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CLIENT ALERT

Not So Fast: An REA that Does Not Seek a Final Decision Is Not a CDA Claim

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In *BAE Systems Ordnance Systems, Inc.*, ASBCA No. 62416 (February 10, 2021), the Armed Services Board of Contract Appeals addressed whether an request for equitable adjustment (REA) constituted a Contract Disputes Act (CDA) claim. BAE submitted a series of REAs that it consistently labeled and characterized as such and certified in accordance with DFARS 252.243-7002, *Requests for Equitable Adjustment*. Additionally, none of the REAs requested a contracting officer's (CO) final decision pursuant to the CDA. In response, the CO disagreed with BAE's request, but did not issue a final decision. BAE responded with further explanations of its position and provided additional information, which it again certified in accordance with DFARS 252.243-7002 (the same REA certification it provided in its initial REAs). BAE, again, did not include the certification required under the CDA or request a final decision. Ultimately, upon their denial, BAE expressly converted the REAs into a claim under the CDA, which it certified in accordance with CDA requirements. BAE subsequently filed an appeal on a deemed denial basis, which the Army moved to dismiss for lack of jurisdiction. The Army argued that BAE's challenge to the CO's decision was untimely because BAE's REAs were actually valid CDA claims. The Board disagreed. The Board traced the history and substance of the parties' communications and held that the REAs were not CDA claims, because BAE was careful not to expressly or implicitly request a final decision. The Board distinguished the facts from those in *Hejran Hejrat Co. Ltd v. United States Army Corps of Engineers*, 930 F.3d 1354 (Fed. Cir. 2019), which we reported on here. In *Hejran Hejrat*,the Federal Circuit was "loath to believe" that the contractor's year-long exchange had not culminated in an implicit request for a final decision on a claim that had purported to be an REA. Here, on the other hand, BAE intentionally sought to avoid converting its REAs into claims, by "scrupulously refraining from requesting a CO's final decision." This decision amplifies the distinctions between an REA and a CDA claim. Contractors who intend to pursue relief through an REA, versus a CDA claim, should diligently avoid requesting a CO's final decision, or otherwise engage in communications or conduct that could be interpreted as such a request.

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