

Recommendation 33: Update the Assignment of Claims processes under FAR Part 32.805.

Problem

FAR Part 32.805, Procedures, specifies outdated procedures for the assignment of claims to contract payments that require a physical impress of the corporate seal of the assignor as well as original documentation related to corporate authority to execute an assignment

Background

The Assignment of Claims Act (31 U.S.C. § 3727, 41 U.S.C. § 6305) was passed in 1940 and provides for an important function in government contract financing. One of the benefits of the assignment of claims policy is to authorize third-party financial institutions to collect on payments made to contractors for performance of a federal contract. Such contractual arrangements between a contractor/assignor and a financing institution are mostly used to facilitate contractors liquidity and fund their operations by allowing the contractor to borrow against future payments.

Assignments are an economically beneficial policy that encourages the growth and continuation of new and existing businesses, and especially useful to encourage small businesses to engage more in federal contracting. FAR Part 32.805 details the processes for the assignment of claims. In some cases the government prohibits the assignment of claims, based on a determination that it is not in the government's interest, but in most cases assignments are accepted as a means of financing. Assignments of claims against contracts have been an accepted practice for many years and are permissible under the FAR as well as the common law going back centuries.

Discussion

The guidance for the assignment of claims process has not been substantively updated since it was initially implemented in 1983.¹ Very little has changed in FAR Part 32.805 beyond a few minor updates, such as including registration in the System for Award Management.

Since that time, technology has created new, widely accepted business processes. The regulation requires four hardcopies of the assignment document to be submitted:

Filing. The assignee shall forward to each party specified in 32.802(e) an original and three copies of the notice of assignment, together with one true copy of the instrument of assignment. The true copy shall be a certified duplicate or photostat copy of the original assignment.²

However, in general, today these documents are electronic, and are converted to hard copies solely for the purpose of submitting to the agency in accordance with the FAR.³ To avoid a slow, cumbersome process, some lenders choose to forego the assignments paperwork at the closure of a loan, choosing

¹ Comparison to Federal Register, Sept. 19, 1983, accessed April 10, 2018, <https://www.gpo.gov/fdsys/browse/collection.action?collectionCode=FR&browsePath=1983%2F09&isCollapsed=false&leafLevelBrowse=false&ycord=400>.

² Assignment of Claims, FAR Part 32.805.

³ Personal Services Council, Submission to the 809 Panel, February 2018.

instead to include a provision in loan documents “which grants the lender the right to require them at any time after the occurrence of an event of default.”⁴

Conclusions

Technology has improved substantially over time, and business processes have accommodated electronic submission of forms. The need to require original authorization documents and impress of a corporate seal are artifacts of a time when electronic means of conducting business were not available and preserving paper documents was the norm. Allowing for contractors and offerors to submit these forms in an electronic format will facilitate more timely submission and has become an accepted legal practice.

Although 41 U.S.C. § 6305 states that written notice must be filed if an assignment is made, a shift from hardcopy submission to electronic transmission is simply ministerial in scope and does not alter the statutory requirement for a written assignment or require a change to either of the underlying statutes.

Implementation

Legislative Branch

- There are no statutory changes required for this recommendation.

Executive Branch

- Update the assignment of claims procedures in the FAR to reflect modern business practices.

Implications for Other Agencies

- This change to the FAR would affect the entire government.

⁴ Shulman Rogers, Assignment of Claims Act Documentation, *The Financing Advisor Newsletter*, accessed April 10, 2018, <http://www.shulmanrogers.com/newsletter-56.html>.

Draft Regulatory Revision

FAR Part 32 – Contract Financing FAR Subpart 32.805 – Assignment of Claims

32.805 Procedure.

(a) Assignments.

(1) Assignments by corporations shall be—

(i) Executed by an authorized representative;

(ii) Attested by the secretary or the assistant secretary of the corporation; and

~~(iii) Impressed with the corporate seal or accompanied by a true copy of the resolution of the corporation's board of directors authorizing the signing representative to execute the assignment.~~

(2) Assignments by a partnership may be signed by one partner, if the assignment is accompanied by adequate evidence that the signer is a general partner of the partnership and is authorized to execute assignments on behalf of the partnership.

(3) Assignments by an individual shall be signed by that individual and the signature acknowledged before a notary public or other person authorized to administer oaths.

(b) Filing. The assignee shall forward to each party specified in 32.802(e) ~~an original and three copies of the notice of assignment together with one a true copy of the instrument of assignment, submitted electronically or certified copy. The true copy shall be a certified duplicate or photostat copy of the original assignment.~~