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Contractor Eligible Under CAS 413 To Recover \$252 Million Pension Deficit

General Motors Corp. v. U.S., 2005 WL 1560462
(Fed. Cl. June 28, 2005)

General releases executed by a contractor for closed, flexibly priced contracts do not bar those contracts from being included in a segment-closing adjustment pursuant to Cost Accounting Standard 413, Adjustment and Allocation of Pension Cost, the U.S. Court of Federal Claims has held. Also, the Federal Acquisition Regulation's Limitation of Cost and Limitation of Funds clauses do not foreclose a final adjustment of previously determined pension costs as part of a segment-closing adjustment. Finally, CAS 412, Cost Accounting Standard for Composition and Measurement of Pension Cost, and the FAR cost principle providing that "to be allowable pension costs must be funded by the time set for filing the Federal income tax return" are not applicable to a segment-closing adjustment, and do not foreclose a contractor's recovery of a pension deficit following such an adjustment.

In 1993, General Motors Corp. sold its Allison Gas Turbine division. Because Allison provided Government services, the sale constituted a segment closing, which triggered certain obligations under CAS 413.

GM sponsored separate pension plans for hourly employees and salaried employees. Because the firm used composite accounting, it did not have a segment separately designated for Allison employees. GM acknowledged that, prior to the sale of Allison, its pension funds were underfunded. Be-

fore GM sold the Allison division, it closed out several Government contracts and released the Government from claims arising from those agreements.

In 1996, GM submitted a \$252 million certified claim to the Corporate Administrative Contracting Officer for a segment-closing adjustment. After the CO denied GM's claim in full, the firm filed suit with the COFC.

As a preliminary matter, the Court held that only contract claims consistent with the requirements of the Contract Disputes Act could be heard by the COFC. The Court dismissed all other contract claims.

Release of Claims—The Government argued that GM is not entitled to recover pension costs on contracts that were closed before the Allison sale because GM released the Government from any claims for pension costs under such contracts. The Government contended that GM's general release of all claims precluded the firm from recovering pension costs attributable to the closed contracts or any pension deficit the Government might otherwise owe pursuant to CAS 413.

GM responded that the Government's argument fails in light of *Allegheny Teledyne Inc. v. U.S.*, 316 F.3d 1366 (Fed. Cir. 2003), 45 GC ¶ 69, which held that the segment-closing adjustment "may be recovered under any flexibly-priced contract that remains open during the year of the segment-closing," and therefore, "the status of past contracts is irrelevant." According to GM, this meant that the segment-closing adjustment may include closed contracts "as long as there is at least one flexibly-priced contract open during the year of the segment-closing."

The Court concluded that, although the issue was not "squarely addressed" in *Teledyne*, it was clear from the holding and the CAS 413 language that the segment-closing calculation would include both open and closed flexibly priced contracts. Thus, the releases executed by GM for the closed contracts did not "foreclose a current period adjustment of previously determined pension costs under CAS 413."

The Court explained that the distinction in *Teledyne* between fixed-price and flexibly priced contracts was made because costs are never adjusted if fixed-price

contracts are closed. Therefore, the CAS 413 adjustment of previously determined pension costs does not apply to these contracts. However, the execution of a release of a flexibly priced contract does not make it like a fixed-price contract for the purposes of the CAS. In other words, the general releases executed by GM, which do not specifically reserve the right to adjust pension costs in closed contracts, do not preclude a CAS 413 segment-closing adjustment for closed flexibly priced contracts.

Funding Requirement—The Government argued that, taken together, FAR pt. 31 cost principles, the Allowable Cost and Payment clause, and CAS 412, barred GM from recovering pension costs under CAS 413. According to the Government, GM was “obligated to determine the amount needed to meet the deficit triggered by the Allison segment-closing and then to advance that payment in the year of the segment-closing.” The Government contended that, under the FAR and CAS, if these pension costs were not funded in the appropriate years, the Government should not be charged.

GM countered that the provisions cited by the Government did not apply to the segment-closing adjustment mandated under CAS 413 because the funding requirement extends only to “normal” pension costs, and not CAS 413’s “extraordinary, one-time segment-closing adjustment.” Specifically, CAS 412 refers to “annual pension adjustments,” as opposed to segment-closing adjustments, which are not annual pension costs. Likewise, GM pointed out that the subject FAR cost principle does not implicate segment-closing adjustments because it only applies to “normal costs of pension plans not funded in the year incurred.” FAR 31.205-6(j)(3)(i)(A).

The Court agreed that these provisions do not extend to the one-time calculation provided for under CAS 413 following a segment closing. The provisions “dictate certain obligations that bind the contractor when allocating or funding pension costs for a given year,” but “do not address a CAS 413 segment-closing adjustment,” the Court explained. “It therefore does not follow that the failure to fulfill these obligations forecloses recovery of a deficit following a CAS 413 segment-closing adjustment.”

Limitation of Cost and Funds Clauses—The Government argued that FAR 52.232-20(b), Limitation of Cost, and FAR 52.232-22, Limitation of Funds, cap the maximum recovery to the amount estimated by the parties for the cost of the contract. GM re-

sponded that the cost and funds limitation clauses do not apply to costs that may be owed pursuant to a CAS 413 segment-closing adjustment.

The Court, in siding with GM, held that the clauses do not operate to foreclose a final adjustment of previously determined pension costs as part of a CAS 413 segment-closing adjustment. According to the COFC, the Government’s interpretation “would subvert the requirements of the CAS 413,” and “[c]ompliance with CAS 413 is mandatory.” Because the adjustment applies to previously determined costs for all post-CAS, flexibly priced contracts, “it does not result in the incurrence of any additional contract-specific pension costs.” Thus, the Court concluded, the CAS 413 adjustment does not implicate the cost or funding limitation clauses.

Profit—The Government contended that CAS 413 does not allow for any profit on GM’s segment-closing adjustment. GM conceded that its profit claim stems from “an established practice between the parties of adding profit in resolving previous CAS disagreements.” The Court agreed with the Government that there is no right to profit on a CAS 413 adjustment and the parties’ past practice does not establish such a right. In granting summary judgment for the Government on the profit claim, the Court explained that the CAS 413 adjustment is an adjustment of “previously determined” pension costs for the entire segment. “If the calculation results in a deficit, then the government’s share must be increased. If the calculation results in a surplus, then the government is entitled to be reimbursed. In either case, there is no occasion to include profit.”

♦ **Practitioner’s Comment**—The *GM* decision should be of particular interest to Government contractors. After a long line of CAS 413 segment-closure cases in which the Government sought to recover surplus assets (*Gould, Johnson Controls, Teledyne*, and *General Electric*), the *GM* decision makes clear that contractors may recover an asset deficit determined under the segment-closure accounting requirements of CAS 413.

Although the COFC had determined that the Allowable Costs and Payment and Credits clauses are the vehicles by which the Government may recover a pension surplus resulting from CAS 413 accounting (*Teledyne, Inc. v. U.S.*, 50 Fed. Cl. 155, 184 (2001)), a long-controversial issue that the Court has now put to rest is whether the pension funding requirements

of the Allowable Costs and Payment clause preclude a contractor from recovering a pension deficit determined through CAS 413 segment-closure accounting. The Court squarely held that the Allowable Costs and Payment clause, and related FAR and CAS provisions upon which the Government relied, are designed for normal pension cost accounting. A segment closure under CAS 413 is an extraordinary event that is not a factor in an actuary's determination of normal pension cost. As CAS 413 itself dictates, the accounting requirement is only triggered by a segment closure—or, as under the CAS revised in 1995, a plan termination or curtailment of benefits. An actuary or contractor cannot reasonably foresee that a segment closure will occur at any particular time and result in a pension deficit of any particular amount, such that the contractor would fund the impending deficit. Accordingly, the Court rightly determined that the funding requirements of the Allowable Costs and Payment clause do not preclude a contractor's recovery of a pension asset deficit.

The inability to reasonably foresee a pension deficit dovetails nicely into another issue that the Court resolved: the effect of the Limitation of Cost and Limitation of Funds clauses on reimbursement of a pension deficit determined through CAS 413. The Court reconciled the CAS and FAR with simple logic. A CAS 413 segment-closure adjustment is not a contract-specific pension cost, it is a unique creation of the CAS segment-closure accounting requirement. Accordingly, the Limitation of Cost and Limitation of Funds clauses, which are contract specific, do not apply. The Court could have reached the same conclusion by simply applying the doctrinal exceptions to the clauses, which include a contractor's inability to reasonably foresee a cost overrun. See *Johnson Controls World Serv. Inc. v. U.S.*, 48 Fed. Cl. 479, 486 (2001).

Another important issue that the Court has set to rest is the distinction between adjustment of costs under the CAS and contract price. Since the first CAS 413 segment-closure case, *Gould Inc.*, ASBCA No. 46759, 97-2 BCA ¶ 29,254, the Government has sought to equate an adjustment of cost, as set forth in CAS 413.50(c)(12), with an adjustment to contract prices. In *GM*, the Government argued a variation on that theme in its assertion that release of claims under closed contracts precludes recovery of pension costs for those closed contracts. The Court explained, as did the board in *Gould*, that CAS 413.50(c)(12) is

an accounting requirement that calls for an adjustment of "previously determined pension cost." This adjustment occurs regardless of contract type or whether the contracts were previously closed. After the accounting adjustment is made in the current year, the effect on contracts does depend on the mix of contract types open in the current period of the adjustment. Moreover, it is highly unlikely that the Government would have sought to preclude the effect of closed contracts had the adjustment in pension costs resulted in surplus assets.

Finally, the Court addressed in *GM* the preclusive effect of the statute of limitations. Of course, regardless of the issue in dispute (CAS or otherwise), a contractor must always be cognizant of the statute of limitations. The Court's decision on the effect of the statute of limitations is a bit confusing, however. The Court held that the CDA governs contract claims even if the Tucker Act provides jurisdiction. The CDA statute of limitations for filing a claim is six years (41 USCA § 605(a)), but the statute of limitations does not apply to contracts awarded before Oct. 1, 1995. *Motorola, Inc. v. Togo West (Secretary of the Army)*, 125 F.3d 1470 (Fed. Cir 1997); FAR 33.206(b). The Government asserts that the claim accrued on Dec. 31, 1993, and the facts indicate that GM filed its certified claim on March 29, 1996, suggesting that, even if the CDA statute of limitations applied, the claim was timely, a point that the Government concedes. Thus, it is unclear how the CDA would preclude GM's claims. There is only a glint of insight in footnote 2 of the decision, which refers to the Government's argument applying to "claims that have not even been presented to [the] court," which might be the claims that the Court's decision affects. Keeping this in mind, the *GM* decision, nevertheless, is important on the substantive issues to a contractor's benefit in recovering a pension deficit under CAS 413.



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