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Legal Roundup - DHG Government Contract Year in Review

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Northrop Grumman Corp. ASBCA No. 61775 (Oct. 7, 2020)

- **Northrup froze a defined benefit pension plan, triggering a CAS 413 requirement to calculate the difference between the plan's assets and liabilities.**
  - The present value of liabilities exceeded assets by approximately $98 million.
  - Based on overhead costs allocated to the government, Northrup determined that the government owed $74 million and submitted a claim for this amount.
- **The government objected to Northrup's interpretation of CAS 413-50(c)(12), which it argued did not require it to make up the difference in the plan's future liabilities.**
  - The ASBCA disagreed, finding that the goal of CAS 413-50(c)(12) is to ensure the pension plan is fully funded.
- **The government also objected to Northrup's use of updated mortality tables to calculate the plan's shortfall.**
  - Citing the Prefatory Comments to the 1995 CAS, the government argued that Northrup was required to use the tables it had used in setting up the plan.
    - The ASBCA disagreed, finding that this rule was not intended to "prevent contractors from using assumptions that have been revised based on a persuasive actuarial study," such as updated mortality tables.
- **The ASBCA also dismissed the government's objection to Northrup's method of accounting for tax liability on the plan's income: it had discounted them by 35% rather than accounting for tax paid.**
  - While the Board agreed the CAS require taxes on income from a pension plan to be treated as an administrative expense, the Board found the CAS violation resulted in no material cost difference.

Boeing Co. v. United States, 968 F.3d 1371 (Fed. Cir. 2020)

- **Boeing challenged the validity of FAR 30.606(a)(3)(ii), which prohibits offsetting increased and decreased cost impacts arising from multiple changes in cost accounting practices.**
  - Boeing claimed that application of FAR 30.606(a)(3)(ii) was a breach of contract and an illegal exaction.
- **Government claimed that Boeing waived its right to challenge the application of FAR 30.606(a)(3)(ii) because Boeing did not challenge the regulation before entering into the CAS-covered contract.**
  - COFC agreed, dismissing the breach of contract claim – essentially incorporating the non FAR part 52 provisions into a contract.
  - COFC also dismissed illegal exaction claim because Boeing could not identify a money-mandating statute or regulation to support its theory.
- **Fed. Cir. reversed COFC on both claims.**
  - Boeing could not "waive" challenge to FAR 30.606(a)(3)(ii) where the CO had no ability to waive the mandatory regulation & the government could not say how Boeing could have challenged the regulation prior to entering into the contract.
  - Boeing's attempt to recover money already paid to the government conferred jurisdiction for the illegal exaction claim, without the need to identify a money-mandating statute or regulation.

Raytheon Co. v. Sec'y of Defense, 940 F.3d 1310 (Fed. Cir. 2019)

- **FAR 31.205-22(a) provides that costs "associated with" a list of lobbying and political activities are unallowable.**
  - Salary not specifically named or stated (nor is any other type of cost).
- **Fed. Cir. held that "[c]osts unambiguously falling within a generic definition of a 'type' of unallowable cost are also 'expressly unallowable.'"**
  - Court found in-house lobbyist salaries a "prototypical" lobbying expense.
- **Decision limited to lobbying activities but creates uncertainty for other types of costs subject to a FAR Part 31 Cost Principle that uses similar "associated with" language.**
- **Overturned part of a 2015 ASBCA *Raytheon* case finding that lobbying costs were not expressly unallowable.**

DynCorp Int'l LLC, ASBCA No. 61950 (Sept. 29, 2020)

- **DCMA determined that DynCorp improperly recovered costs of severance payments made to its former CEO that exceeded the FAR's cap on the recovery of compensation.**
- **DynCorp argued that severance payments do not meet the definition of compensation under FAR 31.205-6(p) and are thus not subject to the compensation cap.**
- **ASBCA found that severance pay is not compensation, but also that costs DynCorp incurred in making severance payments were not reasonable.**
  - Severance payments were two times the CEO's salary, which itself exceeded the statutory cap on compensation.
  - "Bottom line: unallowable salary cost used in a severance pay calculation results in unallowable severance costs – unallowable in, unallowable out."

SRA Int'l, Inc. v. Dept. of State, CBCA Nos. 6563, 6564, 20-1 BCA 37543

- **SRA held a task order and a contract, both subject to incurred costs audits under FAR 52.215-2 and 52.216-7.**
- **In a 2018 disclaimer opinion on SRA's FY 2012-15 incurred cost proposals, DCAA questioned $29 million.**
  - DCAA stated that SRA failed to timely provide supporting documentation to substantiate claimed costs for subcontractors and ODCs were reasonable, allocable, and allowable.
  - During negotiations, SRA attempted to provide supporting documentation it did not submit to DCAA.
- **The COFDs asserted claims against SRA for recovery of the $29 million in disallowed costs & stated that SRA's failure to produce documentation during the audit violated FAR retention requirements.**
  - DOS designated the COFDs as its complaints before the CBCA and attached the DCAA audit.
- **SRA filed a motion to dismiss, alleging the COFDs (1) failed to provide adequate notice as to the basis and amounts of DOS's claims, and (2) failed to state a claim upon which the Board could grant relief.**
  - CBCA denied both bases for dismissal, finding the audit report provided an explanation of DOS's claims and that DOS had asserted a plausible claim that SRA failed to support its incurred costs.

Alloy Surfaces Co., Inc., ASBCA No. 59625, 20-1 BCA 37574

- **Alloy held an IDIQ contract with the U.S. Army for decoy flares.**
- **In Apr. 2006, the Army requested that Alloy provide a price proposal for tripling its usual monthly output of decoy flares.**
  - To support its proposed costs, Alloy provided actual material and labor usage rates from delivery orders it completed in Aug. 2005 and Feb. 2006.
    - + In negotiating the price, the Army used a weighted average of these two delivery orders.
- **DCAA conducted a post-award defective pricing audit in Sept. 2006, using a weighted average of five delivery orders to recommend a $13 million price adjustment.**
- **ASBCA decided that the job cost reports were not "cost and pricing" data as that term is defined in TINA.**
  - The defective pricing clause was not a vehicle for repricing a contract deemed to be unreasonably priced.
  - The Army also failed to demonstrate that having more accurate data would have changed its decision to use a weighted average of the Aug. 2005 and Feb. 2006 orders.

Electric Boat Corp. v. Sec'y of the Navy, 958 F.3d 1372 (Fed. Cir. 2020)

- **Contract for construction of submarines included a "change-of-law" clause (H-30) allowing price adjustment for certain changes in federal laws or regulations.**
  - No adjustment under change-of-law clause for contract costs incurred prior to Aug. 2005.
- **New OSHA regulation effective Dec. 2004 increased cost of construction.**
  - Electric Boat submitted a Notification of Change informing the Navy of increased costs due to the OSHA regulation in Feb. 2005 & a cost proposal for the increased costs due to the OSHA regulation in June 2007.
  - Navy challenged the costs in Oct. 2008 & Electric Boat submitted a revised cost proposal in Apr. 2009.
  - Navy denied entitlement to an adjustment in May 2011 and Electric Boat filed a certified claim in Dec. 2012.
- **ASBCA held that claim accrued in Aug. 2005, when clause first provided right to price adjustment.**
- **Fed. Cir. affirmed ASBCA, finding that Electric Boat's failure to file a claim was not excused by the fact that the Navy did not formally refuse to adjust price until May 2011.**
  - Court also rejected argument that claim accrued after Aug. 2005 because Electric Boat was being fully compensated until its costs exceeded the contract price (which occurred after Dec. 2006): Electric Boat could have filed a claim before incurring actual costs.
  - Similarly, court rejected argument that the claim was timely as to two of the submarines for which the Navy did not authorize funds until after Dec. 2006: Electric Boat was not precluded from filing a claim for adjusted target costs for these two submarines.

Reed Int'l, Inc., ASBCA Nos. 61451-53, 20-1 BCA 37587
Triple Canopy, Inc., ASBCA Nos. 61415 et al., 2020 WL 6372672 (May 7, 2020)

Reed

- **Reed held contracts for security services in Afghanistan that incorporated by reference FAR 52.229-6, "Taxes-Foreign Fixed-Price Contracts"**
  - "The contract price shall be increased by the amount of any after-imposed tax . . . that the Contractor is required to pay or bear."
- **In March 2011, the government of Afghanistan assessed Reed fees for unregistered workers, which Triple Canopy appealed.**
- **In July 2011, Reed paid the fees.**
- **In July 2017, one day shy of six years after it paid the fees to the government of Afghanistan, Reed submitted its claims seeking reimbursement.**
- **ASBCA found that the claim accrued when Reed received the letter demanding payment (Mar. 2011), even where the final amount was uncertain, and that Reed's appeal to the government of Afghanistan did not toll the statute of limitations.**

Triple Canopy

- **Contracts for security services in Afghanistan that incorporated by reference FAR 52.229-6, "Taxes-Foreign Fixed-Price Contracts"**
  - "The contract price shall be increased by the amount of any after-imposed tax . . . that the Contractor is required to pay or bear."
- **In Mar. 2011, the government of Afghanistan assessed Triple Canopy fees for unregistered workers, which Triple Canopy appealed.**
- **In July 2011, Triple Canopy paid the fees.**
- **In June 2017, Triple Canopy submitted claims seeking reimbursement for the fees paid to the government of Afghanistan.**
- **ASBCA found that the claim accrued when the fee was assessed (Mar. 2011), not when they were paid, and that Triple Canopy's appeal to the government of Afghanistan did not toll the statute of limitations.**
  - ASBCA did not agree that filing a claim while simultaneously appealing the assessment would subject Triple Canopy to liability under the False Claims Act.

Parsons Gov't Servs., Inc., ASBCA No. 62113, 20-1 BCA 37586

- **Parsons leased a building to the government, which compensated Parsons through depreciation charges and later-use charges recovered through Parsons's incurred cost submissions.**
- **Parsons submitted its FY 2011 incurred cost submission (ICS) in Sept. 2012.**
- **In Mar. 2018, while the FY 2011 ICS was still pending, Parsons notified the CACO it was entitled to lease costs greater than the amounts it proposed in its FY 2011 ICS.**
  - Parsons did not submit a revised FY 2011 ICS.
  - In Sept. 2018, the CACO issued a unilateral rate determination for Parsons's FY 2011 rates, which did not include the additional lease costs.
- **In March 2019, Parsons submitted a certified claim to the CACO for the additional lease costs and withdrawal of the unilateral rate determination.**
- **ASBCA found that both claims were time-barred.**
  - The unilateral rate determinations were final because not appealed within 90 days.
  - To be timely, Parsons's claim for a sum certain for costs incurred during 2011 were required to have been submitted by the end of 2017.

1000-1100 Wilson Owner, LLC v. GSA, CBCA No. 6506, 20-1 BCA 37642

- **GSA leased office space from Wilson under two consecutive leases.**
- **In Nov. 2012, a GSA budget analyst informed Wilson that GSA had improperly reimbursed Wilson approximately $34k for local taxes under the first lease.**
  - In Dec. 2012, the CO issued a letter withholding an amount equal to the contested taxes from payment under the first lease.
  - Wilson objected to the deduction but did not invoice for the taxes for the remainder of either the first or second lease.
- **In Oct. 2014, GSA demanded $105k to reimburse GSA for overpayment of taxes under the first lease; in July 2016, GSA deducted $105k from payment under the second lease.**
- **GSA did not issue any formal written communications about the taxes, nor did the CO issue a final decision or any other findings regarding the taxes.**
- **Wilson submitted a claim in Nov. 2018, challenging GSA's refusal to pay the local taxes and alleging an illegal setoff and breach of both leases.**
- **CBCA determined that GSA's claim accrued in Nov. 2012, when it first notified Wilson of the overpayment.**
  - The CO had asserted a claim for $34k within the limitations period by issuing a letter withholding that amount in Dec. 2012.
  - There was no evidence the CO made a determination concerning the $105k withheld; GSA's financial services division had set off the amount, rather than the CO.
- **GSA's claim for $105k was barred by the statute of limitations because the CO did not determine the basis or amount of liability within six years of claim accrual.**

Abozar Afzali Construction Co., ASBCA No. 61561, 2020 WL 6372673 (May 6, 2020)

- **The government terminated Abozar's contract for convenience in May 2010 and Abozar submitted a termination settlement proposal as an invoice to the CO the same month.**
- **Abozar again sent invoices to the government in Sept. 2010 and Sept. 2011; the government paid the Sept. 2011 invoice.**
- **In Sept. 2017, Abozar emailed the ASBCA seeking information about how to submit its claim.**
  - ASBCA referred the request to Air Force COs, who responded to Abozar in Nov. 2017; Abozar submitted its claim to the COs in Dec. 2017, and a CO issued a final decision denying the claim in Feb. 2018.
- **ASBCA found that in terminations the parties must attempt to negotiate a termination settlement proposal "leading to an impasse" before submitting a claim.**
  - For a claim to accrue, amount of liability must be fixed and events must "permit assertion of the claim."
- **Abozar's claim accrued in Sept. 2011; barred by CDA Statute of Limitations.**
  - Abozar gave up in its attempts to obtain a larger settlement at this time, and
  - Impasse defined as "the point where an objective observer would conclude that the resolution through continued negotiations is unwarranted or has been abandoned by the parties."

Doubleshot, Inc., ASBCA No. 61691, 2020 WL 6372674 (July 22, 2020)

- **Doubleshot held four CPFF contracts; the CO deobligated funds on two of the contracts in May 2012, after Doubleshot did not submit its FY 2009 & 2010 incurred cost proposals.**
  - After a site visit, DCAA determined that Doubleshot did not maintain a general ledger and "its accounting system is nonexistent."
  - Although the CO stated that he would settle the contracts without an audit using a 20% decrement factor, the CO did not unilaterally set rates.
- **Doubleshot provided its incurred cost proposals in Aug. 2013 and its general ledgers in Dec. 2015.**
- **DCAA issued an audit report questioning direct and indirect costs in June 2017.**
- **COFD demanding payment in June 2018.**
- **ASBCA found the government's claim was not time-barred.**
  - Nothing showing CO knew or should have known in May 2012 amounts that were overpaid: a party can wait until it knew or should have known enough to formulate a sum certain before submitting a claim.
  - Contract required Doubleshot to submit ICPs and general ledgers, which it did not do until 2015.
  - "Doubleshot cannot fail to comply with its contractual duties, while at the same time contending that the statute [of limitations] is running on the Government's claim."

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Questions?

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