Federal Circuit signals broad changes to jurisdictional issues in bid protests and Contract Disputes Act claims

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Four recent cases at the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) signal significant changes to long-standing jurisdictional precedent in bid protests and Contract Disputes Act (CDA) claims.

In these cases, the Federal Circuit held that matters previously believed to be jurisdictional bars are not, and clarified the requirements contractors must follow to avail themselves of the right to appeal a government decision under the CDA. These developments may create new opportunities to litigate the merits of issues that had previously been considered jurisdictional bars.

Bid protest decisions

In *CACI, Inc.-Federal v. United States, General Dynamics Mission Systems, Inc., Sierra Nevada Corporation*, 67 F.4th 1145 (Fed. Cir. May 10, 2023), the Army assessed CACI three deficiencies in its proposal to provide a Next Generation Load Device Medium. CACI subsequently protested the Army's evaluation at the Court of Federal Claims (COFC).

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The Army moved to dismiss the protest for lack of standing, arguing that CACI had an Organizational Conflict of Interest (OCI) that could not be waived or mitigated. The Army also claimed that the OCI rendered CACI ineligible for the award since it was not an "interested party" for standing purposes under the Tucker Act. The COFC agreed, dismissing the protest because there was unrebutted evidence of an OCI, and therefore, CACI did not have standing because it was not an interested party.

On appeal, the Federal Circuit vacated the COFC's standing ruling and proclaimed that "prior caselaw treating the interested party as a jurisdictional issue…is no longer good law in this respect." Specifically, the Federal Circuit found that an "interested party" analysis under the Tucker Act is a question of statutory standing, not the court's Article III subject-matter jurisdiction. Additionally, the court held that questions of whether a protester was prejudiced are also issues of statutory standing and overruled its prior cases finding that prejudice is a jurisdictional consideration.

Moving forward, issues of interested party, prejudice, and the Blue & Gold *waiver rule are no longer bases upon which the COFC can dismiss a protest for lack of jurisdiction.*

In *M.R. Pittman Group, LLC v. United States*, 2023 WL 3573337 (Fed. Cir. May 22, 2023), the Federal Circuit held that the protest waiver rule established under *Blue & Gold Fleet, L.P., v. United States*, 492 F.3d 1308 (2007) is not jurisdictional. Under the *Blue & Gold* waiver rule, a protester must bring a protest relating to a patent error in the terms of a solicitation prior to the deadline for proposal submission or otherwise waive the protest ground.

The COFC and Federal Circuit have traditionally held that they lack subject matter jurisdiction to hear a protest relating to such solicitation defects after the proposal submission deadline has passed. But in *M.R. Pittman Group, LLC*, the Federal Circuit held that the *Blue & Gold* waiver rule is "more akin to a non-jurisdictional claims-processing rule since it 'seeks to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.'"

In other words, the *Blue & Gold* waiver rule does not relate to the COFC's authority to hear a case, it is a procedural obligation imposed upon the protester. In support of this finding, the Federal Circuit noted that the Supreme Court "has stressed a distinction between 'jurisdictional prescriptions' and 'nonjurisdictional claim-processing rules.'" Despite this finding, the Federal Circuit affirmed the COFC's dismissal but on the ground that the protester failed to state a claim.

CDA claims decisions

In *Lockheed Martin Aeronautics Co. v. Sec'y of the Air Force*, 66 F.4th 1329 (Fed. Cir. Apr. 25, 2023), the Federal Circuit held that a contracting officer's (CO) unilateral price definitization on two contracts did not constitute government claims and dismissed the appeal for lack of jurisdiction.

Lockheed Martin entered into two Undefinitized Contract Actions (UCAs) with the Air Force for F-16 upgrades. UCAs permit a contractor to begin performance while the parties reach agreement on contract price and other material terms. After years of failed negotiations, pursuant to the terms of FAR 52.216-25 (which was included in the contracts), the CO unilaterally definitized the UCAs at approximately $1 billion each.

Lockheed Martin appealed the definitizations to the Armed Services Board of Contract Appeals (ASBCA), challenging the prices set by the CO. The government filed a motion to dismiss for lack of jurisdiction arguing that Lockheed Martin had not first submitted a claim requesting a CO's final decision (COFD), a jurisdictional prerequisite to a CDA claim. Lockheed Martin argued that the unilateral definitizations were COFDs on government claims. The ASBCA held that a unilateral definitization does not constitute a final decision on a government claim and dismissed the appeals for lack of jurisdiction.

On appeal, the Federal Circuit affirmed the ASBCA's dismissal, finding that the definitizations were not government claims because they were not demands or assertions by the government seeking relief from Lockheed Martin. Further, the Federal Circuit found 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."

Finally, on May 5, 2023, during oral argument in *ECC International Constructors, LLC v. Secretary of the Army*, No. 21-2323, the Federal Circuit examined long-standing jurisprudence regarding the CDA requirement to state a "sum certain" as part of any monetary claim. The judges questioned government counsel regarding why the ASBCA and courts have treated the "sum certain" requirement as jurisdictional when the CDA does not state or suggest that the requirement is jurisdictional.

Notably, this examination followed the recent Supreme Court decision in *Wilkins v. United States*, 143 S.Ct. 870 (Mar. 28, 2023), where the Court emphasized the "risk of disruption and waste that accompanies the jurisdictional label" and verified that it would "treat a procedural requirement as jurisdictional only if Congress 'clearly states' that it is."

While the opinion for this case has not yet been published, based on the questions raised during this oral argument, it would not be surprising if the Federal Circuit held that the sum certain requirement under the CDA is also not jurisdictional.

Takeaways for contractors evaluating possible bid protests or CDA claims

For bid protests, the *CACI, Inc.-Federal* and *M.R. Pittman Group, LLC* decisions show that the Federal Circuit is motivated to distinguish between statutory standing and Article III jurisdiction as it relates to the Tucker Act and long-standing precedent. Moving forward, issues of interested party, prejudice, and the *Blue & Gold* waiver rule are no longer bases upon which the COFC can dismiss a protest for lack of jurisdiction. Instead, they will be considered when evaluating whether a protester has stated a claim, which may encourage more protests.

As for CDA claims, these developments similarly signal that the Federal Circuit is interested in clarifying whether the claim-processing rules of the CDA and its implementing regulations are jurisdictional. They also indicate a slight leveling of the playing field between government and contractors in CDA disputes since the government has often cited to procedural defects, including sum certain and price definitization, as jurisdictional issues long after the contractor's opportunity to cure any potential issue has passed. This shift may result in more COFC and boards of contract appeals decisions reaching the merits of CDA disputes.

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