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Focus

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FEATURE COMMENT: The Most Notable Government Contract Cost And Pricing Decisions Of 2018

Although there were no truly landmark cost and pricing decisions in 2018, the Armed Services Board of Contract Appeals issued three decisions and the U.S. Court of Appeals for the Federal Circuit issued one that are worthy of note—for better or worse.

In these decisions, the ASBCA reaffirmed the allowability requirements for precontract costs under Federal Acquisition Regulation 31.205-32, interpreted for the first time "entire contract" for purposes of applying the loss adjustment ratio under FAR 52.249-2, Termination for Convenience of the Government (Fixed-Price), clarified the rules for convenience termination settlements, provided a tutorial on the Government's remedy for noncompliance with the FAR cost principles, and addressed the parties' respective burdens when the Government challenges the reasonableness of costs. The Federal Circuit's decision rather unhelpfully created a new jurisdictional barrier for nonmonetary claims.

Precontract, Stop-Work Order and Termination for Convenience Settlement Costs (*Phoenix Data Sols., LLC f/k/a Aetna Gov't Health Plans*, ASBCA 60207, 18-1 BCA ¶ 37,164; 13 CP&A Rep. ¶ 49; 60 GC ¶ 360; mot. for recons. denied, 18-1 BCA ¶ 37,165; 13 CP&A Rep. ¶ 75)—The ASBCA's decision in *Phoenix Data Solutions, LLC f/k/a Aetna Government Health Plans* presents a primer on cost allowability issues that commonly arise when a bid-protest-related stop-work order is issued shortly after award, and followed several months later by a termination.

In July 2009, the TRICARE Management Activity, now known as the Defense Health Agency, awarded the multi-billion-dollar Northeast region TRICARE managed care support contract to Aetna Government Health Plans (AGHP), later renamed Phoenix Data Solution, LLC. A few days after award, the incumbent contractor protested to the Government Accountability Office, requiring DHA to issue a stop-work order.

In November 2009, GAO sustained the protest on multiple grounds, including the appearance of an organizational conflict of interest because AGHP had hired a former DHA official and allowed him to work on part of AGHP's proposal. In early May 2010, six months after GAO issued its decision and more than nine months after issuing the stop-work order, DHA terminated AGHP's contract for the convenience of the Government.

Relying principally on *Dynalectron Corp. v. U.S.*, 518 F.2d 594 (Ct. Cl. 1975), DHA argued that AGHP's purported responsibility for the termination, due to its hiring of a former DHA official and creating the appearance of a conflict of interest, limited AGHP's ability to recover pursuant to the termination for convenience clause. The ASBCA found that this "argument suffers from a fundamental misunderstanding of the FAR's contract termination procedures," and noted that "*Dynalectron*, and the other cases cited by DHA all involve default terminations that were not sustained." The ASBCA concluded, "The fact that DHA might have terminated AGHP for default is irrelevant to the resolution of AGHP's appeal regarding its termination settlement proposal. Instead, we review AGHP's termination settlement proposal pursuant to the contract's termination for convenience provision, and not in reference to the termination for default provision that DHA chose not to apply back in 2010."

The largest single cost item that AGHP claimed consisted of precontract transition-in costs. Because AGHP had never performed a TRICARE managed care contract, it determined that the 10-month transition-in period specified in the solicitation

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was insufficient. AGHP therefore proposed to—and did—commence transition-in activities 330 days before contract award.

DHA did not take exception to AGHP's proposal to begin transition-in before award, but there were no discussions regarding that aspect of AGHP's proposal. Relying on *Integrated Logistics Support Sys. Int'l, Inc. v. U.S.*, 47 Fed. Cl. 248, 257 (2000), aff'd, 36 F. App'x 650 (Fed. Cir. 2002), DHA argued that the precontract costs were unallowable because the Government had not approved them, as purportedly required by FAR 31.205-32.

The ASBCA declined to follow *Integrated Logistics* for several reasons, including that *Radant Techs., Inc.*, ASBCA 38324, 91-3 BCA ¶ 24,106 "is an opinion of the Board, and thus is binding authority which we must follow"; the board is not bound by U.S. Court of Federal Claims decisions, or the unpublished Federal Circuit affirmance; and *Integrated Logistics* misinterprets the authorities upon which it relies. The ASBCA instead applied, and reaffirmed, the four-part test articulated in *Radant Technologies*:

> (1) the costs must be incurred prior to the effective date of the contract;
> (2) the costs must be incurred directly pursuant to the negotiations and in anticipation of the contract award;
> (3) incurrence of the costs must be necessary to comply with the proposed delivery schedule; and
> (4) the costs must have been allowable if they were incurred after contract award.

The ASBCA concluded that AGHP had satisfied all four parts of the test and the precontract costs were therefore allowable. The ASBCA rejected DHA's various challenges to AGHP's quantum calculations for its precontract costs, including in particular AGHP's general and administrative rate of 545.45 percent for 2008, as compared to its 2009 G&A rate of 16.02 percent. DHA argued that the G&A rate was unsupportable because AGHP lacked contemporaneous records, such as timesheets, to support its division of direct and indirect labor. DHA also argued that AGHP was improperly trying to pass along bid and proposal costs and the costs of standing up a new entity, and the rate was unreasonable simply because it was so high. The ASBCA rejected all of these arguments.

AGHP's next largest category of claimed costs was carrying costs incurred during the stop-work period for staff, office space and information technology services. The ASBCA agreed that AGHP's actions during the lengthy stop-work period were reasonable, and that DHA's position—"essentially, that AGHP should have immediately separated all employees"—was unreasonable under the circumstances. The ASBCA further found that AGHP was entitled to *Eichleay* damages, notwithstanding DHA's argument that AGHP was the cause of the delay rather than the Government. The ASBCA reasoned that "[t]he fact that AGHP hired a former DHA employee did not 'cause' the delay at issue in this appeal. The delay was caused by the government issuing a stop-work order and the multi-month delay after the GAO opinion for the government to terminate the contract for convenience."

Resolving an issue of first impression, the ASBCA held that "entire contract" for the purpose of applying the loss adjustment ratio required by FAR 52.249-2(g)(iii) means all awarded line items, but not unexercised options. The ASBCA rejected DHA's calculation of the loss adjustment because it excluded profit on line items awarded but on which no work had been performed.

DHA made several unsuccessful arguments against AGHP's contract close-out and settlement costs. First, DHA argued that AGHP cannot recover its expenses for "meritless proposals that sought plainly unallowable costs and were put forward as part of a litigation strategy." Observing that it had upheld most of AGHP's claimed expenses, the ASBCA rejected this argument.

The ASBCA also rejected DHA's related argument that AGHP's claimed contract close-out and termination settlement expenses were unallowable because they were incurred to promote prosecution of AGHP's Contract Disputes Act claim. The ASBCA noted that once DHA terminated the contract, AGHP had to submit a termination settlement proposal. In addition, the ASBCA noted that DHA's "proposed restriction on recovery of settlement expenses is contrary to the CDA's claims process which encourages the exchange of information between the contracting officer and the contractor."

Citing *ESCgov*, ASBCA 58852, 17-1 BCA ¶ 36,772; 59 GC ¶ 191, DHA argued that AGHP had no legal obligation to pay severance and the costs were therefore unallowable. DHA also argued that AGHP should not be permitted to recover both stop-work period labor and job-elimination benefits.

The ASBCA found that DHA had misstated the requirements for allowability of severance expenses. Specifically, FAR 31.205-6(g)(2)(iii) provides that severance

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pay is allowable if it is required by "Established policy that constitutes, in effect, an implied agreement on the contractor's part." The ASBCA also found that "AGHP presented unrebutted testimony that Aetna, the parent corporation, had a job elimination policy requiring severance payments, and that the policy applied to AGHP employees." This is "factually distinguishable from the situation in *ESCgov* where the employee manual 'permitted' severance payments," the ASBCA said. It also rejected DHA's argument that severance payments would constitute a double recovery because AGHP's actions during the stop-work period were reasonable.

Finally, the ASBCA disagreed with DHA's argument, based on *System Dev. Corp.*, ASBCA 16947, 73-1 BCA ¶ 9,788, that AGHP is not entitled to G&A on its claimed job-elimination benefits. The decision states, "the government misreads the holding in *Systems Development* where the issue was whether the severance expenses should be considered a contingent liability as the contractor had accrued reserves for such expenses. We held that the severance payments should be treated as other direct costs, and thus would be burdened with G&A expenses."

Post-Retirement Benefit Costs (*Northrop Grumman Corp.*, ASBCA 60190, 18-1 BCA ¶ 36,947; 13 CP&A Rep. ¶ 43, appeal docketed, *Defense v. Northrop Grumman Corp.*, No. 18-1945 (Fed. Cir. May 18, 2018))—In *Northrop Grumman Corp.,* the ASBCA denied the Government's motion for reconsideration of the quantum decision issued last year, 17-1 BCA ¶ 36,800; 12 CP&A Rep. ¶ 43, which held that the Government suffered no damages from NGC's noncompliance with FAR 31.205-6(o), and the Government's cost disallowance was therefore improper. In moving for reconsideration, the Government argued that NGC was required to, and thus actually did, "incur" $253 million more post-retirement benefit (PRB) costs "by operation of law" in the pretransition period, and consequently, the disallowed amount was included in the "transition obligation" that NGC had claimed as part of the annual amortization of that obligation since 2007.

Although not mentioned in the decision, the Government's "cost incurrence by operation of law" theory is analogous to so-called "phantom assets" under Cost Accounting Standard 412. Pension costs assigned to a cost accounting period, but not funded in that period, are forever unallowable. CAS 412-50(a)(2)(i) requires that such costs must be separately identified and eliminated from any unfunded actuarial liability being amortized and charged to Government contracts. But in addition, CAS 412-50(a)(2)(ii) provides that these costs are carried forward and adjusted for interest, although "[t]he contractor may elect to fund, and thereby reduce, such portions of unfunded actuarial liability and future interest adjustments thereon." There is no comparable provision in FAR 31.205-6 or any other cost principle.

Not surprisingly, therefore, the ASBCA forcefully rejected the Government's novel "cost incurrence by operation of law" theory. Observing that the "[G]overnment position disregards, and is also inconsistent with, the FAR-prescribed remedy for noncompliance," the ASBCA reiterated that, under FAR 31.201-2(c), "only the 'excess' is unallowable," and "[t]here are no 'excess' NGC PRB costs to disallow in this case." The decision states,

> The concept of cost incurrence "by operation of law" in a government contract accounting "allowability" context is … unique and unprecedented. The government has failed to adduce even one analogous case supporting its position. The government contemporaneously exercised common sense during the pre-transition years and knowingly, willingly, declined to challenge appellant's accounting for its claimed PRB costs that resulted in *lower* costs to the government during the pre-transition years. The "common sense" government position in this regard in the pre-transition years comported with FAR 31.201-2(c). The government now ignores its own regulatory remedy. In doing so it has created an extraordinary new category of costs, incurred not by the contractor's own accounting measurement, accrual or assignment methodology, but allegedly "required" to be incurred by "operation of law," without regard to NGC's accounting procedures. To the contrary, the operation of "law" in this case is the common remedy prescribed for noncompliance in FAR 31.201-2(c). The government's duty is to evaluate costs actually incurred and claimed *by the contractor* under the pertinent cost principle for compliance. If non-compliant, any "excess" is unallowable, not costs that were never incurred or claimed by the contractor.

Cost Reasonableness and Discerning the Opinion of the Board (*Parsons Evergreene, LLC*, ASBCA 58634, 18-1 BCA ¶ 37,137; 13 CP&A Rep. ¶ 68)—The ASBCA in *Parsons Evergreene, LLC* addressed—among other topics covered in the lengthy

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decision—the parties' respective burdens when the Government challenges the reasonableness of costs. Relying on FAR 31.201-3(a), the Air Force argued that PE had not met its burden of proving its claimed costs were reasonable. Consistent with ASBCA practice, the 164-page main decision was written by the presiding administrative judge. Finding the language of FAR 31.201-3(a) unambiguous, the decision states,

> The critical language is, "If an initial review of the facts results in a challenge of a specific cost by the contracting officer or the contracting officer's representative, the burden of proof shall be upon the contractor to establish that such cost is reasonable." This language in FAR 31.201-3(a) is unambiguous. It requires two actions by the government: (1) it must perform an "initial review of the facts," and (2) that review results in a "challenge" to "specific costs." It is the contractor's burden to prove the reasonableness of the challenged specific costs.
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> We must consider if the [Air Force] satisfied FAR 31.201-3(a). The CO requested a [Defense Contract Audit Agency] audit of PE's claim. We hold that DCAA's audit satisfies the requirement for an "initial review of the facts." However, although DCAA found that PE's claimed costs were incurred, it relied on the [Air Force]'s technical review to question all of the costs in PE's claim. As is obvious from this decision, [the Air Force]'s technical review was wrong. Neither DCAA nor the [Air Force] challenged the reasonableness of any "specific costs" in the claims.

The decision found that DCAA and the Air Force's accounting expert "challenged all costs based on the [Air Force's] flawed technical review, but failed to challenge the reasonableness of any specific costs in the claim." It further states, "Such a blanket challenge to all costs is insufficient to satisfy FAR 31.201-3(a). Therefore, we hold that PE has satisfied its burden to prove that its claimed costs are reasonable."

This is an important issue, particularly in light of Government auditors' recent practice of using cost reasonableness as a catch-all for questioning costs without actually reviewing them. And, the analysis presented in the main decision is consistent with the plain language of FAR 31.201-3(a). But is it "the decision of the Board," and if not, what is?

In a two-page concurring opinion, the other two judges on the three-judge panel wrote: "We agree with the amounts awarded in the opinion by Judge Clarke and thus to that extent we concur in the result. We differ, however, over the role that FAR 31.201-2 plays in proving damages and Judge Clarke's interpretation of this provision."

More particularly, the concurring opinion took "great issue with that portion of the damages analysis which leads up to the conclusion that PE has satisfied its burden to prove its claimed costs were reasonable when the government challenged all costs but failed to challenge the reasonableness of any specific cost in the claim." The concurring opinion reasoned that "[o]nce a CO's final decision is appealed to this Board, the parties start with a clean slate and the contractor bears the burden of proving liability and damages *de novo*," and " '[t]he claimant bears the burden of proving the fact of loss with certainty, as well as the burden of proving the amount of loss with sufficient certainty so that the determination of the amount of damages will be more than mere speculation.' " However, the concurring opinion further found that

> [n]otwithstanding FAR 31.201-2 and -3, which directs how COs and the DCAA should evaluate costs, our review of the record leads us to conclude that for the damages awarded by Judge Clarke, appellant proved liability on the part of the government, proved the costs were incurred and were reasonable with "sufficient certainty" such that the amount of damages awarded is "more than mere speculation."

The concurring judges therefore concurred in the result, but not in the analysis of the majority opinion.

In *SWR, Inc.*, ASBCA 56708, 15-1 BCA ¶ 35,832, the ASBCA held that "a prior decision by a panel of this Board is deemed 'binding precedent' in another ASBCA appeal unless the decision has been reversed or otherwise modified by the Board's Senior Deciding Group or our appellate authority." The preface to the Board Rules states in pertinent part, "the decision of a majority of a division constitutes the decision of the Board, unless the Chairman refers the appeal to the Board's Senior Deciding Group (consisting of the Chairman, Vice Chairman, all division heads, and the Judge who drafted the decision), in which event a decision of a majority of that group constitutes the decision of the Board." Apparently, then, it is up to readers to sift through the 164-page main opinion and two-page concurring opinion, and attempt to discern—for all of the many issues addressed by *Parsons*

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Evergreene—precisely what is, and what is not, the "decision of the Board."

The predictable body of precedent established by *SWR* is one of the advantages of appealing to the ASBCA rather than to the COFC, where decisions are the opinion of a single judge and are not binding on the ASBCA, the Civilian Board of Contract Appeals or even other judges of the COFC. See, e.g., *Phoenix Data Sols. LLC f/k/a Aetna Gov't Health Plans*, ASBCA 60207, 18-1 BCA ¶ 37,164 ("First, *Radant Technologies* is an opinion of this Board, and thus is binding authority which we must follow. *SWR, Inc.*, ASBCA 56708, 15-1 BCA ¶ 35,832 at 175,220. Conversely, the opinion in *Integrated Logistics* is the opinion of a single judge of the [COFC] and is not binding on us, or the other judges on the [COFC]."). Requiring practitioners to discern for themselves which portions of a decision constitute "the decision of the Board" seriously undermines that predictability.

Establishing a New Jurisdictional Barrier (*Securiforce Int'l Am., LLC v. U.S.*, 879 F.3d 1354 (Fed. Cir. 2018); 13 CP&A Rep. ¶ 29; 60 GC ¶ 31)—The CDA was enacted to provide a "fair, balanced, and comprehensive statutory system of legal and administrative remedies in resolving Government contract claims." S. Rep. 95-1118, 1978 U.S.C.C.A.N. 5235 at 1 (Aug. 15, 1978). Despite this goal, the Federal Circuit has periodically established jurisdictional barriers that generate a considerable amount of needless litigation before finally being corrected—either by the court recognizing its error or through legislation.

For example, in *Dawco Constr., Inc. v. U.S.*, 930 F.2d 872, 878 (Fed. Cir. 1991); 33 GC ¶ 136, the Federal Circuit held that, for a contractor's submission to qualify as a CDA claim, the "contractor and the government must already be in dispute over the amount requested." Four years later, in *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1573 (Fed. Cir. 1995) (en banc); 37 GC ¶ 411, the en banc court overruled the holding in *Dawco*, concluding that the FAR "alone defines 'claim' for purposes of the CDA," and it "does not require a pre-existing dispute as to either amount or liability when" the contractor submits a non-routine demand for payment.

The Federal Courts Administration Act of 1992, P.L. 102-572, § 907(b)(1), 106 Stat. 4506, 4519 (1992), was intended to resolve two other judge-made jurisdictional barriers:

First, expanding on its earlier decisions that the certification of contractor claims was jurisdictional, the Federal Circuit held in *U.S. v. Grumman Aerospace Corp.*, 927 F.2d 575 (Fed. Cir. 1991), cert. denied, 502 U.S. 919 (1991); 33 GC ¶ 86, that compliance with the FAR requirement for the proper contractor official to make the certification was also jurisdictional. The Federal Circuit therefore vacated the decision of the ASBCA—four years after the claim was filed, the appeal had been fully litigated, and the ASBCA had ruled in Grumman Aerospace's favor—all because the Federal Circuit found that the senior vice president and treasurer of Grumman Aerospace did not satisfy the FAR requirements for who could certify the claim.

Second, in *Overall Roofing & Constr. Inc. v. U.S.*, 929 F.2d 687 (Fed. Cir. 1991); 33 GC ¶ 133, the Federal Circuit held that the Claims Court lacked jurisdiction over a contractor's appeal from a CO's final decision terminating its contract for default. Notwithstanding (1) that the Federal Courts Improvement Act of 1982, P.L. 97-164, § 133(a), 96 Stat. 25, 39, gave the Claims Court "jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a) of the [CDA]"; (2) that the CDA authorized "a contractor to bring an action directly on the claim in the United States Claims Court"; and (3) the Federal Circuit's holding in *Malone v. U.S.*, 849 F.2d 1441, 1443 (Fed. Cir. 1988); 36 GC ¶ 32, that a default termination was a Government claim that could be appealed to the ASBCA, the Federal Circuit held that the Claims Court's jurisdiction was limited to *monetary* claims. Therefore, because the default termination did not "assert a right to presently due money," the Federal Circuit held that the Claims Court had no jurisdiction over the contractor's appeal.

The result in these cases was overturned by the Federal Courts Administration Act of 1992, which amended the CDA to provide that "[a] defect in the certification of a claim shall not deprive a court or an agency board of contract appeals of jurisdiction over that claim," but the defect must be corrected prior to the entry of final judgment. The amendment also eliminated the complicated requirements for determining who could certify a claim, providing simply that the certifier must be "duly authorized to certify the claim on behalf of the contractor." In addition, the 1992 amendments revised the Tucker Act, 28 USCA § 1491(a)(2), by adding all of the language that now appears after the reference to the CDA, 41 USCA 7104(b)(1):

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> The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 7104(b)(1) of title 41, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.

Accordingly, the COFC's CDA jurisdiction should be considered coextensive with that of the agency boards of contract appeals, including the remedies it is authorized to grant. See *Alliant Techsys., Inc. v. U.S.*, 178 F.3d 1260, 1269–70 (Fed. Cir. 1999) (holding that as a result of 1992 amendments, the COFC has jurisdiction to grant nonmonetary relief in CDA cases, including declaratory judgment on interpretation of contract provisions); 41 GC ¶ 308; *Garrett v. Gen. Elec. Co.*, 987 F.2d 747, 750 (Fed. Cir. 1993) (allowing the ASBCA to accept jurisdiction over final decision directing contractor to repair or replace defective engines preserves jurisdictional parity between the COFC and agency boards of contract appeals); 35 GC ¶ 166.

However, the Federal Circuit's decision in *Securiforce Int'l Am., LLC v. U.S.*, 879 F.3d 1354 (Fed. Cir. 2018), rolls back the corrections made by the Federal Courts Administration Act of 1992, and gratuitously establishes a new jurisdictional barrier—elevating the definition that a claim for money must demand a sum certain into a jurisdictional requirement, and applying it to claims for nonmonetary relief that could be converted to monetary claims at a later time.

The dispute in *Securiforce* arose under a Defense Logistics Agency requirements contract for the delivery of fuel to eight sites in Iraq. Shortly after awarding the contract, DLA partially terminated for convenience two of the eight sites because it concluded that delivery to those two sites without an appropriate waiver would violate the Trade Agreements Act of 1979. Thereafter, DLA placed orders for small deliveries to two of the remaining sites, but Securiforce informed DLA that it would not be able to deliver by the requested date. Losing confidence in Securiforce's ability to deliver timely, DLA issued a show cause letter, and subsequently terminated the remainder of the contract for default.

Securiforce filed suit in the COFC requesting declaratory relief that the default termination was improper. Shortly thereafter, Securiforce submitted a claim to the CO, requesting a final decision that the termination for convenience was improper. The CO denied Securiforce's request because it did not seek damages in a sum certain. Securiforce then amended its complaint to include an additional request for declaratory judgment that the termination for convenience was improper, as one of several grounds to support its argument that the termination for cause was invalid.

Following a bench trial, the COFC found it had CDA jurisdiction over both terminations. The COFC held that the CO abused her discretion in partially terminating the contract for convenience because she did not independently make the decision to terminate. However, the COFC held that the termination for default was proper. Securiforce appealed to the Federal Circuit, which affirmed the COFC's determinations regarding the default termination, but vacated its judgment on the convenience termination.

The Federal Circuit stated that "[w]hile contractors may in some circumstances properly seek only declaratory relief without stating a sum certain, they may not circumvent the general rule requiring a sum certain by reframing monetary claims as nonmonetary." The Federal Circuit noted that it has been careful to recognize the distinction between monetary and nonmonetary claims in the "related context" of determining whether an action falls under a district court's Administrative Procedure Act jurisdiction or the COFC's Tucker Act jurisdiction, and "[w]e see no reason to depart from this principle here, when determining whether a claim is monetary or nonmonetary for purposes of CDA jurisdiction."

The Federal Circuit's distinction between monetary and nonmonetary claims is problematic even in the "actual context" of the APA because, rather than applying the two-part rights-and-remedies test applied by other federal circuits, the Federal Circuit essentially has adopted a single-prong test that asks only whether an adequate remedy is available in the COFC and at the same time assumes the remedy available in the COFC—money damages—is always adequate, with the result that the COFC invariably will be the exclusive judicial forum available to Government contractors and the Tucker Act has completely swallowed the APA. See Manos, "Does The APA Still Apply To Government Contractors?" 2 CP&A Rep. ¶ 44.

But applying that distinction—and calling it a jurisdictional requirement—is completely misplaced

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in the context of the CDA. Indeed, the Federal Circuit expressly held in *Alliant Techsystems* that "nonmonetary claims are not outside the jurisdiction of the Court of Federal Claims simply because the contractor could convert the claims to monetary claims." 178 F.3d at 1268.

Predictably, applying its APA analysis, the Federal Circuit found that "Securiforce's claim concerning the termination for convenience, although styled as one for declaratory relief, would—if granted—yield only one significant consequence: it would entitle Securiforce to recover money damages from the government." The Federal Circuit rejected Securiforce's argument that the COFC had jurisdiction under the Tucker Act, as amended in 1992, to provide jurisdiction over "a dispute concerning termination of a contract ... and other nonmonetary disputes on which a decision of the contracting officer has been issued."

Although acknowledging the jurisdictional amendment, the Federal Circuit stated that it "did not relieve parties' obligation to comply with the separate requirements of the CDA, including the statement of a sum certain where, as here, the party is in essence seeking monetary relief." The Federal Circuit further held that "[e]ven if Securiforce's claim were properly characterized as nonmonetary, the Claims Court could not properly exercise jurisdiction over an affirmative declaratory-judgment claim that the government breached the contract by terminating for convenience" because "Securiforce seeks a declaration that the government materially breached the contract," and "damages are always the default remedy for breach of contract."

The Federal Circuit exacerbated its error by treating the FAR 2.101 definition of a claim—and specifically, "a written demand … seeking … the payment of money in a sum certain"—as a jurisdictional requirement of the CDA. Ironically, the same judge who wrote the *Securiforce* decision also wrote the decision in *Sikorsky Aircraft Corp. v. U.S.*, 773 F.3d 1315 (Fed. Cir. 2014); 56 GC ¶ 403, in which the Federal Circuit held that the CDA statute of limitations is not a jurisdictional requirement.

The *Sikorsky* decision explains that the U.S. Supreme Court has "articulated a 'readily administrable bright line' rule, under which the inquiry is 'whether Congress has clearly stated that the rule is jurisdictional; absent such a clear statement, [the Court has] cautioned [that] courts should treat the restriction as nonjurisdictional in character.'" In *Sikorsky*, the Federal Circuit found nothing in the language of 41 USCA § 7103 to suggest, "much less provide clear evidence, that the provision was meant to carry jurisdictional consequences." The court in *Securiforce* did not undertake any similar analysis before concluding that "the statement of a sum certain where, as here, the party is in essence seeking monetary relief" is a jurisdictional requirement. Indeed, since the court was applying a FAR definition, there is plainly no indication that "Congress has clearly stated that the rule is jurisdictional."

The Federal Circuit could have achieved the same result without addressing the COFC's CDA jurisdiction to consider the termination for convenience claim. In fact, after concluding that the COFC "lacked jurisdiction over the declaratory-judgment claim concerning the termination for convenience," it went on to hold that the COFC had jurisdiction over Securiforce's common law defenses of prior material breach, including the improper termination for convenience. The Federal Circuit stated that it "review[s] terminations for convenience for 'bad faith or clear abuse of discretion.' " There were no allegations of bad faith on the part of the Government. The Federal Circuit concluded that the COFC "erred in holding that the decision to terminate for convenience was invalid because it was not reached independently by the CO."

Conclusion—Although 2018 had no landmark decisions on cost and pricing issues, these decisions address important issues affecting contractors and practitioners, and two of the four provide helpful guidance.

This Feature Comment was written for The Government Contractor by* Karen L. Manos*, partner and chair of Government Contracts practice at Gibson, Dunn & Crutcher, LLP.

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