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# BCA BAR JOURNAL

*A Quarterly Publication of the Boards of Contract Appeals Bar Association, Inc.*

## The President's Column

Welcome to the first BCA Bar Journal of 2015, which is being published fresh on the heels of the annual BCABA–George Washington University Colloquium program, cosponsored this year with PubKLaw. Organized by the inimitable duo of our former president, David Black, and Professor Christopher Yukins of GW Law School, this year's Colloquium looked at the history of the boards and sought to tease out lessons to be learned for nations that are developing their own dispute forums for public contracts.

Judge Ruth Burg, Professor Ralph Nash, and Carl Vacketta gave first-hand accounts of why and how the boards evolved as they did. David Metzger and Professor Steve Schooner followed with a discussion of why the U.S. has developed a unique body of law for disputes involving federal contracts. Jim McCullough and Judge Gary Shapiro then talked about how the boards should run and what tools are important to make a board effective. Finally, Sandy Hoe, Jean-Jacques Verdeaux and Judge Paul Williams discussed the dual arbitral and adjudicative roles played by the boards.

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## PRESIDENT'S COLUMN (*cont'd*)

Running throughout were themes of consistency, predictability, efficiency and finality, each of which is an important underpinning for the current system. Although we had a robust discussion of the current tools available to the boards, the Colloquium discussion did not delve into what additional tools might be added, either by Congress or otherwise, to make the boards even more effective. Food for thought for another day . . .

With the Colloquium completed, we move now to future programming. Following our June 10 Board of Governors meeting (12:30 pm at Arnold & Porter LLP, 555 12<sup>th</sup> Street, NW, Washington, DC), BCABA's next event is the annual BCA Judges Panel, to be held on July 9, 2015. The Panel itself will run from 4:30 until 5:30, with our traditional ice cream social afterward. Holland & Knight has graciously agreed to provide the space for the event at its DC office, 800 17<sup>th</sup> Street, NW, Washington, DC. Look for a more formal invitation soon, but in the meantime, please save the date.

Judge Marc Loud and his team are working hard to plan another strong annual meeting program. The program is tentatively set for Wednesday, October 14, 2015. Please let Judge Loud know if you would like to help in the planning process.

Over the past year, a task force led by past-president Judge Gary Shapiro has worked diligently to ensure that the BCABA would be ready to provide a home for the members of the Board of Contracts Appeals Judges Association, should that organization decide to dissolve. We have been informed that the BCAJA has in fact voted to dissolve. Accordingly, BCABA is now working to activate our newly-created Judicial Division. Under BCABA's amended bylaws, all BCAJA members are automatically members of BCABA and of the Judicial Division, without additional payment of dues for the remainder of 2015. The Judicial Division will hold its first meeting on July 9, just prior to the Judges Panel program. As the BCABA-BCAJA liaison, Judge Shapiro will send more information on that meeting directly to Judicial Division members.

Finally, we are always looking for volunteers to support our activities. If you would like to become more involved in any BCABA programs, please contact me at [kristen.ittig@aporter.com](mailto:kristen.ittig@aporter.com) or 202-942-5767. I hope to see you soon at an upcoming BCABA event.

Best regards,

Kristen E. Ittig  
President  
BCABA, Inc.



## OUTGOING PRESIDENT'S COLUMN

*Judge Gary E. Shapiro*

This is my outgoing President's Column for the Boards of Contract Appeals Bar Association. I have felt a great responsibility as President of this organization, and it has been a tremendous privilege to have served.

Since I last spoke with you in this format, our October 15 annual conference and our December 4 executive policy forum, discussing the implied covenant of good faith and fair dealing, were unqualified successes. Effective November 7, we adopted revised bylaws, and officially created a Judicial Division. Although my term is over, I have agreed to coordinate the roll-out of the Judicial Division in 2015.

I leave the presidency so very impressed with the dedication of the many professionals who have generously donated their valuable time for the improvement of practice at the Boards. I owe so much to so many. Specifically, I publicly want to thank Kristen Ittig for managing the annual conference and for being my trusted and always-reliable leadership partner this year. Kristen will be truly outstanding as the 2015 President. I also want to thank the volunteers who have handled our other various events this year – David Black, Shelly Ewald, Judge Alan Caramella, Susan Ebner, and Erin Sheppard. It was such a pleasure (and a relief) to know that they had each event completely under control. Every event was a great success. Also essential to our bar association's accomplishments last year are Skye Mathieson, our BCA Bar Journal Editor in Chief and the 2014 winner of the President's Award, and Will Wozniak, our tireless membership coordinator.

Our membership and attendance at our events never have been higher. Thank you for supporting the BCA Bar Association and for supporting me this past year.



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## INSIDE THE MIND OF A BOARD JUDGE

*By Judge Gary E. Shapiro\**  
Postal Service Board of Contract Appeals

How does a board of contract appeals judge think? Insights into a judge's thinking may be of interest to board practitioners, and I see no reason not to be open with my general thought processes. Of course, I only can speak for myself, and the views here expressed may or may not be subject to generalization to other judges. I suspect though, based on my discussions with other board judges, that many of the insights I share may be common.

I have been told that when I was a trial attorney, my reputation was that of an aggressive advocate who argued every alternative theory. I thought I could force the judge's hand with strongly-worded advocacy of facts and legal analysis that I hoped would leave no alternative but to rule in my favor. I also did not mind overtly criticizing my opposing party or even opposing counsel, where I thought it would convey some advantage. Over six years on the bench has changed my perspective.

Looking back on my own former thought process from my current perspective as a judge, I would have been better served to have tempered my approach. Had I known then what I know now, I would not have argued every theory, because that approach, in practice, diminished the stronger theories I presented and distracted from my overall advocacy. Now, when I see lawyers straining to present weak alternative arguments (which often is far more obvious than the practitioner may believe), I wonder whether their strong arguments are similarly strained. As for advocacy that leaves no alternative for the judge, that was legally immature thinking on my part – there always (or at least usually) is an alternative. Regarding criticizing your opponent or counsel, it is far better to let the strength of your own argument and your substantive reply to your opposing counsel's arguments serve as your persuasive mechanisms. These days, when I read briefs containing overt criticism of a party or opposing counsel, as opposed to addressing counsel's arguments, I cringe.

At a recent judicial training course I attended, the instructor asked the judges (mostly general jurisdiction state court judges) the following question: if you were forced to choose between deciding a case based on the law, or based on your personal sense of justice, which would you choose? I was very surprised to see a



two-thirds preference for personal sense of justice (I was in the minority). The confluence of resolving cases based solely on legal analysis, and reasoning cases based on fairness or “the equities,” often is overlooked in board advocacy because government contracts law is so dependent on established legal doctrine. I wish to commend considering the equities as a subtle though important consideration for the practitioner to bear in mind. I see no reason not to share with the bar the extent to which the overall equities may affect my decision-making.

Judicial fact-finding involves the exercise of my judgment to decide among sometimes conflicting evidence. Those fact-finding judgments are based on my perceptions of witnesses, and on numerous other factors, such as plausibility, consistency, corroboration, and the like. The facts I find then drive my legal analysis to the ultimate result. While I certainly consider myself bound to follow directly where that leads, apparently more so than the judicial classmates I mentioned earlier, I freely admit that I also tend to consider what is fair as I see it, as integral to my decision-making.

I think (some colleagues gently chide me as obsessing) about fairness, and equally as importantly, the appearance and perception of fairness, in every action I take in Board litigation – not just in ultimate decision-making, but throughout case management. Acting as a neutral arbiter, of course, is a fundamental obligation for any judge. Assuring that I am *perceived* as neutral, though, can be more nuanced, and is particularly important for a board judge who came up as a government lawyer as many of us have – and it cuts both ways.

I constantly strive to improve my judicial performance to maximize perceptions of me as fair and neutral. I scrutinize even seemingly trivial impressions I may be giving. When I start a telephone conference for example, my routine is to welcome both attorneys by name, and then say “thank you both for joining me.” I used to say just “thank you for joining me” but became concerned that the first lawyer whose name I called might think I was thanking only the last-named lawyer. It gets down to that level of detail for me. During hearings, I explain my rulings on evidentiary objections more often than some other board judges. I worry that simply overruling an objection without explanation might be thought of as unfair by the objecting attorney. I try to explain hearing procedures in detail, particularly where the contractor is self-represented. I believe that maintaining this type of atmosphere helps support litigants’ feelings that they have been treated fairly. In another judicial training course, I was taught that based on surveys of litigants, more of those polled believed that their perceptions of having been treated fairly were more important than whether they won their cases. Hard to believe, and I will not generalize that sentiment to counsel, but I try to keep that surprising finding in mind.



When writing decisions or even orders, I think about how my words may be perceived by a variety of audiences. After drafting, I perform separate reviews and edits, while mentally putting myself in the place of each audience, and trying to gauge possible reactions for unintended messages. Who are those audiences? For orders, the audience is comprised mainly of the lawyers on each side, and to a lesser extent, the parties. In decisions though, there are many more audiences to consider. I try to think how my words will be perceived by the other judges on the panel who will need to decide the case. I consider how future lawyers looking at the decision as precedent, as well as future boards and courts may construe my words. I think about the appellate court and academic commentators. I also recognize that my words can have a powerful impact, and I worry about avoiding unintended consequences.

Perhaps an example may help me explain. I presided over a case that turned on the contents of a telephone conversation between a government official and a contractor. They testified in a diametrically opposed way that could not be reconciled, and there were no other witnesses to the conversation. I also believed that both had testified truthfully, yet only one version could have been accurate. Based on a variety of factors – contemporaneous corroboration, plausibility and who was more likely to have remembered accurately – I reached a conclusion as to which version of the conversation I believed to be more likely to have been occurred. However, when writing my resulting analysis in the decision, I agonized over avoiding any appearance that I believed that the witness whose version I rejected was being untruthful. I did not want that witness to suffer adverse career consequences were I unintentionally to leave such an impression. If I had believed that the witness had been deceptive, I would not have been as concerned, although I see no reason to point out such things where I do not need to do so. My words have power – I understand and honor the responsibility that comes with that power.

Maintaining both the reality and appearance of fairness is particularly important for cases involving self-represented litigants. Those cases also are much more difficult for me than cases in which both parties are represented by skilled counsel. I constantly consider my obligation to explain the process to the self-represented litigant so that he or she can effectively represent him or herself and not be intimidated by unfamiliar litigation procedures. However, I also struggle to watch the line over which I should not cross of providing so much guidance that it delves into legal advice. That would appear unfair to the other side – in board practice, the government side. So, I try to explain this line to both parties.

During the course of a case, I do not believe in avoiding sharing what I think is important, though I strive to temper that with allowing the advocates to argue the case as they see fit. So, for example, I often (although not always) explain to

counsel at the end of a hearing some of the issues or concerns that occurred to me, and ask that counsel include analysis of those matters in their post-hearing briefs. However, I emphasize that counsel should argue the case as they wish (which I try to remember always to say). I see no reason not to share what may be important to me, and therefore to obtain the advocates' wisdom on the subject – which I think makes for better decision-making. I recognize that I also need to be careful not to give the impression that the issues I raise are dispositive or even necessarily central to the decision, just that they were matters that occurred to me which might not have been apparent to the parties. I will make better decisions if I hear the parties' views on these issues than if I address them on my own. Beyond that, during case administration, or after the hearing, I do not believe that it would be appropriate to offer more of my thinking to the parties about how I think the case may turn out. After all, in the end, I am only one judge in a panel of three.

That raises another matter worthy of mention. If a close trial objection is offered (perhaps, a hearsay matter), I am more likely than a single-judge adjudicator to overrule the objection. Even where I may have been inclined to sustain an objection, the other two board panelists might disagree. As judge fact-finders, we can always disregard resulting testimony if we ultimately decide it should not have been admitted on evidentiary grounds. Sustaining an objection eliminates the testimony from the record and could deprive my board panel colleagues of their voices. I try to remember to explain this at some point during the trial, again so that counsel and parties feel that I am treating them fairly. On the other hand, I think that I am somewhat more likely than some board judges to sustain evidentiary objections. After all, many of the rules of evidence are designed to prevent unreliable information from tainting the record. My advice is that board trial lawyers *should* interject objections during hearings, but should do so only where appropriate, and only for a perceived advantage. If it does not matter, leave it alone. As the judge, I will move things along myself if a hearing becomes unduly delayed by examination that does not matter.

Another example of my evolving thinking as a board judge involves the scope of my decision-making. I strive to resolve only the precise issue presented to me, in the narrowest way needed to reach the decision. I avoid setting tests, and try to keep in mind the need to remain flexible for the future. If an issue is not squarely presented, I try to tailor the decision precisely to the issue that was presented, and save other matters for a future case. I find great value in the board format in which my board colleagues help to narrow my decisions in this regard. While I am sure that single-judge decision-makers use some type of peer review when they can, I take comfort that the robust peer review and concurrence process at the boards makes for better, or at least more consistent decision-making.



When speaking with practitioners at bar association events, I often advise counsel to guard their reputations for integrity as their most valuable asset. I decide matters on the evidentiary record, but the reputation of counsel earned by past behavior, does matter when I consider representations of counsel, or in how my case management proceeds. I will try to illustrate with two examples.

In a recent non-board case,<sup>1</sup> a principal was panicking when her hearing was ready to begin but her advocate was nowhere to be found. The advocate was well-known to me and had earned a reputation for reliability. I will not pre-judge what I would have done with an advocate of a less stellar reputation, but in this instance, I adjourned the hearing and simply waited. The very apologetic advocate appeared perhaps an hour later (quite out of breath), explaining that he had been detained by a power failure which stopped the train he was on, in an area that did not allow for cell phone service. We began the hearing without further incident (after I allowed the representative some time to gather himself).

A board colleague likes to share a story from when he was a trial lawyer. He was accused by opposing counsel of misconduct involving hiding documents during discovery. When presented with a motion, the board judge in that case ruled that even if responsive documents had not been produced, he had no doubt that counsel was not to blame. Based on prior experience, the board judge was confident that this attorney simply would not have participated in improper conduct. That is the reputation practitioners need to strive for in their conduct before the boards. Such things matter to a board judge.

When I was appointed, I sought the advice of a district court judge friend of mine. He offered two suggestions for good judicial decision-making – always hear both sides before deciding anything, and be patient. In judicial training, we are advised to try to slow down our decision-making which, studies show, results in better decisions. My thinking as a board judge honors these concepts, which I try to keep in mind. If I were to give advice to a new judge, I would add a third suggestion: take nothing personally. Judges are human though, and I sometimes need to remind myself that an emotional reaction from me about how I have been perceived has no legitimate place in my decision-making. With me, at least, practitioners need not hesitate to point out where they think I have been wrong. I will not take it personally.

A similar concern, and another area that I strive to keep constantly in mind, is that (with unusual exceptions like judicial or official notice) I am obligated to consider only the facts in the record and reasonable implications based on those facts. It is not unheard of for my board while deliberating on a case (yes, believe it or not, we generally deliberate as a panel) to speculate among ourselves about



“what really happened.” That remains only idle speculation though, and I will not base a decision on anything outside the record. This can be a challenge, but I consider it a core responsibility.

Being clear and open as a judge does not always mean being a nice guy, though. Occasionally, I need to be blunt with or strongly direct a lawyer or a party to ensure fairness. Calling him or her out, but only where absolutely necessary, demonstrates to the *other* party that I recognize behavior that is improper, will deal with it appropriately, and will protect the fairness of the process.

I also want to express my views of the time it takes to issue board decisions. I am sensitive to a common criticism of the boards that decisions take too long to issue. For the most part, I agree, although a significant part of the delay often can be traced to the parties themselves. Nonetheless, quicker decisions certainly would be better, although I consider it far more important for the decision to be right than to be issued faster. Where those interests conflict, I will err on the side of being correct. I ask counsel to bear in mind that, at least at my board, the review process takes longer than the decision drafting process, sometimes considerably so. Practice no doubt differs at the larger boards, but at my board, every board judge (not just the panel members) reviews every decision. Every board judge reviews the entire record, edits substantially, and ultimately concurs or dissents internally, before the case file moves onto the next judge. This can take a while, but results in a better, and more consistent product. I think this type of consistency is a great virtue of the board structure.

Before I close this discussion of my judicial thought processes, I want to address approaches board judges take to being involved in settlement. I have noticed that board judges differ greatly in that approach – some will not mention settlement at all – others push hard for settlement and become actively involved in the settlement process. There are many approaches that can be effective, and it pays for you to learn the style of the judge before whom you are appearing. For me, as I often say to practitioners and at bar association events, I view my job as helping to resolve disputes. That may be accomplished through a hearing and full decision, by helping the parties with settlement efforts directly or indirectly, by suggesting mediation where appropriate to the case, or by any other reasonable method of dispute resolution. It really does not matter to me whether I write a decision or the case settles so long as the dispute is resolved. Based on my experience, it appears that I am somewhat more hands-off when it comes to settlement than many other board judges.

The only approach that I think is not appropriate in this regard is one I encountered early in my career in a case in a different court. In a pre-hearing



conference, the judge bluntly said that the case was not worth his time to decide, that he would not hear the case, and that we must settle. While I understand the pressures of heavy dockets, to me, that attitude abdicated the judge's responsibility. Another lesson emphasized in judicial training classes is that the most routine case to the judge is not routine and is the most important case to the parties. I try to treat every case as the most important case.

In the end, my goal is for both sides to feel that they were given a fair shake, that I both listened and heard them, and that I did what I believed was right in consideration of the law's application to the facts all as influenced by my sense of fairness. If a losing party or lawyer believes that I got it wrong, that they should have won but that at least I considered his or her views reasonably and was fair throughout, I will be satisfied. I hope the practitioner will be as well.

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\* Administrative Judge Gary E. Shapiro is the Vice-Chairman of the Postal Services Board of Contract Appeals and 2014 President of the Boards of Contract Appeals Bar Association. Judge Shapiro's views should be considered his personal views, and not those of the PSBCA, or any other board or judge.

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### ENDNOTES

1. My office, the Postal Service's Judicial Officer Department, is responsible for fourteen types of administrative adjudication other than the PSBCA.

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# ***METCALF* AND THE GOVERNMENT'S IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING**

*By Pamela A. Reynolds\* and Kenneth B. Weckstein\*\**

## **INTRODUCTION**

*Metcalf Construction Co., Inc. v. United States*, 742 F.3d 984 (Fed. Cir. 2014) (*Metcalf II*) was an important decision for the government contracting community. In that case, the Federal Circuit vacated the Court of Federal Claims (“COFC”) decision in *Metcalf Construction Co., Inc. v. United States*, 102 Fed. Cl. 334 (2011) (*Metcalf I*) that found in favor of the Government against a claim for breach of the duty of good faith and fair dealing. According to the Federal Circuit, the COFC had “misread our precedent in articulating what the contractor, Metcalf Construction Company, needed to show in order to prove that the Government breached” the duty of good faith and fair dealing. The “precedent” that the COFC had misread, according to the Federal Circuit, was *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817 (Fed. Cir. 2010) (“*Precision Pine*”). In *Metcalf I*, the COFC read *Precision Pine* as a holding by the Federal Circuit that any contractor asserting a claim for breach of the duty of good faith and fair dealing against the government must demonstrate specifically targeted action to obtain the benefit of the contract or that the government action was undertaken for the purpose of delaying or hampering performance of the contract. Absent that showing, according to *Metcalf I*, the contractor’s claim would fail.

The Federal Circuit’s *Metcalf II* decision gave further clarity to the standard for good faith and fair dealing claims brought against the Government in two important ways:

- First, it made clear that specifically targeted government action is not required to establish a breach of the Government’s duty of good faith and fair dealing.
- Second, it confirmed that a breach of the implied duty of good faith and fair dealing does not require a violation of an express contract provision.



## THE DUTY OF GOOD FAITH AND FAIR DEALING

The duty of good faith and fair dealing is an implied duty that imposes obligations on contracting parties not to interfere with the other party's performance or to act in such a way as to destroy the reasonable expectations of the other party regarding the fruits of the contract. See *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005) (citing to Restatement (Second) of Contracts, § 205 (1981)).

The Restatement explains the cause of action as follows:

Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

Restatement (Second) of Contracts § 205.

Generally, the implied duty applies to the federal government just as it would a private party (although, in practice, that is debatable). And, typically, that has meant that, like any private party to a contract, the Government's actions must be reasonable under the circumstances.<sup>1</sup> In *Precision Pine*, that "reasonableness" test seemingly was ignored by the Federal Circuit. Instead, the Federal Circuit opined that the Government had not breached its duty of good faith and fair dealing because the challenged actions: (1) were not specifically targeted; and (2) did not reappropriate any benefit guaranteed under the contracts at issue. See *Precision Pine* at 829.

### **PRECISION PINE AND THE "SPECIFICALLY TARGETED" STANDARD**

To many, the Federal Circuit's decision in *Precision Pine* appeared to depart from the objective "reasonableness" test that previously had been used to determine whether the Government had breached its duty of good faith and fair dealing. While that may be the case, the facts in *Precision Pine* also were unique.



*Precision Pine* involved a series of timber contracts between the U.S. Forest Service and Precision Pine & Timber, Inc. (“Precision Pine”). Between July 1991 and July 1995, the Forest Service awarded fourteen contracts to Precision Pine to cut and remove timber from national forests in Arizona. The contracts prescribed the timing and methods by which the timber could be harvested.

In April 1992, the Fish and Wildlife Service added the Mexican Spotted Owl to the list of endangered species. That triggered various statutory and regulatory obligations. Among other things, the Forest Service was required to: (1) consult with the Fish and Wildlife Service regarding resource management in areas that might impact the spotted owl; and (2) not make irreversible or irretrievable commitment of resources (such as permitting a contractor like Precision Pine to remove timber resources) that could impact the newly listed Spotted Owl. The Forest Service apparently refused to consult with the Fish and Wildlife Service and refused to suspend timber operations. Eventually, in 1994, the Arizona federal district court granted an injunction prohibiting the Forest Service from engaging in any activities that might impact the Mexican Spotted Owl until the required consultations occurred. As a result of that injunction, all of Precision Pine’s contracts were suspended. The Forest Service waited two months to begin consultations and, ultimately, Precision Pine’s contracts were not resumed until December 1996 when the injunctions were dissolved. Precision Pine filed a complaint at the U.S. Court of Federal Claims alleging, among other things, that the suspensions breached the Government’s implied duty of good faith and fair dealing. The COFC agreed and awarded damages to Precision Pine. The Federal Circuit reversed the COFC’s decision on liability.

In its decision, the Federal Circuit framed the issue of whether the Government breached its implied duty of good faith and fair dealing as one that “typically involve[s] some variation on the old bait-and-switch,” where the Government awards a contract for a significant benefit in exchange for consideration and then rescinds the benefit or provision through subsequent action directed at the target contract. According to the Federal Circuit, the Forest Service did not breach its duty because: (1) its actions were not “specifically targeted” at Precision Pine’s contracts; and (2) did not reappropriate any benefit to Precision Pine guaranteed by the contracts. In fact, the Federal Circuit noted that, if anything, any misconduct on the part of the Forest Service was contrary to its obligations to the Fish and Wildlife Service and the court that issued the injunction. As to the second point, the “implied duty of good faith and fair dealing cannot expand a party’s duties beyond those in the express contract or create duties inconsistent with the contract’s provisions” and, according to the Federal Circuit, uninterrupted performance was not a “benefit” guaranteed to Precision Pine under the contract.<sup>2</sup>



The *Precision Pine* decision raised questions about whether the Federal Circuit intended the “specifically targeted” standard to apply to all cases involving the Government’s breach of the implied duty of good faith and fair dealing.<sup>3</sup> Did the Federal Circuit mean that the Government only could violate the duty of good faith and fair dealing where the Government specifically intended to harm the contractor? Or could the language of *Precision Pine* be interpreted another way?

## THE COFC’S ANALYSIS IN *METCALF*

One COFC judge attempted to answer that question in *Metcalf I*.<sup>4</sup> The *Metcalf I* court took the position that the standard articulated in *Precision Pine* should apply to any cause of action for breach of the Government’s duty of good faith and fair dealing. See *Metcalf I* at 346. According to the *Metcalf I* court, to prove a claim for breach of good faith and fair dealing against the Government, the contractor was required to show the Government “specifically targeted action to obtain the ‘benefit of [the] contract’ that was intended for the contractor or where Government actions were ‘undertaken **for the purpose** of delaying or hampering [performance of the] contract[.]’”<sup>5</sup>

Notably, the facts of *Metcalf* were different than those of *Precision Pine*. *Metcalf* involved a fixed-price Navy contract to design and build housing units at a Marine Corps base in Hawaii. The Navy allegedly took many actions that interfered with the contractor’s performance, including arbitrarily providing conflicting directives and rejecting *Metcalf*’s submittals, over-inspecting *Metcalf* and its subcontractors, actively interfering with the work, and misinterpreting contract provisions and industry standards.<sup>6</sup> According to the COFC, some of those issues may have been attributed to the Navy’s Contracting Officer:

It is clear to the court that Ms. Matsuura’s lack of knowledge and experience significantly contributed to the lack of trust and poor communication that plagued the 212 Project at the beginning. It also appeared that other members of the Navy team actually were making the decisions, as best evidenced by the significant delay in promptly investigating the soil expansion issue.

*Metcalf I* at 364; see also *id.* at 371 (“the court has determined that [Ms. Matsuura] did not have the training or background to function as a CO...”).

Delays also were caused by disagreements between the parties regarding the level of soil expansion at the construction site. Information about the swelling potential of the soil was critical to offerors, as soil expansion could lead to cracks in



concrete foundations and other damage and addressing it could significantly impact the cost and method of construction. A preliminary soil report commissioned by the Government found the swelling potential of the soil to be slight. Those findings were provided to offerors “for preliminary information only,” as the resulting contract required the contractor to conduct its own independent soil analysis. The contract also contained the Differing Site Conditions clause at FAR 52.236-2, which contemplated that the contractor would not bear the risk of site conditions that differ materially from those indicated in the contract.

After award, Metcalf commissioned an independent investigation, which revealed that the soil at the site had a higher “swelling potential” than originally disclosed in the solicitation. According to the contractor, those facts required significant changes to the construction plans. Metcalf promptly notified the Government. Without conducting an investigation, which was required under FAR 52.236-2, the Navy disagreed that differing site conditions were present. According to the Navy, the difference in the Metcalf test results and the Government’s preliminary soil report was attributable to the different testing methods.<sup>7</sup> The Navy concluded that because the results were consistent (in the Navy’s view), Metcalf had not established differing conditions and, therefore, had failed to comply with the differing site conditions clause included in its contract (FAR 52.236-2).

In response to the Navy’s findings, Metcalf commissioned a second investigation of the soil, which confirmed the findings from Metcalf’s initial independent investigation – that the soil had a higher swelling potential than that disclosed in the solicitation. Metcalf again provided notice of these findings to the Government under the Differing Site Conditions clause. The parties then negotiated for about a year. Despite the findings from Metcalf’s investigations, and apparently failing to conduct its own investigation, the Navy continued to insist that there were no differing site conditions and that Metcalf must follow the original construction plans. Faced with continuing schedule slippages and mounting costs, Metcalf elected to proceed and implement changes to the construction process to address the expansive soil issues. All in all, the cost to address the expanding soil issue was more than \$4.8 million.

Even though the COFC seemed to conclude that the contracting officer lacked the necessary training and background and likely contributed to the problems that plagued the project, the *Metcalf I* COFC Judge concluded that none of the actions alleged by Metcalf breached the Government’s duty of good faith and fair dealing. That holding was based on the presumption that the “specifically targeted” standard in *Precision Pine* applied. According to the COFC, the duty of good faith and fair dealing obligates parties to a contract “to not interfere with another party’s



rights under the contract,” but the Federal Circuit precedent required more to establish that the Government breached its duty:

In addition, our appellate court requires that a breach of the duty of good faith and fair dealing claim against the Government can only be established by a showing that it is “specifically designed to reappropriate the benefits [that] the other party expected to obtain from the transaction, thereby abrogating the government’s obligations under the contract.”<sup>8</sup>

Therefore, according to the COFC, “incompetence and/or failure to cooperate or accommodate a contractor’s request do not trigger the duty of good faith and fair dealing, unless the Government ‘specifically targeted action to obtain the ‘benefit of [the] contract’ that was intended for the contractor or where Government actions were ‘undertaken **for the purpose** of delaying or hampering [performance of the] contract[.]’”<sup>9</sup> Thus, according to the *Metcalf I* COFC decision, actions that had the effect of delaying or hampering performance did not rise to the level of a breach of the duty of good faith and fair dealing unless undertaken with that specific purpose.<sup>10</sup>

## THE FEDERAL CIRCUIT’S ANALYSIS IN *METCALF II*

On February 11, 2014, the Federal Circuit vacated the COFC’s *Metcalf I* decision, and, among other things, concluded that the COFC had misread the Federal Circuit’s decision in *Precision Pine*.<sup>11</sup> According to the Federal Circuit, *Precision Pine* “does not impose a specific-targeting requirement applicable across the board or in this case.”<sup>12</sup> Rather, *Precision Pine* applied the “specific targeting” test because the contracts in that case expressly permitted suspension in the face of a court order, without regard to the duration of the suspension, and so the general “bargain-impairment grounds for breach of the duty were unavailable.”<sup>13</sup> Moreover, the challenged government action involved duties imposed on the contracting agency independent of the contract, namely compliance with the district court’s injunction. In those circumstances, the “specifically targeted” language protects against the use of the implied duty of good faith and fair dealing to interfere with the authority or responsibilities of other government entities:

Neither *Precision Pine* nor other authority supports the trial court’s holding that specific targeting is required generally or in the present context, which does not involve the kind of dual-authority circumstances that give rise to the “specifically targeted” formulation as part of the



inquiry in *Precision Pine*. The general standards for the duty apply here. The trial court error in relying on *Precision Pine* for a different, narrow standard.<sup>14</sup>

In that regard, the Federal Circuit noted that the analysis in *Precision Pine* was similar to *Centex Corp. v. United States*, 395 F.3d 1283 (Fed. Cir. 2005) and *First Nationwide Bank v. United States*, 431 F.3d 1342 (Fed. Cir. 2005). In those cases, the challenged conduct involved targeted legislation that retroactively eliminated certain tax benefits to which plaintiffs were entitled as a result of agreements with the Federal Savings and Loan Insurance Corporation (“FSLIC”). Presumably, had the legislation implemented a broader change in the tax code and not been specifically targeted to eliminate tax benefits resulting from the plaintiff’s contracts, there would have been no breach of the Government’s duty of good faith and fair dealing.

In addition, the Federal Circuit rejected the Government’s argument – based in part on language in *Precision Pine* – that the duty of good faith and fair dealing requires a breach of an express contractual duty.<sup>15</sup> The Federal Circuit explained that the Government’s argument “goes too far: a breach of the implied duty of good faith and fair dealing does not require a violation of an express provision in the contract.”<sup>16</sup> Instead, the Federal Circuit explained that “all the quoted language means is that the implied duty of good faith and fair dealing depends on the parties’ bargain in the particular contract at issue.”<sup>17</sup>

As of the date of this article, the ultimate fate of Metcalf’s claims (whether and how much Metcalf is able to recover) has yet to be decided. The Federal Circuit remanded to the COFC for further proceedings “using the correct legal standard.” The case currently is in court-facilitated ADR proceedings before the COFC, according to the COFC docket as of the time of this writing.

## **POST-METCALF II**

Many hailed the *Metcalf II* decision as a win for contractors because it rejected an overly restrictive view of the Government’s duty of good faith and fair dealing. And while *Metcalf II* did provide some clarity on how to analyze the Government’s duty, there still is room for disagreement. Since the Federal Circuit’s decision in *Metcalf II*, there have only been a handful of Board of Contract Appeals cases addressing the Government’s duty of good faith and fair dealing.

Contractors still lose if they argue that the Government should or should not have done something that was beyond or inconsistent with the bargain struck by the parties. In *Tug Hill Construction, Inc.*, ASCBA No. 57825, 14-1 BCA ¶ 35,777,



the ASCBA denied a claim of a Government breach of the implied duty of good faith and fair dealing by not helping the appellant negotiate with utility providers after appellant was awarded the subject task order. The task order required the appellant “to coordinate, negotiate, and finalize the utility systems work with the utility providers,” but did not imply that the Government would intervene in the negotiations and, therefore, the Government’s failure to help appellant negotiate with the utility providers was not inconsistent with the purpose of the task order. Citing to *Metcalf II*, the ASCBA held that the “implied duty of good faith and fair dealing cannot expand a party’s contractual duties beyond those in the express contract.” Likewise, in *Ace American Insurance Co.*, CBCA 2876 *et al.*, 14-1 BCA ¶ 35,791, the Civilian Board of Contract Appeals (CBCA), citing to *Metcalf II*, held that that the Government did not breach its duty of good faith and fair dealing for doing what the contract allowed it to do, namely, adopt a new methodology for calculating premium rates under the contract.

Also, contractors still may face additional burdens in order to prevail on a breach of the duty of good faith and fair dealing claim. *See, e.g., PBS&J Constructors, Inc.*, ASCBA No. 57814, July 25, 2014, 2014 WL 3821353 (“Government officials are presumed to act in good faith and it takes clear and convincing evidence to prove otherwise.”). *But see SIA Construction, Inc.*, ASBCA No. 57693, Sept. 17, 2014 (“However, a showing of “bad faith” or “bad intent” is not necessary to demonstrate a breach of the duty of good faith and fair dealing, which applies to the government just as it does to private parties”).

But there also have been big wins for contractors. Two recent cases from the CBCA and the Postal Service Board of Contract Appeals (“PSBCA”) followed *Metcalf II* and applied the reasonableness standard in finding the Government had breached its duty of good faith and fair dealing.

In *Kiewit-Turner, A Joint Venture v. Department of Veterans Affairs*, CBCA 3450, 15-1 BCA ¶ 35,820, the CBCA held that a contractor was legally entitled to stop work on a construction contract with the Department of Veterans Affairs (the “VA”) after the VA breached its duty of good faith and fair dealing by failing to control the design contractor, delaying approvals, presenting incomplete designs, failing to process change orders in a timely fashion, and failing to make timely payment, among other things. The case involved an integrated design and construct contract awarded to Kiewit-Turner (“KT”) to provide pre-construction services and an option for actual construction of the project. At the time of award, the estimated cost of construction was \$583 million, which was the amount of funding allotted to the project. But immediately after award, the VA was aware that the construction estimates were escalating dramatically. In order to keep the project moving, the parties had modified the contract to include an agreement that



KT would construct the project if the VA provided KT with design plans that would meet the \$583 million funding amount. The VA never produced design plans even close to the target and refused to ask for additional funding. Instead, it insisted that it would "continue to hold Kiewit-Turner responsible to the firm target price and ceiling price" of \$583 million.

The CBCA applied the reasonableness standard of *Metcalf II*, noting also that KT need not prove that the VA acted in bad faith, and determined that the VA had breached its duty of good faith and fair dealing:

Applying these principles, we find that the behavior of the VA has not comported with standards of good faith and fair dealing required by law. The agency failed to provide a design that could be constructed within the ECCA because it did not control its designer, the JVT. It paid no heed to VE suggestions for cost reductions which were made by KT and Jacobs (or even those which were accepted by the agency's own medical center personnel following the "blue ocean" meeting). The agency delayed progress of construction, such as by delaying the processing of design changes and change orders, as described under factor (a) above. The agency disregarded cost estimates by KT and Jacobs, even to the point of rejecting a Jacobs estimate because it was developed under restrictions which the agency itself had imposed. The agency adopted as an independent government estimate a document which was neither independent (it was developed by a subcontractor to the JVT, an entity which had a strong interest in the result), nor by the Government (it was by the JVT), nor an estimate (it was by admission of the chief estimator an academic exercise), and the number was so far below any previous estimate as to be of dubious accuracy. The agency did this notwithstanding the testimony of every witness who addressed the matter, including several VA witnesses, that an "independent" estimate should not be made by a party with a vested interest in the outcome. The agency ultimately directed KT to continue its construction work for the FTP, even though the agency refused to fund that work appropriately.



The CBCA also found that there was no way that KT could be adequately compensated for the VA’s breach because the VA insisted it would not redesign the project or request additional funding. As a result, the CBCA determined that KT was legally entitled to stop work on the project.

Another case decided for the contractor was *JM Carranza Trucking Co. v. United States Postal Service*, in which the PSBCA held that the United States Postal Service (“USPS”) was not entitled to payment for fuel overages after it unreasonably failed to notify the contractor of those fuel overages for a period of five months. See *JM Carranza Trucking Co. v. USPS*, PSBCA No. 6354, Oct. 21, 2014, 14-1 BCA ¶ 35,776. The case involved two mail transport contracts, which used a Fuel Management Program under which the USPS would pay for the fuel used by the appellant up to a certain amount. The JM Carranza drivers purchased fuel using “fuel transaction cards” which allowed both the Government and JM Carranza to review the fuel usage and which were paid directly by the Government. The contracts did not require that the Government continually monitor JM Carranza’s fuel usage, notify JM Carranza of unauthorized use of the fuel transaction cards, or cancel the fuel transaction cards.

According to the CBCA, “the contracting officer became aware sometime in March or April 2010 of substantial overages, indicative of fraud or other serious contract problems, for which Carranza Trucking would be liable if allowed to continue to accumulate unabated.”<sup>18</sup> The CBCA held that the contracting officer’s failure to notify JM Carranza until mid-August 2010 was unreasonable under the circumstances and a breach of the duty of good faith and fair dealing.<sup>19</sup> As a remedy for that breach, the PSBCA held that the Government could not recover for overages that would not have occurred but for the Government's breach.

\* \* \*

As case law has recognized, courts and boards need to strike a balance between what is and is not a breach of the duty of good faith and fair dealing. Most Government officials do act in good faith. Still, it is a good thing that contractors have a viable legal remedy against unreasonable, incompetent, and/or obstructive Government behavior. “Bad apples” may be less likely to engage in abusive tactics in administering their contractors. And contractors may feel more comfortable not pricing lack of cooperation into their contracts, which in turn could lead to lower prices for the Government. In all cases, it is only fair that if the Government chooses to act as a private actor in the commercial marketplace, it should be held to the same standard of good faith and fair dealing as it expects from its contractors.



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### ENDNOTES

1. See *C. Sanchez & Son, Inc. v. United States*, 5 F.3d 1539, 1542 (Fed. Cir. 1993) (citing to *Malone v. United States*, 849 F.2d 1441, 1445 (Fed. Cir. 1988); *Lewis-Nicholson, Inc. v. United States*, 550 F.2d 26, 32 (Ct. Cl. 1977); *George A. Fuller Co. v. United States*, 108 Ct. Cl. 70, 94 (1947)).
2. See *Precision Pine* at 831.
3. See, e.g., *Postscript: Breach of the Duty of Good Faith and Fair Dealing*, 24 No. 5 Nash & Cibinic Rep. ¶ 22 (May 2010).
4. *Metcalf Constr. Co., Inc. v. United States*, 102 Fed. Cl. 334 (2011) (*Metcalf I*).
5. *Id.* (citing to *Precision Pine* at 829) (emphasis added).
6. See *id.* at 345-46.
7. See *id.* at 350.
8. See *id.* at 346 (citing and quoting *Precision Pine*).
9. *Id.* at 346 (emphasis added).
10. The COFC did find that the Navy had breached FAR 52.236-2(b) by failing to promptly investigate Metcalf's notice of a differing site condition. See *Metcalf I* at 354-355. The COFC did not award Metcalf the additional \$4.8 million in



costs, but did find that Metcalf was entitled to be credited a 306-day extension. *See id.*

11. *Metcalf Constr. Co., Inc. v. United States*, 742 F.3d 984 (Fed. Cir. 2014) (*Metcalf II*).
12. *Metcalf II* at 993.
13. *See id.*
14. *See id.*
15. *See Metcalf II* at 993-94. The decision in *Precision Pine* stated “[t]he implied duty of good faith and fair dealing cannot expand a party’s contractual duties beyond those in the express contract or create duties inconsistent with the contract’s provisions.” *See Metcalf II* at 994 (citing and quoting *Precision Pine* at 831).
16. *See id.*
17. *See id.*
18. The *JM Carranza* case does not discuss whether any of JM Carranza’s employees were guilty of any fraudulent actions in connection with the overages. If that had been the case, the result may have been different. For instance, in *Laguna Construction Co., Inc.*, the ASCBA held that fraud committed by a contractor’s officers in connection with its contract constituted a breach of the contractor’s duty of good faith and fair dealing and excused the Government from further payment under the contract. *Laguna Constr. Co., Inc.*, ASBCA No. 58324, Sept. 23, 2014, 14-1 BCA ¶ 35,748. In that case, the contractor appealed the deemed denial of appellant’s request for payment under its contract in the amount of \$2,874,081. After filing that appeal, officers of the contractor pled guilty to accepting kickbacks and submitting inflated invoices to the Government in connection with the contract. The ASBCA held that “an essential element of [the duty of good faith and fair dealing] is the duty of each party to perform with integrity.” And there, according to the decision, the contractor committed the first material breach of the contract when its officers committed the criminal acts, which were committed within the scope of their duties and therefore, imputed to the contractor. As a result, “this first material breach excused the government from subsequently paying appellant’s invoices.”
19. The board rejected JM Carranza’s arguments that it was not liable for the overage because the Postal Service lacked adequate safeguards to prevent the overage, the contracting officer did not monitor the fuel usage, the IG did not investigate the overage, and the Postal Service improperly pooled the number of gallons across the two contracts.

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# TO PAY OR NOT TO PAY, THAT IS THE QUESTION: *LAGUNA CONSTRUCTION* AND ADDRESSING FRAUD IN CLAIMS AND APPEALS

*By Kathleen L. Kadlec\**

## INTRODUCTION

Dealing with suspected fraud in the adjudication of contract claims can be problematic, as denying a claim will most likely result in litigation. Thankfully, recent developments at the Armed Services Board of Contract Appeals (ASBCA) provide some guidance to agencies that suspect a claim to be fraudulent. This paper offers suggested courses of action for agencies at each stage of claim development and adjudication, using three ASBCA decisions involving *Laguna Construction Company*<sup>1</sup> as the starting point.

## **LAGUNA - AMENDING AN ANSWER AT THE ASBCA**

The ideal situation for an agency is for the Department of Justice to have successfully prosecuted a contractor employee while the claim is pending at the ASBCA, as was the case in *Laguna Construction Company* (Laguna).<sup>2</sup> In February 2008, the Federal Bureau of Investigation (FBI) and the Defense Criminal Investigative Services (DCIS) launched an investigation into Laguna and its employees after reports that Laguna's upper management were involved in a subcontract bid-rigging scheme on work performed on Iraq contracts.<sup>3</sup>

In May, 2009, the Contracting Officer informed Laguna that he was postponing a decision on one of its claims under Contract No. FA8903-04-D-8690 after the Defense Contract Audit Agency (DCAA) disapproved over seventeen million dollars in claimed costs on various task orders for fiscal year (FY) 2006.<sup>4</sup> In April 2012, the DCAA, seeking to recover some of the disapproved costs, rejected 14 Laguna vouchers totaling a little over three million dollars.<sup>5</sup> In May 2012, Laguna then sent a certified claim to the Contracting Officer and claimed that the Contracting Officer improperly withheld almost three million dollars.<sup>6</sup> Laguna then filed an appeal and complaint with the ASBCA in October 2012, to which the Government answered in January 2013.<sup>7</sup> The Government did not assert an affirmative defense of fraud at that time.<sup>8</sup>



In the interim (2010), a Laguna project manager pled guilty to conspiring to receive kickbacks in violation of 41 U.S.C. § 53 from subcontractor on a number of projects, including certain task orders under the above contract.<sup>9</sup> In his plea, the Laguna project manager recalled that he would cause subcontractors to submit inflated invoices to Laguna for presentment to the Government and then accept some of that money in return.<sup>10</sup> In July 2013, Laguna’s executive vice president also pled guilty to solicitation and receipt of subcontractor kickbacks, in violation of 41 U.S.C. § 53, attempt to evade and defeat tax in violation of 26 U.S.C. § 7201; and conspiracy to provide, solicit, and accept kickbacks in violation of 18 U.S.C. § 371.<sup>11</sup> Laguna’s vice president admitted in his plea agreement that he accepted kickbacks from subcontractors in return for giving the subcontractor’s favorable treatment in connection with the award of subcontracts made under some of the claimed task orders.<sup>12</sup>

On August 2, 2013, the Government moved to amend its answer, alleging as an affirmative defense that the scheme constituted fraud against the United States and this fraud constituted a breach of the Contract.<sup>13</sup> Applying Federal Rule of Civil Procedure 15 and its own precedent, the ASBCA permitted the amendment.<sup>14</sup> In doing so, the ASBCA noted that the Supreme Court had previously observed:

*Rule 15(a)* declares that leave to amend “shall be freely given when justice so requires”; this mandate is to be heeded . . . . In the absence of any apparent or declared reason -such an [sic] undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of amendment, etc.-the leave sought should, as the rules require, be “freely given.”<sup>15</sup>

To the ASBCA, moving to amend four weeks after the Vice President’s guilty plea was sufficiently timely and despite Laguna’s claims to the contrary, it found that no undue prejudice existed as Laguna could not have been surprised given that the Government had filed an affirmative defense of fraud in an earlier, related appeal, and there was no scheduled trial date.<sup>16</sup> The ASBCA also rejected Laguna’s claim that the amendment was futile, noting that “[f]raud in the performance of a contract may be deemed a breach of contract sufficient to deny payment of appellant’s invoices on grounds of public policy.”<sup>17</sup> The lesson here for practitioners is to seek to amend the answer as soon as possible after the conviction. The earlier you do so the better, as it will undermine the Contractor’s claim of undue prejudice.



## OBTAINING A STAY DURING THE CRIMINAL PROSECUTION

In November 2012, the Air Force had moved to stay the CDA appeal as a federal grand jury had indicated several principal officers of Laguna and its subcontractors.<sup>18</sup> A stay is essential given the weight that a conviction carries as evidence before the ASBCA. In its motion, the agency should include a letter from the respective Office of the U.S. Attorney referencing the indictment and the potential for interference with the criminal prosecution.<sup>19</sup> As the ASBCA noted in *Laguna*, a motion for a stay calls for the exercise of its discretion and judgment as to weighing and balancing the competing interests of the parties.<sup>20</sup> In doing so, the ASBCA asks the following:

[W]hether the facts, issues and witnesses in both the civil and criminal proceedings are substantially similar, (2) whether the government's on-going investigation would be compromised by going forward with the civil case, (3) whether the proposed stay could harm the non-moving party, and (4) whether the duration of the requested stay is reasonable.<sup>21</sup>

Usually the appeal and criminal prosecutions will involve the same facts, issues and witnesses and the Government will seek to stay the case until the federal trial is completed.<sup>22</sup> The U.S. Attorney should outline these facts and include the trial dates, which should be persuasive on matters (1) and (4).<sup>23</sup>

Regarding the second prong, as the claim will undoubtedly involve the charged officers/employees, the agency should argue that proceeding with the claim would be frustrated as the charged persons will surely invoke the Fifth Amendment in any deposition.<sup>24</sup> As to the third prong, while a conviction (obtained during the stay) will certainly harm the contractor's right to recover on a claim and the CDA directs expeditious resolution of claims, the modest delay in waiting for the criminal matter to resolve should yield to the public's interest in resolving the criminal matter without board interference.<sup>25</sup>

## MOVING FOR SUMMARY JUDGMENT AT THE ASBCA

Once the responsible parties enter their guilty pleas (or are convicted), the Government should move for summary judgment on the grounds of fraud.<sup>26</sup> The Government will need to amend the Rule 4 file with the plea agreements, which contain the Appellant's (or officer's) statements under oath as to their fraudulent activity. An indictment by itself does not appear to be sufficient to justify summary judgment. In *Laguna*, the Government attached the plea agreements for the convicted project manager and vice president, along with the indictment, the



“criminal informations,” and the FBI Letter of Investigation to the Defense Contract Management Agency.<sup>27</sup>

As the indictment and criminal informations were merely allegations of wrongdoing and the letter only contained summaries of statements by the accused, the ASBCA did not admit them for proving the truth of the matters stated therein.<sup>28</sup> The ASBCA did find sufficient indicia of reliability in the plea agreements to admit them for the truth of the matters asserted therein, focusing on the admissions of illegal activity made under oath with the advice of counsel and the potential subjection of significant criminal penalties.<sup>29</sup>

The basis for the Government’s motion will be that the Contractor/Appellant committed the first material breach, which excused the Government from paying its invoices.<sup>30</sup> The ASBCA has summed up the policy as follows:

Every contract contains a covenant between the parties to perform in good faith and fair dealing. A failure to fulfill this duty is a breach of contract. *Metcalf Construction Co. v. United States*, 742 F.3d 984, 990 (Fed. Cir. 2014). We believe an essential element of this covenant is the duty of each party to perform with integrity. A breach of such a duty is not only a breach of contract but a betrayal of trust, and vitiates the reasonable and justifiable expectation of the parties in the performance of that contract.<sup>31</sup>

In *Laguna*, the nature of the fraud/breach was twofold: (1) violation of the Anti-Kickback Act (41 U.S.C. § 53), and (2) violation of the Allowable Cost and Payment Clause (FAR 52.216-7), since the subcontractor kickbacks were included in, and inflated, the invoices submitted to the Government for reimbursement.<sup>32</sup>

Breaches resulting from fraud are material no matter the amount or size as any degree of fraud is material as a matter of law.<sup>33</sup> As such, if the contractor breaches the contract by committing fraud, the ASBCA will award summary judgment to the Government. The contracting officer will then want to inform the Suspending and Debarring Official (SDO) or responsible fraud official, as a conviction for certain offenses are grounds for debarment.<sup>34</sup>

## **FRAUD IN THE ABSENCE OF A CONVICTION OR INDICTMENT**

A more difficult problem arises when the Department of Justice declines to take the case but the agency possesses creditable evidence of fraud. Agencies generally have two options: (1) terminate the contract for default, or (2) deny the claim or assert its own claim and allow the contractor to continue performance.

Both of these options should also include referral to the SDO or responsible fraud official, because these officials can debar or suspend the contractor (or individuals) even in the absence of an indictment or conviction.<sup>35</sup>

## TERMINATION FOR DEFAULT

If the Contractor has not completed performance, then the agency should carefully consider terminating the contract for default. Agencies may do so in the absence of a conviction or indictment, but as discussed below, the agency must establish by clear and convincing evidence that the contractor committed fraud. In the default termination, the agency will need to allege that the fraud constituted an antecedent breach justifying the termination.<sup>36</sup> While some actions are curable by a contractor, fraud is not correctable.<sup>37</sup> If the Government terminates the contract for default, it must then pay the contractor work properly performed prior to the default termination less the Government's excess procurement costs.<sup>38</sup>

Before an agency terminates the contract, it will need to meet its standard of proof as the contractor will likely allege breach of contract due to the termination. While normally an agency has to prove by a preponderance of the evidence that the default termination was justified, it must meet this evidentiary standard and then also establish by clear and convincing evidence that the contractor committed fraud.<sup>39</sup> The allegations of fraud must be established as to clearly convince the trier of fact that the fraud occurred.<sup>40</sup> If the government cannot meet this burden, then the termination is converted to one of convenience.<sup>41</sup>

There is a dearth of cases illustrating what constitutes clear and convincing evidence of fraud absent a criminal conviction in either the ASBCA or the COFC.<sup>42</sup> One notable case is *Daff v. United States*, in which the Claims Court held that Government established by clear and convincing evidence at trial that the contractor falsified quality control test results and concealed its discovery that it delivered non-conforming goods.<sup>43</sup> Counsel should consider *Daff* carefully, though, as it also involved 28 U.S.C. § 2514 (Forfeiture of Fraudulent Claims), which includes the element of intent.<sup>44</sup> The Federal Circuit has since held that no proof of intent to defraud is needed to establish the prior material breach defense and contractors can be liable for intentional false statements made by other companies under common control.<sup>45</sup>

This still leaves the question of how much fraud is needed to justify the default termination. While any degree of fraud is sufficient to deny a claim, that does not appear to be the case in a default termination.<sup>46</sup> In *Aptus Co. v. United States*, 61 Fed. Cl. 638 (2004), the COFC noted that it was possible for a small degree of fraud to taint the entire contract.<sup>47</sup> In *Aptus*, the COFC did not find any

fraud as the Government knew about the alleged conduct ten months before it terminated the contract.<sup>48</sup> As such, the COFC held that the Government had waived its right to assert fraud as a basis for termination.<sup>49</sup>

The ASBCA case law is conflicting as well, as it has held on occasion that any degree of fraud is material and justifies the default termination and on another occasion has held that the relevant inquiry is whether the fraud committed by the contractor was “sufficient to warrant termination of the contract by default.”<sup>50</sup> Lastly, the fraud must taint the actual contract at issue.<sup>51</sup> The practical implications of the lack of easily applied case law as to the degree of fraud established by clear and convincing evidence is that counsel must proceed cautiously in exploring this remedy.

## **CLAIM DENIAL AND OTHER CONTRACTUAL REMEDIES**

There may be instances where either the contractor has concluded performance or the agency desires that the contractor continue performance, yet paying the claim or invoice is not in the Government’s best interest. Again, the SDO or designated fraud official plays an important role, as these officials can suspend or debar the contractor (or individual), which allows them to continue performance on the current contracts but prevents them from bidding on future contracts.<sup>52</sup>

Pursuant to the Contract Disputes Act, the contracting officer must first issue a decision on the claim.<sup>53</sup> Even though agency heads do not have the authority to settle claims involving fraud under 41 U.S.C. § 7103(c), a contracting officer can still issue a decision based on the Government’s contract rights even when fraud has been alleged.<sup>54</sup>

Contract rights in this instance usually involve whether payment of the claim would result in overpayment for the goods or services or non-receipt of goods or services. If in the contracting officer’s view, paying the claim (or invoice) would result in an overpayment for services or goods provided, the contracting officer can deny the claim.<sup>55</sup> But the contracting officer only should examine whether the payments, if made, would be accurate, not whether any incorrect statements were made knowingly with intent to deceive.<sup>56</sup>

The contractor has the burden of proving that its claimed costs due to any changes are reasonable and their causal connection to the change order on which the claim is based.<sup>57</sup> But while the burden of proof lies with the Contractor, any claim denial should include the affirmative basis for the denial (rather than just citing to the Contractor’s failure to prove reasonableness and causation). To this



end, the Defense Contract Audit Agency (DCAA) may be helpful and if time permits, should be consulted as soon as the agency suspects an unsupported or improper claim. The subsequent audit report can be used to justify denial of the claim or invoice.

Contracting officers should not be reluctant to deny these claims, yet consultation with counsel is imperative given the potential consequences. Contracting officers should also look to the Government's contractual rights as codified in the FAR. For instance, if the contractor submits inaccurate or incomplete certified cost or pricing data, the contractor officer can modify the contract to reflect a price reduction.<sup>58</sup> Warranty remedies, such as an equitable adjustment for defects, should always be enforced.<sup>59</sup>

The contracting officer can also assert a government claim under a contract when fraud has been alleged. For example, in *Eyak Services*, the Government sought the return of overpayments that the contractor wasn't allowed to receive under FAR 32.601-605.<sup>60</sup> While *Eyak Services* attempted to argue that the ASBCA didn't have jurisdiction because the overpayments were the result of fraud, the ASBCA held otherwise, noting that the Government simply sought to recoup overpayments that were unjustly inflated.<sup>61</sup> Again, contracting officers must remember to steer clear of referencing fraud and focus on the accuracy of government amounts paid to the contractor.

Dealing with fraud is always challenging, but it is necessary in order to protect the public purse. While this article has discussed addressing fraud at various stages of agency action, one thing remains paramount; agencies must address suspected fraud as soon as possible, as failure to do so can constitute waiver of the right to assert it or otherwise prejudice the agency's efforts to address the fraudulent conduct.<sup>62</sup> No agency can afford to waive this right, especially in this fiscal climate.

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## ENDNOTES

1. Those three cases are: *Laguna Constr. Co.*, ASBCA No. 58292, 13-1 BCA ¶ 35,315 (staying proceedings); *Laguna Constr. Co.*, ASBCA No. 58324, 13-1 BCA ¶ 35,464 (amending answer); and *Laguna Constr. Co.*, ASBCA No. 58324, 14-1 BCA ¶ 35,748 (summary judgment).
2. *Laguna Constr. Co.*, ASBCA No. 58292, 13-1 BCA ¶ 35,315.
3. *Id.* at 173,363.
4. *Laguna Constr. Co.*, ASBCA No. 58324, 13-1 BCA ¶ 35,464 at 173,910.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 173,911. Congress re-codified Section 53 of Title 41 as 41 U.S.C. § 8702, effective 4 January 2011.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 173,912.
15. *Id.* (citing *Space Age Engineering*, 83-2 BCA ¶ 16,789 at 83,439-40, *Foman v. Davis*, 371 U.S. 178, 182 (1962)).
16. *Id.*
17. *Id.* (citing *AAA Engineering & Drafting, Inc.*, ASBCA No. 47940 *et al.*, 01-1 BCA ¶ 31,256).
18. *Laguna Constr. Co., Inc.*, ASBCA No. 58292, 13-1 BCA ¶ 35,315 at 173,363.
19. *Id.* at 173,362.
20. *Id.* (citing *Landis v. North American Co.*, 299 U.S. 248 (1936); *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198 (Fed. Cir. 1987)).
21. *Id.* (citing *Public Warehousing Co.*, ASBCA No. 56116, 08-1 BCA ¶ 33,787 at 167,225).
22. *See Laguna Constr.*, 13-1 BCA ¶ 35,315 at 173,364.
23. *Id.* at 173,364-65.
24. *Id.*
25. *Id.* at 173,364.
26. *Laguna Constr. Co.*, ASBCA No. 58324, 14-1 BCA ¶ 35,748.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*

31. *Id.* Even if an agency terminates or breaches a contract for a different reason, if fraud existed before the termination or breach, an agency can use that to justify the termination or breach. *Joseph Morton Co. v. United States*, 757 F.2d 1273, 1277 (Fed. Cir. 1985); *Christopher Village, L.P. v. United States*, 360 F.3d 1319, 1336-37 (Fed. Cir. 2004).
32. *Laguna Constr.*, 14-1 BCA ¶ 35,748.
33. *Id.* In *Laguna*, there was no indication that fraud, while material as a matter of law, pervaded the entire contract. However, if a contract is fraudulently obtained, claims pursuant to the contract can be violations of the False Claims Act (FCA) even if the claims themselves do not contain false statements or misrepresentations. *Verydyne v. United States*, 758 F.3d 1371, (Fed. Cir. 2014) (citations omitted); *Atlas Int'l Trading Corp.*, ASBCA No. 59091, 15-1 BCA ¶ 35,830 (finding that bribery was the but-for cause of the contract award, making the contract void *ab initio*).
34. FAR 9.406-2 and 9.406-5. If the contractor or someone acting for a contractor is convicted of an offense where the conduct violates 41 U.S.C. § 2102 and meets other criteria set forth in FAR 3.104-9 and FAR 52.203-8, the Government may also rescind the contract and recover the amounts expended under the contract.
35. *Id.*
36. *Joseph Morton Co. v. United States*, 757 F.2d 1273, 1278 (Fed. Cir. 1985).
37. *See Lamb Engineering & Constr. Co. v. United States*, COFC No. 01-225C, 2002 WL 32933387, 2002 U.S. Claims LEXIS 388 at \*12 (Aug. 26, 2002) (unreported).
38. *B.R. Servs.*, ASBCA Nos. 47673 *et al.*, 99-2 BCA ¶ 30,397 at 150,285.
39. *Daff v. United States*, 31 Fed. Cl. 682, 688 (1994) (citing *Joseph Morton Co. v. United States*, 757 F.2d 1273, 1278-79 (Fed. Cir. 1985)).
40. *See Aptus Co. v. United States*, 61 Fed. Cl. 638, 646-47 (2004).
41. FAR 52.249-10(c).
42. A criminal conviction for a fraud offense meets the clear and convincing standard. *Hughes Moving & Storage, Inc.*, ASBCA No. 98-1 BCA ¶ 29,693 at 147,169. The ASBCA has converted a default termination into one of convenience based on the Government's failure to establish the contractor's criminal conduct (absent a conviction). *See Fleischzentrale Sudwest, GmbH*, ASBCA Nos. 37273, 39154, 92-1 BCA ¶ 24,612 at 122,775-76.
43. *Daff v. United States*, 31 Fed. Cl. 682, 688-89 (1994).
44. *Id.* at 689. This standard is derived from the Court's application of 28 U.S.C. § 2514 (Forfeiture of Fraudulent Claims), which also includes a clear and convincing evidentiary standard. *Id.* at 688.
45. *Christopher Village, L.P. v. United States*, 360 F.3d 1319, 1335-36 (Fed. Cir.2004) (noting that the two companies had the same president, same sole director, and the same sole shareholder). It should be noted that *Christopher*

- Village* was not a challenge to a default termination, but to an action in the COFC for breach of contract. *Id.*, 360 F.3d at 1324.
46. *Laguna Constr. Co.*, ASBCA No. 58324, 14-1 BCA ¶ 35,748; *Christopher Village, L.P. v. United States*, 360 F.3d 1319, 1333 (Fed. Cir. 2004) (citing *Joseph Morton Co. v. United States*, 757 F.2d 1273, 1278 (Fed. Cir. 1985)).
  47. *Daff*, 61 Fed. Cl. at 646-47. Fraud will support a default termination, even when the fraud is not discovered until after the termination and is offered as a *post-hoc* justification for the termination. *Id.* (citing *Joseph Morton*, 757 F.2d at 1277).
  48. *Aptus*, 61 Fed. Cl. at 649-50.
  49. *Id.*
  50. *Dry Roof Corp.*, ASBCA No. 29061, 88-3 BCA ¶ 21,096 (applying *Joseph Morton*, 757 F.2d 1273 (Fed. Cir. 1985), and rejecting the prior ASBCA holding in *Cosmos Engineers, Inc.*, ASBCA No. 23529, 84-2 BCA ¶ 17,268, that any fraud warrants termination for default as a matter of law). *But see Ricmar Engineering, Inc.*, ASBCA Nos. 44260, 44673, 97-2 BCA ¶ 29,084 (noting that in *Cosmos*, it held that “[a] contractor which engages in fraud in its dealing with the government on a contract has committed a material breach justifying a termination of the entire contract for default...”)
  51. *Giuliani Assocs.*, ASBCA Nos. 51672, 52538, 03-2 BCA ¶ 32,368 at 160,163-64.
  52. FAR 9.406-4 and 9.406-5.
  53. 41 U.S.C. § 7103. In *Laguna Construction*, the Contracting Officer did not issue a decision and Laguna appealed to the ASBCA. *Laguna Constr. Co.*, ASBCA No. 58324, 14-1 BCA ¶ 35,748. Failure to issue a decision is known as a “deemed denial.” 41 U.S.C. § 7103(f)(5).
  54. *Public Warehousing Co.*, ASBCA No. 58078, 13-1 BCA ¶ 35,460 at 173,897. Section 2307 of Title 10 and Section 4506 of Title 41 of the United States Code allows Executive Branch Agency Heads to deny advance, partial, or progress payments under a contract if there is substantial evidence that the request is based on fraud.
  55. *Eyak Tech., LLC*, ASBCA Nos. 58552 *et al.*, 14-1 BCA ¶ 35,569 at 174,321-23 (overpayment for work never performed, fictitious line items and costs in purchase orders, and false invoices); *Appeal of Lecher Constr. Co.*, ASBCA No. 35543, 88-2 BCA ¶ 20,695 (finding that the contractor failed to prove that the claimed costs related to the change order and had attempted to double charge the government on some items).
  56. *Public Warehousing*, 13-1 BCA ¶ 35,460 at 173,897.
  57. *Tulsa Mid-West Constr. Co.*, ASBCA No. 55173, 07-2 BCA ¶ 33,646 at 166,621-22.
  58. FAR 15.408; FAR 52.215-10.
  59. FAR 46.7.

60. *Eyak Tech.*, 14-1 BCA ¶ 35,569 at 174,326.

61. *Id.*

62. *Aptus*, 61 Fed. Cl. at 649 (government waived right to terminate contract for default due to fraud as it modified the contract and allowed the contractor to continue performance after it knew of the alleged fraud). However, only the Department of Justice can waive violations of the False Claims Act. *Hernandez, Kroone & Assocs. v. United States*, 95 Fed. Cl. 395, 398 (2010).



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# THE CHANGES CLAUSE: A DESKTOP GUIDE

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## INTRODUCTION

While it is often said that the perfect contract is only a modification away, changes to contract requirements during performance are not to be taken lightly. In fact, “changes—whether made formally or “constructively” (i.e., through the government’s actions outside the formal changes clause)—are a frequent source of disputes between the government and contractors. Therefore, mastering the basic rules governing changing requirements that can occur with a federal government contract is often critical for a successful project.

This Article will examine the core elements of the Federal Acquisition Regulation (FAR) *Changes* clauses that industry and government contract professionals encounter on a regular basis. After summarizing some key terms of the standard *Changes* clauses, the discussion covers such critical issues as: (1) When are changes in scope or out of scope? (2) Which government official has the authority to make changes? (3) What are the formal and informal types of contract changes? and (4) What are the fundamental policies for pricing adjustments? In analyzing these issues, this Article will provide readers a handy desktop guide that includes the analytical and practical guidance to advance their client’s interests.

## CHANGES CLAUSE OVERVIEW

Standard FAR clauses expressly authorize federal executive branch agencies to make contract changes. FAR 43.205 contains the prescriptions for various clauses that are tailored to specific types of contracts. Some examples are FAR 52.243-1 (fixed price supply contracts); FAR 52.243-1 Alt I (fixed price service contracts for other than professional services without a supply element); FAR 52.243-2 (cost reimbursement contracts); and FAR 52.243-4 (construction contracts). These clauses allow the agency to make unilateral changes even as bilateral modifications under the clauses are the preference (and the usual practice).<sup>1</sup> While



this Article focuses on the above substantive clauses, a unique changes clause, FAR 52.212-4(c), applies to FAR Part 12 commercial item contracts. Unlike the standard *Changes* clauses, this clause does not authorize the government to make unilateral changes but generally requires a bilateral instrument.<sup>2</sup>

Let us examine a very commonly used clause applicable to fixed price supply contracts, FAR 52.243-1, referenced above. Here, the Contracting Officer pursuant to FAR 52.243-1(a) may at any time issue a written order (and without notice to any sureties) that makes changes “within the general scope of the contract.” Some non-exclusive variations of permissible changes can be to the drawings, designs or specifications, the method of shipment or packing, or to the place of the delivery. If such a change occurs, and it creates an increase or decrease in the cost or time of contract performance, the Contracting Officer under FAR 52.243-1(b) shall make an “equitable adjustment.” This adjustment (usually bilateral) is a corrective measure that will leave the parties in the same position in terms of cost, profit, and schedule as they would have occupied absent the change.<sup>3</sup>

Hundreds of decisions from the federal courts (most notably the U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit), the boards of contract appeal and the Government Accountability Office (GAO) have construed FAR 52.243-1 and the other changes clauses. Sometimes, the decision makers follow rules absent from the standard FAR clauses (as discussed below) and yet these doctrines are still authoritative and binding. Because a number of changes doctrines exist only in the case law, it is often important for contract professionals to seek legal advice on contract changes to ensure that all issues are properly addressed.

In the first example of a doctrine that the FAR leaves unmentioned, if a required changes clause is physically absent from the contract, the courts and boards of contract appeal will correct the contract by reading it into the document anyway by operation of law and applying the clause in the usual manner.<sup>4</sup>

In a second example, with a bilateral change, “To be valid and enforceable, a contract [modification] must have both consideration to ensure mutuality of obligation and sufficient definiteness so as to provide a basis for determining the existence of a breach and for giving an appropriate remedy. Performance of a preexisting legal duty is not consideration.”<sup>5</sup>

In a third example, courts and boards of contract appeal do not strictly enforce the rule that contractors must assert the right to an equitable adjustment within 30 days from the date of receipt of the written order. Instead, many cases say the tribunal will excuse a late notice where it does not prejudice the

government's ability in a dispute to defend a claim for extra time or money, such as where it is reasonably certain that the government would not have acted differently if the contractor's notice had been timely.<sup>6</sup> Other exceptions are the late notification can be excused where the government already knew the basis for the claim or where the agency considered the claim on the merits.<sup>7</sup>

## **ADMINISTRATIVE ASPECTS OF CONTRACT CHANGES**

The agency by way of FAR 43.103 may issue a change order either unilaterally (signed only by the Contracting Officer) or bilaterally (signed by both parties). In all instances, FAR 43.201(a) instructs that the change must fall within the "general scope of the contract." Generally, FAR 43.201 instructs the agency to issue a written change order on Standard Form (SF) 30, but telegraphic messages per FAR 43.201(c) are allowable in unusual or urgent circumstances with certain pre-requisites, such as "immediate" follow-up by an SF 30.

Because the above-referenced telegraph has basically disappeared from the business world as a widely-used means of communication, this FAR 43.201 guidance is woefully out of date. Nevertheless, while it can be argued that the SF 30 process is mandatory except as allowed by FAR,<sup>8</sup> the better view is that the non-use of the SF 30 will be a minor informality where (1) an authorized Contracting Officer signs a document on behalf of the government, (2) an authorized representative signs for the contractor, and (3) the writing adequately sets forth the terms of the agreement and the parties' mutual intent.<sup>9</sup>

If the contractor believes that the Government has or will effect a contract change, but the Contracting Officer has not demonstrated the intent to change the contract through the issuance of a signed order, FAR 43.104(a) obligates the contractor to so notify the Government in writing "as soon as possible." In this way, the Government can evaluate the alleged change and either (1) confirm the change, inform the contractor of the mode of future performance and plan for its funding, (2) countermand the alleged change, or (3) notify the contractor that no change has occurred in the Government's view.<sup>10</sup> While the contractor under FAR 52.243-1(c) must assert its right to an adjustment within 30 days of the receipt of the written order directing the change, the Contracting Officer under the same regulation may still receive and act upon a late request provided the contractor submits it before final payment on the contract.

FAR 43.102(b) states that all contract modifications, including those that could be issued unilaterally, shall be priced before their execution by the parties if this process can be accomplished without adversely affecting the Government. If the price increase is likely to be significant, but time does not permit full price



negotiations, FAR 43.102(b) provides that “[a]t least a ceiling price shall be negotiated unless impractical.”

When the change order is not forward priced as discussed above, FAR 43.204(a) instructs that there shall be two documents, the change order and the supplemental agreement reflecting the equitable adjustment. If the parties can agree in advance to an equitable adjustment in the contract price, the delivery schedule, or both, as applicable, FAR 43.204(a) requires only the supplemental agreement. Where the Contracting Officer issues a unilateral order, FAR 43.204(a) initially requires only the one document but FAR 43.204(b) requires Contracting Officers to negotiate the equitable adjustment resulting from the change order “in the shortest practicable time.” The Contracting Officer under FAR 43.105 further shall ensure that where a contract modification will cause an increase in funds, then this official before executing the modification generally must obtain a certification that proper funds are available.<sup>11</sup>

Generally, where the Contracting Officer issues a change order, the contractor under FAR 43.201(b) & FAR 52.233-1(i), the *Disputes* clause, must continue performance of the contract as changed. Notably, FAR 52.243-1(e) provides that the parties’ failure to agree to an adjustment shall be a dispute under the *Disputes* clause but that nothing in FAR 52.243-1 pending a claim or dispute shall excuse the contractor from continuing with performance as changed. One exception is that under FAR 43.201(b), the contractor with a cost reimbursement contract receiving such government direction is not required to continue performance above the contractually-designated monetary limits.

The practitioner should be aware that agency regulations supplementing the FAR may address contract change administration. For example, in the Department of Defense, Defense Federal Acquisition Regulation Supplement 243.204-70 addresses definitization of unpriced change orders with a value exceeding \$5 million.

## “GENERAL SCOPE OF THE CONTRACT”

The *Changes* clause restricts the Contracting Officer’s authority to make contract changes to where they are within the “general scope of the contract.”<sup>12</sup> These scope determination decisions are associated with the “cardinal change doctrine” in both the bid protest and contract dispute settings.<sup>13</sup> Many decisions have construed these standards, whereby contracting officials ultimately must decide on a case-by-case basis the propriety of each change through a careful analysis of the surrounding circumstances.<sup>14</sup> The following principles have particular importance.



First, the cases considering a bid protest have ruled that a contract modification beyond the general scope of the contract for additional supplies or services can be improper where it is not separately justified as a non-competitive procurement as required by the Competition in Contracting Act of 1984 (CICA) (and its implementing regulations in FAR subpart 6.3).<sup>15</sup>

Second, the authorities dealing with a contract dispute have analyzed whether an out-of-scope modification is a cardinal change.<sup>16</sup> A “cardinal change” occurs when the government effects an alteration in the work so drastic that the contractor is called upon to perform duties materially different from those in the original bargain.<sup>17</sup> Such a change will be absent, however, and the action will be within the general scope of the contract, if other potential offerors would have expected it to fall within the changes clause.<sup>18</sup>

The cardinal change doctrine has various nuances that require more in-depth analysis. Although it rarely happens, with a cardinal change, the government can be theoretically guilty of a material breach of contract that would free the contractor of all obligations under the agreement, including the FAR requirement to continue performance notwithstanding a claim or dispute.<sup>19</sup> Notably, a cardinal change does not normally arise with specification problems if “[t]he contract itself explicitly provide[s] that discrepancies, omissions, conflicts and design changes would, or likely, would arise, and that the parties would address such issues during contract performance.”<sup>20</sup>

Besides being a matter of contract administration, a cardinal change can also pertain to a bid protest. The test for this determination is that if the contract as modified “materially departs” from the scope of the original procurement, the usual competition requirements will apply. Therefore, the tribunals look to whether the original offerors for the solicitation were adequately advised of the potential for the types of changes that in fact occurred and “whether the modification is of a nature which potential offerors would reasonably have anticipated.”<sup>21</sup> If the change meets this standard the action likely will be in-scope. This test is closely related to, if not identical with, the case law referenced in the first paragraph above noting that a cardinal change should be processed as a non-competitive action under CICA and FAR subpart 6.3.

The most prudent and practical mindset would be, “if the original purpose or nature of the contract remains basically the same both before and after the change, then the change is most likely considered within scope.”<sup>22</sup> Some examples from the case law will further explain this point. As shown below, four factors are especially important for agencies and vendors to consider in making an out of scope/in scope determination.<sup>23</sup> These factors in turn comprise the “totality” of the relevant



circumstances as the predicate for a reasonable assessment of whether a contract change will be in or out of scope:<sup>24</sup>

*The Function of the Procured Item* – This element is arguably the most important factor; therefore, if the changed item serves basically the same function of the original item, the change is most likely within scope. Thus, for example, where the agency changed the tuners in an aircraft countermeasures system from electro-mechanical to solid state items, the GAO ruled that the change did not substantially alter the basic function of the system.<sup>25</sup> Generally, increases or decreases in minor items or portions of the work will be in scope unless the modification alters the nature of the entire bargain but increases or decreases in the major items or portions of the work will generally be deemed to be out of scope.<sup>26</sup>

*The Dollar Magnitude* – While this factor is not conclusive, as there is no “magic formula,” this point deserves major consideration but not as a simple mathematical comparison of the contract price and the price of the change. Thus, for example, in a construction contract for backfilling around a missile silo, the U.S. Court of Appeals for the Eighth Circuit ruled that tripling the cost of the project made the change out of scope.<sup>27</sup>

*Cumulative Impact* – This factor considers the impact of the change on its own terms along with the accumulated impact of the change on the contract as a whole. For example, where the agency revised portable heaters from being gasoline to diesel-driven, the GAO deemed the modification as being out of scope because of the ripple effect the change had on the basic contract. Those consequential changes involved a substantial revision of the other components of the system, a doubling of the delivery schedule, and a twenty nine percent price increase.<sup>28</sup> By contrast, if the change in the above case had involved only a change in the delivery schedule, the change almost certainly would have been within the general scope of the contract.<sup>29</sup>

*Contract Complexity* – Relatively more complex procurements are reasonably subject to more (in scope) changes because they often involve unforeseeable circumstances or constantly evolving technologies. Thus, where the original Scope of Work in a complex procurement does not cover every contingency necessary for the work, the tribunals typically will afford the agency additional flexibility to adjust the project for unforeseen circumstances and emerging conditions.<sup>30</sup>

Based on these rules, the authors’ practical advice for agencies is that they should draft their scopes of work so that they cover the possible occurrence of a foreseeable event. In this manner, a later change accomplishing that objective will be within the contemplation of the parties and within the bounds of the changes

clause without the need for a new procurement action absent a sole source justification.<sup>31</sup> Our advice for contractors is they should be aware that a cardinal change can support a material breach allegation against the government and that if the contractor prevails in this theory, then it will escape all future obligations under the contract, including the requirement to continue working notwithstanding a dispute.<sup>32</sup> Whether the contractor should take the latter risk and view the contract as extinguished in these circumstances poses additional risks for the contractor that merit prudent consideration. The reason is that if a court or board later determines that the modification was actually a proper in-scope modification, the decision could be that contractor was the party guilty of the material breach and that the government properly issued a default termination in failing to proceed with the work.<sup>33</sup>

## AUTHORITY TO ISSUE CHANGES

FAR 43.202 requires the Contracting Officer to issue the change order except when the Contracting Officer delegates this task to an Administrative Contracting Officer. Generally, non-Contracting Officers lack authority to order or authorize changes because these individuals will have only limited authority to represent the Contracting Officer. A good example of this restricted representative capacity is a government inspector may evaluate the supplies being manufactured to ensure they meet the contractual requirements but the inspector may not independently require a specification revision.

Notwithstanding the clear terms of FAR 43.202, the boards and courts have created a complex body of case law on when the Government will be bound by the actions of its agents or employees obtaining additional goods or services where the Contracting Officer has not formally authorized these persons to issue contract changes.<sup>34</sup> The guiding principle is that unlike the practice under commercial contracts, the government agent or employee's mere apparent authority (as compared with actual authority) to effect a change will not bind the agency. Therefore, the contractor in that situation might perform the change at its own risk and be denied relief as a mere "volunteer."<sup>35</sup> To alleviate this potentially harsh outcome, the cases have adopted the following qualifications.

In the first qualification of the actual authority doctrine, an agency agent or employee's statements, acts, or inaction might amount to a "constructive change" that could bind the government. The subject of constructive changes is discussed below in Section VI below.

In the second qualification, where the agency places the person in a position of responsibility, the employee could have *implied* (or *incidental*) actual authority to

order changes. For example, the Armed Services Board of Contract Appeals has held that where a project officer had the authority to certify payment vouchers, receive progress reports, perform inspections, and accept the finished work, he had the implied actual authority to order a change under pressing circumstances.<sup>36</sup>

In the third qualification, the Contracting Officer may be deemed to have *ratified* the order of a government agent or employee lacking actual authority. For example, where a Contracting Officer normally relied on an inspector and was in constant communication with him, and the inspector changed the work beyond the contract terms, the Armed Services Board of Contract Appeals *imputed* knowledge of the inspector's order to the Contracting Officer. The result was the Contracting Officer ratified the inspector's order.<sup>37</sup>

In the fourth qualification, such actual authority can occur when the facts show the Contracting Officer's informal ratification where this official had constructive notice (i.e., notice implied as a matter of law) of the change and he acquiesced in the extra work being performed. In a Postal Board of Contract Appeals case, for example, the contractor signed a contract modification to remove sections of a sidewalk. The contractor experienced difficulty in completing the job because the sidewalk pavers were very firmly attached. Therefore, the contractor used a more expensive method to remove the pavers. The government's architect engineer observed the extra effort without objection and never informed the Contracting Officer of the circumstances.<sup>38</sup> Nevertheless, based on government acquiescence, the board held the agency responsible for compensating the contractor for the extra work.

## CONSTRUCTIVE CHANGES

Constructive changes occur when an actual change occurs with the contract work but the government has not followed the procedures of the *Changes* clause.<sup>39</sup> More elaborately, a "constructive change" occurs "where a contractor performs work beyond the contract requirements, without a formal order under the Changes Clause, either due to an informal order from, or through the fault of, the government."<sup>40</sup> If the contractor meets its burden of proof in showing a constructive change, it will be entitled to an equitable adjustment.<sup>41</sup>

Constructive changes have three common elements: (1) the government's action can be traced to a government employee with actual authority to order the work; (2) the extra work exceeded the contract requirements, and (3) the contractor gave proper notice to the government that the work was a constructive change.<sup>42</sup> The *Disputes* clause (FAR 52.233-1) is the vehicle for contractors claiming a constructive change.

There are five major categories of constructive changes:

(1) *Contract Misinterpretation* – In this variation, the contractor asserts that the government has misinterpreted the contract to require work that is more costly than the contractor’s interpretation of the agreement. The two steps to the analysis are (1) determining the meaning of contract language in light of the parties’ intent when they entered the agreement and (2) identifying which party should bear the risk of misinterpretation if the parties’ mutual intent cannot be specifically ascertained.<sup>43</sup>

These analytical steps require the use of established principles of contract interpretation.<sup>44</sup> For example, where contract language is ambiguous, i.e., open to two or more reasonable interpretations, the contract will be read in the light most favorable to the contractor and against the government as the drafting party when: (a) the ambiguity was (i) latent, i.e., not clear on the face of the contract or (ii) the ambiguity was patent, i.e., clear on the face of the contract, and the contractor fulfilled its duty of seeking clarification from the agency before submitting its offer, (b) the contractor’s interpretation was in the zone of reasonableness, and (c) the contractor relied on that interpretation during offer preparation.<sup>45</sup>

(2) *Interference and Failure to Cooperate* – This constructive change theory relies on the implied duty of each party to a contract to cooperate with the other party. Specifically, “[t]he covenant imposes obligations on both contracting parties that include the duty not to interfere with the other party’s performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.”<sup>46</sup> For instance, the government’s inspecting work in an overly zealous or restrictive manner and causing the contractor to perform extra work at a higher cost often justifies the contractor in seeking a remedy on a constructive change.<sup>47</sup> The implied duty of good faith and fair dealing cannot, however, expand a party’s contractual duties beyond or in conflict with the express contract.<sup>48</sup>

(3) *Defective Specifications* – Where (a) the specifications (mainly design-oriented) are defective or call for performance that cannot be attained, and (b) the contractor incurs additional expense in attempting to comply, then the contractor can be entitled to an equitable adjustment.<sup>49</sup> Used primarily with construction contracts, the policy for this constructive change theory is the contractor is entitled to rely on government-supplied contract specifications in executing the work so long as the contractor lacks actual or constructive knowledge of the defects before the award. The specifications carry an implied warranty that the specifications are free from error. Accordingly, “The test for recovery based on inaccurate specifications is whether the contractor was misled by these errors in the specifications.”<sup>50</sup>



(4) *Non-Disclosure of Vital Information* – This type of constructive change, also referred to as government “superior knowledge,” has four elements: (a) the government agency knew about the special information, (b) the contractor neither knew nor had reason to know the information, (c) the agency failed to supply the information, and (d) this failure misled the contractor.<sup>51</sup> The government bears the burden of disclosing information related to the work, when unbeknownst to the contractor, which information is often technical in nature, and the contractor has the burden of proving the information not disclosed was vital to performance.<sup>52</sup>

The leading case on the affirmative duty to disclose is still *Helene Curtis Industries, Inc., v. United States*.<sup>53</sup> In this 1963 case, the former Court of Claims granted the contractor an equitable adjustment for the increased costs of producing a disinfectant where the government withheld essential information concerning the contractor’s need to grind the chemicals before mixing them.

(5) *Constructive Acceleration* – In this variation, the contractor is ordered or induced to incur additional costs to complete the work prior to its scheduled completion date. While this constructive change theory has various elements, constructive acceleration in its essence requires a Contracting Officer’s order that causes the contractor to perform earlier than it would have been required to do so had the contract schedule been adjusted to reflect excusable delays. A key part of the contractor’s burden of proof is the contractor must have made the government aware of the delay. Otherwise, the claimant risks the possibility that a court or board will simply view any government insistence that the contractor meet the schedule as a proper order to meet the firm’s existing contractual obligations.<sup>54</sup> An example of such a constructive acceleration is when the government improperly threatens to terminate the contractor for default if the contractor does to adhere to the existing contract schedule even though the contractor has experienced an excusable delay.<sup>55</sup>

## PRICING THE ADJUSTMENT

Price revisions are the most common equitable adjustment issue and normally occur in three forms: actions adding work, actions deleting work, and actions substituting work (which are a combination of the first two circumstances).<sup>56</sup>

With *deleted* work, the adjustment will result in a credit to the government as measured by the net cost savings to the contractor. Thus, where the contractor has saved costs resulting from the reduced work, the equitable adjustment will price the revised work based on the amount it would have cost the contractor had the item not been deleted (but almost always not on the contractor’s original cost



estimate).<sup>57</sup> Some exceptions exist to the “would have cost” rule, such as where the parties have a special agreement on the basis for the equitable adjustment.<sup>58</sup>

With *added* work, the contractor will be entitled to a price increase based on the reasonable cost impact upon the contractor (but not upon the fair market value of the extra effort). The underlying policy is that if the purpose of an equitable adjustment as a corrective measure is to protect the contractor against increased costs caused by a modification, then the basis for compensation cannot be the value received by the Government or the universal, objective measure of cost to other contractors at large. Instead, payment must be commensurate with the altered financial position experienced by the specific contractor seeking compensation.<sup>59</sup>

The government has the burden of proving a downward adjustment and the contractor has the burden of proving an upward adjustment. The evidentiary standard is reasonable certainty and not mathematical exactitude.<sup>60</sup> Courts and boards expect the parties to present the best available evidence, such as actual cost data, although estimates can be admissible absent such proof.<sup>61</sup> In the context of additive changes, a prominent example of a permissible estimating technique is the “jury verdict.” Here, the tribunals resolve conflicting evidence of the cost impact by determining whether (1) clear proof of financial loss is present, (2) no more reliable method exists for computing the compensation, and (3) the evidence permits a fair and reasonable approximation of the incurred detriment.<sup>62</sup> The tribunals generally disfavor the “total cost” method and its variations, which methods measure the adjustment based on subtracting the costs in the bid price from the actual costs of performance and adding a profit to the actual amount.<sup>63</sup>

## CONCLUSION

Perhaps the clearest observations one might make regarding the *Changes* clauses is that they contain numerous pitfalls but that when properly understood they can be a major problem-solving device that can assure project success for both industry and government. At times narrowly construed and at other times broadly interpreted, the *Changes* clauses require contract professionals to perform a careful analysis on a case-by-case basis whenever confronted with shifting contractual requirements.

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## ENDNOTES

1. See FAR 43.102(b), 43.204(a). Another type of unilateral change is where the government makes administrative changes that do not affect the substantive rights of the parties, such as a change in the paying office. See FAR 43.101, 43.103(b)(1)
2. The exception is the parties may tailor this clause to permit the agency unilateral authority to revise the contract terms when consistent with customary commercial practice for the subject matter of the contract. See FAR 12.302.
3. See *SUFI Network Servs., Inc. v. United States*, 105 Fed. Cl. 184, 192 (2012); 2 Ralph C. Nash & Steven W. Feldman, *Government Contract Changes* §16:2 (2007 & Supp.)
4. *GAI Consultants, Inc.*, ENGBCA No. 6030, 95-2 BCA ¶ 27,620.
5. *Northrop Grumman Computing Sys., Inc.*, GSBCA No. 16367, 06-2 BCA ¶ 33,324.
6. *E.g.*, *Mil-Pak Co.*, ASBCA No. 19733, 76-1 BCA ¶ 11,836; see also *Postscript: Notice of Changes*, 18 Nash & Cibinic Rep. ¶ 25 (June 2004) (comprehensive discussion).
7. *Korshoj Constr.*, IBCA No. 321, 1963 BCA ¶3,848.
8. See FAR 43.301(a); *Solar Turbines, Inc. v. United States*, 23 Cl. Ct. 142, 152-53 (1991).
9. *Folk Constr. Co.*, ENGBCA Nos. 5839, 5899, 93-3 BCA ¶ 26,094.
10. See also FAR 52.243-7(b), "Notification of Changes" (similar guidance in clause typically used for research and development contracts).
11. Under the "antecedent liability" principle, an in scope change generally relates back to, and must be funded by, the appropriation used to obligate monies on the underlying contract action. See 71 Comp. Gen. 502 (1992).
12. *E.g.*, FAR 52.243-1(a) ("Changes Fixed Price"); FAR 52.243-2(a) ("Changes-Cost Reimbursement").
13. *Aircraft Charter Solutions, Inc. v. United States*, 109 Fed. Cl. 398, 410-11 (2013).
14. *Id.*
15. *Engineering & Prof'l Servs., Inc.*, B-289331, 2002 CPD ¶ 24; *Neil R. Gross & Co.*, B-237434, 90-1 CPD ¶ 212 at 2-3; *Chapman Law Firm v. United States*, 81 Fed. Cl. 323, 326-27 (2008).
16. *PCL Constr. Servs., Inc. v. United States*, 47 Fed. Cl. 745, 804 (2000).
17. *Id.*
18. *Id.*
19. *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1276 (Fed. Cir. 1999); *Aircraft Charter Solutions, Inc. v. United States*, 109 Fed. Cl. 398, 410



- (2013). *Cf.* FAR 52.233-1(i) (*Disputes* Clause instruction for contractor to continue working notwithstanding a claim or dispute).
20. PCL Const. Servs., Inc. v. United States, 47 Fed. Cl. 745, 805 (2000).
  21. Chapman Law Firm v. United States, 81 Fed. Cl. 323, 326-27 (2008).
  22. Dominic A. Femino, *Within Scope Changes and CICA*, *The Army Lawyer* 34 (Oct. 1986) (analyzing decisions).
  23. *Id.* at 37.
  24. Aircraft Charter Solutions, Inc. v. United States, 109 Fed. Cl. 398, 410 (2013).
  25. B-167003, Sept. 17, 1973, 1970 CPD ¶ 77.
  26. *See* Connor Bros. Constr. Co. v. United States, 65 Fed. Cl. 657 (2005); Valley Forge Flag Co., Inc., VABCA No. 4667, 5103, 97-2 BCA ¶ 29,246.
  27. Peter Kiewit Sons' Co. v. Summit Constr. Co., 422 F.2d 242, 255-57 (8th Cir. 1969).
  28. American Air Filter, 57 Comp. Gen. 567 (1978).
  29. In *Ingersoll-Rand*, Comp. Gen. Dec. B-225996, 87-1 CPD ¶ 474, GAO upheld an agency modification that merely changed the delivery schedule because it did not materially alter the contract.
  30. Armed Forces Hospitality, LLC, Comp. Gen. Dec. B-298978.2, 298978.3, 2009 CPD ¶ 192.
  31. *See* Cardinal Maint. Servs., Inc. v. United States, 63 Fed. Cl. 98, 106-07 (2004); VMC Behavioral Healthcare Services v. United States, 50 Fed. Cl. 328, 332 (2001)(following these principles).
  32. *See supra* Section III.
  33. *See* Ralph C. Nash, Jr. & Steven W. Feldman, *Government Contract Changes* § 6:5 (2007 & Supp.) (noting that this scenario is a “major gamble” for the contractor).
  34. *See* Steven W. Feldman, *Government Contract Guidebook* §15:7 (2013-2014 ed.).
  35. *Brown v. United States*, 207 Ct. Cl. 768, 782 (1975); *Gilroy-Sims & Assocs., Ltd.*, GSBCA No. 9405, 91-1 BCA ¶ 23406; *Inter-Tribal Council of Nev. Inc.*, IBCA No. 1234-12-78, 83-1 BCA ¶16,433; *DBA Sys., Inc.*, NASA BCA 481-5, 82-1 BCA ¶15,468. *But see* *Service Eng'g Co.*, ASBCA No. 42146, 96-2 BCA ¶ 28,376 (presumption is a contractor does not perform the work voluntarily).
  36. *Urban Pathfinders, Inc.* ASBCA No. 23134, 79-1 BCA ¶ 13,709.
  37. *Southwestern Sheet Metal Works, Inc.*, ASBCA No. 22748, 79-1 BCA ¶13,744.
  38. *Alta Constr. Co.*, PSBCA No. 1334, 1487, 87-1 BCA ¶ 1949, *on reconsid.*, PSBCA No. 1334, 87-1 BCA ¶19,655. *But see* Steven W. Feldman, *Government Contract Guidebook* §15:7 (2013-2014 ed.) (observing that the result could be different under later Federal Circuit precedent, *Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429 (Fed. Cir. 1998), which requires for informal ratification that the ratifying official had (1) actual or constructive

knowledge of the unauthorized action plus (2) a “demonstrated acceptance” of the unauthorized action)).

An unusual aspect of the *Alta* case was that the government had imputed notice from the inactions of another contractor as opposed to a government employee. For a discussion of implied actual authority and implied ratification in the latter context, see Ralph C. Nash, Jr. & Steven W. Feldman, *Government Contract Changes* §§ 5:14, 5:15, 5:20, 5:22 (3d ed. 2007 & Supp.).

39. John Cibinic, et al., *Administration of Government Contracts* 427 (4th ed. 2006).
40. *M.A. DeAtley Constr., Inc. v. United States*, 75 Fed. Cl. 575, 581 (2007).
41. *LB&B Assocs., Inc. v. United States*, 91 Fed. Cl. 142, 153-54 (2010).
42. See Steven W. Feldman, *Government Contract Guidebook* §15:24 (2013-2014 ed.).
43. *Id.* § 15:25.
44. For an exhaustive analysis of the principles of contract interpretation in Government procurement, see John Cibinic, et. al, *Administration of Government Contracts*, Chapter Two (4th ed. 2006).
45. Steven W. Feldman, *Government Contract Guidebook* §15:25 (2013-2014 ed.).
46. *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005).
47. *Harris Sys. Int’l, Inc.* ASBCA No. 33280, 88-2 BCA ¶ 20,641.
48. *Metcalf Constr. Co., Inc. v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014).
49. See Steven W. Feldman, *Government Contract Guidebook* §15:27 (2013-2014 ed.). See also *United States v. Spearin*, 248 U.S. 132, 137 (1918); *Hol-Gar Mfg. Corp. v. United States*, 360 F.2d 634, 638 (Ct. Cl. 1964); *M.A. Mortenson Co.*, ASBCA No. 50716, 51241, 51257, 99-1 BCA ¶ 30,270.
50. *Metcalf Constr. Co., Inc. v. United States*, 80 Fed. Cl. 178, 185-86 (2008).
51. *McDonnell Douglas Corp. v. United States*, 27 Fed. Cl. 204, 205 (1992); see also *AT&T Communications, Inc. v. Perry*, 296 F.3d 1307, 1312 (Fed. Cir. 2002) (more elaborate statement of elements).
52. See Steven W. Feldman, *Government Contract Guidebook* §15:28 (2013-2014 ed.).
53. 312 F.2d 774 (Ct. Cl. 1963); see generally Eshelman & Sanford, *The Superior Knowledge Doctrine: An Update*, 22 Pub. Cont. L.J. 477 (1993).
54. See Steven W. Feldman, *Government Contract Guidebook* §15:29 (2013-2014 ed.).
55. See *Intersea Research Corp.*, IBCA No. 1675, 85-2 BCA ¶ 18,058.
56. See generally John Cibinic, Jr., et al., *Administration of Government Contracts* Chapter 8 (4th ed. 2006).
57. *Id.* at 662-63.
58. *Id.* at 665-69.
59. *Id.* at 670.

60. *Id.* at 687-88.

61. *Id.* at 695.

62. *Id.* at 704.

63. *Id.* at 699.





## CASE DIGESTS

*Edited by Heidi L. Osterhout*

*Case Digests offer snapshot summaries of the most interesting, topical, and hopefully useful decisions from the boards of contract appeals over the past several months.*

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***DynPort Vaccine Co. LLC***, ASBCA No. 59298

Jan. 15, 2015 | Judge James

By *Tara Ward* | *Wiley Rein*

In this case, the Armed Services Board of Contract Appeals (“ASBCA” or “Board”) considered whether a unilateral modification issued by the Government requiring the contractor to perform corrective work at no cost to the Government constituted a Government claim that was properly before the Board on appeal. The Board answered in the affirmative, and required the Government to file the initial pleading.

***Facts***

In 1997, the U.S. Army Medical Research Acquisition Activity awarded DynPort Vaccine Company LLC (“DynPort”) a cost-reimbursement, cost sharing, award fee contract for the development and licensure application of vaccines and other biological defense products. After terminating a subcontractor for default, in November 2013, DynPort proposed a change order to add a new subcontractor to finish the required work and to add technology transfer studies—a cost of approximately \$4 million—that DynPort believed were necessary to complete manufacturing and testing following the default termination. The parties exchanged several letters outlining their respective positions: the Government did not believe DynPort was entitled to reimbursement because, according to the Government, the default termination was a result of DynPort’s “gross disregard” of its contractual duties, and DynPort countered that the default termination was unknown and unpreventable, and DynPort had diligently performed its duties under the contract.

In February 2014, the contracting officer (“CO”) issued a unilateral modification pursuant to FAR 52.246-8, the Inspections clause included in the contract, directing DynPort to proceed with the work it had proposed but at no cost to the Government. In particular, the Government cited subsection (h) of the clause, which authorizes the Government to require no-cost correction or replacement when the contractor fails to perform due to fraud, lack of good faith, willful misconduct, or the habitual carelessness of an employee. DynPort notified the CO that it intended to seek an equitable adjustment for the technology transfer costs. By letter dated April 23, 2014, the CO exercised the modification option and directed DynPort to begin performing the work. Neither the modification nor the Government’s April 2014 letter stated that it was a contracting officer’s decision or advised DynPort of its appeal rights.

DynPort appealed to the Board from the modification. According to DynPort, the modification—along with the April 2014 letter—constituted a de facto final decision. The Government moved to dismiss the appeal for lack of jurisdiction under the Contract Disputes Act (“CDA”), 41 U.S.C. §§ 7101-7109, on the ground that the modification did not assert a government claim. According to the Government, the modification was merely an act of contract administration—not a Government claim. DynPort opposed the motion and requested that the Government file the initial pleading.

### ***ASBCA Holding***

The Board held that the modification did, in fact, constitute a Government “claim” within the meaning of the CDA. In so holding, the Board looked to “all the facts and circumstances in the record” to determine whether the unilateral modification constituted “a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract.” The Board stated that “other relief” can include directions by the CO to the contractor to correct or replace work. In other words, contract performance need not be completed for a direction to be considered outside the bounds of ordinary contract administration. *See id.* (rejecting the Government’s argument to the contrary).

The Board reasoned first that limiting Government nonmonetary claims to demands made after acceptance or contract completion would run contrary to the principle that the definition of “claim” is to be read broadly. In addition, the Board found that the Government’s having grounded its modification in the Inspection clause—a clause that, in the Board’s words, “requires the CO to have found the contractor to have committed *serious failures* in performing the contract’s requirements”—indicated that the modification was not part of “a dispute as to ordinary contract administration,” but rather an affirmative Government claim. *Id.* (emphasis added). Thus, the Board held that DynPort’s appeal was proper, and the Board consequently had jurisdiction to entertain the appeal.

The Board concluded by granting DynPort’s request that the Government be ordered to file the initial complaint. According to the Board, “[s]ince the CO is the only one that knows specifically what facts he relied on to determine that [DynPort] had failed to perform the requirements of the contract such that FAR 52.246-8(h) was available to the government, and no explicit CO decision was issued, we determine that requiring the government to file a pleading in the nature of a

complaint would facilitate the proceedings.” *Id.* (citing *Beechcraft Defense Co.*, ASBCA No. 59173, 14-1 BCA ¶ 35,592).

### ***Conclusion***

Although this case is fact-specific in that the Board focused on the facts indicating that the dispute was not part of routine contract administration, it does provide guidance to practitioners in recognizing the indicia of a Government claim where, as here, the claim does not state that it is a “final decision.”



***Tamba Manya Momorie***, PSBCA Nos. 6362 *et al.*

Feb. 9, 2015 | Judge Campbell

By *Oliya S. Zamaray* | *Rogers Joseph O'Donnell, P.C.*

In this case, familiar questions regarding default terminations and a contracting officer’s (CO) discretion in connection with contract renewals collide with incredible accusations of racism, threats of bodily harm, and ominous predictions of life-threatening events. Following a three-day hearing, the PSBCA issued a decision ruling in favor of the Postal Service in connection with both the default termination and decision not to renew.

### ***Facts***

The U.S. Postal Service and Mr. Momorie entered into four mail transportation and delivery service contracts. The so-called Youngstown Contract contained a clause permitting the Postal Service to terminate the contract for default for failure to perform according to the terms of the contract or for failure to supply adequate assurances of future performance. All four contracts included language allowing renewal by the parties’ mutual agreement.

Performance issues quickly arose on the Youngstown Contract. The Postal Service provided substantially more than the contractually-required amount of training because Mr. Momorie hired and ultimately lost a total of five employees. During each employee’s brief on-the-job performance, numerous pieces of mail had been mis-delivered and the Postal Service received daily complaints from customers

on Mr. Momorie's route. Following a brief grace period, the Postal Service began issuing Irregularity Reports and, on September 30, 2010, conducted a formal performance conference with Mr. Momorie to discuss mail mis-deliveries and other performance problems.

Mr. Momorie was advised to take corrective action necessary to provide satisfactory service; he was warned that if performance did not improve, further action would be taken, including terminating the contract for default. Mr. Momorie responded to the Irregularity Reports by flatly denying that any mis-deliveries occurred and accused the Postal Service of falsely creating the Irregularity Reports in the absence of actual customer complaints. He also accused the Postal Service of physically removing mail from customer mailboxes and placing it at incorrect addresses.

On October 20, 2010, the CO issued Mr. Momorie a cure notice, notifying him that unless his poor performance was cured within five business days, the Postal Service might terminate the contract for default. Rather than explain how he intended to cure his performance problems, Mr. Momorie claimed to be doing an "excellent" and "superb" job and accused the Postal Service of racism and creating untrue Irregularity Reports.

On October 29, 2010, the CO issued a final decision terminating the Youngstown Contract for default due to unsatisfactory performance; in fact, 54 Irregularity Reports had been issued during 6 weeks of contract performance. Mr. Momorie emailed the CO, referring to him as his "enemy" and suggesting that the CO was "corrupt." Mr. Momorie then submitted a certified claim for damages due to the default termination. When the CO denied it, Mr. Momorie appealed the final decision to the PSBCA. Following termination, the Postal Service's administrative official received a letter that would ultimately be traced back to Mr. Momorie. The letter included warnings, threats of bodily harm to the postmaster, and warnings of violence against his family.

With regard to Mr. Momorie's three other Postal Service contracts, a CO worked with Mr. Momorie to briefly extend the period of performance on two of the contracts and allowed the third to expire. Mr. Momorie objected, but a higher higher-level contracting authority in the Postal Service denied his challenge concerning non-renewal, finding that Mr. Momorie's "actions created an unsatisfactory working relationship." Thus, the CO properly exercised the Postal Service's right not to renew the contract for a full term. Mr. Momorie subsequently filed a certified claim based on the CO's decision not to renew his contracts. Between November 2011 and February 2012, Mr. Momorie continued to send emails laden with racist language and veiled threats.

The Postal Service argued to the PSBCA that Mr. Momorie’s poor contract performance was the only basis for the default termination of the Youngstown Contract, that it was under no legal or contractual obligation to renew the other contracts involved in the appeal, and that Mr. Momorie’s unprofessional approach justified allowing his contracts to expire. Mr. Momorie, in turn, argued that racially-based conspiracies motivated the termination for default and non-renewal of his contracts.

### ***PSBCA Holding***

The PSBCA ruled in the Postal Service’s favor with regard to both the default termination and the decision not to renew Mr. Momorie’s contracts.

The Board explained the Postal Service’s burden to prove that performance deficiencies fairly attributed to Mr. Momorie materially breached the Youngstown Contract. If the Postal Service met that burden, to avoid termination, Mr. Momorie would have to demonstrate that the performance deficiencies were excusable, or that the CO abused his discretion.

The Board found that Mr. Momorie’s performance deficiencies violated the essential purpose of the mail services contract. In response, Mr. Momorie argued that the evidence was fabricated and resulted from racially-based conspiracies. By relying on suspicions (rather than accrual proof), Mr. Momorie could not establish bias or bad faith based on racial animus. The PSBCA found Mr. Momorie’s testimony to be inconsistent, implausible, evasive, and deceitful. The Board found that the Postal Service’s version was a credible and reliable record of Mr. Momorie’s performance deficiencies. As such, the Board found that Mr. Momorie’s mail mis-deliveries were a material breach which justifiably resulted in default termination. Therefore, the CO’s termination decision was not an abuse of his discretion.

The Board next turned to the remaining three contracts at issue, each of which contained identical language permitting renewal “by mutual agreement of the parties.” The Board observed that the language gave the CO “extraordinarily broad discretion” which is subject to review only for clear abuse of that discretion. The PSBCA concluded that CO did not abuse his discretion when he declined to renew Mr. Momorie’s contracts when the relationship with the contractor had become acrimonious and non-functional.

***Kiewitt-Turner, a Joint Venture***, CBCA No. 3450

Dec. 9, 2014 | Judge Daniels

By *Steven A. Neeley* | *Husch Blackwell LLP*

In this case, the CBCA granted Kiewit-Turner’s (“KT”) appeal seeking to stop work after the Department of Veteran Affairs (“VA”) failed to provide a design for a medical center that could be constructed for the contract’s target funding limit. The Board held that the VA could not compel KT to finance additional construction work where it was clear that the medical center could not be constructed for the target cost amount and where the VA refused to seek additional funding or incorporate value engineering changes to reduce the overall construction cost.

***Facts***

In August 2010, the VA awarded KT a contract for pre-construction services for a medical center campus in Aurora, Colorado. The contract was an integrated design and construct (“IDc”) type contract, which the VA had never used before. Although such contracts are intended to involve the construction contractor in the project at an early stage, the design of the medical center was well underway by the time that KT got involved. The same day that VA awarded the IDc contract to KT, the VA set the medical center’s construction funding limit—the Estimated Construction Cost at Award (“ECCA”)—at \$582,840,000. The ECCA was based on design drawings that were only 50% complete and was established without any input from KT.

Almost immediately, KT began informing the VA that the medical center could not be constructed for the ECCA amount. In January 2011, KT estimated that the construction cost would exceed the ECCA by approximately \$7 million. Three months later, when the design drawings were just 65% complete, KT estimated that the construction costs would exceed the ECCA by \$76 million. Despite these warnings, the VA asked KT to submit a firm target price proposal to construction the medical center and to offer a price that would not exceed \$603 million. KT submitted its proposal in August 2011 and proposed a total price of \$599.6 million, which was based on the condition that the VA implement \$23 million worth of value engineering design changes.

The VA refused to implement the necessary value engineering changes and negotiations over KT’s proposal ensued. Based on KT’s insistence that the project could not be constructed for the VA’s maximum acceptable construction amount, in

November 2011, the VA and KT entered into modification SA-007, which provided that both parties would expend resources to get the project price at or below \$604 million. The modification also required the VA to “ensure” that its design team would produce a design that could be constructed for the ECCA amount of \$582,840,000.

The VA issued KT a notice to proceed the same day that modification SA-007 was signed and KT promptly began soliciting subcontractor bids based on the 95% drawings. The 100% drawings were provided to KT in August 2012 but were far from complete. The VA’s design team ultimately supplemented the design with numerous supplemental instructions, which required KT to submit an “unusually large number” of requests for information. As a result, project costs continued to increase. In December 2012, KT estimated that the construction costs would total \$769 million—nearly \$200 million more than the ECCA amount. Despite these estimates, the VA refused to implement any value engineering changes and instead directed KT to proceed with construction. When KT indicated that it could not construct the project within the available funding limits, the VA responded that it intended to hold KT to the firm target price of \$604 million established in modification SA-007.

In April 2013, KT asserted that the VA had breached its obligation to provide a design that could be constructed for the ECCA amount and that as a result, KT was authorized to stop work. The VA contracting officer denied any breach and again directed KT to proceed with construction of the project. Based on testimony at the hearing, the CBCA found that at the time of the directive to proceed, the VA did not have any plans to redesign the project, had only \$630 million appropriated for construction, and did not have any plans to seek additional funding. The Board also found that KT had already financed \$20 million worth of work for which it had not been paid as of June 2014, and was expected to finance as much as \$100 million by December 2014.

### ***CBCA Holding***

KT’s appeal presented the Board with three distinct questions: (1) whether modification SA-007 required the VA to provide a design that could be constructed for the ECCA amount; (2) whether the VA materially breached the contract by failing to provide such a design; and (3) whether KT was entitled to stop work. The Board answered all three questions in the affirmative.

***The VA was required to provide an ECCA-compliant design.***

With respect to the first question, the Board found that modification SA-007 “could not be more clear” in requiring that the VA provide a design that could be constructed for the ECCA amount of \$582,840,000. The VA argued that the ECCA amount was not material because KT’s firm target price construction proposal required that KT build the project for \$604 million, subject to scope changes. The Board rejected the VA’s arguments and found that the ECCA amount was not only material, but critical, as meeting the \$582,840,000 ECCA design amount was critical to being able to satisfy the proposed \$604 million construction amount.

***The lack of an ECCA-compliant design was a material breach of the contract.***

In determining whether the VA materially breached the contract by failing to provide a design that satisfied the ECCA amount (KT’s second presented question), the Board considered the factors from Restatement § 241: (a) the extent to which KT was deprived of its reasonably expected benefit; (b) whether KT could be adequately compensated for the deprived benefit; (c) whether the VA would suffer forfeiture; (d) the likelihood that the VA would cure its failure to perform; and (e) the extent to which the VA’s behavior complied with the standards of good faith and fair dealing.

Based on those factors, the Board found that KT was deprived of its expected benefit of a design that could be constructed for the ECCA amount and that it could not be adequately compensated for the lack of an appropriate design because the VA did not have adequate funding and did not intend to ask for more. Because the VA had also insisted that it would not redesign the project, the Board found that there was little likelihood that the VA would cure its breach and held that the VA’s behavior violated the standards of good faith and fair dealing. The Board also found that the VA’s forfeiture of the project would be limited because the VA retained possession of the land and construction that had already taken place.

***The VA’s material breach entitled KT to stop work.***

In light of the VA’s material breach, the Board concluded that KT was entitled to stop work. Relying on the Federal Circuit’s decision in *Stone Forest Indus., Inc. v. United States*, 973 F.2d 1548 (Fed. Cir. 1992), the Board reasoned that KT, as the non-breaching party, was entitled to its choice of remedy and could discontinue performance. The Board also rejected the VA’s argument that KT had previously continued to perform despite the VA’s breach and therefore could not stop work now. Although a contractor may be forced to continue work if they

continue performance *without protest*, the Board found that KT had strenuously protested the VA's directive to proceed and only continued performance to avoid the possibility of a default termination.



***Tug Hill Construction, Inc.***, ASBCA No. 57825

Oct. 16, 2014 | Judge McIlmail

By *Sonia Tabriz* | *Fox Rothschild LLP*

After an eight-day hearing on the issue of entitlement alone, the Board denied the contractor's claim for additional compensation noting that the government's implied covenant of good faith and fair dealing does not expand the government's contractual obligations beyond those in the express contract.

***The Delivery Order***

Tug Hill Construction, Inc. (Tug Hill) was one of five contractors under a Multiple Award Task Order Contract (MATOC) with the U.S. Army Corps of Engineers (USACE or the Corps). On April 9, 2010, the Corps issued a Request for Proposals (RFP) for Phases 3 and 4 of the Fort Bliss Aviation Brigade Additional Infrastructure Project (the Delivery Order). The Delivery Order included demolition of existing utility systems and the construction of new primary electric, water, sanitary sewer, communications, and natural gas utilities systems.

On May 11, 2010, the Corps extended the proposal submission deadline and amended the RFP to include the following Special Notice:

**SPECIAL NOTICE:**

The existing Fort Bliss Main Post Utility Systems are privately owned. This scope of work includes coordinating project utility requirements with the owners of the privatized utility systems. Typically Utility owners will remove existing utilities, install new primary utility systems and make final connections between the new systems and existing. However, contractors shall be responsible for negotiating and finalizing utility system

work with the utility providers. The Contractor will include its cost for such work in its cost proposal.

The utility providers on Fort Bliss included Fort Bliss Water Services Company (FBWS) and Rio Grande Electric Cooperative, Inc. (RGEC).

### ***Cost Proposals for Delivery Order***

Three MATOC holders submitted proposals for the Delivery Order: Tug Hill, J.D. Abrams, and Sundt Construction (“Sundt”). Prior to submitting their proposals, Sundt and J.D. Abrams contacted FBWS and RGEC for quotes. While RGEC would not provide a price quote, FBWS provided a quote of \$11,071,000 for water utility system work. Sundt also posted two inquiries on ProjNet regarding what costs should be included in the proposal and requesting a time extension for the utility providers to provide firm price quotations. The Corps did not respond to either inquiry.

Prior to submitting its cost proposal, Tug Hill was told to contact RGEC regarding its proposal for the Delivery Order. Tug Hill contact RGEC and inquired as to RGEC’s scope of work on the project. RGEC responded that it “[had] yet to receive clear plans” and was “unable to fully comment on the work to be completed on the project.” Tug Hill was also warned by an outside company that RGEC did not have a firm price ready and that it would be “bad” if Tug Hill used a price that was less than what RGEC ultimately quoted. Tug Hill’s estimating and purchasing manager even had an internal conversation with Tug Hill’s president and sole owner about “risks” regarding the Delivery Order, including the “impacts of Special Note.”

Nevertheless, Tug Hill submitted a proposal without ever contacting FBWS and without seeking price quotes from either FBWS or RGEC.

### ***Award of Delivery Order and Certified Claim***

USACE awarded the Delivery Order to Tug Hill. After award, Tug Hill received pricing from both FBWS and RGEC that was higher than what Tug Hill had included in its proposal. Tug Hill contacted the Corps and requested that the Corps “direct the Utility Providers to provide competitive pricing.” The Contracting Officer (CO) responded, indicating that Tug Hill’s only recourse was to negotiate directly with the utility providers.

Ultimately, Tug Hill entered into a service agreement with FBWS for \$11,726,123 for water utility system work and another service agreement with RGEC for \$8,821,602.99 for electric utility system work.

Tug Hill then presented a certified claim to the CO for the alleged difference between Tug Hill's proposed price for utility systems work and the ultimate service agreement pricing. Tug Hill contended that USACE breached the implied covenant of good faith and fair dealing, withheld superior knowledge, and constructively changed the terms of the Delivery Order.

The CO issued a final decision denying the claim and Tug Hill timely appealed to the Armed Services Board of Contracting Appeals (ASBCA or the Board).

### ***Implied Covenant of Good Faith and Fair Dealing***

Tug Hill contended that USACE breached the implied covenant of good faith and fair dealing because USACE did not help Tug Hill negotiate with the utility providers after award of the Delivery Order. The Board rejected this contention. The implied covenant of good faith and fair dealing does not expand a party's contractual duties beyond those in the express contract. It merely prevents a party from acting in a way that is not consistent with the contract's purpose.

According to the ASBCA, the Special Notice was unambiguous as to Tug Hill's obligations under the Delivery Order. Tug Hill had been hired by the Corps to negotiate and finalize the utility systems work with the utility providers. The Delivery Order did not imply that the Corps was required to assist with those negotiations. To the contrary, Tug Hill agreed to a fixed price for a scope of work that expressly included negotiating with the utility providers and thereby assumed the risk that the price covered the eventual cost of the work.

Tug Hill further argued that USACE controlled the utility providers through other contracts and failed to exert that control to assist with negotiations. It is true that contractors do not assume the risk that other government contractor's on the project will interfere with their performance. However, Tug Hill failed to identify precisely what control the Corps had over the utility providers.

Lastly, Tug Hill contended that the Corps breached the implied covenant of good faith and fair dealing through its pre-award conduct. According to the Board, the implied covenant does not exist until a contract is executed. That said, the government's pre-award conduct can speak to whether the government has complied with obligations that are eventually imposed by contract. Here, however,

the contract never obligated the Corps to assist in negotiations with the utility providers. So USACE's pre-award conduct did not amount to a breach of the implied covenant.

### ***Superior Knowledge***

Tug Hill next contended that, prior to awarding the Delivery Order, USACE withheld knowledge that the utility providers could not estimate the cost of the work ordered or would charge a premium. Under the superior knowledge doctrine, the government has a duty to disclose otherwise unavailable information that is vital to contract performance. However, where the contractor has the opportunity to access such information prior to contract award, the government's knowledge is no longer "superior."

Prior to submitting its proposal, Tug Hill had already learned that RGEC's role involved all work associated with the electric utility system. Information regarding FBWS was also available to Tug Hill. Had Tug Hill contacted FBWS like the other offers, it might have received FBWS's estimate for water utility system work. Tug Hill had access to Sundt's lengthy inquiries on ProjNet regarding the pricing from utility providers. And Tug Hill's estimating and purchasing manager even spoke with the president regarding these precise "risks."

Therefore, because Tug Hill had access to any information that it claims was withheld by the Corps, its superior knowledge argument failed.

### ***Constructive Change***

Finally, Tug Hill contended that USACE constructively changed the Delivery Order by requiring that Tug Hill contract with the utility providers rather than allowing the contractors to self-perform. To establish a constructive a change, a contractor must establish that it performed work beyond the scope of the contract requirements that was ordered, either expressly or impliedly, by the government.

Tug Hill failed to meet this test. The original scope of work, as stated in the Special Notice, expressly included "coordinating project utility requirements with the owners of the privatized utility systems" and "negotiating and finalizing utility system work with the utility providers." And Tug Hill ultimately did coordinate, negotiate and finalize the performance of this work with the utility providers.

Further, Tug Hill did not establish that USACE dictated any terms (let alone, additional terms) of the service agreements with utility providers. Tug Hill

therefore failed to establish that the Corps mandated the use of the utility providers to perform the utility systems work.

### ***Conclusion***

Ultimately, the Board denied Tug Hill’s appeal on all three grounds, noting that: “It is always more difficult to negotiate after the fact when, as in this case, appellant was clearly put on notice to coordinate with the utility providers prior to submittal.” Tug Hill failed to do so and therefore bore the cost of that decision.



***The Boeing Company***, ASBCA No. 58660  
Nov. 6, 2014 | Judge O’Connell  
*By Hellia Kanzi | Asmar, Schor, & McKenna, PLLC*

In this case, the ASBCA denied Boeing’s motion to dismiss for lack of jurisdiction the government’s claim stemming from cost accounting practice changes. Boeing contended that the Contract Disputes Act’s (“CDA”) six year statute of limitations was triggered by certain communications and PowerPoint presentations it made to the Defense Contract Management Agency (“DCMA”), rather than the substantive cost impact information it later submitted. The Board denied the motion and held that the government’s claim accrued no earlier than the date it received Boeing’s substantive figures.

### ***Facts***

In July 2006, Boeing disclosed its intention to make accounting practice changes by consolidating its Anaheim, California, Accounting Business Unit (ABU) with its Huntington Beach, California ABU in early 2007. Boeing provided a briefing on the consolidation to DCMA’s divisional administrative contracting officer (DACO) on July 21, 2006. This briefing included a PowerPoint presentation outlining the general consolidation process, but did not cover the cost accounting practice changes with specificity.

Throughout November 2006 to February 2007, the DACO repeatedly implored Boeing to comply with the cost accounting disclosure requirements

contained in the FAR. On November 21, 2006, the DACO alerted Boeing to the gaps in its practice change disclosure and requested more details regarding the accounting system consolidation and any subsequent ramifications. The DACO noted that the subject contract contained FAR 52.230-6(b), requiring Boeing to submit a description of any cost accounting change, the total potential impact of the change on contracts containing a cost accounting standards (CAS) clause, and a general dollar magnitude (GDM).

As a result of the November 21 letter, Boeing made a second PowerPoint presentation on November 29, 2006 outlining the consolidation. The presentation stated that Boeing's Disclosure Statements were "awaiting final approval" and that it would provide both the statements and a cost impact submission "shortly." Boeing submitted two Disclosure Statements on December 21, 2006. DCMA noted in its acknowledgement of receipt that Boeing had yet to submit a GDM.

On December 29, 2006, the DACO again reached out to Boeing, citing the need for additional facts and details, stressing the urgency of the situation, and attaching the agenda for an in-person meeting scheduled in early January 2007. The agenda included language regarding Boeing's "delinquent" submission of cost impact statements and DCMA's inability to move forward with a reasonableness determination due to the lack of cost data provided. It is unclear whether the meeting ever took place.

In January 2007, Boeing submitted revised a Disclosure Statement with a roughly identical cover letter, as well as a forward pricing rate proposal and related briefing. The revised Disclosure statement was returned to Boeing on February 2, 2007 for inadequacy and failure to submit a GDM. On February 16, 2007, Boeing submitted a second revised Disclosure Statement with, for the first time, the required GDM. The DACO accepted this Disclosure Statement as adequate and forwarded it to DCAA for audit.

In June 2012, DCAA issued a memorandum rescinding prior satisfactory audits after the discovery of 17 inadequacies not disclosed in its earlier reports. On February 8, 2013, the DACO issued a contracting officer's final decision demanding payment of increased costs and related interest due to the accounting practice change.

On appeal, Boeing filed a "motion to dismiss the government's claim," contending that the claim accrued no later than February 2, 2007 and, accordingly, that the claim was untimely under the CDA six year statute of limitations. The government argued that the claim accrued no earlier than February 16, 2007, when Boeing finally submitted its GDM.

### ***ASBCA Holding***

The Board denied Boeing's motion, holding that its presentations did not trigger accrual of the government's claim, the government should not have to pursue cost impact information on its own where the FAR places the burden on the contractor to submit the GDM, and that the cost impact information provided was an inadequate substitute for a GDM.

#### **(1) Submission of GDM Necessary for this Claim Accrual**

The Board held that Boeing did not meet its contractual obligation to provide certain cost impact documents and figures under FAR 52.230-6, even though the DACO brought this failure to Boeing's attention several times. The decision states that claim accrual begins when the government knows it has a cause of action based on cost impact information; it is not enough for the government to simply be aware of a change. Under this standard, and citing to *Raytheon Company, Space & Airborne Systems*, ASBCA No. 57801, the Board found that this clause places the burden of submitting cost impact information on the contractor, that the government should not have to pursue cost impact information on its own, and that the failure to furnish this information impeded the government's ability to properly present its claim.

#### **(2) Lack of Sufficient Information in the Absence of GDM**

The Board also noted that Boeing did not show that it provided the government with sufficient cost impact information in the absence of a GDM, even though Boeing attempted to "cobble together various pieces of evidence to contend that the government had constructive knowledge of its claim" by February 2, 2007. Boeing's evidence included the DACO's deposition testimony, the PowerPoint presentations, and communications the parties exchanged between July 2006 – February 2007. The Board found that the PowerPoint presentations, despite the heavy reliance placed on them in Boeing's brief, were too vague and contradictory to serve as sufficient cost impact information. None of the information supplied to DCMA by Boeing communicated the precise cost impact, nor were they comparable to detailed price proposals. Thus, the information was insufficient for claim accrual.

#### **(3) January 19, 2007 Disclosure Statement**

The Board did, however, note that Boeing's January 19, 2007 revised Disclosure Statement leaves the door open for further appeal. Boeing avers, in a new declaration, that the information contained in its January 19 disclosure is "indistinguishable" from its second revised Disclosure Statement of February 16,

2007, thus triggering an earlier claim accrual and causing the government's claim to fall outside of the limitations period. This issue will presumably be fully discussed in a second appeal.



***Combat Support Associates***, ASBCA Nos. 58945, 58946

Oct. 22, 2014 | Judge McIlmail

By *Sonia Tabriz* | *Fox Rothschild LLP*

The Board denied the contractor's motion to dismiss appeals from Government claims for lack of jurisdiction, noting the contractor's failure to adequately address when the Government knew or should have known of its claims.

***Contracting Officer's Final Decisions***

Combat Support Associates (CSA) was awarded a contract by the Department of the Army (the Army) to provide support and security services in Kuwait (the Contract). In 2007, CSA submitted its fiscal year (FY) 2006 incurred cost submission (ICS). Upon receipt, the Army requested a formal letter confirming the submission of the ICS, a disc containing "the same information," and a "Schedule T." CSA had submitted these requested items by 20 May 2007.

On 17 June 2013, the Defense Contract Audit Agency (DCAA) issued a report on an audit of the ICS. After reviewing the DCAA audit report, the administrative contracting officer (ACO) issued two final decisions on 23 August 2013. The ACO disallowed and demanded repayment of certain disallowed direct costs for equipment as well as telephone and fax expenses. The ACO also disallowed certain indirect costs and unilaterally determined CSA's indirect cost rates for FY 2006.

On 2 October 2013, CSA timely appealed both final decisions to the Armed Services Board of Contract Appeals (ASBCA). On 20 March 2014, the DCAA Supervisory Auditor declared under penalty of perjury that "the supporting data related to [appellant's ICS] costs identified in the two (2) Government contracting officer final decisions dated August 23, 2013 was not provided to the auditors until after August 23, 2007."

### ***CSA's Motion to Dismiss Appeals for Lack of Jurisdiction***

CSA moved to dismiss both appeals for lack of jurisdiction, contending that the Army's claims were barred pursuant to the Contract Disputes Act (CDA). The CDA requires that a contract claim be "submitted within 6 years after the accrual of the claim." 41 U.S.C. § 7103(a)(4). As the proponent of the Board's jurisdiction, the Army had to establish by a preponderance of evidence that the Board had jurisdiction over the appeals. *See Reynolds v. Army & Air Force Exchange Service*, 846 F.2d 746, 748 (Fed. Cir. 1988).

A claim accrues under the CDA when "all events, that fix the alleged liability . . . and permit assertion of the claim, were known or should have been known." *Raytheon Missiles Systems*, 13 BCA ¶ 35,241 at 173,017 (citing FAR 33.201). To be timely, the Army's August 23, 2013 claims must have accrued on or after August 23, 2007.

The Army contends that it did not know or have reason to know whether costs in the ICS were allowable until CSA provided adequate "supporting data" establishing allowability. Relying on the DCAA Supervisory Auditor's declaration, the Army stated that the requisite supporting data was not provided until after August 23, 2007. Therefore, claims dated August 23, 2013, are timely under the CDA. CSA responded that a contractor is not required to submit supporting data with an ICS. Therefore, the Army's claims accrued no later than May 20, 2007, when CSA had completed its submission of the ICS.

### ***ASBCA's Holding***

According to the Board, CSA's argument "misses the point." The ASBCA noted that "[a]ppellant does not counter that, even without any supporting data, the government had, on 20 May 2007, the information it needed to know that it had the claims set forth in the ACO's August 23, 2013 final decisions" or "that the government had additional information before August 23, 2007 from which it knew or should have known its claims." Instead, CSA focused on whether the ICS met the applicable requirements – when the issue at hand was when the government knew or should have known of its claims.

Therefore, on the record before the Board, the Army had met its burden of establishing that the Board possessed jurisdiction to entertain the Army's claims. CSA's motion to dismiss was denied. But, the ASBCA also highlighted its "special obligation to satisfy itself of its own jurisdiction" and noted that the decision was subject to modification as the record develops.

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***Oswald Ferro v. United States Postal Service***, PSBCA No. 6485

Oct. 28, 2014 | Judge Pontzer

By *Laura Sherman* | *Wiley Rein LLP*

In this case, the PSBCA denied Appellant, Oswald Ferro's, claim for \$848,746.92 for additional services provided under his contract with the U.S. Postal Service ("U.S.P.S."). Mr. Ferro argued that he was not compensated for additional costs resulting from four bilateral amendments to the contract. Mr. Ferro acknowledged that he had agreed to each of the amendments, but argued that they amounted to an unconscionable bargain. The PSBCA found no evidence that the bargain was unconscionable and denied Mr. Ferro's claim.

Mr. Ferro provided mail transportation services under Contract No. HCR 11229 with the U.S.P.S. from July 1, 2001 to September 27, 2010. During the course of the contract, the contract was amended bilaterally on four occasions. Bilateral Amendment 1 required Mr. Ferro to use three tractors and three trailers, rather than the two of each required under the original contract. The remaining three bilateral amendments altered the contract rate depending on various factors including the price of tolls, gas, and fuel. After the contract was terminated, Mr. Ferro submitted a certified claim for \$848,746.92 based on the costs of running the third tractor and trailer as required under the first bilateral amendment to the contract. He argued that although the amendments were bilateral (without reservation), they amounted to an unconscionable bargain and, as a result, he was not fully compensated.

Ultimately, the Board determined that Mr. Ferro had no right to additional compensation because the amendments amounted to an accord and satisfaction with the U.S.P.S. and they did not result in an unconscionable bargain. The Board noted that generally, bilateral amendments amount to an "accord and satisfaction" that "precludes further recovery" by an appellant. *Ferro*, PSBCA 6485 (citing *Valcon II, Inc. v. United States*, 26 Cl. Ct. 393, 397 (1992)). Because Mr. Ferro had not reserved or excepted any claim stemming from the amendments, the Board found that Mr. Ferro's claim would generally be barred.

However, since Mr. Ferro argued that the amendments amounted to an unconscionable bargain, the Board evaluated his claim on that basis. The Board

noted that an unconscionable bargain is one “which no man in his senses, not under a delusion, would make, on the one hand and which no fair and honest man would accept on the other.” *Ferro*, PSBCA 6485 (citing *Glopak Corp. v. United States*, 851 F.2d 334, 338 (Fed. Cir. 1988)). Applying this standard, the Board found that there was “no evidence . . . that Mr. Ferro was forced or coerced into entering the contract amendments in which he agreed to the three trucks and three trailers and other changes” and, accordingly, denied Mr. Ferro’s claim.



***Brad West & Assoc., Inc. v. Dept. of Transportation***, CBCA No. 3879

Sept. 18, 2014 | Judge Stern

By Steven A. Neeley | *Husch Blackwell LLP*

In this case, the CBCA held that the time period under the Contract Disputes Act (“CDA”) for a contracting officer’s final decision on a certified claim is not limitless. Although the CDA contemplates that a final decision may take longer than sixty days, any delay beyond the sixty day period must have a rational basis.

***Facts***

Appellant submitted a request for equitable adjustment (“REA”) under its contract with the Department of Transportation (“DOT”) on June 19, 2013, which DOT only partially granted. On February 29, 2014, Appellant submitted a certified claim in the amount of \$1,375,453 for the denied portions of its REA. Under the CDA, the DOT contracting officer had sixty days, or until approximately April 29, 2014, to issue a final decision on the claim. On March 14, 2014, DOT notified Appellant, without explanation, that it did not “anticipate” issuing a final decision on the claim until December 17, 2014.

Appellant treated DOT’s notification as a deemed denial and filed an appeal with the CBCA on May 29, 2014. On June 6, 2014, the CBCA gave DOT thirty days to either issue a final decision on the claim, or advise the Board of the reasons why a decision could not be provided. On June 16, 2014, DOT filed a motion to dismiss the appeal on the grounds that its notice to Appellant satisfied the CDA requirement to notify Appellant of the time when a final decision would be issued.

Although DOT's motion did not explain the reason for the delay in issuing a decision, its reply to Appellant's opposition offered three main reasons for the delay: (1) the claim was complex and sought over half of the original contract price; (2) the contracting officer had two other requests for final decisions pending when Appellant submitted its claim; and (3) the contracting officer did not have any prior involvement with the claim and was reviewing the request de novo.

### ***Discussion***

The CBCA denied the motion to dismiss and held that the reference in the CDA to "the time within which a decision will be issued" is not a limitless period. The Board explained that "[t]he issuance of a contracting officer's decision should not be delayed unless the Government demonstrates a rational basis for delay beyond the sixty-day period for review envisioned by the statute." The Board also noted that the date provided by the Government for the issuance of the decision must be definite and not approximate or anticipated, as was the case with DOT's notice to Appellant.

In the Board's view, DOT's delay in this case lacked a rational basis. The Board was not persuaded by DOT's reliance on the complexity of the claim because this "was not a new claim." DOT was already familiar with the underlying issues from the REA stage. The Board also rejected the asserted unavailability of DOT personnel and explained that "DOT has an obligation to assign additional attorneys to review the claim, if the designated personnel are unable to review it in a reasonable time frame."

