

CONTRACTOR MAY APPEAL A GOVERNMENT CLAIM WITHOUT SUBMITTING A SEPARATE CLAIM TO CONTRACTING OFFICER

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In a recent case at the Civilian Board of Contract Appeals, the Board reasserted that a contractor may appeal a government claim without submitting a formal claim to the Contracting Officer, and the Board will have jurisdiction over the appeal. *Suffolk Const. Co., Inc. v. General Serv. Admin.*, CBCA 1953-R et al., April 13, 2020.

Suffolk and the General Services Administration (“GSA”) sought to amend the Board decision in CBCA 2953 et al., both seeking adjustments in the quantum (dollar) amount of the award made therein. CBCA Rules 26 & 27 authorize the Board to grant reconsideration or relief for any reasons recognized in rules 59 & 60 of the Fed. Rules of Civ. Procedures. The reasons include: justifiable or excusable mistake, inadvertence, surprise or excusable neglect; the decision is void (for lack of jurisdiction or otherwise); and any other ground justifying relief from the operation of the decision or order. Also, CBCA rule 29 authorizes the Board to correct clerical mistakes while a case is pending, or within 60 days thereafter if a decision has not been appealed.

Suffolk sought a change in the amount for general conditions cost on its work, as well as a change in commission and bonding costs for Suffolk’s subcontractors. The Board denied the change in quantum for general conditions, but increased the subcontractor cost award by \$430,931.

The GSA sought to overturn the Board’s holding that Suffolk was entitled to receive \$1.3 million for the balance of the contract (monies that GSA had retained). GSA asserted that Suffolk never submitted a request that GSA pay the contract balance, had never certified a claim (which was more than \$100,000), and therefore the Board lacked jurisdiction to make such a holding. The Board noted that GSA had misconstrued the contract balance as a contractor claim, when in fact, it was a government claim. Citing *Placeway Const. Corp. v. United States*, 920 F.2d 903, 906 (Fed Cir. 1990), the Board noted that retention of a contract balance to offset costs constituted a government claim. Further, a contractor “may appeal a government claim to the [Board] without having to submit a monetary claim of its own to the Contracting Officer.” *Malone v. United States*, 849 F.2d 1441, 1443 (Fed. Cir. 1988), *modified*, 857 F.2d 787 (Fed. Cir. 1988). The Board also rejected GSA’s contention that the Board lacked jurisdiction over a change order where Suffolk never filed a certified claim. This change order concerned a government claim for monies paid to Suffolk before GSA determined that Suffolk should have borne the cost of the modification itself. The amount of the claim was folded into GSA’s government claim, and therefore the Board had jurisdiction.

Takeaway. Boards and the Court of Federal Claims have jurisdiction over an appeal of a government claim against a contractor, such as an agency’s decision to retain money. No separate claim to the Contracting Officer is required in order to establish jurisdiction.

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