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Gov't Contracts Ruling Validates New Claim Theory

By **Stephen Bacon** (July 20, 2020, 4:50 PM EDT)

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It's not often that a new contract claim theory is established, but that is what has occurred in a series of recent decisions issued by the Armed Services Board of Contract Appeals, or ASBCA. In Appeal of Chugach Federal Solutions Inc., the ASBCA has confirmed the viability of a novel negligent negotiations claim under the Contract Disputes Act, or CDA.

According to the ASBCA, a contractor may assert a valid claim against the government if it violates the rules that govern discussions with offerors in a negotiated procurement under Part 15 of the Federal Acquisition Regulation.

Many contractors are aware that agencies have an obligation to conduct so-called meaningful discussions with offerors in a negotiated procurement. To be meaningful, the discussions must provide offerors an opportunity to address any deficiencies, significant weaknesses or adverse past-performance information in their proposals.[1]

An agency's failure to engage in meaningful discussions can be the basis for a sustained bid protest at the U.S. Government Accountability Office and the U.S. Court of Federal Claims.

In Chugach, however, the ASBCA concluded that improper discussions may also form the basis for a contractor's claim under the CDA. Under the theory of negligent negotiations recognized by the ASBCA, a contractor can potentially recover increased performance costs which could have been avoided if the government complied with its preaward obligation to engage in meaningful discussions.

This is a significant development because it expands the fairly limited grounds on which a contractor may recover from the government for its conduct during contract formation.

While this is generally good news for contractors, the specific legal standards that apply to a negligent negotiations claim remain unclear. Moreover, it is uncertain whether such claims will ultimately be recognized by the Federal Circuit.

This article examines the line of Chugach decisions and the potential implications for contractors and the government.

Background

The Chugach appeal involves a fixed-price, indefinite-delivery, indefinite-quantity contract for a broad range of base operations support services at various Navy installations throughout the Northwest.

The Navy's solicitation included various annexes and sub-annexes that defined the types of services to be performed — e.g. facilities support, utilities, etc. Offerors were required to propose a number of full-time equivalents, or FTEs, to perform the work described in each annex.

During the initial evaluation, the Navy determined that Chugach's staffing levels were significantly low for four of the annexes and that this was a significant weakness. That information, however, was not conveyed to Chugach.

The Navy did advise one of Chugach's competitors and the incumbent contractor, West Sound Services Group LLC, that its proposal had a significant weakness related to low staffing in two annexes.

After the submission of revised proposals, the Navy eliminated West from the competitive range in part due to concerns that West proposed a low number of FTEs for ten annexes.

West protested and the GAO agreed that the Navy failed to engage in meaningful discussions because it did not properly alert West to the agency's concerns about low staffing levels for certain annexes that were not addressed in discussions.[2]

Following the protest, the Navy reopened discussions and allowed the offerors to submit revised proposals. During the final evaluation, the Navy did not identify any significant weaknesses in Chugach's proposal with respect to staffing even though it proposed 311 FTEs, well below the 421 FTEs projected in the Navy's independent government estimate, or IGE.

On March 21, 2014, the Navy awarded the contract to Chugach at a price of $329 million over a potential five-year term, including options. West protested the award and Chugach intervened to defend the Navy's decision.

The GAO denied the protest and held that the Navy reasonably determined that West's low FTEs remained a significant weakness.[3] Although the GAO's decision redacts the specific number of FTEs proposed by West, it is notable that Chugach and West both received an overall technical rating of "good," but Chugach prevailed in the Navy's best value tradeoff in part because its price was $33 million lower than West.

Following the victory at the GAO, Chugach began performing but immediately struggled to satisfy the Navy's requirements with its proposed staffing levels. Ultimately, Chugach was forced to hire additional staff and use overtime to satisfy the Navy's needs.

After more than two years of performance, Chugach submitted a certified claim for $36 million. The contracting officer denied the claim and Chugach filed an appeal at the ASBCA.

Chugach's Negligent Negotiations Claim Survives Navy's Motion to Dismiss

Chugach asserted a variety of claims, including that the Navy's negligent negotiations in violation of FAR 15.306(d) caused significant losses under the contract.

The Navy moved to dismiss Chugach's claim on the grounds that it was essentially a bid protest that is beyond the ASBCA's jurisdiction.

The ASBCA denied the Navy's motion.[4] Relying on the U.S. Court of Appeals for the Federal Circuit's 1995 decision in LaBarge Products Inc. v. West,[5] the ASBCA concluded that a contractor may assert a claim for reformation of a contract based on the government's preaward violation of a regulation that exists for the benefit of the contractor.[6]

In LaBarge, the Army improperly disclosed information about the contractor's initial bid to a competitor prior to the submission of best and final offers, in violation of a regulation which prohibited the use of auction techniques. The court held that the contractor stated a cognizable CDA claim based on the Army's violation of that regulation, which was "plainly for the benefit of the contractor."[7]

The ASBCA concluded that the regulatory requirements that govern exchanges with offerors under FAR 15.306(d) similarly exist for the benefit of the contractor. Thus, the ASBCA held that an alleged violation of that regulation can form the basis for a valid CDA claim under LaBarge.[8]

The Navy argued that allowing claims for negligent negotiations would result in a flood of claims by disappointed contractors who "will seek discovery of source selection documents in search of procedural violations that the contractor will allege to be the source of its losses."[9]

The ASBCA rejected the Navy's prediction, reasoning that there was no flood of claims that materialized after the decision in LaBarge 25 years ago.

In the ASBCA's view, Chugach's negligent negotiations claim was, "for all intents and purposes, really just an element of its superior knowledge claims" which were separately alleged and not subject to the Navy's motion to dismiss.[10]

Chugach claimed that the Navy failed to disclose its superior knowledge, reflected in the undisclosed IGE, that the staffing required to perform the contract would be greater than under West's incumbent contract.

The Navy separately moved for summary judgment on its affirmative defense that Chugach should be judicially estopped from advancing its superior knowledge claim because it was inconsistent with Chugach's position in the bid protest that the IGE was inaccurate.

In a separate published opinion, the ASBCA denied the Navy's motion because the protest record showed that Chugach did not actually take the position that the IGE was inaccurate.[11]

ASBCA Reaffirms Validity of Chugach's Negligent Negotiations Claim

After discovery, the Navy moved for summary judgment on all of Chugach's claims. In its most recent decision in the appeal, the ASBCA partially denied the Navy's motion and again confirmed the viability of Chugach's negligent negotiations claim.[12]

The Navy argued that Chugach could not establish that it would have significantly increased its staffing if the Navy conveyed different information during discussions. The ASBCA disagreed and found that Chugach had sufficient evidence to create a material factual dispute on that issue.

The Navy conceded that Chugach's first proposal revision contained a significant weakness, and this was not conveyed to Chugach during the first round of discussions. Nevertheless, the Navy argued that it was entitled to summary judgment because the source selection team did not find any "significant weakness in Chugach's fifth and final proposal revision."[13]

The ASBCA rejected the Navy's argument because there was "a material factual dispute as to whether the Navy properly informed Chugach of the source selection team's conclusion that there was a significant weakness."[14]

The ASBCA also denied the Navy's motion as to Chugach's superior knowledge claim, mutual mistake claim and constructive change claim.

The ASBCA did grant the Navy's motion with respect to Chugach's claim that the Navy breached the implied duty of good faith and fair dealing because such a claim cannot arise from actions that occur during contract formation.

Did the ASBCA Create New Law?

In its decision on the Navy's motion to dismiss, the ASBCA stated that it was not making new law but, rather, was "applying nearly 25-year old binding precedent" from the Federal Circuit's decision in LaBarge.

The ASBCA analogized FAR 15.306(d) to the regulation at issue in LaBarge, concluding that both existed for the benefit of the contractor.

Interestingly, the ASBCA did not discuss FAR 15.306(d)(2), which states that "[t]he primary objective of discussions is to maximize the government's ability to obtain best value, based on the requirement and the evaluation factors set forth in the solicitation."

This language was added to FAR after LaBarge during the 1997 rewrite of Part 15, which emphasized the government's shift to so-called best value procurements and effectively removed the prohibition on technical leveling — i.e., the government's improper coaching of an offeror through successive rounds of negotiations.[15]

Based on this statement of objective alone, one might conclude that the requirements in FAR 15.306(d) exist for the government's benefit.

Conversely, one could argue that the specific requirement to identify significant weaknesses and deficiencies under FAR 15.306(d)(3) exists for the contractor's benefit because the stated intent of that particular provision is to "enhance materially the proposal's potential for award." The regulation also explicitly recognizes that discussions "are undertaken with the intent of allowing the offeror to revise its proposal," which clearly provides a benefit to the contractor.[16]

At some point, whether in Chugach or some future case, the Federal Circuit will be called upon to resolve whether a negligent negotiations claim is cognizable under the CDA. The Federal Circuit's decision may turn on whether it agrees with the ASBCA's application of LaBarge and its conclusion that FAR 15.306(d) exists for the benefit of the contractor.

Are Negligent Negotiations an Element of Superior Knowledge?

The ASBCA viewed Chugach's negligent negotiations claim as an element of its separate superior knowledge claim.

A superior knowledge claim "is based on the premise that, where the government has knowledge of vital information that will affect a contractor's performance, the government is obligated to share that information" with the contractor prior to award.[17]

In Chugach, the ASBCA seems to blend the government's obligation to disclose vital information with is separate obligation in a FAR Part 15 procurement to identify significant weaknesses or deficiencies during negotiations.

In some instances, the government may identify a significant weakness or deficiency based upon its vital knowledge of a fact that affects performance costs or duration. But that is not always the case.

More often, significant weaknesses or deficiencies are identified based on elements of a proposal that either fail to comply with the terms of the solicitation or create significant performance risks.

Those assessments are frequently based on the government's evaluation judgment as to how the offeror is likely to perform using its proposed technical approach. They are not necessarily based on the government's knowledge of undisclosed vital facts.

Thus, there appears to be an important distinction between a negligent negotiations claim and a superior knowledge claim that was not addressed in the ASBCA's opinion. Although it is unclear from the Chugach decisions, it seems as though a contractor can prove a claim for negligent negotiations without evidence that the alleged violation of FAR 15.306(d) stems from the government's superior knowledge of vital facts.

In other words, Chugach appears to recognize the viability of a claim against the government for its flawed evaluation of the contractor's proposal, which is separate and distinct from a superior knowledge claim.

What Is Required to Prove a Negligent Negotiations Claim?

In the context of a bid protest, agencies are given substantial discretion to identify which attributes in a proposal rise to the level of a significant weakness or deficiency. Indeed, the GAO has long held that "[t]he significance of the weaknesses and/or deficiencies in an offeror's proposal, within the context of a given competition, is a matter for which the procuring agency is, itself, the most qualified entity to render judgment."[18]

Given the GAO's deference to agencies, it will be interesting to see how the ASBCA makes a factual determination as to whether the Navy properly informed Chugach of a significant weakness in its proposal.

The ASBCA's summary judgment ruling suggests that it intends to have a trial to decide whether Chugach's FTEs were low enough to trigger the Navy's obligation to identify a significant weakness in the proposal.

If the Navy established that a certain number of proposed FTEs were acceptable during preaward negotiations, what standards will the ASBCA use now to determine that the Navy should have used a higher threshold?

And, assuming that the Navy should have raised Chugach's low staffing in discussions, the ASBCA also will have to make a counterfactual determination regarding whether proper discussions would have caused Chugach to increase its price and, if so, by how much.

These are difficult questions that will only be addressed if and when there is a trial and decision on the merits in this case.

Implications for Contractors

Claims for negligent negotiations will most likely arise in situations where a contractor underbids a fixed-price contract and suffers steep losses, which may be attributable to a shortcoming in the contractor's technical approach and/or pricing. In these situations, contractors should examine the possibility that losses incurred on a contract could have been avoided if the government identified the proposal shortcoming in negotiations as required under FAR 15.306(d)(3).

Contractors may become aware of negligent negotiations as part of a bid protest, as was the case in Chugach, or during performance once it becomes clear that some aspect of the contractor's approach is so inadequate to perform the contract that it should have been identified by the government in negotiations.

So long as there is a basis to believe that the government knew or should have known that the proposed approach was inadequate, contractors may be able to plausibly allege a claim for negligent negotiations.

If the theory of negligent negotiations takes hold, it could have broader implications for contractors beyond CDA claims. Government contracting is highly competitive and price often determines the outcome of procurements, even those using best value source selection procedures.

Contractors generally are not prohibited from proposing below-cost prices because they bear the risk of profit or loss on a fixed-price contract. But if a contractor may seek post-award reformation of a contract under the theory of negligent negotiations, there is potentially less risk for the contractor to propose low prices.

This could ultimately create more of an incentive for contractors to buy in at low prices.

In the next several years, the ASBCA and possibly the Federal Circuit will have the opportunity to address the scope and viability of the negligent negotiations theory of recovery. Even if Chugach does not result in a flood of claims, as the Navy predicted, it is likely to generate similar post-award disputes about whether agencies engaged in proper discussions.

As the GAO's docket suggests, allegations of improper discussions are frequent in bid protests and they will now begin to proliferate in post-award claims under the CDA.

Clarification: This article's headline has been updated to clarify that the ruling recognized a novel theory of recovery.

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[1] See FAR 15.306(d)(3).

[2] See West Sound Services Group LLC, B-406583.2, et al., July 3, 2013, 2013 CPD ¶ 276.

[3] See West Sound Services Group LLC, B-406583.2, et al., July 9, 2014, 2014 CPD ¶ 208.

[4] See Chugach Fed. Sols. Inc., ASBCA No. 61320, 19-1 BCA ¶ 37,380 ("Chugach III").

[5] 46 F.3d 1547 (Fed. Cir. 1995).

[6] Chugach III at 6-7.

[7] LaBarge, 46 F.3d at 1552. Although the Federal Circuit agreed that the government "clearly" violated the prohibition on "auction techniques," it ultimately denied the contractor's claim on the merits because the government had a rational basis to request further bids. Id. at 1554-56.

[8] Chugach III at 7.

[9] Chugach III at 7.

[10] Chugach III at 7.

[11] See Chugach Fed. Sols. Inc., ASBCA No. 61320, 19-1 BCA ¶ 37,314 ("Chugach II").

[12] See Chugach Fed. Sols. Inc., ASBCA No. 61320, 2020 WL 3046602 ("Chugach IV").

[13] Chugach IV at 3.

[14] Chugach IV at 4.

[15] See 62 Fed. Reg. 51224 (Sept. 30, 1997); Dynacs Eng'g Co. Inc., B-284234, et al., Mar. 17, 2000, 2000 CPD ¶ 50 at 4 (holding that the prior restriction on technical leveling was "eliminated by the part 15 rewrite").

[16] FAR 15.306(d).

[17] Am. Ordnance LLC, ASBCA No. 54718, 10-1 BCA ¶ 34,386 at 169, 787.

[18] Albert Moving & Storage, B-290733, B-290733.2, Sept. 23, 2003, 2003 CPD ¶ 8 at 6.