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FEATURE COMMENT: The Most Important Contract Disputes Decisions Of 2021

As the Government and industry continued to adapt and navigate their ways through the pandemic in 2021, so did the courts and boards of contract appeals. In regard to the courts and boards, a number of important decisions were issued relating to Government contract disputes that have significant impacts on contractors. The decisions that we will focus on in this article relate to Contract Disputes Act (CDA) claims, including claim accrual, the necessity for each distinct claim to have an identifiable sum certain to perfect jurisdiction over those claims, and the viability of the affirmative defense of laches. We also address further clarity of protest timeliness at the U.S. Court of Federal Claims in relation to *Blue & Gold* and its progeny. The below addresses these important cases, as well as a few other important contract disputes decisions issued throughout 2021.

Prior to turning to the specific case discussions, however, we wanted to highlight one noteworthy decision related to contractors' relief in relation to a pandemic. This year, the U.S. Court of Appeals for the Federal Circuit affirmed *Pernix Serka JV v. Dep't of State*, CBCA 5683, 20-1 BCA ¶ 37,589, in which the Civilian Board of Contract Appeals held that a contractor was not entitled to additional costs it incurred under its firm, fixed-price contract due to the Ebola virus disease outbreak in 2014. This Federal Circuit decision (*Pernix Serka JV v. Sec'y of State*, 849 F. App'x 928 (Fed. Cir. 2021)) is not separately addressed below because the Federal Circuit entered a judgment of affirmance without opinion, citing Federal Circuit Rule 36. As effects of the COVID pandemic continue, we wanted to again emphasize that *Pernix* (the CBCA discussion is addressed in further detail in our 2020 Feature Comment, see 63 GC ¶ 50) highlights the importance of obtaining Government direction to assist in recovering increased costs under an FFP contract during unforeseen public health emergencies.

Federal Circuit Confirms No Relief for Increased Costs under Firm, Fixed-Price Contract Performed During Pandemic (*Tolliver Grp., Inc. v. U.S.*, 20 F.4th 771 (Fed. Cir. 2021), rev'g, *Tolliver Grp., Inc. v. U.S.*, 146 Fed. Cl. 475, recons. denied, 148 Fed. Cl. 351 (2020); 64 GC ¶ 8)—In a case involving whether a contractor satisfied the requirements of the CDA for submitting a certified claim against the Government, the Federal Circuit reversed and remanded a decision by the COFC that denied a Government motion to dismiss for lack of jurisdiction.

As background, Tolliver submitted to the Government a claim for reimbursement under Federal Acquisition Regulation 31.205-47 of 80 percent of the legal fees it incurred in its successful defense against a qui tam lawsuit brought under the civil False Claims Act. The contracting officer denied the claim on the basis that the contract was a fixed-price contract. Tolliver appealed the CO's final decision to the COFC arguing: (1) the qui tam litigation arose based on the Government's constructive change to the contract, which in turn caused Tolliver to incur legal fees; and (2) the Government breached the contract by failing to reimburse Tolliver for 80 percent of its legal fees under the FAR. After a few Government motions to dismiss and Tolliver amended complaints in response, Tolliver had only one count before the COFC for "Recovery of Allowable Cost under FAR § 31.205-47." Ultimately, in response to cross-motions for summary judgment, the COFC entered

judgment for Tolliver finding that the Government breached an implied warranty of performance that ultimately led to the qui tam lawsuit and, consequently, Tolliver's costs incurred defending against it.

The Federal Circuit held that the contractor never submitted a claim of breach of implied warranty and, therefore, that the COFC lacked jurisdiction to find for the contractor on that basis. Specifically, the Federal Circuit determined that Tolliver's claim submitted to the Government was based on allowability under FAR 31.205-47 (in that it only cited FAR 31.205-47 and similarly only sought reimbursement of 80 percent of the legal costs), and was not based on a breach of the implied warranty of performance. The Federal Circuit held that the two legal theories contained different elements and, therefore, were not materially the same, meaning the two theories were different CDA claims. The Federal Circuit likewise found that "Tolliver's initial statement requesting 'an equitable adjustment and payment ... for allowable legal fees,' was at so high a level of generality that, without further specification, it could cover materially distinct claims, and it did not give adequate notice of any specific claim."

Whether a new theory of recovery is the same claim depends on the circumstances of each case and the language in the relevant claim. The primary inquiry is whether the two theories involve the same operative facts, seek the same remedy, and contain the same or similar legal elements. Indeed, we note that in contrast to the *Tolliver* decision, the Armed Services Board of Contract Appeals determined early in 2021, in *Northrop Grumman Corp.*, ASBCA 62165, 21-1 BCA ¶ 37,922, that a Government argument that costs were unallowable as unreasonable (which was not asserted in a final decision) was the same claim as the Government's claim asserted in the final decision that the costs were unallowable directly associated costs under FAR 31.201-6.

The *Tolliver* decision highlights both that general or broad statements of recovery may not put the CO on notice of a particular claim and that too narrow or specific of a statement of recovery may only support the existence of one claim. Contractors should carefully craft and consider the potential theories of relief before submitting a claim to ensure it secures jurisdiction over alternative theories of recovery.

Mandatory Pre-Claim Procedures Preclude Accrual of a Claim (*Triple Canopy, Inc. v. Sec'y of Air Force*, 14 F.4th 1332 (Fed. Cir. 2021); 63 GC ¶ 298, *Triple Canopy, Inc.*, ASBCA 61415, 20-1 BCA ¶ 37,675); 62 GC ¶ 277 (Note))—The Federal Circuit, in considering whether a contractor's claim was barred by the CDA's six-year statute of limitations, held that the contractor's claim could not accrue until mandatory pre-claim procedures were completed, resulting in a determination that the contractor timely submitted its claim to the CO.

In this case, after the award of Triple Canopy's contracts, the Government of the Islamic Republic of Afghanistan imposed fees and assessed penalties on certain private security companies operating in Afghanistan. Triple Canopy's contracts required it to comply with local law and incorporated FAR 52.229-6, Taxes—Foreign Fixed-Price Contracts. This FAR clause provides contractors with an avenue for a price increase based on the imposition of after-imposed taxes. It also requires contractors to "take all reasonable action to obtain exemption from or refund of any taxes."

In accordance with FAR 52.229-6, Triple Canopy appealed the assessment to the Government of the Islamic Republic of Afghanistan. The Afghan government denied that appeal, and within six years of that denial Triple Canopy submitted CDA claims to the CO. In its CDA claims, Triple Canopy sought reimbursement under FAR 52.229-6 for the penalties it had paid.

The ASBCA held that Triple Canopy's claim accrued when the Afghan government assessed the tax on Triple Canopy, and not when Triple Canopy's appeal of that tax to the Afghan government was resolved and Triple Canopy made payment. This resulted in Triple Canopy's claims being barred by the CDA statute of limitations.

In reversing the ASBCA decision, the Federal Circuit started its analysis with the definition of claim accrual in FAR 33.201, and then turned to the "conditions of the contract" and the "facts of the particular case," focusing in particular on FAR 52.229-6. The Federal Circuit determined that Triple Canopy's appeal of the tax assessment to the Afghan government was a mandatory pre-claim procedure that had to be completed in order for Triple Canopy's claims to accrue and the CDA statute of limitations period to begin to run.

This decision is in alignment with *Kellogg Brown & Root Servs., Inc. v. Murphy*, 823 F.3d 622 (Fed. Cir. 2016); 58 GC ¶ 194, where the Federal Circuit likewise held that the CDA statute of limitations period

"does not begin to run if a claim cannot be filed because mandatory pre-claim procedures have not been completed."

Whether mandatory pre-claim procedures exist in a given case is both contract and fact specific. Thus, in assessing whether a claim is barred by the CDA statute of limitations, contractors should assess whether a viable argument exists that a claim was subject to mandatory pre-claim procedures and could not accrue until those procedures were complete.

Laches Not a Viable Defense under CDA Disputes (*Lockheed Martin Aeronautics Co.*, ASBCA 62209, 21-1 BCA ¶ 37,886; 63 GC ¶ 242; and *BAE Sys. Land & Armaments L.P.*, ASBCA 62703, 21-1 BCA ¶ 37,936)—The ASBCA affirmed, in two separate appeals this past year, that the affirmative defense of laches—a defense asserting that a party unreasonably delayed in pursuing its claim—is not available in disputes subject to the CDA because the CDA's six-year statute of limitations controls.

First, in *Lockheed Martin Aeronautics*, Lockheed Martin Aeronautics Co. (LMA) alleged that excessive "over & above" work resulted in greater costs and lack of productivity. Pursuant to the CDA, LMA submitted a claim for increased costs and requested a final decision. The CO declined to issue a final decision. LMA then appealed. On appeal, the Government asserted the affirmative defense of laches. LMA filed a motion for partial summary judgment on this affirmative defense, or in the alternative, to strike it.

In granting LMA's motion, the ASBCA reasoned that the affirmative defense of laches is not available when there is a "legislatively-enacted statute of limitations." The ASBCA also found unconvincing the Government's argument that FAR 33.203(c) preserves the affirmative defense of laches. Thus, for CDA claims, the defense of laches is not available and unnecessary given Congress's establishment of a six-year statute of limitations.

Second, in *BAE Systems Land & Armaments L.P.*, the ASBCA reinforced its decision that laches is not available in appeals subject to the CDA. In this appeal, BAE Systems Land & Armaments L.P. (BAE) disputed the Government's final decision alleging defective pricing. On appeal, BAE asserted the Government's claims were barred by the doctrine of laches because the Government unreasonably delayed asserting the defective pricing claims. The Government filed a motion to strike the affirmative defense of laches.

The ASBCA found the laches affirmative defense insufficient as a matter of law and granted the Government's motion, again making it clear that the ASBCA does not have the authority to issue a decision barring claims based upon the defense of laches given the CDA statute of limitations instituted by Congress.

These decisions reinforce Congress's limitation upon the time within which a party may enforce a right under the CDA regardless of which party asserts the defense—each party has six years from the accrual of their claim. This further highlights the importance, as discussed in relation to *Triple Canopy* above, of understanding when a claim "accrues" and asserting that claim within six years of that date.

Each Distinct Claim Requires Its Own Sum Certain (*ECC Int'l Constructors, LLC*, ASBCA 59586, 21-1 BCA ¶ 37,862; 63 GC ¶ 184)—The ASBCA partially dismissed a contractor's appeal for lack of jurisdiction for failure to state a sum certain. ECC International Constructors LLC (ECCI) entered into a contract to design and construct a military compound in Afghanistan. ECCI submitted a claim for three categories of Government-caused delays in the total amount of $13,519,913.91. ECCI also attached a spreadsheet that purported to provide additional detail regarding the costs of the work performed, but the document did not identify the specific rates that apply to specific sub-claims.

The Board noted that a contractor has the burden of proving the Board's jurisdiction by a preponderance of the evidence, which includes demonstrating that the claim for a demand for money includes a sum certain. The Board determined that ECCI presented only a cumulative sum for three separate claims requiring proof of separate sets of facts and, consequently, failed to present a distinct sum certain for each individual claim related to each category of the Government-caused delays.

The Board further disagreed with ECCI's assertion that the individual sums were readily calculable by simple arithmetic. ECCI attempted to point to its spreadsheet attached to the claim, asserting that the spreadsheet "provided the Government with all of the calculations used to determine the costs associated with each of the critical path delays addressed in ECCI's delay claim." The Board rejected this argument, finding that the spreadsheet did not identify the specific rates that apply to specific sub-claims, nor did it indicate how the CO would calculate those rates. In any event, ECCI, during the prosecution of

its claim at the ASBCA, did not identify the rates nor did it perform the arithmetic that it says was simple. Therefore, the Board dismissed ECCI's claims for lack of jurisdiction.

Contractors must carefully prepare their CDA claims, including identifying the sum certain for those claims. If a contractor has more than one distinct claim, then each claim should have its own sum certain. This likely does not mean alternative theories of relief for the same claim necessarily require a different sum certain for each theory of relief, especially if the relief under those alternative theories is the same. Nevertheless and out of an abundance of caution, contractors should consider identifying, for each theory of relief, a sum certain (even if it is the same sum certain) as this is a relatively minor administrative burden that will protect against Government arguments that the Board does not have jurisdiction over those alternative theories.

Clarifying Protest Timeliness at the COFC Based on *Blue & Gold* and Its Progeny (*Harmonia Holdings Grp., LLC v. U.S.*, 20 F.4th 759 (Fed. Cir. 2021); 63 GC ¶ 376; and *VS2, LLC v. U.S.*, 155 Fed. Cl. 738 (2021))—The Federal Circuit and COFC issued two decisions further clarifying bid protest timeliness rules related to the Federal Circuit's decision in *Blue & Gold Fleet, L.P. v. U.S.,* 492 F.3d 1308 (Fed. Cir. 2007) that "a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims."

First, in *VS2 LLC*, the COFC did not extend the bid protest timeliness rule for challenging the terms of the solicitation, as announced in *Blue & Gold*, to corrective action after a Government Accountability Office decision. As background, after the initial award to VS2, LLC, GAO sustained a protest and recommended the Department of the Army make award to another company, Vectrus. VS2 initially filed its corrective action protest at GAO, but GAO dismissed VS2's protest, holding that it was an untimely request for reconsideration of the Vectrus protest decision and that at least one argument, regarding past performance, should have been raised in that earlier GAO proceeding. VS2 subsequently filed a COFC protest challenging GAO's recommendation of a directed award to Vectrus.

At the COFC, the Government and the new awardee asserted that VS2's protest was untimely under *Blue & Gold* because VS2 knew of the GAO recommendation but did not challenge the Army's corrective action until after the Army made the new award. The Court, while recognizing that recent decisions had expanded *Blue & Gold*, rejected this argument finding the waiver rule was limited to a bright-line deadline for challenging the terms of a solicitation, not the corrective action after a GAO decision.

Second, in *Harmonia Holdings Grp., LLC,* the Federal Circuit found that the COFC erred in extending the *Blue & Gold* waiver rule. The protester, Harmonia Holdings Group LLC, filed an agency protest challenging the terms of solicitation issued by U.S. Customs and Border Protection (CBP) for "application development and operation and maintenance support services" in support of certain specified CBP missions. CBP denied Harmonia's pre-award protest, rejecting Harmonia's argument that offerors should be able to update their entire proposals in response to amendments to the solicitation, explaining that the amendments at issue were intended to merely give offerors "additional flexibility towards pricing," "did not change the overall technical solution to be performed," and did not "constitute [ ] a material change to the solicitation."

After Harmonia's unsuccessful agency protest, CBP notified Harmonia that its proposal was unsuccessful, that its proposal revisions would not be considered, and that awardee Dev Technology Group Inc.'s proposal represented the best value to the Government. Harmonia then filed a post-award bid protest at the COFC challenging CBP's denial of Harmonia's pre-award protest, as well as challenging CBP's evaluation of Harmonia's proposal. The COFC determined that Harmonia's bid protest allegation that was based on the same grounds raised in its pre-award protest to CBP (i.e., CBP's limitation on proposal revisions following amendments) failed for untimeliness because "[n]othing in the record or in plaintiff's briefing meaningfully explains the five-month delay in Harmonia filing its pre-award protest with this Court." Therefore, the COFC dismissed Harmonia's protest as an untimely challenge to the terms of the solicitation under *Blue & Gold*.

Harmonia appealed this decision to the Federal Circuit, which reversed the COFC's decision, find-

ing that Harmonia had not waived its challenge. The Federal Circuit held that filing of a pre-award agency protest preserves the challenge for a post-award court protest. Specifically, the Federal Circuit explained that the waiver rule prevents a bidder who is aware of a solicitation defect from waiting to bring its challenge after the award in an attempt to restart the bidding process, "perhaps with increased knowledge of its competitors." Thus, this waiver rule "prevents contractors from taking advantage of the government and other bidders and avoids costly after-the-fact litigation." In addition, the Federal Circuit noted that the *Blue & Gold* waiver rule is predicated not only on the notion of avoiding delay that could benefit the delaying party, but also on the notion of preserving challenges and providing notice to interested parties. Because Harmonia filed an initial agency protest, the Federal Circuit determined Harmonia preserved its later court challenge and reversed the COFC's decision finding the protest untimely.

The *Harmonia* and *VS2* decisions provide contractors greater certainty on when unsuccessful offerors must assert challenges to the terms of solicitations and award decisions. Nevertheless, given the strict timeliness rules laid down in *Blue & Gold* and its progeny, contractors should remain diligent in protesting any errors they perceive prior to contract award.

Two Additional Important Decisions Issued in 2021 Finding a Lack of a Live Dispute Will Cause Future Formal and Informal Disputes (*Lockheed Martin Corp.*, ASBCA 62377, 21-1 BCA ¶ 37,783 and *L3 Techs., Inc.*, ASBCA 61811, et al., 21-1 BCA ¶ 37,808)—In these appeals, the ASBCA declined to address the contractors' claims on the merits in response to oft experienced Government-taken positions because it found there were no live disputes between the parties.

First, in *Lockheed Martin Corp.*, Lockheed Martin and the Government agreed, via a memorandum of understanding, that the Fly America Act, 49 USCA § 40118 (FAA) applied only to direct personnel performing direct work on covered contracts and did not apply to indirect personnel or indirect travel. The Government later issued a letter withdrawing the agreed-upon position. Lockheed Martin submitted a claim to the corporate administrative CO (CACO) seeking an interpretation of the FAA and FAR 52.247-63, to which the CACO issued a final decision that the FAA applied to indirect costs of international transportation.

Lockheed Martin appealed seeking declaratory relief on whether the FAA and FAR 52.247-63 applied only to direct personnel performing direct work on covered contracts or also applied to indirect personnel or indirect travel. The ASBCA, however, declined to grant relief and dismissed the appeal without prejudice finding there was no live dispute between the parties. The ASBCA determined that Lockheed Martin did not make any changes as a result of the withdrawal letter, and therefore, could not have experienced significant ramifications or a continuing impact.

Second, *L3 Technologies., Inc.* involved several Government claims seeking repayment of direct and indirect costs paid to L3 Technologies Inc. The Government claims relied on the Defense Contract Audit Agency's audits that utilized a statistical sampling of costs and then extrapolated those results across the board for the costs in question. After L3 appealed the Government claims, the CO unequivocally withdrew the CO's final decisions (COFDs) and demands for payment, representing it would make no further claims on the contract years in question, and then filed a motion to dismiss the appeals as moot. Despite the withdrawal of the COFDs, L3 argued the dispute was not moot and sought a decision on the merits that would preclude use of DCAA's statistical sampling in similar Government claims in other contract years (specifically arguing the voluntary cessation doctrine and that the appeal was capable of repetition yet evading review).

The ASBCA granted the Government's motion to dismiss and held that the case was moot because the particular COFDs at issue no longer existed and there was no further relief to grant. Notably, Administrative Judge Clarke dissented, opining that the injury at issue was capable of repetition yet evading review given the repetitive cycle of DCAA Audits challenging costs, the Defense Contract Management Agency COFDs demanding repayment, L3's ASBCA appeals, and DCMA's dismissals.

The Government's position that the FAA applies to indirect personnel and the Government's reliance on DCAA's use of the statistical sampling are two common Government positions that contractors experience. Unfortunately, these two decisions left these issues open and will cause continued formal and informal disputes between industry and the

Government. That said, the decision of Government counsel in the L3 appeal that the Government could not defend that appeal should provide contractors with further confidence that the disallowance of their costs based on statistical extrapolation is improper.

Conclusion—This Feature Comment discusses the most important Government contract disputes decisions of 2021. The decisions addressed above, primarily addressing CDA jurisdiction and certified claim requirements, as well as a couple unanswered questions related to common Government arguments, are likely to have sustained impacts on contractors and the Government alike into the foreseeable future.

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