This material from The Government Contractor has been reproduced with the permission of the publisher, Thomson Reuters. Further use without the permission of the publisher is prohibited. For further information or to subscribe, call 1-800-328-9352 or visit http://legal.thomsonreuters.com. For information on setting up a Westlaw alert to receive The Government Contractor in your inbox each week, call your law librarian or a Westlaw reference attorney (1-800-733-2889).

The Government Contractor®

THOMSON REUTERS®

Information and Analysis on Legal Aspects of Procurement

Vol. 65, No. 27 Juy 26, 2023

Focus

¶ 198

FEATURE COMMENT: The Wheels Of CDA Case Law Go Round And Round: A Case Law Update All Through The Town (Or The First Half Of 2023)

In this biannual case law update, we ask our readers to join us for a ride on our proverbial bus through developments in Contract Disputes Act case law in the first half of 2023. While CDA litigation is never simple, we take inspiration from time- and toddler-tested rhymes to navigate through the "dark, dark wood." If we cannot live up to the "Little Golden Books" of yore, we hope to at least avoid the travails of the "three blind mice."

"Humpty Dumpty Had a Great Fall": Making the Lemon of a Default Termination into the Lemonade of a Termination for Convenience—The first half of 2023 was marked by a veritable parade of Court and Board decisions converting contractor terminations for default into terminations for convenience. These decisions together provide hope and, in some cases, a road map, should a contractor ever have "a great fall," that "all the king's horses and all the king's men" could in fact put Humpty together again.

Why did Humpty Fall?: A pair of decisions granted the contractor relief from a default termination by finding the Government actually breached the contract before the contractor did. First, in *Hughes Grp., LLC v. Dep't of Veterans Affairs*, CBCA 5964, 23-1 BCA ¶ 38,297, the Civilian Board of Contract Appeals held that despite a contractor's performance problems, the agency's prior material breach waived its right to terminate the contract for cause. The VA issued 27 contract deficiency reports to its janitorial contractor, but rather than exercising its right under the contract to terminate for poor performance, the VA simply stopped paying the contractor. Months later, the VA finally paid the contractor in full, without reserving any rights, and then shortly thereafter issued a termination for default. The Board held because the "VA had no legal basis to stop paying Hughes while Hughes continued to work … the VA breached the contract." Id. Further, the Board reasoned that when the agency paid the contractor in full, "the agency waived Hughes' performance deficiencies to date, and any subsequent campaign to terminate the contract required the VA to issue a new cure notice, which it did not do." Id. The Board explained that the contractor continued performance in reliance on the agency's promise of payment, and "the agency waived the termination due to the amount of time that passed" (five months). Id. The Board accordingly converted the termination to one for convenience.

Similarly, in *Schneider Elec. Bldgs. Americas, Inc. v. U.S.*, 163 Fed. Cl. 708 (2023), the Court of Federal Claims overturned the Government's "drastic decision of terminating Schneider for default after receiving 91.45% of the value of the contract" for implementation of certain energy conservation measures (ECMs) at a Government facility. Id. at 725. The contract followed the structure of the National Energy Conservation Policy Act, whereby contractors incur the upfront costs of acquiring and installing energy savings measures, and in exchange receive a share of any resulting energy savings. One category of ECM the contractor installed were boilers; the Government claimed the boilers never worked properly and, after several alleged boiler failures, refused to pay the contractor's Year 5 invoice (later only remitting a partial payment). After a series of deteriorating interactions, the agency terminated the contract for default, which the Court

 © 2023 Thomson Reuters

found improper because, among other reasons, the agency's unilateral withholding of significant portions of the contractor's annual payments constituted a prior material breach. The Court eloquently concluded: "Feeling aggrieved by aspects of Schneider's performance—rightly or wrongly—the U.S.' freewheeling stroll down the road to default termination involved turning away from the paths specifically laid out by the Contract's terms. The party that hastily diverts from the path provided by the contract's terms is bound to meet its destiny on the road it took to avoid it." Id. at 725.

What if Humpty Was Pushed?: Another reason a tribunal may overturn a default termination is if the Government somehow caused or contributed to the contract performance issues. This is what happened in *O-Tech Solutions, LLC*, ASBCA 61898, 23-1 BCA ¶ 38,338, in which the Armed Services Board of Contract Appeals held a contractor's delay was excusable due to several Government-caused delays, rendering the default termination improper. Specifically, the Government delayed issuing approval for the contractor to proceed, despite the contracting officer being on notice that the contractor was unable to proceed without Government action. The Board found that had the Government granted the contractor an extension commensurate with the number of days it delayed the project, the contractor could have completed the project within the extended deadline. Because the contractor's default was excusable, the Board converted the termination to one for convenience.

The Government Cannot Turn Humpty into Alice's White Rabbit: In *Consorzio Stabile GMG S.c.ar.l.*, 23-1 BCA ¶ 38, 347, the Board held the Navy's default termination of a contract for the design and construction of a vestibule in Bahrain was unjustified because the Navy had waived the project completion date and failed to establish a new deadline. Three weeks before the end of contract performance, the Navy "issued a partial notice to proceed for work that would take months to complete," and did not reserve its rights to impose the then-current contract completion date or assess liquidated damages. Id. In fact, the Board found that "at no time" after this limited notice to proceed did the Navy "even hint[]" that "time was still of the essence for the contract." Id. Up until issuing a show cause notice, the Navy and the contractor were attempting to negotiate a contract modification that included a time extension, and the Navy continued to routinely approve the contractor's submittals. The Board concluded that "the Navy's affirmative acts showed forbearance, which resulted in Consorzio's reliance to continue working on the Task Order." Id. Simply, the contractor could not be "late" when the "important date" was not set. The Board again sustained the contractor's appeal and converted the default termination into one for convenience.

Procedural Points for All the King's Horses: The CDA contains several procedural steeplechase hurdles that can trip up all the king's horses in their race to put Humpty together again, such as the presentment requirement. In *H&M Assocs., LLC v. U.S.*, 165 Fed. Cl. 174 (2023), the contractor directly appealed a termination for default to the Court of Federal Claims, alleging not only that the default termination was improper but also that the Government had breached its duty to cooperate and duty of good faith and fair dealing. The Government moved to dismiss the contractor's claims seeking a modification of the contract or equitable adjustment on the ground that the Court lacked jurisdiction, and while conceding jurisdiction over the contractor's prior material breach claims, the Government moved to dismiss that one on the ground that the contractor failed to state a claim. Relying on the U.S. Court of Appeals for the Federal Circuit's decision in *M. Maropakis Carpentry, Inc. v. U.S.*, 609 F.3d 1323 (Fed. Cir. 2010); 52 GC ¶ 225, the Court agreed that it lacked jurisdiction to award monetary relief or modify/adjust the contract because the contractor never presented such claims to the CO for a final decision. For this reason, the Court dismissed the breach of the duty of good faith and fair dealing claim and "any part of Plaintiff's defenses to the default termination that effectively request a change in the contract — whether that be an extension of time, a contractual modification, or an equitable adjustment." Id. at 183. Thus, while the Court had jurisdiction over the prior material breach and the CO's abuse of discretion defenses, it lacked jurisdiction over the contractor's commercial impracticability defense, involving an "alleged constructive change to the contract requiring a CO's final decision." Id.

In *Dep't of Transp. v. Eagle Peak Rock & Paving, Inc.*, 69 F.4th 1367 (Fed. Cir. 2023); 65 GC ¶ 173, the Federal Circuit vacated a CBCA decision converting a termination for default to one for convenience on the ground that the Board applied the wrong standard of review under the CDA. The Federal Circuit observed that once appealed to the Board or a Court, the CDA action shall proceed de novo and held that the CBCA "committed legal errors in extensively focusing on the contracting officer's reasoning instead of simply judging de novo, on the evidence developed in the Board proceeding, the [termination for default] claim before it." 69 F.4th at 1374. The Court explained that the "reasonableness" of a

 © 2023 Thomson Reuters

termination decision is rooted not in the CO's own reasoning, but in a "determination by the Board on the evidentiary record developed in the proceeding." Id. at 1375. The Federal Circuit held: "This is a de novo adjudication: If the adjudicatory tribunal finds, based on all the evidence before it, that the standard for termination under the contract's default clause is met, it is to uphold that decision whether or not the contracting officer stated the basis for that finding." Id. at 1376.

Don't Scramble Humpty through Improprieties in the Formation of the Contract: In *Gilbert Solutions, LLC*, ASBCA 63508, 2023 WL 4535894 (June 22, 2023), the Board held a contract void ab initio due to material misrepresentations in the bid, depriving the Board of jurisdiction to consider an appeal of the default termination. The Board recognized that it could "not make findings of fraud, but … may make findings as to the material facts relating to material misrepresentations, and how those facts affect the contract." Id. For the Government to establish the defense of a voidable contract due to a material misrepresentation, the Government must establish: (i) the contractor's misrepresentation was fraudulent or material; (ii) the misrepresentation induced the Government to enter into the contract; and (iii) the Government was reasonable or justified in relying on the misrepresentation. The Board found that on the record before it the contractor signed the contract with the Government for a specific product even though the contractor intended to provide a different product. The Board also found that as "an experienced government contractor," the contractor "likely knew that the government would not award it the contract if it told them it intended to offer a trailer different from the one specified in the [request for quotations], and never provided either 'verbal or written notice' to the Government that it intended to withdraw its bid even though it discovered, prior to contract award, that the product it proposed was not available in time." Id. The Board also observed that even if the CO had learned of the contractor's intention to offer a different product prior to contract award, the "contracting officer had no authority to waive the specifications after bid close"; rather, in order to protect the integrity of the bidding, the CO would have had to allow other bidders a similar opportunity to propose a different product than the one specified in the RFQ. Id. The Board found that the "government clearly relied upon" the contractor misrepresentation and likely would have awarded to a different vendor had it known the contractor intended to provide a different product. Id. Finally, the Board found the Government reasonably relied on the contractor's proposal representations; the contractor even confirmed in response to a CO inquiry that it had the items in stock and could meet the delivery schedule. Because the Board found the contract void ab initio, and thus no CDA contract "in being," the Board lacked jurisdiction to consider the contractor's appeal of the termination for cause.

"How Much is that Doggie in the Window?" Lessons from Recent Cost-Related Jurisprudence—A "penny, penny" may be "easy spent" and "only worth one cent," but cost issues in Government contracts can bedevil every "tinker, tailor, soldier, sailor." Three cases in the first half of 2023 contained notable cost-related holdings.

"One, Two Buckle My Shoe, Three, Four" Unallowable Costs and More: In the highly publicized decision of *Sec'y of Def. v. Raytheon*, 56 F.4th 1337 (Fed. Cir. 2023); 65 GC ¶ 6, the Federal Circuit reversed a prior ASBCA decision and found two categories of costs related to the contractor's Government Relations and Corporate Development departments unallowable. The first involved the contractor's practice of having its employees report time on lobbying activities spent during the work day, and deducting those costs from the contractor's incurred cost submissions to the Government. These same employees, however, engaged in various lobbying activities outside of business hours, which they did not report and thus were not removed from the incurred cost submission. Based on its rejection of the contractor's argument that the time worked beyond 40 hours was additional time, not covered by the salaries, the Federal Circuit concluded: "Raytheon's policies ignoring after-hours time resulted in the Government reimbursing Raytheon for unallowable costs." Id. at 1342. The second related to the contractor's bright line rule of identifying costs associated with planning mergers and acquisitions as unallowable only "after the submission of an indicative offer or the decision to go to market with offering materials." Id. at 1343. The Federal Circuit opined that "[a]s a matter of both logic and common sense, a decision on submitting an offer or to go to market cannot be made unless at least some planning for that offer or the offering materials has occurred." Id. Consequently, the Circuit found the

© 2023 Thomson Reuters

contractor's policy inconsistent with Federal Acquisition Regulation 31.204-27(a)(1), which makes costs associated with "planning … mergers and acquisitions" expressly unallowable.

"Five, Six Pick Up Sticks; Seven, Eight" the Board Gets the Record Straight: The contractor fared better in *Voxtel*, ASBCA 60129, 23-1 BCA ¶ 38,309, in which the Board found the Government had inappropriately disallowed two types of claimed costs (executive compensation and independent research and development (IR&D) costs. The Government disallowed certain executive compensation costs for the contractor's sole owner, president, and CEO that were reported as shareholder distributions on IRS Form 1120 S, Schedule K-1, rather than as income on a W-2, reasoning such costs represented profit distributions unallowable under FAR 31.205-6(a)(6)(iii). The contractor argued, and the Board agreed, that there is no rule prohibiting K-1 distributions from being treated as allowable compensation and that the executive's compensation reported on the W-2 alone would not be "commensurate with" his "position in the company, his educational background, his experience, knowledge, skills and ability." Id. The Board concluded that the contractor sufficiently proved the K-1 distribution included wages, and that the Government did not carry its burden of proving those amounts were unallowable profit. The contractor further convinced the Board that the Government's disallowance of certain IR&D costs was improper. In the underlying audit, the Government erroneously treated the questioned costs as direct costs due to a lack of documentation showing what the costs were. Over the course of the litigation, however, the contractor produced records showing the true nature of the costs. The Board noted that this evidence "was long overdue, not always easily understood, and in some instances contradictory," but found it sufficient to render the Government unable to carry its burden of proving the costs unallowable.

"Nine, Ten" Back to the Board Again: In *Honeywell Int'l, Inc.*, ASBCA 63286, 2023 WL 4196651 (June 7, 2023), the ASBCA denied a contractor's motion for judgment on the pleadings against a Government's claim to claw back general and administrative (G&A) expenses, holding that the contractor had not shown "on the pleadings" that the Cost Accounting Standards sanctioned the challenged practice. At issue was whether the Government, which claimed that it paid more than its fair share of a business segment's G&A, had sufficiently alleged a CAS 410 violation. The segment manufactures gyros incorporated into products sold to the Government and also ships gyros to another segment for incorporation into products sold to commercial customers. The segment transferred the associated labor, materials and overhead costs for the gyros from its allocation base to the other segment (making the cost input base smaller), but not the related G&A expense. Per the Board, "[i]n simple math terms, … the numerator (the G&A expenses) in the formula for calculating G&A remained the same, but the denominator (the cost input base) was smaller." Id. The contractor argued that its practice was consistent with CAS 410 because it "has classified the gyro costs as intermediate cost objectives (a product/service center), rather than final cost objectives, which, it contends, relieves it of the obligation to allocate G&A to these costs." Id. The Board denied the motion finding that "[e]ven if we agreed that CAS 410 provides the contractor with discretion, the Board cannot decide based on the pleadings whether Honeywell acted with 'reasonable discretion.' " Id. The Board also found factual disputes as to whether the cost objectives are intermediate as the contractor claimed, which "cannot be resolved on a Rule 12(c) motion." Id.

The Old Woman Who Lived in a Shoe Had How Many Children? The Sum Certain Requirement—While the saying goes, "there was an old woman who lived in a shoe and had so many children she didn't know what to do," when it comes to claims, the sum certain requirement makes stating the actual amount of a monetary claim imperative. Three cases in the first half of 2023 explored the contours of this rule.

Considering the May 5, 2023 oral argument in the pending Federal Circuit appeal of *ECC Int'l Constructors, LLC v. Sec'y of the Army*, Fed. Cir. no. 21-2323, the authors await a ruling on whether the sum certain requirement in the FAR definition of a claim is jurisdictional or a procedural claims processing requirement. See generally e.g., *Wilkins v. U.S.*, 143 S. Ct. 870, 876 (2023) ("Procedural rules often 'seek to promote the orderly progress of litigation' within our adversarial system. Limits on subject-matter jurisdiction, in contrast, have a unique potential to disrupt the orderly course of litigation.") (internal citation omitted). But, three cases in the first half of 2023 also explored the contours of the sum certain rule.

 © 2023 Thomson Reuters

First, in *CanPro Inv. Ltd. v. U.S.*, 165 Fed. Cl. 397 (2023), the Court held that a contractor cannot prove the sum certain through discovery. CanPro, a commercial real estate management company, claimed the General Services Administration breached its lease because the number of people visiting the leased building (then occupied by a field office of the Social Security Administration) surpassed "normal and customary use of the leased premises" (a clause in the contract), which caused damage to CanPro in the form of: loss of tenants (approximately $16 million), loss of property value ($20–$25 million), and "other lost profits" (value "TBD"). CanPro declined to provide an estimate for "other lost profits," because it felt it could not reach an exact sum certain without additional discovery. The Court dismissed this aspect of CanPro's claim, reasoning:

> CanPro's request for additional discovery to make up for shortcomings in its CDA claim is exactly backwards. The point of the CDA presentment requirement is not for government contractors to check a box before expert discovery; it is to give the contracting officer notice and the opportunity to pay a "sum certain." FAR 52.233-1(c). If the contractor does not follow that requirement, there is no jurisdiction in this Court in the first place; ergo no litigation, and no expert discovery for the parties to look forward to.

Id. at 407.

Equally important is how many "claims" the contractor is asserting, and thus how many "sum certain[s]" it must present. For example, in *Fid. & Deposit Co. of Md.*, ASBCA 63278, 23-1 BCA ¶ 38,341, the Board denied a Government motion to dismiss arguing that the contractor erred by not setting forth a sum certain for each of its seven delay claims. The Board observed that the "government's alleged seven 'claims' are really seven separate events that are all part of the appellant's single delay claim," noting that the contractor "submitted a garden variety delay claim" that "arises from one set of related operative facts and is not seven distinct separate claims." Id. The contractor's claim sought a contract extension of 146 days and monetary damages arising from what it claimed was a variety of Government delays and other events.

Finally, there is no requirement to state a sum certain for a non-monetary claim, as the Board emphasized in *J&J Maint., Inc. d/b/a J&J Worldwide Servs.*, ASBCA 63013, 2023 WL 3881412 (May 15, 2023). In that case, the Defense Commissary Agency (DeCA) agreed to reimburse J&J for the "actual costs" of materials. J&J understood that its subcontractors' markups would be included in the "actual cost"; DeCA disagreed. J&J submitted a claim requesting declaratory judgment on the issue. The Board reasoned that while the declaratory judgment would invariably have monetary implications, that did not mean that J&J erred by failing to state a sum certain where there is *any* significant consequence of prevailing on a claim other than the recovery of money. J&J asserted that a declaratory judgment from the Board would cause J&J to change its approach to fulfilling the rest of the contract (for example, using fewer subcontractors or sourcing materials itself). The Board found that non-monetary consequence sufficient, and noted the Government's position would have dramatically curtailed contractors' ability to bring claims seeking only "the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract," FAR 2.101, since nearly all contract interpretation disputes ultimately have monetary consequences. To arrive at this result, the Board distinguished *Securiforce Int'l Am., LLC v. U.S.*, 879 F.3d 1354, 1360 (Fed. Cir. 2018); 60 GC ¶ 31, in which the Federal Circuit held that if the "*only* significant consequence" of prevailing on a claim is that the contractor would be entitled to recover money from the Government, then it is effectively a monetary claim (emphasis added).

"To Market, to Market" or "Home Again Jiggity Jig"? When a Jurisdictional Home Is Hard to Find—If "five little monkeys" appeal a claim with no jurisdiction, they will assuredly "bump their heads." However, if "Jack" can "be nimble, Jack be quick," Jack may just be able to "jump over the candlestick" and convince a tribunal that jurisdiction exists.

For example, in *OSC Solutions*, ASBCA 63294, 23-1 BCA ¶ 38,266, the contractor was able to allege the existence of an implied-in-fact contract and avoid dismissal. In this appeal, the contractor held a blanket purchase agreement (BPA) with the Navy to provide maintenance services. When the volume of sales did not reach the estimated volume listed in the BPA, the contractor submitted a claim for unabsorbed costs, which the Navy denied on the basis that "the BPA did

© 2023 Thomson Reuters

not guarantee a particular volume of sales." Id. After the contractor appealed to the Board, the Navy moved to dismiss, arguing the Board lacked jurisdiction as the claim pertained to a BPA, which is not a contract. The Board denied the motion, recognizing that "the CDA gives the Board jurisdiction over any express or implied contract for the procurement of property or services." The Board found that the contractor sufficiently alleged the existence of an implied-in-fact contract that required the contractor to incur staffing costs to process orders upon BPA award. While the Board did not reach the merits, this case serves as a reminder of the limits of Board jurisdiction and that implied-in-fact contracts can get a foot in the door.

In *Aries Constr. Corp. v. U.S.,* 164 Fed. Cl. 290 (2023), a case involving presentment (another jurisdictional prerequisite), the Court denied the Government's motion to dismiss, finding that the contractor "gave the contracting officer sufficient notice of a good faith and fair dealing claim." After the contractor encountered what it claimed to be differing site conditions when installing a water pipeline system, the contractor submitted a claim to the Government for its increased costs. When the Government denied the claim, the contractor appealed to the Court arguing the denial of the claim breached the contract and the duty of good faith and fair dealing. The Government moved to dismiss the good faith/fair dealing aspect of the appeal, arguing that the contractor had not presented that argument to the CO. The Court disagreed, observing that "CDA presentment does not require claims in this Court to follow 'the exact language or structure of the original administrative CDA claim.' " Id. (quoting *Scott Timber v. U.S.*, 333 F.3d 1358, 1365 (Fed. Cir. 2003)). Instead, if the claim "arises from the same operative facts and claims essentially the same relief" as the CDA claim to the CO, the Court will have "jurisdiction …, so long as the contractor put the contracting officer on notice of the basis of the claim." Id. (quotation omitted). Drawing all inferences in the plaintiff's favor, the Court found the facts presented to the CO were sufficient to establish a breach of good faith and fair dealing claim:

> Plaintiff's CDA claims to the contracting officer requested an equitable adjustment on the ground that [National Park Service] officials had asked Plaintiff to perform additional work to overcome unexpected obstacles at the job site. … The contracting officer was therefore on notice that if he denied an equitable adjustment to which Plaintiff was entitled, Plaintiff could allege that the government had reappropriated the contract's promised benefits. That, in turn, meant the contracting officer was on notice of the facts and general legal basis that could support a claim for breach of the duty of good faith and fair dealing.

Id. at 295 (internal citations omitted). This case is currently on appeal.

"One for the Master and One for the Dame"—A "Baa Black Sheep" for Every Topic— Here we gather Little Bo-Peep's lost sheep; although the rhyme says if we "leave them alone, they'll come home," we include summaries here so the reader "knows where to find them."

First, in *Lockheed Martin Aeronautics Co. v. Sec'y of the Air Force*, 66 F.4th 1329 (Fed. Cir. 2023); 65 GC ¶ 121, the Federal Circuit clarified that the definitization of an undefinitized contract action (UCA) is not a Government claim; and thus, contractors must submit any claim relating to the definitization of a UCA to the CO before appealing. The Court reasoned that the "decisions to definitize the contract prices here were not Government claims because they were not demands or assertions by the Government seeking relief against Lockheed Martin." Id. at 1336. Instead, the CO was "simply following the agreed upon procedures for determining the final contract price." Id.

Second, in *Lockheed Martin Aeronautics Co.*, ASBCA 62249, 23-1 BCA ¶ 38,311, the ASBCA denied the Government's request to leverage a heightened standard of review in patent proprietary disputes to a motion for summary judgment in this contract dispute. The underlying appeal centered on whether the Government is entitled to specifically negotiated license rights or Government purpose rights in nine items of noncommercial computer software for the F-35 Joint Strike Fighter program. The contract in question did not originally require the contractor to deliver the software, and when the Navy amended the contract to require delivery, the contractor "asserted restrictions on the Navy's rights in the requested software, contending that the software was developed exclusively at private expense." Id. The Government found the restrictions unjustified, and the contractor appealed. The Government then moved for summary judgment on the ground that the contractor had allegedly not demonstrated that the software at issue was

© 2023 Thomson Reuters

"developed," as that term is defined in Defense FAR Supplement 252.227-7014(a)(6). In support of its position, the contractor submitted several declarations of individuals responsible for developing the testing software. The Government made the novel argument that the Board should give these declarations no weight because they were not accompanied by contemporaneous, corroborating evidence of development, the requirement in patent priority disputes. The Board denied the Government's motion, finding the contractor "has put forth sufficient evidence under the well-established standard of review to demonstrate that there is a genuine dispute of material fact" and finding no reason to impose the "corroboration" requirement, which only applies in patent priority disputes in order "to prevent inventors from perpetrating fraud." Id. (quoting *Medichem, S.A. v. Rolabo, S.L.*, 437 F.3d 1157, 1169–70 (Fed. Cir. 2006)). The Board was unconvinced "such a safeguard is necessary" in Government contract software rights disputes.

Finally, in *Triple Canopy, Inc. v. Dep't of State*, ASBCA 61415 et al., 23-1 BCA ¶ 38,316, the Board considered the merits of the contractor's contention that an amount the Afghan government required it to pay in order to employ a certain number of private security guards constituted a tax under FAR 52.229-6, requiring U.S. Government reimbursement. The Board initially held the contractor's claim was time-barred, 20-1 BCA ¶ 37,675, a decision the Federal Circuit reversed. *Triple Canopy, Inc. v. Sec'y of the Air Force*, 14 F.4th 1332 (Fed. Cir. 2021); 63 GC ¶ 298. On remand, the Board held the assessment was a tax under FAR 52.229-6 because it was a "fee levied by the Afghan government for Triple Canopy to do business within Afghanistan." ASBCA 61415 et al., 23-1 BCA ¶ 38,316. While the Government argued the assessment was instead a penalty "intended to deter" certain conduct, the Board cited the Supreme Court's holding in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), that the Affordable Care Act constituted a tax, reasoning "it is well-established that taxes have always been instruments of policy meant to influence behavior in their application." Id.

"A Tisket, A Tasket," a Basket Full of Practice Tips—In this last section, we present a "basket" of practice tips that emerged from early 2023 CDA case law. Even when there is "a ring around the rosy," attempts at bringing a claim can "all fall down" if this practice guidance is not carefully heeded.

"Snakes and Snails and Puppy Dog Tails": Denigrating your subcontractor's pass-through claim will impede its likelihood of success. In *Frazier Inv., Inc., d/b/a Optimum Constr.*, ASBCA 63001, 23-1 BCA ¶ 38,313, the contractor appealed a denial of its request for an equitable adjustment for alleged constructive changes. The Board denied the appeal, agreeing that the contractor had failed to provide any constructive changes not covered by the fixed-price modification. The Board cited the prime's statements—including that its subcontractor's claims for additional costs were "not valid or warranted"—as support for the fact that the contractor knew the impact of the firm-fixed-price contract amendment it signed and could not later claim for a price adjustment.

"Are You Sleeping, Are You Sleeping, Brother John?": If you miss your appeal deadline, you cannot resubmit your claim and file a timely appeal from a new denial. In *BES Design/Build, LLC v. GSA*, CBCA 7587, 23-1 BCA ¶ 38,318, the contractor submitted a nearly identical claim a year after GSA denied its first claim, and timely appealed when GSA responded it had already denied the claim. The Board found it lacked jurisdiction over the appeal. The only difference between the two claims was a reduction in amount, as GSA made a payment in the intervening years. The contractor even stated it was "resubmit[ting] the claim" in its transmission letter. The Board concluded that because both claims "arise from the same set of operative facts, the same contract, and the same work," the claims were the same, and the appeal deadline had passed. Id.

"Jack Fell Down and Broke His Crown and Jill Came Tumbling After": A Government request to delay submitting claims does not toll the statute of limitations and can lead to a contractor stumble. In *Patricia I. Romero, Inc. d/b/a Pac. W. Builders*, ASBCA 63093, 2023 WL 3881420 (May 12, 2023), the contractor submitted an affidavit stating that the CO twice asked the company to hold its claim "in abeyance," rather than submitting it at the time. While the Board recognized the "CDA's statute of limitations is not jurisdictional and is subject to equitable tolling," the Board found the circumstances of this case not so "extraordinary" to merit equitable tolling. Id. The contractor offered "no evidence that the government acted with any duplicitous intent or otherwise engaged in any

© 2023 Thomson Reuters

misconduct that would justify equitable tolling"; rather, to the Board it seemed the contractor simply "neglect[ed]" its obligation to timely file. Id.

"Mary, Mary, Quite Contrary": While it may seem counterintuitive that indefinite-delivery, indefinite-quantity (IDIQ) contracts are only enforceable at the minimum ordering level, decision after decision, including two in the first half of 2023, reaffirms this is the case. First, in *ESA South, Inc.*, ASBCA 62242, 23-1 BCA ¶ 38,335, the ASBCA considered a contract for emergency roof repair that was labeled as an IDIQ, had a total estimated value of $45 million, stated a minimum guarantee of $2,500, and included a schedule of "production rates" starting day 4 after award (1 roof/day) and increasing to 20 roofs/day on day 6 and up to "200-300 roofs/day" by day 10 after award. The Government ordered "over $3 million" in services under the contract, which the contractor asserted constituted a breach of contract causing it to lose the money it spent preparing and mobilizing to perform, as well as in unrecovered overhead. The Board held that as an IDIQ contract, the Government had no obligation to meet the stated roofs-per-day rate, denying the contractor's claim in full.

Second, in *Sage Acquisitions LLC v. Dep't of Housing and Urban Dev.*, CBCA 7319, 23-1 BCA ¶ 38,315, the Board confirmed that this principle applies even in a termination for convenience. That is, once the guaranteed minimum is met, the contractor "was not eligible to receive termination for convenience costs." Id. The Board reasoned: "The risk of any losses incurred by the contractor as a result of start-up costs that exceeded this minimum lies squarely with the contractor. Additionally, any projected costs for terminated work are not recoverable because, when the contracts were terminated, the Government had no further legal obligation under the contracts because the guaranteed minimums had already been met." Id.

"Last Stop on [CDA] Street"—This concludes our journey through CDA case law developments in the first half of 2023. Hopefully, your journey was "neither too hot nor too cold, but just right."

This Feature Comment was written for The Government Contractor by* Kara Daniels *and* Amanda Sherwood. *Kara is a partner and Amanda is a senior associate in the Government contracts practice at Arnold & Porter. They specialize in counseling, litigating and resolving disputes, and provide thought leadership to federal and state government contractors and grantees.

© 2023 Thomson Reuters