

Contract Performance Issues

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Agenda

- Procedure and Jurisdiction
- The Clock Is Ticking
- Hidden Sources of Liability Risk: Third Party Claims and Contracts
- Excusable Delay in a Fixed-Price Contract
- Disputes
 - Contract Administration Issues
 - Developments Under the Implied Duty of Good Faith and Fair Dealing
- Terminations

Performance Issues: 2018

Procedure and Jurisdiction

- Government's affirmative defense of offset based on insurance reimbursement was not a "claim" for CDA jurisdiction purposes because it did not seek money or other relief under the contract (*Kan. City Power & Light Co. v. United States*, 131 Fed. Cl. 161 (2017))
- No CDA jurisdiction over claims arising from contract with Iraq's Coalition Provisional Authority (a transitional authority consisting of the United States and its coalition partners) (*Agility Logistics Servs. Co. KSC v. Mattis*, No. 2015-1555, 2018 WL 1787664, at *1 (Fed. Cir. Apr. 16, 2018))



Performance Issues: 2018

Procedure and Jurisdiction (cont.)

- Forum selection clause in the parties' MOU was "permissive," rather than mandatory, because it did not contain "specific language of exclusion" (*BAE Sys. Tech. Sol. & Servs., Inc. v. Republic of Korea's Def. Acquisition Program Admin.*, 884 F.3d 463, 472 (4th Cir. 2018), as amended (Mar. 27, 2018) (affirming declaratory judgment that BAE did not breach any contractual obligation to the Republic of Korea in its FMS contract))



Performance Issues: 2018

The Clock Is Ticking

- A failure to promptly notify CO of changes in international tax laws may preclude a later claim based upon increased tax liability (*Gazromneft-Aero Kyrgyzstan LLC v. United States*, 132 Fed. Cl. 202 (2017) (barring contractor's claim due to contractor waiting more than two years to inform CO of increased Kyrgyz tax, which caused prejudice to government))
- It was reasonably foreseeable to the government in 1942 that the taxes clause of a World War II fuel manufacturing contract could be invoked in the future to cover environmental cleanup costs (*Shell Oil Co. v. United States*, 130 Fed. Cl. 8 (2017))

Performance Issues: 2018

The Clock Is Ticking (cont.)

- Subcontractor's breach claim for unpaid G&A costs was time-barred, when subcontractor waited until completion of the prime contract to settle dispute (*Fluor Fed. Sols. v. PAE Applied Techs.*, No. 17-1468, 2018 WL 1768233 (4th Cir. Apr. 12, 2018) (finding that subcontractor's claim was for a "single continuous breach" that accrued on the first day of the alleged breach 12 years prior))
- Contractor entitled to G&A costs, because agency "waited too long to resolve the G&A allocation issue" (*CH2M-WG Idaho, LLC*, CBCA 3876, 17-1 BCA ¶ 36,849 (upholding contractor's claim for incentive fee relating to its CAS compliant allocation of G&A costs under its CPFF arrangement for extra work))

Performance Issues: 2018

Excusable Delay in a Fixed-Price Contract

- Border closure by Pakistan in 2011 constituted "excusable delay," and the government "constructively accelerated" the fixed-price contract when it failed to coordinate with the contractor to find an alternative shipping arrangement for Afghanistan-bound products (*IAP Worldwide Servs.*, ASBCA No. 59397, 17-1 BCA ¶ 36,763)



Performance Issues: 2018

Hidden Sources of Liability Risk: Third Party Claims and Contracts

- Beware of statutory or regulatory liabilities imposed under the terms of a third-party contract (even when executed in support of a government contract) (*Call Henry, Inc. v. United States*, 855 F.3d 1348 (Fed. Cir. 2017) (finding contractor's withdrawal liability under the MPPAA was not an increased cost covered by FAR 52.222-43's price adjustment provisions))
- Beware of liability to third-party beneficiaries of your prime contract (*McDowell v. CGI Fed. Inc.*, No. CV 15-1157, 2017 WL 2392423 (D.D.C. June 1, 2017) (finding civilian's claim that she was an intended third-party beneficiary of a DOS contract sufficient to overcome a motion to dismiss))



Performance Issues: 2018

Disputes: Contract Administration Issues

- Contractor's recovery under a CPFF contract was constrained by LOF clause, which applied at delivery order, not contract, level (*InterImage, Inc. v. United States*, 133 Fed. Cl. 355 (2017))
- If government does not "match terms" with the original offer, any purported exercise of a renewal option is not acceptance, but a counteroffer; contract specialist lacked authority to bind the government (*First Crystal Park Assocs. Ltd. P'ship v. United States*, 130 Fed. Cl. 260 (2017))

Performance Issues: 2018

Disputes: Developments Under the Implied Duty of GF&FD

- Remand appropriate where ASBCA erroneously decided it "need not decide" a contractor's implied duty of good faith and fair dealing ("GF&FD") claim (*Agility Pub. Warehousing Co. KSCP v. Mattis*, 852 F.3d 1370 (Fed. Cir. 2017) ("breach of the implied duty of [GF&FD] does not require a violation of an express provision in the contract"))
- Government's reduction in scope of work may violate its implied duty of GF&FD when it improperly eliminates a significant benefit to the contractor (*K2 Sols., Inc.*, ASBCA No. 60907, 2017 WL 7051806 (Jul. 13, 2017))



Performance Issues: 2018

Disputes: Developments Under the Implied Duty of GF&FD (cont.)

- Contractor may raise a GF&FD argument for the first time upon appeal if the facts alleged in the claim and complaint are the same operative facts as those supporting the alleged breach (*Michael Johnson Logging v. Dep't of Agric.*, CBCA 5089, 18-1 BCA ¶ 36,938)



Performance Issues: 2018

Disputes: Developments Under the Implied Duty of GF&FD (cont.)

- USACE violated the implied duty of GF&FD when it delayed construction on an Army Reserve Center by attempting to impose its obligation on the contractor through "misleading, dilatory, and bad faith conduct" (*MW Builders, Inc. v. United States*, 134 Fed. Cl. 469 (2017), *reconsideration denied*, No. 13-1023C, 2018 WL 1150729 (Fed. Cl. Mar. 5, 2018))

PERFORMANCE ISSUES - 2018

Terminations

- Christian doctrine may not be used to "read in" a different version of a FAR clause (*Atlas Sahil Constr. Co.*, ASBCA No. 58951, 17-1 BCA ¶ 36,910)



- "Fair compensation" included the costs of employees hired by the contractor and kept on standby awaiting a notice to proceed (*Pro-Built Constr. Firm*, ASBCA No. 59278, 17-1 BCA ¶ 36,774)

Performance Issues: 2018

Terminations (cont.)

- Where a contract contains conflicting commercial and non-commercial FAR clauses, with no indication of the parties' intent, commercial clause applied because contract was awarded under FAR Part 12 procedures and terminated pursuant to commercial termination clause (*ESCgov, Inc.*, ASBCA No. 58852, 17-1 BCA ¶ 36,772 (contractor entitled to price-based, rather than cost-based, recovery under commercial termination for convenience clause))

Questions?