THE GOVERNMENT CONTRACTOR®

THOMSON REUTERS

Information and Analysis on Legal Aspects of Procurement

Vol. 62, No. 27 **July 22, 2020**

Focus

¶ 197

FEATURE COMMENT: Government Contracts Disputes In Focus: Claims Cases And Trends From The First Half Of 2020

While much of the world shut down in the first half of 2020, Government contract claims tribunals issued several important and noteworthy Contract Disputes Act decisions. And, all indications are that Government contractor claims will be an increasingly important practice area in the months ahead. Ellen Lord, the undersecretary of defense for acquisition and sustainment, recently testified before Congress that additional Department of Defense appropriations were necessary precisely because DOD expects so many contractors to file claims arising out of the coronavirus crisis and ensuing confusion as shutdown orders and changes in performance result to adapt to a new normal. See *www.defensenews.com/congress/2020/06/10/defense-industrys-covid-costs-could-tank-dod-modernization-plans/*.

This article summarizes 13 notable claims decisions issued by the courts and boards of contract appeals from January–June 2020. Government contracting practitioners would be wise to study these decisions and take account of how they impact the practice and procedure of litigating claims moving forward.

The U.S. Court of Appeals for the Federal Circuit Reiterates That Contract Must Support the Relief the Contractor Seeks—Claims cases rarely make their way up to the Federal Circuit, so it is always noteworthy when the Circuit issues a decision. In *Army Corps of Eng'rs v. Grimberg Co., Inc.*, 2020 WL 3053992 (Fed. Cir. June 9, 2020), the Federal Circuit reversed an Armed Services Board of Contract Appeals decision granting a contractor an equitable adjustment for a differing site condition. While both the ASBCA and the Federal Circuit agreed that the contractor's interpretation of the contract documents at issue was unreasonable, the ASBCA still ruled in favor of the contractor, reasoning that the Government's interpretation was even more unreasonable. The Federal Circuit rejected this approach, explaining that the controlling inquiry was whether the *contractor* based its claim for relief on a reasonable contract reading: "For over thirty years, we have required that, to receive an equitable adjustment to the contract price, a contractor must prove that it reasonably relied on its interpretation of the contract." Id. at *3, citing *Stuyvesant Dredging Co. v. U.S.*, 834 F.2d 1576, 1581 (Fed. Cir. 1987).

The Federal Circuit's holding that, as a matter of law, the contractor cannot obtain an equitable adjustment based on an unreasonable interpretation of contract documents should not be surprising. But, it serves as a good reminder to carefully plead the appropriate elements when presenting a claim for an equitable adjustment, and always check what the contract documents actually say: contractors "must bear the risk of bidding on a contract without reasonably interpreting what that contract discloses." Id.

The U.S. Court of Federal Claims Permits Recovery of Qui Tam Costs—The COFC issued an unusual holding permitting recovery of additional costs under a fixed-price contract, in the specific circumstance of costs spent defending an ultimately frivolous False Claims Act (FCA) action. In *Tolliver Grp., Inc. v. U.S.*, 146 Fed. Cl. 475 (2020), the Court considered the contractor's appeal of a contracting officer's denial of a CDA claim for an equitable adjustment seeking 80 percent of its legal fees spent defending a qui tam FCA case filed against it. The Government did not intervene or move to dismiss, forcing the contractor to incur costs to defend the litigation all the way up the U.S. Court of Appeals

for the Fourth Circuit, which affirmed the district court's dismissal.

The FCA action focused on the contract's requirement that the Army provide a technical data package (TDP) to the contractor, including the vehicle manufacturer's engineering drawings. The Army failed to deliver the data package, but still directed the contractor to perform. The Army eventually modified the contract to remove the TDP obligations, but in the interim, the relator brought an FCA action alleging that the contractor falsely certified compliance with the nonexistent TDP. The CO determined that the costs to defend against the FCA claim were neither allocable nor allowable within the terms of the firm-fixed-price contract.

The COFC analyzed the claim under *Spearin* doctrine, which provides that when the Government provides defective specifications, the Government is deemed to be in breach of the underlying contract and liable for all costs proximately flowing from the breach. (Note: while the *Spearin* doctrine does not apply to costs to defend third-party claims, the Court held that limitation inapposite to the facts before it because the Government is considered the actual plaintiff in qui tam actions.) Applying that doctrine, the Court held that, in addition to any harm caused by giving a contractor defective specifications, the Government will owe the contractor's defense costs where those defective specifications prompt a relator's frivolous FCA case, and the Government does not promptly intervene to dismiss the action. This is so even under a fixed-price contract. (The Court later allowed $195,889.78 in legal expenses, 80 percent of the amount incurred. *Tolliver Grp., Inc.*, Fed. Cl., No. 17-1763C, Docket #62 (July 14, 2020).) Although this decision is based on a specific fact pattern related to defective specifications, the Court's holding provides further impetus for the Government to move to dismiss frivolous FCA actions against its contracting partners.

The ASBCA Clarifies Estimates Are Not Subject to TINA Disclosure—The relatively infrequent and complex case law interpreting the Truthful Cost or Pricing Data Act (still referred to by its historic name, the Truth in Negotiations Act, or TINA) makes it difficult to discern clear rules about what information is subject to disclosure under the law. TINA requires contractors to submit certified cost or pricing data if a procurement's value exceeds the specified threshold and no exceptions apply. What exactly constitutes the "cost or pricing data" that contractors must disclose is often unclear—but the ASBCA this spring provided additional guidance regarding whether estimates qualify in *Alloy Surfaces Co., Inc.*, ASBCA 59625, April 9, 2020, 20-1 BCA ¶ 37,574; 62 GC ¶ 122. This case held that contractors' in-progress estimates of labor and material usage need not be disclosed, even when they turn out to be accurate. The Board relied on TINA's statutory text exempting business judgments from disclosure in order to reach this result. See 10 USCA § 2306a(h)(1) ("cost or pricing data" "does not include information that is judgmental, but does include the factual information from which a judgment was derived").

In this case, the contractor prepared a proposal for a second delivery order while still performing a prior delivery order under the same contract. The contractor's TINA certification did not include any of the in-process labor or material usage estimates, instead relying on actual, final labor and material costs incurred for prior, completed delivery orders. Meanwhile, the Government clearly knew that the contractor was at the time performing the first task order, and there was evidence that the Government even knew that the contractor prepared monthly reports containing labor and material usage estimates. Yet, the Government requested no information about this ongoing performance before reaching price agreement in the later task order.

The contractor's estimates regarding labor and material usage in the first task order turned out to be very accurate and approximated the final performance rates, and the Army brought a defective pricing suit, asserting that the contractor misrepresented its costs and pricing data on the second task order by failing to disclose the in-process estimates. The ASBCA disagreed and held that it did not matter that these monthly estimates ultimately proved remarkably accurate in predicting final usage rates for the delivery order: "it is impossible to point to a time along the continuum where the estimates become accurate enough to possess the requisite degree of certainty necessary for providing certified cost and data to the government." *Alloy Surfaces*, 20-1 BCA ¶ 37,574. Because, the record revealed that the contractor did not reach final usage rates for the first task order until price agreement was reached on the second task order, and because the Board found the in-process estimates were only business judgments (no matter how accurate), the Board held that those estimates need not have

been disclosed under TINA. This decision should be helpful to contractors in arguing that their internal, in-process reports and estimates should not be subject to disclosure.

This case also serves as a warning to Government negotiators who fail to request known information before price agreement that they may later not be able to demonstrate that they would have relied on the missing information in reaching price agreement. The Board noted that the Government did not meet its burden of demonstrating that even were the estimates subject to disclosure, disclosure of the estimates would have changed the Government's decision to rely on data from completed task orders. The Government relied on this completed performance data with full knowledge of the existence of more recent data from in-progress performance, presumably because it thought that data was more reliable.

The CBCA Addresses Emergency Contracting—The Civilian Board of Contract Appeals issued two decisions in early 2020 speaking to the perils of contracting in a time of emergency. Emergencies will likely be a theme of many post-coronavirus claims, and contractors may very well be frustrated to the extent their well-meaning efforts to support their Government customers end up being uncompensated. These cases emphasize the importance both of documenting the reasons for acting at the time of contract performance, despite the emergency circumstances, and of remembering any express limitations on recovery in the written contract.

Crowley Logistics v. Dep't of Homeland Sec., CBCA 6188, 6312, April 9, 2020, 20-1 BCA ¶ 37,579: When Hurricanes Maria and Irma hit Puerto Rico and the Virgin Islands, the Federal Emergency Management Agency (FEMA) did not have in place any contracts for the transit of equipment or goods from the continental U.S. to either island. The closest existing contract was an indefinite-delivery, indefinite-quantity contract held by Crowley Logistics Inc., for shipments from Puerto Rico to the Virgin Islands, which had a ceiling of only $4 million. FEMA modified Crowley's contract to add 101 contract line item numbers, including shipments from the U.S. to the islands, and increased the price ceiling to $100 million. FEMA quickly exceeded the $100 million ceiling, but instructed Crowley, which had quickly mobilized to meet the needs of the emergency, to keep performing. In a scramble to modify Crowley's contract again, a CO whose warrant was limited to contract actions of $25 million or less executed a modification expanding the scope of the contract by an additional $96 million. FEMA later ratified many of the additional costs that Crowley incurred, but not all.

While many similar stories end poorly for the contractor, in this case, the CBCA found that although the CO lacked a warrant to authorize many of the additional costs, "it is clear and indisputable that other contracting officers who held unlimited warrants of contracting authority not only knew what was happening—if not at the moment of the modification's execution, very soon thereafter—but were also intimately involved in ensuring that Crowley continued performing for months after realizing the modification signatory error." The CBCA enforced the contract as written, despite the problems with CO authority. The Board noted that a CO who did have the requisite authority was copied on the correspondence purporting to authorize the additional costs, and decided that even if that CO's conduct and constructive knowledge did not authorize the costs (which the Board declined to decide on summary judgment), at the very least he implicitly ratified them. This case shows that a contractor who supports its customer during an emergency can recover, despite technical or documentation issues with the contracting paperwork, although the best practice is to always ensure that all technicalities are followed to avoid litigation and all doubt.

Pernix Serka JV v. Dep't of State, CBCA 5683, April 22, 2020, 20-1 BCA ¶ 37,589: Pernix Serka was not quite as lucky as Crowley. Pernix was performing a firm-fixed-price contract in Sierra Leone to construct a rainwater capture and storage system when the Ebola virus outbreak occurred. Pernix requested guidance from the Department of State on how it should respond; State refused to provide any guidance, instead taking the position that it was the contractor's duty to decide how to proceed. Pernix temporarily demobilized and only returned to the worksite after having contracted for additional medical services for its employees. The CBCA refused Pernix's attempt to charge these additional outbreak-related costs to the Government, citing the risk allocation inherent in firm-fixed-price contracts. Contractors attempting to charge personal protective equipment and other coronavirus-related costs to firm-fixed-price contracts may face a similar threat. This case shows the unfortunate consequence of the Government not acting as a good contracting partner, and that, without Government approval of proceeding with increased costs, the

contractor performs at risk. The best practice in such a situation is to document the changed performance and request that the Government either excuse nonperformance under the force majeure clause or approve the changed performance under the changes clause.

Developments in GSA Multiple Award Schedule-Related Claims—General Services Administration multiple award schedule (MAS) contracts carry specific compliance considerations, including when a contractor decides to bring a claim relating to a schedule contract. The CBCA issued two decisions in early 2020 of note to schedule contractors.

Avue Techs. Corp. v. Dep't Health and Human Servs. and GSA, CBCA 6360, Feb. 3, 2020, 20-1 BCA ¶ 37,503: Avue, a software company which does not itself hold a GSA schedule contract but resells its products to the Government through Carahsoft's GSA schedule, brought a CDA claim against the ordering agency (the Food and Drug Administration (FDA)) for breaching the licensing terms associated with its software. The FDA did not act on the claim and Avue appealed the "deemed denial" to the CBCA.

The Government filed motions to dismiss on at least two bases. First, the Department of Health and Human Services (HHS) (FDA's parent agency) alleged that Avue was akin to a subcontractor, which does not have standing to sue under the CDA. The Board found it had jurisdiction because Avue grounded its claims in the licensing agreement between it and the Government that was incorporated into the schedule contract, and thus Avue made a "non-frivolous" claim that it was in direct privity with the Government under that agreement:

> Avue points to a specific writing (the [End User License Agreement], allegedly "incorporated" in the [Federal Supply Schedule] contract) that it considers a government contract. These allegations of the existence of a contract suffice to take the claim out of the realm of subcontractor claims and into the world of claims within our CDA jurisdiction, provided the other jurisdictional requirements are met.

Avue Techs. Corp. v. HHS, CBCA 6360, June 28, 2019, 19-1 BCA ¶ 37,375.

Secondly, both HHS and GSA argued that each other were the proper defendant in the action—HHS argued that Avue's claim required interpretation of the schedule contract, rendering GSA the proper defendant, and GSA responded that no contract between Avue and GSA existed. (Avue filed a second "protective" claim with GSA after HHS argued that GSA was the proper defendant.) The Board refused to dismiss either defendant at this juncture, explaining that it had jurisdiction over one or the other defendant and "pragmatic considerations" counseled against deciding the issue now, without any "case-management benefits" or "genuine prejudice to either respondent" of delaying the decision. *Avue Techs.*, 20-1 BCA ¶ 37,503.

This case accordingly presents two important reminders to contractors doing business under GSA schedule contracts. First, technology companies that have a direct license agreement with the ordering agency may be able to assert claims against the Government for breach of that agreement, even though they do not hold the underlying procurement contract. Second, when filing a CDA claim based on interpretation of a schedule contract, the contractor should file the claim with both GSA and the ordering agency to protect against jurisdictional challenges on appeal.

CSI Aviation, Inc. v. GSA, CBCA 6543, April 9, 2020, 20-1 BCA ¶ 37,580: When an ordering agency cancelled orders previously placed under a GSA schedule contract, the contractor argued it was due its fixed cancellation charges under its commercial price list. The Government countered that the cancellations are instead properly viewed as terminations for convenience. The contractor framed its appeal in terms of whether a GSA schedule contract's standard termination for convenience clause takes precedence over a cancellation charge appearing in the price list incorporated into the schedule contract. The applicable termination for convenience clause, Federal Acquisition Regulation 52.212-4(l) (the clause for commercial item contracts), provides that the "Government reserves the right to terminate this contract, or any part hereof, for its sole convenience …. *Subject to the terms of this contract*, the Contractor shall be paid a percentage of the contract price" (emphasis added). The clause goes on to state that any inconsistencies in the contract shall be resolved by giving precedence to the schedule of supplies/services first, then other addenda to the contract, and only then other paragraphs of the clause, including the termination of convenience provision. FAR 52.212-4(s).

The Board denied the contractor's motion for summary judgment, but made an interesting holding in doing so: "We find that, in the event of a conflict between the 'commercial price list' incorporated in the schedule contract and the standard termination provision in the contract, the price list would control."

But, the Board found that holding does not resolve the appeal because

> the price list incorporated in the schedule contract does not state a price for cancelling an order, and the language used in the price list to refer the reader to a separate, unattached "terms and conditions" document, which allegedly contained the cancellation charge, is too vague or ambiguous for [the Board] to interpret in favor of either party without further factual development.

Under the commercial termination clause, it seems likely that there would have been no conflict if the price list actually proposed how to handle a cancellation. The Board, however, could not determine what the parties' agreed to because the cancellation provisions apparently appeared in a separate document that was not actually attached to the contract.

This case is one to watch, as it could have implications for the standard interpretation rules of GSA schedule contracts. It also confirms that terminations for convenience under commercial contracts do not follow the FAR 52.249 termination for convenience process, and that the Government will be held to commercial terms related to cancellation fees if the Government has agreed to such terms. Commercial contractors should make such terms explicit in the contract documents to avoid the problems faced by CSI in this case. Notably, this case also cited *Avue* and restated its holding: the Board will not dismiss GSA from a CDA action unless it is clear that the schedule contract need not be interpreted to decide the case (which evidently was not true here).

Practice Tips—Not every noteworthy case changes the law or merits lengthy discussion. To conclude this article, the six cases listed below reemphasize rules that all practitioners should know—but sometimes forget during the heat of litigation. In view of these decisions, it is clear that contractors and their counsel must stay abreast not only of the statutory and regulatory CDA requirements but also the evolving case law on these matters. The rules of the game are many and nuanced, and failing to follow them strictly can have dire consequences.

Raytheon Co. v. U.S., 146 Fed. Cl. 469 (Jan. 14, 2020); 62 GC ¶ 33: Although most CDA claims are for money, it is important not to forget the other remedy available under the CDA—declaratory judgment. In this case, the COFC held it had jurisdiction to consider a contractor's appeal of a CO's direction to remove its restrictive markings and apply a Government purpose rights legend to its vendor list. The Court agreed with the Government that Raytheon's claim did not fall within the Court's jurisdiction under 28 USCA § 1491(a)(1) because Raytheon was not seeking money damages for the alleged statutory violation. But, the Court denied the Government's motion to dismiss because Raytheon's request for declaratory relief falls within the Court's CDA jurisdiction under § 1491(a)(2). The Court explained: "The claims covered by this grant of jurisdiction include disputes 'concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, *and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of th[e CDA].*'" Id. at 474 (quoting 28 USCA § 1491(a)(2)) (emphasis in original).

Odyssey Int'l, Inc., ASBCA 62062, Jan. 28, 2020, 20-1 BCA ¶ 37,510: It is a well-known truism that CDA claims must state "a sum certain"—that is, a definite amount that the contractor claims it is due. The Board dismissed a claim for "at least $15,033,862" in this case, citing its many years of precedent holding that "qualifications to a numerical amount, such as the use of the word 'approximately,' 'no less than,' or 'well over' prevent its consideration as a sum certain." When damages numbers are not yet certain, contractors would be better served by pleading a sum certain—for which they have a good faith basis—and revising that number later if necessary. While tribunals will often permit damages revisions that do not alter the substance of the claim presented to the CO, an indefinite claim amount is nearly certain to be dismissed. See, e.g., *Tecom, Inc. v. U.S.*, 732 F.2d 935, 937 (Fed. Cir. 1984) (citing past precedent on the disruptions to the litigation process from a requirement to resubmit a revised damages calculation for agency decision, and holding that "the contractor could legally increase its monetary demand before the ASBCA in view of the intervening prolongation of the contract and the experience of actual operation"); but see *Wheeler Logging, Inc. v. Dep't of Agric.*, CBCA 97, Oct. 10, 2008, 08-2 BCA ¶ 33,984 (finding that revised claim amount that included "new claim elements" must be presented to CO).

Penrose Park Assocs., LP v. U.S., 147 Fed. Cl. 407 (March 23, 2020): Another key CDA claim requirement is certification. Not only must certification be accurate, it must be signed by the contractor—not the contractor's agent. The COFC dismissed this claim because the contractor's attorney signed the CDA certification, instead of the contractor itself.

Parsons Gov't Servs, Inc., ASBCA 62113, April 15, 2020, 20-1 BCA ¶ 37,586: This case serves as an important reminder of the requirement to file an appeal timely with the Board within 90 days of receiving a final decision. In this case, the contractor received a unilateral, final indirect rate determination in September 2018. The Board noted that "[i]t is well settled that a unilateral rate determination is a Government claim." The contractor accordingly had the option of either accepting the rate or filing an appeal, which the contractor did with the Board in July 2019. The Board dismissed the case, as the contractor's right to appeal to the Board expired after 90 days. Notably, it appears the contractor's claim would have been timely filed at the COFC, to which contractors may bring de novo CDA claims within one year of receiving a CO's decision. 41 USCA § 7104(b).

Reed Int'l, Inc., ASBCA 61451, April 16, 2020, 20-1 BCA ¶ 37,587: The statute of limitations presents another obstacle to the successful filing of CDA claims. In this case, the contractor asserted its claim accrued when it paid a certain foreign tax; the Government instead argued that the claim accrued at an earlier date, when the foreign government assessed the tax and the liability became due. The Board agreed with the Government—otherwise, the contractor could delay the running of the statute of limitations by simply refusing to pay until the last minute.

Rapid Temps, Inc. v. Dep't of Veterans Affairs, CBCA 6703, June 19, 2020, 2020 WL 3468029: The submission of a claim to a CO for final decision is a prerequisite for any appeal to the boards or COFC. In this case, the Department of Veteran Affairs denied payment on two contractor invoices. The small business contractor's chief operating officer sent an email to the CO, asking how to dispute the nonpayment. The CO responded by email, citing FAR 1.602-3(d) on nonratifiable commitments. The contractor filed a notice of appeal with the Board, attempting to appeal the invoice rejection. The Board held that the contractor's email exchanges with the CO did not constitute a claim under the CDA and granted the VA's request for dismissal.

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This Feature Comment was written for THE GOVERNMENT CONTRACTOR by* Kara L. Daniels *and* Amanda J. Sherwood*, members of Arnold & Porter's Government contracts practice and resident in the firm's Washington, D.C. office. Together with their colleagues, they counsel and litigate on behalf of federal and state government contractors and grantees.