MATERIAL DIFFERENCE IN CLAIM PRESENTED TO CONTRACTING OFFICER

Readers of this column are well aware that contractor must make a valid claim to the contracting officer ("CO") prior to litigating that claim at the Court of Federal Claims ("COFC") or a Board of Contract Appeals ("BCA"). *Contract Disputes Act*, 41 U.S.C. § 7103 (a)(1). Only after the CO has issued a final decision on that claim (or failed to issue the decision within a specified time, in which case the claim will be "deemed denied," *id.,* §7103(f)(5)) can the contractor begin to litigate the claim.

Readers are also aware that a claim is not required to be not be submitted in any particular form or use any particular wording, but must provide a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim. However, the claim will be examined by the forum to determine whether it is the same claim as the one presented to the CO, and in doing so, the forum will consider what remedies the claim sought and the elements of the claims in assessing whether this "sameness" requirement is met. The focus is on whether the contracting officer was given "an ample pre-suit opportunity to rule on a request through the presentment of its claims to the CO, with the CO knowing at least the relief sought and what substantive issues are raised by the request. In *ABV Rock Group Co., Ltd*, No. 24-704 (Fed. Cl. May 5, 2026), the issues of sameness and presentment to the CO were thoroughly addressed and is discussed herein.

ABV was awarded a contract by Saudi Arabia to perform construction on several Saudi bases, and the work was to be paid for by the United States Army Corps of Engineers ("Corps"). The Corps terminated the contract for default, and ABV requested a final decision from the CO and filed a complaint in the COFC requesting that the default termination be converted to one for convenience. ABV's certified claim to the CO alleged as follows:

- The Corps had breached the implied duty of good faith and fair dealing by improperly handling bonds, withholding retainage and liquidated damages, wrongfully reducing invoices, failure to approve advance payments for procurement, and not approving proposed changes to the contract line item structure;
- ABV's default was excused because Saudia Arabia had arrested ABV's principal and frozen its assets as part of an anticorruption investigation
- The Corps had administered the contract improperly with respect to submittal reviews and a proposed contract modification
- There had been several other constructive changes, including increase in cost of work permits, denial of ABV's request to retrieve backfill offloaded in another contractor's project site and directives to upgrade airfield system beyond the scope of the contract.

The CO issued a final decision denying ABV's claims in their entirety. After numerous subclaims in a second amended complaint at the COFC were adjudicated (and most dismissed upon motion of the government), ABV sought to file a third amended complaint—but that required the court's leave to amend since the government objected to it.

The third amended complaint alleged that ABV would not have incurred $2.1 million in security costs had the Corps waived the requirement that it post a performance bond or provide other security, and it argued that its injury was a breach of contract by the Corps by retaining the security it had posted after terminating for default. The government moved to dismiss the third amended complaint because this claim had not been presented to the CO for decision, and the court would therefore lack jurisdiction over it.

ABV asserted that its third complaint arose from the same operative facts that had been presented to the CO, and merely asserted different legal theories for its recovery. ABV's claim to the CO was based on the implied duty of good faith and fair dealing, arguing that the Corps had "frustrated the purpose of the contract." However, in the third amendment, ABV brought an allegation based on the theory that the Corps had not met a contractual requirement to retain the security it posed during the re-procurement process once the contract had been terminated for default. The COFC said "the original claim for breach of the duty or good faith and fair dealing and its new breach of contract claim are not materially the same." ABV had presented a new legal theory to the court, not presented to the CO for a final decision. The COFC refused to accept this logic, holding that "when a claim presented to the CO provides a materially different legal theory than the one alleged in the complaint, the CDA's requirement [that it be presented to the CO] has not been met." The COFC denied the motion to permit for leave to file a third amended complaint.

Takeaway, although a claim presented to the contracting officer for a decision may be based on the same set of facts therein, it cannot rely on a materially different legal theory. This violates the Contract Disputes Act which requires the materially different legal theory be presented to the CO for decision before raising it at the COFC, or at a BCA.

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