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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 2

This article continues our road trip through 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. In the first half of our semiannual case law summary, 64 GC ¶ 201 we started our summer road trip by learning the rules of the road, packing up a number of decisions that turned on jurisdictional and procedural matters before winding our way through merits cases that concentrated on the terms of the contract. In this second half of our journey, we consider bumps in the road, first summarizing pandemic-related claims litigation, taking a detour to discuss decisions about terminations and releases, and then completing our journey with sundry practice tips. It's time to fasten your seatbelts and remember, "[i]t's not the destination, it's the journey." Ralph Waldo Emerson.

Road Closed: Excusable Delay—More than two years into the pandemic, tribunals have made clear that covid-19 is now a foreseeable circumstance to account for and not a safe harbor for performance issues.

This is true especially where the contract at issue was "written for a need during a pandemic." The contract terminated in *Orsa Techs., LLC v. Dep't of Veterans Affairs*, CBCA 7141, 22-1 BCA ¶ 38,025, covered surge supplies of nitrate gloves necessitated by an increased demand during the pandemic, and resulted from a request for proposals that required supply on-hand (pun intended) within 45 days of award. A few weeks after receiving the award, the contractor (a distributor of the gloves) apparently got into a dispute with the original equipment manufacturer (OEM) and the OEM terminated the relationship—ending the contractor's access to the gloves it agreed to provide to the VA. After the deadline for delivery passed, the VA terminated the contract for default, and the contractor appealed to the CBCA, arguing first that the termination was invalid because the Government did not issue a notice to cure. The CBCA disagreed, explaining that no cure notice is required when the agency waits to terminate until after the contractor missed the delivery deadline. The CBCA also denied the contractor's request to defer ruling on whether the default was excusable, reasoning that no expert testimony was necessary for the legal question of whether the circumstances were foreseeable. The CBCA pointed to record evidence demonstrating that many of the difficulties about which the contractor complained occurred or began before it submitted its quote. In essence, the Board was not persuaded that pandemic effects caused the performance difficulties; rather, the problems originated with the contractor's dispute with the OEM—which the Board found was within the contractor's control. The Board reiterated that the purpose of the excusable delay clause is to protect the contractor against the unexpected; but here, the contractor was fully aware of the challenges arising from the covid-19 pandemic at the time of contracting. The Board rejected the contractor's arguments that foreseeability is not

part of the excusability analysis under Federal Acquisition Regulation 52.212-4(f), relying on the Federal Circuit's decision in *Gen. Injectables & Vaccines v. Gates*, 519 F.3d 1360, 1364–65 (Fed. Cir. 2008); 50 GC ¶ 133, and longstanding common law principles described in *U.S. v. Brooks-Callaway Co.*, 318 U.S. 120 (1943). The Board reasoned: "how, without an unforeseeability element in the excusable delay analysis, can the Government ensure timely receipt of materials needed to address public safety during epidemics or products needed to respond to epidemics? It cannot."

The CBCA released a similar decision involving a separate contract involving parallel terms between the same contractor and a different VA office. The situation in *Orsa Techs., LLC v. Dep't of Veterans Affairs*, CBCA 7142, 22-1 BCA ¶ 38,042 differed slightly because, although not required to do so, the contracting officer twice extended the delivery deadline and agreed to price increases, yet the contractor still did not deliver any gloves. The CBCA reached the same result as described in the appeal above, ruling that the termination for default was justified and the contractor, which entered into a contract seeking supplies "on hand" and knowing the pandemic's impact on the market, could not then use those market challenges as an excuse for a default that was occasioned by a dispute with the OEM.

The ASBCA joined in this trend, affirming in *Cent. Co.*, ASBCA 62624, 22-1 BCA ¶ 38,057 that the covid-19 pandemic is not a catch-all excuse. In this appeal involving a design/build construction contract, the Board upheld the Government's default termination, refusing the contractor's unsupported pleas for its performance delays to be excused due to the pandemic. Under Rule 11 written disposition procedures, the Board observed that the contract was awarded on Sept. 30, 2019 and required completion by May 19, 2020, yet by Feb. 28, 2020, over halfway through the performance period, the contractor had only made one submission (which was rejected as unacceptable). And, by the June 4, 2020 termination, two weeks after the scheduled completion date, the contractor had completed 0 percent of the work. The Board reasoned that the contractor's general statement about how bad the situation was "is a general statement about COVID that probably applied to most people in early 2020, but is irrelevant to this appeal without more specificity." The Board reiterated a foundational element for any excusable delay claim: "[i]f 'the situation' with Central's performance was 'bad' (i.e. halted by COVID), it was [the contractor's] obligation to contemporaneously demonstrate when the delays occurred and their real effect upon [the contractor's] work … none of which has been done."

Neither is an unsupported reliance on the pandemic an excuse for missing one's discovery obligations. In *United Fac. Servs. Corp. v. Gen. Servs. Admin.*, CBCA 5272, 22-1 BCA ¶ 38,055, GSA served interrogatories on the contractor on May 6, 2021, rendering responses due June 7, 2021. The contractor changed counsel and requested and received an extension for discovery until Sept. 27, 2021. When the contractor requested another enlargement, the Board convened a status conference in which GSA represented that it had completed all discovery obligations and that the contractor needed to answer the interrogatories before GSA could depose the contractor's representative. The Board set a new deadline of Nov. 16, 2021, which the contractor did not meet. The Board then issued a show cause order on Dec. 1, 2021, to which the contractor did not respond. At this point, GSA filed a motion to dismiss for failure to prosecute on Dec. 21, 2021; the contractor responded, saying it was a small business heavily impacted by covid-19 and would prosecute its claim moving forward. The CBCA found this assertion to be "empty" given it was unsupported by any declarations, the contractor's repeated "failed promises to respond to the interrogatories," and its failure to prove "that COVID-19 has made it impossible for Eastco to develop even partial responses to the interrogatories for more than nine months."

Divided Highway—Government as Contracting Party and Sovereign—The ASBCA issued two decisions applying the sovereign acts doctrine to deny contractor claims for costs resulting from Government-imposed pandemic restrictions. First, in *JE Dunn Constr. Co.*, ASBCA 62936, 2022 WL 1601938 (April 25, 2022), a contractor submitted a claim for the cost impact of a 14-day quarantine requirement that both New York and the relevant Army base imposed on persons traveling from high-risk states. While the state later reduced the quarantine period to three days, the Army kept the 14-day rule. The ASBCA denied the

contractor's appeal, crediting the Government's sovereign acts defense. The Board observed that for this defense "to apply, (1) the Government's act must be public and general, and (2) the act must render performance of the contract impossible." With regard to the first element, the quarantine requirement was generally applicable to all Army base visitors and not targeted at the contractor. As to the second, the Board rejected the contractor's argument that the real source of its cost impacts was the Army's imposition of the 14-day quarantine, rather than the New York's three-day period. The ASBCA reasoned that even had the Government imposed only a three-day quarantine, the contractor could not prove its "employees would have tested negative following their three-day quarantines, and therefore cannot establish that it would not have suffered the same damages regardless."

Three days later, the ASBCA issued a second decision applying the sovereign acts defense to deny a contractor claim for increased costs incurred due to pandemic-related restrictions. In *APTIM Fed. Servs. LLC*, ASBCA 62982, 2022 WL 1601951 (April 28, 2022), a design-build contractor, who was working on an Air Force base that was closed for approximately two months at the outset of the pandemic, submitted a certified claim for the administrative costs it incurred during the time the base was closed (the period of performance was extended, but the Government did not compensate the contractor for the additional time). The Government invoked the sovereign act defense, whereas the appellant argued it should recover under the Suspension of Work clause. The Board again found that the base closure was generally applicable and thus satisfied the first element of the sovereign act defense. With regard to the second, although the contractor urged that the Government failed to prove this prong and thus "must automatically lose access to this affirmative defense," the Board disagreed, finding that the contractor "repeatedly conflates the government as sovereign and the government as contracting party." The Board explained:

> While it is true that the government must prove impossibility of performance, and the government did have the contractual obligation to provide site access, or at least to not interfere with [the contractor's] work, we are able to see that the 'impracticability of the performance [was] plain: the government cannot allow [appellant] to proceed [with its contractual work] ... without violating the law,' as in *Century Expl. New Orleans, LLC v. United States*, 110 Fed. Cl. 148, 181 (2013).

The contractor was excluded from the base, like all other non-essential personnel, to address a public health crisis and mitigate a national security risk; the CO could not provide site access without violating the Base Commander's order. "This exclusion made performance of each party's contractual obligations impossible during the time period at issue," and the Board denied the appeal.

Terminations—When the Parties Reach the End of the Road (and May Have Taken a Detour Along the Way)—Two termination decisions issued in the past six months illustrate that a contractor's ability to recover when performance differs from the contract terms will depend on the Government's contemporaneous actions. If the Government reserves its right to enforce the contractual terms, the contract will govern, but if the Government accepts substitute performance without qualification, then strict compliance with the contract may no longer be an available defense.

First, in *Zahra Rose Constr.*, ASBCA 62732, 22-1 BCA ¶ 38,111, the agency terminated for convenience a contract for the lease of two fuel trucks in Afghanistan after the Government took possession of the trucks, noted some deficiencies in the trucks, but still appeared to use the trucks for about three weeks. The contractor submitted a termination settlement proposal for $30,400, including its already-paid cost of $28,800 (for the full contract period) and a future cost of $1,600 for "pick up." The Government countered with a $15,000 offer "to cover the first full month of the contract," and the contractor declined the settlement and submitted a notice of appeal to the Board. At the Board, using the Rule 11 written submission procedures, the Government argued the contractor was not entitled to a settlement due to non-conforming trucks. The Board disagreed, noting that the Government never rejected the trucks and when the Government terminated the contract for convenience under FAR 52.212-4(l), "the government became responsible for a termination settlement regardless of the uncommunicated deficiencies in the trucks." The Board awarded the

contractor $28,800, its actual incurred costs.

By contrast, in *GSC Constr., Inc. v. Sec'y of the Army*, 2022 WL 1299122 (Fed. Cir. May 2, 2022), the contractor's failure to comply with the contractual terms doomed its claim. For context, after failing to convince the ASBCA to overturn its termination for default, the contractor appealed to the Federal Circuit. The contractor re-asserted its argument that the Army "forfeited any right to enforce" the contract's original completion date "because the Army initially provided [the contractor] with additional time to complete the project" before issuing the termination for default. Id. at *2. The Federal Circuit disagreed, adopting the Board's reasoning that "although the Army permitted GSC to work past the original completion date, [the Army] expressly and repeatedly stated, that it did not 'condone any delinquency' or forfeit any rights under the contract." Id. at *5. Consequently, the Court credited the Army's "repeated reservation of its rights" and affirmed the Board's decision upholding the termination for default. Id.

Caution Sign—Rights at Play—Contractors must take caution when signing releases, as tribunals rigorously enforce them and they can unintentionally prevent the prosecution of claims. The COFC has issued two decisions thus far this year denying contractor recovery due to previously signed releases.

First, in *Cornelio Salazar d/b/a USA Ranch v. U.S.*, 159 Fed. Cl. 567 (2022); 64 GC ¶ 164, the contractor countersigned a Government invoice that released future claims. The contractor later filed a claim for additional money, asserting it signed the release under duress because the Government advised that the contractor would not receive payment unless it signed. The COFC denied the appeal, finding the contractor was not truly under duress, but instead "[t]he Government, in effect, gave Mr. Salazar a choice between immediate payment upon signing a waiver and a potentially larger future payment after litigation." Id. at 572. The COFC clarified that, while "[a] duress defense might still be available in exceptional circumstances, such as where the government's own wrongful acts have placed the signing party under extraordinary financial pressure at the time of the waiver," "[o]rdinarily, the possibility of litigation is precisely the kind of 'alternative' that precludes a duress defense to a contract." Id.

Second, the decision in *T.H.R. Enters., Inc. v. U.S.*, 2022 WL 2062416 (Fed. Cl. June 8, 2022), reminds contractors to review the release provision in any settlement agreement carefully in order to prevent the unintended loss of other claims involving the same contract. In this appeal, the Government moved to dismiss, arguing that the contractor released the claim in a broad settlement addressing earlier claims that the contractor appealed and the parties settled before the CO issued a final decision on the current claim. The contractor opposed dismissal, contending that the release related only to the settled claims in the prior "Appeal." The COFC agreed that the contractor released the claim, observing that "[w]hile the Settlement agreement references 'the Appeal,' it explicitly treats claims related to the appeal as included in the range of matters released," due to the use of the phrase "including without limitation." Id. at *2. The Court reasoned: "The words 'including without limitation' cannot have the effect of making an inclusion limiting …. A better interpretation would treat the phrase as introducing a prototypical example of what is released." Id. at *4. The Court also found unpersuasive the contractor's attempted reliance on a "whereas" clause to limit the broad language of the general release, explaining that the "whereas" clause "was not contractual" and, while such clauses may lend evidence of the parties' intent in the face of an ambiguous provision, they "may not … create ambiguity" where the contractual provision has only one permissible meaning. Id.

Contractors also encounter waivers in the modification context; namely, contract modifications often purport to release all claims associated with the modification (or claims known as of the time of the modification), leaving contractors in a bind when COs refuse to negotiate modification language. The contractor encountered a version of such a situation in *Tanik Constr. Co. Inc.*, ASBCA 62527, 2022 WL 2377398 (June 7, 2022). The contractor admitted it signed the release in question, but submitted affidavits averring it only did so after the agency assured the contractor that it would still be able to pursue its additional costs via a request for equitable adjustment. The ASBCA denied the Government's motion for summary judgment based on the admittedly unambiguous release language, finding instead that the contrac-

tor presented enough evidence to assert that the Government obtained the contractor's signature through fraud or misrepresentation, a possible defense to the release and a narrow exception to the parol evidence rule (which normally precludes consideration of affidavits). While the Board was careful to note the contractor "has a long way to go to succeed in this allegation," it found the contractor had "produced enough evidence to preclude summary judgment in favor of the government," observing that the affidavits, which were very clear that the contractor would not have signed the modification without assurances from the Government, were "consistent with contemporaneous email inquiring about the means of submitting a REA."

Practice Tips to Ensure an Open Road to Recovery—As discussed in an earlier article, not every noteworthy case merits a lengthy discussion. To conclude this article, the following cases provide guidance to contractors and practitioners alike to avoid proceeding the "Wrong Way."

- *Do I Have a Defense If the Government Required that I Subcontract with a Specific Subcontractor?* The appeal in *Metro Machine*, ASBCA 62221, 22-1 BCA ¶ 38,096, involved a challenge to liquidated damages that the Government imposed on the contractor based on delays that related to problems with a certain part that the Navy required the contractor to acquire from the OEM. The contractor argued that because the Government required use of a specified subcontractor then the contractor should not be responsible if that required source later has problems performing. The ASBCA squarely rejected this argument, finding that the prime was the only party with privity of contract with the subcontractor and was responsible for managing that subcontractor appropriately. The ASBCA reasoned, "with the exception of the warranty that the sole-source supplier identified by the Government is capable of performing the work, the government makes no other warranties when such a subcontractor is identified by contract, and the prime contractor is as responsible for that subcontractor's work as it would be any other subcontractor." The Board continued: "[g]iven the limits of that warranty, the government is not liable for the acts or omissions of a sole-source contractor who, though capable, does not meet the performance needs of the prime and the identification of such a sole source contractor would not make a deficient specification for which the government is liable." Contractors would thus be wise to perform appropriate due diligence on Government-directed sources and ensure the subcontract contains appropriate controls and remedies in the event of performance troubles.
- *When Can I Petition the CBCA to Direct the CO to Issue a Decision?* The CDA provides: "[a] contractor may request the tribunal concerned to direct a contracting officer to issue a decision in a specified period of time, as determined by the tribunal concerned, in the event of undue delay on the part of the contracting officer." 41 USCA § 7103(f)(4). In *Constr. Servs. Grp., Inc. v. Dep't of Veterans Affairs*, CBCA 7344, 22-1 BCA ¶ 38,092, when the CO failed to issue a final decision within 60 days after receipt of a claim, the contractor appealed and requested the CBCA to direct the CO to do so. The CBCA denied the request and clarified its authority under § 7103(f)(4). The CBCA explained that, despite the broad language, the statute authorizes the Board to act only in the limited circumstance when a CO has stated a new date certain by which she will issue a final decision, and the contractor wishes to advance that date so as to be able to appeal a "deemed denial." The CBCA continued: "[u]nder this statutory provision, the Board is authorized to alter a time extension that the contracting officer has granted … and to allow a contractor to appeal on a 'deemed denial' basis if the contracting officer fails to issue a decision by the Board's revised deadline for a decision, if it finds that the contracting officer's extension was unreasonable." In the instant appeal, however, the contractor had already availed itself of a deemed denial because the 60 days passed without the CO stating an alternative deadline. Of note, the ASBCA appears to have a different practice. Specifically, ASBCA Rule 1(a)(5) states that "[i]n lieu of filing a notice

of appeal … the contractor may petition the Board to direct the contracting officer to issue a decision in a specified period of time as determined by the Board." For example, in *Alutiiq Mgmt. Servs., LLC*, ASBCA 63175, 22-1 BCA ¶ 38,114, the contractor filed a petition under this Rule, requesting the Board direct the Government to issue decisions on 250 previously submitted claims. The parties reached an agreement "that the government process at least 20 claims per quarter until all remaining claims are decided, with decisions upon the entirety of pending claims to be issued within 3 years." The Board found this reasonable and held that if the Government fails to comply with this plan, "such failure will be deemed a decision by the contracting officer denying the remaining claims" which the contractor could appeal.

- *How Many Separate "Claims" Have I Alleged that Require a "Sum Certain"?* In a prior article, we observed that the jurisdictional "sum certain" requirement applies to each distinct claim, even if submitted together. A [Legal] Affair to Remember: Claims Cases and Lessons Learned in the Second Half of 2020, 22-3 Briefing Papers 1. In a subsequent decision involving the same contracting parties but a different project, the Government reprised this argument, moving to dismiss the appeal in *ECC Int'l, LLC*, ASBCA 60167, 2022 WL 509701 (Jan. 25, 2022) on the basis that the contractor's certified claim actually contained two separate claims (breach of implied warranty and breach of good faith and fair dealing), but did not demand a separate sum certain for each. The contractor opposed the motion, contending that its certified claim set forth a single set of operative facts that support multiple theories of liability. The ASBCA agreed with the contractor and denied the Government's motion, finding that the breach of warranty of specifications and duty of good faith and fair deaing theories rely on common operative facts and seek the same remedy (a sum certain of damages). The Board explained: "[t]he facts enumerated in ECCI's certified claim are relevant to both theories of recovery, and we are satisfied that the contracting officer was adequately apprised of both the amount of, and the two articulated bases for, ECCI's claim."
- *What Impact, If Any, Will Corporate Transactions Have on the Claim?* The COFC highlighted the perils associated with buying and selling Government contractors while a dispute is pending in *DDS Holdings, Inc. v. U.S.*, 158 Fed. Cl. 431 (2022); 64 GC ¶ 75. DDS Holdings owned Doctor Diabetic Supply Inc. at the time it performed a Government contract, and sold it to another company after contract performance ended but while a dispute was pending. Nevertheless, after the sale, the holding company attempted to file suit alleging the government breached the contract with Doctor Diabetic Supply, claiming it "retained the right to pursue the claims" as "the successor in interest and representative of the former owners" of Doctor Diabetic Supply. Id. at 435. The COFC granted the Government's motion to dismiss, finding that DDS Holdings did not have privity of contract with the Government and was not validly assigned the claim, either by law (because DDS Holdings was not "for all intents and purposes … essentially the same entity, which has undergone a change in its corporate form or ownership," as Doctor Diabetic Supply) or through either express or implicit Government recognition. Id. at 437. The COFC rejected DDS Holdings' argument that it "retained" the contract claim post-sale, finding any such retention "would be an assignment of a claim expressly forbidden by" the Anti-Assignment Act. Id. at 438.
- *Should I Seek In Camera Review of Documents the Government Has Withheld Based on the Deliberative Process Privilege?* In *Active Constr., Inc. v. Dep't of Transp.*, CBCA 6597, 22-1 BCA ¶ 38,043, the contractor requested in camera review of documents over which the Government had asserted the deliberative process privilege. The Board found that *none* of the documents qualified for the privilege—they all either related to decisions that had already been made when

the documents were created, had no discernible tie to a decision the agency was deliberating, or related to matters of pure contract administration. The Board explained: "only in unusual situations will an agency be able to preclude production of documents relating to contract administration decisions, particularly those relating to decisions about contract changes and modifications, under the guise of the deliberative process privilege when defending against a contract action seeking damages for those same contract administration activities, changes, and modifications," because the privilege is intended to protect discussions regarding agency policy, and its purpose of not stifling frank agency discussions is not applicable to factual investigation of contract claims.

- *Is a Notice of Intent to Recoup Liquidated Damages an Appealable CO's Final Decision (COFD)?* The answer, provided in *ECC Int'l Constructors, LLC*, ASBCA 59586, 22-1 BCA ¶ 38,028, is that such a notice is not sufficient to constitute a COFD unless a demand for payment is included. The Board reiterated that the "government has the burden of proving that the Board possesses jurisdiction to entertain its claim for liquidated damages by demonstrating that the assessment of liquidated damages is memorialized in a timely final decision by a contracting officer." Because the Government offered only its decision denying the contractor's request for a time extension and contract adjustment, and not a decision assessing liquidated damages, the Board dismissed the claim to liquidated damages. The Board stated that "what the government says is $940,274 in liquidated damages is actually, at least at this point, a contract balance presumably owed to appellant." The Government subsequently moved for reconsideration, pointing to a pay estimate in which the administrative CO assessed and withheld the $940,272.98 in liquidated damages for 402 days of delay. In light of the affirmative withholding of liquidated damages, the Board granted in part the motion, finding "there is still before us appellant's claim to the remission of that withholding," and noted that appellant's remission claim and the Government's position regarding its entitlement to keep those liquidated damages would be addressed in a separate opinion. Stay tuned.

Although this concludes our summer road trip through notable CDA decisions published in the first half of 2022, "[t]he road goes on forever and the party never ends." Robert Earl Keen.

Whatever your destination is this summer, we hope you enjoyed this journey with us.

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