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Surfin' CDA: Finding "Good Vibrations" In Contract Disputes Act Case Law Developments From The Second Half Of 2024

By Kara Daniels and Amanda Sherwood[*]

We're back with our 10th biannual Contract Disputes Act (CDA) case law update, following up on our summary of noteworthy decisions from the first half of 2024 that was published in a two-part *Feature Comment* in THE GOVERNMENT CONTRACTOR.[1] Because we subscribe to Henry David Thoreau's view that "[o]ne must maintain a little bit of summer, even in the middle of winter," we have filled this proverbial beach bag of developments in Contract Disputes Act (CDA) case law from the second half of 2024 with some sunny, tropical getaway themes to beat the winter blues away. Surf's Up!

Is It A Pina Colada (Claim) Or Just A Coconut (REA)? The Boards Apply *Zafer*'s Objective Test

The second half of 2024 brought two different applications of the U.S. Court of Appeals for Federal Circuit's splashy *Zafer Construction Co. v. United States* precedent[2] to find that a contractor had submitted a claim under the CDA. First, in *Mindseeker, Inc.*,[3] the Armed Services Board of Contract Appeals (ASBCA) considered a contract for medical coding services using a government-provided platform that failed repeatedly during performance, harming the contractor's productivity. The contractor submitted a "Request for Price Modification" seeking four buckets of damages, including compensation for lost production value ("the first claim") as well as a "price increase per coded record" for future work ("the second claim"). Several months later, the contractor submitted a revised document titled "Request for Equitable Adjustment" (REA) limited to only the first and second category of damages and proceeded to negotiate with the Army for nearly two years, ultimately submitting a CDA certification in response to an Army request. At

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IN THIS ISSUE:

Is It A Pina Colada (Claim) Or Just A Coconut (REA)? The Boards Apply *Zafer*'s Objective Test 1

The King Of The Sandcastle: The Sovereign Acts Doctrine 3

When Bidding On IDIQ Contracts, As When Sunbathing, Take Precautions Or Risk Getting Burned 4

To Turn That Grain Of Sand In The Oyster Into A Pearl, Keep Your Receipts 5

Unfair Tripadvisor (erm, CPARS) Reviews 6

Beware Of The Waivers Or Releases When Renting The Boogie Board (Or Signing A Contract Modification) 7

Prevent Wipeout By Showing The Government's Termination Justification Is An Empty Shell 7

Does This Claim Have Legs Or Is It A Mermaid? Passing The Jurisdictional Test 8

Conclusion 9

Guidelines 9

the end of each REA communication, the contractor included language thanking the government for considering its request and expressing a willingness to discuss matters further. The Army eventually issued a decision denying the REA and asserting that despite including the CDA certification language, "the language and tenor of that document, as well as other contemporaneous communications between Mindseeker and the Government at the time that the updated/revised REA was submitted, indicate" it remained an REA and not a claim.[4] Mindseeker appealed, and the Army moved to dismiss, alleging Mindseeker failed to convert its REA to an appealable claim.

The board granted the motion to dismiss as regards the "second claim," but denied the motion as to the "first claim." In doing so, the board applied the Federal Circuit's *Zafer* precedent to determine whether the contractor made a written demand, included a CDA certification, and requested a final decision from the contracting officer. Despite the contractor's inclusion of "continued negotiation" language at the end of each submission, the board found that "nearly every filing (whether labeled a 'request for price modification' or an 'REA') included a clear and unequivocal statement explaining the basis of" the claim. This satisfied the first, "written demand" requirement.[5] However, while Mindseeker requested a sum certain from the Army for its first claim, it failed to do so for its second claim both because it contained no demand for money "as a matter of right," as it pertained to future downtime, and because Mindseeker failed to quantify the number of units the future price change would implicate. Absent a sum certain, the second claim was not a valid CDA claim and was dismissed by the board without prejudice.[6]

The board retained jurisdiction over the "first claim" after observing both that the Army requested that Mindseeker use the CDA certification in its REA, which goes beyond the Defense Federal Acquisition Regulation Supplement (DFARS) REA certification,[7] and Mindseeker requested a final decision from the Army. Citing *Zafer*, the board reasoned that objectively, "the content and context of the correspondence between the Army and Mindseeker show that . . . Mindseeker's submissions started as an REA, but that changed when Mindseeker certified its submission."[8] The board reasoned that the Army "placed itself on notice that Mindseeker was converting its REA to a CDA claim by requesting that Mindseeker certify its REA using the CDA certification."[9] The board also rejected the Army's argument that Mindseeker failed to explicitly request a final decision, citing precedent that "[w]hether explicit or implicit, a submission need not use any 'magic words' to make a request for a contracting officer's final decision."[10] Instead, the requirement "focuses on whether, objectively, the document's content and the context surrounding the document's submission put the contracting officer on notice that the document is a claim requesting a final decision."[11] Here, the Army could not fairly claim it was not on notice, given the contractor's repeated communications and the Army's own request that Mindseeker replace the REA certification with the CDA certification.[12]

The Civilian Board of Contract Appeals (CBCA) similarly applied *Zafer* to the contractor's benefit in *ELA Group, Inc. v. Department of Labor*.[13] In this case, the contractor submitted a payment demand to the contracting officer in October 2023, which the contracting officer denied by email and not by formal decision in November 2023. The contractor appealed the deemed denial of its claim in October 2024. The government moved to dismiss the appeal, asserting that the October 2023 submission was an REA, that contractor had filed a "more formal

Editor: Valerie L. Gross

Briefing Papers® (ISSN 0007-0025) is published monthly, except January (two issues) and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. Customer Service: (800) 328-4880. POSTMASTER: Send address changes to Briefing Papers, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

claim" on September 12, 2024, rendering the appeal premature. The CBCA observed that the appeal did not reference the September 2024 claim and applied *Zafer* to find that, reviewed objectively and without consideration of subjective intent, the October 2023 submission constituted a claim rather than a REA and therefore the board had jurisdiction to entertain the appeal of the deemed denial of that claim. The contractor "submitted its demand to the [Department of Labor] contracting officer for payment of a specific sum of money," "identified the basis of its payment demand," and "implicit[ly]" requested a final decision by asserting it is '' 'entitled to receive[]' the requested money and its attachment of its change order form detailing the incurred costs that it wanted to be reimbursed."[14] The CBCA considered that the contractor identified its October 2023 submission as a "proposal," which mirrors terminology used in the contract's equitable adjustment clause. But the CBCA concluded that the proposal in that clause referred to future work not yet performed, whereas the contractor had submitted a demand for work already completed.[15]

The CBCA explained that absent *Zafer*'s instruction to ignore the parties' subjective intent, the fact that the contractor submitted a formal CDA claim, labeled as such, in September 2024 would indicate it did not consider its October 2023 submission to be a claim, but the Federal Circuit was clear that such analysis was inappropriate. Reviewed objectively, the October 2023 submission was a claim and appealable. The CBCA dismissed aspects of the appeal only raised in the September 2024 submission and not the October 2023 submission.[16]

Additionally, on the beach it may be "No Shoes, No Shirt, No Problem," but with the CDA, it's "No Claim, No Final Decision, No Jurisdiction." In *The Povolny Group, Inc. v. Department of Veterans Affairs*,[17] a contractor submitted a request for information (RFI) to request that the government approve a different size stud than listed in a project's specifications. The government denied the request, and the contractor installed the different sized studs anyway. The government then issued a "final decision" instructing the contractor to either redo the work or make some alterations to the installed studs. The contractor filed what it termed a "protective appeal" of the "final decision," while noting that the CBCA might lack jurisdiction as there was no underlying CDA claim. The CBCA agreed, reasoning that under 41 U.S.C.A. § 7103(a), "a contractor's claim submission is a prerequisite for a contracting officer's final decision." Because no claim existed, there was no basis for the board's jurisdiction.[18]

The King Of The Sandcastle: The Sovereign Acts Doctrine

The Sovereign Acts Doctrine, under which the United States is immune from liability for obstruction of the performance of a contract resulting from its public and general acts as sovereign, can frustrate a contractor's attempt to recoup meritorious-seeming claims. Two cases in the second half of 2024 explored the limits of this doctrine, with one finding it barred contractor relief and the other finding the contract expressly placed the risk of the particular potentially sovereign act on the government.

First, in *GEMS Environmental Management Services*,[19] after receiving a contract to construct buildings on a military installation, the contractor alleged that changes to security access procedures to the government worksite imposed during contract performance caused it to incur substantial unanticipated costs. The government asserted the security procedures were subject to the Sovereign Acts Doctrine. The board explained that this doctrine differentiates between acts that are "relatively free of Government self-interest," in which case the government enjoys immunity from impacts of its actions on its contracts, and those circumstances where the action is "tainted by a governmental object of self-relief," in which case the doctrine does not apply.[20] The contractor argued that the doctrine could not apply because the security procedures applied only to contractors, rather than to the public generally, and because the government's action did not make performance of the contract impossible. The board rejected both arguments, finding the additional security procedures "fit squarely within the sovereign acts rubric."[21]

On the first argument, the board concluded that the changed access rules, which phased out an old security system and required greater advanced notice prior to issuing passes, applied on their face to all visitors, even if, in practice, the change ultimately ended up only affecting contractors. The board cited a Federal Circuit case providing that the defense "does not rest on a mechanical determination of the number of contractors affected, but rather

focuses on the nature and scope of the governmental action."[22] Here, the security procedures concerned a "quintessential government function (installation security), and are not to the government's benefit as a contracting party."[23]

Turning to the second argument, the board distinguished between the sovereign act making *full* compliance impossible and the sovereign act *utterly destroying* the contractor's ability to perform.[24] The Sovereign Acts Doctrine is not limited to circumstances "when it was impossible to perform the contract at any cost," but rather applies, as here, where the contractor's performance was obstructed by the sovereign act.[25]

The contractor had better luck in *Chugach Federal Solutions, Inc.*,[26] which considered an Air Force contract to provide operations and maintenance services at three remote facilities in the Pacific Ocean. When COVID-19 broke out, the Air Force required Chugach's employees to quarantine for 14 days before entering government facilities. In response to Chugach's claim for reimbursement of its costs to comply with the quarantine requirement, the Air Force argued that its imposition of a quarantine qualified as a sovereign act, shielding it from liability for Chugach's compliance expenses. The board disagreed.

The contract at issue incorporated Air Force Federal Acquisition Regulation Supplement (AFFARS) 5352.223-9001, HEALTH AND SAFETY ON GOVERNMENT INSTALLATIONS (JUN 1997), which required Chugach to "[c]omply with the health and safety rules of the Government installation that concern related activities not directly addressed in this contract" and provided that "any adjustments resulting from such direction will be in accordance with the Changes clause of this contract." The Changes clause, in turn, provided for an equitable adjustment for contracting officer-imposed changes to the work.[27]

The board found that the quarantine fell under the scope of the AFFARS health and safety provision and the government could not avail itself of the sovereign acts defense because the existence of the AFFARS clause demonstrated that the parties considered the risk of a quarantine when contracting and placed the risk of increased costs related to such a change on the government.[28]

When Bidding On IDIQ Contracts, As When Sunbathing, Take Precautions Or Risk Getting Burned

Although they might not be the hottest topic in government contracts, indefinite-delivery, indefinite-quantity (IDIQ) contracts can still result in a misinformed contractor getting burned. Several cases in 2024 involving IDIQ-related claims evidenced the importance of questioning or clarifying terms during the solicitation process or risking the inability to interpret the contract in such a way as to succeed in a later contract dispute.

For instance in *Commonwealth Home Health Care, Inc. v. Department of Veterans Affairs*,[29] the Department of Veterans Affairs (VA) awarded a firm-fixed-price requirements contract to provide home oxygen equipment for veterans with a base year and four one-year options. The contract contained an estimated number of patients to be served, which escalated by 5% each year, and a statement that the fact that actual needs did not rise to these estimates would not be considered a basis for an equitable adjustment. The actual number of patients served never met the contractual estimates and declined over the course of performance. Litigation revealed that the VA had based the contractual estimates on arithmetic errors, and past experience showed escalation never exceeded 1%. The contractor submitted a claim asserting that the VA negligently prepared the estimates and that the option years were improperly exercised when the actual patient numbers fell below the estimates. The CBCA agreed that the estimates were problematic, but denied relief on the ground the contractor could not demonstrate reasonable reliance on the negligent estimates. In so holding, the CBCA applied the Federal Circuit's standard that the estimates were "inadequately or negligently prepared, not in good faith, or grossly or unreasonably inadequate at the time the estimate was made."[30] The CBCA observed that the VA's numerous mathematical errors, misuse of historical data, and failure to use the most recent available data met that standard. Yet, the CBCA held that as the incumbent, the contractor "had access to and was the source of all the data used . . . to generate the estimate" and could not just stick its head in the sand. The CBCA recognized that while "[a] contractor without the experience and access to the underlying historical data may have prevailed upon the negligent estimate theory . . . to give Commonwealth a pass on its role as the incumbent would

violate the long-standing rule regarding the obligation of contractors to address defects before contract execution."[31]

Much as no amount of sunblock can undo a sunburn, no amount of creative lawyering can change an IDIQ contract into a requirements contract. In *Sage Acquisitions LLC v. Secretary of Housing & Urban Development*,[32] the U.S. Court of Appeals for the Federal Circuit rejected the contractor's attempt to recast three IDIQ contracts into requirements contracts in order to recover termination for convenience costs and other costs after the guaranteed minimums had been met. At issue were three Department of Housing and Urban Development (HUD) contracts for management and marketing services (in three geographical areas) as part of its Real Estate Owned (REO) disposition program that HUD later terminated for convenience. The contractor argued it was entitled to recover because even though the contracts were identified as IDIQ contracts, provided guaranteed minimums, and did not contain clauses for requirements contracts (e.g., Federal Acquisition Regulation (FAR) 52.216-21), they were in substance requirements contracts that required HUD to provide all REO work to the contractor for the geographical areas covered by the contracts.[33] The Federal Circuit disagreed; relying on *Mason v. United States*,[34] the court reasoned that contractual provisions describing the contractor's work described what the contractor was required to perform and not what the government was obligated to order. Any other interpretation would render inoperable (or superfluous) a separate contractual provision reserving the government's right to work with other contractors.[35] Because the agency ordered the guaranteed minimum associated with each IDIQ contract, HUD had fully discharged its contractual obligations and the contractor was not entitled to any damages.[36]

To Turn That Grain Of Sand In The Oyster Into A Pearl, Keep Your Receipts

Claims may seem as numerous as grains of sand on a beach, but only those where the contractor retains supporting documentation will see the pearl of success. For example, in a pair of decisions in late 2024 involving the same contractor and similar facts, *Melwood Horticultural Training Center, Inc. v. General Services Administration*,[37] the CBCA held that FAR 52.222-43, which provides for annual price adjustments for labor cost increases under the Fair Labor Standards Act and the Service Contract Act, requires calculation of any price increase based on "the contractor's actual incurred costs, not the costs the contractor *proposed* that it would incur when it agreed to the contract."[38] FAR 52.222-43(d) states: "The contract price, contract unit price labor rates, or fixed hourly labor rates will be adjusted to reflect the contractor's *actual* increase or decrease in applicable wages and fringe benefits [emphasis added]." The board interpreted the word "actual" to mean "in reality," and explained: "A contractor's right to a price adjustment under FAR 52.222-43 and the Government's duty to approve price adjustments is triggered only when a contractor faces increased costs resulting from complying with an increase in the contract's wage determination."[39] In this case, the calculation required the company submit payroll information as proof of actual costs—regardless of the fact that the government had not required such information for prior price increases—as extrinsic evidence of prior course of dealing cannot change the clear contract language.[40]

Although the disposition in *ACLR, LLC v. United States*,[41] is nonprecedential, the case presents two primary issues: the government's flexibility to constructively terminate a commercial item contract for convenience and the need for contractors to maintain a "standard record keeping system" to recover under FAR 52.212-4(l). That provision entitles the terminated contractor to "a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate[,] to the satisfaction of the ordering [agency] using its standard record keeping system, have resulted from the termination."[42] In that appeal, the contractor had performed multiple recovery audits for the Centers for Medicare and Medicaid Services (CMS) by which it was paid on a contingency basis, i.e., a certain percentage of the amounts the contractor collected. In the case of two audits subject to the dispute, CMS terminated the audits after the contractor had identified purported overpayments but before it had collected any amounts. The contractor claimed that the terminations amounted to a breach and sought damages. The government successfully sought summary judgment at the Court of Federal Claims, and the contractor appealed.

The Federal Circuit affirmed the Court of Federal

Claims' holding, noting that CMS' failure to invoke FAR 52.212-4(l) or make any reference to a termination for convenience only served to make "CMS' termination for convenience *constructive* rather than express."[43] Citing to *JKB Solutions & Services, LLC v. United States*,[44] the court explained that when a contracting officer terminates "for ultimately questionable or invalid reasons," even without invoking the termination for convenience clause, "the contract's termination for convenience clause may constructively justify the government's actions, avoid breach, and limit liability."[45]

As far as the damages related to the constructive termination for convenience under FAR 52.212-4(l), the Federal Circuit observed that the provision contemplates two types of damages. First, the contractor may receive a percentage of the contract price reflecting work performed prior to termination, and second, reasonable charges that resulted from the termination, as demonstrated using a standard record keeping system. Because the CMS order entitled the contractor to a contingency fee for only overpayments *recovered*, and the termination happened before any such recovery, the contractor was not entitled to any damages for performance prior to the termination.[46] Regarding the second category of potential damages, the Federal Circuit agreed with the Court of Federal Claims "that a 'standard record keeping system' requires a 'regular, organized method for tracking relevant costs.' "[47] But ACLR sought to rely on a "vast collection of documents, some of which reflect post hoc estimates, rather than a systemic or organized method of tracking costs relevant to a particular project," which was so disorderly that "no reasonable factfinder could view ACLR's record keeping system as regularly used, carefully thought-out, or even organized and orderly" to meet the standard system required for recovery.[48] In so holding, the Federal Circuit noted that neither it nor the Court of Federal Claims interpreted the "standard record keeping system" in FAR 52.212-4(l) to "be 'specific' or 'overly sophisticated.' "[49] Even though the standard was not high, here the contractor had shipwrecked.

Unfair Tripadvisor (erm, CPARS) Reviews

Every vacation destination and government contractor want a good review. Just like a bad Tripadvisor rating, poor Contractor Performance Assessment Reporting System (CPARS) reviews can destroy a contractor's dreams of island living. In *Michael M. Tsontos, S.A. Chania Sucursala Bucuresti*,[50] a company successfully convinced the ASBCA that an element of its Contractor Performance Assessment Reports (CPARs) was incorrect, requiring remand back to the agency. The CPARs issued on task orders listed a foreign branch's parent company as the performing company, rather than the foreign branch. On appeal, the company argued that the CPARs were in error because FAR 42.1502 provides such reports "are generally for the entity, division, or unit that performed the contract," and here, the foreign branch was that entity.[51]

The ASBCA agreed. The United States Army Corps of Engineers (USACE) awarded the multiple award task order contract to Tsontos Greece for construction services in Romania. Later, in order to take advantage of a value added tax exemption in Romania, Tsontos Greece established a branch of its company in Romania, which was issued a certificate of registration identifying it as a branch of a foreign firm, a unique registration code, and European Identity number. Tsontos Greece then contacted USACE and asked it to recognize Tsontos Romania as a separate entity. USACE agreed and issued a modification changing the contractor's name, address, and CAGE code on the contract to Tsontos Romania, set up a separate entry and unique number in its own tracking system for Tsontos Romania, and made all future payments under the contract to Tsontos Romania. USACE justified naming Tsontos Greece as the performing party on the CPARs instead of Tsontos Romania because Tsontos Romania lacked its own separate legal personality and did not "exclusively perform[]" the contract, since it benefitted from overhead provisions from its parent company in Greece, and since Mr. Tsontos headed both the Greek parent company and Romanian division.[52]

The board concluded that Tsontos Romania is a branch of Tsontos Greece (equivalent to a "division"), and that an entity need not be a separate legal company with its own legal personality to be considered a separate entity for purposes of being listed on a CPAR. In addition, it did not matter that Mr. Tsontos headed both the Greek Company and the Romanian branch; his position as Tsontos Greece's chairman did not preclude him from also acting as the administrator of Tsontos Romania in taking official actions on behalf of the branch. The board remanded the CPARs to be amended to list Tsontos Romania as the party being reviewed.[53]

Beware Of The Waivers Or Releases When Renting The Boogie Board (Or Signing A Contract Modification)

The CBCA rejected a contractor's argument due to a contractual release in *Fortis Industries, LLC v. General Services Administration*.[54] Difficulties between the parties began when the General Services Administration (GSA) made deductions to payments to a base services operations and maintenance services contract citing staffing level, performance, training, and other deficiencies before terminating the contract for convenience. GSA provided a proposed modification effectuating the termination, which the contractor signed. The modification stated that "[t]he contractor unconditionally waives any charges against the Government because of the termination of the contract and, except as set forth below, releases it from all obligations under the contract or due to its termination." The modification continued: "The Government agrees that all obligations under the contract are concluded, except as follows: payment for work performed per [the] contract from 6/1/2022–6/30/2022."[55] After signing the modification, the contractor submitted a certified claim to recoup some of the previously imposed deductions. The CBCA agreed with GSA that the plain language of the modification "releases the Government from all obligations under the contract except for work performed in June 2022."[56] The CBCA was not convinced by the contractor's argument that its "claim" was different from an "obligation," explaining that "[a] 'claim' is what arises when one party seeks to enforce a contractual obligation."[57] Nevertheless, based on the contractor offering emails suggesting that at least the contractor understood that payments for May 2022 remained unresolved and not released, the CBCA concluded that a disputed fact existed as to whether the parties agreed to exclude certain claims from the release. The CBCA accordingly denied GSA's motion for partial summary judgment as pertained to deductions from May 2022 but granted the motion as regarding deductions from other months.[58]

Prevent Wipeout By Showing The Government's Termination Justification Is An Empty Shell

Sometimes a tempest besets a contract and after a period of seasickness, a termination results. Whether a contractor weathers the storm or wipes out depends on whether the government's termination decision holds water. Two contrasting decisions in the second half of 2024 demonstrate how a contractor can sink or swim in a termination.

First, in *Adapt Consulting, LLC v. General Services Administration*,[59] the contractor demonstrated a termination for default lacked a justifiable basis where the government's explanations for default lacked detail and were grounded on conduct by others. The contract was for installation of a security system; the government terminated after the contractor failed to resolve a series of error messages. The CBCA found that the government had the burden of demonstrating the complained-of error messages were the contractor's fault, and thus a proper basis for termination, and failed to do so. The board explained that "Adapt's witnesses testified credibly that the system functioned as designed and that the [fault/fault clear] messages arose from environmental factors such as unpinning or propping open the doors."[60] By contrast, the board found that "GSA's evidence . . . was so minimal," "that it carries no weight."[61] While "GSA plainly does not like the results of Adapt's investigation [into the cause of the error messages], GSA has not identified an alternate cause for the [fault/fault clear] occurrences to show that Adapt's analysis is incorrect."[62] The board accordingly instructed the termination be converted from a default to one for convenience.[63]

By contrast, in *Sergent's Mechanical Systems, Inc. v. United States*,[64] the Court of Federal Claims upheld the Department of Veterans Affairs' (VA) default termination where it found the contractor's explanations for delay and non-performance were "convoluted" and "little more than conclusory statements unsupported by law."[65] The court first found the government met the initial burden of establishing the validity of the termination by showing that at the time of termination, the contractor had no intention or capability of completing contract tasks (replacing cooling coils in an air conditioning system and removing asbestos) as required.[66] The court next found the contractor did not prove its delay was excusable. Although the contractor argued its "untimely performance was excused due to government actions," ranging from ambiguities in contract drawings and the VA's failure to identify and clear the asbestos, the court found both assertions unsubstantiated.[67] The contractor's explanations were too full of holes to stay afloat and justify its admittedly deficient performance.

Does This Claim Have Legs Or Is It A Mermaid? Passing The Jurisdictional Test

Two cases in the second half of 2024 addressed atypical jurisdiction matters and reinforced that matters under the sea (disputes within the scope of the CDA) are subject to Poseidon and his trident (the boards and the Court of Federal Claims). In the first, *Boeing Co. v. United States*,[68] the contractor appealed a decision by the court dismissing its complaint, which raised three contract claims grounded on a price adjustment for cost accounting changes and one illegal exaction claim. In its contract claims, Boeing alleged that the Contracting Officer's adjustment violated the cost accounting standards statute, 41 U.S.C.A. § 1503(b), by not offsetting the cost increases by the cost decreases resulting from the accounting changes, even if FAR 30.606(a) instructs contracting officers not to "combine the cost impacts of . . . [o]ne or more unilateral changes" unless "all of the cost impacts are increased costs to [the] Government."[69] On summary judgment, the lower court characterized Boeing's contract claims as "a challenge to the validity of FAR 30.606" and determined it lacked jurisdiction to review the validity of regulations under the Administrative Procedure Act.[70] The Federal Circuit disagreed with the underlying characterization of Boeing's claims, stating: "Although Boeing's claims implicate the validity of FAR 30.606, the 'true nature of the action' is undoubtedly a contract dispute" under the CDA.[71] The Federal Circuit continued:

> [R]esolution of this contract dispute—*i.e.*, whether under the contract, the government is entitled to recover increased costs calculated pursuant to FAR 30.606—is inextricably intertwined with the validity of the regulation. As such, we conclude that the Court of Federal Claims has jurisdiction under the CDA to resolve this contract dispute and the validity of the underlying regulation.[72]

Thus, where a genuine contract dispute with the government arises and turns on the validity of a federal regulation, the contractor can challenge that regulation in the Court of Federal Claims as its litigation is a contract dispute under the CDA.

In another atypical jurisdiction case, *DSME Construction Co., Ltd.*,[73] the ASBCA resolved that the mere fact that a foreign country is funding a contract does not deprive the boards of contract appeals of jurisdiction even if the contract states it is not subject to the CDA. The U.S. Army's 411th Contracting Support Brigade awarded a contract to DSME Construction to provide preventative maintenance, on-call service, and equipment repairs in various facilities at Camp Humphreys and Camp Yongin in South Korea. The work would be paid for by South Korea, but was administrated by a U.S. contracting officer. The contract's disputes clause provided that disputes between the contracting parties would be decided by the CO, that appeals of the CO's decision would be heard by the Principal Assistant Responsible for Contracting (PARC), and that the contract was not subject to the CDA.

A few months after the parties entered into the contract, the contracting officer terminated the contract for default. DSME submitted a claim to the CO, who issued a decision, and DSME appealed to ASBCA without first appealing to the PARC. Even though, as discussed, the contract stated it is not subject to the CDA, the contractor moved to affirm the board's jurisdiction and the government did not oppose the motion. The board held that it had jurisdiction, relying on *Sungwoo E&C Co.*,[74] which held in a similar scenario that the determining factor is not the source of the funding, but whether the U.S. benefited from the procurement.[75] Here, because the contract was executed and administered by a U.S. contracting officer on behalf of an executive agency and for the benefit of the United States, South Korea's ultimate funding of the services was inapposite. The board also ruled that "the presence of a clause in the contract providing a dispute resolution process other than what is provided under the CDA does not divest the Board of jurisdiction," citing *Sungwoo* and other cases.[76] For example, in *OSHCO-PAE-SOMC v. United States*,[77] the court permitted a contractor to file under the CDA notwithstanding the underlying contract's direction to first appeal to the "Grievance Council of the Saudi Arabian Government," reasoning that "[w]here Congress has precluded contractors from bargaining away rights," as it had in the CDA, "the legislation is controlling, not the contract."[78] Similarly, in *Burnside-Ott Aviation Training Center v. Dalton*,[79] the Federal Circuit upheld an ASBCA decision to take jurisdiction notwithstanding an underlying contract provision asserting that decisions of the government's Fee Determining Official were not appealable, reasoning a contract provision could not take away the ASBCA's power of de novo review.

Conclusion

We hope you enjoyed the ebb and flow of this installment of our CDA case law review and, much like the Beach Boys, it made you think of "warmed up weather" until we can "do it again."

Guidelines

Like the list you make before you pack for your next island adventure, we finish with these *Guidelines* to ensure nothing important from this BRIEFING PAPER's discussion of recent CDA cases gets left behind. As always, this abbreviated list is no substitute for professional representation in any specific situation.

1. Although there never is a bad day at the beach, the same is not true with CDA litigation. To obtain relief from a government contracts tribunal or court, the contractor must have first submitted a timely proper written "claim" within the six-year statute of limitations to the applicable Contracting Officer that meets each of the specific procedural requirements (including stating a sum certain, including a proper certification if money damages are claimed, and requesting a final decision). The contractor must then timely appeal the final decision or deemed denial in accordance with the statutory deadlines (90 days from date of receipt of CO's final decision to an agency board or 12 months from that date to the Court of Federal Claims).

2. Just as it is important to build a strong foundation for your sandcastle, good procurement practices can provide a strong foundation for future CDA claims. Clarifying ambiguous or questionable terms during the procurement process will ensure all parties are on the same page and prevent the risk that a CDA tribunal will later use the ambiguity against the contractor in subsequent litigation.

3. Saltwater heals everything but is no substitute for documentation substantiating entitlement and the quantum sought under the CDA. Make sure to document changes, directions, and other interactions with the government to retain and segregate increased costs.

ENDNOTES:

[1]Amanda Sherwood & Kara Daniels, "Feature Comment: The Tortured Claimants Department—A Swifty Summary Of CDA Case Law Developments In The First Half Of 2024—Part II," 66 GC ¶ 199 (July 31, 2024);

Amanda Sherwood & Kara Daniels, "Feature Comment: The Tortured Claimants Department—A Swifty Summary Of CDA Case Law Developments In The First Half Of 2024—Part I," 66 GC ¶ 190 (July 24, 2024).

[2]Zafer Constr. Co. v. United States, 40 F.4th 1365 (Fed. Cir. 2022), 64 GC ¶ 233.

[3]Mindseeker, Inc., ASBCA No. 63197, 2024 WL 4252067 (Aug. 29, 2024).

[4]Mindseeker, Inc., ASBCA No. 63197, 2024 WL 4252067 (Aug. 29, 2024).

[5]Mindseeker, Inc., ASBCA No. 63197, 2024 WL 4252067 (Aug. 29, 2024).

[6]Mindseeker, Inc., ASBCA No. 63197, 2024 WL 4252067 (Aug. 29, 2024).

[7]See DFARS 252.243-7002(b).

[8]Mindseeker, Inc., ASBCA No. 63197, 2024 WL 4252067 (Aug. 29, 2024).

[9]Mindseeker, Inc., ASBCA No. 63197, 2024 WL 4252067 (Aug. 29, 2024).

[10]Mindseeker, Inc., ASBCA No. 63197, 2024 WL 4252067 (Aug. 29, 2024) (citing Hejran Hejrat Co. v. U.S. Army Corps of Eng'rs, 930 F.3d 1354, 1357 (Fed. Cir. 2019), 61 GC ¶ 237).

[11]Mindseeker, Inc., ASBCA No. 63197, 2024 WL 4252067 (Aug. 29, 2024) (citing Zafer Constr. Co. v. United States, 40 F.4th 1365, 1368 (Fed. Cir. 2022), 64 GC ¶ 233).

[12]Mindseeker, Inc., ASBCA No. 63197, 2024 WL 4252067 (Aug. 29, 2024).

[13]ELA Group, Inc. v. Dep't of Labor, CBCA 8235, 2024 WL 4919650 (Nov. 22, 2024), 67 GC ¶ 3.

[14]ELA Group, Inc. v. Dep't of Labor, CBCA 8235, 2024 WL 4919650 (Nov. 22, 2024), 67 GC ¶ 3.

[15]ELA Group, Inc. v. Dep't of Labor, CBCA 8235, 2024 WL 4919650 (Nov. 22, 2024), 67 GC ¶ 3.

[16]ELA Group, Inc. v. Dep't of Labor, CBCA 8235, 2024 WL 4919650 (Nov. 22, 2024), 67 GC ¶ 3.

[17]Povolny Group, Inc. v. Dep't of Veterans Affairs, CBCA 8160, 2024 WL 4521104 (Oct. 16, 2024).

[18]Povolny Group, Inc. v. Dep't of Veterans Affairs, CBCA 8160, 2024 WL 4521104 (Oct. 16, 2024).

[19]GEMS Envtl. Mgmt. Servs., ASBCA Nos. 61737 et al., 2024 WL 3508079 (July 2, 2024).

[20]GEMS Envtl. Mgmt. Servs., ASBCA Nos. 61737 et al., 2024 WL 3508079 (July 2, 2024) (citing United States v. Winstar Corp., 518 U.S. 839, 896 (1996) (Souter, J., concurring)).

[21]GEMS Envtl. Mgmt. Servs., ASBCA Nos. 61737 et

al., 2024 WL 3508079 (July 2, 2024).

[22]Conner Bros. Constr. Co. v. Geren, 550 F.3d. 1368, 1377 (Fed. Cir. 2008), 51 GC ¶ 17.

[23]GEMS Envtl. Mgmt. Servs., ASBCA Nos. 61737 et al., 2024 WL 3508079 (July 2, 2024).

[24]GEMS Envtl. Mgmt. Servs., ASBCA Nos. 61737 et al., 2024 WL 3508079 (July 2, 2024) (citing Yankee Atomic Elec. Co. v. United States, 112 F.3d 1569, 1574 (Fed. Cir. 1997), 39 GC ¶ 281).

[25]GEMS Envtl. Mgmt. Servs., ASBCA Nos. 61737 et al., 2024 WL 3508079 (July 2, 2024).

[26]Chugach Fed. Sols., Inc., ASBCA Nos. 62712, 62713, 62877, 2024 WL 4542405 (Oct. 2, 2024), 66 GC ¶ 323.

[27]Chugach Fed. Sols., Inc., ASBCA Nos. 62712, 62713, 62877, 2024 WL 4542405 (Oct. 2, 2024), 66 GC ¶ 323.

[28]Chugach Fed. Sols., Inc., ASBCA Nos. 62712, 62713, 62877, 2024 WL 4542405 (Oct. 2, 2024), 66 GC ¶ 323.

[29]Commonwealth Home Health Care, Inc. v. Dep't of Veterans Affs., CBCA 7601, 7721, 2024 WL 4472546 (Oct. 7, 2024).

[30]Commonwealth Home Health Care, Inc. v. Dep't of Veterans Affs., CBCA 7601, 7721, 2024 WL 4472546 (Oct. 7, 2024) (citing Agility Def. & Gov't Servs., Inc. v. United States, 847 F.3d 1345, 1350 (Fed. Cir. 2017), 59 GC ¶ 49).

[31]Commonwealth Home Health Care, Inc. v. Dep't of Veterans Affs., CBCA 7601, 7721, 2024 WL 4472546 (Oct. 7, 2024).

[32]Sage Acquisitions LLC v. Sec'y of Hous. & Urb. Dev., 119 F.4th 973 (Fed. Cir. 2024), 66 GC ¶ 306.

[33]Sage Acquisitions LLC v. Sec'y of Hous. & Urb. Dev., 119 F.4th at 979.

[34]Mason v. United States, 615 F.2d 1343 (Ct. Cl. 1980).

[35]Sage Acquisitions LLC v. Sec'y of Hous. & Urb. Dev., 119 F.4th at 981.

[36]Sage Acquisitions LLC v. Sec'y of Hous. & Urb. Dev., 119 F.4th at 983.

[37]Melwood Horticultural Training Ctr., Inc. v. Gen. Servs. Admin., CBCA 7989, 2024 WL 5003433 (Dec. 3, 2024); Melwood Horticultural Training Ctr., Inc. v. Gen. Servs. Admin., CBCA 8075, 2024 WL 5003437 (Dec. 3, 2024).

[38]Melwood Horticultural Training Ctr., Inc. v. Gen. Servs. Admin., CBCA 7989, 2024 WL 5003433 (Dec. 3, 2024) (emphasis in original); Melwood Horticultural Training Ctr., Inc. v. Gen. Servs. Admin., CBCA 8075, 2024 WL 5003437 (Dec. 3, 2024).

[39]Melwood Horticultural Training Ctr., Inc. v. Gen. Servs. Admin., CBCA 7989, 2024 WL 5003433 (Dec. 3, 2024).

[40]Melwood Horticultural Training Ctr., Inc. v. Gen. Servs. Admin., CBCA 7989, 2024 WL 5003433 (Dec. 3, 2024); Melwood Horticultural Training Ctr., Inc. v. Gen. Servs. Admin., CBCA 8075, 2024 WL 5003437 (Dec. 3, 2024).

[41]ACLR, LLC v. United States, No. 1:15-cv-00767-PEC, 2024 WL 4315111 (Fed. Cir. Sept. 27, 2024).

[42]FAR 52.212-4(l).

[43]ACLR, LLC v. United States, 2024 WL 4315111, at *4.

[44]JKB Sols. & Servs., LLC v. United States, 18 F.4th 704, 708 (Fed. Cir. 2021), 63 GC ¶ 358.

[45]ACLR, LLC v. United States, 2024 WL 4315111, at *4.

[46]ACLR, LLC v. United States, 2024 WL 4315111, at *6.

[47]ACLR, LLC v. United States, 2024 WL 4315111, at *7.

[48]ACLR, LLC v. United States, 2024 WL 4315111, at *7–*8.

[49]ACLR, LLC v. United States, 2024 WL 4315111, at *8.

[50]Michael M. Tsontos, S.A. Chania Sucursala Bucuresti, ASBCA No. 63595, 2024 WL 4777910 (Oct. 30, 2024).

[51]Michael M. Tsontos, S.A. Chania Sucursala Bucuresti, ASBCA No. 63595, 2024 WL 4777910 (Oct. 30, 2024).

[52]Michael M. Tsontos, S.A. Chania Sucursala Bucuresti, ASBCA No. 63595, 2024 WL 4777910 (Oct. 30, 2024).

[53]Michael M. Tsontos, S.A. Chania Sucursala Bucuresti, ASBCA No. 63595, 2024 WL 4777910 (Oct. 30, 2024).

[54]Fortis Indus., LLC v. Gen. Servs. Admin., CBCA 7967, 2024 WL 4327405 (Sept. 18, 2024).

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[56]Fortis Indus., LLC v. Gen. Servs. Admin., CBCA 7967, 2024 WL 4327405 (Sept. 18, 2024).

[57]Fortis Indus., LLC v. Gen. Servs. Admin., CBCA 7967, 2024 WL 4327405 (Sept. 18, 2024).

[58]Fortis Indus., LLC v. Gen. Servs. Admin., CBCA 7967, 2024 WL 4327405 (Sept. 18, 2024).

[59]Adapt Consulting, LLC v. Gen. Servs. Admin., CBCA 7213, 7393, 2024 WL 3534587 (July 22, 2024).

[60]Adapt Consulting, LLC v. Gen. Servs. Admin., CBCA 7213, 7393, 2024 WL 3534587 (July 22, 2024).

[61]Adapt Consulting, LLC v. Gen. Servs. Admin., CBCA 7213, 7393, 2024 WL 3534587 (July 22, 2024).

[62]Adapt Consulting, LLC v. Gen. Servs. Admin., CBCA 7213, 7393, 2024 WL 3534587 (July 22, 2024).

[63]Adapt Consulting, LLC v. Gen. Servs. Admin., CBCA 7213, 7393, 2024 WL 3534587 (July 22, 2024).

[64]Sergent's Mech. Sys., Inc. v. United States, 173 Fed. Cl. 56 (2024).

[65]Sergent's Mech. Sys., Inc. v. United States, 173 Fed. Cl. at 67–68.

[66]Sergent's Mech. Sys., Inc. v. United States, 173 Fed. Cl. at 65–66.

[67]Sergent's Mech. Sys., Inc. v. United States, 173 Fed. Cl. at 66–74.

[68]Boeing Co. v. United States, 119 F.4th 17 (Fed. Cir. Oct. 4, 2024), 66 GC ¶ 288.

[69]Boeing Co. v. United States, 119 F.4th at 20 (citing FAR 30.606(a)(3)(ii)(A)).

[70]Boeing Co. v. United States, 119 F.4th at 22.

[71]Boeing Co. v. United States, 119 F.4th at 23.

[72] Boeing Co. v. United States, 119 F.4th at 24.

[73]DSME Constr. Co., Ltd., ASBCA No. 63878, 2024 WL 3946626 (July 30, 2024).

[74]Sungwoo E&C Co., ASBCA Nos. 61144, 61219, 19-1 BCA ¶ 37,449, 2019 WL 5496018, 61 GC ¶ 326.

[75]DSME Constr. Co., Ltd., ASBCA No. 63878, 2024 WL 3946626 (July 30, 2024).

[76]DSME Constr. Co., Ltd., ASBCA No. 63878, 2024 WL 3946626 (July 30, 2024).

[77]OSHCO-PAE-SOMC v. United States, 16 Cl. Ct. 614 (1989).

[78]OSHCO-PAE-SOMC v. United States, 16 Cl. Ct. at 619.

[79]Burnside-Ott Aviation Training Center v. Dalton, 107 F.3d 854, 858 (Fed. Cir. 1997).

BRIEFING PAPERS