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The Clause

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

The President's Column David Black

Dear BCABA Members:

As we enter the BCABA's 22nd year, I would like to reflect on the unique function we perform as practitioners before the various Boards of Contract Appeals. The attorneys who practice before the BCAs work at the intersection unlike any other in American law – the relationship between the "sovereign" acting in its proprietary capacity and commercial (usually for-profit) organizations. The two sides in this relationship have different purposes and responsibilities, operate under different economic structures and incentives, and involve people with different backgrounds and experience. When disputes occur (as they inevitably do), it is the attorneys, often working under the procedures established by the BCAs, who function as a bridge between these two sides, helping our clients understand each other and reach results that are just, fair, and in accordance with law.

While our daily work is often dominated by the granularities of contract terms and conditions applied to specific facts, we should never lose sight of its larger importance. Ultimately, our work is important to the preservation of confidence – by both the Government and the commercial marketplace – in the continued use of contracts to regulate

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President's Column (cont'd):

their relations as they exchange goods and services for consideration of equivalent value.

This continued confidence should not be taken for granted. Without a process that efficiently and justly resolves disputes, Government policy-makers could easily conclude that using independent contractors is no longer an effective use of taxpayer dollars; or many private investors might decide that doing business with the Government is not worthwhile as compared with other opportunities in the marketplace. Ultimately, this faith in government contracting helps *people*, including the public that benefits from Government activities supported more cost effectively by contractors and those who find employment by working in government contracting.

Which brings us back to the BCABA. Our purpose is to help *you* – the BCA practitioner – to be a better counselor and advocate as you play your role in this larger process serving this important purpose. We do this through activities that disseminate useful information and build collegial relationships. No organization is as focused on the mission of improving the practice of law before the BCAs as we are, and no organization has been doing this for as long. For this we have to thank the BCABA Presidents, Officers, and Board Members who have come before me, including my immediate predecessor, Susan Warshaw Ebner (Buchanan, Ingersoll & Rooney), who did a *fabulous* job making sure that the BCABA remains on sound organizational footing.

This year, we will strive to meet the high standards established by the BCABA leadership of years past. Our plans include the following:

- Thanks to the tireless editorial contributions of Pete McDonald, we will continue to publish *The Clause*, which offers timely content regarding a broad variety of government contracting issues.
- In February, we hosted a first-time mentoring event for young attorneys and current law students, at which Susan Ebner and the ASBCA's Judge Diana Dickinson led an informal yet informative discussion on career opportunities and career paths in government contract law.
- Because lawyers don't always need the law to enjoy each other's company, Anissa Parekh will be planning a few social gatherings at a watering hole near you (if you happen to be located in the D.C. area).
- In the May/June timeframe, Michele Brown (SAIC) and Joe Hornyak (Holland & Knight) are planning our annual Colloquium event with the George Washington University Law School.

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President's Column (cont'd):

- In July, Susan Ebner is planning our annual reception for the BCA Judges.
- Our annual Trial Advocacy Program is being planned for September by Shelly Ewald (Watt, Tieder, Hoffar & Fitzgerald), Peter Pontzer (Army), and Donald Yenovkian (Army).
- Also in the September timeframe, we will present our annual Executive Policy Forum.
- Of course, Chip Purcell (Williams Mullen) is already hard at work planning our Annual Program in October.

Look for updates and details regarding all of these events at our website: www.bcaba.org. We are always looking for volunteers to support our activities. If you have any interest in getting involved with the BCABA (a great way to network!), please contact me at david.black@hklaw.com or 703-720-8680.

Our quarterly Board of Governors meetings this year will be held at the office of Holland & Knight LLP, 1600 Tysons Boulevard, Suite 700, McLean, Virginia. Our next meeting is on March 17, 2011, starting at noon.

Thank you for your continued interest in the BCABA. We look forward to seeing you at our upcoming events. If you have any questions, comments, or suggestions, please feel free to contact me at the email or phone number indicated above.

Best regards,

David Black
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.)

Leading this issue is an announcement of the proposed new rules at the ASBCA. There are also several diverse articles in this issue. Liz Fleming and Rebecca Clawson lead with an article on issues associated with fraud counterclaims in the COFC. The article by Vernon Edwards revisits the problems with how terms are defined, which is always worth considering when dealing with contract language. Jim Nagle and Jonathan DeMella then present a scholarly primer on prime-sub disputes. Finally, J. Hatcher Graham addresses the problems that arise when contractors want to challenge their past performance evaluations (an emerging area).

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: Don't take all this government contract stuff too seriously. In that regard, we again received some articles that were simply unsuitable for publication, such as: "Pete Caught in Bait Car Video!"; and "Enraged CBCA Converts T4C to T4D!!!"; and "Pete's TSA Body Scan Available on eBay!!!"



Annual Dues Reminder

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

- ☉ Dues notices were 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*.
- ☉ The Membership Directory is maintained on the website.

**Proposed Rules
of the
Armed Services Board of Contract Appeals**

Federal Register Volume 76, Number 29 (Friday, February 11, 2011)] [Proposed Rules]
[Pages 7782-7788]
From the Federal Register Online via the Government Printing Office [www.gpo.gov]
[FR Doc No: 2011-3120]

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System
48 CFR Chapter 2

Defense Federal Acquisition Regulation Supplement; Rules of the Armed Services Board of Contract Appeals

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is issuing a proposed rule to update the Rules of the Armed Services Board of Contract Appeals (ASBCA). The proposed rule implements statutory increases in the thresholds relating to the submission and processing of contract appeals and updates statutory references and other administrative information.

DATES: Comment date: Interested parties should submit comments in writing to the address shown below on or before March 14, 2011.

ADDRESSES: You may submit comments, identified by "DFARS ASBCA Rules", using any of the following methods: Regulations.gov:<http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting "DFARS ASBCA Rules" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS ASBCA Rules." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS ASBCA Rules" on your attached document.

E-mail: dfars@osd.mil. Include DFARS ASBCA Rules in the subject line of the message.

Fax: 703-681-8535

Mail: Armed Services Board of Contract Appeals, Attn: Catherine Stanton, Skyline Six, Room 703, 5109 Leesburg Pike, Falls Church, VA 22041-3208.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment, please

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Proposed Rules of the ASBCA (cont'd):

check <http://www.regulations.gov> approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Catherine Stanton, Executive Director, ASBCA, 703-681-8503, Internet address: catherine.stanton@asbca.mil; or David Houpe, Chief Counsel, ASBCA, 703-681-8510, Internet address: david.houp@asbca.mil.

SUPPLEMENTARY INFORMATION:

I. Background

The rule is being issued on behalf of Mr. Paul Williams, Chairman, Armed Services Board of Contract Appeals. It proposes to amend DFARS Appendix A, Armed Services Board of Contract Appeals, Part 2--Rules, to update thresholds related to requirements for contractor claims and to update information as follows:

- The Preface, section II(a), is amended to update the Board's address and telephone number.
- In Rule 1, subsections (b) and (c) implement section 2351(b) of Public Law 103-355, 108 Stat. 3322 (1994). Section 2351(b) amended 41 U.S.C. §605(c) to increase, from \$50,000 to \$100,000, the threshold relating to certification, decision, and notification requirements for contractor claims.
- Rule 12.1, subsection (a), and Rule 12.3, subsection (b), implement section 2351(d) of Public Law 103-355, 108 Stat. 3322 (1994). Section 2351(d) amended 41 U.S.C. §608(a) to increase, from \$10,000 to \$50,000, the threshold for applicability of small claims procedures for disposition of appeals.
- Rule 12.1, subsection (a) implements section 857 of Public Law 109-364, 120 Stat. 2349 (2006). Section 857 amended 41 U.S.C. §608(a) to insert after "\$50,000 or less" the following language: "or, in the case of a small business concern (as defined in the Small Business Act and regulations under that Act), \$150,000 or less."
- Rule 12.1, subsection (b), implements section 2351(c) of Public Law 103-355, 108 Stat. 3322 (1994). Section 2351(c) amended 41 U.S.C. §607(f) to increase, from \$50,000 to \$100,000, the threshold for applicability of accelerated procedures for disposition of appeals.
- Rule 28, subsection (b), implements section 4322(b)(7) of Public Law 104-106, 110 Stat. 677 (1996). Section 4322(b)(7) amended 41 U.S.C. §612 to update statutory references relating to payment of claims. Rule 28, subsection (b), also contains changes for consistency with the judgment fund certification process specified in the Treasury Financial Manual, Financial Management Service, Department of the U.S. Treasury.
- Minor changes were made throughout the Rules to ensure uniformity and to correct typographical errors.

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Proposed Rules of the ASBCA (cont'd):

II. Executive Order 12866

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. §804.

III. Regulatory Flexibility Act

DoD does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. §601, *et seq.*, because the rule implements current statutory provisions relating to the submission and processing of contract appeals, primarily adjusting current dollar limits affecting the processing of contract appeals to keep pace with inflation. Therefore, the adjustment of thresholds just maintains the status quo. Accordingly, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties on the expected impact of this rule on small entities.

IV. Paperwork Reduction Act

The rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under the [[Page 7783]] Paperwork Reduction Act, 44 U.S.C. §3501, *et seq.*

List of Subjects in 48 CFR, Appendix A, Part 2:

Government procurement.

Ynette R. Shelkin,
Editor, Defense Acquisition Regulations System.



Fraud Counterclaims in the Court of Federal Claims: Not So Fast, My Friend

by
Elizabeth W. Fleming
And
*Rebecca Clawson**

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This article is about 130 years of legal error. It's about a single case repeatedly cited in error. It's also about the difference between a holding and dicta. Finally, it's about the absence of developed case law governing the constitutional right of a litigant to a trial by jury in the United States Court of Federal Claims (COFC). In this article, we will explain that there is in fact no authority for the pursuit of fraud counterclaims in the COFC. We will further explain that a litigant defending against an allegation of the tort of fraud has a right to a jury trial under the Seventh Amendment. Because the Court of Federal Claims cannot provide a jury trial, a fraud action cannot lawfully proceed as a counterclaim against a plaintiff pursuing judicial review under the Contract Disputes Act of 1978 (CDA).¹

Historical Perspective

Litigation of claims and counterclaims in the Court of Federal Claims and its predecessors occurred long before the Wright Brothers flew at Kitty Hawk. In 1880, the US Supreme Court rendered a decision in *McElrath v. United States*.² McElrath had a pay issue related to the characterization and timing of his discharge as a lieutenant in the US Marine Corps. Ultimately, the secretary of the navy decided that Lt. McElrath had been erroneously dismissed from the marines in 1866, but the secretary accepted McElrath's resignation as of 1873, resulting in a dispute over some seven years of pay. After the issue made its way through the bureaucracy, the comptroller general eventually issued something akin to a paycheck to McElrath for half-pay of a first lieutenant for the period. McElrath, heedless to the caution that a bird in the hand is worth two in the bush, petitioned the United States Court of Claims for full pay. The United States, now a defendant in a lawsuit and not an administrative paymaster, decided that Lt. McElrath was due no pay at all for that period of time and counterclaimed for the half-pay already granted — and won.

Even though this case had nothing to do with fraud, any other tort, or any other common law action, and even though this case well predates the Seventh Amendment jurisprudence that developed in the federal courts during the twentieth century, it has been cited repeatedly as authority for the proposition that the United States may counterclaim for anything it wants in the COFC, including the tort of fraud, the constitutional right to a jury trial notwithstanding. This point requires a brief outline of what is a “holding” and what is “dicta” when evaluating any case authority for its stare decisis effect on the matter at hand.

In a law review article only a philosophy major could love, Michael Abromowicz and

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Fraud Counterclaims (cont'd):

Maxwell Stearns evaluated every aspect of what “holding” and “dicta” really mean.³ Fortunately for those who find the deconstruction of these kinds of truths more boring than watching a parked car, we can summarize the point we need to make here as follows. The easiest situation to analyze involving “holding” versus “dicta” is the very one we examine in this article: “when a judicial statement transparently implicates facts not involved in the case, courts generally take any conclusions drawn from such discussions to be dicta.”⁴ There is ample authority on this very point, even predating Lt. McElrath’s pay problems. For example, in *Carroll v. Carroll’s Lessee*,⁵ the Supreme Court held:

And therefore this court and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties. In *Cohens v. The State of Virginia*,⁶ Wheat. 399, this court was much pressed with some portion of its opinion in the case of *Marbury v. Madison*. And Mr. Chief Justice Marshall said, “It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented.”

Thus, the McElrath opinion might say that a plaintiff in the Court of Claims is subject to “any set-off, or counter-claim, which the government may assert,”⁷ but the term “any” in this opinion only applies to the set-off in that particular case — a pay issue — which was most certainly not a counterclaim sounding in the tort of fraud. Once the term “any” as used in McElrath is subjected to this analysis, an entire line of case law becomes suspect, as described in more detail below. The fact is that there is no controlling legal authority on the specific issue of whether a plaintiff in the Court of Federal Claims can demand a trial by jury in defending a counterclaim based in the tort of fraud.

The Right to Trial by Jury in a Civil Case

The Seventh Amendment to the United States Constitution says:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

It is clear, then, that there is a viable constitutional right to trial by jury in a civil case in American jurisprudence. Commentators have used the term “historical test”⁸ to summarize the following rule: If the action before the court is one that would lie in law, as opposed to equity, for a remedy in money damages, in eighteenth-century England, then the parties have a constitutional right to a trial by jury.⁹ This is true even if the cause of action, albeit statutory,

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Fraud Counterclaims (cont'd):

has a basis in the English common law.¹⁰ Fraud is an action in tort for damages at the common law.¹¹ The Rules of Practice before the Court of Federal Claims do not provide for a jury trial, and therefore the United States cannot lawfully plead a counterclaim in fraud in that court.

Justice Scalia's concurring opinion in *City of Monterey v. Del Monte Dunes*¹² includes an outline of the fundamentals of Seventh Amendment jurisprudence. In that case, the court held that the litigant had a Seventh Amendment right to trial by jury on its claim for damages under 42 U.S.C. §1983. The court outlined a two-part analysis for determining a right to a jury trial. First, is there a statutory right? Second, if there is no explicit statutory right, is there a constitutional right? For a constitutional right to accrue the cause of action must have been one that was tried at law at the founding of the United States, or analogous to one that was.¹³ The court determined that section 1983 did not carry a specific right to a trial by jury, so it reached the constitutional question. Starting with the obvious fact that section 1983 did not exist at the time our country was founded, the court held that because an action based on that statute basically sounds in tort for damages at common law, the litigant has a constitutional right to a trial by jury under the Seventh Amendment.

The government normally pleads the following causes of action in a fraud counterclaim in the COFC:

- A violation of the False Claims Act (31 U.S.C. §3729-3733);
- A "special plea in Fraud" (under 28 U.S.C. §2514);
- A violation of the anti-fraud provisions of the CDA (41 U.S.C. §604).

None of the statutes cited above provides an explicit right to trial by jury. Although it is clear from the legislative history of the Contract Disputes Act, as well as from early practice under that statute, that Congress expected that fraud actions would be severed from contract disputes procedures and brought in the United States district court, which would clearly entitle the defendant to a jury trial.¹⁴ In early practice, because the Department of Justice has sole authority as an executive agency over civil fraud, fraud issues were frequently severed from CDA proceedings and filed in the district court.¹⁵ In fact, the boards of contract appeals — as distinct from the COFC — have "refused" to hear the issues of fraud, but have frequently continued to process contract claims by severing the fraud element from the claim.¹⁶ Furthermore, if a board decides a case in which the government contends that fraud is present, the contractor probably will not collect any amount to which it ultimately may be entitled until the fraud allegation is resolved.¹⁷

Even absent an explicit or implied right to a trial by jury in a matter involving statutory fraud, it is clear that fraud is, and always has been, a tort at common law.¹⁸ As such, a litigant defending allegations of fraud has a constitutional right to a jury trial. If the Supreme Court can find a tort action in common law under section 1983, then it is certainly appropriate for the Court of Federal Claims to find a tort action for counterclaims based on fraud.

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Fraud Counterclaims (cont'd):

Now that we have established the right to a jury, we must explore whether, and how, that right can be lawfully waived. As a general proposition, a presumption exists against a valid waiver of a right to jury trial, because the right is fundamental and “can only be relinquished knowingly and intelligently.”¹⁹ Nevertheless, specific waivers of the right to a jury trial have been enforced in the courts.²⁰

The COFC and its predecessors have found valid waivers of a contractor’s right to trial by jury as against counterclaims for breach of contract and offset of funds since *McElrath*.²¹ Each of those cases involved a counterclaim based on the contract in question or the pecuniary issue at the heart of the plaintiff’s initial suit; none of these cases involved a counterclaim in tort. Accordingly, for all the reasons stated above, none of those cases is valid authority on this particular issue. Finally, every single one of those cases involves a holding that the plaintiff waived its right to jury trial by its own conduct and not by an express provision in a contract that preceded the litigation itself. This is indeed an important distinction.

In fact, in the body of law in the federal courts regarding the validity of a party’s waiver of its right to a jury trial, each of the reported decisions involves the court’s enforcement of a jury trial waiver contained in a *contract* between the parties that existed prior to the litigation.²² In all of the cited cases, the parties negotiated a jury trial waiver, in their business contract, before litigation, at arms-length, and when those parties were knowledgeable in the subject matter of the business involved. In such situations, the courts have held that the waivers were made knowingly, intelligently, and voluntarily.²³

Only the United States Court of Appeals for the Federal Circuit (Federal Circuit) and the various incarnations of the Court of Claims have found a waiver of the right to a jury trial by conduct alone. In *Seaboard Lumber Co. v. United States*²⁴ the Federal Circuit found that Seaboard had, in its contract with the government (a type of contract that is often described as a “contract of adhesion”), agreed to disputes procedures that did not include trial by jury.²⁵ This is an interesting way to avoid the constitutional issue and completely ignores the body of law in the federal courts that not only requires a valid jury trial waiver to be knowing, intelligent, voluntary, and specific, but also puts the burden of proof as to a waiver on the party trying to enforce the waiver. In any event, the *Seaboard* court did not have before it a counterclaim based in fraud.²⁶

It is more than a leap of blind faith into an abyss to say that a plaintiff pursuing a CDA *contract* claim has made a knowing, intelligent, voluntary, and specific waiver of its Seventh Amendment right to a jury trial by contractual agreement, or by its conduct, to resolve issues in *tort* without a jury. In Federal Acquisition Regulation (FAR) Part 33, which governs the resolution of protest, disputes, and appeals concerning contracts with the federal government, the only mention of fraudulent claims is as follows:

If the contractor is unable to support any part of the claim and there is evidence that the inability is attributable to misrepresentation of fact or to fraud on the

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Fraud Counterclaims (cont'd):

part of the contractor, the contracting officer shall refer the matter to the agency official responsible for investigating fraud.²⁷

If the entire FAR references the concept of fraud only in this provision, and in the outline of debarment and suspension criteria found in FAR Part 9, it is entirely unreasonable to construe that a party seeking to resolve a contract dispute waives its right to a jury trial on a counterclaim for fraud.

This is the key: *Fraud is a tort, not a contract action.* In *City of Monterey*, the court's opinion, both the majority and the concurrence by Justice Scalia, places enormous significance on the fact that the section 1983 claim involved an action in tort.²⁸ A tort is defined as a "civil wrong, other than breach of contract, for which a remedy may be obtained, usu[ally] in the form of damages."²⁹ This means that it is necessarily and tautologically true that a breach of contract is not a tort, and that a tort is not a breach of contract.

Thus, even if a plaintiff in the Court of Federal Claims did effect a valid waiver of jury trial for an action in contract by using the CDA disputes procedures, it would not likewise effect a waiver of jury trial for an action in tort. (There are contrary, nonbinding, holdings in the Court of Federal Claims. In *BMV-Combat Sys. Div. of Harsco Corp. v. United States*,³⁰ for instance, Judge Tidwell ruled that BMV did not have a Seventh Amendment right to a trial by jury in the COFC. Nevertheless, Judge Tidwell's ruling is not binding precedent for that court.)³¹

Procedural Aspects

This legal issue is less of an exercise in counting angels on the head of a pin than one might be led to believe. As several legal commentators have observed, the Department of Justice has increased its focus on fraud counterclaims.³² Also, the COFC is increasingly finding fraud liability. This trend seems to come as a result of the decision in *Daewoo Engineering & Construction Co. v. United States*.³³ In *Daewoo*, the plaintiff contractor allegedly included in its certified claim losses that had not occurred at the time of certification under the CDA. The government made a fraud counterclaim in the COFC. The Federal Circuit ultimately held that Daewoo committed fraud, thereby forfeiting its claims and subjecting itself to statutory fraud damages.

The implications of this trend are daunting, and the jury trial issue may have to come before the trial judges of the COFC several times before it is fully litigated before the Federal Circuit, and, ultimately, the Supreme Court. One may lose one's motion to dismiss the fraud counterclaims at the COFC, as we did. As a next step, a COFC judge can certify a question for interlocutory appeal to the Federal Circuit under 28 U.S.C. §1292.³⁴ If one loses the motion at the trial court, and the judge declines to certify the issue for interlocutory appeal, the recourse is to wait for a final judgment, take the normal course of appeal to the Federal Circuit, and revisit the jury trial issue at that point. In the meantime, the client has been subjected to a trial and

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Fraud Counterclaims (cont'd):

judgment on multiple damages and the agency involved may have initiated debarment proceedings.

Each of these circumstances can adversely affect a contractor's cash flow, its perceived responsibility to receive contract awards, and its ability to meet bonding requirements for further work. These items may motivate a plaintiff to settle a matter on unfavorable terms. Accordingly, it may make sense to consider filing a petition for a writ of mandamus to the Federal Circuit.³⁵ The authority for such a writ lies in the All Writs Act, 28 U.S.C. §1651, and the procedures to be followed can be found at Rule 21 of the Federal Rules of Appellate Procedure.

Conclusion

We think it is wrong of the Court of Federal Claims to rely on the authority of *McElrath* to allow a government counterclaim in fraud to proceed in a contract dispute case when the plaintiff demands a jury trial on the *tort* of fraud pursuant to the Seventh Amendment. It is to be hoped that another similar case in the COFC will end differently, or, more to the point, that the Federal Circuit, or the Supreme Court, may someday consider the issue on appeal, and reach the correct result.

* - Elizabeth W. Fleming is the assistant district attorney in Kodiak, Alaska. Rebecca Clawson is an associate with Barokas Martin & Tomlinson in the firm's Seattle, Washington, office.

Endnotes

1. 41 U.S. §§601-613.
2. 102 U.S. 426 (1880).
3. Michael Abromowicz & Maxwell Stearns, *Defining Dicta*, 57 Stan.L. Rev. 953 (2005).
4. *Id.* at 1074.
5. 57 U.S. 275 (1853).
6. *Id.* at 287.
7. 102 U.S. 426 at 440.
8. *United States v. Wonson*, 28 F. Cas. 745 (C.C.D. Mass. 1812).
9. *Marseilles Hydro Power LCC v. Marseilles Land and Water Co.*, 299 F. 3d 643, 648 (7th Cir. 2002) (Posner, J).
10. *Id.*
11. Restatement (Second) of Torts §525 (1977).
12. 526 U.S. 687, 723-32 (1999).
13. *Id.* at 708.
14. *See* Fed. R. Civ. P. 38.
15. *See, e.g.*, John Cibinic, Jr., Ralph C. Nash, Jr. and James F. Nagle, *Administration of Government Contracts* 1240-42 (4th ed. 2006); *see also* S. Rep. 95-1118, 95th Cong., 2d Sess. 1978, 1978 U.S.C.C.A.N. 5235 (“If such cases do arise and are thus handled in the courts, other parts of the claim not associated with possible fraud or misrepresentation of fact will continue on in the agency Board or in the Court of Claims where the claim originated.”)

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Fraud Counterclaims (cont'd):

Endnotes (cont'd)

16. Cibinic, Cash & Nagle at 1241.
17. *Id.* at 1240-42; *see, e.g., United States v. Rockwell International Corp.*, 795 F. Supp. 1131 (N.D. Ga. 1992) (common law fraud actions can be brought in actions outside the Contract Dispute Act).
18. 37 Am.Jur. 2d, Fraud and Deceit, §12 (“An action for fraud and deceit is of common law origin.”).
19. *National Equipment Rental, Inc. v. Hendricks*, 565 F. 2d 255, 258 (2d Cir. 1977).
20. *Great Earth International Franchising Corp. v. Milks Dev.*, 311 F. Supp. 2d 419 (S.D.N.Y. 2004)(waiver of jury trial on franchise agreement valid and enforceable); *Phoenix Leasing, Inc. v. Sure Broadcasting, Inc.*, 843 F. Supp. 1379 (D. Nev. 1994)(waiver of right to jury trial in loan agreements is constitutionally valid); *Allyn v. Western Life Insurance Co.*, 347 F. Supp. 1246 (M.D. Fla. 2004)(sophisticated, educated borrower made valid jury trial waiver in contract).
21. *McElrath*, 102 U.S. 426; *Seaboard Lumber Co. v. United States*, 903 F. 2d 1560 (Fed. Cir. 1990)(government contractor waived its Seventh Amendment right to jury trial for breach of contract counterclaim by availing itself of Contract Disputes Act procedures).
22. *See* 13 A.L.R. Fed. 145; 92 A.L.R. Fed. 688; 93 A.L.R. 2d 410.
23. *See Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 500 F.3d 171 (2d Cir. 2007)(waiver found enforceable); *First Union National Bank v. United States*, 164 F. Supp. 2d 660, 663 (E.D. Pa. 2001)(burden of showing waiver to be both knowing and intelligent falls on party seeking enforcement of waiver). Interestingly, at least one court that has found a valid waiver has noted , in dicta, that where a contract is silent on waiver of the right to a jury trial, Federal Rule of Civil Procedure 38 applies and the right is intact. *See IFC Credit Corp. v. United Business & Industrial Credit Union*, 512 F.3d 989, 993 (7th Cir. 2008). In the Court of Federal Claims, there is no equivalent to Rule 38.
24. 903 F.2d 1560.
25. *Id.* at 1567.
26. Of course, there are sovereign immunity issues intricately intertwined with the law governing the resolution of government contract disputes under the Disputes clause. The point of this article is that sovereign immunity issues do not apply when the United States becomes a party plaintiff in a lawsuit. Thus, an exposition of the sovereign immunity implications in government contract law far exceeds the scope of this article.
27. FAR 33.209.
28. 586 U.S. at 709, 727-28 (“There is no doubt that the cause of action created by §1983 is, and always was, a tort claim.”).
29. *Black’s Law Dictionary* 1626 (9th Ed. 2009).
30. 26 Cl. Ct. 846 (1992).
31. *West Coast General Corp. v. Dalton*, 30 F.3d 312, 315 (Fed. Cir. 1994)(“Court of Federal Claims decisions, while persuasive, do not set binding precedent for separate and distinct cases in that court.”).
32. *See* Jeffrey A. Belkin & J. Andrew Howard, *Prospective Damages and CDA Certification; The Real Daewoo Issue*, *Andrews Litig. Rep.*, Vol. 21, No. 18 (Jan. 14, 2007); James L. D’Agostino & Sean M. Connolly, *Contractors See Rise in Fraud Counterclaims*, *Nat’l Defense*, Sept. 1, 2007; Adrian Bastianelli III & Patrick J. Greene, Jr., *United States: New Stakes in Doing Business with the Federal Government*, Mar. 23, 2007, at <http://www.mondaq.com/unitedstates/article.asp?articleid=47068>.
33. 73 Fed. Cir. 547 (2006), *aff’d* 557 F.3d 1332 (Fed. Cir.), *cert. denied*, 130 S. Ct. 490 (2009).
34. *See Salman Ranch, Ltd. V. United States*, 573 F. 3d 1362 (Fed. Cir. 2009)(trial judge certified for appeal ruling on applicable statute of limitations).
35. *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500 (1959)(mandamus appropriate remedy where jury trial denied by trial court); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 470 (1962)(federal courts of appeal responsible to grant mandamus to protect the right to trial by jury); *In re Lockheed Martin Corp.*, 503 F.3d 351 (4th Cir. 2007)(petition for writ of mandamus is proper challenge to denial of jury trial); *Myers v. U. S. District Court for the District of Montana*, 620 F.2d 721 (9th Cir. 1980)(issues writ after timely jury trial demand denied at trial court); *Bruce v. Bohanon*, 436 F.2d 743 (10th Cir. 1970); *Bereslavsky v. Caffey*, 161 F.2d 499, 501 (2d Cir. 1947)(“There can be no doubt of our power in such a case to issue a writ of mandamus.”).

Defining “Definitions”

by
Vernon J. Edwards*

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It is impossible to overstate the importance of the definitions of the words and terms used in regulations, solicitations, and contracts. When we read a newspaper, a novel, or a work of popular nonfiction, we do not always consult a dictionary when we encounter a word that we do not know. We may instead take our sense of it from the context. But in contract management, words and terms in regulations, solicitations, and contracts have legal force and effect and it is our job to fully understand them and to act on our understandings accordingly.¹

The importance of definitions is revealed in numerous decisions of the Government Accountability Office (GAO), the boards of contract appeals, and the federal courts. To give just one example, in a 2008 protest decision, GAO decided that on the basis of the definitions of *acquisition* and *contract* in Federal Acquisition Regulation (FAR) 2.101, the “Rule of Two” for small business set-asides applies to the issuance of task and delivery orders under multiple award indefinite-delivery/indefinite-quantity contracts:

In our view, the legal question is whether the Rule of Two, which by its terms Applies to “any acquisition over \$100,000”...applies to individually competed task or delivery orders under multiple-award contracts. We conclude that it does, because, at least for purposes of this analysis, those orders are properly viewed as “acquisitions.” We have previously concluded that a delivery order placed under an [indefinite delivery/indefinite quantity] contract is, itself, a “contract,” at least for some purposes...and contracts are covered by the definition of “acquisition” in FAR sect. 2.101.²

That decision stunned many contract managers. Clearly, the definitions of words and terms must not be taken lightly.

What, Exactly, are Definitions?

The definition of a *definition* is a proposition that declares the meaning of a word or term, either as commonly accepted or as used by a writer or speaker for a particular purpose.³ A definition has two parts: 1) the *definiendum*, which is the word or term to be defined; and 2) the *definiens*, which is the proposition declaring what the word means. Consider the definition of *pricing* in FAR 2.101: “*Pricing* means the process of establishing a reasonable amount or amounts to be paid for supplies or services.” “*Pricing*” is the *definiendum*, and the words that follow constitute the *definiens*.

Definition is an important topic in logic and rhetoric, and people have been arguing about the nature and variety of definitions since the time of Socrates.⁴ There are many kinds of definitions, but three kinds are especially important to contract managers:

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Defining “Definitions”(cont’d):

- Lexical definitions,
- Precising definitions, and
- Stipulative definitions.⁵

Lexical definitions are found in ordinary dictionaries. They state the common meanings of words as used by speakers and writers of a language.⁶ Lexicographers make records of actual usage, which are the bases for their definitions. The first great dictionary of English was Samuel Johnson’s famous *A Dictionary of the English Language*, published in 1755. In 1828, Noah Webster published the *American Dictionary of the English Language*, the ancestor of today’s “Webster’s” dictionaries. The greatest dictionary of the English language today is the 26-volume *Oxford English Dictionary*. However, to save space on bookshelves, there are two fine single-volume English dictionaries available: *Webster’s Third New International Dictionary of the English Language* and the *American Heritage Dictionary of the English Language* (fourth edition).

In contrast to dictionary definitions, the definitions of important terms in the FAR and other U.S. government regulations are considered “precising” and “stipulative” definitions. *Precising definitions* narrow the meaning of lexical definitions by adding limiting criteria. The official definition of “claim” in FAR 2.101 is an example of a precising definition. The lexical definition of *claim* in the *Oxford English Dictionary* is: “A demand for something as due; an assertion of a right to something.” The precising definition in FAR 2.101 is:

“Claim” means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. However, a written demand or written assertion by the contractor seeking the payment of money exceeding \$100,000 is not a claim under the Contract Disputes Act of 1978 until certified as required by the act. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim.

Note that a “claim,” as defined in the FAR, is still a demand or assertion for something due as a matter or right, but additional criteria must be met. Under the FAR, a “claim” must be:

- Written,
- For one or more specific kinds of things,
- Certified if over \$100,000, and
- In dispute if a routine payment request.

Other examples of precising definitions in the FAR include the definitions of *affiliates*, *building*, *conviction*, *day*, *ineligible*, *solicitation*, *suspension*, and *United States*.

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Defining “Definitions”(cont’d):

Stipulative definitions state the intended meaning of a word or term for which there is no applicable lexical definition. For example, the definition of *sole source acquisition* in FAR 2.101 states: “‘Sole source acquisition’ means a contract for the purchase of supplies or services that is entered into or proposed to be entered into by an agency after soliciting and negotiating with only one source.” Other examples of stipulative definitions in the FAR include the definitions of *bundling*, *commercial item*, *contract action*, and *cost or pricing data*.

Official Definitions in the FAR

Official definitions appear in statutes and regulations. Many words and terms are so familiar to us that we may not stop to think whether they have official definitions. For example, many people are shocked to discover that the term *contracting officer*, as defined in FAR 2.101 and in the Contract Disputes Act of 1978,⁷ includes authorized representatives of the contracting officer acting within the limits of their authority. Thus, contracting officer technical representatives are contracting officers for some purposes.

The FAR contains about 700 official definitions, not including the ones in agency FAR supplements. The largest single collection of them is in FAR Part 2, “Definitions of Words and Terms,” which as of January 1, 2011, contains 228 precisising and stipulative definitions. Forty-four of the remaining 52 FAR parts also contain definitions, most of which are in sections titled, “Definitions.”

FAR 2.101 states the general rules about definitions:

- a. A word or a term, defined in this section, has the same meaning throughout this regulation (48 C.F.R. Chapter 1), unless—
 1. The context in which the word or term is used clearly requires a different meaning; or
 2. Another FAR part, subpart, or section provides a different definition for the particular part or portion of the part.
- b. If a word or term that is defined in this section is defined differently in another part, subpart, or section of this regulation (48 C.F.R. Chapter 1), the definition in—
 1. This section includes a cross-reference to the other definitions; and
 2. That part, subpart, or section applies to the word or term when used in that part, subpart, or section.

You may also wish to review the “Definitions” clause at FAR 52.202-1, which is discussed below.

FAR 1.108, “FAR Conventions,” states how a word or term is to be defined when there is no official definition:

Definitions in Part 2 apply to the entire regulation unless specifically defined in another part, subpart, section, provision, or clause. Words or terms defined in a
(continued on next page)

Defining “Definitions”(cont’d):

specific part, subpart, section, provision, or clause have that meaning when used in that part, subpart, section, provision, or clause. Undefined words retain their common dictionary meaning.

As we shall see, FAR 1.108(a) notwithstanding, we cannot always rely on “common dictionary meanings.”

The definitions in the FAR tell contract managers what words and terms mean as used in the FAR. They may not be consistent with definitions elsewhere. For example, the definition of *offer* in FAR 2.101 differs from the ones in *Black’s Law Dictionary* and in the *Restatement of the Law of Contracts* section 24. Those definitions state what an offer is according to American common law. But the definition in the FAR says only what the word *offer* means as used in the FAR. Thus, there is no mention of “promise” or “manifestation of willingness to enter into a bargain.”⁸ The definitions in the FAR are incorporated into government solicitations and contracts by inserting the “Definitions” clause, FAR 52.202-1, which states:

- a. When a solicitation provision or contract clause uses a word or term that is defined in the [FAR], the word or term has the same meaning as the definition in FAR 2.101 in effect at the time the solicitation was issued, unless—
 1. The solicitation, or amended solicitation, provides a different definition;
 2. The contracting parties agree to a different definition;
 3. The part, subpart, or section of the FAR where the provision or clause is prescribed provides a different meaning; or
 4. The word or term is defined in FAR Part 31, for use in the cost principles and procedures.
- b. The FAR Index is a guide to words and terms the FAR defines and shows where each definition is located. The FAR Index is available via the Internet at <http://www.acqnet.gov> at the end of the FAR, after the FAR Appendix.⁹

Note that the definitions applicable to a contract are the ones that were in effect when the solicitation was issued, which may have been two years or more before the contract was awarded. Note, too, that the clause applies the FAR definitions only to solicitation provisions and contract clauses, not to specifications, statements of work, or other parts of a contract.

Words and Terms with Multiple Definitions

Some words are defined in a number of places in the FAR, but not always in the same way. For example, the FAR contains several definitions of *United States*. Compare the definitions of *United States* in FAR 2.101, 3.1001, and 22.801. Each means something different than the others. There are also multiple definitions of *subcontract*. None of them are

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Defining “Definitions”(cont’d):

in FAR Part 2, which means that no single definition of *subcontract* applies throughout the FAR. The word appears in 36 parts of the FAR, yet if you ask most practitioners what a “subcontract” is they will refer to the definition in FAR 44.101, which applies only to the policies in FAR Part 44 and to the clauses that implement those policies. In addition to FAR 44.101, definitions of *subcontract* appear in FAR 3.502-1, 3.1001, 12.001, 15.401, 19.701, 22.801, 22.1801, and in the provisions and clauses associated with those sections. The definitions are not all the same, and every difference, however seemingly slight, is loaded with the possibility of different legal effect.

Obscure and Frequently Contested Definitions

Official definitions do not always settle matters. Some official definitions are vague, ambiguous, obscure, or circular. A notorious example of an obscure definition is the one for *cost or pricing data* in FAR 2.101, which has prompted a significant amount of litigation over what it means.¹⁰ In recent years, the meanings of *inherently governmental functions* and *organizational conflict of interest*, also defined in FAR 2.101, have been controversial.¹¹ Some definitions have prompted litigation even though apparently clear (such as the definition of *claim* discussed earlier).¹² As distinguished attorney W. Stanfield Johnson wrote in 1999: “Two decades [after enactment of the Contract Disputes Act], after repeatedly revisiting the subject in litigation, regulation, and statutory amendment, we are still not completely certain what ‘claim’ means.”¹³

Definitions in Other Titles of the U.S. Code of Federal Regulations

In addition to the definitions in the FAR and its agency supplements, about 18 other titles of the U.S. Code of Federal Regulations (C.F.R.) contain definitions that apply to acquisition. These are often overlooked by contract managers, which is a mistake because they apply in certain cases and sometimes differ from the definitions in the FAR. For example, compare the definition of *construction* in FAR 2.101 to the definitions in 15 C.F.R. §700.8, “Defense Priorities and Allocations System definitions”; 29 C.F.R. §3.2, “Copeland Act definitions”; and 29 C.F.R. §5.2, “Davis-Bacon Act definitions.” The two definitions in Title 29 differ from each other, as well.

Dictionary Definitions

FAR 1.108(a) states that when a word or term is not defined in the FAR, it retains its “common dictionary meaning.” When interpreting statutes, regulations, and contracts, the federal courts, the boards of contract appeals, and GAO have resorted to a variety of English dictionaries in order to ascertain the meanings of words and terms. Sometimes a court will refer to more than one dictionary. For example, consider the U.S. Court of Federal Claims’ decision in *Vero Technical Support, Inc.*¹⁴:

The meaning of the word “pending,” when used as an adjective in the legal context, is plain and well-understood. See, e.g., *Webster’s Third New International Dictionary* 1669 (1976) (providing as first definition, “not yet

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Defining “Definitions”(cont’d):

decided: in continuance: in suspense”); *Black’s Law Dictionary* 1154 (7th ed.1999) (defining pending as “[r]emaining undecided; awaiting decision”). “Pending” has had this common meaning at the time, and long before, it was used in the predecessor to Section 1500 in section 8 of the act of June 25, 1868, 15 Stat. 75, 77. See, e.g., William A. Wheeler, *A Dictionary of the English Language* 528 (1868) (defining pending as “[r]emaining undecided; in suspense”); [In re:] *Ouachita Cotton*, 6 Wall. 521, 73 U.S. 521, 527, 18 L.Ed. 935 (1867) (using “still pending” and “awaiting adjudication” interchangeably); 11 *Oxford English Dictionary* 468 (2d ed. 1989) (citing a 1797 usage of the term in a reference to legal proceedings).

Among the most frequently cited dictionaries are the *Oxford English Dictionary*, *Webster’s Third New International Dictionary*, and the *American Heritage Dictionary of the English Language*. In addition to those large English dictionaries, the tribunals rely on various small “collegiate” dictionaries. “Common” dictionary definitions are not always determinative or even helpful. For example, FAR 52.215-10, “Price Reduction for Defective Cost or Pricing Data,” states that the government is entitled to a price reduction if a the price was increased “by any *significant* amount” due to defective pricing. What, exactly, constitutes a *significant* amount? The *American Heritage College Dictionary*, fourth edition, defines *significant* as follows:

- Having or expressing a meaning; meaningful.
- Having or expressing a covert meaning; suggestive: a significant glance...
- Having or likely to have a major effect; important.
- Fairly large in amount of quantity.

Which of those definitions applies in the context of defective pricing? A casual poll of contract managers suggests that most interpret *significant* according to the fourth definition, as referring to the amount in question as a percentage of the total price—the higher the percentage, the greater the significance. However, that is not how the boards of contract appeals and the courts have applied it. As reported by two experts:

The [Armed Services Board of Contract Appeals (ASBCA)] has read the Term “significant” so broadly as to render it practically meaningless. In *American Bosch Arma Corp.*, ASBCA No. 10305, 65-2 BCA ¶5280, corrected decision issued, 66-2 BCA ¶5747, the Board held \$20,000 out of a target price of \$15 million (less than 2/10 of one percent) to be significant.¹⁵

Words are very often defined differently in different dictionaries, so the choice of a dictionary can affect interpretation. As pointed out in a frequently cited *Harvard Law Review* note about the use of dictionaries for statutory interpretation:

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Defining “Definitions”(cont’d):

One of the most significant flaws of dictionaries as interpretive tools is the imperfect relationship of dictionaries to statutory context. The essence of words can never be described fully in the absence of contextual cues; in fact, many theorists have argued that meaning, as we understand it, does not exist without context. Consequently, no dictionary can completely capture the particular historical and textual framework of a statutory term. Nor does any dictionary claim to do so. According to Hart and Sacks’s Legal Process materials, dictionaries, like canons of construction, “simply answer the question whether a particular meaning is linguistically permissible, if the context warrants it.” Dictionaries are only starting points, organized according to rough analogies and dependent on evidence that “the context warrants” application of their definitions.¹⁶ (Notes omitted.)

Technical Terms, Words and Terms of Art, and Trade Usages

In addition to official definitions and common dictionary definitions, contract managers must be familiar with technical terms, words and terms of art, and trade usages in the contracts that they manage. These are certain expressions that have a more or less clear meaning in a specific field of endeavor, but no “official” definition. Perhaps the best known terms of art in government contracting are *general scope of the contract* and *equitable adjustment*, which are used in the FAR changes clauses. Neither expression is officially defined and the meanings of both as applied in specific contexts have been litigated many times.¹⁷

Specific industries and professions have special terms of their own, or use ordinary words in special ways. Some have their own dictionaries. Construction is an example. This field uses many specialized terms, and one of the best known and respected industry dictionaries is the *RSMean Illustrated Construction Dictionary*, fourth edition. There are many dictionaries of industry-specific words and terms, such as *Newton’s Telecom Dictionary*, *The Cambridge Dictionary of Space Technology*, and *Glossary of Supply Chain Technology*. There are also general technical dictionaries, such as the *McGraw-Hill Dictionary of Scientific and Technical Terms*.

In an amusing trade usage case with which many law students are familiar, *Frigalment Importing Co.*,¹⁸ the U.S. district court judge began his decision with the following sentence: “The issue is, what is a chicken?” The parties had gotten into a dispute about what *chicken* meant as used in their contract. The buyer had wanted frying (young) chicken, but the seller had shipped both frying and stewing (old) chicken. The buyer objected. After reading the contract, communications between the parties, and government regulations, and considering expert witness testimony about trade usage, the judge decided that “chicken” meant all kinds of chicken or, as one witness put it, “everything except a goose, a duck, and a turkey.” (Expert witnesses are often called to testify about trade usage.) Trade usage is very important in the world of contract management. A distinguished jurist has pointed out that reliance upon trade usage avoids the need to include additional detail in contracts, which would increase the cost of negotiating and writing them.¹⁹

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Defining “Definitions”(cont’d):

An Eye for Definitions

Many people don’t think about the meanings of words until an issue arises. For contract managers, that is a mistake. We operate in a murky world of statutory, regulatory, and contractual language in which words and terms lie in wait to ambush us. We cannot read and write acquisition documents like laypersons. We must bring an entirely different sensibility to those tasks. We must be alert to the possibility that our familiarity with a word might lull us into thinking that we know what it means. We must look at *each and every word* or term as if seeing it for the first time, even words and terms like *United States*, which are so familiar to us that were it not for professional self-discipline we might not think how we would define them or what might be the legal effect of our definition. We must have a deep knowledge of the materials with which we work.

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Endnotes

1. For a general discussion on definitions in the law of contract interpretation, see John Cibinic Jr., Ralph C. Nash Jr., and James F. Nagle; *Administration of Government Contracts*, fourth ed. (Washington, DC: The George Washington University, National Law Center, 2006): 159–167.
2. *Delex Systems, Inc.*, Comp. Gen. Dec. B-400403, October 8, 2008, 2008 CPD 181. The “Rule of Two” is stated at FAR 19.502-2(a).
3. This definition is a modernization of the one in John Stuart Mill, *Philosophy of Scientific Method* (Mineola, New York: Dover Publications, 2005): 96.
4. For an overview, see entry “Definitions,” *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu>. For excerpts from foundational texts, see Juan C. Sager, *Essays on Definition* (Amsterdam: John Benjamins Publishing Co., 2000).
5. Typologies vary widely, but see Norman Schwartz, *Definitions, Dictionaries, and Meanings* (2010), available at www.sfu.ca/~swartz/definitions.htm.
6. For an introduction to dictionaries and modern lexicography, see Barbara Ann Kipfer, *Introduction to Lexicography: A Course for Dictionary Users* (2010), available only for Kindle users; for non-Kindle users, see “Dictionaries of English,” *Webster’s New World College Dictionary*, fourth ed. (Cleveland: Wiley Publishing, Inc., 2005): xxv; for a comprehensive discussion of the making of *The Oxford English Dictionary*, see “The History of the Oxford English Dictionary,” *Oxford English Dictionary*, second ed. (Oxford: Clarendon Press, 1989): xxxv.
7. 41 U.S.C. §604(3).
8. For an extended discussion of the differences between definitions of words and of things (i.e., verbal versus *real* definitions, a controversial matter), see Richard Robinson, *Definition* (London: Oxford University Press, 1954): 149–192; and W.H. Werkmeister, *An Introduction to Critical Thinking*, revised ed. (Lincoln, Nebraska: Johnsen Publishing Co., 1957): 158–160.

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Defining “Definitions”(cont’d):

Endnotes (cont’d)

9. See the clause prescription in FAR 2.201 and 52.212-4(e).
10. See Kent R. Morrison and David Z. Bodenheimer, *Defective Pricing* (Washington, DC: Federal Publications, LLC, 2007): 47–82.
11. See Ralph C. Nash Jr., “Contracting-Out Policy: Guidance From The Office of Federal Procurement Policy,” *The Nash & Cibinic Report* (May 2010): ¶23; and Ralph C. Nash Jr., “Organizational Conflicts of Interest: An Increasing Problem,” *The Nash & Cibinic Report* (May 2006): ¶24.
12. See, e.g., *BLR Group of America, Inc. v. U.S.*, Fed. Cl., 2010 WL 5121642 (Fed. Cl. 2010); and *L.A. Ruiz Assocs., Inc. v. U.S.*, 94 Fed. Cl. 768 (2010).
13. W. Stanfield Johnson, “A Retrospective On The Contract Disputes Act,” *Public Contract Law Journal* (Summer 1999): 569.
14. *Vero Technical Support, Inc. v. U.S.*, 94 Fed. Cl. 784 (2010).
15. Morrison and Bodenheimer, see note 10, at 68.
16. “Looking it up: Dictionaries and Statutory Interpretation,” *Harvard Law Review* (1994): 1449–1450.
17. Ralph C. Nash Jr. and Steven W. Feldman, *Government Contract Changes*, third ed. (Thomson-West, 2007): §4.3 and chapter 6.
18. *Frigalment Importing Co. v. B.N.S. International Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960).
19. Richard A. Posner, “The Law and Economics of Contract Interpretation,” *Texas Law Review* (May 2005): 1600.



A Primer on Prime Contractor—Subcontractor Disputes Under Federal Contracts

by
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And
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The federal government spends more than \$500 billion a year on contracts.¹ More than 50 percent of that total works its way down to subcontractors. Thus, disputes between prime contractors and their subcontractors on federal contracts are relatively common, but may nevertheless contain some issues unfamiliar even to the experienced government contractor or government contract lawyer.

Applicable Law

Certainly, the subcontract itself can identify the applicable body of law that will be used to interpret it. If the prime contractor and the subcontractor are both California corporations and the contract is formed and performed in California, it would be logical for the parties to agree that California law will apply. Frequently, however, the parties will designate "federal procurement law" as the body of law used to interpret the subcontract.²

Federal procurement law typically means the decisions of the federal forums in the area: the United States Court of Appeals for the Federal Circuit, the United States Court of Federal Claims, the applicable boards of contract appeals, and, in certain circumstances, the Government Accountability Office.³ At one time, there were numerous agency boards of contract appeals. Now, there are two multi-agency boards: the Armed Services Board of Contract Appeals (ASBCA), which deals with appeals from the Department of Defense agencies such as the Corps of Engineers, NASA, the CIA and a few other departments; and the Civilian Board of Contract Appeals (CBCA), which in January 2007 replaced such former agency boards as the General Services Administration Board of Contract Appeals and the boards of the Departments of Energy, Interior, Health and Human Services, Transportation, and Veterans Affairs.⁴

Federal procurement law also includes the regulations set forth in the Federal Acquisition Regulation (FAR), which can be found at Title 48 of the Code of Federal Regulations (CFR), Chapter 1, and the agency supplements that are also in Title 48 of the CFR. For example, Chapter 2 of Title 48 is the Defense Federal Acquisition Regulation Supplement (DFARS). Chapter 9 is the Department of Energy Acquisition Regulation (DEAR)—another example of an agency's supplemental regulation. The FAR and its supplements implement numerous statutes that apply to federal procurements, such as the Contract Disputes Act of 1978, the Truth in Negotiations Act, the Competition in Contracting Act, and the Buy American Act.

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A Primer on Prime Contractor—Subcontractor Disputes (cont'd):

Choosing federal procurement law to govern a subcontract makes sense for two reasons. First, the prime contractor will often want to be bound by the same set of rules upstream (to the government) and downstream (to the subcontractor); the prime does not want to be caught in the middle and face the danger of inconsistent results.⁵ Second, it is common that federal contract clauses are “flowed down” in the subcontract. While relatively few clauses are mandatorily flowed down,⁶ it is prudent for the prime contractor to flow down such clauses as the Changes⁷ and Terminations⁸ clauses, and a host of others.

Even if a particular state's law is the applicable law for the agreement between the prime contractor and its subcontractor, very often the parties will have to brief the trial judge on the meaning of an “equitable adjustment,” “allowable costs,” or a “component” under the Buy American Act. These definitions have already been established by numerous federal court and board cases involving federal procurement law.

If the subcontract does not designate which law will apply, a judge may sometimes fill the void by designating federal procurement law as the applicable law.⁹ This is done relatively rarely and normally only in the case of national defense or Department of Energy contracts where a judge may decide that uniform law across all 50 states must apply.

Besides the applicable statutory, regulatory, and case law, it is critical that counsel for the subcontractor review the prime contract with the government because the subcontract often states that the subcontractor will be bound by all of the terms and conditions in the prime contract. This very common clause is frequently inappropriate, however, such as when the prime contract with the government is a cost-reimbursable construction contract and the subcontract in question is a fixed-price supply contract. Such fundamental discrepancies are frequently overlooked.¹⁰

Pass-Through or “Sponsored” Claims

Regardless of which law applies to the subcontract, the prime contractor may agree fully with the subcontractor's claim that, for example, the government's specifications were defective, a differing site condition was discovered, or that the government interfered with performance of the work. In these situations, because there is no privity of contract between the subcontractor and the government, the subcontractor will submit its claim to the prime.

Often a subcontractor does not want to litigate with its prime because it recognizes that the prime was not at fault, or the prime is on shaky financial ground and may not have the resources to pay the claim, or both.¹¹ In that event, the subcontractor will present a claim to the prime contractor and request that it be “passed through” or “sponsored” by the prime to the government. Although the prime is often very anxious to pass through a claim, sometimes the prime demurs because it has very little or no faith in the subcontractor's claim as to the narrative or costs, or because the prime does not want to pass a problem on to the government customer with which it wants to do more business. If the prime does not sponsor the claim, almost

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certainly it will be locked in litigation or arbitration with the subcontractor; if it does sponsor the claim, it must take a variety of procedural steps. Unless the subcontract covers the point, the prime must enter into an agreement with the subcontractor that defines the parties' obligations.

First, the prime will want to negotiate with the subcontractor something like the following:

We both agree that the government specifications/interference/change caused your increased costs. Let's submit this to the government and whatever amount the government ultimately agrees to pay (from the contracting officer, the Board of Contract Appeals, the Court of Federal Claims) will be in full satisfaction of your claim.

In other words, if the subcontractor's claim is for \$1 million but the contracting officer or the appropriate federal forum concludes that the claim is only worth \$300,000, the prime wants the subcontractor to accept that \$300,000 in complete satisfaction of its claim and never to seek further money from the prime. Understandably, subcontractors are often reluctant to do this. Their contention would be "our contract is with you. Whether you get reimbursement from the government is immaterial. We refuse to let you walk out."¹²

Despite this potential obstacle, very often the parties will agree to the pass-through, with or without this release, for three reasons. First, the prime contractor may not be financially viable enough to make the payment. Second, the subcontractor may need the full cooperation of the prime, not only in terms of sponsoring the claim but also for providing witnesses and documents, and other tactical considerations. Third, the terms of the subcontract may give the prime the right to attempt to pass the claim through, and so the subcontractor may have no choice. In any event, there frequently will be a haggling process in which the parties work out a joint prosecution agreement or a joint defense agreement, including a release.

The prime contractor sponsors the subcontractor's claim by bringing an appeal on the subcontractor's behalf or by permitting the subcontractor to bring an appeal in the contractor's name. FAR 44.203(c) explicitly allows such "indirect subcontractor appeals." It provides:

Contracting officers should not refuse consent to a subcontract merely because it contains a clause giving the subcontractor the right of indirect appeal to an agency board of contract appeals if the subcontractor is affected by a dispute between the Government and the prime contractor. Indirect appeal means assertion by the subcontractor of the prime contractor's right to appeal or the prosecution of an appeal by the prime contractor on the subcontractor's behalf. The clause may also provide that the prime contractor and subcontractor shall be equally bound by the contracting

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officer's or board's decision. The clause may not attempt to obligate the contracting officer or the appeals board to decide questions that do not arise between the Government and the prime contractor or that are not cognizable under the clause at 52.233-1, *Disputes*.

The right of a subcontractor to appeal in the name of a prime contractor has been affirmed, even when the prime has neither paid the claim nor admitted liability, as long as the claim is made in good faith.¹³ The prime must not have already waived its right against the government. Such waivers occur surprisingly often when the prime issues a final release to the government in return for final payment or issues a release on a claim before ensuring that all the claims from affected subcontractors have been submitted.¹⁴

Although a prime contractor may sponsor the claim of a subcontractor, the subcontractor does not have privity of contract with the government and is not a proper party before a board of contract appeals. In *Zenith Data Systems*, for example, the ASBCA denied a prime contractor's request to add its subcontractor as a "co-appellant."¹⁵ After a termination for default, a surety took over and entered into a subcontract with the original contractor to complete the job. On appeal, the default termination was overturned and converted to a termination for convenience. The ASBCA held that it did not have jurisdiction over that part of the termination settlement proposal covering costs incurred while the contractor was acting as subcontractor to the surety because the claim was not sponsored by the surety.¹⁶

Certification

In the federal system, for claims of more than \$100,000, the contractor must certify that: (1) the claim is made in good faith; (2) the supporting data are accurate and complete to the best of the contractor's knowledge and belief; (3) the amount requested accurately reflects the amount for which the contractor believes the government is liable; and (4) the signer is duly authorized to certify the claim.¹⁷ If the prime is prudent, it will require the same certification from the subcontractor, but this alone is not sufficient. The prime itself must certify the subcontractor's claim. That puts the prime on the horns of a dilemma.

First and foremost, the prime may not have intimate knowledge of the facts and certainly will not know as much about the subcontractor's books as it does about its own. The prime may have some doubts about the claim on legal or factual grounds. Fortunately for prime contractors, the United States Court of Appeals for the Federal Circuit has provided an escape route. In *United States v. Turner Construction Co.*,¹⁸ Turner was the prime contractor and had earlier recommended to the government that the claim of its subcontractor, Johnson Controls, be denied. Later, not willing to be caught in litigation with Johnson, Turner sponsored the claim to the government.

The government tried to dismiss the claim because of the earlier rejection, but the Federal Circuit disagreed. The court stated "the certification requirement requires not that the prime contractor believe the subcontractor's claim to be certain, but that the prime contractor

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believe that there is good ground for the claim.” The court's rationale was partly premised on the recognition of the prime's inability to be as intimately aware of the facts and numbers as its subcontractor.¹⁹

The *Severin* Doctrine: Is the Government Potentially Liable?

Sponsored claims are permitted only if the prime contractor is liable to the subcontractor and can charge the cost of the subcontractor's claim to the government, or can make a claim against the government based on the subcontractor's actual or anticipated recovery. This is known as the *Severin* doctrine.

The *Severin* doctrine states that if the prime contractor has not paid the subcontractor, and has no possible liability to the subcontractor on the claim (e.g., because the subcontractor has released the prime), the prime has suffered no harm at the hands of the subcontractor and cannot pass the claim through to the government.²⁰ Judges have narrowed the doctrine by strictly interpreting any release or exculpatory clause. If the release or exculpatory clause is anything less than “iron-clad”²¹ and does not completely free the contractor from liability, sponsorship will be permitted. Even when the subcontract provides that the contractor will pass subcontractor claims through to the government but will have no further liability, it has been held that the *Severin* doctrine does not bar the claim.²² Further, a clause that relieves the prime of responsibility to the subcontractor for price increases, damages, and additional compensation as a consequence of delay does not necessarily preclude the prime contractor from recovering against the government on behalf of its subcontractor.²³

A subcontractor can assure itself of the right to pursue the government by entering into an agreement that establishes the conditional liability of its prime contractor. In *W.G. Yates & Sons Constr. Co. v. Caldera*,²⁴ both Yates, the prime, and IDC, the subcontractor, pursued their claim against the government under a Liquidation and Consolidation Claim Agreement (LCCA). Under the LCCA, Yates agreed to sponsor IDC's claims to the contracting officer and, if necessary, to the ASBCA. In the event that they prevailed on their claim, the parties agreed that Yates would pay IDC whatever Yates recovered from the government for IDC's losses. In exchange for the assurances that it made to IDC, Yates received a promise from IDC to pay Yates's procurement costs regardless of the board's decision. Applying the *Severin* doctrine, the Army sought dismissal of Yates's claim because Yates “[bore] no real liability to IDC for IDC's damages.” The Federal Circuit determined that, under the subcontract and the LCCA, Yates could not “avoid liability if it receiv[ed] payment from the government for its damage,” so Yates was “conditionally liable” to IDC. The court affirmed the ASBCA's holding that Yates had standing to bring suit “on behalf of IDC for IDC's damages and expenses.” The court also affirmed that Yates had standing to sue on behalf of IDC for the excess procurement costs that Yates had recovered from IDC.

Although the *Severin* doctrine has infrequently precluded sponsored claims, it still has vitality in those cases where the contractor has not paid the subcontractor and is not even

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conditionally liable.²⁵ In *George Hyman Constr. Co. v. United States*,²⁶ the subcontractor executed a general release in favor of the contractor. The court found that this release was unconditional and held that sponsorship was not permitted. The court rejected the contractor's argument that the parties had not intended to include the particular claim in the release. It also rejected a later release excepting the claim. The court held that, even if the later release were binding under state law, sponsorship would not be permitted because it depended on "continuing," not "revived" liability.

Privity

To avoid the pass-through process, very often subcontractors will try to allege privity with the government. This is an extremely difficult task. It is against the government's policy to deal directly with subcontractors.²⁷ As a result, direct subcontractor claims are very rare.

The government will try to maintain the rule of privity as much as possible. In 2007, the government had prime contracts with approximately 169,000 different contractors.²⁸ That is a very large, but manageable, number. If subcontractors (which, under the FAR, normally means subcontractors at any tier) were included, millions of entities would have the ability to sue the government directly. Unless the government has agreed to make joint checks to the prime contractor and the subcontractor,²⁹ had the prime assign the subcontract to the government,³⁰ and specifically designated the prime as the government's purchasing agent,³¹ subcontractors have no right to use the disputes process in their own name, but can sue the government only if their claims are sponsored by the prime contractor.³²

There is one other notable instance in which the standard privity rules may be relaxed: when the prime has not been paying the sub, but the government has paid the prime. This resulted when Congress discovered that, very often, the subcontractor would perform the work and send a bill to the prime, which the prime would include within a billing to the government. The government would pay the prime promptly, but the prime would then put the money into an interest-bearing account for 60, 90, or 120 days and then pay the sub without any interest. During that time, if the subcontractor approached the government to complain, the government would very often simply dismiss the sub saying there was no privity. When Congress became aware that the government was essentially making interest-free loans to prime contractors, it passed a statute, now implemented at FAR 32.112-1, that allows the subcontractor to contact the contracting officer. In such event, the contracting officer may take one of the following actions: encourage the prime to get current with the sub; withhold further payments to the prime until it becomes current with the sub; or refer the matter to other appropriate authorities. These authorities may be criminal investigators, on the basis that the prime's failure to pay the sub violates its certifications of payment to the government and constitutes a false claim.

Contract Termination Issues

If the government concludes that continued performance of a contract is no longer in its best interest, it has the right to terminate the contract for its convenience. Generally speaking, a

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subcontractor has no contractual rights against the government upon the termination of a prime contract.

FAR 49.108-8 states that when the government terminates a contract for convenience, the prime is obligated to assign all “rights, titles and interest” under any subcontract that is terminated because of the termination of the prime contract, when the TCO (termination contracting officer) determines that such assignment is in the government's best interest. The FAR also provides the government the right to settle and pay any settlement proposal arising out of the termination of subcontracts. This is not to say it is the government's obligation to settle and pay proposals; rather, the general rule is that the prime contractor is obligated to settle and pay these proposals. However, when the TCO determines it is in the government's best interest, the TCO may settle the subcontractor's proposal using the same procedures used by the government for the settlement of prime contract terminations.

If a subcontractor obtains a final judgment against the prime (or reaches a settlement with a prime) in connection with a contract termination, the FAR instructs the TCO to treat the amount of such judgment or settlement as a cost of settling with the prime, provided the prime has taken certain steps to limit the amount of the subcontractor's rights to recover what the government deems fair and reasonable.³³ These steps include, for instance, reasonable efforts by the prime to include a clause in the subcontract excluding payment of anticipatory profits or consequential damages and to settle with the subcontractor, and diligent efforts by the prime to defend against any lawsuit or assist the government in such suit, if the government has assumed control of the defense.

Miller Act

As most federal contractors and subcontractors are aware, payment and performance bonds must generally be secured before commencing work on federal or state public construction projects. The Miller Act, 40 U.S.C. §§3131-34, was enacted in 1935 to require that such bonds be in place on federal projects exceeding \$100,000 in value. These statutory requirements are implemented at FAR Subpart 28.102. In addition, most state and local governments have adopted similar legislation, often referred to as “Little Miller Acts.”

In theory, a performance bond is issued to protect the government from increased costs in the event the prime contractor runs into problems during performance. By contrast, a payment bond is issued to protect subcontractors and suppliers in the event they are not paid by the prime.

The Miller Act provides that the payment bond protection applies to first-tier subcontractors, or those subcontractors and suppliers that contract directly with a prime. In addition, certain second-tier parties that supply labor or materials directly to a subcontractor performing work are protected. Second-tier parties that contract with a material supplier rather than with a subcontractor, and subcontractors and suppliers further down the chain, however,

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do not receive Miller Act protection. The question of whether a party is a subcontractor or a material supplier-and whether that party falls under the protection of the Miller Act-has been extensively litigated and is an issue of continuing debate.

The Miller Act contains specific notice requirements for parties seeking its protection. Although first-tier subcontractors and suppliers are not required to provide notice of a claim to the prime contractor, second-tier claimants must give written notice of the claim within 90 days after the last day labor or materials are furnished. The notice must contain both the amount claimed and the name of the party to which the material or labor was provided.

As a consequence, dispute resolution between the prime contractor and the subcontractor will see another party in the room: the surety. This does not fundamentally change the process, but it may add an extra step.

Conclusion

Unique aspects of law and practice affect prime contractor-subcontractor disputes arising out of federal projects and drastically impact the handling and outcome of these matters. It is especially problematic for practitioners who do not regularly deal with federal contracts but whose clients, perhaps because of the recession, are venturing into that arena, either as primes or subcontractors. Shepherding the prime in its dealing with the government is difficult enough, but advising on federal subcontracting adds an additional level of complexity. We hope that this article and the articles, cases, and treatises we have cited will help practitioners navigate through this minefield.

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Endnotes

1. See www.usaspending.gov.
2. See, e.g., *Sulzer Bingham Pumps, Inc. v. Lockheed Missiles and Space Co.*, 947 F.2d 1362, 1365 (9th Cir. 1991).
3. See James F. Nagle & Bryan A. Kelley, *Exploring the Federal Forums for Government Contracts*, 2 J. Am. C. Constr. Law. 189 (2008) (details on forums and their predecessors). The clause used in the *Sulzer* case was as follows:

This subcontract shall be governed by and construed in accordance with the law of U.S. Government contracts as set forth by statute and applicable regulations, and decisions by the appropriate courts and Board of Contract Appeals. To the extent that the law referred to in the foregoing sentence is not determinative of an issue arising out of the clauses of this subcontract recourse shall be to the law of the State of California.

4. Nagle & Kelley, *supra* note 3, at 199-204.

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Endnotes (cont'd)

5. For this reason, many prime contractors also insert subcontract clauses by which subcontractors agree (1) to stay the prosecution of any claims against the prime that are passed through by the prime to the government, and (2) to be bound by the results of any dispute proceedings between the prime and the government concerning the pass through claim.
6. Some that are, include the Audit clause, FAR 52.21 5-2 and the Equal Opportunity clause, FAR 52.222-25.
7. *E.g.*, FAR 52.243-1.
8. *E.g.*, FAR 52.249-1.
9. *E.g.*, *American Pipe & Steel Corp. v. Firestone Co.*, 292F.2d 640,644 (9th Cir. 1961); *New SD, Inc. v. Rockwell Inter. Corp.*, 79 F.3d 953, 955 (9th Cir. 1996).
10. It is amazing how often no one considers this until it is too late. The author was arbitrating one case in which that clause appeared. During the first preliminary conference call, the arbitrator said he would like to get a copy of the prime contract. The subcontractor's representatives said they would like one too because they had never seen it. This was long after they had agreed to be bound by it.
11. As noted above, the subcontractor may have agreed that any claim that relates to the government's conduct or the design may be passed through to the government, and that the subcontractor shall be bound by the results of any dispute proceedings between the prime and the government concerning the pass through claim
12. For a discussion of pass-through agreements, see Joel D. Heusinger, *Practical Concerns in Prosecuting Pass-Through Claims*, *Constr. Law.*, 25:2 at 26 (Spring 2005).
13. *TRW, Inc.*, ASBCA No. 11373,66-2BCA ¶5382.
14. See John Cibinic, Jr., Ralph C. Nash, Jr. & James F. Nagle, *Administration of Government Contracts* (4th ed. 2006) (discussion of matters—changes, delays, differing site conditions, defective property, interference—that typically arise in claims).
15. *Zenith Data Sys.*, ASBCA No. 49611, 98-1 BCA ¶29,72. See *McPherson Contractors, Inc.*, ASBCA No. 50830, 98-1 BCA ¶29,349 (board has no jurisdiction over appeal by prime contractor on behalf of its subcontractor after prime withdrew its sponsorship).
16. *Walsky Constr. Co.*, ASBCA No. 52772, 01-2 BCA ¶31,557.
17. FAR 52.233-1.
18. 927 F.2d 1554, 1561 (Fed. Cir. 1987).
19. *Accord Arnold M. Diamond, Inc. v. Dalton*, 25 F.3d 1006 (Fed. Cir. 1994), *reh'g denied* (Jul 07, 1994); *Alvarado Constr., Inc. v. U.S.*, 32 Fed. Cl. 184 (1994) (citing *Turner and Transamerica v. United States*, 973 F.2d 1572 (Fed. Cir. 1992) (case subsequently overruled in part on different point of law) (“In *Transamerica* and *Turner*, the Federal Circuit recognized that a contractor often will not have the same quality of information about a subcontractor's costs as it does about its own costs. The court also recognized, in effect, that [41 U.S.C.] Section 605(c)(1) does not require a contractor, prior to submitting a certified claim covering subcontractor costs, to secure an equivalent level of certainty as to the government's liability for the subcontractor costs as it would have for a claim covering the contractor's own costs.”)
20. See *Severin v. United States*, 99 Ct. Cl. 435 (1943), *cert. denied*, 322 U.S. 733 (1944).
21. *M. A. Mortenson Co.*, ASBCA No. 53761, 06-1 BCA ¶33,180 at 164,439.
22. *Castagna & Son, Inc.*, GSBCA No. 6906, 84-3 BCA ¶17,612; see also *Folk Constr. Co. v. United States*, 2 Cl. Ct. 681 (1983); *Pan Arctic Corp. v. United States*, 8 Cl. Ct. 546 (1985).
23. *Castagna & Son*.
24. 192 F.3d 987 (Fed. Cir. 1999).
25. See *James Reeves Contractor, Inc. v. United States*, 31 Fed. CL.712 (1994) (arbitration binding under state law operated to deny subcontractor's claim against contractor without reservation).
26. 30 Fed. Cl. 170 (1993), *aff'd*, 39 F.3d 1197 (Fed. Cl. 1994)

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Endnotes (cont'd)

27. See FAR 44.203(b)(3), which prohibits contracting officers from giving their consent to “subcontracts obligating the contracting officer to deal directly with the subcontractor.”
28. Christopher Yukins, *U.S. Contractor Compliance Rules Are Likely to Expand*, 50 *The Gov't Contractor*, April 23, 2008, at 1.
29. In *D&H Distributing Co. v. United States*, 102 F.3d 542 (Fed. Cir. 1996), the court found that a subcontractor had a third-party beneficiary relationship with the government when the contracting officer had modified the prime contract to make the contractor and the subcontractor joint payees. In addition, despite the statutory prohibition on the assignment of rights in government contracts, the court found that the contract modification at issue could be viewed as a valid assignment of payment rights from the contractor to the subcontractor because the contracting officer assented to the assignment. The government's subsequent failure to make payments according to the modified contract was a breach entitling the subcontractor to damages. Note, however, that this decision has been significantly restricted by the Federal Circuit in *Winter v. FloorPro, Inc.*, 570 F.3d 1367 (Fed. Cir. 2009). In that case, a subcontractor sought payment directly from the government on the basis that it had a third-party beneficiary relationship with the government pursuant to a contract modification by which the government agreed to issue joint checks to FloorPro, the subcontractor, and the prime contractor. Following *D&H Distributing*, the ASBCA concluded that the government was liable to FloorPro for breaching the payment provision in the modification. On appeal, the Federal Circuit disagreed, reasoning that the waiver of sovereign immunity under the Contract Disputes Act (CDA) is strictly construed and that, because FloorPro was not a "contractor" within the meaning of the CDA, it could not maintain a direct claim against the government. The Federal Circuit distinguished its earlier decision in *D&H Distributing*, which it acknowledged had similar facts, on the basis that the Tucker Act jurisdiction under which the subcontractor claims in *D&H Distributing* were raised is broader and more accommodating of direct subcontractor claims than the CDA, which was the jurisdictional basis for FloorPro's claims.
30. See FAR 49.108-8; *United States v. Georgia Marble Co.*, 106 F.2d 955 (5th Cir. 1939) (court found that government entered into implied contract to pay subcontractor for material government took from subcontractor).
31. Direct contractor claims have been permitted if the contractor is an agent of the government. See, e.g., *Kern-Limerick v. Scurlock*, 347 U.S. 110 (1954). Here, too, the likelihood of a contractor's being considered an agent of the government is remote. In *United States v. Johnson Controls, Inc.*, 713 F.2d 1541 (Fed. Cir. 1983), *aff'd*, 827 F.2d 1554 (Fed. Cir. 1987), the court held that a contractor that served as a construction manager was not, for that reason, an agent of the government. The court stated that the contractor was not a purchasing agent, there was no contractual designation of an agency relationship with the government, and the government was not bound to pay the subcontractor directly. See also *United States v. New Mexico*, 455 U.S. 720 (1982) (contractors operating government facilities had substantially independent role in making purchases, were not agents of the government, and, therefore, were not immune from taxation).
32. See *Lockheed Martin Corp. v. United States*, 50 Fed. Cl. 550 (2001), *aff'd*, 48 Fed. Appx. 752 (Fed. Cir. 2002); *Detroit Broach Cutting Tools, Inc.*, ASBCA No. 49277, 96-2 BCA ¶28,493; *Southwest Marine, Inc.*, ASBCA No. 49617, 96-2 BCA ¶28,347; *Dept. of Army v. Blue Fox*, 525 U.S. 255 (1999).
33. FAR 49.108-5.



Contractor Performance Assessment Reports: Past Performance Evaluations and What to do with Them

by
*J. Hatcher Graham**

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Those of us who have been in the federal government contracting community for more than 20 years remember the days of awards to the lowest, responsive, responsible bidder. We also realize that those days are gone forever. Because a few awardees defaulted on their performances and then were able to acquire other contracts, the government created “best value” awards. Here, price is just another factor in the award decision, and usually not the most important one.

This gave rise to “past performance” evaluations, which are usually a major evaluation factor. Every agency now has its own method for evaluating a contractor’s performance and a database where these evaluations can be found and resurrected to be utilized in determining an award. Most solicitations now require that the proposer provide a list of past contracts for the evaluation committee to contact to determine the proposer's past performance score, which may doom a contractor’s chance for an award. This was recognized by the U.S. Court of Federal Claims when it stated:

The Federal Acquisition Regulation [FAR] requires all federal agencies to collect past performance information on contracts. CPARs [contractor performance assessment reports] contain information about a contractor’s performance and are used by procurement officials to determine a contractor’s “responsibility” when evaluating the contractor’s bid for work on a subsequent contract. The primary purpose of the [CPAR System] is to ensure that accurate data on contractor performance is current and available for use in source selections.... Performance assessments will be used as a resource in awarding best-value contracts and orders to contractors that consistently provide quality, on-time products and services that conform to contractual requirements. Thus...the content of a CPAR is “vitally important to a contractor’s ability to win future government contracts.”¹

So what happens when a contractor finds that it has received a low past performance score that disqualifies it for award and it disagrees with the past performance evaluation? If the contractor discovers this after award, its only recourse is a protest against an award. Generally, this will mean an expensive protest to the Government Accountability Office (GAO), as a

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protest to the same contracting agency that made the evaluation would be practically useless. However, even when a contractor challenges a past performance review after being rejected in a solicitation, the agency action is given the “greatest deference possible.”² Further, “[e]ven when the agency violates its regulations by assigning a lower past performance rating to a contractor that the contractor’s history actually warrants, the contractor must meet the high bar of being able to demonstrate specific prejudice resulting from the erroneous rating.”³

In a bid protest situation, the creation of mandatory performance reviews, databases archiving those reviews, and the requirement to consider those archived materials in future contract awards means that a negative review is potentially devastating to a contractor, who may have no, or very little, opportunity to mitigate the impact that the review will have on future awards. So what is a contractor to do when it receives a less-than-adequate performance review that it feels is either incorrect or the result of a contracting officer’s bad feelings? This is not a farfetched example, since my firm is presently representing a contractor who was downgraded in its performance review because, among other similar items, it retained an outside consulting company to represent it in a modification dispute. A contractor has an absolute right to retain counsel or experts in a dispute with the government and should not be penalized just for proving the contracting officer incorrect; however, this generally happens when ego overrides responsibility.

All of the agency regulations requiring past performance reviews also require that the agency provide the contractor with a copy of the initial review prior to it being finalized and allow the contractor a chance to comment on the review. This is the contractor’s first chance to ensure that the past performance evaluation is accurate. It should be reviewed carefully and any real or perceived inaccuracies commented on. Make sure that the review accurately portrays the contractor’s performance. Remember, a “satisfactory” report can result in losing a contract award if all of the other proposers have been rated “outstanding.”

Let us assume that a contractor has determined that its past performance is not accurate for some reason. Some examples from actual cases include:

- A contractor being accused of delaying the project when it was delayed by the government’s slow approval of changes or unanticipated subsurface conditions;
- Defective specifications resulting in delays which are blamed on the contractor;
- Changes in contract administration, which resulted in inconsistent directives that were subsequently blamed on the contractor;
- Government changes in reimbursable items challenged by the contractor;
- The government micromanaged the project, resulting in delays that were blamed on the contractor; and
- A general evaluation that the contracting officer would not award to the contractor if he or she had a choice.

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What does a contractor do if the contracting officer refuses to alter the evaluation and archives the evaluation with the negative information? Once the contractor has exhausted its administrative remedies, the only recourse now is litigation. But how does the contractor go about it?

Oddly enough, until 2007 there were no cases challenging inaccurate past performance evaluations. The contractors traditionally waited until they lost an award and then filed a GAO protest based on an inaccurate past performance evaluation. These were met with almost universal denials. However, the boundaries of the reach of the law are limited only by the imagination of the lawyers.

In 2007, a contractor was able to convince Judge Wheeler of the U.S. Court of Federal Claims to issue an injunction against the Department of Defense and the Defense Supply Agency restraining them from providing any details to inquiring agencies concerning a Justice Department investigation of the contractor.⁴ This was followed by another case in which a contractor directly challenged a past performance review prepared by a U.S. Air Force contracting officer.⁵ The contractor had taken the usual steps when it received a negative CPAR by writing to the contracting officer with a detailed statement of why it thought the CPAR was inaccurate and what it thought the correct rating should be. The government refused to amend the CPAR and posted it to its online archives. The court's initial determination was whether or not the contractor had submitted a "valid claim." It stated that for the contractor to submit a valid claim, it must be seeking relief "as a matter of right" under the contract. The court stated:

Here, plaintiff seeks a fair and accurate CPAR and a properly formatted PPIRS [Past Performance Information Retrieval System] entry.... Specifically, plaintiff contends that its "written comments to the initial CPAR evaluation claimed entitlement to the relief of a correct CPAR and that [a]fter the final CPAR evaluation was published in the PPIRS database it demanded in writing that the CPAR be corrected."⁶

The court then had to decide whether the contractor was entitled to a CPAR. It resolved this in the positive as the FAR required that each contract that exceeded the acquisition threshold have a CPAR and that this had been entered into the regulations at 48 C.F.R. 42.1502(a). The court also found that as the contractor was entitled to a CPAR, it was also entitled to a fair and accurate CPAR as "anything less than fair and accurate information in a CPAR would be a disservice to the contractor and other government agencies considering doing business with the contractor."⁷

The court also decided that the contractor had submitted a claim to the contracting officer in that he had objected to the CPAR as written and requested changes. When the

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contracting officer denied the request, the court held this to be a contracting officer's denial, even though the letter did not contain the required language concerning a final contracting officer's decision. The court also stated that as this claim was for a non-monetary relief and as a reasonable period of time had occurred, the court would consider a "deemed denial" and allow the parties to proceed with the litigation.⁸ However, this part of the decision would be reversed by a later ruling.

The next case on this issue to arrive at the Claims Court was Todd Construction.⁹ This involved a U.S. Army Corps of Engineers' contractor evaluation under its Construction Contractor Appraisal Support System (CCASS). Again, the contractor disagreed with the government's performance evaluation and submitted comments to the contracting officer on why it should be changed. His suggestions were denied and the original evaluation was placed in the Corps' archival system. The contractor filed with the Claims Court. The court first went into a detailed explanation of why they had jurisdiction over the case as this was a request for non-monetary relief and the original Tucker Act,¹⁰ on which the jurisdiction of the Claims Court was based, only granted jurisdiction over monetary claims against the United States. Under the Federal Courts Improvement Act of 1982, the Claims Court was split into a trial court and an appellate court (U.S. Court of Appeals for the Federal Circuit) and expanded its jurisdiction. Congress also redefined the jurisdiction of the Boards of Contract Appeals, giving them the authority to grant any relief available to a litigant in the Claims Court. However, it took the Federal Circuit Court of Appeals to define the jurisdiction of the Boards of Contract Appeals to cover nonmonetary claims.

In Malone,¹¹ the court concluded that the Boards possessed jurisdiction to provide "declaratory" (or non-monetary) relief in default termination cases. This same conclusion was not reached in Overall Roofing & Construction, Inc.,¹² where the Federal Circuit ruled that the Tucker Act did not give the Claims Court declaratory relief jurisdiction. Partly in response to Overall, Congress then amended the Tucker Act to include a general grant of jurisdiction over Contract Dispute Act nonmonetary disputes.¹³ Therefore, the Claims Court does have jurisdiction over non-monetary or declaratory relief. However, the court requested the parties to conduct additional briefings on whether or not the court could provide the relief the plaintiff was requesting—i.e., injunctive relief and a rewriting of the performance evaluation.

We now jump ahead through two more Todd rulings,¹⁴ one more BLR case,¹⁵ and an additional case, Kemron Environmental Services, Inc.¹⁶ Rather than analyze each of these cases, I will try to pull from them the present state of the law and how an inaccurate performance report should be handled.

Jurisdiction

The Claims Court has now apparently settled the fact that they do have jurisdiction over a properly filed complaint challenging a past performance review. It has authority to review a nonmonetary dispute pursuant to the Contract Disputes Act.¹⁷ The regulations requiring past

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performance reviews are incorporated into the contracts¹⁸ and the benefits apply equally to both the contractor and the government.¹⁹

CDA Claim

All of the cases have ruled that to be properly before the Claims Court, the contractor must have filed a proper claim pursuant to the Contracts Disputes Act (CDA). This means that the contractor must have filed a document with the contracting officer stating that it is claiming as a matter of right something to which it is entitled to under the contract and requesting a contracting officer's final decision letter. In BLR (2010), the court ruled that it had the jurisdiction to rule on the complaint; however, the series of letters and correspondence between the contractor and the contracting officer did not rise to the level of a request for a final decision and a resulting contracting officer's final decision. Therefore, it did not qualify as a CDA claim.²⁰ In Todd (2010), the court determined that a proper CDA claim had been filed. However, a review of the complaint revealed that the contractor did not provide facts which would substantiate the court's providing the requested relief.²¹

Relief

In Todd (2008), the court first took on the issue of whether or not it could provide any relief, even if the contractor submitted a proper CDA claim. The court could not decide if it possessed the proper authority to order injunctive or corrective relief and directed the parties to brief this issue further.²² In Todd (2009), the court stated that it had the jurisdiction to declare the rights of the parties; however, this would not resolve the dispute because it would neither change the performance rating nor remove the evaluation from the archived system.²³

The court went on to decide that while the contractor was entitled to a fair and accurate evaluation and the court had the jurisdiction to review the evaluation process to determine if it was fair and accurate, it did not possess the jurisdiction to order the agency to give the contractor a specific rating. It could, however, review the process to determine if the exercise of the contracting officer's discretion in what was a subjective process was arbitrarily or capriciously exercised.²⁴ As the court stated:

Given the remedial powers relied upon by the plaintiff, the court may issue a declaration of rights and may remand to the contracting officer with "proper and just" instructions, but those instructions cannot include a direction that the Agency reach a particular conclusion on the merits of the performance evaluation. Thus, the court does not possess the ability, under the remand clause of §1491(a)(2) [Tucker Act], to order that the corps set aside its final evaluation or remove it from CCASS. Under its remand authority, this court can review the procedural propriety of the manner in which the performance evaluation was determined and, if it finds inadequacies, remand to the agency with a description of the procedural deficiencies found by the court and directions as to how to remedy them. The court can also review whether the agency abused its

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discretion in determining that the assigned performance rating was “accurate” and “fair” and, if it finds an abuse of discretion, can remand to the agency for further consideration. The court contemplates that such a remand would involve a “proper and just” direction that the agency reexamine its rating and either build a proper record for the rating it assigned or assign a rating that is supported by the record. The court does not possess the power to mandate that upon remand the agency assign a particular rating, withdraw a rating, or remove a rating from the prescribed database.²⁵

Important Lessons Learned

The key takeaways to glean from this discussion include the following:

- Always check any CPAR evaluation to ensure that it is a “proper and just” rating and that it reflects the contractor’s actual performance.
 - If the rating is inaccurate, object in writing to the contracting officer and specify where you think it is inaccurate and what the rating should be.
 - If you are not satisfied with the action taken by the contracting officer, always appeal to the proper authorities above his or her authority. Remember that one inaccurate bad rating can jeopardize your entire contracting future.
 - If, after you have exhausted all administrative avenues, you are still not satisfied and want to take it to the next level (i.e., a judicial appeal), do not depend on the stream of correspondence between you and the government to provide the basis of a proper CDA claim. Submit a formal claim letter to the contracting officer detailing where the performance evaluation is incorrect and what it should be. Identify the letter as a claim and specifically request a “contracting officer’s final decision.”
 - As this is not a monetary claim, it does not have to be certified. The contracting officer has a “reasonable time” in which to issue a final decision. The general rule is that if a final decision has not been issued in 60 days, consider it a “deemed denial” and prepare to file with the U.S. Claims Court.
 - If you file with the U.S. Claims Court, make sure that your complaint is very detailed and provides the basis for the Court to determine that the performance evaluation is not accurate or that the contracting agency’s actions were arbitrary and capricious.
 - Finally, realize that this is a very new area of the law and is thus very fluid. Even if you are successful at the U.S. Claims Court, the agency may not revise the performance report totally as you request as the court does not have the jurisdiction to order this. However, if you subsequently get into a proposal evaluation controversy and are protesting because you were downgraded due to this performance report, you should have documentation to show GAO that a court disapproved of the evaluation.

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Endnotes

1. *BLR Group of America, Inc. v. United States*, 84 Fed. Cl. 634, 636 (2008).
2. *See Westech Int'l v. United States*, 79 Fed. Cl. 272, 293–294 (2007).
3. *Precision Images, LLC v. United States*, 79 Fed. Cl. 598, 624–625 (2007).
4. *Public Warehousing Company K.S.C. v. United States*, 2007 U.S. Claims LEXIS 431 (2007).
5. *BLR Group of America, Inc.*, see note 1.
6. *Ibid.*, at 640.
7. *Ibid.*, at 641.
8. *Ibid.*, at 648.
9. *Todd Construction, L.P. v. United States*, 85 Fed. Cl. 34 (2008).
10. 28 U.S.C. §1494(a)(2).
11. *Malone v. United States*, 849 F.2d 1441, Fed. Cr. (1988).
12. *Overall Roofing & Construction, Inc. v. United States*, 929 F.2d 687, Fed. Cr. (1991).
13. As an aside, the author of this article was the plaintiff's counsel for both *Malone* and *Overall*.
14. *Todd Construction, L.P. v. United States*, 88 Fed. Cl. 235 (2009); and *Todd Construction, L.P. v. United States*, 2010 U.S. Claims LEXIS 544 (2010).
15. *BLR Group of America, Inc. v. United States*, 2010 U.S. Claims LEXIS 593 (2010).
16. *Kemron Environmental Services, Inc. v. United States*, 93 Fed. Cl. 74 (2010).
17. *Todd* (2008), see note 9.
18. *Todd* (2010), see note 14, at 551.
19. *Ibid.*, at 552.
20. *See* note 15, at 612; *see also Kemron*, note 16, at 93.
21. *Todd* (2010), see note 14, at 556.
22. *Todd* (2008), see note 9, at 48.
23. *Todd* (2009), see note 14, at 244.
24. *Ibid.*, at 247–248.
25. *Ibid.*, at 248–249.

