

## **DON'T MAKE A FATAL MISTAKE AT THE BOARDS OF CONTRACT APPEAL**

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Recently, a contractor who had submitted a claim to its contracting officer, made a fatal procedural mistake when asking the Civilian Board for summary judgment. *CSI Aviation, Inc. v. Dept of Homeland Security*, CBCA 6292, Feb. 25, 2020.

As readers well know, a motion for summary judgment is a request for judgment as a matter of law based on undisputed material facts. CSI moved for summary judgment, and included a “statement of undisputed material facts” that was required by the Board’s rules. However, that statement of undisputed material facts contained only two paragraphs and cited only the contracting officer’s decision on CSI’s certified claim.

The Civilian Board’s (“CBCA”) Rule 8(f)(1) requires a movant to “cite appeal file exhibits, admissions in pleadings and/or evidence filed with the motion.” Note: The Armed Services Board of Contract Appeals (“ASBCA”) has a similar rule 7(c) which requires that the movant for summary judgment “cite to the record and attach any additional evidence upon which it relies (e.g. affidavits, declarations, excerpts from depositions, answers to interrogatories, admissions.)”

In the CSI case, the CBCA denied the motion for summary judgment because Boards decide contracts claims *de novo*, 41 U.S.C. §§ 7104(b)(4), 7105(e)(2), and the Board cannot treat statements in contracting officer’s decisions as evidence. See *Wilner v. United States*, 24 F. 3d 1397, 1402 (Fed. Cir. 1994) *en banc*, (“Once an action is brought following a contracting officer’s final decision, the parties start in court or before the board with a clean slate.”). As a result, the appellant CSI offered the Board no basis to find that it was entitled to judgment as a matter of law based on undisputed facts.

Takeaway. The failure to include the proper factual basis was fatal to CSI’s motion. Appellants must fully adhere to the Board Rules. As an appellant you must furnish the facts necessary for your motions—you cannot rely on anything stated or implied by the contracting officer.

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