We have recently spent some time and several blog articles discussing the Contracting Officer's Final Decision (COFD). (See our 2-part series of articles on "Settling Disputes" – especially **Part 3 of 2** .)

We discussed the fundamental distinction between a "routine" request for payment and a "non-routine" request. A routine request requires a *bona fide* dispute between the contracting parties (relating to the contract) in order for the Courts to have jurisdiction over a claim, whereas a non-routine request does not have that same requirement. And, of course, there must be a proper COFD issued, in order for the parties to litigate pursuant to the Contract Disputes Act (CDA). All that stuff is covered in our prior articles (link in the first sentence).

As we told our readers, we were interested to see Vern Edwards publish his own blog article on a very similar topic at roughly the same time our articles came out. And we were grateful for his erudite work because it pointed out an error we had made (which necessitated the Part 3 of the 2-Part article.) We were also interested to see the Judge Sweeney of the Court of Federal Claims tackle almost the same topic at almost the same time, in the matter of *Atkins North America & Mactech Engineering and Consulting v. US*
. (Link:
here
.)

In *Atkins*, Judge Sweeney was asked to decide cross motions for summary judgment. As such, the case is far from over. But Judge Sweeney's decision had a lot to say about the

validity of the COFD and the Contracting Officer's exercise of independent judgment, which was some of the very same issues we touched on.

If you are getting the feeling that this is a current topic of interest, you would be correct. But let's also note that arguments about the propriety of a COFD and a Court's jurisdiction to hear the parties' dispute have a long pedigree, pre-dating the passage of the CDA in 1978. That the issues continue to plague litigants today, more than 30 years after passage of the CDA, underlines the complexity of the topic—which is why we are going to spend a lot of time discussing (and quoting from) Judge Sweeney's decision in *Atkins*. Assuming the decision is not overturned on appeal, the
Atkins
decision will provide a good reference for those interested in the issue.

Atkins and its predecessor company provided architect-engineering services to the U.S. Army Corps of Engineers (USACE). Five years after Atkins delivered its work product, the USACE informed the company that a design deficiency and a potential claim for errors and omissions had been identified. On March 28, 2008—roughly five years and nine months after Atkins had completed its work—the USACE Contracting Officer (Ms. Gonzalez) issued a COFD that asserted a claim against Atkins in the amount of $15.7 Million.

During her deposition, Ms. Gonzalez stated that an Architect-Engineer Responsibility Management Board (AERMB) had determined that Atkins was liable for design deficiencies. She also stated that a USACE attorney drafted the COFD and provided a preliminary draft to Ms. Gonzalez for review. She reviewed the preliminary COFD to make sure it was factually correct—by comparing it to the AERMB's report and to correspondence. Judge Sweeney found that "These documents–the case document, correspondence, contract clauses, and regulations–were the only documents Ms. Gonzalez relied on and referred to when reviewing the draft decision."

After her review, Ms. Gonzalez returned the draft COFD to the attorney with the comment that it contained more case law than was necessary. Eventually, Gonzalez and the attorney came to an agreement on the wording, and Gonzalez issued the COFD to Atkins. Judge Sweeney found that "Ultimately, the only changes she [Gonzalez] made to the [attorney's] draft decision were related to punctuation and grammar." In other words, the COFD was almost entirely the work product of the USACE attorney, and not the cognizant Contracting Officer.

Atkins (and co-appellant Mactech) argued that Ms. Gonzalez' COFD "was invalid because it did not represent Ms. Gonzalez' independent judgment and did not reflect that [Atkins] was afforded impartial, fair, and equitable treatment."

Judge Sweeney first had to decide on the Government's argument that, if the COFD was invalid, then the Court had no jurisdiction and it could not rule on the underlying matter. The Government also argued that the Court lacked the ability to invalidate a COFD, because doing so would constitute a legally impermissible declaratory judgment. Judge Sweeney didn't buy the Government's second argument. She wrote—

Under the CDA, the court has jurisdiction over a claim only if there is a contracting officer's decision on, or deemed denial of, that claim. See, e.g., England v. Swanson Grp., Inc., 353 F.3d 1375, 1379 (Fed. Cir. 2004) (holding that "jurisdiction over an appeal of a contracting officer's decision is lacking unless . . . that officer renders a final decision on the claim"); Paragon Energy Corp. v. United States, 645 F.2d 966, 971 (Ct. Cl. 1981) ("[T]o invoke the jurisdiction of this court . . . there must first be a 'decision' (or failure to decide) by the contracting officer."). In issuing a decision, the contracting officer must satisfy the procedural and substantive requirements set forth in the CDA. See 41 U.S.C. § 605(a), (c)(1)-(3) (1994). A failure to satisfy these requirements may render the decision invalid. Compare Case, Inc. v. United States, 88 F.3d 1004, 1009 (Fed. Cir. 1996) ("A contracting officer's final decision is invalid when the contracting officer lacked authority to issue it."), and Sharman Co. v. United States, 2 F.3d 1564, 1570-71 (Fed. Cir. 1993) (holding that a letter that did not clearly indicate that it was a final decision did not constitute a valid contracting officer's decision), overruled on other grounds by Reflectone, Inc. v. Dalton, 60 F.3d 1572 (Fed. Cir. 1995) (en banc), and Fireman's Fund Ins. Co. v. United States, 92 Fed. Cl. 598, 698 (2010) (holding that the contracting officer's failure to comply with the FAR rendered her decision invalid), with Alliant Techsys., Inc. v. United States, 178 F.3d 1260, 1268 (Fed. Cir. 1999) ("A letter can be a final decision under the CDA even if it lacks the standard language announcing that it constitutes a final decision."), and Placeway Constr. Corp. v. United States, 920 F.2d 903, 907 (Fed. Cir. 1990) ("The decision is no less final because it failed to include boilerplate language usually present for the protection of the contractor."). If the decision is invalid, then the court lacks jurisdiction to rule on the underlying claim. See Case, Inc., 88 F.3d at 1009 ("[A]n invalid contracting officer's decision may not serve as the basis for a CDA action.");

Daff v. United States
, 78 F.3d 1566, 1571 (Fed. Cir. 1996) ("A valid contracting officer's decision is a prerequisite for a suit under the CDA."); see also
N.Y. Shipbldg. Corp. v. United States
, 385 F.2d 427, 437 (Ct. Cl. 1967) ("No proper initial decision has been rendered administratively, there is nothing from which to appeal, and there is nothing for the appeal board to consider."). Accordingly, the court has the authority to rule on the validity of a contracting officer's decision as part of its jurisdictional inquiry.
See also Renda Marine, Inc. v. United States
, 509 F.3d 1372, 1380 (Fed. Cir. 2007) (noting that a court "may declare a contracting officer's final decision invalid–for whatever reason").

(We printed the foregoing paragraph as an intact whole, less footnotes but including case law citations, to serve as a reference for those considering litigation.)

Judge Sweeney also discussed the CDA requirements of a COFD, as well as the FAR requirements. She wrote—

The FAR expands upon the CDA's requirements. First, it describes the steps a contracting officer is required take when the government intends to assert a claim against a contractor: the contracting officer must review the pertinent facts, secure assistance from the appropriate advisors, coordinate with the office administering the contract, and prepare a written decision. FAR 33.211(a). Second, it sets forth what must be included in the decision: a description of the government's claim, reference to the relevant contract terms, a description of the factual areas of agreement or disagreement, a statement of the contracting officer's decision and rationale, a notice of the contractor's appeal rights, and a demand for payment, if appropriate. FAR 33.211(a)(4). Third, it explicitly requires contracting officers to "[r]equest and consider the advice of specialists in audit, law, engineering, transportation, and other fields, as appropriate," in carrying out their duties. FAR 1.602-2(c). Finally, it provides that the contracting officer must "[e]nsure that contractors receive impartial, fair, and equitable treatment[.]" FAR 1.602-2(b); se e also Penner Installation Corp. v. United States
, 89 F. Supp. 545, 547 (Ct. Cl. 1950) ("[T]he contracting officer must act impartially in settling disputes. He must not act as a representative of one of the contracting parties, but as an impartial, unbiased judge."), aff'd by an equally divided court, 340 U.S. 898 (1950).

We very much liked Judge Sweeney's cite to the Supreme Court's 1950 decision in *Penner*, in which SCOTUS held that the Contracting Officer "must not act as a representative of one of the contracting parties." In our recent experience, a number of Contracting Officers suffer from an inability to act impartially and, either through personal choice or because of direction from above, seem to think they are part of a larger government team that is in an adversarial position vis-à-vis the contractor. We are going to remember that SCOTUS decision for future

use!

(Yes, Charlie Williams, Jr., and Shay Assad. We are looking at *you* right now.)

Judge Sweeney also discussed what the Courts have held in this area, writing—

The courts and boards of contract appeals have further elucidated the requirements for contracting officer decisions and the extent of the contracting officer's involvement in issuing those decisions. Most importantly, a decision must represent the contracting officer's independent judgment. See Pac. Architects & Eng'rs Inc. v. United States, 491 F.2d 734, 744 (Ct. Cl. 1974) (quoting
N.Y. Shipbldg. Corp.
, 385 F.2d at 435 (holding that a contracting officer must "put his own mind to the problems and render his own decisions"));
N. Star Alaska Hous. Corp. v. United States
, 76 Fed. Cl. 158, 209 (2007) ("[A] contracting officer may not forsake his duties, but rather must ensure that his decisions are the product of his personal and independent judgment.");
CEMS, Inc. v. United States
, 65 Fed. Cl. 473, 479 (2005) (noting that the contracting officer "failed to take ownership of all determinations included in the final contracting officer's opinion"); see also
Air-O-Plastik Corp.
, GSBCA 4802 et al., 81-2 BCA ¶ 15,338 ("Usually a holding that a given decision does not represent the independent judgment of the contracting officer is reached only when the purported decision is imposed by higher authority or when the contracting officer completely abandons his decisional responsibility to another."). To inform that judgment, contracting officers are entitled to obtain technical and legal advice. See
Pac. Architects & Eng'rs Inc.
, 491 F.2d at 744 (noting that when a contracting officer is preparing a decision, there is "no implied prohibition against his first obtaining or even agreeing with the views of others");
Barringer & Botke
, IBCA 428-3-64, 65-1 BCA ¶ 4,797 ("[A] contracting officer may, for the purpose of forming his independent judgment, obtain information and advice from his staff offices and advisors, particularly in the areas of law, accounting and engineering, in which fields he may have little or no expertise."). However, contracting officers may not substitute the judgment of others for their own independent judgment. See
N.Y. Shipbldg. Corp.
, 385 F.2d at 435 (holding that it is improper for a contracting officer to "merely rubber-stamp[] a subordinate's or superior's findings");
CEMS, Inc.
, 65 Fed. Cl. at 480 ("Although a contracting officer may review claims using in-house assistance, he must still understand and be persuaded by the determination made in his

contracting officer's final decision.");
Jamco Constructors, Inc.
, VABCA 3271, 94-1 BCA ¶ 26,405 ("[A] contracting officer may not abdicate his responsibility by accepting any opinion offered without subjecting it to some analysis–particularly where he is, or should be, aware of information which calls that opinion into question.").

Again, we quoted a length because we are going to use Judge Sweeney's decision as a reference for future discussions with Contracting Officers. We suggest readers might want to do the same.

Ultimately, Judge Sweeney decided that Ms. Gonzalez had issued a valid COFD. She wrote (and we will quote)—

Under the CDA, the contracting officer, not some other official, is required to issue the contracting officer's decision. However, as noted in the legislative history of the CDA, 'practicability dictates that the extent to which the contracting officer relies on his own judgment or abides by the advice or determination of others is dependent on a variety of factors, including the officer's personal knowledge, capability, and executive qualities, as well as the nature of the particular procurement.' S. Rep. No. 95-1118, at 21. In an acknowledgment that contracting officers may not have the personal knowledge or capability to make certain determinations, the FAR requires them to secure assistance from the pertinent advisors; in other words, to request and consider the advice of accountants, attorneys, engineers, and other specialists. The Corps implements the requirements of the CDA and the FAR by specifying that a contracting officer's decision must be drafted by counsel with technical assistance from appropriate staff members, and that before the contracting officer issues the decision, she should familiarize herself with the facts and proposed conclusions in the decision and either adopt the facts and conclusions as her own or make appropriate changes. If the contracting officer complies with the requirements of the FAR and the EFARS in issuing a decision, then the decision represents the contracting officer's independent judgment.

Although it was the USACE attorney who drafted the COFD, the fact of the matter was that the EFARS required an attorney to draft it. Further, Ms. Gonzalez, the cognizant Contracting Officer, issued the decision herself. So the fact that the decision was written by the attorney and not the Contracting Officer was not dispositive. What was dispositive was whether the COFD was the product of Ms. Gonzalez' independent business judgment. Judge Sweeney wrote—

… both the Court of Federal Claims and the boards of contract appeals have provided multiple examples of what does, and what does not, constitute familiarization with the facts and conclusions contained in a contracting officer's decision. The Court of Federal Claims concluded in CEMS, Inc. that the contracting officer was not familiar with the facts contained in

the contracting officer's decision prepared by another individual because he (1) did not know whether the other individual had conducted a critical path analysis or interviewed potential witnesses; (2) was unaware that the decision contained information directly contradicted by information supplied by the contractor; (3) did not consider other evidence submitted by the contractor; (4) could not explain why the contractor was not interviewed regarding ambiguities; (5) was unfamiliar with back-up documentation; and (6) actually denied contractor claims in which the government had admitted error. … In North Star Alaska Housing Corp. , the court concluded that one of the contracting officers had abdicated his responsibility to make an independent decision when he (1) did not personally investigate many of the contractor's claims; (2) ruled against the contractor without reviewing all of the documentation; and (3) incorrectly presumed that the government's explanation of its position on a particular issue had been provided to the contractor. … And … the court in Fireman's Fund Insurance Co. held that the contracting officer did not give the contracting officer's decision sufficient attention because she (1) only discussed the decision with counsel and the administrative contracting officer for less than one hour and only to verify that they were seeking a time credit; (2) did not seek to verify the length of time that was purportedly saved and instead relied on the calculations on others; (3) did not review project schedules; (4) did not independently verify, or ask the administrative contracting officer whether he verified, the accuracy of the findings of fact; and (5) did not review the documents appended to the decision.

Judge Sweeney wrapped up his decision, denying Atkin's request for summary judgment that would have invalidated Ms. Gonzalez' COFD thusly—

It is readily apparent that there is no rigid test for determining how a contracting officer becomes familiar with the facts and conclusions in a contracting officer's decision. Reflecting that there is no one-size-fits-all approach, the adjudicative bodies that have addressed the issue have reached disparate, and sometimes, contradictory, conclusions regarding what factors are dispositive in this inquiry. Thus, rather than compare what Ms. Gonzalez did and did not do with what the contracting officers did and did not do in other cases, the court focuses on whether, in the particular circumstances presented in this case, Ms. Gonzalez satisfied the CDA, FAR, and EFARS by becoming familiar with the facts and conclusions contained in the draft contracting officer's decision, such that the decision she issued was, in fact, her product and reflected her independent judgment. …

Despite what Ms. Gonzalez did not do when reviewing the draft contracting officer's decision, the evidence before the court reflects that what she did do is sufficient to establish that she was familiar with its facts and proposed conclusions. As explained above, familiarity is not a high standard to meet. It merely requires an acquaintance with the facts and conclusions in the decision. It does not require an investigation into the basis of the facts, particularly when the facts are prepared by others with greater knowledge than the contracting officer. Nor does it require a probing into the basis of the conclusions, especially when those conclusions are of a technical nature outside the scope of the contracting officer's knowledge and expertise. Ms.

Gonzalez reviewed the facts and proposed conclusions contained in the draft decision, compared them with the facts and conclusions contained in the case document, and discussed them with counsel and technical staff. These actions are what one would expect from someone familiarizing herself with the contents of a contracting officer's decision. Ms. Gonzalez was not required to take any additional action; thus, her failure to do so does not render her treatment of plaintiff unfair or inequitable. Given that the facts demonstrate that she satisfied the CDA, FAR, and EFARS, Ms. Gonzalez cannot be penalized for not doing something that she was not required to do.

We would wrap-up this perhaps overly long article at this point, except for a most excellent footnote in Judge Sweeney's decision. In the second paragraph quoted above, footnote 12 stated—

In reaching this conclusion, the court is not foreclosing Atkins and MACTEC from later alleging, and attempting to prove, that Ms. Gonzalez did not act fairly, impartially, or equitably on the grounds that 'there is no substantial basis in the contract to support [her] ruling, or no substantial evidence to support it, or . . . [her] decision is grossly erroneous . . . .' Penner Installation Corp.
, 89 F. Supp. at 547;
see also id.
at 548 ('In considering whether or not the contracting officer has acted impartially it is, of course, proper to take into consideration in any case, whether or not actual bias is shown, *the correctness of his findings*
, his relationship to the parties, the allegiance he avows, and the duties his employment by one of them casts upon him.' (emphasis added)). This is a question that can be resolved only after consideration of the merits of Atkins's suit.

So now we are done. Although Judge Sweeney ultimately found that Ms. Gonzalez had issued a valid COFD, she left the door open for further arguments at trial regarding the impartiality and/or correctness of her decision. And while doing so, she provided a very useful roadmap for those seeking to evaluate whether or not their Contracting Officer has rendered a "valid" COFD.