

## WHO DECIDES SCHEDULE CONTRACT DISPUTES

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The Federal Circuit recently answered the question of which contracting officer (“CO”) should decide a dispute over an order from a General Services Administration (“GSA”) schedule contract. The Court ruled that most disputes must be submitted to the GSA CO. *Sharp Elec. Corp. v. Sec’y of the Army*, No. 2012-1299 (Fed. Cir. Feb. 22, 2013).

Sharp had received an order from the Army for a four year lease of copiers in annual option increments, based on its schedule contract. The contract stated that, with respect to orders of this type, “the Government intends to exercise the renewal options and lease for the entire lease term” and the contract included a premature cancellation fee. When the Army issued only a partial exercise of the third option year, Sharp viewed this as a premature cancellation (going only to the terms of the order), and submitted its claim for cancellation fees to the Army ordering CO. The Army CO never issued a decision and never referred the claim to the GSA CO (see below discussion of FAR provision), so Sharp appealed to the Armed Services Board when its claim was “deemed denied” after 60 days. The ASBCA dismissed the appeal for lack of subject matter jurisdiction, concluding that the FAR does not permit ordering agency CO’s to decide disputes pertaining to the interpretation of disputed schedule contract provisions. Sharp Appealed to the Federal Circuit

The problem arises from the wording of FAR 8.406-6, which appears to bifurcate authority to resolve contract disputes with schedule contractors between the ordering agency CO and the GSA CO, depending on the nature of the dispute. The section reads as follows:

- (a) Disputes pertaining to the performance of orders under a schedule contract.
  - (1) Under the Disputes clause of the schedule contract, the ordering activity contracting officer may—(i) *Issue final decisions on disputes arising from performance of the order (but see paragraph (b) of this section); or*
  - (ii) *Refer the dispute to the schedule contracting officer.*
  - (2) The ordering activity contracting officer shall notify the schedule contracting officer promptly of any final decision.
- (b) Disputes pertaining to the terms and conditions of schedule contracts. *The ordering activity contracting officer shall refer all disputes that relate to the contract terms and conditions to the schedule contracting officer for resolution under the Disputes clause of the contract and notify the*

schedule contractor of the referral.

FAR 8.406-6 (2012) (emphases added).

The big question was whether this dispute over partial exercise of an option pertained to the contract terms and conditions of the schedule contract, or arises from performance of the delivery order. The Court concluded that the FAR creates a bright-line rule—all disputes requiring interpretation of the schedule contract go to the schedule CO, *even if those disputes also require interpretation of the order, or involve issues under the order*. The FAR does not authorize an ordering CO to decide a dispute requiring interpretation of schedule contract provisions, in whole or in part, even if the parties frame their dispute (as they did here) as pertaining to performance. The Federal Circuit decided this was a dispute about the contract provisions, not a mere issue involving the Army's order, agreed with the ASBCA decision, and advised Sharp to resubmit its claim to the GSA CO.

TIPS: (1) As a practical matter, submit any claim on a schedule order to *both* your ordering officer and contracting officer. If both CO's deny them, appeal both. If one denies it, and the other claim is deemed denied, appeal both. Sharp spent a great deal of money on litigation when it could have submitted its claim to both CO's, and the ASBCA or the Civilian Board (and the Federal Circuit) would have been forced to rule on the merits of the claim.

(2) If you insist on selecting only one CO to send your claim to, at least send a "cc" or carbon copy to the other CO. You might be able to argue later that you had "submitted" your claim to the other CO.

(3) Under the Federal Circuit's holding in this case, when in doubt, you should submit your claim to the GSA schedule CO.