NOTICE: WE ARE NOT LAWYERS. WE ARE NOT GIVING LEGAL ADVICE. YOU SHOULD OBTAIN LEGAL ADVICE FROM COMPETENT ATTORNEYS.

As we posited in Part 1, we don't think DCMA Contracting Officers are resolving many "contractual issues in controversy by mutual agreement at the contracting officer level" (as is the policy of the U.S. Government and as is established in DCMA's own guidance to its COs). Instead, our experience has been that COs are simply rubber-stamping a DCAA audit report and issuing it as an attachment to their Final Decision—essentially daring the contractor to take them to court, instead of trying to negotiate an acceptable resolution. That's the exact opposite behavior of what's expected *and required* of a warranted Contracting Officer, yet nobody seems to be holding them accountable for their actions (or inactions).

As we've noted in several articles, the two courts in which contract disputes are litigated (the Armed Services Board of Contract Appeals and the U.S. Court of Federal Claims) have a tendency to strictly enforce the rules established by the Contract Disputes Act of 1978 (CDA). For instance, in **this case** , Judge Firestone of the COFC rejected a Government argument that it was entitled to an equitable adjustment (that would act to offset Raytheon's claims related to an underfunded pension plan) because a Contracting Officer had never issued a final decision on the matter. Because the Government did not strictly follow the requirements of the CDA, she could not rule on the matter. She wrote—

… the court agrees with Raytheon, and holds that because the government's claim for the pension surplus as a set-off is governed by the CDA, and because the government did not comply with the CDA, the court does not have jurisdiction over the government's claim for a set-off based on the Optical segment closing adjustment surplus. … Because the government's claim … is governed by the CDA, the government must show either that it

complied with the CDA or that it is exempt from obtaining an administrative decision from the contracting officer establishing Raytheon's liability for the surplus. … *The fact that there was a decision on Raytheon's claim does not excuse the government from having to provide its own contracting officer decision. Each specific claim has to have been the subject of a contracting officer decision. … The purpose of this requirement is to ensure that the contractor is on notice of its potential liability.* …
Here, Raytheon did not have notice of the government's claim to a pension surplus in connection with the Optical segment closing until trial. … Raytheon would have had no reason to suspect that the government would later seek a set-off. … Thus, Raytheon did not have any notice of the government's claim, contrary to the requirements of the CDA. … In sum, because the government needed a CDA decision in order to obtain payment from Raytheon for the Optical pension surplus and failed to obtain one, and because the court cannot find any reason for excusing the government's failure to comply with the CDA's jurisdictional requirements, this court will not exercise jurisdiction over the government's claim for a set-off of the pension surplus arising from the Optical segment closing.

[Emphasis added.]

The Courts seem to be even-handed in their handling of the claims. In many other cases, the contractor has seen its claim thrown out of court (in whole or in part) because it did not comply with the requirements of the CDA. As the attorneys at Sheppard Mullin **wrote** , "there is no shortage of cases in which such appeals are dismissed for lack of jurisdiction because the original requests for payment did not constitute 'claims' under the CDA."

It is important for contractors to understand when they have a claim and when they don't. The SMRH blog article (link in above paragraph) discussed the Appellate Court decision in ***Parsons Global Services***
. Rather than recap the Court's decision ourselves, we'll quote from the SMRH attorneys, who wrote—

The case centered on the termination for convenience of several task orders under an indefinite-delivery-indefinite quantity contract awarded by the Army to Parsons for design-build work in Iraq. Parsons had entered into a subcontract with Odell International, Inc. ('Odell') to construct health care facilities and deliver medical equipment in Iraq pursuant to the prime contract.

Shortly before the task orders were terminated for convenience by the Government, the Defense Contract Audit Agency ('DCAA') determined that Odell had been mistakenly billing Parsons using a lower overhead rate than was specified in the subcontract. Odell then invoiced Parsons for the difference, but Parsons refused to pay the invoice and submitted a termination

settlement proposal to the Termination Contracting Officer ('TCO') without including the disputed Odell costs. Two years later, as part of settlement of the prime contract, DCAA audited Parsons' billed costs, including Odell's costs, and determined that Odell's costs at the higher overhead rate were supported and appropriate. Odell submitted a new invoice for the difference, and Parsons submitted three payment requests for the additional Odell costs to be paid directly by government. The TCO declined to act on the requests to settle directly with Odell. Parsons then submitted a sponsored 'Certified Claim for Payment' under the CDA on behalf of Odell to the Procurement Contracting Officer ('PCO'), and appealed the PCO's denial of the claim to the Armed Services Board of Contract Appeals ('ASBCA').

The Government moved to dismiss for lack of jurisdiction, arguing that Parsons' routine request for payment to the PCO did not amount to a claim under the CDA. Parsons countered that, because its requests for payment occurred two years after the termination of the task orders and thus could not be subject to routine invoicing and termination procedures, the request was non-routine and sufficient by itself to constitute a claim. The ASBCA sided with the Government and dismissed the claim.

On appeal, the Federal Circuit affirmed the ASBCA's decision, holding that Parsons' request for payment was not a claim as defined in FAR 2.101. Under the FAR, demands for payment can be classified as either 'routine' or 'non-routine.' If the request is 'non-routine,' then it constitutes a claim under the CDA so long as 'it be (1) a written demand, (2) seeking, as a matter of right, (3) the payment of money in a sum certain.' However, if the request is 'routine,' a pre-existing dispute is necessary for it to constitute a claim under the CDA.

As the Federal Circuit detailed, non-routine requests for payment typically spring from additional or unforeseen costs not covered by the contract:

Such requests include requests for equitable adjustments for costs incurred from 'government modification of the contract, differing site conditions, defective or late-delivered government property or issuance of a stop work order' and other government-ordered changes; for damages resulting from the government's termination for convenience and termination settlement proposals that have reached an impasse; for compensation for additional work not contemplated by the contract but demanded by the government; for the return of contractor property in the government's possession; and for damages stemming from the government's breach of contract or cardinal change to the contract. In contrast, according to the Federal Circuit, the request for payment of Odell's costs made to the PCO was routine because the costs were explicitly covered by the contract and, but for the billing error, would have been subject to routine invoicing during contract performance. Furthermore, the routine request was not subject to a pre-existing dispute because the PCO, the appropriate official to evaluate the request, never received a proper request for payment prior to the improper 'Certified Claim for Payment.'

Okay, perhaps that was a bit long-winded, but we think it's important for you to get the distinction between a routine request for payment made pursuant to contractual terms and conditions, and a non-routine request for payment made based on alleged damages suffered

from government action (or inaction). But the point of this article is that even non-routine requests for payment are not disputes within the meaning of the CDA until and unless negotiations have ended because the parties are at an impasse. And DCMA Contracting Offices are responsible for making good faith attempts to resolve non-routine requests for payment so that they don't ripen into disputes and become claims that have to be heard by the Courts.

The ASBCA thoroughly discussed the role of the Contracting Officer in resolving potential claims in its 1982 decision, *Space Age Engineering, Inc.*, (ASBCA No. 26028). In that pre-Internet decision, the ASBCA Judges wrote—

The contracting officer, when considering claims, serves in a quasi-judicial capacity. *He has an obligation to consider all of the relevant and material evidence and to make findings of fact, and to apply the law to the facts found and render a fair, impartial and informed judgment. When a judgment is rendered which is not a fair, impartial and informed one, he has a duty to correct it.* This corrective action can cut either way. A denial of a claim may turn into an upholding of a claim or vice versa.

[Emphasis added.]

In that same case, the Government asserted a counterclaim against the appellant (Space Age Engineering). The Government's counterclaim was the subject of a Contracting Officer's Final Decision, but the contractor had never been apprised of the facts underlying the counterclaim until it was presented in court. The ASBCA Judges rejected the Government's counterclaim (even though it had been the subject of a COFD). The ASBCA looked to a then-recent Appellate Decision (W*oods Hole*), writing—

In the instant case there are a number of similarities to the *Woods Hole* case. There, as here, the contractor wanted a certain sum of money. There, as here, the Government believed the contractor was not entitled to the sum of money requested. There as here, the contracting officer unilaterally determined and set the amount of money it would pay. There, as here, the Government paid the amount of money it had unilaterally determined should be paid. There, as here, the contractor disagreed and appealed to higher authority. There, as here, while preparing to defend against the appeal Government lawyers concluded that grounds existed upon which to claim back all of the funds previously paid. There, as here, the contracting officer agreed with his lawyers and amended his earlier final decision, by the issuance of another final decision, and demanded the money back which it had earlier paid to the contractor. There, as here, the contracting officer had no contact with the contractor before issuing his second final decision and, obviously, gave him no opportunity to explain, argue or contest the proposed

action.

We believe that the same result should follow here, as there. The same reasoning is applicable. *The least that should have been done was to give the contractor an opportunity to express his views on the proposed action before the contracting officer had reached his decision.* We do not know if anything appellent could or would have said would have made any difference to the contracting officer but that is of no consequence. *The defect in the process, which both the Court of Claims and the Court of Appeals found, was the failure to hear the other party before rendering a judgment. That failure deprives the decision of any efficacy.*

[Emphasis added. Note that *Woods Hole* was subsequently vacated.]

The result was that the Government's counterclaim was dismissed and the Government was invited to issue a "proper final decision."

Another 1982 ASBCA case (*Chandler Manufacturing and Supply*, No. 27030) included a similar discussion of the need for discussions before a COFD is issued, though the Judges reached a different conclusion in that case. The ASBCA Judges wrote—

In view of appellant's statement in its 29 March 1982 letter of the contracting officer that 'there has been no negotiating session in the terms of a fair and equitable settlement', the Board brought to the parties' attention that a contracting officer's determination of a Government claim against a contractor could possibly be deemed not to be a 'decision' within the meaning of Section 6(a) of the CDA unless the contractor has had some opportunity to reply to the claim. …

Under the Contract Disputes Act we have continued to require that the contractor must have had an opportunity to express its views or state its position with respect to claims or demands the Government is pursuing against the contractor before a contracting officer could issue a decision pursuant to section 6(a) of the Contract Disputes Act.

Even though we are unable to conclude that the contracting officer fully complied with and followed the procedure set forth in DAR app. E, Part 6, the above described circumstances show that the Government presented its position and claims to the contractor and the latter had the opportunity to dispute them.

These circumstances provide, although perhaps only in a minimal way, a sufficient basis for the conclusion that the contracting officer's decision of 26 March 1982 regarding the Government's demands against the appellant constitutes a 'decision' within the meaning of

section 6(a) of the Contract Disputes Act. The appeal from this decision suffices to give this Board jurisdiction over the subject matter included in the decision.

We want to discuss one more ASBCA case (*United Aero, Inc.*, No. 26967, 1983) where the Judges took a different tack. They wrote—

However [the Government's] argument does not recognize the facts that (1) the statute is a 'Disputes' Act, (2) its legislative history shows a purpose to 'induce resolution of more contract disputes by negotiation prior to litigation', and (3), of most importance, as noted in *Chandler Manufacturing and Supply*
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supra
, the regulations which implement the Act, in DAR 1–314(i), provide for the steps to be taken by a contracting officer 'when a claim by or against a contractor cannot be satisfied or settled by agreement and a decision on the claim is necessary . . .' In addition to other requirements specified in the regulation, the contracting officer is required to include in the decision 'a statement of the factual areas of agreement or disagreement.'(DAR 1–314(i)(2)(iv)) …

As demonstrated above, the Board understands the law to have long been clear that contracting officers have not had, and do not have, the power to issue procedurally valid disputes article decisions, which could become final if not appealed, unless, *inter alia*, there has previously been a dispute concerning a question of fact arising under the contract to decide. Based on the implementing regulations, the rule is comparable under the Contract Disputes Act with respect to claims 'relating to a contract'. (Section 6(a) of the Act). …

Since the Government's purported final decisions were premature, the appeals are subject to dismissal without prejudice.

Readers, note that the ASBCA Judges noted that the intent of the Contract Disputes Act itself was to "induce resolution of more contract disputes by negotiation prior to litigation." So there is a statutory basis (in addition to the regulatory basis we discussed in Part 1) for the responsibility of Contracting Officers to negotiate contentious issues. Moreover, (as the three cases above show) a failure to discuss/negotiate the issues may lead to a dismissal of any Government claims, because they are procedurally deficient and "premature."

So what if the Contracting Officer's Final Decision (COFD) was premature and the Government's claim is dismissed pending a correction of the procedural defect(s)? Well, let's say the Government was right up against the six-year statute of limitations found in the CDA. (We assume that you all know about that issue by now, as we written about it extensively.) Let's say the COFD was issued one day before the expiration of six years. But the COFD was deficient and the Government's claim was dismissed. Can the Government then remedy the deficient COFD and resubmit its now procedurally sound and "ripe" claim for adjudication?

We don't think so. We think that a strict reading of the CDA and evolving case law in this area would lead the Court to conclude that it no longer had jurisdiction to hear the matter.

We think this hypothetical situation is all-too-possible, given the DCAA's well-known backlog of incurred cost audits and the number of aged CAS noncompliances that led to DOD's "contractor recovery initiative." We think the Courts may have to decide this issue, sooner or later.

So this stuff matters, whether you are a small business or a major defense contractor. You've got to know the different between a difficult routine administrative matter and a dispute that may ripen into a claim. You've got to understand the procedures involved in obtaining a COFD and submitting a procedurally sound claim to the Courts for adjudication.

And if you are a DCMA Contracting Officer, we think you better think long and hard about whether you've fulfilled your responsibilities in this area. Whether or not you're being held accountable for compliance, procedural defects may doom the Government's claims in court.