THE GOVERNMENT CONTRACTOR®

Information and Analysis on Legal Aspects of Procurement

THOMSON REUTERS®

Vol. 65, No. 5 February 8, 2023

Focus

¶ 25

FEATURE COMMENT: The Most Important Government Contracts Disputes Of 2022

In 2022, the U.S. Court of Appeals for the Federal Circuit, the Court of Federal Claims, and the Boards of Contract Appeals addressed matters of first impression, set new precedent, and clarified lingering legal issues affecting Government contractors. The Civilian Board of Contract Appeals addressed whether a third-party licensor could bring a claim under the Contract Disputes Act by virtue of its licensing agreement being incorporated into a Federal Supply Schedule (FSS) contract of another contractor. Addressing an area in which the Government and Government contractors have disagreed for years, the COFC set important limits around what is (and is not) technical data under Department of Defense contracts. The Armed Services Board of Contract Appeals also provided grounds for the Government potentially to further avoid contractor statute of limitations defenses in defective pricing claims. These decisions, and others, are discussed in detail below.

CBCA Does Not Have Jurisdiction to Hear Third-Party Claim When Licensing Agreement Is Incorporated into the Contract (*Avue Tech. Corp. v. Dep't of Health & Human Servs.*, CBCA 6360, 6627, 22-1 BCA ¶ 38,024; 64 GC ¶ 34)—The CBCA dismissed Avue Technologies Corp.'s claims against the Government because Avue did not have a procurement contract relationship with the Government necessary to establish jurisdiction under the CDA.

Avue developed a software platform, Avue Digital Services (ADS), that it sold to Carahsoft Technology Corp. In turn, Carahsoft (as an authorized reseller) sold a subscription to Avue's software to the Government under its FSS contract with the General Services Administration. The contract modification that added ADS to Carahsoft's FSS contract incorporated Avue's master subscription agreement (MSA) into the FSS. The MSA was Avue's standard commercial license that purported to bind subscribers.

Avue submitted a certified claim to the contracting officer alleging that the Food and Drug Administration (FDA), one of the agencies who placed an order for ADS under Carahsoft's FSS contract, had misappropriated proprietary ADS data in violation of the MSA. The claim was denied, and Avue appealed to the CBCA. In assessing whether it had jurisdiction under the CDA, the CBCA considered whether the MSA constituted a procurement contract for purposes of the CDA. The CBCA noted that the appeal presented a novel question and one which it had not previously addressed.

In concluding that it lacked jurisdiction, the CBCA emphasized the fact that the FDA bought the subscription from Carahsoft, not Avue, and the MSA did not actually require Avue to provide any services directly to the Government. This decision provides a stark reminder of the jurisdictional challenges contractors, particularly those providing commercial software and information technology products, oftentimes face when seeking recourse from the Government. And while this outcome shows that a direct claim is unlikely to pass jurisdictional muster at the Boards of Contract Appeals under the CDA, a similarly situated contractor seemingly still has options to pursue these types

of claims as pass-through claims through a prime contractor (reseller) or at the COFC under the Tucker Act.

Data That May Be Useful to Government Engineers Is Not Necessarily Technical Data (*Raytheon Co. v. U.S.*, 160 Fed. Cl. 428 (2022); 64 GC ¶ 224)—In a case involving Government overreach in the technical data sphere, and specifically addressing for the first time whether a company's proprietary supplier data constitutes technical data under the Defense Federal Acquisition Regulation Supplement, the COFC granted Raytheon Co.'s cross-motion for summary judgment, holding that Raytheon's vendor lists (i.e., its list of suppliers for the Patriot system) were not technical data within the meaning of DFARS 252.227-7013.

Raytheon provided engineering services to the U.S. Army through a series of a contracts starting in 2009. Beginning in 2012, the Army required Raytheon to submit its vendor lists identifying the suppliers that supported the program and the parts Raytheon purchased from these suppliers. Beginning in 2014, the Government began pushing back on the proprietary markings limiting distribution that Raytheon applied to the submittals. The Government asserted that the data in the vendor lists fit within the definition of technical data, instructed Raytheon to remove its proprietary markings, and to replace them with a legend that recognized the Government's broad license rights in the data.

On summary judgment, the Government made a variety of arguments as to why the vendor lists were technical data, including, among others, because (1) the data was useful to Government employees with technical backgrounds, (2) the lists included part numbers that may correspond to technical drawings, and (3) the lists would streamline the Army's procurement of spare parts. The COFC rejected each of the Government's arguments, concluding that the vendor lists did not constitute technical data because the lists did not "describe" the parts in any meaningful way.

The decision is important for contractors in two ways. It provides a roadmap for pushing back on Government overreach in asserting broad license rights to data that is not clearly technical in nature. But also it shows the importance of ensuring that the parties have a clear understanding and expectation regarding what the Government can (and cannot) do with the myriad of data (particularly non-technical data) contractors routinely are required to submit in connection with their Government contracts.

Claim Accrual for the Truth in Negotiations Act (*AAI Corp., d/b/a Textron Sys., Unmanned Sys.*, ASBCA 61195, 2022 WL 1154833 (March 23, 2022))—In this case, the ASBCA found that certain of the Government's Truthful Cost or Pricing Data statute, 10 USCA § 2306a, commonly referred to by its historical name, the Truth in Negotiations Act (TINA), related claims did not accrue for statute of limitations purposes until Textron Systems actually provided documentation putting the Government on notice of its potential claims years after contract award.

TINA requires contractors to submit current, accurate and complete cost or pricing data (i.e., the "facts that, as of the date of agreement on the price of a contract ..., a prudent buyer or seller would reasonably expect to affect price negotiations significantly") prior to the date of agreement on price. If a contractor fails to do so, the Government may bring a defective pricing claim, which is a breach of contract claim subject to the CDA's six-year statute of limitations. Under the CDA, accrual of a claim occurs when all events that fix liability were known or should have been known. FAR 33.201. To determine when a claim accrues, the ASBCA considers the elements which the Government must prove to establish its claim. For a defective pricing claim these elements consist of establishing that "(1) the information in dispute is 'cost or pricing data' under TINA; (2) the cost or pricing data was not meaningfully disclosed; and (3) the government relied to its detriment upon the inaccurate, noncurrent or incomplete data presented by the contractor." *McDonnell Douglas Servs., Inc.*, ASBCA 56568, 10-1 BCA ¶ 34,325; 52 GC ¶ 86.

Here, the Government asserted that Textron's failure to disclose certain subcontractor pricing in its proposals resulted in increased contract prices and a violation of TINA. Textron had performed three low rate initial production (LRIP) contracts for the Army. When the Army requested a proposal for the fourth LRIP, Textron used its previous proposal and applied an adjustment factor to the costs. But, just weeks before signing its certificate of cost or pricing data, Textron had received a firm quote from the subcontractor for a price lower than what Textron had included in its proposal, and Textron

failed to disclose this quote to the Government. The Government argued that its claim did not accrue when it executed the contract, but instead when Textron produced documents demonstrating the subcontractor's price approximately seven years after contract award. The ASBCA agreed with the Government, finding that Textron failed to establish a record that the CO knew or should have known of the lower subcontractor price because Textron did not disclose it, and because the CO had no way to learn of it on his own.

The Government based its second claim on the alleged duplication of costs contained within Textron's proposal. The Government contended that the statute of limitations did not bar its claim because the claim only became "knowable" once Defense Contract Audit Agency auditors reviewed Textron's proposal. Here, the ASBCA disagreed with the Government's position and held for Textron. Even if the CO did not grasp the duplication of costs in the initial review of the proposal, the ASBCA found that the Government could have discovered the alleged duplication of costs in the six years it had to scrutinize the proposal more closely. According to the ASBCA, "[c]laim accrual is not suspended simply because the Government failed to appreciate the significance of what the contractor furnished." (internal citations omitted).

This decision is another in a long line of relatively unfavorable ASBCA decisions on statute of limitations. While the ASBCA held on the one hand that the Government's failure to appreciate the significance of information contained in a proposal did not toll the statute of limitations, it seemingly opened the door to wide-spread Government assertions that it had no way of knowing of cost or pricing data, which could effectively toll the running of the statute of limitations indefinitely in defective pricing claims.

Terms and Conditions of Prime Contractor Incorporated into Contract (*CSI Aviation, Inc. v. Dep't of Homeland Sec.*, 31 F.4th 1349 (Fed. Cir. 2022); 64 GC ¶ 127)—The Federal Circuit overturned the CBCA's denial of a contractor's claim for cancellation charges, and remanded the case back to the CBCA. CSI Aviation Inc. (CSI) sought payment from the Department of Homeland Security (DHS) for flight cancellation charges that CSI claimed under the CSI terms and conditions that CSI contended were incorporated by reference into the parties' schedule contract.

CSI's terms and conditions' cancellation clause established a 25-percent nonrefundable cancellation charge applicable to flights cancelled up to 14 days prior to departure, and a 100-percent charge for flights cancelled thereafter. Throughout CSI's performance under its contract, the Government cancelled several scheduled flights triggering the payment requirements under the cancellation clause. CSI submitted invoices for payment related to the cancellations, which the Government refused to pay. The CO ultimately denied CSI's claim after determining that the terms and conditions actually were incorporated by reference into the contract, but that the cancellation clause conflicted with FAR 52.212-4(*l*), Termination for Government Convenience Clause (termination clause). Rather than determining whether the termination clause took precedence, the CBCA instead found that the parties had not incorporated the CSI terms and conditions into the schedule contract.

The Federal Circuit reversed the CBCA's decision and held that the contract, through language in CSI's offer, expressly and clearly identified the terms and conditions and incorporated them into the contract in such a way that no ambiguity existed about the identity of the incorporated document and its incorporation into the contract. The Federal Circuit also critiqued the CBCA's "unreasonable strain[] to find ambiguity" as to whether the contract had incorporated CSI's terms and conditions. It stated that the CBCA placed too much weight on whether the contract used the same express language to incorporate CSI's terms and conditions that it did to incorporate other contract documents. The Federal Circuit also reiterated that the incorporation of outside terms and conditions into a contract does not require specific "magic words."

While the Federal Circuit found that the contract incorporated the terms and conditions, the success of CSI's claim on remand likely will depend on another tenet of contract interpretation—assessment of what terms take precedence. This decision highlights the importance of performing a thorough assessment of all documents referenced during contract formation in order to evaluate what provisions are applicable and enforceable during contract performance.

Presentation of Claim to Correct CO Under Supply Contract (*DLT Sols., LLC*, ASBCA

63069, 22-1 BCA ¶ 38,144)—The ASBCA denied the Government's motion to dismiss the contractor's claims under a GSA FSS contract finding that the contractor properly presented its claim to the ordering CO. DLT Solutions LLC (DLT) provided software licenses, and associated maintenance and support under an FSS order to the U.S. Marine Corps (ordering activity). The Government contended that DLT should have presented its claim to the GSA CO rather than the ordering activity CO.

Under the CDA, a contractor must present its claim to an authorized CO who must issue a final decision on that claim. Claims under FSS contracts present difficult decisions for contractors as to which CO—either the ordering activity CO or the FSS holder CO—it should present its claim to. The rule, as described in *Sharp Elec. Corp. v. McHugh*, 707 F.3d 1367, 1372–74 (Fed. Cir. 2013); 55 GC ¶ 72, states that "FAR § 8.406-6 does not authorize an ordering CO to decide a dispute requiring interpretation of schedule contract provisions." If the dispute involves a specific order, rather than the schedule contract, then the ordering activity CO may decide the contractor's claim.

Here, DLT submitted a quote to the ordering activity CO, which mandated that the order contain a bona fide needs provision, which required the Government to exercise each renewal option, as long as the Government needed the product or "functionally similar" products. DLT's quote was accepted, and the bona fide needs provision was incorporated into the order. In its motion to dismiss, the Government pointed to the bona fide needs provision and speculated that the parties' dispute may require interpretation of the schedule contract's annual funding provision or the schedule contract's payment provision, meaning that DLT should have presented its claim to the GSA CO. The ASBCA found no conflict between those terms and the bona fide needs provision. The Government also argued that the ASBCA may need to interpret the schedule contract's order of precedence clause in order to resolve the dispute. The ASBCA found it did not need to evaluate that provision when it had already determined that no conflict existed between the bona fide needs provision and the schedule contract's provisions. Accordingly, the ASBCA found that the Government's failure to exercise the options when there was a bona fide need and whether this violated the bona fide needs provision pertained to the "performance or the construction of the Order, and [did] not require any interpretation of the Schedule Contract."

This decision provides contractors some additional clarity on who a claim arising under an FSS contract should be presented to, but the underlying murkiness can remain in some instances. Contractors, therefore, should thoroughly assess whether the nature of their claims will rely on an interpretation of the schedule contract or the order, before deciding which CO has authority to properly decide their claims.

Government Did Not Forfeit Right to Enforce Contract Terms (*GSC Constr., Inc. v. Sec'y of Army*, 2022 WL 1299122 (Fed. Cir. May 2, 2022))—The Federal Circuit affirmed the ASBCA's denial of a contractor's appeal of a termination for default when it determined that the Government did not breach the contract, and that it did not waive its enforcement rights under the contract.

Over the course of GSC Construction, Inc.'s (GSC) contract work, GSC refused to perform work it considered outside of the scope of the contract, and it utilized the incorrect building standards for designing the structures, both of which caused GSC to fall significantly behind the contract's construction schedule. The Army issued two notices to GSC stating that GSC was behind schedule and that it considered terminating the contract for default. In its response to the initial notice, GSC stated that it could complete the project within five months, and the Army permitted it to continue performance. But the parties did not enter into a contract modification to extend the contract's term, and in both notices, the Army stated that it did not waive any rights under the contract. Eventually, the CO terminated GSC's contract for default. GSC appealed to the ASBCA, arguing that it was entitled to an extension, and that the Army had forfeited any right to enforce the original completion date because it had provided GSC with additional time to complete the project. The ASBCA upheld the CO's final decision, and rejected GSC's argument that "because the Army initially provided GSC with additional time to complete the project, it forfeited any right to enforce the original completion date."

The Federal Circuit upheld the ASBCA's decision stating that "although the Army permitted GSC to work past the original completion date, [the Army] expressly and repeatedly stated, that it did

not 'condone any delinquency' or forfeit any rights under the contract."

Whether the Government has extended the length of the contract or waived its right to enforce the contract's deadline is a fact-specific inquiry. Most delinquency notices will state that the Government has not forfeited its rights under the contract. So, while the Government may permit work past the initially agreed-upon completion date, if no formal contract modification is issued extending the completion date, there is risk that *the Government may terminate the contract for default.*

♦

This Feature Comment was written for THE GOVERNMENT CONTRACTOR by* Steve Masiello, Gale Monahan *and* Caroline Colpoys *of Dentons US LLP. All authors practice in Dentons's Government Contracts practice group and are resident in the Denver, Colorado and Dallas, Texas offices.

