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NEWSLETTER

Bumpy Road to Recovery: Two Recent CBCA Decisions Analyze Recovery of Service Contract Act Related Cost Issues

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The Civilian Board of Contract Appeals recently issued two decisions, *Sotera Defense Solutions* and *Stobil Enterprise*, that may provide federal service contractors with better comfort in administering contracts subject to the McNamara-O'Hara Service Contract Act (SCA). Both rejected certain agency objections to contractors' efforts to recover SCA-related cost increases, albeit in different contexts. Both decisions reveal guidance that contractors facing similar SCA cost recovery situations may find helpful.

The SCA applies broadly to many federal service contracts. The thresholds for coverage are low and interpreted liberally by the enforcement authority, the Department of Labor (DOL). But FAR 22.1003-7 puts the onus on the contracting agency to determine affirmatively if a service contract is covered by the SCA. As a result, it is not uncommon for service contractors to find themselves in the uncomfortable position of receiving award of a service contract that appears to be SCA-covered, yet does not incorporate any SCA clause or SCA wage determination directly or by reference. Under such circumstances, must the contractor still comply with the SCA even though the SCA is not included the contract?

The initial instinct may be to think of the *Christian* doctrine here, which provides that "a mandatory contract clause that expresses a significant or deeply ingrained strand of public procurement policy" is read into a contract by operation of law if it has been omitted by the agency. *S.J. Amoroso Const. Co., Inc. v. United States*, 12 F.3d 1072, 1075 (Fed.Cir.1993). Under this doctrine, courts and boards

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have read into contracts particular SCA clauses and wage determinations omitted from contracts, such as the FAR 52.222-43 SCA price-adjustment clause. *E.g., Call Henry, Inc. v. United States*, 855 F.3d 1348, 1351 n.1 (Fed. Cir. 2017).

But in *Sotera Defense Solutions*, the CBCA drew a line. *See* CBCA 6029, 6030 (Aug. 29, 2019). The appeal concerned in part a task order that had not incorporated any SCA obligations at all. (The underlying contract likewise did not incorporate SCA obligations.) After award, DOL determined the SCA applied to the task order and directed retroactive application of the SCA back to task-order award. When the contractor appealed the denial of its claim for the resulting cost increases, the contracting agency argued that the SCA should have been read into the task order from the beginning, under the *Christian* doctrine, such that the contractor already had the obligation to pay SCA-specified wages and fringe benefits and could not recover for the increased costs of complying with the SCA mid-stream.

Not so, said the Board, finding that application of the SCA "cannot just be read into the contract under the *Christian* doctrine." Although particular SCA provisions have been read into contracts under *Christian*, in those cases the contracting agency had already determined that the SCA applied to the contract. Thus, "[t]he SCA requires a determination that it applies to a contract" in the first place before the *Christian* doctrine can apply to read in any specific SCA obligations that may have been omitted from the contract.

Overall, *Sotera Defense* may help contractors in recovering increased costs under contracts determined only after award to be SCA covered. Still, in our experience, contractors should consider addressing SCA coverage proactively in some circumstances. When a solicitation or contract calls for services not clearly outside the SCA's coverage, yet no SCA clauses or wage determinations appear in the documents, it may be worth raising the issue with the contracting agency. Early SCA incorporation could save the future costs and administrative effort of applying the SCA mid-performance at DOL's direction, and potentially retroactively. In addition, DOL data has often classified retroactive SCA payments to employees as resolving "violations," even when the payments cover periods when the SCA was not incorporated in the contract at all. So even if the increased compensation costs might be recoverable under *Sotera Defense*, the better course may be to address the obligations up front.

The second recent CBCA decision addressed a more routine aspect of adjusting SCA-covered contract pricing. Contracting agencies must incorporate updated SCA wage determinations at specified intervals. Under clauses such as FAR 52.222-43, contracting agencies must adjust prices in certain types of contracts (typically fixed-price, T&M, and labor-hour contracts) when the updated wage determinations result in increased costs for the contractor. FAR 52.222-43 requires contractors to submit price adjustment requests within thirty days of receiving these updates. But calculating adjustments can be complex. What happens when the request goes to the contracting agency after thirty days have passed?

In *Stobil Enterprise*, the Board held that a price adjustment is not foreclosed solely by submission of the request after thirty days. *See* CBCA 5698 (Sept. 10, 2019). The Board reaffirmed the view of one of its

predecessor boards that "a late notice does not defeat a contractor's claim unless a contract clearly states an untimely submission will cause a contractor to lose rights, or unless an agency can demonstrate it was prejudiced by a late notice." The Board found neither circumstance present, so the contractor had not lost its right to seek a price adjustment more than thirty days after receiving the updated wage determinations.

This holding should offer contractors some comfort if, for some reason, they submit a price-adjustment request under FAR 52.222-43 or a similar clause more than thirty days after receiving updated wage determinations for an SCA-covered contract. *Stobil Enterprise* is no free pass, however—a contract clause might expressly foreclose late submission, or an agency may be able to show prejudice from a delay past thirty days. Submission within thirty days thus remains the best policy.

In addition, we recommend using any time taken to gather and prepare detailed support for adjustment requests, such as payroll and accounting data. Doing so will help avoid the ultimate outcome in *Stobil Enterprise*: the CBCA denied the claim because the contractor failed to provide records showing its costs had actually increased. Even if *Sotera Defense* and *Stobil Enterprise* help with procedural-type aspects of recovering SCA-related cost increases, contractors will still need to show entitlement to the recovery at the end of the day.

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