consulting firm may need to segregate claimable costs - “hunting ground”



Methods of Proving Damages

- Actual Costs – Highly favored
- Total Cost Method – Less favored
- Modified Total Cost Method
- Jury Verdict – Seldom used

Contract Disputes Act (CDA) Claims and Alternative Dispute Resolution (ADR)

- Understanding the CDA
 - "Claim" to the Contracting Officer
 - Appeal of the CO's decision, if necessary
- CDA Pitfalls and How to Avoid Them
- Using ADR to Reduce Time and Expense

Understanding the CDA

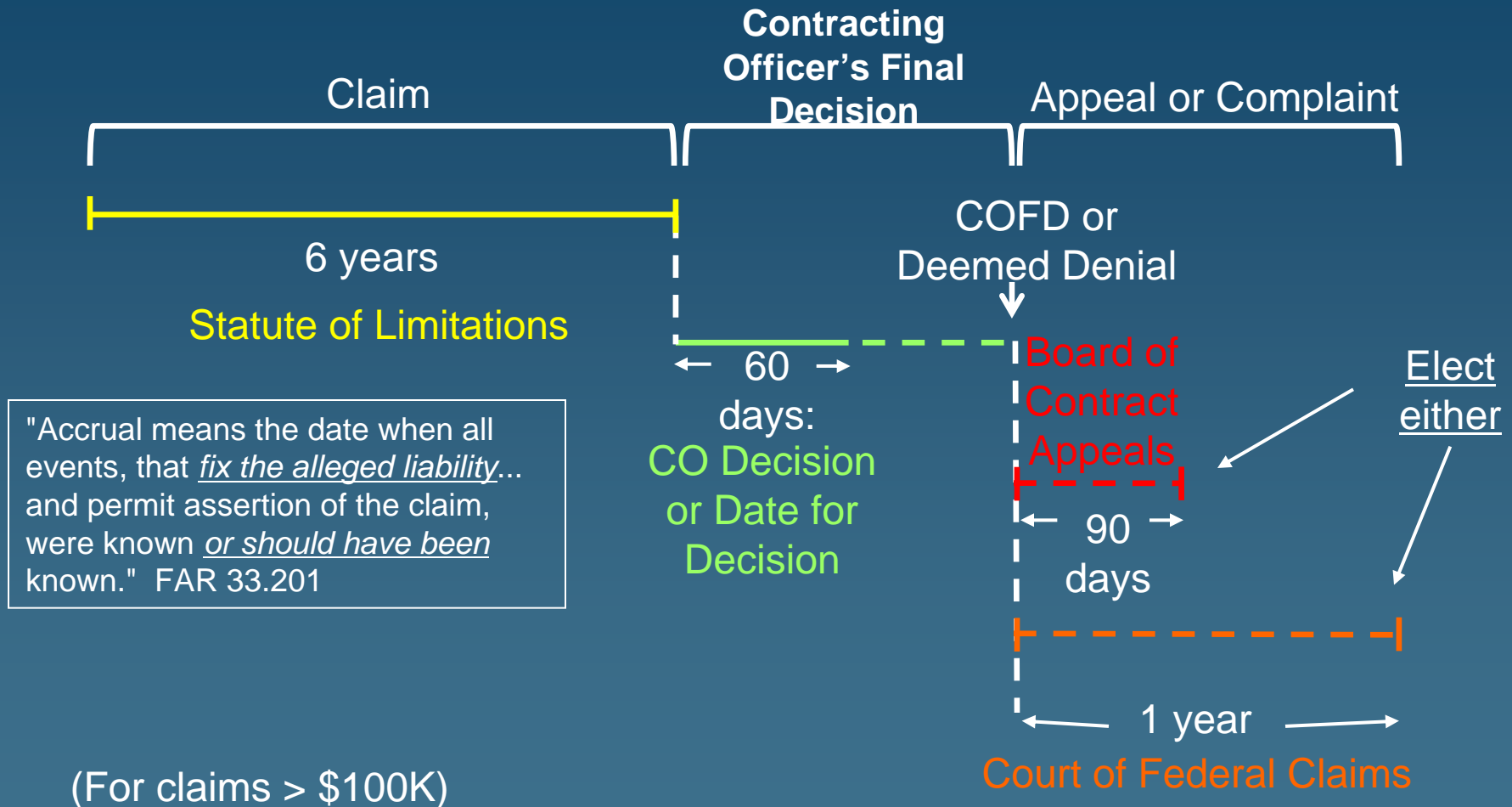
- Contract Disputes Act (41 U.S. Code Ch. 71)
 - FAR Disputes Clause 52.233-1
- Elements of a "Claim"
 - Written demand or assertion
 - By the prime contractor or the government
 - Seeking relief
 - If money, a sum certain
 - Adjustment or interpretation of contract terms
 - Voucher, invoice, or other "routine" request for payment not in dispute when submitted is not a claim
- \$100K+ claim requires "certification"

Understanding the CDA

- Contractor liable for unsupported claim attributable to misrepresentation or fraud
- Contracting Officer's final decision on claim:
 - < \$100 K – decision in 60 days
 - > \$100 K – decision or date for decision within 60 days
- If CO decides against contractor, right of appeal
- Government claims must also be the subject of a CO's final decision

CDA Pitfalls and How to Avoid Them

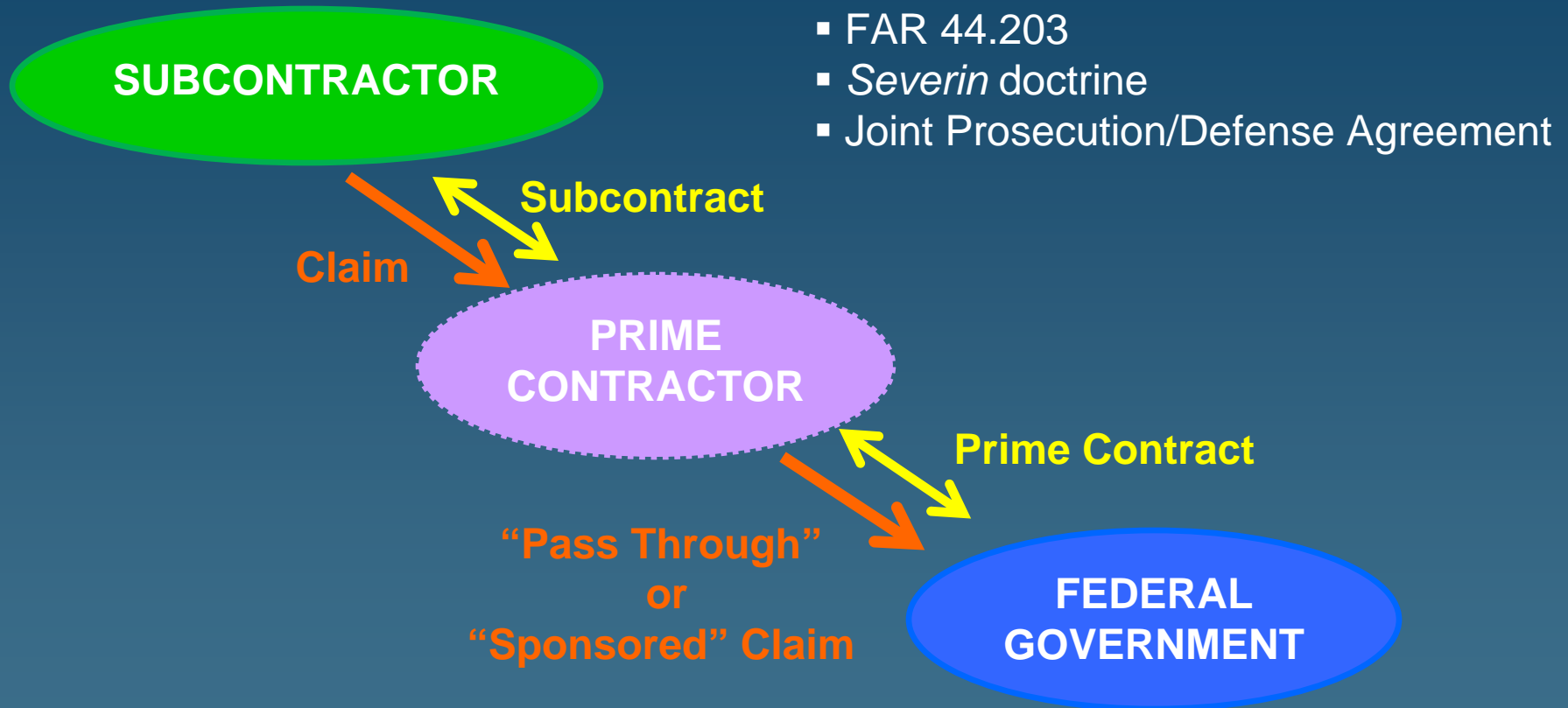
Statute of Limitations / Appeal Period



CDA Pitfalls and How to Avoid Them: Accuracy of Submission

- Not an "opening offer" or negotiation tactic
 - Frivolous or improper purpose
 - Speculative future costs
- Facts must be carefully and accurately represented
 - Avoid reckless factual assertions
 - Use of outside experts may be necessary
- Legal positions cannot be unreasonable
 - Including contract interpretation
- Potential Government counterclaim

CDA Pitfalls and How to Avoid Them: Subcontractor Claims



CDA Pitfalls and How to Avoid Them: Forums for Appeal of Adverse COFD

Boards of Contract Appeals

- 90 days to appeal
- Agency is settling authority
- Quasi-Judicial
- Panel
- ADR procedures
 - E.g., ASBCA Notice on webpage outlines options

Court of Federal Claims

- 1 year for complaint
- DOJ is settling authority
- Judicial
- One Judge
- ADR procedures
 - Appendix H

Alternative Dispute Resolution

- Elements of ADR
 - Issue in controversy
 - Voluntary election by both parties
 - Agreement on alternative procedures and terms in lieu of litigation
 - Participation in process of officials who have authority
- Types of ADR – Third Party Assistance
 - Neutral Evaluation
 - Settlement Judge
 - Mediation
 - Mini-Trial

Alternative Dispute Resolution

- Pros:
 - Preserve customer relationship
 - Avoid time and expense of litigation
 - Can provide more flexible relief
- Con: Likelihood of something less than "total win"
- Government may be hesitant to use ADR if:
 - Precedent required, significant policy questions, full public record
- Timing of ADR
 - Any time
 - After CO Final Decision – Does not alter time limit on appeal of final decision FAR 33.214(c)

Roadmap for ADR if CO Decides Against You

- File timely appeal at BCA
 - Meet timeliness requirements
 - Deal with Agency, rather than DOJ
- Request stay of proceedings for ADR
 - Board retains jurisdiction
- Conduct most appropriate form of ADR
 - Neutral evaluation or settlement judge for independent look
 - Quicker and cheaper than litigation

Settlement and Getting Paid

- Agency may consent or stipulate to judgment based on ADR
- The "Judgment Fund" is available for judgment or compromise settlement See 31 U.S. Code 1304(c)
 - Board or court orders the award from Judgment Fund
- Agency must reimburse the Judgment Fund, usually within one year See 41 U.S. Code § 7108(c)
- Budget pressure may increasingly limit settlements/ADR and force agencies to litigate

Summary

- Recognizing changes is key
- Comply with notice provisions
- Lay the groundwork to prove your damages
- Know CDA pitfalls and avoid them
- Maximize opportunity to settle through ADR



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