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The Clause

A Quarterly Publication of the Boards of Contract Appeals Bar Association, Inc.

The President's Column

Dear BCABA Members:

Greetings colleagues, and welcome to the June edition of *The Clause*, ably assembled by our editor, Pete McDonald. A special note of appreciation to Ryan Roberts and his team of editors for investing significant time and effort to bring the BCABA Case Digests back to *The Clause*.

We have a couple of important upcoming events that you don't want to miss: First, on Thursday, July 18, we will be co-hosting our annual Summer Social in honor of the Boards of Contract Appeals judges. In addition to gelato, biscotti, lemonade, and cappuccino, former BCABA President Susan Warshaw Ebner and judges from the ASBCA, CBCA, DCCAB, FAA ODRA, and the GAO CAB will be serving up "Practical Advice From the Government Contracts Bench." I will send out the details shortly.

Second, we have adjusted the date for our Annual Program to October 16, 2013. Given the austere fiscal environment faced by government agencies, law firms, and corporations alike, we are making a concerted effort to provide the absolute best CLE value proposition of the year to our members and colleagues in the federal procurement law community.

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President's Column (cont'd):

I would also like to take a moment to thank Dan Gordon, Steve Schooner, former BCABA President David Black, and their all-star panelists for putting on a fantastic program earlier this month that asked: "What's the Value of a GAO Protest?" We usually partner with GWU Law School as part of our Annual Colloquium, and Dan Gordon's recent research, which created significant buzz around the GovCon bar, was the perfect subject for a robust discussion amongst experts from the civilian and defense agencies, congress, industry, and academia. While the Annual Colloquium began the process of answering the titular question, it is clear that the panelists, audience, and broader community don't want Dan to stop there.

We look forward to seeing you around the bar this summer.

Best regards,

Donald M. Yenovkian
President
BCABA, Inc.



Bored of Contract Appeals (a.k.a. The Editor's Column)

by

Peter A. McDonald

C.P.A., Esq.

(A nice guy . . . basically.)

Back with this issue are the ever popular *Case Digests*, edited by Ryan Roberts. In the first article, Jack Horan and Patrick Stanton use a construction case arising out of a renovation project at West Point to cover the often overlooked topic of a prime contractor's responsibility. In her article, Samantha Daniels points out how grants are similar to contracts where disputes are concerned. Finally, Greg Hallmark and myself discuss a timely topic, the allowability of severance costs.

The Clause will reprint, with permission, previously published articles. We are also receptive to original articles that may be of interest to government contracts practitioners. But listen, everybody: You really shouldn't take all this government contract stuff too seriously. And as usual, we received some articles that were simply unsuitable for publication, such as: "Pete's Downward Mobility Slows"; "BCA Judges Take a Vow of Poverty"; and "Pete Finds a Friend (He Says)".

And for the next issue, I thought we'd do something different. Specifically, I solicit submissions for the "articles unsuitable for publication" feature of this column. All you have to send me is a title. If you don't want your name associated with your submission, it will be published anonymously. You will understand how I am looking forward to some REALLY good titles . . . (!!)



Reminder of Cheap Annual Dues

This is to remind everyone about the BCABA, Inc., dues procedures:

- ☺ Dues notices will be emailed on or about **August 1st**.
- ☺ Annual dues are **\$30** for government employees, and **\$45** for all others.
- ☺ Dues payments are due NLT **September 30th**.
- ☺ There are no second notices.
- ☺ Gold Medal firms are those that have all their government contract practitioners as members.
- ☺ Members who fail to pay their dues by September 30th do not appear in the Directory and do not receive *The Clause*.
- ☺ **Members are responsible for the accuracy of their information in the Membership Directory**, which is maintained on the website (bcaba.org).

Case Digests

*Edited by
Ryan Roberts**

BCABA members – Thank you for reading the June edition of the BCA Case Digests. First, a brief introductory note for those who are unfamiliar with the Case Digests. In June 2011 our staff began summarizing the most interesting and relevant substantive decisions from the boards of contract appeals as part of the another BCABA publication, *The Clause*. Below you will find summaries of the most interesting appeals decided during the months of January through April 2013.

As a preliminary note, I'd like to extend a special thank you to a few new Contributing Editors – Skye Mathieson, Laura Sherman, and Ethan Brown. Without their hard work, as well as the continuing commitment of our preexisting Contributing Editors, the Case Digests would not be possible.

To date, 2013 has produced a number of interesting cases. Perhaps most interesting is the ASBCA's decision in *Impact Associates* – the next chapter in the ASBCA's interpretation and application of the Federal Circuit's decision in *Sharp Electronics Corp. v. McHugh*, 707 F.3d 1367 (Fed. Cir. 2013) relating to the jurisdiction of ordering activity Contracting Officers to decide claims based on orders placed under a contractor's GSA Schedule contract. Two appeals were notably simply for the interesting statistics they produced – *Strand Hunt* resulted in a 155 page opinion with a 130 page dissent, and *PHI Applied* resulted in the Appellant being awarded a mere 0.001% of its claimed amount.

This quarter also produced the typical litany of contract interpretation appeals, challenges to claim certification requirements, and even two cases concerning sanctions and bad faith. As always, the Case Digests are a work in progress, so please feel free to contact me if you have any comments or questions.

Ryan Roberts
Editor-in-Chief
Sheppard, Mullin, Richter & Hampton

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Case Digests (cont'd):

Drennon Construction & Consulting, Inc.

CBCA No. 2391, January 4, 2013 – Judge Daniels

by Tara L. Ward, Wiley Rein LLP

In this case, the CBCA awarded damages to Drennon Construction & Consulting, Inc. (“Drennon”) for suspension of work due to a differing site condition and defective specifications. Drennon, which held a contract with the Department of Interior Bureau of Land Management (“BLM”) to widen a road to a campground in central Alaska, encountered collapsible soil that rendered its excavation efforts unsafe and unproductive. Drennon sought damages for unused materials, as well as idle equipment and labor costs.

BLM had previously contracted with the engineering firm USKH Inc. to provide drawings and specifications for the construction of the road within BLM’s budgetary constraints—documents that were incorporated into the solicitation and ultimately the contract. According to USKH’s design, which was developed digitally without a site visit, the construction contractor would be required to excavate into the hillside to widen the road before erecting a wall of gabions—wire structures filled with rocks and soil. USKH and BLM knew that the design was flawed, but used “weasel words” in the solicitation and planned to correct the design after the required post-award survey.

Drennon’s post-award survey of the project area revealed that the road could not be built according to the design drawings, but rather had to be built into the hillside, which would require additional excavation and a different approach. Upon encountering the collapsible soil, however, Drennon stopped work because “the hill was not going to stabilize” but rather “was going to continue to unravel.” The Contracting Officer authorized a stop work order due to the “great safety hazard” posed by continuing excavation. Drennon submitted several alternate proposals to complete the work, but BLM scaled back the project due to budget concerns. Drennon subsequently submitted two claims to the Contracting Officer: one seeking costs for purchasing, transporting, assembling, and disposing unused gabions, and another for costs incurred for idle equipment and manpower during the suspension.

The Board determined that the site conditions differed “significantly” than those identified in the solicitation, the specifications were defective, and the suspension was “*per se* unreasonable.” In particular, the Board found that the geotechnical report made representations regarding the site conditions, the site conditions were not reasonably foreseeable because there was no information available to offerors other than the contract documents and the area had been inaccessible to offerors during the proposal period, Drennon relied on the contract representations, and the conditions did in fact differ substantially from those described in the contract documents. Even though Drennon did not follow the report’s recommendations regarding construction approach, the Board found that Drennon would not have been successful even if it had followed the report’s advice.

The Board awarded Drennon all of its claimed costs for gabions, and all costs (except profit) for idle labor and equipment. Although the suspension period was not unreasonable, the Board noted that delay caused by defective or erroneous specifications are *per se* unreasonable, entitling Drennon to relief.

Case Digests (cont'd):

Although prevailing on a differing site condition claim is generally difficult due to the factual nature of the inquiry, the Board showed its willingness to find liability where, as here, the contractor truly has no information about the site conditions other than defective contract documents.

American AquaSource, Inc.

ASBCA Nos. 56677, 57275, January 8, 2013 – Judge Tunks
by Tara L. Ward, Wiley Rein LLP

In this case, the ASBCA considered and rejected two appeals by American AquaSource Inc. (“AAS”) related to its failure to timely deliver bottled water to a military base in Talil, Iraq under a contract that also contemplated construction of a bottling plant on government-furnished land. First, AAS requested that the termination of its contract for cause be converted into a termination for convenience. Second, AAS appealed the deemed denial of a claim asserting that the Government breached the contract by, among other things, failing to provide land for the bottling plant and to provide housing for AAS’s Iraqi workers.

AAS sought conversion of the default termination into a termination for convenience, arguing that the Government had waived the delivery date. For the Board to find a waiver, AAS had to establish that the Government failed to terminate the contract within a reasonable time after default, and that AAS had relied on that failure and continued to perform with the Government’s knowledge and implied consent. The Board found that AAS had failed to establish reliance. According to the Board, AAS had not performed activities amounting to “productive performance or tangible progress on the contract”: the fact that AAS conducted a site survey after defaulting was of no moment; AAS’s possible liability to the bottling plant construction contractor for liquidated damages was not “productive performance”; AAS’s efforts to purchase water from another source were “minimal” and thus did not meet the standard; AAS’s acceptance of government land was always contemplated by the contract and thus did not constitute “productive” or “tangible” performance; and AAS’s proposal to construct a mancamp was merely a request to perform additional work, not substantive progress. Thus, the Board concluded that the Government had not waived the delivery date and the termination for cause was proper.

The Board also denied AAS’s breach of contract claim. The Board found that, contrary to AAS’s assertions, the Government was not the “proximate cause” of AAS’s failure to meet the delivery deadline. AAS’s proposal stated that it would buy water from an approved source for the first quarter of contract performance, a strategy that, according to the Board, would have ensured AAS met the delivery deadline. In addition, the Board found that the breach allegations were meritless, as AAS could have performed the contract on the land provided and had never begun processing Iraqi workers in the first instance.

Contractors are advised to meet contractual deadlines to avoid termination of any kind. In the event of a missed deadline, however, contractors should be wary of “relying” on the Government’s failure to terminate the contract immediately as justification for continuing performance.

Case Digests (cont'd):

Lockheed Martin Aeronautics Co.

ASBCA No. 56547, January 22, 2013 – Judge Peacock

by Townsend L. Bourne, Sheppard Mullin Richter & Hampton LLP

In *Lockheed Martin*, the Board examined whether the alleged nondisclosure of subcontractor data constituted an overstatement of contract price (defective pricing) under the Truth in Negotiations Act (“TINA”).

Raytheon Systems Company (“Raytheon”), a subcontractor to Lockheed Martin Aeronautics Company (“Lockheed”), produced the Modular Mission Computer (“MMC”) provided by Lockheed to the Government for use in the F-16 aircraft. Raytheon had been providing the MMC 3000 to Lockheed while simultaneously developing a newer version of the system, the MMC 5000. When it became clear that Lockheed required more MMC 3000s than contemplated under the parties’ current agreement, Lockheed and Raytheon negotiated and entered into a Bridge contract under which Raytheon was to supply additional MMC 3000 components, as well as developmental components of the MMC 5000. The Bridge contract did not include procurement of the MMC 5000s that Lockheed would supply to the Government under the federal contract at issue. The MMC 5000s for the federal contract were procured under a later agreement between Lockheed and Raytheon, the Material Requirements Contract (“MRC”). The prices proposed by Raytheon for the MRC were based on an average rate – actual price was to be determined following definitization of Lockheed’s requirements, which occurred after Lockheed and the Government concluded negotiations on the federal contract. A post-award DCAA audit report concluded that the federal contract was defectively priced because Lockheed failed to disclose prices associated with MMC components under its Bridge contract, and DCAA recommended a contract price adjustment on this basis.

Before the Board, the Government argued that Lockheed’s failure to disclose prices associated with its Bridge contract constituted defective pricing, which caused an overstatement in the price of the computer systems. It advanced four theories for computation of its damages (two of which were proffered in a post-trial brief), all of which were rejected by the Board.

The Board found that Lockheed rebutted the presumption that an alleged nondisclosure results in an overstated contract price, and it stated that the Government failed to meet its burden to demonstrate the connection between the non-disclosed data and the contract price increase. The decision focuses on the inadequacies in the Government’s damages theories, stating throughout that the theories are without support and, specifically with regard to theories advanced post-trial, that “the theories are far from clear, obvious and logical without testimony or record support.” The Board found that the Government, *inter alia*, applied an unsubstantiated decrement when comparing contract prices, failed to account for varying delivery rates, and presented contradictory theories, one of which was refuted by its own auditor at trial. The ASBCA further stated that “the presence of multiple damages theories, particularly where unsupported by evidence, detailed logic regarding causation and how the data specifically would have been used by actual government negotiators, makes it unfeasible to conclude that the government suffered any damages.”

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Case Digests (cont'd):

Raytheon Missile Systems

ASBCA No. 58011, January 28, 2013 – Judge Melnick
by Steven Cave, Womble Carlyle Sandridge & Rice, LLP

The lone issue in *Raytheon* was whether the Government timely submitted a claim for Raytheon's alleged violation of its disclosed Cost Accounting Standards (“CAS”). Raytheon submitted a CAS disclosure statement (the “Statement”) to the Defense Contract Management Agency (“DCMA”) at the end of 1998 to take effect January 1, 1999. The Statement disclosed that certain subcontract costs, labeled “Major Subcontracts,” would receive a lower burden rate than Raytheon's fully burdened overhead rate.

In May 1999, Raytheon received a letter contract, in support of which it submitted a price proposal (the “Price Proposal”). The Price Proposal conveyed Raytheon's intention to issue a Subcontract to Lockheed Martin (the “Subcontract”) for the acquisition of certain items. The Price Proposal was reviewed by certain contracting office personnel, the Defense Contract Audit Agency (“DCAA”), and a DCMA Price Analyst (the “Price Analyst”). According to the price analyst's report, DCMA requested clarification from Raytheon regarding the burden applied to materials. In response to the request for clarification, Raytheon revealed its proposed burden rates and subsequently finalized contract terms and executed it in August 1999 (the “Contract”).

In June 1999, after receiving the letter contract but before entering into the Contract, Raytheon amended its Statement to expand the group of Major Subcontracts receiving the lower burden (“Revised Statement”). The Revised Statement was retroactively effective as of January 1, 1999.

In August 2005, the same DCMA Price Analyst who reviewed Raytheon's price proposal submitted in 1999 in support of the Contract reviewed Contract pricing information to verify whether Raytheon applied a reduced burden to its Subcontract, finding instead that Raytheon had fully burdened its Subcontract. On April 3, 2006, DCAA issued a draft condition statement alleging that Raytheon failed to comply with its disclosed “special burden” practices for Major Subcontracts by applying its fully burdened rate to its Subcontract. The condition statement further claimed that Raytheon's noncompliance increased the Government's incurred costs. In September 2006, DCAA issued an audit report relying on the 1999 Statement, Price Proposal, and Revised Statement to confirm the assertions in the draft condition statement.

Relying on DCAA's audit report, DCMA issued an Initial Determination of CAS noncompliance on October 13, 2006. In the Initial Determination, DCMA concluded that Raytheon applied a full burden to its Subcontract. The Contracting Officer, armed with the Initial Determination of CAS noncompliance, issued a final decision asserting a Government claim for over \$17 million.

In appealing the Government claim, Raytheon challenged the ASBCA's jurisdiction as time barred under the Contract Disputes Act (“CDA”) because it requires a contract claim to be “submitted within 6 years after the accrual of the claim.” According to the ASBCA, the

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Case Digests (cont'd):

the Government's November 29, 2011 claim could not have accrued before November 29, 2005 to be timely. As with many other claims filed under the CDA, the specific dispute was when the claim accrued. As described in the case, a claim accrues, under the CDA, when "all events, that fix the alleged liability . . . and permit assertion of the claim were known or should have been known."

Regarding claim accrual, the ASBCA stated that events fixing liability are generally known when they occurred unless they were concealed or were inherently unknowable. Applying that principle, the ASBCA ruled that the Government's claim acknowledged that Raytheon's July 1999 Price Proposal formed the basis of liability by disclosing the fully burdened rate applied to the Subcontract in contravention of its Revised Statement. According to the claim, the events giving rise to liability occurred in 1999 and therefore, unless said events were somehow delayed until at least 2005.

The Government raised three arguments supporting its contention that the claim did not arise until 2005, all of which were rejected by the ASBCA. First, the Government asserted that the Price Analyst was unaware of the burden applied to the Subcontract. The Board rejected the argument stating that "accrual [of a claim] does not turn upon what a party subjectively understood; it objectively turns upon what facts are reasonably knowable" and the Price Analyst's 2005 reconsideration concedes that the 1999 Price Proposal disclosed the burden to be applied to the Subcontract.

Second, the Government insisted that, even if the Price Analyst was aware of the proposed burden from the Price Proposal, the claim did not arise until the DCMA Divisional Administrative Contracting Officer ("DACO") became personally aware because only the DACO may issue a final decision asserting a Government claim. The Board emphatically rejected the argument by noting the lack of any supporting case law and that, if adopted, the Government's position would allow contractors and the Government to circumvent the CDA statute of limitations by compartmentalizing relevant information.

Third, the Government argued that the claim did not accrue until September 2006 because it was unaware of the injury sustained from Raytheon's noncompliance with its CAS disclosure Statement. Rejecting the Government's contention, the Board cited a string of cases clearly holding that damages do not need to be calculated for a claim to accrue. Similar to the Government's second argument, the ASBCA concluded that, if allowed to pronounce a claim's accrual only after calculating damages, a party could unilaterally postpone accrual to create an indefinite term for filing a claim. Once again, the ASBCA pointed to the Government's admission that it was on notice at least as early as August 2005 and relied on Raytheon's 1999 Price Proposal to establish liability. The ASBCA confirmed its long-standing position that a party's decision to postpone assertion of a claim based on available information does not delay or toll the CDA statute of limitations.

In addressing a peripheral issue, the ASBCA addressed – and made clear – the burdens associated with proving a board of contract appeal board's jurisdiction when challenged. Upon imposing the burden of proving jurisdiction on the Government, the ASBCA cited well-established precedent holding that "once challenged, the proponent of jurisdiction bears the burden of proving facts sufficient to support jurisdiction."

Case Digests (cont'd):

Colorado River Materials, Inc. d/b/a NAC Construction

ASBCA No. 57751, February 4, 2013 – Judge Thrasher

by *Daniel Strouse, Wittie, Letsche & Waldo LLP*

The ASBCA was asked whether a bilateral settlement agreement established a release and accord and satisfaction of all of a contractor's claims.

NAC entered into a task order to reconstruct parking lots and entrances. During performance, NAC found that unsuitable materials had to be removed and replaced. The order was modified for removal, but not replacement, of the materials. In March 2010, the CO informed NAC of "failures" on work, including the task order at issue. NAC responded that it was not at fault. In April, NAC submitted an RCO (RCO 2) seeking payment for the replacement of materials, an issue which had not yet been addressed.

In May 2010, the CO issued a final decision addressing the Agency's notice of failures, finding that NAC was required to fix areas at no additional cost to the Government. NAC did not appeal that decision. NAC completed the work and subsequently submitted another RCO (RCO 4) for additional payment, without explicitly referencing RCO 2. In December 2010, the CO issued a decision that NAC was entitled to a contract price increase. The CO prepared a "bilateral settlement agreement" that did not identify RCO 2, but related to "all issues and claims" arising under the contract, and "constitut[ing] an accord and satisfaction of all claims and all potential claims arising from" the contract.

Prior to signing the agreement, NAC asked the Government about the status of RCO 2, explaining that it had been long seeking resolution to that RCO. The Government responded that it believed all issues were resolved, citing its May 2010 decision; NAC signed the agreement. NAC subsequently filed a claim under RCO 2. After a deemed denial, NAC filed an appeal and the Government filed a motion for summary judgment, arguing that NAC had waived its right to pursue the claim.

NAC argued that there was no meeting of the minds regarding the scope of the agreement. Specifically, NAC's PM stated that he believed the agreement was limited to RCO 4, asserting that the Government had indicated that RCO 2 was still being processed.

The Board held that there were no material facts at issue with regard to the scope of the agreement, there was a meeting of the minds, and NAC knowingly waived its rights to pursue its RCO 2 claim. While the Board noted that a release and an accord and satisfaction are distinguishable, the agreement at issue constituted both a release and an accord and satisfaction. When an agreement contains unambiguous language, as the Board found here, the Board will not consider "extrinsic evidence." Because the agreement stated "all claims and all potential claims" were settled, the Board held that the unambiguous language of the agreement indicated that there was a meeting of the minds.

NAC also argued that the Government represented that RCO 2 was still being considered, and that NAC relied on that misrepresentation before it signed the agreement. The

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Case Digests (cont'd):

Board agreed with NAC that an accord and satisfaction may be voided if a party's assent is the result of a material misrepresentation. However, the Board did not find sufficient evidence that the Government misrepresented RCO 2's status to NAC. Therefore, the agreement remained binding.

As the Board noted, contractors should not sign a release or an accord and satisfaction for "all claims or potential claims" under an entire contract unless it is certain that all of its claims are resolved.

DCE Properties

CBCA No. 2923, February 12, 2013 –Judges Daniels
by *Benjamin J. Kohr, Wiley Rein LLP*

In *DCE Properties ("DCE") v. General Services Administration ("GSA")*, the Board literally applied a Tax Adjustment clause requiring DCE to submit an invoice for any increased taxes within 60 days of payment to preclude compensation for the increased taxes when DCE failed to submit the required invoices within sixty days.

DCE and GSA entered into a lease agreement for office and parking space in Monroe, Pennsylvania on April 1, 2003. The lease was to run for 10 years, until March 31, 2013. The lease contained a Tax Adjustment clause which, among other requirements, stated that the Government would "make a single annual lump sum payment to [DCE] for its share of any increase in real estate taxes during the lease term over the amount established as the base year taxes." However, the clause specifically conditioned payment, in bold text, on the submission of proper invoices and evidence of payment by DCE within sixty calendar days of the due date for the taxes. The real estate taxes were increased throughout the life of the lease, but DCE submitted its invoices for the adjustments in 2010 and 2011 more than sixty days after the tax due date. GSA refused to pay the increase as the invoices were submitted after the sixty day deadline.

On appeal, DCE argued that limitations imposed by contract provisions should generally be applied liberally and that a contractor's failure to meet such a limitation should only be enforced where the Government can demonstrate it has been prejudiced by the failure. In doing so, DCE relied upon *4J2RIC L.P. v. GSA*, GSBCA 1584, 02-1 BCA ¶ 37,742, in which the Board held that GSA's long-standing course of dealing in making tax adjustment payments despite late notice overruled a contract clause similar to the one in DCE's contract. In the alternative, DCE argued that allowing GSA to receive a windfall due to a technicality such as DCE's failure to provide the invoice within sixty days would constitute a forfeiture. Because DCE had fully performed the contract, it argued that the doctrine of substantial performance would prevent such a result. The Government replied that, unlike *4J2RIC L.P.*, there was no similar course of dealing here, and that the plain language of the contract clearly conditioned payment on the submission of invoices in a timely manner.

The Board rejected both of DCE's arguments, holding that the plain language of the

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Case Digests (cont'd):

contract should be applied. Because the contract clearly stated that DCE would lose its rights to a tax adjustment if it did not provide the invoices within a specified period of time, and it did not meet that requirement, DCE was not entitled to any compensation for the adjusted taxes. Unlike in *4J2RIC L.P.*, the Board found that there was no long-standing course of conduct under which DCE could have construed the Government to have abandoned its rights. Furthermore, the Board held that DCE failed to establish how it had been compensated anything less than the agreed upon rent. As a result, the doctrine of substantial performance was inapplicable as DCE had been fully compensated for its performance. The tax adjustment payments merely represented an opportunity for DCE to receive additional funds if it so chose.

The Board's holding provides a stark reminder that contractors must be fully aware of the terms to which they agree when entering into contracts with the Government.

JRS Management

CBCA 3053, February 14, 2013 – Judge Goodman

by Eugene Scott

The issue in this case is how to determine whether a contractor's purported second claim is sufficiently different from a prior claim to be considered a "new claim" for purposes of review at the Board.

Respondent, Federal Bureau of Prisons, prepared contractor performance evaluations based on appellant's ("JRS") performance, even though such evaluations were not required by the Federal Acquisition Regulations. Appellant submitted a claim ("Claim 1") to the Contracting Officer alleging that the contractor performance evaluations were not authorized by the contract, were inaccurately conducted and that the contract was not legally enforceable. Appellant sought \$1500 as compensation and a modification of the performance evaluations.

The Contracting Officer issued a timely final decision dated May 24, 2012 which was received by appellant on May 29, 2012 denying the claim. Appellant did not file a notice of appeal of this decision at any time thereafter.

On August 15, 2012 appellant submitted another claim ("Claim 2") to respondent. Claim 2 was based on the same underlying facts as Claim 1, but contained three counts in lieu of two, sought additional monetary damages and requested an interpretation that the contract was legally unenforceable. The Contracting Officer responded that this second claim was previously addressed in the prior Contracting Officer decision dated May 24, 2012.

Appellant's owner filed this appeal on October 16, 2012 alleging that the Contracting Officer failed to issue a final decision in response to its second claim. Respondent moved to dismiss for lack of jurisdiction to entertain the appeal.

Apparently appellant determined that Claim 2 should be considered a new claim because of its different number of counts, a new legal theory and sought additional damages. The Board held that because appellant didn't file an appeal within ninety days of the Contracting Officer's final decision of Claim 1 as required by the Contract Disputes Act, the Board does not have jurisdiction to review the merits of an appeal that is based on the same underlying facts as Claim 1.

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Case Digests (cont'd):

The real take away here is that legal counsel could have helped appellant preserve the opportunity for a review of the merits of its case at the Board. Instead of filing a second claim, appellant could have filed an appeal of the first claim. If it had, the appeal would have been timely and the Board may have reviewed the merits of the appeal. Although pursuing some matters pro se may provide a cost savings, in this case it came at the expense of missing an opportunity to review the matter at the Board.

Expeditors Worldwide USA, Inc. v. General Services Administration

CBCA Nos. 2748, 3237, Feb. 28, 2013 – Judge Walters

by Gregory R. Hallmark, Holland & Knight LLP

This appeal concerned the Government's sale of property, specifically whether the Government had misrepresented the condition of the property and whether the Government's subsequent conduct breached the implied duty of cooperation.

GSA offered for sale through its GSA Auctions website a barge that NASA had used in conjunction with its Apollo and Space Shuttle Programs. The solicitation stated that the barge was "in fair condition for transit." Expeditors paid a \$10,000 bid deposit and submitted the winning bid of \$337,165. But rather than being "in a fair condition for transit," the barge had 200,000 gallons of possibly contaminated water in its ballast tanks that would have to be removed prior to transit. The solicitation had made no mention of the ballast water. The Board found that although Expeditors did not inspect the barge prior to bidding, a reasonable pre-bid inspection would not have alerted it to the quantity of water in the ballast tanks or what the purchaser would have to do with the water in order to take delivery of the barge. After learning of the ballast water, Expeditors notified GSA that it expected NASA to remove the ballast water. NASA alerted GSA that it was willing and able to dispose of the ballast water, but GSA failed to pass that message on to Expeditors and instead "tersely" told Expeditors that GSA expected timely payment and would "not accept any further excuses." Expeditors did not make payment, and GSA terminated the contract for default. GSA asserted \$16,858.25 in liquidated damages, and retained the \$10,000 bid deposit in partial satisfaction of the liquidated damages.

Expeditors appealed, arguing that GSA had misdescribed the condition of the barge in its solicitation. The Board agreed, finding that "critical information" about the purchaser's ability to transport the barge was omitted from the solicitation, and that the description of the barge as being in "fair condition for transit" constituted a misdescription. The Board added that GSA's conduct in terminating for default and retaining of the bid deposit, after failing to provide the information and guidance needed to remove the barge and failing to respond to Expeditors' inquiry about whether NASA would remove the ballast water, was "entirely inappropriate and in breach of the implied duty of cooperation inherent in all contracts." The Board held that Expeditors was entitled to recover the \$10,000 bid deposit.

This case offers a reminder that the Government, like private contractors, is expected to conduct its contractual relationships in an open and cooperative manner.

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Case Digests (cont'd):

Troy Eagle Group

ASBCA No. 56447, March 4, 2013 – Judge Grant

By Laura E. Sherman, Wiley Rein LLP

In this appeal, the ASBCA addressed whether delays caused by the United States Government acting in its sovereign capacity are financially compensable under the Sovereign Acts Doctrine. Here, the Board held that as a matter of law, a contractor cannot recover costs for delay caused by sovereign acts of the U.S. Government. This appeal involved a variety of additional issues that the Board commented upon but left open for resolution subsequent to summary judgment.

On January 17, 2007, the Joint Contracting Command – Iraq/Afghanistan awarded a contract to Troy Eagle Group (“TEG”) for up-armoring, upgrading, and painting vehicles for the Iraqi National Police. After two modifications of the contract to address design issues, TEG began performance, during which it experienced significant delays. TEG encountered delays as a result of the Government’s border restrictions and convoy requirements and had difficulties picking up supplies because of road blocks. TEG repeatedly asserted that it was entitled to compensation for these delays. As a result of these delays in contract completion, the Government issued a Notice of Contract Conclusion on February 14, 2008.

After its request for equitable adjustment was denied, TEG submitted a claim in part for “extended overhead” and “inefficient production” costs resulting from the delays discussed above. TEG was awarded some costs based on other grounds, but the CO denied any claims for delay costs based upon the Government’s actions and policies. TEG appealed to the Board and the Government moved for summary judgment. In its motion, the Government argued that TEG was not entitled to delay costs because road blocks, border restrictions, and convoy requirements are sovereign acts of the Government for which a contractor cannot be compensated. The Board agreed.

The Board rejected TEG’s claim for delay costs and granted the Government’s Motion for Summary Judgment on that ground. Any act by the U.S. Government of a “public and general nature” that does not target a contractor constitutes a sovereign act. As long as a sovereign act was not taken for financial advantage in connection with a specific contract, the Government is shielded from liability for financial claims resulting from these acts. In this case, the Board found no evidence that TEG was targeted or that the acts were taken in pursuit of a financial advantage for the Government. In turn, it held that under the sovereign act doctrine, the Government was not liable for any delay costs as a result the Government’s road blocks, border restrictions, or convoy requirements.

To the extent that TEG argued that delays were caused by road blocks, border restrictions, or convoy requirements imposed by the Iraqi government, the Board found a dearth of evidence in support of this assertion. The Board granted summary judgment on this ground as well after finding no facts, case law or contract requirements that supported the U.S.

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Government's liability for the acts of the Iraqi government.

This appeal offers a reminder that contractors will not be compensated for the sovereign acts of the U.S. Government, even if those acts cause contract delays. However, it should be noted that a more fully pleaded claim could potentially defeat summary judgment if it contained concrete facts, case law, or contractual arguments in support of the contractor's position.

ALK Services, Inc.

CBCA Nos. 1789, 1845, 1929, 1930, March 15, 2013 – Judge Hyatt
by Daniel Strouse, Wittie, Letsche & Waldo LLP

The CBCA had to determine if the Veterans Administration ("VA") breached requirements contracts by reducing the number of orders, not exercising options, having VA employees perform the required services, and delaying orders.

ALK entered into three contracts with the VA for cemetery work: (1) snow removal; (2) grounds maintenance; and (3) headstone installation. Because there was no clearly stated maximum order for any of the contracts, and the estimated quantities were not guaranteed, the Board concluded that each contract was intended to be a requirements contract.

Contract performance was satisfactory under the original COTR. After an investigation of an altercation involving the COTR, as to which ALK's subcontractor provided testimony, the COTR was replaced by the cemetery director. The director administered the contracts differently, ordering fewer services and deciding not to exercise options. ALK alleged that the Government breached the contracts.

ALK argued that the VA acted in bad faith by reducing the orders. It asserted that the director was "displeased" with ALK's subcontractor's testimony during the investigation, and she retaliated against ALK. The Board noted that a showing of bad faith requires "almost irrefragable" proof (evidence of specific intent to injure). The Board concluded that ALK's allegations were "too general in nature," and its proffered evidence did not clearly and convincingly show bad faith by the VA. The Board noted that the VA had exercised all options on a separate contract with ALK, signifying a lack of bad faith.

ALK also argued that the Board acted in bad faith and abused its discretion by declining options. As noted above, ALK did not prove that the VA acted in bad faith. Further, the VA reasonably believed declining options would result in cost savings to the Government; therefore, the Board held that the VA did not abuse its discretion. In the absence of bad faith, the Boards presume that Government action is based upon valid business reasons.

ALK next argued that VA employees performed services that should have been ordered under the contracts. ALK offered three incidents of VA employees' performing grounds maintenance work; it asserted that the reduction in orders indicated that VA employees performed the work. The Board held that the few specific allegations were "negligible," and that ALK did

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not quantify the amount of work performed or its lost income. Thus, ALK failed to prove a breach by a preponderance of the evidence, and failed to establish breach damages. The Board also indicated that the Government is entitled to reduce its requirements for legitimate business reasons, and “there [were] plausible reasons” for the reduction in orders. While the Board ultimately concluded that the Government may have improperly assigned work to VA employees, ALK did not satisfy its burden of proof.

Lastly, ALK argued that the VA delayed making orders, interfering with ALK’s reasonable expectation of contract performance and rendering contract performance more costly. The Board agreed that such conduct may constitute a breach. However, ALK did not provide sufficient evidence of its damages. The Board noted that under requirements contracts, contract damages are measured from lost profits on the work that should have been awarded, not the estimated maximum, as ALK claimed. Therefore, the Board could not provide a remedy.

This case is a reminder that contractors must provide ample evidence to bolster their factual allegations and damages claims.

Appeal of Raytheon Missile Systems Company

ASBCA No. 57594, March 18, 2013 – Judge Clarke

by John Sorrenti, McKenna Long & Aldridge LLP

In Raytheon Missile Systems Company (“Raytheon”), Raytheon appealed a Contracting Officer’s decision denying its claim for \$3,368,510. Raytheon alleged that the Naval Air Systems Command (“NAVAIR”) breached its implied duty not to hinder or interfere with Raytheon’s performance such that it damaged Raytheon. But first, the ASBCA had to determine whether the Defense Energy Support Center’s (“DESC”) action in increasing the price of fuel was imputed to NAVAIR so that the ASBCA had proper jurisdiction over the appeal.

On August 18, 2004, NAVAIR awarded Raytheon a contract for Block IV Tactical Tomahawk Full Rate Production Cruise Missiles. Under the contract, Raytheon had to furnish the fuel for the missiles, called JP-10 fuel. In light of this, Raytheon included a firm fixed price for JP-10 fuel in its proposal of \$14 per gallon. Raytheon understood that it assumed some risk with this firm-fixed price for fuel, but the price of JP-10 fuel was usually stable and typically did not fluctuate in unit price.

The DESC supported the Department of Defense (“DoD”) and operated as the Integrated Material Manager (“IMM”) for certain aerospace energy products, including JP-10 fuel. Although NAVAIR and DESC are completely separate organizations within DoD, NAVAIR is DESC’s customer and under the contract at issue here, Raytheon was required to purchase all its JP-10 fuel from the DESC.

The DESC set the price per gallon for JP-10 fuel and would not allow Raytheon to

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purchase directly from its contractor which manufactured the fuel. After hovering between \$13-16 per gallon each year from 2003-2006, from 2007-2010, the DESC increased the price per gallon of JP-10 fuel to \$25.00 in order to: (1) cover increased costs related to DESC's contract to build a storage facility for JP-10; (2) purchase excess fuel to stock the storage facility; and (3) subsidize other losses by DESC's Aerospace Energy Business Unit experienced in commodities other than JP-10 fuel.

As a result of the increase in JP-10 fuel price, Raytheon submitted a request for economic adjustment to its NAVAIR Contracting Officer, which the Government denied. Raytheon then submitted a Contract Disputes Act certified claim for \$3,909,544 based on the increase in price of JP-10 to \$25, alleging that the increase in price constituted a breach of the Government's duty to cooperate and not hinder performance and unconscionability.

The ASBCA rejected the Government's argument that it lacked jurisdiction because Raytheon should have filed its claim with DESC and not NAVAIR. In doing so, the ASBCA first found that there was a "sufficiently close" relationship between NAVAIR and DESC. Noting that DESC was the purchasing agent and IMM of JP-10, that the contract between Raytheon and NAVAIR required Raytheon to provide the JP-10 fuel, and that DESC was the only available source of the fuel, the ASBCA found that DESC's decision to increase the price was imputed to NAVAIR.

To determine whether NAVAIR breached its implied duty not to hinder or interfere with performance, the ASBCA looked at whether NAVAIR's increase in the price of JP-10 fuel (1) was "specifically targeted" at Raytheon and (2) "reappropriated" a benefit guaranteed by the contract to Raytheon. The ASBCA determined that because DESC was the only source of JP-10 available to Raytheon and the price increase only affected DESC customers buying JP-10, NAVAIR's action "specifically targeted" the small group of JP-10 customers, which included Raytheon.

To determine whether the increase in the JP-10 fuel price reappropriated a benefit guaranteed by the contract, the ASBCA looked at the risk that Raytheon assumed for the price of fuel when it entered into the contract. At the time of contract award, DESC had published an explanation of how its fuel costs were determined and what elements were considered when setting fuel costs. These elements included the budgeted cost of transporting, storing, and managing the government fuel system, among other factors. Thus, Raytheon's benefit under the contract was its right to limit its risk of price increase to the components identified in DESC's published explanation. The ASBCA then looked at the components listed in the published explanation and compared them against the elements that composed the \$25 per gallon price to determine whether that composition contrasted with DESC's published explanation.

The ASBCA first found that the cost of losses from commodities other than JP-10 was included in the published explanation and thus including this as an element of the \$25 per gallon price of JP-10 did not breach NAVAIR's implied duty. However, the ASBCA found that financing the construction of the fuel storage facility and funding the purchase of the fuel to stock the storage facility were not included in the DESC's published price description. Thus, as

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to these two elements of the \$25 price per gallon, NAVAIR breached its implied duty of cooperation and noninterference. The ASBCA held that to the extent the \$25 per gallon price of JP-10 included the cost of constructing the storage facility and purchasing the excess fuel, Raytheon's appeal was sustained, and remanded the case to the parties to determine quantum.

This case shows that agencies can breach their implied duty not to hinder or interfere with performance when they take an action that specifically targets the contractor and reappropriates benefits from the contractor that were guaranteed by the contract. Here, the contract only required Raytheon to take on a published and defined risk of price increases in fuel. When the agency increased the price of fuel to pay for certain components that were not included in that published and defined explanation of price, the agency reappropriated Raytheon's benefit of its limited assumed risk and thus the agency hindered or interfered with Raytheon's performance under the contract.

Shubhada Industries

ASBCA No. 58173, March 21, 2013 – Judge Younger

by Townsend L. Bourne, Sheppard Mullin Richter & Hampton LLP

In *Shubhada Industries*, the ASBCA examined jurisdiction over an appeal by a non-corporate entity. The Government entered into a supply contract with Shubhada Industries ("Shubhada") for cover assembly ducts and first article testing. Following termination of the contract by the Government for convenience, the parties could not agree on termination settlement costs. The Contracting Officer eventually decided that Shubhada was entitled to \$500 in settlement costs, and Shubhada appealed. The Government argued before the Board that the Board lacked jurisdiction because the Government believed it had entered into a contract with Shubhada, Inc., a corporation, and the certificate of incorporation for Shubhada, Inc. had been revoked by the state of New Jersey. Thus, the Government argued, Shubhada was without authority to file a termination settlement proposal.

The Board denied the Government's motion to dismiss for lack of jurisdiction, finding that, despite the Government's position, the Government clearly had entered into a contract with Shubhada Industries, a sole proprietorship with a valid CAGE code. Shubhada, Inc. was never a party to the contract. The Board further stated that the Contract Disputes Act ("CDA") defines "contractor" as "a party to a Government contract other than the Government." The CDA does not dictate that a party to a Government contract must be a corporation. Thus, this decision reinforces the breadth of the Board's jurisdiction and serves as a reminder that Government contractors may come in all shapes and sizes.

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Green Dream Group

ASBCA Nos. 57413, 57414, 57565, March 25, 2013 – Administrative Judge Tunks
by Benjamin J. Kohr, Wiley Rein LLP

This appeal concerned a contractor's request for reimbursement of costs and profit following a termination for convenience where the Government alleged that the contract was, in reality, terminated for poor performance and that the contractor had submitted false documentation to support its termination settlement proposal. The certification in the case had also been previously challenged, as discussed in the Vol. No. XXI, Issue No. 3 of the Clause.

In September 2008, the Government awarded two task orders to Green Dream Group ("GDG") to provide road repair apprenticeship training in Iraq for six months. The umbrella contract under which the task orders were awarded required GDG to obtain the Contracting Officer's ("CO's") approval for any machinery and mechanical equipment to be utilized during work. With respect to one task order, the appellate record contained evidence that GDG submitted a list of equipment and machineries, but the record did not contain the list itself. An equipment list was also submitted for the second task order but it was rejected by the Government. Separately, each task order required GDG to provide security at the training site, which GDG provided by contracting with a local Sheik, Sheik Jamal, to secure the training sites. GDG provided the apprenticeship training for both task orders until the Government suspended work on the first task order in January 2009. The Government suspended work on the second task order in March 2009. Both task orders were terminated for the Government's convenience in May 2009.

GDG submitted termination settlement proposals for both task orders that included the costs incurred in renting machinery to perform the contract and the cost of its subcontract to provide security through Sheikh Jamal. In support of its proposals, GDG provided agreements with two equipment rental companies for several vehicles and equipment utilized under the task orders, as well as accounting records indicating payment for that equipment. GDP also submitted a security agreement with Sheikh Jamal, which required Sheikh Jamal to provide security for both sites in return for a lump sum payment at the beginning of the agreement. The Government issued final decisions disallowing most of the proposed amounts on the ground that GDG never provided a list of equipment to the Government, the equipment was never actually used in the performance of the contract, and discrepancies in the record raised questions as to whether security was ever provided and the existence of Sheikh Jamal. GDG appealed.

On appeal, the Government argued that GDG's task orders were terminated for "poor performance," despite the language of the termination. Furthermore, the Government argued that GDG failed to acquire the necessary CO approval of their equipment lists, used the equipment for only a few days, failed to provide security, fabricated the existence of Sheikh Jamal as indicated by GDG's inability to produce any supporting documentation, and falsified portions of the documents supporting its claims.

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In its decision, the ASBCA reiterated that, per FAR 52.249-2, the Government's responsibility to reimburse contractors for all allowable costs when terminating a contract for convenience extends to costs incurred producing defective work unless the Government establishes that the expense resulted from the gross negligence of contractual duties. Further, the ASBCA found that the rental agreements and receipts were sufficient to support GDG's claimed costs with respect to the equipment rentals. As the task orders required performance over the course of the full six months, GDG reasonably prepaid for all of the equipment and thus it was inconsequential as to the number of days the equipment was utilized. GDG was therefore awarded all of its equipment costs. The ASBCA also found the declaration of a local Sheikh stating that security services had been provided but no payments made as more persuasive than the Government's inability to locate Sheikh Jamal. However, because the record did not contain any evidence that GDG had paid for the services, the costs were insufficiently substantiated. Finally, the ASBCA recognized the allegations of false statements by the Government, but noted that the Contracts Disputes Act did not convey jurisdiction to adjudicate government claims and therefore did not address the issue.

The decision provides an important reminder—contractors must always take care to fully document costs incurred during the performance of government contracts. While doing so is good business practice generally, such documentation can be the difference between recovering or not recovering those costs should the Government terminate a contract for its convenience.

Dynamics Research Corporation

ASBCA No. 57830, March 26, 2013 – Judge James

by Eugene Scott

The issue in this appeal was whether a contract's Limitation of Government's Obligation ("LOGO") clause is enforceable by the Government to deny reimbursement of contractor costs above the contract's funded amount.

The appeal is of a Contracting Officer's decision to deny appellant's ("DRC") claim for unfunded work. The contract contained the DFARS clause Limitation of Government's Obligation (LOGO) which (i) provided that the contractor was not authorized to continue work beyond the point at which the total amount payable by the Government approximated the total amount funded to the contract and (ii) required that the contractor provide notice to the Contracting Officer in writing at least 90 days before the date the contract work would reach 85% of the total amount then allotted.

DRC provided written notices to the Government of its expenditures, requested additional funding and informed the Government that it was working "at risk". However the notices did not provide an estimate of when DRC would expend 85% of the allotted funding. Appellant submitted a claim for work it performed in excess of the contractually funded

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amount, based on what it said were assurances from the Government's technical point of contact that additional funds would be made available. It cited a prior Board decision, *Applied Technology Associates, Inc.*, ASBCA No. 49200 as authority to recover overrun costs. That case had a similar LOGO clause but it lacked the key provision authorizing the contractor to stop performance when it exhausted the allotted funding.

The Board held that the Government can enforce the contract's LOGO clause and deny appellant reimbursement for its costs incurred in excess of the contractual funding limit. The Board distinguished the *Applied Technology Associates* decision because its funding limitation clause didn't contain a right for the contractor to stop performance when it exceeded the contract's funding limitation. The lack of authorization for the contractor stop performance made the clause was unenforceable. The Board held the LOGO clause in the instant case authorizes the contractor to stop working when it reaches the contract funding limit and is thus enforceable.

After determining that the LOGO clause is enforceable, the Board determined that DRC's notices and requests for funding didn't comply with their contract's LOGO clause because it did not estimate the date when 85% of the allotted funds would be expended and additional funds needed to continue performance.

Lawyers for the Government and contractors should carefully review any funding limitation clauses to determine if the contractor has the right or duty to stop performance when it will exceed the contractual funding limit. Without that right or duty, a funding limitation clause may be unenforceable and the contractor may be entitled to recoup its overrun expenditures.

Further contractors should ensure that they comply with all parts of the notice requirement in a funding limitation clause. That is, not only providing notice of the remaining funding, but also providing an estimate when it will reach the point of expending 85% of the allotted funding and submitting it to the Contracting Officer.

Taj Al Safa Company

ASBCA Nos. 58394, April 1, 2013 – Judge Melnick
by Oliya Zamaray, Holland & Knight LLP

ASBCA Judge Melnick dismisses the appeal for lack of jurisdiction where the claim submitted to the Contracting Officer was in excess of \$100,000 and not certified under the Contract Disputes Act (CDA) 41 U.S.C. §§ 7101-7109.

In September 2008, the Joint Contracting Command Iraq/Afghanistan awarded Taj Al Safa Company a contract for ablution (cleansing) and water removal services in Iraq. In correspondence with one and then a second Contracting Officer, it came to be understood that Taj Al Safa was making a demand for \$551,000. The second Contracting Officer issued a final decision in September 2012, denying Taj Al Safa's claim for \$551,000. In subsequent email

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communications, Taj Al Safa asserted entitlement to different amounts, including \$537,000 and \$600,000. The Contracting Officer reiterated denial of Taj Al Safa's claims. Taj Al Safa emailed its Notice of Appeal to the Board in November 2012.

In response, the Board inquired as to whether Taj Al Safa had submitted a claim to the Contracting Officer and even suspended proceedings pending clarification of that issue. The Government subsequently filed a motion to dismiss, asserting that Taj Al Safa's claim exceeded \$100,000, but was not the subject of a CDA certification. Taj Al Safa's response provided copies of various invoices, but no certification.

In his decision, Judge Melnick reiterated a fundamental legal principle of claims litigation before the Board: that the Contract Disputes Act calls for a written and certified claim submitted to the Contracting Officer for a decision. 41 U.S.C. §§ 7103-7105. He acknowledged that the parties both treated Taj Al Safa's submission as a claim, citing to *Transamerica Ins. Corp. v. United States*, in which the Federal Circuit noted that the fact that the Government referred to the operative submissions as "claims" was persuasive. 973 F.2d 1572, 1579 n.2 (Fed. Cir. 1992). Judge Melnick then analyzed the legal ramifications of certification. He explained that while a defective certification does not deprive the Board of jurisdiction, it must be corrected before the Board may issue a decision. 41 U.S.C. § 7103(b)(3). However, the "complete absence of certification is not a jurisdictional defect that can be corrected after an appeal has been taken," and therefore would dictate dismissal.

Judge Melnick dismissed Taj Al Safa's appeal for lack of jurisdiction, noting that the company could still submit a properly certified claim to the Contracting Officer, and demand a final decision. Taj Al Safa would be within its rights to timely appeal to the Board any unfavorable decision by the Contracting Officer.

United Healthcare Partners, Inc.

ASBCA No. 58123, April 2, 2013—Judge Page

by Ethan Brown, George Washington University Law School LL.M.—Government Procurement

In *United HealthCare Partners* ("UHP"), the ASBCA held that UHP did not submit a monetary claim to the Contracting Officer for a final decision in accordance with Contract Disputes Act.

The United States Air Force awarded a firm fixed-price contract to UHP on October 1, 2011 for the purpose of "perform[ing] a 1-800 telephone-based Nurse Triage Answering Service on a 24/7 basis." The contract required UHP to "provide clinical assessment and [the] appropriate level of care support services for beneficiaries stationed at the Davis-Monthan [Air Force Base]" for the period of time from October 1, 2011 until September 30, 2012.

The Government accepted and paid UHP's invoice for October 2011. After the October 2011 invoice had been paid, however, disagreements between the Government and UHP arose;

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specifically, the Government disputed UHP's reported call volumes, and UHP disagreed with the Government's basis for rejecting UHP's invoices, as the Government insisted that UHP provide additional documentation (a monthly report) to verify the level of call services performed. UHP argued that the monthly report was unrelated to Government approval of UHP's invoices. On November 23, 2011, the Government sent a Show Cause notice to UHP, stating that "the Government considers your failure to maintain the standards outlined . . . in the contract unacceptable." The notice also directed UHP to address Government concerns within fourteen days or face termination under FAR 52.249-8. In January 2012, the Government notified UHP that it would withhold payment of the November 2011 and December 2011 invoices "pending verification of call volume." On January 31, 2012 UHP responded by reiterating its stance that the monthly call reports were not required for invoice approval under the contract.

Both parties continued to trade correspondence in the same vein until February 3, 2012, when UHP informed the Government that it would suspend all services under the contract until a resolution of the unpaid invoices could be reached. On February 6, 2012, the Government then issued a notice of termination for cause under FAR 52.249-8, justified by UHP's "failure to maintain the standards required by the [contract]." The Government advised UHP that the termination "is the final decision of the [CO]."

UHP subsequently submitted a May 7, 2012 written appeal of the CO's termination for cause of the contract, asserting that the Government "improperly denied payment for [services] performed, in breach of [the contract]." Further, in its appeal, UHP claimed that it "remained uncompensated [for services rendered] in the amount of \$71,659.30." Among the attachments to the June 21, 2012 pleading is a "Request for Fair Compensation" for \$71,659.30; however, this document is not referred to as a claim by UHP nor addressed to the CO for a decision. The UHP CEO signed the document and added the words: "I certify that the request is made in good faith, and that the supporting data is accurate and complete to the best of my knowledge and belief."

The Board began its analysis by reiterating that UHP bore the burden of establishing jurisdiction for the claim, and that the CDA requires that "[e]ach claim by a contractor against the Federal Government relating to a contract shall be submitted to a [CO] for a decision." 42 U.S.C. § 7103(a)(1). Although the CDA does not precisely dictate a particular wording or format for a claim, a claimant, at the very least, must furnish in writing "a clear and unequivocal statement that gives the [CO] adequate notice of the basis and amount of the claim." *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.3d 586, 592 (Fed. Cir. 1997). Additionally, a claim under the CDA must first be submitted to the CO for a decision. *James M. Ellett Constr. Co. v. United States*, 93 F.3d 1537, 1543 (Fed. Cir. 1996). However, the Board found that neither UHP's "Request for Fair Compensation" nor its regularly-submitted invoices provided a cognizable claim under the CDA.

First, the Board did not consider UHP's "Request for Fair Compensation" as a valid CDA claim, as there did not appear to be any proof that UHP's demand was properly submitted

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to the CO for a decision. Nor can UHP first assert a claim as part of its complaint, as it is “the claim, not the complaint [that] determines the scope of our jurisdiction in this appeal” *American General Trading & Contracting, WLL*, ASBCA No. 56758, 12-1 BCA ¶ 34,905 at 171,639.

Further, the Board did not find any evidence that UHP’s regularly-submitted invoices provided the basis for a valid CDA claim. FAR 2.101 dictates that a claim is distinguished from a routine request made in the ordinary course of business that is not in dispute at the time of submission. The Board’s inquiry as to whether a request is routine or non-routine is factual and dependant on the circumstances of the particular case. But a contractor’s request for payment, such as a voucher or UHP’s regularly-submitted invoices, is considered “routine” and must be converted into a claim in accordance with FAR 2.101. *See Ellett*, 93 F.3d at 1542-43.

This case provides a good lesson for government contractors on the acceptable contents and format to establish a cognizable claim under the CDA. Contractors must remember that routine requests for payment will not meet the test for the submission of a valid claim.

Servicios y Obras Isetan S.L.

ASBCA No. 57584, April 5, 2013 – Judge Wilson

by *Skye Mathieson, U.S. Air Force, Commercial Law & Litigation Directorate*

The question before the ASBCA was whether a contract should be deemed *void ab initio* if its award resulted from misrepresentations in the contractor’s proposal.

In 2008 the Air Force solicited for the construction of a fire training hardstand at Morón Air Base, Spain. The RFP required offerors to possess current certificates and have sufficient past performance in numerous categories of work. The Appellant, Isetan, was only qualified in one category. However, Isetan’s proposal contained a “private contract” with a subcontractor, Heliopol. Heliopol was certified and had past performance in all but one category. A second subcontractor satisfied the final category. Based on these representations, Isetan’s offer received an acceptable rating. The Air Force ultimately awarded the contract to Isetan for 594,978€.

Several months into performance, the Air Force discovered that Isetan had never had a subcontract with Heliopol. This misrepresentation, in addition to Isetan’s sluggish performance and concerns over falsified bid bonds, lead the CO to retain 10% of payments on Isetan’s invoices. Subsequently, the CO terminated Isetan for default based in part on the falsified proposal. Isetan appealed the termination to the ASBCA and sought recoupment of 112,439.80€ in withheld invoice payments.

The Air Force moved to dismiss the appeal for lack of jurisdiction, or, in the alternative, to deny the appeal. The Air Force argued that the contract was *void ab initio* for fraud in the inducement because Isetan knowingly submitted the fictitious Heliopol subcontract in order to

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obtain the award. The Air Force further argued that Isetan knowingly submitted a fictitious bid bond in order to begin performance.

The ASBCA first turned to the three-step test for voiding a contract that is tainted by misrepresentation: (1) the misrepresentation must have been either fraudulent or material; (2) the misrepresentation must have induced the Government to make the contract; and (3) the Government must have been justified in relying on the misrepresentation.

After examination of the evidence, the Board ruled in favor of the Air Force. First, the Board found that Isetan had “materially misrepresented its relationship with Heliopol” because the two companies did not have a contractual relationship. Second, the Board determined that Isetan’s inclusion of the Heliopol subcontract enhanced its ability to obtain award, and that the Air Force had relied on the misrepresentation in making its award decision. Third, the Board found that the Air Force’s reliance on Isetan’s misrepresentation was reasonable. Based on the above, the Board deemed the contract *void ab initio* and denied (rather than dismissed) the appeal.

This case offers a reminder that, although the Boards do not have jurisdiction to make findings of fraud under the customary False Claims Act or the CDA anti-fraud provision, the Boards do have jurisdiction to examine whether an award was tainted by material misrepresentations or fraud that render the contract *void ab initio*.

Glasgow Investigative Solutions, Inc.

ASBCA No. 58111, April 9, 2013 – Judge James

by Christopher Noon, Baker & Hostetler LLP

The issue before the ASBCA was whether the Government improperly exercised its option rights under FAR 52.217-8, *Option to Extend Services*. In this case, appellant Glasgow Investigative Solutions, Inc. (“Glasgow” or the “Appellant”) was awarded a contract by the U.S. Property & Fiscal Office, Army National Guard (the “Agency”) for security guard services. The contract started as a base period of performance with four 12-month option periods. Glasgow alleged that the Agency constructively changed the contract when the Agency extended the period of performance of Option Year 1 on a month-to-month basis through a series of bilateral modifications. Glasgow argued this was improper and that the Agency should have instead exercised Option Year 2 for a full 12-month period.

The dispute centered partly on bilateral Mod. P00003 to the contract, which extended the base period of performance by four months and changed the start dates for each of the four option periods. The Government later exercised Option Year 1 for the 12-month period of February 1, 2010 through January 31, 2011. However, at the completion of Option Year 1, the

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Case Digests (cont'd):

Agency did not have the funding available to exercise Option Year 2 for another 12 months. Instead of exercising Option Year 2, the parties entered into a series of five (5) bilateral modifications that extended Option Year 1 from January 31, 2011 to July 31, 2011, a total of six months.

Glasgow filed a claim for \$99,833.04 for the Agency's series of monthly extensions that extended Option Year 1 instead of exercising Option Year 2 in accordance with the contract. Glasgow first argued that these month-to-month extensions were an improper exercise of FAR 52.217-8, arguing that the clause is only appropriately exercised when there is a follow-on contract and the government needs to bridge performance between the incumbent and the new contractor. Glasgow also argued that the Agency exhausted its extension rights under FAR 52.217-8 when it issued Mod. P00003 to the contract, which extended performance of the base period. FAR 52.217-8 provides that the Government may extend performance under the contract "but the total extension of performance . . . shall not exceed 6 months."

The Agency argued that the five bilateral modifications were valid exercises of FAR 52.217-8 since options may be exercised prior to exercising all contract option years.

The Board agreed with the Agency and held that post-option extensions are not the only circumstances for the proper use of the FAR 52.217-8 clause. The Board cited FAR 31.111 for support, which lists delays due to bid protests and alleged mistakes in bid as appropriate circumstances for FAR 52.217-8 extensions. The Board also held that the Agency did not exhaust its extension rights under FAR 52.217-8 when the parties agreed to Mod. P0003 because FAR 52.217-8 expressly gives the Government the right to unilaterally extend contract performance and Mod. P00003 was a bilateral modification. Therefore, the Board held that the Agency retained its extension rights when it extended Option Year 1 by 6 months.

As illustrated by this case, the Government has broad authority to extend or modify a contract. If a contractor agrees to a change in the form of a bilateral modification, it may have subtle but important ramifications for the contractor, even where the contractor reserves its rights as the Appellant did in this case.

Strand Hunt Construction, Inc.

ASBCA No. 55905, April 11, 2013 – Judge Thomas, Judges Paul and Younger dissenting
by *Jeffery M. Chiow, Rogers Joseph O'Donnell*

Strand Hunt Construction, Inc. ("Strand Hunt") was awarded a contract to design and build a Joint Security Forces Complex (JSFC) at Eielson AFB, Alaska. The parties agreed that the project was substantially complete on 1 November 2005, and they agreed that Strand Hunt was entitled to 60 days of delay after the contract completion date. But the parties could not agree upon a binding contract completion date or whether Strand Hunt was entitled to any additional delay to avoid liquidated damages or to support its affirmative claim of nearly \$500,000. Neither could all of the Board Judges.

The Solicitation sought completion in 630 days; but Strand Hunt, in its winning
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proposal, offered to complete the work in 570 days with a goal to finish on 1 July 2005. The Notice to Proceed (NTP) said that the “entire work is to be complete and ready for use by 1 July 2005.” For nearly a year, both parties’ actions were focused on and consistent with a July 1, 2005 completion date, but as Strand Hunt fell behind its working schedule, it sought schedule relief, asserting that the contract completion date was 23 September 2005, *i.e.* 570 days from the NTP. Judge Thomas’s 23-page majority opinion concluded that Strand Hunt agreed to complete the work in 570 days, and that any subsequent modification to that agreement failed for lack of consideration. Judge Paul’s 131-page dissenting opinion found that, notwithstanding the “apparent confusion in [the Contracting Officer’s Final Decision]” and the Source Selection Evaluation Board’s discussion of Strand Hunt’s “confusing” schedule, the baseline schedule with a 1 July 2005 completion date was the only schedule accepted by the Corps. Judge Younger’s half-page dissenting opinion agreed, without analysis, that 1 July 2005 was the contract completion date.

The Board opinions also disagreed about the resulting damages. The majority and Judge Paul agreed with Strand Hunt that “substantial completion” was synonymous with “beneficial occupancy” so that any liquidated damages beyond the stipulated substantial completion date were inappropriate.¹ The majority opinion then awarded Strand Hunt 68 days of delay damages for government-caused, non-concurrent delay after substantial completion, and for part of a stop work period imposed after an incident in which Strand Hunt’s application of muriatic acid created an environmental and occupational hazard. Judge Paul’s highly critical dissent would deny Strand Hunt any compensable delay, and enforce liquidated damages against Strand Hunt for the month of October 2005, finding that the actual contract completion date and the parties stipulations compelled that result. Judge Younger seems to agree with Judge Paul in the result, and specifically disagrees with the majority’s finding that assigned any delay responsibility to the Government for the muriatic acid stop work order.

The combined 155 pages of opinion provide almost no clear guidance for contracting professionals, and one wonders how the Board would have determined the parties’ intent in the several schedule modifications during performance had they not agreed to several key stipulations. But it is clear as cavil that much effort was wasted over an issue so fundamental as the completion date upon which the parties’ agreement is premised.

Turner Construction Company v. Smithsonian Institution

CBCA No. 2862, April 19, 2013 – Judge Somers

by Steven Cave, Womble Carlyle Sandridge & Rice, LLP

The dispute in *Turner* centered on whether the parties agreed to a contract with a fixed, not-to-exceed (“NTE”) price that barred Turner Construction (“Turner”) from recovering increased costs. After reviewing the contract language, the contract modifications’ terms, and the parties’ conduct, the CBCA granted Turner’s Motion for Summary Relief in part.

¹ - Judge Younger’s dissent does not address this point.

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A contract for the “Concept Phase” of the Smithsonian's “Public Space Renewal at the National Museum of American History” program was novated to Turner Construction in early 2004. In September of 2005, Turner was awarded a new contract (the “Contract”) under the same program to revitalize various Smithsonian exhibits in various museums. The Contract's price term indicated that, for certain specified services, it was a “not-to-exceed” price. As cited in the decision, the parties entered into many modifications to this contract. Smithsonian's argument was not that the contract itself indicated that this was fixed price contract with a specified NTE amount; rather, Smithsonian asserted that the modifications established a NTE price beyond which Turner could not recover excess costs.

Modification 0007 played an important role in the decision because it stated that “[t]his is a funding action only [sic] is not intended to represent a total firm fixed amount obligation on the part of the Contractor. . . . Once construction activities are definitized, funding will represent a firm fixed price contract amount.” Prior to executing Modification 0007, Turner submitted its 95% construction documents and, after correspondence, Smithsonian issued a funding notice with instructions to proceed that stated “[a] formal modification will be issued to definitize activities.”

A month after the parties executed Modification 0007, Smithsonian unilaterally issued Modification 0008 to increase contract funding to match the price proposed in Turner's 95% construction documents. Modification 0008 stated that it was issued to provide additional funding and that it was a funding modification only. Modification 0008 did not state that it was establishing a fixed NTE price. The parties subsequently entered into modifications 0009-0015.

In contemplation of entering into Modification 0016, the parties communicated about the status of the project whereby the Contracting Officer expressed concern about completion. Turner responded that it was

currently working under a contract that is undefinitized relative to cost and this has been confirmed in Modification #7 and has been reconfirmed in Modification #16. The path to definitizing the cost and pricing for the contract is somewhat complicated and the path forward after the definitization (as to what constitutes a change) will also require some discussion.

Modification 0016, executed after the correspondence, expressed the parties' intent to definitize the project as soon as possible while reiterating Modification 0007's statement that this was a funding modification and, like previous modifications, was not intended to represent a total firm fixed price amount, leaving a large portion of the contractual services undefinitized. Modification 0016 stated, in part, that

Subsequent to Modification 0007, Modifications 0008 and 0012 have been issued to provide additional undefinitized funding; however, Modifications, other than those cited, represent affirm-fixed price commitment on the part of the Contractor for performing the work that has been definitized or described in associated changes; however, it is agreed that the construction activities for total funds available on the contract have not been completely definitized.

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In an effort to definitize the scope of work (“SOW”) and contract price, the parties corresponded about Turner's 95% construction documents and addenda. The correspondence addressed the parties' understanding of the type of contract they had entered into and the mutual intent to definitize the SOW and total estimated costs. A disagreement over the total cost of construction ultimately emerged at which time Turner met with Smithsonian's newly assigned Contracting Officer (“CO”). The CO asked Turner to put its “position” regarding the price discrepancy in writing; Turner asserted that

Smithsonian clearly understood that a definitized contract amount was to be negotiated. This has not happened yet.

To date, only \$14,707,748 in scope has been definitized. Turner and the Smithsonian must still negotiate and definitize the balance.

In response, the CO issued a determination concluding that the funding modifications' failure to allocate funding, although potentially confusing to Turner, did not relieve Turner from finishing construction for the NTE amount identified in Modification 0001. The CO's conclusion cited the parties' intent to establish a NTE price which he asserted was supported by the contractual language. Turner subsequently submitted a certified claim for \$14,527,695 which was denied in its entirety. In its appeal, Turner averred that the contract was a fixed price contract that required the parties to agree to pricing terms for a definitized SOW but the parties failed. Smithsonian countered that it accepted Turner's fixed NTE price proposal when it issued Modification 0008 after submission of the 95% construction documents.

In deciding whether Turner was entitled to recover its costs, the CBCA reviewed the contractual language and the parties' course of conduct. According to the Board, the contract required the parties to negotiate the SOW and price at the completion of the 95% construction documents, which they did. The CBCA ultimately held that although no agreement was ever reached, neither party breached the contract and, because a NTE price was never agreed upon to limit the final cost of construction, Turner was entitled to recover increased costs. The CBCA also considered and emphasized the parties' conduct, finding that “Turner could not have been clearer in its actions and correspondence throughout the process that it believed that the parties had not agreed on a price.” This further supported the conclusion that Turner was entitled to compensation for additional work because there was no ceiling on incurred costs.

The CBCA also addressed the minor issue about contract type. Smithsonian maintained that, if Turner was reimbursed for reasonable construction costs, the Board would have to declare the contract to be a cost-reimbursement contract in contradiction to the parties' agreement that this was a fixed price contract. The Board disagreed, ruling that it does not have to declare the contract a cost-reimbursement type because, under a fixed price contract with a ceiling, a contractor can submit a claim seeking an equitable adjustment to the contract.

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Impact Associates, Inc.

ASBCA No. 57617, April 19, 2013 – Judge James

By Ryan Roberts, Sheppard, Mullin, Richter & Hampton

The Appeal of Impact Associates, Inc., is the next chapter in the ASBCA's interpretation and application of the Federal Circuit's decision in *Sharp Electronics Corp. v. McHugh*, 707 F.3d 1367 (Fed. Cir. 2013). In *Sharp*, the Federal Circuit established a clear delineation of jurisdiction between GSA Schedule and ordering activity Contracting Officers for deciding claims relating to a GSA Schedule order. The Federal Circuit held that where a claim involves the terms of the order are at issue, or where the claim requires merely applying the terms of the contractor's GSA Schedule contract, the ordering activity Contracting Officer has jurisdiction to decide the claim. However, where the claim requires some interpretation of the terms and conditions of the contractor's GSA Schedule contract, or involves both an interpretation question and a question relating to the terms of the individual order, the GSA Schedule Contracting Officer has jurisdiction to decide the claim. Placing the wisdom of this logic aside for present purposes, this decision has forced the ASBCA to examine closely the nature of each claim relating to a GSA Schedule contract to determine whether the ordering activity Contracting Officer had jurisdiction to decide the claim.

In *Impact*, the Government placed an order under Impact's GSA Schedule contract for "Trade Shows/Exhibits and Conference and Event Planning Services." The no-cost order required Impact to plan, organize, and conduct the "Unexploded Ordnance (UXO)/Countermine Forum." Impact's GSA Schedule contract includes a clause stating that it "is entitled to all of the registration, exhibition, sponsorship and/or other fees collected as payment for performance under the task order if there is no cost to the Government." Once performance began, however, the Army objected to Impact's attempts to obtain sponsorships, and prevented Impact from signing sponsors on the basis that it "created the perception/appearance of 'access' for sponsorship." In support of its argument, the Government cited DoD Joint Ethics Regulations, ¶ 3-206 (which prohibits co-sponsorships of non-Governmental entities of DoD sponsored conferences) and Impact's GSA Schedule contract (which requires it to comply with all applicable laws, rules, and regulations).

With *Sharp* as the backdrop for its decision, the ASBCA held that "[t]he parties plainly dispute the meaning of the FSS contract's no-cost task order clause, FAR 52.203-13, 52-212-4 (q) and GSA 552.203-71, as well as the DoD Joint Ethics Regulations, ¶ 3-206, allegedly referenced in the 52.212-4(q) clause. . . . Hence, to decide this appeal, the CO inescapably must interpret those FSS provisions as well as provisions of DO 317. Therefore, we hold that FAR 8.406-6(b) required the ordering CO to refer this dispute to the GSA schedule CO, and the ASBCA lacks jurisdiction of the appeal."

Impact is one of many cases we will see in the near term where the ASBCA will be forced to examine closely the jurisdiction of ordering activity Contracting Officers who have

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denied contractor claims. The ASBCA clearly decided Impact within the Sharp framework and, because the claim clearly required the Contracting Officer to interpret the no-cost provision of Impact's GSA Schedule contract, the ASBCA correctly dismissed the appeal for lack of jurisdiction. Going forward, contractors should both closely examine the nature of their claims and prudent contractors will likely either file any claim that could potentially relate to the terms and conditions of its GSA Schedule contract to the GSA Schedule Contracting Officer or file claims with both Contracting Officers.

MAC International FZE

ASBCA No. 56355, April 23, 2013 – Judge Dickinson
by Christopher Noon, Baker & Hostetler LLP

The issue before the ASBCA was whether it has jurisdiction over the claim appeal of Appellant MAC International FZE ("MAC" or "Appellant"). This was the second opinion issued in this case. In the first opinion, the Board found that it did not have jurisdiction to hear MAC's claim for funds that it alleged had not been paid under delivery orders funded with U.S. government appropriated funds. *See MAC International FZE*, ASBCA No. 56355, 10-2 BCA ¶ 34,591 ("MAC I"). In this second opinion, the Board examined whether it had jurisdiction over the remainder of MAC's claim whereby MAC sought interest under the Prompt Payment Act ("PPA") in an amount of \$653,629.52. MAC alleged that it was owed this amount in interest under 16 delivery orders for which it had been paid, but allegedly later than required by the PPA.

This case originates from a contract between MAC and the Coalition Provisional Authority ("CPA) in Iraq. The CPA was created in 2003 by a coalition of nations, including the United States. The U.S. Government provided funding and U.S. Army personnel to provide management and acquisition support to the CPA and any successor entity. On June 28, 2004, the CPA was dissolved and all authorities, responsibilities, and obligations were transferred to the Interim Iraqi Government ("IIG"). IIG then delegated contracting authority to the Project and Contracting Office ("PCO") and the Joint Contracting Command-Iraq/Afghanistan ("JCC-I/A"). The PCO and JCC-I/A provided contracting support through December 31, 2007. On February 14, 2008, MAC submitted its certified claim.

MAC principally argued that the U.S. Government should be liable for its claim because only U.S. Government appropriated funds were used in the 16 delivery orders now at issue and, for that reason, the liabilities under the delivery orders belonged to the U.S. Government and the liabilities were not transferred to the IIG.

The Board disagreed with MAC and found that the contract under which the deliver orders were issued was a contract between the CPA, an international entity, and MAC; the U.S. Government was never a party to the contract or to any of the delivery orders. At all times the U.S. Government was solely a delegate of the CPA and, after its dissolution, a delegate of the IIG. The Board also cited case law that has held that the CPA was not an instrumentality of the U.S. Government despite being principally controlled and funded by the U.S. Government. *See*

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United States of America ex rel. DRC, Inc. v. Custer Battles, LLC, 444 F. Supp. 2d 678, 688-89 (E.D. Va. 2005). Accordingly, since the U.S. Government was never a party to the contract or the delivery orders, it could not be liable after dissolution of the CPA.

Furthermore, since the U.S. Government was not a party to the contract, the Contract Disputes Act (“CDA”) does not apply. Therefore, MAC could not recover interest under the PPA because the PPA must be asserted in a claim under the CDA. Accordingly, the Board held that it did not have subject matter jurisdiction to decide the merits of MAC’s claim appeal.

This case is another in a series of cases at the boards and courts addressing the CPA’s classification and whether there is jurisdiction over claims against the CPA. *See, e.g., United States of America ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617 (E.D. Va. 2005); *United States of America ex rel. DRC, Inc. v. Custer Battles, LLC*, 444 F. Supp. 2d 678 (E.D. Va. 2005), *rev’d in part on other grounds and remanded*, 562 F.3d 295 (4th Cir. 2009); *Laudes Corp. v. United States*, 86 Fed. Cl. 152 (2009); *MAC International FZE*, ASBCA No. 56355, 10-2 BCA ¶ 34,591. These cases have repeatedly found that the CPA is an international entity and not an entity of the U.S. Government. Accordingly, contractors have found it difficult to assert a claim against the CPA. Although these cases will decline in the future due to the dissolution of the CPA in 2004, these cases expose the risk of contracting with similar international entities that are funded and staffed by the U.S. Government.

Appeal of ADT Construction Group, Inc.

ASBCA No. 55358, Apr. 30, 2013 – Judge Shackelford
by Gregory R. Hallmark, Holland & Knight LLP

In ADT, the ASBCA had to decide, among other issues, whether the Armed Services Board would impose monetary sanctions and draw adverse inferences against the Government for destroying allegedly relevant documents.

The appeal concerned a February 2006 termination for default by the U.S. Army Corps of Engineers of a contract for the design and construction of a munitions maintenance facility, primarily due to the contractor's lack of progress. The contractor, ADT, brought a claim and an appeal arguing that the default termination was unjustified, the default was excusable, and the Government had breached the contract. In a December 2006 deposition, ADT became aware of the existence of documents related to the contract that had been maintained by the Government's project manager. In May 2010, ADT requested discovery of the documents. The Government failed to produce the documents, asserting that they had been destroyed pursuant to a routine document retention policy. In a subsequent deposition of the project manager, he testified that he believed the documents had not yet been discarded as of the December 2006 deposition. In December 2010, immediately before the hearing in the appeal was held, ADT moved for sanctions for spoliation. ADT requested attorneys fees and costs, as well as certain adverse evidentiary inferences based on the Government's failure to produce the documents.

In addition to denying the substantive portions of the appeal, the Board denied the

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motion for sanctions in whole. The Board first simply noted that it lacks authority to assess monetary sanctions against a party. Further, it declined to draw adverse inferences against the Government in this instance for two reasons. First, the inferences requested would not have addressed the primary basis for the termination and thus would not have changed the outcome of the appeal. Second, the Board held that the record was insufficient to demonstrate any of the three elements of a spoliation claim: (1) that the party having control over the evidence had an obligation to preserve it; (2) that the destruction was done with a culpable mental state; and (3) that the evidence was relevant to the extent that a reasonable fact-finder could conclude that it would have supported the claims or defenses of the party that sought it.

In determining that the record was insufficient to make the requisite findings, the Board noted that its “main concern” with the spoliation motion was timeliness – the appellant waited too long to seek the documents in question and bring the spoliation motion. ADT became aware of the documents in a December 2006 deposition, but did not make a request for their production until May 2010 – and then did not move for sanctions until December 3, 2010, the Friday before the Monday on which the hearing in the appeal was to begin.

The lesson for practitioners and contractors is clear – do not delay in seeking discovery. Even when the Government has destroyed potentially relevant documents *during litigation*, the ASBCA is likely to be unsympathetic if the appellant fails to proceed expeditiously.

PHI Applied Physical Sciences, Inc.

ASBCA Nos. 56581, 58038, April 30, 2013 – Judge Peacock
by *Oliya Zamaray, Holland & Knight LLP*

In this appeal, Judge Peacock denied all but \$1,546 of a claim for \$1,276,904 in vouchers for cost overruns allegedly incurred by PHI Applied Physical Sciences, Inc. (“Appellant”) in performance of a cost-plus-fixed-fee Army contract to develop an instrument for the Defense Research Projects Agency. Auditors had previously found that Appellant did not have the cost accounting system required for cost-type contracts and also advised Appellant that it could not exceed the Limitation of Cost clause in the contract except at its own risk. The Government argued that Appellant failed to give notice of the alleged cost overruns in accordance with the contract’s Limitation of Cost clause and, furthermore, that the contractor was never issued the requisite notice by the Contracting Officer that contract costs were to be increased from the estimated total cost of \$37,730 with zero fixed fee. After finding that it had jurisdiction to resolve the dispute as to the vouchers totaling \$1,276,904, the Board turned to entitlement and the merits.

Judge Peacock agreed with the Government, finding that Appellant failed to notify the Contracting Officer that costs would exceed the 75% limit in the Limitation of Cost clause in the contract (FAR 52.232-20). Judge Peacock explained that:

the simple protection and solution for appellant was to provide the overrun notice and await notice from the CO that the estimated costs of the contract

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were increased before expenditure of the funds in question. Appellant was repeatedly advised of its rights and obligations under the LOC clause and could not have been confused. PHI was aware of these issues almost from the very inception of the contract yet knowingly entered into it.

Importantly, Judge Peacock also found that the Contracting Officer never notified Appellant that more funds were available (“no increase in the contract’s estimated cost was authorized at anytime”). Judge Peacock noted that if a fixed-price contractual vehicle been selected, Appellant would likely have avoided formal audit review, but it would have also assumed the risk of cost increases without the protections afforded by the Limitation of Cost clause.

Judge Peacock also rejected Appellant’s argument that the Contracting Officer abused her discretion in awarding a cost-plus-fixed-fee contract to Appellant without first reviewing appellant’s accounting system:

In essence, in the reverse of the more typical situation where the contractor argues that such risks were not properly allocated to it by a fixed-price contracting vehicle, appellant here suggests that it was an abuse of discretion not to allocate appellant such risks. *Cf. AT&T v. United States*, 307 F.3d 1374 (Fed. Cir. 2002). Appellant was not prejudiced by selection of the CPFF contractual arrangement.

Finding that no abuse of discretion occurred, Judge Peacock noted that, “in any event, [precedent] establishes that contractors have no judicially enforceable remedy for alleged violation of regulations and internal agency directives guiding the CO’s selection of a contract type.”

Despite finding that Appellant had “wholly failed to offer any persuasive evidence of quantum,” the Board awarded Appellant \$1,546 based on various remarks made by government officials expressing wiliness to compensate Appellant for the amount remaining on the contract.

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**The Buck Stops Here:
Prime Contractor Responsibility and
Government Authority in Government Contracts**

by
Jack Horan
And
*Patrick J. Stanton**

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In 1996, a fire broke out at the United States Military Academy at West Point, damaging the campus' Indoor Marksmanship Center (IMC), including the destruction of the building's pistol and rifle ranges. In order to make the firing ranges at the nation's premiere military academy fully functional once more, West Point began efforts to renovate the IMC, including restoration of the pistol and rifle ranges.

West Point began by contracting with STV, Inc., to design the renovations, including the heating, ventilation, and air conditioning (HVAC) systems for the building's shooting ranges. An HVAC system for a shooting range has special requirements—e.g., it must provide enough air velocity to clear fumes, including gun powder and lead residue from the discharge of weapons, without causing air movement, which could disturb the targets. The West Point Association of Graduates (AOG) also agreed to support the renovation project by funding the purchase of the firing ranges' target systems. AOG authorized Lt. Col. Earl Duston Saunders, an employee of AOG and the then chief of Alumni Support Operations, to select the target systems. After consulting with the U.S. Navy's chief range specialist, Saunders determined that either Rangetech International Corp. or Caswell Detroit Armor Company should provide the targeting systems.

On July 11, 2000, West Point issued a solicitation for the renovations to the IMC. Seeking to integrate the target system selected by AOG with the overall building renovation, West Point included a provision requiring the contractor to subcontract its HVAC system with either Rangetech or Caswell—even though Rangetech and Caswell did not perform heating and air conditioning work. The solicitation also required the contractor to adhere to the design specifications provided by STV.

It was at this point that seeds were sown for later litigation. When Rangetech and Caswell reviewed the design specifications that were included in the solicitation, both firms informed Saunders that the HVAC designs were flawed. On July 13, 2000, Saunders sent an e-mail to Caswell, on which he copied West Point's project engineer, stating that if Caswell felt "your own system, not the one designed by STV, is superior and/or cheaper, a modification to the contract will be made." Caswell understood that this e-mail was authorizing it to deviate from the solicitation's design specifications.

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The Buck Stops Here (cont'd):

To comply with the solicitation requirement to use either Rangetech or Caswell, one offeror, P&K Contracting, requested a proposal from Gleason & Elfering, an HVAC services contractor with an exclusive relationship with Caswell. Gleason & Elfering responded with a proposal that addressed the design flaws identified by Caswell instead of adhering to the solicitation's specifications. Despite the fact that Gleason & Elfering stated in its proposal that its design did necessarily meet the plans and specifications of the solicitation, P&K included Gleason & Elfering's estimated cost of \$570,000 into the final proposal submitted to West Point. P&K apparently omitted Gleason & Elfering's disclaimer that its design did not necessarily meet the solicitation specifications.

West Point ultimately received four bids for the renovation solicitation and the source selection decision determined that P&K provided the best overall value. As a result, on September 28, 2000, P&K was awarded a fixed-price contract for the amount it had bid: \$3,911,142. The contract contained a standard clause, which provided that any modifications shall be made only by the contracting officer by a properly executed modification.

Upon finalizing the contract, P&K entered into a subcontract with Gleason & Elfering and had Gleason & Elfering submit its HVAC designs to STV for approval. Not surprisingly, STV found that Gleason & Elfering's proposal did not meet the solicitation's design specifications. The contracting officer subsequently rejected the proposal, despite Gleason & Elfering's insistence that STV's designs were flawed.

Following the contracting officer's rejection of Gleason & Elfering's proposed designs, both Gleason & Elfering and Caswell refused to install the STV-designed HVAC system because they were convinced the design was flawed and did not want to harm their professional reputation by adhering to the imperfect design. With Caswell refusing to perform, the contracting officer modified the contract on February 1, 2001, lifting the requirement that Caswell or Rangetech provide HVAC services. P&K then secured the services of HVAK Mechanical, who agreed to do the work for \$783,500, exceeding Gleason & Elfering's original cost estimate by \$213,000. On June 1, 2001, P&K submitted a request for a price adjustment for these extra costs, but no action was taken. P&K completed the renovations without the price adjustment.

Once open, users of the firing ranges noticed that the HVAC system caused targets to sway. On September 8, 2003, West Point issued a contract modification, which called for demolition and replacement of the ranges' air diffusers and provided P&K with an additional \$50,667.

On August 23, 2006, P&K submitted a claim for an equitable adjustment of \$245,525 for the difference in cost between the HVAC system that Gleason & Elfering had proposed and the actual cost of the system P&K was required to build, plus overhead and profit. On March 12, 2009, the contracting officer rejected the claim, leading P&K to file suit in the Court of

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Federal Claims. The case is noted as *P&K Contracting, Inc. v. United States*, No. 09-399C (Fed. Cl., December 21, 2012).

Both the government and P&K filed motions for summary judgment by the Court based on the written record. P&K argued that it was entitled to recovery for the following reasons:

- Lt. Col. Saunders' July 13, 2000, e-mail authorized Caswell to submit an alternative design, which would be incorporated into the contract through a modification;
- The contracting officer ratified Saunders' July 13, 2000, e-mail;
- The parties made a mutual mistake, both believing that Gleason & Elfering based its proposal on the solicitation specifications; and
- West Point bore the risk of the deficient design based on equitable principles.

On December 21, 2012, the Court granted the government's motion for summary judgment, rejecting all of P&K's arguments.

The Court began its ruling with an analysis of contracting authority, as this was central to all of P&K's claims. The Court stressed that in dealings with the government, apparent authority is insufficient. Rather, an official must have actual authority in order to make a binding modification. Here, the contract explicitly informed P&K that only the contracting officer could issue modifications. The Court determined that only the contracting officer had actual authority to make modifications to P&K's contract. Lt. Col. Saunders lacked the authority to promise that Caswell's designs would be substituted for STV's.

Further, the Court rejected P&K's argument that Saunders' e-mail had been ratified by the contracting officer. The Court noted that ratification requires "[a]ctual knowledge by one with contracting authority." Saunders' e-mail did copy West Point's project engineer, but there was no evidence that the contracting officer had any knowledge of the e-mail. Without such evidence, the contracting officer's "silence and lack of response...forecloses any ratification." As P&K could neither demonstrate that Saunders had actual authority nor that his e-mail promising a modification had been ratified by the contracting officer, the Court determined that Saunders' e-mail could not serve as a modification to the contract and that P&K was required to adhere to STV's design plans.

Having found that the contract had not been altered by a modification, the Court then turned to the question of whether reformation was required due to a mutual mistake of the parties. P&K contended that such a reformation was merited, as both West Point and P&K shared the belief that Gleason & Elfering had based its subcontract on the solicitation's specifications. The Court rejected this argument, finding that the mistake was unilateral. The Court noted that Gleason & Elfering's proposal to P&K specified that it may not comply with

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The Buck Stops Here (cont'd):

the specifications, which should have informed P&K of this risk. There was no evidence that P&K had submitted Gleason & Elfering's proposal to the Source Selection Board. Rather, the evidence indicated that P&K had merely incorporated Gleason & Elfering's price into its bid, meaning the contracting officer could not have been aware of Gleason & Elfering's failure to adhere to the solicitation's specifications. Therefore, the mistake was unilateral.

Because the contract had not been modified and could not be re-formed, the Court next moved to P&K's arguments that West Point bore the risk of loss in this case. First, P&K argued that the government had breached its warranty of adequate specifications because the solicitation's designs proved flawed and required additional work. On this issue, the Court found that the design flaws that Gleason & Elfering's design were meant to protect against were potential lead poisoning and air pressure issues, not the airflow problems that were addressed after the original construction and for which P&K was paid. Thus, there were no defects in the original design for which P&K was not compensated.

Second, P&K contended that West Point had superior knowledge: It knew that Gleason & Elfering's proposal was based on the assumption that Saunders' e-mail was accurate and the design specifications would be changed to accommodate Caswell's design. The Court noted that P&K knew that Gleason & Elfering's bid did not comply with the specifications, and Saunders' knowledge could not be attributed to the government because he did not have contracting authority. Thus, P&K's knowledge was at least equal, and possibly superior, to the government's.

Third, P&K asserted that equitable estoppels entitled it to compensation for its additional costs, as it had relied upon the representation of Saunders when submitting its bid and had incurred a loss based upon this reliance. The Court quickly dismissed this argument, finding that because Saunders lacked authority to modify the contract, P&K could not rely upon his representations. Further, the Court stressed that estoppel requires "affirmative misconduct" by the government, which P&K had failed to demonstrate.

Finally, P&K argued that West Point had breached the covenant of good faith and fair dealing by requiring the use of subcontractors who would not comply with the solicitation's specifications. In rejecting this argument, the Court quoted *Franklin E. Penny Co. v. United States*, 207 Ct. Cl. 842, 853 (1975) for the proposition that the government does not represent that "named sources are ready, willing, and able to do the work contemplated by the contract" simply by identifying subcontractors that are to be used. Accordingly, West Point had not engaged in conduct that would frustrate or hinder performance and P&K was not excused from checking Gleason & Elfering's proposal and ensuring that it actually complied with the design specifications in the solicitation.

The *P&K* case presents many valuable lessons for contractors. Most important, the case demonstrates that a prime contractor is responsible for the mistakes of its subcontractors.

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The Buck Stops Here (cont'd):

The Court in this case was clearly unimpressed with P&K's claim that it could not be responsible for its subcontractor's failure to adhere to the solicitation's specifications. Rather, the Court stressed that the prime contractor "is responsible for verifying that its subcontractor's proposal complied with the specifications of the solicitation." This should serve as an important reminder that even when faced with the hectic schedule and inevitable time crunch of preparing a proposal, a prime contractor must understand its subcontractors' proposals. If P&K had reviewed the proposal of its subcontractor and understood that it did not comply with the solicitation's specifications, it could have avoided submitting a proposal that did not conform to the solicitation requirements, or at least notified the government of the problem with the solicitation specifications.

Additionally, this case demonstrates the importance of understanding authority and responsibility on the governmental side of a contract. When dealing with the government, contractors will often work with officials that have substantial power and influence within their agency and apparent authority to make decisions about a contract. However, the courts have strictly interpreted the requirement of actual authority, and, as this case shows, it can be very difficult to establish implied authority or authority through ratification. As such, contractors must carefully examine the terms of their contracts to determine who has contracting authority and confirm that any representations that are made, any modifications that are proposed, and any orders that are given are coming from officials with such authority.

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Tucker Act Jurisdiction Over Federal Grants

by
Samantha A. Daniels*

The United States Court of Appeals have held that grant awards are not contracts, but “part of a procedure mandated by Congress to assure federal grants are disbursed in accordance with Congress’ will.”¹ Courts generally look to the statutory provisions, regulations, and other agency guidelines at the time the grant was made when interpreting the terms of a grant.² An exception to this rule is where the U.S. Court of Federal Claims has exercised Tucker Act jurisdiction over a federal grant as a contract.³

The Court of Federal Claims is a court of limited jurisdiction that Congress created as a forum where private parties could sue the government for monetary, non-tort claims that would otherwise be barred by sovereign immunity.⁴ The Court derives its statutory authority from the Tucker Act. The Tucker Act provides that:

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States.⁵

The Act confers the Court with jurisdiction over both express and implied-in-fact contracts with the U.S. Government.⁶ Generally, the Court lacks jurisdiction over grants.⁷

In *Thermalon Industries, Ltd. v. United States*, the Court of Federal Claims exercised its Tucker Act jurisdiction over a National Science Foundation (“NSF”) grant and found that the agreement constituted a contract.⁸ In contrast, the Court in *Pennsylvania Department of Public Welfare v. United States* declined to exercise jurisdiction over a grant agreement, and clarified the statutory requirements for treating a grant as a contract.⁹ This article will discuss the cases involving the Court of Federal Claims’ Tucker Act jurisdiction over grants.

Thermalon Industries, Ltd. v. United States

In *Thermalon Industries, Ltd. v. United States*, the Court of Federal Claims asserted Tucker Act jurisdiction over an NSF research grant.¹⁰ The government had offered grant money to Thermalon Industries, Ltd. (“Thermalon”), a small business, for a project that would “support high-quality research proposals on important scientific or engineering problems and opportunities that could lead to a significant public benefit if the research is successful.”¹¹ In return for the grant money, the government would acquire from Thermalon the right to, among other things, “a royalty-free license to the intellectual property resulting from the research, including a license under a patent.”¹²

Although procurement contracts and grant agreements are statutorily distinct,¹³ the Court of Federal Claims reasoned that the distinction had no bearing on its Tucker Act

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Tucker Act Jurisdiction (cont'd):

jurisdiction over grant agreements that resemble contracts.¹⁴ Under the Court's reasoning, the Grant Act's use of the word "agreement" encompasses both contracts and arrangements that do not qualify as contracts.¹⁵ Accordingly, the Court evaluated the grant agreement under the general requirements of the Tucker Act for a binding contract with the United States: (1) mutual intent to contract; (2) an offer and acceptance; (3) consideration passing between the parties; and (4) a government representative who entered or ratified the agreement that had authority to bind the United States in contract.¹⁶ The Court concluded that because the instant federal grant satisfied the criteria for a contract with the government, the Court had Tucker Act jurisdiction over the grant agreement.¹⁷

The Court distinguished Thermalon's grant from other federal grant agreements held to be "a governmental gift or mere gratuity."¹⁸ The Court emphasized the agreement's significant consideration.¹⁹ The patent license had potential "significant economic value because without a patent license, NSF would have been vulnerable to a damage suit . . . in the event NSF practiced the patented invention." Concluding the patent license amounted to "significant consideration" passing to the government, the Court reasoned the agreement fell outside the "mere gratuity" realm.²⁰

The Court noted that the parties possessed a mutual intent to enter into a contract because the agreement's language demonstrated that both parties were mutually dependent on the other's compliance with the grant's terms.²¹ Unless the parties were mutually bound, the NSF could not be assured that it would "receive the anticipated benefits of its investment."²² Moreover, as the grant agreement contained a definitive standard for assessing Thermalon's allowable costs, Thermalon intended to bind the NSF to assure "its investment of time and money on the approved research project would be reimbursed by the United States."²³

Pennsylvania Department of Public Welfare v. United States

Next, in *Pennsylvania Department of Public Welfare v. United States*, the Court of Federal Claims employed a contractual analysis to determine whether a grant agreement constituted a contract.²⁴ In that case, the State of Pennsylvania applied for a federal grant from the U.S. Department of Health and Human Services ("HHS") for monetary assistance for child and family services under Title IV-B of the Social Security Act.²⁵ As required by the grant agreement, Pennsylvania submitted and the government approved a 5-year State Plan based on HHS guidelines.²⁶ When the Office of Family Assistance of HHS refused to pay for an Emergency Assistance program for juvenile justice services under Title IV-A of the Social Security Act, Pennsylvania claimed that HHS breached its duties under the grant agreement.²⁷ As the Office of Family Assistance had authority over the Emergency Assistance program and had previously agreed that such funds could be used under the State Plan to support Title IV-B programs, Pennsylvania argued that HHS was contractually obligated to pay the Title IV-A funds.²⁸

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Tucker Act Jurisdiction (cont'd):

Consistent with *Thermalon*, the Court acknowledged that federal grants can act as contracts when the grant meets the requirements of contract thereby falling within the Court's Tucker Act jurisdiction.²⁹ However, the Court held that the grant in *Pennsylvania Department of Public Welfare* was not a contract because Pennsylvania failed to show that a government agent with actual or implied authority to bind the government had entered into the agreement.³⁰ Unlike *Thermalon*,³¹ the Court emphasized that the lack of a statute authorizing HHS to enter into a contract precluded a contractual commitment.³²

Further distinguishing *Thermalon*, the Court stated that the grant agreement lacked mutuality on the part of the government to contract.³³ The Court first noted that "absent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'"³⁴ In contrast to *Thermalon*, in which the court reasoned that its NSF grant containing significant consideration and mutual dependency was distinct from a "mere gratuity,"³⁵ the Court in *Pennsylvania Department of Public Welfare* characterized the grant award for juvenile justice services as a non-binding gratuity.³⁶ Instead, the State Plan implemented a public benefit program with the purpose to provide welfare services to children.³⁷ Thus, the government, by funding and regulating a program designed for the public good of the United States, was more closely "acting in its role as sovereign and the moneys promised are gifts or gratuities which do not establish any contractual obligation, express or implied, on the part of the United States."³⁸

Conclusion

The Court of Federal Claims has taken Tucker Act jurisdiction over federal grant agreements.³⁹ Grant agreements have been held to be contracts, and thus within Tucker Act jurisdiction, when all the requisite elements of a contract are present.⁴⁰ A claimant must prove: (1) lack of ambiguity in offer and acceptance; (2) mutuality of intent to contract, and (3) consideration.⁴¹ Additionally, the government representative making the grant needs actual authority to bind the government in contract.⁴²

All four elements are necessary to state a contract claim.⁴³ Consideration was the key element for the *Thermalon* court in determining the existence of a contract and asserting jurisdiction over the grant agreement.⁴⁴ In *Pennsylvania Department of Public Welfare*, the Court of Federal Claims emphasized the necessity of an agency's express statutory authority to enter into contracts.⁴⁵ Moreover, the *Pennsylvania* court implied a grant's purpose can inform the existence of mutuality.⁴⁶

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Tucker Act Jurisdiction (cont'd):

Endnotes

1. *City and County of San Francisco v. Federal Aviation Administration*, 942 F.2d 1391 (9th Cir. 1991).
2. *Bennett v. Kentucky Dept. of Educ.*, 470 U.S. 656, 670 (1985).
3. *Thermalon Industries, Ltd. v. United States*, 34 Fed. Cl. 411 (1995).
4. Steven W. Feldman, Government Contract Awards: Negotiation and Sealed Bidding §1:16 (2012).
5. 28 U.S.C. §1491(a)(1).
6. 28 U.S.C. §1491(a)(1); *Thermalon Industries*, 34 Fed. Cl. at 420; *Amsinger v. U.S.*, 99 Fed. Cl. 254 (2011); *SGS-92-X003 v. U.S.*, 85 Fed. Cl. 678 (2009).
7. *Pennsylvania Department of Public Welfare v. United States*, 48 Fed. Cl. 785, 791 (2001).
8. *Thermalon Industries*, 34 Fed. Cl. at 413.
9. *Pennsylvania Department of Public Welfare*, 48 Fed. Cl. at 791.
10. *Thermalon Industries*, 34 Fed. Cl. at 413.
11. *Id.*
12. *Id.* at 415.
13. The Federal Grant and Cooperative Agreement Act of 1977 (“the Grant Act”) directs government agencies when it is appropriate to enter into a procurement contract or issue a grant agreement. Regarding procurement contracts:

An executive agency shall use a procurement contract as the legal instrument reflecting a relationship between the United States Government and a . . . recipient when—

 - (1) the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; or
 - (2) the agency decides in a specific instance that the use of a procurement contract is appropriate.

As for grant agreements:

An executive agency shall use a grant agreement as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when--

 - (1) the principal purpose of the relationship is to transfer a thing of value to the State or local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and
 - (2) substantial involvement is not expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.

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Tucker Act Jurisdiction (cont'd):

Endnotes (cont'd)

14. *Thermalon Industries*, 34 Fed. Cl. at 417 (“There is no suggestion in the Grant Act that procurement contracts are the only type of contracts enforceable under the Tucker Act or that grant agreements that satisfy all of the ordinary requirements for a government contract should not be classified as contracts enforceable under the Tucker Act.”).
15. *Id.* at 418; *but see Trauma Service Group, Ltd. v. United States*, 33 Fed. Cl. 426, 429 (1997) (noting word “agreement” instead of procurement “contract” suggests that Congress did not intend to create binding contractual obligations).
16. *Thermalon Industries*, 34 Fed. Cl. at 413.
17. *Id.*
18. *Id.* at 415 (distinguishing case which reasoned that grant agreements are “mere gifts or gratuities”).
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Pennsylvania Department of Public Welfare*, 48 Fed. Cl. at 790-91.
25. *Id.* at 786.
26. *Id.*
27. *Id.* at 785.
28. *Id.* at 787.
29. *Id.* at 790 (“Any agreement can be a contract within the meaning of the Tucker Act, provided that it meets the requirements for a contract with the government, specifically: mutual intent to contract including an offer and acceptance, consideration, and a government representative who had actual authority to bind the government.”).
30. *Id.* at 788.
31. *Id.* at 791 (noting in *Thermalon* 42 U.S.C. §1870(c) authorized NSF to enter into contracts to promote scientific activities).
32. *Id.*
33. *Id.*
34. *Id.* (citing *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465 (1985) (citing *Dodge v. Board of Education*, 302 U.S. 74, 79 (1937))).
35. *Thermalon Industries*, 34 Fed. Cl. at 415.
36. *Pennsylvania Department of Public Welfare*, 48 Fed. Cl. at 791.
37. *Id.*
38. *Id.* (citing *Marshall N. Dana Construction, Inc. v. United States*, 229 Ct. Cl. 862 (1982)).

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Tucker Act Jurisdiction (cont'd):

Endnotes (cont'd)

39. See, e.g., *City of Manassas Park v. United States*, 633 F.2d 181 (1980); *Thermalon Industries*, 34 Fed. Cl. 411; *Cole County Reg'l Sewer Dist. v. United States*, 22 Cl. Ct. 551 (1991), aff'd. 949 F.2d 404 (1991); *City of Wheeling v. United States*, 20 Cl. Ct. 659 (1990).
40. *Thermalon Industries*, 34 Fed. Cl. at 414.
41. *Pennsylvania Department of Public Welfare*, 48 Fed. Cl. at 787; *Trauma Service Group*, 104 F.3d at 1326; see also *Henke v. Department of Commerce*, 83 F.3d 1445, 1453 (D.C. Cir. 1996) (holding “the term ‘Federal contracts’ in Privacy Act exemption (k)(5) encompasses a federal grant agreement if the grant agreement includes the essential elements of a contract and established a contractual relationship between the government and the grantee”).
42. *Pennsylvania Department of Public Welfare*, 48 Fed. Cl. at 787.
43. *Id.* at 788.
44. *Thermalon Industries*, 34 Fed. Cl. at 415.
45. See, e.g., *City of Manassas Park*, 633 F.2d 181 (contractual authority from 33 U.S.C. §1283(a)(1)); *Thermalon Industries*, 34 Fed. Cl. 411 (contractual obligation authorized by 42 U.S.C. §1870(c)); *Cole County Reg'l Sewer Dist.*, 22 Cl. Ct. 551 (contractual obligation authorized by 33 U.S.C. §1283(a)(1)); *City of Wheeling*, 20 Cl. Ct. 659 (contractual obligation authorized by 33 U.S.C. §1283(a)(1)); *Pennsylvania Department of Public Welfare*, 48 Fed. Cl. 785 (holding that the court could not assert jurisdiction over grant agreement partially because no statute authorized government representative to enter into a contract on behalf of the government).
46. *Pennsylvania Department of Public Welfare*, 48 Fed. Cl. at 791.



Allowability of Severance Costs

by
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Background

With widespread budget cutbacks, agencies will be forced to prioritize their projects and decide which will be funded and which will not. Undoubtedly, in these determinations there will be some winners and some losers. For programs that agencies decide they can live without, contracting officers will generally look for the most inexpensive route of escape. On this point, both agencies and the contractor community know that not exercising an option is the easiest way to get out of a contract. Accordingly, contractors can expect to learn of program cancellations in this manner, i.e., when an agency allows an option to lapse.

When programs end, contractors are often forced to let go the affected employees. For larger programs, this will mean mass lay-offs. The cumulative impact of lay-offs from smaller contracts may be as great or even greater. Depending on the circumstances, many terminated employees will be eligible for severance pay.

This article addresses the allowability of severance costs.

FAR 31.205-6(g)

The primary legal authority for the allowability of severance payments is the cost principle at FAR 31.205-6(g).

Definition of Severance Pay

FAR 31.205-6(g) defines severance pay as a payment made to an employee whose employment is being involuntarily terminated.¹ Payments made for voluntary terminations are not allowable. In some cases, firms seeking to effect a reduction in force will take measures to entice employees to “volunteer” to leave. One such inducement may be *special* severance pay, i.e., an amount greater than what would be provided under the company’s regular policy. Employees who “volunteer” to accept such special termination benefits pursuant to a reduction in force are nonetheless considered to have been involuntarily terminated.²

Another inducement may be favorable early retirement incentive plans. FAR 31.205-6(g) makes clear that payments under early retirement incentive plans are not “severance pay.”

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Allowability of Severance Costs (cont'd):

The allowability of costs of early retirement incentive plans is governed by a different set of rules. Early retirement incentive plan costs are generally allowable as long as other applicable pension cost criteria are met.³

One last point about what severance pay isn't. If a contractor terminates employees because it has lost a contract, but the employees are picked up by the successor contractor under substantially the same conditions, any additional pay given to the employees upon their termination is not actually "severance pay" and is not allowable.⁴ Similarly, if an employee is not truly terminated by the contractor, but is simply reassigned to another facility, subsidiary, or parent company, any additional pay provided is not "severance pay" and is unallowable.⁵

Allowability of Severance Pay

Severance pay is allowable only if it is required by one of the following:

- law;
- employment agreement;
- established policy; or
- "circumstances of the particular employment."

Each of these will be discussed in order. But first, it is worth noting that even if severance pay is mandated by law, employment agreement, established policy, or circumstances of the employment, its allowability is still subject to the general requirement of reasonableness.⁶ Factors that are considered in determining whether severance pay is reasonable include the practices of other firms of the same size, in the same industry, in the same geographic area, and engaged in similar non-government work under the same circumstances.⁷

Law. A few states require severance pay when specific conditions are met. On the federal level, contractors are required in some circumstances to pay severance under the WARN Act. Additionally, contractors operating internationally may be subject to the laws of foreign nations that require employees to be paid severance. (Notably, FAR 31.205-6(g)(6) provides that the costs of severance payments to foreign nationals performing work outside the United States may be allowable only to the extent that they do not exceed amounts typically paid to employees providing similar services in the same industry in the United States.) Where severance payments are required by law, the amount of severance pay is calculated in accordance with the applicable law.

Employment Agreement. If not legally required, severance pay may be allowable if an employee is entitled to it under the terms of an employment or collective bargaining agreement. That agreement determines not only an employee's eligibility for severance pay, but also how the amount of the payment is ascertained.

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Allowability of Severance Costs (cont'd):

Established Policy. Allowability is less certain if the basis rests on a contractor's "established policy that constitutes, in effect, an implied agreement on the contractor's part." As any experienced practitioner will tell you, proving the existence of an implied agreement is difficult. A policy need not be in writing to be "established," but can be established by conduct.⁸ The ASBCA has held that "an established policy or practice allows for discretion, but at the same time must be consistently applied and clearly defined."⁹ There is no established policy if payments are made "with numerous and extreme variations in amounts, for purposes of rewarding or penalizing employees at the whim of management, or denying payment to otherwise eligible individuals." A policy "which would permit payments to be made or not made in the unlimited discretion of management" is not considered the kind of established policy that renders severance payments allowable.

The Armed Services Board of Contract Appeals (ASBCA) has stated that "a first time payment may be allowable under appropriate circumstances."¹⁰ This statement has its limits, however. In the *Trans World Airlines* case, for example, the contractor's evidence of an "established policy" consisted of a single employee who had been given severance pay. However, the company denied that employee severance pay for months on the grounds that supervisory employees were not entitled to it under company policy, before suddenly reversing its position. The Court of Claims held that this did not constitute an "established policy."

"Circumstances of the Employment." In the absence of a law, employment agreement or established policy mandating severance pay, the allowability of severance costs rests on the "circumstances of the particular employment," a phrase that unfortunately is nowhere defined. Also, the phrase itself is hopelessly subjective. As a result, severance payments made where they are not compelled by law, employment agreement or established policy are less likely to be allowed and almost invite audit challenges.

Accrual of Severance Pay and "Abnormal or Mass" Severance Costs

Some contractors, especially ones with large workforces that regularly experience significant turnover, may wish to charge severance costs to the government through accruals—i.e., estimated costs based on historical data—rather than charging actual costs as they happen. The cost principles at FAR 31.205(g)(4) and (g)(5) address the allowability of accrued severance costs. Under FAR 31.205(g)(4), accrual of "normal turnover severance payments" is acceptable if the amount of the accrual is "reasonable in light of payments actually made for normal severances over a representative past period."

On the other hand, accrual of "abnormal or mass severance pay" is not allowable, meaning that such costs may only be recovered only on the basis of actual costs incurred by the contractor, if at all. This principle goes hand-in-hand with the principle that accrual of severance costs is allowable only if based on actual historical payments for "normal" turnover. If an accrual is greater than the amount that would cover "normal" turnover, it is essentially an

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accrual for “abnormal or mass severance” and is not allowable. According to the cost principle, accrual of abnormal or mass severance pay is unallowable because such costs are deemed to be too “conjectural.”

However, the cost principle recognizes the government’s “obligation to participate, to the extent of its fair share,” in abnormal or mass severance costs that are *actually incurred*. In such an event, “the Government will consider allowability on a case-by-case basis.”¹¹ This is not to say that the question of allowability of abnormal or mass severance pay is a matter of the government’s absolute discretion.

In *Aerojet-General Corporation*, the ASBCA held that the government was, in fact, required to pay its “fair share” of abnormal or mass severance costs. The ASBCA suggested that “fair share” meant that the costs should be allocated between contracts “in a way that reflects ‘cost/benefit relationships.’” The Board rejected the government’s proposed allocation, holding that it would have resulted in an unfair share of the costs being allocated to fixed-price contracts and therefore disproportionately absorbed by the contractor.

Accordingly, a contractor wishing to recover its severance costs on an accrual basis should accrue an amount that is based on actual normal turnover severance payments over a representative past period, and seek reimbursement of the government’s fair share of any actual severance costs incurred that are greater than the accrued amount. The problem for the contractor here is that the allowability of the “abnormal” severance costs cannot be determined until after the payments have been made. For this reason, it is wise practice to enter into an advance agreement with contracting officers whenever possible.

The phrases “abnormal or mass” and “normal turnover” are not defined in FAR 31.205-6, but the case law sheds some light. In *ITT Federal Services Corp. v. Widnall*,¹³ the Court of Appeals for the Federal Circuit held that severance payments triggered by the simple expiration of a contract by its terms were not “abnormal or mass severance pay,” and the contractor thus was not eligible for consideration of allowability on a case-by-case basis.

In *Detroit Diesel Allison Div., General Motors Corp.*,¹⁴ the ASBCA held that a lay-off of 216 employees at a plant upon the termination of a contract was not abnormal when the contractor had experienced lay-offs of 281, 238, 195, 214, 284, 463, 300, and 181 employees at that and other plants in the immediately preceding years, and had made no attempt to recover the excess over its accruals in those years. Thus, lay-offs of roughly similar proportions as in prior years may not be abnormal or mass, even if they number in the hundreds at a single plant. Conversely, where the entire workforce at a plant was laid off and an entire division of a company closed, the ASBCA held that associated severance payments were “abnormal or mass.”¹⁵

(continued on next page)

Allowability of Severance Costs (cont'd):

Severance Pay Under Fixed-Price Contracts

Under fixed-price contracts, offerors must include any severance costs that can be reasonably expected in their proposed prices. To the extent that larger-than-expected severance costs are allocated to fixed-price contracts, the contractor must absorb them.¹⁶

In *ITT Federal Services Corporation*,¹⁷ the ASBCA held that the cost principle at FAR 31.205-6(g) did not provide a remedy for contractors to recoup severance costs under fixed-price contracts because a contractor bears the risk of increased costs. The contractor argued on appeal to the Federal Circuit that it could not include its eventual severance costs in its fixed price due to the prohibition on accruing abnormal or mass severance pay. It also argued that the government was obligated to pay its fair share of the actual severance payments incurred under FAR 31.205-6(g)(5). The Federal Circuit held that because the expiration of a contract by its own terms is foreseeable, it does not create an abnormal or mass termination scenario that triggers FAR 31.205-6(g)(5), even if the cost principle did provide a remedy for recovery of severance payments.

Severance payments are not recoverable under the Continuity of Services clause,¹⁸ which requires the government, even in a fixed-price contract, to reimburse a contractor for costs incurred within an agreed period after contract expiration that results from phase-in, phase-out requirements. The Federal Circuit in *ITT Federal* held that severance payments are not phase-in, phase-out costs: They are not incurred as a result of the contractor's assistance to the successor contractor or the government in taking over operations, and they are not designed to ensure the continuity of services during a transition period.

On the other hand, the ASBCA held in *ARCTEC Services*¹⁹ that severance payments made to union employees pursuant to a collective bargaining agreement can be recovered under the Service Contract Price Adjustment clause.²⁰ That clause entitles contractors to a price adjustment to recover increased wages and fringe benefits resulting from required compliance with Department of Labor wage determinations incorporated into the contract. Notably, the Board held that only *actual* increases in benefits may be included in a price adjustment proposal under the Service Contract Price Adjustment clause, so accrual of speculative, unknown future severance costs would not be appropriate.

Conclusion

Where severance pay is provided pursuant to applicable law, employment agreement, or established policy, reasonable costs are generally allowable. If these circumstances are not present, contractors should be considerably less confident about the allowability of severance costs. To begin with, auditors are likely to challenge severance costs that lack an authoritative basis, and few contracting officers will allow payment over auditor objections. Even if a contracting officer is sympathetic to a contractor's position, there may be no funds available for payment, especially where the contract prematurely ends due to budgetary constraints.

Allowability of Severance Costs (cont'd):

Endnotes

1. FAR 31.205-6(g)(1).
2. Defense Contract Audit Agency Contract Audit Manual §7-2107.1.
3. FAR 31.205-6(j)(6).
4. FAR 31.205-6(g)(3).
5. Note also that if a contractor is obligated, as through an employment agreement, to continue paying wages to an employee even after termination of the contract on which the employee was employed, those costs are not severance pay, but may be allowable under FAR 31.205-42(b), Termination Costs. *See R&B Bewachungs GmbH*, ASBCA No. 42214, 92-3 BCA ¶25,105 (May 26, 1992).
6. FAR 31.201-2(a)(1).
7. FAR 31.205-6(b).
8. *Boeing Aerospace Operations, Inc.*, ASBCA No. 46274, 94-2 BCA ¶26,802 (Mar. 21, 1994); *Trans World Airlines, Inc. v. United States*, No. 229-75 (Ct. Cl. 1978).
9. *Boeing*, 94-2 BCA ¶26,802.
10. *Boeing*, 94-2 BCA ¶26,802.
11. FAR 31.205-6(g)(5).
12. ASBCA No. 34202, 90-1 BCA ¶22,631 (Nov. 27, 1989).
13. 132 F.3d 1448 (Fed. Cir. 1997)
14. ASBCA No. 20199, 77-1 BCA ¶12,414 (1977).
15. *Aerojet*, 90-1 BCA ¶22,631.
16. *Aerojet*, 90-1 BCA ¶22,631.
17. ASBCA No. 46146, 97-1 BCA ¶28,655 (Nov. 22, 1996), *aff'd on other grounds by ITT Federal Services*, 132 F.3d at 1451.
18. FAR 52.237-3.
19. ASBCA No. 5644, 2011-1 BCA ¶34,743 (Apr. 15, 2011).
20. This is now FAR 52.222-44, Fair Labor Standards Act and Service Contract Act – Price Adjustment (Sept 2009).

