United States Court of Appeals for the Federal Circuit

THE BOEING COMPANY,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2019-2148

Appeal from the United States Court of Federal Claims in No. 1:17-cv-01969-PEC, Judge Patricia E. Campbell-Smith.

Decided: August 10, 2020

MICHAEL W. KIRK, Cooper & Kirk, PLLC, Washington, DC, argued for plaintiff-appellant. Also represented by CHARLES J. COOPER, JOHN DAVID OHLENDORF; SUZETTE DERREVERE, The Boeing Company, Arlington, VA; SETH LOCKE, Perkins Coie, LLP, Washington, DC.

ERIN MURDOCK-PARK, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by ETHAN P. DAVIS, ELIZABETH MARIE HOSFORD, ROBERT EDWARD KIRSCHMAN, JR.

Before MOORE, TARANTO, and CHEN, *Circuit Judges*.

TARANTO, *Circuit Judge*.

From 1992 to 2015, the Boeing Company entered into numerous contracts with the United States Department of Defense, among them the contract at issue in this case. In 2011, Boeing permissibly changed multiple cost accounting practices simultaneously; some of the changes raised costs to the government, whereas others lowered costs to the government. In late 2016, the Defense Contract Management Agency, invoking Federal Acquisition Regulation (FAR) 30.606, 48 C.F.R. § 30.606, determined the amount of the cost-increasing changes for the present contract and demanded that Boeing pay the government that amount plus interest. Boeing began doing so.

In 2017, Boeing filed an action in the Court of Federal Claims to seek recovery of the amounts thus paid, asserting that the government, in following FAR 30.606, committed a breach of contract and effected an illegal exaction. Boeing's core argument, applicable to both claims, is that, although FAR 30.606 undisputedly required the Defense Department to act as it did, that regulation is unlawful—principally because it is contrary to 41 U.S.C. § 1503(b) (and also for procedural reasons). According to Boeing, that provision of the Cost Accounting Standards (CAS) statute, which is incorporated into the contract at issue, requires that simultaneously adopted cost-increasing and cost-lowering changes in accounting practices be considered as a group, with the cost reductions offsetting the cost increases. Boeing argues that, by following FAR 30.606's command to disregard the cost-lowering changes and bill Boeing for the cost-increasing changes alone, the government unlawfully charged it too much.

The trial court held that Boeing had waived its breach of contract claim by failing to object to FAR 30.606 before entering into the relevant contracts. *Boeing Co. v. United*

States, 143 Fed. Cl. 298, 307–15 (2019). The trial court also determined that it lacked jurisdiction to consider Boeing's illegal exaction claim because the claim was not based on a "money-mandating" statute. *Id.* at 303–07. We now reverse and remand, concluding that the trial court misapplied the doctrine of waiver and misinterpreted the jurisdictional standard for illegal exaction claims.

I

A

The federal government has long entered into contracts under which amounts it pays to contractors are based on the contractors' costs in performing the contracts. *See*, *e.g.*, *Lockheed Aircraft Corp. v. United States*, 375 F.2d 786 (Ct. Cl. 1967). In an effort to regularize cost-accounting practices relevant to such contracts, the Office of Federal Procurement Policy Act Amendments of 1988 (the CAS Act) established the CAS Board within the Office of Federal Procurement Policy. Pub. L. 100-679, § 5, 102 Stat. 4055, 4058–63 (1988) (originally codified at 41 U.S.C. § 422, but now codified at 41 U.S.C. §§ 1501–06). The CAS Act gave the Board "exclusive authority to prescribe, amend, and rescind cost accounting standards." 41 U.S.C. § 1502(a)(1). Standards promulgated by the Board are "mandatory for use by all executive agencies and by contractors and subcontractors in estimating, accumulating, and reporting costs in connection with the pricing and administration of, and settlement of disputes concerning, all negotiated prime contract and subcontract procurements with the Federal Government in excess of the amount set forth in section 2306a(a)(1)(A)(i) of title 10," which refers to contracts worth more than $2 million. *Id.*, § 1502(b)(1)(B); *see* 10 U.S.C. § 2306a(a)(1)(A)(i).

The CAS Act directed the Board to establish regulations "requir[ing] contractors and subcontractors as a condition of contracting with the Federal Government to . . . agree to a contract price adjustment, with interest, for any

increased costs paid to the contractor or subcontractor by the Federal Government because of a change in the contractor's or subcontractor's cost accounting practices." 41 U.S.C. § 1502(f). In accordance with that mandate, the Board promulgated FAR 9903.201-4, which requires contracting officers to insert, in each CAS-covered contract, a clause that "requires the contractor to comply with all CAS specified in [48 C.F.R. pt. 9904]." 48 C.F.R. § 9903.201-4(a)(2). The required clause states that "the provisions of [part] 9903 are incorporated herein by reference" and that a contractor shall "[c]omply with all CAS, including any modifications and interpretations indicated thereto contained in part 9904" as of certain times and "any CAS (or modifications to CAS) which hereafter become applicable to a contract." 48 C.F.R. § 9903.201-4 (clause sections (a)(1) and (a)(3)). As relevant here, the clause also requires the contractor, upon making a "change to a cost accounting practice," to "negotiate an equitable adjustment . . . ." *Id.* (clause section (a)(4)(iii)). Notably for purposes of this case, another regulation, FAR 52.230-2, provides for insertion of a clause that incorporates 48 C.F.R. part 9903 by reference and that otherwise is the same for present purposes as the clause set out in FAR 9903.201-4. *See* 48 C.F.R. § 52.230-2.

An additional regulation, FAR 52.230-6, entitled "Administration of Cost Accounting Standards," establishes a framework for determining the amount of an equitable adjustment; as relevant here, it requires that every CAS contract contain a detailed clause addressed to that topic. 48 C.F.R. § 52.230-6. Each relevant agency must appoint a "Cognizant Federal Agency Official" (CFAO), *i.e.*, a contracting officer responsible for implementing CAS provisions that govern the agency's contracts. 48 C.F.R. § 52.230-6 (clause section (a)). In that role, the designated contracting officer coordinates the agency's response to changes in cost accounting practices.

A contractor must "[s]ubmit to the CFAO a description of any cost accounting practice change . . . and any written statement that the cost impact of the change is immaterial." *Id.*, § 52.230-6 (clause section (b)). As relevant here, upon determining that a change complies with the CAS but is "undesirable," the contracting officer must classify the change as "unilateral" and inform the contractor that "the Government will pay no aggregate increased costs." *Id.* (clause section (a)). The contracting officer may request that the contractor submit a "general dollar magnitude (GDM) proposal" calculating the "cost impact" of the changes. *See id.* (clause section (c)(1)) (GDM proposal must be "in accordance with paragraph (d) or (g) of this clause"); *id.* (clause section (d)(1)) ("[T]he GDM proposal shall . . . [c]alculate the cost impact in accordance with paragraph (f) of this clause."). For a unilateral change, the proposal must include an estimate of the "increased cost to the Government in the aggregate." *Id.* (clause section (f)(2)(iv)).

At the heart of this case is one further regulation, FAR 30.606, entitled "Resolving cost impacts." 48 C.F.R. § 30.606. Although FAR 52.230-6 and its required contract clause do not refer to FAR 30.606, it is undisputed that, in deciding how to deal with the cost impacts of changes, "the Government was required to follow FAR 30.606 when administering the Contract." U.S. Br. at 45 (citing 41 U.S.C. § 1121(c)(1)); *id.* ("FAR 30.606 is mandatory"); *id.* at 50 ("We do not dispute that FAR 30.606 could not be waived, nor that contracting officers are precluded from granting such a waiver."). FAR 30.606 gives the contracting officer discretion to "adjust[] a single contract, several but not all contracts, all contracts, or any other suitable method." 48 C.F.R. § 30.606(a)(2). But the regulation limits that discretion in a respect central to the dispute in this case. It instructs the contracting officer not to "combine the cost impacts of . . . . [o]ne or more unilateral changes" "unless all of the cost impacts are increased costs to the government." *Id.*, § 30.606(a)(3)(ii)(A). As is undisputed, that

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.