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¶ 177 FEATURE COMMENT: Camp CDA: Fun And Games With Case Law Developments In The First Half Of 2025

Rise and shine, campers, that bugle call means it's time for our eleventh biannual summary of Contract Disputes Act case law, this time from the first half of 2025. Your camp counselors—ranging from the U.S. Court of Appeals for the Federal Circuit, Court of Federal Claims, Armed Services Board of Contract Appeals, to the Civilian Board of Contract Appeals—have been busy serving up decisions interpreting the CDA, so circle up around the campfire, grab some bug spray and let's CANNON BALL in.

Cabin (CDA) Rules—Just as campers must follow the cabin rules, CDA litigants must follow the substantive and procedural rules of the CDA or else risk being sent home (i.e., having your claim dismissed).

Scout's Honor (the Certification Requirement): A core CDA requirement is the submission of a certification averring the accuracy of any claim. 41 USCA § 7103(b). Ideally, this certification appears with a signature on the claim letter, but in *KiewitPhelps*, ASBCA 62980, 2025 WL 1217317 (March 24, 2025), the ASBCA viewed a contractor's submission as a whole (as well as interactions with contracting and auditing personnel) to excuse a defective certification. The contractor submitted a signed letter seeking a contracting officer's final decision and damages resulting from alleged Government delay. The letter did not include any certification language, but it attached more than 500 pages of information, one of which was a proposed change order that included the Defense Federal Acquisition Regulation Supplement 252.243-7002 request for equitable adjustment (REA) language certifying "that the request is made in good faith and that the supporting data are accurate and complete to the best of my knowledge and belief." This document included a typed name but no signature. The letter was referred to the Defense Contract Audit Agency (DCAA), which requested a formal certification. The record reflected that the CO was in contact with DCAA and agreed with the request for a certification. The contractor provided the requested claim certification to DCAA but did not copy the CO. The CO ultimately issued a final decision partially granting the claim and expressly noting that "proper certification of the claim is not waived." When the contractor appealed the denied portion of the claim to the ASBCA, the Government moved to dismiss, arguing there was no signed certification as the CDA requires. The Board explained that where there is no certification the Board lacks jurisdiction. However, if the certification is "defective," the Board has jurisdiction yet must order the defect be corrected before issuing a decision. See 41 USCA § 7103(b)(3). The Board recognized its past precedent holding that the lack of a signature on a claim document renders the claim uncertified (and not a defective certification that can be cured). Although the instant facts were a "close call," the Board held that the typed

signature on the attachment with the DFARS REA language qualified as a defective certification that could be cured. Alternatively, the Board explained that the certification provided to DCAA remedied any error as it was done "with the knowledge of the contracting officer" and sufficiently satisfied the certification "purpose of deterring fraud and ensuring the contractor stands behind its claim."

"Red Rover, Red Rover, Tell (Your Prime Contractor) to Come Over" (Prohibition on Non-pass Through Subcontractor Claims): While subcontractors may wish to join the (claims) fun and games, the ASBCA affirmed in *Frontline Support Solutions, LLC,* ASBCA 64022, 2025 WL 1217349 (April 3, 2025), that it lacks jurisdiction over appeals filed by subcontractors without a prime sponsor even where the Government terminated the prime contract for default. The subcontractor argued that "due to alleged fraud and insolvency on the part of the prime contractor," "extraordinary circumstances" existed "warranting an exception to the CDA's privity of contract requirement." The Board disagreed. The subcontractor neither alleged nor maintained that it held a contract with the Federal Government and therefore did not qualify as a contractor under the CDA. 41 USCA § 7101(7). The Board recognizes only two limited exceptions to the privity requirement for subcontractors: where the prime contractor acts as an agent for the Government and where the prime sponsors the subcontractor's claim. Neither exception was present here: "[w]hile the allegations raised by Frontline are serious, these allegations are not sufficient to overcome the lack of privity." The CBCA reached a similar conclusion in *UnlimitComp, LLC v. Dep't of Veterans Affairs*, CBCA 8366, 2025 WL 1908111 (June 30, 2025), when it dismissed an appeal filed by a subcontractor on a contract that was terminated for convenience. While the subcontractor believed it did not receive its fair share of the termination settlement, that was a dispute to be raised with the prime and not the agency (or the Board).

Knock Knock Who's There? (Correct Company Name): Because only a company holding a contract with the Federal Government can file a claim, the identity of the contractor in any "roll call" must match the company pursuing a claim. In *CGS-ACE Sec. LLC v. Dep't of State*, CBCA 7965, 2025 WL 819236 (March 11, 2025), the CBCA held where the company name differed between the Standard Form 33 (showing the LLC) on the awarded contract and the attached proposal (showing a joint venture), FAR 52.215-8, Order of Precedence (which was incorporated by reference into the contract) required that the SF 33 governs. The Government moved to dismiss the appeal by the LLC, arguing that the "contract must be deemed awarded to the entity whose name is on the proposal, regardless of the plain language of the contract itself." The Board disagreed, finding that the contract identified the LLC as the offeror, and the Government failed to show that "a contract must be deemed awarded to the entity whose name is on the proposal, regardless of the plain language of the contract itself." The Federal Circuit clarified in June 2025 that the contractor and not its owners must pursue any CDA related appeals: in *Onyems v. Dep't of the Navy*, 2025 WL 1603783 (Fed. Cir. June 6, 2025), the sole owner of a contractor attempted to appeal an ASBCA decision in his individual capacity. The Court dismissed the appeal, finding the owner did not qualify as a "contractor" under the CDA because the owner "was not a party to the challenged contract."

Simon Says to State a "Sum Certain" or You're Out: The CBCA explained that the so-called "sum certain" requirement applies to both contractor and Government claims in *Crystal Clear Maint. v. Gen. Servs. Admin.*, CBCA 7547, 2025 WL 943061 (March 24, 2025). On July 6, 2021, the CO issued a letter to the contractor demanding payment for water damage repair costs. The letter was titled a Contracting Officer's Final Decision and Demand for Payment and stated: "As of the date of this letter, the total cost of damage continues to be assessed, but is currently a minimum of $173,978.19." On Oct. 13, 2022, the CO issued an "Updated Demand for Payment" that referenced the prior letter and asserted a total amount due of $567,819. On Oct. 21, 2022, the contractor appealed the Government claim to the Board, where the Government moved to dismiss for failure to appeal within 90 days of the July 2021 letter, per 41 USCA § 7104(a). The Board held that the July 2021 letter failed to satisfy the sum certain requirement. Because the Government "failed to put [the contrac-

tor] on notice as to the exact amount and provided no way to ascertain that total amount until GSA issued the second letter," the appeal clock did not start until receipt of that second letter. The ASBCA also applied the sum certain requirement to dismiss without prejudice a contractor's appeal in a case seeking a declaration that the contractor had the right to seek a price adjustment under the Economic Price Adjustment Clause, which was incorporated by reference in the contract. See *GE Renewables US, LLC,* ASBCA 63842, 2025 WL 1938376 (June 24, 2025); 67 GC ¶ 176. Although the contractor argued that the main consequence of such a declaration would be that the parties would enter negotiations, the Board agreed with the Government that the "the essence of those negotiations would be exclusively monetary" as they "would only address whether it is entitled to a price adjustment." Because the "essence of the dispute" was monetary and yet the claim did not state a sum certain, the ASBCA found the contractor had failed to state a claim.

Camp Counselors Are Always Here to Help (Availability of Declaratory Judgment): As the prior case makes clear, although most CDA claimants seek money damages, declaratory judgment is another available remedy. In *Broadway Gold, LLC v. U.S.*, 2025 WL 1420087 (Fed. Cl. May 15, 2025), the COFC considered a U.S. Postal Service (USPS) lease that gave USPS the right to purchase the property for stated amounts. USPS attempted to exercise this right to purchase, and the landowner resisted, arguing that the right to purchase provision in the lease was unenforceable due to USPS's alleged prior breaches. The landowner filed suit at the COFC under the CDA, requesting in its first count a declaratory judgment that the lease be declared void, or in the alternative, that USPS may not exercise the option to purchase (among other counts). The Government moved to dismiss the first count, asserting "this Court is precluded from entering declaratory judgments and instead is limited in its relief to monetary damages only." The court disagreed with the Government, finding declaratory judgments are not precluded; rather, the court must consider whether it is "appropriate to consider them," e.g., "when there is 'a fundamental question of contract interpretation or a special need for early resolution of a legal issue.' " Id. at *3 (quoting *Alliant Techsys., Inc. v. U.S.*, 178 F.3d 1260, 1271 (Fed. Cir. 1999); 41 GC ¶ 308). Because in this case, a declaration would resolve the live dispute of "whether the USPS can exercise an option in the lease agreement to purchase the property" or is unable to do so "due to the Government's alleged breach," and because monetary damages "would be insufficient to provide Plaintiff with relief" the Court denied the motion to dismiss and held it had subject matter jurisdiction to consider whether the grant of a declaration judgment was appropriate. Id. at *3–4.

Be on Time to Activities (Statute of Limitations): In *Textron Aviation Def., LLC v. U.S.*, 2025 WL 1000380 (Fed. Cir. April 3, 2025), the Federal Circuit affirmed the COFC's holding that a contractor's claim for the Government's share of a pension deficit was barred by the CDA's six-year statute of limitations. See 161 Fed. Cl. 256 (2022). For context, on Dec. 31, 2012, the contractor's predecessor terminated two pension plans and curtailed the third. Under Cost Accounting Standard (CAS) 413, upon pension plan termination or curtailment, the contractor must perform a calculation to determine whether the plan was over- or under-funded and, as appropriate, reconcile the Government's share of any surplus or deficit. The company underwent a series of bankruptcies and corporate reorganizations and ultimately in April 2018 submitted a letter to the Government requesting its share of the pension adjustment costs. In February 2020, DCAA audited the request and determined the Government's share was approximately $19.4 million. In July 2020, the company submitted a CDA claim for this amount, which the CO denied in September 2020 citing the CDA's six-year statute of limitations. The Federal Circuit agreed with the COFC that CAS 413 does not contain "mandatory pre-claim procedures that would have delayed the accrual of the statute of limitations." Id. at 4. The Court explained: "Textron does not argue that it was precluded by law or regulation from calculating the at-issue sums, but merely that calculation was impractical." Id. The Federal Circuit also agreed with the COFC's finding that the company's purported lack of knowledge of the sum certain necessary to bring its claim was not convincing:

> All Textron had to do in order to bring its claim in a timely manner was calculate that sum certain (i.e., the CAS adjustment amount) within the six-year period of the statute of limitations. The statements Textron identifies about the complexity of the calculation (for example, that "it took a lot of time … to perform the calculation") are conclusory and, without more, are insufficient to preclude summary judgment.

Id. at 5. Lastly, the Federal Circuit again agreed with the COFC's handling of the company's argument that its claim did not accrue until the Government refused to pay its "routine request for pension adjustment costs"—i.e., in summer 2020. The Federal Circuit recognized that the "CAS 413 request for payment was non-routine" because it bore no relation to the progression of contract performance and instead arose "from an unanticipated bankruptcy and associated segment closings." Id. at 6. But the contractor suffered injury long before the Government denied its non-routine request in summer 2020. The Federal Circuit reasoned that the contractor:

> was injured once CAS 413-50(c)(12) was triggered on December 31, 2012, when the pension plans were terminated or curtailed, or at the latest by February 15, 2013, when the bankruptcy proceedings concluded. *See Decision* at 262. By that point, the government's obligation to pay was fixed; all the events that gave rise to Textron's right to payment from the government had occurred.

Id. at 7. Because these facts were true at the time of pension curtailment in December 2012 or at the latest shortly thereafter, the claim was time-barred. The Federal Circuit explained that policy considerations supported its holding, as "[u]nder Textron's understanding, the limitations period for a CAS 413 adjustment claim would not begin to run until the contractor submitted a request for payment and the government then disputed that request … effectively allow[ing] it to control when the statute of limitations period begins to run, which is impermissible." Id.

Don't Hit the Snooze Button (and Miss the Appeal Deadline): In *US Pan Am. Solutions, LLC*, ASBCA 63957, 25-1 BCA ¶ 38,814 (April 25, 2025), the Board dismissed an appeal of a termination for cause as untimely when the contractor filed the appeal 91 days after the contractor admitted to receiving the termination notice. The contractor argued the governing date was when the contractor signed the contract modification effectuating the termination. The Board disagreed, finding that "the law is clear, contractors have 90 days from *receipt* of a decision to appeal to this Board … the 90-day clock *does not* run from the date the contractor acknowledges receipt or signs a termination modification, as appellant has requested." (emphasis in original).

Where to Pitch Your Tent: Leases—The Boards issued two novel decisions in the first half of 2025 addressing claims related to Government leases of real property. First, in *Boyd Atlanta Rhodes LLC v. Gen. Servs. Admin.*, CBCA 7753, 2025 WL 1202011 (April 16, 2025), the CBCA denied a motion to dismiss, permitting a lessor to allege damages measured in the amount of lost rent the Government's breaches allegedly caused. The lessor alleged the Government delayed formulating and approving design drawings and issuing a notice to proceed to the lessor to complete the building spaces, which was a condition precedent for Government acceptance of the space under the lease (and which started the Government's obligation to pay rent). The lessor tabulated that the Government's actions "caus[ed] the rent commencement date to be delayed for over 400 days" and sought "to be placed in as good of a position as it would have been had the agency performed its lease obligations." Accordingly, the lessor's "calculations of damages are based in part on the net rent it would have received during the delay period or the time value of the rent had it been paid during the delay period." GSA moved to dismiss, contending that as a matter of law the lessor could not recover rent for any time preceding Government acceptance of the space. The CBCA agreed that "[u]nder the lease, the term 'rent' refers to a payment to be made after acceptance of the space for the ten-year term," so the lessor could not recover "rent" for this period. But, by its claim and appeal, "the lessor seeks to be made whole for what it contends are Government breaches and uncompensated changes," and accordingly the CBCA reasoned that what the lessor meant by "rent" was really nothing more than breach damages:

> The lessor uses the term "rent" to reflect a dollar amount utilized in calculating the damages it

> contends it is due. The lessor values the space for the days of alleged Government delay at the rental rate it would have received had occupancy not been delayed. The lessor contends that rent payments did not commence within the time frame established in the lease agreement because the Government improperly impeded the lessor's progress and delayed issuing the notice to proceed with tenant improvements and, thereafter, inappropriately interfered with the lessor's performance. Thus, the phrase "lost rent" represents what the lessor believes is an appropriate measure of damages arising from the Government's actions and inactions, which the lessor equates to breaches.

The CBCA distinguished past precedent finding that loss of rental income was not an available remedy on the basis that past cases have not involved a finding of material breach (and instead were largely issued under particular contracts' changes clauses on the reasoning that missed rent was not an increased cost of performance compensable under a changes clause). Conversely, the changes clause in the instant lease contained nonstandard language referencing Government actions that "cause[] an increase or decrease in Lessor's cost or time required for performance of its obligations under this Lease." The Board found that neither this changes clause nor past case law precludes lost rent as a measure for relief at the dismissal stage.

Also related to leases, in *Parsons Gov't Servs., Inc.*, ASBCA 62269 et al., 2025 WL 1217311 (March 26, 2025), as a matter of first impression, the Board held that where a contractor sells a building (for which the contractor had previously charged the Government depreciation), and then leases that building back (a "sale-leaseback"), the amount of rent that the contractor can then charge as an allowable cost to Government contracts is capped by the limitation on gains rule in FAR 31.205-16(d). Relevantly, the cost principle on rental costs provides:

> Rental costs under a sale and leaseback arrangement [are allowable] only up to the amount the contractor would be allowed if the contractor retained title, computed based on the net book value of the asset on the date the contractor becomes a lessee of the property adjusted for any gain or loss recognized in accordance with 31.205-16(b).

FAR 31.205-36(b)(2). The contractor had argued that this provision permitted it to charge lease costs up to the sales price; the Board disagreed, holding the contractor's approach violates the regulations when considered as a whole, which are intended to ensure neither the contractor nor the Government is "better or worse off than if the sale and leaseback had not occurred."

Tug-of-War: Contract Interpretation Battles—Although the classic outdoor game of tug-of-war focuses on strength and teamwork, to win at CDA camp one needs to focus on the fine print and use team work to resolve any ambiguities before you sign up (or sign on) to play.

In *Beacon Point Assocs. LLC v. Dep't of Veterans Affairs*, 139 F.4th 1306 (Fed. Cir. 2025); 67 GC ¶ 158, the Federal Circuit affirmed the CBCA's holding that a contract did not incorporate any terms of the contractor's quote. When the agency emailed the purchase order for signature, the contractor responded by attaching its standard terms and conditions and stating: "this needs to be part of the contract." Id. at 1307. The contractor later signed the purchase order notwithstanding that the Government did not attach or reference the contractor's terms and conditions and instead attached FAR 52.212-4, "Contract Terms and Conditions – Commercial Items" and FAR 52.217-9, "Option to Extend the Term of the Contract." The only reference to the contractor's quote was the following: "YOUR OFFER ON SOLICITATION (BLOCK 5) INCLUDING ANY ADDITIONS OR CHANGES WHICH ARE SET FORTH HEREIN IS ACCEPTED AS TO ITEMS: [Blank]." Id. at 1308. When the agency did not exercise the option or apply the payment terms contained in the contractor's terms and conditions, and instead followed the FAR clauses stated in the order, the contractor brought a CDA claim. The Federal Circuit affirmed the CBCA's holding that the order did not incorporate the contractor's terms and conditions by reference. The Federal Circuit held that in order to incorporate terms and conditions by reference, "the incorporating contract must use language that is express and clear, so as to leave no ambiguity about the identity of the document being referenced, nor any reasonable doubt about the fact that the referenced document is being incorporated into the contract." Id. (quoting *CSI Aviation, Inc. v. Dep't of Homeland*

Sec., 31 F.4th 1349, 1355 (Fed. Cir. 2022); 64 GC ¶ 127). Because the only reference to the contractor's terms and conditions (quoted in all caps above) did not "clearly communicate that the purpose of the reference to the Quote is to incorporate all of the terms of the Quote into the contract," incorporation by reference did not occur. Id. at 1309. The challenged Government actions complied with the actual contractual terms and thus there was no breach.

The Federal Circuit emphasized that the clear terms of a contract include the total contract file, to include later-issued modifications that might have changed earlier contract language, in *WSP USA Solutions Inc. v. Sec'y of the Army*, 2025 WL 573242 (Fed. Cir. Feb. 21, 2025). The question on appeal was whether work ordered under a requirements contract during an earlier option year, but performed during a later option year, should be priced under the earlier or the later year's rates. Both parties claimed the contract's plain language was unambiguously in their favor. After the ASBCA agreed with the Government that the rates from the year the work was ordered applied (versus the rates from the year the work was performed), the contractor appealed. The Federal Circuit observed that because a requirements contract is not itself a binding contract, orders placed thereunder necessarily become a part of the contract and modify any conflicting terms of the overarching requirements contract. Consequently, the Court held that the Board erred in failing to consider how these subsequently placed orders—and the dozens of modifications to those orders—altered the contract's pricing provisions. In light of this error in the Board's analysis, the Court could not find that "the contract taken as a whole, including modifications, supplies an unambiguous answer to the question of which contract rates apply." Id. at *6, 10. The Federal Circuit remanded "for reconsideration of the proper interpretation of the contract including all relevant modifications." Id. at *10.

Unhappy Campers Sent Home Early: Contract Terminations—No one wants the summer to end early, but sometimes campers may be sent home either for alleged misbehavior or a camp closure.

In *D-STAR Eng'g Corp.*, ASBCA 62075, 62780, 2025 WL 1482062 (April 28, 2025), the ASBCA considered several issues arising from the Government's denial of a contractor's request for compensation in a termination settlement proposal (TSP) and demand for repayment of amounts allegedly over-paid to the contractor during performance. The contractor appealed both the Government's debt demand and a CO's final decision denying recovery of additional costs under the TSP. The Board largely agreed with the Government but found the contractor entitled to a little extra money (for the tolls home).

First, the Board agreed that certain direct labor costs in the contractor's TSP were not reasonable, explaining "despite this being a government claim, contracts subject to FAR Part 31.2 place the burden of proof regarding cost reasonableness on the contractor once the CO has 'challenged specific costs.' " (quoting *Northrop Grumman Corp.*, ASBCA 62165, 23-1 BCA ¶ 38,394; 65 GC ¶ 224). Even though the Defense Contract Management Agency identified the specific challenged costs and "provid[ed] a brief explanation why it found each time entry unreasonable," the contractor offered no proof establishing the costs were reasonable, leading the Board to find that the evidence supported the disallowance. Second, the Board agreed that the contractor had previously charged some of its indirect factory expenses directly to a separate contract, rendering the inclusion of those costs in an overhead pool impermissible under FAR 31.205-26(d). Third, the Board agreed that certain general and administrative expenses were unsupported in the contractor's accounting system and were themselves improperly burdened, among other calculation errors in the TSP. Fourth and by contrast, the Board found the contractor's fee calculation methodology to be reasonable, finding that the Government failed to prove its proposed settlement number "constituted fair compensation." The Board reasoned that because the contractor "has shown that the early termination prevented the contractor from fully recovering the financial investments it anticipated recovering over the full contract," the Government should have factored these costs into the calculation of the "percentage of completion of work" (FAR 52.249-6(h)(4)(i)) when calculating the fee. Finally, the Board found some of the contrac-

tor's claimed settlement expenses to be unreasonable, adopting instead the Government's position of 681.35 direct labor hours, versus the 2,810.7 hours claimed.

Eagle Peak Rock & Paving, Inc. v. Dep't of Transp., CBCA 7832 (5692)-REM, 2025 WL 943059 (March 14, 2025), involved an appeal on remand after the Federal Circuit had vacated a CBCA decision holding that the Federal Highway Administration default termination was improper and converting it to one for convenience. The Federal Circuit opined that the Board had erred by focusing on deficiencies in the CO's reasoning rather than making de novo findings about what the record showed about whether the standard of default was met. *Dep't of Transp. v. Eagle Peak Rock & Paving, Inc.*, 69 F.4th 1367 (Fed. Cir. 2023); 65 GC ¶ 173. On remand, after a detailed review of the record, which included a two-week hearing, the Board again found the termination for default improper: the contractor submitted compliant schedules, made sufficient progress such that the likelihood of timely completion was not impaired, and had taken steps to increase its manpower to accelerate its progress. The Board again converted the termination to one for convenience.

Trail Mix: a Random Assortment of "Crunchy" or Otherwise Noteworthy Holdings—*Unauthorized Markings in Capture the Flag*: In *FlightSafety Int'l Inc. v. Sec'y of the Air Force*, 130 F.4th 926 (Fed. Cir. 2025); 67 GC ¶ 81, the Federal Circuit affirmed a decision of the ASBCA that commercial subcontractor data markings contradicted the Government's rights in that data. See ASBCA 62659, 23-1 BCA ¶ 38,245. The subcontract in question contained DFARS 252.227-7015 (the "commercial data rights clause"), which describes the rights applicable to data developed exclusively at the contractor's private expense. Specifically, while the contractor may generally restrict Government rights in such data, subsection (c) of that clause limits the contractor's ability to do so for certain categories of data, including data necessary for operation, maintenance, installation, or training (so-called "OMIT data"). For these categories of data, the Government receives "the unrestricted right to use, modify, reproduce, release, perform, display, or disclose technical data, and to permit others to do so." The subcontractor marked commercial data developed exclusively at private expense with legends that either provided the Government rights particular to use under a particular contract or marked the data as "proprietary" with some "rights reserved." Id. at 930. The subcontractor argued that regardless of the Government's rights to OMIT data under DFARS 252.227-7014, "the government may not use commercial OMIT data that have been developed exclusively at private expense for future procurements," and instead "the clause only allows the government to use OMIT data for OMIT purposes—that is, for 'operation, maintenance, installation, and training.' " Id. at 933. The Federal Circuit disagreed: the "character of the data" defines the Government's rights under the commercial data rights clause (here, the fact that it was indisputably OMIT data), "not the purpose for which the data may be used." Id. at 934. The Federal Circuit likewise upheld the Government's ability to challenge data markings under DFARS 252.227-7037 if the Government agreed that the data in question was privately funded, noting that the regulation and the statute focus on challenges to asserted restrictions. Lastly, the Circuit found each of the subcontractor's markings to be improperly restrictive, reasoning that there is no meaningful distinction between unrestricted rights to the Government in the -7015 clause and unlimited rights in the -7013 clause. Id. at 941. Note that this appeal was raised by a subcontractor directly consistent with 10 USCA § 3785(b), which broadens the definition of a claim under the CDA to include "a claim pertaining to the validity of the asserted restriction [that] is submitted in writing to a contracting officer by a contractor or subcontractor at any tier."

"Mother May I?" (Superior Knowledge Claims): In *IVA'AL Solutions, LLC*, ASBCA 63430, 2025 WL 869947 (Feb. 12, 2025), the Board denied the contractor's equitable adjustment claim on a fixed-priced level of effort contract providing social services but held that the Government withheld superior knowledge from the contractor. The contractor argued it could bill for the fixed monthly price regardless of hours worked and the Government rejected all such invoices, contending that the contract required invoices submitted on the basis of

hours worked. Although it took issue with the Government's characterization of the contract as a "firm-fixed price hourly" contract, the Board found that this fixed-price level of effort contract only entitled the contractor to bill for actual hours worked. The Board explained this "is a fixed-price type contract, so it does not require cost-realism or price realism analysis.... However, it is like a cost-reimbursement contract in that the agency pays for the level of effort expended." The Board found that the Air Force had failed to disclose superior knowledge about the contract's historical vacancy rate—applying the Federal Circuit's test from *Hercules, Inc. v. U.S.*, 24 F.3d 188, 197 (Fed. Cir. 1994), to find that the existing vacancy rate constituted "vital knowledge" as "[i]t is routine for contractors on service contracts to hire the exiting contractor's workforce" and "[k]nowledge of a large number of vacancies would indicate to a bidder the need for higher wages and more recruiting expenses." Moreover, the Air Force was aware that the contractor lacked the information and provided a misleading Request for Information answer during the procurement that suggested there were no current vacancies. Because the Air Force failed to provide the relevant information, the Air Force failed to disclose superior knowledge, a holding the Board differentiated from one based on a breach of the duty of good faith and fair dealing because a breach of the latter duty "does not apply prior to contract formation, while the superior knowledge [doctrine] applies to contract formation issues."

Unfair Demerits: Contractors successfully appealed the "demerits" against them in two Board cases. First, in *King & George, LLC v. Gen. Servs. Admin.*, CBCA 7891, 2025 WL 1676262 (June 5, 2025), the CBCA found that a contract did not permit deductions for less than full staffing regardless of the contractor's satisfactory performance record. The Board analyzed the contract's deductions clause and found it did not authorize deductions on the sole basis of staffing vacancies; rather: "[u]nder the clear terms of the contract, only performance failures justified the assessment of deductions, and staffing shortfalls could not reasonably be considered performance failures" where the contract did not clearly establish staffing as a performance requirement. Id. Second, in *ECC Int'l Constructors, LLC*, ASBCA 59586, 2025 WL 1357784 (April 18, 2025), the ASBCA, among other holdings, confirmed that a Government's withholding of liquidated damages constitutes an appealable Government claim and that the Government may not impose liquidated damages during a time of established excusable delay. The Board ordered the Government to return the liquidated damages assessed during periods of excusable delay (while finding the Government entitled to assess liquidated damages where the contractor's performance failures were not excused).

Binding Contract or Pinky Promise: *The Kennedy Collective v. U.S.*, 174 Fed. Cl. 545 (2025); 67 GC ¶ 39, involved a dispute between a non-profit organization, supporting individuals with intellectual and other types of disabilities, and the National Oceanic and Atmospheric Administration (NOAA) in connection with a blanket purchase agreement (BPA) for personal protective equipment and cleaning supplies. Id. at 549. The BPA allows NOAA to purchase supplies by placing "call orders" and utilizes a tiered delivery schedule where the most urgent orders must be delivered within five to 10 days. The contractor pre-purchased $2.1 million in inventory to address the most urgent orders, but over the three-year span of the contract, the agency purchased only $609,214 worth of supplies—and much of the pre-purchased inventory expired, causing the contractor to incur disposal costs exceeding $380,000. The contractor sought damages for its inventory and disposal costs, and the Government moved to dismiss the action on the basis that the BPA was not a binding contract. The Court observed that the BPA "contains some irregularities," for example it "refers to itself as a 'contract' " and does not address whether the contractor could reject an order. Id. at 555–56. Yet, the Court found there to be no "mutuality of consideration arising from the BPA's terms sufficient to create contractual duties for both parties." Id. at 556. The Court disagreed with the contractor's assertion that the BPA required the contractor to pre-purchase inventory, because even if that were true (which the Court noted seemed doubtful), "the government was not obligated to do anything until *after* it placed a call order." Id. at 557. The Court accordingly found the normal analysis that BPAs are " 'illusory promises

that do not impose obligations on either party' " to apply: that is, "[i]f a party never places an order under a BPA, no obligation is ever created necessitating the other party to act." Id. (quoting *Crewzers Fire Crew Transp., Inc. v. U.S.*, 741 F.3d 1380, 1382–83 (Fed. Cir. 2014); 56 GC ¶ 49). The Court "pressed" the Government at oral argument "as to whether Kennedy's lack of ability to reject call orders constitutes consideration," but ultimately found no provision of the BPA prohibited the contractor from rejecting an order and so "decline[d] to infer constructive consideration where the BPA is silent." Id. at 558. The Court also declined to read into the BPA "an implied 'reasonable' minimum quantity" term, finding the BPA stated no such term and instead included "0.000" as the "Amount" of each listed good. Id. at 558–59. Neither was the contractor able to demonstrate that the BPA was a requirements contract, as it "contain[ed] no language requiring NOAA to fulfill *all* its [personal protective equipment] needs from [the contractor] alone." Id. at 559. Lastly, the Court found the BPA was not an indefinite quantity contract given its lack of a mandatory minimum order. Accordingly, without a valid contract, no breach of any implied duty of good faith and fair dealing was possible. The Court found the contractor failed to state a claim upon which the Court could order the relief of an equitable adjustment and dismissed the case.

Day Is Done, Gone the Sun—That concludes this summer session of Camp CDA. We hope you'll join us for the next session, but until then, we'll roast one more marshmallow, sing one more song ("Hello Muddah, Hello Fadduh"), and await further guidance from our trusty camp counselors on the intricacies of claims and disputes.

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