

PRATT'S GOVERNMENT CONTRACTING LAW REPORT

VOLUME 6

NUMBER 11

November 2020

Editor's Note: False Claims Act and More! Victoria Prussen Spears	369
False Claims Act Enforcement During the COVID-19 Pandemic and Beyond George B. Breen and Alexis Boaz	371
Continued Uncertainty Clouds DOJ's Dismissal Power Under False Claims Act Pablo J. Davis	381
Executive Order Regarding Domestic Production and Purchase of Essential Medicines: A Lot to Unpack and More Than Meets the Eye Merle M. DeLancey Jr. and John M. Clerici	388
Dear Magic 8-Ball—Should I Protest? Critical Protest Implications Following the Federal Circuit's Expansion of <i>Blue & Gold's</i> Waiver Rule in <i>Inverso</i> Ethan M. Brown	393
Government Reliance on Waiver Argument to Keep Price Adjustment Windfall Fails Scott Arnold	398
The Artemis Accords Seek to Propel a New Industry William T. Gordon, Vivasvat Dadwal, and Carson W. Bennett	401

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Heidi A. Litman at 516-771-2169
Email: heidi.a.litman@lexisnexis.com
Outside the United States and Canada, please call (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
Customer Service Website <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940
Outside the United States and Canada, please call (937) 247-0293

Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)

ISSN: 2688-7290

Cite this publication as:

[author name], [article title], [vol. no.] PRATT’S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt).

Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT’S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2020 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. Originally published in: 2015

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

MARY BETH BOSCO

Partner, Holland & Knight LLP

MERLE M. DELANCEY JR.

Partner, Blank Rome LLP

DARWIN A. HINDMAN III

Shareholder, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

J. ANDREW HOWARD

Partner, Alston & Bird LLP

KYLE R. JEFCOAT

Counsel, Latham & Watkins LLP

JOHN E. JENSEN

Partner, Pillsbury Winthrop Shaw Pittman LLP

DISMAS LOCARIA

Partner, Venable LLP

MARCIA G. MADSEN

Partner, Mayer Brown LLP

KEVIN P. MULLEN

Partner, Morrison & Foerster LLP

VINCENT J. NAPOLEON

Partner, Nixon Peabody LLP

STUART W. TURNER

Counsel, Arnold & Porter

ERIC WHYTSELL

Partner, Stinson Leonard Street LLP

WALTER A.I. WILSON

Partner Of Counsel, Dinsmore & Shohl LLP

Pratt's Government Contracting Law Report is published 12 times a year by Matthew Bender & Company, Inc. Copyright © 2020 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 646.539.8300. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

Government Reliance on Waiver Argument to Keep Price Adjustment Windfall Fails

*By Scott Arnold**

This article discusses a recent opinion by the U.S. Court of Appeals for the Federal Circuit that articulated limits to the government's ability to rely on the waiver doctrine to enforce Federal Acquisition Regulation provisions of questionable legality.

The U.S. Court of Appeals for the Federal Circuit recently articulated limits to the government's ability to rely on the waiver doctrine to enforce Federal Acquisition Regulation ("FAR") provisions of questionable legality, and, in so doing, cast doubt on the government's "heads we win, tails you lose" approach to measuring the cost impact of simultaneous changes to a contractor's cost accounting practices.

In *The Boeing Company v. United States*,¹ the Federal Circuit rejected the government's argument that Boeing's claim—which was based on an apparent conflict between (1) a statutory provision limiting the costs the government may recover for cost accounting practice changes to the aggregate increased cost to the government, and (2) a FAR provision under which the government's recovery considers only the changes that increase costs to the government, and disregards changes that decrease costs to the government—was waived because Boeing did not raise the issue prior to contract award.

BACKGROUND

Contractors covered by the cost accounting standards ("CAS") sometimes change their cost accounting practices. They are allowed to do this so long as they disclose the changes and cooperate with the government's efforts to determine whether, and the extent to which, the changes increase costs to the government. If changes in cost accounting practices do increase the amount charged to the government, the government is entitled to a price adjustment to neutralize the increased costs.

In 2010, two years after award of the contract used in this test case litigation, Boeing informed the Defense Contract Management Agency ("DCMA") of

* Scott Arnold is a partner at Blank Rome LLP concentrating his practice in all areas of government contracts law, including litigation and counseling matters. He may be reached at sarnold@blankrome.com.

¹ 2019-2148 (Aug. 10, 2020), available at http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/19-2148.OPINION.8-10-2020_1633634.pdf.

Boeing's plans to implement several simultaneous changes to its cost accounting practices in 2011. DCMA requested a proposal to measure the cost impact of the changes. Boeing provided a proposal that reflected two changes that would increase the government's costs by roughly \$940,000 and two other changes that would save the government roughly \$2,284,000. Boeing contended that because these simultaneous changes would result in net savings to the government, no price adjustment—i.e., no payment to the government—was warranted.

DCMA disagreed, based on FAR 30.606. That FAR provision, promulgated in 2005, precludes the government, when resolving cost impacts from cost accounting changes, from considering changes that will save the government money as offsets against changes that will cost the government money. DCMA accordingly issued a final decision asserting the government's right to a price adjustment in excess of one million dollars (\$940,000 plus interest).

LITIGATION

Boeing filed suit in the Court of Federal Claims ("COFC"), arguing that FAR 30.606 is at odds with the CAS clause in the contract, FAR 52.230, and the CAS statute, 41 U.S.C. 1503(b), which preclude the government from recovering costs greater than the aggregate cost to the government of changes to cost accounting practices. In other words, Boeing argued that a cost impact measurement rule that disregards changes resulting in savings to the government results in an unfair windfall to the government.

The COFC seemed to agree that the FAR 30.606 is inconsistent with 41 U.S.C. 1503(b), noting that the asserted inconsistency amounted to a patent ambiguity in the contract, but held that Boeing had waived the argument by not raising the issue prior to contract award. On appeal, the Federal Circuit reversed, holding there had been no waiver. The Federal Circuit noted Boeing's argument that FAR 30.606 was actually not in the contract, but chose not to decide whether the absence of the provision, in and of itself, could be a basis for not finding waiver. Rather, the Federal Circuit relied on the unavailability of any effective agency or judicial pre-award relief.

It observed that any complaints to the agency prior to award would have been futile. Regardless of whether FAR 30.606 was incorporated into the contract, the provision did expressly preclude the government from using cost-saving changes as offsets, and DCMA could not have realistically responded to any Boeing pre-award complaints by saying, in effect, "you are right, so we will disregard the FAR."

The Federal Circuit also rejected the notion that judicial relief would have been feasible, noting that the issue of how to measure price adjustments is

essentially one of contract administration, and therefore could not be effectively raised in a pre-award bid protest. Indeed, the issue would not be ripe until a contractor actually made cost accounting practice changes after award.

KEY TAKEAWAYS

1. The Federal Circuit did not directly address the validity of FAR 30.606. But its reversal and remand to the COFC suggests the government may be on thin ice if it continues to take a “heads we win, tails you lose” approach to measuring the impact of cost accounting practices changes. It is illogical and inequitable—and likely inconsistent with statute—to count only changes that cost the government more, and ignore those that save the government money.
2. It is refreshing to see rejection of the waiver defense where raising an issue at the pre-award stage would have been futile, if even possible. But do not expect similar results in situations where the agency could possibly provide effective relief to a problem at the pre-award stage, or where the matter could be raised and heard in a pre-award bid protest. When in doubt, raise issues apparent in a solicitation early—before proposals are due.