Subpart 5133.2 - Disputes and Appeals

Parent topic: Part 5133 - Protests, Disputes, and Appeals

5133.203 Applicability.

(b)(2) The Assistant Secretary of the Army (Acquisition, Logistics and Technology) shall determine the application at FAR 33.203. See Appendix GG for further delegation.

5133.204 Policy.

(a) As used in this section:

“Dispute Resolution Specialist” means the official designated by the head of an agency to implement agency ADR policy as prescribed by Section 3(b) of the Administrative Dispute Resolution Act of 1996, 5 U.S.C. 571-584 and Note. The Principal Deputy General Counsel of the Army is designated the Army Dispute Resolution Specialist.

“Issue in controversy” means a material disagreement between the Army and a contractor that may result in a claim, or is all or part of an existing claim.

(b) Contracting officers and their legal counsel, assisted by other members of the Acquisition Team as necessary, are encouraged to use ADR techniques to resolve pre-appeal disputes (e.g., claims, unresolved requests for equitable adjustment, and other issues in controversy) to the maximum extent practicable and appropriate. For any dispute in which unassisted negotiations have reached impasse or in which the Contracting officer has received a request for ADR, the Contracting officer shall review the dispute to determine whether ADR is appropriate for resolving it, applying the reasons listed in paragraph (c) of this section. If the Contracting officer finds ADR to be appropriate, the Contracting officer should offer or agree to ADR. Participation in ADR does not obligate any party to settle or accept a proposal for settlement. This section does not create any right to ADR for any contractor or prospective contractor, and a decision by the Contracting officer finding ADR to be inappropriate is not subject to appeal.

(c) The use of ADR to resolve an issue in controversy is generally authorized if the parties agree. However, the Contracting officer or other authorized official may decide that ADR is inappropriate to resolve the issue for any of the following reasons:

(1) A definitive or authoritative resolution of the matter is required for precedential value, and an ADR proceeding is not likely to be accepted generally as an authoritative precedent.

(2) The matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and an ADR proceeding would not likely serve to develop a recommended policy for the Army.

(3) Maintaining established policies is of special importance, so that variations among individual decisions are not increased, and an ADR proceeding would not likely reach consistent results among individual decisions.

(4) The matter significantly affects persons or organizations who are not parties to the ADR proceeding.

(5) A full public record of the proceeding is important, and an ADR proceeding cannot provide such a record.

(6) The Army must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the Army's fulfillment of that requirement.

(7) The issue is amenable to a disposition that will fully resolve the matter quickly and with a high probability of finality, including procedures under Rules 11 and 12 of the Rules of the Armed Services Board of Contract Appeals (ASBCA).

(8) The anticipated transaction costs of ADR in money and time materially exceed the anticipated transaction costs of litigation.

(9) The dispute involves one or more credible allegations or indications of fraud, gross mismanagement, abuse of official authority, or violation of federal or state criminal laws.

(10) Any other specific reason why the Contracting officer determines ADR is inappropriate. Sole reliance on this provision to find ADR inappropriate must be approved by the cognizant SCO, or higher authority. Forward a copy of any decision based on this provision, with supporting rationale, to the Army Dispute Resolution Specialist at usarmy.pentagon.hqda-ogc.mbx.adr@mail.mil. Include the name, telephone number and email address of the point of contact for the decision.

(d) The Contracting officer, legal advisor, attorney of record, or other official responsible for procurement ADR matters within the cognizant interested organization(s) may contact the Army ADR Program Office in the Office of the Army General Counsel (SAGC-ADR) for advice and guidance on ADR processes, strategies, and other informal dispute resolution matters. Send correspondence to:

Department of the Army General Counsel

ADR Program Office (SAGC-ADR)

104 Army Pentagon

Washington DC 20310-0104;

by fax to 703-697-9235; or by email to: usarmy.pentagon.hqda-ogc.mbx.adr@mail.mil. Ensure appropriate coordination through command channels before contacting SAGC-ADR directly for assistance under this section. USACE contracting activities may also contact

U.S. Army Corps of Engineers

Attn: CECC-C Alternative Dispute Resolution Specialist

441 G St., N.W.

Washington, DC 20314-1000,

for dispute resolution guidance.

(e) Appeals filed with the ASBCA are eligible for ADR consideration, consistent with the Chief Trial Attorney's authority over litigation of all ASBCA matters. Apply the reasons in paragraph (c) of this section when considering whether to participate in ADR. All decisions whether to participate in ADR for any issue in controversy are within the Chief Trial Attorney's discretion, and are not subject to appeal.

5133.212 Contracting officers duties upon appeal.

5133.212-90 Appeal procedures.

(a) For purposes of this section and DFARS Appendix A, the Army Chief Trial Attorney or the Engineer Chief Trial Attorney performs the duties and responsibilities of the Chief Trial Attorney as follows:

(1) In accordance with Army Regulation (AR) 27-1, the Army Chief Trial Attorney appointed by the Judge Advocate General is the authorized representative of the Secretary of the Army with sole authority and responsibility for the conduct and control of litigation of contract disputes for all Department of the Army cases docketed with the ASBCA, except for United States Army Corps of Engineers (USACE) cases described in (2) and (3).

(2) The Engineer Chief Trial Attorney, appointed by the USACE Chief Counsel, is the authorized representative of the Secretary of the Army and has sole authority and responsibility for the conduct and control of litigation of contract disputes for all USACE cases docketed with the ASBCA of a value of less than $3 million

(3) The Director, Litigation Division, U.S. Army Legal Services Agency may determine, on a case-by-case basis, to delegate USACE cases of a value of $3 million or more to the Engineer Chief Trial Attorney.

(b) All contract disputes addressed in this section remain subject to the litigation oversight authority and responsibility of the General Counsel of the Department of the Army.

5133.212-91 Notice of an appeal.

Contracting officers must perform the following actions concurrently:

(a) Send any notice of appeal received directly, including the envelope showing the postmark directly to:

Chairman, ASBCA

5109 Leesburg Pike

Skyline 6, Room 703

Falls Church, VA 22041-3208.

(b) When the Defense Contract Management Agency has participated in contract award and/or administration, send to the Defense Contract Management Agency office involved, the notice of the

appeal with direction to preserve all documents pertaining to the contract.

5133.212-92 Comprehensive report to the Chief Trial Attorney.

(a) Concurrent with forwarding the appeal file to the ASBCA, the Contracting officer must send the following documents to the addressee in AFARS 5133.104(a)(3)(i)(1)(ii) or (iii) as applicable with a copy to the reviewing official designated in accordance with AFARS 5133.212-93:

(1) A copy of the appeal file.

(2) A trial attorney's litigation file, The Contracting officer shall not provide this report to the ASBCA or the contractor. The litigation file shall include the information listed in paragraphs (2)(i) through (iv) of this section.

(i) The names, current addresses and telephone numbers of all potential witnesses (including the contractor's) who have information concerning the facts in dispute.

(ii) A signed statement of each Government witness itemizing personal knowledge of the facts to which the witness will testify under oath at hearing, or a summary if it is impossible to obtain a signed statement. Include the following:

(A) Background and circumstances surrounding the generation of pertinent documents.

(B) Explanation, basis and/or rationale of those portions of the available documents which will require clarification at the hearing.

(C) List of any facts and events not shown by available documents.

(D) Identification of any other persons who have personal knowledge of pertinent facts.

(E) A statement regarding the expected availability of the witness for the hearing.

(iii) An analysis for the Chief Trial Attorney discussing the contractor's individual allegations and overall position with an opinion of the validity of each, and an appraisal of the strengths and weaknesses apparent in both parties' positions.

(iv) A memorandum by the legal advisor or the official making the decision, with input from legal counsel, setting forth an analysis of the legal issues involved in the dispute, including comments about the adequacy of the findings of fact and the legal sufficiency of the decision.

(b) The Contracting officer must send a copy of all correspondence, and other data pertinent to the dispute, to the Chief Trial Attorney. This includes all documents received after submitting the trial attorney's litigation. The Contracting officer shall forward copies to the reviewing official.

(c) The Chief Trial Attorney may, upon discovery of new facts or circumstances, have the reviewing official reconsider the matter.

5133.212-93 Review of appeal.

(a) The head of the contracting activity shall –

(1) Furnish technical and legal assistance to the Contracting officer as required; and

(2) Establish procedures to ensure that review of all appeals filed under the disputes clause occur at a level higher than the Contracting officer.

(b) The HCA designated reviewing official shall –

(1) Ensure that the findings cover all issues in dispute and are consistent with the decision from the appeal;

(2) Ensure that the Contracting officer's comprehensive report to the Chief Trial Attorney, including the evidence submitted in support of the Contracting officer's decision, is complete;

(3) Within 10 calendar days after receiving the Contracting officer's comprehensive report, forward to the Chief Trial Attorney –

(i) Evaluations, conclusions and recommendations;

(ii) Any additional evidence considered essential to enable the Chief Trial Attorney to protect the interests of the Government before the ASBCA; and

(iii) If the reviewing official decides that the available evidence does not sufficiently support the Contracting officer's decision, or that the decision is erroneous, an estimated date by which the contracting office will either furnish additional support or withdraw the decision; and

(4) Assist the Chief Trial Attorney in obtaining additional evidence or in making other necessary preparations for presenting the Government's position before the ASBCA.

5133.212-94 Receipt of complaint.

(a) See DFARS Appendix A, Part 2, Rules , Rule 6, paragraph b. If the Contracting officer receives the complaint after forwarding the comprehensive report to the Chief Trial Attorney, he/she must, within 15 calendar days after receipt of the complaint, send directly to the Chief Trial Attorney supplementary information regarding any issues raised in the complaint that the comprehensive report did not sufficiently cover. Include specific admissions or denials of each allegation of fact contained in the complaint and a statement of any affirmative defenses or counterclaims applicable.

(b) Provide copies of the supplementary information furnished to the Chief Trial Attorney to the reviewing official.

5133.212-95 Litigation.

(a) See AFARS 5133.212-90(a)(1) regarding the authority and responsibility of the Chief Trial Attorney.

(b) The Chief Trial Attorney will present all Army cases to the ASBCA, using trial attorneys assigned to the office, except the Chief Trial Attorney may authorize local legal counsel to act as trial attorneys or to assist in the presentation of Army cases if the appeal has particular significance to the contracting activity and that it involves difficult operational issues and technical facts.

(c) Local legal counsel and personnel within the contracting activity assist and support the Office of the Chief Trial Attorney in preparing the case.

(d) The Chief Trial Attorney and the attorneys assigned may communicate directly with any person or organization to secure any witnesses, documents, or information considered necessary in connection with representing the Government in matters before the ASBCA. The Chief Trial Attorney must inform the Contracting officer of any actions taken in connection with these matters.

5133.212-96 Disposition.

(a) The authority and responsibility to settle contract disputes docketed with the ASBCA remains with the Contracting officer, subject to (b) and the following:

(1) The Contracting officer must advise the Chief Trial Attorney of all offers of settlement from a contractor, whether directly from the contractor or through the contractor's attorney.

(2) The Contracting officer must consult with the Chief Trial Attorney before accepting a contractor's offer of settlement and before making a settlement offer to the contractor.

(b) The Chief Trial Attorney has all necessary authority to conclude settlement agreements with the concurrence of the Contracting officer, the reviewing official, or the DASA(P). He/she must notify the appropriate Army Command legal office/staff judge advocate of any disagreement regarding the settlement of a case before raising the matter to the Assistant Secretary of the Army (Acquisition, Logistics and Technology).

(1) The Chief Trial Attorney or an individual trial attorney may enter into an agreement on matters for which there is no substantial controversy and which will not have the effect of disposing of an appeal, provided that, in the case of a pre-hearing written stipulation or agreement, the Chief Trial Attorney has granted this authority to the individual trial attorney in advance.

(2) In appropriate cases, such as those where time-consuming delays would occur by returning the appeal to the Contracting officer, the Chief Trial Attorney or an individual trial attorney acting with the prior approval of the Chief Trial Attorney may enter into an agreement with an appellant which will have the effect of disposing of an appeal after obtaining concurrence from a representative of the HCA. Such agreement may then become the basis of an ASBCA decision disposing of the appeal.

5133.212-97 Review of ASBCA decisions.

(a) *Contracting activity review .*

(1) The contracting activity must review ASBCA decisions and, if the HCA thinks that the ASBCA should reconsider a decision or appeal to the U.S. Court of Appeals for the Federal Circuit, the HCA may within 10 calendar days after receipt of the decision, request the Chief Trial Attorney to either –

(i) File a motion for reconsideration, stating the grounds relied upon to sustain the motion; or

(ii) Initiate action seeking an appeal to the U.S. Court of Appeals for the Federal Circuit, stating the basis for such an appeal pursuant to the review standards of section 7107(b) of the Contract Disputes statute (41 U.S.C. chapter 71).

(2) If the Chief Trial Attorney or the HCA designated reviewing official does not concur with a request of the within five calendar days, the Chief Trial Attorney or the HCA designated reviewing official shall forward the request, together with reasons for opposition, through the Judge Advocate General to the addressee in AFARS 5101.290(b)(1) for the decision in coordination with the General Counsel of the Army. If the DASA(P) determines that the Government will not make a motion for reconsideration or that the Government will not take an appeal to the U.S. Court of Appeals for the Federal Circuit, the Chief Trial Attorney may certify this fact to the ASBCA.

(3) When it appears that an adverse decision of the ASBCA has resulted from flaws in the regulations that implement DoD policy rather than an error by the ASBCA, recommendations for changes to acquisition regulations should be developed following the format in DFARS 201.201-1(d)(i) and submitted to the addressee in AFARS 5101.290(b)(2)(ii)(B).

(b) *Chief Trial Attorney review.* The Chief Trial Attorney independently reviews all ASBCA decisions involving Army contracts to determine whether the ASBCA should reconsider any decision or if the Army should appeal a decision to the U.S. Court of Appeals for the Federal Circuit.

5133.212-98 Dispute settlement and judgments, use of the Judgment Fund.

(a) *Judgment Fund.*

(1) The Contract Disputes statute provides for the use of the Judgment Fund ("the Fund") (31 U.S.C. 1304) to pay for adverse judgments against the Government. Under certain circumstances, the Army can convert settlement agreements in Contract Disputes statute cases before the ASBCA into consent judgments to access the Fund to pay for settlements. In Contract Disputes statute cases before Federal courts where Department of Justice represents the Army, the Department of Justice may use its independent authority to use the Fund for settlements. Contracting officers should consult with their legal counsel and their local resource management office prior to taking any actions related to the use of the Fund. Only authorized officials of a Government agency may submit a request for payment from the Fund. Requests submitted by anyone other than an authorized Government official are deemed fraudulent. Filing a false or fraudulent claim constitutes a Federal offense that is punishable by fines, imprisonment, or both (See 31 U.S.C. 3729 and 18 U.S.C. 287). The Army authorized official for use of the Fund is the Assistant Secretary of the Army for Financial Management and Comptroller (ASA(FM&C)). See Appendix GG for further delegation. Army contracting activities shall follow the policy set forth in this section of the AFARS.

(2) The Army must reimburse the Fund with funds current as of the date of the judgment. According to the DoD Financial Management Regulation, (FMR), Volume 3, Chapter 08, paragraph 4.2.7, approval authority is required from the cognizant Assistant Secretary of the Military Department for Financial Management and Comptroller or Defense Agency Comptroller for all Judgment Fund Reimbursements to the Department of the Treasury in excess of $1,000,000.

(b) *Fiscal considerations in settlements*. If funds appropriate to pay a settlement are expired but the account remains open, Contracting officers must use expired funds to pay the settlement. If the account remains open but no expired funds remain, Contracting officers must use the Judgment Fund to access current funds to pay the settlement. Access to the Fund requires a consent judgment from the Board or use of the Department of Justice's independent authority to use the Fund. The Contracting officer may use current funds to pay the settlement if appropriate accounts are canceled or closed.

(c) *Settlement procedures*.

(1) The ASA(FM&C), tracks available expired funds within the Army.

(2) The Army shall use the following procedures for settlements:

(i) In situations where contract funds have expired but the accounts have not closed, the Army shall fund settlements with expired funds if available. Contracting officers will ascertain the availability of appropriate expired funds through their resource management office.

(ii) If the resource management office determines that no expired funds exist within the Army to fund the settlement and the accounts are not closed, the Contracting officer must access the Fund through a consent judgment in order to use current year funds to pay the settlement (i.e., reimburse the Fund).

(iii) If no expired funds exist but the account remains open, use the following procedure. If current year funds are available to reimburse the Fund, then the Contracting officer may enter into a consent decree and allow the Fund to pay the judgment. If there is not sufficient current funding to reimburse the Fund, the Contracting officer must receive authorization from the ASA(FM&C) prior to entering into a consent decree.

(iv) If the accounts are closed, use the following procedure. If the Contracting officer determines there are sufficient funds to pay the settlement, he/she will not use the Fund, and pay the settlement with Agency funds. If sufficient current funds are not available, ASA(FM&C) will provide approval to access the Fund prior to the Contracting officer entering into a consent judgment.

(v) When use of the Fund is authorized, the Contracting officer shall work with the resource management office to ensure execution of the appropriate Certificate of Finality and Bureau of the Fiscal Service forms (FS Forms 195, 196, 197A and 198 (if appropriate)) and submit the payment request to the FMS. The “reimbursement contact” on FS Form 196 shall be the ASA(FM&C).

(d) *Judgments*. Use the following procedures to pay judgments using the Fund.

(1) The Contracting officer shall ascertain the availability of current funds through financial management channels. If current funds are available, the Contracting officer will not use the Fund, and will pay the judgment with Agency funds.

(2) If current funds are not available, the Contracting officer must receive authorization from the ASA(FM&C) to access the Fund prior to paying the judgment.

(e) *Settlement agreements*. All settlements converted to consent judgments and funded by the Fund shall be in writing and contain appropriate release language. The Contracting officer, local attorney and trial attorney shall ensure that all settlement amounts are fair and reasonable.

(f) *Expeditious handling*. To expedite handling of settlements, the inquiries and approvals these procedures require may be oral; however, to support the action, the Contracting officer must document the steps taken in a memorandum for record and include a copy in the contract file.

5133.213 Obligation to continue performance.

(a) The Contracting officer must obtain written approval from the HCA to use the Alternate I paragraph in the clause at FAR 52.233-1. See Appendix GG for further delegation.

5133.215 Contract clauses.

(3) The head of the contracting activity shall make the determination at DFARS 233.215(3). See Appendix GG for further delegation.