

Government Contracts Update

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Federal Circuit Reminder: Routine Requests for Payment May Not Be Filed as CDA Claims until They Are Disputed

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Ensuring payment in the context of a termination for convenience settlement can be a complicated process for primes and subcontractors. A recent decision from the U.S. Court of Appeals for the Federal Circuit, *Parsons Global Services, Inc. v. Secretary of the Army*, No. 2011-1201, slip. op. at 12 (Fed. Cir. Apr. 20, 2012), reminds government contractors that before a contractor may file a claim under the Contract Disputes Act ("CDA") for the government's failure to pay a routine request for payment, the claim must be disputed. The decision in *Parsons Global Services* highlights the practical complexities that face a prime and a subcontractor in negotiating settlements resulting from the government's termination for convenience. It also serves as a reminder that the jurisdictional prerequisites for filing a claim under the CDA may serve as a trap for unwary contractors that fail to follow proper procedures in submitting what is initially a routine request for payment.

Following the case summary are a few tips for practitioners. Contractors are advised to examine the FAR carefully in negotiating termination settlements and correcting billing errors, or submitting other routine requests for payment, related to those settlement agreements.

Case Summary

On April 20, 2012, the Federal Circuit affirmed an Armed Services Board of Contract Appeals (the "Board") decision that a prime contractor's certified claim under the CDA submitted on behalf of a subcontractor was not a valid "claim" under the CDA because it was a "routine" payment arising under the contract that did not involve a dispute.

The legal dispute in *Parsons Global Services* arose from a subcontract to an indefinite-delivery, indefinite-quantity, cost-reimbursement contract awarded by the Army for work performed in Iraq. *Id.* at 2. Days prior to the Army's termination of the contract for convenience, the Defense Contract Audit Agency ("DCAA") determined during an audit that the subcontractor had been billing the prime contractor on an incorrect—and lower—mark-up rate for general and administration ("G&A") costs than what was provided for under the subcontract. *Id.* at 4. While the subcontractor submitted an invoice to correct the under-billing, the prime contractor initially disputed the entitlement and did not submit the costs as part of its termination settlement proposal. In 2008, the DCAA "discussed, *inter alia*, the appropriate mark-up for labor costs incurred under the subcontract," *id.*; i.e., the government admitted that it did in fact owe the subcontractor money. At this point, the prime contractor took several steps in an attempt to recover the monies. After discussing the settlement with the Termination Contracting Officer ("TCO"), the prime submitted three payment approval requests to the TCO. When the TCO denied those requests, the prime submitted a certified claim for payment to the Procurement Contracting Officer ("PCO"), and appealed the PCO's denial to the Board. The Board subsequently dismissed the claim for lack of jurisdiction because the request for payment was a "routine" request which was not disputed and, as such, was not a "claim" under the CDA for which the Board held jurisdiction.

The Court affirmed the Board's decision and held that the prime contractor's "request for payment is routine," *id.* at 9, and, as such, is not a claim under FAR 2.101. Under that provision, "demands for payment can be classified into two categories: 'routine' and 'non-routine.'" *Id.* at 7. For a "routine" request for payment to be a "claim" under the CDA, the request must be based on a pre-existing dispute. *Id.* A routine request is one that is expected to be submitted during contract performance. *Id.* at 8.

The Board's finding, upheld by the Court, that the routine request for payment was not disputed is ironic given that the subcontractor invoiced twice for these amounts, the prime contractor submitted three Payment Approval Requests reflecting the costs submitted by its subcontractor to the TCO, and the TCO refused to pay. The Federal Circuit's decision suggests that where the underlying entitlement is

not in dispute, there is no “dispute” for the purposes of jurisdiction. Parsons never alleged as part of its complaint or appeal that the amounts were disputed.

Analysis

The *Parsons Global Services* decision highlights the need for contractors to comply with the technical aspects of the claims process. The Federal Circuit asserted that FAR 49.302—which allows contractors to submit vouchers after termination—or FAR 49.108-3—which provides for contractors to submit to the TCO for approval a settlement with a contractor—were options of alternative payment mechanisms available to the prime contractor. *Id.* at 11. It seems that the *Parsons Global Services* contractor should have, as an initial matter, simply filed a voucher. See FAR 52.233-1 (providing that a “claim” does not include a “voucher, invoices, or other routine request for payment that is not in dispute when submitted,” but that such a voucher or invoice can be “converted to a claim under the Act by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount”). Accordingly, the *Parsons Global Services* decision makes clear that no amount of time or adherence to the CDA claims process will rectify a right for payment that was not correctly submitted from the start.

The merits of the, at times, draconian request for payment submission process are debatable, as Judge Newman points out in her dissent, that “a simple correction of a billing error has morphed into a nearly four-year litigation, with no end in sight.” *Id.* at 2 (J. Newman, dissenting). “This lengthy litigation of a conceded governmental obligation is an embarrassment,” she says. *Id.* at 5.

Practitioner’s Tips

- It is critical that both primes and subcontractors understand and follow the proper billing process for a given request for payment. The Court’s decision suggests that the fact that the costs flowed from the subcontractor’s own billing error impacted its finding that the demand was routine.
- The settlement of a termination for convenience may involve complex negotiations and competing interests between the prime, its subcontractors, and the TCO.
- Following termination, the prime has six months to submit standard vouchers. It is important to use that time to voucher as many costs as possible. Although the FAR contains a procedure for the submittal of unvouchered costs, delay in properly vouchering undisputed costs may have the practical effect of later precluding payment.

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