



GOVERNMENT CONTRACTS CLAIMS & DISPUTES UPDATE

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Speaker Bio

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SETH LOCKE | PARTNER



Seth Locke is Co-Chair of Perkins Coie's Government Contracts Practice Group. In his counsel to government contractors, Seth protects clients' rights and interests in a range of matters, including bid protests, contract performance issues, cost accounting claims, and other disputes. He advocates before the Boards of Contract Appeals, the U.S. Court of Federal Claims, and the U.S. Government Accountability Office (GAO).

In addition, Seth counsels clients in transactions such as mergers and acquisitions, helping clients comply with the maze of government regulations and unique M&A issues, such as the novation process, surrounding these deals. Seth has extensive experience with the Federal Acquisition Regulation. Risk management and litigation prevention in the government contracting process are at the core of Seth's counsel to his clients, who include defense contractors, logistics contractors, global aerospace manufacturers, healthcare contractors, and several technology companies.

Speaker Bio

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ALEXANDER CANIZARES | PARTNER



Alexander Canizares is a Partner in Perkins Coie's Government Contracts Practice Group who represents government contractors and other companies in litigation, investigations, and regulatory matters involving federal departments and agencies. As a former trial attorney with the U.S. Department of Justice's (DOJ) Civil Division, Alex draws on his experience serving as lead counsel in complex cases involving the federal government to advise companies in the aerospace and defense, technology, healthcare, professional services, and other industries in a range of areas, including contract claims and disputes, False Claims Act (FCA) matters, bid protests, and strategic counseling related to all phases of federal procurement.

Alex writes and speaks frequently regarding government contracts matters and is an adjunct professor of Performance of Government Contracts at The George Washington University Law School. He serves as co-chair of the American Bar Association's Public Contract Law Section's (PCLS) Contract Claims and Disputes Resolution Committee and vice-chair of the Procurement Fraud and False Claims Committee.

Speaker Bio

PATRICK JENSEN| PARTNER, HKA



Patrick Jensen is a Partner in the Washington, D.C., office of HKA. Patrick assists government contractors on financial, cost, economic, valuation, and damages analyses for matters in dispute, including offering expert witness testimony. He has consulted on various issues implicating government contracts issues and the Federal Acquisition Regulations, including breach of contract claim development and defense; requests for equitable adjustment (“REAs”); procurement disputes; potential false claims; investigations; US government agency audits from the United States Government; and terminations. Patrick also has advised clients on risk management and compliance considerations.

Patrick is a Certified Public Accountant (“CPA”), a Certified Fraud Examiner (“CFE”), a Certified Valuation Analyst (“CVA”), and a Master Analyst in Financial Forensics (“MAFF”).

Speaker Bio

NINA SAMUELS | ASSOCIATE GENERAL COUNSEL BOOZ ALLEN HAMILTON



Nina Samuels is an Associate General Counsel at Booz Allen Hamilton Inc. Nina joined Booz Allen in 2019 and practices government contracts law in connection with the company's support to a number of civilian agencies. Prior to Booz Allen, Nina was an Associate in the government contracts practice of Wiley Rein.

Agenda



**REAS AND
CLAIMS: THE
ESSENTIALS**



**KEY
CONSIDERATIONS
AND CASE LAW
DEVELOPMENTS**



**SUBCONTRACTOR
CLAIMS AND
PRIME-SUB
DISPUTES**



QUESTIONS?



REAs AND CLAIMS: THE ESSENTIALS

Contract Disputes Act (41 U.S.C. §§ 7101-09)

- The Contract Disputes Act of 1976 (“CDA”) provides the framework for resolving disputes with the Government under federal procurement contracts.
- Contractors present CDA claims to the agency Contracting Officer for a final decision in the first instance, subject to further appeal.
- Implemented in FAR 52.233-1 (Disputes).
- FAR defines “claim”: Written demand or assertion seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief under or relating to contract.
- Claims > \$100,000: person with authority to bind contractor must certify claim is made in good faith + data is accurate and complete to best of knowledge.

Requests for Equitable Adjustments vs. Claims

REAs

- Requesting adjustment to contract, e.g., contract modification.
- Costs to prepare REA may be allowable (e.g., legal fees, consultant costs).
- REA may be converted to a claim by complying with submission and certification requirements.
- Subject to negotiation.

CLAIMS

- Must satisfy prerequisites in accordance with CDA.
- Costs to prepare claims are not allowable.
- But interest may be recoverable from date CO receives the claim.
- Claims may be resolved through negotiation, but formalities must be satisfied and claim must be supported with evidence.

Appeal Decisions and Considerations

BOARDS OF CONTRACT APPEALS

- Appeal deadline: 90 days from CO final decision.
- Government represented by agency counsel.
- Boards have large volume of CDA cases.
- Discovery may be streamlined.

U.S. COURT OF FEDERAL CLAIMS

- Appeal deadline: 1 year from CO final decision.
- Government represented by DOJ.
- CDA cases are among many types heard by Court.
- Discovery may be expansive.

Recent case law highlights the risks of waiting too long and having a claim dismissed on statute of limitations or other grounds



KEY CONSIDERATIONS AND CASE LAW DEVELOPMENTS

Key Considerations When Preparing Claims

Where to start?

- Gather facts and evidence—assess both entitlement and quantum.
- Check the statute of limitations and applicable deadlines.
- Strategy for long-term—is this claim of sufficient scale/importance that the business will want to appeal to COFC/Board?
- Outside counsel vs. preparing in-house.
- Which teams within company to engage for what purpose.
- If subcontractors involved, act early to gather documentation and consider jurisdictional prerequisites and due diligence.

Key Issues (*De Novo* Review)

Department of Transportation v. Eagle Peak Rock & Paving, Inc., Fed. Cir. 2021-1837 (June 6, 2023)

- Eagle Peak had contract with Federal Highway Administration (FHWA) for construction work at Yellowstone National Park.
- FHWA terminated contract for default. Eagle Peak appealed. CBCA found T4D improper, citing deficiencies in contracting officer's reasoning.
- Held: CBCA should have reviewed agency's termination under a *de novo* standard—without regard to the CO's reasoning or findings of fact.
- Dissent: case should not be remanded to board for re-determination.
- **Takeaway** – *De novo* standard is a “clean slate” to re-examine legal issues. Litigants should be prepared to marshal evidentiary record.

Key Issues – (Non-Monetary Claims)

J&J Maintenance, Inc., ASBCA No. 6313 (May 16, 2023)

- Contractor requested COFD confirming that contract allowed subcontractors to charge certain mark-ups but did not seek money. USG argued that claim was actually monetary but lacked a “sum certain” and therefore was beyond the board’s jurisdiction.
- **Held:** A sum certain is required for jurisdiction under the CDA for claims when the “only significant consequence” of the claim would be money damages. Here, contractor’s claim was a legitimate non-monetary claim because the requested relief had a “significant consequence other than the recovery of money.”
- Practice point: decide up front if your claim is monetary vs. non-monetary and be prepared to address jurisdictional issues.

Key Issues (Software End User License Agreements)

Avue Technologies Corp. v. HHS and GSA (CBCA 6360, 6627) Jan. 14, 2022

- Avue is software developer that licensed software to agencies through a reseller under a GSA Schedule contract. GSA modification “incorporated” Avue’s EULA into the contract.
- Avue sought damages from USG under the EULA. Agency argued there was no “procurement contract” under CDA.
- **Held:** Board lacked jurisdiction under CDA because even if the Board were to find that there was an independent contract between the USG and Avue, the EULA did not *procure* services within CDA.
- **Takeaways: CDA is for *procurement* contract disputes only.** Consider negotiating claim sponsorship language in EULAs.



SUBCONTRACTOR CLAIMS AND PRIME- SUB DISPUTES

Subcontractor Pass-Through Claims

- Subcontractor claims against the USG must be “sponsored” by the prime.
- *Severin* doctrine – prime must be liable to the sub.
- Be mindful of releases and their legal effect.
- False Claims Act risks and diligence.
- Subcontractor fault - What to do if no cure notice?

Prime-Subcontractor Disputes

- Teaming and disputes
 - Exclusive v. non-exclusive
 - Enforceability
 - Dispute settlement provisions (choice of law, arbitration, jurisdiction).
 - Anticipating compliance issues

Cost Recovery and Claims

- Establishing evidence of quantum,
 - Work with finance teams to gather cost information establishing allowability.
 - Reasonable allowance for profit.
- Working with experts/consultants.
- What does it take to prove a “sum certain”?

Cost Claims and Contract Terminations

- Contractors are entitled under the FAR to recover certain costs in the event of a termination for convenience.
- Commercial products/services contracts – may recover percentage of contract price reflecting percentage of work performed prior to notice of termination plus “reasonable charges” resulting from termination the contractor can demonstrate to USG’s satisfaction using its “standard record-keeping system” (FAR 52.212-4(l)).
- *ACLR, LLC v. United States* (162 Fed. Cl. 610 (2022), *appeal pending*, Fed. Cir. 23-1190 (denied T4C claim, finding contractor’s “record keeping system” inadequate).



QUESTIONS?