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Food For Thought: A Straight From The Oven Summary Of Contracts Dispute Acts Case Law Developments In The Second Half Of 2023

By Kara Daniels and Amanda Sherwood[*]

In this biannual case law update, which follows up on our summary of noteworthy decisions from the first half of 2023 that was published as a *Feature Comment* in THE GOVERNMENT CONTRACTOR,[1] we have stirred, sautéed, and even flambéed the most flavorful developments in Contract Disputes Act (CDA) case law from the second half of 2023. While some tastebuds may find this material dry and lacking in zest, we have done our best to spice it up with culinary metaphors. Please "be our guest" and enjoy the multiple courses prepared by your master chefs at Arnold & Porter. Bon Appétit!

Like Baking, Litigating CDA Claims Is Science: Follow The Recipe

The "recipe" to file a claim is a complex one, and a failure to follow the required steps, in the right order, can foreclose even the most meritorious dishes from ever reaching the dinner table. Every forum from the U.S. Court of Appeals for the Federal Circuit, to the U.S. Court of Federal Claims, to the boards of contract appeals issued opinions in the second half of 2023 clarifying the requirements associated with litigating CDA claims, which chefs—erm, practitioners—would be wise to heed or risk presenting a soufflé that won't rise ('Sacré bleu!').

Sometimes certain steps of a recipe must be followed before moving down the list, e.g., butter must be melted before it can be poured; the pan must be greased before baking. One such requirement in the CDA dispute process is that a contractor must submit (or present) its affirmative CDA claim against the government to the contracting officer for decision before

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the contractor can raise that claim on appeal.[2] While this instruction may sound obvious (akin to the requirement to crack eggs before scrambling them), in practice it can be more complicated. The procedural history of *ECC Centcom Constructors, LLC v. United States*,[3] in which the Court of Federal Claims held that the doctrine of claim preclusion meant a contractor could not remedy its earlier failure to present its complete claim to its contracting officer in a separate litigation, illustrates this point. Based on complications following a bid protest and other delays, the contractor submitted a schedule shortly before the original completion date showing a 262-day delay.[4] In response to a show cause letter, the contractor presented a recovery schedule that still showed delays, and although the agency extended performance for a few days due to weather delays, it ultimately terminated the contract for default 124 days past the original completion date.[5] The contractor appealed to the Armed Services Board of Contract Appeals (ASBCA), asserting in part excusable delay as a defense to the termination.[6] After a five-day hearing, the board issued a decision ruling the termination decision was reasonable and, to the extent ECC raised a weather delay claim, ECC failed to offer proof beyond the days already granted by the contracting officer.[7] The ASBCA dismissed the excusable delay aspect of the appeal, finding it an affirmative claim that the contractor had never presented to the contracting officer pursuant to *M. Maropakis Carpentry, Inc. v. United States*,[8] and denied the remainder of the contractor's appeal on the merits.[9] When the contractor motioned to stay the appeal while it presented the excusable delay claim to the contracting officer, the ASBCA denied the request, finding it both untimely and futile, as the contractor's own expert conceded only some of the total delay days were possibly excusable.[10]

The Federal Circuit summarily affirmed the ASBCA decision two years later,[11] and a few months later, the contractor then submitted a claim to the contracting officer seeking a time extension due to excusable delay, withdrawal of the assessed liquidated damages, and conversion of the termination for default to one for convenience. The contractor appealed the government's deemed denial of this claim to the Court of Federal Claims, which dismissed under the doctrine of claim preclusion, describing the complaint as "challenging the same termination and offering the same excuses for [the contractor's] inability to complete the project by the deadline."[12] The court reasoned that "[c]laim preclusion applies when: '(1) the parties are identical or in privity; (2) the first suit proceeded to a final judgment on the merits; and (3) the second claim is based on the same set of transactional facts as the first.' "[13] The contractor argued the second prong did not apply, as the ASBCA dismissed its excusable delay claim without reaching a decision on the merits. The court disagreed and, relying on case law applying claim preclusion to affirmative defenses and counterclaims that arise from the same set of facts, held that it was sufficient for purposes of claim preclusion that the ASBCA reached a final judgment on the case generally.[14] The court explained that the contractor's termination for default was fully litigated at the ASBCA, and the contractor, "as the master of its appeal, should have brought its excusable delay claims to the CO to properly assert them in the ASBCA litigation."[15] "Because its termination for default was the subject of that appeal, any plausible defense ECC had to convert that termination to one of that of convenience was required to be brought first to the CO . . . ."[16] The court explained that the contractor "was in full control of evoking the ASBCA's jurisdiction to hear its claims prior

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to appealing to the ASBCA," and that the contractor "was obligated to prosecute [the excusable delay] claims in the same proceeding."[17] The contractor's failure to do so, and instead presentment of a claim that was only half-baked, "was by their own hand."[18]

Another precondition for properly initiating the appeal of a CDA claim is the requirement that an actual dispute exist (either through the denial or deemed denial of a proper contractor claim or the government asserting its own claim). Two cases in the second half of 2023 offer further guidance on these steps in the CDA litigation recipe.

At issue in *AeroKool Aviation Corp.*[19] was whether the contractor's breach of contract and termination settlement proposals (TSPs) constituted CDA claims, warranting a final decision. These questions were raised in a petition by the contractor to the ASBCA seeking an order directing the contracting officer to issue a final decision on the claims, and a government motion to dismiss the petition for lack of jurisdiction. In granting the petition, the board held that AeroKool converted its breach of contract proposal into a CDA claim when AeroKool certified the claim in 2021 and requested a final decision. The board also found that the breach of contract claim was independent from the TSP even though they were submitted in one document because the contractor presented different theories of recovery, with separate legal theories and costs, and therefore the breach of contract claim warranted a response through a contracting officer's final decision. Finally, the board ruled that the "government's dilatory processing of AeroKool's TSP rises to the level of an impasse" sufficient to convert the proposal into a claim.[20] The board noted that "twenty-nine months have elapsed since AeroKool submitted its TSP," and that AeroKool indicated its desire to begin the disputes process "when it certified the TSP and requested a final decision."[21] A certified, disputed CDA claim clearly existed, and it was time to move to the next step of the CDA's recipe for dispute resolution.

Illustrating the government's penchant for moving to dismiss CDA claims on the grounds of jurisdictional defects, in *PAE Applied Technologies LLC*,[22] the government sought to dismiss the contractor's appeal from a Navy demand letter because the letter was not styled as a final decision and did not include appeal language. The board denied the request, finding that the Navy's "Demand for Payment of Unallowable Covid Costs" directed the contractor to reimburse over four million dollars, plus interest and a 2% fee. The board observed that the contracting officer's demand letter provided adequate notice of the specific dollar amount the Navy sought, its reason for demanding a refund, and an express demand for payment.[23] The board found it irrelevant that the letter was not labeled as a final decision (observing that the "CDA does not state a claim must say it is a [contracting officer's final decision]"), and cited longstanding precedent holding that the omission of appeal language only affects CDA jurisdiction if it prejudices the contractor.[24] The board also rejected the Navy's "mistaken" view that the letter failed to state a sum certain because in addition to demanding $4,302,782.81 it sought "applicable indirect rates" and "plus applicable burdens."[25] The board explained: "[T]he sum certain amount the government requested in its demand letter is the amount the government previously reimbursed PAE for the alleged COVID costs. The additional language concerning applicable indirect rates and fee does not change the demanded sum certain."[26]

The ASBCA also rejected the Navy's arguments that the demand letter was not a government claim appealable to the board because the contracting officer did not intend the letter to be a contracting officer's final decision, explaining the "contracting officer's subjective intent is not controlling as to whether a communication is a final decision."[27] Instead, the board looks to the "totality of the communications" between the government and the contractor, which here made clear that "the parties had reached a 'stalemate' regarding the allowability of these costs resulting in the contracting officer's issuance of the demand letter."[28] Because the dispute had reached the boiling point, it was an appealable final decision.

Finally, in *ECC International Constructors, LLC v. Secretary of the Army*,[29] the Federal Circuit held that the previously discussed "sum certain" requirement (by which a claim must state a definitive dollar value) is not jurisdictional, upending decades of precedent holding otherwise. The underlying dispute involved a construction delay claim, which the contractor filed in 2014. Af-

ter lengthy but ultimately failed settlement negotiations, the board held a full hearing on the claim in 2020. Not until after the hearing did the government file a motion to dismiss for lack of jurisdiction due to the contractor's failure to state a sum certain, which the ASBCA granted.[30] On appeal, the Federal Circuit reversed, acknowledging that its prior precedent referred to the sum certain requirement as jurisdictional, but reasoning that recent Supreme Court guidance provides that in order for a procedural requirement to be jurisdictional, Congress must clearly so indicate via statute.[31] The CDA statute refers to a written claim, but contains no mention of a sum certain,[32] and indeed, famously contains no definition of the term "claim" itself.[33] Instead, the sum certain requirement comes from the Federal Acquisition Regulation (FAR), which in two places defines a "claim" as "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."[34] The Federal Circuit concluded, in accord with Supreme Court precedent treating claim processing rules such as filing deadlines, preconditions to suit, and exhaustion, that the sum certain requirement is not jurisdictional.[35] It can accordingly be waived if not timely raised as a defense. The court remanded to the board to consider whether the government thereby forfeited its right to raise this challenge but observed that the government did not object to the contractor's failure to state a sum certain for six years after the contractor filed the claim, after negotiating with the contractor for years and participating in a nine-day board hearing.[36]

Although this decision changes how to litigate the sum certain requirement, it does not substantively change the CDA framework. The sum certain requirement set forth in the FAR still applies to both the contractor and the government; and claimants risk dismissal of appeals of claims lacking a sum certain. But the decision holding that the sum certain requirement is a claims processing rule now means that the defense may be waived if not raised in a timely manner,[37] and the burden of proof now rests entirely on the entity defending the claim and asserting the defense. Further, if raised in a dismissal motion, the tribunal will draw all inferences in favor of the claimant.

Past The Expiration Date: The Statute Of Limitations

Time impacts a recipe's success in multiple ways. A masterpiece left too long in the oven will satisfy no one, and using stale or spoiled ingredients can ruin a perfectly good concoction. Similarly in CDA litigation, the statute of limitations provides the outer bounds on when claims can be sauteed, baked, or litigated. Several decisions in the second half of 2023 remind contractors that untimely claims are useful as spoiled milk.

In *Government of Greece Hellenic Air Force v. United States*,[38] the Court of Federal Claims applied the CDA's six-year statute of limitations to deny a claim that it found accrued at least by 2009. Greece contracted with a U.S. company through the Foreign Military Sales (FMS) program for military grade surveillance cameras in 1999. Greece was immediately dissatisfied with the cameras, and the U.S. government instituted a Supply Deficiency Report (SDR) process to resolve the concerns.[39] The U.S. government ultimately refunded to Greece approximately $2 million, and in 2008 closed out the contract.[40] The close-out letter informed Greece that all SDRs must be submitted within one year of shipment, and in 2009 the U.S. government denied several of Greece's SDR's because Greece missed this deadline.[41] In 2015, Greece requested the U.S. government reopen the contract to address additional quality concerns, which the U.S. government denied and then Greece appealed to the ASBCA. The ASBCA dismissed the suit for lack of jurisdiction, finding the request to reinstate the contract required injunctive relief, which it could not give.[42] In April 2018, Greece submitted a certified claim to the contracting officer for over $21 million.[43] Thereafter, Greece filed a complaint with Court of Federal Claims in 2019, which in 2023 the court dismissed as untimely (granting a motion to dismiss filed in 2020). While Greece asserted that the accrual period for its claim was suspended because it did not realize the contract was closed, the court denied this argument because the U.S. government sent Greece multiple notices of contract close-out in 2008. The latest date the claim accrued was in 2009, when the U.S. government denied all of Greece's remaining SDRs, rendering the 2019 Court of Federal Claims' complaint well outside the CDA's six-year statute of limitations.[44]

Just because the issues had moved to the contractor's back burner did not mean the statute of limitations was tolled.

While a contractor may argue the cook time for its claim has been suspended for a number of reasons, it is only the unusual case where the result will not be an irreparably burned-to-a-crisp and untimely claim. For example, in *South Texas Health System v. Department of Veterans Affairs* (VA),[45] the CBCA held, among other things, that the parties' extended negotiations did not toll the date by which the contractor had to file a claim. In its motion for summary judgment, filed in lieu of an answer, the VA showed that of the 393 medical claims in the appeal, 262 involved "episodes of care that occurred on or before February 3, 2014," more than six years before the submission of the February 3, 2020 certified claim.[46] In addition to other meritless defenses, the contractor argued that equitable tolling preserved its claims, because the parties engaged in repeated settlement negotiations that, in the contractor's view, were necessary in order to understand the contract's medical claims processing procedures, which implicated the amount and timing of the overall claim. The CBCA cited longstanding Federal Circuit precedent to hold "[t]he mere continuance of negotiations, even where United States representatives express a view that a settlement is likely, constitutes no reason to extend the limitations period."[47]

Likewise, in *J. Star Enterprises, Inc. v. United States*,[48] the court held that a Freedom of Information Act (FOIA) request did not toll the statute of limitations. The Army assessed liquidated damages against a contractor's invoices due to delays experienced in performance and paid the last invoice, less liquidated damages, on October 1, 2015. On November 24, 2021, the contractor submitted a claim challenging the liquidated damages, and based on a constructive denial of the claim, filed its complaint with the court on January 3, 2023.[49] The court found this complaint doubly time barred because "under relevant case law the contract modification and assessment of damages in this case constitute a final decision."[50] Because the contractor did not file its claim for more than six years after receiving the final invoice (which was the latest date "that could have fixed the liability of the United States"), the court held "there is no available relief."[51] Further, the CDA requires an appeal of a final decision (here, the final invoice) to the court within 12 months, which the contractor did not do. The contractor asserted that its claim was timely because it submitted a FOIA request to the government pertaining to its claim on November 3, 2015, and did not receive responsive documents until February 10, 2016, which it asserted was the date affixing liability. The court disagreed, finding under the evidence before it that the "FOIA request does not and could not affect the dates when liability would have been fixed and could not affect the date for claim accrual."[52] The contractor simply let the dispute simmer for too long.

Six years may seem a questionable "shelf life" for food staples, but it the governing statutory limitation for asserting claims against the government. In *Goodloe Marine, Inc.*,[53] the Army Corps of Engineers sought summary judgment denying the contractor's claim seeking compensation for added cost it incurred due to a three-month suspension of work but filed more than five years and nine months after the suspension was lifted. Specifically, the government argued that the "Suspension of Work" clause, FAR 52.242-14, which requires the contractor to assert any claim resulting from a suspension "as soon as practicable after the termination of the suspension, delay, or interruption, but not later than the date of final payment under the contract" trumped the general six-year CDA statute of limitations.[54] Although the board had harsh words for the contractor, observing that if it "[w]ere we writing this opinion on a blank slate, we might join the government in saying to Goodloe, 'too bad, so sad,' " the panel explained that "the law is forgiving of contractors who bring claims within the CDA's statute of limitations, but outside the time limits set forth in the FAR, so long as the government is not prejudiced."[55] Because the government provided no evidence of prejudice, the ASBCA permitted the claim to proceed. While some may be suspicious of ingredients nearing their expiration date, the board refused to toss out this claim before its "sell by" date.

Audit Rights—When The Government Has Its Fingers In The Contractor's Pie

The government's broad audit rights can be hard for

contractors to swallow, but those rights are not unlimited. Three cases from the second half of 2023 explored the scope of the government's audit rights and ability to question costs and emphasize the importance of a contractor's checking the government's regulatory authority before questioning the government's ability to inspect the contractor's kitchen.

First, in *HPM Corp. v. Department of Energy*,[56] the CBCA held that the government could audit the firm-fixed-price portion of a hybrid contract with the Department of Energy (DOE) that contained cost-reimbursement elements. The contract contained three clauses giving the DOE the ability to audit relevant records: (1) the "Audit and Records—Negotiation" clause at FAR 52.215-2, which applies to a "a cost-reimbursement, incentive, time-and-materials, labor-hour, or price redeterminable contract"; (2) the "Allowable Cost and Payment" clause at FAR 52.216-7, expressly noted in this contract as "Applies to Cost-Reimbursement"; and (3) the "Access to and Ownership of Records" at DOE Acquisition Regulation (DEAR) 970.5204-3, paragraph (d) of which requires the contractor to make records "acquired or generated by the Contractor under this contract" available to DOE for audit.[57]As part of a yearly incurred cost audit, DOE requested that the contractor provide data regarding the fixed-price portion of the contract (information about contractor's actual labor costs charged as fixed price), to which the contractor objected, arguing the audit clause only gave DOE the right to access data regarding the cost-reimbursement portion of the contract. The contractor filed a nonmonetary claim requesting interpretation of the audit clauses, and the DOE unsurprisingly concluded that it had the requisite audit powers to access proprietary material relating to the firm-fixed-price portion of the hybrid contract.

On appeal, the CBCA agreed with the DOE's interpretation. But before ruling on the merits, the CBCA explained it had jurisdiction to interpret the audit clause, because although the contractor could wait until the conclusion of an audit (in which it declined to provide documentation) and then file a monetary claim challenging any resulting indirect cost reductions, the contractor "is not obligated to wait until DOE takes such action in order to seek a decision interpreting its audit production obligations under the contract."[58]

Turning next to the three clauses, the CBCA explained that while the "Allowable Cost and Payment" clause (FAR 52.216-7) was expressly tied to the cost-reimbursement portions of HPMC's contract, the "Audit and Records—Negotiation" clause (FAR 52.215-2) is not so limited and provides for audits of "cost-reimbursement contracts." Regardless of whether FAR 52.215-2 "applies only to the cost reimbursement [contract line item numbers (CLINs)] . . . or to the contract as a whole," the CBCA found that "DOE's auditors have not requested documents that would fall outside the context of a normal incurred-cost audit," as "[a] well-known audit risk is misallocation and/or cost shifting between fixed price, cost reimbursable, and indirect work/costs." [59] Therefore, the CBCA read the FAR audit clause as permitting the government to fully audit firm-fixed-price portions of hybrid contracts, as long as there is any cost-reimbursement portion to which the contractor could improperly be shifting costs. Even without FAR 52.215-2, the CBCA found that the DOE-specific audit clause (DEAR 970.5204-3) had no limitation to only cost-reimbursement contracts or CLINs, giving DOE full authority to request the information. The board concluded it "is in no position to impose some type of myopic limitation on the scope of documentation that auditors need to support an audit of the cost-reimbursement aspects of this contract or of HPMC's indirect cost rates."[60]

Second, in *Allard Nazarian Group, Inc. dba Granite State Manufacturing*,[61] the ASBCA held that the government did not have the authority to reduce fixed-rate labor-hour charges under a time-and-materials (T&M) contract based on indirect cost rate issues. Due to the contractor's alleged failure to submit final indirect cost rate proposals for fiscal years 2009 to 2014, the contracting officer applied either a 16% or a 20% decrement to all invoices the contractor submitted during that period, including the contractor's direct, fixed-price labor costs under four T&M contracts. The contractor appealed the government's claim for reimbursement to the ASBCA and argued that the contracting officer's application of the decrement to direct labor-hour charges under a T&M contract had no regulatory basis. The ASBCA agreed with the contractor.

The government contended its decrement to direct

labor hour charges was permitted under FAR 52.216-7(g), which gives the government the authority to "have the Contractor's invoices or vouchers and statements of cost audited" and to "adjust" any payment "for prior overpayments."[62] The ASBCA rejected the government's interpretation, reasoning the language of FAR 16.307(a) limits the application of FAR 52.216-7 only to material costs in T&M contracts, meaning that FAR 52.216-7 only authorizes adjustment of material costs and not direct labor hour billings in T&M contracts. The ASBCA also held that the government's power to audit and establish indirect rates also does not include any authority to adjust billings that have no connection to indirect rates or cost reimbursement contract elements. The ASBCA explained that the government does have the power to audit and, if appropriate, adjust direct labor hour billings on T&M contracts, but under FAR 52.232-7 and not under any authority or procedure the government invoked in the instant appeal.

Third, in *Northrop Grumman Corp.*,[63] the ASBCA considered a contractor's appeal of the disallowance of certain pension costs. The ASBCA upheld the disallowance, reasoning that the contractor impermissibly included unallowable compensation costs in its pension cost calculations (specifically, compensation in excess of the FAR's allowable limit). The ASBCA explained that FAR 31.201-6(a) disallows costs "directly associated" with unallowable costs, defined as "any cost that is generated solely as a result of incurring another cost, and that would not have been incurred had the other cost not been incurred."[64] Here, the "challenged pension costs would not have been incurred but for the incurrence and inclusion of salary and bonus costs exceeding the FAR 31.205-6(p) cap," rendering the pension costs unallowable, directly associated costs.[65]

One of the contractor's many defenses was that its pension plan had been unchanged for decades and yet the government had never, until the audits resulting in this appeal, challenged any benefits the pension plan provides as an unallowable cost. The ASBCA was not persuaded that the length of time the pension plan had been in place was relevant to the allowability analysis: "[T]he government is not somehow estopped from disallowing the challenged costs simply because [the Defense Contract Audit Agency (DCAA)] did not question the costs in prior audits. Absent affirmative misconduct, DCAA's prior allowance of an alleged improper indirect cost submission does not constitute a waiver of contractor compliance."[66] Because the contractor did not allege government misconduct, the government was within its rights to reject the unallowable costs.

Missing Ingredients Lead To Kitchen Catastrophes: Do Be Afraid To Take Whisks

The CDA, by its terms, applies to "any express or implied contract . . . made by an executive agency for—(1) the procurement of property, other than real property in being; (2) the procurement of services; (3) the procurement of construction, alteration, repair, or maintenance of real property; or (4) the disposal of personal property."[67] In *Cobra Acquisitions, LLC v. Department of Homeland Security*,[68] the contractor attempted unsuccessfully to stretch CDA applicability to a contract dispute where the U.S. government was not a party. The claim involved a non-payment dispute by an affected contractor against the Federal Emergency Management Agency (FEMA), which had provided disaster assistance funding to Puerto Rico in the aftermath of Hurricane Maria. The contractor, Cobra Acquisitions, LLC, however, did not have a contract with FEMA, but rather had contracted with the Puerto Rico Electric Power Authority (PREPA) to repair the island's decimated power grid. In an attempt to hold FEMA liable under the CDA, Cobra alleged that during performance of its PREPA contract, FEMA repeatedly assured Cobra that FEMA would pay for its work, and when PREPA failed to paid for all work performed, Cobra submitted a claim to FEMA claiming that "FEMA did not uphold its part of the bargain by ensuring that Cobra was paid in full."[69] FEMA declined to issue a final decision on the ground that it had no contract with Cobra, and Cobra appealed to the CBCA. The CBCA granted FEMA's motion to dismiss the appeal, agreeing with FEMA that no procurement contract existed between Cobra and FEMA. The board explained that taking Cobra's factual allegations as true, it had alleged at most a suretyship contract, and not a procurement contract necessary for CDA jurisdiction. The CBCA also dismissed Cobra's allegations that PREPA acted as a purchasing agent for FEMA, reasoning: "While grantees and subgrantees

may use contractors to assist them in carrying out public assistance awards, these contracts are *not* on behalf of FEMA nor is FEMA ultimately a party to the contracts."[70] Lastly, the CBCA denied Cobra relief as a third-party beneficiary to the FEMA-Puerto Rico agreement to provide disaster assistance, finding that the agreement was a cooperative agreement between the Federal Government and local government for use of grant funds, and not a procurement contract. While Cobra did its best to cook up a CDA claim against FEMA, it lacked the essential ingredient of a procurement contract with a federal agency.

Everything But The Kitchen Sink

The following smorgasbord of cases yielded delectable bite-sized tidbits for practitioner thought.

● *The Cost-Plus-a-Percentage-of-Cost "Poison Apple"*—In *OST, Inc. v. Department of Homeland Security*,[71] the contractor held a cost-plus-fixed-fee contract to administer certain insurance and pension fund services for the National Flood Insurance Program. The latter part of the contract was funded incrementally, and the agency paid the contractor all obligated funds in each year except for 2011 and 2012. The contractor subcontracted a portion of its scope of work to a subcontractor. The subcontract stated it was cost-plus-fixed-fee, but it defined the fixed fee as 8% of total costs. When the prime contractor sponsored the subcontractor's claim for unbilled amounts to the agency and appealed the deemed denial to the CBCA, the CBCA denied the appeal for several reasons. First, the contractor failed to provide notice of the claimed subcontract costs under the contract's "Limitation of Funds" clause, and the agency had already paid the contractor all obligated funds for fiscal years 2009, 2010, and 2013, rendering further recovery for those years barred. Second, the CBCA found that while the subcontract was "the epitome of an illegal" cost-plus-a-percentage-of-cost contract, that "mere fact . . . d[id] not automatically dispose of" the claim, as recovery was still possible under a quantum meruit theory.[72] The contractor would have to prove in further proceedings that for fiscal years 2011 and 2012, the provided value of its services exceeded what the government paid.

● *"Beat It": Federal Circuit Rejects Contractor's Claim That the Court of Federal Claims Violated Parol Evidence Rule*—In *Nova Group/Tutor-Saliba v. United States*,[73] the contractor appealed a decision by the Court of Federal Claims denying the contractor's differing site conditions claim, arguing among other things that the court erred by allowing a pre-negotiation memo related to a contract modification into evidence. After holding as a matter of first impression that the court reviews a trial court's application of the parol evidence rule *de novo*, the Federal Circuit ruled that the Court of Federal Claims' admission of the memo and testimony related to it did not violate the parol evidence rule and affirmed the decision denying the contractor's claim.[74] The Federal Circuit observed that the memo at issue was not introduced to modify or add to the terms of the government's agreement to pay a prior equitable adjustment but rather to show that the modification was not an agreement by the government that a differing site condition existed.[75] The court explained: "An agreement to settle a claim alleging a differing site condition under a clause governing differing site conditions is different from an agreement that the alleged differing site condition actually existed."[76] The contractor's challenge also failed because the "parol evidence rule does not prevent a party to a contract from presenting evidence that 'a recital of fact in an integrated agreement may be . . . untrue,' " i.e., those provisions of an agreement that "do not themselves create promises, obligations, or substantive rights." [77]

● *No CBCA Appetite for Disagreement With ASBCA and Court of Federal Claims Treatment of Termination Costs*—In *Ben Holtz Consulting, Inc. dba California Avocados Direct v. Department of Agriculture*,[78] the CBCA agreed with ASBCA and Court of Federal Claims precedent that the commercial contract termination for convenience provision, FAR 52.212-4(l), permits contractor recovery of two distinct types of costs: first, a portion of the contract price for "work performed prior to the notice of termination," and also for "reasonable charges" that "resulted from the termination." The first prong does not include preparatory or startup activities for work not yet completed; those costs are instead properly pursued under prong two. Therefore, in this case, the CBCA denied a contractor's request for costs incurred to compile boxes of food that were never delivered under the contract, under prong one of FAR

52.212-4(l) (prong two was not before CBCA at the summary judgment phase).

● *The Government Cannot Take a Bite Out of the Contracted-For Minimum Quantity*—In *Amentum Services, Inc., f/k/a AECOM Management Services, Inc.*,[79] the ASBCA considered a "novel question" about the application of the minimum order requirement in indefinite-delivery, indefinite quantity (IDIQ) contracts. The National Aeronautics and Space Administration (NASA) awarded an IDIQ contract to launch services with a minimum ordering requirement of $8 million in fiscal year (FY) 2015. NASA issued task orders valued $8,283,014.87 that year; however, one order was descoped in FY 2017, reducing this amount by $334,050.76, and rendering the actual ordered amount below the $8 million threshold. The CBCA rejected the government's argument that "the task orders were properly recorded in the fiscal year issued" and that "the deobligated amount should be credited against the orders in the year the task order was modified."[80] The CBCA reasoned that the minimum order requirement obligated the government to "issue" task orders surpassing $8 million each year, which the government did; however, the CBCA concluded that the deobligated amount "should be deducted from the ordering amount for the year the task order was issued."[81] The government's failure to meet the minimum order requirement constituted a breach of contract.

● *Chef's Kiss: Finally, a Recovery on a Covid-Related Claim*—In *StructSure Projects, Inc.*,[82] the contractor held a contract for design-build construction services for the David Grant Medical Center, Travis Air Force base, that also required the provision of temporary phasing facilities for use during construction. When the pandemic broke out, the government deemed the contract non-essential and suspended performance for 44 days. However, the government continued to use the temporary phasing facilities and associated rental furniture and equipment during the work stoppage, and the extension of the contract period resulted in the incurrence of additional rental costs for the facilities, furniture, and equipment. The contractor presented its certified claim to the contracting officer, which the government denied asserting that the suspension was a sovereign act and that task order was firm fixed price. On appeal to the ASBCA, the board held that the contractor was entitled to compensation because the government changed the task order requirement by extending the period of performance, and that the government's sovereign act did not impact the contractor's delivery of the facilities, furniture, and equipment, which were already on-site and in-use at the time of the sovereign act.

Conclusion

We hope our readers are satiated with this installment of our CDA case law review, and that you will join us next time. As Ms. Julia Child aptly noted: when "you're in a good profession, it's hard to get bored, because you're never finished—there will always be work you haven't yet done."

Guidelines

As a lagniappe, we finish with these *Guidelines* as a digestif to ensure your smooth comprehension of this Briefing Paper's discussion of the impact of recent case law on CDA claims. They are not, however, a substitute for professional representation in any specific situation.

1. Just as when preparing to cook a dinner for guests, when preparing your CDA claim check all claim ingredients and know the timing for each "dish." Anything undercooked (premature) or overcooked (submitted past the deadline) will be unsuccessful.

2. Carefully review and understand the contract's audit provisions; mixed fixed-price and cost items may give the government "critic" more authority to second-guess the contractor's decisions.

ENDNOTES:

[1]Daniels & Sherwood, "Feature Comment: The Wheels of CDA Case Law Go Round and Round: A Case Law Update All Through the Town (or the First Half of 2023)," 65 GC ¶ 198 (July 26, 2023).

[2]41 U.S.C.A. § 7103(a)(1).

[3]ECC Centcom Constructors, LLC v. United States, 167 Fed. Cl. 236 (2023).

[4]167 Fed. Cl. at 240–41.

[5]167 Fed. Cl. at 241.

[6]167 Fed. Cl. at 241.

[7]167 Fed. Cl. at 241–42.

[8]M. Maropakis Carpentry, Inc. v. United States, 609 F.3d 1323 (Fed. Cir. 2010), 52 GC ¶ 225.

[9]167 Fed. Cl. at 246.

[10]167 Fed. Cl. at 242.

[11]ECC Centcom Constructors, LLC v. Sec'y of the Army, 779 F. App'x 750 (Fed. Cir. 2019), aff'g ASBCA No. 60647, 18-1 BCA ¶ 37,133, 2018 WL 4591773, 60 GC ¶ 307.

[12]167 Fed. Cl. at 242.

[13]167 Fed. Cl. at 245 (quoting Ammex, Inc. v. United States, 334 F.3d 1052, 1055 (Fed. Cir. 2003)).

[14]167 Fed. Cl. at 245–46.

[15]167 Fed. Cl. at 246.

[16]167 Fed. Cl. at 246.

[17]167 Fed. Cl. at 246–47 (citation omitted).

[18]167 Fed. Cl. at 246.

[19]AeroKool Aviation Corp., ASBCA 63637-PET, 2023 WL 7401803 (Oct. 16, 2023).

[20]AeroKool Aviation Corp., ASBCA 63637-PET, 2023 WL 7401803 (Oct. 16, 2023).

[21]AeroKool Aviation Corp., ASBCA 63637-PET, 2023 WL 7401803 (Oct. 16, 2023).

[22]PAE Applied Techs. LLC, ASBCA No. 63233, 2023 WL 5827257 (Aug. 24, 2023).

[23]But see Optum Pub.Sector Sols., Inc., CBCA No. 7920, 23-1 BCA ¶ 38,464, 2023 WL 8167220, where the CBCA dismissed the contractor's appeal for lack of jurisdiction, where contractor attempted to appeal a letter that requested the contractor reimburse the government for any improper payment and noted that the government would issue a formal demand if not corrected, but did not quantify any amount owed, did not indicate the letter was a final decision, and did not address the contractor's appeal rights.

[24]PAE Applied Techs. LLC, ASBCA No. 63233, 2023 WL 5827257 (Aug. 24, 2023).

[25]PAE Applied Techs. LLC, ASBCA No. 63233, 2023 WL 5827257 (Aug. 24, 2023).

[26]PAE Applied Techs. LLC, ASBCA No. 63233, 2023 WL 5827257 (Aug. 24, 2023) (citation omitted).

[27]PAE Applied Techs. LLC, ASBCA No. 63233, 2023 WL 5827257 (Aug. 24, 2023) (citation omitted).

[28]PAE Applied Techs. LLC, ASBCA No. 63233, 2023 WL 5827257 (Aug. 24, 2023) (citation omitted).

[29]ECC Int'l Constructors, LLC v. Sec'y of the Army, 79 F.4th 1364 (Fed. Cir.), 65 GC ¶ 239.

[30]79 F.4th at 1367.

[31]79 F.41 at 1371(citing Boechler, P.C. v. Comm'r, 142 S. Ct. 1493, 1497 (2022) ("Congress need not 'incant magic words,' but the 'traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences.' " (citation omitted))).

[32]41 U.S.C.A. § 7103(a).

[33]See 41 U.S.C.A. § 7101.

[34]FAR 2.101; FAR 52.233-1.

[35]79 F.4th at 1375–76.

[36]79 F.4th at 1379–80.

[37]See JE Dunn Constr. Co., ASBCA No. 63183, 2023 WL 9054358 (Dec. 13, 2023), where the ASBCA, applying the ECC holding, concluded that the government waived its dismissal argument related to the lack of a sum certain by waiting to raise it until after the merits hearing, stating: "The government had the opportunity—on its own initiative or in response to the Board's having raised the issue—to take the position before or during the hearing on the merits that [the contractor] had not satisfied the sum-certain requirement. The government did not do so. Having waited until after the hearing on the merits to request dismissal, on sum-certain grounds, for lack of jurisdiction or failure to state a claim upon which relief can be granted, the government forfeited its right to challenge [the contractor's] satisfaction of the sum-certain requirement."

[38]Gov't of Greece Hellenic Air Force v. United States, 166 Fed. Cl. 546 (2023).

[39]166 Fed. Cl. at 548.

[40]166 Fed. Cl. at 548.

[41]166 Fed. Cl. at 548.

[42]166 Fed. Cl. at 548; see Hellenic Air Force, ASBCA No. 60802, 17-1 BCA ¶ 36,821, 2017 WL 3526890.

[43]166 Fed. Cl. at 548.

[44]166 Fed. Cl. at 551.

[45]So. Tex. Health Sys. v. Dep't of Veterans Affs., CBCA 6808, 2023 WL 5673805 (Aug. 23, 2023).

[46]So. Tex. Health Sys. v. Dep't of Veterans Affs., CBCA 6808, 2023 WL 5673805 (Aug. 23, 2023).

[47]So. Tex. Health Sys. v. Dep't of Veterans Affs., CBCA 6808, 2023 WL 5673805 (Aug. 23, 2023) (citing Brighton Village Assocs. v. United States, 52 F.3d 1056, 1061 (Fed. Cir. 1995)).

[48]J. Star Enters., Inc. v. United States, 167 Fed. Cl. 434 (2023).

[49]167 Fed. Cl. at 436–37.

[50]167 Fed. Cl. at 439 n.3 (citing Alliant Techsystems, Inc. v. United States, 178 F.3d 1260, 1267 (Fed. Cir. 1999), 41 GC ¶ 308).

[51]167 Fed. Cl. at 439.

[52]167 Fed. Cl. at 440.

[53]Goodloe Marine, Inc., ASBCA No. 61960, 2023 WL 4844132 (July 12, 2023).

[54]Goodloe Marine, Inc., ASBCA No. 61960, 2023 WL 4844132 (July 12, 2023).

[55]Goodloe Marine, Inc., ASBCA No. 61960, 2023 WL 4844132 (July 12, 2023).

[56]HPM Corp. v. Dep't of Energy, CBCA 7559, 2023 WL 4839050 (July 12, 2023).

[57]HPM Corp. v. Dep't of Energy, CBCA 7559, 2023 WL 4839050 (July 12, 2023).

[58]HPM Corp. v. Dep't of Energy, CBCA 7559, 2023 WL 4839050 (July 12, 2023).

[59]HPM Corp. v. Dep't of Energy, CBCA 7559, 2023 WL 4839050 (July 12, 2023).

[60]HPM Corp. v. Dep't of Energy, CBCA 7559, 2023 WL 4839050 (July 12, 2023).

[61]Allard Nazarian Grp., Inc. dba Granite State Mfg., ASBCA Nos. 62413, 62414, 2023 WL 5199773 (July 27, 2023).

[62]Allard Nazarian Grp., Inc. dba Granite State Mfg., ASBCA Nos. 62413, 62414, 2023 WL 5199773 (July 27, 2023).

[63]Northrop Grumman Corp., ASBCA No. 62165, 2023 WL 4929004 (July 5, 2023), 65 GC ¶ 224.

[64]Northrop Grumman Corp., ASBCA No. 62165, 2023 WL 4929004 (July 5, 2023), 65 GC ¶ 224.

[65]Northrop Grumman Corp., ASBCA No. 62165, 2023 WL 4929004 (July 5, 2023), 65 GC ¶ 224.

[66]Northrop Grumman Corp., ASBCA No. 62165, 2023 WL 4929004 (July 5, 2023), 65 GC ¶ 224.

[67]41 U.S.C.A. § 7102(a).

[68]Cobra Acquisitions, LLC v. Dep't of Homeland Sec., CBCA 7724, 2023 WL 6319798 (Sept. 21, 2023), 65 GC ¶ 286.

[69]Cobra Acquisitions, LLC v. Dep't of Homeland Sec., CBCA 7724, 2023 WL 6319798 (Sept. 21, 2023), 65 GC ¶ 286.

[70]Cobra Acquisitions, LLC v. Dep't of Homeland Sec., CBCA 7724, 2023 WL 6319798 (Sept. 21, 2023), 65 GC ¶ 286.

[71]OST, Inc. v. Dep't of Homeland Sec., CBCA 7077, 7103, 2023 WL 5319430 (July 31, 2023).

[72]OST, Inc. v. Dep't of Homeland Sec., CBCA 7077, 7103, 2023 WL 5319430 (July 31, 2023).

[73]Nova Grp./Tutor-Saliba v. United States, 87 F.4th 1375 (Fed. Cir. 2023), 66 GC ¶ 17, aff'g 159 Fed. Cl. 1 (2022).

[74]87 F.4th at 1379–80.

[75]87 F.4th at 1380.

[76]87 F.4th at 1380.

[77]87 F.4th at 1380 (internal citation omitted).

[78]Ben Holtz Consulting, Inc. dba Cal. Avocados Direct v. Dep't of Agric., CBCA 7637, 2023 WL 8167218 (Nov. 17, 2023), 66 GC ¶ 7.

[79]Amentum Servs., Inc., f/k/a AECOM Mgmt. Servs., Inc., ASBCA No. 62835 et al., 2023 WL 7476093 (Oct. 25, 2023).

[80]Amentum Servs., Inc., f/k/a AECOM Mgmt. Servs., Inc., ASBCA No. 62835 et al., 2023 WL 7476093 (Oct. 25, 2023).

[81]Amentum Servs., Inc., f/k/a AECOM Mgmt. Servs., Inc., ASBCA No. 62835 et al., 2023 WL 7476093 (Oct. 25, 2023).

[82]StructSure Projects, Inc., ASBCA No. 62927, 2023 WL 5606951 (Aug. 8, 2023).

BRIEFING PAPERS