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

Government Contracts Disputes In Focus: Claims Cases And Trends From The Second Half Of 2020

By Kara Daniels and Amanda Sherwood[*]

While 2020 was unusual in countless ways, one thing that did not change was the Government's efforts to dismiss contractors' Contract Disputes Act (CDA)[1] litigation based on jurisdictional and procedural arguments. The decisions issued by the courts and boards of contract appeals from late June through December 2020 remind contractors that CDA rules and procedures continue to emerge and evolve through litigation. This BRIEFING PAPER follows up on our prior summary of noteworthy decisions from the first half of 2020 that was published as a *Feature Comment* in THE GOVERNMENT CONTRACTOR.[2] Below we have provided a comprehensive update of 27 claims decisions that offer guidance to those navigating the complex rules of presenting and seeking relief for government contracts claims.

Proving (And Not Proving) Constructive Ch-Ch-Changes

What happens when the contracting officer (or other authorized government representative) demands performance different than what the contract requires without a formal modification? A constructive change of course! We begin our summary with an examination of two Armed Service Board of Contract Appeals (ASBCA) decisions and two decisions of the U.S. Court of Appeals for the Federal Circuit issued in the second half of 2020 bearing on how a contractor can establish a constructive change.

In *Raytheon Co.*,[3] the ASBCA utilized extrinsic evidence showing the government and Raytheon entered into the contract with the same understanding about the period of performance—a period that differed from the contracting officer's later order—to find Raytheon was entitled to its request for increased costs. The ASBCA observed that Raytheon's contract was ambiguous as to whether the services at issue were governed by the one-

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year period or a three-year period of performance provision in the contract. Yet, because the parties' "prior course of dealing established a common basis of understanding" that the services at issue fell within the one-year provision, the board held that the contracting officer constructively changed the contract by ordering Raytheon to perform the services for a three-year period without adjustment. To reach its decision, the ASBCA examined various contracting officer and other government employee statements that seemed to acknowledge the one-year period of performance, including discussions about changes to the language during contract negotiations, which were ultimately abandoned because the change would result in a cost increase.

Conversely, in *ECC International, LLC*,[4] the ASBCA rejected the contractor's attempt to rely on course of dealing evidence because the contract was not ambiguous and the contractor's actions at issue deviated from that prior course of dealings. The contractor sought to recover reinstallation costs after its subcontractor installed a tiled ceiling rather than the more expensive plaster and lath ceiling specified in the task order. Among other arguments, the contractor contended that the tiled ceiling installation was proper because the government had accepted alternative ceiling materials in prior task orders issued under the contract. But the record showed that, in each of those other instances, the government specifically agreed to the variation of the task order requirements prior to construction, whereas the subcontractor made the change at issue without notice to or prior approval of the government. Even the prime contractor admitted that it did not know of the change until the government discovered the issue. The board also rejected the contractor's argument that the government had waived compliance with the ceiling specification when it approved shop drawings and samples reflecting the tiled ceiling because the task order required contracting officer approval for design changes, and no evidence existed this official had "knowingly rescinded the government's right to require compliance with a Task Order minimum requirement." Accordingly, the board found that the "government cannot properly be blamed for approving the design when [the prime contractor] failed to inform the government that its design deviated from Task Order minimum requirements."

In *Kiewit Infrastructure West Co. v. United States*,[5] the Federal Circuit ruled that the government may not contrive an ambiguity in the contract language to avoid an equitable adjustment arising from a constructive change to that language. The Circuit held the government effectuated a constructive change where it required the contractor to purchase mitigation credits for wetlands encountered at government-designated waste disposal sites despite that the applicable solicitation provision provided that "no further analysis of the environmental impacts" of using the designated waste disposal sites was needed. The Federal Circuit reasoned: "If the government intended to exclude wetland impacts from the 'environmental impacts'. . ., it should have included contract language to that effect."[6] The contract did not, and thus the contractor reasonably interpreted the specification "to mean what it says—that no further environmental impacts analysis would be required if a contractor chose to dispose of waste and excess material at government-designated waste sites."[7] The court remanded the case to the U.S. Court of Federal Claims (COFC) to determine quantum.

A final decision, *BGT Holdings LLC v. United States*,[8] offers important practice reminders regarding how to

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plead constructive changes. The contractor appealed a COFC dismissal decision and judgment for the government, which would have left the contractor without a remedy for increased performance costs resulting from the government's failure to provide promised government-furnished equipment (GFE). The Federal Circuit vacated the lower court's dismissal of the contractor's complaint, because under the government property clause the contracting officer had a duty to consider an equitable adjustment in good faith. The Federal Circuit rejected the government's argument that the applicable language ("shall consider" a request for equitable adjustment) gave the contracting officer absolute discretion to deny any request regardless of whether the contractor could prove financial loss due to the government's change. The court reasoned: "It is dubious, to say the least, that the drafters of the [Federal Acquisition Regulation's (FAR's)] government property clause . . . envisioned that the government would essentially have an unfettered right to withdraw promised GFE from a contract without consequence."[9] The court also observed that FAR 1.602-2 "demands that the contracting officer exercise impartiality, fairness, and equitable treatment when considering requests for equitable adjustment."[10] In deciding that the contractor also alleged sufficient facts to assert a constructive change, the Federal Circuit reasoned that the COFC erroneously held that the contractor had waived the right to assert a change by ratification by agreeing to a changes clause that said the contractor shall not comply with an order unless issued by the contracting officer. The court observed that the changes clause did not address ratification or limit or restrict the contracting officer's authority to ratify an unauthorized change.[11]

Setoff, Offset, Tomato Tomahto!

What's more off-putting than an offset? An "offset" refers to the government's ability to withhold or deduct payment due under a contract based on a separate amount the contractor owes the government. The government's right to offset contractual debts is the same as any creditor's under the common law. Specifically of concern to contractors, this right includes the ability to deduct from payments due on one contract based on performance or other issues on a separate contract or pursuant to contractual terms. The government also has the right to collect debts through offset under the federal Debt Collection Act.[12] Four interesting cases dealing with government offsets issued in the second half of 2020.

(1) *Government offsets do not excuse contractor default.* In *Aerospace Facilities Group, Inc.*,[13] the ASBCA rejected the contractor's attempt to escape default arising from the contractor's admitted nonperformance after the government exercised its offset right. No dispute existed that the government had terminated the contract because the contractor failed to deliver the specified equipment by the contractually required delivery date. The contractor nevertheless argued unsuccessfully that the government should have excused the nonperformance of its subcontractor due to lack of payment because the government had withheld payments to the prime contractor based on problems the prime had experienced on a separate contract—effectively exercising its offset right. The board held that the default resulted from the contractor's decision not to pay its subcontractor for equipment, "even though the contractor could have done so out of its corporate funds." In sum and unsurprisingly, the government's exercise of its offset right does not ease the contractor's obligations.

(2) *Government offsets made without contracting officer involvement do not constitute final decisions*. The Civilian Board of Contract Appeals (CBCA) held that merely taking an offset without contracting officer involvement does not meet the requirements for a contracting officer's final decision asserting a government claim in *1000-1100 Wilson Owner, LLC v. General Services Administration*.[14] The General Services Administration (GSA) determined that it had overpaid for leased office building space by paying certain real estate taxes for which the government was allegedly not liable. This claim for overpayment accrued in November 2012. The contracting officer withheld payment of approximately $34,000 remaining under lease I, and, subsequently, in July 2016, another department within the GSA imposed offsets to collect the remaining amount of disputed tax payments under a subsequent lease II with the same contractor. In November 2018, the contractor submitted a certified claim to the contracting officer challenging the GSA's refusal to pay the taxes and the offsets as a breach of both leases. By agreement of the parties, the GSA filed a complaint with the CBCA seeking a declaration that its offsets were proper; the contractor then sought dismissal on the ground that the CDA's six-year statute of limita-

tions rendered the government's offset claim untimely.[15] The CBCA cited the CDA's requirement that all claims be submitted to the contracting officer for decision[16] and agreed with the contractor as to the setoff on lease II because the contracting officer was not involved in that offset (the financial services division withheld the lease payments). The CBCA, however, denied the dismissal motion with regard to the withholding under lease I, which the contracting officer effectuated with a unilateral supplemental lease agreement, based on the Federal Circuit's holding in *Placeway Construction Corp. v. United States* that a final decision was issued where the contracting officer's setoff decision determined both liability and damages.[17]

(3) *When a contractor properly challenges an offset under the Debt Collection Act, the tribunal must consider the merits of the overpayment decision serving to justify the offset*. The Federal Circuit addressed an atypical offset scenario in *Agility Public Warehousing Co. K.S.C.P. v. United States*[18] that arose under the Debt Collection Act and not the CDA because the United States was not the contracting counterparty. Agility performed several task orders assisting in the Iraq reconstruction, and payment disputes arose. After Agility did not respond to multiple demands for repayment, the Army notified Agility it would begin withholding payments under a separate contract. Because of the particularities of the Iraqi reconstruction effort, Agility's original challenge was dismissed for lack of jurisdiction under the CDA because the United States was the contract administrator and not a contracting party to the Iraqi effort so the CDA did not apply.[19] Thereafter, Agility filed a second action in the COFC claiming a breach of the separate Army contract. Agility contended that given the United States was not a party to the Iraq reconstruction contract, any overpayment on that contract was due to Iraq, so the Army's offset on the unrelated contract was improper. The COFC dismissed the case, finding that the United States was owed the alleged overpayment and that the Debt Collection Act authorized offsets.[20] On appeal, the Federal Circuit agreed that to the extent the United States overpaid Agility with United States funds, "the United States has an independent and inherent right to recover" because the payments were congressionally appropriated.[21] But, the Federal Circuit reversed and remanded on the ground that the COFC had legally erred in holding that the contracting officer determination that an overpayment decision was made was sufficient to establish a valid debt under the Debt Collection Act. The Federal Circuit clarified that the Debt Collection Act "does not give the United States a freestanding mechanism to create a debt but rather provides only a mechanism to offset a preexisting, valid debt."[22] As such, the COFC should have considered whether Agility was actually overpaid under the Iraq reconstruction contract because that determination serves as the basis for the offset under the separate contract. The Federal Circuit also remanded for the COFC to determine whether the United States provided Agility "all of the required procedural safeguards due under the Debt Collection Act" prior to implementing the offset.[23] Although the route was circuitous, the contractor finally will obtain judicial review of the validity of the overpayment determination.

(4) *The Federal Circuit finds CDA jurisdiction to challenge payment demand under FAR 30.606 and rejects the Department of Justice's (DOJ's) waiver defense under the facts*. The Federal Circuit issued yet another very high profile case addressing offsets in the crossroads between claims and bid protests in *The Boeing Co. v. United States*,[24] righting what many in the industry viewed to be an incorrect 2019 COFC ruling. A little history provides context. Prior to 2005, the Cost Accounting Standards (CAS) stated that when a contractor made multiple changes to its cost accounting practices, the proper method to determine the cost impact of these changes was to offset cost increases against cost decreases. In 2005, the FAR Council adopted FAR 30.606(a)(3)(ii) changing the calculation to count only the increases and prohibiting any offsets. After this new rule went into effect, Boeing entered into a CAS-covered contract, during the performance of which Boeing changed its cost accounting practices. When the government invoked FAR 30.606(a)(3)(ii), Boeing filed suit in the COFC under the CDA, arguing that FAR 30.606(a)(3)(ii) conflicts with a provision of the CAS statute, 41 U.S.C.A. § 1503(b), and the government's inflated contract price adjustment based thereon breached the contract, or alternatively, constituted an illegal exaction. In a surprise decision, the COFC dismissed the complaint, adopting the government's argument that because the conflict between FAR 30.606(a)(3)(ii) and the CAS provision was patent, Boeing waived its challenge to the FAR clause's legality by not raising it prior to entering the contract.[25] The COFC also held that it lacked jurisdiction over Boeing's illegal

exaction claim because the CAS statute was not a money-mandating statute.[26] The Federal Circuit reversed, holding that the COFC "misapplied the doctrine of waiver and misinterpreted the jurisdictional standard for illegal exaction claims."[27] In rejecting the government's waiver claim, the Federal Circuit explained that it would "not create such a new basis for waiver where the government had not identified a judicial forum in which the plaintiff would clearly have been entitled, during the contract-formation process, to obtain a ruling on the merits of the objection it has raised in the later contract case."[28] The Federal Circuit observed that the CAS statute directs resolution of contract price adjustment disputes under the CDA, and that matters of contract administration are outside the scope of the bid protest process. The Federal Circuit also clarified that "to establish Tucker Act jurisdiction for an illegal exaction claim, a party that has paid money over to the government and seeks its return must make a non-frivolous allegation that the government in obtaining the money, has violated the Constitution, a statute, or a regulation."[29] Thus, Boeing's allegation that "the government has demanded and taken Boeing's money in violation of a statute" conferred jurisdiction over Boeing's illegal exaction claim.[30] Because the Federal Circuit did not rule on the merits of Boeing's challenge, contractors will want to stay tuned as to how the COFC adjudicates the fate of the controversial offsetting provision in FAR 30.606(a)(3).

Isn't That Convenient?: When An Agency Orders Less Than It Promised, The COFC Finds Constructive Termination For Convenience

The COFC denied a contractor's breach of contract claim based on the doctrine of constructive termination for convenience where the agency ordered less than the contract specified. In *JKB Solutions & Services, LLC v. United States*,[31] the contractor filed a complaint alleging that the government breached the contract by ordering fewer than the 14 classes required per ordering period and seeking payment for the classes not ordered. The government countered that the contract required payment only for classes used, and alternatively, the contract's termination for convenience clause limited the contractor's ability to recover to termination for convenience costs, if any. The record showed that although the procuring agency had never explicitly terminated the task orders or the contract for convenience, the contracting officer had issued unilateral deductive change orders to each task order seeking to close them out and deobligating payment for the classes not used. Based on these facts, the COFC agreed with the government, reasoning that "when the government no longer requires all of the services it has ordered, 'the deletion of work . . . resulted in a constructive termination for convenience.' "[32] This situation notably differed from the situation the Federal Circuit addressed in *Ace-Federal Reporters, Inc. v. Barram*, in which the Circuit declined to impose an after-the-fact termination for convenience on a schedule contract that "had been fully performed in accordance with its terms" and the contracting officer herself resisted ordering agency attempts to deviate from contract terms.[33] Because the contractor in *JKB* had not included a claim for termination costs, the COFC granted judgment for the government. Given that the termination for convenience clause would be included in most if not all contracts (either expressly or through the *Christian* doctrine[34]), contractors asserting claims based on payment (or scope) reductions should cover their bases by alternatively submitting a termination for convenience settlement proposal to preserve their ability to recover costs related to the termination. An appeal of this decision is currently pending in the Federal Circuit which might result in an important gloss being placed on the rule of *Ace-Federal*.[35]

Government Damages Claim Sounds in Tort—Abort! No CDA Jurisdiction Results

The COFC issued a decision of first impression late in 2020 addressing an unusual scenario in which a government final decision attempted to impose joint and several liability on two contractors who performed under two separate contracts. In *Johnson Lasky Kindelin Architects, Inc. v. United States*,[36] the government contracted with two companies to install a new courthouse air conditioning system—JLK for design work and MDB for installation. The new system malfunctioned and caused extensive damage. The government issued a final decision purporting to find "[b]oth JLK and MDB are at fault, and are jointly and severally liable" for the damage and demanding "JLK and MBD collectively reimburse GSA" nearly $2 million.[37] The COFC acknowledged "the self-evident proposition that the parties' dispute centers upon

a government contract subject to the CDA" and alleges breaches of this contract but found this was not sufficient to confer jurisdiction under the CDA because both the government's final decision and counterclaim "rely upon a tort theory of damages in their attempt to impose liability on JLK."[38] The COFC held "that the CDA does not permit the government to issue a [contracting officer's final decision] on a government claim, finding two different contactors jointly and severally liable for the same quantum of damages under two different contracts, particularly where, as here, there is no mechanism to prevent the government's double recovery."[39] The court explained that the "jurisdictional defect . . . lies . . . in the government's theory of recovery: joint and several liability cannot be invoked to hold JLK liable for another party's breach of a separate contract any more than the government or JLK can be held liable for punitive damages in this Court."[40] Under this holding, the government is required to find how much of the damages it suffered is attributed to one contractor's actions on one contract versus another contractor's actions on another contract.[41] While future contracting officers are unlikely to make a similar mistake, this case provides an important reminder of the far-reaching ramifications of both the CDA's requirement of a sum certain and of a written contracting officer's final decision on each claim, neither of which was satisfied in this case.

CDA Claim Contract Performance Practice Pointers

The cases discussed below, all decided in the latter half of 2020, serve as important reminders of ways contractors can either ensure later claim success or dig themselves into a hole during contract performance.

(a) *There are limits on the amounts of executive severance that can be reimbursed*. In *DynCorp International LLC*,[42] the contractor appealed a government disallowance of a severance payment that the contractor based on the former chief executive officer's salary, which exceeded the statutory cap. The contractor argued that severance did not qualify as "compensation" and therefore was not subject to the statutory cap. Although the ASBCA agreed that severance was not compensation under the FAR cost principles, the ASBCA denied the appeal, holding that "unallowable salary costs used in a severance pay calculation results in unallowable severance costs—unallowable in, unallowable out." The board added: "[T]here is nothing magic about a severance pay calculation that converts unallowable salary into allowable severance payments."

(b) *If a contractor makes a side agreement with the government, that contractor must document it and ensure the government official had authority to enter that agreement*. In *U.S. Coating Specialties & Supplies, LLC*,[43] a contractor that had rejected its contract in bankruptcy proceedings appealed a related default termination arguing that the Assistant U.S. Attorney (AUSA) involved in the bankruptcy proceedings had orally agreed that the procuring agency would terminate the contract for convenience. The ASBCA denied the appeal because the contractor failed to meet its burden to demonstrate the existence of the side agreement. The contractor could not prove the government actually made the agreement (at best the AUSA said that the agency would have no issue with a termination for reasons other than default), and the AUSA lacked authority to bind the procuring agency in any event.

(c) *While the government only has actual authority, contractors can be bound by apparent authority*. In *Aspen Consulting, LLC*,[44] when the government issued payment to a German bank account rather than the Bank of America account listed in the contract, the contractor sued for breach. The ASBCA denied the appeal because the contractor's vice president and chief operating officer directed that payment be made to the German account. This individual was the day-to-day manager of the project and government point of contact, so the government reasonably believed he had authority to issue the payment direction.

(d) *Contractors may utilize a proprietary legend restricting the rights of non-government third parties to noncommercial items to the extent those restrictions do not impair the government's rights*. In *The Boeing Co. v. Secretary of the Air Force*,[45] the government challenged the contractor's placement of a "proprietary" marking to third parties that was not specified as a legend in the governing noncommercial data rights clause. The case turned on the proper interpretation of the "Rights in Technical Data—Noncommercial Items" clause at Defense FAR Supplement (DFARS) 252.227-7013, which the Federal Circuit held relates only to the license rights

to the government and does not govern the legends a contractor may use to restrict the rights of nongovernmental third parties. The court observed that the government cites "nothing in the DFARS (or anywhere else) to suggest that the [Department of Defense] intended the technical data rights regulations . . . to have a broader impact that could affect a contractor's relationship with third parties."[46] The Federal Circuit remanded the case to the board to resolve the factual dispute about whether the Boeing legend at issue restricted the government's rights.[47]

(e) *Contractors should be careful not to release claims until the government has fulfilled all contract obligations*. In *Alistiqama Co.*,[48] the contractor signed a release in order to close out a contract before the government had returned all of its equipment. The government returned the equipment six months later, and the contractor filed a claim for rental costs for this time period. The ASBCA denied the appeal, finding that the contractor had not pled any facts that would invalidate the release. The ASBCA suggested that the contractor may be able to recover under a new implied-in-fact contract for equipment rental, but the contractor failed to plead the existence of any contract other than the one for which it had signed the release.

(f) *Great care is due with the wording of settlements with the government for many reasons, but claims consequences should not be ignored*. In *Regiment Construction Corp. v. Department of Veterans Affairs*,[49] the contractor filed its appeal based on a deemed denial of its certified claim and after the government filed its answer, the parties sought a stay of proceedings while they engaged in settlement negotiations. While those negotiations were ongoing, the contractor, a principal, and the DOJ entered into a settlement, and the agency referred the company to the suspension and debarment official. As a consequence, the government sought summary judgment on the appeal asking the board to hold as a matter of law that the contractor had committed fraud and thus the contract (under which the contractor had submitted a claim) was *void ab initio*. The CBCA denied the government's motion observing that the terms of the settlement expressly said that it was not to be construed as an admission of liability, and that the contractor and principal disputed the merits of the allegations contained therein. This could have turned out differently with a differently worded settlement.

CDA Claim Process Practice Pointers

Lastly, even the most meritorious claims can suffer procedural pitfalls that can have dire consequences.

(1) *Raise all arguments and legal theories in the written claim to the CO*. In *Kiewit Infrastructure West Co. v. United States*,[50] the constructive changes aspect of which we discussed above, prior to reaching the merits, the court also discussed a government jurisdictional argument that the court lacked jurisdiction over the contractor's alternative differing site condition theory of relief, which the contractor raised in the lower court proceedings but not in the underlying written claim to the contracting officer. The Federal Circuit reiterated the well-established rule that a court may consider two claims the '' 'same' for CDA jurisdictional purposes if 'they arise from the same operative facts, claim essentially the same relief, and merely assert different legal theories for that recovery.' ''[51] The court nevertheless determined that it need not resolve whether that rule applied to the contractor's differing site conditions theory because the court could adequately assess the contractor's requested relief under the constructive change theory, which the contractor had indisputably presented to the contracting officer.[52] While the court found for the contractor based on the legal theory presented in the written CDA claim, the government's jurisdiction argument serves as an important reminder for practitioners to present all possible legal theories to the contracting officer in the first instance to avoid potential problems (and increased litigation costs to establish jurisdiction) later. Conversely, in *HCIC Enterprises, LLC v. United States*,[53] the COFC denied a contractor's request to amend its complaint as futile on the grounds that (a) the contractor's claim against liquidated damages assessment was not ripe because the government had not yet assessed liquidated damages, and (b) the contractor did not first present to the contracting officer its argument seeking to rescind prior waiver of another damage claim before raising it in court. Similarly, in *Philips Lighting North American Corp.*,[54] the ASBCA held that the board lacks jurisdiction to adjudicate a government monetary claim for liquidated damages raised for the first time in the government's responsive pleadings to a contractor's appeal.

(2) *Timely file CDA claims or else lose the right to payment*. In *Anis Avasta Construction Co.*,[55] the board

dismissed an appeal related to a claim that the contractor waited "seven years, one month and 18 days" after accrual before filing. While the contractor argued its claim was timely because it sent email requests for payment in the interim, the board found that these email requests did not amount to a CDA claim or toll the CDA's six-year statute of limitations.[56] Similarly, in *Zafer Construction Co. v. United States*,[57] the court found a claim untimely when it accrued in August 2011, the contractor filed requests for equitable adjustment in September 2013 and December 2014, and the parties engaged in years of negotiations that ultimately failed, after which the contractor then filed a certified CDA claim in February 2018. The court rejected the contractor's argument that the claim did not accrue during the extended period of negotiations because there was no real controversy during that time, reasoning that such an argument contravened FAR 33.201's statement that claims accrue "when all events that fix the liability" were known.

(3) *Timely file appeals*. The boards and the COFC reiterated in the second half of 2020 that neither has jurisdiction unless a timely appeal is made from the contracting officer's final decision on the government's claim or in response to the contractor's certified written claim. In *Haakenson Electric Co.*,[58] the ASBCA found that an appeal filed with the board 91 days after the contractor's receipt of the final decision was untimely. (This case also provides a good reminder that subcontractor claims must be passed through the prime contractor.) Likewise, in *Parsons Evergreene, LLC v. Secretary of Air Force*,[59] the Federal Circuit held it lacked jurisdiction over an appeal from an ASBCA decision when the board issued two different numbered decisions, the contractor only requested reconsideration of one, and then the contractor appealed both, but the appeal of the one not involved in the request for reconsideration was filed more than 120 days after the issuance of the original decision. The Circuit held that "[t]he 120-day deadline was not tolled by the request for reconsideration" in the other numbered appeal.[60]

(4) *Alternative dispute resolution (ADR) is voluntary, and the board's rules require parties jointly request and agree on ADR procedures*. In *S&DF Properties, LLC v. General Services Administration*,[61] the CBCA refused to compel the government to participate in ADR, finding ADR is "counterproductive when forced on unwilling participants."

(5) *The ASBCA now permits typed name signatures, in conjunction with other evidence of the author's identity, on claims, overturning past precedent requiring handwritten signatures*. In *Kamaludin Slyman CSC*,[62] the contractor submitted a typed certification by email. The board found the typed email signature to be both a "discrete" and "verifiable" mark that can be tied to an individual showing a present intention to authenticate the writing because "the name came from an email correspondence which demonstrates that the document came from the sender's email address." The board required additional indicia that the email address was in fact associated with the individual who signed the email and indicated that a mere typed signature in other contexts would be insufficient for a CDA certification. While this decision provides an opening to contractors to certify claims using a typed signature, note that a defective certification is treated as no certification at all, warranting care in this regard.

(6) *Non-monetary claims are permitted, but face hurdles*. First, they may be dismissed on prudential grounds, if the contract has ended. In *Midland Language Center v. Department of Veteran Affairs*,[63] a contractor challenged a contract discrepancy report that the agency had issued for non-performance. The board recognized this as a valid non-monetary claim, taking jurisdiction, but then dismissed the appeal on prudential grounds citing *Alliant Techsystems, Inc. v. United States*,[64] because there was no live dispute as the contract had ended. Second, they must be truly non-monetary. In *MAC Electric, Inc.*,[65] the board dismissed a contractor's allegedly non-monetary claim asking for a government determination of the substantial date of completion of work under the contract, finding the claim was in essence monetary because "the only significant consequence" of the requested declaratory relief would be submission of a second claim seeking money damages based on the number of days of delay. Under these facts, the contractor should have simply submitted a certified claim for money damages based on what it believed to be the substantial date of completion.

Conclusion

In sum, while a great many things changed in 2020, the development of CDA claims case law continued unabated. We hope the above summary of late June

through December 2020 case law assists contractors and their counsel in maneuvering through the often-complicated rules in pursuing and defending contract claims against the federal government.

Guidelines

These *Guidelines* are intended to assist you in understanding the impact of recent case law on the litigation of CDA claims. They are not, however, a substitute for professional representation in any specific situation.

1. *Stay up to date on claims litigation developments*. The CDA statutory framework, *as refined and clarified by case law*, places various preconditions to review by agency boards of contract appeals and courts. The rules of the CDA claims game are many and nuanced, and even small procedural changes in the evolving case law can have large impacts on the viability of a claim.

2. *Remember the ABCs of claims litigation*. Far too many claims are dismissed for failure to timely present arguments, assert a sum certain, timely appeal, properly certify, or other easily avoidable flaws.

3. *Always think about the claims consequences of actions—during contract negotiations, during contract performance, and in seemingly unrelated proceedings*. The most meritorious of claims can suffer from bad positioning or failure to document properly.

ENDNOTES:

[1]41 U.S.C.A. §§ 7101–7109.

[2]Kara Daniels & Amanda Sherwood, "Feature Comment: Government Contracts Disputes in Focus: Claims Cases and Trends from the First Half of 2020," 62 GC ¶ 197(July 22, 2020).

[3]Raytheon Co., ASBCA Nos. 60448, 60785, June 24, 2020, 20-1 BCA ¶ 37,637, 62 GC ¶ 211.

[4]ECC Int'l, LLC, ASBCA No. 58875, Aug. 25, 2020, 20-1 BCA ¶ 37,683.

[5]Kiewit Infrastructure West Co. v. United States, 972 F.3d 1322 (Fed. Cir. 2020), 62 GC ¶ 259.

[6]972 F.3d at 1330.

[7]972 F.3d at 1332.

[8]BGT Holdings LLC v. United States, 984 F.3d 1003 (Fed. Cir. 2020), 63 GC ¶ 16.

[9]984 F.3d at 1011.

[10]984 F.3d at 1011.

[11]984 F.3d at 1014.

[12]31 U.S.C.A. § 3701(a)(1); see also Cecile Indus., Inc. v. Cheney, 995 F.2d 1052, 1055 (Fed. Cir. 1993), 35 GC ¶ 410 (observing that the enacted purpose of the Federal Debt Collection Act "underscores that it does not apply to restrict the common law doctrines governing contractual offsets").

[13]Aerospace Facilities Group, Inc., ASBCA No. 61026, Aug. 11, 2020, 20-1 BCA ¶ 37,668.

[14]1000-1100 Wilson Owner, LLC v. Gen. Servs. Admin., CBCA 6506, July 6, 2020, 20-1 BCA ¶ 37,642.

[15]See 41 U.S.C.A. § 7103(a)(4).

[16]41 U.S.C.A. § 7103(a)(1).

[17]Placeway Constr. Corp. v. United States, 920 F.2d 903, 907 (Fed. Cir. 1990), 32 GC ¶ 320.

[18]Agility Pub. Warehousing Co. K.S.C.P. v. United States, 969 F.3d 1355 (Fed. Cir. 2020), 62 GC ¶ 245.

[19]Agility Logistics Servs. Co. KSC v. Mattis, 887 F.3d 1143 (Fed. Cir. 2018), 60 GC ¶ 137.

[20]Agility Pub. Warehousing Co. K.S.C.P. v. United States, 143 Fed. Cl. 157 (2019).

[21]969 F.3d at 1365.

[22]969 F.3d at 1364.

[23]969 F.3d at 1370.

[24]Boeing Co. v. United States, 968 F.3d 1371 (Fed. Cir. 2020), 62 GC ¶ 235.

[25]Boeing Co. v. United States, 143 Fed. Cl. 298, 310 (2019).

[26]143 Fed. Cl. at 306–07.

[27]968 F.3d at 1374.

[28]968 F.3d at 1380.

[29]968 F.3d at 1383.

[30]968 F.3d at 1383.

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

[32]150 Fed. Cl. at 257 (quoting Praecomm, Inc. v. United States, 78 Fed. Cl. 5, 12 (2007), 49 GC ¶ 337).

[33]Ace-Federal Reporters, Inc. v. Barram, 226 F.3d 1329, 1333–34 (Fed. Cir. 2000), 42 GC ¶ 416 (noting that the "concept" of constructive termination for convenience "is a fiction to begin with, but there has to be some limit to its elasticity").

[34]G. L. Christian & Assocs. v. U.S., 312 F.2d 418 (Ct. Cl. 1963) (a contract clause omitted from a contract will be read into the contract, but only where the clause is required by regulation and is based on a fundamental procurement policy).

[35]JKB Solutions & Servs., LLC v. United States, No. 21-1257 (Fed. Cir. filed Nov. 18, 2020).

[36]Johnson Lasky Kindelin Architects, Inc. v. United States, No. 19-1419C, 2020 WL 7649972 (Fed. Cl. Dec. 23, 2020).

[37]2020 WL 7649972, at *3.

[38]2020 WL 7649972, at *8.

[39]2020 WL 7649972, at *8.

[40]2020 WL 7649972, at *14.

[41]2020 WL 7649972, at *17.

[42]DynCorp Int'l LLC, ASBCA 61950, Sept. 29, 2020, 20-1 BCA ¶ 37,703, 62 GC ¶ 306.

[43]U.S. Coating Specialties & Supplies, LLC, ASBCA No. 58245, Sept. 28, 2020, 20-1 BCA ¶ 37,702.

[44]Aspen Consulting, LLC, ASBCA No. 61122, Oct. 14, 2020, 20-1 BCA ¶ 37,715.

[45]Boeing Co. v. Sec'y of the Air Force, 983 F.3d 1321 (Fed. Cir. Dec. 21, 2020), 63 GC ¶ 8.

[46]983 F.3d at 1328.

[47]983 F.3d at 1334.

[48]Alistiqama Co., ASBCA No. 62501, Oct. 27, 2020, 20-1 BCA ¶ 37,720.

[49]Regiment Constr. Corp. v. Dep't of Veterans Affairs, CBCA 6449, Oct. 1, 2020, 20-1 BCA ¶ 37,700.

[50]Kiewit Infrastructure West Co. v. United States, 972 F.3d 1322 (Fed. Cir. 2020), 62 GC ¶ 259.

[51]972 F.3d at 1328.

[52]972 F.3d at 1328.

[53]HCIC Enters., LLC v. United States, 149 Fed. Cl. 297 (2020).

[54]Philips Lighting N. Am. Corp., ASBCA No. 61769, July 30, 2020, 20-1 BCA ¶ 37,679.

[55]Anis Avasta Constr. Co., ASBCA No. 61926, Nov. 18, 2020, 20-1 BCA ¶ 37,743.

[56]See 41 U.S.C.A. § 7103(a)(4).

[57]Zafer Constr. Co. v. United States, No. 19-673C, 2020 WL 7767509 (Fed. Cl. Dec. 30, 2020).

[58]Haakenson Elec. Co., ASBCA No. 62606, Dec. 18, 2020, 2020 WL 8148706.

[59]Parsons Evergreene, LLC v. Sec'y of Air Force, 968 F.3d 1359 (Fed. Cir. 2020), 62 GC ¶ 244.

[60]968 F.3d at 1367.

[61]S&DF Props., LLC v. Gen. Servs. Admin., CBCA 6809, Aug. 13, 2020, 2020 WL 4915841.

[62]Kamaludin Slyman CSC, ASBCA Nos. 62006 et al., Sept. 25, 2020, 20-1 BCA ¶ 37,694, 62 GC ¶ 291.

[63]Midland Language Center v. Dep't of Veteran Affairs, CBCA 6841, Oct. 27, 2020, 2020 WL 6380249.

[64]Alliant Techsystems, Inc. v. United States, 178 F.3d 1260 (Fed. Cir. 1999), 41 GC ¶ 308.

[65]MAC Elec., Inc., ASBCA No. 62503, Dec. 18, 2020, 2020 WL 8148702 (quoting Securiforce Int'l Am., LLC v. United States, 879 F.3d 1354, 1360 (Fed. Cir. 2018), 60 GC ¶ 31).

NOTES:

BRIEFING PAPERS