THE NASH & CIBINIC REPORT
government contract analysis and advice monthly from professors ralph c. nash and john cibinic

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MAY 2024 | VOLUME 38 | ISSUE 5

¶ 33 INTERPLAY BETWEEN LIMITS OF CDA JURISDICTION AND OF DISCOVERY: Latest Court Of Federal Claims Decision In *Sikorsky* Dispute

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The U.S. Court of Federal Claims recently blocked the Government's attempt to seek discovery outside the scope of its claim in its latest decision in *Sikorsky Aircraft Corp. v. U.S.*, No. 21-2327, 2024 WL 1230156 (Fed. Cl. Mar. 15, 2024). While holding it could not dismiss a Government claim that the Government had never in fact asserted, the court instead granted a protective order against Government discovery requests outside the bounds of the claim that the Government did assert. This decision explores when Government discovery requests are relevant to claims properly pending before the court and elucidates several procedural aspects of claims litigation that do not often enjoy their moment in the spotlight.

Case History

This decision is the latest development in a longstanding dispute resulting from a December 29, 2020 Contracting Officer's final decision finding that Sikorsky Aircraft Corporation's allocation of independent research and development and bid and proposal costs incurred from 2007 to 2017 did not comply with Cost Accounting Standard 420, 48 CFR § 9904.420. For the uninitiated, CAS 420 requires IR&D and B&P costs be allocated to final cost objectives and business segments on the basis of beneficial or causal relationships. 48 CFR § 9904.420–40. As background, Sikorsky entered into several CAS-covered contracts with the Federal Government between 2007 and 2017, and set out in its CAS Disclosure Statement its method for allocating IR&D and B&P costs to its contracts. The Defense Contract Audit Agency issued a Statement of Conditions and Recommendations finding the company's IR&D and B&P allocation method violated CAS 420 in 2012 and the DCAA issued an audit report finalizing this conclusion in 2014. Yet, not until December 2020 did the Defense Contract Management Agency issue a COFD demanding repayment of IR&D and B&P costs that Sikorsky allegedly improperly billed the Government from 2007 through 2017. Sikorsky appealed

to the Court of Federal Claims seeking a declaratory judgment that its accounting practices complied with CAS 420 as well as alleging breach of contract, on the basis that Sikorsky had disclosed its accounting practices, the Government had not objected to those practices, and those practices were thereby incorporated into its contracts.

In an earlier decision, *Sikorsky Aircraft Co. v. U.S.*, 161 Fed. Cl. 314 (2022), the court denied the Government's attempt to dismiss the contractor's challenge, finding it to be an "open…question" whether the Government had waived its claim by unduly delaying its evaluation of the contractor's disclosed practices and even entering into new contracts based on those disclosed practices in the interim. Citing the duty of good faith and fair dealing that applies to both parties to a contract, the court reasoned that there must be some "connection between the Government's duty to act in good faith by not allowing Sikorsky to incur costs it would later be expected to bear alone and Sikorsky's regulatory and contractual obligation to accept changes." The dispute has yet to result in a merits decision on this question; any such decision could have significant implications on the Government's ability to assert CAS noncompliances years after the fact.

Latest Dispute

The court's March 15, 2024 decision (reissued publicly on March 22) explains that since the denial of the Government's motion to dismiss in August 2022, the parties had engaged in a contentious discovery process. The dispute resulting in this decision involved a Government request for production of documents related to 155 Sikorsky IR&D projects. Sikorsky objected that this request went "beyond the operative facts of the 2020 COFD" and, therefore, was "beyond the scope of the claim at issue in this action." Sikorsky filed a motion, which it styled a motion to dismiss, alleging that the COFD only asserted a Government claim with respect to one or at most two projects (the "S-92 Gearbox" project and the "H-60 Blackhawk" project) and, therefore, any potential Government claims relating to other IR&D projects fell outside the court's subject matter jurisdiction, as they were never subject to a COFD.

Procedural Propriety Of Motion To Dismiss

To recap, Sikorsky moved to dismiss unasserted future Government claims that it "anticipated and understood by reference to the government's discovery request." The court first addressed the procedural propriety of Sikorsky's motion. To do so, the court laid out the standards for a motion to dismiss under Rule 12 of the Rules of the Court of Federal Claims as well as discovery proceedings under RCFC 26.

As explained in the decision, RCFC 12 permits a party to defend against a pending claim via a motion to dismiss. RCFC 12(b)(1) in particular permits a party to seek dismissal of a claim over which the court lacks subject matter jurisdiction. This "defense to a claim for relief" can be asserted in the responsive pleading or by motion. RCFC 26 addresses discovery proceedings and RCFC 26(b)(1) states that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." On this point, the court cited the U.S. Court of Appeals for the Federal Circuit's decision in *Micro Motion Inc. v. Kane Steel Co.* as establishing that a discovery request may be deemed irrelevant "if the inquiry is based on the party's mere suspicion or speculation." 894 F.2d 1318, 1326 (Fed. Cir. 1990). Under RCFC 26, a party may move for protective order from a discovery request, which the court may issue "for good cause." On this point, the court cited *Science Applications International Corp. v. U.S.*, which states

that the court may issue a protective order in those instances "where a party wants to embark on a fishing expedition based on irrelevant evidence that itself is not likely to lead to any relevant evidence." 156 Fed. Cl. 486, 494 (2021).

After the robust overview of the relevant standards for assessing Sikorsky's motion, the court held: "Put simply, Sikorsky's motion to dismiss is the improper means by which to raise its objection to the Government's discovery requests."

In its motion, Sikorsky asserted that "the government has made clear that it intends to pursue other, different claims that were not the subject of the 2020 COFD" and that such claims must be dismissed. The court found this motion procedurally improper, explaining that RCFC 12(b)(1) furnishes a "defense to a claim for relief," whereas Sikorsky cited RCFC 12(b)(1) to "raise a defense to a claim that does not currently exist." While Sikorsky read the Government's discovery request to mean that "the government is asserting in this litigation an unspecified number of separate claims alleging that some, most, or all of [Sikorsky's] IR&D project cost allocations were noncompliant with CAS 420," the court agreed with the Government that "the only claims before the [c]ourt in this case are Sikorsky's." On this point, in footnote 7, the court recognized that the pending action resulted from a Government CDA claim, but looked to Sikorsky's amended complaint for the claims eligible for dismissal.

In this context, in footnote 7, the court recognized the proposition from *Raytheon Co. v. U.S.* that "a government assertion of CAS noncompliance is a government claim for which the government bears the burden of proof," 747 F.3d 1341, 1352–53 (Fed. Cir. 2014), 56 GC ¶ 124, but held that Sikorsky's reliance on this authority to establish "which party is raising a claim" was "misdirected" at this juncture. While the pending action "arises as a result of a government CDA claim," and the Government maintains the burden of proving certain issues in the case, that "does not necessarily mean that a government claim is presently before this court." As the Government had not raised any additional and plausibly impermissible claims regarding all of Sikorsky's IR&D projects, no such claims existed and thus, the court could not dismiss them. Per footnote 8, Sikorsky's allegations could not be construed as affirmative defenses for the same reason: Sikorsky could not affirmatively defend against a Government claim not yet asserted by the CO.

That was not the only substantive footnote worthy of mention. As for what claims were encompassed by the 2020 COFD, interestingly, in footnote 5, the court denied Sikorsky's assertion that only the S-92 Gearbox project was contemplated in the COFD and the claim pending before the court. The court explained the pleadings on this issue were unclear and referenced Sikorsky's own prior assertions (in discovery-related correspondence) that the COFD arguably encompassed the H-60 Blackhawk project as well in construing Sikorsky's motion as seeking to limit the claims at issue to the S-92 Gearbox and H-60 Blackhawk projects. This was not the only place in the opinion that the court referenced Sikorsky's pre-litigation statements; in footnote 9, the court summarily disposed of the Government's assertion that Sikorsky's own lack of detail in its pre-COFD submissions regarding other IR&D projects precluded detailed consideration of those projects in the COFD. That is, the scope of the COFD determined the scope of the action before the court, and the court could only analyze (and potentially dismiss) the claims before it.

Protective Order To Limit Discovery

The court did not leave Sikorsky without relief, though, finding that despite being styled as a mo-

tion to dismiss under RCFC 12, "Sikorsky's motion is better understood as a motion for a protective order" under RCFC 26(b)(1) and specifically, whether the documents requested by the Government fell outside the scope of the COFD. According to the court, "at issue is whether the Government's discovery requests are so expansive as to contravene Rule 26(b)(1)'s requirement that the discoverable information be 'relevant to any party's claim or defense.' " The court concluded that a protective order was appropriate.

Because the scope of discovery is limited to "relevant" materials, "[i]n an appeal of a COFD, the limits of the case are set by the claims addressed by the COFD." The court read Sikorsky's motion as asserting that the Government's discovery requests fell outside the scope of any claim before the court, because the discovery sought related to projects *other than* the S-92 Gearbox and H-60 Blackhawk projects. Here, the Government sought discovery relating to all Sikorsky IR&D projects, which Sikorsky averred that the Government "plans to use [] to conduct a fishing expedition to determine if it has a factual basis to assert a CAS 420 noncompliance arising from the allocation of the cost of any other IR&D project." The Government countered that Sikorsky has put forward a jurisdictional analysis, that "the scope of discovery extends to *all* the IR&D projects for which Sikorsky was required to allocate costs under CAS 420," and that courts generally construe the scope of relevant discovery broadly.

The court first established that the Government cannot sidestep whether discovery is relevant under RCFC 26 merely because Sikorsky improperly brought its challenge as a motion to dismiss. To resolve whether the Government's requested discovery fell within the scope of the pending action, the court applied the so-called "same-claim test." As the court explained, only claims that were first the subject of a COFD are reviewable by the court under the CDA. And as the Federal Circuit explained in *Scott Timber Co. v. U.S.*, when a party seeks review (by the court or the boards of contract appeals) of a claim that has been the subject of a COFD, that claim must be "based on the same claim previously presented to…the contracting officer." 333 F.3d 1358, 1365 (Fed. Cir. 2003). To determine whether the claim is the same as that which was the subject of the COFD, the court quoted its prior decision in *Kansas City Power & Light Co. v. U.S.* for the three-pronged test: "whether the claims 1) are based on the same underlying theory; 2) seek the same relief; and 3) arise from the same operative facts." 124 Fed. Cl. 620, 623 (2016). As the court explained, this test does not mean there can be no deviation between the claim addressed in the COFD and that before the court. But as previously held in *J.F. Shea Co. v. U.S.*, parties are prohibited from "raising any new *claim* before this court which was not previously presented and certified to the contracting officer for decision," e.g., by "presenting a materially different factual or legal theory," which would preclude the CO's pre-suit review as contemplated by the CDA. 4 Cl. Ct. 46, 54 (1983).

To assess whether the Government's discovery request to Sikorsky was permissible under RCFC 26, the court applied the same-claim test to assess and concluded that the S-92 Gearbox and H-60 Blackhawk projects contemplated in the COFD were distinct from the remaining IR&D projects regarding which the Government also sought discovery.

The court applied the first prong of the test to find that the Government's allegations regarding all 155 IR&D projects were "based on the same underlying theory" as the S-92 Gearbox and H-60 Blackhawk projects—namely, that Sikorsky's allocation of costs associated with those projects was noncompliant with CAS 420. The court likewise found the second prong met, as the Government "seek[s] the same relief" as to all Sikorsky IR&D projects. The third prong proved determinative:

the court found that the 155 IR&D projects encompassed by the Government's request for production of documents did not "arise from the same operative facts" as the S-92 Gearbox and H-60 Blackhawk projects. While the Government attempted to define the scope of its claim as including "all the IR&D projects for which Sikorsky was required to allocate costs under CAS 420," the court disagreed. The court noted that all references to the other IR&D projects in the COFD were "conclusory" with "no specifics whatsoever"; hence, "[d]iscovery spanning beyond the scope of" the two named projects "is unwarranted at this time."

The court explained the implications of the Government's arguments were untenable. Given the court's *de novo* review of a COFD, the Government's "conclusory assertions regarding general alleged non-compliance" precluded the court from "mak[ing]" its required "independent assessment." The court reasoned:

> Concluding otherwise would risk allowing the government to make a "profound alteration" in the scope of its claims, spanning beyond the operative facts upon which the COFD was apparently based.... [T]his court now prohibits the government from expanding the scope of claims at issue in the discovery context from a few projects to 155, based solely on vague and ambiguous references included in the COFD.

The court recognized that Federal Circuit precedent recognizes that "merely adding factual details or legal argumentation does not create a different claim." See *K-Con Building Systems, Inc. v. U.S.*, 778 F.3d 1000, 1006 (Fed. Cir. 2015), 57 GC ¶ 64. However, here, the court found that "allowing the scope of the claims at issue and the corresponding discovery to be expanded beyond the S-92 Gearbox and H-60 Blackhawk projects at this juncture" would "impermissibly deprive the contracting officer of the opportunity to make an initial independent assessment of compliance for each distinct project, as the statutory purpose of the CDA requires." If the Government wished to assert that Sikorsky's accounting of additional projects did not comply with CAS 420, the court reasoned, "the government may assert those claims of non-compliance separately for the consideration of the contracting officer in a new COFD, in accordance with 41 U.S.C. § 7103(a)(3)."

Conclusion

Sikorsky accordingly received the remedy it desired, albeit in the form of a protective order against the Government's "requested discovery relating to projects other than the S-92 Gearbox and H-60 Blackhawk-related improvement projects," and not a dismissal order. In granting Sikorsky this remedy, the court analyzed a number of important procedural points that merit mention.

First, this decision highlights the interplay between the scope of a CDA claim and the scope of permissible discovery. That is, the scope of the claim, properly interpreted as limited to the operative facts on which it relies, defines the scope of permissible discovery. The court viewed skeptically the Government's attempt to leverage blanket assertions of noncompliance in lieu of alleging facts specific to each project or cost allocation at issue. Because the court found the propriety of Sikorsky's accounting for each project to rely on its own set of operative facts, and because discovery is only proper for a "matter that is relevant to" the claim, the lack of specific allegations in the Government's claim as to the remaining IR&D projects bounded the Government's subsequent discovery request.

Second, the court referenced both parties' pre-litigation communications in its analysis of the scope of the claim before it. Sikorsky apparently strictly construed the Government's information requests pre-claim and did not provide "extra" information regarding any unnamed projects. The Government then attempted to blame this lack of information from Sikorsky for any lack of detail in its 2020 COFD regarding the other Sikorsky IR&D projects. The court was not persuaded by this

argument, affirming that the Government was responsible for establishing the bounds of its claim, which then governs the scope of any appeal. Conversely, Sikorsky's attempt to limit the scope of the COFD to only encompass the S-92 Gearbox project was thwarted by its references to the H-60 Blackhawk project in its discovery-related correspondence. That the court raised and considered these exchanges in assessing the scope of the parties' dispute provides an interesting gloss on who defines the scope of a claim and when that scope is defined.

The court's decisions to date in the *Sikorsky* dispute have illuminated various procedural issues impacting claims litigation; future developments, including a potential decision on the merits, are worth close analysis—particularly as it relates to Government assertions of a CAS noncompliance and cost disputes more generally. *Amanda Sherwood and Sonia Tabriz*