FEDERAL CONTRACTS: THE YEAR IN REVIEW

Navigating Federal Government Contracts Northwest 2020
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I. NEW STATUTES

A. THE NATIONAL DEFENSE AUTHORIZATION ACT (NDAA) FOR FY 2020

On December 20, 2019, President Trump signed into law the National Defense Authorization Act (NDAA) for FY 2020 (Pub. L. No. 116-92).

Post-Award Explanations for Unsuccessful Offerors for Certain Contracts

- Section 874 requires the FAR to be revised within 180 days to mandate that contracting officers provide a brief explanation of award, upon written request from an unsuccessful offeror, for task order or delivery order awards in an amount greater than the simplified acquisition threshold and less than or equal to $5.5 million issued under an indefinite delivery-indefinite quantity contract. The explanation must include a summary of the rationale for the award and an evaluation of the significantly weak or deficient factors in the offeror's proposal. Currently, offerors are only entitled to a debriefing after award of an order exceeding $5.5 million

- **Accelerated Payments for Small Businesses**. Section 873 requires all agencies, including DOD, to establish an accelerated payment date for small business prime contractors, with a goal of 15 days after a proper invoice is received if a specific payment date is not established by contract. The statute also requires agencies to establish a similar accelerated payment schedule for small business subcontractors,

assuming a specific payment date is not established by contract and the prime contractor agrees to the payment schedule.

- **Federal "Ban-the-Box" Law: The Fair Chance Act to Limit Criminal Background Inquiries by Federal Contractors.** The Act "bans the box" by prohibiting federal contractors from asking applicants applying to work in connection with federal contracts about their criminal histories until after the contractor extends a conditional job offer. It also prohibits contractors from seeking such information from other sources. As part of the NDAA, the government enacted the Fair Chance to Compete for Jobs Act of 2019. The Fair Chance Act goes into effect on December 20, 2021.

  The Act applies only to job openings "related to work under" a federal contract.

  Further, pre-offer criminal inquiries are allowed:

  - Where criminal background checks are otherwise required by law;
  - Where "a contract … requires an individual hired under the contract to access classified information or to have sensitive law enforcement or national security duties"; and
  - In connection with other positions to be identified in regulations that will be issued no later than April 2021 (16 months after enactment of the Act).

  The Act directs the Office of Personnel Management to issue regulations identifying additional positions that are exempted from the law. The Office of Personnel Management also must establish a complaint process and progressive penalties, ranging from a written warning for a first violation to payment suspension and contract termination for subsequent violations.

B. SMALL BUSINESS RUNWAY EXTENSION ACT

In December 2018, President Trump signed the Small Business Runway Extension Act of 2018, which amended the Small Business Act—15 U.S.C. § 632(a)(2)(C)(ii)(II)—to change the basis for determining the size of a business concern from the annual average gross receipts of the company over a period of three years to five years without affecting

the underlying mechanics of how to calculate receipts. The SBA's regulations at 13 C.F.R. § 121.104(c), however, continued to maintain the three-year standard and the SBA had indicated that formal rulemaking was required in order for the Runway Extension Act to take effect. Shortly after the House of Representatives introduced H.R. 2345—Clarifying the Small Business Runway Extension Act—in April 2019, which instructed the SBA to issue a final rule implementing the Runway Extension Act by December 2019, the SBA issued a proposed rule on June 24, 2019 to amend its regulations. In the proposed rule, the SBA again warns that the three-year calculation period continues to apply to any offer submitted prior to the effective date of a final rule.

On December 5, 2019, the SBA announced that it was modifying its rule to calculate average annual revenue to increase the measuring period from **three** years to **five** years. This five-year change became effective for procurements issued on or after January 6, 2020. For most small businesses, this change is good news as it will enable the business to remain small for a longer period of time assuming the business' revenue increases incrementally each year. The Regulations will allow small businesses a two year phase-in period until January 6, 2022 to decide which period to use.

II. NEW REGULATIONS

A. New Interest Rate and Minimum Wage Rules

The Treasury rate for interest payments under the Contract Disputes Act or the Prompt Payment Act for the period beginning from January 1, 2020 to June 30, 2020 was 2.125%; from July 1-December 31, 2020 it is 1.125%.

On September 19, the DOL announced the Federal Contractor Minimum Wage rate would increase to $10.80 per hour on January 1, 2020.

B. Federal Acquisition Circulars (FAC)

Federal Acquisition Circular 2020-07; amends the FAR as follows:

Item II—Increased Micro-Purchase and Simplified Acquisition Thresholds (FAR Case 2018-004)

This final rule increases the micro-purchase threshold (MPT) from $3,500 to $10,000, increases the simplified acquisition threshold (SAT) from $150,000 to $250,000, and increases the special emergency procurement authority in paragraph (2) from $300,000 to $500,000. The rule also clarifies certain procurement terms, as well as aligns some non-statutory thresholds with the MPT and SAT. It implements section 217(b) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 and sections 805, 806, and 1702(a) of the NDAA for FY 2018.

Item IV—Modifications to Cost or Pricing Data Requirements (FAR Case 2018-005)

This final rule increases the threshold for requesting certified cost or pricing data from $750,000 to $2 million for contracts entered into after June 30, 2018. For earlier contracts, contractors may request a modification to use the new clause Alternates, with the new $2 million threshold for subcontracts awarded on or after July 1, 2018. The rule implements section 811 of the National Defense Authorization Act for Fiscal Year 2018, Public Law 115-91.

FAC 2020-06 May 6, 2020

Item II—Applicability of Inflation Adjustments of Acquisition-Related Thresholds (FAR Case 2018-007)

This final rule makes inflation adjustments of statutory acquisition-related thresholds under 41 U.S.C. 1908 applicable to existing contracts and subcontracts in effect on the date of the adjustment. It implements section 821 of the National Defense Authorization Act for Fiscal Year 2018.

C. Other Regulations

Agencies Accelerates Accelerated Payments for Small Business Prime Contractors

The General Services Administration issued a class deviation to allow GSA to provide accelerated payments to small business contractors, with a goal of 15 days after receipt of a proper invoice. With this class deviation, GSA accelerated its own implementation of Section 873 of the National Defense Authorization Act for Fiscal Year 2020, which expands the Federal Acquisition Regulation's provisions for accelerated payments to prime contractors subcontracting with small business concerns to also include prime contractors that are small businesses.

The Department of Commerce has issued a class deviation in accordance with Federal Acquisition Regulation (FAR) 1.404 to implement Civilian Agency Acquisition Council (CAAC) Letter 2020-02 and Section 873 of the National Defense Authorization Act (NDAA) for Fiscal Year 2020 to provide for accelerated payments to contractors that are small businesses, and to small business subcontractors by accelerating payments to their prime contractors.

FedBizOpps to Become beta.SAM.gov in 2020

The GSA has announced that the Federal Business Opportunities website — commonly referred to as "FedBizOpps.gov" — will be decommissioned "starting on November 8, 2019" and that the website's "critical functionality will be transitioned into beta.SAM.gov in the first quarter of the 2020 fiscal year. Once the transition is complete, beta.SAM.gov should have the same federal business opportunity capabilities found today in the fbo.gov site.

Construction-Manager-As-Constructor Recognized as an Acceptable Project Delivery Method in Federal Contracts

On December 19, 2019, the General Services Administration issued a final rule which amends the General Services Administration Acquisition Regulation ("GSAR")

regarding project delivery methods for construction.[1] This rule, effective January 21, 2020, adopts the Construction-Manager-as-Constructor ("CMc") project delivery method, one of the three most common construction services delivery methods. By adding the CMc delivery method in the GSAR as an alternative to design-bid-build and design-build, the Government is making it easier to comply with contracting requirements and to conduct business with the Government.

III. THE PANDEMIC

On March 27, 2020, Congress passed and President Trump signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act), Pub. L. No. 116-136 which in Section 3610 allows federal agencies to use "funds made available by the Act" to modify contracts to reimburse contractors for the costs of providing "paid leave … to keep [their] employees or subcontractors in a ready state" if they are unable to enter a government-approved site of work due to closures or quarantine restrictions resulting from COVID-19. This provision supplements other new requirements in the CARES Act and its predecessor, the Families First Coronavirus Relief Act ("FFCRA"), for paid sick leave.

Section 3610 contains several limitations for government contractors:

- Reimbursement is limited to "minimum applicable contract billing rates," and may not exceed an "average of 40 hours per week."
- Reimbursement will be made only if the relevant employees' job duties "cannot be performed remotely." This limitation is consistent with the new paid sick leave provided by FFCRA; employees are *not* eligible for that paid sick leave if they are able to telework.
- Reimbursement will not be made for costs incurred after September 30, 2020, the end of the government's fiscal year. This is stricter than the FFCRA paid sick leave, which is available through December 31, 2020.

- The payments are offset by the amount of refundable tax credits that employers may receive under FFCRA. In essence, this prevents "double-dipping" for reimbursements.

The CARES Act includes loans that may be forgiven under certain circumstances to small businesses and cost relief to contractors who have been prevented from working. Moreover, Section 3610 encourages federal agencies to modify the terms and conditions of their contracts with business concerns of all sizes to reimburse contractors for keeping their personnel in a ready state (as opposed to terminating them), based on "the minimum applicable contract billing rates not to exceed 40 hours" a week of leave.

To further execute Section 3610 of the CARES Act, the Office of the Undersecretary of Defense, issued a class deviation to the standard contract cost principles under FAR Part 31 and DFARS Part 231 providing for a new cost principle governing allowable paid leave costs incurred by the contractor for contracts in place from January 31, 2020 through September 30, 2020. Contractors will not be entitled to reimbursement for leave costs incurred outside this period or leave costs unassociated with the impact of COVID-19. Under the newly issued DFARS 231.205-79, contracting officers are permitted to reimburse contractors not to exceed an average of 40 hours per week, including paid leave and sick leave contingent upon the availability of funding.

Contractors will be required to submit representations when seeking reimbursement under Section 3610 of the CARES Act of any other relief it has claimed arising out of the pandemic and that it will not pursue reimbursement for the same costs it has incurred provided in the supporting documentation. In other words, contractors may not seek double reimbursement for the same costs if it is receiving compensation for paid leave costs from other COVID-19 relief statutes or regulations, including tax credits. Further, relief under Section 3610 of the CARES Act is not appropriate for small business that should instead enroll itself into the Paycheck Protection Program.

The DoD's implementation guidance provides additional insight and emphasizes the need to communicate with the contracting officer. At a minimum, the contracting officer must issue a written determination that the contractor is an "affected contractor" to receive reimbursement, but the approach to reimbursement will differ depending on the type of contract. For firm fixed-price contracts, the contractor may need to seek an equitable adjustment and the contract will need to be modified with a fixed-price line item for covered costs. For cost reimbursement contracts, costs should be charged to a separate account such as "Other Direct Cost – COVID 19," billing in accordance with the contracting officer's directives.

First, the implementing cost principle, DFARS 231.205-79, applies only if a contracting officer has made the written determination that a contractor's employees or its subcontractor's employees meet both of the following criteria:

- They cannot perform work on a government-owned, government-leased, contractor-owned, or contractor-leased facility or a site approved by the federal government for contract performance due to closures or other restrictions.
- They are unable to telework because their job duties cannot be performed remotely during the public health crisis.

This restriction, which resolves the open question regarding what Congress meant by "a site that has been approved by the Federal Government," makes clear that if your employees can access the worksite or can telework, Section 3610 relief will not be available.:

The Office of the Under Secretary of Defense directed contracting officers to consider the immediacy of the specific needs of the contractor. In its Memorandum, the agency recognized certain contractors are not conducting business during the pandemic and therefore are not generating revenue, which would otherwise allow them to meet their

payroll, retain employees, and meet their financial obligations, such as paying rent for their business operations. Accordingly, contracting officers have been given wide discretion and flexibility to keep their contractors in ready state. However, a contracting officer's decision to ultimately grant relief under Section 3610 of the CARES Act and DFARS 231.205-79 will be determined on a case-by-case basis and the contracting officer is not obligated to grant relief to the contractor. Whether a contractor should seek relief under Section 3610 of the CARES Act, will depend on the extent of the impact of COVID-19 on the contractor's ability to perform and the relief the contractor may be able to seek under applicable changes and delays provision available in its contract.

3610 is dependent on the availability of funds. Requests for Equitable Adjustment (REAs) will not be approved unless sufficient funds are available.

Presidential Memorandum Grants VA Authority to Indemnify COVID-19 Contractors

On April 10, 2020, the White House issued a Presidential Memorandum authorizing the Secretary of Veterans Affairs to exercise authority under Public Law 85-804 in connection with contracts awarded by the VA to combat COVID-19. Public Law 85-804, as amended by 50 U.S.C. §§ 1431 et seq. and Executive Order 10789, provides federal agencies with the authority to grant "extraordinary contractual relief," including the authority to indemnify contractors against claims resulting from performing work that involves "unusually hazardous" risks.

DOD Clarifies Progress Payments Deviation

DOD issued a deviation on March 20, 2020, allowed for an increase in progress-payment rates under DOD contracts from 80 percent to 90 percent for large business concerns and from 90% to 95% for small business concerns. In a press release discussing the deviation, the DCMA described the change as an "an important avenue where industry cash flow can be improved."

Stafford Act Assistance for COVID-19 Pandemic

As part of the federal government's response to the COVID-19 pandemic, President Trump declared two different types of emergencies. The first, under the National Emergencies Act, allows the president to waive various federal regulatory requirements and activate a variety of emergency authorities already embedded in federal statutes. The second, under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, allows the federal government, through the Federal Emergency Management Agency, to take specific actions in support of the US Department of Health and Human Services, as the lead federal agency for the COVID-19 response, and to provide certain specific types of assistance to states and local governments as well as other specific types of private non-profit organizations. Among other things, the Stafford Act declaration allows FEMA to provide federal financial assistance from the President's Disaster Relief Fund.

CBCA DENIES EBOLA SHUTDOWN CLAIM

In Appeal of Pernix Serka Joint Venture v. Department of State, CBCA No. 5683 (April 22, 2020), the Civilian Board of Contract Appeals ("CBCA") denied a contractor's claim for the costs of demobilizing from a construction site due to concerns about performing work during an Ebola virus outbreak. The U.S. Department of State ("DOS) awarded the contractor a fixed-price contract to construct a rainwater capture and storage system in Freetown, Sierra Leone. The contractor became concerned about the potential impact of the spread of the Ebola virus in Sierra Leone and its ability to support its personnel should they need to be evacuated from the country.

The World Health Organization declared the outbreak an international public health emergency and the contractor decided to shut the project down and evacuate most of its personnel from Sierra Leone. The contractor advised DOS of its decision to temporarily shut down the project work site. At that time, DOS was continuing its own operations in

Sierra Leone and had not removed its personnel from the country – although it had begun removing eligible family members of its staff.

DOS acknowledged the contractor's decision to shut down and the concerns that prompted the shutdown. However, DOS advised the contractor that, since the contractor took this action unilaterally based on circumstances beyond the control of either contracting party, DOS believed that there was no basis for an equitable adjustment for the additional costs the contractor might incur in connection with the contractor's decision to stop work.

The project site was shut down for more than six months, during which time the contractor provided limited staff. When the contractor remobilized, it employed additional health and safety measures, including expanding its health facilities and employing full time medical staff.

The contractor submitted a claim for additional life safety and health costs incurred due to differing site conditions, disruption of work, and the need to maintain a safe work site, as well as for additional costs incurred resulting from the disruption of work and the need to demobilize and remobilize at the site. DOS denied the claim finding there was no contractual basis for a price adjustment. DOS, however, had given the contractor a time extension of 195 days – the amount of time requested by the contractor. The contractor appealed the final decision and DOS moved for summary judgment. The CBCA granted the motion.

The CBCA held that the Default clause, FAR 52.249-10, explicitly addressed how acts of God, epidemics, and quarantine restrictions were to be treated – the contractor was entitled to additional time, but not additional costs. The CBCA stated that the contractor had not identified any clause in the contract that served to shift the risk to DOS for any costs incurred due to an unforeseen epidemic and rejected the contractor's arguments that there was a cardinal change or a constructive change. It also found that

DOS was not required to provide the contractor with direction on how to respond to the Ebola outbreak. As this was a firm, fixed-price contract, the CBCA concluded that the contractor bore the additional costs of contract performance even if the contractor did not contemplate those measures at the time it submitted its proposal or at contract award.

IV. PRE AWARD

A. PROTEST REPORT

The GAO annual bid protest report for FY 2019 shows that protesters continue to receive some form of relief in nearly half of the protests filed with GAO

The FY 2019 report shows that, for the second straight year, protesters received some relief in 44% of the protests. GAO reports this statistic as an "effectiveness rate"—i.e., the percentage of protests where the protester obtained "some form of relief from the agency . . . either as a result of voluntary agency corrective action or [GAO] sustaining the protest." For cases that went to decision the sustain rate in FY19 is 13%, compared to 15% in FY18.

The report states that "the most prevalent reasons for sustaining protests" during FY 2019 were: (1) unreasonable technical evaluation; (2) inadequate documentation of the record; (3) flawed section decision; (4) unequal treatment; and (5) unreasonable cost or price evaluation.

Protest filings are down by 16%, which means about 400 fewer protests than FY18. After years of GAO receiving 2500 or more protests, FY 2019 saw only 2198 cases filed—a fairly substantial drop-off of 16 percent from the 2607 cases filed in FY 2018. This could be an anomaly, or may reflect the fact that the Government is making a greater percentage of awards through task orders, which have seen their protest jurisdiction further restricted (see below). Also it may be related to GAO's new Electronic Protest Docketing System — and associated $350 filing fee. Prior to EPDS, anyone could submit

a protest simply by emailing a protest letter to GAO. Now, a protester must file electronically through a formal docketing system — and pay $350 to get on file.

Task Order Protests Are Up. Despite the overall drop-off, the number of task order protests increased in FY 2019 to a near-record high of 373. This is despite the fact that the threshold for GAO protests of task or delivery orders under Department of Defense ("DoD") multiple award contracts increased from $10 million to $25 million in May 2018, making fewer task order procurement protestable.

The increase in task order protests despite reduced protest jurisdiction indicates that, generally speaking, significantly more procurements are being conducted as task order or delivery order awards. This may explain in part the overall decrease in the number of GAO protests. Now that the change in threshold has been implemented, there may be many procurements (DoD awards between $10-$25 million) that would have been protested in years past, but now cannot be. Because the revised threshold went into effect in May 2018, FY 2019 represented the first full year of restricted jurisdiction.

The number of hearings significantly increased from FY18. There were only 5 hearings in FY18 (i.e., in 0.51% of cases), compared to 21 hearings in FY19 (i.e., in 2% of cases). The number of hearings at GAO had fallen consistently for years, to the point that hearings were almost extinct.

B. Agencies are not obligated to fill in gaps in the proposal

Protest challenging agency's technical evaluation and cost realism analysis is denied; *BEAT, LLC*, GAP B-418235, B-418235.2. The protester alleged it should not have received a weakness for failing to demonstrate required experience because its proposal demonstrated the experience. But GAO found that the protester had only made general references to its experience without providing specific examples. The protester contended that the agency already knew it had the required experience from its performance on other contracts. But GAO reasoned that an agency is not required to rely on its knowledge of an

offeror's experience if that experience is not included in the offeror's technical proposal. The protester also complained that the agency's cost realism analysis was flawed, and that the agency should have adjusted the protester's price. GAO found the adjustment reasonable. What's more, even if the agency had adopted the protester's realism methodology, it was not have changed the best value analysis.

C. Evaluation

1. Contractor Take Care

Agency Reasonably Found Protester's Rock Bottom Prices Unrealistic; *ACTA, LLC*, GAO B-418352, B-418352.2

Protest challenging the agency's price realism evaluation is denied. The agency had eliminated the protester from consideration, finding that its price was unrealistically low. The protester thought the agency's realism evaluation was flawed. But GAO backed the agency, noting that protester's price—which was 50 percent less than the government estimate far and away the lowest among 11 offerors—was exceptionally low and thus almost certainly unrealistic.

In *Office Design Group*, *Office Design Grp. v. United States*, 2019-1337 (Fed. Cir. Mar. 6, 2020), protester alleged the Department of Veterans Affairs (VA) unfairly downgraded its proposal to supply healthcare furniture and related services, alleging that its proposal was "sufficiently similar" to the awardees' proposals to merit the same ratings.

After failing to convince the GAO or COFC that it was the victim of disparate treatment, the protester appealed to the Federal Circuit on the same grounds, alleging seven examples of disparate treatment.

The protester had no better luck on appeal. The Federal Circuit observed that it had not previously articulated a standard for assessing disparate evaluation protest grounds. The court noted that to prevail at the Claims Court, a protester must show the agency unreasonably downgraded the protester's proposal for deficiencies which were

"substantially indistinguishable" or "nearly identical" to those contained in proposals that were rated differently. The Federal Circuit adopted the lower court's precedents and held that, unless a protester makes such a showing, a reviewing court should dismiss the protest. Doing otherwise would give a court "free reign [*sic*] to second guess the agency's discretionary determinations," exceeding its mandate.

The GAO found it unnecessary to resolve whether the proposed key person was actually unavailable, as the awardee provided a declaration that it had no actual knowledge of unavailability and the proposed key person, who was another company's employee, had not rescinded his commitment letter. The GAO found this lack of actual knowledge of unavailability was sufficient to deny the protest ground: "While an offeror generally is required to advise an agency where it knows that one or more key employees have become unavailable after the submission of proposals, there is no such obligation where the offeror does not have actual knowledge of the employee's unavailability."

Agency Can Find References Deficient Under an Experience Factor and Still Find those Same References Satisfactory Under a Past Performance Factor; *Network Runners, Inc.*, GAO B-418268, B-418268.2

Protest challenging agency's evaluation of the protester's proposal is denied. The protester challenged deficiencies it received under the solicitation's experience factor. The deficiencies, however, were warranted because the protester had failed to demonstrate experience in all of the SOW's key areas. The protester contended that the agency failed to collectively evaluate references as required by the solicitation. GAO found, however, that the protester had not been prejudiced by the error. Finally, the protester contended that the deficiencies it received under the experience factor were inconsistent with its satisfactory rating under the past performance factor because it had submitted the same references under each factor. But GAO reasoned that experience and past performance are distinct concepts and an agency can reasonably assess different ratings under each factor for the same references.

Contractors need to carefully review the availability of proposed key personnel before submitting final proposal revisions (FPRs).

In *NetCentrics Corp. v. United States*, No. 19-839C (Sept. 6, 2019), the COFC held that the agency acted within its discretion when it rescinded NetCentrics' contract award and disqualified the company from the procurement upon discovering that NetCentrics had misrepresented the employment status and availability of its proposed Deputy Program Manager (DPM) in its FPR. The court was not swayed by NetCentrics' claim that the misrepresentation was inadvertent—it held that disqualification is reasonable if a misrepresentation is material, regardless of whether the contractor intended to actually deceive the agency.

In *NCI Information Systems, Inc.*, B-417805.5 et al., Mar. 12, 2020, the protester alleged that one of the awardee's proposed key personnel became unavailable during voluntary corrective action taken in response to a prior protest. The protester argued that, the awardee should have notified the agency of the alleged unavailability. Because the awardee did not do so, and because its key person allegedly was not available as of the agency's decision to reaffirm the original contract award, the protester argued the awardee was ineligible for award.

2. Government Take Care

Flawed Best Value Analysis—Which Created "False Impression of Equivalence" Among Proposals—Turned Acquisition Into Lowest-Priced Technically-Acceptable Procurement; *System Studies & Simulation, Inc. v. United States*, COFC No. 191518C

Protest challenging agency's best value tradeoff is granted. The awardee had the lowest rated proposal on non-price factors. Despite this, the SSA's analysis went to great lengths to smooth over differences between proposals and create a false impression of equivalence between the awardee's proposal and other in the competitive range. Having equalized proposals, the SSA selected the awardee's lowest priced offer even though its price was only a few percentage points lower than other higher-rated offers. The court

found that the SSA's attempt to level proposals improperly turned a best value tradeoff into a lowest-price technically acceptable procurement.

Agency's Lack of "Any Defensible Legal Position" In Response to Protest Warrants Recommendation for Reimbursement of Costs; *Spry Methods, Inc.—Costs*, GAO B-417800.3

Protester's request for a recommendation of protest costs is granted. The protester alleged the agency had unduly delayed in taking corrective action in the face of a clearly meritorious protest. The agency alleged that the protest—which alleged unequal discussions—was not clearly meritorious. GAO rejected the agency's position, noting that that the agency had only conducted discussions with the awardee. Indeed, the agency's attempt to argue that it had not conducted discussions were so ham-handed and far-fetched that accepting them would undermine the integrity of the protest system.

Court Sustains Protest Due to Agency's Phoned-In Evaluation of Unbalanced Pricing; *The Green Technology Group, LLC v. United State*s, COFC No. 19-907C

Protest challenging agency's price, technical, and past performance evaluations is sustained in part in denied part. The agency had found that the awardee had proposed unbalanced prices. Nevertheless, the agency concluded, in one sentence, that the imbalance did not result in performance risk. The court found the agency's cursory analysis of unbalanced pricing irrational and sustained the protest on those grounds. The court, however, found that the challenges to the technical and past performance evaluations were not compelling and thus denied the protest as to those arguments.

How an Agency Loses a Protest and Alienates Offerors: (1) Invent a Solicitation Requirement, (2) Find Offerors Met Requirement Even Though Proposals Didn't Contemplate It, (3) Adjust Prices to Reflect Cost of Non-Existent Requirement; *PMSI, LLC d/b/a Optum Workers' Compensation Services of Florida,* GAO B-417237 et al.

Protest challenging agency's evaluation of the awardee's and the protester's proposals is sustained. The agency made-up a requirement that was not in the solicitation. It then found that both the protester and the awardee had satisfied this requirement

although they did not propose to the supposed requirement. Despite finding that both offerors satisfied the requirement, the agency somehow managed to disparately evaluate offerors under the invented requirement. Finally, the agency erred in adjusting the protester's price upward to reflect the costs of the false requirement that the protester never proposed to satisfy.

Awardee Takes Exception to Solicitation Requirements, Loses Protest; *Deloitte Consulting LLP*, GAO B-417988.2 et al.

Protest alleging that awardee took exception to material solicitation requirements is sustained. The solicitation required the contractor to perform tasks according to a certain schedule. The awardee's stated that it may perform tasks in a different order than the schedule prescribed by the solicitation. GAO found that the decision to perform tasks in a different order took exception to material solicitation requirements, which made the awardee's proposal unacceptable. GAO also found that the agency botched the award decision by failing to discuss difference between proposals and simply making award based on numerical ratings.

Agency Flubs Past Performance Evaluation By Assigning a Marginal Rating to Protester In the Face of Exemplary PPQs; *Addx Corporation,* GAO B-417804.2 et al.

Protest challenging agency's past performance evaluation and best value tradeoff is sustained. The agency applied unstated criteria as part of the past performance evaluation, penalizing the protester for lacking experience that the solicitation did not require. Additionally, GAO found, the agency inexplicably assigned the protester's past performance a marginal rating despite having received highly rated responses to the protester's past performance questionnaires. What's more, the agency botched the best value analysis by failing to consider price before selecting the awardee.

Agency Helped Awardee's Product Shed Pounds Before Weigh-in*; High Noon Unlimited, Inc.*, GAO B-417830, November 15, 2019

Protest challenging the agency's evaluation of offerors' proposed products is sustained, where the agency did not properly weigh the products in accordance with the solicitation. While the agency stated it would weigh the "total system" to determine whether products fell within the defined weight limits, it failed to weigh essential components of the awardee's proposed solution. Had it weighed the "total system" the awardee offered, the agency would have found the product exceeded the weight limit. Because the awardee's product failed to meet a material requirement of the solicitation, GAO found the award improper.

Strengths Assigned to Awardee's Proposal Unconnected to Stated Requirements; *Information International Associates Inc.,* GAO B-416826.2, May 28, 2019

Protest challenging the agency's technical evaluation is sustained, where the agency unreasonably assessed strengths to the awardee's proposal for areas that did not exceed the solicitation requirements or were not connected to the requirements. GAO also found the agency unequally assessed a weakness to the protester's proposal for an approach that was essentially equal to the awardee's. GAO denied challenges to the past performance evaluation and the price realism analysis.

GAO Eviscerates Agency's Illogical, Poorly-Documented, Slapdash Evaluation; *Harmonia Holdings Group, LLC*, GAO B-417475.3, B-417475.4, September 23, 2019

The GAO sustained Harmonia's protest of the Department of Agriculture's contract award based on a source selection decision that was flawed in virtually every respect, including the agency's past performance evaluation, assignment of weaknesses, and best value tradeoff

The selection official responsible for evaluating the proposals had previously served as the contracting officer on one of Harmonia's prior projects for the agency, in which the takeover from the incumbent had not gone completely smoothly. He began his evaluation with a negative view of Harmonia. His evaluation was based on the recommendations of

a technical evaluation board (TEB), the members of which had positive personal experiences with some of the key personnel from the eventual awardee. While it is legitimate for source selection personnel to consider their past experience with contractors, it cannot control the entire process, as it evidently did in *Harmonia*.

After the initial contract award to a company whose price was significantly higher than Harmonia's, Harmonia protested and the agency quickly took corrective action. The agency then issued a new award to the same awardee, based on a revised evaluation that was flawed in virtually every respect. Here are a few examples:

- The agency determined that the awardee's pricing was "lower on most positions" by selectively comparing less than half of the positions in the offers. The agency then calculated an overall price for each offer inclusive of optional CLINs that were "to be defined as the needs/requirements arise" and that were not supposed to be evaluated under the terms of the solicitation. The GAO held that this price comparison was unreasonable.
- Harmonia submitted past performance projects that were similar in size, scope and complexity, to the subject project, whereas the awardee's past performance examples were significantly smaller and of shorter duration. Nonetheless, the agency assigned a much higher rating to the awardee's past performance than to Harmonia's. The GAO held that the high rating for the awardee was "facially inconsistent" with the past performance references the awardee submitted.
- The agency assigned weaknesses to Harmonia's technical approach and management approach because "while the technical approach met the requirements of the RFQ, it did not show how Harmonia's approach was the best." The GAO held that these were comparative assessments, not weaknesses demonstrating any failure to meet the solicitation's requirements.
- The agency assigned a weakness because Harmonia's proposed staffing level was lower than the government's estimated staffing level. The GAO held this was improper because "the government's estimate was not disclosed to the offerors; the agency failed to conduct discussions with the offeror concerning the discrepancy; and the agency did not look beyond the bottom-line numbers to determine whether there were specific areas in which the offeror's proposed staffing was adequate."
- The agency assigned a weakness based on a deficiency in Harmonia's original proposal, which had been corrected in its revised proposal. The agency stated that while the revised proposal corrected the problem, Harmonia "showed a lack of diligence in initial proposal." The GAO held that it was unreasonable to assign a weakness for a deficiency which had been corrected.
- The agency failed to document the basis for its best-value tradeoff decision, and so could not demonstrate why it was advantageous to the government to pay the

awardee's higher price. The GAO held that the agency had also conducted the tradeoff analysis in a mechanical way, without any consideration of the quality of proposals other than the list of weaknesses assigned, unreasonably, to Harmonia.

The high number and unreasonable nature of the agency's procurement errors are clear evidence that the agency was biased against Harmonia from the start.

D. Late Proposals

Vizocom, a San Diego company, was a potential offeror for a solicitation released by the Department of the Army. The solicitation had explicit instructions for delivery, including an express directive that offerors obtain military installation access prior to proposal submission if they intended to hand-deliver their proposal.

Vizocom intended to hand-deliver its proposal and hired a courier thirty minutes prior to the proposal submission deadline to make the delivery. Vizocom also sent an email to the Army Contract Specialist to advise that Vizocom had dispatched a courier to deliver its proposal. The courier, however, encountered delays attempting to deliver the proposal because she required a sponsor to enter the military installation. Then, upon gaining access to the installation, the courier mistakenly went to the incorrect location for proposal delivery. Ultimately, the Army did not receive Vizocom's proposal until twenty minutes after the time specified in the solicitation, and the contracting officer rejected Vizocom's proposal as late.

Vizocom protested at the GAO, arguing that the solicitation's addresses for proposal delivery were ambiguous and that the proposal was only late because of improper government action. The GAO, however, disagreed, finding that Vizocom's late delivery was the result of its own lack of planning, rather than any improper government action. *Vizocom*, B-418246.2, February 14, 2020

No Evidence of Government Control in Dispute Over Late Proposal; GAO B-418443*, Cla-Val Company*

Protest challenging the agency's rejection of a proposal as late is denied, where the agency provided documentation from its receiving office showing when the proposal arrived via commercial delivery service, how it was processed, and when it was delivered to the contracting officer. The protester provided a delivery receipt from the carrier showing that the package was delivered on-time, but GAO said that such receipts, without more, are not enough to show the government had control over the package.

E. Protester Must Show Prejudice

Evaluation Criteria that Heavily Favored Incumbent Not Unduly Restrictive; *Flight Support, Inc.*, GAO B-417637.2, November 26, 2019

Protest challenging the terms of a solicitation as unduly restrictive is denied. The protester contended that only the incumbent could receive a "very relevant" rating under the solicitation's corporate experience and past performance factors. But just because criteria favor an incumbent does not make them unreasonable. What's more, even if offerors could not receive a very relevant rating, they were not precluded from receiving the contract. The protester also argued that the corporate experience and past performance criteria were too restrictive because the agency would only consider the experience of an entity, not of individual employees. GAO found, however, that the protester had not explained how this restriction inhibited competition.

***American Relocation Connections, LLC,* U. S., No. 2019-1245 (Fed. Cir. October 11, 2019)**

To have standing under § 1491(b)(1), a party must show that it '(1) is an actual or prospective bidder and (2) possess[es] the requisite direct economic interest." *Rex Serv. Corp. v. United States*, 448 F.3d 1305, 1307 (Fed. Cir. 2006). To prevail, however, there are two tests, both require prejudice. In a post-award bid protest, the prospective bidder 'must show that there was a 'substantial chance' it would have received the contract award but for the alleged error in the procurement process.' *Info. Tech. & Applications Corp. v. United States*, 316 F.3d 1312, 1319 (Fed. Cir. 2003). In a pre-award bid protest, however,

a prospective bidder need only allege a 'non-trivial competitive injury which can be addressed by judicial relief.' *Weeks*, 575 F.3d at 1363.

RFQ as a small business set-aside, then ARC would be in a better competitive position to win the contract. However, while ARC may have suffered a non-trivial competitive injury and, thus, had standing to challenge the RFQ, this did not necessarily mean that it had shown that the failure to consult with the SBA was prejudicial error on the merits.

In order to show prejudicial error on the merits, the Federal Circuit explained that "ARC must 'show a significant, prejudicial error in the procurement process,' meaning it must show that there is a greater-than-insignificant chance that CBP would have issued the 2018 RFQ as a set-aside for small businesses" had it not failed to consult with the SBA during market research. The Federal Circuit stated that "the record shows that even if CBP had consulted with the SBA during its market research, it would not have issued the 2018 RFQ as a small business set-aside because there were not enough qualifying small businesses to compete under the applicable NAICS code." Therefore, the Federal Circuit affirmed the COFC's dismissal of ARC's protest.

F. Jurisdiction

Contractor Can't Challenge Validity of CPAR in a Bid Protest: *Colonna's Shipyard, Inc. v. United States*, COFC No. 19-1373C, January 21, 2020

Government's motion to dismiss bid protest for lack of subject matter jurisdiction is, for the most part, granted. The court found that most of the counts in the protester's complaint were challenges to the validity of a Contractor Performance Evaluation Report (CPAR) that the agency considered in evaluating the protester's proposal. Challenges to a CPAR must be brought under the Contract Disputes Act, not the court's bid protest jurisdiction.

Modification of Task Orders

***Akira Technologies, Inc. v. United States*, COFC No. 19-1160C (Fed. Cl. Oct. 10, 2019)**

The U.S. Centers for Medicare & Medicaid Services (CMS) awarded contracts to Akira and C-HIT under a multiple award IDIQ contract. After contract performance had begun, CMS decided that it would not exercise the option years on Akira's order and instead modified C-HIT's task order to include the necessary services.

Akira filed a post-award bid protest challenging CMS's sole-source award decision. CMS moved to dismiss Akira's protest for lack of subject matter jurisdiction on the grounds that FASA bars the court from hearing protests in connection with the issuance of a task order, except on the grounds that the order increases the scope, period, or maximum value of the IDIQ contract. Akira attempted to circumvent the court's lack of jurisdiction by arguing that it was not protesting the award of the task order, but instead was seeking review of CMS's task order modification.

The court concluded that "[a] protest of a task order modification to acquire additional services directly connected to the services provided in a previously issued task order that does not otherwise increase the scope, period or the maximum amount of the IDIQ contract is a protest 'in connection with the issuance of a task order.'" Therefore, the court granted CMS's motion to dismiss for lack of jurisdiction.

Agency Decision to Terminate Contract for Convenience Rather Then Defend Award is not Protestable; *Lyon Shipyard, Inc.*, GAO B-417734.2, October 22, 2019

Protest challenging the termination of awardee's contract after another disappointed bidder protested is dismissed. GAO does not hear matters of contract administration. Here, the termination was an agency business decision that presented a question of administration that GAO will not review.

GAO Sustains Protest, Finding that Contract Modification Improperly Exceeded the Scope of the Contract; *Leupold Stevens, Inc.*, GAO B-417796, December 2, 2019

Protest alleging that a modification was outside the scope of the contract is sustained. The solicitation sought scopes for small arms. The awardee proposed wire crosshairs for its scope while other offerors proposed more expensive glass crosshairs. After award, however, the agency modified the contract to require the awardee to use glass crosshairs. This modification also required the awardee to redesign the scope. GAO determined that the modification was outside the scope of the contract because it contravened a solicitation provision that explicitly prohibited the redesign of the scope in the event the agency changed crosshairs. GAO further found that this modification was a material change that could not have been anticipated by the offerors and was not permitted under the contract's changes clause.

G. Timeliness of Protest

Protester Fails to Timely Challenge Terms of "Borderline Nonsensical," "Rorschach Test" Solicitation But Still Prevails Because Agency Ignored Solicitation's Evaluation Process; *HVF West, LLC v. United States*, COFC No. 19-1308C

Protest alleging that the government failed to adhere to the terms of a solicitation is sustained. The protester contended that the government erred by failing to consider technical information from bidders and treating the procurement like a sealed bid acquisition. The court found that the solicitation contained a patent ambiguity concerning when the agency was supposed to evaluate technical information; indeed, the court found the whole evaluation process borderline nonsensical. It was not clear whether the agency was supposed to evaluate technical factors as part of the evaluation or after award as part of a responsibility determination. The protester, however, had failed to challenge this patent ambiguity before bids were due and thus waived the argument. Nevertheless, the court found that the agency ignored the awardee's failure to submit technical information required by the solicitation and thus erred in awarding the contract to an ineligible bidder.

COFC Decision Clarifies Filing Deadline

In *NIKA Technologies v. U. S.,* No. 20-299C (April 21, 2020),, the Army Corps of Engineers provided the protester with a written debriefing on March 4, 2020, and included in the debriefing the option for the protester to submit additional questions related to this debriefing within two business days after receiving the debriefing. The letter stated that "[t]he [g]overnment will consider the debriefing closed if additional questions are not received within two (2) business days. If additional questions are received, the [g]overnment will respond in writing within five (5) business days ... [and] will consider the debriefing closed upon delivery of the written response to any additional questions." The protester sent a letter to the Corps on March 5, 2020, noting that it had received the written debriefing the previous day and that it planned to follow up with the Corps by March 6, 2020, on any official debrief questions it might submit. On March 7, 2020, the protester informed the Corps that it did not have any debriefing questions to submit.

The protester then filed a post-award bid protest at GAO on March 10, 2020. When the Corps subsequently indicated in a filing to GAO that the protester's protest filing was untimely for the imposition of an automatic stay under CICA, the protester filed its complaint at the COFC, challenging the Corps' refusal to implement a CICA stay.

At the COFC, the Government contended that for an automatic CICA stay to apply, the protester was required to file its protest by March 9, 2020, arguing that protester had failed to do so because it did not submit any additional questions to the Corps after the written debriefing letter was received on March 4, 2020. In contrast, the protester argued that its decision not to submit additional debriefing questions by March 6 meant that its debriefing was closed as of that date and, therefore, its protest filed on March 10 would be timely.

In his opinion, Judge Charles F. Lettow concluded that the GAO protest was entitled to an automatic stay under CICA. The judge noted that the relevant statutory language in the 2018 National Defense Authorization Act clearly includes the two business days for

further questions as part of the debriefing. Judge Lettow also noted that a “debriefing date” refers to the date at the end of a potentially multiday debriefing process because the debriefing period could have been extended in this scenario if the protester had submitted additional questions to the Corps.

Agency’s Decision to Voluntary Answer Protester’s Debriefing Questions Did Not Toll Protest Deadline; *Centerra Integrated Facilities, LLC*, GAO B-418628

Protest challenging award is dismissed as untimely. The protester had received a debriefing, asked the agency questions about the debriefing, and then filed a protest within 10 days after it received answers to its questions. Generally, when an agency provides a statutorily required debriefing, the time the agency takes to answer debriefing questions will toll the 10 day protest deadline. The agency in this case, however, was not subject to the normal federal procurement statutes; instead, it was governed by its own acquisition policies. Thus, the agency was not obligated by statute to provide a debriefing. Because the agency did not have to provide a statutorily required debriefing, its decision to voluntarily answer the protester’s debriefing questions did not toll the protest deadline. The protester thus had to file the protest within 10 days of the initial debriefing, not within 10 days of the receiving answers to its debriefing questions.

H. Documentation

GAO Refuses to Accept Agency’s Poorly Documented, Unsupported Evaluation Conclusions; *Ohio KePRO, Inc.*, GAO B-417836, B-417836.2

Protest challenging agency’s cost, technical, and experience evaluations is sustained where the agency failed to adequately document it evaluation conclusions. Nothing in the record showed that the agency had evaluated the awardee’s proposed direct labor rates. Additionally, the record only showed that the agency had evaluated a small fraction of the activities specified in the solicitation. The agency failed to explain in the evaluation why it accepted the awardee’s deviation form a baseline specified in the

solicitation. Moreover, the agency failed to adequately document its evaluation of the awardee's references under the solicitation's experience factor.

Agency Unable to Explain Strengths Assigned to Awardee; *IAP Worldwide Services, Inc,* GAO B-417824, B-417824.2

Protest challenging strengths assigned to the awardee is sustained. The protester argued that the agency assigned strengths to the awardee that were either based on unstated criteria or provided no relevant benefit. GAO agreed with the protester, finding that the agency's rationales for these strengths were more attenuated than the most delicate gossamer.

V. POST AWARD

A. TERMINATION FOR DEFAULT

Contractor's Unequivocal Refusal to Perform Warrants Termination for Cause; *Appeal of Molly Jessie Company,* ASBCA No. 62140

Appeal challenging termination for cause is denied. The government terminated the contract because the contractor flat out refused to perform. The contractor claimed it nonperformance was excused because the contract's safety paperwork requirements were excessive. The board found that the burdensome paperwork requirements did not excuse nonperformance. If the contractor had a problem with the paperwork requirement, it should have raised the issue before the proposal deadline, not after award.

Contractor's Relentless Goldbricking Justified Termination for Cause; *Appeal of Molly Jessie Company,* ASBCA No. 62134

Appeal of agency decision to terminate contract for cause is denied. The agency terminated because the contractor had stopped performing. The contractor claimed it was unable to perform due to weather conditions. The board didn't buy the bad weather story. Rather, it appeared the contractor had stopped working because it was too costly. The contractor's cost of performance, however, was not the government's fault. The termination was warranted.

B. CLAIM and APPEAL PROCEDURES

1. Standing

Federal Circuit Affirms that Surety, Which Executed Takeover Agreement with the Government, Lacks Standing to Assert Claims that Arose Before the Takeover Agreement; Guarantee Company of North America, *USA v. Ikhana, LLC,* Fed. Cir. 2018-1394, November 7, 2019

The Federal Circuit affirmed an ASBCA decision finding that a surety lacked standing to intervene in an appeal pending before the board. Under the CDA only the prime contractor can appeal a claim to the ASBCA. The only exception to this rule occurs when the prime contractor's surety has entered a takeover agreement with the government. But even then, a surety can only appeal claims that arose after execution of the takeover agreement. Here, a surety sought to intervene in an appeal pending before the ASBCA. But the claims before the ASCBA arose before the execution of the takeover agreement. Thus, the surety was barred from intervening in the ASBCA appeal. Two judges on the Federal Circuit panel concurred in the outcome contending that the rule that prohibits sureties from asserting claims prior to a takeover agreement conflicts with the general law of suretyship.

The court reasoned that a party seeking to supplant the plaintiff in a legal proceeding must be able to show that they could have initiated the complaint on their own. Under the CDA, however, only contractors can appeal a decision to the board. The point of this limitation is to ensure that there is a single point of contact for contract claims. The only exception to this rule, set forth in *Fireman's Fund Ins. Co. v. England*, 313 F.3d 1344 (Fed. Cir. 2002), is when a surety executes a takeover agreement under which the government allows the surety to step into the contract. But, the court noted, even if a surety enters a takeover agreement, it will only have standing to assert claims that arose after the takeover agreement was executed.

One of the judges on the panel concurred in the outcome but wrote a separate opinion (which another judge joined) to criticize the precedent underlying the decision. The

concurring judge argued that the case on which the decision was based, *Fireman's Fund*, was wrongly decided.

As noted, *Fireman's Fund* holds that a surety that executes a takeover agreement can only raise claims against the government for work the surety did itself following the takeover agreement. This rule was intended to narrow the claims before the board to those between the government and a single point of contact, i.e., the prime contractor. But the court noted that this "single point of contact" rule was based on a Senate Report that was primarily concerned with precluding subcontractors from bringing claims, not sureties. A surety is different than a subcontractor in that sureties are obligated to step into the contract and ensure that performance is completed. And outside of the government contracts context, a surety is typically expected to address pending litigation involving the contractor. Thus, a rule limiting the ability of sureties of government contracts to only resolve claims that arise after a takeover agreement conflicts with the law of suretyships. The concurrence opined that this case was an appropriate vehicle to review the rule in *Fireman's Fund*.

2. Sum Certain

Contractor's Equivocation on Monetary Claim Fails to State a Sum Certain and Fails to Invoke Board's Jurisdiction; *Appeal of High-Tech Launderette LLC,* ASBCA No. 62259

Appeal asking the ASBCA to order agency to cease and desist with a termination and seeking money damages of "approximately $150,000" is dismissed for lack of jurisdiction. A cease and desist request is effectively a request for injunctive relief. The board does not have jurisdiction to grant injunctive relief. The qualified request for "approximately $150,000" failed to state sum certain and thus failed to invoke the board's jurisdiction.

Email from Contractor Notifying Agency that "We Have Some Damage" Does Not Constitute a Valid Claim*; Appeals of Naseem Al-Oula Company*, ASBCA Nos. 61321 et al., January 14, 2020

Appeal of claim seeking reimbursement for damage to vehicles used by the government is denied due to lack of jurisdiction. The claim did not request a sum certain.

Naseem Al-Oula Company had a contract with the Army to provide vehicles for the use of Air Force personnel in Iraq. When the vehicles were returned to Naseem, the company sent an email to the Army, claiming that the windows had been damaged. The email included three different estimates for the damage and very little narrative beyond stating that “we have some damage . . . please let me know when any more information required [sic.].”

The Army treated the email as a claim for—despite the three different estimates—$16,900. The Army denied the claim, finding that the damage to the windows resulted from normal wear and tear. Naseem appealed the denial of its claim to the ASBCA. The Army moved to dismiss, alleging a defective claim and thus the ASBCA’s lack of jurisdiction.

The ASBCA agreed that the claim was deficient, and that the board lacked jurisdiction. First, Naseem had failed to submit a sum certain as required by the Contract Disputes Act. Its email included three different estimates for five vehicles without specifying a single dollar amount. The fact that the Army contracting officer had identified the claim amount as $16,900 did not change the board’s decision. The record did not explain how the CO arrived at that amount, and speculation could not satisfy Naseem’s obligation to meet its burden of proof.

Ambiguous Words in Government Contract Claims Regarding Amount Claimed, *Odyssey International, Inc.,* ASBCA No. 62062, Jan. 28, 2020

The ASBCA recently dismissed in part Odyssey International, Inc.’s appeal of a government contracts claim for consequential damages because the contractor failed to seek a “sum certain.” Instead, the contractor claimed “*at least* $15,033,862”.

Claim for Contract Interpretation Really Just a Claim for Money, Which Board Dismissed for Failure to State a Sum Certain; *Appeal of Parsons Government Services, Inc.*, ASBCA No. 62113

Appeal of a denied claim seeking recovery of lease costs is dismissed. The contractor appealed a unilateral rate determination that decided the contractor's lease costs. As part of the appeal, the contractor also sought contract interpretation of the FAR provisions governing leaseback costs. The board found the appeal of the unilateral rate determination was untimely. A unilateral rate determination is a government claim that must be appealed in 90 days. The contractor had waited six months. The board also found that the contract interpretation claim was effectively a claim for money damages. Because the contractor had failed to allege a sum certain for what was essentially a money claim, the board found that it lacked jurisdiction over the claim under the CDA.

3. Certification

A contractor's digital signature complied with the CDA's claim certification requirements, *URS Federal Services, Inc.*, ASBCA 61443, October 3, 2019

The signature in question was electronically affixed to the claim document—along with a digital certificate—using software that required the signer to input a unique password and user identification before signing. The government argued that one "cannot trust the [digital] certificate to prove the identity of the person who applied it," because there was no "suitable ID" to prove the signer's identity. While noting that it had previously found typed but unsigned names to be insufficient, the Board rejected the government's argument, because the digital signature was "discrete" and "verifiable" in accordance with the CDA's requirements. The Board reasoned that "[n]o ink signature, on its face, includes any way for the reader to know who executed it unless that reader already possesses an intimate familiarity with the certifier's handwriting" and declined to "impose draconian demands on digital signatures, not required to be met for their ink counterparts."

4. Final Decision

CBCA Reminds Claimants that Statements Made in a Contracting Officer's Decision Are Not Binding on the Government; *CSI Aviation, Inc. v. Department of Homeland Security and General Services Administration*, CCBA 6292, 6386

Contractor's motion for summary judgment is denied. In support of its summary judgment motion, the contractor submitted a statement of facts that cited only to the contracting officer's decision denying the claim. The board reasoned that because it reviews claims de novo, a contracting officers' statements denying a claim are not evidence and are not otherwise binding on the government. Thus, the contractor could not rely on the contracting officer's statements as undisputed facts.

CO's Failure to Plan Does Not Excuse Need For Timely COFD, CTA I, LLC dba CTA Builders, CBCA 6783, May 14, 2020

The CBCA drastically shortened the agency's window for deciding a claim under a now-terminated construction contract. The board agreed with the appellant that the agency's failure to plan for the long-expected claim contributed to the expected 284-day timeline for reviewing and deciding the claim.

In January 2020, CTA submitted a certified claim for $4.4 million and in March 2020, the VA CO advised that he would render a decision by November 9, 2020, or 284 days after the submission. CTA asked the board for an order setting the deadline for a COFD to June 15, 2020.

The matter was part of an ongoing dispute between CTA and VA involving a construction contract. The parties partially settled the matter two years ago. CBCA stayed that case with the expectation that it would be consolidated with the remaining unresolved claims once the contract was completed. VA terminated the contract for convenience in January 2019, and it appeared no action was taken on the contract or claims for some time.

The board sided with the appellant, finding that VA's failure to prepare for receipt of the claim had caused an undue delay. The board noted that it could not literally order the agency to issue a decision by the appellant's proposed date, but only shortening an extension that the CO had given himself within the 60-day window. The board noted that

CTA had the discretion to appeal from a deemed denial, should a decision not be forthcoming.

Claim Failed to Ask for COFD; Wa*Aron Security Inc. v. Department of the Interior,* CBCA No. 6664

The Civilian Board of Contract Appeals dismissed an appeal for lack of jurisdiction, finding the contractor did not request a final decision from the CO. While the appellant had disputed the CO's denial of a request for a contract modification and asserted a sum certain that it sought to recover, it did not either explicitly nor implicitly request a final decision, which deprived the court of jurisdiction.

Agency Not Required to Identify Board to Which Claimant May Appeal; *Mahavir Overseas v. Agency for International Development*, CBCA 6704

Appeal of agency claim is dismissed as untimely. The agency issued a final decision asserting a claim against a contractor, seeking reimbursement for defective items. The contractor asked the agency where it could appeal the decision. The agency notified the contractor that it could appeal to the CBCA after the 90 day appeal had passed. The board noted that while the agency's conduct was somewhat unseemly, the agency had no obligation to provide the contractor with the identify or address of the CBCA. Contractors are charged with legal notice of that information. Because the appeal deadline was jurisdictional, the board lacked discretion to grant the contractor an extension for filing the notice of appeal.

C. BASIS FOR CLAIMS

1. Delays

Keeping a Workforce on Standby Does Not Mean They Must Be Idle*; RLS Construction Group, LLC v. Department of Veterans Affairs*, CBCA 6349, April 10, 2020

RLS Construction had a contract with the Department of Veterans Affairs to construct a new entrance to a medical center. Following completion of the contract, RLS submitted claims to the VA, alleging agency-caused delay and seeking reimbursement for

additional supervisory costs, administrative costs, home office overhead, proposal preparation fees, and profits. The VA denied the claims. RLS appealed to the CBCA. The VA moved for summary judgment.

The government argued that the contractor was not entitled to home office overhead costs because it could not prove that its workforce had been on standby; rather, the government, contended, the contractor's employees had a constant presence on the worksite throughout. But the board found that just because the workforce was not idle did not mean it was not on standby.

The VA moved for summary judgment on RLS's claim for home office overhead costs. To recover home office overhead a contractor must prove (1) a government-caused delay, (2) that extended the original time for performance of the contract, and (3) that the contractor was required to remain on standby during the delay. The VA claimed that RLS could not prove it was standby. Indeed, the VA noted that RLS's workforce had been constantly present on the site, so they could not have been on standby.

The board, however noted that entitlement to home office overhead does not depend on whether RLS's workforce was idled. Rather, it depends on whether there was a suspension or delay of indefinite duration. The board found issues of fact concerning the delay that precluded summary judgment.

Contractor Not Entitled to Delay Costs for Time Spent Asking Agency to Move Construction Site; *Appeal of AISG, Inc.,* ASBCA Nos. 58696, 59151

Contractor's claim for delay costs is denied. The contract was for construction of a police station in Afghanistan. The contractor claimed it was entitled to recover costs incurred over several months while it tried to convince the agency to move construction site to a more suitable location. The ASBCA rejected the contractor's argument. Although the agency eventually agreed to move the site, it did not cause any delay. The contractor could have begun construction at the original site. The contractor chose to hold out for a

new site. Any delay costs the contractor incurred trying to get the site changed were not the agency's obligation.

Agency's Mismanagement of Contract Schedule Necessitated Subcontractor Standby, Which Justified Recovery of Home Office Overhead; *Appeal of Alderman Building* Company*, Inc.*, ASBCA No. 58082, May 21, 2020

Appeal of a subcontractor's pass-through claim seeking unabsorbed home office overhead is sustained. The agency conceded that it was responsible for delay of the project, but it argued that the subcontractor was not entitled to overhead costs because it had not been required to keep staff on standby during the delay. The board found that while the agency never explicitly required a standby, indirect evidence established the subcontractor was on standby. In particular, the agency's failure to extend the contract and inability to commit to a firm start date required the subcontractor to keep staff available. The agency also argued that the subcontractor was not entitled to unabsorbed overhead because it found substitute work during the delay. But the board found that this work did not cover the subcontractor's costs.

2. **Did a Contract Exist? Panther Brands, LLC and Panther Racing, LLC vs the United States, No. 16-1157C, December 17, 2019)**

In October 2012, Panther, an IndyCar racing team, signed a sponsorship agreement with a broker under which Panther would be paid $12.8 million to put together a U.S. Army National Guard-branded racing team during the 2013 IndyCar series and to provide other promotional services. The agreement contained an option for the 2014 season exercisable before July 31, 2013.

A lieutenant general told Panther in a February 2013 meeting that its sponsorship was authorized and funded for 2014, according to Panther. Later that month, the COR orally advised Panther that its IndyCar contract would be renewed and that Panther should start preparing. Per Panther, whom the Guard had sponsored annually since 2008, this was the usual practice: the Guard would first give oral authorization to proceed, and

contract documents would be signed later. Panther revved up its operations for 2014, hiring a new driver and technical advisor, conducting R&D for its vehicle, and engaging in various promotional services for IndyCar races. But July 31 came and went without option execution. Instead, the Guard explored sponsoring a different racing team and ultimately decided to go with a competitor for the 2014 season.

Following an unsuccessful bid protest, Panther filed its claim at the Court of Federal Claims under the Contract Disputes Act seeking reimbursement of expenses in preparation for the 2014 season. Among other counts, the claim alleged breach of an implied-in-fact contract. The Government filed for summary judgment following discovery on the grounds that Panther could not demonstrate the existence of any implied-in-fact contracts. Granting the Government's motion, the Court found that Panther failed to submit evidence that either the general or the COR had actual authority to bind the government for the 2014 season, and that Panther was unable to establish ratification of the oral advisements by a contracting authority. Panther was unable to recover about $5 million. It eventually would close shop in August 2014.

Having Implicitly Ratified a Contract Modification, Agency Could Not, Through an Express Ratification, Change Modification's Terms; *Crowley Logistics, Inc. v. Department of Homeland Security*, CBCA 6188, 6312

Contractor's motion for summary judgment in an appeal of a denied claim is granted. The contractor argued that the agency had implicitly ratified the pricing terms in an otherwise unenforceable contract modification. The agency, however, argued that there was no implicit ratification because (1) the agency had expressly ratified the modification; and (2) at the time of that express ratification, the agency had changed the pricing terms. The board, however, found that a subsequent express ratification cannot eradicate a prior implicit ratification. The agency, through constructive knowledge of the unauthorized modification, had implicitly ratified the modification and was bound—regardless of a later express ratification—by what it implicitly ratified.

D. INSPECTION WAIVERS

Agency's Obliviousness to Requirement Results in Waiver of That Requirement; Appeals of Buck Town Contractors & Co., ASBCA Nos. 60939, 60940, 60941, January 8, 2020

The contractor argued the agency had constructively waived a contract specification that required the installation of geotextile fabric in a levee with perpendicular seams. The board agreed, reasoning that the agency observed and accepted fabric with parallel seams. The contractor also contended that it was entitled to be reimbursed for costs incurred to remedy geotextile that failed to meet the contract's strength requirements. The contractor claimed that while individual samples of the geotextile did not satisfy the contract's requirements, the average strength of the multiple layers of geotextile did satisfy those requirements. The board, however, rejected the contractor's "average strength" argument, reasoning that levee is only as strong as its weakest point. The integrity of the levee was a matter of public safety. Each sample of fabric had to satisfy the contract's strength specifications.

Buck Town Contractors had a contract with the Army Corps of Engineers to reconstruct a hurricane protection levee in Louisiana. The contract required placement of geotextile—a permeable fabric that helps with soil stability and erosion control—at the base of the levee. The contract specified that the seams and overlaps of the geotextile had to be installed perpendicular to the centerline of the levee.

Buck Town's subcontractor, however, installed the geotextile with seams parallel to the center of the levee. Multiple Corps officials observed, inspected, and photographed the parallel installation over the course of several weeks. The Corps' quality assurance inspectors signed off on the installation, noting that Buck Town's work was acceptable. It wasn't until after a significant work on the levee had been completed that the Corps noticed the flaw in the installation. The Corps required Buck Town to degrade and rebuild the levee with a new layer of properly installed geotextile.

Buck Town submitted a $3 million claim to the Corps. Buck Town contended that it was entitled to a contractual adjustment for the parallel geotextile seams because the Corps, through its inaction, had constructively waived that perpendicular seam requirement. As to the claim

Buck Town contended that the Corps was aware of and did not object to the parallel seams and thus constructively waived the perpendicular seams requirement.

The board noted that a constructive waiver occurs when (1) the contracting officer possessed knowledge of the work outside the scope of the contract, (2) action or inaction by the contracting officer indicated acceptance of non-specified performance, (3) the contractor relied on the contracting officer's action or inaction, and (4) inequity would result if acceptance of non-specified performance were retracted.

Here, the board found that Buck Town had satisfied the elements of constructive waiver. With regard to the first element—knowledge of work outside the scope of the contract—the Corps argued that it lacked actual knowledge of the improper geotextile installation. The board, however, reasoned that a waiver can be based on the constructive knowledge. In this case, Buck Town's quality control reports specifically stated that it was installing geotextile with parallel seams. None of the government's quality assurance reports noted defects in the installation. Moreover, Corps representative visited the job site and observed the parallel seams. Based on the totality of the evidence, the contracting officer either knew or should have known that Buck Town was installing geotextile with parallel seams.

The board also found that the second element—action or inaction by the CO—was satisfied because inaction of the entire quality assurance team indicated to Buck Town that the Corps accepted the parallel seams. The third element was satisfied because Buck Town obviously relied on the Corps' acceptance of the seams while building up the levee.

The fourth element was satisfied because it would be inequitable for force Buck Town to bear the costs of the Corps' failure to enforce the contract's provisions.

Even assuming that the levee as a whole met the minimum strength requirements, it would still have been weaker than if built according to the actual contract specifications.

The board also noted that its own precedent holds that the economic waste theory does not apply when public safety is at issue. The levee in this case was part of a high risk system. Breach of the levee could result inundation of 191,000 structures and over $47 billion in damages. Given the stakes, the Corps did not act arbitrarily when it required Buck Town to satisfy the contract's tensile requirements.

Agency's Failure to Notice that Contractor Was Not Installing Proper Conduit Did Not Waive Conduit Requirement; *Appeal of Watts Constructors, LLC,* ASBCA No. 61493

Claim to recover the costs of installing electrical conduit is denied. The contract required installation of a rigid conduit. The contractor, however, installed a flexible metal cable. The board found that the metal cable was not conduit. Although the agency initially acquiesced to the installation of the cable, the board found that this did not waive the conduit requirement.

E. COST RECOVERABILITY

Lack of Available Pilots Shoots Down Claim for Unpaid Transportation Services; *Appeal of AAR Airlift Group Inc.,* ASBCA No. 59708, October 29, 2019

Appeal of a denied claim seeking additional compensation for helicopter transportation services reserved but not used is denied, where the appellant could not demonstrate that it had sufficient aircrew available to pilot the aircraft, should they have been needed. The contract provided that payment would be made when an aircraft was fully mission capable and when pilots were available, but the appellant's own duty rosters failed to show personnel were available for missions on those dates.

Decision to Not Attend Site Visit Dooms Claim for Extra-Contractual Work; *Appeals of Linda Rugina Company D/B/A Ruginas Afrikan Village*, ASBCA Nos. 62207, 62334

Claim seeking recovery for extra-contractual work is denied. The contract had a site investigation clause, which stated that failure to visit the site would not relieve the contractor of the responsibility to properly estimate the work. Here, the contractor declined to attend a site visit and thus could not recover the cost of the additional work that a site visit would have revealed.

Contractor Can't Recover Costs Incurred as a Result of a Third Party's Conduct; *ECC International Constructors, LLC v. Secretary of the Army,* Fed. Cir. 2019-1619

Appeal of ASBCA decision denying contractor's constructive change claim is affirmed. The contractor claimed it was entitled to costs incurred as a result of heightened security procedures for its work site. The court held that the government is not liable for increased costs caused by a third party. Here, the heightened security procedures were imposed by an international military base, which had authority over security procedures at the worksite. The government never agreed to cover security costs for the contractor and thus was not liable for the contractor's increased security costs.

Who Bears the Risks of War? Federal Circuit Affirms ASBCA's Decision that the Contractor Bore the Risk of Changes to Base Access, *ECC International, LLC*, ASBCA No. 60484, Nov. 16, 2018, 18-1 BCA ¶ 37203,

which rejected a contractor's claims arising out of the Government's closure of a key access route to a construction site in Afghanistan. The Armed Services Board of Contract Appeals ruled that the contractor bore the risk of changes to base access, the contract did not warrant continued access through a particular gate, the Government did not impliedly warrant access through that gate, and closure of the gate was not a constructive change. The Federal Circuit now has agreed with the Board's decision in No. 60284 and related appeals, explaining that "the change in security procedures was not a constructive change in the contract for which ECC is entitled to compensation."

F. CONSEQUENCES OF AN APPEAL

Appellant Wins Appeal but Nets Only Half the Recovery COFD Originally Awarded; *Appeal of BES Construction LLC*, ASBCA No. 60608, November 6, 2019

Appeal of the agency's denial of a claim for compensable delay is sustained in part, where the appellant failed to provide any rationale for recovery but the government's expert witness suggested that some payment was owed. The board considered the opinion of the government's expert witness as a concession that the government owed BES some amount in delay cost. The board granted the appeal in the amount suggested by the witness – $69,483.88, plus interest.

Contracting Officer's Stern—"Bordering on Verbally Abusive"—Emails Come Back to Haunt Agency in Attorney Fees Proceeding; *Vet4U, LLC v. Department of Veterans Affairs*, CBCA 6612-C(5387), February 19, 2020

Application for attorneys' fees under the Equal Access to Justice Act is granted in part. A claimant that had prevailed on some of its claims requested fees under the EAJA. The agency objected to a fee award, arguing that its litigation position had been justified. The board found the agency's litigation position—especially in light of it behavior during contract performance—was not justified.

Here, while Vet4U did not prevail on all its claims, the board found that during performance, the VA's conduct was not justified. The agency increased costs and prevented the parties from efficiently resolving disputes. The VA forced Vet4U to do work that was outside the scope of the contract, failed to reimburse Vet4U for emergency repairs, ignored requests for assistance in securing cooperation from another contractor, and left Vet4U in limbo with respect to a change work order. The VA failed to act when circumstances required it. Instead of proposing solutions, the contracting officer sent Vet4U stern emails that bordered on being verbally abusive.

The agency increased costs and inhibited an efficient resolution of disputes during performance. The unreasonableness of the agency's position was exacerbated by the conduct of the contracting officer who, rather than working with the contractor, sent stern, almost abusive, emails berating the contractor.

Lawyer's Government Contracts Experience Is Not Distinctive Knowledge or a Specialized Skill that Justifies Fee Award in Excess of EAJA's Statutory Cap; *2M Research Services, LLC v. United States*, COFC No. 17-1638

Successful protester's application for attorney's fees under the Equal Access to Justice Act is granted in part. The court found that the protester was eligible for a few award under the EAJA. But the protester argued that a special factor warranted a fee award in excess of the EAJA's statutory cap. The protester contended it was entitled to an enhanced fee award because it had to hire a highly specialized government contracts attorney. But the court reasoned that experience with government contracts is not the type of distinctive knowledge or specialized skill that supports a special factor finding.

G. RELEASE/WAIVER

In *Meridian Engineering Company vs. The United States*, COFC 11-492C, September 23, 2019, the dispute involved a contract between Meridian and the U.S. Army Corps of Engineers for a flood-control project in Nogales, AZ. The Contracting Officer had issued two contract modifications that compensated Meridian for government-caused delays related to an access ramp and surveys. As a result of the underlying delays, Meridian's work was pushed into the yearly rainy season in southern Arizona, referred to as the "monsoon" season, and completion of the critical channel invert work was impacted by numerous flood events. Had it not been for the earlier access ramp and survey delays, the work would have been completed before the onset of the "monsoon" season. The two modifications, signed by Meridian, contained "Closing Statements" which said:

> It is understood and agreed that pursuant to the above, the contract time is extended the number of calendar days stated, and the contract price is increased as indicated above, which reflects all credits due the Government

> and all debits due the Contractor. It is further understood and agreed that this adjustment constitutes compensation in full on behalf of the Contractor and its Subcontractors and Suppliers for all costs and markups directly or indirectly attributable for the change ordered, for all delays related thereto, for all extended overhead costs, and for performance of the change within the time frame stated.

The Government argued that the release language should be read broadly to include the release of all flood-event damage claims, past and future, arguing that these were encompassed within the related-costs language of the release. Meridian, on the other hand, argued that each of the releases only applied to the specific costs and time associated with the purposes explicitly listed in the modifications; that is, the costs of the new access ramp and the survey drawing delays.

The Court agreed with Meridian and ruled that "flood-event damage claims arising in the future are simply too attenuated from the access ramp and survey delays to be within the subject matter of these releases." The Court further found that "the releases do not explicitly cover flood damage that had not yet occurred and whose scope was not predicted." In essence, the Court ruled that the subject matter of the releases did not address future flood events. In addition, the Court found that there was no meeting of the minds between the parties, and noted that the Corps continued to consider and negotiate the flood events claim after the modifications were issued.

In the *Meridian* case, the subject matter of the modification was limited to specific past events, and not future flood events, and that there was no meeting of the minds.

H. INTERPRETATION

Agency Liable for Claim Due to Prodigious Obliviousness and Indifference as to What It Purchased from Contractor; *Appeal of Command Languages, Inc. d/b/a CLI Solutions*, ASBCA No. 61216, February 7, 2020

Contractor's appeal from a denied claim is sustained. The contractor was hired to translate technical manuals for the agency. The tasks in the translated manuals implicated

tasks in other manuals. The contractor stated in it proposal that its translation would reference the tasks in the other manuals but not incorporate those tasks into the translations. The agency, however, did not bother to read the proposal before awarding the contract. The agency then (1) ignored the contractor's reference-only approach in a slideshow, (2) ignored the reference approach in sample manuals provided during performance, and (3) failed to address concerns it had about the contractor's very low price. It was only after the contractor had completed much of the work that the agency realized it did not want mere references. Given the agency's disregard for the contractor's technical approach, the board determined the it was liable for the increased costs of incorporating the tasks from other manuals.

I. ODD CASES

Documents Prepared as Part of Government's Claims Investigation Not Protected by Work Product Doctrine; *Ingham Regional Medical Center et al. v. United States*, COFC No. 13-821, January 6, 2020

Contractors' motion asking the court to declare that documents were not protected by the work product doctrine is granted. The government argued the documents were created in anticipation of possible litigation arising out of claims made by healthcare providers for underpaid medical reimbursements. The court, however, found that the documents did not constitute attorney work product but rather were documents produced as part of the claims investigation. In investigating the claims, the court reasoned, the government was akin to an insurance company assessing an insurance claim. The potential for litigation is inherent in insurance claims. Nonetheless, insurers produce claims documents are produced as part of their business, not in anticipation of litigation, so the claims docs are not protected by the work product doctrine. Similarly, while the prospect of litigation hung over the government's claim investigation, it was too remote to trigger the work product doctrine.

Federal District Court Takes Jurisdiction

A federal contractor has used a rare exception to keep its case for monetary damages against the Government in Federal District Court. In *J-Way Southern Inc. v. U.S.,* the United States District Court for the District of Massachusetts has denied the Government's request to remove the case despite the long standing that the COFC has exclusive jurisdiction over contract claims against the U.S. in excess of $10,000.

The judge focused on a little used provision of the Contract Disputes Act that only applies with maritime contracts, 41 U.S.C. § 7102(d). The decision does somewhat expand what qualifies for this exception. The contractor in *J-Way* used land-based construction equipment to dredge a small waterway. While this work appears to be typical construction, because the ***purpose*** of the contract was to support maritime activities, the court applied the maritime exception. While the circumstances remain rare, it is always worth considering exceptions like this to give your claim a better fighting chance when possible.

Is a Supply from a Foreign Country

In *Acetris Health LLC v. United States, No. 2018-2399 (Feb. 10, 2020),* the Federal Circuit was asked to interpret the country of origin requirements under the Trade Agreements Act of 1979 ("TAA") and related regulations.

Acetris Health, LLC ("Acetris") is a distributor of generic pharmaceuticals. In April 2017, the U.S. Department of Veteran Affairs ("VA") requested Acetris prove its products comply with the TAA by obtaining a country of origin determination from U.S. Customs and Border Protection ("CBP"), which commonly makes authoritative country of origin determinations. At the time, Acetris supplied the VA with 10 pharmaceutical pills sourced from a manufacturer in Ohio, which manufactured the pills using an active pharmaceutical ingredient from India. In February 2018, the CBP determined these pills were products of India, and therefore not compliant with the TAA, because the active ingredients were products of India, and the manufacturing process in the U.S. did not constitute a "substantial transformation" of the active ingredient – merely a packaging of the pills. See

83 Fed. Reg. 5130-33 (Feb. 5, 2018). In March 2018, the VA issued a new solicitation, for which Acetris sought award. Acetris submitted a proposal, but Acetris also sued, alleging the VA misinterpreted the requirements of the TAA under the terms of the solicitation.

As a matter of law and federal policy, the U.S. prefers to buy U.S.-origin products, but that preference is often subject to numerous international trade agreements. The TAA offers an exception to certain "Buy American" requirements, allowing the Government to purchase "foreign end products" only if those products are from certain designated countries with which the U.S. has a free trade agreement. 19 U.S.C. §§ 2501-2582. The TAA incorporates a country-of-origin test, defining "a product of a country" as:

An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

19 U.S.C. §2518(4)(B) (emphasis added).

The FAR implements this statutory definition for foreign-made products; but with regard to U.S.-made end products, the FAR definition is slightly different. Specifically, FAR 52.225-5(b) defines a "U.S.-made end product" as:an article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

The FAR 52.225-5(b) definition of "U.S.-made end product" omits the term "wholly" – meaning that, in order to satisfy the TAA, a U.S.-made end product can be partially – not "wholly" –manufactured in the U.S.

The Federal Circuit agreed with the contractor, confirming there are three ways for contractors to demonstrate TAA compliance under the FAR, i.e. demonstrating the end product being delivered to the Government is: (1) substantially transformed in the U.S. or a designated country; (2) wholly manufactured in a designated, free trade agreement country; or (3) mined, produced, or manufactured in the U.S. (but not necessarily wholly manufactured). Given this formulation, products will be deemed to be TAA compliant if manufactured in the U.S., regardless of where the individual components or ingredients originated, regardless of whether the products are "wholly manufactured" in the U.S., and regardless of whether the products are "substantially transformed" in the U.S.

Subcontractor Successfully Pleads that It's a Third Party Beneficiary of Prime's Contract with Government; *Constructora Guzman, S.A. v. United States*, COFC No. 19-498C, November 19, 2019

Government's motion to dismiss subcontractor's suit for failure to state a claim is denied in part. A subcontractor sued the government claiming that it was a third party beneficiary to a contract between the government and the prime contractor, and that the government had breached that contract. Contrary to the government's contentions, the court found the plaintiff had sufficiently pleaded a third party beneficiary theory. The government had modified the prime contract to retain 10% per invoice in lieu of bonds. The court found that this created an inference that the government intended to benefit subcontractors by paying them in the event the prime contractor did not. The court, however, dismissed the subcontractor's implied contract theory, finding there had been no meeting of the minds between the government and the subcontractor.

Knowing Retention of Improper Overpayment Enough to Support Allegation of Reverse False Claim; United States District Court for the Middle District of Florida, *U.S. ex rel. Corina Herbold v. Doctor's Choice Home Care Inc., et al.*, Tampa Division No. 8:15-cv-1044-T-33AEP, October 31, 2019

Motion to dismiss a *qui tam* case alleging violations of the Stark Act, Anti-Kickback Statute, and False Claims Act is denied, where the government plausibly alleged the

defendants paid improper payments to physicians in exchange for their referrals of patients to the defendants' home health care services. The defendants argued the allegations were not specific, but the court found the government explained in detail how the defendants disguised improper kickback as employment salaries, paid physicians for work they did not do, and paid physicians' spouses for the doctors' referrals. The court rejected the defendants' assertion that the government failed to show that safe harbors did not apply, as this is an affirmative defense the government was not required to disprove at this stage. The court also explained the government did not have to allege a specific agreement to submit false claims, as the allegations that physicians were paid to induce referrals was sufficient.

The court also declined to dismiss the motion to dismiss allegations of reverse false claims, as the government did not have to allege a false claim to assert that the defendants failed to repay an overpayment. The allegation that the defendants knowingly retained an overpayment was sufficient. Similarly, the court allowed claims of unjust enrichment and payment by mistake to proceed, as the government was entitled to recover the money it erroneously paid to the defendants.

4834-5354-3879, v. 1