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FEATURE COMMENT: Gas (Or Charge) Up Your Vehicle And Join Us For A Summer Road Trip Through Notable CDA Claims Decisions In The First Half Of 2022: Part 1

In this fifth semiannual installment, we have packed up the notable Contract Disputes Act claims litigation decisions coming out of the Federal Circuit, Court of Federal Claims, Armed Services Board of Contract Appeals, and Civilian Board of Contract Appeals in the first half of 2022, and are ready to set out on our summer road trip. While claims litigation can at times seem endlessly complex, with blind spots and other obstacles at each turn, the road to one's recovery destination may be found through the decisional guidebook. With this guiding principle in mind, our trip begins with decisions that turned on jurisdictional and procedural matters before winding our way through merits cases that concentrate on the contractual terms. We then take a much-deserved rest before continuing, in the second half of this summary to be published next week, with pandemic-related claims litigation, taking a detour to discuss decisions about terminations and releases, and then completing our journey with sundry practice tips. Grab your favorite tunes, and away we go.

Danger Falling Rocks—Steer Clear of Common Pitfalls in Claim Submission or Your Claims Journey Will Dead End—No matter how meritorious the claim, litigants must meet numerous procedural prerequisites before those merits ever have hope of seeing daylight. Claims litigation is remarkable not only for these procedural rules of the road but also for how often defiance of those rules is outcome determinative. The following decisions in our set are emblematic of this principle and serve as an important reminder to dot i's, cross t's, and keep your hands at the 10am and 2pm position when submitting a CDA claim.

License and Registration to File—State a Sum Certain and Certify the Claim: For any claim "of more than $100,000," the CDA requires that an individual "authorized to bind the contractor with respect to the claim" sign a certification that the claim is made in good faith, the supporting data are accurate and complete to the best of the contractor's knowledge and belief, the amount requested accurately reflects the contract adjustment for which the contractor believes the Federal Government is liable, and the certifier is authorized to act on the contractor's behalf. 41 USCA § 7103(b). In *Sungwoo E&C, Co. Ltd.*, ASBCA 61144, 61219, 62738, 2022 WL 1601921 (April 27, 2022), the Government moved to dismiss an appeal because a "foreign legal consultant," and not a "duly authorized corporate officer" of the company, signed the certification. The ASBCA denied the Government's motion and restated its rule that the certification requirement does not prohibit lawyers—with the power of attorney to bind the contractor—from signing certifications (although that may not be best practice for other reasons). The Board observed that the CDA does not require "that the person providing the certification be an employee of the contractor," "have any involvement with the administration or performance of the contract," or "have sufficient personal knowledge of the details of the claim itself to respond to the government's discovery requests as the government argues." Id. (citing 41 USCA § 7103(b)(1); Federal Acquisition Regulation 33.207(c)).

A Necessary Pitstop—Presentment: The CDA also requires that all claims first be submitted to the contracting officer before being appealed to a court or board. 41 USCA § 7103(a). Although the concept seems simple, in practice it is more complicated. For instance, contractors must present to the CO all claims involving the same operative facts at once or risk waiving the claim as happened in *Avant Assessment, LLC v. U.S.*, 159 Fed. Cl. 632 (2022); 64 GC ¶ 145. As background, the contractor in this decision submitted claims associated with a termination to the CO, and then appealed the denial of those claims to ASBCA. On appeal, the contractor raised additional claims related to the termination—constructive acceptance claims and improper rejection claims—which the ASBCA dismissed for failure to present to the CO. Following the dismissal, the contractor then presented those claims to the CO and appealed the CO's subsequent denial to the COFC. The COFC held that these claims, which involved the same transactional facts as those before the ASBCA, were barred by claim preclusion: "Avant may not submit some, but not all, of its claims to the contracting officer and proceed to piecemeal litigation of its claims through selectively creating or limiting ASBCA's or this Court's jurisdiction over its claims." Id. at 639. Because Avant could have presented all its termination-related claims "to the contracting officer in its initial settlement proposals, thereby bringing all of its claims at one time … Avant gets no second bite at the apple in this Court." Id.

Relatedly, contractors must alert the CO of each element of all theories of liability pertaining to a particular claim before proceeding with those theories on appeal. In a case discussing both this and the sum certain requirement (discussed later in this article), *ECC Int'l, LLC*, ASBCA 60167, 2022 WL 509701 (Jan. 25, 2022), the contractor submitted a certified claim based on breach of implied warranty of specifications and breach of the duty of good faith and fair dealing. During the appeal of a deemed denial, the Government sought dismissal of two additional theories of recovery that the Government argued the contractor added for the first time on appeal: commercial impracticability and superior knowledge. The ASBCA agreed with the Government as to the commercial impracticability count on the ground that this theory contains an element (the additional expense was so substantial that performance would be commercially senseless) that was not present in any of the other theories of recovery set forth in the certified claim and thus never presented to the CO. By contrast, the ASBCA denied the Government's dismissal motion as to the superior knowledge count because "the elements of breach of duty to disclose superior knowledge overlap and do not differ materially from those of the two theories of recovery presented to the contracting officer in ECCI's certified claim." To avoid even the cost of addressing such a dismissal motion, contractors are wise to present each and every possible theory of relief based on the same operative set of facts to the CO. See also *DLT Sols., LLC*, ASBCA 63069, 2022 WL 2339045 (May 26, 2022) (dismissing superior knowledge and fraudulent inducement theories for lack of jurisdiction because contractor first raised these theories on appeal and did not present those theories of liability—which involve pre-award conduct—to the CO in its certified claim).

Notably, contractors must present their certified CDA claim to the correct CO, i.e., the individual with authority to decide the claim. While this is often obvious, complications can arise where the claim involves a Federal Supply Schedule (FSS) Contract, and the Government contract holder (the General Services Administration) is different than the ordering agency. FAR 8.406-6 addresses which COs have authority to resolve disputes pertaining to orders under a schedule contract and provides generally that if the claim requires interpretation of the FSS contract, then the GSA CO must decide the claim; while disputes related to performance of the order may be resolved by the ordering activity CO. The ASBCA applied this rule in *DLT Solutions, LLC*, ASBCA 63069, 2022 WL 2339045 (May 26, 2022) to deny the ordering agency's motion to dismiss for lack of jurisdiction, which argued no valid claim existed because the contractor should have presented the claim to the GSA CO. The Board found all pertinent issues related to the performance of the order (i.e., whether the ordering activity breached the Order's Bona Fide Needs Provision by failing to exercise the options when a bona fide need for the software existed) and did not require interpretation of the schedule contract.

"But Officer …" (Be Truthful): Contractors must take great care that all CDA claims are truthful and rely on accurate data. *Lodge Constr., Inc. v. U.S.*, 158 Fed. Cl. 23 (2022), provides a harsh warning to

Government contractors regarding the consequences of submitting false claims (in fact, the introduction to the opinion expressly states that warning). This case resulted from a construction contract plagued with performance problems from the start. The contractor submitted a series of CDA claims, each bearing the FAR-required certification that the claim was made in good faith, that the supporting data are accurate, and that the amount accurately reflects the Government's liability. The Government shortly terminated the contractor for default, and the contractor appealed the claims to the COFC. The Government asserted fraud counterclaims, alleging the contractor included false delay costs and double-billing and exaggerated equipment costs. After discovery and a trial, the COFC agreed with the Government, finding the contractor knowingly submitted false claims accompanied by false records with respect to the type of equipment it utilized on the project, at a minimum acted with reckless disregard for accuracy in its use of a ratio in its billings that was not a reasonable or accurate measure of its costs, and also knowingly or recklessly claimed costs that the Government had already paid. The Court found the contractor "failed to earnestly undertake the obligations of claim certification" and cautioned:

> [w]hen job cost data and recordkeeping are inaccurate, the claim will inevitably contain errors and the line between negligence and reckless disregard for the truth becomes vanishingly thin. Cross it, and the Government contractor's claim becomes fraudulent as a matter of law … while some elements of [the contractor's] claims may reflect nothing more than slapdash formulae, overwhelming evidence establishes that substantial portions of those claims are patently deceitful.

Id. at 29.

A Need for Speed: the Statute of Limitations Defense: The CDA requires all claims "be submitted within 6 years after the accrual of the claim." 41 USCA § 7103(a)(4). This requirement applies to both contractors and the Government as claimant. The ASBCA reminded contractors in *Strategic Tech. Inst.*, ASBCA 61911, 22-1 BCA ¶ 38,027, of the importance of documenting submissions to the Government and retaining that documentation in order to be able to assert this defense against untimely Government claims. In this case, the Government asserted a claim disallowing costs in an incurred cost proposal (ICP) more than six years after the alleged submission. However, the contractor was unable to prove it timely submitted its ICP and therefore lost the benefit of its statute of limitations defense. The contractor testified it had directed an employee (who no longer worked at the company) to load the relevant documents onto discs and to submit them to the Government via UPS or FedEx, but retained no documentation of it occurring. By contrast, the Government consistently maintained systems for logging incoming submissions and testified to the absence of any record of having received the ICP until it later obtained it via audit.

The statute of limitations runs from the time the basis of a claim is known or should have been known, not from contract close out. The contractor made this fatal mistake in *Herren Assocs., Inc.*, ASBCA 62706, 2022 WL 1601930 (March 29, 2022), asserting that because its contract provided for interim invoicing with a final true-up payment accounting for actual costs incurred, the contractor need not have submitted any claims related to increased costs encountered in performance until six years after this final payment. The Board rejected this contention, finding the claims—some of which were submitted more than a decade after the contractor should have known of them—untimely and reasoned that the contract's final payment clause contained no language that would toll the time for requesting an increase in final payment.

The ASBCA confirmed in *Lockheed Martin Aeronautics Co.*, ASBCA 62209, 22-1 BCA ¶ 38,112, that, where the claim for adjustment had multiple accrual dates that correspond to each Government-approved Material Deficiency Report (MDR) ordering the contractor to perform extra work, the continuing claims doctrine can preserve jurisdiction of the claim for those Government orders that fall within the statutory six-year period. Lockheed filed a claim in October 2018 seeking amounts for an alleged constructive change to its contract. The Air Force argued the claim was untimely because it was apparent to Lockheed the work was taking longer than expected before October 2012. The Board applied the continuing claim doctrine to find that Lockheed could not have filed its claim until the Government authorized additional work, which the Government did on multiple separate dates. Claims based on Government authorizations after

October 2012 were timely. The ASBCA notably rejected the Air Force's argument that the continuing claim doctrine requires "specifically identifiable damages" for each claim event, distinguishing that asserted standard from precedent requiring that each event or wrong have "its own associated damages." The Board explained: "[i]nsofar as the Government's contentions here, our determination that [Lockheed's] claim arose from multiple events is not defeated even if appellant 'cannot even identify a single hour of the 428,482 claimed "production hours" allegedly caused by any identifiable MDR and the number of O&A hours related thereto.' "

Lastly, in *AAI Corp., d/b/a Textron Sys., Unmanned Sys.*, ASBCA 61195, 61356, 2022 WL 1154833 (March 23, 2022), the contractor sought to dismiss a multi-ground defective pricing claim by the Government based on a statute of limitations defense. Before applying the statute of limitations to each Government allegation, the Board recognized that no bright line rule exists in defective pricing cases that the limitation period begins to run on the date the parties execute the contract. Turning to the first ground, relating to an undisclosed subcontractor bid, the Board found it timely, because there was no evidence the Government ever knew of the existence of the undisclosed bid until the time of its audit many years later. Conversely, the Board found time barred the second Government ground, based on duplication of shelter costs that was apparent from the face of the contractor's proposal. The Board noted that while the cost duplication "might not have jumped off the pages on a first read," the Government "had six years to scrutinize it more closely," and "[c]laim accrual is not suspended simply because the Government failed to appreciate the significance of what the contractor furnished." As with the first ground, the third, relating to labor hours on another project sent to the Government in monthly reports and analyzed by the contractor in relation to this contract, was timely. The Board explained "there is a great difference in the degree of effort required to uncover the defective pricing" associated with these reports compared to the duplicative costs contained in the actual proposal. The Board said that the statute requires

> contractors to certify their data and submit it to the contracting officer …. There would be no point in such a requirement if the CO were not entitled to rely on it. If the Board were to rule that the government must conduct a forensic examination of years of data at the time of bid notwithstanding the certification, it would defeat the purpose of the certification.

No U-Turns; If You Miss the Appeal Deadline, You Cannot Turn Back: The CDA requires contractors to appeal a final decision to the ASBCA or CBCA within 90 days or to the COFC within one year. 41 USCA § 7104. The ASBCA confirmed in *Zahra Rose Constr. & Logistics Servs. Co.*, ASBCA 63221, 2022 WL 2116305 (May 19, 2022), that even when a final decision may contain defects (such as failure to advise the contractor of its appeal rights), a contractor must demonstrate the particular defect prejudiced its ability to timely file its appeal within 90 days of receipt in order to be excused from a timely appeal. On the record on which the Board dismissed the appeal, the contractor could not and did not argue that the final decision's omission of the contractor's right to appeal nor the agency's failure to transmit the CO's decision by a method that provides evidence of receipt, forgave the more than 90-day notice of appeal. Instead, the contractor alleged that it could not timely notice its appeal due to the Taliban takeover of Afghanistan. Although the Board observed that "these highly unusual circumstances might warrant further consideration," the contractor's activity in another appeal before the ASBCA evidenced that the contractor was regularly communicating with the Board and had the ability to conduct business before the Board during the 90-day appeal period.

The CBCA issued another cautionary tale in *Eagle Peak Rock & Paving, Inc. v. Dep't of Transp.*, CBCA 5955, 22-1 BCA ¶ 38,100, holding it does not matter who at the company received the final decision; if it was received, the 90-day timeline for submitting an appeal is running. In this case, the contractor's office was closed the Friday before the Labor Day long weekend (September 1st). The only person in the office was a receptionist, who accepted a FedEx delivery containing a CO's final decision. The company asserted it did not receive the final decision until the Tuesday after Labor Day (September 5th), and appealed that decision on December 1st. The CBCA held the appeal untimely because the FedEx receipt showing the receptionist signed for the package, although she may not have been authorized to do so, was "objective evidence

of receipt," rendering November 30th the 90-day appeal deadline.

Look Both Ways—an Important Part of the Claims Journey Is Reading and Understanding the Contract—Once a dispute exists, it is remarkable how often it is resolved by the plain terms of the contract.

Reserved Parking—Only Those with a Procurement Contract with the Government Can Be in the "Driver's Seat" to Assert the CDA Claim: In *Avue Techs. Corp. v. Dep't of Health & Human Servs. & Gen. Servs. Admin.*, CBCA 6360, 6627, 22-1 BCA ¶ 38,024; 64 GC ¶ 34, the CBCA held it lacked jurisdiction over a software company's claim that the Government breached its license agreement because that agreement was not a procurement contract under the CDA. Instead, the procurement contract was the contract between the software reseller and the Government; that contract incorporated the software licensing agreement by reference but gave the software company no right to submit its own claim under the CDA. The Board cited Federal Circuit precedent for the holding that a " 'procurement contract' subject to the CDA must be a contract for 'the acquisition by purchase, lease or barter, of property or services for the *direct benefit or use* of the Federal Government.' " *Avue Techs. Corp. v. HHS & GSA*, CBCA 6360, 20-1 BCA ¶ 37,503 (quoting *New Era Constr. v. U.S.*, 890 F.2d 1152, 1157 (Fed. Cir. 1989)). The Government here agreed to purchase the software through a purchase order with a reseller that held a GSA schedule contract, not directly from Avue under its licensing agreement. This decision makes clear that, to obtain relief for license agreement breaches, similarly situated software licensors must either submit a "pass-through" CDA claim, sponsored by its reseller with a Government contract, or pursue a copyright infringement action in the COFC under the Tucker Act, 28 USCA § 1491.

Flashing Yellow—Promises to Discuss Changes Are Not a Change: The ASBCA refused to reform a contract to increase prices due to underbidding in *Cooper/Ports Am., LLC*, ASBCA 61349, 22-1 BCA ¶ 38,065. In this case, the claimant had purchased an unprofitable contract, but the CO for that contract had stated he would "work with" the claimant on the contract's pricing moving forward. The claimant then brought a claim for reformation of the pricing terms stated in the contract, which the Board denied, holding that a promise to consider changing a contract's price is not enforceable, as it is "too vague, indefinite, uncertain, and lacking clarity as to all essential terms to constitute a binding promise." The Board also explained that it only reforms contracts to reflect the parties' true intent, and the Government's alleged promise to "merely discuss" a price change did not mean the Government actually intended to do so.

Two-Way Street—the Government Likewise Cannot Avoid the Contractual Terms When It Fails to Modify the Contract: In *Aspen Consulting, LLC v. Sec'y of the Army*, 25 F.4th 1012 (Fed Cir. 2022); 64 GC ¶ 56, the Federal Circuit considered a contractor's appeal of a decision denying a breach of contract claim seeking compensation related to the Government's failure to deposit payments in the account designated in the contract. The contract at issue involved construction performed in Germany that stated the Government was to make payments to the contractor's U.S. bank account. The contractor's chief operating officer (COO) in Germany requested that future payments be made to an account he opened there, purportedly for convenience. The Government made two such payments, and the contractor submitted a claim for payment for the misdirected amounts (which apparently were not routed by the COO). The ASBCA denied the appeal, finding that the Government did not breach by failing to pay the bank account listed in the contract and that the COO had apparent authority to change the contractor's payment instructions. The Federal Circuit reversed, finding the contract unambiguously stated that payment "shall" be made to the U.S. account listed. While the COO may have had apparent authority to consent to a contract change, no such contract modification was ever made.

Merging Traffic—Assess When the Contract Incorporates Other Terms by Reference: In *CSI Aviation, Inc. v. Dep't of Homeland Sec., Gen. Servs. Admin.*, 31 F.4th 1349 (Fed. Cir. 2022); 64 GC ¶ 127, the Federal Circuit reversed the Board's denial of a contractor's claim, which depended on the contractor's standard terms and conditions being incorporated by reference into its FSS contract. Whereas the CBCA found the contract's scattered references to the contractor's terms and conditions ambiguous as to whether the parties sought to incorporate them by reference, the Federal Circuit found the contract "uses sufficiently clear and

express language to establish the identity of the document being referenced and to incorporate the CSI Terms and Conditions into the Schedule Contract by reference." Id. at 1355. The Federal Circuit observed that its precedent does not require "magic words" to effectuate incorporation by reference, and disagreed with the Board's reasons for finding the language ambiguous, reasoning that the Board's alternative interpretation was not reasonable and any question about the version of the terms being referenced was "not relevant to deciding the question before us: whether any version was incorporated into the contract by reference." Id. at 1357.

"Right Lane Must Right Left"—What to Do When the Contract Is Ambiguous?: Two cases so far this year addressing patent ambiguities reached diametrically opposite results, wholly due to how the contractor responded to that ambiguity. First, in *Lebolo-Watts Constructors 01 JV, LLC v. Sec'y of the Army*, 2022 WL 499850 (Fed. Cir. Feb. 18, 2022), the Federal Circuit addressed a patent ambiguity where the contractor did not inquire as to whether the construction of two circuit breakers was included in the contract's scope of work. The Court affirmed the ASBCA's denial of the claim, agreeing that any ambiguity regarding whether the contractor was expected to provide these breakers was at best patent. On the whole, the Circuit tended to agree with the Government's view that the circuit breakers were clearly included in the statement of work, but the Court found some evidence in the contract supporting the contractor's interpretation. Because the ambiguity with respect to the obligation to provide breakers was patent, the law required the contractor to inquire about it, and the contractor's failure to do so "was properly construed against" the contractor. Id. at *5.

Conversely, the contractor did so inquire in *ECC Int'l, LLC*, ASBCA 58993, 60167, 60283, 22-1 BCA ¶ 38,073, submitting a question regarding the presence of collapsible soil at a construction site. The Government responded, "Bid it as you see it." The contractor included in its price proposal its interpretation that the solicitation excluded collapsible soils mitigation. When there turned out to be collapsible soil and the Government directed the contractor to perform the work, the contractor submitted a claim. The Board found no differing site condition because the contract included the possibility of collapsible soil. Nevertheless, the Board agreed that the contract did not include the work to mitigate collapsible soils given the Government's acceptance of the qualified proposal "constituted its acquiescence to ECCI's clearly expressed interpretation of a solicitation ambiguity created by the government." The Government's demand that the contractor perform this work after refusing to clarify the scope of the contract pre-award constituted a compensable contract change. Of note, the Board observed that the Government had created the ambiguity and in response to bidder questions, invited the offerors to propose their own solutions, and thus was bound by the contractor's "reasonable and clear pre-award, pre-dispute interpretation." "Whether by acquiescence or negligence, the Government accepted ECCI's qualification when it awarded the contract without discussions." See also *Gen. Dynamics – Nat'l Steel and Shipbuilding Co.*, ASBCA 61524, 22-1 BCA ¶ 38,067 (construing ambiguity against the contractor because evidence showed that, when preparing its bid, the contractor was on notice that its subcontractors interpreted the scope of work differently than it did but the contractor failed to inquire about the ambiguity before submitting its proposal).

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To avoid over-tiring our readers and fellow travelers, we now exit into the nearest camp site before continuing our claims journey. Please pitch a tent, enjoy some s'mores, and join us for the second half of our road trip to be published next week.

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