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Pre-Contract Challenges to Government Assertions of CAS Noncompliance and Cost Disallowances

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Contractors regularly challenge government assertions regarding Cost Accounting Standards (CAS) compliance or cost allowability through the disputes process under the Contract Disputes Act (CDA).[1] Disputes under the CDA presume, and in fact require, that a contract exists. There are circumstances, however, where the government's contentions regarding CAS compliance and administration or cost allowability may impact the contractor's interests with regard to potential future contracts. In this context, the question arises as to whether a contractor may properly obtain prospective judicial relief in challenging government assertions or interpretations *prior* to contract award. That question is the focus of this article.

The potential pre-award problems associated with CAS compliance and cost allowability challenges become particularly important when a contractor has both fixed-price and cost reimbursement contracts in its business portfolio. For example, if the government improperly asserts that a type of cost is expressly unallowable under the Federal Acquisition Regulation (FAR) cost principles, which in turn may violate CAS (e.g., CAS 405, Accounting for Unallowable Costs), the determination affects not only the contracts under which such a determination is made but also a contractor's proposals. Indeed, with regard to firm fixed price (FFP) contracts, there is generally no mechanism for relief after the FFP contract is negotiated, even when the government's assertion is later proven incorrect.

To remedy this problem, a contractor may well consider two potential avenues to prospective judicial relief: (1) a Court of Federal Claims (COFC) pre-award protest under the Tucker Act or (2) an Administrative Procedures Act (APA) action.[2] Of course, the contractor may also be free to walk away from the potential contract, but that solution is not particularly satisfactory to the contractor and may not be rational government procurement policy if the dispute is one that arises from an improper

continued on page 23

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continued from page 1

interpretation of law or regulation that can be resolved so the parties can both move forward productively.

A recent Federal Circuit decision, *Boeing Company v. United States*,[3] sheds some light on whether contractors may obtain such prospective relief. As discussed below, while *Boeing* involves a post-contract award dispute regarding the pricing of unilateral cost accounting changes, the decision indicates that in some circumstances, contractors may be able, and in fact may be *required*, to seek pre-award relief in order to preserve post-award challenges to the government's interpretation of contract terms or FAR provisions that are not incorporated into the contract but may negatively impact contract performance.

As set forth below, we explore the contract waiver doctrine analyzed in both the Federal Circuit's and the COFC decisions. These decisions also may instruct contractors to pursue prospective relief in order to avoid waiver and proactively protect their interests. Critically, the decisional law interpreting the Tucker Act and the APA, however, complicates matters and creates doubt as to the viability of such pre-award relief.

While such doubt is echoed in *Boeing*, the Federal Circuit did not definitively rule out the possibility that a contractor may waive contract claims by failing to obtain pre-award judicial review as may be required in certain circumstances. Accordingly, we discuss how contractors should consider filing an APA or bid protest action to prospectively dispute the government's application or interpretation of certain regulations such as the FAR cost principles or the CAS.

In addition, we also explore the potential application of this analytical framework to other government contracts regulatory regimes, such as the brewing potential disputes regarding cybersecurity and business systems compliance. In particular, we explore *Boeing*'s concepts of waiver and whether any avenue of relief may be available to contractors when attempting to comply with the requirements of these often-disputed regulatory regimes.

Background

The *Boeing* case involves the appropriate resolution of cost impacts resulting from accounting practice changes. Specifically, on January 1, 2011, Boeing implemented eight simultaneous accounting changes.[4] The Defense Contract Management Agency (DCMA) cognizant federal agency official (CFAO) for Boeing determined that these changes were "unilateral," meaning that while Boeing had changed its accounting practice from one compliant practice to another, the government's CFAO did not deem the changes to be desirable and, therefore, would not pay aggregate increased costs.[5] Boeing was asked to prepare and submit an estimate of the cost impacts associated with the accounting practice changes, known as a gross dollar magnitude, or "GDM," proposal.[6]

Based on its GDM, Boeing determined that while two changes increased cost to the government, the other changes decreased cost to the government.[7] Accordingly, Boeing asserted that there were no increased costs to the government in the aggregate as a result of the unilateral accounting practice changes.[8] The government disagreed. Finding that FAR 30.606 required that the offsetting cost impacts must be ignored, the contracting officer (CO) focused only on those accounting practice changes that caused increased cost to the government and issued a final decision asserting a demand that Boeing pay the government $1,064,773 with regard to a representative contract.[9] Boeing began paying the government on the claim and timely appealed the final decision to the COFC.[10]

The Court of Federal Claims Decision

On May 29, 2019, resolving dispositive cross-motions, the COFC issued its decision regarding Boeing's challenge to what Boeing claimed was the government's improper administration of CAS. The court determined that Boeing's complaint advanced three counts, which the court characterized as contract claims, and a final count asserting an illegal exaction.[11] Specifically, Boeing alleged that the government had breached its contract[12] and had alternatively illegally taken funds from Boeing because adhering to FAR 30.606 violated the CAS statute, 41 U.S.C. § 1503(b). Boeing also sought a declaratory judgment that would confirm that the government's improper administration of the CAS applied to hundreds of contracts between Boeing and the government.[13]

In resolving the dispositive motions, the court started with the government's jurisdictional challenges to Boeing's illegal exaction claim. The court dismissed this claim, finding that Boeing had "failed to meet its burden of establishing that its illegal exaction claim is founded on a money-mandating statute [and] must be dismissed for lack of subject matter jurisdiction."[14]

The court then turned briefly to the government's alternative jurisdictional challenge, which alleged that Boeing's claim that FAR 30.606 is illegal should have been brought as a claim under APA in a district court action. Boeing's failure to do so, the government asserted, precluded jurisdiction before the COFC under the CDA or the Tucker Act. The court found these arguments to be unpersuasive and did not grant the government's motion to dismiss on this basis.

Turning from these jurisdictional challenges, the court then addressed the parties' cross motions for summary judgment and the government's affirmative defense of waiver. As an initial matter, the court examined Boeing's citation to *GHS Health Maintenance Organization, Inc. v. United States* (*GHS II*),[15] which Boeing argued

compelled rejection of the government's waiver defense. In rejecting this argument, the court's rationale was that the Federal Circuit's decision in *GHS II* contained only a "short analysis" that did not explain why the government's waiver defense was found "frivolous," and the Federal Circuit had not cited any of the lower court's discussion of waiver. Accordingly, the court determined that the Federal Circuit's *GHS II* decision did not compel the court to reject the government's waiver defense.[16]

The court then rejected Boeing's argument that FAR 30.606 was not applicable to the representative contract because it was nowhere expressly incorporated into the agreement. Based on its finding that FAR 30.606 was applicable to the government's administration of the representative contract, and Boeing's acknowledgment that it was aware of FAR 30.606 when it entered into that contract in 2008, the court determined FAR 30.606 was applicable to the representative contract.[17]

The next question addressed was whether the applicability of FAR 30.606 created a patent ambiguity that Boeing had failed to timely challenge prior to entering the representative contract. Finding that a government contractor has an obligation to resolve patent ambiguities in a solicitation, the court reasoned that Boeing was obligated to address what it viewed to be a clear violation of the CAS statute that was required by FAR 30.606 before entering into the contract. Boeing's failure to raise the issue, therefore, precluded its contract claim.[18] The court noted that "Boeing consistently entered into contracts with the government, after FAR 30.606 became effective, without challenging this regulation in any type of pre-award protest or negotiation with the government, before its contracts were awarded."[19] Boeing's failure to do so, in the court's view, foreclosed Boeing's contract claims as a matter of law.[20]

Finally, the court turned to the government's affirmative defense of waiver. Framing the question regarding waiver narrowly, the court focused on two prior Federal Circuit decisions discussing how a plaintiff waives its basis to challenge the government's adherence to a preexisting regulation in its administration of a contract: *LaBarge Products, Inc. v. West*[21] and *American Telephone and Telegraph Company v. United States*.[22]

In *LaBarge*, the Federal Circuit held that a contractor is not estopped, due to an initial failure to protest, from later seeking reformation of a contract in circumstances where a government official has made a contract that is not authorized and that is in violation of law.[23] In declining to extend *LaBarge* to the circumstances in *Boeing*, the court first distinguished *LaBarge* on the basis that the government officials in that case had engaged in unlawful conduct. Moreover, the court explained, "it would be an improper extension of *LaBarge* to conclude that a sophisticated contractor like Boeing can enter into a contract with the government, in this case three years after FAR 30.606 went into effect, and not waive a challenge to the legality of that regulation."[24]

The court then considered Boeing's bases advanced to avoid application of the *AT&T* decision. In *AT&T*, the Federal Circuit had found waiver where a contractor had failed to raise alleged violations of law (relating to the selected contract type) at the time of contract negotiation. The court rejected Boeing's bases for distinguishing *AT&T* and held that, consistent with the principles in *AT&T*, Boeing had waived its challenge to FAR 30.606 when it entered into the representative contract. Thus, the court granted the government's motion for summary judgment with regard to Boeing's three contract claims. The court did not find that Boeing's illegal exaction claim had been waived, but as noted above, that claim had been dismissed for lack of subject-matter jurisdiction.

The Federal Circuit's Decision

As discussed above, the COFC held that Boeing waived its ability to challenge the validity of FAR 30.606 by failing to object to the application of FAR 30.606 in its contract before contract award. The COFC characterized the asserted conflict between FAR 30.606 and the CAS statute as a "patent ambiguity" in Boeing's contract, in which Boeing should have challenged pre-award by filing a bid protest. The Federal Circuit reversed, holding that Boeing did not waive its challenge because the government had not shown that Boeing bypassed an avenue of relief on the merits from the agency, nor had the government shown that Boeing bypassed a judicial forum that would adjudicate its contention on the merits.[25]

The Federal Circuit explained that, contrary to the COFC's holding, the decision in *GHS II* was in fact binding because *GHS II* was "clear and to the point" on the issue of waiver given the similar nonnegotiable nature of the regulation at issue in *GHS II* and that of FAR 30.606 in the case of Boeing's contract. Specifically, the government's concession that it did not have the discretion to apply or not apply FAR 30.606 essentially rendered any "consent" to FAR 30.606 illusory, like the nonnegotiable contract provision in *GHS II*, which fatally undermined a finding of waiver. Moreover, the Federal Circuit explained that the COFC's reliance on the *AT&T* decision was misplaced, noting that the decision in *AT&T* was based upon a finding that the relief sought by AT&T could have been obtained from the agency during contract negotiation (i.e., changing the contract type from fixed-price to cost reimbursement) and, therefore, AT&T had waived its challenge.[26] Thus the Federal Circuit, in distinguishing *AT&T*, explained that Boeing had no effective remedy from the agency regarding FAR 30.606 where the government admitted it could not have provided such a remedy.

In addition, the Federal Circuit further explained *GHS II* did not definitively rule out the possibility of waiver "where, though relief from the agency was not available, a contractor or bidder bypassed, during the contract-formation process, an opportunity for a judicial ruling on the

merits of the objection later asserted in court." Despite mentioning two possible paths Boeing might have taken to obtain judicial relief—(1) an action under the APA and (2) a bid protest action under the Tucker Act—the Federal Circuit held that the government failed to meet its burden to establish how and where Boeing could have sought pre-award judicial review.[27]

Notably, the Federal Circuit did not rule on whether *either* action might have been viable. Instead, the Federal Circuit signaled doubt as to whether an APA action could have been sustained by Boeing to challenge the government's implementation of the CAS statute via FAR 30.606. The Federal Circuit pointed to the fact that the CAS statute expressly provides that judicial resolution of disputes over "contract price adjustment[s]" shall take place under the CDA and declares that "[f]unctions exercised under this chapter are not subject to sections 551, 553 to 559, and 701 to 706 of title 5," which arguably excludes coverage under the APA's judicial review provisions.[28] The Federal Circuit's reference to *Thunder Basin Coal v. Reich*[29] casts further doubt on the applicability of the APA. *Thunder Basin Coal* generally held that the "'detailed structure for reviewing violations' of a statutory provision or regulation precluded a 'pre-enforcement challenge,'" suggesting that APA review may not be available even assuming that section 1502(g) did not preclude APA review. The potential relevance of *Thunder Basin Coal* and whether a pre-enforcement APA action is available could become more pronounced in other government contracting contexts where a challenged statute does not expressly prohibit or address the APA but evidences an intent to preclude pre-enforcement APA challenges.

With regard to pre-award bid protest relief, the Federal Circuit left the door open, suggesting that the government's waiver argument could find support under the Federal Circuit's recent decision in *Acetris Health, LLC v. United States*.[30] In *Acetris*, the Federal Circuit affirmed the COFC's finding of jurisdiction to hear a plaintiff's challenge to a clear government position about a requirement that would likely make the plaintiff ineligible to compete for likely future government procurements for which it was likely to submit bids.[31] Under this standard, the government presumably could have asserted that Boeing should have been aware of the government's definitive position as to its interpretation of the CAS statute and FAR 30.606 that could have negatively impacted its manner of performance, and, as a result, the time to challenge this definitive position regarding CAS was *before* contract award.

The Practical Implications of the Federal Circuit's Boeing Decision

It remains to be seen whether the government will accept the Federal Circuit's invitation to demonstrate how a contractor may waive contract claims by failing to pursue pre-award judicial avenues for relief. The Federal Circuit questioned whether an APA action was viable but left open the possibility of pre-award bid protest relief. Additionally, as noted in the hypothetical above regarding the interplay of CAS 405 and FFP contracts, a contractor will not generally be able to obtain a money judgment against the government after the fact under FFP contracts absent a reopener clause. The lack of such retrospective relief suggests that a pre-award bid protest or APA action may be properly asserted. Accordingly, we explore below these potential pathways and the significant obstacles that likely exist.

In addition, we briefly explore how *Boeing*'s analytical framework could be applied in other government contract contexts, such as cybersecurity and business systems, and whether aggrieved contractors are able to seek redress of perceived government errors and unreasonable actions regarding the application and interpretation of such requirements.

Viability of Pre-award Challenges to Government Regulatory Interpretations

Recalling the hypothetical above, *Boeing* instructs that there are two potential pre-award avenues to seek redress of an erroneous government interpretation of the cost principles and CAS: (1) an APA action or (2) a bid protest action under the Tucker Act. As discussed below, while there is a reasonable basis to assert that either a federal district court (FDC) or the COFC has jurisdiction to hear a pre-award claim based on the government's violation of the CAS in the context of negotiating an FFP, there is significant uncertainty whether either forum will determine that it has jurisdiction to hear a pre-award dispute.

As a threshold matter, recent government contract decisions concerning bid protests and APA actions related to other transaction agreements (OTAs) cast uncertainty whether either forum would hear such pre-award disputes where both forums have seemingly declined to take jurisdiction.[32] In addition, where an FDC determines that an adequate remedy exists under the CDA (i.e., a claim that is asserted under an existing contract) or the Tucker Act for bid protests, it very often will dismiss an APA action for lack of jurisdiction. These cases highlight the risk that both forums could decline jurisdiction and could leave contractors without any avenue for relief.

Accordingly, we discuss in turn below the strategies for getting into each forum, addressing jurisdictional issues, relevant requirements to establish a claim, relevant timing considerations, standards of review, and the potential limitations for each type of claim.

Bringing an Action Under the APA in Federal District Court

1. Jurisdictional Issues

As a general matter, where the CDA or Tucker Act applies, an FDC lacks jurisdiction under the APA.[33] This means that an FDC has jurisdiction involving an issue

relating to a government contract only when there is no adequate remedy at law, e.g., relief under the CDA or Tucker Act, or some other source of law. An FDC's jurisdictional grant has generally been interpreted narrowly, and FDCs have tended to make this grant as narrow as possible.[34] Nevertheless, an FDC may have jurisdiction when (1) the relief sought is other than one for money damages, (2) there is no other adequate remedy available under the Tucker Act, and (3) nothing expressly or impliedly forbids the relief sought.

2. Nature of the Relief Sought

An important aspect of whether an APA claim may be viable depends on the nature of the relief sought—specifically, whether the claim is properly construed as seeking declaratory and injunctive relief rather than a claim for money damages. For example, in *Bowen v. Massachusetts*, the Commonwealth of Massachusetts sought declaratory and injunctive relief under the APA regarding the government's disallowance of certain costs associated with the state's Medicaid program.[35] The state also sought a declaratory judgment from the FDC that the government's withholding of such amounts from future advances to the state was a violation of the Medicaid statute that did not permit the withholding of the advances.[36] Notably, the Supreme Court held that the state's claim was not one for money damages and was proper under the APA even though a payment of money would result if the Court ruled in the state's favor.

In addition, the Court explained the claim was not for compensatory relief for an injury suffered, which is generally the character of a money damages claim. Instead, the state's suit was in the nature of an equitable action for specific relief seeking reimbursement to which the state was allegedly already entitled, rather than money in compensation for losses suffered as a result of the disallowance. The Court also noted that it was "not willing to assume, categorically, that a naked money judgment against the United States will always be an adequate substitute for prospective relief fashioned in the light of the rather complex ongoing relationship between the parties."[37] Therefore, the Court determined that the state's APA suit was properly before the FDC.

In contrast, an FDC could determine that a claim is distinguishable from *Bowen* because the claim is really a CDA claim, and when the CDA applies, it provides the exclusive mechanism for dispute resolution. Specifically, in *Lockheed Martin Corp. v. Defense Contract Audit Agency*, Lockheed Martin Corp. (Lockheed) sought a declaratory judgment under the APA that the Defense Contract Audit Agency's (DCAA) revocation of Lockheed's direct billing authority under many of its contracts was arbitrary, capricious, an abuse of discretion, and otherwise contrary to the FAR and CDA and an injunction to stop DCAA from rescinding Lockheed's direct billing authority and prevent monies under such contracts from being withheld.[38] The court found that Lockheed's claim was really an issue "related to" Lockheed's contracts and would be a "nonmonetary dispute" that the COFC is empowered to resolve. The court noted that the COFC's jurisdiction over CDA claims is not limited to purely monetary disputes and that Lockheed had the ability to avoid the revocation of its direct billing if Lockheed voluntarily deducted the disputed amounts from its billings for all impacted contracts. As such, in the FDC's view, Lockheed's claim could be converted into a purely monetary one for the disputed sums and Lockheed could be adequately protected from the withheld amounts by seeking interest on the amounts that may have been due if the payments were unlawfully being withheld. Therefore, the FDC determined that the COFC was the proper venue to hear the dispute because the CDA applied and the COFC could afford an adequate remedy.

Another important consideration regarding the viability of an APA claim is whether an adequate remedy exists at law, such as under the COFC's Tucker Act jurisdiction for contract claims or bid protests.[39] For instance, consider the situation where a significant component of the APA claim seeks prospective relief on future contracts that have yet to be entered into because, as noted above, there is generally no mechanism to recoup the disputed disallowed costs on an FFP contract and therefore no claim to be made at law. In other words, a contractor in our hypothetical example will not generally be able to obtain a money judgment against the government after the fact under such FFP contracts absent a reopener clause, supporting the position that there is a lack of an adequate legal remedy. Further supporting an FDC's jurisdiction is the fact the COFC does not have general equitable powers, which indicates that the remedy available from the COFC may not provide complete relief.

3. Other APA Requirements—Challenging Final Agency Action

In addition to the jurisdictional requirements discussed above, an APA challenge must be made to "final agency action."[40] The final-action requirement is generally satisfied when either (1) an applicable statute or regulation clearly demonstrates that a particular action is final or (2) the doctrines of ripeness and exhaustion demonstrate that agency action is ready for review.[41]

4. Timing

As general matter, many statutes authorizing judicial review of particular agency actions also impose filing deadlines for such challenges.[42] Absent a specific statutory deadline, civil actions against the United States must be filed within six years of when the claim accrued or originated.[43] Accordingly, assuming that an APA claim is proper and no statute or regulation imposes a specific deadline, an APA claim must generally be brought within six years of its accrual, which in our hypothetical is likely the initial determination/disallowance that the disputed costs are expressly unallowable.

5. Standard of Review

The standard typically applied in an APA action as set forth in 5 U.S.C. § 706 is that a court will set aside final agency action where it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[44]

6. Potential Limitations

The Federal Circuit in *Boeing* cast doubt on whether an FDC had jurisdiction to hear an APA action challenging the government's interpretation of FAR 30.606 and the CAS statute. The Federal Circuit pointed to title 41, section 1502(g), which highlighted the fact that the CAS statute expressly provides that judicial resolution of disputes over "contract price adjustment[s]" shall take place under the CDA and declares that "[f]unctions exercised under this chapter are not subject to sections 551, 553 to 559, and 701 to 706 of title 5," which, according to the Federal Circuit, arguably excludes coverage under the APA's judicial review provisions.[45] While the court noted a pre-formation action would be outside the CDA and questioned how a non-CDA pre-formation route of a judicial relief was available by routing the dispute to the CDA, the court went on to question the viability of an APA action by citing to the CAS APA bar.[46] Importantly, the Federal Circuit may be overstating the breadth of this provision excepting the CAS statute from APA review because the APA bar only applies to the functions set forth more broadly in section 1502.

The functions described in the CAS statute are (1) the authority of the CAS board to "prescribe, amend, and rescind cost accounting standards, and interpretations of the standards"; (2) when use of CAS is mandatory; (3) the required CAS Board actions for prescribing the CAS and interpretations (which are set forth in 48 C.F.R. § 9904); and (4) the requirement that CAS Board issues implementation regulations of the CAS (which are incorporated into FAR chapter 99).[47] Thus, a more reasonable construction of section 1502(g) arguably is that the APA bar it mandates applies only to direct challenges of the CAS rules themselves as issued by the CAS Board. This is distinguishable from a challenge to a CO or other procurement official's unreasonable interpretation/application of such CAS or FAR related to the CAS during the contract negotiation and administration process. This construction is supported by the fact that the regulation Boeing challenged was promulgated by the FAR Council, not the CAS Board.[48]

Accordingly, why section 1502(g) acts as a limit on an FDC's jurisdiction to assess the legality of FAR 30.606 is difficult to discern from the Federal Circuit's decision. Therefore, an APA claim is arguably properly brought within the FDC's jurisdictional purview.

At bottom, there is significant risk that, given the complexities of the underlying merits of a potential dispute, an FDC may be unwilling to weigh in on such matters even though the claim might not get dismissed for lack of jurisdiction. As a practical matter, an FDC may be inclined to find ways out of hearing the dispute because, for example, the merits of the dispute raise complicated government contracting issues that the FDC is ill-equipped to resolve or for which it may view the COFC as having better expertise because it involves issues closely related to a contractual dispute.

However, there is case law supporting FDC jurisdiction where "a [district] court will not find that a particular claim is one contractually based merely because resolution of that claim requires some reference to a contract."[49] Therefore, some FDCs have been willing to weigh into these disputes. Nonetheless, an FDC could very likely dismiss the APA action if the contractor filed an identical claim in another forum.[50]

Pre-Award Protest at the Court of Federal Claims

1. Standing and Jurisdictional Issues

In general, a protester has the burden to establish the requisite standing to invoke the COFC's jurisdiction over a pre-award bid protest pursuant to 28 U.S.C. § 1491(b)(1). The protester must establish that it is "an interested party objecting to (1) a solicitation by a Federal agency for bids or proposals for a proposed contract or (2) to a proposed award or the award of a contract or (3) any alleged violation of statute or regulation in connection with a procurement or a proposed procurement."[51] The decision in *Acetris* provides a framework for finding protest jurisdiction to challenge errant government interpretations of law or regulation. In *Acetris*, the COFC found that the protester had standing to challenge a procurement based on the procuring agency's erroneous interpretations of the Trade Agreements Act and the FAR that "would exclude Acetris from future procurements for other products on which it is a likely bidder."[52] Using the hypothetical scenario above or looking to the facts underlying *Boeing*, the likely jurisdictional hook under those circumstances is that there is a government violation of law (i.e., CAS or the relevant FAR provisions) that impacts a contractor's economic interest "in connection with a procurement" that gives standing and jurisdiction.

In the pre-award context, a direct economic interest is demonstrated when a protester has suffered a "non-trivial competitive injury which can be redressed by judicial relief."[53] A nontrivial competitive injury may be established in a variety of ways, including by showing harm to a contractor's bottom line or the economic stake of a protestor in having a solicitation carried out in accordance with applicable law.[54]

2. Standard of Review

The COFC will review challenged agency conduct pursuant to the standards set forth in the APA, 5 U.S.C. § 706.[55] Specifically, "the proper standard to be applied in bid protest cases is provided by 5 U.S.C. § 706(2)(A): a reviewing court shall set aside the agency action if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"[56]

3. Potential Limitations

To the extent that the same or a similar alleged violation of law is asserted in the context of a CDA dispute under an existing contract, the COFC may decline to take bid protest jurisdiction where the court determines the CDA disputes process is the proper mechanism to resolve the claim. However, a CDA claim would not likely fully resolve a potential protest of a different contract opportunity because the existing contract and the new contract opportunity may involve separate federal agencies making the relief obtained in a CDA dispute potentially nonbinding on the other agency. In addition, if the contract that is the subject of a CDA claim is cost reimbursement, relief under that contract will not be sufficient to afford relief if the other contract is FFP. As we previously noted, FFP contracts generally lack mechanisms to allow a contractor to renegotiate prices, absent a reopener clause, that are nonstandard and rarely agreed to by the government. As such, a contractor may be thrust into a difficult position of either accepting the government's violation of law or walking away from the contract absent the ability to assert pre-award challenges to the government's unreasonable actions.

In addition, the COFC does not have general equitable powers to grant prospective relief.[57] Instead, that relief is generally limited to enjoining the award of a contract for a specific solicitation.[58] Therefore, an APA action may provide the means to obtain more complete relief.

Boeing's Implications on Other Areas of Government Contract Law

Perhaps one of the most important lessons from *Boeing* is that the conclusion that waiver did not apply in that case does not invariably resolve or eliminate the waiver risk for contractors in other contexts. Again, an important feature of the Federal Circuit's rationale in *Boeing* was the Federal Circuit's view that a pre-award challenge regarding the alleged conflict between the CAS statute and FAR 30.606 would have been futile. The Federal Circuit was not convinced that had Boeing pursued pre-award litigation, a court would have taken jurisdiction to resolve the question regarding the alleged illegality of FAR 30.606. Moreover, because FAR 30.606 is legally binding on the government's CO, there was nothing that the government's CO could do to adjust the anticipated contract to eliminate or resolve the issue of concern.[59] Such an apparent inability to adjust the contract's terms demonstrates the lack of available relief and therefore supports APA jurisdiction.

Absent this type of futility, however, contractors may still face arguments that a failure to raise and seek resolution regarding patent ambiguities or other contract arguments results in waiver. Thus, *Boeing* certainly does not eliminate the waiver risk and, instead, may counsel in favor of raising alleged improper regulatory interpretations in the pre-award context or face the risk of waiver in the event of a dispute.

Like the CAS, there are other government contract compliance or business systems requirements that cut across multiple contracts. Accordingly, an errant government interpretation can have impacts on both current contracts as well as future potential contracts. For example, in the context of cybersecurity, for government contractors doing work for DOD, the DCMA has already begun conducting assessments of contractor compliance with the DOD FAR Supplement (DFARS) clause 252.204-7012 and implementation of the security controls called for under National Institute of Standards and Technology Special Publication 800-171. Moreover, in the coming years, DOD will begin to implement the Cybersecurity Maturity Model Certification (CMMC), which will require that contractors have achieved a particular certification level as a condition precedent to being eligible for contract award. The DFARS business systems rule, somewhat similarly, requires periodic assessments of the acceptability of various business systems (e.g., estimating, purchasing, and property). When the government identifies significant deficiencies in a contractor's business system, the system will be disapproved, pending the contractor's implementation of corrective actions.

Government decisions regarding the contractor's compliance with cybersecurity requirements and business systems obligations both have contract-specific impacts, but also can significantly impact the contractor's ability to compete for future contract awards. Moreover, an errant government interpretation regarding what a particular regulation requires, if not challenged based on issues like patent ambiguity due to conflicts between competing requirements (for example), could create the same risk of government waiver arguments that Boeing encountered at the COFC. Thus, in considering how to resolve the issue with the government, the contractor not only should consider its contract-specific challenges under the CDA, but also should be considering its potential pre-award challenges for any future contracts so as to preserve the issue and avoid the waiver risk.

Whether attempting to challenge the overall validity of a regulation or the government's interpretation and application in a particular solicitation, consideration should be given to both the potential avenues that the APA and a bid protest action present, as well as the potential risks that such an action will prove unsuccessful. In the context of waiver regarding a pre-award concern, however, the very act of raising the issue may enable the contractor to preserve the matter for further dispute down the road, assuming the court does not resolve the issue through a final judgment. Of course, creating a system where contractors are forced to consider such litigation aimed at preserving issues for future disputes raises important policy questions relating to judicial resources, acquisition policy generally, and the potential relationship impacts from such litigation.

Conclusion

In the wake of the *Boeing* decision, it will be important that contractors assess whether to assert a pre-award challenge to what they see as unreasonable government interpretations or application of law and regulations such as the CAS and FAR. Although the contractor in *Boeing* successfully convinced the Federal Circuit that waiver of its claims was not appropriate, the *Boeing* decision counsels caution and diligence by contractors so that they do not find themselves having waived significant contract claims. On the other hand, *Boeing* provides a helpful framework for identifying potential pre-award avenues of relief. Such pre-award avenues of relief may be of particular importance when faced with ill-defined or legally suspect agency action that impacts not just current contracts but also the contractor's ability to compete for potential future contracts or the potential for waiver of the issue in the context of future disputes. In this context, these potential pre-award avenues for judicial relief under the APA or the Tucker Act's bid protest jurisdiction should not be disregarded. PL

Endnotes

1. 41 U.S.C. ch. 71; 48 C.F.R. pt. 9904.
2. 5 U.S.C. § 701 et seq.; 28 U.S.C. § 1491.
3. 968 F.3d 1371 (Fed. Cir. 2020).
4. *Id.* at 1376.
5. *Id.*; *see* FAR 52.230-6.
6. 968 F.3d at 1376.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 1376–77.
11. As noted by the court, "An 'illegal exaction,' as that term is generally used, involves money that was 'improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation.'" *See* Boeing Co. v. United States, 143 Fed. Cl. 298, 304 (2019) (quoting Norman v United States, 429 F.3d 1081, 1095 (Fed. Cir. 2005)).
12. For purpose of the dispute, a representative contract was identified by Boeing.
13. The COFC decision also noted that during oral argument, Boeing noted that it had raised its challenge regarding FAR 30.606 in three other actions pending before the same COFC judge and in 12 cases pending at the board of contract appeals. Thus, the resolution of the case carried the potential to affect thousands of government contracts.
14. *Boeing*, 143 Fed. Cl. at 307.
15. 536 F.3d 1293 (Fed. Cir. 2008).
16. *Boeing*, 143 Fed. Cl. at 308 (citing Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (for the proposition that prior decisions that had not "squarely addressed" an issue were not binding precedent on that issue)).
17. *Id.*
18. *Id.* (citing K-Con, Inc. v. Sec'y of Army, 908 F.3d 719, 723 (Fed. Cir. 2018) (holding that because the solicitation contained a patent ambiguity, the contractor's failure to seek clarification of the ambiguity prevented the contractor's interpretation of the contract from binding the parties)).
19. *Id.* at 309.
20. *Id.*
21. 46 F.3d 1547 (Fed. Cir. 1995).
22. 307 F.3d 1374 (Fed. Cir. 2002).
23. *See LaBarge*, 46 F.3d at 1552–53.
24. *See Boeing*, 143 Fed. Cl. at 313.
25. Boeing Co. v. United States, 968 F.3d 1371, 1378 (Fed. Cir. 2020). The Federal Circuit also reversed the COFC decision on Boeing's illegal exaction claim. *Id.* at 1382.
26. *Id.* at 1379 (explaining that "the proper time for AT&T to have raised the issue[] . . . was at the time of contract negotiation, *when effective remedy was available*") (emphasis added in original).
27. *Id.* at 1381 ("the government never asserts, let alone establishes, that Boeing would have been entitled to a ruling on the merits . . . had it pursued either of those paths in 2008, when the contract at issue was negotiated").
28. *Id.*
29. 510 U.S. 200 (1994).
30. *Boeing*, 968 F.3d at 1382, n.4 (citing Acetris Health, LLC v. United States, 949 F.3d 719, 727–28 (Fed. Cir. 2020)).
31. *Acetris*, 949 F.3d at 727.
32. *Compare* Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433 (2019) (explaining that COFC lacked jurisdiction under the Tucker Act but transferred case to a federal district court (FDC) to hear APA action), *with* MD Helicopters Inc. v. United States, No. CV-19-02236-PHX-JAT, 435 F. Supp. 3d 1003 (D. Ariz. 2020) (finding that the FDC lacked jurisdiction under the APA but determined COFC likely had jurisdiction under the Tucker Act). *But see* Space Expl. Techs. Corp. v. United States, Case No. 2:19-CV-07927 (C.D. Cal. Sept. 25, 2020) (Dkt. No. 233) (FDC determined it had APA jurisdiction to review challenges to an OTA awarded by the Department of Defense (DOD) but ultimately rejected the claims on the merits).
33. *See* Suburban Mortg. Assocs., Inc. v. U.S. Dep't of Hous. & Urban Dev., 480 F.3d 1116 (Fed. Cir. 2007) (explaining the availability of money damages under the Tucker Act is presumptively "adequate remedy" for purposes of an APA jurisdictional exception); Validata Chem. Servs. v. United States Dep't of Energy, 169 F. Supp. 3d 69 (D.D.C. 2016) (dismissing APA claim for lack of jurisdiction because the FDC determined that contractor's claim was covered by the Tucker Act pursuant to the Administrative Dispute Resolution Act (ADRA)).
34. *See, e.g.*, Validata Chem. Servs. v United States Dep't of Energy, 169 F. Supp. 3d 69 (D.D.C. 2016).
35. Bowen v. Massachusetts, 487 U.S. 879, 893 (1988).
36. *Id.* at 900–01.
37. *Id.* at 905.
38. 397 F. Supp. 2d 659, 664 (D. Md. 2005).
39. *See* 28 U.S.C. § 1491; 41 U.S.C. § 7104.
40. 5 U.S.C. § 704.
41. *See* Bennet v. Spear, 520 U.S. 154, 162 (1997); McCarthy v. Madigan, 503 U.S. 140 (1992).
42. *See, e.g.*, 30 U.S.C. § 1276(a)(1) (requiring petitions for review of certain Environmental Protection Agency actions to be filed within 60 days).
43. *See* 28 U.S.C. § 2401.
44. 5 U.S.C. § 706.
45. Boeing Co. v. United States, 968 F.3d 1371, 1381 (Fed. Cir. 2020).
46. *Id.*
47. 41 U.S.C. § 1502.
48. Notably, the disputed FAR provision in *Boeing* was promulgated by the FAR Council, which consists of representatives from the DOD, General Services Administration, and National Aeronautics and Space Agency and not by the CAS Board. *See, e.g.*, Federal Acquisition Regulation; Cost Accounting Standards, 57 Fed. Reg. 39,586 (Aug. 31, 1992) (the regulatory history of FAR 30.606 citing the FAR council members' rulemaking authority, 40 U.S.C. § 486(c) (now codified at 40 U.S.C. § 121(c)), 10 U.S.C. ch. 137, and 42 U.S.C. § 2473(c) (now codified at 51 U.S.C. § 20113)).
49. Spectrum Leasing Corp. v. United States, 764 F.2d 891, 893 (D.C. Cir. 1985); *see also* Rollock Co. v. United States, 115 Fed.

Cl. 317, 333 (2014) (recognizing that the COFC may lack jurisdiction where prospective relief is sought); Blackhawk Indus. Prods. Grp. Unlimited, LLC v. U.S. Gen. Servs. Admin., 348 F. Supp. 2d 662 (E.D. Va. 2004) (APA jurisdiction over a claim alleging that GSA improperly excluded plaintiff's products due to GSA's unreasonable interpretation of the FAR and failure to properly apply an exemption).

50. Cartwright Int'l Van Lines, Inc. v. Doan, 525 F. Supp. 2d 187, 196 (D.D.C. 2007) (dismissing APA action because an identical claim was pending before the CBCA and the claims in both forums concerned the same determination ultimately based on the same contracts and "a remedy existed in another court").

51. *See* CliniComp Int'l, Inc. v. United States, 904 F.3d 1353, 1358 (Fed. Cir. 2018).

52. Acetris Health, LLC v. United States, 949 F.3d 719, 728 (Fed. Cir. 2020).

53. *See* Weeks Marine, Inc. v. United States, 575 F.3d 1352, 1359 (Fed. Cir. 2009).

54. *See* Raymond Express Int'l, LLC v. United States, 120 Fed. Cl. 413, 424 (2015); CGI Fed. Inc. v. United States, 118 Fed. Cl. 337, 348 (2014), *rev'd and remanded on other grounds*, 779 F.3d 1346 (Fed. Cir. 2015).

55. 28 U.S.C. § 1491(b)(4).

56. Banknote Corp. of Am. v. United States, 365 F.3d 1345, 1350 (Fed. Cir. 2004).

57. Bowen v. Massachusetts, 487 U.S. 879, 905 (1988).

58. 28 U.S.C. § 1491(b)(2).

59. *See* United Launch Servs., LLC v. United States, 139 Fed. Cl. 664, 682 (2018) (explaining "that contracting officers lack the authority to bind the government to contractual payment provisions that are contrary to statute or regulation (including the FAR), and that such provisions are therefore not enforceable").