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NEWSLETTER

ASBCA Confirms Jurisdiction Over Data Rights Challenges

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Given the Department of Defense's (DoD) increase in aggressive challenges to contractor data rights assertions, more cases are addressing such scenarios. In the recent appeal of *Alenia North America, Inc.*, ASBCA No. 57935, Mar. 26, 2013, 2013 WL 1871512, the Armed Services Board of Contract Appeals (ASBCA) considered the question of what constitutes a claim when the Government challenges a contractor's data rights assertions. The Board concluded that a contracting officer's letter asserting unlimited rights in the contractor's intellectual property and directing the removal of a non-conforming restrictive legend constituted a valid Government claim and denied the contractor's motion to dismiss for lack of jurisdiction.

In 2008, the Air Force awarded Alenia North America, Inc. (Alenia) a contract to supply aircraft and sustainment support to the Afghanistan National Army Air Corps. Alenia was also required to deliver certain technical publications with each aircraft. The contract provided that the Government was authorized to distribute these technical publications "to US Government agencies and their contractors." Nonetheless, Alenia affixed a non-conforming restrictive legend to each publication, asserting that the publication "must not be disclosed to unauthorized persons or reproduced without written authorization from the owner of the copyright."

The Air Force objected to Alenia's markings—albeit more than a year and half later—and asserted Government Purpose Rights (GPR) in the technical publications. Alenia disagreed, arguing that the Government had no basis to assert GPR and insisting that its legend was "fully consistent" with the contract.

Authors

Scott A. Felder
Partner
202.719.7029
sfelder@wiley.law

Alenia's situation worsened a few months later when the Contracting Officer issued a final decision asserting unlimited rights in the technical publications and demanding that Alenia remove its restrictive legend, noting that Alenia's proposal did not identify any data to be delivered with less than unlimited rights.

Alenia timely appealed to the ASBCA, and then moved to dismiss for lack of jurisdiction. Alenia argued that there was neither a contractor claim nor a valid Government claim, in the latter case because, at the time the Contracting Officer issued the final decision, there was no dispute as to the Government's assertion of *unlimited* rights—only as to its earlier assertion of GPRs. The Government disagreed, arguing that the final decision constituted a valid Government claim, both because there was clearly a dispute over what type of rights the Government had in Alenia's technical publications and because the "in dispute" requirement applies only to routine requests for payment, not *non-routine* requests for relief, such as the Government's demand here.

The ASBCA, relying upon the familiar definition of "claim" in FAR 2.101, sided with the Government. The Board concluded first that, although the Contracting Officer's letter asserting unlimited rights in Alenia's technical data did not cite to the Contract Disputes Act or the Disputes clause, and did not contain the prescribed notice of appeal rights, it constituted a valid Contracting Officer's final decision. Second, the Board held that the final decision constituted a valid Government claim because it went to a question of contract interpretation—what rights, if any, in Alenia's intellectual property did the Government procure under the contract? Further, the Government's demand that Alenia remove its restrictive markings constituted a claim as a matter "related to" the performance of the contract.

The Board rejected Alenia's counterargument that the Government's assertion of *unlimited* rights could not constitute a claim because there was no dispute as to the *specific* type of rights. Although the Board acknowledged that the precise nature of the rights in question was undetermined, there was nonetheless a dispute about data rights at the time of the final decision. In any event, under *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995) (en banc) and *TRW, Inc.*, ASBCA Nos. 51172, 51530, Apr. 30, 2001, 99-2 BCA ¶ 30,407, there is no "in dispute" requirement for non-routine requests for relief. Either way, the Contracting Officer's final decision constituted a valid Government claim over which the Board had jurisdiction.

As the *Alenia* case moves forward, the Board will likely address at least one novel data rights issue: whether or not DFARS 252.227-7037, Validation of Restrictive Markings on Technical Data, can be read into a contract under the *Christian* doctrine. Moreover, *Alenia* serves as a reminder of the draconian consequences of not properly asserting restrictions on technical data and computer software, including the failure to mark deliverables in accordance with DFARS-prescribed legends.