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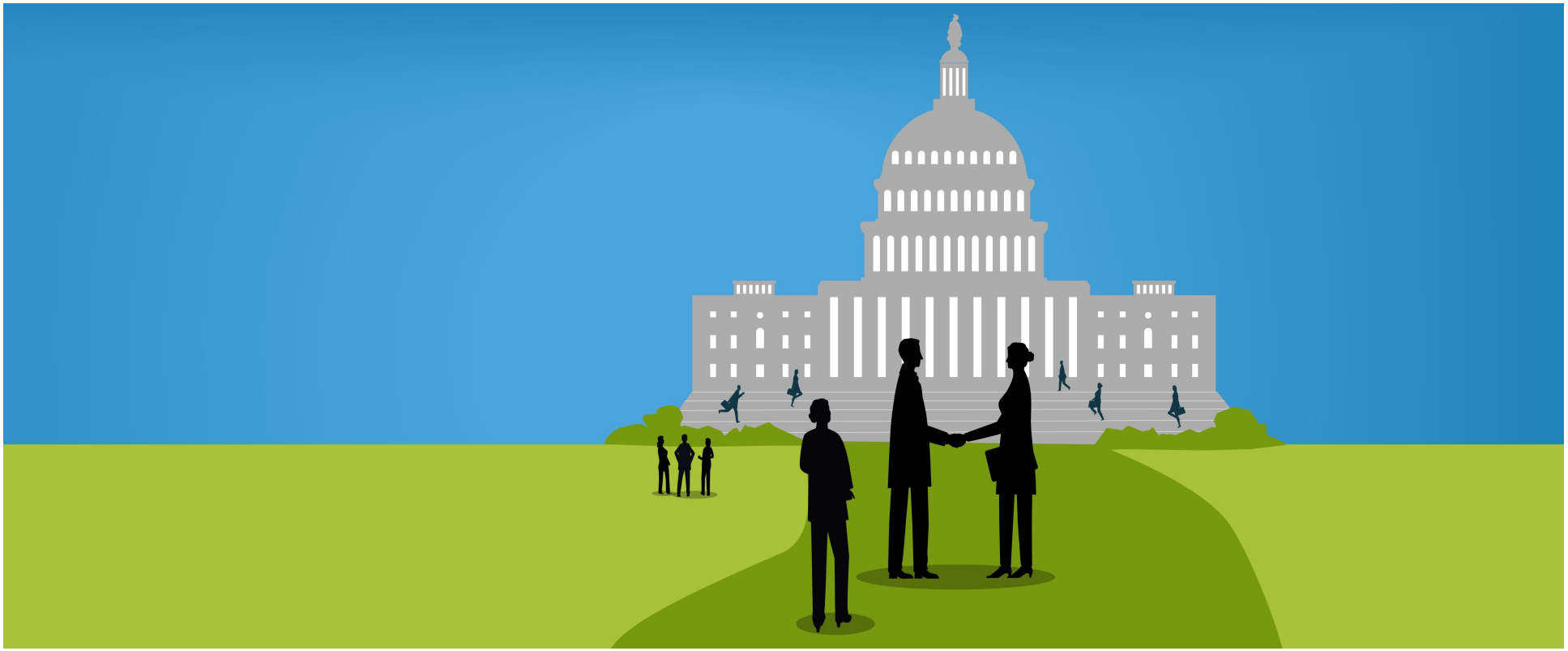

Leveraging Legal Precedents: Impacts to Your Company

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Speaker

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Paul counsels a wide range of companies in contract formation, performance and compliance. Much of his practice focuses on accounting, cost and pricing: CAS, the Truthful Cost or Pricing Data Act (formerly TINA), Federal Acquisition Regulation (FAR) cost principles and DCAA audits. He also represents clients in dispute resolution: claims, appeals (before the ASBCA, CBCA, and Court of Federal Claims), and alternative dispute resolution (ADR), as well as bid protests and Competition in Contracting Act (CICA) overrides. He has successfully represented contractors in precedent-setting CAS cases, many involving benefits issues, litigated a seminal Limitation of Cost clause case, and litigated a series of cases establishing law fundamental to the statute of limitations. He also has experience with Foreign Military Sales (FMS), counsels clients on mergers and acquisitions, financing, appropriations and contract negotiations, and advises research universities, educational institutions and FFRDCs on compliance with issues stemming from grants and agreements. In addition, Paul handles various fraud matters and internal investigations. He is included in Chambers USA: America's Leading Lawyers for Business for Government Contracts.

DRS Global Enter. Sol., Inc., ASBCA No. 61368, 18-1 BCA ¶ 37131

- Armed Services Board of Contract Appeals denied the contractor's motion for summary judgment in a case where the government filed a claim against the contractor for repayment of costs ($8,607,879.23) the government deemed unallowable because the contractor lacked proof of payment.
- The contractor had argued that the government's claim was untimely because the government knew or should have known of its claim as early as 2006 (when the government paid the last invoices at issue).
- The Board held that the government did not have knowledge of the unallowable costs because much of the evidence the contractor relied upon was not in the record, and the contractor produced no "smoking gun." The Board also declined to consider applying the doctrine of laches, because the contractor did not raise this argument in its appeal.

Electric Boat Corp. (EB), ASBCA No. 58672, 19-1 BCA ¶ 37233

- Contractor filed claim for additional costs associated with new OSHA regulations – effective 2004. Contractor requested contract adjustment in 2005 and cost proposal in 2007.
- Government failed to include a special clause allowing price adjustments and did not amend for the clause until 2010. Contractor waited until 2012 to file a certified claim for both its costs and its subcontractor costs.
- Board found claim for EB's costs to be barred by the statute of limitations – regardless of absence of special clause, nothing prevented filing a claim.
  + Board found that there was no continuing claim, because the funding was one continues event for the submarine.
- Board found claim for EB's subcontractor's costs timely, because the subcontractor costs were not eligible for recovery until the H-30 clause was included, and then flowed down.

AMEC Foster Wheeler Env't & Infrastructure, Inc., CBCA 5168, 6298, 2019 WL 995753 (February 27, 2019)

- In September 2011, the Department of Interior (DOI) awarded AMEC a task order for stabilizing and repairing the underground citadel and the shower rooms of the Alcatraz Cellhouse. AMEC filed a certified claim for $12.7 million alleging constructive change and breach of the duty of good faith. AMEC filed appealed (CBCA 5168).
- During discovery of CBCA 5168, AMEC learned that DOI had information that was not disclosed to the bidders. In August 2018, AMEC submitted a new claim for $13.2 million alleging DOI withheld superior knowledge from AMEC prior to award. The CO denied the 2018 claim and AMEC appealed (CBCA 6296).
- DOI filed a motion to dismiss arguing that AMEC's 2018 claim was time-barred by the statute of limitations. DOI maintained that AMEC knew as of January 2012, when it began work, that the solicitation did not reflect the conditions that AMEC actually encountered.
- The Board found that AMEC did not know enough to "permit assertion of" its 2018 claims until AMEC took discovery in CBCA 5168. The Board held AMEC's 2018 claim was timely.

Europe Asia Constr. Logistic, ASBCA No. 61553, 2019 WL 989682 (February 14, 2019)

- April 22, 2010 the Army awarded the contract.
- April 24, 2010, the CO issued a notice to proceed.
- May 17, 2010, the Army terminated for convenience, and reduced the amount of the contract to the $300 DBA insurance payment.
- Contractor submitted a claim in September 2017.
- Board held that the claim was untimely under the statute of limitations and should have been filed within six years of the May 17, 2010 zero sum termination.

United Liquid Gas Co. D/B/A United Pacific Energy, CBCA 5846, 18-1 BCA ¶ 37172

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- Contractor sought partial relief from CO final decision seeking $3,321,946.62 in overpayments.
  - + Agency issued four task orders against the GSA schedule contract for propane gas during fiscal years 2011, 2012, 2013 and 2014, which contractor fulfilled.
  - + In 2016, GSA determined that the contractor overbilled agency on the task orders.
- Contractor argued that $279,029.64 in overpayments occurred prior to 2011 and that this portion of the claim was untimely under the statute of limitations.
- Board concluded that claims in issue began to accrue on January 5, 2011, when the government overpaid the first task order invoice submitted for payment under the task order.
  - + At that point in time, the terms of the contract clearly put both Ft. Irwin and GSA on notice that contractor was overbilling the government and all events that fixed the alleged liability, specifically, in this case, overpayments in a "sum certain," were known or should have been known.
  - + Government claims continued accruing each time Ft. Irwin overpaid a task order 1 invoice under the MAS contract, because every time a payment was made on an invoice, the government knew or should have known of the overpayment and the "sum certain" it was overpaying.
- Therefore, any government claims for overpayments predating June 13, 2011, were time-barred.

The Tolliver Group, Inc. v. U.S., 140 Fed. Cl. 520 (2018)

- Contractor successfully prevailed over qui tam relator in a False Claims Act case brought regarding the contractor's fixed-price, level-of-effort contract. The contractor sought to recover legal fees from the government, but the government denied the claim, the contractor appealed to the Court of Federal Claims, and the government moved to dismiss.
- The Court denied the government's motion to dismiss because:
  + Although neither an express nor implied term allowing cost reimbursement appeared in the contract, the cost principles of FAR 31.2 appeared to apply by operation of law under the *Christian* doctrine.
    - The Court determined that the cost principles applied by operation of law if the contract required cost analysis or if reimbursement of legal fees claimed by the contractor represented a significant or deeply ingrained aspect of a fixed price, level of effort development contract.
  + Since the contract was manifestly established on the basis of cost principles pursuant to FAR 15.404-1 and FAR 31.103, FAR 31.205-47 appeared to apply.
  + The contractor pled sufficient facts to satisfy the requirements of FAR 31.205-47 and the remainder of FAR 31.2 did not otherwise prohibit reimbursement of the legal costs.

Energy Matter Conversion Corp., ASBCA No. 61583, 19-1 BCA ¶ 37225

- Contractor incurred legal fees in connection with DOJ investigation.
- Parties settled, contractor included legal fees in incurred cost submission.
- Board found the costs expressly unallowable:
  - + 31.205-47(b) "specifically state[s] that costs incurred in connection with any proceedings – including investigations – brought by the government for a violation of law that result in disposition by compromise are unallowable if 'the proceeding could have led to debarment.'"
  - + Because proceeding could have resulted in debarment if not resolved, the costs were expressly unallowable.
  - + Could not apportion the costs to reflect "success" to the extent that the settlement was only 55% of the potential liability.

Raytheon Co., ASBCA No. 57743, *18-1 BCA ¶ 37129*

- ASBCA denied the parties' motions for reconsideration of the Board's previous decision, in which, the Board denied Raytheon's appeal from the corporate administrative contracting officer's (CACO's) assessment, and non-waiver, of penalties and interest concerning lobbying costs and sustained Raytheon's appeal from the government's claim for penalties and interest under FAR 42.709-1(a)(1) regarding aircraft fractional lease costs.
- The Board held:
  - + Salaries of employees engaged in unallowable lobbying activities were "expressly unallowable" as "directly associated costs" because the relevant FAR provision states that costs "directly associated with" lobbying activity are unallowable, and although salaries are not spelled out as "directly associated" costs, it is "obvious" that salary costs are associated with unallowable lobbying costs.
  - + Raytheon's airplane lease costs are not expressly unallowable, making a distinction that while Raytheon previously agreed not to charge such costs to the government (in which case they would be expressly unallowable and subject to level two penalties), Raytheon did not concede that the costs were unallowable under the FAR.
  - + The government failed to pursue level two penalties earlier in the case, and could not raise them in its motion for reconsideration.

Adams & Assoc., Inc. v. Dep't of Labor, CBCA 5642, 18-1 BCA 37181

- Contractor sold its office building to an affiliated company, then leased the office back. On a later contract, the contractor included the rent for the building in its overhead pool.
- The government limited the reimbursable rental costs to the costs of ownership under FAR 31.205-36(b) where a sale and leaseback occurred and where a lease existed between companies under common control.
- The Civilian Board of Contract Appeals agreed and found:
  - The contractor owned the building throughout until it sold the building to its affiliate and thereafter leased the building, so this was a sale and leaseback that triggered the limitations on allowability in the regulations.
  - The entities involved in the lease were under common control.
  - The contractor was allowed the normal costs of ownership and not the rent paid where a sale and leaseback occurred and where the contractor and its landlord were under common control.
  - The record did not contain a dollar figure for the facilities capital cost of money under FAR 31.205-10(b)(3), so the Board refused to make an adjustment.

United Launch Servs. LLC v. United States, 139 Fed. Cl. 664 (2018)

- CAS 406 requires that a contractor's practice of deferring costs for expensing in later cost accounting periods be GAAP-compliant.
- The contractor filed a CDA claim against government, claiming that the government breached the launch capability contract by demanding repayment of $72,198,875 and refusing to make any further deferred support costs payments and also breached the contract by failing to negotiate reasonable value for deferred production costs and to allocate it among rocket launch missions thereby causing contractor to incur $106,095,968 in damages.
- The Court denied the contractor's motion for summary judgment, holding:
  - The "plain and palpable" standard advanced by ULS was inapplicable and found that if ULS' accounting practices did not comply with GAAP, the deferred costs were unallowable costs.
  - CAS 406 required that a contractor's practice of deferring costs for expensing in later cost accounting periods be GAAP-compliant.
  - GAAP determined whether claimed costs were traceable to losses on other contracts and not allowable under FAR 31.205-23.
- The contractor's motions for interlocutory appeal and to stay proceedings pending appeal were denied because it was unclear whether resolution of the proper illegality standard would materially affect the court's determination regarding the enforceability of the payment provisions. United Launch Servs., LLC v. United States, COFC No. 12-380C (Nov. 1, 2018).

Parsons Evergreene, LLC, ASBCA No. 58634, 18-1 BCA ¶ 37137

Case addresses the parties' respective burdens when the Government challenges the reasonableness of costs.

- Air Force argued that contractor had not met its burden of proving its claimed costs were reasonable under FAR 31.201-3(a).
  - + Board found following language in FAR 31.201-3(a), unambiguous: "If an initial review of the facts results in a challenge of a specific cost by the contracting officer or the contracting officer's representative, the burden of proof shall be upon the contractor to establish that such cost is reasonable."
  - + Board stated that 31.201-3(a) requires two actions by the government: (1) it must perform an "initial review of the facts," and (2) that review results in a "challenge" to "specific costs."
  - + The contractor then has the burden to prove the reasonableness of the challenged specific costs.
- Board found that DCAA and the Air Force's accounting expert "challenged all costs based on the [Air Force's] flawed technical review, but failed to challenge the reasonableness of any specific costs in the claim."
  - + Board held that: "Such a blanket challenge to all costs is insufficient to satisfy FAR 31.201-3(a)."
- Therefore, the contractor satisfied its burden to prove that its claimed costs were reasonable.

Phoenix Data Solutions LLC, F/K/A/ Aetna Government Health Plans, ASBCA No. 60207, 18-1 BCA ¶ 37164

Contractor sought recovery of preaward costs after termination of contract for convenience following successful GAO bid protest.

- Agency effectively asked board to convert termination for convenience to a termination for default, arguing that contractor could have structured its bid and responded to the stop-work order in a manner that would have resulted in a lower potential cost to the government.
- Board found contractor's preaward costs allowable as they met the four-part test of *Radiant Technologies, Inc.*, ASBCA No. 38324, 91-3 BCA ¶ 24106:
  - (1) the costs must be incurred prior to the effective date of the contract; and
  - (2) the costs must be incurred directly pursuant to the negotiations and in anticipation of the contract award; and
  - (3) the incurrence of the costs must be necessary to comply with the proposed delivery schedule; and
  - (4) the costs must have been allowable if they were incurred after contract award.
- Parties did not dispute that the pre-contract costs were incurred prior to the effective date of the contract.
- Record established that contractor sought reimbursement for costs incurred after it submitted its bid in response to the solicitation, thus the costs would not have been incurred except in anticipation of performing the contract.
- Contractor not required to prove that the pre-contract expenditures were necessary to meet the delivery schedule - contractor must have reasonably believed, at the time of the incurrence of the costs, that the pre-contract work was necessary and undertook it in good faith.
- Pre-contract costs would be allowable if incurred following contract award as they were necessary transition-in activities within the scope of CLIN 0001.

CB & I AREVA MOX Services, LLC v. United States, 138 Fed. Cl. 292 (2018)

- Breach of contract claim on government's claw back of $21.6 million in provisional incentive fees paid to contractor constructing facility to transform weapons-grade plutonium into fuel for commercial nuclear power plants prior to completion of project.
- Contract unambiguously provided that the incentive fees paid to contractor were to remain in the custody of contractor until construction was completed.
- Agency attempted to claw back $21.6 million in provisional incentive fees on assertion that contractor had hopelessly exceeded the estimated project cost, had no chance of meeting the project schedule parameter, and thus would not be able to show entitlement to any incentive fees at project completion.
- Contractor argued that it was not responsible for the increased costs and schedule delays.
- Court concluded that regardless of which party was responsible for the increased costs and schedule delays, none of the contract provisions permitted the agency to claw back provisional incentive fees before the completion of the facility.
- Contracting officer's denial of contractor's certified claim, and demand for refund of $21.6 million, as a way to gain leverage over contractor through baseless retaliation was a failure of its duty to act in good faith.
- Declaratory relief granted, requiring agency to return $21.6 million to contractor until the project was completed.

The Boeing Co., ASBCA No. 60373, 18-1 BCA ¶ 37112

Issue concerned whether software developed with costs charged to Technology Investment Agreements (TIAs) pursuant to 10 U.S.C. § 2358, Research and development projects, constitute software developed "exclusively at private expense" as term is defined in DFARS 252.227-7014(a)(8).

- In relevant part, DFARS 252.227-7017(a) provides that:
  - (8) *Developed exclusively at private expense* means development was accomplished entirely with costs charged to indirect cost pools, costs not allocated to a government contract, or any combination thereof.
  - (9) *Developed exclusively with government funds* means development was not accomplished exclusively or partially at private expense.
  - (10) *Developed with mixed funding* means development was accomplished partially with costs charged to indirect cost pools and/or costs not allocated to a government contract, and partially with costs charged directly to a government contract.
- A TIA dated November 2001 was for the Airborne Manned-Unmanned System Technology—Demonstration (AMUST-D) research and development effort.
- The AMUST-D TIA was described as cooperative agreement under 10 U.S.C.§ 2358.
  - The government contributed $8,827,130 to the AMUST-D effort, while Boeing did not contribute any funds to the effort.
- June 2003 TIA for the Manned/Unmanned Common Architecture Program (MCAP) research and development effort.
  - Boeing to contributed an undisclosed amount and the government contributed $11,800,000 to the MCAP effort.
- ASBCA held to the extent that the software was funded by the AMUST-D and MCAP TIAs, the costs were not allocated to a government contract, because the TIAs were not "contracts" pursuant to the definition in the FAR.
  - Funding satisfied the definition of "developed exclusively at private expense" at DFARS 252.227-7014(a)(8).
  - Expenditures did not satisfy the definition of "developed with mixed funding" because the costs charged to the TIAs were not charged directly to a government contract as required by DFARS 252.227-7014(a)(10).
- Therefore, software developed with costs charged solely to the TIAs were developed exclusively at private expense.

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Questions?