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Step Right Up To The Dazzling Display Of 2022 Developments In Contract Disputes Act Case Law

By Kara Daniels and Amanda Sherwood[*]

"Time is a circus, always packing up and moving away."[1] But luckily for us, the fleeting 12 months of 2022 occasioned enduring legal developments in the Contract Disputes Act (CDA) litigation arena, from its "three rings" (the U.S. Court of Appeals for the Federal Circuit, the U.S. Court of Federal Claims, and the boards of contract appeals). This BRIEFING PAPER asks you to "step right up" and join us as we present notable claims cases from 2022, taking some artistic license from the Greatest Show on Earth.

Must Have Ticket To Enter: The Importance Of Recordkeeping For Recovery

Two cases in 2022 highlighted the dangers of contractors maintaining insufficient recordkeeping systems. The first cautioned that even approved purchasing systems do not by operation of law support the reasonableness of incurred costs, and the second made clear that while the Federal Acquisition Regulation (FAR) does not define a "standard record keeping system," more is required than a simple *ad hoc* practice of maintaining certain records in order to carry a burden of proof.

Mission Support Alliance, LLC v. Department of Energy[2] involved a contractor claim for payment of subcontractor costs under a cost type contract. There was no dispute that the contractor, MSA, actually paid the claimed amount to its subcontractors, but the Civilian Board of Contract Appeals (CBCA) found that MSA did not meet its burden to prove that the incurred amounts were reasonable, a burden which the CBCA characterized as "inherently factual."[3] The contractor moved for reconsideration, arguing that record evidence proved that it had an approved purchasing system "which had been reviewed and approved by DOE [the respondent, Department of Energy,] and its auditor . . . , for reviewing and approving subcontractor

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work and costs."[4] The board denied the motion, explaining that it "did not consider MSA's arguments that it followed its own procedures to be material."[5] Rather, "[p]roof of reasonableness should entail some 'independent evidence of the reasonableness' of the dollars spent—not merely evidence of the contractor's own behavior."[6] The board clarified that MSA's reliance on its "Government-reviewed purchasing system" provides some evidence of the reasonableness of costs, because it "is marginally more likely, other things being equal, to have spent money reasonably than is a contractor without such a system."[7] But, the board found this evidence to be "circumstantial" and insufficient to carry its burden to prove reasonableness.[8] Thus, MSA's repeated assertions that its employees followed proper procedures to approve subcontractor invoices, using a government-approved purchasing system, had some probative value, but was ultimately insufficient to prove the costs were reasonable both in type and in amount. The best practice would be to contemporaneously document the reasonableness of the charge; while this may be more time consuming than simply recording the charge in a purchasing system, such documentation would serve the contractor well in the event of a later dispute.

The Court of Federal Claims provided guidance on what constitutes the "standard record keeping system" required to prove termination for convenience damages for a commercial contract under FAR 52.212-4(l) in *ACLR, LLC v. United States*.[9] The issue arose because the government moved for summary judgment against the contractor's claim for termination damages, arguing that the contractor's record keeping system did not meet the FAR 52.212-4(l) requirements and therefore did not constitute adequate evidence of reasonably incurred costs. Finding no precedent describing the requirements of a standard record keeping system within the meaning of FAR 52.212-4(l), the court consulted the dictionary definitions of "standard" and "system," and reasoned: "[T]aken together, these definitions indicate that a standard system is a regularly used, carefully thought-out method that involves a set of organizing and orderly procedures."[10] The court held that the contractor's system, described as follows, did not meet this requirement:

> [Plaintiff's] standard record keeping system includes the use of QuickBooks, an accounting software package, to track costs; Microsoft File Explorer, which electronically stores vendor invoices, client work product, and archived communications data; Microsoft Outlook, which tracks company communications; external suppliers and various external file storage devices used to back up and secure company data to ensure against data loss; and paper files for employee and client contract information.[11]

The court concluded that "a regular, organized method for tracking relevant costs is required," and noted here the contractor "merely describes a vast collection of documents, some of which reflect post hoc estimates, rather than a systematic or organized method of tracking costs relevant to a particular project."[12] The court observed that the contractor "has pieced together the voluminous evidence in its possession *precisely because* no standard system for tracking the relevant data was in place."[13] Because the contractor did not prove an essential element of its case, the court granted summary judgment for the government, with the result that the contractor received no damages for the government's admitted termination for convenience of its commercial item contract.[14]

These two cases remind contractors that maintaining an organized recordkeeping system is a necessary first step to support the contractor's demand, but contractors should take care to document the reasonableness of the types and amounts of the cost claimed.

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Don't Let Audit Delays Create A "Side Show": Maintain Records To Support Your Defenses And Consider Whether The Government's Delay Is Itself A Defense

The unfortunate reality of long after-the-fact audits is that many contractors simply cannot produce documentation years' old, and as a result, are either denied recovery or lose the ability to assert a statute of limitations defense. For example, in *Strategic Technology Institute, Inc.*,[15] the government issued a final decision disallowing costs in a contractor's incurred cost proposal (ICP) more than six years after the ICP was supposed to have been submitted; however, the contractor was unable to produce documentation confirming that it had timely submitted the ICP. The contractor testified that it had directed a former employee to load the relevant documents onto CDs and send them to the government via either UPS or FedEx, but the contractor retained no evidence of this submission actually occurring. By contrast, the government presented evidence that it consistently maintained systems for logging incoming submissions and testimony that it had no record of ever having received the ICP until a later audit.[16] Because the contractor was unable to rebut the government's evidence and confirm that it submitted the ICP more than six years before the government claim, the contractor lost the benefit of a statute of limitations defense.[17]

This and other similar cases can paint a bleak picture for contractors facing aged claims for which documentation is nonexistent or lacking. But two cases in 2022 leave open the possibility of defenses against government claims resting on lack of documentation when an intervening government excused the contractor from maintaining the records.

In the first, *Doubleshot, Inc.*,[18] the government and the contractor entered into four contracts from 2006–2007, yet the Defense Contract Audit Agency (DCAA) did not begin to audit Doubleshot's 2009 and 2010 final indirect cost rate proposals, until late 2015. A contracting officer's final decision followed in 2018 asserting a government claim, more than half of which related to the contractor's inability to produce employee timecards, citing FAR 31.201-2(d)'s requirement that contractors maintain records adequate to demonstrate claimed costs were incurred. On appeal, the Armed Services Board of Contract Appeals (ASBCA) analyzed the FAR recordkeeping provisions and concluded that the contractor was not required to retain the timecards by the time DCAA started its audit: "Because Doubleshot no longer had any obligation to maintain these records, the government's claim fails to the extent it is based on the lack of such records."[19] The contractor benefited from the FAR's specific two-year rule pertaining to timecards; the FAR's lack of specific rules regarding other documentation and disputes about how to interpret the record maintenance provisions could have led to the opposite result, however.

In the second delayed audit case, *Sikorsky Aircraft Corp. v. United States*,[20] the contractor entered into several CAS-covered contracts with the federal government between 2007 and 2017, and set out in its Disclosure Statement its method for allocating independent research and development (IR&D) and bid and proposal (B&P) costs to its contracts. In 2012, the DCAA first found that the company's IR&D and B&P allocation method violated Cost Accounting Standard (CAS) 420, but not until December 2020 did the Defense Contract Management Agency (DCMA) issue a contracting officer's final decision demanding repayment of IR&D and B&P costs allegedly improperly billed from 2007 through 2017. Sikorsky appealed to the Court of Federal Claims seeking a declaratory judgment that its accounting practices complied with CAS 420 as well as alleging breach of contract, on the basis that Sikorsky had disclosed its accounting practices, the government had not objected to those practices, and those practices were thereby incorporated into its contracts. The government moved to dismiss Sikorsky's appeal, asserting (among other things) that the contracts' inclusion of FAR 52.230-2, "Cost Accounting Standards," which requires the contractor to agree to a price adjustment in the event of a CAS noncompliance, precluded the contractor's novel breach of contract theory. The court rejected the dismissal request, observing that the government "accepted Sikorsky's accounting practices for five years before it issued" the first statement of noncompliance "and another two years after that before issuing an audit report."[21] The court characterized as "uncertain" the government's argument that "it is allowed to wait years after entering a contract before making a compliance determination, allowing a contractor to accrue years of associated costs without any notice from the government that it views such practices as noncompliant."[22] Whether these open questions "constitute[d] a waiver or otherwise obligated the government in some fashion," required fact finding that was not available at the proceeding stage.[23] Watch

this space: a final victory for Sikorsky in this case would provide well-needed incentive for the government to act promptly to raise objections to contractors' accounting practices instead of changing the rules of the game long after contract performance began, and in many cases, ended.

License Terms Serve As The (Trapeze) Artist's "Safety Net": On The Protection Of Intellectual Property

The claims process can be an important mechanism to protect a company's rights in its intellectual property, something which all too often becomes an issue in contention during the performance of government contracts. Four cases in 2022 provided important takeaways for contractors.

In *Raytheon Co. v. United States*,[24] the Court of Federal Claims upheld the contractor's proprietary markings, reasoning that vendors lists are not "technical data" subject to the Defense FAR Supplement (DFARS) data rights process and thus rejected the government's claim that the data had to be delivered with "government purpose" rights. The court noted that the regulations do not define "technical data" but "[i]n the Court's view, the information on the vendor lists is not inherently or essentially technical in nature."[25] The court continued: "The lists alone do not reveal anything of substance about the parts other than that Raytheon purchased them within the preceding two years and from whom they were purchased."[26] The court "f[ound] it telling that the information on the lists was not derived from technical sources or prepared by technical experts," but rather the contractor "was to assemble the lists from information contained in contractor invoices and purchase orders."[27] Because the vendor list did not constitute technical data, the contractor's bespoke proprietary legend was unobjectionable.

The contractor was less lucky in *FlightSafety International, Inc.*,[28] in which the ASBCA held that the contractor's commercial restrictive markings contradicted the Air Force's contractual license rights in technical data. At issue were drawings, with "proprietary" markings delivered to the Air Force as part of the contractor's technical data package. The ASBCA held that DFARS 252.227-7015, "Technical Data—Commercial Items," gave the government unlimited rights in this data, so the markings were inappropriate. This clause gives the government unrestricted rights in technical data that "are necessary for operation, maintenance, installation, or training (other than detailed manufacturing or process data)" (often called OMIT data),[29] and due to a partial settlement, the parties had effectively agreed that the data constituted OMIT data. The board held that "the contractor's legends—whatever the wording—may not contradict the license rights the government obtains under the Commercial Technical Data clause."[30] Because the contractor's "proprietary" legend "conveys that the Air Force may not disseminate the data received and any authorized users would have to treat the data as subject to confidential and trade secret protection," it contradicts the unrestricted rights license in the DFARS 252.227-7015 clause.[31]

Moving on from markings challenges, another intellectual property issue raised in recent cases is what happens when the government infringes a license that it has to a contractor's software. After the Federal Circuit held that the government's copying of a contractor's software infringed the government's implied license to that software in *Bitmanagement Software GMBH v. United States*,[32] the Federal Circuit remanded to the Court of Federal Claims. On remand, the court was to determine how much the contractor was due for that breach under 28 U.S.C.A. § 1498(b), which states the contractor is entitled to recover "reasonable and entire compensation" for the infringement. The court considered applicable precedent and determined that the proper amount of damages was the amount the parties would have agreed to in a hypothetical license negotiation, had the contractor agreed to sell and the government agreed to buy the number of software licenses that the government ultimately used.[33] The court detailed the objective facts that it found relevant to this hypothetical license negotiation, including that the government was in a stronger bargaining position as one of the contractor's most important customers, that the contractor was in a poor financial condition, how many licenses the government would have agreed to procure, and what royalty rate the parties would have agreed upon.[34] While the contractor claimed over $155 million in damages, the court only awarded $154,000.[35]

Much software ends up in government hands through resellers; that is, the actual owner of the software intellectual property does not have a direct contractual arrangement with the contractor. If this is the arrangement, the CBCA confirmed that the software owner cannot assert a

claim directly against the government in *Avue Technologies Corp. v. Department of Health and Human Services*.[36] In this case, a software company claimed that the government breached its license agreement, which was incorporated into the procurement contract by which the government obtained the software by reference. The board cited Federal Circuit precedent to hold that a " 'procurement contract' subject to the CDA must be a contract 'for the acquisition by purchase, lease, or barter, of property or services for the *direct benefit or use* of the Federal Government.' "[37] The CBCA held that it lacked jurisdiction to consider the software company's claim regarding lease of the licensing agreement.[38] This decision makes clear that in order to obtain relief for breaches of license agreements, software licensors must either submit a "pass-through" CDA claim that is sponsored by its government contract reseller or pursue its own copyright infringement action under the Tucker Act.

Impalement Arts—Precision Needed To Recover Increased Costs Resulting From The COVID-19 Pandemic

More than three years after the COVID-19 outbreak, a number of pandemic-related claims have wound their way through the courts and boards. The major takeaway from these cases is that the pandemic is not a catchall excuse for contractor nonperformance, and the government is not required to adjust the price to account for increased costs of unchanged performance under firm-fixed-price contracts or when sovereign acts impact performance.

First, a number of cases have reemphasized that the pandemic is not a blanket excuse to claim excusable delay. A Department of Veterans Affairs (VA) solicitation for plastic gloves resulted in a notable amount of litigation, none of which turned out well for the contractors. In short, the VA issued solicitations in late 2020 and early 2021 seeking contractors that already had plastic gloves "on hand." When the short-turn delivery date arrived, it became clear that several companies bid for and received contracts despite not having the necessary supplies, instead intending to procure them. When the global shortage of personal protective equipment and supply chain and shipping issues prevented these companies from promptly obtaining the gloves to meet the agreed-upon delivery deadline, the government terminated the contracts for default. The companies argued excusable delay, but both the CBCA and the Court of Federal Claims disagreed, reasoning that the excusable delay clause is supposed to protect the contractor against the unexpected. Here, however, the contractors were fully aware of the challenges arising from the COVID-19 pandemic at the time of contracting; in fact, the pandemic was one of the reasons for the procurement.[39]

A second theme of cases arising from the pandemic is the consequence of the government's pandemic restrictions, many of which qualified as sovereign acts. The sovereign acts doctrine results from the government's unique role as both contracting counterparty and sovereign and provides that the United States cannot be held liable for an obstruction to the performance of a contract that resulted from the government's public and general acts as sovereign. The sovereign acts doctrine applies when the government's act (1) is general and not targeted, and (2) renders contract performance impossible, and if a sovereign act impedes performance, the contractor is entitled only to schedule relief, not increased costs. The ASBCA has issued two decisions denying the contractor's pandemic-related claim based on application of the sovereign acts doctrine. In the first, *JE Dunn Construction Co.*,[40] a contractor claimed the cost impact of a 14-day quarantine requirement that both New York and the relevant Army base imposed on persons traveling from high-risk states. While the state later reduced the quarantine period to three days, the Army kept the 14-day rule. The ASBCA denied the contractor's appeal, finding the quarantine to be a sovereign act, as it did not apply only to the contractor but to all visitors to the base. Regarding the contractor's argument that the Army should have adopted New York's looser, three-day quarantine, the ASBCA found that the contractor failed to demonstrate that any of its employees would have tested negative after only three days and therefore avoided the extra 11 days of cost impact.[41]

Three days later, in *APTIM Federal Services LLC*,[42] the ASBCA denied a contractor's appeal for delay related costs resulting from the commander's closure of the base to all non-operationally urgent personnel, finding that commander's order was generally applicable, not directed at the contractor, and rendered the contractor's performance impossible, and therefore was a sovereign act. Of note, here, the government extended the period of performance commensurate with this lock-out, but the government did not compensate the contractor for the additional time, so the contractor submitted a claim. The board found

that the government as contracting party could not permit the contractor to access the base without violating the rule established by the government as sovereign, so the board denied the contractor's appeal.[43]

A third common thread of pandemic claims litigation is whether government direction should be considered a constructive termination of a contract. The ASBCA issued an interesting decision on this front in *Heartland Energy Partners, LLC*.[44] In this case, the board considered a U.S. Army Corps of Engineers task order awarded against a commercial items contract for physical security services that had 11 firm-fixed-price contract line item numbers (CLINs). The facts were not under dispute, only their consequence. Specifically, the contracting specialist, who lacked authority to modify the contract, instructed the contractor to stop performance of four of the CLINs involving travel and in-person meetings that did not comply with then-current DOD guidance related to the pandemic. Although the contracting officer never ratified the direction, the contractor followed the contract specialist's direction and stopped working. The board concluded that despite the contracting officer's failure to terminate the CLINs for convenience properly, the "legal fiction of a constructive termination is clearly applicable."[45] Because a partial termination for convenience of a firm-fixed-price contract turns the terminated CLINs into cost-reimbursement CLINs, the contractor was due payment for the work actually performed under those CLINs and nothing more.[46]

Fourth and finally, claims litigation in the past year has made clear that increased material costs in the performance of firm-fixed-price contracts as a result of a pandemic, does not require a price adjustment. In *Ace Electronics Defense Systems*,[47] a firm-fixed-price contractor that provided parts associated with cruise missiles experienced large price increases from its vendors since the start of the pandemic. The contractor cited the July 2, 2020 Office of the Under Secretary of Defense for Acquisition and Sustainment memorandum noting the challenges that firm-fixed-price contractors were facing[48] to argue that the government breached its contract by failing to follow this memo and modify its contract to reflect a higher price. The ASBCA dismissed the appeal for failure to state a claim, reasoning that the memo was not incorporated into the contract in any way, and regardless, it only grants CO's discretion to modify contracts "to reflect changes to the Government's needs."[49]

Walking The Tightrope Between A Request For Equitable Adjustment And A Claim

The Federal Circuit issued an important decision on the thorny distinction between a request for equitable adjustment (REA) and a claim, a decision which the boards are already interpreting in interesting ways.

In *Zafer Construction Co., aka Zafer Taahhut Insaat Ve Ticaret A.S. v. United States*,[50] the contractor submitted an REA in 2013, and over the next four and a half years engaged in negotiations with the government to resolve the REA but never reached resolution. In 2018, Zafer converted its REA to a claim, and the contracting officer denied most of the claim as time barred because the underlying government conduct transpired more than six years beforehand. The Court of Federal Claims denied the appeal, focusing on the fact that the REA expressly requested negotiation and therefore did not meet the requirements to itself constitute a claim.[51] The Federal Circuit disagreed, holding that whether a document constitutes an REA or a claim depends not on the contractor's subjective intent, but rather, on whether "objectively, the document's content and the context surrounding the document's submission put the contracting officer on notice that the document is a claim requesting a final decision."[52] The Circuit found that the 2013 REA met that standard. The Circuit recognized the uncertainty contracting officers may face in deciding whether a contractor submission is a claim or an REA, and suggested the government's response could determine the ultimate characterization of the document, i.e., if the government "communicate[s] to the contractor that [it] is going to treat the document as a claim," then it is a claim, but if the government "explicitly require[s] the contractor to propose settlement terms," then the document is an REA.[53] The Federal Circuit held that, because the contractor's REA "implicitly request[ed] a final decision," it constituted a claim submitted within the CDA's statute of limitations.[54]

The only published case so far that applies the *Zafer* test found that the "objective" circumstances surrounding a contractor submission rendered it an REA and not an appealable claim. In *Gulf Tech Construction, LLC v. Department of Veterans Affairs*,[55] the CBCA dismissed a contractor's appeal of a contracting officer's final decision, holding that despite the existence of a contracting officer's final decision, there was no underlying claim but rather

only an REA. In reaching this conclusion, the CBCA pointed to two determinative facts. First, the contractor did not request a contracting officer's final decision in its submission; instead the "REA was submitted at the contracting officer's request as part of continuing discussions."[56] Second, the REA sought payment of more than $100,000 yet was not certified as required for a CDA claim under 41 U.S.C.A. § 7103(b)(1). Based on those facts, the board held that objectively the submission did not constitute a claim, and although the contracting officer issued what he called a "final decision," such a decision cannot create jurisdiction where there is no underlying CDA claim. Rather, "[u]ntil the contractor submits a proper claim under the CDA, 'no decision is possible.' "[57]

Hall Of Mirrors And Distorted Glass: On The Enforceability Of Potentially Illusory Obligations

A trio of cases in 2022 reminds contractors that a binding contractual obligation must actually exist in order to confer any recovery rights. Indefinite-delivery, indefinite-quantity (IDIQ) contracts, options, and requirements contracts are special vehicles that impose differing obligations depending on the circumstances.

First, in *Integhearty Wheelchair Van Services, LLC v. Department of Veterans Affairs*,[58] the contractor argued it held a requirements contract, whereby it was entitled to perform all of a certain type of the VA's patient transfers. The CBCA disagreed, holding "this particular contract does not contain the standard FAR clause, FAR 52.216-21, that is supposed to be included in requirement contracts or any specially-drafted clauses expressly stating that a requirements contract was intended."[59] While the contract stated the contractor's obligation to provide all requested services to the VA, the contract did not impose any obligation on the VA to request all such services from the contractor. Neither did the contract qualify as a viable IDIQ contract, as it contained "no minimum monetary guarantee."[60] Accordingly, the CBCA held that the "contract is enforceable only to the extent of the work performed" and dismissed the contractor's claim "for lost profits for contract work that [the contractor] was never assigned."[61]

The contractor did not fare any better in *Caring Hands Health Equipment & Supplies, LLC v. Department of Veterans Affairs*,[62] in which the contractor argued that language stating that its contracts were "for the actual requirements of the VA as ordered by the VA during the life of the contract," created requirements contracts. The CBCA, disagreed, noting that the contracts stated that "the volumes or amounts shown" in the contract "are estimates only and impose no obligation on the VA."[63] Because there was "no requirement for the VA to order any specific quantity pursuant to these contracts" (including a minimum order value that could have rendered the contract an IDIQ), the contracts were illusory and unenforceable unless and until the VA ordered a specific quantity, and even then the VA was "only obligated to pay for quantities ordered."[64]

Lastly, the contractor learned the hard way that options are only binding once executed in *MicroTechnologies, LLC v. U.S. Attorney General*.[65] In that case, the contractor purchased licenses for use during the option period of a contract before the government actually exercised the option. The government did accidentally exercise the option, then immediately terminated the contract 12 hours later. The Federal Circuit affirmed the denial of the contractor's claim for these license costs as termination costs, reasoning that the costs did not reasonably result from the termination because the contractor "incurred the cost . . . at the beginning of the base year period of performance—well before modification 2 was signed and then terminated."[66]

Only The Ringmaster Can Start The Show And Only The Contractor Can Assert A Valid Claim: On The Impact Of Corporate Transactions Without Proper Assignment Or Authority

The "C" in "CDA" stands for "contracts," and it is important to remember that regardless of any changes in corporate form or ownership, the default rule is that only the entity holding the contract can pursue claims under the CDA. Three cases in 2022 reminded contractors of the potentially harsh effects of this rule for companies.

First, in *DDS Holdings, Inc. v. United States*,[67] the Court of Federal Claims issued a reminder of the importance of adequately assigning rights when buying and selling government contractors. DDS Holdings sold Doctor Diabetic Supply Inc., a government contractor, to another company, after performance had ended but while a dispute

was pending on one of the sold company's contracts. Nevertheless, DDS Holdings attempted to file suit at the court, alleging that the government breached the contract with Doctor Diabetic Supply and claiming that DDS Holdings "retained the right to pursue the claims" as "the successor in interest and representative of the former owners" of Doctor Diabetic Supply.[68] The COFC dismissed the case, holding that DDS Holdings did not have privity of contract with the government and was not validly assigned the claim, either by operation of law (because DDS Holdings was not "essentially the same entity" as Doctor Diabetic Supply) or through express or implicit government recognition.[69] DDS Holdings' argument that it "retained" the contract claim post-sale could not succeed because any such retention would violate the Anti-Assignment Act.[70]

Second, the ASBCA declined recovery to a company that claimed it actually performed the work, but yet was not the named contracting party in *Trinity Source Logistics LLC*.[71] The Air Force entered into a contract with a U.S. company named "Trinity Logistics Source" to provide school and teaching supplies for children in Syria. However, another company, based in Iraq, with the same name but only partially the same ownership, claimed that it actually performed the contract and sought the payment. The board dismissed the Iraqi company's appeal, finding that the contract named the U.S. entity and, while the U.S. entity attempted to assign the contract to the Iraqi entity, the assignment did not include the government's consent and so was invalid.[72]

Third, the ASBCA considered the limitations on authority in a joint venture agreement in *Contrack Watts-Uejo Kogyo JV*.[73] Contrack Watts, Inc. and Uejo Kogyo K.K. established a joint venture (JV) to perform a contract; part of the agreement limited each partner's ability to act on behalf of the JV. One partner submitted a claim, and the other partner wrote a letter to the contracting officer expressing its disagreement with claim. The ASBCA denied the appeal on the ground that a claim was not submitted nor was the appeal approved by an individual with authority to do so given that the JV agreement clearly stated that one partner could not act without the consent of another.[74]

Don't Let Your Rights Disappear Like The Rabbit In The Magician's Hat; Pay Attention To The Claim Accrual Timing

The CDA requires all claims "be submitted within 6 years after the accrual of the claim."[75] The rule that a claim accrues when all events that fixing liability are known or should have been known (deriving from FAR 33.201's definition of "accrual of a claim") sounds easy enough but is routinely subject to litigation.[76] In *Herren Associates, Inc.*,[77] the contractor asserted that because its contract provided for interim invoicing with a final true-up payment accounting for actual costs incurred, the statute of limitations ran from this final true-up payment. The board disagreed, holding that claims for increased costs submitted more than six years after the contractor should have known of them were untimely, and reasoning that the contract's final payment clause did not toll the time for requesting an increase in the amount of the final payment.[78]

The COFC in *Textron Aviation Defense LLC v. United States*[79] applied FAR 33.201's definition of "accrual" to a claim centering on pension cost allocations (which the court noted is "a process of such complexity that, if it were just a game, it would make professional poker look like a round of go fish").[80] The claim arose out of Textron's 2014 acquisition of Beechcraft, which underwent bankruptcy proceedings in 2012–2013 involving the transfer of the assets and liabilities in Beechcraft's pension plan to the Pension Benefit Guaranty Corp. In 2018, Textron submitted a payment demand for what it asserted was the government's share of the pension costs under Cost Accounting Standard (CAS) 413. The DCAA audited and in February 2020 determined the government's share was actually higher than Textron calculated. Textron then submitted a certified CDA claim for this new amount in April 2020, which the Contracting Officer denied on statute of limitations grounds. The contractor appealed to the court, and the government moved to dismiss for lack of jurisdiction because Textron's claim accrued at the latest in mid-February 2013 and thus was time barred. Textron opposed, arguing that CAS 413 mandates a pre-claim procedure in which the parties negotiate and agree on a payment amount, and because that agreement did not occur until February 2020, the claim was timely. The COFC rejected Textron's arguments, ruling that (1) CAS 413 does not contain a mandatory pre-claim procedure (agreeing with the government that '' 'Textron AD does not identify any

language in CAS 413 that required it to wait to submit its certified claim' ''),[81] and (2) Textron's claim accrued in late 2012 or early 2013 (at the conclusion of Beechcraft's bankruptcy), when Textron (or its predecessor-in-interest) knew or should have known all the information necessary to file the claim.[82] Of note, however, the court observed the "unfortunate" results that application of the claim accrual definition and jurisdictional confusion caused in this case: "The fact that this case turns on the FAR's definition of a 'claim'—a term that is not even defined in the CDA itself—and gives rise to the jurisprudential equivalent of situation ethics, jurisdictional confusion and, thus, extensive litigation, is indeed unfortunate and imposes unnecessary costs on the procurement system and, in turn, the public fisc."[83]

The continuing claims doctrine, which recognizes that some claims are "inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages,"[84] can preserve jurisdiction where a claim has multiple accrual dates. In *Lockheed Martin Aeronautics Co.*,[85] the government issued multiple Material Deficiency Reports (MDR) ordering the contractor to perform extra work, and the contractor filed a claim many years later alleging a constructive change to its contract. The government argued that the entire claim was untimely, as it was filed more than six years after the first MDR, but the board disagreed, reasoning that Lockheed could not have filed its claim for additional hours until the government authorized the additional work, which the government did on multiple separate dates. Accordingly, the appeals relating to any MDRs issued within the past six years were timely under the continuing claims doctrine.[86]

The appeal of *AAI Corp., d/b/a Textron Systems, Unmanned Systems*,[87] addressed when a government's defective pricing claim accrues and found no bright-line rule exists; rather the board analyzed the facts of each separate ground of the claim. The board found timely the ground relating to an undisclosed subcontractor bid, because there was no evidence the government ever knew the undisclosed bid existed until it audited the contractor many years later. The board also found timely a third ground, relating to labor hours on another government project, focusing on the greater effort required to uncover defective pricing versus, for example, the duplicative costs contained on the face of the proposal. The board reasoned there "would be no point" in the requirement that contractors certify cost or pricing data "if the CO were not entitled to rely on it. If the Board were to rule that the government must conduct a forensic examination of years of data at the time of bid notwithstanding the certification, it would defeat the purpose of the certification."[88] By contrast, the board found a ground relating to duplication of shelter costs, to be untimely, because while the cost duplication "might not have jumped off the pages on a first read," the government had the documents showing the duplication for more than six years.[89]

Lastly, the Court of Federal Claims held in what it stated was a matter of first impression that a constructive change claim accrues when the contractor receives specific instructions to perform work outside of the contract. In *Square One Armoring Services Co. v. United States*,[90] the government directed the contractor to perform additional work outside of the contract specifications on numerous occasions between 2007 and 2014. In 2014, the contractor submitted 18 claims to the contracting officer seeking compensation for this extra work. The contractor asserted even the claims based on changes in 2007 were timely because they did not accrue until the contractor knew the total "sum certain" it would seek from the agency.[91] The court disagreed, finding "there is not a 'sum certain' requirement applicable to the claim accrual analysis,"[92] and, even if there were, "it is clear that the statute of limitations begins running prior to a contractor having knowledge of the full extent of its costs"; otherwise, "a plaintiff would be required to file a new claim each time their costs changed."[93] Hence, the contractor could not wait until it "had knowledge of *all* costs it would incur from the" changes.[94] Instead, the court "held that the proper inquiry to determine accrual of a [constructive change order] claim requires analysis of when the contractor received instructions from the Government to perform work outside the scope of the contract; at that point a plaintiff is on notice of the potential claim and the claim accrues."[95]

Federal Circuit Roundup: A Peek Inside The Big Tent

The Federal Circuit issued several additional claims decisions in 2022 that do not fit into any of the above referenced themes but are worthy of mention.

First, in *CSI Aviation, Inc. v. Department of Homeland Security*,[96] the Federal Circuit assessed the incorporation

of the contractor's standard terms and conditions into its Federal Supply Schedule contract. Whereas the CBCA found the contract's scattered references to the contractor's terms and conditions ambiguous as to whether the parties sought to incorporate them by reference, the appellate court disagreed, finding the contract "uses sufficiently clear and express language to establish the identity of the document being referenced and to incorporate the [the contractor's] Terms and Conditions into the Schedule Contract by reference."[97] The Federal Circuit observed that there are no "magic words" required to effectuate incorporation by reference[98] and disagreed with the board's focus on the ambiguity of which version of the standard terms and conditions were incorporated, stating that that question was "not relevant to deciding the question before us: whether any version was incorporated into the contract by reference."[99]

Second, the Circuit addressed patent ambiguity in *Lebolo-Watts Constructors 01 JV, LLC v. Secretary of the Army*.[100] Where a contractor did not inquire whether the construction of two circuit breakers was included in the contract's scope of work, the Federal Circuit affirmed the ASBCA's denial of the contractor's claim for additional compensation. The court tended to agree with the government's view that the circuit breakers were clearly included in the statement of work, but found some evidence in the contract supporting the contractor's interpretation. Because the ambiguity was patent, the law required the contractor to inquire, and the contractor's failure to do so "was properly construed against" the contractor.[101] A recent ASBCA case provides an interesting comparator. In *ECC International, LLC*,[102] the contractor did so inquire, submitting a question regarding the solicitation before submitting a proposal. The government declined to clarify the solicitation, but then demanded the contractor perform the work in question. The board observed that the Government created the ambiguity in its response to the bidders' questions and thus was bound by the contractor's "reasonable and clear pre-award, pre-dispute interpretation."[103]

Third, the Circuit enforced the plain language of a contract in *Aspen Consulting, LLC v. Secretary of the Army*.[104] The contract involved construction performed in Germany and required the government to make payments to the contractor's U.S. bank account. The contractor's chief operating officer (COO) in Germany requested the government instead make payments to a German bank account, purportedly for convenience, and the government made two such payments. The contractor submitted a claim for these two payments, which the COO apparently did not remit to the company. While the ASBCA denied the appeal, finding the COO had apparent authority to change the contract's payment instructions, the Federal Circuit reversed, finding the contract unambiguously stated that payment "shall" be made to the U.S. bank account listed.[105] Even if the COO did have apparent authority to consent to a contract change, the contract was never actually modified.[106]

Fourth, in *U.S. Aeroteam, Inc. v. United States*,[107] the Federal Circuit held that in order for the government to be liable for additional costs related to a change, the government must order the constructive change; the contractor cannot voluntarily or independently change performance without an express or implied order from the government. At issue, after the contractor's vendor started charging higher prices for certain gears, the contractor requested the government's permission to manufacture the gears itself. The government agreed, but the contractor also experienced higher than expected costs during manufacture. The contractor tried to pass those increased costs along to the government under its firm-fixed-price contract, but its claim was denied at every level, up to the Federal Circuit which made clear that the fact that the government approved its manufacturing request did not rise to the level of a government-direct change. The court stated: "Mere approval, standing alone, is insufficient to prove constructive change. Rather, there must be an 'order[],' either 'express[] or implied[].' "[108]

Fifth, in *Supreme Foodservice GmbH v. Director of the Defense Logistics Agency*,[109] the Federal Circuit affirmed the ASBCA's decision that the contractor's claims against the government were barred by the contractor's prior material breach. The dispute involved a contract to provide food and water to U.S. forces in Afghanistan. During performance, a relator filed a qui tam complaint against the contractor alleging fraud, and the United States intervened. While the fraud investigation was underway, the government extended the contract twice. The contractor ultimately entered a guilty plea, and the government issued a contracting officer's final decision demanding repayment of large sums of money it had paid under the contract. The contractor submitted a claim for money it claimed it was due under the contract that the government had been withholding, plus interest. The government pled prior material

breach as an affirmative defense to the contractor's claim, but the contractor argued the government had waived this defense by continuing to contract with the company after learning of the fraud. Relying on the decision of *Laguna Construction Co. v. Carter*,[110] the Federal Circuit held that the government could not have waived its defense prior to the guilty plea because it did not have a "known right" until then.[111] Because the government did not extend the contract after the guilty plea, "conclusively ending the criminal investigation into [the] fraud," the government did not waive its prior material breach defense.[112]

Conclusion

Ernest Hemingway said: "The circus is the only fun you can buy that is good for you." Whether you agree with that sentiment or not, we hope you have enjoyed our attempt at taming the CDA case law lions of 2022 and that you will join us the next time this circus comes in town.

Guidelines

While litigating CDA cases necessarily involves a certain amount of juggling, follow these *Guidelines* to ensure a successful balancing act and avoid inopportune tumbles. They are not, however, a substitute for professional legal representation in any specific situation.

1. Preparation is always better than reaction: instituting solid recordkeeping systems and processes now is better than performing improv later.

2. At the first sign of trouble, document—both interactions with the government and company acrobatics to mitigate or resolve issues.

3. Fixed price means fixed price unless there is a government-ordered change; tribunals will closely inspect requests for additional cotton candy or other compensation (even understandable ones).

4. Decide whether an REA or a claim is advisable and diligently walk the tightrope between the two.

5. Don't let your claim (and right to relief) go poof; calendar and track the earliest potential accrual date.

6. Keep abreast of case law developments; don't be the clown that misses something important.

ENDNOTES:

[1]Ben Hecht, "Elegy for Wonderland," Esquire (Mar. 1, 1959).

[2]Mission Support Alliance, LLC v. Dep't of Energy, CBCA 6477-R, 22-1 BCA ¶ 38,210.

[3]Mission Support Alliance, LLC v. Dep't of Energy, CBCA 6477-R, 22-1 BCA ¶ 38,210.

[4]Mission Support Alliance, LLC v. Dep't of Energy, CBCA 6477-R, 22-1 BCA ¶ 38,210.

[5]Mission Support Alliance, LLC v. Dep't of Energy, CBCA 6477-R, 22-1 BCA ¶ 38,210.

[6]Mission Support Alliance, LLC v. Dep't of Energy, CBCA 6477-R, 22-1 BCA ¶ 38,210.

[7]Mission Support Alliance, LLC v. Dep't of Energy, CBCA 6477-R, 22-1 BCA ¶ 38,210.

[8]Mission Support Alliance, LLC v. Dep't of Energy, CBCA 6477-R, 22-1 BCA ¶ 38,210.

[9]ACLR, LLC v. United States, 162 Fed. Cl. 610 (2022). FAR 52.212-4(l) provides: "[T]he Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination."

[10]162 Fed. Cl. at 615.

[11]162 Fed. Cl. at 613.

[12]162 Fed. Cl. at 616.

[13]162 Fed. Cl. at 616.

[14]162 Fed. Cl. at 616.

[15]Strategic Tech. Inst., Inc., ASBCA No. 61911, 22-1 BCA ¶ 38,027.

[16]Strategic Tech. Inst., Inc., ASBCA No. 61911, 22-1 BCA ¶ 38,027.

[17]Strategic Tech. Inst., Inc., ASBCA No. 61911, 22-1 BCA ¶ 38,027.

[18]Doubleshot, Inc., ASBCA No. 61691, 2022 WL 186651 (July 19, 2022).

[19]Doubleshot, Inc., ASBCA No. 61691, 2022 WL 186651 (July 19, 2022).

[20]Sikorsky Aircraft Corp. v. United States, 161 Fed. Cl. 314 (2022).

[21]161 Fed. Cl. at 323.

[22]161 Fed. Cl. at 323.

[23]161 Fed. Cl. at 322 n.11.

[24]Raytheon Co. v. United States, 160 Fed. Cl. 428 (2022).

[25]160 Fed. Cl. at 437.

[26]160 Fed. Cl. at 438.

[27]160 Fed. Cl. at 439.

[28]FlightSafety Int'l, Inc., ASBCA No. 62659, 2022 WL 17731018 (Nov. 29, 2022).

[29]DFARS 252.227-7015(b)(1)(iv).

[30]FlightSafety Int'l, Inc., ASBCA No. 62659, 2022 WL 17731018 (Nov. 29, 2022).

[31]FlightSafety Int'l, Inc., ASBCA No. 62659, 2022 WL 17731018 (Nov. 29, 2022).

[32]Bitmanagement Software GMBH v. United States, 989 F.3d 938 (Fed. Cir. 2021).

[33]Bitmanagement Software GMBH v. United States, No. 16-840C, 2022 WL 17077251 (Nov. 1, 2022).

[34]2022 WL 17077251, at *10–18.

[35]2022 WL 17077251, at *18.

[36]Avue Techs. Corp. v. Dep't of Health & Human Servs., CBCA 6360, 6627, 22-1 BCA ¶ 38,024.

[37]Avue Techs. Corp. v. Dep't of Health & Human Servs., CBCA 6360, 6627, 22-1 BCA ¶ 38,024 (quoting New Era Constr. v. United States, 890 F.2d 1152, 1157 (Fed. Cir. 1989)).

[38]Avue Techs. Corp. v. Dep't of Health & Human Servs., CBCA 6360, 6627, 22-1 BCA ¶ 38,024.

[39]Orsa Techs., LLC v. Dep't of Veterans Affairs, CBCA 7141, 22-1 BCA 38,025; Orsa Techs., LLC v. Dep't of Veterans Affairs, CBCA 7142, 22-1 BCA ¶ 38,042; Am. Med. Equip., Inc. v. United States, 160 Fed. Cl. 344 (2022); Servant Health, LLC v. United States, 161 Fed. Cl. 210 (2022). Neither has the board countenanced unsupported reliance on the pandemic as an excuse for missing discovery deadlines. See, e.g., United Facility Servs. Corp. v. Gen. Servs. Admin., CBCA 5272, 22-1 BCA ¶ 38,055 (rejecting the contractor's request for additional time to respond to interrogatories, the CBCA found contractor's pandemic defense to missing deadlines "empty" given the contractor's repeated "failed promises" and its failure to prove "that COVID-19 had made it impossible" to do so for so many months).

[40]JE Dunn Constr. Co., ASBCA No. 62936, 22-1 BCA ¶ 38,123.

[41]JE Dunn Constr. Co., ASBCA No. 62936, 22-1 BCA ¶ 38,123.

[42]APTIM Fed. Servs. LLC, ASBCA No. 62982, 22-1 BCA ¶ 38,127.

[43]APTIM Fed. Servs. LLC, ASBCA No. 62982, 22-1 BCA ¶ 38,127.

[44]Heartland Energy Partners, LLC, ASBCA No. 62979, 22-1 BCA ¶ 38,200.

[45]Heartland Energy Partners, LLC, ASBCA No. 62979, 22-1 BCA ¶ 38,200.

[46]Heartland Energy Partners, LLC, ASBCA No. 62979, 22-1 BCA ¶ 38,200.

[47]Ace Elecs. Def. Sys., ASBCA No. 63224, 22-1 BCA ¶ 38,213.

[48]The memorandum, entitled "Guidance for Assessment of Other COVID-19 Related Impacts and Costs," states: "Contracting Officers are granted discretion, subject to the availability of funds, to modify contracts (e.g., under FAR 52.243-1, Changes-Fixed Price, and its applicable alternatives) to reflect changes to the Government's needs as a result of COVID-19."

[49]Ace Elecs. Def. Sys., ASBCA No. 63224, 22-1 BCA ¶ 38,213.

[50]Zafer Constr. Co. v. United States, 40 F.4th 1365 (Fed. Cir. 2022)

[51]Zafer Constr. Co. v. United States, 151 Fed. Cl. 735, rev'd and remanded, 40 F.4th 1365 (Fed. Cir. 2022).

[52]40 F.4th at 1368.

[53]40 F.4th at 1371. This provides an interesting contrast to the ASBCA's analysis in BAE Systems Ordnance Systems, Inc., which determined that the fact that the contracting officer issued a final decision could not transform the contractor's REA into a claim. The board concluded: "At the end of the day. . .whether a contractor submits a claim or a non-claim REA should be up to the contractor." ASBCA No. 62416, 21-1 BCA ¶ 37,800.

[54]40 F.4th at 1371.

[55]Gulf Tech Constr., LLC v. Dep't of Veterans Affairs, CBCA 7447, 22-1 BCA ¶ 38,179.

[56]Gulf Tech Constr., LLC v. Dep't of Veterans Affairs, CBCA 7447, 22-1 BCA ¶ 38,179.

[57]Gulf Tech Constr., LLC v. Dep't of Veterans Affairs, CBCA 7447, 22-1 BCA ¶ 38,179 (quoting Paragon Energy Corp. v. United States, 645 F.2d 966, 971 (Ct. Cl. 1981)).

[58]Integhearty Wheelchair Van Servs., LLC v. Dep't of Veterans Affairs, CBCA 7318, 22-1 BCA ¶ 38,156.

[59]Integhearty Wheelchair Van Servs., LLC v. Dep't of Veterans Affairs, CBCA 7318, 22-1 BCA ¶ 38,156.

[60]Integhearty Wheelchair Van Servs., LLC v. Dep't of Veterans Affairs, CBCA 7318, 22-1 BCA ¶ 38,156.

[61]Integhearty Wheelchair Van Servs., LLC v. Dep't of Veterans Affairs, CBCA 7318, 22-1 BCA ¶ 38,156.

[62]Caring Hands Health Equip. & Supplies, LLC v. Dep't of Veterans Affairs, CBCA 6814, 22-1 BCA ¶ 38,182.

[63]Caring Hands Health Equip. & Supplies, LLC v. Dep't of Veterans Affairs, CBCA 6814, 22-1 BCA ¶ 38,182.

[64]Caring Hands Health Equip. & Supplies, LLC v. Dep't of Veterans Affairs, CBCA 6814, 22-1 BCA ¶ 38,182.

[65]MicroTechnologies, LLC, dba MicroTech v. U.S. Att'y Gen., No. 2021-2169, 2022 WL 2981589 (Fed. Cir. July 28, 2022).

[66]2022 WL 2981589, at *3. Perhaps not illusory but unenforceable nonetheless, in *Fluor Federal Solutions,*

Inc., the ASBCA considered a situation where after contract expiration, the government attempted to extend performance by six months under the FAR 52.217-8, "Option To Extend Services" clause. The board held that the FAR's extension clause could not be used to revive an already expired contract. ASBCA No. 62343, 2022 WL 4113732 (Aug. 8, 2022).

[67]DDS Holdings, Inc. v. United States, 158 Fed. Cl. 431 (2022).

[68]158 Fed. Cl. at 435.

[69]158 Fed. Cl. at 437.

[70]158 Fed. Cl. at 438.

[71]Trinity Source Logistics LLC, ASBCA No. 62435, 22-1 BCA ¶ 38,185.

[72]Trinity Source Logistics LLC, ASBCA No. 62435, 22-1 BCA ¶ 38,185.

[73]Contrack Watts-Uejo Kogyo JV, ASBCA Nos. 63211 et al., 22-1 BCA ¶ 38,201.

[74]Contrack Watts-Uejo Kogyo JV, ASBCA Nos. 63211 et al., 22-1 BCA ¶ 38,201.

[75]41 U.S.C.A. § 7103(a)(4).

[76]The Court of Federal Claims made clear in 2022 that laches cannot bar a claim asserted during a statutory limitations period. Chevron U.S.A. Inc. v. United States, 160 Fed. Cl. 583 (2022) (here, the Contract Settlement Act).

[77]Herren Assocs., Inc., ASBCA No. 62706, 22-1 BCA ¶ 38,122.

[78]Herren Assocs., Inc., ASBCA No. 62706, 22-1 BCA ¶ 38,122.

[79]Textron Aviation Def. LLC v. United States, 161 Fed. Cl. 256 (2022).

[80]161 Fed. Cl. at 259.

[81]161 Fed. Cl. at 269.

[82]161 Fed. Cl. at 266–67.

[83]161 Fed. Cl. at 275.

[84]ASFA Int'l Constr. Indus. & Trade, Inc., ASBCA No. 57880, 14-1 BCA ¶ 35,736.

[85]Lockheed Martin Aeronautics Co., ASBCA No. 62209, 22-1 BCA ¶ 38,112.

[86]Lockheed Martin Aeronautics Co., ASBCA No. 62209, 22-1 BCA ¶ 38,112.

[87]AAI Corp., d/b/a Textron Sys., Unmanned Sys., ASBCA No. 61195, 22-1 BCA ¶ 38,094.

[88]AAI Corp., d/b/a Textron Sys., Unmanned Sys., ASBCA No. 61195, 22-1 BCA ¶ 38,094.

[89]AAI Corp., d/b/a Textron Sys., Unmanned Sys., ASBCA No. 61195, 22-1 BCA ¶ 38,094.

[90]Square One Armoring Servs. Co. v. United States, 162 Fed. Cl. 429 (2022).

[91]162 Fed. Cl. at 436.

[92]162 Fed. Cl. at 437.

[93]162 Fed. Cl. at 438.

[94]162 Fed. Cl. at 438.

[95]162 Fed. Cl. at 440.

[96]CSI Aviation, Inc. v. Dep't of Homeland Sec., 31 F.4th 1349 (Fed. Cir. 2022).

[97]31 F.4th at 1355.

[98]31 F.4th at 1356.

[99]31 F.4th at 1357.

[100]Lebolo-Watts Constructors 01 JV, LLC v. Sec'y of the Army, No. 2021-1749, 2022 WL 499850 (Fed. Cir. Feb. 18, 2022).

[101]2022 WL 499850, at *5.

[102]ECC Int'l, LLC, ASBCA Nos. 58993 et al., 22-1 BCA ¶ 38,073.

[103]ECC Int'l, LLC, ASBCA Nos. 58993 et al., 22-1 BCA ¶ 38,073.

[104]Aspen Consulting, LLC v. Sec'y of the Army, 25 F.4th 1012 (Fed Cir. 2022).

[105]25 F.4th at 1016–17.

[106]25 F.4th at 1017.

[107]U.S. Aeroteam, Inc. v. United States, No. 2021-2272, 2022 WL 2431626 (Fed. Cir. July 5, 2022)

[108]2022 WL 2431626, at *3.

[109]Supreme Foodservice GmbH v. Dir. Defense Logistics Agency, 54 F.4th 1362 (Fed. Cir. 2022).

[110]Laguna Constr. Co. v. Carter, 828 F.3d 1364, 1369 (Fed. Cir. 2016).

[111]Supreme Foodservice GmbH v. Dir. Defense Logistics Agency, 54 F.4th at 1368.

[112]54 F.4th at 1368.

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BRIEFING PAPERS