wiley

NEWSLETTER

Mind Your Mods: A Unilateral Modification May Be Immediately Appealable

Winter 2015

Authors

Kara M. Sacilotto
Partner
202.719.7107
ksacilotto@wiley.law

When a contractor submits a claim to the Government under the Disputes Clause of the contract and the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, it is usually easy to identify the claim. Indeed, experienced contractors will affirmatively assert that they are submitting a claim under the contract and CDA, claim a right to interest under the CDA, request a Contracting Officer Final Decision (COFD) and, if the amount exceeds the CDA threshold, include the required certification. This contractor claim either results in the requested COFD or the contractor can file an appeal deeming its claim denied after 60 days with no response from the contracting officer.

For *Government* claims, however, it can be a little more confusing when a claim is asserted and a final decision issued. After all, the Government frequently does not submit a "claim" to a contractor but proceeds directly to making a demand for performance or payment. Those demands for performance or payment may or may not be accompanied by a document called a COFD. Moreover, as the Federal Circuit has held, the fact that a "final decision" does not identify itself as a COFD or include the FAR 33.211 text regarding appeal rights does not negate the finality of a "final decision." *See, e.g., Placeway Constr. Corp. v. United States*, 920 F.2d 903 (Fed. Cir. 1990). Accordingly, a Government claim, or a final decision on a Government claim, may not announce itself.

In *DynPort Vaccine Co., LLC.*, ASBCA No. 59298, 2015 WL 315474 (Jan. 15, 2015), the Armed Services Board of Contract Appeals (ASBCA) wrestled with whether a unilateral modification constituted a Government claim that was immediately appealable. The dispute involved whether DynPort Vaccine (DVC) should be compensated

under cost-plus award fee CLINs for the costs associated with technology transfer studies necessary to get a particular manufacturer's vaccine ready for licensure after DVC terminated its prior vaccine-manufacturer subcontractor for default. In a nutshell, DVC believed it should be compensated for the costs of the studies as an allowable cost that the Government had previously reimbursed. The Government disagreed, claiming that the need for these particular transfer studies was the result of DVC's mismanagement of the contract. After meetings and an exchange of letters, the CO issued a contract modification that accepted DVC's proposed change order, ordered it to perform (but at no cost), and included options to proceed with the work at different stages as proposed in the change order. Upon receipt, DVC asserted its right to an equitable adjustment for performance of the directed work. The Government then exercised the options established in the unilateral modification, pursuant to FAR 52.246-8(h), at no cost to the Government. Neither the modification nor option exercise letter asserted that it was a COFD, nor did either document include a notification of appeal rights. Nonetheless, DVC filed an appeal of the unilateral modification, asserting that it constituted a "de facto" COFD. The Government moved to dismiss the appeal.

The Government argued that since the modification was issued during contract performance, and no deliverables had been accepted or rejected, the modification was a matter of contract administration over which the Board did not have jurisdiction under prior ASBCA decisions (e.g., *Hughes Aircraft Co., Electron Dynamics Division*, ASBCA No. 43877, 93-3 BCA ¶ 26,133). DVC, on the other hand, argued it was not required to complete performance and submit its own claim in lieu of appealing the Government's direction reflected in the modification.

The Board first held that contract performance need not be completed for a CO's direction to be outside the bounds of contract administration. The Board then considered whether based on the facts and the parties' communications, the modification was a final decision despite the absence of a "label." The Board noted that over the course of five months, the parties exchanged correspondence disputing whether the technology transfer studies were reimbursable. It further noted that FAR 33.201 and the contract Disputes Clause broadly define a claim to include a demand for payment of money in a sum certain, the adjustment or interpretation of contract terms, or "other relief" under the contract. "Other relief" could be a demand for rework and could constitute a Government claim in circumstances where the Board is not being asked to become involved in ordinary contract administration. Here, those conditions were met. If the Government's position were to prevail, the Board reasoned, the broad definition of a "claim" would not be honored because a claim could only exist if work were accepted or contract performance completed. In addition, the Government's position narrows the scope of FAR 52.246-8(h), which allows the Government to require "at any time" that a contractor remedy work by correction or repair. Finally, the Board noted that the parties' exchange of correspondence, coupled with a unilateral modification that directed the work to be performed at no charge, did not "strike" the Board as an ordinary contract administration dispute. Under the circumstances, the unilateral modification constituted a Government claim and since DVC timely appealed it, the Board held that it had jurisdiction.

DynPort Vaccine Co. reinforces the importance of diligent contract administration. Because a final decision on a Government claim can take many forms, contract administration personnel must be sensitized to the need to involve counsel early in the disputes process. Particularly where, as in *DynPort Vaccine*, the parties have been

engaged in a letter-writing campaign, receipt of a modification intended to "resolve" the dispute is important, and contractors want to be sure to protect their rights by not acceding to the modification. Moreover, contract administration personnel and counsel should assess whether the modification is really a final decision that is immediately appealable. In these circumstances, the contractor also may wish to ask the CO whether a unilateral modification is intended as a COFD or, similar to *DynPort*, file a protective appeal at the relevant Board (within 90 days) or the Court of Federal Claims (within 12 months), even if the Government may claim the appeal is premature.