BRIEFING PAPERS® SECOND SERIES

PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

A [Legal] Affair To Remember: Claims Cases And Lessons Learned In The Second Half Of 2021

By Kara Daniels and Amanda Sherwood[*]

Following up on our past articles,[1] in this BRIEFING PAPER we summarize notable Contract Disputes Act (CDA) decisions by the courts and boards of contract appeals from the second half of 2021. With holdings both timeless and at times novel, we draw inspiration from similarly unforgettable lines from classic cinema. "Fasten your seatbelts. It's going to be a bumpy [and detailed case law summary]."

Rebel Without A [Contract]: "You Say One Thing, He Says Another, And Everybody Changes Back Again"

The existence of an implied-in-fact contract is difficult to prove, and contractors would do well to remember that trying to imply a contract in the absence of a formal written agreement is "risky business." Two recent cases make this point and left disappointed contractors in their wake.

In *Intellicheck, Inc.*,[2] the Armed Services Board of Contract Appeals (ASBCA) ruled that an agency's inaction could not constitute acceptance of an offer to form a contract. A federal government subcontractor argued it formed an implied-in-fact contract with the Navy to store and maintain government property until the Navy provided disposal instructions. The task order in question ended on September 6, 2012, and the prime contractor filed a claim against the Navy to recover additional costs incurred during performance on September 23, 2013. The prime contractor and the Navy reached a settlement on August 22, 2014, and the settlement included a release of all subcontractor costs. In April 2015, the subcontractor contacted the Navy, advising that it was still in possession of "very large marine buoys that had to be stored in rented space and required ongoing maintenance." The subcontractor disposed of this property, in accordance with the Navy's instructions, in December 2015. The subcontractor then submitted a certified claim for main-

[*] *Kara Daniels and Amanda Sherwood are 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.*

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tenance and storage costs dating from August 2014 based on an alleged implied-in-fact contract to maintain the property safely, which the Navy denied. The board reasoned that no implied-in-fact contract existed between the subcontractor and the Navy, because there was no evidence of mutuality of intent to contract or an unambiguous offer and acceptance. The board first rejected the subcontractor's argument that by entering into an express contract with the prime, the Navy also had entered into an implied-in-fact contract with the subcontractor. The board next rejected the subcontractor's argument that, after the close out of the express contract, the Navy, "through its actions of not providing timely disposal instructions," accepted the subcontractor's unstated offer of continuing to maintain the property. In short, the board held that the parties' inaction did not constitute evidence of creating a new, implied-in-fact contract between the Navy and the subcontractor. While the Navy knew the subcontractor retained possession of the property, the Navy never took any action that could be interpreted to create a new contract with the subcontractor. While this may seem an unfair result, it is an important reminder that subcontractors lack privity with the government and should ensure their subcontracts provide adequate remedies. Of note, the board observed that the ongoing storage costs and disposal of the property "should have been addressed before the Navy and the prime executed the August 2014 settlement agreement and before the task order was closed out."

In *6601 Dorchester Investment Group, LLC v. United States*,[3] the contractor's mistake was trusting a government agent without authority, interactions with whom could not generate an implied-in-fact contract. The contractor alleged that it was incentivized to participate as a landlord in a Department of Housing and Urban Development (HUD) housing voucher program targeted to veterans based on a Department of Veterans Affairs (VA) agent's promise to reimburse the contractor for any unpaid rent owed by, or apartment damage caused by, the veteran participants. Apparently the contractor actually did receive some such payments, and when they stopped, it sued in the U.S. Court of Federal Claims (COFC) based on an implied-in-fact contract. The COFC held the contractor failed to allege facts sufficient to establish that there was any meeting of the minds with the government, and even had there been, the contractor failed to establish that the individual with whom the contractor communicated had actual authority to bind the government or that any reasonable inference could have been made that the agent had implied actual authority. Furthermore, any government agreement to reimburse the contractor on behalf of the veteran participants in the HUD program would have directly contravened the express regulation of that program in several respects. Again, relying on an implied contract with the government is never where a company should aim to be. The best practice is to verify that the official has actual authority to contract and agree to the terms, and to document the agreement in writing.

Garden Stat[ute Of Limitations]: "[G]ood Luck Exploring The Infinite Abyss"

The CDA's six-year statute of limitations[4] can prove devastating when contractors fail to timely assert their claims. Even worse when that failure results from legitimate confusion regarding when a claim accrues. Three dueling statute of limitations decisions in the second half of 2021, two finding a contractor's claims untimely and the other reaching the opposite result, tease out the intricacies of this doctrine. These cases reinforce that the central inquiry is when a contractor could bring its claim under the specific factual circumstances—a contractor may be reasonable to wait to file in some circumstances but cannot bide its time in others.

Editor: Valerie L. Gross

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First, in *BNN Logistics*,[5] the ASBCA, relying on the U.S. Court of Appeals for the Federal Circuit's decision in *Electric Boat Corp. v. Secretary of the Navy*,[6] clarified that a claim accrues when a contractor knows of some sort of injury, not when it finds out the precise amount of damages resulting from that injury. The unlucky contractor in this case received invoices back from the Army explaining that the Army was deducting the contractor's payments due to performance issues. While the contractor argued that its claim did not accrue until it actually received the lesser payment from the Army, not when it received these notices, the board disagreed and held the claim accrued when the deductions were known to the contractor, i.e., when it received the invoices from the Army. If the contractor "believed the deductions were not proper, it could have raised a claim for the deductions upon receipt of the invoices." Unfortunately for the contractor, it did not submit its claim until more than six years had passed beyond this time, rendering its claim for these deductions untimely.

In *Triple Canopy, Inc. v. Secretary of the Air Force*,[7] the contractor correctly took the FAR-mandated procedural steps before filing its claim, and the Federal Circuit ruled that claim did not accrue until those steps were complete. In this case, the government of Afghanistan imposed a tax on the contractor in March 2011, which the contractor appealed. The Department of Defense also requested that Afghanistan waive this tax. In July 2011, Afghanistan resolved the contractor's appeal by reducing the tax assessment by half, and that same month the contractor paid the reduced assessment. The contractor did not submit certified claims to the contracting officer until June 2017, seeking reimbursement of this amount under the Federal Acquisition Regulation (FAR) "Foreign Tax" clause.[8] The board held the contractor's claim to be untimely, reasoning that the claim accrued when Afghanistan imposed the tax, in March 2011, as that was when the contractor became legally obligated to pay. On appeal, the court disagreed, noting that the FAR "Foreign Tax" clause requires the contractor "take all reasonable action to obtain exemption from or refund of any taxes or duties."[9] Therefore, under the FAR's definition of claim accrual, "all events, that fix the alleged liability of . . . the contractor" did not occur until the contractor's attempts to dispute the tax liability were resolved.[10] The Circuit also noted actions by the Department of Defense indicating, contrary to the dismissal arguments, that the U.S. government also considered the tax liability not to be final. The Circuit concluded by observing that the contractor's successful appeal of the tax earned the U.S. government a significant reduction in the tax liability that it ultimately paid, making the government's litigation-based characterization of the contractor's appeal as meritless "difficult to fathom."[11]

Lastly, it is important to remember that negotiations with the government do not pause claim accrual. In *Globe Trailer Manufacturing, Inc.*,[12] the contractor submitted a termination settlement proposal (TSP) and, later, a TSP supplement that incorporated a constructive change claim. The board earlier held that while the original TSP was not a CDA claim, the TSP supplement was.[13] Meeting the CDA elements of a claim did not result in the contractor receiving relief, however, as the board granted the government's motion to dismiss the constructive change claim on the basis that the contractor failed to submit that claim within six years of accrual. The contractor argued that this claim did not accrue until the parties' termination settlement negotiations reached an impasse; the board held this was true as regards the TSP but not the separate constructive change claim: "The fact that [the contractor] was simultaneously negotiating a termination settlement proposal did not toll the statute of limitations for its constructive change claim." The board explained that the contractor was improperly conflating its settlement claim and its separate constructive change claim: "Here, [the contractor] attempts to combine its constructive change claim with its termination for convenience claim to assert what it attempts to characterize as a single cause of action, that did not accrue until the later of the accrual dates—that is the accrual for its termination settlement proposal. . . . [The contractor's] error is in attempting to bring its constructive change claims within the scope of the termination settlement."

A League Of Their Own [Claims Presentment]: "There's No Crying In Baseball [Or CDA Litigation]"

It is common for cases to evolve through litigation: arguments are refined, and discovery may produce evidence that supports an amended complaint. Meeting the CDA's presentment requirement, when such an evolution requires submission of a new claim to the contracting officer, can be a thorny issue that a contractor may address too late if it gets lost in the shuffle. Three cases in the latter half of 2021 explore the complexities of this rule.

First, *ACC Construction Co.*,[14] provides an overview of the claims presentment rule. In that case, for a contract to design and build various Army Reserve facilities in Virginia, the contractor claimed that the state of Virginia imposed unexpected storm water drainage requirements that increased its costs and that the government failed to disclose its prior knowledge that the relevant Virginia agency was likely to cause difficulty during contract performance. After both claims were denied and the contractor appealed to the ASBCA, the contractor attempted to add a new claim via complaint amendment that "the government failed to disclose that it had not followed standard operating procedures requiring the coordination and design development." The board found this to be a new allegation with a separate operative factual predicate (although under the same superior knowledge legal theory) that was never presented to the contracting officer, and so dismissed this portion of the case: "When an amended complaint relies upon different operative facts than what was previously submitted to the contracting officer, the Board lacks jurisdiction to decide the unsubmitted matter."

Conversely, the contractor fared better in *Anthony & Gordon Construction Co.*[15] The contractor alleged that the Navy provided defective design specifications, both increasing the cost and extending the amount of time required to renovate an aircraft component maintenance facility. The Navy sought dismissal of the complaint, arguing it was "essentially different in nature" from the certified claim because the claim calculated damages based on a total cost method, but the complaint calculated the damages based on distinct periods of government-caused delay. The board disagreed with the Navy, stating the legal rule as: "No new claim arises by introduction of a new legal theory of recovery, additional facts that do not alter the nature of the original claim, or a dollar increase in the amount claimed, so long as the theory, facts, or dollar increase rely on the same operative facts included in the original claim." The board found that both the contractor's claim and complaint relied on the same operative fact that "compensable delay resulted from the Navy's defective design." The contracting officer was accordingly on notice of the basis of the claim, even if the method for calculating the damages was different, and thus, the board had jurisdiction over the appeal.

The Federal Circuit reached a somewhat different result in *Tolliver Group, Inc. v. United States*,[16] a decision that serves as a warning for contractors should legal theories evolve too drastically as a case progresses. The Federal Circuit reversed a COFC decision granting the contractor relief on a different legal basis than that on which the contractor had premised its underlying claim. In short,[17] the contract contemplated that the Army would provide a technical data package (TDP) to the contractor, which the Army failed to do while still directing the contractor to perform. The Army eventually modified the contract to remove the TDP reference, but in the interim, a relator brought a False Claims Act (FCA) action alleging the contractor had falsely certified compliance with the nonexistent TDP. When the government failed to intervene or move to dismiss the FCA action, the contractor had to defend it all the way up to the U.S. Court of Appeals for the Fourth Circuit, which affirmed dismissal of the FCA action.[18] The contractor later submitted a claim to the Army for 80% of its litigation defense costs under FAR 31.205-47, which the contracting officer denied. On appeal, the COFC analyzed the claim under the *Spearin* doctrine, which provides that the government is liable for all costs proximately flowing from its provision of defective specifications to a contractor,[19] finding this doctrine encompassed litigation defense costs when defective specifications prompt a frivolous FCA case that the government does not promptly dismiss. The Federal Circuit reversed, finding that the COFC had no jurisdiction to issue this holding because the legal theory underlying the original claim—the allowability of legal costs per FAR 31.205-47—was "not materially the same" as the "defective specification" basis of COFC's ruling.[20] According to the Circuit, the contracting officer could not have recognized that the contractor was seeking adjudication of a *Spearin* warranty-breach claim, so the COFC lacked jurisdiction to consider this as a basis for recovery. The claims were so different that the contractor had not met the CDA's presentment requirement by its previous claim submission.

Terminations: "Hasta La Vista, Baby"

Terminations in all their forms often make for interesting claims cases due to the stakes involved. Receiving a letter titled "Notice of Intent To Terminate for Default" is never a contractor's desired outcome, and contractors often immediately seek to appeal termination decisions. That's precisely what the contractor did in *Ultra Electronic Ocean Systems, Inc.*,[21] appealing the noticed termination to the ASBCA and factually disputing the bases underly-

ing the government's action. The government moved to dismiss, arguing that the board lacked jurisdiction because the notice was not a contracting officer's final decision. The government focused on the fact that the notice stated that a future contract modification effectuating the termination would follow the letter and that the letter did not state the contractor's appeal rights. The board disagreed with the dismissal arguments, observing that while the notice was titled a "notice of *intent* to terminate for default," the contracting officer signed the notice and the notice contained the statement that "effective immediately . . . the Government hereby exercises its rights to terminate the contract." Under these facts, especially the use of "hereby," the board found the notice to be an appealable contracting officer's final decision, and the appeal will proceed for merits adjudication. The board also rejected the government's attempted weaponization of the notice's omission of a recitation of the contractor's appeal rights, reasoning that the government could not render its own decision invalid by failing to include this language.[22]

A common strategy to avoid litigation over default terminations is to agree to convert the termination into one for convenience, which among other benefits, enables the contractor to recover reasonably expended costs to date. A recent board case highlights that any equivocation about the conversion makes it ineffectual. In *Satterfield & Pontikes Construction, Inc.*,[23] after converting the termination for default into a termination for convenience, the government moved to dismiss the appeal, arguing it was moot, despite the fact that the government had retained the right to reinstate the default termination in specified circumstances. The government asserted it was not "reasonably likely that the actual legal scenario that could trigger the Navy's hypothetical option to reinstate the default termination will ever occur." The board refused to dismiss the appeal, finding that the conversion was not unequivocal and that the government had not furnished any evidence to support its assertion that it would not reinstate the default. So long as the government retained the right to terminate the contractor for default, the contractor could appeal that decision.

The government's right to terminate for convenience is set by regulation,[24] but the Federal Circuit made clear that the government cannot invoke the incorrect contract clause to effectuate such a termination in *JKB Solutions & Services, LLC v. United States*.[25] The COFC had held that the government could constructively terminate what all parties agreed was a noncommercial services contract based on the commercial item termination for convenience clause included in the parties' contract.[26] The Federal Circuit disagreed; while recognizing the government's general power to terminate a contract constructively for convenience in the absence of bad faith or a clear abuse of discretion, it found the commercial item termination for convenience clause was inapplicable to the contractor's noncommercial services contract. The court rejected the government's argument that the clause bound the parties because it was incorporated into the signed contract, reasoning that "the government simply incorporated a FAR provision that, on its face, applies only to commercial item contracts."[27] The Federal Circuit accordingly vacated the COFC's decision and remanded the case for further consideration, noting that the COFC "may consider whether the *Christian* doctrine applies to incorporate a termination for convenience clause and whether . . . the doctrine of constructive termination for convenience applies in these circumstances."[28] The victory for JKB may be short lived if the COFC on remand reads an applicable termination for convenience clause into the contract under the *Christian* doctrine. Nevertheless, the decision may prove helpful to contractors (or subcontractors) to show that inapplicable clauses included in their contracts do not actually apply in the event of a later dispute.

[CDA] House Rules: Ask The Questions, Hear The Answers

While claims case law can at times be devilishly tricky, sometimes the applicable rule is easily stated, as a number of recent cases affirmed.

(1) *Laches is not a viable affirmative defense in CDA cases.* While many practitioners already considered this to be the rule, the ASBCA removed all doubt in a pair of decisions issued in 2021. First, in *Lockheed Martin Aeronautics Co.*,[29] the board rejected the government's attempted use of laches as an affirmative defense to a contractor claim, reasoning that laches cannot apply when a statute (here, the CDA) provides a set statute of limitations. Second, in *BAE Systems Land & Armaments L.P.*,[30] the ASBCA clarified that this holding applies equally to a contractor's use of laches in defense of a government claim.

(2) *Unilateral contract definitization is not a government claim.* In a different appeal filed by *Lockheed Martin*

Aeronautics Co.,[31] the board affirmed its 1988 decision that a unilateral contract definitization is "an act of contract administration, subject to a claim by the contractor." That is, should the government unilaterally definitize a contract, the contractor cannot directly appeal to a board of contract appeals but instead must first file a certified claim with the contracting officer.[32] The contractor argued that the Federal Circuit's decision in *Todd Construction v. United States*,[33] holding a contractor may challenge a negative performance evaluation under the CDA, liberalized the definition of a claim so that definitization actions should be included. The board disagreed, observing that the *Todd Construction* decision never held the evaluation was a government claim but rather that performance evaluations were challengeable under the CDA. Instead, unilateral contract definitization was just another example of a contract administration matter that a contractor may, or may not, base a claim upon.

(3) *Blanket purchase agreements (BPA) are not contracts*. In *Hallym Furniture Industrial Co.*,[34] the board refused to hear a contractor's claim seeking reinstatement of a cancelled BPA. The BPA did not impose any binding obligation on the government to place orders, so despite containing various, inconsistent internal references to the document as a "contract," the BPA was not a contract, and accordingly the cancellation was not subject to a CDA appeal at the board.

(4) *The plain contract language governs*. The Federal Circuit, agreeing with the board majority opinion, found that a hauling contractor in Afghanistan forgot this simple rule in *Starwalker PR LLC. v. Secretary of the Army, Secretary of Defense*.[35] The contractor sought payment for its return trips after completing contract work—i.e., the government would direct it to haul goods between two points, and the contractor sought payment for the time spent on the return trip as well. The Federal Circuit held the contract expressly precluded recovery of such costs unless the government specifically ordered the return trip. The contractor's attempt to bootstrap the requirement to return the goods upon completion of a trip into payment for the return trip could not override the plain terms of the contract that only provided payment for movement "directed by the Government."

(5) *The COFC cannot grant a preliminary injunction for a CDA action seeking only monetary damages*. In *Sergent's Mechanical Systems, Inc. d/b/a Sergent Construction v. United States*,[36] the COFC reiterated this rule in an appeal by the contractor of its termination for default. Although the CDA complaint did not seek a permanent injunction, the contractor sought preliminary injunctive relief to prevent the government from executing a new contract to another contractor for the terminated work. In denying preliminary injunctive relief, the court indicated it was "not a close call" as none of the requested relief in the CDA complaint had anything to do with the preliminary injunction the contractor sought in this early stage of litigation.[37] The court explained that it may award equitable relief in Tucker Act cases in only three scenarios: bid protests, "incident of and collateral to" a monetary judgment (citing 28 U.S.C.A. 1491(a)(2)), and for nonmonetary CDA claims.[38] The court held that a preliminary injunction to prevent the government from entering into a contract fit into none of those categories, noting regarding the second category that "a preliminary injunction, by definition, cannot be 'incident of and collateral to' a final money judgment."[39] And, the COFC rejected the plaintiff's attempt to invoke jurisdiction under 28 U.S.C.A. § 1491(b) to grant preliminary injunctive relief in a CDA claim challenging a default termination under 28 U.S.C.A. § 1491(a).

Clean Up The Dancing: Don't Put Baby In A Corner With A Procedural Mishap

As always, we conclude with a summary of practice tips that contractors and their counsel should heed in order to avoid the many potential pitfalls of CDA litigation.

(a) *Seek relief if the government's "boilerplate" discovery responses are unduly evasive or completely nonresponse*. In *Lockheed Martin Aeronautics Co.*,[40] after the board denied the government's attempted use of a laches defense, the board granted a contractor's motion to compel in the face of the government's repeated interrogatory response that it was "unduly burdensome to attempt to locate anyone who might be able to remember any information relevant to this interrogatory" and that it "could not possibly lead to the discovery of any relevant evidence." The board emphasized that it is not the government's role to decide "whether appellant can be successful on its method of proof" and that the failure to even "attempt to locate" an individual with knowledge failed to demonstrate a good faith effort to respond to the contractor's legitimate discovery demands.

(b) *Be careful with novations*. In *3 Crescent Drive*

Owner I LLC et al. v. Department of Agriculture,[41] the board *sua sponte* dismissed an appeal when the company filed a claim with the contracting officer before the company was formally recognized as the lessor (contractor) under a novation agreement. The board reasoned that because the CDA requires the contractor to submit the claim, no valid claim was before it, such that the board lacked authority to resolve the dispute. Conversely, however, in *Alares LLC v. Department of Veterans Affairs*,[42] the board maintained jurisdiction over an appeal filed under the wrong company name (the prior name, before the contract had been novated), because the government received full and timely notice of the appeal by receiving notice of the contract and the final decision at issue and was not prejudiced by the change in party name. In *Alares*, the successor company, after the novation, had properly submitted several requests for equitable adjustment and converted them into claims. Although each of the contracting officer final decisions was issued to the successor company, it mistakenly appealed the decisions in the name of the predecessor company. The board agreed with the appellant that this name mishap was "an inadvertent misnomer," and granted the appellant's motion to amend the pleadings to correct the name.

(c) *Summary judgment cannot resolve contract interpretation cases where, despite being a legal issue, the parties support their proposed interpretations with conflicting evidence.* In *NTT Data Services Federal Government, LLC v. Department of Education*,[43] the board refused summary judgment where the parties largely admitted each other's factual statements, but submitted lengthy "clarifying statements" that referred to various materials in the appeal file and deposition transcripts that revealed "considerable disagreement."

(d) *The sum certain requirement applies to each distinct claim, even if submitted together*. In *ECC International Constructors, LLC*,[44] the board dismissed several of a contractor's claims, agreeing with the government's argument that the contractor did not submit a sum certain for each claim. The board explained that "Congress did not intend the word 'claim' to mean the whole case between the contractor and the Government," but, rather, that a "claim" under the CDA is one "for money that is one part of a divisible case." The board explained that claims that seek different types of remedy (such as expectation damages versus consequential damages) or that rely on materially different factual or legal theories are different claims that each must independently meet the CDA's jurisdictional requirements, including the sum certain. "The jurisdictional standard must be applied to each claim, not an entire case; jurisdiction exists over those claims that satisfy the requirements of an adequate statement of the amount sought and an adequate statement of the basis for the request."

(e) *The 90-day time period for contractors to appeal a contracting officer's final decision to the board*[45] *applies equally to denials of contractor claims and to government claims*. In *Kellogg Brown & Root Services, Inc.*,[46] the board denied the government's dismissal request which argued that the contractor's timely appeal of a final decision denying the contractor's claim failed to also appeal the government claim contained within the final decision. The final decision in question mentioned that the government retained the right to recoup progress payments and impose liquidated damages, along with its denial of the contractor's claim for delay. The board first cited its longstanding rule that a contractor's notice of appeal need not mention any government claim embedded within the appealed final decision in order for the appeal of that decision (and all claims therein) to be timely filed. Then, the board held that the mention of progress payments and liquidated damages in the decision failed to state valid government claims because the contracting officer's decision did not demand or assert the right to the payment of money and also failed to state a sum certain. Instead, the government issued demand letters for recoupment of payments and liquidated damages months later that met the CDA requirements, and which the contractor properly and timely appealed. The "totality of the circumstances" demonstrated that these demand letters constituted final decisions subject to contractor appeal. The contractor timely appealed every document that could be construed as a final decision on these government claims, and thus no basis for dismissal existed.

Guidelines

The following *Guidelines* are intended to help contractors achieve a "happily ever after" in claims litigation. They are not a substitute for professional legal representation. Until next time, "Here's looking at you, [readers]."

1. Asserting entitlement based on the existence of an implied-in fact-contract is "risky business." Only accept

government promises made by personnel with authority and, when possible, given in writing.

2. "Toto, I've got a feeling we're not in Kansas anymore." CDA claims have numerous specific requirements—such as presentment to the contracting officer—that can doom even the most meritorious of claims if not done correctly.

3. "Tomorrow is another day," but a claim filed tomorrow may be untimely. While there are legitimate reasons to wait to file a claim, the statute of limitations cutoff is non-negotiable.

ENDNOTES:

[1]Daniels & Sherwood, "Much Ado About the CDA: Claims Cases and Trends From the First Half of 2021," 21-8 Briefing Papers 1 (July 2021); Daniels & Sherwood, "Government Contracts Disputes in Focus: Claims Cases and Trends From the Second Half of 2020," 21-3 Briefing Papers 1 (Feb. 2021); Daniels & Sherwood, "Feature Comment: Government Contracts Disputes in Focus: Claims Cases and Trends From the First Half of 2020," 62 GC ¶ 197 (July 22, 2020).

[2]Intellicheck, Inc., ASBCA No. 61709, June 24, 2021, 2021 WL 2912092.

[3]6601 Dorchester Inv. Grp., LLC v. United States, 154 Fed. Cl. 685 (2021).

[4]41 U.S.C.A. § 7103(a)(4)(A).

[5]BNN Logistics, ASBCA No. 61841 et al., Aug. 5, 2021.

[6]Elec. Boat Corp. v. Sec'y of the Navy, 958 F.3d 1372 (Fed. Cir. 2020), 62 GC ¶ 153.

[7]Triple Canopy, Inc. v. Sec'y of the Air Force, 14 F.4th 1332 (Fed. Cir. 2021), 63 GC ¶ 298.

[8]FAR 52.229-6.

[9]FAR 52.229-6(i).

[10]FAR 33.201.

[11]Triple Canopy, Inc., 14 F.4th at 1342.

[12]Globe Trailer Mfg., Inc., ASBCA No. 62594, Nov. 16, 2021, 2021 WL 5757221.

[13]Globe Trailer Mfg., Inc., ASBCA No. 62594, Jan. 28, 2021, 21-1 BCA ¶ 37,795. See also Daniels & Sherwood, "Much Ado About the CDA: Claims Cases and Trends From the First Half of 2021," 21-8 Briefing Papers 1, 2–3 (July 2021).

[14]ACC Constr. Co., ASBCA Nos. 62265, 62937, Sept. 22, 2021, 21-1 BCA ¶ 37,935.

[15]Anthony & Gordon Constr. Co., ASBCA No. 61916, July 1, 2021, 2021 WL 3021277.

[16]Tolliver Grp., Inc. v. United States, 20 F.4th 771 (Fed. Cir. 2021), 64 GC ¶ 8, rev'g 146 Fed. Cl. 475 (2020).

[17]The authors covered the COFC decision in detail in "Feature Comment: Government Contracts Disputes in Focus: Claims Cases and Trends From the First Half of 2020," 62 GC ¶ 197 (July 22, 2020).

[18]See United States ex rel. Searle v. DRS Tech. Servs., 680 Fed. Appx. 163 (4th Cir. 2017).

[19]See United States v. Spearin, 248 U.S. 132, 136 (1918).

[20]Tolliver Grp., Inc., 20 F.4th at 777.

[21]Ultra Elec. Ocean Sys., Inc., ASBCA No. 62804, June 17, 2021, 21-1 BCA ¶ 37,884.

[22]Cf. Cherokee 8A Grp. v. Dep't of Veterans Affairs, CBCA No. 7107, July 8, 2021, 2021 WL 3013535, dismissing an appeal for lack of jurisdiction when an agency's final decision stated the contractor had 90 days to appeal to "the agency board of contract appeals" but did not identify the CBCA as the proper forum for appeal. The contractor "repeatedly requested information from the VA about the appropriate agency board of contract appeals," but the VA did not respond for nearly two years. The contractor appealed one month after receiving the VA's response, and the board found the appeal untimely, as the agency's original language matched that required by the FAR, the agency did not affirmatively mislead the contractor, and the appropriate forum "was publicly available."

[23]Satterfield & Pontikes Constr., Inc., ASBCA Nos. 59980, 62301, June 3, 2021, 21-1 BCA ¶ 37,873.

[24]G.L. Christian & Assocs. v. United States, 320 F.2d, 345, 349, 355 (Ct. Cl. 1963).

[25]JKB Sol. & Servs., LLC v. United States, 18 F.4th 704 (Fed. Cir. 2021), 63 GC ¶ 358.

[26]JKB Sols. & Servs., LLC v. United States, 150 Fed. Cl. 252 (2020).

[27]JKB Sols. & Servs., LLC, 18 F.4th at 711.

[28]JKB Sols. & Servs., LLC, 18 F.4th at 711.

[29]Lockheed Martin Aeronautics Co., ASBCA No. 62209, June 22, 2021, 21-1 BCA ¶ 37,886, 63 GC ¶ 242.

[30]BAE Sys. Land & Armaments L.P., ASBCA Nos. 62703, 62704, Sept. 23, 2021, 21-1 BCA ¶ 37,936.

[31]Lockheed Martin Aeronautics Co., ASBCA Nos. 62505, 62506, June 24, 2021, 21-1 BCA ¶ 37,888.

[32]Lockheed Martin Aeronautics Co., ASBCA Nos. 62505, 62506, June 24, 2021, 21-1 BCA ¶ 37,888 (citing Bell Helicopter Textron, ASBCA No. 35950, 88-2 BCA ¶ 20,656, aff'd on mot. for recons., 88-3 BCA ¶ 21,048).

[33]Todd Constr., L.P. v. United States, 656 F.3d 1306 (Fed. Cir. 2011), 53 GC ¶ 299.

[34]Hallym Furniture Indus. Co., ASBCA No. 62782, Sept. 2, 2021.

[35]Starwalker PR LLC. v. Sec'y of the Army, No. 2020-2024, 2021 WL 4302988 (Fed. Cir. Sept. 22, 2021), aff'g

ASBCA No. 60485, 20-1 BCA ¶ 37,551.

[36]Sergent's Mech. Sys., Inc. d/b/a Sergent Constr. v. United States, No. 21-1685C, 2021 WL 5575356 (Fed. Cir. Nov. 29, 2021).

[37]Sergent's Mech. Sys., Inc. d/b/a Sergent Constr., 2021 WL 5575356, at *1.

[38]Sergent's Mech. Sys., Inc. d/b/a Sergent Constr., 2021 WL 5575356, at *3.

[39]Sergent's Mech. Sys., Inc. d/b/a Sergent Constr., 2021 WL 5575356, at *4.

[40]Lockheed Martin Aeronautics Co., ASBCA No. 62209, Oct. 26, 2021, 2021 WL 5278521.

[41]3 Crescent Drive Owner I LLC et al. v. Dep't of Agriculture, CBCA 6867, Sept. 23, 2021, 21-1 BCA ¶ 37,930.

[42]Alares LLC v. Dep't of Veterans Affairs, CBCA 6149 et al., Aug. 11, 2021, 21-1 BCA ¶ 37,906.

[43]NTT Data Servs. Fed. Gov't, LLC v. Dep't of Educ., CBCA 6887, Nov. 18, 2021, 2021 WL 5833566.

[44]ECC Int'l Constructors, LLC, ASBCA No. 59643, Nov. 10, 2021, 2021 WL 5561118.

[45]41 U.S.C.A. § 7104(a).

[46]Kellogg Brown & Root Servs., Inc., ASBCA No. 62681, Nov. 24, 2021, 2021 WL 5918471, 64 GC ¶ 28.

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BRIEFING PAPERS