

# Requests for Equitable Adjustment, Claims, and Terminations

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Our Government Contracts team is skilled at guiding contractors through the equitable adjustment, claims, and termination process, whether that termination is for default or the convenience of the government. We also routinely counsel and represent contractors when the tables are turned, and the government is pursuing compensation against the contractor.

Wiley attorneys work closely with contractor management, program, accounting, and engineering personnel to develop strategies for recovery. We investigate the facts, formulate optimal legal theories, and draft and present requests for equitable adjustment (REAs) or certified claims in a manner that maximizes the contractor's chances of recovery, while being sensitive to relationships with government customers and other stakeholders. If contractor or government claims cannot be successfully resolved short of litigation, we represent contractors in alternative dispute resolution proceedings or disputes litigation before the Armed Services Board of Contract Appeals (ASBCA), the Civilian Board of Contract Appeals (CBCA), and the U.S. Court of Federal Claims (COFC).

When faced with a possible termination for default or termination for convenience, it is imperative that contractors retain experienced counsel. The Wiley team helps contractors respond to show cause and cure notices in a manner to avoid default termination, preserve the business relationship, and put the contractual relationship back on track. We assist with developing legal defenses to termination and corrective action plans and negotiating resolutions short of default termination. And, if all else fails, we litigate terminations at the ASBCA, CBCA, and COFC. We assist contractors faced with a convenience termination with assembling, supporting, and negotiating settlement proposals that maximize the contractor's legitimate recovery.

Representative successes and experience include:

- Successfully represented a Subsistence Prime Vendor contractor in what is believed to be the highest-value matter in the history of the ASBCA. Following a five-week trial, the Board issued a decision denying the U.S. Department of Defense's \$8.8 billion claim and awarded our client more than \$142 million for additional services performed under the contract pursuant to a change order. *See Supreme Foodservice GmbH*, ASBCA No. 57884, 20-1 BCA ¶ 37,618.
- Served as lead counsel for one of the world's largest aerospace companies in a long-running appeal before the COFC of the denial of claims to recover hundreds of millions in costs related to the

restructuring of the Evolved Expendable Launch Vehicle program, successfully mediating and then settling the highly complex cost accounting case, with the client recovering more than \$300 million.

- After successfully opposing the government's motion to amend its answer as futile, successfully settled an appeal at the ASBCA relating to the recovery of legal costs and that involved a classified record and classified discovery. *See Engility, LLC*, ASBCA No. 61281, Aug. 2019, 19-1 BCA ¶ 37430.
- In a case with industry-wide implications, successfully appealed government claims for repayment of reimbursed executive compensation costs by demonstrating statistical flaws in methodology used by Defense Contract Audit Agency to assess reasonableness of executive compensation costs. *See Appeals of J.F. Taylor, Inc.*, ASBCA No. 56105, Jan. 18, 2012, 12-1 BCA ¶ 34920.
- Successfully obtained the dismissal of a government claim for increased costs alleged to have been incurred as a result of a voluntary change in the contractor's accounting system, on the ground that the government's claim was barred by the Contract Disputes Act's six-year statute of limitations. *See Appeal of The Boeing Company*, ASBCA No. 57490, 12-1 BCA ¶ 34916.
- Successfully helped numerous contractors avoid termination for default by, among other things, preparing legal arguments to establish excusable delays, advocating for restructuring of contracts, assisting with preparation of corrective action plans and responses to show cause or cure notices, assisting with potential terminations under commercial item contracts, and negotiating "no cost" or convenience terminations to avoid the financial, administrative, and reputational impacts of a default termination.
- Assisted numerous contractors with preparing multimillion-dollar termination settlement proposals following a termination for convenience by the government, including incorporating requests for equitable adjustment for contracts that might otherwise appear to be in a loss position, and promptly negotiating successful resolutions of those proposals without the time and expense of litigation.
- Successfully represented major defense contractor in claims related to data rights disputes. In a claim before the ASBCA, Wiley successfully secured summary judgment that software development costs charged to a technology investment agreement constituted private expense. *See The Boeing Company*, ASBCA No. 60373, July 17, 2018, 18-1 BCA ¶ 37112. In an appeal to the U.S. Court of Appeals for the Federal Circuit, Wiley successfully argued for reversal of the Board's decision and secured a ruling that markings directed to third parties to their technical data deliverables. *See The Boeing Company v. Secretary of the Air Force*, 983 F.3d 1321 (Fed. Cir. 2020).
- Represented major defense IT contractor in successfully resolved litigation that involved 15 consolidated claims, including a government counterclaim, alleging breach of contract, delay and disruption, and constructive changes, in what then was the largest case in ASBCA history; engaged in a "mega ADR" process that involved additional requests for equitable adjustment, fact-finding, submission of position papers, and three-week long oral presentations and mediation.
- Negotiated no-cost termination for convenience with mutual releases on behalf of a contractor that could not obtain necessary funding to perform recently awarded contract as a result of downturn in financial markets.

- Prepared numerous REAs for contractors, in some cases negotiating favorable resolution and in others converting the REA to a formal claim.