

DISPUTES IN GRANTS AND COOPERATIVE AGREEMENTS

Presented By:

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Phases of Dispute Resolution

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- q Pre-contract
- q During performance
- q Making a claim
- q The formal disputes process/ADR

Typical Dispute Scenarios

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- q U.S. —> Prime Recipient
- q Prime —> U.S.
- q Prime —> Subrecipient
- q Subrecipient —> Prime

Typical Disputes

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q Government/Prime

- Funding
- Substitution of personnel and changes
- Over/under payment
- Property issues
- Delays and terminations

No Changes Clause in Most GCAs

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But see for example:

DARPA Cooperative Agreement General Terms and
Conditions For Profit Organizations

4. Amendment of Agreement

And

- NSF Grant General Conditions, Article 8.b

“...NSF approval of such changes will be by an
amendment to the award signed by the NSF Grants
Officer”

Request for Equitable Adjustment

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- Q Whichever side wants the benefit bears the burden
- Q Must prove two things:
 - P Entitlement
 - P Quantum-costs/time caused by the claimed event

Mechanics of the Modification Process

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- Q Timing
 - P Prospective
 - P Retroactive
- Q Unilateral or bilateral
- Q Definitized or not
- Q Request for equitable adjustment
- Q Certifications
- Q Release

Types of Changes Warranting Equitable Adjustments

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- q Adding work
- q Deleting work
- q Substituting work
- q Delaying work
- q Accelerating work
- q Disrupting work

Measure of an Equitable Adjustment

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- q Actual costs
- q Day-for-day extensions
- q Other measures

Disputes Process

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Q Contracts

P FAR Subpart 33.2

P FAR 52.233-1 – Disputes Clause

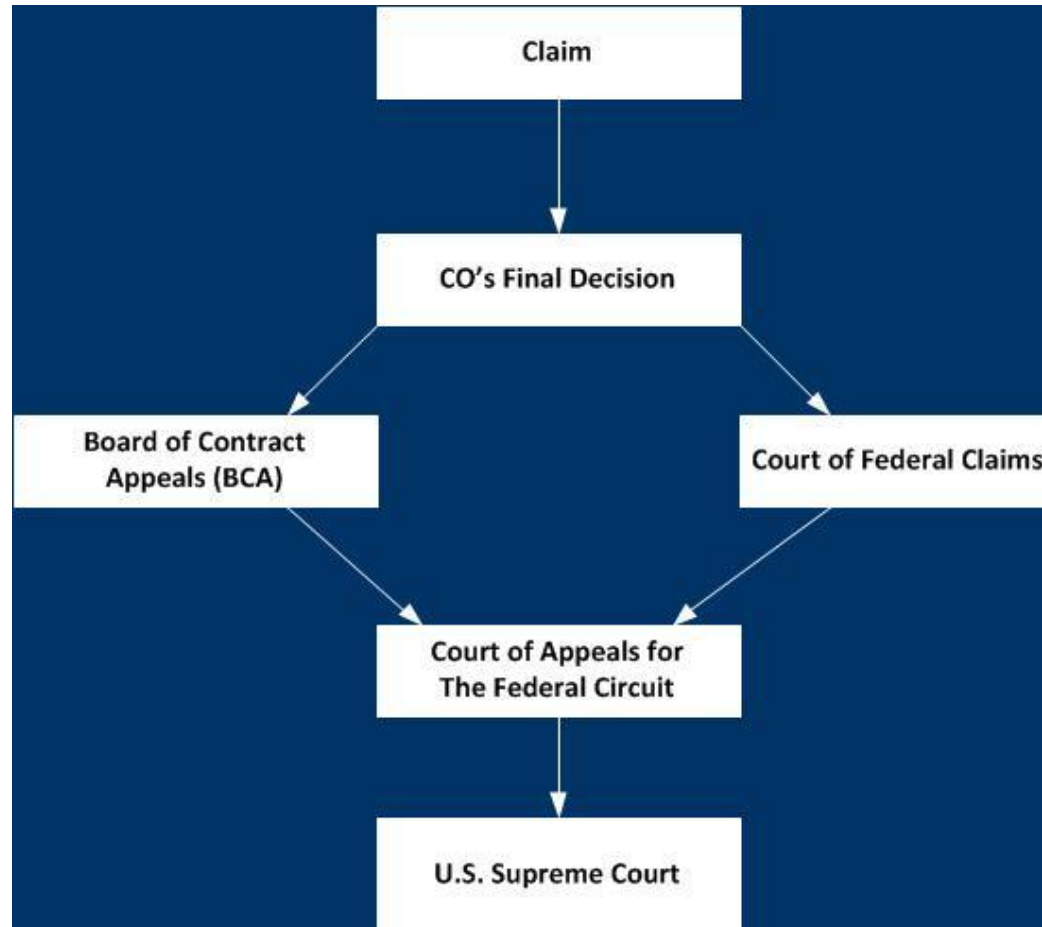
Q GCAs

P No unified regulations

P No unified clauses or terms and conditions

Jurisdictional Path of a Contract Claim

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Contract Disputes Clause

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Subparagraph (a)

(a) This contract is subject to the Contract Disputes Act of 1978, as amended ([41 U.S.C. 601-613](#))

- q Contracts
 - Not grants or preaward

Subparagraph (b)

(b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause

- q Matters reserved to other agency
 - SBA, DOL, OSHA, EPA
- q Fraud
- q Torts

What Starts the Contract Disputes Process?

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Claim

A written demand or assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising or relating to the contract.

Government “Claim” (often)

Refuse to pay and wait for claim

Disputes Under GCAs

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- q Grant-related disputes may be programmatic, financial or may fall into another category altogether
 - Programmatic disputes include suspension or termination of funding
 - Financial disputes, which are typically resolved through audit proceedings, are often a result of cost disallowances
 - Additional types of disputes include declaratory actions and debarment and suspension

Claims, Disputes and Appeals Usually in Award Terms or Agency Regulations

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- For instance:
 - DOD Grant Regulations
- 32 CFR § 22.815
 - (a) **Award terms.** Grants officers shall include in grants and cooperative agreements a term or condition that incorporates the procedures of this section for:
 - (1) Processing recipient claims and disputes.
 - (2) Deciding appeals of grants officers' decisions.

Award Terms or Agency Regulations on Claims

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- For instance:
 - DOD Grant Regulations
- 32 CFR § 22.815
 - (b) **Submission of claims – (1) Recipient claims.** If a recipient wishes to submit a claim arising out of or relating to a grant or cooperative agreement, the grants officer shall inform the recipient that the claim must:
 - (i) Be submitted in writing to the grants officer for decision;
 - (ii) Specify the nature and basis for the relief requested; and
 - (iii) Include all data that supports the claim.

Suggestion for Claims Under Contract or GCA

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- q Keep it as simple as possible
- q Make it as detailed as necessary
- q Use contemporary documents whenever possible

GCA Disputes

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- q Decision issued by Grants Officer or other official **DEPENDING ON REGULATION**
- q The decision should contain:
 - A complete statement of the background and basis of the awarding agency's decision, including reference to the pertinent statutes, regulations, or other governing documents; and
 - Enough information to enable the recipient to understand the issues and the position of the HHS awarding agency

Language Normally Required in Decisions

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- Q The following or **similar** language (consistent with the terminology of the **applicable** statutes or regulations):
- "This is the final decision of the (title of grants officer or other official responsible for the decision). It shall be the final decision of the Department unless, within 30 days after receiving this decision, you deliver or mail (you should use registered or certified mail to establish the date) a written notice of appeal to (name and address of appropriate contact, e.g., the office responsible for awarding agency preliminary appeal process)
 - For instance – the Departmental Appeals Board, Department of Health and Human Services, Washington, D.C. 20201). You shall attach to the notice a copy of this decision, note that you intend an appeal, state the amount in dispute, and briefly state why you think that this decision is wrong. You will be notified of further procedures."

Reflectone, Inc. v. Dalton

60 F.3d 1572 (Fed. Cir. 1995)

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- q The court distinguished between routine and nonroutine requests for payment
 - Routine requests are vouchers, invoices and requests for progress payments
 - Nonroutine requests include changes and termination settlement proposals

Reflectone Causes Dilemma for Recipients

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- q If recipients want to be able to recoup the costs of paying advisers and consultants, they should not treat the submission as a claim but as a request for an equitable adjustment

Statute of Limitations

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- q Generally a 6-year time limit on the submission of claims (that is, claims must be filed within 6 years of their accrual)
- q Creates an issue regarding when the recipient knew, or should have know, of its claim

When Must the Grants Officer Decide?

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- q Agency rules, if at all
- q If no time in regulations, then “reasonable” time is usually interpreted to be applicable

Grants Officer Decisions

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Agency Regulations

- q For instance:
 - DOD Grant Regulations
- q 32 CFR § 22.815
 - (1) Within 60 calendar days of receipt of a written claim, the grants officer shall either:
 - (i) Prepare a written decision, which shall include the reasons for the decision; shall identify all relevant data on which the decision is based; shall identify the cognizant Grant Appeal Authority and give his or her mailing address; and shall be included in the award file; or

(continued)

Grants Officer Decisions (2)

- (ii) Notify the recipient of a specific date when he or she will render a written decision, if more time is required to do so. The notice shall inform the recipient of the reason for delaying the decision (e.g., the complexity of the claim, a need for more time to complete ADR procedures, or a need for the recipient to provide additional information to support the claim).

Effect of Decision on Dispute

- q The decision of the grants officer shall be **final**, unless the recipient decides to appeal
- q If a recipient decides to appeal a grants officer's decision, the grants officer shall encourage the recipient to enter into ADR procedures, as described in paragraph (c) of this section

Appeal of Decision

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- q Right of appeal
- q Based on Agency Regulations or
- q Administrative Procedures Act
- q NOT Contract Disputes Act
- q e.g., “A recipient has the right to appeal a grants officer's decision to the Grant Appeal Authority (but note that ADR procedures, as described in paragraph (c) of this section, are the preferred means for resolving any appeal).”

Appeal Procedures: Notice of Appeal

- q Appeals of decision within **SET NUMBER** of calendar/business days of receiving that decision, usually by filing a written notice of appeal to an appellate organization within the Agency and usually also to the initial decisional officer
- q Sometimes under ADR procedure, the recipient is permitted an additional time to file

Appeal File

- Agency Regulations govern
 - e.g., “Within 30 calendar days of receiving the notice of appeal, the grants officer shall forward to the Grant Appeal Authority and the recipient the appeal file, which shall include copies of all documents relevant to the appeal. The recipient may supplement the file with additional documents it deems relevant. Either the grants officer or the recipient may supplement the file with a memorandum in support of its position. The Grant Appeal Authority may request additional information from either the grants officer or the recipient.”

“Discovery”

- q If allowed, usually informal, but some agencies may provide for:
 - Document requests
 - Interrogatories (written questions to other side)
 - Depositions

Appellate Decision

- q The appeal may be decided solely on the basis of the written record, or after more or less formal fact-finding procedures or an oral hearing on the appeal.
- q Procedures as established by Agency rule or Appellate body procedures

Representation

- q Usually, a recipient may be represented by counsel or any other designated representative in any claim, appeal or ADR proceeding
- q Agency will almost certainly be represented by counsel

Recipient Options if the CO Does Not Issue a Timely Decision

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- q Go directly to Board or court for order
- q Consider inaction a “deemed denial” of claim and commence litigation

Alternative Dispute Resolution (ADR) Procedures

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- q ADR Act of 1996, 5 U.S.C. 571 et seq.
 - Partnering
 - Mediation
 - Binding arbitration (award final 30 days after service but may be extended 30 days)
 - Nonbinding arbitration
 - Settlement judge (Board judge will act as mediator)
 - Mini-trial

The ADR Process

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- q Deciding on ADR use – parties must jointly determine whether an ADR process is appropriate and which process will meet their needs
- q ADR players and roles
- q The ADR agreement
- q Preparing for ADR
- q Deciding to settle
- q Memorializing the settlement agreement

The ADR Process: Players and Roles

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- q Contracting/Grants Officer: retains authority to negotiate/settle
- q Legal counsel:
 - Provides advice on legality
 - Provides assessment of litigation risk
 - Helps determine whether ADR is appropriate
 - Helps present issues and facts
 - Helps prepare settlement agreements

(continued)

The ADR Process: Players and Roles (2)

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q The ADR Neutral:

- Assists parties with formulation of ADR process/ procedures
- Counsels parties on efficient use of fact-finding and discovery in advance of ADR proceedings
- May provide evaluation of merits *if desired by parties* – including views on strengths and weaknesses of parties' respective positions, should the matter be litigated
- Focuses the parties' attention on the issues requiring resolution and may narrow the scope of litigation
- Facilitates and maintains discussion/negotiation
- May recommend settlement scenarios with agreement of the parties

The ADR Process: The ADR Agreement

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- q Parties' agreement to use ADR process
 - Written agreement highly desirable
 - Identifies ADR Neutral, his/her role, and how Neutral is compensated (not applicable to IBCA Judges)
 - Spells out process/procedures to be used
 - Sets timetable for submissions and proceedings
 - Provides for termination of ADR process
 - Provides for bounds of ADR confidentiality and how materials may be used if matter ultimately requires litigation

The ADR Process: Preparation for ADR

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- q Fact-finding/discovery – ADR Neutral’s assistance in helping the parties to streamline the process
- q Defining issues to be resolved – ADR Neutral can play an important role in helping the parties
- q Designation of negotiation principals with settlement authority – critical for successful negotiation process
- q Prepare/submit brief position statements in advance of ADR proceedings – crystallize the reasons for positions taken; incorporate “key” documents

The ADR Process: Deciding to Settle

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- q Risk assessment is essential – roles of legal counsel and ADR Neutral
- q Evaluation of costs & benefits – consider:
 - Relative strengths and weaknesses of positions, both on specific claims and overall
 - Costs of litigation in terms of dollars, time and diverted resources (impact on the Agency's program)
 - Benefits of settlement in terms of maintaining cordial business relationships, particularly where contract is ongoing

The ADR Process: Memorializing the Settlement

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- q Require a written settlement agreement
 - Have parties sign a preliminary agreement (Memorandum of Understanding) before leaving the ADR session
 - Make sure signatories have authority
 - Funding – Contract/GCA Modifications and/or use of Stipulated Judgments and the Judgment Fund

Interest

- q Simple interest at rate provided by the Department of the Treasury
- q From receipt of claim by CO until payment

Duty to Continue

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- q Generally must continue performance while matter is disputed, unless breach of contract has occurred
- q Disputes clause – alternative 1 requires continued performance even if a breach of contract has occurred (rarely used)

Judicial Review of Agency Decisions

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- q Once an Agency Authority has issued a decision, that decision can usually be appealed to a higher entity within the agency
- q Those appealing an agency decision must usually exhaust agency remedies before moving the action to a federal court
- q The final agency decision can usually be appealed
 - To a federal court of appeals if Congress has provided an appeals process
 - To the federal district court if no provision for appeal has been specified

Judicial Review of Administrative Decisions: Common Issues

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- q Constitutionality
- q Agency acted outside the scope of delegated authority
- q Procedural due process violations
- q Arbitrary and capricious decision
- q Abuse of agency discretion
- q Separation of powers
- q Interpretation of the language of the enabling statute or regulation

When Federal District Court Has Original Jurisdiction Over Agency Matter

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- q When an agency is the plaintiff (See 28 USCA 1345)
- q When there is a federal question (See 28 USCA 1331)
- q When there is a mandamus action to compel an agency to perform a duty owed to plaintiff
- q When there is a specific statute authorizing original jurisdiction in the federal district court

Court of Federal Claims

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- q Contracts under CDA
 - The U.S Court of Federal Claims within 12 months of the Contracting Officers Final Decision
- q GCA and CRADAs
 - *May* have access to U.S. Court of Federal Claims under Tucker Act, 28 USC §1491, jurisdiction
 - GCAs and CRADAs are federal contracts, see, e.g., ***Chem Services***, 816 F.Supp 328

Appeals from Boards or U.S. Court of Federal Claims

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- q For Contract claims under CDA, appeal to Circuit Court of Appeals for the Federal Circuit
- q For non-CDA claims, may be to COFC first and then to Federal Circuit, if for money damages
- q To U.S. District Courts for APA cases

Representation

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COFC

- q Recipient
 - Partnership or corporation – must have attorney
- q Government
 - Department of Justice (DOJ) with agency “of counsel”

Settlement

Boards or Agency Activities

- q CO makes the decision to settle
- q Perhaps with concurrence of chief trial attorney

CFC

- q DOJ attorney makes decision to settle
- q Regardless of whether CO wants to or not

Fraud Jurisdiction

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Fraud counterclaim

- q Yes at CFC
- q No at Boards

Forfeiture Act (28 U.S.C. 2514)

- q Yes at CFC
- q No at Boards

Equal Access to Justice Act

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- q Small recipient
 - *Individual*: Not more than \$2 million in net worth at the time action initiated
 - *Partnership or corporation*: Not more than \$7 million in net worth and not more than 500 employees—both at the time the case began
- q Government position not substantially justified
- q Reasonable costs

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