



**FOREST SERVICE HANDBOOK
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FSH 2409.15 - TIMBER SALE ADMINISTRATION HANDBOOK

CHAPTER 70 - CONTRACT CLAIMS AND DISPUTES

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Associate Deputy Chief,
for National Forest System

Date Approved: XX/XX/2020

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Digest:

70 – Revises, reorganizes, recodes and updates chapter in its entirety. Updates statutory references to Contracts Disputes Act. Adds contract forms FS-2400-13/13T to contracts administered by a Timber Sale Contracting Officer.

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70.1 - AUTHORITY

See FSM 2450.1 for a description of the authorities for settling contract claims and disputes.

70.5 - Definitions

Appeal. A formal filing before the Civilian Board of Contract Appeals or U.S. Court of Federal Claims of a Contracting Officer's (CO's) Final Decision under the Contract Disputes Act (41 U.S.C.7101, et. seq.).

Bid Protest. A complaint filed by an interested party over a decision to award or not award a contract to an interested party. By agreement with the Forest Service, the Government Accountability Office (GAO) decides bid protests concerning the sale of national forest timber. Refer to FSH 2409.18, Ch. 60 for bid protests.

Civilian Board of Contract Appeals (CBCA). An independent tribunal housed within the General Services Administration. Its primary responsibility is to resolve contract disputes between Government Contractors and agencies under the Contract Disputes Act.

Claim. A written demand or assertion by one of the parties to a contract seeking, as a legal right, the payment of money, adjustment or interpretation of contract terms, or other relief under or relating to a contract. A claim by a Purchaser shall be made in writing and submitted to the Contracting Officer for decision.

CDA. Contract Disputes Act of 1978 (41 U.S.C. 7101, *et.seq.*).

Contracting Officer (CO). An individual designated by name in accordance with applicable regulations, with authority to make and administer contracts and to make determinations and findings with respect to contracts (FSM 2404.21).

Contractor. Party, other than the Federal Government, to a Stewardship End Result Contract also known as an Integrated Resource Timber Contract (IRTC).

Dispute. A controversy or disagreement related to contract interpretation or performance. A dispute is the subject of a claim, but not all disputes result in a claim.

Integrated Resource Timber Contract (IRTC). A Stewardship End Result Contract on form FS-2400-13 or FS-2400-13T, where the Forest Service made a determination under Title 36, Code of Federal Regulations, § 223.301(b)(2) that a stewardship contract is to be a contract for the sale of property. IRTCs are a form of Timber Sale Contract.

Lawsuit. A proceeding by a party against another party, such as an appeal of a CO's final decision to the U.S Court of Federal Claims or to the Civilian Board of Contract Appeals.

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Purchaser. Party, other than the Federal Government, to a Timber Sale Contract, including forms FS-2400-6/6T, FS-2400-3S/3T/3P, FS-2400-4, and FS-2400-2.

70.6 – Contract Forms

The following Timber Sale Contract forms are currently in use:

1. FS-2400-2 Contract For Sale of Decked Timber;
2. FS-2400-3S Timber Sale Contract (Applicable to timber sales to be scaled after felling);
3. FS-2400-3T Timber Sale Contract (Applicable to sales to be measured before felling);
4. FS-2400-3P Forest Products Contract (Applicable to the sale of nonconvertable products);
5. FS-2400-4 Forest Products Contract and Cash Receipt;
6. FS-2400-6 Timber Sale Contract (Applicable to timber sales to be scaled after felling);
7. FS-2400-6T Timber Sale Contract (Applicable to sales to be measured before felling);
8. FS-2400-13 Integrated Resource Contract (For measurement of products after harvest);
9. FS-2400-13T Integrated Resource Contract (For measurement of products before harvest).

The different contract forms may be revised and updated over time. When this occurs the date of the revision is added after the contract form number. The newest version of a contract form will always be used as new sales are prepared but because many sales have a contract length of two or more years, there may be more than one version of a contract form in use at any given time. Care must be exercised when administering a contract to be sure which version is used as there can be significant differences in similarly numbered and titled contract provisions between the different versions. Always refer to the contract in the official contract file.

There are differences in terminology between Timber Sale Contracts used solely for the sale of products and Integrated Resource Contracts that combine the sale of property with the procurement of services. For ease in reading this chapter, and unless noted otherwise, when the following timber sale terms are used, they apply to the equivalent Integrated Resource Contract terms:

Term Number	<u>Timber Sale Term</u>	<u>Integrated Resource Project Term</u>
1.	Timber Sale	Integrated Resource Project or Stewardship Project
2.	Timber Sale Contract	Integrated Resource Contract or Integrated Resource Timber Contract
3.	Purchaser	Contractor
4.	Sale Area	Contract Area
5.	Sale Area Map	Contract Area Map
6.	Division A/AT Specific Conditions	Part A/AT Specific Conditions

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7.	Division B/BT Standard Provisions	Parts B/BT through J/JT Standard Provisions
8.	Division C/CT Special Provisions	Part K/KT Special Provisions

The numbering system for contract provisions differs between FS-2400-6/6T contracts and FS-2400-13/13T contracts. For ease in reading this chapter, and unless noted otherwise, references to a Timber Sale Contract provision apply to the corresponding provision with the same descriptive title in an Integrated Resource Contract.

71 - RECOGNIZING AND RESOLVING CLAIMS OR DISPUTES

1. Accept a claim that is expressed as a written demand by a contracting party seeking, as a legal right, the payment of money, adjustment or interpretation of contract terms, or other relief arising from or related to the Timber Sale Contract.

A voucher, invoice, or request for payment that arises from normal business under the contract that is not in dispute when submitted is not considered a claim under the CDA. When a voucher, invoice, or request for payment is subsequently not acted upon in a reasonable time, or becomes disputed as to liability or amount, it may be considered as a claim. Examples of situations that may or may not be a claim under the CDA are as follows:

Example 1: An Ordered Design Change increases the actual quantity of items of a specified road. Upon Forest Service acceptance of the work, an adjustment is made to the Purchaser's timber sale account for the actual quantities and associated costs. The Purchaser's subsequent request for a cash payment in the amount of the adjustment is not a claim under the CDA. However, a Purchaser's demand for a payment in excess of the amount of the adjustment would be a claim under the CDA.

Example 2: The Contractor submits an invoice for stewardship work performed in an IRTC, form FS-2400-13. The Forest Service inspection supports the invoice. The Contracting Officer (CO) may authorize stewardship credits for the completed work without issuing a CO's final decision under CDA.

Example 3: A Purchaser requests 16 calendar days of contract term adjustment under B/BT8.21. In most cases a request for CTA can be authorized without issuing a Contracting Officer's decision. However, if the Contracting Officer disputes the amount of time claimed by the Purchaser, issue a Contracting Officer's decision stating the basis for the time granted/denied and the Purchaser's appeal rights.

Example 4: The Purchaser's assertion of a right under a provision of the contract that requires analysis by the CO to determine the validity of such a right may be considered a

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claim even if the results of the analysis do not result in a dispute. For example, a Purchaser's request for payment of out-of-pocket expenses under B/BT8.35 should always be treated as a claim. Since the Contracting Officer shall document his/her decision the most expedient way to do so is with a Contracting Officer's Final Decision (COFD). A COFD will provide the documentation needed to process a payment if out-of-pocket expenses are granted and will be required if out-of-pocket expenses are denied in whole or in part.

2. Deal fairly and firmly with the Purchaser when disputes arise. Approach disputes from the point of view that the Purchaser and Forest Service should make a good faith effort to work out contract interpretation and performance issues.
3. Attempt to resolve disputes by written, mutual agreement before they become claims. Keep an open mind regarding the matter in dispute and the adequacy of the information provided in support of the positions by both the Purchaser and the Government. Consider requesting informal discussions by individuals representing the Purchaser and the Forest Service who have not participated substantially in the matter in dispute to aid in the resolution of differences. Once a dispute becomes a recognizable claim, the CO must issue a Contracting Officer's Final Decision (COFD), or, as appropriate, state when a COFD will be issued, within the prescribed time frame under the CDA (sec. 72.4).
4. Use applicable Forest Service Manuals and Handbooks, environmental documentation, the appraisal, and other material as guides or estimates for interpreting disputes. Use the language of the contract when a point of conflict arises between the contract and related documents. Use the Timber Sale Contract as the basis for decision on any dispute or claim.
5. Do not attempt to resolve disputes or claims involving fraud or claims another Federal agency is specifically authorized to administer or settle. These are excluded from the CO's delegated authority (41 U.S.C. 7101 *et seq.*). If in doubt, seek advice from Regional Office staff or the Office of the General Counsel (OGC).
6. Issue a final claim decision (COFD) under the CDA when the parties cannot agree to satisfy or settle a claim. The COFD on a claim is not subject to review by any forum, tribunal, or Federal Government agency, unless an appeal is timely commenced as authorized under the CDA.

72 - DISPUTES UNDER CONTRACT DISPUTES ACT AUTHORITY

The Contract Disputes Act (41 U.S.C. 7101, *et seq.*) established a comprehensive statutory scheme for resolving disputes relating to Government contracts.

1. The CDA authorizes the Timber Sale Contracting Officer to settle disputes relating to the Timber Sale Contract and applicable claims (FSM 2450.1). The CDA applies to all

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Timber Sale Contract forms including FS-2400-2, FS-2400-3S/3T/3P, FS-2400-4, FS-2400-6/6T and FS-2400-13/13T. The CDA does not apply to permit forms FS-2400-1 (Forest Products Removal Permit and Cash Receipt), or FS-2400-8 (Forest Products Free Use Permit).

Contracting Officers may settle disputes under the CDA, unless a lawsuit has been filed in the Court of Federal Claims in which case the Contracting Officer will no longer have authority. At this point the DOJ will have authority under 28 USC 516-519. When working toward resolving disputes the CO shall maintain awareness of the Debt Collection Act of 1982 and the Debt Collection Improvement Act of 1996 which include limitations on the authority to compromise a claim owed to the United States that is valued at \$100,000 or more, exclusive of interest, penalties, and administrative costs (FSH 6509.11h Ch. 22 & 26). While the joint U.S. Department of Justice (DOJ) and U.S. Department of Treasury Regulations that implement the Debt Collection Improvement Act of 1996 encourage agencies to use all authorized remedies, such as the CDA, to compromise or settle claims, such efforts must be consistent with the various Federal debt collection statutes. In accordance with the regulations, authority to compromise claims of \$100,000 or more rests with the Department of Justice (31 U.S.C. 3711, 31 CFR 900.1(c) and 31 CFR 902.1(b)).

2. The CDA provides limited authority to reform a Timber Sale Contract if the parties discover that the written contract clearly does not meet the intent of the parties, such as a mistake. For example, the prospectus and bid form list ponderosa pine as one of the species but the contract inadvertently lists pinion pine which was not listed in the prospectus or bid form. The prospectus and bid form do not list pinion pine as a species offered in the sale area. Although this authority allows a CO to correct a mistake in the written contract to make the contract reflect the actual intent of the parties, such action shall only be taken in consultation with the Washington Office, Director, Forest Management, and Office of General Counsel (OGC).
3. Modifications of Timber Sale Contracts are guided by 36 C FR 223.112 and 36 CFR 223.113, and specific language in the contract. Consult the applicable statutory and regulatory authorities before reaching any decision that would result in reformation or modification of a Timber Sale Contract in response to a dispute.

The Contracting Officer does not have authority to cancel a contract to prevent environmental damage (36 CFR 223.116(b) and FSM 2404.11).

72.1 - Claims by Government Against Purchaser

Bills for Collection (form FS-6500-89) relating to timber sales and retention of Purchaser deposits by the Government that are undisputed are not claims. Examples include bills for periodic payments, liquidated damages under B/BT3.46, escalation, extension deposit and for cooperative deposits under B/BT4.218. However, if the Purchaser disputes either liability or

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amount pursuant to procedures in C/CT4.4 Payments Not Received, a Government claim against the Purchaser exists. Assert the Government's claim by means of a written CO's decision.

Assert all Government claims for default damages (FSM 2454 by means of a written Contracting Officer's decision.

72.2 - Claims by Purchaser Against Government

1. A timber sale Purchaser's claim against the Government must be in writing and must be submitted to the Contracting Officer. A voucher, invoice, or request for payment that arises from normal business under the contract that is not in dispute when submitted is not considered a claim under the CDA (sec. 71). Claims for more than \$100,000 require the Purchaser to submit a written certification that:
 - a. The claim is made in good faith;
 - b. The supporting data are accurate and complete to the best of the Purchaser's knowledge and belief; and
 - c. The amount requested accurately reflects the contract adjustment for which the Purchaser believes the Government is liable;
 - d. The certifier is authorized to certify the claim on behalf of the Purchaser.

Do not require this certification in a nonmonetary claim.

2. The Timber Sale Contract specifies a maximum time allowed for submitting specific types of claims in contract provision B/BT9.21. Generally, deny in the form of a COFD a claim that isn't filed within the prescribed time limit. Consult with OGC in cases where timeliness of a claim is uncertain, such as mishandled mail.

72.3 – Processing Claims

72.31 - Preparing Claim File

The Contracting Officer's claim decision must be based on a claim file (case file).

1. Start to compile this file when it becomes apparent that either the Purchaser or the Government has a CDA claim.
2. Prepare the claim file in a timely manner so that the Contracting Officer's decision can be made within the required timeframe (sec. 72.4).
3. Include in the claim file all information the Contracting Officer needs to make a decision on the claim. The claim file should be complete but should not include material that is

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not necessary for the decision. Vary its length and content depending upon the complexity of the claim.

It is important that there is no misunderstanding as to the specific points at issue in a claim. If a claim issue is unclear, ask the Purchaser in writing to provide additional information and clarifications and specify a reply due date. However, even if requested, the Purchaser is not obligated to provide additional information. Receiving additional information supporting the original claim will not change the due date for the CO's decision without a written agreement to do so from the Purchaser (sec. 72.4).

4. If the Contracting Officer's decision is appealed, the claim file may be reproduced, in part or in full, in an appeal file or become an exhibit in evidence. To facilitate future reproduction and eliminate the potential for not copying the back side of double-sided documents, it is recommended all documents in the claim file be single sided.
5. Bind the claim file in a file folder or notebook so the file remains intact and can be readily used.
6. Include the following material if the information is pertinent to the claim being considered:

Section 1 - Identification number. Get an identification number for the claim from the Regional Office Forest Management Staff. The identification number consists of four parts:

- a. Designation as a CDA claim;
- b. Forest Service Region;
- c. Fiscal year (yy);
- d. Claim number. For example, the identification number for the fifth claim received in the Pacific Northwest Region (R6) in FY 2017 would be: CDA 6-17-5.

Section 2. Purchaser's or Government's written claim (including certification (Sec. 72.2) if a Purchaser's claim is over \$100,000)).

Section 3. Copies of the following documents, as needed:

- a. Environmental document and decision;
- b. Complete timber sale appraisal;
- c. Advertisement and prospectus;

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- d. Award proceedings, including executed bid form;
- e. Timber Sale Contract, contract modifications, extensions, and sale area map.

Section 4. All specifications, plans, and drawings, if the claim involves a specified road and this information is needed for the CO's decision.

Section 5. Written documentation of the chronological order of events in the case. Include notes regarding telephone conversations, field reviews, inspection reports, email correspondence, meetings, advice to the Purchaser about the provisions of the contract, letters to/from the Purchaser during negotiations about the dispute, and any other information concerning the Contracting Officer's attempts to resolve the dispute by mutual agreement prior to receiving or filing a written claim. At the beginning of this section, include a chronological list of the documents in the section.

Section 6. Other data pertinent to the claim:

- a. Any investigation conducted by Forest Service Law Enforcement & Investigations (LEI) contained in a report or summary that has been cleared for inclusion by LEI or U.S. Department of Agriculture, Office of the Inspector General (OIG);
- b. Identification of individual issues;
- c. Facts.

Obtain material needed to prepare this section from all pertinent sources, such as records or any other evidence submitted by the Purchaser, statements from expert witnesses or persons with knowledge of the issues in the claims, job diaries, engineer's field books, suppliers, delivery records, contract modifications, and so forth. If statements are obtained from persons with knowledge of the issue in the claim, obtain these statements in the form of affidavits. Include any photographs or videotapes in this section of the file. State each fact individually. Reference the document(s) establishing the fact and page number(s) where the document(s) are located in the claim file.

Section 7. The CO's draft decision. Section 7 is used when advice will be sought (sec. 72.32) before preparing a final decision (sec. 72.33). Be clear and concise including enough detail so that someone not familiar with the circumstances can understand the basis for the decision. Conversely, do not include information not pertinent to the decision.

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72.32 - Seeking Contract Disputes Act Advice

Upon issuing a CDA number, Regional Foresters shall forward an electronic copy of the claim and CDA number to the Washington Office, Sale Administration Specialist, of Forest Management. To ensure consistent consideration of claims and if uncertain about the appropriate response to a given contract claim or dispute situation, Regional Foresters should seek advice from the Washington Office, Director, Forest Management.

1. Contracting Officers shall request technical assistance from the Regional Office Forest Management Staff for situations when:
 - a. The claim exceeds \$50,000;
 - b. The Contracting Officer's decision would involve reformation of the contract;
 - c. The Contracting Officer's decision is to terminate the contract in whole or in part;
 - d. The claim is based on an action of the Government affecting multiple contracts administered by more than one Contracting Officer such as:
 - (1) An ordered suspension of operations due to a government shutdown;
 - (2) A new listing of a Threatened & Endangered species; and
 - (3) Litigation over a National Environmental Policy Act (NEPA) process affecting multiple sales.
 - e. A fraudulent claim is suspected;
 - f. No precedent is available for reference;
 - g. The Contracting Officer is uncertain about any aspect of a claim or the interpretation of a contract provision as it pertains to the claim.
2. Regional claim teams may request technical assistance on any claim from the Washington Office, Director of Forest Management.
3. The Regional Office and Washington Office claims teams must include expertise from the following staffs:
 - a. Forest Management;
 - b. Office of the General Counsel;
 - c. Engineering (when the claim involves specified roads);

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- d. Fiscal (when the claim involves payments);
- e. Ecosystem Management Coordination (when the claim involves NEPA processes);
- f. Wildlife (when the claim involves T&E species); and
- g. Any other staff(s) or subject matter expert(s) deemed appropriate by the Director based on the basis for the claim.

The amount of advice the claim team provides should be commensurate with the Contracting Officer's expertise and the complexity of the claim.

72.33 - Contracting Officer's Decision

1. Preparation. In preparing the final decision:
 - a. Review the facts pertinent to the claim;
 - b. Consider the assistance and review provided by legal and other advisors, including Administrative Services and Contracting;
 - c. Document the findings. Make a decision on each individual issue in the claim before a summary decision is reached on the overall claim. Consider denying claims if the Purchaser fails to provide adequate supporting information unless that information is readily available in the contract files.
2. Standards. The Contracting Officer's decision must meet the following standards:
 - a. Written. Document the decision in writing.
 - b. Clear. Ensure the decision is clear as to the issues dealt with and that it deals only with those issues.
 - c. Complete. Ensure that the analysis and decisions are complete and are based on all the advice, information, and facts available.
 - d. Impartial. Strive to make an objective, impartial decision based on an analysis of the facts, information available, and the terms of the contract.
3. The Decision Document. The decision document must include:
 - a. A description of the claim or dispute.
 - b. A reference to pertinent contract provisions.

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- c. A statement of the factual areas of agreement and/or disagreement.
 - d. A statement of the Contracting Officer's decision, with supporting rationale.
4. Format. Follow the format and direction in Exhibit 01 when preparing a Contracting Officer's decision. Include in the preface and digest only those items necessary for a specific decision to meet the standards in the preceding paragraphs 1 through 3 above. Include the appropriate concluding information in every Contracting Officer's decision. Regional Contract Specialists can provide examples of COFDs.

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72.33 - Exhibit 01

Sample Format for Contracting Officer's Decision

Purchaser and address: No Logs Sawmill

1 Sawmill Road

Spar Tree, Kansas 85666

Date: January 10, 2018

1. **PREFACE AND DIGEST:** Use this section in all decisions and include the following:

a. Decision Identification Number: CDA 7-18-1

b. Location of Sale:

Region: Kansas (R7)

National Forest: Lost Trees NF

Ranger District: Lone Pine RD

c. Sale Information:

Purchaser name: No Logs Sawmill

Contract date: September 30, 2016

Contract number: 072004003

Sale name: Dry Creek TS

Contract form and date: FS-2400-6 (6/06)

d. Claim Summary: Claims may be poorly written with multiple issues presented in a disorganized manner. See Paragraph 2., Purchaser's Claim, below for how to address a poorly written claim. State when the claim was received and then disaggregate the claim summarizing the relevant points in short concise statements, including the amount(s) claimed by contract provision(s) if the Purchaser is seeking payment of money. If the claim is for multiple items, provide a list by contract provision. For example:

- (1) Purchaser requests payment in the amount of \$6,874.26 for various out-of-pocket expenses under B8.35. (Details addressing specific out-of-pocket expenses claimed should be specified in Sec. 3 Findings of the COFD).

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72.33 - Exhibit 01--Continued

- (2) Purchaser requests 112 calendar days of contract term adjustment under B8.21.
 - (3) Purchaser requests a partial termination of contract under B8.342.
 - e. Contracting Officer's (CO) Disposition of claim: Summarize the relevant points of the CO's decision in short concise statements following the same order as the claim summary. For example:
 - (1) Purchaser's requests for payment in the amount of \$6,874.26 for various out-of-pocket expenses under B8.35 is granted in part and denied in part. Total out-of-pocket expenses granted are \$4,879.75. (Details addressing specific out-of-pocket expenses claimed should be stated in Sec. 3 Findings).
 - (2) Purchaser's request for 112 calendar days of contract term adjustment under B8.21 is granted.
 - (3) Purchaser's request for a partial termination of contract under B8.342 is denied.
 - f. Summary of dollars involved: Include a summary of the amounts claimed and payments granted if the amounts claimed are linked to different contract provisions. For example, section 1d might list monetary claims for a physical change under B5.252, variations in quantities under B5.251, and material sources under C5.221#. The amounts claimed and payments authorized under each provision are listed in sections 1d and 1e. Summarize the total amounts claimed and payments authorized in section 1f. If the amounts claimed in section 1d and payment authorized in section 1e are limited to one contract provision, use of section 1f is optional.
2. **PURCHASER'S CLAIM:** State the reasons given by the Purchaser as the basis for the claim, the amount of the claim, and/or other relief requested. The purpose of including this statement at the beginning is to indicate at the outset exactly what the overall claim involves. For claims that are ambiguous, poorly written or disorganized, this section provides the Contracting Officer the opportunity to state his/her understanding of the claim in a clear succinct format. It is generally advisable to do this with short concise statements in a list or bullet format addressing specific points. This will make it easier to identify and track the relevant points between sections of the decision. Simply restating a poorly written or poorly organized claim will make the subsequent analysis difficult to follow.

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72.33 – Exhibit 01--Continued

3. **FINDINGS.** Address each specific claim issue separately from other issues in the claim. Give a number and/or descriptive title to each claim issue for ready identification and correlation with the Purchaser's claim. Whenever possible the descriptive title should use the principal contract provision number, provision title and subsection if the claim is for multiple relief measures under a single provision (e.g. B8.35). Similarly, where issues cannot be logically considered separately, they should be grouped together under a descriptive title and number.

Each claim issue should be dealt with to completion before the next is introduced, as follows:

Claim Item 1: Descriptive Title (e.g. B8.12 Liability for Loss)

- a. **Contract Requirements.** Include all contract provisions and specifications applicable in resolving each point at issue. In the interest of brevity and avoiding repetition, it is usually desirable to make reference to exhibits or to footnote, rather than to quote the entire contract provision or specification. Direct quotations may be used when necessary for clarity or emphasis.
- b. **Facts.** State each fact individually. Include a narrative recitation of the evidence and all facts of performance pertaining to the issue. Cite supporting information the Purchaser submitted with the claim (e.g. invoices showing amounts paid for a performance bond, move-in/move-out expenses, when operations began/ceased, etc.). Purchaser's failure to provide adequate supporting documentation substantiating the basis for or amount of a claim may be the basis for denying a claim. Document efforts made to obtain additional supporting information from the Purchaser if Purchaser fails to provide adequate supporting information.
- c. **Analysis.** Weigh each issue raised by the Purchaser against the contractual requirement(s) and the facts. Show calculations supporting the analysis and how the CO has changed or adjusted any of the amounts claimed. The results of this analysis constitute the findings on the claim.
- d. **Decision.** State the decision for the Claim Item and how the Facts and Analysis lead contractually and logically to the decision. If awarding monetary damages, state the date that interest begins accruing. In some cases, this may be different than the date of the claim (sec.72.62). Seek the advice of the Office of the General Counsel if the COFD relies on previous decisions of the Civilian or Agriculture Board of Contract Appeals, Comptroller General, U.S. Court of Federal Claims, or other Federal courts.

Claim Item 2: Descriptive Title

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72.33 – Exhibit 01--Continued

Follow the format above for each point in the claim.

DECISION. Summarize each Claim Issue decision with a brief justification. Reference the analysis section for details. Each analysis of an issue is the basis for a respective portion of the decision. If monetary relief, performance time, or other relief measures are disallowed, in whole or in part, so state. If monetary relief, performance time or other relief measures are allowed, itemize the basis for each and show the totals for the entire claim.

4. **CONCLUDING INFORMATION.**

Include the following in all decisions:

“This is the final decision of the Contracting Officer. This decision may be appealed to the Civilian Board of Contract Appeals.”

“If you decide to make such an appeal, you must mail or otherwise furnish written notice thereof to the Civilian Board of Contract Appeals within 90 days from the date you receive this decision. You must furnish a copy of the written notice to the Contracting Officer from whose decision the appeal is taken. You must reference this decision and identify this contract by number.”

“Additional information about the process for filing such an appeal is on the website: <https://cbca.gov/howto/index.html>”.

If the monetary amount in dispute is less than \$100,000, include the following paragraph in the decision (CBCA Rule 53):

“In the event you appeal this decision to the Civilian Board of Contract Appeals, you may request that the Board process this appeal under the accelerated procedures. 41 U.S.C. 7106(a).”

If the monetary amount in dispute is either \$50,000 or less, or \$150,000 or less and the appellant is a small business concern (as defined in the Small Business Act and regulations issued thereunder), include the following paragraph in the decision (CBCA Rule 52):

“In the event you appeal this decision to the Civilian Board of Contract Appeals, you may request that the Board process this appeal under the accelerated procedures 41 U.S.C. 7106(a), or under the small claims procedures 41 U.S.C. 7106(b).”

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72.33 - Exhibit 01--Continued

“In lieu of appealing to the Civilian Board of Contract Appeals, you may bring an action directly in the U.S. Court of Federal Claims within 12 months of the date you receive this decision. Additional information about the process for filing such an appeal is on the website: <http://www.uscfc.uscourts.gov/filing-a-complaint>.”

Signature:

Contracting Officer

Name:

Address:

Telephone Number:

Date _____

72.4 - Statutory Time Limitations

Meet the following statutory time limitations for decisions issued by the Contracting Officer. In all cases, unless otherwise noted, the timeframes refer to calendar days:

1. Claims of \$100,000 or Less. Issue a decision within 60 days of receipt of a written claim from the Purchaser (41 U.S.C. §7103 (f)(1)(2011)). This time limit cannot be extended without a written agreement with the Purchaser. Requesting and receiving additional supporting documentation from the Purchaser does not in and of itself restart the 60-day time clock. An amended claim submitted by the Purchaser may restart the clock on some or all of the Purchaser’s original claim items. An amended claim is one adding or changing items claimed as opposed to only providing additional supporting documentation for items in the original claim. Seek advice from OGC regarding the time for issuing a decision if Purchaser submits an amended claim.
2. Claims of More Than \$100,000. Issue a decision within 60 days of receipt of a certified claim, or if a decision will not be issued within 60 days, notify the Purchaser in writing of the timeframe for issuing the decision (41 U.S.C. §7103 (f)(2)). The CDA does not specify a timeframe when the 60-day period for issuing a decision is extended or for the Purchaser to agree to such extension, only that the decision be issued within a “reasonable time” considering the size and complexity of the claim and the adequacy of

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the information provided by the Contractor. This time limit cannot be subsequently extended without a written agreement with the Purchaser.

3. Claims Not Involving a Monetary Value and for Which the Contracting Officer Has Jurisdiction. Issue a decision within 60 days of receipt of a claim or, if a decision will not be issued within 60 days, notify the Purchaser of a timeframe for issuing the decision.
4. Failure by the Contracting Officer to issue a decision on a claim within the time required shall be deemed a decision by the Contracting Officer to deny the claim (41 U.S.C. §7103 (f)(5)). This allows the Purchaser to file suit in the U.S. Court of Federal Claims or appeal the decision to the Civilian Board of Contract Appeals. Consequently, it is extremely important that all decisions be issued on time or within the notified, deferred date identified by the Contracting Officer.

72.5 - Decision Delivery

Furnish a copy of the final decision to the Purchaser by certified mail, return receipt requested, or any other method that provides evidence of receipt, including the date of receipt. If an attorney has filed a claim on behalf of the Purchaser, furnish copies of the notification of deferred decision dates and/or a copy of the decision to the attorney, concurrent with transmittal of these documents to the Purchaser.

72.6 - Claim Payments

72.61 - Payment of Purchaser Claims

Follow the procedures for Miscellaneous Payments on the following Albuquerque Service Center (ASC) web site for making payments on claims against the government:

<http://fsweb.asc.fs.fed.us/bfm/programs/financial-operations/payments/miscellaneous/Procedures-QuickGuides.php>

1. Sections 7108(a) and 7108(b) of the CDA, 41 U.S.C. Chapter 71, provide that settlements negotiated by the Justice Department, awards made by Federal boards of contract appeals, and judgments made by Federal courts shall be paid from a U.S. Department of Treasury permanent indefinite appropriation, commonly referred to as the "Judgment Fund" (31 U.S.C. §1304). Section 7108 (c) provides that payments made on behalf of Federal agencies from the Judgment Fund shall be reimbursed.

Reimbursements are chargeable to the appropriated funds that were available for the Forest Service's contract activities at the time of the settlement, board award, or court judgment. If the Forest Service's funds are insufficient at the time of the award or judgment, 41 U.S.C. 7108(c) allows the Agency to seek supplemental appropriations. The U.S. Department of Treasury bills the Forest Service to reimburse the Judgment

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- Fund. Reimbursement request billing letters are mailed to the Forest Service within two weeks of the payment from the Judgment Fund.
2. The amount determined payable in the CO's decision, less any portion already paid, normally should be paid without awaiting Purchaser action on an appeal. Make such payment without prejudice to the rights of either party.
 3. Except as noted below, claims are paid from appropriated or salvage sale funds available to the Forest Service and shall not come from stumpage receipts or the Judgment Fund. Since Forests are responsible for the costs of their Timber Sale Contracts, costs associated with claims should be covered by Forest funds. It may be necessary for the involved Forest and Region to reprogram funds to cover these costs.
 - a. Early coordination is essential with the Regional Office Forest Management, Fiscal, and Budget Staffs and with OGC.
 - b. The Washington Office does not set aside funds to pay these judgments; however, Regional Offices should work with the Washington Office, Program and Budget Analysis Staff to identify if there are carryover or other funds available to assist Regions in payment of claims.
 - c. Funds must be available to avoid violating the Anti-Deficiency Act. The CO shall not issue a decision to pay a claim unless money is available. When a decision is made that supports making a payment but insufficient funds are available, the CO must consult with the Regional Office and OGC prior to issuing a decision to deny payment based on insufficient funds.
 4. If the contract has not been closed and a claim is made because the Forest Service collected money to which it was not entitled, it may be possible to refund the over collection to the Purchaser through a correction in the statement of account. If the contract has been closed, the Treasury Department has a fund that can be used to pay amounts that were erroneously collected. However, the Forest Service is still liable for the payment of interest on these claims.
 5. In accordance with 16 U.S.C. 2104, FSH 6509.11g, chapter 60, and FSH 6509.11h, chapter 30, retained receipts from an IRTC may not be used to make claim payments. However, section 205 of the Consolidated Appropriations Act, 2018, EXCESS OFFSET VALUE amends section 604(g)(2) of the Healthy Forests Restoration Act of 2003 (16 U.S.C. 6591c) to permit the use of excess receipts to satisfy any outstanding liabilities for cancelled agreements or contracts. This would include paying liability damages in event a timber sale (FS-2400-6/6T) or stewardship (FS-2400-13/13T) contract is cancelled. Note that excess offset receipts must first be used for all outstanding cancellation liabilities and only then may be used for other stewardship projects.

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6. If the claim involves specified road construction under contract provision B/BT5.2, the Forest should charge that portion of the payment to construction of roads for timber. This procedure is consistent with the charge-as-worked concept in that the roads specified in the Timber Sale Contract are National Forest System roads. If the Forest Service had constructed the roads, timber road construction funds would have been used to pay for the roads.
7. While it is the contract that gives rise to the liability, the contract may have a purpose other than timber management. Timber sales categorized as Forest stewardship sales or multi-purpose sales have purposes that wholly or partially benefit ecosystem management, wildlife, watershed, range, recreation, or other purposes. The management purposes for harvesting trees are identified in the environmental assessment. While the claim may be the result of actions necessary to protect threatened, endangered, or sensitive species or other resource values, this is not the sole basis for determining fiscal responsibility. Associated claims are paid from the funds for administering the sale; however, it may be appropriate to request reprogramming of funds from the benefiting function.

72.62 - Calculation of Interest on Claims

Contract provision B/BT9.2 requires the payment of interest from the date the claim is received until payment of the claim.

1. The rate of interest is at the Prompt Payment Rate established by the Secretary of Treasury on the amount found due on the Purchaser's claim. ASC debt collection will provide the compound interest calculation.
2. The claim includes all alleged damages prior to the claim date. To the extent these damages are allowed in the claim decision, interest should be allowed from the date the claim is received by the Contracting Officer until payment of the claim.
3. The Contracting Officer may include damages in the decision that accrued after the date for the claim; for example, performance bond expenses or liquidated damages if a contract is terminated or partially terminated for reasons stated in contract termination provisions. In most cases, liquidated damages accrue after the date of the claim, since the timber is not removed until the Chief approves the cancellation or partial cancellation. Interest for damages that accrue after the date of the claim must be calculated from the date the expenses or damages accrue to the Purchaser.
4. A final calculation of interest will be performed at the time the claim is paid. The CO's decision must clearly show the amount of damages being paid and the date when interest began accruing. If interest began accruing at various times for different portions of the claim clearly show by claim item when interest began accruing.

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72.63 - Collection of Government Claims

Follow the procedures for collection of Government claims in FSH 6509.11h, chapter 20, section 22.

For assistance in collecting government claims the Contracting Officer should open an e-ticket at the ASC web site: <http://fswb.asc.fs.fed.us/bfm/programs/customer-support/index.php> and ask for assistance with claims.

72.64 - Fraudulent Claims

Section 5 of the CDA (41 U.S.C. 7103(c)(2)) provides that if a Purchaser is unable to support any part of the claim and such inability is attributable to misrepresentation of fact or fraud on the part of the Purchaser, the Purchaser shall be liable to the Government for:

1. An amount equal to the unsupported part of the claim; and
2. The cost to the Government attributable to reviewing that part of the claim. Under the CDA, misrepresentation of fact is a false statement of substantive fact or any conduct that leads to a belief of a substantive fact that is material to proper understanding of the matter at hand and made with the intent to deceive or mislead.
3. COs do not have the delegated authority to issue a decision on a fraudulent claim. Report all instances of suspected fraudulent claims through the U.S. Department of Justice, and the Regional Attorney for OGC.

72.65 – Claims Tracking

The Washington Office, Forest Management Staff maintains a Timber Sale Contract Claims spreadsheet that is used to track payments from and Forest Service reimbursements to the Judgement Fund (sec. 72.61). Regions are required to update their portion of the spreadsheet annually as a part of the Year-End Integrated Reporting Schedule.

Each Region is responsible for tracking claims received by its Contracting Officers. To facilitate identifying trends in contract claims nationally, electronic copies of claims and associated Contracting Officer's decisions shall be sent to the Washington Office, Sale Administration Specialist, Forest Management staff when claim identification numbers are issued and when the corresponding Contracting Officer's decision is issued (FSM 2454).

72.7 - Information Sharing

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Share the content or a summary of Contracting Officer decisions with other Contracting Officers on other administrative units on which the Purchaser is likely to have open contracts. Share unique or controversial decisions with the Forest Management Staff in the Region, Washington Office, and other individuals who may need to respond to the issues raised.

73 - LAWSUITS

73.1 - Appeals of Contracting Officer Decisions

An appeal of a Contracting Officer's decision to the Civilian Board of Contract Appeals (CBCA) or U.S. Court of Federal Claims initiates a lawsuit. Upon learning of an appeal of a COFD, the Contracting Officer shall promptly notify the Regional Forest Management Staff who in turn shall notify local OGC staff and the Washington Office, Sale Administration Specialist, Forest Management. An appeal of a Contracting Officer's decision and the Government's response both adhere to timelines which are based on calendar days not business days.

73.11 – Appeals to the Civilian Board of Contract Appeals

1. The Purchaser has 90 days from the date of receiving the Contracting Officer's decision to appeal to the CBCA (Sec. 72.33, Ex. 01).
2. Submit the appeal to the Regional Office for analysis and transmittal to the Office of the General Counsel Regional Attorney, for advice on how the Government will proceed. The Regional Office will transmit electronic copies of the appeal, claim, and CO's decision to the Washington Office, Sale Administration Specialist, of Forest Management. Include the CBCA docket number with all transmittals.
3. The CBCA's established Rules of Procedure are posted at <https://cbca.gov/howto/rules/procedure.html>. Contracting Officers must obtain and become familiar with the CBCA Rules of Procedure.
4. The CO shall prepare a CBCA Rule 4 Appeal File. This is due within 30 days of the Board's docketing notice unless the Board authorizes additional time. Having a complete claim file (sec. 72.31) will expedite preparation of the Appeal File.
5. Until an appeal is settled or decided, the CO must be prepared to reprioritize or drop other work as needed to meet deadlines established by CBCA proceedings. In complex cases, it may be necessary to bring in a detailer to handle the Contracting Officer's normal duties while he/she focuses on the appeal case.
6. Normally, the OGC represents the Forest Service before the Civilian Board of Contract Appeals. After a case has been docketed OGC will designate an attorney to represent the government and provide notice of appearance to the CBCA.

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7. Proceedings before the CBCA tend to be less formal than in the U.S. Court of Federal Claims. Under Rule 5, appellants are not required to be represented by a licensed attorney. But, if appellant does have legal counsel, the Contracting Officer shall be represented by an OGC attorney during any communications with appellant's attorney. Regardless of the fact that the appellant may or may not retain counsel, it is in the best interest of the CO to have OGC participation in any communications with the Purchaser if an appeal has been filed.
8. A timber sale Purchaser may appeal an adverse Civilian Board of Contract Appeals decision to the U.S. Court of Appeals for the Federal Circuit within 120 days of receipt of the Civilian Board of Contract Appeals decision.

73.12 – Appeals to the U.S. Court of Federal Claims

1. The Purchaser has 12 months from the date of receiving the Contracting Officer's decision to appeal to the U.S. Court of Federal Claims (Sec. 72.33, Ex. 01).
2. Submit the appeal to the Regional Office for analysis and transmittal to the Office of the General Counsel, Regional Attorney for advice on how the Government will proceed. The Regional Office must also transmit electronic copies of the appeal, claim and Contracting Officer's decision to Washington Office, Sale Administration Specialist, of Forest Management. Include the Court's docket number with all transmittals.
3. The DOJ represents the Forest Service before the U.S. Court of Federal Claims. After a case has been docketed DOJ will designate an attorney to represent the Government and provide notice of appearance to the CBCA. The OGC will also designate an attorney to represent the Agency and the Contracting Officer with DOJ.
4. The Contracting Officer must prepare a litigation report in accordance with FSM 1548.11. Having a complete claim file (sec. 72.31) will expedite preparation of the litigation report.
5. Until an appeal is settled or decided, the CO must be prepared to reprioritize or drop other work as needed to meet deadlines established by Court proceedings. In complex cases it may be necessary to bring in a detailer to handle the Contracting Officer's normal duties while he/she focuses on the appeal case.
6. Proceedings before the U.S. Court of Federal Claims are more formal than the CBCA. Appellants are required to be represented by a licensed attorney. The Contracting Officer must be represented by the DOJ or OGC attorney during any communications with appellant's attorney.
7. OGC will guide the Contracting Officer through U.S. Court of Federal Claims procedures and during collaboration with DOJ.

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73.13 - Appeals by Government

The Chief, with prior approval of the DOJ may choose to request judicial review by the U.S. Court of Appeals for the Federal Circuit of an adverse decision from the Civilian Board of Contract Appeals or U.S. Court of Federal Claims. OGC will advise the Forest Service on timing and procedures when considering such a request. The CO must be prepared to assist and provide information in a timely manner.

73.14 - Reconsiderations

The Contracting Officer may modify or reverse an original claim decision prior to or after appeal to the Civilian Board of Contract Appeals based on new information or information that had not been properly considered in the original decision. This action may take place at any time until the CBCA issues a final decision. Reconsiderations are very rare and should only occur after consultation with OGC. The CO will need to provide notice to the CBCA and to the appellant(s) and may need to seek leave of the Board to reconsider any CO's decision.

The CDA does not provide a formal reconsideration process. If interested parties request a formal reconsideration, inform them there is no established reconsideration process and advise them of their appeal rights. In event of a reconsideration, inform all parties to the contract of a reversal or modification of the decision.

The CO may not independently modify or reverse a decision that is the subject of a complaint in the U.S. Court of Federal Claims or that is being appealed to the Court of Appeals for the Federal Circuit. Only DOJ, after seeking leave from the Court, may direct a CO to modify or reverse a decision.

74 – SETTLEMENT AGREEMENTS

74.1-Alternative Dispute Resolution

Section 7103 (h) of the CDA provides that the Contractor and a Contracting Officer may use any alternative means of dispute resolution found in 5 U.S.C., Title 5, Subchapter IV or other mutually agreeable procedures for resolving claims. These alternate means include but are not limited to conciliation, facilitation, mediation, fact finding, minitrials, arbitration and the use of an ombudsman or any combination thereof.

A CO who rejects a Contractor's request for Alternative Dispute Resolution (ADR) proceedings shall provide the Contractor with a written explanation citing one or more of the conditions in section 5 U.S.C., section 572(b) or other specific reasons that ADR procedures are inappropriate.

A Contractor that rejects an agency's request for ADR proceedings shall inform the Agency in writing of the Contractor's specific reasons for rejecting the request.

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Settlement agreements can occur any time when trying to resolve a claim submitted under the Contracts Disputes Act. The CBCA and U.S. Court of Federal Claims generally prefer the parties settle a case and may even require the parties to attempt settlement before hearing a case.

Only DOJ can enter into and sign off on settlement agreements for disputes litigated in the U.S. Court of Federal Claims. In cases before the CBCA, OGC may represent the government in settlement discussions and the CO, after approvals are received in accordance with Departmental Regulations discussed below, is authorized to sign a settlement agreement. Regardless of the venue, settlements must be conducted in accordance with applicable USDA and Agency policy and applicable Department Regulations (DR), including DR 1521-001 (Jan. 4, 2018). Prior to entering into a settlement agreement or ADR process the Contracting Officer, through the Region, must obtain approval from either the Washington Office, Director, of Forest Management, or the U.S. Department of Agriculture (USDA), Under Secretary, dependent on the amount at issue (DR 1521-001). The purpose of this requirement is to assure applicable USDA and Agency policies and regulations are followed, including coordination with OGC, and if applicable, DOJ. The Washington Office, Director, of Forest Management, or a designee, will establish a settlement team consisting of one or more of the following individuals to assist the CO:

1. Contracting Officer of record;
2. Regional Office, Timber Sale Administration Specialist;
3. Washington Office, Timber Sale Administration Specialist;
4. Office of the General Counsel , Regional Attorney assigned to the case;
5. Office of the General Counsel, Washington Office Attorney;
6. Department of Justice, Attorney assigned to the case, if in U.S. Court of Claims; or
7. Any other person(s) the Director deems appropriate.

The settlement team will evaluate the merits of the case including litigation risks and the type of ADR process proposed.

The team will develop a general settlement strategy. Based on this strategy the attorney representing the Government will be provided with a set of settlement parameters including a maximum dollar amount approved by the Director or a designee. No further approval is needed if the case can be settled within those parameters.

If in the opinion of the attorney representing the Government, settlement discussions are progressing but settlement is unlikely within the parameters provided, the Director or a designee may reconvene any or all of the settlement team to re-evaluate the Government's position. The Director or a designee may establish a new set of parameters including a revised maximum dollar amount allowing the ADR process to continue. Final approval for settlements must be obtained in accordance with Departmental Regulations and based on the amount at issue. During some ADR sessions, the OGC or DOJ attorney may need to seek advice from the Director or his/her designee. Arrangements must be made in advance if this need is anticipated.

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EFFECTIVE DATE: XX/XX/2020
DURATION: This amendment is effective until superseded or removed.

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Refer to FSH 6509.11h, chapter 22 for further information regarding settlement procedures on Timber Sale Contracts.