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¶ 190 FEATURE COMMENT: The Tortured Claimants Department—A Swifty Summary Of CDA Case Law Developments In The First Half Of 2024—Part I

In this ninth biannual case law update, we harness the lyrical mastery of a certain pop superstar to cast a "*Lavender Haze*" over Contract Disputes Act case law developments in the first half of 2024. Even if we can't "*make the whole place shimmer*," these decisions of the U.S. Court of Appeals for the Federal Circuit, Court of Federal Claims, Armed Services Board of Contract Appeals, and Civilian Board of Contract Appeals "*polish up real nice*." In this first of two parts, we discuss decisions dealing with contract interpretation, the difference between requirements and indefinite-delivery, indefinite-quantity contracts, and continuing impacts of the covid-19 pandemic. Without further ado: "*Are you ready for it?*"

Contract Interpretation ("*Are We in the Clear?*")—We start our recording session with a comparison of two cases considering whether a contract incorporates another document by reference. In the decisions, the tribunals are clear that filling in a "*Blank Space*" in a contract requires clear language, unambiguous intent, and an absence of heartbreak, erm, conflict. Judges, like our pop superstar's character James, "*won't make assumptions*."

"In Plain Sight [the Incorporation by Reference] Hid": Two years ago, the Federal Circuit reversed a contrary CBCA holding and determined that a contractor's standard terms and conditions had been incorporated into the Federal Supply Schedule contract despite not appearing in a list of six documents that were expressly incorporated by reference. *CSI Aviation v. Dep't of Homeland Sec.*, 31 F.4th 1349 (Fed. Cir. 2022); 64 GC ¶ 127. The Court reasoned that the contract used "sufficiently clear language" to refer to the terms and conditions and there are no "magic words" required to effectuate incorporation by reference. The Federal Circuit remanded to the CBCA to determine whether the terms and conditions were inapplicable for some other reason (e.g., they were inconsistent with other terms) or resolved the parties' dispute, a decision the CBCA issued in early 2024. *CSI Aviation, Inc. v. Dep't of Homeland Sec.*, CBCA 6385, 7423 (6292), 2024 WL 511904 (Feb. 2, 2024).

On remand, the agency urged the CBCA to hold the contractor's terms and conditions were void because they conflicted with several terms of the schedule contract (including terms related to the CDA, the Anti-Deficiency Act, and the Equal Access to Justice Act) and therefore could not apply. The Board did not disagree that there were conflicting terms but found no conflicts that impacted the claims or defenses asserted in the present case. Instead, it

severed the conflicting provisions, noting that the applicable Federal Acquisition Regulation supplement (the General Services Administration Acquisition Regulation) recognizes that commercial supplier terms and conditions may contain terms that cannot apply when the purchaser is the Federal Government, and in such case the regulations instruct that the clauses shall simply be stricken from the contract: ‘‘Since none of the provisions identified by GSA and [U.S. Immigration and Customs Enforcement] go to the heart of the parties' bargain and current GSA regulation would sever these provisions, it is not appropriate to toss the entirety of the terms and conditions based upon the presence of these provisions.’’ Id.

Turning then to the contract interpretation issues presented by the parties' dispute, the CBCA noted that the contractor sought $37 million for more than 600 flights that the agency cancelled within 14 days of the scheduled flight based on its standard commercial terms, which allowed it to recover a 100-percent cancellation fee if a flight was cancelled with less than 14 days' notice. The agency argued that such a term conflicted with the termination for convenience provision in the schedule contract and therefore was not enforceable. The Board disagreed and found no conflict because the termination for convenience clause allowed the Government to terminate all or part of a task order, while the contractor's specific cancellation clause covered the cancellation of specific flights, and thus the provisions were separate. Id.

Similarly, the contractor's terms and conditions allowed the contractor to round up hours on all flights (per the contractor, entitling it to $27 million in additional payment), which the Government argued conflicted with the contract's payment provision stating the contractor would be paid for *actual* service charges. The Board again found no conflict, holding that the payment provision requires payment for ‘‘actual hours’’ instead of ‘‘estimated hours’’ and the contract did not mention minutes or payment for flight hours; thus, the CBCA reasoned that the term ‘‘actual’’ was not a limitation that the contractor ‘‘only bill for the actual hours and minutes that it flew.’’ Such an interpretation reconciled all terms of the contract. The Board ultimately denied both parties' motions for summary judgment due to outstanding questions of material fact. Id. Rather than continue to litigate, the Government agreed to pay the contractor $34,450,000. *CSI Aviation, Inc. v. Dep't of Homeland Sec.*, CBCA 6385, 7423, 2024 WL 3167667 (June 20, 2024).

‘‘Wake Up and Find that What You're Looking for Has Been Here the Whole Time’’: The CBCA used the test the Federal Circuit established in *CSI Aviation* to find a contractor's standard services agreement was not incorporated into the final contract in *Clean Harbors Envtl. Servs., Inc. v. Dep't of Health & Human Servs.*, CBCA 7704, 2024 WL 124691 (Jan. 10, 2024). The contractor submitted a quote to provide waste disposal services to the Indian Health Service, and then two weeks later submitted a second quote, attaching a copy of its standard environmental services agreement (ESA). The contractor submitted its final pricing a few days later, which did not reference the ESA. The agency issued a purchase order to the contractor that referenced an attached statement of work and the contractor's final pricing quote, but did not reference the ESA. When the agency requested the contractor pick up waste, the contractor requested that the agency fill out ‘‘waste profiles specifying the waste to be picked up,’’ as laid out in the ESA. The agency refused and terminated for default.

The contractor appealed the termination to the CBCA, arguing the agency's noncompliance with the ESA was a prior breach. The agency asserted the ESA was not incorporated into the contract. The CBCA agreed with the agency. While the contractor pointed to a request for quotation provision stating that offerors should submit ‘‘descriptitve [sic] literature,’’ the CBCA found the RFQ's statement that ‘‘[t]erms and conditions other than those stated will not be accepted’’ to control; the contractor could not impose any additional process requirements on the agency's placement of orders for waste removal. Further, neither the RFQ nor signed contract documents incorporated the ‘‘descriptive literature’’ provided by the contractor as a contract term, and the contract documents did not incorporate, much less reference, the ESA in any way. Under *CSI Aviation*, ‘‘[t]o incorporate material by reference, the incorporating contract must use language that is express and clear, so as to leave no

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ambiguity about the identity of the document being referenced, nor any reasonable doubt about the fact that the referenced document is being incorporated into the contract.'' 31 F.4th at 1355 (quotation omitted). That standard was not met here.

Furthermore, and contrary to the remand analysis in *CSI Aviation*, the Board found that the ESA contained several other terms that directly conflicted with the purchase order terms:

> The inclusion in the ESA of so many provisions that would have to be stricken for it to be enforceable against the United States and that would create direct conflicts with the actual express terms of the purchase order, without any evidence that the parties considered and dealt with those problems, further supports respondent's position that the ESA could not have been incorporated into the purchase order.

Accordingly, the CBCA found that the ESA was not incorporated into and did not become part of the purchase order.

IDIQ vs. Requirements Contracts (*''Sorry, I Can't See Facts Through All of My Fury*'')—Most Government contracts practitioners claim to understand the difference in an IDIQ and a requirements contract *''All Too Well.*'' That doesn't stop contractors from attempting to leverage the difference to ''*Call It What You Want To*'' when it suits their needs. Two cases in early 2024 explored the fundamental differences in these types of contracts.

''I Think It's Time to Teach Some Lessons'': In *Caring Hands Health Equip. & Supplies, LLC v. Sec'y of Veterans Affairs*, the Federal Circuit held that although certain contracts did not contain the FAR Requirements clause (FAR 52.216-21), other provisions in those contracts evidenced ''words of exclusivity'' denoting a requirements contract. 2024 WL 223170 (Fed. Cir. Jan. 22, 2024). The contractor entered into a series of contracts with the VA to deliver Government-owned home medical equipment. Eight such contracts (the ''2014 contracts'') contained FAR 52.216-22 (Indefinite Quantity) and FAR 52.216-19 (Order Limitations); the other eight contracts (the ''2015 contracts'') contained neither clause, and stated: ''The volumes or amounts shown... are estimates only and impose no obligation on the VA. The contract shall be for the actual requirements of the VA as ordered by the VA during the life of the contract.'' When the VA placed orders for covered equipment from entities other than the contractor, the contractor submitted a claim asserting it held a requirements contract and, as such, was the sole vendor from which the VA could order. The CBCA held that the 2014 contracts were IDIQ contracts and not requirements contracts, meaning the VA satisfied its obligations when it ordered the stated minimum quantity and did not breach when it ordered from other vendors. The CBCA found the 2015 contracts to be illusory, as they did not qualify as either requirements or IDIQ contracts, and therefore unenforceable except for orders placed, delivered, and paid for. *Caring Hands Health Equip. & Supplies, LLC v. Dep't of Veterans Affairs*, CBCA 6814, 22-1 BCA ¶ 38,182.

The Federal Circuit concurred with the Board as to the 2014 contracts, finding they were not ''requirements contracts as a matter of law because they do not contain the FAR Requirements clause or any other words of exclusivity.'' 2024 WL 223170 at *2 (citing *Coyle's Pest Control, Inc. v. Cuomo*, 154 F.3d 1302, 1305 (Fed. Cir. 1998); 40 GC ¶ 491). The Federal Circuit disagreed with the Board regarding the 2015 contracts, finding their language ''unambiguously establishes an intent to create requirements contracts.'' Id. Even though the FAR Requirements clause was not present in the 2015 contracts, the Federal Circuit found ''[t]he plain language of the 2015 contracts,'' which stated the contracts were ''for the actual requirements of the VA,'' established the requisite exclusivity. The 2015 contracts' General Requirements clause stated: ''The contract shall be for the *actual requirements of the VA* as ordered by the VA during the life of the contract.'' Id. This language obligated the VA to purchase all required services exclusively from the contractor. That the clause stated that the volumes on the contract are ''estimates only and impose no obligation on the VA'' meant only that the VA had not committed to purchase any specific amount. Nevertheless, the VA had committed to purchase any such requirements—regardless of amount—from the contractor. Id. Any other result would have left the language ''actual requirements of the VA'' superfluous, an unreasonable result.

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"I [Should've Known] You Were Trouble When [I Entered into the Contract]": In *MLB Transp., Inc. v. U.S.*, the Court found a contract for special needs transportation was ambiguous as to whether it was an IDIQ or a requirements contract and because that ambiguity was patent at the time the contractor entered the contract, the contractor had a duty to inquire and could not rely on its asserted interpretation in litigation. 170 Fed. Cl. 322 (2024). When the Government's needs failed to approach the stated estimates in the solicitation, the contractor argued the VA was improperly utilizing other transportation providers outside the scope of its requirements contract. The Government argued the contract was an IDIQ, as the solicitation "unambiguously solicited offers for an IDIQ contract because it stated the basis of award as an IDIQ contract and contained the IDIQ FAR clause." Id. at 336. The contractor, conversely argued that the solicitation and award document contained the FAR Requirements clause in the statement of work as well as Veterans Affairs Acquisition Regulation 852.216-70, Estimated Quantities (APR 1984), which states in relevant part, that "the [VA] shall not be relieved of its obligation to order from the contractor all articles or services that may, in the judgment of the ordering officer, be needed." Id. The Court held that given that solicitation was patently ambiguous—the solicitation states the basis of award as an IDIQ contract yet contains a provision that obligates the Government to order all articles or services from the contractor—the law required the contractor to rectify the inconsistency before award. The contractor's failure to timely raise and resolve the inconsistency "precludes [its post-award CDA claim based on] its interpretation of the contract as a requirements contract." Id. at 337.

Covid Cases (*"You Wouldn't Admit that We Were Sick"*)—In the years since the outbreak of the covid-19 pandemic, contractors have pled unique theories to mixed success to recover pandemic-related costs. While tribunals have been sympathetic to some such claims in specific circumstances, the simple complaint that *"it's [covid], it's ruining my life*" continues to be unconvincing to decisionmakers.

"Everything Has Changed": In *McCarthy HITT – Next NGA West JV*, the contractor on a design-build construction project filed a claim for pandemic-related impacts to the project. ASBCA 63571, 63572, 63573, 2023 WL 9179193 (Dec. 20, 2023). The Government moved to dismiss, arguing that the contractor had not stated a claim for relief and that any Government liability was barred by the sovereign acts doctrine. The Board disagreed, refusing to dismiss the appeal. First, the Board found that the complaint alleged a sufficient basis for a constructive change claim, such as the allegation that the agency "required it to comply with government guidance on covid-19 and implement covid-19 exposure control procedures; perform additional job safety analyses and task-specific analyses; create new health and safety signage; provide additional training; develop contact tracing, testing, and quarantine programs;" and to change crew compositions and work plans. The Board concluded these allegations "plausibly suggest[]" that the Government required the contractor to perform "differently than set forth in the Contract" and accordingly, whether the Government may have defenses to those allegations, the dispute should continue to its merits.

Second, the Board found the contractor plausibly claimed a constructive suspension of work claim, i.e., the agency's "actions and inactions in administering the Contract once the pandemic struck had the effect of unreasonably disrupting, delaying or hindering the work on the Project," including by alleging that the Government refused to acknowledge that the project was delayed and encountering additional costs due to the pandemic. Third, the Board found the contractor adequately alleged a breach of the Government's implied duty of good faith and fair dealing in failing to "cooperate with [the contractor] in managing or addressing the impacts [of the pandemic], which were severe and unexpected," and instead instructing the contractor to "continue to perform as though nothing of consequence was occurring" and being "nonresponsive to requests for help in complying with all the new and changing requirements placed upon" the contractor.

Lastly, the Board denied the Government's motion to dismiss premised on the sovereign acts doctrine. As a reminder, the sovereign acts defense requires the Government to "prove that (1) the Government action

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was public and general; and (2) the act rendered performance impossible.'' Although on the merits the Government may be able to offer evidence the Government conduct giving rise to the allegations was required by public and general acts over which the agency in its contractor capacity could not control, any such defense was not provided on the allegations in the complaint. Similarly, the Board found that the second element was not clear was from the face of the complaint. Rather, if the contracting officer had discretion to impose the alleged changed requirements, ''then arguably the impossibility element is not established.'' While the contractor still had to prove its case on the merits, the Board refusal to dismiss.

"*I Lived in Your Chess Game but You Changed the Rules*": In *Amentum Servs., Inc.*, a contractor for airport maintenance services at two naval air stations, Lemoore and North Island, requested a price increase for the costs of complying with the Navy's two-week quarantine requirement and new California state legislation requiring 80 hours of covid-19 paid sick leave for full-time employees. ASBCA 63250, 63251, 63350, 2024 WL 773339 (Feb. 6, 2024). The Board granted the contractor's request for one air station but not the other, under FAR 52.222-43, Fair Labor Standards Act and Service Contract Labor Standards—Price Adjustments, which requires a contract price adjustment where the contractor experiences an actual increase in wages or fringe benefits due to a change in federal law. Because the collective bargaining agreement (CBA) for the Lemoore air station (enforceable under federal law) provided that ''[p]ersonal medical leave will be granted in accordance with the [Family and Medical Leave Act], company policy, and *all state of California* and federal laws,'' the Board granted summary judgment for the contractor's claim for paid sick leave under state law. (Emphasis added.) But, because the North Island CBA did not contain a similar provision, the Board found the paid sick leave not to qualify for a price increase under FAR 52.222-43. The Board reasoned, ''the change in California law requiring the provision of covid-19 medical leave, while, presumably, binding upon appellant,'' does not (without incorporation via a CBA) ''constitute[] an increased wage determination for purposes of federal law.'' The Board denied the contractor any relief regarding the Navy's 14-day quarantine requirement, finding it to constitute a sovereign act that ''removes the government's liability under the changes clause for any increase in costs that Amentum suffered as a result.''

''Would've, Could've, Should've [Entered into a Different Contract Type]": In *Lusk Mech. Contractors, Inc. v. Gen. Servs. Admin.*, the Board held the contractor could not escape its firm fixed-price contract by pleading entitlement to additional costs under the Suspension of Work clause. CBCA 7759, 2024 WL 1953697 (Apr. 30, 2024). After GSA issued a notice to proceed in January 2020 with a firm fixed-price construction contract related to the U.S. Courthouse in St. Croix, on March 13, 2020, the governor of the U.S. Virgin Islands declared a state of emergency due to the covid-19 pandemic, ordering all non-essential businesses to ''cease in-person business operations'' for two weeks. When that order expired, GSA issued the first of a series of suspension of work notices on March 27, 2020, citing FAR 52.422-14, Suspension of Work clause. The contractor was eventually permitted to resume work on June 1, 2020, and submitted a request for equitable adjustment for over $800,000 for costs incurred during the shutdown under the FAR Suspension of Work clause. The Board reiterated its oft-applied pandemic rule: ''Absent a special adjustment clause, this Board has held that an unforeseen pandemic does not shift the risk to the Government for any unexpected costs incurred under a firm, fixed-price contract.'' The Board concluded that ''no such adjustment clause'' exists here and the contractor could not ''shift the risks of increased costs of performance to GSA under a suspension of work theory.'' The CBCA cited its own precedent that ''[a] contractor may only recover under the Suspension of Work clause 'when the Government's actions are the *sole* proximate cause for the contractor's additional loss, and the contractor would not have been delayed for any other reason during that period.' '' (quoting *Tidewater Contractors, Inc. v. Dep't of Transp.*, CBCA 50, 07-1 BCA ¶ 33,525). Here, the U.S. Virgin Islands governor's order ''equally interfered'' with the contractor's performance of the work. Furthermore, the CBCA found that

''[e]ven had GSA been the sole cause of delay, the length of the suspension period was reasonable'' given the pandemic conditions, which under FAR 52.242-14 precludes any recovery.

* * *

It appears "*we [took] this way too far*," so in order to avoid "*leav[ing] you breathless*," or worse, "*with a nasty scar*," we split this recording session into two parts. Please "*Come Back, Be Here*" next week for the remainder of our greatest hits from early 2024 CDA case law.

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