

Chapter 22B
The Litigation Process



2014 Contract Attorneys Deskbook

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CHAPTER 22B

THE LITIGATION PROCESS

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CHAPTER 22B

THE LITIGATION PROCESS

I. REFERENCES

1. Rules of the United States Court of Federal Claims (RCFC), August 30, 2013.
2. United States Court of Federal Claims website, <http://www.uscfc.uscourts.gov/>.

II. INITIATING SUIT.

A. Action Commenced With A Complaint.

1. A “short and plain” statement showing jurisdiction and entitlement to relief, and demanding judgment for the relief sought. RCFC 8(a).
2. In addition, the complaint must contain:
 - a. A statement regarding any action taken on the claim by Congress, a department or agency of the United States, or another tribunal, RCFC 9(o);
 - b. A citation to any statute, regulation, or Executive order upon which the claim is founded, RCFC 9(j); and
 - c. Identification of any contract on which the claim is founded, as well as a description or attached copy of the contract. RCFC 9(k).
3. Compare: At BCAs, action commenced with notice of appeal.

B. Statute of Limitations.

1. Contract claims. Generally, six years after the claim first accrues. 28 U.S.C. § 2501.
2. The COFC generally considers the Clerk of Court’s record of receipt to be final and conclusive evidence of the date of filing. But the Court will deem a late complaint timely if the plaintiff:

- a. Sent the complaint to the proper address by registered or certified mail, return receipt requested;
- b. Deposited the complaint in the mail far enough in advance of the due date to allow delivery by the due date in the ordinary course of the mail; and
- c. Exercised no control over the complaint from the date of mailing to the date of delivery. See B.D. Click Co. v. United States, 1 Cl. Ct. 239 (1982) (holding that the contractor failed to demonstrate the applicability of exceptions to timeliness rules).

C. The “Call Letter.”

1. The Attorney General must send a copy of the complaint to the responsible military department, along with a request for all of the facts, circumstances, and evidence concerning the claim that are within the military department’s possession or knowledge. 28 U.S.C. § 520(a).
2. The responsible military department must then provide the Attorney General with a “written statement of all facts, information, and proofs.” 28 U.S.C. § 520(b)
3. Don’t wait for the call letter before contacting DOJ. DOJ is usually the last to know when a complaint is filed.

III. RESPONDING TO THE COMPLAINT.

A. The Answer.

1. The Government must either respond with a motion under RCFC 12 or file its answer within 60 days of the date it receives the complaint. RCFC 12(a)(1)(A).
2. If the Government submits an answer, the Government must admit or deny each averment in the complaint. RCFC 8(b)(1)(B).
3. If the Government lacks sufficient knowledge or information to admit or deny a particular averment, the Government must say so. RCFC 8(b)(5).
4. If the Government only intends to oppose part of an averment, the Government must specify which part of the averment is true and deny the rest. RCFC 8(b)(4).

B. Defenses.

1. Where appropriate, the Government asserts the following defenses by motion:
 - a. Lack of subject-matter jurisdiction;
 - b. Lack of personal jurisdiction;
 - c. Insufficiency of process; and
 - d. Failure to state a claim upon which the Court may grant relief. RCFC 12(b).

2. If an answer is required, the Government must plead the following affirmative defenses:
 - a. “accord and satisfaction;
 - b. arbitration and award,;
 - c. assumption of risk;
 - d. contributory negligence;
 - e. duress
 - f. estoppels;
 - g. failure of consideration;
 - h. fraud;
 - i. illegality;
 - j. laches;
 - k. license;
 - l. payment;
 - m. release;
 - n. res judicata;
 - o. statute of frauds;

- p. statute of limitations;
- q. waiver, and
- r. any other matter constituting an avoidance or affirmative defense.” RCFC 8(c)(1).

C. Counterclaims.

- 1. To preserve its right to judicial enforcement of a claim, the Government must state any claim it has against the plaintiff as a counterclaim if:
 - a. The claim arises out of the same transaction or occurrence as the plaintiff’s claim; and
 - b. The claim does not require the presence of third parties for its adjudication. RCFC 13(a)(1).

D. Signing Pleadings, Motions, and Other Papers.

- 1. The attorney of record must sign every pleading, motion, and other paper. The attorney’s signature constitutes a certification that the attorney has read the pleading, motion, or other paper; that to the best of the attorney’s knowledge, information, and belief formed after reasonably inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. RCFC 11(a)&(b).
- 2. The COFC will strike a pleading, motion, or other paper if the attorney does not promptly sign it after the omission of the attorney’s signature is brought to the attorney’s attention. RCFC 11(a).
- 3. The COFC will impose appropriate sanctions against the attorney and/or the represented party if the attorney signs a pleading, motion, or other paper in violation of this rule. RCFC 11(c)(1).

E. Early Meeting of Counsel. RCFC, App. A, Pt. II.

- 1. The Case Management Procedure, located at RCFC, App. A, Pt. II, contain procedures “intended to promote cooperation among counsel, assist in early identification of issues, minimize the cost and delay of litigation, and enhance the potential for settlement.” RCFC, App. A, Pt. I.
- 2. The parties must meet after the Government files its answer to:

- a. Identify each party's factual and legal contentions;
- b. Discuss each party's discovery needs and discovery schedule; and
- c. Discuss settlement.
- d. As a practical matter, DOJ orchestrates this.

F. Joint Preliminary Status Report (JPSR).

1. The parties must file a JPSR no later than 49 days after the Government answers or plaintiff files its reply to a Government counter-claim. RCFC, App. A, Pt. III.
2. The JPSR must set forth answers to the following questions:
 - a. Does the Court have jurisdiction?
 - b. Should the case be consolidated with any other action?
 - c. Should trial of liability and damages be bifurcated?
 - d. Should further proceedings be deferred pending consideration of another case? Consider 28 U.S.C. § 1500; UNR Indus., Inc. v. United States, 962 F.2d 1013 (1992), cert. granted, 113 S. Ct. 373(1992); Keene Corn. v. United States, 113 S. Ct. 2035 (1993). Subsequent interpretations of 28 U.S.C. § 1500 include: Wilson v. United States, 32 Fed. Cl. 794 (1995) (same recovery in both actions); McDermott, Inc. v. United States, 30 Fed. Cl. 332 (1994) (constitutional claims and challenges to Federal statutes pending in a district court action not the same as the contract actions before the COFC); Marshall Assoc. Contractors Inc. v. United States, 31 Fed. Cl. 809 (1994) (surety's suit against the United States pending in another Federal court not a jurisdictional bar to contractor's suit before the COFC).
 - e. Will a remand or suspension be sought?
 - f. Will additional parties be joined?
 - g. Does either party intend to file a motion to dismiss for lack of jurisdiction, failure to state a claim, or summary judgment? If so, a schedule.
 - h. What are the relevant issues?

- i. What is likelihood of settlement?
- j. Do the parties anticipate proceeding to trial? If so, does any party want to request expedited trial scheduling?
- k. Is there any other information of which the court should be made aware?
- l. What do the parties propose for a discovery plan and deadlines?

IV. BASIS FOR RESPONSE - THE LITIGATION REPORT.

- A. The agency is required, by statute, to file a litigation report. 28 U.S.C. § 520(b).
 1. Army Regulation 27-40, paragraph 3-9 requires the SJA or legal advisor to prepare the litigation report when directed by Litigation Division. Neither the court nor the plaintiff sees the report. Therefore the attorney preparing the litigation report should err on the side of inclusion, not exclusion and stamp the report "Attorney Work Product."
 2. Litigation Reports. AR 27-40, para. 3-9.
 3. Statement of Facts. A complete statement of the facts on which the action and any possible Government defenses are based. Where possible, support facts by reference to documents or witness statements. Include details of previous administrative actions, such as the filing and results of an administrative claim. AR 27-40, para. 3-9(a).
 4. Setoff or Counterclaim. Identify with supporting facts. AR 27-40, para. 3-9(b).
 5. Responses to Pleadings. Prepare a draft answer or other appropriate response to the pleadings. Discuss whether allegations of fact are well-founded. Refer to evidence that refutes factual allegations. AR 27-40, para. 3-9(c).
 6. Memorandum of Law.
 - a. "Include a brief statement of the applicable law with citations to legal authority. Discussions of local law, if applicable, should cover relevant issues such as measure of damages Do not unduly delay submission of a litigation report to prepare a comprehensive memorandum of law." AR 27-40, para. 3-9(d).
 - b. Identify jurisdictional defects and affirmative defenses.

- c. Assess litigation risk. Do not hesitate to form (and support) a legal opinion. Give a candid assessment of the potential for settlement.
7. Potential witness information. List each person having information relevant to the case and provide an office address and telephone number. If there is no objection, provide the individual's social security account number, home address, and telephone number. This is "core information" required by Executive Order No. 12778 (Civil Justice Reform). Finally, summarize the information or potential testimony that each person listed could provide." NB: DOJ usually does not require SSNs, but it really needs to know witnesses' expected availability (retiring? PCS'ing to Greenland?). AR 27-40, para. 3-9(e).
8. Exhibits. "Attach a copy of all relevant documents Copies of relevant reports of claims officers, investigating officers, boards, or similar data should be attached, although such reports will not obviate the requirement for preparation of a complete litigation report . . . Where a relevant document has been released pursuant to a Freedom of Information Act (FOIA) request, provide a copy of the response, or otherwise identify the requestor and the records released." AR 27-40, para. 3-9(f).
9. Draft an answer.
10. Identify documents and information targets for discovery. Think about things you know exist or must exist that will help the agency position as well as things that might exist that might undermine the agency's position.
11. Consider drafting a motion to dismiss for lack of jurisdiction, RCFC 12(b)(1), or for failure to state a claim, RCFC 12(b)(6).
12. Consider drafting motion for summary judgment, RCFC 56. NB: RCFC 56(d) requires that the moving party file a separate document entitled Proposed Findings of Uncontroverted Fact, and that the responding party file a "Statement of Genuine Issues," and permits the responding party to file proposed findings of uncontroverted facts.

B. Analyze the Client.

1. If the plaintiff's position is unbelievable, there is some chance the agency has simply misunderstood it (perhaps because the position was poorly presented). Identify the questions that will assure the Government understands the contractor's point so we can target discovery, properly respond, and be assured the Government will not be blind-sided at trial.
2. Identify any agency concerns, uncertainty, hard or soft spots (the contracting officer will fight to the death vs. the contracting officer was

surprised the contractor never called to negotiate), witness problems or biases, and anything else you would like to know if you were trying the case.

V. AGENCY ROLE THROUGHOUT DISCOVERY.

A. Discovery scope.

1. Discovery rules and discussion are located at RCFC 26 and Appendix A, Pt. V, ¶¶ 9-10. Clear communication and cooperation between the agency and DOJ throughout the litigation process are essential.
2. Agency counsel must assist in the discovery process and the preservation

B. Methods of Discovery.

1. The parties may obtain discovery by depositions upon oral examination or written questions, written interrogatories, requests for the production of documents, and requests for admission. RCFC, App. A, Pt. V.
2. The Court may limit discovery if:
 - a. The discovery sought is unreasonably cumulative or duplicative;
 - b. The party seeking the discovery may obtain it from a more convenient, less burdensome, or less expensive source;
 - c. The party seeking the discovery has had ample opportunity to obtain the information sought; or
 - d. The burden or expense of the proposed discovery outweighs its likely benefit.
 - e. Remember, defendant is the United States – thus discovery requests could include more than one Federal agency. RCFC 26(b)(2)(C).

C. Protective Orders.

- a. It is important that all counsel involved in litigation are aware of the details of all protective orders in place. RCFC 26(c) and Form 8.

- b. The court may make “any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” RCFC 26(c)(1).

D. Depositions. RCFC 30.

1. Purpose.

- a. Lock in testimony, pure exploration, testing a theory/confirming a negative.
- b. Need relevant documents to refresh witness's testimony and keep questioning specific.

2. Subpoenas may be served at any place within 100 miles of deposition, hearing or trial. Upon a showing of good cause, a subpoena may be served at any other place. RCFC 45(b)(2).

3. Defending Subpoenas.

- a. Agency counsel should coordinate service.
- b. If the party that gave notice of the deposition failed to attend (or failed to subpoena a witness who failed to attend), the court may order that party to pay the other party’s reasonable expenses, including reasonable attorney’s fees. RCFC 30(g).
- c. DOJ should take lead in preparing witnesses, including how much and how to prepare.
- d. Agency may be asked to identify relevant documents and likely questions.
- e. All contact with witness must be coordinated with DOJ.

4. Submission of Transcript to Witness. RCFC 30(e).

The deponent may make changes to the deposition transcript; however, the deponent must sign a statement that details the deponent’s reasons for making them. RCFC 30(e)(1)(B).

E. Interrogatories. RCFC 33.

1. The Government may serve interrogatories on the plaintiff after the plaintiff files the complaint, and the plaintiff may serve interrogatories on the Government after the Government receives the complaint.
 2. The party upon whom the interrogatories have been served (i.e., the answering party) must normally answer or object to the interrogatories within 30 days of service. RCFC 33(b)(2).
 3. The answering party may answer an interrogatory by producing business records if:
 - a. The business records contain the information sought; and
 - b. The burden of deriving or ascertaining the answer sought is substantially the same for both parties.
 - c. The responding party must be specific about where the information can be located. Otherwise, the burden is not the same. RCFC 33(d).
 4. The answering party must sign a verification attesting to the truth of the answers. The answering party's attorney must sign the objections. RCFC 33(b)(5).
- F. Requests for the Production of Documents. RCFC 34.
1. The rules are similar to the rules for interrogatories.
 2. The party producing the records for inspection/copying may either:
 - a. Produce them as they are kept in the usual course of business; or
 - b. Organize and label them to correspond to the production request.
 3. Exercise caution in privilege review: once they've got it, assume we can't take it back. Prepare a draft privilege list of documents withheld, providing sufficient detail to assure recipient can analyze applicability of privilege (usually, to, from, subject, and the identity of sender/recipient's office (e.g., "Counsel")).
- G. Requests for Admission. RCFC 36.
1. The answering party must:
 - a. Specifically deny each matter; or

- b. State why the answering party cannot truthfully admit or deny the matter.
 2. The answering party may not allege lack of information or knowledge unless the answering party has made a reasonable inquiry into the matter. RCFC 36(a)(4).
 3. If the answering party fails to answer or object to a matter in a timely manner (usually within 30 days after being served), the matter is admitted. RCFC 36(a)(3).
 4. Admissions are conclusive unless the court permits the answering party to withdraw or amend its answer. RCFC 36(b).
 5. Great tool for narrowing the facts in dispute.
- H. Agency Counsel Role in Responding to Interrogatories, Requests for Production and Admissions.
 1. Identify who should answer.
 2. Inform all potential witnesses and affected activities that a lawsuit has been filed; that, as a normal part of discovery, plaintiff is entitled to inspect and copy all related documents; that “documents” includes electronic documents, such as email and “personal” notes kept in performing official duties, such as field notebooks; that witnesses are not to dispose of any such documents; that they should begin to collect and identify all files related to the lawsuit – including those at home. AR 27-40
 3. Current employees should also be told they are represented by DOJ and the contractor is represented by counsel, and they should not talk to the contractor or its attorneys about the lawsuit.
- I. Discovery Planning Conference.
 1. Agency counsel and answering witnesses should discuss with DOJ a strategy for responding, to include:
 - a. Objections in lieu of responses (what we won’t tell them);
 - b. Objections with limited responses (what we will tell them), e.g., requests for “all documents” or “all information related to.”
 - c. When DOJ will produce documents instead of responding to an interrogatory in accordance with RCFC 33(d).

- d. How documents will be organized and stamped, including adoption of a stamping protocol (e.g., “HQDA0001 . . . ,” “AMC0001”) to identify source of produced documents and to identify them as having been subject to discovery effort.
 - e. How copying and inspection will be handled – security concerns? Cost concerns?
2. Preparation of a privilege log. All relevant documents not produced and not covered by an objection must be listed on a privilege log furnished to the other side. Typically, they list to, from, date, subject, and privilege claimed. They should be sufficiently detailed so that the basis for the privilege is evident but does not disclose the privileged matter. E.g., “Ltr. From MAJ Jones, AMC Counsel, to Smith, CO re: claim.”

J. Failure to Cooperate in Discovery.

- 1. Motion to Compel Discovery. If a party or a deponent fails to cooperate in discovery, the party seeking the discovery may move for an order compelling discovery. RCFC 37(a)(3)(B).
- 2. Expenses. The court may order the losing party or deponent to pay the winning party’s reasonable expenses, including attorney fees. RCFC 37(a)(5).
- 3. Sanctions. RCFC 37(b).
 - a. If a deponent fails to answer a question after being directed to do so by the court, the court may hold the deponent in contempt of court.
 - b. If a party fails to provide or permit discovery after being directed to do so, the court may take one or more of the following actions:
 - (a) Order that designated facts be taken as established for purposes of the action;
 - (b) Refuse to allow the disobedient party to support or oppose designated claims or defenses;
 - (c) Refuse to allow the disobedient party to introduce designated facts into evidence;
 - (d) Strike pleadings in whole or in part;
 - (e) Stay further proceedings until the order is obeyed;

- (f) Dismiss the action in whole or in part;
 - (g) Enter a default judgment against the disobedient party;
 - (h) Hold the disobedient party in contempt of court; and
 - (i) Order the disobedient party—and/or the attorney advising that party—to pay the other party’s reasonable expenses, including attorney’s fees.
- c. In Mortenson Co. v. United States, 996 F.2d 1177 (Fed. Cir. 1993), the CAFC affirmed a \$22 million award of attorney fees and costs against the United States as a Rule 37(a)(4) sanction for the VA's failure to comply with certain discovery orders.

VI. TRIAL.

- A. Meeting of counsel. RCFC, Appendix A, ¶ 13.
- 1. No later than 63 days before the pretrial conference, counsel for the parties shall:
 - a. Exchange all exhibits (except impeachment) to be used at trial.
 - b. Exchange a final list of names and addresses of witnesses.
 - c. To disclose to opposing counsel the intention to file a motion.
 - d. Resolve, if possible, any objections to the admission of oral or documentary evidence.
 - e. Disclose to opposing counsel all contentions as to applicable facts and law, unless previously disclosed.
 - f. Engage in good-faith, diligent efforts to stipulate and agree to facts about which the parties know, or have reason to know, there can be no dispute for the purpose of simplifying the issues at trial.
 - g. Exhaust all possibilities of settlement.
 - h. Ordinarily, the parties must file:
 - i. A memorandum of contentions of fact and law;
 - j. A joint statement setting forth the factual and legal issues that the court must resolve NLT 21 days before the pretrial conference;

- k. A witness list;
 - l. An exhibit list.
 2. Failure to identify an exhibit or a witness may cause the Court to exclude the exhibit or witness. RCFC, Appendix A ¶¶ 13(a), 13(b), 15.
 3. The attorneys who will try the case must attend the pretrial conference. RCFC, Appendix A, ¶ 11.
- B. Pre-Trial Preparation.
 1. Contact all witnesses ensure none will be gone during trial and that former Government employees have signed representation agreements if they wish to.
 2. Outline Witness Testimony.
 3. Prepare Witnesses.
 4. Prepare FRE 1006 summaries.
 5. Copy and organize documents.
- C. Offers of Judgment.
 1. The Government may make an offer of judgment at any time more than 14 days before the trial begins. RCFC 68(a).
 2. If the offeree fails to accept the offer and the judgment the offeree finally obtains is not more favorable than the offer, the offeree must pay any costs the Government incurred after it made the offer. RCFC 68(D).

VII. SETTLEMENT.

- A. Authority
 1. The Attorney General has authority to settle matters in litigation, 28 U.S.C. § 516, and has delegated that authority depending upon dollar value of settlement. 28 C.F.R. § 0.160, et seq., e.g., Assistant Attorney General (AAG), Civil Division may settle a defensive claim when the principal amount of the proposed settlement does not exceed \$2 million.
 2. The AAG has redelegated office heads and U.S. Attorneys, but redelegation subject to exceptions, including cases where the Agency opposes settlement.

3. Whether a matter is “in litigation,” is not always clear. The Sharman Co., Inc. v. United States, 2 F.3d 1564 (1993); Boeing Co. v. United States, Cl. Ct. No. 92-14C (June 3, 1992), reversed 92-5129, 92-5131 (Fed. Cir., March 19, 1992) (unpublished); Durable Metal Products v. United States, 21 Cl. Ct. 41, 45 (1990); but see Hughes Aircraft Co. v. United States, 209 Cl. Ct. 446, 465, 534 F.2d 889, 901 (1976). The body of law on this issue continues to develop. See, e.g. Alaska Pulp Corporation v. United States, 34 Fed. Cl. 100 (1995) (default terminations); Volmar Construction, Inc. v. United States, 32 Fed. Cl. 746 (1995) (claims and setoffs); Cincinnati Electronics Corp. v. United States, 32 Fed. Cl. 496 (1994) (default terminations).
4. When in doubt, assume the matter is in litigation and all settlement discussions should be made through DOJ.

B. Assume a Discussion About Settlement Is Coming.

1. The agency has little influence on the process when the agency counsel is not sufficiently familiar with case developments to offer a persuasive opinion.
2. Explain to your clients that ADR and, if warranted, settlement are more arrows in the quiver for resolving the dispute.
3. Explain that settlement should be used when it avoids injustice, when the defense is unprovable, when a decision can be expected to create an unfavorable precedent; and when settlement provides a better outcome (including the fact it might include consideration that a court judgment will not) than could be expected from a trial. The availability of expiring contract funds might also be considered.
4. In that regard, help the client understand the difference between their believing a fact, and it being legally significant and provable.
5. Identify early on who within the agency has authority to recommend settlement, and who within the agency has the natural interest or “pull” to affect that recommendation, such that they should be continually updated on the litigation.

C. Settlement Procedure.

1. Agencies must be consulted regarding “any significant proposed action if it is a party, if it has asked to be consulted with respect to any such proposed action, or if such proposed action in a case would adversely affect any of its policies.” U.S. Attorney’s Manual, para.4-3.140C

2. Litigation attorney coordinates with installation attorney and contracting officer to determine whether settlement is appropriate.
3. If settlement is deemed appropriate, the litigation attorney prepares a settlement memorandum. Next, the litigation attorney submits the memorandum through the Branch Chief to the Chief, Litigation Division. The Chief, Litigation Division must approve all settlement agreements. He has authority to act on behalf of TJAG and the Secretary of the Army on litigation issues, including the authority to settle or compromise cases. See AR 27-40, paragraph 1-4d(2).
4. Finally, the recommendation of the Chief, Litigation Division is forwarded to the DOJ. Then DOJ goes through a similar process to get approval of a settlement.

VIII. ALTERNATIVE DISPUTE RESOLUTION (ADR).

A. ADR Automatic Referral Procedures, General Order No.44

1. The COFC pilot program requires that designated cases be automatically referred to an ADR judge; however, the parties may opt out.
2. Each party presents an abbreviated version of its case to a neutral advisor, who then assists the parties to negotiate a settlement. Suggested procedures are set forth in the General Order.

B. ADR Methods

1. The court offers ADR methods for use in appropriate cases.
 - a. Use of a settlement judge.
 - b. Mini-trial.
2. Both ADR methods are designed to be voluntary and flexible.
3. If the parties want to employ one of the ADR methods, they should notify the presiding judge as soon as possible.
 - a. If the presiding judge determines that ADR is appropriate, the presiding judge will refer the case to the Office of the Clerk for the assignment of an ADR judge.
 - b. The ADR judge will exercise ultimate authority over the form and function of each ADR method.

- c. If the parties fail to reach a settlement, the Office of the Clerk will return the case to the presiding judge's docket.

IX. POST JUDGMENT.

A. Final Judgment Rule.

Unless timely appealed, a final judgment of the court bars any further claim, suit, or demand against the United States arising out of the matters involved in the case or controversy. 28 U.S.C. § 2519.

B. New Trials. RCFC 59.

The COFC may, on motion, grant a new trial or rehearing or reconsideration based on common law or equity. RCFC 59(a)(1).

C. Appeals.

1. See generally, Jennifer A. Tegfeldt, A Few Practical Considerations in Appeals Before the Federal Circuit, 3 FED. CIR. BAR. J. 237 (1993).
2. A party may appeal an adverse decision to the CAFC within 60 days of the date the party received the decision. 28 U.S.C. § 2522.

D. Paying plaintiff attorney fees.

A different attorney fee statute. The Court of Federal Claims grants Equal Access To Justice Act (EAJA) relief pursuant to 28 U.S.C. § 2412, unlike the BCAs, which grant EAJA relief pursuant to 5 U.S.C. § 504. See also, Form 5 in Appendix of the RCFC (application form for EAJA fees).

E. Payment of Judgments.

1. An agency may access the "Judgment Fund" to pay "[a]ny judgment against the United States on a [CDA] claim." 41 U.S.C. § 612(a). See 31 U.S.C. § 1304; cf. 28 U.S.C. § 2517.
2. The Judgment Fund also pays compromises under the Attorney General's authority.
3. If an agency lacks sufficient funds to cover an informal settlement agreement, it may "consent" to the entry of a judgment against it. Bath Irons Works Corp. v. United States, 20 F.3d 1567, 1583 (Fed. Cir. 1994).

4. An agency that accesses the Judgment Fund to pay a judgment must repay the Fund from appropriations that were current at the time the judgment was rendered against it. 41 U.S.C. § 612(c).