



Professional Perspective

ABCs of CDA Claims Litigation

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Tribunals hearing Contract Disputes Act (CDA) claims issued decisions containing several important reminders to government contractors in the first half of 2020. These tribunals include the Armed Services Board of Contract Appeals (ASBCA), Civilian Board of Contract Appeals (CBCA), Court of Federal Claims (COFC), and the Federal Circuit.

This alert summarizes a few quick ABCs of claims litigation coming out of these decisions, which practitioners and contractors alike would be wise to study, as they establish a clear roadmap contractors must follow in order to obtain relief under the CDA.

Always Read the Contract

When considering possible contract claims, be sure to read and follow the terms of the contract—which may govern the available theories of relief (and government defenses), circumscribe the available recovery, contain timing considerations for notification to the contracting officer, or otherwise define the rights and obligations of the parties.

Are there other relevant documents, and are they attached to the contract? Recent CBCA cases permitted suit based on a direct license agreement between a technology company and a government customer, even when that customer purchased the software through a reseller, but refused to summarily decide that commercial terms that were not actually attached to the contract applied to the parties' relationship. Even better, check the contract provisions constantly throughout contract performance to clarify any possible ambiguities that could impact rights later on. The Federal Circuit confirmed in June 2020 that only reasonable contract interpretations may serve as a basis for recovery, and the burden is on the claimant.

Be Sure to Document

Maintain contemporaneous documentation to address potential disputes in the future. Changes happen, and contractors should be sure to document the reasons behind those changes, the direction or agreement from a contracting officer, and the direct link between the change and any increased costs to ensure later recovery of those costs (and segregate those costs if possible).

The more and clearer the documentation, the better the chances for recovery later on. For instance, in one appeal decided in April 2020 involving emergency contracting, the CBCA granted relief for the contractor despite issues with contracting officer authority. The CBCA relied on the fact that a contracting officer who did have the requisite authority was copied on the correspondence purporting to authorize the additional costs.

Care, however, should be taken not to proceed with changed work without direction by the contracting officer (whether or not the contracting officer agrees the work is a change). The CBCA recently refused a contractor's attempt to pass along increased costs resulting from the Ebola epidemic under the terms of its fixed price contract, when the contractor elected to incur additional costs to perform despite the contracting officer refusing to provide direction on how to proceed.

Craft a Written CDA Claim Meeting All Technical Requirements

Even the most meritorious claim will fall flat if it misses one of the procedural requirements governing CDA claims. The claim must be in writing and contain a proper certification, signed by a company representative and not its attorney (an error a contractor made in a COFC case dismissed in March 2020).

The claim must be filed within the applicable statute of limitations and contain a sum certain (without any qualifying language such as "approximately," per established ASBCA case law) if claiming money damages (but as COFC recently reminded the contracting community, the CDA also permits contract interpretation-based claims). Lastly, the claim must be filed with the proper contracting officer—in a multiple award schedule context, 2019 and 2020 CBCA decisions make clear that the safest bet is to submit both to the GSA and the ordering agency.

Decide Which Forum For Appeal and Determine Deadlines

Don't dally after receipt of the contracting officer's written decision on a claim. Contractors lose their right to appeal to the Boards within 90 days and to COFC within one year, and these deadlines are not flexible, no matter the cause of the delay. The decision of which forum to select should be made based on the facts of the case and not because the contractor missed a deadline.