Most Significant Claims Cases of the First Half of 2022

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Incorporation by Reference

CSI Aviation, Inc. v. Department of Homeland Security, 31 F.4th 1349 (Fed. Cir. 2022).

- CSI Aviation sought payment of flight cancellation charges from the Department of Homeland Security totaling over $40 million under its schedule contract.
- The Civilian Board of Contract Appeals held that CSI's terms and conditions had not been incorporated into its schedule contract. As a result, the CBCA dismissed a number of consolidated appeals.
- On appeal, the Court of Appeals for the Federal Circuit reversed the CBCA's holding and found that CSI's schedule contract expressly incorporated a document that "unambiguously identified the CSI Terms and Conditions and that makes clear the terms and conditions apply to all operations," i.e., the terms had been incorporated into the schedule contract.

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Duty to Inquire

Lebolo-Watts Constructors 01 JV, LLC v. Secretary of the Army, 2022 WL 499850 (Fed. Cir. Feb. 18, 2022).

- Lebolo contracted with the Army Corps of Engineers to construct a Wideband Satellite Communication Operations Center and a new electrical substation, designed to receive power from an existing building. The solicitation included drawings of the existing building that included two circuit breakers, but nothing stated who was to provide the circuit breakers.
- During performance, the agency held the position that Lebolo had to provide these circuit breakers. Lebolo directed one of its subcontractors to provide them – who was delayed in providing them. After completion of the project, Lebolo submitted a claim seeking compensation for the circuit breakers and two pass-through claims for subcontractors claiming losses due to delay caused by the circuit breaker delay.
- The Court denied Lebolo's claims because any ambiguity as to which party was required to provide circuit breakers was patent, and thus Lebolo had a duty to inquire. Likewise, the Court denied the subcontractor pass-through claims because they were based on delays caused by the circuit breakers and, concurrently, the delays of other subcontractors – and thus could not demonstrate the government's actions were the sole proximate cause of the loss.

False Claims and Forfeiture of Other Claims

Lodge Construction Inc. v. United States, 158 Fed. Cl. 23 (2022).

- This case arose from Lodge Construction, Inc.'s ("Lodge") submission of fraudulent cost claims to the government.
- After trial, the Court of Federal Claims (COFC) found that the Department of Justice had proved "that Lodge misrepresented the value of certain equipment billing the United States for operating four off-road trucks and collectively valued at over $3,500,000 when the trucks were actually worth less than $100,000 combined. The United States also demonstrated that Lodge designed a ratio to inflate its total equipment, labor and overhead costs – a ratio through which Lodge at times billed taxpayers at rates between $2,000 and $22,000 per hour for work performed by a single laborer or piece of equipment."
- As a result, the COFC concluded that Lodge had violated the civil False Claims Act and ordered Lodge to pay civil penalties for its false claims, and found that Lodge had forfeited some claims in its complaints pursuant to 28 U.S.C. § 2514.
- This case underscores the importance of accurate cost data, the avoidance of "rudimentary record keeping," and back-of-the-envelope methodologies for quantifying damages.

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Breach of Contract and the Affirmative Defense of Payment

Aspen Consulting, LLC v. Sec'y of Army, 25 F.4th 1012 (Fed. Cir. 2022), *remanded to* ASBCA No. 61122, 2022 WL 2338979 (June 3, 2022).

- Aspen's contract with the Army Corps of Engineers included FAR clause 52.232-33, which required the government to pay according to the information included in the Central Contractor Registration Database (CCR). The CCR in turn specified Aspen's Bank of America account as the account to be paid. After making 12 payments to the bank of America Account, Aspen's senior VP and COO directed the CO to make payments to a German account.
- Aspen's owner argued the agency failed to comply with the FAR clause and filed a certified claim to recover the funds. The CO denied this claim because the VP had apparent authority to negotiate on behalf of Aspen. The Armed Services Board of Contract Appeals (ASBCA) issued a final decision agreeing, and stated that the contractor was permitted to change its bank account information before updating in the CCR database.
- On appeal, the Federal Circuit found that the FAR clause unambiguously required the government to pay according to the CCR database information and remanded to determine whether the agency could succeed on an affirmative defense of payment. The ASBCA on remand found the government presented enough information to demonstrate payment.

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Sovereign Acts

JE Dunn Construction Co., ASBCA No. 62936, 22-1 BCA ¶ 38,123.

- JE Dunn contracted with the Army Corps of Engineers to complete a construction project at Fort Drum in NY. Following the COVID-19 outbreak, Fort Drum implemented protocols that required a 14-day quarantine for anyone traveling to the base from outside a 350-mile radius.
- This mirrored a NY state executive order that required a 14-day quarantine for anyone traveling to NY from a state that exceeded a certain positivity rate threshold. In November 2020, NY issued another executive order that permitted travelers to bypass the requirement if they tested negative both before and after 3 days of quarantine.
- Four employees of JE Dunn had to quarantine for 2 weeks between October 2020 and January 2021. JE Dunn submitted a claim requesting reimbursement for the expenses related to the quarantine. The CO denied the claim.
- On appeal, the ASBCA determined JE Dunn's claim was precluded by the Sovereign Acts Doctrine because the quarantine requirement was public and general, and rendered the government's contract performance impossible.

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Sum Certain and Jurisdictional Bars

ECC International, LLC, ASBCA No. 60167, 2022 WL 509701 (Jan. 25, 2022).

- This case arises from the government's motion to dismiss ECC International, LLC's (ECCI) appeals for lack of subject matter jurisdiction. Specifically, the Corps of Engineers claimed that the ASBCA lacked jurisdiction because ECCI's certified claim contained two separate claims (breach of implied warranty of specifications and breach of the duty of good faith and fair dealing), but only one sum certain. The government also sought to dismiss additional claims that ECCI asserted for the first time in its complaint (superior knowledge and commercial impracticability) that had not first been presented to the contracting officer.

- The ASBCA denied the government's motion to dismiss ECCI's breach of implied warranty of specifications, breach of the duty of good faith and fair dealing, and breach of the duty to disclose superior knowledge, but granted the government's motion to dismiss ECCI's impracticability claim.

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“Incurred” Actual Costs

Cellular Materials International, Inc., ASBCA No. 61408, BCA 22-1 ¶ 38,022.

- CMI submitted final indirect cost proposals that included approximately $205,000 in promissory notes executed for consultant services performed by Mr. Wadley.
- Payment on the promissory notes was due 5 days after demand, but Mr. Wadley had not demanded payment at the time CMI submitted the indirect cost proposal.
- The ASBCA found that these costs had not been incurred. Actual costs must be “incurred” and cannot be simply forecasted – this means that liability of a future cost must attach. Because Mr. Wadley had not demanded payment, no liability attached.

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No Jurisdiction Over License Agreements

Avue Technologies Corporation v. Department of Health and Human Services, CBCA Nos. 6360, 6627, 22-1 BCA ¶ 38,024.

- Avue Technologies ("Avue") sold licenses of a software it had developed through another company that held a General Services Agency Schedule contract.
- FDA purchased a subscription to Avue's software from the schedule contractor.
- Avue sought $41.4 million in damages pursuant to Avue's software license that the CBCA assumed had been fully incorporated into the "prime contractor's schedule contract and in FDA's order from the prime contractor."
- The issue before the CBCA was whether the FDA's breach of Avue's software license constituted a claim under the Contract Disputes Act (CDA).
- Ultimately, the CBCA held that the license agreement lacked key aspects of a CDA procurement contract, which is a contract "for the acquisition by purchase, lease or barter of property or services for the direct benefit or use of the Federal Government." (citation omitted)

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No Authority to Compel Mediation

Active Construction, Inc. v. Department of Transportation, CBCA No. 6597, 22-1 BCA ¶ 38,051.

- Active and the Federal Highway Administration had previously tried to resolve a dispute with a neutral mediator under Board Rule 54. These efforts failed.
- Active wanted to try again with a private mediator, but the agency refused.
- Active filed a motion to the CBA asserting that Board had authority to compel the agency to participate under the Alternative Dispute Resolution Act's (ADRA) Amendment to the Administrative Procedures Act (APA).
- The CBCA found it does not have authority to compel mediation under the ADRA amendments to the APA, because the Contract Disputes Act (CDA), not APA, grants the CBCA jurisdiction over contract disputes. Under the CDA, alternative dispute resolution is voluntary.

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Questions?

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Have More Questions? Contact us

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