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NEWSLETTER

It's My Appeal, But It's Your Claim: ASBCA Orders Government to File Complaint in Appeal of Government Claim

Spring 2014

No contractor wants to be on the wrong end of a government claim. But they are even worse when the contracting officer's final decision (COFD) fails to adequately explain the full rationale behind the claim, or fails to show how the government calculated the claimed amount. This puts contractors in a bind. The Contract Disputes Act (CDA) requires that all claims must be the subject of a COFD, and all proceedings before the Boards of Contract Appeals must commence with an appeal of the COFD by the contractor. If the contractor does not understand the basis for the government's claim, however, it may have to engage in a fair amount of speculation and guesswork in its complaint.

In a recent decision, the Armed Services Board of Contract Appeals (ASBCA or Board) confirmed the use of a little-known procedural tactic through which a contractor stuck in this situation can force the government to file the complaint instead. The case, *Beechcraft Defense Company*, ASBCA No. 59173, involved an appeal from a COFD issued by the Defense Contract Management Agency (DCMA). The COFD alleged that Beechcraft was noncompliant with CAS 402 from 2006 until the present and asserted a government claim for $5.9 million. The COFD referenced only five documents and identified a single contract as a representative contract.

Shortly after filing its Notice of Appeal, the contractor filed a motion seeking to have the Board direct the government to file the complaint. The contractor argued that since the appeal involved a government claim, the government was in a better position to file the complaint and the proceeding would be facilitated by the government's filing of the initial pleading setting forth the full rationale for the assertion of its claim. In response, DCMA objected to filing the initial pleading and asserted that Beechcraft was in the best position to assert the facts that would establish a CAS 402-compliant accounting practice.

In granting the contractor's motion, the ASBCA noted that it has recognized in prior cases that there exist situations when the proceedings would be facilitated by the government filing the complaint or initial pleading. Here, the Board found that the government's response "evidences a basic misunderstanding concerning the alleged CAS violations. It appears the government believes that it is appellant's burden to establish that its accounting system is CAS compliant. The law is otherwise. The burden of proving noncompliance is upon the government." The ASBCA thus found that the proceedings would be facilitated by

having the government set forth in an initial pleading, the facts and rationale for its COFD finding that Beechcraft was noncompliant with CAS 402, and the position the government was taking before the Board.

This procedural maneuver will not work in all appeals. It is best suited for cases where the government has the burden of proof but has failed to adequately support or explain the rationale for its COFD. Government claims arising out of Defense Contract Audit Agency reports, like this one, may often be good candidates for this approach. The case also serves as a reminder that ASBCA judges are not wedded to the "typical" procedural process for contract appeals, and are willing to deviate from those procedures where circumstances warrant.