



Important Government Contract Claims Decisions From 2016: Maximizing Recovery and Strengthening Defenses

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Agenda

- Refresher: Claims 101
- Developments and Decisions
 - Key Developments
 - Reiterating the Basics
 - REA vs. Claim
 - Survey of Contractor and USG Claims
 - Collateral Impact of a USG Claim: Prime/Sub Dispute

Refresher: Claims 101

The Contract Disputes Act

- The Contract Disputes Act (CDA) provides framework for prosecution of claims
 - Codified at 41 USC § 7101, *et seq.*
- CDA applies to executive express or implied executive agency contracts for:
 - (1) the procurement of property, other than real property in being;
 - (2) the procurement of services;
 - (3) the procurement of construction, alteration, repair, or maintenance of real property; or
 - (4) the disposal of personal property.

What is a Claim?

- FAR 2.101 defines a “claim”:
 - 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 the contract.
 - A written demand or assertion seeking the payment of money in **excess of \$100,000** must be **certified** to qualify as a claim.
 - A **voucher, invoice, or other routine request for payment** that is **not in dispute** when submitted is **not a claim**. The submission may be converted to a claim, by written notice to the contracting officer if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

Crafting a CDA Claim

■ Entitlement

- Factual and legal basis for the claim
- Remedy granting clause or breach of contract

■ Quantum

- Equitable adjustment or breach damages
- Sum certain if requesting monetary adjustment/damages

■ CDA Certification

- Individual with authority must certify claims more than \$100,000
- FAR 33.207 provides a form certification

Submitting the Claim; Appealing the Final Decision

■ Submit claim to Contracting Officer (CO)

- Obligation to continue performance
- Six-year statute of limitations

■ CO issues Final Decision to grant/deny contractor claim or assert USG claim

- Must issue Final Decision on contractor claim within certain amount of time, or deemed denial
- Final and binding unless appealed

■ Appealing the Final Decision

- Initial appeal to Boards of Contract Appeals or US Court of Federal Claims
- Further appeal to US Court of Appeals for the Federal Circuit, and then to US Supreme Court

Key Developments

Key Developments

- Asserting defenses
- Fraud and other bad acts
- CDA statute of limitations

Asserting Defenses

- *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323 (Fed. Cir. 2010)
 - USG assessed liquidated damages despite contractor's request for time extensions
 - Contractor appealed Final Decision: sought time extensions and remission of liquidated damages
 - But never submitted an affirmative claim for a time extension
 - On appeal to Federal Circuit, contractor argued that excusable delay was a *factual defense* to USG's liquidated damages assessment
 - Federal Circuit held that it lacked jurisdiction because "a contractor seeking an adjustment of contract terms must meet the jurisdictional requirements and procedural prerequisites of the CDA, whether asserting the claim against the government as an affirmative claim or as a defense to a government action"
- Subsequent decisions have ameliorated concerns about the scope and reach of *Maropakis*

Asserting Defenses

- *Jane Mobley Assocs. v. GSA*, CBCA No. 2878, 16-1 BCA ¶ 36209
 - Decision is critical of *Maropakis*
 - If *Maropakis* is applied to “any defense raised by a contractor . . . that is not in the nature of an adjustment of contract terms or not seeking separate monetary relief, the ‘drastic consequence’ could well be that the contractor’s appeal is never able to be heard on the merits”
 - Key inquiry: does defense seek an adjustment or other entitlement under the contract; what relief is requested
 - “Where the contractor is merely ‘appealing and defending a Government claim [and] not asserting its own claim for relief,’ the strict rules of the CDA do not apply to the contractor’s defense”
 - Look to underlying purpose of defense, not labels

Fraud and Other Bad Acts

- *Laguna Constr. v. Carter*, 828 F.3d 1364 (Fed. Cir. 2016)
 - Submission of vouchers inflated by employees' fraudulent acts of accepting kickbacks constituted violations of the Allowable Cost and Payment clause
- *Supreme Food Service GmbH*, ASBCA No. 57884, 2016 WL 3264699
 - Board possesses jurisdiction over fraud-in-the-inducement allegations
- *ERKA Constr.*, ASBCA No. 57618, 16-1 BCA ¶ 36301
 - Contractor breached by allowing its employees or subcontractors to steal fuel, even though there was "little evidence" tying ownership/upper management to theft
- *Kellogg Brown & Root Servs., Inc.*, ASBCA No. 57530, 16-1 BCA ¶ 36449
 - Board denies Government motion to dismiss/stay, based on pendency of related FCA case

CDA Statute of Limitations

- *Kellogg Brown & Root Servs., Inc. v. Murphy*, 823 F.3d 622 (Fed. Cir. 2016)
 - Found that claim did not accrue because there was not a “sum certain”
- *Crane & Co.*, CBCA 4965, 2016 WL 6639729
 - Finds claim accrued even though all costs resulting from change/breach had not been incurred

Survey of 2016 Decisions

Reiterating the Basics: Sum Certain

- *Govt. Servs. Corp.*, ASBCA No. 60367, 16-1 BCA ¶ 36411
 - Sum certain must be “clear and unequivocal statement” that provides CO with “adequate notice” of the claim amount
 - Sum certain can be based on estimated and approximate costs
- *Strobe Data, Inc.*, ASBCA No. 60123, 16-1 BCA ¶ 36214
 - Claim asserted payment of a “minimum” amount
 - Unequivocal assertion in Board complaint could not cure lack of sum certain stated in underlying claim

Reiterating the Basics: Certification

- *Richter Developments, Ltd. v. GSA*, CBCA No. 5119, 16-1 BCA ¶ 36306
 - Final Decision issued on an uncertified claim cannot cure jurisdictional defect
- *ABS Development Corp.*, ASBCA No. 60022, *et al.* (2016)
 - Typed name in “*Lucida Handwriting*” font does not satisfy signature requirements for certification
 - Certification requires signature that can be authenticated

Reiterating the Basics: Presentment

- *Regency Constr., Inc. v. Dept. of Agric.*, CBCA Nos. 3246, 4356, 16-1 BCA ¶ 36468
 - Contractor desired to recover certain contract administration costs, but did not present a claim for these costs to the CO
 - Contractor argued that these costs generally were “part of the quantum associated with the changes experienced on the project”
 - CBCA lacked jurisdiction because the contractor failed to mention these costs to the CO, and the CO had no basis to evaluate the requested costs

Reiterating the Basics: Timeliness of Appeal

- *Bushra Co.*, ASBCA No. 59918, 16-1 BCA ¶ 36355
 - Appeal after 90 days untimely
 - USG termination letter did not explain right to appeal within 90 days, but contractor did not allege it was misled about timing requirements for appeal
- *Mansoor Int'l Dev. Servs.*, ASBCA Nos. 59466, et al, 16-1 BCA ¶ 36376
 - Appeal after 90 days untimely
 - CO Final Decisions either failed to mention appeal rights or were otherwise defective, but contractor “had received notice of its appeal rights under this contract, demonstrated an understanding of the 90-day limitation for appealing here, and had access to counsel to advise it upon the subject”
- *Access Personnel Servs., Inc.*, ASBCA No. 59900, 16-1 BCA ¶ 36407
 - Appeal after 90 days (and almost 4 years late) excused
 - CO Final Decision denying claim did not include rights of appeal language, and contractor demonstrated that it was “misled and prejudiced” through “detrimental reliance” by the USG’s failure to provide notice of appeal rights

Reiterating the Basics: Timeliness of Appeal

- *Military Aircraft Parts*, ASBCA No. 60139, 2016 WL 3353870
 - Contractor submitted claim for breach of contract arising from USG termination for default, but did not timely appeal USG termination for default
 - Found that breach of contract claim was really an “implicit challenge” to the default termination
- *Guardian Angels Med. Serv. Dogs, Inc. v. United States*, 809 F.3d 1244 (Fed. Cir. 2016)
 - Contractor requested that CO reconsider default termination decision issued
 - CO’s willingness to consider additional evidence “vitiates the finality of her original default termination notice”
 - Contractor timely appealed to COFC within 12 months of receiving CO’s letter reiterating the default determination after contractor failed to provide additional evidence

Reiterating the Basics: Deemed Denial

- *Aetna Gov't Health Plans*, ASBCA No. 60207, 16-1 BCA ¶ 36247
 - CO's statement that he "anticipated issuing a decision upon the claim 'within 90 days of receipt' of the [requested] documentation" was a deemed denial
 - CO must either issue Final Decision within 60 days or "pinpoint a particular date" to issue the Final Decision

REA vs. Claim

- *Creative Times Dayschool*, ASBCA No. 59507, 2016 WL 6539945
 - Contractor initially submitted CDA claim to CO, then downgraded it to an REA, and then later reconverted it to a CDA claim
 - Contractor could not recover professional fees for preparation of REA
- *Northrup Grumman Corp. v. United States*, 126 Fed. Cl. 602 (2016)
 - No spoliation sanctions for Postal Service's failure to impose a litigation hold after contractor submitted a comprehensive REA

Authority / Ratification

- *Baistar Mechanical, Inc. v. United States*, – Fed. Cl. –, 2016 WL 5404169 (2016)
 - Claim for out-of-scope emergency snow removal work ordered by COR
 - COFC acknowledged that emergency exception to the actual authority requirement is “limited,” but concluded that the contract itself provided the COR with authority to order emergency work
- *Americom Gov’t Servs., Inc. v. GSA*, CBCA No. 2294, 16-1 BCA ¶ 36320
 - GSA sought recoupment (through deductions of other contract amounts) from contractor after GSA determined the licenses and services provided by contractor were not properly procured
 - Contractor argued it was entitled to compensation based on institutional ratification because GSA accepted benefits of licenses and services
 - CBCA rejected GSA’s argument that no one with “actual or constructive authority knew the benefits were continuing and still being received”; found that knowledge was imputed to the CO

Disclaimer, Release, As Is/Where Is

- *José Gustavo Zeno v. Dept. of State*, CBCA No. 4867, 2016 WL 2640622
 - Contractor challenged termination for cause of personnel services contract
 - Contractor executed release during closeout stating that he “does hereby remise, release, and discharge the Government, its officers, agents and employees of and from all liabilities, obligations, claims and demands whatsoever under or arising from the said contract”
 - Release construed not to waive ability to challenge termination decision
- *Douglas P. Fleming, LLC v. Dept. of Vetr. Affairs*, CBCA Nos. 3656, et al, 16-1 BCA ¶ 36509
 - Contractor claim for additional administrative costs denied because of bilateral “no cost” modification which deleted work, added other work, changed the completion date
 - Release stated: “[T]he consideration (\$0.00 change in total contract price) represents a complete equitable adjustment for all costs, direct and indirect, associated with the work and time agreed herein, including but not limited to all costs incurred for extended overhead, supervision, disruption or suspension of work, labor inefficiencies, and this change’s impact on unchanged work”

Disclaimer, Release, As Is/Where Is

- *BMC Contracting, LLC v. Dept. of Agric.*, CBCA No. 4939, 2016 WL 3405326
 - “As is” clause in timber sales contract solicitation precluded claim for mutual mistake for regarding quality and value estimates
- *Marine Metal, Inc. v. Dept. of Transp.*, CBCA No. 4740, 16-1 BCA ¶ 36386
 - “As is, where is” and other clauses precluded contractor claim based on mutual mistake, discrepancies in the vessel’s weight, and alleged inspection restrictions and misdescription of the vessel’s weight

Constructive Change

- *Zafer Taahhut Insaat ve Ticaret A.S.*, 833 F.3d 1356 (Fed. Cir. 2016)
 - Government's negotiations with Pakistan to re-open contract route (sovereign act) did not amount to fault establishing constructive change
- *Baistar Mechanical, Inc. v. United States*, – Fed. Cl. –, 2016 WL 5404169 (2016)
 - Claim denied because contract provided CO with exclusive authority to make changes to the scope of work, and contractor only received direction from COR

Cost Allowability / Cost Accounting

- *Mission Support Alliance*, CBCA No. 4985, 2016 WL 6639730
 - Claim for cost of purchasing insurance denied where contractor failed to notify and obtain prior consent from CO
- *Raytheon Co., Space & Airborne Systems*, ASBCA No. 58068, 16-1 BCA ¶ 36484
 - CO violated requirement to consider all criteria for determining materiality of change to cost accounting practices

Delays

- *Regency Constr., Inc. v. Dept. of Agric.*, CBCA Nos. 3246, 4356, 16-1 BCA ¶ 36468
 - Contractor (and its subcontractor) were delayed due to the presence of sewer contractor on site
 - Contractor argued that agency was liable for delay “because the agency warranted with the amendment [to the contract] that the sewer contractor would be finished before work began”
 - CBCA found that agency’s statement constituted a warranty, and therefore, contractor could recover for delay under Suspension of Work clause

Terminations

- *Military Aircraft Parts*, ASBCA No. 60290, 2016 WL 899837
 - Contractor can pursue breach claims independent of pending termination settlement where breach claims relate to other orders and provide different relief
- *Third Coast Fresh Distrib.*, ASBCA No. 59696, 16-1 BCA ¶ 36340
 - Default termination appropriate where contractor agreed in contract to take ownership and deliver goods using its own personnel and trucks but then subcontracted for that work
- *Avant Assessment*, ASBCA No. 58986, 16-1 BCA ¶ 36505
 - Default termination converted to convenience termination where government presented no evidence of contractor's failure to meet delivery schedule and no evidence contractor failed to deliver required number of items

Terminations

- *Bass Transport. Servs.*, CBCA No. 4995, 16-1 BCA ¶ 36464
 - Board lacked jurisdiction over contractor's certified claim where, although appeal was timely, consideration of appeal would require consideration of prior default termination, which contractor had not timely appealed
- *Missouri Dept. of Soc. Servs.*, ASBCA No. 59191, 2016 WL 7026002
 - Contractor entitled to equitable adjustment for increased costs of performing remaining work caused by government's partial termination for convenience of requirements contract

Bad Faith

- *DekaTron Corp. v. United States*, 128 Fed. Cl. 115 (2015)
 - Alleged that CO:
 - Did not remedy the COR's bad faith conduct against contractor (harassing employees, hindering performance)
 - Did not exercise independent judgment when it decided not to exercise option
 - Intended to harm contractor
 - “Where, as here, there have been serious allegations of improper conduct of a discriminatory nature by government procurement officials, which in this case were independently confirmed by the DOL’s EEO, a plaintiff must be given the opportunity to prove its case”
 - But reaffirms that “bad faith is very difficult to establish”

Quantum and Failure of Proof

- *Northrop Grumman Computing Sys., Inc. v. United States*, 823 F.3d 1364 (Fed. Cir. 2016)
 - Contactor assigned all payments due under contract to a third-party in exchange for payment of expected contract profit amount
 - Federal Circuit found that contractor was not damaged (and harmed) by USG's alleged refusal to exercise option because the contractor's "financial position is equal to what it expected to profit had the Government exercised all the option years"
- *BAE Sys. San Francisco Ship Repair*, ASBCA Nos. 58810, 59642, 16-1 BCA ¶ 36404
 - "Estimates are a preferred method of pricing equitable adjustment only where actual costs are not available"
 - Contractor initially relied on estimates, and later supplemented evidence of actual labor and material costs
 - Contractor not prevented from using job labor status reports to demonstrate labor hours even if evidence included some disallowable hours or charging errors

Quantum and Failure of Proof

- *Douglas P. Fleming, LLC v. Dept. of Vetr. Affairs*, CBCA Nos. 3656, et al, 16-1 BCA ¶ 36509
 - Contractor's failure of proof of entitlement "works against it in our consideration of these appeals"
 - Contractor's estimated costs are less "compelling" where "actual costs should be available"
- *Native American Constr. Servs., LLC v. Dept. of Intr.*, CBCA No. 5232, 2016 WL 5958866
 - Appeal denied where contractor offered no evidence to prove amount of increased costs resulting from alleged breach
 - Contractor's attempt in post-award brief to present damages calculation based on GSA equipment and labor rates was flawed because no evidence that these were contractor's actual costs
- *Sys. Fuels, Inc. v. United States*, 818 F.3d 1302 (Fed. Cir. 2016)
 - Spent nuclear fuels case
 - Contractor entitled to damages arising from loading fuel into storage casks due to USG breach in accepting fuel
 - Potential future USG costs to reload fuel into transportation casks was speculative

Collateral Impact of a USG Claim

- *BAE Sys. Land & Armaments, L.P. v. Ibis Tek, LLC*, – F.3d –, 2016 WL 3281844 (D. Minn. 2016)
 - USG issued Final Decision determining that subcontractor had submitted defective cost and pricing data, and USG recouped corresponding debt from prime contractor
 - Although prime contractor sponsored subcontractor's appeal of Final Decision before ASBCA, prime contractor sued subcontractor in US District Court for indemnification of amounts recouped by USG
 - US District Court determined that indemnity obligations accrued when prime contractor suffered a loss (*i.e.*, when the Final Decision was issued and USG recouped debt)
 - Decision demonstrates why it is critical to review indemnification clauses in subcontracts

Final Thoughts

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- Be diligent and vigilant
- Be precise: words matter

Contact us with any questions

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