

VOLUME 10, CHAPTER 3: “CONDITIONS AFFECTING CONTRACTUAL CLAIMS”

SUMMARY OF MAJOR CHANGES

All changes are denoted by **blue font**.

Substantive revisions are denoted by an * symbol preceding the section, paragraph, table, or figure that includes the revision.

Unless otherwise noted, chapters referenced are contained in this volume.

Hyperlinks are denoted by **bold, italic, blue and underlined font**.

The previous version dated February 2009 is archived.

PARAGRAPH	EXPLANATION OF CHANGE/REVISION	PURPOSE
A11	Reworded chapter for readability.	Update
030208	Added policy for Electronic Funds Transfer information governing Novations and Assignment of Claims.	Add

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CHAPTER 3

CONDITIONS AFFECTING CONTRACTUAL CLAIMS

0301 OVERVIEW

030101. General

This chapter prescribes policy relating to miscellaneous claims against the United States, which must be adjudicated by the responsible government agency before payment is made or denied. It includes the assignment of claims, name change agreements and claims that fall under the Contract Disputes Act involving government contracts. It also includes the regulatory authority, required documentation, and the responsibilities of the agencies involved.

030102. Policy

[Section 3727 of Title 31, United States Code \(USC\) \(31 USC 3727\)](#) provide statutory requirements concerning the assignment of claims and [41 USC 7101-7109](#) provide statutory requirements for contracts in dispute. [Federal Acquisition Regulation \(FAR\) Parts 32 “Contract Financing”](#) and [42 “Contract Administration and Audit Services”](#) govern claims for monies due, or to become due, under government contracts. There are specific criteria and required documentation for payment of valid claims.

030103. Internal Controls

Internal controls **must** be in place to ensure that duplicative or erroneous payments **do not** occur. **Annual risk assessments are required to** ensure that sufficient management control mechanisms are available so that Department of Defense (DoD) funds are spent appropriately and in accordance with all applicable laws and regulations. See [Appendix C to Office of Management and Budget \(OMB\) Circular A-123](#) for additional guidance.

0302 ASSIGNMENT OF CLAIMS

030201. Conditions for Assignment of Claims

[FAR Subpart 32.8](#) prescribes policy for assignment of claims **which** refers to the transfer by the contractor of its right to be paid by the government for contract performance to a bank, trust company, or other financing institution, as security for a loan **made** to the contractor.

A. The **authorization to assign claims** to banks, trust companies, or any financing institution (including federal lending agencies) of monies due, or to become due, under government contracts totaling \$1,000 or more **is prescribed by** 41 USC 15 and 31 USC 3727, if not prohibited in the contract and **when** the requirements of 31 USC 3727(c) are met.

B. A contract may prohibit the assignment of claims if the agency determines the prohibition to be in the government’s interest per FAR 32.803(b).

C. When a contractor is paid by the government purchase card, the contractor may not assign their rights under the contract as prescribed by [FAR 52.212-4\(b\)](#).

D. Unless otherwise expressly permitted in the contract, the assignment must:

1. Cover all amounts payable under the contract not already paid;
2. Not be made to more than one party, except that it may be made to a party as agent or trustee for more than one party participating in the financing.

E. If an agency pays a party other than the assignee when an assignment has been properly filed, it may result in government liability to the assignee.

1. When such an error occurs, the agency remains liable to the assignee for the amount of the payment, subject to potential defenses.

2. The agency will initiate collection against the payee for any erroneous payment.

F. See FAR Subpart 32.8 and the [Defense Federal Acquisition Regulation Supplement \(DFARS\) 232.8](#) for additional guidance concerning the assignment of claims.

030202. Actions Required With Assignments

The following actions are required in connection with assignments.

A. The assignee will forward a true copy of the [Instrument of Assignment](#), which is a certified duplicate or photo copy of the document with no alterations or changes, and an original and one copy of the [Notice of Assignment](#) to the entitlement office designated in the contract to make payment.

B. The surety, if any, will return an acknowledged copy of the [Notice of Assignment](#) to the assignee, who will forward copy to the entitlement office cited in the contract.

C. If the contracting officer determines that the assignment is valid, then the designated entitlement office acknowledges the [Notice of Assignment](#) and takes the required action as detailed:

1. Acknowledge and return to the assignee the copy of the [Notice of Assignment](#) and file the true copy of the [Instrument of Assignment](#) and the original [Notice of Assignment](#).

2. Pay assignees only after receipt of these assignment documents:

a. Copy of the [Notice of Assignment](#) acknowledged by the contracting officer,

b. Copy of the signed notice and a true copy of the Instrument of Assignment from the assignee, and

c. Copy of the notice acknowledged from the surety or sureties, if any. The copy is received from the surety or sureties via the assignee.

D. If the contracting officer rejects the assignment, then the entitlement office returns the acknowledged notice and copy of the assignment to the assignee. The office advises that the assignment cannot be recognized for the reasons stated by the contracting officer.

030203. Letter Contracts

When assignments of claims under letter contracts are made, notices (with copies of assignments) are given to contracting officers and entitlement offices.

A. If a letter contract is assigned, then that assignment is not voided by a subsequent definitization of the contract.

B. Contracting officers and entitlement offices accept, receipt for, and honor the assignment of the proceeds of a definitive contract superseding a letter contract.

030204. Open-end, Call-Type, or Indefinite Delivery-Type Contracts

Assignment of claims under Open-End, Call-Type, or Indefinite Delivery-Type Contracts are authorized, provided orders of \$1,000 or more are placed prior to the assignment; or the basic contract imposes a minimum obligation of \$1,000 or more. When the entitlement office cannot determine whether an assignment of claims applies to an individual call or order under indefinite delivery-type contracts, the office withholds payments until the contracting office determines the status and validity of the assignment. See [FAR Subpart 16.1](#) for information concerning contract types.

030205. Basic Ordering Agreements

A notice of assignment will not be acknowledged based solely on a basic ordering agreement because the basic ordering agreement is not a contract between the government and contractor. The contracting office returns the notice and a copy of the assignment to the assignee and advises that assignments may be acknowledged on individual orders of \$1,000 or more. It should be noted that Basic Ordering Agreements require a Notice of Assignment for each delivery order/supplemental procurement identification number. If there is any doubt on any of these types of contracts, then the contracts should be referred to a legal office for determination.

030206. Special Considerations for Assignments of Claims

The following are special considerations for assignment of claims:

A. Two assignments of the same contract cannot exist without a release from the first assignment. A second assignment may be made after releasing the first assignment and notifying the original parties. See FAR 32.805 for further guidance.

B. If the amount of the contract is increased, then it is not necessary to execute an additional assignment.

C. Date of assignment will not be before the date of contract.

030207. Release of Assignment of Claims

A release of an assignment is required whenever there has been a further assignment or reassignment. A release is also required when the contractor wishes to establish a right to receive payments after the contractor's obligations to the assignee has been satisfied and a balance remains due on the contract.

A. If the assignee releases the contractor from an assignment of claims under a contract, the contractor must file a written notice of release together with a true copy of the release of assignment notice to the same offices noted in 030202.A.

B. The contracting office:

1. Signs and returns a copy of the release notice to the contractor.

2. Files the true copy of the instrument of release of assignment and the original release notice with its office copy of the contract. The contracting officer's and surety's acknowledgment are required. See FAR 32.805(e) for additional guidance.

3. Signs, dates, and returns the receipt, if applicable, to the assignee.

C. The entitlement office makes remaining payments to the contractor once it receives these release documents:

1. A true copy of the instrument of release of assignment.

2. The original and two copies of the release notice.

*030208. Electronic Funds Transfer

If a contractor attempts to change the identity of the payee by changing Electronic Funds Transfer (EFT) or other information in System for Award Management (SAM) without complying with the rules governing novations and assignment of claims, the payment

information will be incorrect within the meaning of the “Suspension of Payment” paragraph of the EFT clause in the contract ([FAR 4.1102 C](#)).

0303 NOVATION AND CHANGE OF NAME AGREEMENTS

030301. Legal Considerations

A. A novation agreement is a legal instrument executed by all of the following: the contractor (transferor), the successor in interest (transferee), and the United States Government. The transferor guarantees performance of the contract, the transferee assumes all obligations under the contract, and the government recognizes the transfer of the contract and related assets. See [FAR Subpart 42.12](#) for additional information.

B. A change of name agreement is a legal instrument executed by the contractor and the government that recognizes the legal name change of the contractor without affecting the original contractual rights and obligations of the parties.

C. Title 41 USC 15 prohibits transfer of government contracts. However, the government may, in its interest, recognize a third party as the successor in interest to a government contract when the third party’s interest in the contract arises out of the transfer of all the contractor’s assets or the entire portion of the assets involved in performing the contract. Examples include, but are not limited to:

1. Sale of these assets with a provision for assuming liabilities.
2. Transfer of these assets incident to a merger or corporate consolidation.
3. Incorporation of a proprietorship or partnership, or formation of a partnership.

030302. Contractor and Contracting Officer Responsibilities

The contractor provides evidence [to the contracting officer responsible for processing and executing novation and change of name agreements](#).

A. The [contracting officer enters into a bilateral](#) modification to the contract, which changes the name of the contractor.

B. Questions regarding the novation and change of name agreements are referred to the [contracting officer](#).

030303. Transfer of Contractual Obligation

When a contracting officer approves the transfer of a contract to another contractor, the transferor guarantees performance of the contract by the transferee (a satisfactory performance bond may be accepted instead of the guarantee).

A. A transferee assumes all the transferor's obligations under the contract and the transferor waives all rights under the contract against the government. See FAR 42.1204 for additional guidance.

B. When it is in the government's interest not to concur with the transfer of a contract from one company to another company, the original contractor remains under contractual obligation to the government.

0304 CONTRACT DISPUTES

030401. Contractor Claims

[The Civilian Board of Contract Appeals \(Contract Disputes Act of 1978 \(CDA\), 41 USC 7101-7109](#) allows federal government contractors to file a claim with the United States Government for monetary damages and other legal remedies related to their contractual dealings.

A. The CDA waives the government's sovereign immunity, permitting contractors to appeal a contracting officer's final decision to the appropriate board of contract appeals or file suit in the Court of Federal Claims.

B. Routine submissions for payment are not claims under the CDA. The submission may be converted to a claim, by written notice to the contracting officer as provided in FAR 33.206(a).

C. All claims by contractors against the United States Government must be a written demand or assertion submitted to the contracting officer for a decision. A contractor asserting a claim exceeding \$100,000 must provide a certification as required by FAR 33.207(c).

030402. Interest Penalties

Interest on amounts due the contractor on claims under the CDA will be paid to the contractor from the date the contracting officer receives the claim or payment would otherwise be due, whichever is later (see FAR 33.208(a)). The interest rate is established by the Secretary of the Treasury pursuant to the 41 USC 7109. Interest rates applicable to CDA claims may be found on the Department of the Treasury's website. Under the CDA, only simple interest is paid, as noted in FAR 33.208(b); compound interest (interest on interest) is not paid under the CDA.

030403. Questionable and Fraudulent Claims

The following information pertains to questionable and fraudulent claims:

A. If any part of a claim that is attributable to misrepresentation of fact or fraud on the part of the contractor, [then the contracting officer will refer the matter to the agency official responsible for investigating fraud in accordance with FAR 33.209](#).

B. Fraudulent and questionable claims should not be paid. See Volume 5 Chapter 25 for additional information concerning fraudulent and questionable claims.