

Suing Uncle Sam:
How to Win a Contract Claim
Against the Government

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Overview

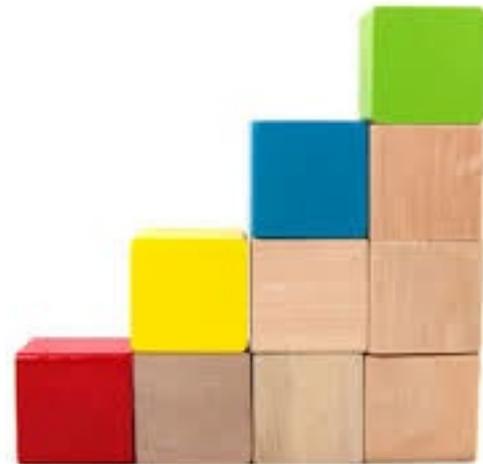
- 4 Key Concepts
- Tucker Act and Contract Disputes Act
- Other Types of Claims
- Settlement Prospects

The “Franconia” Case

Franconia Associates v. United States,
536 U.S. 129 (2002)



4 Key Concepts



Concept 1: Sovereign Immunity

- “A government cannot be sued in its own courts without its consent.” (Black’s Law Dictionary)

“Rex non potest peccare”

- The United States has waived its immunity through a number of statutes:

“It is as much the duty of government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals.”

-Abraham Lincoln, 1861

Concept 2: Statute of Limitations

- Statutes of limitations for claims against government are “jurisdictional” — if the specified time period has passed, the court has no authority to consider the case.
- ***Franconia***: Statute of Limitations does not begin to run when Congress changes the law, but when the government fails to perform under the contract. Thus, legislation qualified as an “anticipatory repudiation.”

Concept 3: Authority of Government Agents

Federal Crop Insurance Corp. v. Merrill:

“...anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority...”

332 U.S. 380 (1947)

Concept 4: The Christian Doctrine

G. L. Christian v. United States:

Mandatory incorporation of contract clauses reflecting a “significant or deeply ingrained strand of public procurement policy”

160 Ct. Cl. 1 (1963)

Claim Process



Tucker Act

- 28 USC § 1491 (1887)
- Applies to claims *for money damages* against the government arising under the constitution, statutes, agency regulations or contracts, *other than tort claims*.
- **6-year statute of limitations**

The Court of Federal Claims

- Created in 1855 (“Court of Claims”) as venue to assert contract claims against government.
- Prior to 1855: petition Congress to pass an appropriation.
- Tucker Act (1887) expanded the court’s jurisdiction to all money claims against government, including claims under Constitution, except tort, equitable and admiralty claims.
- The court was reformulated in 1982 and name changed to Claims Court; then changed to Court of Federal Claims in 1992.

Contract Disputes Act

- Contract Disputes Act of 1978, 41 U.S.C. § 7101 et seq.
- Incorporated into most Federal Government Contracts
- Applies to claims under contracts for *goods or services* (procurement).

Contract Disputes Act: “Claim”

- Incorporated into contracts through Disputes Clause, FAR 52.233-1.
 - Defines “claim” as “a **written** demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a **sum certain**”
 - Contractor must also expressly request a **final decision**.

CDA: Claim Certification

- For claims over \$100,000, contractor must certify:
 - The claim is made in **good faith**;
 - The **supporting data are accurate and complete** to the best of the contractor's knowledge and belief;
 - The **amount requested accurately reflects** the contract adjustment for which the contractor believes the Federal Government is liable; and
 - That the **certifier is authorized to certify the claim** on behalf of the contractor.
- *Penalties for fraudulent claims (41 USC § 7103)*

CDA: CO Decision

- Claims of \$100,000 or less: CO must issue decision within sixty days.
- Claims over \$100,000: CO must either issue a decision within sixty days or inform the contractor of when the decision will be issued.
- **“Deemed denied”**: If CO fails to issue decision within reasonable time, contractor may commence an appeal or suit.

Grounds for CDA Claims

- **Termination** (FAR Part 49)
 - For Convenience:
 - Government must compensate the contractor for costs incurred, profit for work *performed*, and costs associated with the termination.
 - For Default:
 - If it is established that the contractor is not in default, or failure to perform is excusable, converts to termination for convenience.

Grounds for CDA Claims

- **Changes** (FAR Part 43.1; 52.243-1)
 - Actual: Change Order
 - “Constructive Change”
 - Examples: defective specs or drawings, schedule changes, acceleration, interference or lack of cooperation by government, government-caused delays, suspension of work, contract interpretation
- Compare: Request for Equitable Adjustment (“REA”)

CDA: Government Claims

- The government initiates a claim by issuing a demand letter to the contractor.
- The contractor must be given an opportunity to state its position, express its views, and contest the proposed action.

CDA: Statute of Limitations

- Claims by a contractor or the government must be submitted within 6 years of the accrual of a claim.
 - “Accrual of a claim means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known.” FAR 33.201.
 - Monetary damages need not have been incurred.
- Time period for filing may be decreased by contract.

CDA: Appeals Process

Boards of

Contract Appeals vs. COFC

90 days

12 months

Less formal

More formal

No Jury

No Jury

Agency attorneys

DOJ attorneys

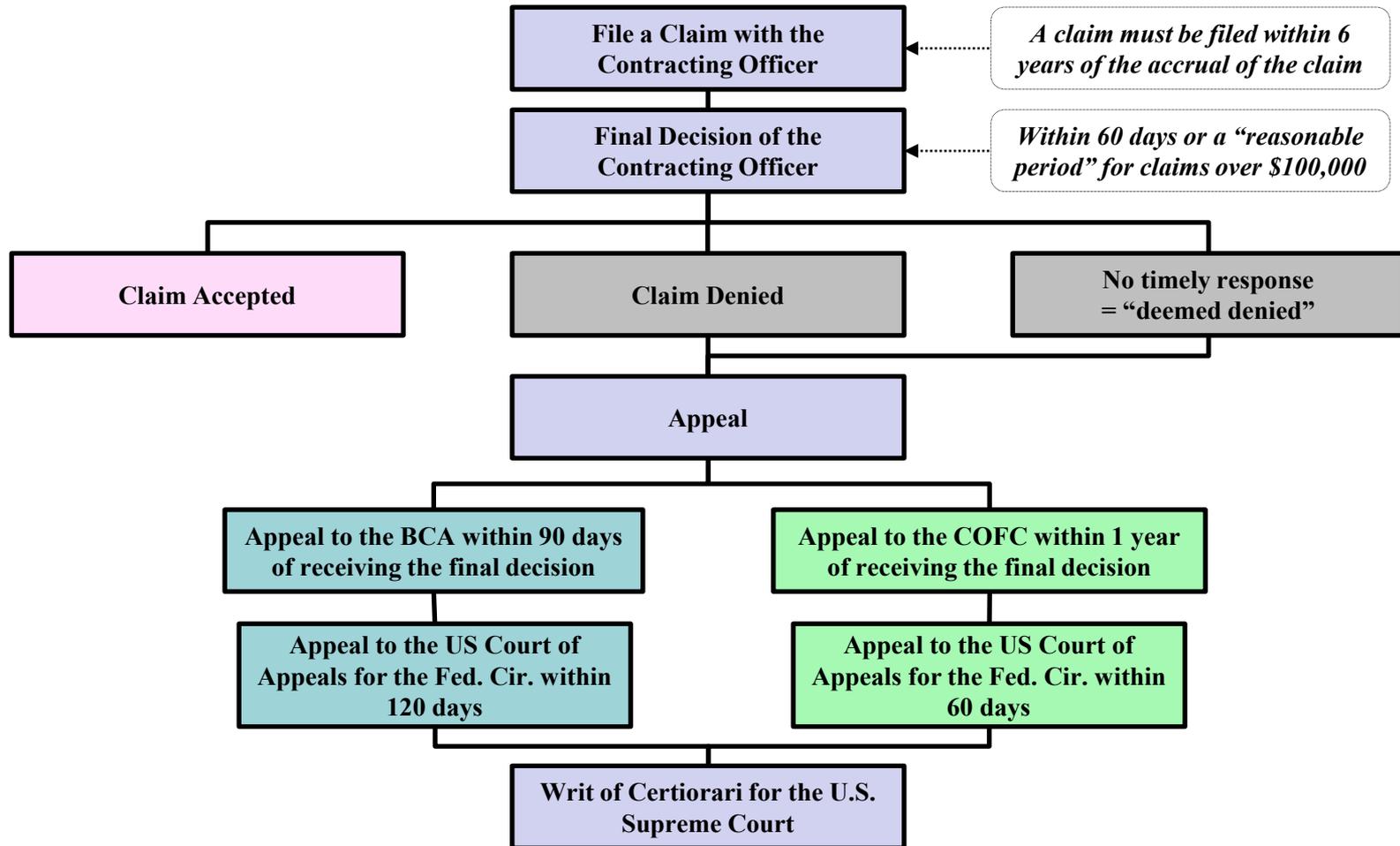
Appeal to Fed. Cir.

Appeal to Fed. Cir.

(120 days)

(60 days)

CDA Process Summary



Other Claims



Takings

- The 5th Amendment of the Constitution provides citizens the right to be compensated for property taken for public use:
“nor shall private property be taken for public use without just compensation.”
- “Taking” may be by eminent domain or regulations. When by regulation, generally subject to 3-factor test (the “*Penn Central*” test)
- Brought in Court of Federal Claims under Tucker Act

Administrative Procedures Act

- “A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 USC § 702.
- Generally must **exhaust** administrative remedies before commencing suit. 5 § USC 704.
- Standard: “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 USC § 706.
- Brought in Federal District Court.
- *Money Damages not available*

Federal Tort Claims Act

- 28 USC § 2671 *et seq.* and 28 USC § 1346.
- Waives sovereign immunity, allowing the Federal Government to be sued for many torts.
 - Based on state tort law
 - Discretionary acts of government officials excepted
 - Intentional acts excepted
- File administrative claim with agency within 2 years: Form SF 95
- Brought in Federal District Court

1983/Bivens Actions

- 42 USC § 1983 allows suits against those acting “under the color of” state law for the deprivation of civil rights:
“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.”
- A “Bivens” action is essentially a 1983 Action applied to federal officials. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).
- Brought in Federal District Court

Claim Type	Basis	Governing Statutes & Regulations	Statute of Limitations	Claim Procedures	Jury
<i>Contract Disputes Act (CDA)</i>	Claim for damages under contract for procurement of goods or services	41 USC 7101 <i>et seq.</i> ; FAR 33.2	6 years (41 USC 7103(a)(4)(a))	Claim filed with Contracting Officer Appeals to relevant Board of Contract Appeals (90 days) <i>OR</i> Court of Federal Claims (1 year) Further appeal to Federal Circuit (within 120 days if from BCA or within 60 days if from Court of Federal Claims)	No
<i>Bid Protests</i>	An interested party may protest the award of a government contract.	41 USC 423; FAR 33.1	<i>For defect in solicitation:</i> prior to bid opening or time for receipt of proposals <i>All others:</i> 6 years or 10 days	Claims may be filed with the procuring agency, the GAO, or the US Court of Federal Claims.	No

Claim Type	Basis	Governing Statutes & Regulations	Statute of Limitations	Claim Procedures	Jury
<i>Tucker Act</i>	Claims against the government arising under the constitution (including takings), statutes, agency regulations or contracts, other than tort claims.	28 USC 1491	6 years (28 USC 2501)	Commence an action in the Court of Federal Claims.	No
<i>Takings Claims</i>	The right to be compensated for property taken for public use under the 5 th Amendment, which states “nor shall private property be taken for public use, without just compensation.”	5 th Amendment; 28 USC 1491	6 years	Commence an action in the Court of Federal Claims.	No
<i>Administrative Procedures Act (APA)</i>	A person negatively affected by an agency action or decision is entitled to review.	5 USC 500 et seq.	6 years 28 USC 2401(a). (Also follow agency rules.)	Must first exhaust remedies and obtain a final agency decision. <i>Money damages not available.</i>	No

Claim Type	Basis	Governing Statutes & Regulations	Statute of Limitations	Claim Procedures	Jury
<i>Federal Tort Claims Act</i>	Allows the government to be sued for many torts. Most intentional torts, as well as discretionary acts of government officials are excepted.	28 USC 2671 <i>et seq.</i> ; 28 USC 1346	2 years, or 6 months after final denial from agency.	First, file administrative claim with the appropriate agency using Form SF 95. If your claim is denied, you may file a suit in federal district court.	No (except wrongful tax collection)
<i>1983 Claim</i>	A lawsuit against those acting “under the color of” state law for the deprivation of civil rights.	42 USC 1983	State tort law	Bring a claim in state or federal district court. If you file in state court, defendant may remove to federal court.	Yes
<i>Bivens Claim</i>	Essentially a 1983 lawsuit applied to federal, rather than state, officials.	<i>Bivens v. Six Unkown Named Agents</i> , 403 388 (1971); 28 USC 1331	State tort law	Bring a claim against the individual in federal district court.	Yes

Settlement Prospects

- Will the Government settle?
- Avenues
 - Court Programs for “ADR”
 - Negotiation/Mediation/Arbitration
- DOJ Approval Process
 - Standard: “Best interests of the US”
 - Payment: “Judgment Fund”

Thank You!

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