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Focus

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FEATURE COMMENT: The Most Important Contract Disputes Decisions Of 2020

Calendar year 2020 was a tumultuous year for everyone. For those practicing law, it upset the normal course of business by closing many courthouses and delaying pending proceedings. Many lawyers had to learn to practice remotely—both in relation to litigating cases and to counseling their internal and external clients. Throughout all of the uncertainty and disruptions, however, a number of important cases were decided relating to Government contract disputes that have significant impacts on contractors.

Specifically, the U.S. Court of Appeals for the Federal Circuit throughout this past year issued two important decisions involving Boeing—one related to simultaneous changes to cost accounting practices and the other to contractor's data rights. The Federal Circuit also continues to provide guidance to contractors and the Government on the Contract Disputes Act statute of limitations. In addition to the above, the Civilian Board of Contract Appeals issued a timely decision on a contractor's entitlement to relief based on a pandemic, and the Armed Services Board of Contract Appeals overruled decades of prior precedent and clarified what constitutes an electronic signature under the CDA certification requirements. Lastly, the U.S. District Court for the District of Columbia, in a case representing the latest example of the increasing exposure and scrutiny contractors face when dealing with Federal Government cybersecurity requirements, dismissed a qui tam relator False Claims Act case that involved alleged false claims under an implied certification theory related to certain cybersecurity vulnerabilities and obligations. The below addresses these important cases, as well as provides closing remarks that contain a significant update to our discussion last year on whether disclosures made pursuant to the mandatory disclosure rule may result in a waiver of attorney-client privilege.

Contractor Claim Challenging the Legality of the FAR's Cost Accounting Regulations Is Proper (*Boeing Co. v. U.S.*, 968 F.3d 1371 (Fed. Cir. 2020), rev'g, 143 Fed. Cl. 298 (2019); 62 GC ¶ 235)—In a case involving whether a contractor waived its breach of contract claim arising from a contractor's challenge to Federal Acquisition Regulation 30.606 that limits a contractor's ability to offset cost impacts stemming from multiple cost accounting practice changes, the Federal Circuit reversed and remanded a decision by the U.S. Court of Federal Claims and held that the contractor had not waived its claim. The Federal Circuit also reversed and remanded the COFC's dismissal of the contractor's illegal exaction claim, and held that the COFC had subject-matter jurisdiction over the claim.

Specifically, in 2011, The Boeing Co. made eight unilateral changes to its cost accounting practices that resulted in cost impacts to certain of its Government contracts. Certain of the changes resulted in increased costs to the Government, and others resulted in decreased costs. The net effect of the changes resulted in decreased costs to the Government. The Government, however, refused to offset the increased and decreased costs based on FAR 30.606, Resolving Cost Impacts, which prohibits the offsetting of increased and decreased cost impacts that result from multiple changes in a contractor's cost accounting practices, and demanded that Boeing pay the Government the increased costs plus interest. See FAR 30.606(a)(3)(ii) (the contracting officer "[s]hall not combine the cost impacts of ... [o]ne or more unilateral changes," "unless all of the cost impacts are increased costs to the Government").

At the COFC, relying on 41 USCA § 1503, Contract Price Adjustment, and FAR 52.2306,

Administration of Cost Accounting Standards, Boeing argued that FAR 30.606 was unlawful because the Government is prohibited from recovering costs greater than the aggregate increased cost to the Government. See 41 USCA § 1503(b) (the Government "may not recover costs greater than the aggregate increased cost"); see also FAR 52.230-6(k) (contract clause requiring the contractor to "[r]epay the Government for any aggregate increased cost paid to the Contractor" that result from unilateral, undesirable cost accounting practice changes). The COFC did not address the merits of Boeing's argument, but instead, dismissed Boeing's claim on procedural grounds. The COFC determined that Boeing had waived its challenge to the lawfulness of FAR 30.606 because it had failed to challenge the regulation before signing the contract.

On appeal, the Federal Circuit disagreed with the COFC's decision that Boeing had waived its challenge to the lawfulness of FAR 30.606 because a "pre-award objection by Boeing to the Defense Department would have been futile, as the government concededly could not lawfully have declared FAR 30.606 inapplicable in entering into the contract." In reaching its conclusion, the Federal Circuit noted the importance of whether the contractor could have obtained relief prior to entering into the contract in determining whether the waiver doctrine applies. The Federal Circuit reasoned that because the clause is mandatory and COs do not have discretion in whether to apply the clause, Boeing did not waive its objection to the lawfulness of FAR 30.606.

With respect to Boeing's separate claim characterizing its overpayment to the Government as an illegal exaction, the Federal Circuit again disagreed with the COFC's holding that it did not have subject-matter jurisdiction. The Federal Circuit explained that the Tucker Act, 28 USCA § 1491(a), "has long distinguished three types of claims against the federal government: contractual claims, illegal-exaction claims, and money-mandating-statute claims." The court then held that Boeing had established jurisdiction under the Tucker Act because Boeing alleged that the Government demanded and took Boeing's money in violation of a statute, which sufficed for purposes of jurisdiction of its illegal exaction claim.

The reversal and remand suggest that the COFC will need to resolve the apparent inconsistencies between the Cost Accounting Standards statute and FAR provisions related to simultaneous changes to cost accounting practices. In addition, while the Federal Circuit held that Boeing did not waive its claims, the court's discussion on the doctrine of waiver raises important questions regarding whether other types of claims could be waived and whether contractors may be able to obtain prospective judicial relief when challenging Government assertions of interpretations of regulations or contract requirements prior to contract award.

Contractor's Use of Legends to Restrict Third Party Rights in Technical Data (*Boeing Co. v. Sec'y of the Air Force*, 983 F.3d 1321 (Fed. Cir. 2020), rev'g, *Boeing Co.*, ASBCA 61387, 2019 WL 1487313 (Mar. 18, 2019); 63 GC ¶ 8)—This is a case related to Boeing's right to use legends outside of, and in addition to, those in the Department of Defense FAR Supplement to restrict the rights of non-governmental parties in noncommercial technical data.

In this case, the Government had "unlimited rights" in certain noncommercial technical data under two contracts that contained DFARS 252.227-7013. Boeing, however, marked each technical data deliverable that it submitted to the Government under the contracts with a legend that described Boeing's rights in the data as they pertain to third parties. The Government rejected Boeing's use of the restrictive legends on the basis that such legends allegedly were not authorized by DFARS 252.227-7013. Boeing disputed this rejection.

At the ASBCA, the Board upheld the Government's decision rejecting the use of Boeing's restrictive legend. The Federal Circuit, however, reversed this decision, explaining that the plain language of DFARS 252.227-7013(f) only applies to legends that restrict the Government's rights in technical data. It does not apply to legends used to restrict third parties' rights.

In reaching its decision, the Federal Circuit focused on the first two sentences of subsection (f) which, in relevant part, state the following:

> The Contractor, and its subcontractors or suppliers, may only assert restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data to be delivered under this contract by marking the deliverable data subject to restriction. Except as provided in paragraph (f)(5) of this clause, only the following legends are authorized under this contract: the government purpose rights legend at paragraph (f)(2) of this clause; the limited

> rights legend at paragraph (f)(3) of this clause; or the special license rights legend at paragraph (f)(4) of this clause; and/or a notice of copyright as prescribed under 17 USCA 401 or 402.

DFARS 252.227-7013(f). Each party had contended that the plain language supported its position.

In finding in favor of Boeing's interpretation, the Federal Circuit held that the Government's interpretation would read out the first sentence of the clause, which limits the clause's application to restrictions placed on the Government's rights, not third parties. The court also noted that its interpretation of the -7013(f) clause supports the overall purpose of the -7013 clause because it governs the rights between contractors and the Government, and not contractors and third parties. The Federal Circuit, however, remanded the case on the factual question regarding whether Boeing's proprietary legends, in fact, restrict the Government's rights. Thus, it remains to be determined on remand whether Boeing's legends were appropriate under the circumstances.

The CDA SOL—Guidance on Claim Accrual Continues (*Elec. Boat Corp. v. Sec'y of the Navy*, 958 F.3d 1372 (Fed. Cir. 2020), aff'g, *Elec. Boat Corp.*, ASBCA 58672, 19-1 BCA ¶ 37,233; 62 GC ¶ 153)—In this case, the Federal Circuit affirmed the ASBCA's holding that a contractor's claim seeking a price adjustment under a change-of-law clause was time barred by the CDA's six-year statute of limitations (SOL).

On Aug. 14, 2003, Electric Boat and the Navy entered into a contract for the construction of submarines. The contract included a change-of-law clause, which (1) provided for a price adjustment if compliance with a new federal law, or a change to existing federal laws or regulations, directly increases or decreases Electric Boat's performance costs; and (2) specified that no cost adjustments would be made for the first two years after the effective date of the contract (i.e., until Aug. 15, 2005). On Dec. 14, 2004, approximately one year after the parties entered into the contract, a new Occupational Safety and Health Administration (OSHA) federal regulation became effective. In February 2005, Electric Boat submitted a notification of change because it anticipated that compliance with the new OSHA regulation would result in increased performance costs of over $125,000 per submarine and, in June 2007, officially sought price adjustments for all submarines to be delivered under the contract. In May 2011, the CO denied any adjustments. And, in December 2012, Electric Boat submitted a certified CDA claim to which, in February 2013, the CO issued a final decision denying the CDA claim.

At the ASBCA, the Board held that Electric Boat's CDA claim was time barred by the CDA's six-year SOL because Electric Boat knew of its claim no later than February 2005, when it submitted its notification of change and had suffered some injury no later than Aug. 15, 2005, when the contract's change-of-law clause first provided Electric Boat the right to a price adjustment. Reviewing the ASBCA's decision de novo, the Federal Circuit affirmed the Board's holding and reasoned that Electric Boat's CDA claim was time barred because the Navy's liability for a price adjustment resulting from the OSHA regulation became fixed under the contract on Aug. 15, 2005, which was when the change-of-law clause first provided a right to a price adjustment.

In reaching this decision, the Federal Circuit determined that the contract, and specifically the change-of-law clause, did not provide for mandatory pre-claim procedures that needed to be completed in order for the SOL period to begin to run. The court found that, based on the issue and contract clause in dispute here, Electric Boat was not required to await a unilateral Navy price adjustment prior to filing a claim. While the Federal Circuit rejected Electric Boat's mandatory pre-claim procedures argument in this case, there are certain circumstances where mandatory pre-claim procedures must be completed before a contractor's claim is determined to accrue (see e.g., *Kellogg Brown & Root Servs., Inc. v. Murphy*, 823 F.3d 622 (Fed. Cir. 2016); 58 GC ¶ 194). Because decisions involving SOL issues are fact-specific and determined on a case-by-case basis, future cases further clarifying the circumstances when mandatory pre-claim procedures exist should be expected.

No Relief for Increased Costs Under Firm, Fixed-Price Contract Performed During Ebola Virus Outbreak (*Pernix Serka JV v. Dep't of State*, CBCA 5683, 20-1 BCA ¶ 37,589)—In this case, the CBCA denied a contractor's claim seeking additional costs it incurred under its firm, fixed-price (FFP) contract due to the Ebola virus disease outbreak in 2014.

In September 2013, the Government awarded an FFP contract requiring Pernix Serka Joint Venture (PSJV) to construct a rainwater capture and storage system in Sierra Leone. The initial price of the contract included all labor, materials, equipment and ser-

vices necessary to complete the contract. After PSJV was awarded the contract, an outbreak of the Ebola virus began in the Republic of Guinea and spread to Sierra Leone. PSJV requested guidance from the CO and Government representatives on whether to stay or evacuate the project site. The Government provided no guidance and repeatedly stated that it was incumbent on PSJV to determine whether it should stay or evacuate.

PSJV eventually made a unilateral decision to evacuate the site in order to protect its employees. As the result of the evacuation, as well as performance during the outbreak, PSJV incurred increased and unanticipated costs; namely, "additional life safety and health costs incurred due to differing site conditions, disruption of work and the need to maintain a safe work site," as well as "additional costs incurred resulting from that disruption of work, and the need to demobilize and remobilize at the work site." PSJV sought recovery of these costs from the Government. The Government, while providing PSJV with additional time to perform pursuant to the excusable delay clause, denied any monetary recovery.

At the CBCA, PSJV pursued four legal theories to attempt to recover its increased costs: (1) cardinal change, (2) constructive change, (3) breach of the implied duty to cooperate and (4) constructive suspension of work. As related to cardinal change, PSJV argued that the Government forced PSJV to return to the project site by adding life safety measures not contained in the contractor's approved work plan. The CBCA rejected PSJV's argument because the Government "never changed the description of work it expected from the contractor," and never gave PSJV direction on how it should respond to the ongoing outbreak. As related to the constructive change, PSJV argued that the demobilization and remobilization of its personnel, and the additional safety measures established at the site, constituted constructive changes. The CBCA again rejected PSJV's argument because there was no dispute that the Government had not given PSJV direction to evacuate the project site. The CBCA did not address PSJV's remaining two legal theories due to jurisdictional issues.

Pernix highlights the importance of obtaining Government direction to assist in recovering increased costs under an FFP contract during unforeseen public health emergencies. It also highlights why many agencies and COs have provided guidance/direction to contractors, and why Congress has authorized alternative avenues for the recovery of certain incurred costs (such as Section 3610 of the Coronavirus Aid, Relief, and Economic Security Act), during the COVID-19 pandemic. Each contractor scenario will be unique and the facts (and the contractor's communications with its customer) will be important in ascertaining a contractor's ability to recover increased costs arising as a result of a pandemic.

Electronic Signatures Under CDA Certification Requirement (*Kamaludin Slyman CSC*, ASBCA 62006, 20-1 BCA ¶ 37,694; 62 GC ¶ 291)—In a case involving the validity of electronic signatures in certifying a CDA claim, the majority of the senior deciding group (appeals referred to the senior deciding group are those of unusual difficulty or significant precedential importance, or that have occasioned serious dispute within the normal decision process) expressly overruled decades of prior precedent and clarified what constitutes an electronic signature under the CDA certification requirement.

Specifically, for decades, the ASBCA held that typed, "//signed//," email signature blocks, and similar signatures were not valid to certify a contractor's claim under the CDA. The ASBCA further held that these types of signatures were the equivalent of a lack of signature and a failure to certify—not a defective certification that could be corrected—resulting in the ASBCA lacking jurisdiction and, in some cases, subsequent claims by contractors being barred by the CDA SOL. This ASBCA precedent created a difficult standard with regard to the validity of other forms of electronic signatures (e.g., Adobe digital signatures) for certifying CDA claims. Indeed, it led to a series of appeals that were subject to Government motions to dismiss, some of which had been pending for several years, based on the Government's allegation that contractors failed to certify their claims because they used an "improper" electronic signature.

However, in *Kamaludin*, the ASBCA provided necessary clarification regarding the validity of electronic signatures. The senior deciding group held that a signature satisfying the following requirements is valid for purposes of CDA certification no matter what form the signature takes:

1. The signature is "discrete," meaning "separate and distinct";
2. The signature is "verifiable," meaning "the mark can be tied to an individual" (i.e., the signature permits a determination of which individual is responsible for the claim); and

3. The signature "demonstrates a present intention to authenticate," meaning, generally, that the party affixes its name at the end of the document.

In *Kamaludin*, this meant that the owner of the contractor that submitted a CDA certification of its claim in an email signed with a typed signature at the end of the email was valid. The ASBCA noted that "a typed name, without more, does nothing to verify the identity of the person submitting it," but in *Kamaludin*, the "name came from an email correspondence which demonstrates that the document came from the sender's email address." Thus, the ASBCA determined that "[i]f we can satisfy ourselves that the email address is linked to the certifier (and there are numerous ways we may do that, including the practice of the government in communicating with Kamaludin during contract performance through that very same email address), then the signature is verifiable."

This decision relaxes the Board's previous standard for CDA certifications, holding that "so long as a mark purporting to act as a signature may be traced back to the individual making it, it counts as a signature for purposes of the CDA, whether it be signed in ink, through a digital signature application, or be a typed name." It also refocuses consideration of the validity of the certification on the traceability of the signature, and not the fact that the signature hypothetically could be forged ("we treat it as we would a handwritten mark purporting to be a signature or a digital signature—no better, no worse: absent the later production of evidence proving otherwise, we find that the claim ... is certified"). While contractors should take comfort that electronic signatures and other typewritten signatures generally will validly certify a CDA claim, they should remain cognizant of the manner in which they submit their certified CDA claims and ensure the signature meets all of the CDA certification requirements—the primary focus of which is that it is "verifiable" or "can be tied to an individual."

Alleged Cybersecurity Vulnerability Not Sufficient to Establish Materiality to Government Decision to Pay (*U.S. ex rel. Adams v. Dell Computer Corp.*, 2020 WL 5970677 (D.D.C. Oct. 8, 2020))—In this case, the U.S. District Court for the District of Columbia dismissed a qui tam relator's suit accusing Dell of violating the civil False Claims Act by providing computer systems to the Government that contained a cybersecurity vulnerability that Dell allegedly knew or should have known about before selling the systems to the Government. The Government declined to intervene in this case.

While the court dismissed the suit, the decision counsels that contractors should approach their cybersecurity obligations with care and diligence. In this regard, the court had held that the relator plausibly alleged a false implied certification claim under the FCA. However, the court dismissed the relator's suit because the relator: (1) failed to properly allege the materiality of the alleged false certifications to the Government's decision to pay and (2) could not establish a plausible claim of knowledge.

On the first point, the relator argued that the Government operates under a variety of technology policies to assure the security of both the Government's and Government contractors' information systems. The relator then asserted that because of the type of vulnerability introduced by Dell's affected systems, the Government would not have acquired such systems had it known of the security vulnerability. The relator, however, did not allege that Dell was required to comply with any of the aforementioned federal technology policies or that Dell's contracts required them to do so. Even assuming Dell was required to follow the policies referenced by the relator, the court found that the policies did not require "defect-free products, merely that agencies limit the vulnerabilities and attempt to remedy them if located." Accordingly, the court held that the existence of a single vulnerability would not necessarily be material to the Government's acceptance of Dell's products.

On the second point, the court questioned whether Dell had the requisite knowledge of the alleged vulnerability sufficient to establish a false claim. For instance, the court found the relator's allegations of Dell's knowledge conflicting with the relator's claim that he was uniquely qualified and singularly able to detect the vulnerability. Thus, the court found that the relator failed to state a plausible claim of knowledge because he did not explain how Dell employees had knowledge or acted in reckless disregard for the truth.

As industry is aware, the Government is increasing its scrutiny of contractors' compliance with cybersecurity requirements via new DFARS clauses (i.e., DFARS 252.204-7019, -7020, and -7021). Whether such requirements will be determined material to a Government decision to pay remains to be seen, but contractors should be prudent to assess their compliance obligations and take appropriate action to mitigate the risk of contractual noncompliances

and potential liability under the FCA. Indeed, while the court dismissed this FCA case, it highlights that relators also are focused on Government contractors' cybersecurity and, in another situation, it is perceivable that a court could find the requisite materiality and knowledge arising from a contractor's noncompliance with cybersecurity obligations.

Conclusion—This Feature Comment discusses the most important Government contract disputes decisions of 2020. In addition to the above and in closing, we briefly wanted to note that in our 2019 Feature Comment we had discussed an unsettling decision from the U.S. District Court for the Eastern District of Virginia that certain disclosures a Government contractor made pursuant to the mandatory disclosure rule constituted a waiver of the attorney-client privilege. See 62 GC ¶ 28. The U.S. Court of Appeals for the Fourth Circuit, in *In re Fluor Intercontinental, Inc.*, 803 F. App'x 697 (4th Cir. 2020), importantly reestablished the status quo for Government contractor disclosures made pursuant to the mandatory disclosure rule, while also providing further insight into when a disclosure could waive privilege (distinguishing between disclosures based on the advice of an attorney (not a waiver of privilege) and disclosures that divulge the underlying attorney-client communication itself (a waiver of privilege)). While contractors must remain vigilant about the level of information disclosed pursuant to the mandatory disclosure rule and ensure the disclosure does not divulge the underlying attorney-client communication, this decision should provide a level of comfort to the Government contract community.

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