

“Arising Under or Relating to” a Contract

Written by Nick Sanders
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From time to time we pretend to be lawyers and we try to interpret a recent judicial decision. We're not lawyers, though. We're really not. Much of the legal jurisprudence that comes our way baffles us. So keep that in mind. If you want good legal advice, hire an attorney. If you want our layperson's thoughts on legal stuff that impinges upon government contract cost accounting, administration, and compliance, then please keep reading this blog article.

Today's discussion concerns the Contract Disputes Act (CDA) and what claims can be adjudicated by a court. The CDA confers jurisdiction to one of two types of fora: either the Court of Federal Claims or an appellate Board such as the Armed Services Board of Contract Appeals or the Civilian Board of Contract Appeals.

But what is a claim?

The FAR defines a “claim” at 2.101; the definition states –

‘Claim’ means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. However, a written demand or written assertion by the contractor seeking the payment of money exceeding \$100,000 is not a claim under [41 U.S.C. chapter 71](#), Contract Disputes, until certified as required by the statute. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the contracting officer as provided in 33.206(a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

Based on the FAR definition, a claim can be a demand for one of three things:

- 1.

The payment of money in a sum certain

- 2.

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The adjustment or interpretation of contract terms

3.

Other relief

But whatever a claim may be, it must also arise “under” or “relating to” a government contract.

And therein lies the question we will explore today. What does it mean to arise under or relating to a contract?

This question was tackled by the Armed Services Board of Contract Appeals (ASBCA) in its [recent opinion](#)

on a government motion to dismiss a contractor’s appeal of its contracting officer’s final decision, based on an asserted lack of jurisdiction by the ASBCA. The decision, captioned “ABB Enterprise Software, Inc., f/k/a Ventyx” (ASBCA No. 60314), concerned allegations by a contractor that the Navy had violated its software agreement by using multiple copies of the contractor’s software. Eventually the contractor filed a claim with the contracting officer, who denied it because it was not a dispute covered by the CDA, in that it did not arise under and/or was not related to the contract. The contractor appealed that COFD and, during the appeal process, the government filed a motion to dismiss for lack of jurisdiction, essentially repeating that same argument the contracting officer had used to deny the contractor’s original claim.

According to Judge Prouty’s recital of the facts, ABB Enterprise Software, Inc., which was formerly known as Ventyx, which was formerly known as Tech-Assist, Inc., held two contracts with the Navy. Each contract was awarded to acquire “a number of Electronic Shift Operations Management Systems (eSOMS) clearance and database software modules.” The contracts “also expressly required Tech-Assist to provide to the Navy licenses to use the software.”

Separately, the Navy and Tech-Assist executed a software license agreement for 268 copies of the eSOMS software. The dispute arose because Ventyx (Tech-Assist’s successor-in-interest) complained that the Navy had violated the software agreement. For its part, the Navy denied (in writing) that it had violated the agreement, but also stated that any

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disputes would need to be resolved pursuant to the requirements of the Contract Disputes Act. There was extensive correspondence over a period of at least 18 months, “culminating in a 28 June 2013 letter from a Navy attorney to Ventyx’s general counsel, suggesting that Ventyx file a CDA claim if it wished to pursue the matter further.” Apparently Ventyx was surprised when the contracting officer rejected its claim, using the rationale that a license agreement violation was not a CDA dispute.

In its motion to dismiss, the Navy argued that the “arising under or relating to” a contract requirement was not met, since the software agreement did not expressly reference any government contract. The Navy further argued that the language must be read narrowly, such that “only direct breaches of a contract” would qualify as meeting the test. Judge Prouty quickly dismissed the Navy’s arguments, writing that “the first argument is not consistent with binding precedent; the second is belied by the uncontroverted facts.”

In making his decision, Judge Prouty cited to a 2011 Federal Circuit decision, *Todd Construction, L.P.*

, in which the Federal Circuit “instructed that this phrase is to be read ‘broadly’ in the context of CDA jurisdiction.” As Judge Prouty wrote—

Put yet another way, to be related to a contract, a claim ‘must have some relationship to the terms or performance of [the] government contract.’” Accordingly, “we reject the Navy’s proposed construction of the CDA, which would limit our jurisdiction to only those claims involving breaches in the terms of the contract or matters encompassed in the disputes clause.

As for the Navy’s second argument, Judge Prouty wrote “execution of the license agreement was part and parcel with the performance of the contract. The contract was for acquisition of software along with the associated license agreement. ... Thus, the license agreement ... was required by the contract and related to performance of that contract.”

It is axiomatic that our system of justice is an adversarial one. We think, however, that the Navy’s arguments were a bit *too* adversarial, and verged on frivolity—wasting the Board’s resources and delaying a just decision.

But what do we know about such things?

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