SESSION 8

Claims, Disputes, and Terminations

WEDNESDAY, JANUARY 27, 2021
12:00 PM to 2:00 PM

Pub K
PUBLIC CONTRACTS

Jeri K. Somers
Chair
Civilian Board of Contract Appeals

Robert Nichols
Partner
Nichols Liu

Paul Khoury
Partner
Wiley

Seth Locke
Partner
Perkins Coie

Daniel Graham
Partner
Vinson & Elkins

Overview

- Constructive Changes & Terminations
- Government Claims and Investigations
- Jurisdiction
- Elements of Entitlement
- Timeliness and Waiver

Constructive Changes and Terminations

- *Kiewit Infrastructure v. United States*, 972 F.3d 1322 (Fed. Cir. 2020)(Nichols)
- *Pernix Serka v. Department of State*, CBCA No 5683, 20-1 BCA ¶ 37,589 (Nichols)
- *Raytheon*, ASBCA No. 60448, 20-1 BCA ¶ 37,637 (Somers J.)
- *ACLR v. United States*, No. 15-767C (Fed. Cl. Apr. 6, 2020) (Nichols)
- *Valerie Lewis Janitorial v. Department of Veterans Affairs*, CBCA No. 4026, 2020 WL 2507940 (May 5, 2020) (Locke)
- *BGT Holdings LLC v. United States*, Fed. Cir. No. 20-1084 (Dec. 23, 2020) (Graham)
- *VET4U, LLC v. Dep't of Veterans Affairs*, CBCA No. 611, 20-1 BCA ¶ 37,504 (Graham)

Kiewit Infrastructure W. Co. v. United States, Fed. Cir. No. 2019-2125 (Aug. 26, 2020) (Nichols)

- Contractor claimed constructive change because government required purchase of wetland credits for worksite when contract provided that environmental impact analysis was unnecessary.
- Government argued that environmental impact clause only applied to certain environmental laws, not to wetland credits under Clean Water Act.
- Court found constructive change: "Contract language matters." Environmental impact clause was not limited. If government wanted to exclude wetland credits, it should have expressly done so.

Pernix Serka Joint Venture v. Department of State, CBCA No. 5683 (April 22, 2020) (Nichols)

- Contractor sought costs incurred as a result of Ebola virus outbreak in Africa.
- CBCA denied recovery because contractor had firm fixed-price contract under which contractor assumed risk of unexpected costs not attributable to the government.
- Contractor contended it could recover under cardinal or constructive change theories, but board found that the government never directed contractor to change its performance in light of the virus.

Raytheon, ASBCA No. 60448, 20-1 BCA ¶ 37,637 (Somers J.)

- Contract required production of missiles over a three-year period, and engineering/management over a one-year period
- Contract ambiguous as to whether engineering/management was to be provided during the production period
- Board determined that the parties' prior course of conduct indicated that it did not, and so the agency's requirement for the contractor to do so was a constructive change

ACLR, LLC v. United States, COFC No. 15-767C (April 6, 2020) (Nichols)

- Contractor alleged government breached the contract when it directed contractor to stop providing audit services.
- COFC found no breach, but rather a constructive termination for convenience—a judicial doctrine that allows the court to retroactively justify a termination when the government's basis is inadequate.
- Although asserted bases for termination were questionable, the government's concerns about underlying data in audits amounted to a change in circumstances that otherwise justified termination.

Valerie Lewis Janitorial v. Department of Veterans Affairs, CBCA No. 4026, 2020 WL 2507940 (May 5, 2020) (Locke)

- A bacterial infection broke out at a VA facility, leading to increased cleaning costs for the contractor.
- The outbreak caused the contractor to employ a “two-step” cleaning process to prevent its further spread.
- The Board determined that the requirement to use the “two-step” cleaning process was a constructive change.

BGT Holdings LLC v. United States, Fed. Cir. No. 20-1084 (Dec. 23, 2020) (Graham)

- Requirement in FAR 52.245-1 that the government "shall consider an equitable adjustment" when government-furnished equipment is increased or decreased requires a good faith and reasonable assessment of entitlement and not merely "think[ing] over" a request before denying it
- Fed. Cir. rejected the argument that the clause "imposed no duty to grant an adjustment even if BGT could prove financial loss due to the government's withdrawal of the [GFE]," and remanded the case for a determination "whether BGT is entitled to an equitable adjustment as fair compensation"
- "It is dubious, to say the least, that the drafters of the FAR's government property clause, 48 C.F.R. § 52.245-1, envisioned that the government would essentially have an unfettered right to withdraw promised GFE from a contract without consequence."

VET4U, LLC v. Dep't of Veterans Affairs, CBCA No. 611, 20-1 BCA ¶ 37,504 (Graham)

- Vet4U appealed 23 claims totaling $296,853. Appellant prevailed in recovering $46,052 and sought attorneys' fees under EAJA, 5 U.S.C. § 504.
- The Board ruled that the agency's position was not reasonable "simply because it prevailed on the majority of the claims or on a particular issue or argument." The Board looked "not only to the agency's legal stance during the litigation, but also to the agency's conduct during performance of the contract."
- As Vet4U's costs mounted for issues where the government was responsible, the CO "sent stern emails—sometimes bordering on verbally abusive—from offsite," never visited the project site, and did not attend project meetings.
- "[T]he VA's failure to recognize its own hand in increasing the costs of performance prevented the parties from resolving disputes in a more cost-efficient manner."

Government Claims and Investigations

- *Agility Public Warehouse Co. v. United States*, 969 F.3d 1355 (Fed. Cir. 2020) (Khoury)
- *In re Fluor Intercontinental*, 803 F. App'x 697 (4th Cir. 2020) (Khoury)
- *Supreme Foodservice*, ASBCA Nos. 57884 et al., 20-1 BCA ¶ 37,618 (Graham)

Agility Public Warehouse Co. v. United States, 969 F.3d 1355 (Fed. Cir. 2020) (Khoury)

- Contractor held agreement with Iraq, which was funded by the US. A DCAA audit determined that the contractor was overpaid.
- The United States issued a COFD for the amount and began withholding funds due to the contractor under a separate contract with the US under the Debt Collection Act.
- COFC upheld the withholding as effectively unreviewable, but the Federal Circuit reversed, holding that the US needed to establish the validity of the underlying debt.

In re Fluor Intercontinental, 803 F. App'x 697 (4th Cir. 2020) (Khoury)

- Contractor made a mandatory disclosure following an internal investigation into one of its employees, who was terminated.
- The employee sought discovery of the privileged report—and the district court agreed that the mandatory disclosure waived privilege over the report.
- The Fourth Circuit granted a mandamus petition, vacating the district court opinion, holding that a mandatory disclosure does not, on its own, waive privilege.

Supreme Foodservice, ASBCA Nos. 57884 et al., 20-1 BCA ¶ 37,618 (Graham)

- Multiple appeals arising out of contract for delivery of food to US forces in Afghanistan where parties agreed on tentative rates and contractor was paid at lower interim rates pending DLA's audit of the tentative rates
  - Nos. 57884 and 61361—DLA established final rates and demanded the return of $1.1 billion in interim payments
  - Nos. 58666 and 59636—Supreme sought $2.4 billion based on the agreed upon tentative rates
  - No. 59811—DLA asked the Board to declare the contract void ab initio due to Supreme's guilty plea for major fraud for using a middleman company it owned to inflate the tentative rates, and for a variety of other allegedly fraudulent or dishonest actions. DLA sought the return of all payments to Supreme under the contract, totaling more than $8 billion.

Supreme Foodservice (cont'd) (Graham)

- The Board refused to declare the contract void ab initio. Although the Board acknowledged the CO's testimony that she would not have signed a contract modification establishing tentative rates had she known of Supreme's fraud, "not every fraudulent or corrupt action gives rise to a void contract," and Supreme had already paid around $400 million to settle criminal and False Claims Act claims.
- "While it is undisputed that Supreme committed fraud, it is also undisputed that Supreme delivered more than 3 billion pounds of quality food that has been consumed by U.S. forces. Supreme successfully delivered that food in some of the most dangerous places on earth. We see no basis for awarding DLA any relief beyond that which we have awarded in this opinion or that which it obtained in the district court."

Supreme Foodservice (cont'd) (Graham)

- The Board further ruled that DLA could not claw back the full $1.1 billion based on the rates established by DLA, holding that some disputed cost claims had been legitimate.
- The DLA had already withheld about $540 million in payments, and there was a "significant possibility" that it would have to give some of that back to Supreme.
- The Board ruled that Supreme could not claim interest because Supreme had committed the first material breach of the contract by its fraud.

Jurisdiction

- *Odyssey International*, ASBCA No. 62062, 20-1 BCA ¶ 37,510 (Somers J.)
- *Kamaludin Sylman CSC*, ASBCA Nos 62006, 20-1 BCA ¶ 37,694 (Khoury)
- *Mountain Movers/Ainsworth-Benning, LLC*, ASBCA No. 62164, 20-1 BCA ¶ 37,664 (Locke)

Odyssey International, ASBCA No. 62062, 20-1 BCA ¶ 37,510 (Somers J.)

- Contractor brought numerous claims, including for consequential damages.
- Submitted a certified claim for “at least” $15M, which the agency denied.
- The Board granted the motion to dismiss for lack of jurisdiction, holding that the words “at least” meant that the contractor did not submit a claim for a “sum certain.”

Kamaludin Sylman CSC, ASBCA Nos 62006, 20-1 BCA ¶ 37,694 (Khoury)

- Contractor submitted a certified claim via email, signing it by typing the employee's name. The government moved to dismiss, citing years of Board precedent that an email signature is not valid.
- The Board reversed precedent, holding that an email signature can satisfy the certification requirements of the CDA.
- Three judges signed a concurring opinion that, while the Board's precedent shouldn't be reversed, the certifications were merely defective and could be cured for jurisdictional purposes.

Mountain Movers/Ainsworth-Benning, LLC, ASBCA No. 62164, 20-1 BCA ¶ 37,664 (Locke)

- CO issued a final decision, which the contractor appealed. The government later discovered the contractor may have committed fraud, and issued a second final decision, rescinding the first.
- The government moved to dismiss the appeal because the Board lacks jurisdiction over fraud claims.
- The Board denied the motion, holding that the original final decision had nothing to do with fraud.

Elements of Entitlement

- *Kellogg Brown & Root v. Secretary of the Army*, 973 F.3d 1366 (Fed. Cir. 2020) (Nichols)
- *MicroTechnologies*, ASBCA No. 62394, 20-1 BCA ¶ 37,632 (Somers J.)
- *Kellogg Brown & Root*, ASBCA No. 59385, 20-1 BCA ¶ 37 (Somers J.)
- *Tolliver Group, Inc. v. United States*, 146 Fed. Cl. 475 (2020) (Locke)
- *The Boeing Company v. United States*, Fed. Cir. No. 2019-2147 (Dec. 21, 2020) (Graham)

Kellogg Brown & Root Services, Inc. v. Secretary of Army, Fed. Cir. No. 2019-1683 (Sept. 1, 2020) (Nichols)

- KBR sought delay costs incurred delivering trailers to Iraq, alleging the government failed to provide security.
- Fed. Cir. declined to even address delay issue b/c KBR had not shown that claimed costs were reasonable.
  - KBR's claim assumed perfect performance by subcontractor.
  - KBR assumed all delays were caused by the government.
  - KBR failed to provide evidence of costs—no witnesses, no substantiating data.
  - "Jury verdict" method for assessing costs was not appropriate.

MicroTechnologies ASBCA No. 62394, 20-1 BCA ¶ 37,632 (Somers J.)

- Contract incorporated supplemental terms, which the contractor sought to enforce.
- ASBCA held the terms—incorporated into the contract—were unenforceable.
- The government personnel who agreed to the terms lacked authority to bind the government.

Kellogg Brown & Root Services, Inc., ASBCA No. 59385, 20-1 BCA ¶ 37,656 (Somers J.)

- KBR sought to recover costs it incurred responding to labor strikes and the Djibouti government's labor standards.
  - KBR brought these claims under numerous legal theories, such as breach of contract, breach of good faith, superior knowledge, etc.
- The Board rejected every theory—the government was not on the hook for costs incurred by KBR resulting from its own labor practices falling short of host nation standards

Tolliver Group, Inc. v. United States, 146 Fed. Cl. 475 (2020) (Locke)

- Contractor was entitled to recover legal fees due to defending against a *qui tam* suit.
- The government's failure to provide a "technical data package" in turn prevented the contractor from performing in accordance with the PWS, which was the basis for the FCA suit.
- The court found that the government's failure breached the implied warranty of satisfactory performance, and the contractor was entitled to an equitable adjustment for the legal fees incurred in defense of the lawsuit.

The Boeing Company v. United States, Fed. Cir. No. 2019-2147 (Dec. 21, 2020) (Graham)

- Contractors can mark technical data delivered with “unlimited rights” under DFARS 252.227-7013 in order to notify third parties of the rights retained by the contractor, so long as the markings do not restrict the government’s rights.
- Boeing delivered to the USAF “unlimited rights” data with a legend stating that the data were “Boeing Proprietary” and that third parties could use and disclose the data “Only as Permitted in Writing by Boeing or by the U.S. Government”
- Fed. Cir. agreed with Boeing that DFARS marking procedures apply “only in situations when a contractor seeks to assert restrictions on the government's rights,” and do not address “any legends that a contractor may mark on its data when it seeks to restrict only the rights of non-government third parties”
  - Fed. Cir. remanded to determine whether Boeing’s legend in fact restricted the Government’s rights

Timeliness and Waiver

- *Boeing v. United States*, 968 F.3d 1371 (Fed. Cir. 2020) (Nichols)
- *Parsons Evergreene, LLC v. Secretary of the Air Force*, 968 F.3d 1359 (Fed. Cir. 2020) (Khoury)
- *Electric Boat Corp. v. Secretary of the Navy*, 958 F.3d 1372 (Fed. Cir. 2020) (Locke)

The Boeing Company v. United States, Fed. Cir. No. 2019-2148 (Aug. 10, 2020) (Nichols)

- Boeing alleged the government breached the contract by applying cost accounting standards in a way that conflicted with federal statute.
- COFC found Boeing waived claim—conflict between standards and statute was ambiguity that Boeing should have raised pre-award.
- Fed. Cir. held no waiver due to futility of pre-award challenge:
  - No pre-award challenge under CDA because no existing contract
  - No pre-award protest because cost accounting concerns contract administration
  - No APA challenge because disputes involving cost accounting exempt from judicial review

Parsons Evergreene, LLC v. Secretary of the Air Force, 968 F.3d 1359 (Fed. Cir. 2020) (Khoury)

- Multiple consolidated appeals—appeal of one to Federal Circuit is timely, but the other is not.
- The Board heard the appeals together but deconsolidated them in the decision for clarity and administrative convenience.
  - Contractor moved for reconsideration of one decision but not the other
  - After the reconsideration decision, the contractor appealed both to the Fed. Cir.
- The court dismissed one appeal as untimely—while the reconsideration motion tolled that appeal, it did not toll the other.

Electric Boat Corp. v. Secretary of the Navy, 958 F.3d 1372 (Fed. Cir. 2020) (Locke)

- Contract contained a clause entitling contractor to an equitable adjustment if a change in law increased the cost of performance.
- Fed. Cir. held that the contractor incurred the injury when a regulation that increased its costs of performance was issued, and the Navy's liability was fixed during the next price adjustment.
- Fed. Cir. rejected contractor argument that its claim did not accrue until the government denied its request for a price adjustment.

Challenge Question

Submit your answer to craig@pubklaw.com
Subject line: Panel 8 Challenge Question

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