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COFC: In "Quirky CDA Realm," Contractor Need Not Submit Its Own Claim Before Appealing Adverse Contracting Officer Decision

Article By:

Alan A. Pemberton

Judge Mary Ellen Coster Williams of the Court of Federal Claims recently clarified the procedural requirements of the **Contract Disputes Act ("CDA")** that a contractor must meet before appealing an adverse Contracting Officer decision. In Total Engineering, Inc. v. United States, No. 13-881C (Fed. Cl. Jan. 26, 2015), the Army Corps of Engineers terminated Total's construction contract for default, after which the Contracting Officer issued a final decision directing Total to pay to the Corps $2.3 million in costs (after offsetting approximately $700,000 that Total was still owed). Total appealed that final decision to the Court, arguing that its performance issues were the result of defective contract specifications, and seeking payment of the $700,000 balance it was concededly owed. The Government moved to dismiss, arguing that Total should have submitted its own certified claim to the Contracting Officer consistent with the CDA's requirements at 41 U.S.C. § 605.

The court disagreed, denying the motion after rejecting the Government's contention that by claiming defective specifications, Total was actually claiming impracticability of performance, requiring a new submission to the Contracting Officer. The court explained that Total was not "advancing a 'claim' for relief due to defective specifications," but instead raising a defense: any issues the Government had with the completed work were not a result of Total's performance, but the contract's specifications themselves. In so doing, the court rejected the Government's reliance upon the Federal Circuit's decision in M. Maropakis Carpentry, Inc. v. United States, which had previously held that even when appealing an adverse Government action, the CDA's claim submission requirements applied to a contractor seeking to adjust the terms of its contract (in that case, the performance schedule, as a result of Government delay). 609 F.3d 1323, 1331 (Fed. Cir. 2010). Here, because Total was not seeking any additional monetary relief or an adjustment of its contract, the court concluded thatMaropakis was inapposite, and characterized the Government's demand that Total submit a claim before filing suit as "a meaningless duplicative administrative exhaustion requirement not contemplated by the CDA."

For the same reason, the court rejected the Government's argument that Total's challenge to the Corp's withholding of the contract balance was a claim for payment triggering the CDA's submission requirements. To the contrary, the court explained that the Corps' withholding of Total's payment was a claim by the Government, and Total's challenge to it "d[id] not implicate any contractor claim." Accordingly, the court held that even absent the submission of a certified claim to the

Contracting Officer, “in this quirky CDA realm where a plaintiff is appealing a Contracting Officer’s Final Decision on a Government claim,” it could exercise jurisdiction over Total’s appeal.

The court’s decision is significant in that it clarifies that a contractor is not required to submit a certified claim merely because it includes defenses to a government claim in its CDA challenge to such a claim, thereby suggesting a way around the Federal Circuit’s decision in Maropakis. Nonetheless, contractors proceed at their own peril where they do not certify defensive issues when appealing a Government action. Total’s lawsuit was crafted to require neither the modification nor interpretation of its contract by the Court, claimed no additionalmonies owed, and presented only questions of fact regarding performance issues and the work to be completed per the contract’s requirements. To the extent that a contractor seeks to modify a contract’s payment or performance terms, even if couched as part of a defense against an adverse Government claim, it would be well advised to submit a formal claim to the Contracting Officer in accordance with the CDA’s requirements before proceeding to a board or the court.

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