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# Jurisdictional Update On 2015 Gov't Contracts Cases: Part 1

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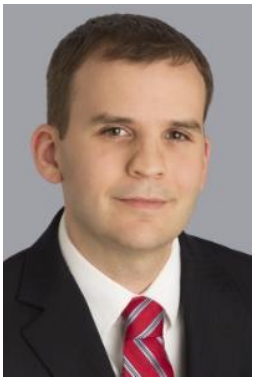

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This is the first in a two-part article analyzing cases from the first half of 2015 that address the unique jurisdictional requirements that apply when contractors sue the U.S. government in the tribunals that hear government contracts disputes — the 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. Contractors must consider these jurisdictional implications on par with the substantive merits of the dispute for, as the cases below demonstrate, the procedural nuances of litigating government contracts disputes can easily make or (more often) break the case.

**Defining the Claim**

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

K-Con contracted with the U.S. Coast Guard to build a "cutter support team building." The contract was to be completed by November 2004, with K-Con agreeing to pay 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 constituted an "impermissible penalty;" and (2) liquidated damages were inappropriate because the Coast Guard failed to authorize extensions to the completion date as required by the contract. The contracting officer denied the claim and K-Con filed suit in the COFC. While that litigation was ongoing, K-Con submitted a second letter to the contracting officer requesting 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 to request relief on these additional grounds.

Judge Margaret M. Sweeney of the COFC 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; 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 Richard G. 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 Contract Disputes Act confers jurisdiction on the COFC 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.

**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 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 Services Inc., 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. Armylogistical support contract. KBR immediately moved to dismiss, arguing that the government's claim was time barred by the CDA because it had accrued more than six years before the final decision. After a hearing on KBR's motion, but before the board issued its decision, the Federal Circuit issued its decision in Sikorsky. In supplemental briefing and argument, both parties consented to the board converting the motion to dismiss to cross motions for summary judgment.

The ASBCA (Administrative Judge Cheryl L. Scott) 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, the board held KBR did not show that the Army knew or should have known in 2005 (when the Defense Contract Audit Agency 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 (Administrative Judge Diana S. Dickinson) 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.

**Timeliness of Appeals**

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 taken within 90 days of receiving the contracting officer's final decision.

***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 Army counsel, rather than the ASBCA. Because this "appeal" was submitted to government counsel within the 90-day window, the board (Administrative Judge Elizabeth W. Newsom) found the misdirection was not fatal and determined it would exercise jurisdiction. With respect to the second appeal, the board noted 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 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 emailed on May 1 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 Aug. 18, which was within the 90-day requirement only if the "date of receipt" was deemed to be May 19 or later.

The board (Administrative Judge Lynda T. O'Sullivan) granted the DLA's motion to dismiss the final decision received by TTF on May 8, but denied the motion for the other two. 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 noted that electronic

correspondence alone may suffice to begin the 90-day clock if the contractor has agreed to receive correspondence in that format.

***Tessada & Associates Inc., ASBCA No. 59446 (Apr. 21, 2015)***

In another decision addressing the timeliness of mailed notices of appeals, the board (Administrative Judge Jack Delman) noted a nonintuitive distinction in the case law concerning method of delivery: when a notice of appeal is delivered through the Postal Service, the appeal is deemed filed 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. The contractor transmitted a notice of appeal to the board via FedEx on July 22 (88th day), which was delivered to the board on July 25 (91st day). But it also on July 24 (90th day) sent a copy of the appeal notice to the contracting officer via U.S. mail, which was not actually received until Aug. 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 was sufficient to vest jurisdiction even as the FedEx-delivered notice (received one month earlier) was not.

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 COFC 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, the CDA provides the contracting officer with 60 days to either: (1) "issue a decision;" or (2) "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 COFC and the NOAA filed a motion to dismiss for failure to obtain a valid contracting officer's final decision.

The court (Judge Lydia Kay Griggsby) denied the motion to dismiss, holding that the government is allowed only one extension for issuing a contracting officer's final decision, which 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."

In part two of this article, we'll examine decisions discussing the CDA's requirements for a valid claim or contract; the standard for directing the government to file the complaint; the impact of a contractor's

forum selection; and the standards for claiming fraud in the government contracts tribunals.

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