Part 5233 - PROTESTS, DISPUTES, AND APPEALS

The official NMCARS regulation resides at https://www.secnav.navy.mil/rda/DASN-P/Pages/NMCARS.aspx

Subpart 5233.1 - PROTESTS

5233.103 Protests to the agency.

5233.104 Protests to GAO.

5233.170 Briefing requirement for protested acquisitions valued at $1 billion or more.

Subpart 5233.2 - DISPUTES AND APPEALS

5233.201 Definitions.

5233.203 Applicability.

5233.204 Policy.

5233.204-90 General.

5233.209 Suspected fraudulent claims.

5233.211 Contracting officer's decision.

Subpart 5233.90 - PROCEDURES

5233.9001 Claims approval requirements.

5233.9002 Contractor appeals to the Armed Services Board of Contract Appeals (ASBCA).

Subpart 5233.1 - PROTESTS

5233.103 Protests to the agency.

(d)(4) HCAs are responsible for establishing procedures for handling requests made by interested parties for an independent review of their protest at a level above the contracting officer. In addition, for purposes of this paragraph, a “level above the contracting officer” means the CCO or, if the CCO is less than two levels higher than the contracting officer, the Chief of the next higher contracting office. An individual so designated who has been personally and substantially involved with the procurement shall recuse himself or herself and, instead, refer the matter to another appropriate official at a comparable or higher level.

(f) For purposes of this paragraph, a “level above the contracting officer” means the CCO or, if the CCO is less than two levels higher than the contracting officer, the Chief of the next higher contracting office. An individual so designated who has been personally and substantially involved with the procurement shall recuse himself or herself and, instead, refer the matter to another appropriate official at a comparable or higher level.

5233.104 Protests to GAO.

(g) HCAs shall consult with DASN(P) before any final decision is reached not to implement GAO's recommendations. Concurrent with the submission to the Comptroller General, a copy of the report shall be provided to DASN(P) by email at usn.pentagon.asstsecnavrdadc.mbx.pabt@us.navy.mil with the subject “[Activity Name] FAR 33.104 – GAO Protest Recommendation Decision.”

5233.170 Briefing requirement for protested acquisitions valued at $1 billion or more.

Within 5 days of receipt of the protest, submit the required protest notice to DASN(P) by email at usn.pentagon.asstsecnavrdadc.mbx.pabt@us.navy.mil with the subject “[Activity Name] PGI 233.170 - Protest [solicitation or contract number, as appropriate].”

Subpart 5233.2 - DISPUTES AND APPEALS

5233.201 Definitions.

"Disruption", as used in this part, means the cost effect upon, or the increased cost of performing, the unchanged work due to a change to the contract.

"Delay", as used in this part with respect to contractors, claims or requests for equitable adjustments, means the time-oriented cost effects or length of a suspension in scheduled contract work or a period of time-oriented cost effects or length of a suspension in scheduled contract work or a period of time a contractor is required to perform beyond the contract delivery or completion date, allegedly due to contractually remediable Government actions or inactions. Delay can be expressed in terms of time or cost or some combination of time and cost.

5233.203 Applicability.

(b)(2) The HCA is delegated the authority to make the determination that the application of the Act to the contract would not be in the public interest.

5233.204 Policy.

5233.204-90 General.

(a) *Multi-discipline approach*. Since claims by contractors often involve difficult and complex legal, factual and financial issues requiring extensive fact-finding or analysis to determine whether or not the Government is liable, a multi-disciplined team should generally be established to analyze the claim.

(b) *Formal and constructive changes*.

(1) When DON actions alleged by the contractor, after appropriate evaluation, constitute a change, the contracting officer shall promptly formalize such constructive change(s) in writing as soon as the parties have negotiated an acceptable adjustment to the contract price and delivery clauses, irrespective of whether the contract contains the clause at FAR 52.243-7, Notification of Changes.

(2) In exceptional cases where disruption, delay or other claimed impacts are known to exist and cannot be currently resolved, the contracting activity may proceed with equitable adjustments covering the interrelated formal changes coupled with usage or qualified release. The qualified release should specifically identify the inter-relationship with the contractor's claim such as delay or disruption impacts reserving to the contractor the right to pursue and demonstratesupport for a separate equitable adjustment therefore under the contract.

(c) *Rejection of "total cost" and "total time" based claims*.

Claims based on "total cost" or "total time" approaches are considered only as a last resort. A contractor (claimant) filing a total cost or total time-based claim should establish that there is no other feasible, acceptable basis for computing the claimant's increased costs or delays and prove that there is no way of correlating government actions and omissions to historical cost elements or even to reasonable substantiated cost estimates.

5233.209 Suspected fraudulent claims.

The Naval Criminal Investigative Service is the agency official responsible for investigating fraud.

5233.211 Contracting officer's decision.

(a)(1) When reviewing the facts pertinent to a claim, the contracting officer shall determine if the claimant established:

(A) the existence of a legal basis for entitlement,

(B) facts meeting the elements of proof required to support the basis of entitlement, and

(C) adequate factual support for the amounts claimed.

(b) Copies of the contracting officer's decision shall receive the same distribution as the related contract and also shall be furnished to any assignee, guarantor, or surety of the contractor.

Subpart 5233.90 - PROCEDURES

5233.9001 Claims approval requirements.

(a) All proposed claim settlements in excess of $25 million, and final decisions of the contracting officer involving payments in an amount greater than $25 million, shall be submitted for review and approval to DASN(P) by email at usn.pentagon.asstsecnavrdadc.mbx.pabt@us.navy.mil with the subject "[Activity Name] NMCARS 5233.9001 – Proposed Claim Settlement >$25M." Other proposed claim settlements and final decisions of the contracting officer shall be reviewed and approved as specified by the HCA.

(b) The supporting documentation submitted to DASN(P) with respect to claim settlements or final decisions of a contracting officer shall include a legal memorandum. As a minimum the required legal memorandum should:

(1) Analyze the applicability and adequacy of the contractor's legal theory or theories of Government liability;

(2) Analyze and evaluate the presence and adequacy of evidentiary facts satisfying the elements of proof required by such legal theory or theories;

(3) Analyze the applicability and adequacy of any affirmative defense the Government may have to the contractor's claim, e.g., accord and satisfaction, failure of consideration, fraud, release, laches, statute of limitations; and

(4) Analyze and evaluate the presence of any counterclaims the Government may have against the contractor.

(c) No settlement commitment or final decision may be made prior to obtaining the required approval.

(d) Primary emphasis should be given to achieving prompt settlement of claims, thereby obviating need for provisional price increases or payments. Provisional price increases or provisional payments against contractor claims may be made when the following documents have been obtained:

(1) A legal determination that the contractor is entitled to compensation.

(2) Sufficient technical, administrative, and audit analyses to permit such legal determination; and

(3) A determination by the contracting officer with respect to the amount of compensation for which there is entitlement and that the amount of ultimate entitlement to compensation will equal or exceed the amount of the provisional price increase or provisional payment.

(e) When a provisional payment, either individually or cumulatively against a single claim exceeds $25 million, a written justification shall be submitted for approval to DASN(P) by email at usn.pentagon.asstsecnavrdadc.mbx.pabt@us.navy.mil with the subject "[Activity Name] NMCARS 5233.9001 – Proposed Claim Provisional Payment >$25M."

The justification shall cover--

(1) the requirements of the claim;

(2) the projected date of settlement of the claim; and

(3) other pertinent information, including comments as to whether the contractor has reasonably satisfied all requests for documentary and analytical support of the claimed amount.

5233.9002 Contractor appeals to the Armed Services Board of Contract Appeals (ASBCA).

(a) *General*. The DON Office of the General Counsel (OGC) has sole litigation authority for all appeals under DON contracts to the ASBCA. Because of the frequent complexity of these cases, the DON OGC and the contracting activity involved should maintain the continuity of any DON claim team that might have investigated and evaluated the contractor's claim submission. Such teams should continue to function in an assisting capacity under the leadership of the DON OGC Trial Attorney assigned to handle the appeal.

(b) *Litigation report requirement*. With the compilation of ASBCA Rule 4 documents (available at https://www.asbca.mil/Rules/rules.html), a comprehensive litigation report shall be forwarded to the Litigation Division. The report should include:

(1) A detailed narrative statement of facts, preferably in chronological sequence, and with a topical segregation when appropriate, with references to attached supporting documents of expected testimony. If such a statement was previously submitted, it need not be submitted a second time, but should be supplemented or revised if additional information becomes available in the interim.

(2) An analysis and evaluation (classified as attorney-client privileged information) of the factual and legal positions of both sides (including affirmative defenses and counterclaims available to the Government), the available evidence, and the expertise and effectiveness of prospective witnesses.

(3) The advisory report, if any, of the reviewing official or board.

(c) *Settlement negotiations pending appeal*. The conduct of settlement negotiations in connection with any pending appeal should generally be accomplished by a selected team consisting of the trial attorney and representatives of the contracting officer (including contracting activity technical personnel, counsel, negotiator, and auditor if necessary). Other arrangements may be made in specific cases as appropriate. However, no final settlement agreement will be made without the written approval of the contracting officer. When a settlement is made, a memorandum shall be prepared by the negotiating team (and signed by all team members) stating the basis and reasons. The settlement agreement shall be drafted by the contracting activity and trial attorney. The trial attorney shall file any legal papers required to be filed with the ASBCA to effect disposition of the case by mutual agreement of the parties.

(d) *Review and approval*. Negotiated settlements of appeals pending before the ASBCA, as well as negotiated settlements of appeal issues that have been remanded to the DON for quantum determination, will be subject to review and approval at levels established for claims of the same dollar amount.

(e) *Contract modification*. Whenever contract modification and other contract documents are

required to implement a settlement of ASBCA or appellate court decision, they should reference the ASBCA proceedings by title and docket number.