GIBSON DUNN

July 29, 2015

2015 MID-YEAR GOVERNMENT CONTRACTS LITIGATION UPDATE

To Our Clients and Friends:

In this inaugural Government Contracts Litigation Update, Gibson Dunn examines trends and summarizes highlights from the government contracts-related decisions of the U.S. Court of Appeals for the Federal Circuit, the U.S. Court of Federal Claims, the Armed Services Board of Contract Appeals, and the Civilian Board of Contract Appeals over the first six months of 2015.

This year already has yielded seven opinions from the Federal Circuit of particular interest to government contractors. Through June 30, 2015, the U.S. Court of Federal Claims issued 224 Orders and Opinions, 150 of which were published. Bid protests (not a focus of this publication) continue to lead the way in terms of dominant government contracts issues, but the Court has issued numerous contract interpretation, jurisdictional, and cost principles-related decisions with which companies with government contracts should be familiar. The Armed Services Board of Contract Appeals ("ASBCA") published 84 substantive decisions from January – June 2015. Finally, through June 30 of this year, the Civilian Board of Contract Appeals ("CBCA") has issued 112 decisions.

Key cases discussed herein address nearly every topic in the hornbooks, from contract formation, enforceability, and interpretation, to procedural challenges, to jurisdictional claims, to whistleblowing activities, to interpretation of the Federal Acquisition Regulation ("FAR") cost principles and Cost Accounting Standards ("CAS"). Broadly speaking, these decisions can be grouped into five main categories: (1) jurisdictional cases; (2) cases arising from contract terminations; (3) issues of contract interpretation; (4) cost principles and CAS; and (5) issues relating to attorneys' fees and the attorney-client privilege. But before addressing each of these areas in turn, we briefly discuss the tribunals that adjudicate government contract disputes.

I. THE TRIBUNALS THAT ADJUDICATE GOVERNMENT CONTRACT DISPUTES

Under the doctrine of sovereign immunity, the United States generally may not be sued unless it has waived its immunity and consented to suit. Pursuant to statute, the Government has waived immunity over certain claims arising out of federal contracts through the Contract Disputes Act, 41 U.S.C. §§ 7101-09 ("CDA"), and through the Tucker Act, 28 U.S.C. § 1491. Under the CDA, any claim arising out of or relating to a government contract must be decided first by a contracting officer. A contractor may contest the contracting officer's final decision either by filing a complaint in the U.S. Court of Federal Claims or by appealing to a board of contract appeals. The Tucker Act, in turn, waives the government's sovereign immunity with respect to certain claims under statute, regulation, or express or implied contract, and grants jurisdiction to either the Court of Federal Claims or, in certain circumstances, the U.S. district courts.

The Court of Federal Claims thus has jurisdiction over a wide range of monetary claims against the government including, but not limited to, contract disputes and bid protests pursuant to both the CDA and the Tucker Act. For example, if a contractor's claim is founded on the Constitution or a statute instead of a contract, there is no CDA jurisdiction in any tribunal, but the Court of Federal Claims only would have jurisdiction under the Tucker Act as long as the substantive source of law granted the right to recover damages. Thus, the Court of Federal Claims' jurisdiction is broader than that of the boards of contract appeals.

Unlike the Tucker Act, the CDA also allows contractors to file suit against the Government before boards of contract appeals. The ASBCA is an administrative tribunal that hears and decides post-award contract disputes between contractors and the Department of Defense and its military departments, NASA, and the Central Intelligence Agency. The ASBCA has jurisdiction pursuant to the CDA, its Charter, and other remedy-granting contract provisions. Similarly, the CBCA hears and decides contract disputes between contractors and civilian executive agencies under the provisions of the CDA. The CBCA's authority extends to all agencies of the federal government except the Department of Defense and its constituent agencies, NASA, the U.S. Postal Service, the Postal Regulatory Commission, and the Tennessee Valley Authority.

The U.S. Court of Appeals for the Federal Circuit hears and decides appeals from decisions of the Court of Federal Claims, the ASBCA, and the CBCA, among many other tribunals. Significantly, the Federal Circuit has a substantial patent and trademark docket, hearing appeals from the U.S. Patent and Trademark Office and federal district courts, that greatly exceeds its government contracts litigation docket. Nevertheless, the Federal Circuit is the governing authority for most government contracts disputes.

The ASBCA, U.S. Court of Federal Claims, and the U.S. Court of Appeals for the Federal Circuit each publish annual reports that provide statistics regarding each tribunal's activity and caseload during a given fiscal year ("FY"). The ASBCA and the Federal Circuit both ended FY 2014 with a substantially higher number of pending cases than the number at which they started the year: the ASBCA had a net increase of 173 pending appeals as of September 30, 2014, and the Federal Circuit had a net increase of 114 pending appeals. Both tribunals ended FY 2014 with more than 1,000 pending cases. Unlike the ASBCA and the Federal Circuit, the U.S. Court of Federal Claims *decreased* its number of pending cases by 110, but the Court nevertheless has well over 1,000 pending cases.

The Federal Circuit returned to full strength with the 95-0 Senate confirmation of Kara Farnandez Stoll to the bench on July 7, 2015. Judge Stoll, a private-sector attorney and adjunct professor of law, filled the seat vacated by Chief Judge Randall Rader's 2014 retirement. The bench of the Court of Federal Claims remains comparatively understaffed, with only one of six vacancies filled during the first half of 2015--Judge Lydia Kay Griggsby (a former Assistant U.S. Attorney and Senate Judiciary Committee counsel) began her active service on the Court on January 5, 2015. President Obama re-nominated candidates to fill the five remaining vacancies on the Court of Federal Claims on January 7, 2015, but the Senate has yet to act on any of them as of the date of this publication. There were no

appointments to the ASBCA or CBCA during the first half of 2015, which is not particularly surprising in light of four appointments to the ASBCA and two to the CBCA in 2014.

II. JURISDICTIONAL ISSUES

Jurisdictional issues dominated the landscape of key government contracts decisions during the first half of 2015.

A. Defining the Claim

K-Con Building Sys., Inc. v. United States, 778 F.3d 1000 (Fed. Cir. Feb. 12, 2015)

K-Con entered into a contract with the U.S. Coast Guard to construct a "cutter support team building" in Port Huron, Michigan for nearly $583,000. The contract was to be completed by November 2004, with K-Con agreeing to pay $589 in liquidated damages for each day of delay. The building was not accepted as substantially complete until May 2005, and the Coast Guard withheld approximately $110,000 in liquidated damages for the 186-day delay.

K-Con disputed the withholding in a letter to the contracting officer, arguing: (1) that the liquidated damages clause was unenforceable and thus constituted an "impermissible penalty;" and (2) liquidated damages were inappropriate because the Coast Guard had failed to authorize extensions to the completion date required by Coast Guard-mandated changes to the contract. The contracting officer denied the letter request for remission of liquidated damages and K-Con filed suit in the Court of Federal Claims. Then, while that litigation was ongoing, K-Con submitted a second letter to the contracting officer asking for a new remedy--$196,000 in additional compensation for work associated with the changes--as well as a 186-day extension in the contract completion date. When the contracting officer denied this request, K-Con amended its complaint in the Court of Federal Claims to assert entitlement to relief on these additional grounds.

Judge Sweeney of the Court of Federal Claims ruled for the Coast Guard, holding that: (1) the liquidated damages clause was enforceable; (2) K-Con did not provide valid written notice of the alleged changes and was therefore not entitled to additional compensation for them; and (3) the Court did not have jurisdiction over K-Con's claim that it was entitled to the 186-day extension. The Federal Circuit, in a unanimous panel decision authored by Judge Taranto, affirmed all three rulings.

Most significant about the Federal Circuit's ruling is the manner in which it parsed the jurisdictional question in order to harmonize two well-established rules: (1) that the CDA confers jurisdiction on the Court of Federal Claims only for claims that have been submitted to the contracting officer for decision; and (2) that once a claim is in litigation, the contracting officer is divested of authority to decide the claim. The Court held there was jurisdiction for one basis of relief sought in the second letter to the contracting officer--the claim for an additional $196,000 in compensation for work associated with the changes--because that was a new claim not already in litigation and thus the contracting officer still had authority to adjudicate it. But there was no jurisdiction over a second issue raised in the same letter--that K-Con was entitled to a 186-day extension in the contract--because that claim was already "squarely in litigation" based on the initial complaint. Put another way, the Court

looked to the complaint to determine what was in litigation. This aspect of the decision could create a jurisdictional trap if the complaint alleges a claim broader than that submitted to the contracting officer for a decision. The net result could be that the broader claim alleged in the complaint precludes the contracting officer from ruling on it, but because the broader claim was not submitted to the contracting officer for a decision, the Court lacks jurisdiction over it.

On the merits, the Federal Circuit held that: (1) the $589-per-day liquidated damages assessment was "a reasonable estimate of the costs that delay in job completion would likely impose" and thus not "so extravagant or disproportionate . . . as to constitute an impermissible penalty;" and (2) even if the Coast Guard's alleged changes in specifications were material enough to constitute constructive changes to the contract, K-Con did not comply with the contract's requirement that the contractor provide written notice to the Government within 20 days that it considered these to be constructive changes--raising the issue two years later during the course of litigation was thus not timely.

B. Converting Motions to Dismiss to Summary Judgment

JRS Management v. Lynch, – F.3d – (Fed. Cir. June 16, 2015)

JRS had a one-year contract with the Department of Justice, with four option years, to provide culinary arts instruction at a federal correctional institution in Miami, Florida. A dispute arose between JRS and DOJ concerning, among other things, the qualifications of the instructors submitted, and ultimately DOJ declined to exercise the first option year. JRS submitted a claim seeking approximately $18,400 in damages for alleged breach of contract and arbitrary refusal to exercise the option year. DOJ denied the claim, after which JRS appealed to the CBCA.

Before the CBCA, DOJ filed a motion to dismiss, which the Board (Stern, A.J.) converted to a motion for summary judgment and, finding no material facts in dispute, ruled in DOJ's favor without providing notice to either party. JRS appealed to the Federal Circuit.

Looking to the Federal Rules of Civil Procedure for guidance, the Federal Circuit (O'Malley, J.) observed that Rule 12(d) provides that if a motion to dismiss presents matters outside the pleadings it "must be treated as one for summary judgment under Rule 56 and all parties must be given a reasonable opportunity to present all material that is pertinent to the motion." The Court rejected DOJ's argument that JRS was on "constructive notice of the potential conversion" based on the fact that both parties cited to CBCA Rule 4 appeal file documents in their pleadings, noted that DOJ's motion to dismiss should have been rendered moot by JRS's later-filed amended complaint, and critiqued the CBCA's resolution of material factual disputes against JRS. In light of these disputes, the Federal Circuit held that it was inappropriate for the Board to grant summary judgment to DOJ and the CBCA's opinion was vacated and the case remanded.

C. Interpreting *Sikorsky*

Following the Federal Circuit's landmark ruling in *Sikorsky Aircraft Co. v. United States*, 773 F.3d 1315 (Fed. Cir. 2014), which held that the CDA's six-year statute of limitations is not a jurisdictional requirement subject to resolution on a motion to dismiss, the ASBCA had several occasions during the

first half of 2015 to articulate how it will treat motions to dismiss predicated on the statute of limitations that were pending at the time of the *Sikorsky* decision.

Kellogg Brown & Root Servs., ASBCA No. 58175 (May 13, 2015)

KBR appealed from a contracting officer's final decision asserting a claim for $11.5 million in allegedly unreasonable subcontractor costs paid to KBR under a U.S. Army logistical support contract. KBR immediately moved to dismiss, arguing that the government's claim had accrued more than six years before the final decision and thus that it was time barred by the CDA. After a hearing on KBR's motion, but before the Board issued its decision, the Federal Circuit's *Sikorsky* decision came down holding that the CDA's six-year statute of limitations is not jurisdictional. In supplemental briefing and argument, both parties consented to the Board converting the motion to dismiss to cross motions for summary judgment.

The ASBCA (Scott, A.J.) held that the government's claim was not time-barred. Observing that post-*Sikorsky*, failure to meet the statute of limitations is an affirmative defense on which the party asserting the defense bears the burden of proof, the Board held that KBR did not show that the Army knew or should have known in 2005 (when the Defense Contract Audit Agency ("DCAA") conducted a subcontract audit) that KBR was billing for dining services at a higher headcount than what the contracting officer had approved. Instead, the Board held that the claim did not begin to accrue until 2010, when the government "mistakenly paid KBR" for the excessive subcontract costs--after KBR voluntarily refunded an amount it initially determined was unallowable and then submitted a claim for the costs after it determined the amount was allowable. Given the complex facts of the case, the decision may have limited relevance.

The Ryan Co., ASBCA No. 58137 (May 27, 2015) *Raytheon Co.*, ASBCA No. 58849 (May 27, 2015)

In decisions issued on the same day, the ASBCA (Dickinson, A.J.) denied motions to dismiss predicated on the six-year CDA statute of limitations in two separate cases, declining to convert the motions to summary judgment where the parties had not yet conducted discovery. The Board held in each case that the "should have known" test of claim accrual "has a reasonableness component based upon what facts were reasonably knowable to the claimant," which generally (and in these specific cases) renders it inappropriate for resolution on summary judgment.

D. Timeliness of Appeals

Whereas the cases discussed above address the alleged failure to assert a claim within the CDA's six-year statutory mandate, three other recent ASBCA cases address the CDA jurisdictional requirement of timely filing an appeal after receipt of a contracting officer's final decision. Under the CDA, the Board has jurisdiction only over appeals that are taken within 90 days of receiving the contracting officer's final decision (as opposed to the one-year statutory clock applicable to claims filed in the Court of Federal Claims).

Axxon Int'l, LLC, ASBCA Nos. 59497 *et al.* (Jan. 21, 2015)

Axxon sought to challenge two contracting officer's final decisions concerning, respectively, the default termination and refusal to pay for costs associated with a propane supply contract. With respect to the first appeal, Axxon mistakenly submitted the appeal to U.S. Army counsel, rather than the ASBCA. Because this "appeal" was submitted to government counsel within the 90-day window, the Board (Newsom, A.J.) held that the misdirection was not fatal and determined that it would exercise jurisdiction. With respect to the second appeal, the Board determined that the 90th day fell on a Sunday, which under Board rules meant the notice was due the following business day, Monday, when it was received. The Board thus upheld its jurisdiction over the appeal.

TTF, LLC, ASBCA Nos. 59511 *et al.* (Feb. 5, 2015)

The Defense Logistics Agency Aviation, a field activity of the Defense Logistics Agency, issued three contracting officer's final decisions terminating three TTF contracts on the same date, April 30, 2014. Electronic copies of the three decisions were e-mailed on May 1, an automated electronic notification was sent on May 2, and then hard copies were sent out separately via certified mail. Two of the mailed final decisions "followed a circuitous route" and did not arrive until May 19, whereas the third was routed more directly and signed for by the contractor on May 8. TTF postmarked notices of appeal for all three decisions on August 18, which was within the 90-day requirement only if the "date of receipt" was deemed to be May 19 or later.

The Board (O'Sullivan, A.J.) granted DLA's motion to dismiss for the final decision received by TTF on May 8, but denied the motion for the other two final decisions. Even though electronic copies of all three decisions were first sent on May 1, the Board held that "sending copies of a contracting officer's final decision without indicating which of them is intended to begin the running of the appeal period confuses a contractor as to the date for appeal of the decision, entitling the contractor to compute the date from receipt of the last copy." The Board did note that electronic correspondence by itself may be notice of a final decision sufficient to begin the 90-day clock if the contractor has agreed to receive correspondence in that format.

Tessada & Assocs., ASBCA No. 59446 (Apr. 21, 2015)

In another decision addressing the timeliness of mailed notices of appeals, the Board (Delman, A.J.) noted a non-intuitive distinction that has arisen in the Board's case law concerning the method of delivery: when a notice of appeal is delivered through the U.S. Postal Service, the appeal is deemed filed the day it is transferred into the Postal Service's custody with a valid address and sufficient postage (*i.e.*, when it is mailed); however, when a notice of appeal is sent via commercial carrier, the notice is deemed filed when it is actually received by the Board. Tessada received a contracting officer's final decision on April 25, 2014, meaning that its 90-day period for appealing to the Board expired on July 24. The contractor transmitted a notice of appeal to the Board via FedEx on or about July 22, which was delivered to the Board on July 25. But it also on July 24 sent a copy of the notice of appeal to the contracting officer via U.S. mail, which was not actually received by the contracting officer until August 26. Because filing a notice of appeal with a contracting officer is the equivalent of

filing it with the Board, and because the contracting officer's letter was mailed on the 90th day, the Board held that the notice sent via U.S. mail was sufficient to vest jurisdiction even as the FedEx-delivered notice (received more than one month earlier) was not.

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Timeliness is not only an issue for contractors to be concerned about--the Government also has an obligation to comply with the CDA's timing requirements, as the Court of Federal Claims addressed in the following recent case.

Rudolph & Sletten, Inc. v. United States, 120 Fed. Cl. 137 (Feb. 23, 2015)

When a contractor submits a certified claim to a contracting officer for more than $100,000, the CDA provides the contracting officer with 60 days to either: (a) "issue a decision;" or (b) "notify the contractor of the time within which a decision will be issued." Further, the decision must be "'issued within a reasonable time,' which is calculated by 'taking into account such factors as the size and complexity of the claim and the adequacy of information in support of the claim provided by the contractor.'" "If the contracting officer denies the claim within the required time period, that claim is actually denied," and the contractor may appeal. If, on the other hand, the contracting officer fails to issue a decision within the required period, the claim may be "deemed denied" unless the contracting officer sets a reasonable extension within that 60-day window.

Rudolph & Sletten submitted a certified claim to the National Oceanic and Atmospheric Administration in August 2013. Within 60 days of receipt, the contracting officer advised the contractor that due to its complexity, a final decision on the claim would not be ready for nine months from that letter--on July 15, 2014. On July 8, 2014, the contracting officer wrote Rudolph & Sletten again, advising that it would need another eight months--until March 2015--to reach a final decision. Shortly thereafter, Rudolph & Sletten filed suit in the Court of Federal Claims and NOAA filed a motion to dismiss for failure to obtain a valid contracting officer's final decision.

The Court (Griggsby, J.) denied the motion to dismiss, holding that the government is allowed only one extension for issuing a contracting officer's final decision, and that extension must be set within 60 days of receiving the certified claim. Because the July 8, 2014 extension was both a second extension and set outside of the 60-day period, it was not effective and Rudolph & Sletten was authorized to treat it as a "deemed denial." The Court did, however, stay the proceedings for 30 days and remand the matter to the contracting officer to provide one last opportunity to issue a final decision. Notably, 30 days from the Court's order was within the March 2015 revised deadline set by the contracting officer, casting a shadow over the contractor's victory.

E. Is There A Valid Claim Or Contract?

The ASBCA and CBCA also have considered in decisions this year whether contractors had appealed valid claims under the CDA. FAR 2.101 defines a "claim" as "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 this contract."

DynPort Vaccine Co. LLC, ASBCA No. 59298 (Jan. 15, 2015)

DynPort held a cost-reimbursement contract with the U.S. Army Medical Research Acquisition Activity for the development of vaccines and biological defense products. USAMRAA's contracting officer issued a unilateral contract modification directing DynPort "to perform corrective or replacement work at no cost to the government." DynPort appealed to the ASBCA, treating the unilateral contract modification as a contracting officer's final decision. USAMRAA filed a motion to dismiss

The Board (James, A.J.) denied the Government's motion, rejecting USAMRAA's argument that the modification "was an act of contract administration, not a government claim," and refusing to order DynPort to perform the work without reimbursement before filing a claim. The Board observed that "[t]he absence of an express styling of a document as a CO's decision or of notice of the contractor's appeal rights, or of both, does not render a CO's decision ineffective or deprive the Board of jurisdiction." In upholding jurisdiction, the Board explained that the phrase "other relief" in the FAR's definition of "claim" "can include directions by the CO to the contractor to correct or replace work and be considered a government claim under circumstances where the Board is not being asked to take jurisdiction over ordinary contract administration actions." In this case, the contractor being directed to perform work without compensation pursuant to a clause that required a finding of "serious failures in performing the contract's requirements" did not strike the Board as "ordinary contract administration."

Corrections Corp. of America v. Dep't of Homeland Sec., CBCA 2647 (Apr. 30, 2015)

CCA operated a detention facility for the Department of Homeland Security ("DHS") pursuant to a multi-year contract in which it was entitled to a 3% price escalation each year. During the contract, the Department of Labor issued a minimum wage determination triggering an increase in wages for which CCA sought a price adjustment. The DHS contracting officer denied the request, stating that the 3% price escalation clause accounted for all potential increased costs allowable under the contract. CCA appealed and DHS moved to dismiss, arguing that CCA had "sidestep[ped] the ordinary claim process" by bringing a claim without providing the Government sufficient information by which to analyze it.

The CBCA (Lester, A.J.) held that the CCA had met the test for bringing a "claim" under the CDA, which requires only that a contractor submit a "written demand or written assertion . . . 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." DHS's attempt to require "that the contractor's claim be supported by adequate documentation . . . [was] unavailing" under relevant case precedent.

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Sometimes, the issue arises not from whether the contractor has a valid claim, but rather whether the contract under which the claim arises is sufficient to confer jurisdiction. Two Board cases considered this issue.

Latifi Shagiwall Constr. Co., ASBCA No. 58872 (Mar. 24, 2015)

LSCC was an indigenous Afghan company awarded a contract under the Commanders' Emergency Response Program ("CERP") to design and build a gravel road in Afghanistan. The contracting officer terminated the contract for convenience and LSCC sought payment for work completed prior to termination, which the contracting officer denied.

The Board (Dickinson, A.J.) granted the Government's motion to dismiss, reasoning that because the CDA applies only to contracts "for the direct benefit or use of the United States Government" and CERP contracts are "for the benefit and use of the people of Iraq or Afghanistan," the CDA does not apply to CERP contracts. Because the CDA as "a statute waiving sovereign immunity . . . must be strictly construed," the Board rejected the argument that the contracting officer's instruction to appeal to the ASBCA could itself confer jurisdiction upon the Board where none existed under the CDA.

Tech Projects, LLC, ASBCA No. 58789 (Mar. 26, 2015)

Tech Projects sought to "recover costs incurred in connection with two requirements issued" as part of the Small Business Set-Aside Program that the Government ultimately decided to perform in-house. The Government moved to dismiss on jurisdictional grounds, arguing that there was no contract for purposes of the CDA.

Denying the Government's motion, the Board (Younger, A.J.) held that, at the motion-to-dismiss stage, Tech Projects had sufficiently "made a non-frivolous allegation" of an implied-in-fact contract. Tech Projects was bolstered in this respect by the fact that the contracting officer had acknowledged a colorable implied-in-fact contract in his final decision.

F. Establishing a Claim for a Sum Certain

The Court of Federal Claims and the ASBCA each issued decisions over the past six months analyzing whether contractors had adequately claimed a "sum certain," a jurisdictional prerequisite under the CDA and FAR definition of "claim."

United States Enrichment Corp. v. United States, 121 Fed. Cl. 532 (June 3, 2015)

In 2011, USEC submitted a certified claim for $11,217,504 to its Department of Energy contracting officer for indirect costs related to work performed at USEC's plants in Ohio and Kentucky from 2003-05. The DOE, however, did not set USEC's final indirect rates for 2003-2005 until December 2013. The Government filed a partial motion to dismiss, arguing that "because final indirect rates had

not been set until 2013, USEC's 2011 claim cannot serve as a jurisdictional predicate for the amended complaint's challenge to final indirect rates."

The Court of Federal Claims (Firestone, J.) denied the motion, holding that it did have jurisdiction over the claim. Emphasizing that the requirement that a contractor submit a claim to a contracting officer prior to filing suit must be applied in a "practical way," the Court refused to require USEC to submit a second claim as a challenge to the 2013 indirect rate determination when the 2011 claim was based upon the same set of facts and the same legal theory as any challenge it would bring to the 2013 determination.

Joseph Sottolano, ASBCA No. 59777 (Apr. 22, 2015)

Mr. Sottolano entered into a contract to serve as the head baseball coach of the U.S. Military Academy. Although the contract was not itself subject to the CDA, it contained a disputes clause that provided for appeals to the ASBCA for relief from adverse determinations by the contracting officer, provided that claims in excess of $100,000 needed to be certified. After his contract was terminated for cause, Sottolano filed a certified claim letter with the contracting officer seeking varying damages, some of which were estimated in their amount. The contracting officer rejected the claim on the grounds that she was unable to calculate the sum sought. Sottolano's counsel responded by letter without the necessary certification, clarifying that the amount sought was $2.74 million. The contracting officer again rejected the claim, this time because it was for more than $100,000 and not certified, and Sottolano appealed to the ASBCA.

The Board (McIlmail, A.J.) granted the Government's motion to dismiss Sottolano's appeal, finding that it lacked jurisdiction because Sottolano failed to submit a claim for a sum certain as required by the disputes clause of his contract. With respect to the first claim letter, which was certified, the Board held that the qualifying language "approximately" attached to certain of the demands meant that the claim was not for a "sum certain." The second claim letter was for a sum certain ($2.74 million), but was not certified. Thus, the Board did not have jurisdiction.

Sudor Al-Khair Co. – SAKCO for General Trading, ASBCA Nos. 59036 *et al.* (Apr. 14, 2015)

This case arose from two separate appeals involving SAKCO's U.S. Army contract for the design and construction of barracks and classroom buildings in Iraq. In the first appeal, SAKCO sent an e-mail demanding payment on an invoice for a $72,077.33 progress payment, as well as incurred costs of $343,460 for air conditioning units supplied. The second appeal involved the Army's demand for $65,763.13 in incurred damages arising from the same contract, which was the subject of two separate contracting officer's final decisions. The Government moved to dismiss both appeals for lack of jurisdiction.

With respect to the first appeal, the Board (Melnick, A.J.) disaggregated the two demands set forth in SAKCO's e-mail, finding they constituted distinct claims arising from different operative facts. Thus, the Board held it did have jurisdiction over the $72,077.33 progress payment claim, but not the $343,460 air conditioning unit claim that was not certified as is required of claims exceeding

$100,000. Notably, the Board refused to consider a second certified claim for the air conditioning units that was submitted after SAKCO filed its appeal with the Board.

With respect to the second appeal, the Army contracting officer had issued two separate final decisions--the original in 2010, which led to SAKCO's counter-demand for payment in the first appeal, and a second in 2013, which both denied SAKCO's claim and reaffirmed that the Army was entitled to payment from SAKCO as damages. The Government focused on the 2010 final decision and claimed that the 90-day statute of limitations applicable to Board appeals had long since expired. It argued that the 2013 final decision "did not vitiate the finality" of the 2010 decision because the contracting officer was not reconsidering the earlier decision, but rather addressing SAKCO's "failure to heed previously communicated instructions." The Board did not address that issue, however, as it found nothing in the record demonstrating that SAKCO ever received the 2010 decision. Thus, the 2013 final decision was the operative one and the Board had jurisdiction.

G. Directing the Government to File a Complaint

In a developing area of law reinvigorated by the 2014 *Beechcraft Defense Co.* (ASBCA No. 59173) and *BAE Systems Land & Armaments Inc.* (ASBCA No. 59374) decisions, the ASBCA provided further guidance in the first half of 2015 on the standard for when the Government--rather than the contractor--may be directed to file the complaint with the Board.

Kellogg Brown & Root Servs., Inc., ASBCA No. 59557 (Jan. 22, 2015)

KBR had a LOGCAP support contract that required it to provide workers' compensation insurance for its employees and its subcontractors' employees. In June 2014, an administrative contracting officer issued a final decision demanding repayment of nearly $34 million in allegedly unallowable insurance costs and giving as the basis for the decision a single, cursory paragraph that incorporated by reference a DCAA audit report and KBR response to a draft of the same. KBR appealed the final decision and moved the Board to order the Government to file a complaint.

The Board (O'Sullivan, A.J.) began its analysis by acknowledging that the "contractor . . . is the only party who may initiate proceedings at the Board, 41 U.S.C. § 7104, and Board Rule 6(a) requires the appellant to file the complaint in an appeal." However, "[i]n appropriate cases, the Board may exercise its discretion to require the government to file the complaint, if doing so will facilitate efficient resolution of the appeal. Such situations can arise if relevant information concerning the basis for the claim resides with the government, not the contractor." Looking at the facts of this case, the Board reasoned that the contracting officer's decision did "not explain the rationale for finding these costs unallowable," nor did the audit report provide sufficient information for KBR to fully understand the basis for the Government's claim. In directing the Government to file the complaint, the Board concluded that KBR "should not have to speculate about the basis for the government's claim in its complaint."

Carro & Carro Enterps., Inc., ASBCA No. 59485 (Mar. 10, 2015)

In this appeal, the ASBCA denied CCE's motion requesting that the Board direct the Government to file the Complaint. The dispute arose from a contract between CCE and the Army Corps of Engineers for flood control construction work in Puerto Rico. The Corps allegedly withheld payment of approximately $127,000 from CCE due to alleged deficiencies in CCE's performance. CCE submitted a demand for payment and, when that was denied, appealed the final decision.

Before the ASBCA, CCE argued that the Government should have to file the Complaint because its withholding of money "was a government claim for a reduction in contract price." The Board (Hartman, A.J.) rejected CCE's contentions that this was truly a "government claim" and that CCE did not have "sufficient information to understand the CO's justification for the withholding." Accordingly, the Board denied CCE's motion for the Government to file the complaint and instead ordered CCE to file the complaint.

H. Forum Choice / Fraud

The first half of 2015 also saw several decisions from the Court of Federal Claims and ASBCA addressing the jurisdictional impact of a contractor's forum selection, as well as the standards for bringing a claim of fraud.

Palafox St. Assocs., L.P. v. United States, – Fed. Cl. – (June 18, 2015)

In this quirky case spanning several years of complex jurisdictional maneuvers, the Court of Federal Claims (Campbell-Smith, J.) ultimately ruled that that it did not possess jurisdiction over certain claims due to the "election doctrine." The matter arose out of a dispute between Palafox and the General Services Administration concerning whether Palafox had appropriately charged GSA for approximately $824,000 in tax assessments associated with the lease of a federal courthouse. Palafox originally filed an appeal with the CBCA in 2012, but then withdrew it after the Board directed the parties to "consider" whether the pre-appeal correspondence amounted to a certified claim by the contractor. The CBCA dismissed the case without prejudice and Palafox submitted a properly certified claim to the contracting officer. Because neither party sought reinstatement within 180 days, the Board (while that certified claim was pending with the GSA contracting officer) converted the dismissal without prejudice to a dismissal with prejudice. The contracting officer then denied the claim in a final decision and Palafox filed suit in the Court of Federal Claims.

In holding that it did not have jurisdiction over the later-filed complaint, the Court observed that "[p]ursuant to the election doctrine, once a contractor chooses the forum in which to lodge its appeal, the contractor's choice is binding, and the contractor is no longer able to pursue its appeal in the alternate forum." The Court could find no prior authority governing the "unique factual circumstances in this case," including where the contractor appealed one final decision to a board of contract appeals and then appealed a second, related final decision to the Court of Federal claims, but ultimately held that because the two appeals arose from the "same operative facts," the Court was precluded from exercising jurisdiction. Acknowledging that this ruling put Palafox in an unfavorable position, the Court suggested that Palafox seek to convince the Board to reopen its case, and even went so far as to

urge GSA to cooperate with these efforts due to the "adverse[] and unfair[]" effect the Government's "inconsistent litigation positions" have had on Palafox's efforts to have its claim adjudicated.

Jasmine Int'l Trading & Servs., Co. W.L.L. v. United States, 120 Fed. Cl. 577 (Mar. 31, 2015)

This year's decision in *Jasmine* builds upon the Federal Circuit's landmark 2013 decision in *Kellogg Brown & Root Servs., Inc. v. United States*, 728 F.3d 1348 (Fed. Cir. 2013), *opinion corrected on denial of reh'g*, 563 F. App'x 769 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 167 (2014). Jasmine was awarded several contracts by the U.S. Army to service latrines and provide equipment, supplies, water, and transportation services in Kuwait, and later sued the government for breach of contract based upon several claims related to these services. In response, the Government brought counterclaims under the False Claims Act and Forfeiture of Fraudulent Claims Act, as well as for common law fraud, arguing that Jasmine obtained these contracts through fraud; specifically, by bribing the contracting officer responsible for administering these contracts for the U.S. Army. However, after the Federal Circuit dismissed similar claims in *KBR*, the Government voluntarily withdrew its FCA and FFCA claims. This decision arose from Jasmine's further motion to dismiss the common law fraud claims that remained.

In *KBR*, the Federal Circuit held that to succeed on common law fraud claims it is not enough to simply show that "kickbacks were paid to personnel involved in contract decision-making;" rather, the Government must "show some causal link between the illegality and the contract provisions." This is known as "but-for" causation. The trial court in *KBR* found that no such causal link existed, and the Federal Circuit found no clear error in that analysis. In *Jasmine*, however, the Court (Williams, J.) found that the Government met the "but-for" causation test: "Defendant has pled sufficient facts 'to raise a reasonable expectation that discovery will reveal evidence' that [the U.S. Army Contracting Officer's] fraudulent conduct was a but-for cause of Jasmine's receipt of these awards." The Court thus denied Jasmine's motion to dismiss and set the case for further proceedings.

Tri-County Contractors, Inc., ASBCA No. 58167 (June 16, 2015)

Tri-County contracted with the Naval Facilities Engineering Command to replace an oil and lubrication system. A dispute arose concerning the contractor's entitlement to a $242,830 equitable adjustment for changed circumstances not accounted for in its proposal. While these negotiations were ongoing, Tri-County accepted payment on its last ($9,676.85) invoice and executed a blanket release (without exemption) "forever discharg[ing] the Government . . . of and from all liabilities, obligations and claims whatsoever in law and equity arising under or arising out of [the] contract." The Navy contracting officer thereafter denied Tri-County's request for an equitable adjustment based on this release. Tri-County appealed to the ASBCA, arguing that it never intended that the release include the outstanding equitable adjustment dispute.

Although acknowledging century-old precedent holding that claims not excepted from a general release are forever barred, the Board (James, A.J.) found that this case presented one of those "special and limited" exceptions to the rule. Specifically, the Board held that on the facts before it (including contemporaneous correspondence between government personnel expressing surprise at the release but

never asking the contractor about it), the Government should have known of Tri-County's "unilateral mistake" in failing to except its equitable adjustment claim from the general release. Thus, the equitable adjustment claim was not barred based on the release. However, on the merits, the Board held that Tri-County was not entitled to recovery on the equitable adjustment claim because the contractor failed to inquire about a patent ambiguity in the contract.

III. TERMINATIONS

The courts and boards also issued a few key decisions during the first half of 2015 arising from contract terminations, including both terminations for convenience and terminations for default.

EM Logging v. Dep't of Agric., 778 F.3d 1026 (Fed. Cir. Feb. 20, 2015)

EM Logging appealed from a judgment of the CBCA holding that the U.S. Forest Service had properly terminated a timber sale contract on the basis of EM Logging's "flagrant disregard" of material contract provisions. In August 2010, EM Logging entered into a Forest Service contract for timber sales in the Kootenai National Forest in Montana. The contract provided for strict requirements governing the method for transporting logs out of the forest to weighing locations. After reviewing these conditions, EM Logging provided an analysis detailing how it would be difficult to meet the 12-hour delivery requirement while adhering to the route requirement and requesting a modified 24-hour delivery requirement. The request was denied and EM Logging was subsequently cited for numerous breaches of the agreement before ultimately being terminated for cause based on an alleged "pattern of activity that demonstrates flagrant disregard for the terms of [the] contract."

On appeal, the CBCA held that EM Logging's actions amounted "to blatant and flagrant violations of material contract provisions, given that [it] had sought, but was denied, deviations, and often was reminded the requirements." But the Federal Circuit, in a unanimous panel opinion by Judge Moore, turned to the dictionary definition of "flagrant disregard" and reversed. The Court found that the plain meaning of "flagrant" and its use in the contract itself precluded a finding of breach for "technical breaches of minor contract provisions or isolated breaches of material contract provisions which caused no damage."

Allen Eng'ng Contractor Inc. v. United States, – F.3d – (Fed. Cir. May 7, 2015)

Allen Engineering entered into three construction contracts with the Navy, each of which required performance and payment bonds. Allen Engineering submitted the bonds and work on the three contracts commenced. During administration of the contracts, it came to the Navy's attention that the bonds on file for Allen Engineering were fraudulent. The Navy directed Allen Engineering to acquire valid bonds and, when the contractor was unable to do so, terminated the contracts for default. Allen Engineering filed suit challenging the terminations in the Court of Federal Claims.

The Court of Federal Claims (Merow, J.) ruled for the Navy, holding that Allen Engineering had materially breached its contracts by failing to replace the fraudulent bonds and rejecting the contractor's argument that the Navy was responsible due to its failure to discover that the bonds were fraudulent when initially investigating their validity. The Federal Circuit, in a unanimous panel

opinion by Judge Clevenger, upheld the trial court's ruling, holding that the contractor's breach was material and could not be excused by the Navy's failure to follow its own contracting manual in investigating the bond because the bond regulation exists for the benefit of the Government, not private contractors.

H.J. Lyness Constr., Inc. v. United States, 121 Fed. Cl. 287 (Fed. Cl. May 15, 2015)

The General Services Administration terminated for convenience H.J. Lyness's contract to renovate and provide security improvements to the John Weld Peck Federal Building in Cincinnati due to issues with the fire evacuation plan submitted with the contract design. GSA and the contractor exchanged various financial analyses in support of a settlement, but disagreed significantly regarding settlement value due primarily to a dispute over the calculation of unabsorbed overhead costs. When they could not reach agreement, H.J. Lyness filed suit in the Court of Federal Claims.

By the time of the Court's opinion, the Government had conceded liability and the only issue before the Court was the amount of damages. The contractor's expert witness designed a formula to calculate unabsorbed overhead specifically for this case, but the Court of Federal Claims (Damich, J.) did not agree with the use of this formula because "there is only one proper method of calculating unabsorbed home office overhead: the *Eichleay* formula . . . ." H.J. Lyness did not qualify for application of the *Eichleay* formula because it did not meet the third of three prerequisites: "(1) [t]here must have been a government-caused delay of uncertain duration; (2) the contractor must show that the delay extended the original time for performance or that, even though the contract was finished within the required time period, the contractor incurred additional costs because he had planned to finish earlier; and (3) the contractor must have been on standby and unable to take on other work during the delay period." Because the contractor did not provide evidence that it was required to remain on standby, the Court did not reach application of the *Eichleay* formula and adopted the Government's substantially lower calculation of damages.

TriRAD Techs. Inc., ASBCA No. 58855 (Feb. 23, 2015)

This appeal arising out of a termination for convenience presents an excellent illustration of the difference between the termination clauses prescribed by FAR Part 12 (applicable to commercial items) and Part 49 (applicable to all other terminations for convenience). At issue was a termination of a commercial items contract for the delivery of ten aircraft simulators to Randolph Air Force Base. After the contractor experienced substantial technical difficulties, the Air Force terminated TriRAD's contract initially for cause, but then later converted the termination to one for convenience. The parties could not come to agreement on the allowable convenience termination costs to which TriRAD was entitled and TriRAD ultimately appealed to the ASBCA.

The Board (Clarke, A.J.) sustained TriRAD's appeal in its entirety. In its analysis, the Board distinguished the termination provisions for commercial item contracts in FAR Part 12, which permits recovery for a "percentage of the contract price reflecting the percentage of the work performed," from the "work delivered and accepted" standard under FAR Part 49. In so doing, the Board rejected the Air Force's argument that TriRAD's recovery should be limited by the fact that only one simulator was

delivered and not accepted. Further, under the second prong of FAR 52.212-4(l)'s recovery provision, the Board held that TriRAD was entitled to recovery of "reasonable charges" not relating to work completed but that nevertheless "resulted from the termination" and that "should be reimbursed to fairly compensate the contractor." Applying these factors, the Board sustained TriRAD's appeal in the requested amount of nearly $1.3 million.

Dellew Corp., ASBCA No. 58538 (May 1, 2015)

In a second commercial item termination for convenience case, the ASBCA was called upon to decide whether termination costs allowable under the FAR Part 12 provision described above are expanded by a contract's inclusion of DFARS 252.232-7007, which arguably includes even more permissive language. Dellew held a firm-fixed-price commercial items contract with the Air Force to provide various support services. The Air Force terminated the contract for convenience, triggering both the FAR and DFARS clauses. Dellew calculated a settlement proposal primarily relying upon the DFARS provision, which the contracting officer rejected. Dellew then appealed to the ASBCA.

FAR 52.212-4(l) provides that contractor "shall" recover upon a termination for convenience, among other things, "a percentage of the contract price reflecting the percentage of the work performed . . . ." DFARS 252.232-7007(b), in turn, provides that "the total amount payable by the Government in the event of termination . . . for convenience includes costs, profit, and estimated termination settlement costs." The Board (Page, A.J.) found that the use of the term "shall" in FAR 52.212-4 established that the entitlement formula in the clause is mandatory, whereas the DFARS clause is "less definitive." Therefore, the Board found, "where FAR 52.212-4(1) includes mandatory language and contemplates actual rather than estimated costs, the contract's termination for convenience clause controls entitlement to termination settlement amounts" notwithstanding the arguably more permissive language in the DFARS clause. The Board granted the Government's motion for summary judgment as to this contract interpretation question, but denied its motion, and Appellant's cross-motion, as to the proper calculation for recovery pending additional evidence.

Gov't Contracting Res., Inc., ASBCA No. 59162 (Mar. 12, 2015)

GCR held a firm-fixed-price contract with NASA to distribute mail at Kennedy Space Center. During administration of the contract, GCR and its subcontractor entered into a collective bargaining agreement with a union representing their employees. When GCR learned that NASA did not intend to renew the contract on the same terms, it requested an equitable adjustment to cover the increased severance costs that would be incurred by it and its subcontractor pursuant to the collective bargaining agreement. The NASA contracting officer denied the request and GCR appealed to the ASBCA.

The Board (Melnick, A.J.) sustained GCR's appeal in its entirety and ordered NASA to make the equitable adjustment. Rejecting NASA's argument that GCR bore the risk of increased severance costs under the fixed-price contract, the Board observed that the contract incorporated FAR 52.222-41 and -43's Department of Labor wage determinations, which clearly provide that increases in the cost of providing a collective bargaining agreement-defined benefit entitles a contractor to a price adjustment.

Martin Edwards & Assocs., Inc., ASBCA No. 57718 (Mar. 10, 2015)

MEA held a contract with the U.S. Army to install and service clothes washers and dryers at military installations in North Carolina. During administration of the contract, the Army informed MEA that it would not be permitted to install equipment outside of normal business hours. When MEA had difficulty installing the equipment under these terms, the Army terminated the contract for cause. Subsequently, the Army converted the termination to one of convenience pursuant to a bilateral modification under which both parties waived all claims against one another related to the contract. After the modification was executed, MEA learned that the replacement contractor received permission to work on weekends. MEA then filed a claim for $850,000, arguing that the Army induced its assent to the bilateral modification by misrepresenting the hours that were available for contract performance.

The Board (McIlmail, A.J.) denied the contractor's appeal. Although a contract to waive claims against another other party is voidable where assent was "induced by either a fraudulent or a material misrepresentation," and although denying MEA the opportunity to work weekends while knowing that it would allow another contractor to do the same could in theory constitute a material misrepresentation, the Board held that on the entire record MEA had failed to meet its burden of showing that the Army intentionally made a fraudulent misrepresentation. There was no evidence presented that the Army misrepresented how it would administer the follow-on contract or that MEA made clear that it was only signing the modification because it could not work weekends.

IV. CONTRACT INTERPRETATION

A number of noteworthy decisions from the first half of 2015 articulate broadly applicable contract interpretation principles that should be considered by government contractors.

DayDanyon Corp. v. Dep't of Defense, 600 Fed. App'x 739 (Fed. Cir. Jan. 9, 2015)

DayDanyon held an indefinite-delivery-indefinite-quantity contract task order to deliver collapsible joint modular intermodal containers to the Naval Sea Systems Command. The task order provided for a minimum order of 500 containers per year over a two-year period and further required DayDanyon to deliver within 120 days of order, but did not require DayDanyon to deliver any containers after the two-year period. The Navy ordered 500 containers, which DayDanyon failed to deliver. Nevertheless, when the contract entered its final 120 days, DayDanyon submitted a certified claim alleging breach by the Navy for failure to order the minimum 1,000 units. The contracting officer denied the claim on the grounds that it was premature until the contract expired, and then terminated the contract for default and argued that the default termination relieved the Navy of the minimum order requirement. DayDanyon appealed to the ASBCA.

The Board (James, A.J.) granted summary judgment to the Navy rejecting the argument that the 120-day delivery period shortened the Government's obligation to order 1,000 units to anything less than two years. The Federal Circuit affirmed. In a unanimous panel opinion by Judge Dyk, the Court held that the plain language of the contract clearly provided for a two-year ordering period and that any interpretation of the contract terms that shortened the base order period by 120 days would render

meaningless the contract's incorporation of FAR 52.216-22(d), which repeatedly provides for the two-year ordering period. Thus, under the plain language of the contract, the government had the full two-year period to order the guaranteed minimum, whether or not DayDanyon was obligated to deliver beyond that date.

JRS Mgmt. v. United States, 600 Fed. App'x 760 (Fed. Cir. Jan. 27, 2015)

JRS held two requirements contracts with the Bureau of Prisons ("BOP") to provide (i) ceramics training and (ii) parenting classes to inmates at a federal prison camp. The ceramics class contract was terminated--first for default, then for convenience--and the parenting class contract was not renewed, both due to alleged performance deficiencies. Afterwards, BOP issued Past Performance Evaluations ("PPE") that rated JRS's performance on the two contracts as "poor" and "unsatisfactory" under certain evaluation criteria. These evaluations later caused JRS to lose a bid for a subsequent BOP contract because BOP determined that JRS was non-responsible. After submitting claims to the contracting officers, JRS ultimately filed suit in the Court of Federal Claims requesting relief from the PPEs on the grounds that they were not contemplated by the contracts and further arguing that the contracts themselves were not legally enforceable.

The Court of Federal Claims (Damich, J.) granted summary judgment to BOP holding that although the requirements contracts were unenforceable as written, "the contracts were both enforceable to the extent that they were actually performed." The Court further held that although PPEs were not mandated by FAR 42.15, that did not mean that BOP was without discretion to prepare them if it wanted to. The Federal Circuit, in a unanimous panel opinion by Judge Wallach, affirmed on all counts.

Zafer Taahhut Insaat Ve Ticaret, A.S. v. United States, 120 Fed. Cl. 604 (Apr. 3, 2015)

The *Zafer* case presents the perils of operating in an austere environment: harsh and frequently unpredictable conditions. The contractor held a firm-fixed-price contract with the Army Corps of Engineers to construct a building on Bagram Air Field in Afghanistan and was responsible under the contract for delivering construction materials and supplies to the site. In November 2011, the Pakistani government closed the border with Afghanistan for 219 days to protest the death of 24 Pakistani citizens in a U.S./NATO combat incident. Zafer claimed an equitable adjustment of nearly $770,000 due to increased delivery and storage costs resulting from the border closing. The contracting officer denied Zafer's claim, finding that the company "made a business decision" to continue procuring and shipping materials even after it was warned by the Government not to take actions that would increase cost, and after it was given an opportunity to seek a time extension. Zafer filed suit in the Court of Federal Claims.

The Court (Wheeler, J.) granted summary judgment to the Government. Looking to FAR 16.202-1 for the "single principle [that] guides the Court's analysis when a contractor seeks an equitable adjustment from the Government for additional costs incurred during the performance of a firm fixed-price contract," the Court held that "absent some compensable government action" a firm-fixed-price contract "places upon the contractor maximum risk and full responsibility for all costs and resulting

profit or loss." The Court saw no exception "to this overarching risk-allocation principle" because "the contract allocated the risk of transportation costs to the contractor."

AMEC Env't. & Infrastructure, Inc., ASBCA No. 58948 (Mar. 16, 2015)

In this appeal, the Board (O'Connell, A.J.) granted the Air Force's motion for partial summary judgment concerning approximately $28,600 in increased costs incurred by AMEC on a firm-fixed-price contract due to a change in permitting requirements by a state environmental agency. AMEC held a firm-fixed-price contract with the Air Force for the design and construction of a new facility at Andrews Air Force Base in Maryland. There was initially a "general permit" in place for the construction project covering discharges into navigable waters for Clean Water Act purposes, but during the administration of AMEC's contract a legal challenge to the renewal of that general permit forced AMEC to apply for an individual permit. AMEC sought an equitable adjustment for the cost of obtaining this individual permit, which the contracting officer denied. AMEC appealed.

The Board first rejected AMEC's argument that the increased costs resulted from a constructive change to the contract, because AMEC failed to allege that the Air Force played a role in the Maryland permitting process. The Board next held that AMEC's breach of contract claim failed because the contract "clearly required AMEC to obtain the necessary permits at no additional expense to the Government." Thus, the Board granted the Government's motion for partial summary judgment and found that AMEC could not recover the permitting costs it sought to recoup.

Optimum Servs., Inc., ASBCA No. 58755 (Mar. 25, 2015)

OSI held a contract with the Jacksonville District Corps of Engineers for the restoration of Rose Bay in Volusia County, Florida. It sponsored and submitted on behalf of its subcontractor a certified claim for increased costs incurred by the subcontractor during dredging activities due to unanticipated "firm layers of crust" encountered. Specifically, OSI and its subcontractor claimed that they were required to dredge oyster beds even though oyster bed dredging was explicitly excluded under the contract. The contracting officer denied the claim and OSI appealed, with the subcontractor pursuing the appeal.

The Board (Ting, A.J.) affirmed OSI's appeal, holding that OSI had encountered a Type I differing site condition, which is defined in FAR 52.236.2(a)(1) as "subsurface or latent physical conditions at the site which differ materially from those indicated in the contract." In a comprehensive and thorough opinion, the Board held that OSI had met its burden of establishing that: (1) "the condition indicated in the contract differs materially from those actually encountered during performance;" (2) "the conditions actually encountered were reasonably unforeseeable based on all information available to the contractor at the time of bidding;" (3) "the contractor reasonably relied upon its interpretation of the contract and contract-related documents;" and (4) "the contractor was damaged as a result of the material variation between expected and encountered conditions." Accordingly, OSI and its subcontractor were entitled to an equitable adjustment, and the Board remanded to the parties to determine quantum.

Enterprise Info. Servs., Inc. v. Dep't of Homeland Sec., CBCA 4671 (June 16, 2015)

Enterprise Information Services, Inc. ("EIS") appealed to the CBCA from a DHS contracting officer's final decision preventing it from working as a subcontractor on a program for which it also served as a prime contractor, even though the two roles would fall under different portions of the program. The relevant program was EAGLE II, which was divided into three separate "functional categories": service delivery ("FC1"), program support services ("FC2"), and independent verification and validation ("FC3"). EIS was a prime contractor under FC2, and sought to participate as a subcontractor under FCs 1 and 3.

DHS, concerned about potential conflicts of interest, had issued a "news alert" to all prime contractors within all three FCs informing them that they could not work as subcontractors to other EAGLE II prime contractors. Even so, as the CBCA (Daniels, A.J.) found, DHS had never incorporated this restriction into the contract itself, and the "news alert" did not constitute a valid modification of the contract terms. As the CBCA wrote, "[t]his is all we really need to know in order to answer the question posed. . . . Because the contract does not state that a prime contractor in one FC may not be a subcontractor in another FC, the contract cannot be read to preclude EIS, a prime contractor in FC2, from performing as a subcontractor in FC1 or FC3." Although upholding EIC's appeal, the CBCA did note that DHS was still within its right to either (1) modify the contract to include such a restriction, or (2) disqualify any participating prime contractor from further participation as a subcontractor if actual or apparent conflicts of interest were found to exist.

V. COST ISSUES

The first six months of 2015 saw a relatively few decisions on the merits arising from disputes relating to cost principles or CAS.

EJB Facilities Servs., ASBCA No. 57112 (Jan. 22, 2015)

EJB held a base operation support contract to service various Navy facilities in the Western Puget Sound area of Washington State. Mid-contract, the Navy sent EJB a proposed change for how to perform the contract and requested a cost proposal. EJB submitted a proposal for $3.54 million, which the Navy rejected due to alleged errors and double charging. The Navy thereafter issued a unilateral modification for $2.48 million. EJB sought an equitable adjustment and then submitted a certified claim for an additional $1.9 million. The contracting officer did not respond and EJB appealed the deemed denial of its claim to the ASBCA.

On appeal, the Board (Clarke, A.J.) ordered EJB to submit a Statement of Costs and for the Navy to respond to the same. The Board then heard from an expert witness for the Navy who critiqued EJB's "total cost method" of quantifying its claim. After observing that there was "an imbalance in the quality of the evidence" presented, in that the Navy's expert "appeared to understand EJB's data much better than did EJB's witnesses," the Board noted that the total cost method--whereby the measure of damages is the difference between the actual cost of the contract and the contractor's bid--is disfavored where a more reliable method of quantification is available. The burden was on EJB to prove: (1) "the impracticability of proving its actual losses directly;" (2) "the reasonableness of its bid;" (3) "the

reasonableness of its actual costs;" and (4) "lack of responsibility for the added costs." Applied to the facts of this case, the Board held that EJB had not proven the first (impracticability) or second (reasonableness) elements. Thus, the Board denied EJB's appeal in its entirety.

Watts Constructors, LLC, ASBCA No. 59602 (Jan. 26, 2015)

Watts sought an equitable adjustment for additional direct costs of just over $41,000 incurred while addressing a "differing site condition" in connection with the relocation of a sewer lift station during the performance of a utility upgrade project for the Navy at Camp Pendleton Marine Corps Base. The major issue in dispute was whether Watts could claim "field office overhead" as direct costs, or, as the Navy argued, they should be categorized as indirect costs.

In a non-precedential Rule 12.2 decision, the Board (Thrasher, A.J.) acknowledged that FAR 31.105(d)(3) provides contractors with the option of treating "field office overhead costs" as either direct or indirect, "as long as they are charged consistently." (quoting Karen L. Manos, *Government Contract Costs & Pricing,* vol. 2, § 87:D:3 at 316 (2d ed. 2004)). But because Watts had initially "elected to use the indirect method" to charge these types of costs, its "proposal for additional costs" characterizing these as direct costs was not permissible. Thus, Watts's appeal was denied.

Raytheon Co., Space & Airborne Sys., ASBCA Nos. 57801 *et al.* (May 7, 2015)

Raytheon SAS made several revisions to its CAS Disclosure Statement for the years 2004 through 2008, some of which increased costs to flexibly-priced contracts and decreased costs to fixed-price contracts (disfavoring the Government) and the rest of which had the opposite effect--decreasing costs to flexibly-priced contracts and increasing costs to fixed-price contracts (favoring the Government). The Government sought to recover the increased costs from the changes that disfavored it and refused to offset those increased costs by the decreased costs stemming from the same revisions. Raytheon SAS appealed to the Board.

With respect to the change to Raytheon SAS's CAS Disclosure Statement in 2004, the Board (O'Connell, A.J.) held that at that time there was an "established practice" of Government agencies "to allow the offset of simultaneous changes" and the Government was bound by this. But on April 8, 2005, FAR 30.606 was revised to prohibit combining cost impacts of any accounting changes unless all of the changes increase the cost to the Government. Rejecting Raytheon SAS's arguments that the FAR Councils overstepped their authority in an area reserved exclusively to the CAS Board, as well as that the contracting officer erred in his "discretionary" determination that the changes were not "desirable," the Board ruled for the Government on the post-2004 revisions. Importantly, however, the Board held that in assessing damages for changes that result in a shift of costs from fixed-price contracts to flexibly-priced contracts, the Government cannot obtain a "double recovery" for both the increase in costs to flexibly-priced contracts and the corresponding decrease in costs to fixed-price contracts because 41 U.S.C. § 1503(b) "prohibits the government from recovering greater than the aggregate increased cost to the government." The Government's position that it was entitled to both was, according to the Board, "the very definition of a windfall."

VI. ATTORNEYS' FEES AND PRIVILEGE ISSUES

Two additional cases of note from the Federal Circuit and the Court of Federal Claims addressed contractors' entitlement to attorneys' fees in connection with a previous ASBCA award, and the treatment of a party's selective waiver of the attorney-client privilege.

SUFI Network Servs., Inc. v. United States, 785 F.3d 585 (Fed. Cir. Apr. 24, 2015)

The Air Force appealed from a decision of the Court of Federal Claims (Wheeler, J.) awarding approximately $725,000 in attorneys' fees to SUFI. The attorneys' fees were connected to an earlier ASBCA award of approximately $112 million against the Air Force for breach of an exclusivity agreement. Before the Federal Circuit, the Air Force argued that the fees: (1) had been improperly awarded under the Changes clause in the contract; and (2) were unreasonable. The Air Force further alleged that the lower court had erred in granting SUFI interest on its attorneys' fees from the date on which its attorneys began working on the claim, as opposed to the date on which SUFI first requested fees and expenses from the contracting officer. SUFI cross-appealed, seeking an additional award for overhead and lost profit, which was denied by the court below.

The Federal Circuit, in a unanimous panel opinion authored by Judge Reyna, affirmed the attorneys' fees award to SUFI, added an additional award for overhead and lost profit, and remanded to the Court of Federal Claims for reconsideration of the date of interest accrual. On the issue of attorneys' fees, the Court did not address the Changes clause but instead affirmed the lower court's holding that the contractor was entitled to these fees under the common law, under which damages for breach of contract are intended to place the wronged party in the position it would have been but for the breach. On the reasonableness of the fees, the Federal Circuit affirmed that the attorneys' rates, which were consistent with prevailing rates in the community, were appropriate and reasonable. The Court did side with the Air Force, however, in its assertion that the lower court should not have awarded interest for attorneys' fees from the date that SUFI's attorneys first began working on the claim, because the attorneys were retained under a contingency fee arrangement. Finally, the Federal Circuit held that because the contract between SUFI and the Air Force was a non-appropriated funds contract, the FAR (and specifically FAR 52.215-23(b)) did not apply to bar "excessive pass-through charges." Thus, applying the common law, the Court allowed SUFI to recover for both overhead and lost profits associated with pursuing it attorneys' fee claim.

UUSI, LLC v. United States, 121 Fed. Cl. 218 (Fed. Cl. May 5, 2015)

The *UUSI* case highlights the general disfavor courts have for parties selectively waiving the attorney-client privilege over self-serving communications while at the same time invoking the privilege over potentially damaging communications regarding the same subject matter. The underlying case is a patent dispute surrounding electronic starters in Army vehicles. Third-party defendant GHSP filed a summary judgement motion on laches and estoppel grounds, arguing that "Plaintiffs unreasonably delayed filing suit until 2012, despite having actual and constructive knowledge of their infringement claims as early as December 14, 2000." To prove prejudicial delay, GHSP relied on the affidavit of the

founder of GHSP's predecessor-in-interest, who in turn said that he relied on the advice of his patent counsel and concluded that any alleged patent infringement claims were meritless.

Plaintiffs then issued a subpoena to the patent counsel to produce documents relevant to the alleged patent infringement. GHSP claimed privilege over the documents and plaintiffs filed a motion to compel. The Court of Federal Claims (Williams, J.) granted the motion, holding that "[i]t would be unfair for GHSP to waive the attorney-client privilege with respect to the . . . discussions on . . . claims of patent infringement but then invoke the privilege to shield documents authored by counsel and [an] engineer that also reflect their discussions on [the] infringement claims."

VII. ADDITIONAL CASES OF NOTE

Although this update focuses on government contracts litigation arising out of the boards of contract appeals, Court of Federal Claims, and Federal Circuit, several decisions from other tribunals merit the attention of our government contractor clients.

A. Supreme Court Addresses Wartime Suspension of Limitations Act and False Claims Act's "First-to-File Bar"

As covered in greater detail in our 2015 Mid-Year False Claims Act Update, on May 26, 2015 the U.S. Supreme Court issued a seminal False Claims Act ruling in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015). In this case the Court was asked to determine whether the Wartime Suspension of Limitations Act ("WLSA"), which suspends the statute of limitations for criminal False Claims Act offenses during times of war, also acts to suspend the statute of limitations for claims of civil fraud. The U.S. Court of Appeals for the Fourth Circuit held below that it did, but the Supreme Court reversed, holding that the WLSA does not apply to civil claims because "[t]he text, structure, and history of the WSLA show that the Act applies only to criminal offenses."

Also of significance, the Court ruled on the applicability of the FCA's so-called "first-to-file bar"--which provides that "no person other than the Government may intervene or bring a related action based on the facts underlying the *pending* action"--to cases brought when earlier-filed suits are no longer pending. The Court affirmed the Fourth Circuit's decision below on this issue holding that the bar, based on its plain language, does not preclude a later-filed *qui tam* action if the prior suit has been dismissed.

B. Sixth Circuit Reverses $657 Million False Claims Act Judgment (Again)

On April 6, 2015, the Sixth Circuit reversed a $657 million False Claims Act judgment against United Technologies Corporation in connection with alleged overbilling of the U.S. Air Force for F-15 and F-16 fighter jet engines. *United States v. United Techs. Corp.*, 782 F.3d 718 (6th Cir. 2015). The case concerns allegedly false cost estimates submitted by UTC's Pratt & Whitney business unit to the Air Force in a 1983 competition with GE Aircraft. The first time the case was before the Sixth Circuit, the Court affirmed the trial court's finding of liability and imposition of approximately $7 million in statutory False Claims Act penalties but remanded to the district court to reassess its holding that the

Air Force did not suffer any damages because notwithstanding the false statements Pratt & Whitney's price reflected fair market competition.

On remand, the U.S. District Court for the Southern District of Ohio (Rose, J.) boosted the Government's award by $657 million in damages, including False Claims Act trebling and prejudgment interest. Reversing this damages assessment for a second time, the Sixth Circuit held that the Air Force had failed to prove that it was damaged by the false estimates because, among other things, it failed to offer a damages expert who could speak to the impact of competition on its damages, instead relying solely on its expert auditor who, in calculating damages, "refused to consider either the role that competition between Pratt and GE Aircraft (and other factors) played in determining reasonable and fair prices, or whether that competition and the prices that resulted from it eliminated any damages to the government." In remanding the case for a second time, the Sixth Circuit remarked upon its "temptation" to hold that "after seventeen years of litigation about a fraud that occurred thirty-two years ago, the time has come to end this dispute." Even so, the Sixth Circuit remanded, noting that the district court would be in the best position to decide whether the government should have another opportunity to prove damages.

C. District Court Rejects DCAA Malpractice Suit for Lack of Jurisdiction

On April 30, 2015, the U.S. District Court for the District of Delaware (Andrews, J.) dismissed a Federal Tort Claims Act suit brought by KBR alleging that an audit conducted by the DCAA--which found that KBR had billed almost $100 million in purportedly unallowable costs--ran counter to mandatory auditing standards and amounted to malpractice. *Kellogg Brown & Root Servs., Inc. v. United States*, 2015 WL 1966532 (D. Del. Apr. 30, 2015). The audit triggered a nearly $45 million withholding by the U.S. Army, and also caused DOJ to bring suit against KBR for alleged False Claims Act violations. KBR defeated both actions, and brought suit against DCAA to recover approximately $12.5 million in attorney's fees that it had incurred in the course of its defense.

To the disappointment of many who have contended with DCAA audits, the Court held that it did not have jurisdiction over the lawsuit under the "discretionary function exception" to the Federal Tort Claims Act, which protects "governmental actions and decisions based on considerations of public policy." Specifically, the Court held that every decision challenged--the DCAA's audit opinion, the contracting officer's final decision upholding the same, and DOJ's decision to bring the False Claims Act suit--was discretionary in nature and therefore not subject to challenge.

VIII. CONCLUSION

We thank our readers for their time and attention and look forward to continuing to keep you all informed on government contracts litigation developments in the years to come.

Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding the issues discussed above. Please contact the Gibson Dunn lawyer with whom you usually work, or any of the following:

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