

Federal Circuit Addresses Adding Claims to Pending Court of Federal Claims Litigation and Delays in Providing Notice of Constructive Changes

Winter 2015

In *K-Con Building Systems Inc. v. United States*, No. 2014-5062 (Feb. 12, 2015), the Federal Circuit addressed two notable claims issues. First, the Court held that litigating one claim at the Court of Federal Claims (COFC) did not necessarily preclude a contractor from subsequently amending its complaint to add a separate, but related, claim. Second, the Court held that late notice of constructive changes to the contract precluded the contractor, K-Con, from recovering.

K-Con contracted with the Coast Guard to build a "cutter support team building" in Michigan for \$582,641. K-Con experienced delays, however, and did not complete the project until 186 days after the contracted completion date. In response, the Coast Guard withheld \$109,554 as liquidated damages for the tardiness. Notably, the Coast Guard also requested changes throughout the project, which K-Con accommodated without objection. After project completion, K-Con filed its first claim.

In a letter to the contracting officer (CO), K-Con requested the withheld payments be remitted, arguing the liquidated damages were unreasonable. K-Con also alleged generally that the Coast Guard failed to issue extensions, which were necessary in response to the additional work required by the Coast Guard's requested changes. Its letters, however, lacked any detail as to the alleged changes. The letter also sought to recover the withheld payments only. The CO issued a final decision denying K-Con's request. Shortly thereafter, K-Con appealed to the COFC requesting remission on two

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grounds: the liquidated damages were unreasonable, and it should have received an extension.

After litigation was underway, K-Con submitted a second letter to the CO. This time, K-Con sought compensation for the additional work necessitated by the changes. The CO again denied the request. In response, K-Con amended its complaint, adding the new claim. The COFC ruled against K-Con on all three claims on summary judgment. First, it held that the liquidated damages were reasonable. Second, the court held that K-Con did not comply with the notice provision of the changes clause and, therefore, K-Con was deemed to accept the disputed changes. Last, the COFC held that it lacked jurisdiction over the extension claim because the claim was never properly the subject of a final decision.

On appeal by K-Con, the Government argued the Court lacked jurisdiction over the changes claim because, like the extension claim, it was not the subject of a final decision. Once litigation began, it argued, the Department of Justice acquired exclusive authority over the matter and, by extension, the CO lost authority over the matter. The CO's second final decision was therefore invalid, and it could not serve as the basis for appeal. The Federal Circuit disagreed. The Court explained its jurisdiction was limited to individual claims, not entire cases. Thus, pending litigation divests COs of authority only as to the claims at issue, not all potential related claims. Whether the CO had authority to issue his second final decision-and thus whether the Court had jurisdiction-depended upon whether the changes claim was separate from the claims in the original complaint.

The Court found the changes claim was indeed separate from the time-extension and liquidated damages claims in the complaint. It sought different relief and was brought on a different basis-either of which are sufficient to create a distinct claim. Because the changes claim was not the subject of the initial litigation, the CO's second final decision was valid. The Court did note that it would look beyond how the claim was presented to see if it was truly distinct, but in this case, the claims were "categorically different."

Addressing the merits, the Court summarily rejected K-Con's challenge to the liquidated damages provision. It then turned to the notice provision. The changes clause in K-Con's contract, Federal Acquisition Regulation (FAR) § 52.243-4, required K-Con to provide notice to the CO of any alleged change to the contract and precluded any equitable adjustment for any costs incurred more than 20 days before K-Con gave written notice. K-Con alleged two types of changes, but the Court found that during the course of performance, K-Con never objected to the changes. Moreover, it never provided notice of the changes in accordance with the notice provision. Instead, it first identified the changes in its second claim letter two years later. The Court stated that the "the notice provision serves an important purpose in a contract in which *some* government requests are plainly contemplated *under* the contract." The Court also noted that timely notice "differentiates requests the contractor views as outside the contract from those it deems contemplated by the contract." It also gives the Government timely notice "of what amounts it might be on the hook for, so it will not be surprised by money claims later, as well as an opportunity to address demands for more money when it might yet avoid them."

The Court noted that "extenuating circumstances have weighed against strict enforcement of the time limit," but found that there were no extenuating circumstances here, and K-Con presented no evidence that the Government knew or should have known of the changes.

K-Con presents one instructive - and one cautionary - tale. Regarding jurisdiction, K-Con holds that initiating litigation at the COFC does not foreclose adding later claims to the complaint if additional bases or remedies are discovered. If contractors present a separate and distinct claim to COs after initiating litigation on an earlier, related claim, the CO's final decision will be valid. That decision will then be appealable, regardless of any other pending litigation on a related claim. This aspect of the case, therefore, is a win for contractors that identify additional bases for relief after filing a complaint in court.

The late notice aspects of the decision, however, may catch contractors unawares. As the Court notes, some prior decisions have held that notice provisions should not be strictly enforced (citing *Hoel-Steffen Const. Co. v. United States*, 456 F.2d 760 (Ct. Cl. 1972)). Perhaps the very late notice in K-Con - two years after the alleged changes- and the fact that K-Con did not present evidence that the Government had constructive knowledge of the claims distinguishes it, but the decision nonetheless highlights the need for diligent contract administration, including the prompt identification of changes and compliance to the greatest extent possible with notice provisions of a changes clause.