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FEATURE COMMENT: COFC Dismissal Of Boeing's Challenge To The Application Of FAR 30.606 To Its Contracts Yet Again Leaves Unresolved The Issue Of Combining The Cost Impact Of Multiple Changes In Cost Accounting Practice

In *Boeing Co. v. U.S.*, 2022 WL 4364180 (Fed. Cl. Sept. 21, 2022) (Campbell-Smith, J.); 64 GC ¶ 283, the U.S. Court of Federal Claims again avoided, on jurisdictional and other procedural grounds, deciding a long-pending, substantive question of significant importance to the Government and contractors alike. Specifically, the Court (for the second time) dismissed Boeing's complaint in its entirety and declined to decide whether the Government's application of Federal Acquisition Regulation 30.606(a)(3)(ii), Resolving Cost Impacts, to Boeing's contracts violated the Cost Accounting Standards statute, 41 USCA §§ 1501–1506. The CAS statute provides that "[t]he Federal Government may not recover costs greater than the aggregate increased cost to the Federal Government, as defined by the Board." 41 USCA § 1503(b). Yet FAR 30.606(a)(3)(ii) prohibits the combination and offsetting of cost impacts from multiple cost accounting practice changes to account for cost savings by the Government, which is contrary to 41 USCA § 1503(b). Moreover, the procedural legality of FAR 30.606(a)(3)(ii)'s prohibition on aggregating certain cost impacts has been criticized on the basis that the FAR Council is not authorized to promulgate binding regulations on this issue. See 41 USCA § 1503(b). In this comment, we consider the FAR and CAS provisions at issue, the procedural history of this case, and what contractors can expect going forward. Unfortunately, given the COFC's avoidance of the merits of Boeing's claims, substantive questions regarding the validity of FAR 30.606(a)(3) remain unresolved.

Section 1503(b) and FAR 30.606(a)(3)—Under the Office of Federal Procurement Policy Act Amendments of 1988, codified at 41 USCA §§ 1501–06 (CAS Act), the CAS are "mandatory for … estimating, accumulating, and reporting costs in connection with the pricing and administration of … all negotiated prime contract and subcontract procurements with the Federal Government" in excess of $2 million. 41 USCA § 1502(b)(1)(B); 10 USCA § 2306a(a)(1)(A)(i). Under the CAS Act, the Cost Accounting Standards Board is the body responsible for promulgating regulations interpreting the CAS statute, and has "exclusive authority" to promulgate such rules. 41 USCA §1502(a)(1) ("The Cost Accounting Standards Board has exclusive authority to prescribe, amend, and rescind cost accounting standards, and interpretations of the standards, designed to achieve uniformity and consistency in the cost accounting standards governing measurement, assignment, and allocation of costs to contracts with the Federal Government."); see also *Boeing Co. v. U.S.*, 968 F.3d 1371, 1374 (Fed. Cir. 2020), 62 GC ¶ 235.

With respect to combining the cost impact of multiple cost accounting practice changes, 41 USCA § 1503(b), Amount of Adjustment, states, in relevant part,

> A contract price adjustment undertaken under section 1502(f)(2) of this title shall be made, where applicable, on relevant contracts between the Federal Government and the contractor that are subject to the cost accounting standards so as to protect the Federal Government from payment, in the aggregate, of increased costs, as defined by the Cost Accounting Standards Board. The Federal Government may not recover costs greater than the aggregate increased cost to the Federal Government, as defined by the Board, on the relevant contracts subject to the price adjustment unless the contractor made a change in its cost accounting practices of which it was aware or should have been aware at the time of the price negotiation and which it failed to disclose to the Federal Government.

But notwithstanding that this matter is within the exclusive statutory authority of the CAS Board, the amendments to FAR pt. 30 that took effect on April 8, 2005, limit the cognizant federal agency official's (CFAO) ability to aggregate certain types of cost impacts. Under FAR 30.606(a)(3), in the event that a contractor implements more than one cost accounting practice change, any decreased costs resulting from one of those changes may not be offset against any increased costs when calculating the cost impact. Specifically, FAR 30.606(a)(3)(i) states, in pertinent part, that

> [i]n resolving the cost impact, the CFAO … [s]hall not combine … any of the following:
> (A) A required change and a unilateral change[;]
> (B) A required change and a noncompliance[;]
> (C) A desirable change and a unilateral change[; or]
> (D) A desirable change and a noncompliance.

FAR 30.606(a)(3)(i). And, the following subsection states that the CFAO

> [s]hall not combine the cost impacts of any of the following unless all of the cost impacts are increased costs to the Government:
> (A) One or more unilateral changes[;]
> (B) One or more noncompliances[; or]
> (C) Unilateral changes and noncompliances[.]

FAR 30.606(a)(3)(ii).

This FAR provision departs from prior practice. For example, earlier decisions of the Armed Services Board of Contract Appeals held that, prior to the 2005 regulatory change, the contractor could combine multiple, simultaneous cost accounting practice changes for the purpose of computing the aggregate cost impact to the Government. See *The Boeing Co.*, ASBCA 57549, 13-1 BCA ¶ 35427; 55 GC ¶ 337; *Raytheon Co. Space & Airborne Sys.*, ASBCA 57801 et al., 15-1 BCA ¶ 36,024.

Moreover, the FAR provision effectively penalizes contractors who make voluntary changes to their cost accounting practices by treating unilateral changes the same as a noncompliances, even though in promulgating the CAS, the CAS Board expressly permitted contractors to change their cost accounting practices. And permitting the contractor to combine the cost impact of unilateral changes is not only consistent with 41 USCA § 1503(b), but it is also consistent with the CAS clause's only requirement—i.e., that the contractor "[n]egotiate with the Contracting Officer to determine the terms and conditions under which a change may be made to a cost accounting practice . . .; provided that no agreement may be made under this provision that will increase costs paid by the United States." See FAR 52.230-2, Cost Accounting Standards.

Commentators have further observed that the 2005 revision to FAR 30.606 is unenforceable as it was promulgated without the public "notice and comment" period required by law. See 41 USCA § 1707. The substantive addition of the FAR 30.606 prohibition at the time the final rule was published, rather than in the notice of proposed rulemaking or supplemental notice of proposed rulemaking that preceded the final rule, meant that industry had no meaningful opportunity to comment. See 70 Fed. Reg. 11743, 11749 (March 9, 2005). It appears that public comment may have been helpful as the *Federal Register* notice accompanying publication of the final rule reveals that the drafters errantly interpreted the underlying statute as including a "statutory requirement that the Government recover the increased costs in the aggregate for each unilateral change/noncompliance." Id. There is no such statutory requirement.

Procedural History of *Boeing Co. v. U.S.*— Unfortunately, the Court did not reach the merits of Boeing's challenge to the application of FAR 30.606 to its contracts. Rather, as briefly summarized here, the winding procedural history of this dispute took yet another turn away from the long-awaited answer to the question regarding the validity of

FAR 30.606 as it applies to Boeing's Government contracts.

In 2011, Boeing changed many of its cost accounting practices simultaneously, resulting in cost impacts to certain of its contracts with the Department of Defense. See *Boeing Co.*, 968 F.3d at 1376. Certain of these changes resulted in increased costs to the Government, while others resulted in decreased costs, with the net effect of the changes being decreased Government contract costs. Under the CAS statutes and implementing regulations, contractors must submit to the CFAO a description of any cost accounting practice change and any written statement that the cost impact of the change is immaterial. See FAR 52.230-6. Following that, as explained by the Federal Circuit, "[a]s relevant here, upon determining that a change complies with the CAS but is 'undesirable,' the contracting officer must classify the change as 'unilateral' and inform the contractor that 'the Government will pay no aggregate increased costs.' " Id.; *Boeing Co.*, 968 F.3d at 1375. In Boeing's case, a Defense Contract Management Agency CO found that Boeing's cost accounting practice changes were "unilateral changes" under the CAS. *Boeing Co.*, 968 F.3d at 1376. The CO asked Boeing to provide a general dollar magnitude proposal for the changes across its contracts based on a representative contract, and Boeing did so. See id. Five years later, a Divisional Administrative Contracting Officer (DACO) issued a final decision concluding that Boeing's cost accounting practice changes impermissibly increased costs to the Government under FAR 30.606 and asserted a Government claim for $1,064,733 in increased costs, plus interest. See id. The DACO "drew that conclusion by limiting her calculation to the '[t]wo of the eight changes … [that] materially … increased costs to the Government,' disregarding the other, cost saving changes." See id. Boeing began making monthly payments. See id.

In 2017, Boeing filed suit in the COFC under the Contract Disputes Act to recover the already paid amounts and to nullify any obligation to continue payment under its contracts. See id. Boeing's complaint contained four counts: (i) a breach of contract claim based on the Government's failure to negotiate an equitable adjustment; (ii) a challenge to the lawfulness of FAR 30.606; (iii) a request for a declaratory judgment that FAR 30.606 could not be applied across its contracts; and (iv) an illegal exaction claim.

Specifically, Boeing alleged that the Government breached the parties' contract "by failing to 'negotiate an equitable adjustment,' [48 CFR] 9903.201-4, in accordance with the CAS statute." See id. And, "[i]n particular, Boeing renewed its argument that FAR 30.606, which forbids the offsetting of cost increases and cost reductions from simultaneous changes in cost accounting practices, is unlawful, including because it is counter to the CAS statute's general rule that '[t]he Federal Government may not recover costs greater than the aggregate increased cost to the Federal Government,' 41 U.S.C. § 1503(b)." See id. "Alternatively, Boeing alleged, the government's 'demand for payment,' 'in direct violation of 41 U.S.C. § 1503(b),' was an 'illegal exaction.' " See id. With respect to the illegal exaction claim, "Boeing alleged that the government ha[d] demanded and taken Boeing's money in violation of a statute," and "[o]ne way an illegal exaction occurs … is when the plaintiff has paid money over to the Government … and seeks return of all or part of that sum that was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation." See id. at 1383 (cleaned up); see also *Virgin Islands Port Auth. v. U.S.*, 922 F.3d 1328, 1333 (Fed. Cir. 2019) (quoting *Eastport S.S. Corp. v. U.S.*, 372 F.2d 1002, 1007 (Ct. Cl. 1967)).

Boeing filed a motion for judgment on the pleadings and the Government cross-filed a motion to dismiss. The COFC granted the Government's motion in 2019, agreeing that Boeing waived its contract claim challenging FAR 30.606 because it did not seek clarification of the alleged ambiguity caused between FAR 30.606 and the CAS statute prior to accepting the contract. The Court also dismissed Boeing's illegal exaction claim, concluding that, to establish jurisdiction over the claim under the Tucker Act, 28 USCA § 1491(a)(1), Boeing needed to demonstrate that the CAS statute was money mandating—that is, that the statute required the Government to pay money to contractors for the Government's violations of the statute. The COFC opined that the CAS statute does not create such money-mandating rights to recovery, and therefore there was no Tucker Act jurisdiction over the claim.

Boeing appealed to the U.S. Court of Appeals for the Federal Circuit, which reversed and remanded with a full reinstatement of Boeing's claims. As to the claims alleging that application of FAR 30.606

to Boeing's contracts was unlawful, the Federal Circuit held that under its precedent, Boeing did not waive its arguments by failing to raise the ambiguity caused by the interplay between the FAR and CAS provisions prior to entering the contract. The Federal Circuit also held that there is no money-mandating statute requirement for bringing illegal exaction claims in the COFC where the illegal exaction refers "only to the amounts" a contractor "paid over to the government based on the government's allegedly illegal application of FAR 30.606." *Boeing Co.*, 968 F.3d at 1384. The Federal Circuit explained that, to establish jurisdiction for an illegal exaction claim under the Tucker Act, 28 USCA § 1491(a), "a party that has paid money over to the government and seeks its return must make a non-frivolous allegation that the government, in obtaining the money, has violated the Constitution, a statute, or a regulation." Id. at 1383. Applying this standard, the Federal Circuit held that Boeing properly established jurisdiction for its claim based on its allegation that the Government had demanded and taken payment in violation of 41 USCA § 1503(b) and 41 USCA § 1707.

On remand, the parties filed cross-motions for summary judgment. During briefing of the motions, the Government sought leave to file a motion for partial dismissal of Boeing's illegal exaction claim, contending that the COFC lacked jurisdiction because Boeing did not pursue the claim in accordance with the CDA's procedures. See id. The Court denied the Government's motion for leave to file a motion to dismiss, but ultimately granted summary judgment to the Government, denied summary judgment to Boeing, and dismissed Boeing's complaint. See id.

Analysis—As noted above, the Court did not consider the validity of FAR 30.606(a)(3) because it held that it did not have jurisdiction to hear Counts I–III of the complaint, and that Boeing did not bring its illegal exaction claim under the CDA. While the decision offers a variety of reasons for the Court's holding, none of them are persuasive.

The Court first addressed Counts I, II and III of Boeing's complaint, which alleged that application of FAR 30.606 to its contracts was unlawful under the CAS because the FAR provision "purports to bar the practice of offsetting, but that provision is inconsistent with Section 1503(b)" and "the FAR Council had no authority to define the 'aggregate increased costs' that the Statute authorizes the Government to recover," and that the FAR provision was "illegally promulgated" because it was promulgated "without authority, meaningful explanation, or notice and comment." See id. In addressing these arguments and the Government's counterarguments that the Court lacked jurisdiction to hear Boeing's claims, the Court invoked the principle that courts look to the "true nature" of an action to determine jurisdiction, rather than the parties' characterization of a claim. The Court found that Boeing's contract arguments were, in essence, challenges to the interpretation of law that controlled payment to the plaintiff, not true contract claims, as follows:

> Plaintiff asserts that its claims are contract claims. *See* ECF No. 1 at 31-34. Plaintiff's breach claims, however, are premised on its allegation that the agency applied a regulation that "violates the CAS statute and was illegally promulgated." ECF No. 43-1 at 8. Plaintiff argues that because FAR 30.606 is invalid, *see id.* at 28-38 (arguing that the regulation is invalid because it conflicts with the CAS statute and was promulgated without authority, meaningful explanation, or notice and comment), defendant breached its contract with plaintiff when it applied the regulation to calculate the impact of the changes plaintiff made to its cost accounting methods, *see id*. at 41-42. In the court's view, therefore, the gravamen of plaintiff's complaint is a challenge to the validity of FAR 30.606.

Boeing Co., 2022 W 4364180, at *3.

The Court cited Boeing's complaint as support for its conclusion, explaining that "[a]lthough plaintiff couches its claims in terms of breach and money damages," the true relief sought was for "declaratory and other equitable relief" regarding the allegedly invalid regulation that the Government applied. Once it determined the true nature (in the Court's view) of Boeing's claims as challenges to the validity of the FAR provision, the Court ruled it had no jurisdiction over those claims, which should have been brought in U.S. district court pursuant to the Administrative Procedure Act, 5 USCA § 702.

At the outset, the Court's finding that "[t]his is, thus, 'not a contract case,' " is at odds with the Court's first decision in this case that FAR 30.606

was effectively incorporated into the representative contract between Boeing and the Government such that Boeing should have protested that term at the time it entered into the contract. For example, the Court found in its first decision that "FAR 30.606 applies to the representative contract," noting that "[w]hile maintaining a challenge to the validity of FAR 30.606, plaintiff does not appear to dispute that FAR 30.606 is applicable to the administration of Boeing's contract with the United States," and "aside from an argument as to the contingent nature of the applicability of FAR 30.606, because cost accounting standards are somewhat unpredictable, plaintiff does not refute the fact that Boeing was fully aware of the existence and applicability of FAR 30.606 at the time it entered into the representative contract." *Boeing Co. v. U.S.*, 143 Fed. Cl. 298, 309 (2019). The Court further stated that, "[t]he focus of this lawsuit is on the application of cost account standards to a contract between the United States military and The Boeing Company (Boeing)." *Boeing Co.*, 143 Fed. Cl. at 301.

The Court's finding that Boeing's claims are not contract claims is also inconsistent with the Federal Circuit's holding in the appeal from the first decision:

> The CAS statute expressly provides that judicial resolution of disputes over 'contract price adjustment[s]' shall take place under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–09[;] 41 U.S.C. § 1502(a). That description fits Boeing's challenge: Boeing and the government disagree about the proper contract price adjustment to reflect Boeing's post-contract-formation 2011 changes in its cost accounting practices.

Boeing Co., 968 F.3d at 1381.

Likewise, the Court's finding that it does not have jurisdiction over Boeing's claims is inconsistent with the Federal Circuit's holding in *Texas Health Choice L.C. v. Office of Pers. Mgmt.*, 400 F.3d 895, 900 (Fed. Cir. 2005); 47 GC ¶ 142. In *Texas Health*, the contractor filed suit in the district court alleging that an agency regulation incorporated into its contract conflicted with a provision of the Federal Employee Health Benefits Act. See id. at 897. The defendant moved to dismiss the complaint for lack of jurisdiction and to transfer the claim to the COFC, arguing that the contract was governed by the CDA. See id. at 898. The district court denied the motions, but the Federal Circuit held that the COFC had jurisdiction under the CDA. In pertinent part, the Federal Circuit stated as follows:

> That Texas Health's complaint, literally read, sought only to invalidate the Final Year Regulation, as opposed to recover the $622,246 reconciliation amount, is of no consequence to the question of jurisdiction because the complaint relates to a dispute implicating a contract with the Government. Indeed, Texas Health's complaint expressly mentions its FEHBA contract with the Government and the deemed denial of its claim before the contracting officer.

Id. at 900.

The Federal Circuit concluded that, "under the CDA, the Court of Federal Claims has exclusive jurisdiction over [plaintiff's] suit against [defendant] relating to the validity of the [regulation] incorporated into the … contract," and that "because [plaintiff's] claim is related to the … contract," the CDA "exclusively governs" the dispute. Id. at 898 (internal quotation marks omitted). And because "the CDA clearly and comprehensively defines the procedures for all contractual disputes between the United States and private contractors," any contrary arguments "are misplaced in light of the dispute resolution scheme for contract-related disputes against the Government set forth in the CDA." Id. at 900 (internal quotation marks omitted).

It is not clear why the Court did not apply the same rationale here. In fact, the Court cited to *Texas Health* in stating that "[t]he Federal Circuit has previously held that, in certain circumstances, the court has jurisdiction to consider challenges to regulations made in the context of a CDA claim," but then found that *Texas Health* was distinguishable because unlike the narrow regulatory interpretation issue in that case, Boeing's claims involved a "complex, ongoing relationship between plaintiff and the Government in which plaintiff seeks declaratory or injunctive relief to modify the Government's future obligations," and thus could not be brought in the COFC under the CDA. But, as noted above, *Texas Health* is squarely on point.

And even if, outside the procurement context, Boeing could arguably have brought an APA action, the CDA is clear that a contractor has a right to appeal a decision by a CO, and "may bring an action directly on the claim in the United States Court of Federal Claims, notwithstanding any contract

provision, regulation, or rule of law to the contrary." 41 USCA § 7104(b)(1).

Turning to Boeing's illegal exaction claim, the Court accepted the Federal Circuit's ruling that the absence of a money mandate under the CAS statute did not deprive it of jurisdiction. But the Court nonetheless dismissed the claim on the alternate grounds that it was a challenge to the application of the CAS statute, and thus squarely within the exclusive procedural framework of the CDA. According to the Court, "Plaintiff's claim, therefore, must be brought under the CDA—an illegal exaction claim is barred in this case." And "[b]ecause plaintiff cannot make a showing sufficient to establish its ability to bring an illegal exaction claim in this case, the court dismisses the illegal exaction claim." This is a remarkable holding that, if affirmed, would mean that Government contractors whose claims are subject to the CDA are precluded from bringing an illegal exaction claim altogether. The Court's holding also seems to be inconsistent with the Federal Circuit's holding that the Court *in this case* had jurisdiction to hear that same claim.

On Oct. 6, 2022, Boeing appealed the Court's decision to the Federal Circuit, so the question whether the Court can consider Boeing's claims remains open. Although COFC decisions are not binding on the boards of contract appeals or other COFC judges, if the Federal Circuit were to affirm the COFC's holding in *Boeing*, it would continue the delay in answering the question of the propriety of the application of FAR 30.606(a)(3)(ii), which is important to resolve for parties to Government contracts and the law in this area.

That said, for now, Government contractors must continue to wait for the courts' input on how to calculate cost impacts resulting from multiple cost accounting practice changes and, specifically, whether increased and decreased impacts can be offset to calculate any resultant payment due to the Government. Depending on how the Federal Circuit rules, the COFC may yet be forced to grapple with the validity of FAR 30.606 as it applies to Boeing's Government contracts, and with Boeing's illegal exaction claim.

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