

## WHAT CONSTITUTES A FINAL CONTRACTING OFFICER'S DECISION?

Copyright 2022 Richard D. Lieberman, Consultant and Retired Attorney

In an interesting case, the Armed Services Board concluded that a contractor had appealed every single final contracting officer ("CO") decision that could conceivably be construed as a final CO decision on a government claim, and also concluded that government letters demanding payment from the contractor constituted government claims and CO final decisions. *Kellogg Brown & Root Servs, Inc.*, ASBCA No. 62681 et al, Nov. 21, 2021.

Here are the various letters at issue:

- |                |   |
|----------------|---|
| May 31, 2016   | Kellogg Brown & Root ("KBR") submitted a \$75 million request for equitable adjustment for impacts and delays on a contract for the construction of a missile defense system in Romania, awarded by the Corps of Engineers  |
| March 15, 2019 | KBR submitted a certified a \$50 million certified claim for changes and delays   |
| July 1, 2020   | The CO issued a final decision denying KBR's certified claim. The CO also stated the government was entitled to recoup \$27 million in provisional payments because KBR had failed to substantiate excusable delay. The final decision stated that KBR was not entitled to waiver of liquidated damages, and the CO stated the government reserved the right to collect these damages in a future decision. |
| Sept. 24, 2020 | KBR filed a combined notice of appeal and complaint with the ASBCA, attaching a copy of the CO's July 1, 2020 decision  |
| Dec. 10, 2020  | The CO sent KBR two "demand letters" regarding provisional payment and liquidated damages, demanding repayment of \$27 million in provisional acceleration payments and \$5.3 million in liquidated damages.  |
| Jan. 20, 2021  | KBR filed two notices of appeal with the ASBCA, stating that it understood the Dec. 10, 2020 letter to be a CO final decision with regard to the liquidated damages and provisional acceleration payments. KBR attached each demand letter to the respective notices of appeal  |

The Army moved to dismiss KBR's appeals challenging the government claims and asserted that KBR's timely notice of appeal of the July 2, 2020 failed to state that KBR specifically intended to appeal the government claims in that decision and KBR's subsequent appeals challenging the agency's demand letters were not valid CO final decisions. The Board disagreed completely with the Army stating that the appeals were timely and effective.

The Board first found that KBR had timely appealed the July 1, 2020 CO decision, and that its

appeal met the statutory minimum required, by being filed within 90 days and explicitly stating that KBR appealed the CO final decision.

The Board also noted that “a contractor timely appeals a CO final decision that includes both contractor and government claims, even where the contractor’s notice of appeal fails to mention the government claim embedded within the final decision appealed.”

Finally, the Board concluded that the totality of the circumstances surrounding the December 10, 2020 demand letters showed that these constituted government claims and a final CO decision.

Even though not labeled a “final decision,” a communication from a CO can constitute a valid decision,” and these were final decisions, based on the totality of the communications between contractor and CO, so KBR’s appeals were timely and proper. The Army’s motion to dismiss KBR’s claims was denied by the Board.

Takeaway. KBR properly appealed everything that remotely seemed to be a final CO decision, even though it may not have been identified as such. That’s a good strategy when a contractor is unsure of the exact meaning a letter which may or may not be a final decision.

**For other helpful suggestions on government contracting, visit:  
Richard D. Lieberman’s FAR Consulting & Training  
at <https://www.richarddlieberman.com/>, and Mistakes in Government Contracting  
at <https://richarddlieberman.wixsite.com/mistakes>.**