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

Much Ado About The CDA: Claims Cases And Trends From The First Half Of 2021

By Kara Daniels and Amanda Sherwood[*]

As discussed in our previous articles on this topic,[1] government contractors and their counsels must keep watch of decisions by the courts and boards of contract appeals clarifying and evolving the applicable guideposts on litigating contract disputes under the Contract Disputes Act (CDA).[2] Finding some inspiration from William Shakespeare, this BRIEFING PAPER discusses some noteworthy decisions from the first six months of 2021 that have been a "mingled yarn."

What Is A Claim? "A Rose By Any Other Name. . ."

Sometimes it is the simple things that cause the most confusion. In the world of contract claims, simply defining what is and what is not a claim can be a thorny issue, with potentially highly prejudicial impacts on the procedural timeline and other jurisdictional requirements for seeking recovery. Of note, the CDA itself does not define the term "claim." Consequently, tribunals rely on the definition of "claim" in the Federal Acquisition Regulation (FAR). In the first half of 2021, several decisions were issued that illuminate important distinctions in the FAR's definition of a "claim."

First, it is a refrain nearing cliché that a claim must state a sum certain.[3] Despite the universal acceptance that this is true, as always, the devil is in the details. For example, in *Sage Acquisitions, LLC v. Department of Housing & Urban Development*,[4] the Civilian Board of Contract Appeals (CBCA) dismissed an appeal on the basis that the underlying claim—a termination settlement proposal (TSP)—failed to state a sum certain. The contractor had included termination for convenience costs and separate requests for equitable adjustment (REAs) in the TSP, and although the TSP stated an amount titled "Gross Proposed Settlement," the document was unclear on whether this amount was partially duplicative of the REA costs described in the document. The board observed that the fact that the contractor had described the REA costs as an "estimate" and "the suggestion that certain of these costs

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may be duplicative of termination for convenience costs result in an unfixed variable in the calculation of the amount requested." Accordingly, the board held the TSP "could not give the contracting officer a clear and unequivocal statement with adequate notice of the amount of the claim, and as such was not a claim as required by the CDA."

The U.S. Court of Appeals for the Federal Circuit also addressed the issue of a "sum certain" in *Creative Management Services, LLC, DBA MC-2 v. United States*,[5] this time in connection with a *government* claim denying a TSP. The dispute centered on whether the money in a reserve account with a variable balance belonged to the contractor or the government upon a termination for convenience. In March 2016, the contracting officer issued a final decision denying the contractor's TSP, advised that the contractor was actually indebted to the government, and demanded that the contractor "return all monies remaining in the account," which at the time of the decision was "at least" $1.2 million. Three years later, the government again demanded payment and the contractor appealed to the U.S. Court of Federal Claims (COFC). The Department of Justice (DOJ) moved to dismiss for lack of jurisdiction because the appeal was filed more than 12 months after the March 2015 final decision.[6] The COFC agreed and the contractor appealed. On appeal, the Circuit agreed that the contracting officer's final decision (COFD) was a government claim that satisfied the sum certain requirement because the amount of money in the account was "readily ascertainable" at the time of the claim (i.e., decision), and "as the account holder" the party on which the demand was made (here the contractor) "only needed to check the Reserve Fund account balance to confirm the amount of the government's claim.[7] Therefore, in this situation, a "precise monetary amount" was not necessary to state a "sum certain."[8] In reaching its decision, the Court also clarified that "there is no rule that '[q]ualifying terms like "nearly" or "approximately," . . . cannot be a sum certain,' " provided, however, that the claimant provided other substantiating information to the party against whom the demand was made.[9]

Second, a claim must request definitive relief and cannot merely be a request for additional negotiation or a simple statement of opinion. Three recent Armed Services Board of Contract Appeals (ASBCA) decision elucidate this distinction. In *Northrop Grumman Corp.*,[10] Northrop wrote a letter to an agency explaining why it believed certain litigation settlement costs were allowable under FAR 31.205-47, "Costs related to legal and other proceedings," and the agency disagreed in a response letter. Northrop appealed, and the government moved to dismiss for lack of a claim. Northrop argued that the agency's response letter qualified as a government claim subject to appeal. The board disagreed: the agency's letter did not demand payment of money or issue a contract interpretation; instead, it notified Northrop that certain costs were not allowable. Neither did the letter comply with CDA or FAR requirements for a COFD.[11] Such a statement of opinion did not constitute a claim under the CDA.

TSPs and REAs walk the blurry line between negotiation with the agency customer and a formal CDA claim. In *Globe Trailer Manufacturing, Inc.*,[12] the board explained that TSPs generally are not claims because they are submitted for *negotiation*, citing Federal Circuit precedent holding that TSPs are "proposals" that the parties contractually agreed to submit and attempt to negotiate a resolution in the event of a termination.[13] By contrast, the board held that a TSP Supplement that incorporated a constructive change claim, that the contractor later submitted after submitting its original TSP, was a valid claim. Consider-

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ing all the circumstances, this "Supplement" met all the requirements of a claim and was independent of the TSP: it made a demand for payment due to a constructive change (not the termination) and was certified. This case reminds contractors not to lose sight of CDA jurisdictional requirements when negotiating with the government—while different bases for recovery may naturally arise and intermingle in the course of negotiations and disputes, contractors must take care to meet the requirements for submission of any valid CDA claims.

Because the party submitting the document controls whether or not the document requests a claims remedy, contractors—if they tread carefully—can control when negotiations ripen into a CDA claim, thereby triggering the appeal timeline. This is what happened in *BAE Systems Ordnance Systems, Inc.*,[14] which the government moved to dismiss, arguing that the contractor's REAs were claims and the contracting officer's response to those REAs was a final decision, so the appeal clock had already expired. The board disagreed, finding the contractor had neither expressly nor implicitly requested a final decision in its earlier REA.[15] Because the contractor carefully avoided—in its many government communications spanning several years—requesting a final decision, it never submitted a claim (until it later wanted to), and there was never any final decision triggering the appeal timeline. The board stated: "At the end of the day (consistent with the law, of course), whether a contractor submits a claim or a non-claim REA should be up to the contractor."

Lastly, related to what constitutes a "claim," the CBCA issued a decision clarifying the requirements for a valid COFD. In *Wise Development, LLC v. General Services Administration*,[16] the agency argued its 2014 termination for default letter constituted a final decision, so that despite the many communications with the terminated contractor in subsequent years, the contractor's appeal five years later was untimely. The CBCA rejected this argument. The board noted that, even though a "contracting officer's decision to terminate a contract for default is treated as a government claim,"[17] usually triggering a 90-day appeal period, here "the purported final decision did not identify itself as a 'final decision' and wholly failed to provide the contractor with *any* appeal rights notice." The contractor also demonstrated it was prejudiced by this failure—as a small company that did not typically engage in government contracting and with counsel who did not specialize in government contracts and who appeared to believe the CDA's six-year statute of limitations applied. The board relied on Federal Circuit precedent in holding that although a lack of notice is not usually sufficient to maintain a contractor's appeal rights, it is when the contractor can establish detrimental reliance.[18] While a more experienced practitioner would have known the rules for challenging terminations, here the government's error excused counsel's "folly and ignorance."

"Words Words, Mere Words. . .": Adventures In Contract Interpretation

Contract interpretation is fundamental to claims practice, and debates over the meaning of even simple contract clauses can make or break a contractor's case for recovery. A dispute over the meaning of certain contract line items (CLINs) made it all the way to the Federal Circuit in *P.K. Management Group, Inc. v. Secretary of Housing & Urban Development*.[19] In short, the contractor performed various services for both Department of Housing and Urban Development- (HUD)-owned properties and "custodial" properties, which HUD had taken possession of but did not yet own. The dispute centered on whether the contractor should be paid for each visit to custodial properties, as it was for HUD-owned properties, or whether its services related to custodial properties were covered under its monthly fee. The agency originally paid the individual fee but later changed its practice, saying it had been mistaken, leading to a contractor claim and then appeal. The Federal Circuit found the clear meaning of the contract to require only payment of the monthly fee for custodial properties. First, the title of the individual service fee CLIN (0005AA) was "On-Going Property Inspection HUD-OWNED Vacant," and a proper contract interpretation must give meaning to those words.[20] Second, CLIN 0005 applied to HUD-owned properties, and CLIN 0006 applied to custodial properties. An interpretation applying CLIN0005AA to custodial properties would render "the CLIN numbering system and titles meaningless."[21] Because the contract was unambiguous, the fact that the agency had originally paid individual service fees for custodial properties was irrelevant to the contract's requirements.

A second Federal Circuit opinion addressed the clear meaning of a contract in the first half of 2021, this time in the context of General Services Administration (GSA) leasing. Many if not most GSA leases require the government to pay the real estate taxes applicable to properties it

is renting. Conflicts arise when local jurisdictions impose new taxes, after the lease is signed, that may or may not fit within the lease's definition of real estate taxes. The Federal Circuit addressed one such instance of this conflict in *NOAA Maryland, LLC v. Administrator of the General Services Administration*.[22] The government argued (and the CBCA had agreed) that no later-imposed tax could qualify as a real estate tax under the relevant lease. The Federal Circuit reversed, interpreting the plain language of the lease to require the government to pay all taxes that meet the lease's definition of real estate taxes, no matter when those taxes were imposed.

Sometimes issues of contract interpretation turn not on what the contract says, but rather on what the contract does not say. In *CSI Aviation, Inc. v. Department of Homeland Security*,[23] a contractor's claim depended on the contractor's standard terms and conditions being incorporated by reference into its Federal Supply Schedule contract. However, the contract's list of six documents that were incorporated by reference did not include the contractor's terms and conditions. The contract's scattered references to the contractor's terms and conditions did not constitute "express, clear language of incorporation." The board reached this conclusion despite proof that the terms and conditions document was in the GSA's contract file, and that the contractor sent the GSA updated versions of the document over the course of performance. The board reasoned that a document cannot be ambiguously incorporated into a contract by reference; if there is reasonable doubt about whether the parties intended to incorporate the document, then it cannot constitute a binding part of the agreement between the parties. In short, if a contractor seeks to rely on a separate document of terms and conditions for contract performance it must make sure the contract unambiguously and expressly incorporates that document.

Contract interpretation is not only an issue during litigation; contractors should make sure they can unambiguously interpret their contracts during contract bidding and performance as well. In *Brantley Construction Services, LLC*,[24] the contractor failed this seemingly simple requirement. The board agreed with the contractor that the specification in issue was defective, but denied the appeal because the contractor could not establish that it had relied on the specification. The record showed that the contractor did not have an adequate understanding of what was required to perform when it crafted its bid—that is, it simply assumed it would be able to find a subcontractor that could meet this requirement.

"All Men Make Faults"—Tales Of (Alleged) Fraud, Board Jurisdiction, Statute Of Limitations, And Alternate Theories

It is well-settled that the boards cannot make factual determinations of fraud; however, that maxim does not mean that any passing reference to the "f word" removes board jurisdiction. Three remarkably similar cases from the first half of 2021 turned on this distinction and illustrate that the timing of allegations of fraud can make all the difference in whether a claim appeal is booted from the boards.

First, in *GSC Construction, Inc.*,[25] the contractor submitted a certified claim for $604,985.16 "for providing a catwalk in lieu of a platform it asserted was required by the task order." The contractor appealed the deemed denial of this claim. The government moved to dismiss the appeal, asserting that the reason it had not yet issued a final decision was that it was investigating potential false statements related to the claim. The government argued that its "position may be substantially prejudiced and undercut by ASBCA proceedings occurring before [the contractor's] potential liability under the False Claim Act or other federal statutes for false claims and false statements are resolved." The board refused to dismiss the appeal because the claim pertained to contract interpretation—whether the contract required the catwalk in question—and did not require the board to determine whether fraud had been committed.

A couple weeks later, the CBCA encountered a similar scenario in *Wide Scope Consulting & Contracting Services v. Department of Health & Human Services*[26] and found it had jurisdiction over an appeal of a deemed denial where the agency, after the appeal was filed, explained that it had declined to issue a decision on the claim due to suspected fraud. While part of the decision is redacted, the board distinguished a prior case in which the DOJ had already filed an action in district court.[27] Here, the contracting officer "has only a suspicion of fraud on the claim," and the board held that "mere suspicion is insufficient to defeat a finding of jurisdiction."

The third case explained in detail why the boards maintain jurisdiction over these types of cases. Similar to

the other cases, in *Nauset Construction Corp.*,[28] the contractor appealed a deemed denial of its claim to the board, and the Army explained that the reason for the delay in issuing a final decision was that the Army referred a contractor's claims to its investigative agencies, which preliminarily found the claimed costs to be fraudulent. The board parsed the language of 41 U.S.C.A. § 7103(c), which states that a contracting officer has no authority to resolve claims "involving fraud," to hold that this statute does not remove a contracting officer's authority over claims that are merely *suspected* to involve fraud. The board then cited prior authority stating that if the latter formulation were true, "the government presumably could defeat any appeal before this board simply by presenting to the Board a letter from the [contracting officer] written after the filing of the appeal articulating the contracting officer's suspicion that the claim underlying the appeal was fraudulent."[29] Neither does the existence of an ongoing investigation deprive the board of jurisdiction; instead, the well-settled rule is that the board retains jurisdiction so long as it need not make any factual determinations of fraud. The board's jurisdiction attached when the contractor appealed the deemed denial of its claims, and the contracting officer could not invalidate that jurisdiction by issuing a decision referencing suspected fraud.

Allegations of fraud do not only impact the jurisdiction of a dispute; they can also impact the statute of limitations. The CDA contains an anti-fraud provision that states that if a contractor cannot support a claim "and it is determined that the inability is attributable to a misrepresentation of fact or fraud by the contractor," then the contractor is liable for the amount of the claim.[30] This provision continues: "Liability under this paragraph shall be determined within 6 years of the commission of the misrepresentation of fact or fraud."[31] In *Lodge Construction, Inc. v. United States*,[32] the government argued this provision applies when the government discovers the fraud, or at least when the government filed a claim to recover under this provision. The COFC disagreed. While noting that at least three past decisions afford differing treatment of the issue, the court applied the statute's "shall be determined" language to hold that this statute of limitations stops running when a court makes a determination of fraud, not when government asserts or alleges fraud. Here, because no court made a finding of fraud within six years of the alleged fraudulent conduct, the government's claim was untimely.

Those looking to escape their contractual obligations may wish to cry foul—or plead fraud in the inducement, which voids contracts *ab initio*. Litigants should be careful they do not cry wolf when making these arguments. In *E&I Global Energy Services, Inc. v. United States*,[33] a contractor tried to sue both to enforce a contract (demanding payment on several invoices) and at the same time to argue it was fraudulently induced to enter the contract. The COFC found the contractor could not logically argue both things. The ASBCA did void a contract *ab initio* due to fraud in *Hollymatic Corp*.[34] The government sought commercial meat grinders with two separate motors and two specific certifications. The contractor's grinder was deemed unacceptable through three rounds of discussions because, while it was certified, it only had one motor. In its final proposal revision, the contractor submitted a drawing of a grinder—with the same model number provisionally proposed—with two motors. The contractor did not include in this proposal iteration a chart listing the applicable certifications, but the ASBCA found that the "implication" from the final proposal was that the contractor offered an option model with two motors and the required certification. Only after the delivered grinders malfunctioned did the government learn that the grinders were not certified and were in fact developed only after the contractor received the award. The board found the contractor made a material misrepresentation even though the contractor never specifically stated that the model currently existed or was certified, rejecting the contractor's argument that the government should have verified these facts because the government was entitled to rely on representations in contractor proposals. Because the contract was void *ab initio*, the board was deprived of jurisdiction as no CDA contract existed.

"Sir, I Am [Never] Too Old To Learn"—Subject Matter Grab Bag

The above cases are relevant to claims practice no matter the actual subject matter of the particular claim. Sometimes, however, the subject matter at issue can carry its own complications and specific concerns. We highlight developments in three different areas below.

(a) *Software*. A recurring issue in the digital age is the government installing or utilizing more licenses or instances of software than it purchased from a contractor. In *Force 3, LLC v. Department of Health & Human Ser-*

vices,[35] when the base year of the contract expired, the government continued using a contractor's software without exercising the contract's option period. The CBCA cited prior authority that the government cannot exercise an option in any way except by strictly complying with the terms of the contract and noted that while usually a defective option exercise results in a constructive change to the contract, here that did not make sense because the government did not even attempt to exercise the option. In holding the government liable for its extra-contractual use of software, the CBCA found that the government's continued use of the software when the contract ended and with knowledge of the contracting officer constituted a ratification of an unauthorized commitment.

(b) *Incurred Cost Submission Cases*. The ASBCA issued a very detailed decision in an incurred cost submission case, *Raytheon Co. & Raytheon Missile Systems*.[36] The board reiterated that the government has the burden of proof on government claims, e.g., when the Defense Contract Audit Agency (DCAA) issues an audit report disallowing a laundry list of costs without much explanation, and the responsible contracting officer then adopts the audit as a final decision without further elaboration. The board was clear that the government maintains the burden to prove that costs are unallowable and cannot shift the burden to the contractor to prove that its incurred costs were allowable, even with hot button costs such as those associated with lobbying. The board also chided the government for not consistently calculating the amount of costs it alleged were expressly unallowable, highlighting the government's failure to meet its burden of proof. Contractors should remember this decision if they ever receive a final decision simply adopting a DCAA audit without analysis or explanation, as such "dilatory sloth and tricks" cannot meet the government's burden of proof.

The DCAA's backlog of incurred cost audits—the result of which is that audits occur many years after the years in question—is the cause of many headaches for contractors, such as when an issue recurs year after year without resolution. A divided board panel addressed one such recurring headache in *L3 Technologies, Inc*.[37] In this case, the contractor appealed three final decisions resulting from its 2011 incurred cost audit. During the pendency of the appeals, the government withdrew the final decisions and sought dismissal on mootness grounds. The contractor opposed, arguing that two exceptions to the mootness doctrine precluded dismissal: (1) voluntary cessation and (2) capable of repetition but evading review. Specifically, the contractor argued that it had appealed the results of its incurred cost audits pertaining to its corporate travel policy from the years 2006, 2007, 2008, 2009, and 2010 and had never received an opinion on the merits. A divided ASBCA panel disagreed with the contractor and held that the voluntary cessation doctrine[38] did not apply because the government stated that "it will never again challenge the incurred price proposals for the contract years at issue." The contractor did not seek a declaratory judgment or injunctive relief relating to its corporate travel policy, and a binding decision on the merits for the years at issue would provide the contractor no more than the withdrawal of the COFDs and commitment by the government to no longer challenge the incurred cost submissions at issue. The ASBCA also found the contractor did not suffer an injury capable of repetition yet evading review, as should the DCAA disallow a similar travel cost in a future year, the contractor could again appeal that decision. Notably, the decision came with a lengthy dissent that would have found such an injury because the contractor "has endured this cycle of audit, final decision, appeal and dismissal for at least twelve years with no end in sight."

CDA Claim Contract Performance Practice Pointers

The below cases, all decided in the first half of 2021, serve as important reminders of how contractors' actions during performance can impact later claims litigation, for "we know what we are but know not what we may be."

(1) *Take care when signing releases*. In *Glen/Mar Construction, Inc. v. Department of Veterans Affairs*,[39] the board enforced a release to deny a contractor's appeal when the release on its face had broad applicability. The board noted the "special and limited" circumstance where the parties' conduct in continuing to consider the claim *after the execution of the release* makes plain that they never construed the release as constituting an abandonment of the claim, but found no evidence of such conduct in this case. In *Shneez Veritas, LLC*,[40] a contractor filed a number of claims related to a termination for convenience. Some but not all of these claims settled, and the contractor appealed the denial of its remaining claim for unabsorbed overhead. The contractor then moved for partial summary judgment on the government's affirmative defense that releases contained in the settlement agreement of related

cases barred the claim as a matter of law, arguing that one settlement agreement preserved any overhead claim (and superseded prior agreements with full releases). The board found the scope of the releases to be a matter of disputed fact and accordingly denied summary judgment.

(2) *Consider whether contractual provisions are for the government's or the contractor's benefit*. Two recent cases provide an interesting illustration of this principle. On the one hand, in *ECC International LLC*,[41] the board held that the agency's failure to provide personnel that the contract stated the government would furnish was not a breach because the personnel were intended to benefit the government, not the contractor. On the other hand, the board held in *General Dynamics—National Steel & Shipbuilding Co.*[42] that the government must compensate the contractor when it demanded the contractor furnish materials that the contract designated as government-furnished material.

(3) *Mandatory minimums govern, not the "expected" or "anticipated" quantity*. In *Future Forest, LLC. v. Secretary of Agriculture*,[43] the Federal Circuit affirmed a CBCA decision denying a contractor claim for lost profits.[44] The contractor had argued the agency breached its duty of good faith and fair dealing by issuing task orders for under 72,000 acres instead of 150,000 acres and claimed that the agency minimized orders under this indefinite-delivery, indefinite-quantity (IDIQ) contract for forest management in favor of managing acreage through another program due to "animus" toward the contractor.[45] The IDIQ contract at issue included a guaranteed minimum of 5,000 acres a year over 10-year contract term, but stated that the Forest Service "anticipate[d]" releasing 15,000 acres per year for a total of 150,000 acres over the term of the contract.[46] The Federal Circuit unsurprisingly ruled that "the implied duty of good faith and fair dealing cannot expand a party's contractual duties beyond those that are expressly set forth in the contract."[47] Relatedly, in *Meridian Global Consulting, LLC v. Department of Homeland Security*,[48] a contractor tried to hold the agency to the "estimated" ordering quantity stated in its labor hour contract, which the agency did not meet. The CBCA found this argument meritless because "the contract contained no guarantee that [the agency] would order a fixed quantity of services," and the contractor made no showing that it had relied on this estimate in calculating its hourly rate.

(4) *Contract assignments require written notice*. In *Allied Meridian Funding, LLC. v. Department of Agriculture*,[49] the original contractor (Genesis) assigned its rights under the contract to Allied Meridian in October 2016, but Allied Meridian did not notify the government of this assignment until December 2016. The government accordingly continued paying Genesis until it was notified of the assignment. Allied Meridian asserted a claim for the amounts paid to Genesis after the assignment but before the notification, arguing it "believed" the government had been notified. The board denied the appeal—statute and regulation require written notice of assignment.[50] The contractor's "belief" did not meet the requirements for an effective assignment.

(5) *Increased pandemic costs may be unallowable*. In *Pernix Serka Joint Venture v. Secretary of State*,[51] the Federal Circuit affirmed, without opinion, the CBCA's decision denying increased contract costs resulting from the outbreak of the Ebola pandemic. While this affirmance does not have precedential effect, it could signal the Circuit's inclinations toward the applicability of excusable delay and other similar doctrines to future cases involving the COVID-19 pandemic.

(6) *Challenge liquidated damages imposed on substantially completed projects.* The boards state as a rule that "after the date of substantial completion or performance, it is improper to assess liquidated damages."[52] In *Sauer Inc.*,[53] the board clarified that for a project with three phases, of which the first phase constituted 98% of the work, it was unreasonable for the government to assess the full amount of liquidated damages when the contractor was late in delivering only the last phase of work. If liquidated damages were even appropriate, then they should have been apportioned to only apply to the incomplete work. Similarly, in *Fortis Networks, Inc.*,[54] the board held the government erred when it applied liquidated damages due to delay on an entire project consisting of five buildings, when some of the buildings were substantially complete within the contractual period of performance; instead, the government should have apportioned the liquidated damages.

(7) *A contract may be implied through course of dealing, if the government officials involved in the course of dealing have actual authority. In Interaction Research Institute, Inc.,*[55] the board refused to dismiss a claim brought by a contractor that provided several trainings to the government at certain government officials' oral request—when the board found those individuals likely

had actual authority to order the trainings on a government credit card. While it is always best practice to demand paperwork, an implied contract may arise in narrow circumstances.

CDA Claim Process Practice Pointers

Even the most meritorious of claims can fail to gain traction if counsel falls into one of the many potential procedural pitfalls in claims litigation, which like the "laboring spider, weave[] tedious snares to trap" litigants. The following cases provide important practice tips that should inform counsel's claims prosecution strategy.

(a) *When seeking a declaratory judgment, explain why it matters*. In *Lockheed Martin Corp.*,[56] the government and the contractor initially reached an agreement that the Fly American Act (FAA)[57] would only apply to personnel performing direct work on covered contracts and not to indirect personnel or indirect travel. The government later issued a letter reversing this position. The contractor sought a declaratory judgment on whether the FAA applies to indirect personnel or travel, but attested that it had not made any changes to its billing or transportation policies in response to the government reversal letter and that the government had not yet denied any costs based on the supposed noncompliance. The contractor likely made this statement to demonstrate its belief that its current actions did not violate the FAA, but the contractor's view that the reversal letter did not mandate any change in practice it condemned its declaratory judgment action. The board held that the disputed interpretation of the FAA did not have "any serious ramifications" on the contractor and therefore dismissed due to the admitted lack of a live dispute between the parties. To summarize the board's position: "Things past redress are now with me past care."

(b) *New theories must relate to the underlying claim to be timely*. In *Blanchard's Contracting, LLC*,[58] a contractor filed for summary judgment, asserting entitlement to the $73,304 sought in its original delay claim and an additional $50,000 for producing drawings and $173,712 for delay after the first delay claim ended. The government moved to dismiss the two additional claims, as they were never presented to the contracting officer. The contractor contended these two additional claims related to the original claim and were therefore properly pled. The board held the contractor's additional claims did not meet the applicable test—i.e., claims are the "same" for jurisdictional purposes if "they arise from the same operative facts, claim essentially the same relief, and merely assert differing legal theories for that recovery."[59] Namely, the drawing claim was not a delay claim but rather a claim for additional work performed, and the factual basis for the second delay claim differed from that of the original claim, as well as pertaining to a different time period.

(c) *A COFD does not have to state a sum certain in order to be valid; it just must relate to a proper CDA claim that does*. The Federal Circuit clarified this point in *Creative Management Services, LLC, DBA MC-2 v. United States.*[60] As the COFD was valid in this case (it referred to and denied a CDA claim stating a sum certain), and the contractor appealed it to COFC more than a year later, the appeal was untimely.

(d) *Be careful with expert reports*. In *SRM Group, Inc. v. Department of Homeland Security*,[61] the government removed two buildings from the scope of a services contract and then later sought to re-add them to the scope of the contract. The parties could not agree on the cost associated with the change, so the contractor submitted an REA. Over the course of the litigation, the contractor employed two different experts with differing opinions on how much the additional work cost the contractor. The board reaffirmed that the party seeking the recovery of incurred costs has the burden of proving their amount and held that the contractor's five differing expert reports—each with differing methods and figures—and lack of explanation of these differences failed to meet this burden.

(e) *What happens when you request a final decision but your claim isn't covered by the CDA?* In *Transdev Services, Inc.*,[62] a Washington Metropolitan Area Transit Authority (WMATA) contract included a "Disputes" clause stating that the contracting officer shall issue a decision should any dispute arise. The contracting officer failed to do so, and the contractor appealed the deemed denial. The ASBCA held it had jurisdiction over the appeal because the failure to issue a final decision constituted a breach of contract, as the "Disputes" clause required it, and because disputes with WMATA are appealed to the ASBCA. Looking to the CDA's 60-day clock for guidance,[63] the ASBCA found the passage of four months without a final decision sufficient to convey jurisdiction over the deemed denial.

(f) *Certify your claim*. In the latest iteration of the case

in which the board held in Fall 2020 that a typed signature qualifies as claim certification, the board has now held in *Kamaludin Slyman CSC*[64] that contractors may not impliedly certify a claim. The board stated: "If a contractor could assert that the certification is to be implicitly found in the entirety of the claim, albeit, in a defective way, there would be no such thing as a claim lacking in certification."

Contractors and government contracts counsel must take care to dot I's and cross T's when submitting and appealing claims to ensure a procedural mishap does not doom a legitimate claim before it has a chance to take flight. To quote the Bard, "Things done well, and with a care, exempt themselves from fear."

Guidelines

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

1. REAs and claims are different submissions with different requirements and different impacts. It is important to distinguish between the two when drafting and submitting a document, as it is possible to accidentally trigger the CDA's timelines and other requirements, to prejudicial effect.

2. Submission of a proposal for negotiation with the government and a claim for payment in the same document creates risks. Separating different requests into separate documents may be the most prudent course.

3. While fact patterns involving alleged fraud can be bounced from the boards, that is by no means a certain outcome. So long as the fact of fraud is not relevant to a particular claim for relief, there is no jurisdictional bar to presenting such claim to the board for resolution.

ENDNOTES:

[1]Kara Daniels & Amanda Sherwood, "Government Contracts Disputes in Focus: Claims Cases and Trends From the Second Half of 2020," 21-3 Briefing Papers 1 (Feb. 2021); 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).

[2]41 U.S.C.A. §§ 7101–7109.

[3]See FAR 2.101 ("Claim means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract.").

[4]Sage Acquisitions, LLC v. Dep't of Hous. & Urban Dev., CBCA 6631, Jan. 28, 2021, 2021 WL 1337578.

[5]Creative Mgmt. Servs. LLC, DBA MC-2 v. United States, 989 F.3d 955 (Fed. Cir. Feb. 26, 2021), 63 GC ¶ 73, aff'g No. 18-1864C, 2020 WL 102992 (Fed. Cl. Jan. 8, 2020).

[6]On appeal, the Federal Circuit observed that arguably the DOJ should have brought its dismissal motion under COFC Rule (RCFC) 12(b)(6) for failure to state a claim versus RCFC 12(b)(1) lack of jurisdiction because the Federal Circuit has "questioned whether compliance with the twelve-month filing period in [41 U.S.C.A.] § 7104(b)(3) is a jurisdictional requirement." The court found that it need not resolve that matter under the facts of the case because it found dismissal was proper. 989 F.3d at 961.

[7]989 F.3d at 962–63. Note this is an important distinguishing factor from the Sage Acquisitions case, where the party on which the demand was made (the government) could not readily ascertain the amount sought based on ambiguities in the TSP.

[8]989 F.3d at 962.

[9]989 F.3d at 963.

[10]Northrop Grumman Corp., ASBCA No. 62189, Apr. 13, 2021, 21-1 BCA ¶ 37,843, 63 GC ¶ 137.

[11]See 41 U.S.C.A. § 7103(e); FAR 3.211(a)(4)(v).

[12]Globe Trailer Mfg., Inc., ASBCA No. 62594, Jan. 28, 2021, 21-1 BCA ¶ 37,795.

[13]James M. Ellett Constr. Co. v. United States, 93 F.3d 1537, 1543-44 (Fed. Cir. 1996), 38 GC ¶ 426.

[14]BAE Sys. Ordnance Sys., Inc., ASBCA No. 62416, Feb. 10, 2021, 2021 WL 934959.

[15]In so holding, the board rejected a contractor argument in the alternative that the REA could not be a claim because the contractor utilized the specific certification language from the Defense FAR Supplement pertaining to REAs. See DFARS 252.243-7002. Because the defective certification (from a claims perspective) could have later been cured, use of REA certification language did not by itself resolve whether the document was an REA or a claim.

[16]Wise Dev., LLC v. Gen. Servs. Admin., CBCA 6659, Jan. 6, 2021, 21-1 BCA ¶ 37,774.

[17]Malone v. United States, 849 F.2d 1441, 1443 (Fed. Cir. 1988).

[18]See Decker & Co. v. West, 76 F.3d 1573 (Fed. Cir. 1996).

[19]P.K. Mgmt. Group, Inc. v. Sec'y of Hous. & Urban Dev., 987 F.3d 1030 (Fed. Cir. Feb. 4, 2021), 63 GC ¶ 56.

[20]987 F.3d at 1032.

[21]987 F.3d at 1032.

[22]NOAA Md., LLC v. Admin. of the Gen. Servs. Admin., 997 F.3d 1159 (Fed. Cir. May 13, 2021), 63 GC ¶ 166, rev'g CBCA 5269, Oct. 31, 2019, 19-1 BCA ¶ 37,458.

[23]CSI Aviation, Inc. v. Dep't of Homeland Sec., CBCA 6292 et al., Jan. 4, 2021, 21-1 BCA ¶ 37,769.

[24]Brantley Constr. Servs., LLC, ASBCA No. 61118, Jan. 28, 2021, 21-1 BCA ¶ 37,794.

[25]GSC Constr., Inc., ASBCA No. 62530, Mar. 1, 2021, 2021 WL 1158553.

[26]Wide Scope Consulting & Contracting Servs. v. Dep't of Health & Human Servs., CBCA 6895, Mar. 17, 2021, 2021 WL 1590347.

[27]Savannah River Nuclear Solutions, LLC v. Dep't of Energy, CBCA 5287, May 12, 2017, 17-1 BCA ¶ 36,749.

[28]Nauset Constr. Corp., ASBCA Nos. 61673, 61675, May 5, 2021, 2021 WL 2029232.

[29]ESA South, Inc., ASBCA Nos. 62242, 62243, 20-1 BCA ¶ 37,647.

[30]41 U.S.C.A. § 7103(c)(2).

[31]41 U.S.C.A. § 7103(c)(2).

[32]Lodge Constr., Inc. v. United States, 153 Fed. Cl. 430 (Apr. 14, 2021).

[33]E&I Global Energy Servs., Inc. v. United States, 153 Fed. Cl. 459 (Apr. 15, 2021).

[34]Hollymatic Corp., ASBCA Nos. 61920, 61956, Mar. 22, 2021, 21-1 BCA ¶ 37,823, 63 GC ¶ 121.

[35]Force 3, LLC v. Dep't of Health & Human Servs., CBCA 6654, Apr. 14, 2021, 2021 WL 1691457.

[36]Raytheon Co. & Raytheon Missile Sys., ASBCA Nos. 59435 et al., Feb. 1, 2021, 2021 WL 753661.

[37]L3 Techs., Inc., ASBCA Nos. 61811 et al., Mar. 1, 2021, 2021 WL 1158545.

[38]"A defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 189 (2000).

[39]Glen/Mar Constr., Inc. v. Dep't of Veterans Affairs, CBCA 6904, Apr. 2, 2021, 21-1 BCA ¶ 37,829.

[40]Shneez Veritas, LLC, ASBCA No. 62067, Feb. 9, 2021, 2021 WL 934949.

[41]ECC Int'l LLC, ASBCA Nos. 61176, 62029, Mar. 22, 2021, 21-1 BCA ¶ 37,824.

[42]General Dynamics—Nat'l Steel & Shipbldg. Co., ASBCA No. 61854, Jan. 25, 2021, 2021 WL 753663.

[43]Future Forest, LLC. v. Sec'y of Agric., 849 F. App'x 922 (Fed. Cir. Apr. 15, 2021).

[44]Future Forest, LLC v. Dep't of Agric., CBCA 5764, Sept. 25, 2018, 19-1 BCA ¶ 37,238, 62 GC ¶ 164.

[45]849 F. App'x at 925.

[46]849 F. App'x at 924.

[47]849 F. App'x at 926.

[48]Meridian Global Consulting, LLC v. Dep't of Homeland Sec., CBCA 6906, June 15, 2021, 2021 WL 2483835.

[49]Allied Meridian Funding, LLC. v. Dep't of Agric., CBCA 6893, Mar. 18, 2021, 21-1 BCA ¶ 37,815.

[50]41 U.S.C.A. § 6305(b)(6); FAR 32.802(e).

[51]Pernix Serka Joint Venture v. Sec'y of State, 849 F. App'x, 928 (Fed. Cir., June 9, 2021), aff'g CBCA 5683, Apr. 22, 2020, 20-1 BCA ¶ 37,589.

[52]Gassman Corp., ASBCA Nos. 44975, 44976, Dec. 29, 1999, 00-1 BCA ¶ 30,720.

[53]Sauer Inc., ASBCA No. 62395, Apr. 16, 2021, 21-1 BCA ¶ 37,845.

[54]Fortis Networks, Inc., ASBCA No. 61941, June 2, 2021, 2021 WL 2499177.

[55]Interaction Research Inst., Inc., ASBCA No. 61505, May 5, 2021, 2021 WL 1990264.

[56]Lockheed Martin Corp., ASBCA No. 62377, Jan. 7, 2021, 21-1 BCA ¶ 37,783.

[57]49 U.S.C.A. § 40118.

[58]Blanchard's Contracting, LLC, ASBCA No. 62508, Feb. 23, 2021, 2021 WL 1056106.

[59]Scott Timber Co. v. United States, 333 F.3d 1358, 1365 (Fed. Cir. 2003).

[60]Creative Mgmt. Servs., LLC, DBA MC-2 v. United States, 989 F.3d 955 (Fed. Cir. Feb. 26, 2021), 63 GC ¶ 73.

[61]SRM Group, Inc. v. Dep't of Homeland Sec., CBCA 5194, 5938, Mar. 11, 2021, 2021 WL 1035781

[62]Transdev Servs., Inc., ASBCA Nos. 62654, 62655, Jan. 25, 2021, 2021 WL 753681.

[63]41 U.S.C.A. § 7103(f)(2).

[64]Kamaludin Slyman CSC, ASBCA Nos. 62006 et al., Apr. 29, 2021, 2021 WL 1970583.

NOTES:

BRIEFING PAPERS