

ALERT

Federal Circuit Holds That the Air Force's Unilateral Price Definitizations Were Not Government Claims

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WHAT: On April 25, 2023, the United States Court of Appeals for the Federal Circuit issued a decision in *Lockheed Martin Aeronautics Co. v. Secretary of the Air Force*, No. 2022-1035, holding that the Contracting Officer's unilateral price definitizations on two contracts did not constitute government claims. While the Federal Circuit's decision provides some clarity as to whether a price definitization gives rise to a government claim (which it did not here), it remains to be seen how much the decision fills the gaps in distinguishing between government and contractor claims under the Contract Disputes Act (CDA).

WHAT DOES IT MEAN FOR INDUSTRY: The decision resolves one factual scenario under which a government contractor generally must assert its own claim under the CDA: challenging a unilateral price definitization by a Contracting Officer. But the decision still leaves uncertainty, more generally, about what constitutes a government CDA claim that the contractor can appeal without first asserting its own claim. The decision also alludes (in dicta) to the merits issue of which party bears the burden of proof in a dispute over the definitized price, though the decision does not explore the question in any depth.

BACKGROUND

Lockheed Martin entered into two Undefinitized Contract Actions (UCAs) with the Air Force in 2015 and 2016 for upgrades to F-16 aircraft. UCAs allow contractors to begin work before the parties have reached final agreement on contract terms, specifications, or

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price. Both Lockheed UCAs included FAR 52.216-25, which required the parties to negotiate a definitive price and provided that if the parties were unable to reach agreement on contract price, the Contracting Officer (CO) could "determine a reasonable price or fee in accordance with subpart 15.4 and part 31 of the FAR, subject to Contractor appeal as provided in the Disputes clause." After several years of negotiations, the COs unilaterally definitized the UCAs at a price of about \$1 billion each.

Lockheed appealed the definitization directly to the Armed Services Board of Contract Appeals (ASBCA or the Board), challenging the definitized prices. The Government moved to dismiss for lack of jurisdiction on grounds that Lockheed had not submitted a claim requesting a CO's final decision. In response, Lockheed argued that the unilateral definitizations were CO final decisions (COFDs) on government claims that it could directly appeal to the ASBCA. Over the presiding judge's dissent, and relying on a prior ASBCA decision, *Bell Helicopter Textron*, ASBCA No. 35950, 88-2 BCA ¶ 20,656, *aff'd on mot. for recon*, 88-3 BCA ¶ 21,048, the Board held that a unilateral contract definitization does not constitute a final decision on a government claim that is directly appealable to the ASBCA and thus dismissed the appeals for lack of jurisdiction. Lockheed appealed.

THE FEDERAL CIRCUIT'S DECISION

On appeal, the Federal Circuit affirmed the Board's conclusion that the CO's definitizations were not final decisions on government claims. The court acknowledged that the CDA offers "minimal guidance" on what constitutes a government claim, providing only that "[e]ach claim by the Federal Government against a contractor relating to a contract shall be the subject of a written decision by the contracting officer." 41 U.S.C. § 7103(a)(3). Turning to the regulatory definition, the court noted that FAR 2.101 defines a claim as a "written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract." The court noted that its prior decisions interpreted "as a matter of right" to include a demand for "something due or believed to be due."

With this background, the court held that the definitizations were not government claims because they were not demands or assertions by the Government seeking relief from Lockheed. The court reasoned that the COs "were simply following the agreed upon procedures for determining the final contract price" without a demand for "something due or believed to be due." Further, the court distinguished actions it had previously found to be government claims, such as a termination for default, a direction to correct defects, and a decision to withhold payment for failure to complete work timely.

Finally, the court rejected two additional Lockheed arguments characterizing a price definitization as an "adjustment of contract terms" and "other relief" under the FAR 2.101 definition of a claim. First, the court distinguished between establishing something new ("prices where none existed") from adjusting an existing contract term. Second, the court concluded that establishing prices "cannot be characterized as the government seeking something due or believed to be due" because it is "merited under the definitization clauses."

IMPLICATIONS FOR CONTRACTORS

Lockheed instructs contractors that to challenge a CO's unilateral definitization of a UCA, the contractor must first submit a claim to the CO requesting a COFD. But the decision also weighs in on two broader issues:

1. How does this decision enhance contractors' understanding of what constitutes a claim?

As discussed in a previous newsletter article, the CDA and FAR definitions of a "claim" leave something to be desired in helping contractors evaluate whether government action amounts to an appealable final decision on a government claim. Although Congress enacted the CDA roughly 45 years ago, uncertainty about this threshold jurisdictional issue still persists. In fact, according to the ASBCA's annual reports for Fiscal Years 2021 and 2022, Government agencies have questioned the Board's jurisdiction in more than 10% of all pending cases. Accordingly, contractors should carefully evaluate jurisdictional issues in the early stages of any disputes with the Government.

The Federal Circuit's past decisions have built, case-by-case, a framework through which contractors and their counsel can evaluate whether a government claim has been asserted, or how to proceed with a contractor claim. The *Lockheed* decision fills in another piece to the framework, but also offers additional insight into how the court looks at defining a claim.

In this example, the Federal Circuit emphasized the role and effect of price definitization in shaping the agreement between Lockheed and the Government. The court highlighted its perception that the COs' actions resulted in "completion of the definitization process," following the "agreed upon procedures for determining the final contract price." This emphasis suggests that the court may view activities consistent with the ordinary course of business as distinct from seeking "relief" and thus less likely to be government claims. Although establishing a definitive price may seem like a rare event in government contracts generally, it is a mandatory step in every UCA. By contrast, the parties are not expected to invoke other remedy-granting clauses (e.g., the inspection or termination clauses) in every contract.

Still, *Lockheed* also dealt with a fairly specific definitization scenario and request for relief. Even another CO's definitization decision could come closer to seeking "relief" if, for example, (i) the definitized price is less than any interim billing price, leading the Government to also seek the return of moneys already paid; or (ii) the definitization seeks some other form of relief or additional performance from the contractor. Thus, even with UCA definitizations, contractors need to be on the lookout for any government action that could constitute an immediately appealable final decision on a government claim—for which their time to appeal may be running.

2. Who bears the burden of proof in challenging the CO's price definitization?

A footnote in *Lockheed* goes beyond the jurisdictional issue before the court to note that whether a claim is a contractor or government claim can play a role in determining which party will bear the burden of proof on the merits. Typically, although not universally, the claimant is the party bearing the burden of proof. That general rule makes less sense here where FAR 52.216-25 puts the onus on the CO to determine a reasonable

price or fee in accordance with subpart 15.4 and part 31 of the FAR if the parties reach an impasse. Vesting authority in the CO to unilaterally determine a reasonable price would suggest that the CO has the burden to justify the price he or she selects.

Noting that Lockheed can challenge a price definitization through its own claim, the court does not go any further to address expressly which party bears the burden of proof on the definitized price. Until there is further guidance from the courts or boards, contractors should consider the burden of proof in their assessments and also consider negotiating UCA terms that set objective criteria for establishing a "reasonable price."

Wiley's Government Contracts Practice represents contractors of all sizes in pursuing requests for equitable adjustment, pursuing contractor claims, and appealing final decisions on government claims. Our group has deep experience litigating and negotiating contractor and government claims before the ASBCA, the Civilian Board of Contract Appeals, the Court of Federal Claims, and the Federal Circuit.